

THE NEW NEGATIVE HABEAS EQUITY

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THE NEW NEGATIVE HABEAS EQUITY

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A federal statute restricts the habeas corpus remedy, but do federal judges also have equitable discretion to deny relief to unlawfully detained prisoners? Over the last several terms, the Supreme Court has begun to embrace this novel, ambitious view of habeas law. Although the Court has long cited what I call “negative” equity as a source of authority to devise its own limits on habeas relief, it had never — until recently — suggested that lower courts have free-floating discretion to deny relief to which prisoners are otherwise entitled.

This Article, which consists of three parts, considers and refutes the “new negative equity.” In Part I, I set forth the older version of negative equity and then describe the recent departure therefrom. In Part II, I explain why the new negative equity doesn’t follow from any text-centered approach to statutory interpretation — relying substantially on context and drawing heavily from a statutory history that decisional law and academic discourse have thus far neglected. In Part III, I focus on the most troubling register of the new negative habeas equity, which involves a rule against habeas relief for those who are not “factually innocent.”

Equitable power to refuse relief might be consistent with “comity, finality, and federalism,” as it were, but orphaned policy preferences are not law. Under the text-centered approach to law endorsed by most who favor habeas restrictions, such a practice is impossible to justify. Although no interpreter can be perfectly certain of statutory meaning, the new negative equity is both inconsistent with habeas history and a least-plausible reading of the modern statute.

INTRODUCTION

Habeas corpus is a grand instrument of English common law,¹ although many describe it colloquially as an equitable power.² For its part,

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¹ King’s Bench and inferior common law courts had English authority to issue habeas corpus *ad subjiciendum*, which is the “Great Writ.” See PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 4 (2010). Professor Paul Halliday’s book is the defining work of English habeas history, see, e.g., Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 947 (2011) (book review) (describing Halliday’s archival work as “by far the most comprehensive”), and I reference it often throughout this Article. Halliday developed his history based on review of writs issued from King’s Bench every fourth year between 1500 and 1800, and from comprehensive review of all writs issued “for periods known to contain important developments.” HALLIDAY, *supra*, at 5; see also *id.* at 319–33 (describing the study’s methodology).

² See Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1046 & n.285 (2015). Professor Bray’s work belongs to a wave of new scholarship on equitable power, although that material is largely beyond the scope of this Article. See also, e.g., Aditya Bamzai & Samuel L. Bray, *Debs and the Federal Equity Jurisdiction*, 98 NOTRE DAME L. REV. 699, 702–03 (2022) (discussing when the federal government may invoke equity as authority for it to sue); Owen W. Gallogly, *Equity’s Constitutional Source*, 132 YALE L.J. 1213, 1221 (2023) (siting the constitutional authority for equitable remedies in the judicial power).

the Supreme Court has long asserted equity-like discretion to *limit* habeas relief. I refer to that familiar practice as “negative habeas equity.”³ On the traditional theory of negative equity, the Court has discretion to formulate non-statutory restrictions on the habeas remedy, which apply across the federal judiciary. This view of negative equity animates, among other things, a harmless-error standard, the procedural default doctrine, and rules against the retroactive application of new Supreme Court decisions.⁴ These judge-made rules have survived many legislative revisions, so one might at least argue that Congress has implicitly ratified them.⁵

Over the last several terms, however, the Supreme Court has advanced a much more ambitious theory of negative habeas equity — one that is far beyond the scope of any implicit ratification. *Brown v. Davenport*⁶ and *Shinn v. Ramirez*⁷ are two recently decided cases that, in different measures, embraced the newer theory.⁸ That version asserts more than *Supreme Court* power to formulate judge-made limits on the habeas remedy — it also asserts discretionary authority for *lower courts* to reject relief to which claimants are otherwise entitled. As *Ramirez* puts it: “[E]ven if a prisoner overcomes all [the limits imposed by statute and announced by the Supreme Court], he is never entitled to habeas relief. He must still ‘persuade a federal habeas court that law and justice require [it].’”⁹

As phrased by Justice Gorsuch, its primary expositor, this “new negative habeas equity” has roots in two statutory provisions. First, the primary power-granting provision, 28 U.S.C. § 2241, provides that federal courts “may” grant habeas writs.¹⁰ But § 2241 phrases that power permissively because it’s contingent on *other conditions set forth in the statute* — not because judges retain free-floating discretion to deny relief. Second, § 2243 requires that a federal court “dispose of the [habeas] matter as law and justice require” after it has found predicate facts.¹¹

³ Positive equity would be the exercise of discretionary power to award more complete relief upon a finding of unlawful custody. For example, the Tenth Circuit has a line of cases invoking the idea as a source of power to bar retrials of successful habeas claimants. *See, e.g.,* Capps v. Sullivan, 13 F.3d 350, 352 (10th Cir. 1993) (citing 28 U.S.C. § 2243) (interpreting law-and-justice language to empower federal court to bar retrial); *see also* Graham v. White, 678 F. Supp. 3d 1332, 1359–60 (N.D. Okla. 2023) (largely same).

⁴ *See, e.g.,* Withrow v. Williams, 507 U.S. 680, 717 (1993) (Scalia, J., concurring in part and dissenting in part) (harmless error); Dretke v. Haley, 541 U.S. 386, 392 (2004) (procedural default); Danforth v. Minnesota, 552 U.S. 264, 278 (2008) (retroactivity).

⁵ *See infra* notes 76–83 and accompanying text (discussing concept of congressional acquiescence).

⁶ 142 S. Ct. 1510 (2022).

⁷ 142 S. Ct. 1718 (2022).

⁸ *Davenport*, 142 S. Ct. at 1524; *Ramirez*, 142 S. Ct. at 1731.

⁹ *Ramirez*, 142 S. Ct. at 1731 (alteration in original) (quoting *Davenport*, 142 S. Ct. at 1524).

¹⁰ 28 U.S.C. § 2241.

¹¹ *Id.* § 2243.

But § 2243's law-and-justice language anchors judicial power to craft efficacious remedies, not to withhold relief.

These interpretive mistakes are of surpassing doctrinal importance, and they would work a habeas revolution. Consider an example involving *Atkins v. Virginia*,¹² which barred death sentences for intellectually disabled people. If a death-sentenced person proved that they were intellectually disabled, and if they are otherwise entitled to habeas relief, then could a federal judge really withhold a remedy for “equitable” reasons? On what legal authority? What would those “equitable” reasons be? Because the crime was heinous, the defendant was unrepentant, or the surviving victims would be especially aggrieved? *Atkins*, moreover, is but one constitutional site of profound vulnerability. Freewheeling habeas remediation would chew at the least popular constitutional rights: the Sixth Amendment right to counsel,¹³ due process rights against prosecutorial misconduct,¹⁴ and the right to suppress tainted confessions,¹⁵ to name just a few.

I use this Article to urge skepticism about the new negative habeas equity, which relies on a superficial literalism that is impossible to square with statutory context, structure, and history. In Part I, I set forth the older version of negative equity and then describe the recent departure therefrom, evident in *Davenport* and *Ramirez*. In Part II, I explain why the new negative equity doesn't follow from any text-centered approach to statutory interpretation¹⁶ — relying substantially on context and drawing heavily from a statutory history that *Davenport*, *Martinez*, and academic discourse have neglected.¹⁷ In Part III, I focus on the most troubling register of the new negative habeas equity, which involves a rule against habeas relief for those who are not “factually innocent.”

¹² 536 U.S. 304 (2002).

¹³ See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984) (ineffective assistance of trial counsel).

¹⁴ See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963) (suppression of material evidence).

¹⁵ See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (suppression of inculpatory statements given without sufficient waiver).

¹⁶ My argument doesn't proceed from any exotic textualism; I simply reject literalism that is blind to what people sometimes call semantic context. See Tara Leigh Grove, *The Supreme Court, 2019 Term — Comment: Which Textualism?*, 134 HARV. L. REV. 265, 269 (2020) (“Formalistic textualism emphasizes semantic context, rather than social or policy context, and downplays the practical consequences of a decision.”); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 92–96 (2006) (distinguishing semantic from policy context); see also Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 24 (Amy Gutmann ed., 2d ed. 2017) (“[T]he good textualist is not a literalist . . .”). My argument from text should also appeal to purposivists for whom statutory language is the best evidence of legislative purpose. See Manning, *supra*, at 78 (describing this category of purposivists).

¹⁷ The Supreme Court's negative equity revision remains unexplored in academic work. One exception is a manuscript by Michael McCue, entitled *Discretion to Deny* (on file with the Harvard Law School Library).

Although the new negative equity is normatively aligned with restrictive habeas innovations more credibly tethered to authoritative law, it attempts to squeeze water from a statutory stone. This Article presents a statutory history, centered on the 1874 Revised Statutes¹⁸ (1874 Revisions) and the 1948 Judicial Code,¹⁹ that remains as-yet unlinked to the new negative equity. A history of the enacted changes to text over time can be deeply moving to those who embrace ordinary-public-meaning textualism, like Justice Gorsuch himself.²⁰ I also make several arguments rooted in traditional doctrine, but the timing and stakes make it doctrinalism of unique urgency. The vision of negative habeas equity appearing in *Davenport* and *Ramirez* is dicta,²¹ so there remains an opportunity for the Supreme Court to course correct.

I. THE RUPTURE

Negative habeas equity is a basic story of steady state and rupture. Prior to *Davenport* and *Ramirez*, there was a familiar body of judge-made law supplementing statutory restrictions on habeas relief. The Supreme Court carefully specified (and lower courts applied) these judge-made rules — rules against relief for procedurally defaulted claims, for nonretroactive legal decisions, and for harmless constitutional errors.²² The emergent strain of negative habeas equity, by

¹⁸ See Revised Statutes of 1874, 18 Stat. 1 (1873) (1874 Revisions). The formal enactment publishing these statutes was the Act of June 20, 1874, ch. 333, 18 Stat. 113.

¹⁹ See Act of June 25, 1948, ch. 646, 62 Stat. 869 (revising and codifying Title 28 of the U.S. Code).

²⁰ See generally Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 270 (2022) (discussing the use of statutory history in new textualist method). Justice Scalia, for example, has embraced statutory history as a legitimate tool of new textualism. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 256 (2012) (“[This type of statutory history] form[s] part of the context of the statute, and (unlike legislative history) can properly be presumed to have been before all members of the legislature when they voted.”). So has Justice Gorsuch. See, e.g., *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting) (defining valuable statutory history as “the record of enacted changes Congress made to the relevant statutory text over time”). In fact, Professor Krishnakumar has collected data showing that Justice Gorsuch is “by far the most frequent user of statutory history.” Krishnakumar, *supra*, at 289.

²¹ See *infra* section II.C, pp. 2250–57.

²² See *supra* note 4 and accompanying text.

contrast, invites district courts to improvise.²³ It assigns to them a discretionary power to deny claims that otherwise merit relief.²⁴

A. Habeas and Equity: The Standard Story

English courts used different kinds of habeas corpus writs to move prisoners around — to bring them to court to testify, to summon them for pardon hearings, to shuttle them between jails, and so forth.²⁵ What is often called the “Great Writ” is habeas corpus *ad subjiciendum*, which common law courts sent to jailers so that the jailers would produce prisoners, and so that the judges could inspect custody thereafter.²⁶ (The power to send the writ in order to review custody was distinct from the power to order relief upon a conclusion that custody was unlawful.²⁷)

The power to send habeas writs grew out of the royal prerogative to inspect custody exercised in the Crown’s name.²⁸ Eventually, the Justices of King’s Bench — long the highest common law court in England — wrested the habeas power from the Crown,²⁹ using the *ad subjiciendum* writ to inspect even custody ordered by the Crown itself.³⁰ Habeas authority also empowered King’s Bench to craft creative, efficacious remedies. Per Professor Paul Halliday, the world’s leading habeas historian: “[B]ail, discharge, or remand represented only the elemental possibilities for habeas corpus judgments.”³¹

During the American Revolution, Parliament “suspended” the habeas privilege six times,³² allowing England to detain former colonists without judicial review. These suspensions were a defining grievance

²³ One might fairly point out that the Supreme Court delegates power to a lower court any time it uses a more general term to articulate a rule. See, e.g. Tara Leigh Grove, Essay, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1559–60 (2021) (discussing examples in which the Court used vague standards to force contentious decisionmaking into the lower courts). So, for example, one could conceptualize the Court-created construct of “cause” for procedural default as a type of delegation to the lower federal judiciary. See *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (announcing cause construct as part of cause-and-prejudice requirement). Little about my argument, however, turns on whether *Davenport* and *Ramirez* are better described as a difference in kind or a massive difference in degree. Either way, the new negative habeas equity represents a view of lower courts that exercise a near-standardless discretion under an extremely general delegation.

²⁴ See *Shinn v. Ramirez*, 142 S. Ct. 1718, 1731 (2022).

²⁵ See R. J. SHARPE, *THE LAW OF HABEAS CORPUS* 1–2 (1976).

²⁶ See Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1535 (2007).

²⁷ See Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 763 (2013).

²⁸ See HALLIDAY, *supra* note 1, at 64–95 (discussing the prerogative).

²⁹ See Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 585 (2008).

³⁰ See G. Edward White, *Looking Backward and Forward at the Suspension Clause*, 117 MICH. L. REV. 1313, 1314 (2019).

³¹ HALLIDAY, *supra* note 1, at 116.

³² See 22 Geo. 3, c. 1 (1782) (Gr. Brit.) (renewal); 21 Geo. 3, c. 2 (1781) (Gr. Brit.) (renewal); 20 Geo. 3, c. 5 (1780) (Gr. Brit.) (renewal); 19 Geo. 3, c. 1 (1779) (Gr. Brit.) (renewal); 18 Geo. 3, c. 1 (1778) (Gr. Brit.) (renewal); 17 Geo. 3, c. 9 (1777) (Gr. Brit.) (renewal).

against their former colonizer,³³ so Americans included the Suspension Clause in Article I of the Constitution.³⁴ Congress gave statutory habeas power to courts and judges in the Judiciary Act of 1789,³⁵ and it has remained on the books thereafter.³⁶

Courts and treatises frequently describe habeas corpus as an equitable remedy.³⁷ That's not formally true — habeas corpus *ad subjiciendum* traces to King's Bench and other common law courts³⁸ — but it's easy to understand the colloquial usage. Basic features of the habeas writ *feel* like the equitable powers of Chancery.³⁹ At least historically, habeas power was shot through with the influence of mercy,⁴⁰ the discretion to use *ad hoc* procedure,⁴¹ and the authority to craft case-specific remedies.⁴² The point of habeas corpus was to “[l]ay[] bare the hidden righteousness of the law.”⁴³ So when I use the term “equity” in this Article, I do so in this functional sense.

As mentioned above, and as a technical matter, the habeas writ simply ordered the prisoner produced in court so that the judge could review the custody. For a long time, a court needed not send the writ whenever a prisoner asked for it,⁴⁴ but American habeas statutes made discharge mandatory upon any jurisdictionally sound finding that custody was unlawful.⁴⁵ Over time, Congress added some statutory limits — most notably in 1996, when it passed the Antiterrorism and Effective Death Penalty Act (AEDPA).⁴⁶ There is also a set of limits that are creatures of *judicial* making, and it is those limits that are the traditional markers of negative equity.

Those limits are also familiar to anyone who has done post-conviction work, and to students who have taken a federal courts class. First, the Supreme Court developed habeas restrictions that Congress subsequently enacted as part of the U.S. Code. For example, 28 U.S.C. § 2254(b) codifies a Court-made exhaustion rule that requires convicted

³³ See Halliday & White, *supra* note 29, at 671.

³⁴ U.S. CONST. art. I, § 9, cl. 2.

³⁵ Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

³⁶ See 28 U.S.C. § 2241.

³⁷ See, e.g., *Schlup v. Delo*, 513 U.S. 298, 319 (1995) (“[H]abeas corpus is, at its core, an equitable remedy.”); 39 C.J.S. *Habeas Corpus* § 3 (“Habeas corpus is, at its core, an equitable remedy . . .”).

³⁸ See HALLIDAY, *supra* note 1, at 87.

³⁹ See *id.*

⁴⁰ See *id.* at 87–88.

⁴¹ See Halliday & White, *supra* note 29, at 610–11.

⁴² See David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 87 (2006) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *134).

⁴³ Halliday & White, *supra* note 29, at 609 (quotation marks omitted).

⁴⁴ See Kovarsky, *supra* note 27, at 763.

⁴⁵ For example, the 1867 Habeas Corpus Act provided that, if a claimant were detained in violation of federal law, “he or she shall forthwith be discharged and set at liberty.” Ch. 28, § 1, 14 Stat. 385, 386 (emphasis added).

⁴⁶ Pub. L. No. 104–132, §§ 101–108, 110 Stat. 1214, 1217–26 (1996) (codified as amended in scattered sections of 21 and 28 U.S.C. and at FED. R. APP. P. 22).

state prisoners to pursue all state remedies.⁴⁷ And 28 U.S.C. § 2244(b) codifies a Court-made restriction on claims that may be considered in successive petitions.⁴⁸

Second, the Supreme Court has developed limits on habeas relief that operate alongside limits in the statute. Procedural default doctrine sets the criteria for federal habeas consideration of claims that prisoners forfeit in state courts.⁴⁹ Court-made rules also limit the retroactive effect of new laws, meaning that not every convicted prisoner can invoke a new Court decision as a basis for habeas relief.⁵⁰ And the harmless-error threshold applicable in federal habeas proceedings comes from *Brecht v. Abrahamson*,⁵¹ which is very expressly grounded in the Court's equitable authority.⁵²

Looking backwards upon five hundred or so years of habeas history, the valence of equity seems to have flipped. Under English common law, equity was in some sense *positive*. It was something that judges invoked to skirt rigid boundaries that might otherwise thwart sufficient remediation.⁵³ Through habeas judgment, a court formally ordered that the jailer do something with the body of the prisoner, and the varied approach to remedies was a mark of habeas power.⁵⁴ Under modern American habeas law, however, equity is mostly *negative*. It operates primarily as license for the Supreme Court to develop procedural restrictions on relief — even when a prisoner's custody is unlawful.

B. The New Negative Equity

The last several Supreme Court terms have featured a significant analytical shift in the account of negative equity. Instead of invoking equity as a source of *its own authority* to develop new habeas restrictions, the Supreme Court has started to describe equity as a *license for district courts* to discretionarily deny relief. A Court majority did not endorse the new negative equity until *Davenport* and *Ramirez*, but the modern story starts with Justice Gorsuch's concurrence in an earlier case, *Edwards v. Vannoy*.⁵⁵

Even though its content was related only tangentially to the issue decided in *Edwards*,⁵⁶ Justice Gorsuch's concurrence sketched a

⁴⁷ See *Rose v. Lundy*, 455 U.S. 509, 516 (1982).

⁴⁸ See *Magwood v. Patterson*, 561 U.S. 320, 337 (2010). The statutory restrictions were actually more stringent than the judge-made antecedents, in several respects. See, e.g., *id.*

⁴⁹ See *Dretke v. Haley*, 541 U.S. 386, 392 (2004).

⁵⁰ See *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008).

⁵¹ 507 U.S. 619 (1993).

⁵² See *Brown v. Davenport*, 142 S. Ct. 1510, 1523 (2022).

⁵³ See HALLIDAY, *supra* note 1, at 115–21.

⁵⁴ *Id.* at 59.

⁵⁵ 141 S. Ct. 1547 (2021); see *id.* at 1566 (Gorsuch, J., concurring).

⁵⁶ Compare *id.* at 1551 (majority opinion) (“The question in this case is whether the new rule of criminal procedure announced in [*Ramos v. Louisiana*, 140 S. Ct. 1390 (2020)] applies retroactively to overturn final convictions on federal collateral review.”), with *id.* at 1566–73 (Gorsuch, J., concurring).

remarkably restrictive view of the habeas privilege.⁵⁷ Citing language in 28 U.S.C. § 2241(a), Justice Gorsuch reasoned that “[t]he statute provides that ‘writs of habeas corpus *may* be granted’ — not that they *must* be granted. The law thus invests federal courts with equitable discretion to decide whether to issue the writ or to provide a remedy.”⁵⁸ In his own concurrence, Justice Thomas dropped a footnote endorsing Justice Gorsuch’s view that “federal courts have ‘equitable discretion to decide whether to issue the writ or to provide a remedy.’”⁵⁹

The project of new negative equity got started in earnest with *Davenport*. In that case, there was a question about how to treat a harm inquiry on federal habeas review.⁶⁰ The Supreme Court ruled against *Davenport*, holding that he had to meet the most exacting combination of harm showings to obtain federal habeas relief.⁶¹ *Davenport*, authored by Justice Gorsuch, offered some “background” in the course of its holding.⁶² The background material, which bore almost no relationship to the issue presented,⁶³ begins by observing that habeas courts had the power (not the duty) to issue habeas relief and that the discretion to deny otherwise warranted habeas relief “lives on in contemporary statutes.”⁶⁴

It dwells in the statutes, *Davenport* said, because those statutes provide that “federal courts ‘may’ grant habeas relief ‘as law and justice require.’”⁶⁵ It is the statutory “may” from 28 U.S.C. § 2241 and then the reference to “law and justice” from § 2243 that had, according to *Davenport*, authorized the Supreme Court to develop judge-made limits on habeas relief. And *Davenport* noted that “law and justice” at least require “federal habeas courts to apply this Court’s precedents governing the appropriate exercise of equitable discretion.”⁶⁶

After *Davenport*, there was *Ramirez*. In *Ramirez*, the habeas claimant had procedurally defaulted a Sixth Amendment claim that his trial counsel was ineffective.⁶⁷ In an opinion that Justice Thomas authored, the Supreme Court held that the habeas statute did not permit *Ramirez* to introduce any new evidence to prove his claim in federal court.⁶⁸ In so doing, *Ramirez* recited the negative equity proposition from

⁵⁷ See *id.* at 1566–73 (Gorsuch, J., concurring).

⁵⁸ *Id.* at 1570 (citation omitted) (quoting 28 U.S.C. § 2241(a)) (citing 28 U.S.C. § 2243).

⁵⁹ *Id.* at 1566 n.4 (Thomas, J., concurring) (quoting *id.* at 1570 (Gorsuch, J., concurring)).

⁶⁰ See *Brown v. Davenport*, 142 S. Ct. 1510, 1517 (2022).

⁶¹ See *id.* at 1517, 1524.

⁶² *Id.* at 1520. I have taken issue with other parts of Justice Gorsuch’s historical account, present in *Davenport*, in earlier writing. See generally Lee Kovarsky, *Habeas Myths, Past and Present*, 101 TEX. L. REV. ONLINE 57, 67–78 (2022).

⁶³ See *supra* note 56 and accompanying text.

⁶⁴ *Davenport*, 142 S. Ct. at 1520.

⁶⁵ *Id.* (quoting 28 U.S.C. §§ 2241, 2243).

⁶⁶ *Id.* at 1524.

⁶⁷ See *Shinn v. Ramirez*, 142 S. Ct. 1718, 1729 (2022).

⁶⁸ See *id.* at 1740.

Davenport,⁶⁹ but with a potentially crucial difference. Whereas *Davenport* might plausibly be interpreted to hold only that *existing* judge-made limits on habeas relief were authorized by statutory reference to “law and justice,”⁷⁰ *Ramirez* went further. It alluded to the judge-made limits, and it invoked § 2243’s law-and-justice language as license for lower courts to impose *additional* limits on habeas relief.⁷¹ Citing *Davenport*, it held: “And even if a prisoner overcomes all of these limits, he is never entitled to habeas relief. He must still ‘persuade a federal habeas court that law and justice require [it].’”⁷²

Whatever the difference between *Davenport* and *Ramirez*, the end-point is the same. *Davenport* had cited the habeas statute as authority for the Supreme Court to formulate judge-made limits on habeas relief, which did not necessarily disrupt the prevailing understanding of habeas power. *Ramirez*, however, expressly exhorted lower federal courts to go beyond established judge-made doctrine and to apply free-floating equitable instincts when adjudicating a claimant’s entitlement to relief.

* * *

Lower courts are still processing *Davenport* and *Ramirez*. The best way to conceptualize the likely response involves a spectrum of negative habeas equity.⁷³ On one end will be jurisdictions that treat the new negative habeas equity a lot like the old negative habeas equity. On that end, *Davenport* and *Ramirez* simply highlighted the link between the Supreme Court’s equitable precedents and the habeas statute.⁷⁴ On the

⁶⁹ See *id.* at 1731 (quoting *Davenport*, 142 S. Ct. at 1524).

⁷⁰ See *Davenport*, 142 S. Ct. at 1524.

⁷¹ *Ramirez*, 142 S. Ct. at 1731.

⁷² See *id.* at 1731 (alteration in original) (quoting *Davenport*, 142 S. Ct. at 1524). The proposition that a claimant must “persuade” a court that “law and justice require” relief isn’t a restatement of old negative equity — in the sense that the power to declare when “law and justice” require relief is still reserved for the Supreme Court. The upstream referent of “these limits” included Supreme Court-made restrictions on relief, and so the additional hurdles must be something else.

⁷³ There are still courts that invoke 28 U.S.C. § 2243 as a source of equity to craft appropriate relief. See, e.g., *Capps v. Sullivan*, 13 F.3d 350, 352 (10th Cir. 1993) (interpreting law-and-justice language to empower federal court to bar retrial); *Osborn v. Shillinger*, 861 F.2d 612, 630–31 (10th Cir. 1988) (ordering sentencing retrial before different judge in a different venue); *Graham v. White*, 678 F. Supp. 3d 1332, 1359–60 (N.D. Okla. 2023) (invoking positive equity in support of order barring retrial); *Whitehead v. LaManna*, No. 18-CV-1436, 2023 WL 3588155, at *16 (N.D.N.Y. May 19, 2023) (vacating convictions in case of ineffective appellate counsel, where ordinary remedy would have been a new appeal).

⁷⁴ For cases that translate *Davenport* and *Ramirez* into a traditional rule of negative equity, see, for example, *Holt v. Smith*, No. 97-cv-06210, 2023 WL 3126313, at *75 (E.D. Cal. Apr. 27, 2023) (seeming to emphasize *Davenport*’s reference to equitable limitations as meaning limitations announced by the Supreme Court); *Greene v. Chetirkin*, No. 22-150, 2023 WL 2401509, at *5 (D.N.J. Mar. 8, 2023) (same); *Pearson v. Gomez*, No. 21 C 50148, 2022 WL 16553040, at *9 n.8 (N.D. Ill. Oct. 31, 2022) (same); *Williams v. Davis*, No. 20-413, 2022 WL 4466622, at *6 (D.N.J. Sept. 26, 2022) (same); *Towers v. Brannon*, No. 17 C 7481, 2022 WL 4094138, at *8 (N.D. Ill. Sept. 7, 2022) (same); *Williams v. Superintendent*, 20-CV-908, 2022 WL 1321128, at *5 (M.D. Pa. May 3, 2022) (same).

other end are appellate jurisdictions that invoke *Davenport* and *Ramirez* not just as authority empowering them to deny relief discretionarily, but also as authority to formulate new rules barring relief entirely.⁷⁵ In the balance of this Article, I explain why the former is bad textualism, and why the latter is something altogether more troubling.

II. EVALUATING NEGATIVE EQUITY

Even if an inference of legislative acquiescence could follow from the failure of Congress to curb some long-asserted judicial power,⁷⁶ no acquiescence story supports the new negative habeas equity. To the contrary, the negative equity of *Davenport* and *Ramirez* asserts a *new* power lurking in the abstract language of 28 U.S.C. §§ 2241 and 2243. And the Supreme Court has historically refused to read longstanding statutory language to bear broad, newly asserted authority lacking historical precedent⁷⁷ — at least in the absence of exceptionally clear statutory meaning.⁷⁸

⁷⁵ The primary example of this phenomenon is the rule, discussed in Part III, that prisoners must show factual innocence in order to obtain habeas relief.

⁷⁶ Even in situations where the modern Supreme Court construed precise statutory language on a narrow question, it hesitated to read congressional nonresponse as an agreement with the original construction. *See, e.g.*, *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) (“It does not follow . . . that Congress’ failure to overturn a statutory precedent is reason for this Court to adhere to it. It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts’] statutory interpretation.” (alteration in original) (internal quotation marks omitted) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989))); *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) (“[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.”). The legislative process involves too many vetoes to draw those kinds of inferences. *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 99 (1988); Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035, 1052 (2013).

⁷⁷ *See* Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React when the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 542–43 (2015) (characterizing as “secure,” *id.* at 542, the principle that courts should “hesitate before finding a serious change in the law . . . hiding in an unassuming, easy-to-miss provision,” *id.* at 543). This principle of statutory interpretation sounds like the principles used to justify the so-called “major questions” doctrine. *See, e.g.*, *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 663, 665 (2022) (applying this doctrine to the authority of OSHA under the Occupational Safety and Health Act of 1970); *King v. Burwell*, 576 U.S. 473, 497 (2015) (“We have held that Congress ‘does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.’” (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001))). Although the issue is well beyond this Article’s scope, the textualist and legislative supremacy arguments I make here do not mean that, in the administrative law context, new regulations touching on important social issues are outside the scope of statutory delegation. *See* William N. Eskridge, Jr. et al., *Textualism’s Defining Moment*, 123 COLUM. L. REV. 1611, 1676–77 (2023); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1069–91 (2023).

⁷⁸ *See, e.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1753 (2020) (“We can’t deny that today’s holding . . . is an elephant. But where’s the mousehole?”); *Aaron v. SEC*, 446 U.S. 680, 694 n.11 (1980) (refusing to adopt an interpretation buttressed by subsequent statutory nonrevision where the interpretation was “clearly at odds with [the statute’s] plain meaning and legislative history”); *see also* Eskridge, *supra* note 76, at 78–84 (discussing “reenactment cases”).

Interpreters with a principled commitment to legislative supremacy *should* be skeptical of previously unasserted judicial powers that spring from ambiguous-but-longstanding statutory language. A long-running failure to exercise a significant judicial power is strong evidence: that the drafters of a statute didn't intend the language to create the power,⁷⁹ that the original audience didn't interpret the statute that way,⁸⁰ that subsequent judicial interpreters shared that understanding,⁸¹ that the public relied on it,⁸² *and* that amending legislatures baked it into ratified statutory meaning.⁸³ So two questions specific to the new negative habeas equity arise. First, does it follow with sufficient clarity from traditional sources of statutory meaning? Second, are the predicating decisions more supportive than they seem? Part II addresses these two questions.

The new negative habeas equity is bottomed on a basic claim about statutory meaning: that §§ 2241 and 2243 combine to vest lower federal courts with free-floating discretion to deny habeas relief. *Davenport* strongly implied that construction of the statute,⁸⁴ and *Ramirez* openly embraced it.⁸⁵ But this revised story of negative habeas equity flunks basic interpretive testing. Even in a contextual vacuum, the argument from text is weak — and it is categorically foreclosed by statutory structure and history.⁸⁶ Section 2241(a) is a power-granting statute worded

⁷⁹ See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 62 (2019).

⁸⁰ See *id.*

⁸¹ See, e.g., *Can. Packers, Ltd. v. Atchison, Topeka & Santa Fe Ry. Co.*, 385 U.S. 182, 183 (1966) (sustaining a statutory interpretation with which the Court might disagree “[a]n original matter” because it “is one of long standing . . . and one [that] this Court has upheld on more than one occasion”) (per curiam) (citations omitted) (citing *Black Horse Tobacco Co. v. Ill. Cent. R.R. Co.*, 17 I.C.C. 588 (1910); *Citizens Gas & Coke Util. v. Canadian Nat'l Rys.*, 325 I.C.C. 527 (1965)); *cf. also* Eskridge, *supra* note 76, at 110–11 (arguing that acquiescence principles have greater bite in cases where ongoing decisional practice reinforces interpretive propositions).

⁸² See Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 16 (2020); Eskridge, *supra* note 76, at 111.

⁸³ See, e.g., *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978) (“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. . . . Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”).

⁸⁴ See *Brown v. Davenport*, 142 S. Ct. 1510, 1520 (2022) (citing the two sections together to describe the Court’s discretion over habeas relief).

⁸⁵ See *Shinn v. Ramirez*, 142 S. Ct. 1718, 1731 (2022) (quoting *Davenport*, 142 S. Ct. at 1520, to offer a similarly combined interpretation of the two sections).

⁸⁶ I lack space to address extensively whether the new negative equity might be justified as the exercise of judicial power under a so-called “common law statute.” Common law statutes are those in which Congress gives courts broad, policy-oriented instructions to discretionarily effectuate that policy, using some approximation of a common law process. See William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1377 (1988). Professor Eskridge has suggested that the habeas corpus provisions might be described as one such statute, see William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1540 n.247 (1987), but a paradigmatic example is the Sherman Act (antitrust), see Eskridge, *Overruling Statutory Precedents, supra*, at 1401; *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007). I make only

permissively not because judges retain free-floating discretion to deny relief, but because *the statute* specifies contingencies that disable the power. And Congress didn't hide what would be the habeas statute's most significant rule at the very end of § 2243, a barely noticed provision that otherwise specifies the most mundane elements of habeas procedure.⁸⁷

I analyze §§ 2241 and 2243 separately, but it's worth pausing to consider how awkward the argument linking the two provisions is. The standard telling of the new negative habeas equity threads together a "may" from § 2241 with the reference to "law and justice" from § 2243, as though the two work in tandem. *Davenport* was a touch misleading, then, when it simply stated that "federal courts 'may' grant habeas relief 'as law and justice require'" without clearly indicating that the quoted terms hail from completely different sections of the U.S. Code.⁸⁸ And then *Ramirez* just quoted *Davenport's* conclusion, without any direct citation to §§ 2241 or 2243 at all.⁸⁹

The sleight of hand would be mostly harmless if either § 2241 or § 2243 were alone sufficient to support the new negative equity, but that's not the case either. As mentioned above and detailed below, the "may" in § 2241(a) reflects contingencies elsewhere in the habeas statute, and § 2243 recognized a power to craft efficacious remedies for successful claimants. I take the provisions in reverse order because the new negative equity emphasizes § 2243 more than it does § 2241, and I conclude with a brief section explaining why the new negative equity is normatively undesirable.

A. Analyzing § 2243

Section 2243 articulates a law-and-justice power that isn't self-defining. Statutory context, structure, and history are, for that reason,

two brief points. First, the new negative equity is a major revision in *policy* — which even a common law statute is supposed to set — rather than a revision in effectuating decisional law. Second, the common-law-statute model is inconsistent with most text-based approaches to statutory interpretation, which are my focus in this Article. See Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 CALIF. L. REV. ONLINE 40, 45 (2018); see also Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common Law Statutes" Different?*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 89, 89 (Shyamkrishna Balganeshe ed., 2013) (arguing that on adjudication under common law statutes, "[t]extualists concede that text is not controlling").

⁸⁷ See 28 U.S.C. § 2243 (describing procedural requirements for the application of a writ of habeas corpus).

⁸⁸ *Davenport*, 142 S. Ct. at 1520 (quoting 28 U.S.C. §§ 2241, 2243). Sections 2241 and 2243 are both cited generally to support the quoted proposition, but there is no indication that the "may" comes from § 2241 and the "law and justice" language comes from § 2243. See *id.* at 1520, 1523.

⁸⁹ See *Ramirez*, 142 S. Ct. at 1731 (quoting *Davenport*, 142 S. Ct. at 1524).

important indicia of statutory meaning⁹⁰ — indicia that array decisively against the new negative equity in general, and the § 2243 argument in particular. The “law and justice” language appears at the end of § 2243 not because it recognizes free-floating discretion to withhold relief, but because it affirms habeas power to remedy unlawful custody efficaciously.

I. Context and Specialized Meaning. — At this juncture, readers should understand a basic division of statutory labor in habeas cases. Habeas writs formally order that a prisoner be produced in court so that the judge can review custody, and the court will then review a substantive “ground” or “claim” alleging that custody (or some other restraint on liberty) is unlawful.⁹¹ The habeas statute defines, by category, permissible claims for relief.⁹² Habeas law also contains other restrictions on relief, often barring remedies when the substantive claims are presented in some procedurally defective way.⁹³ Finally, habeas law prescribes basic claim-processing rules that aren’t restrictions on relief at all.⁹⁴ A major structural problem for new-negative-equity arguments is that § 2243 is a provision in the third category. Such a provision would be an exceedingly bizarre place to stash (in highly ambiguous terms) what would be the most important habeas rule in the U.S. Code: free-standing discretion to deny relief.

To appreciate the oddity of the argument, consider the full statutory context for the law-and-justice language:

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

⁹⁰ See *Abramski v. United States*, 573 U.S. 169, 179 (2014); cf. Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1355–73 (2018) (appendix collecting methods of federal appellate judges, including several approaches toward applying context, structure, and history to statutory interpretation).

⁹¹ See 28 U.S.C. § 2254(a) (defining “ground” and “claim” for post-conviction challenge of state claimant to be the underlying allegation of constitutional error); *Mullis v. Lumpkin*, 70 F.4th 906, 910 (5th Cir. 2023) (describing the court’s history of using “claim” to refer to the underlying constitutional violation asserted as a basis for relief).

⁹² These are generally found in 28 U.S.C. § 2241. See 28 U.S.C. § 2241(c).

⁹³ One example is a statute of limitations along the line of that found in 28 U.S.C. § 2244(d). See 28 U.S.C. § 2244(d)(1).

⁹⁴ See *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (“These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.”).

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and *dispose of the matter as law and justice require*.⁹⁵

Anyone familiar with habeas practice recognizes that § 2243 sets forth the minutiae of habeas procedure.⁹⁶ Technically, the habeas writ doesn't itself order discharge; it just commands that a prisoner be produced in court so that the judge can consider whether the jailer's custody is lawful. To avoid the disruption that physical presentation of prisoners would create, § 2243 authorizes *nisi* process; judges can rely formally on show-cause orders and use habeas as a backstop for non-compliance.⁹⁷ Section 2243 also specifies the proper respondent, the number of days for a response, the form of certification, the timing of a hearing, the circumstances under which the claimant may be physically present in court, the right to traverse the return, the rules for amendment, and so on.⁹⁸

To put it as bluntly as possible: Congress did not ambiguously enact free-floating discretion to deny relief at the conclusion of this mundane list of procedural rules.⁹⁹ Section 2243 proceeds chronologically through the habeas process. The "law and justice" language appears at the very end, and that's because it refers to power to craft an *efficacious* remedy at the conclusion of the habeas proceeding — in the event relief is granted. The statutory history discussed in the next section confirms

⁹⁵ 28 U.S.C. § 2243 (emphasis added).

⁹⁶ See, e.g., Tor Ekeland, Note, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, Of the United State Constitution and the War on Terror*, 74 *FORDHAM L. REV.* 1475, 1507 (2005) (asserting that § 2243 codifies habeas procedure); Note, *A Textual Argument for Challenging Conditions of Confinement Under Habeas*, 135 *HARV. L. REV.* 1397, 1412 (2022) (same).

⁹⁷ A habeas writ formally requires that a prisoner be physically produced in court. The federal statute adopts an English workaround, which requires that the receiving judge send a show-cause order, rather than a habeas writ, to the jailer. As a result, jailers need not actually produce prisoners; they just need to answer a show-cause order. See 28 U.S.C. § 2243; James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 *COLUM. L. REV.* 1515, 1526 & n.41 (2001).

⁹⁸ See 28 U.S.C. § 2243.

⁹⁹ One might make a more sophisticated argument than what appears in *Davenport and Ramirez* — that Congress didn't enact what I've called "free-floating" discretion because they effectively delegated to the *Supreme Court* the power to decide when *lower courts* can exercise discretion. Even this idea is a bridge too far for the most devoted textualists, however, as it mines "law and justice" for an impossibly baroque system of delegation. Perhaps less-pure textualists could make the argument, but then those very impurities would elevate the importance of settled precedent denying law-and-justice discretion to lower courts. See generally *supra* notes 76–83 and accompanying text (explaining why textualists might be bound to distinguish between Supreme Court and lower court discretion on the basis of existing precedent).

this reading of the provision, and the Supreme Court (before *Davenport*) had long accepted that inference.¹⁰⁰

An observation about specialized meaning complements the contextual inference. The rule that relief issue as “law and justice” requires comes from the Latin expression *ex debito justitiae*.¹⁰¹ Judicial relief available *ex debito justitiae* is relief available as a matter of right.¹⁰² Relief available *ex debito justitiae* contrasts with relief available *ex gratia*, or as a matter of grace.¹⁰³ Making habeas subject to a law-and-justice rule tracks the common law practice under which a claimant was entitled to relief *ex debito justitiae* in cases where custody was unlawful.¹⁰⁴ Fervent textualists would have to tie themselves in knots to conclude that language affirming the *ex debito justitiae* status of the habeas remedy instead made the remedy into something discretionary.

2. *Statutory history.* — The requirement that judges order efficacious relief began as a mandatory rule, and Congress has never altered it. Every time Congress tinkered with the pertinent provision, it made clear that the rule remained unchanged. The statutory history of § 2243’s law-and-justice language is a story of *positive* equity — about discretion to craft remedies for successful habeas claimants. Section 2243’s statutory history centers on three statutes: the 1867 Habeas Corpus Act,¹⁰⁵ the 1874 Revisions,¹⁰⁶ and the codification of the Judicial Code in 1948.¹⁰⁷

¹⁰⁰ See *infra* notes 207–12 and accompanying text.

¹⁰¹ *Ex Debito Justitiae*, BLACK’S LAW DICTIONARY (11th ed. 2019). Merriam-Webster’s Dictionary defines “*ex debito justitiae*” to mean “of or by reason of an *obligation of justice*: as a matter of right.” See *Ex debito justitiae*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/ex%20debito%20justitiae> [https://perma.cc/3F2L-XQ5P] (emphasis added). The reference to “justice” refers to error, which contrasts with the concept of “favor,” which refers to remedies available notwithstanding error. See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 324 (1966). This meaning, and the linkage of “justice” to the concept of relief available *ex debito justitiae*, is evident in *R v. Wilkes* (1770) 98 Eng. Rep. 327, 339–40; 4 Burr. 2527, 2549–50 (KB). Relief available “from justice” is described as relief grantable *ex debito justitiae*, and is contrasted to relief “from favour,” where there was no error. See *id.* at 340.

¹⁰² See *United States v. O’Keefe*, 78 U.S. (11 Wall.) 178, 183 (1871) (“As the prayer of the petition is grantable *ex debito justitiae*, it is called a petition of right”); *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648, 656 (1832) (“[F]or in such cases the motion is not granted *ex debito justitiae*, but in the exercise of a sound discretion by the court.”); 7 C.J.S. *Assistance, Writ of* § 2 (2023) (“Where there is no ground for the discretionary withholding of the right, the [assistance] writ issues *ex debito justitiae*, or as of right, and is as much a matter of course as an execution after judgment at law.”).

¹⁰³ See *Ex Gratia*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁰⁴ See WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 4 (1980); S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40, 53 (1951); see also, e.g., *R v. Delaval* (1763) 97 Eng. Rep. 913, 914; 3 Burr. 1434, 1436–37 (KB) (“[T]he Court is bound, *ex debito justitiae*, to set the infant free from an improper restraint: but they are not bound to deliver them over to any body nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them.”).

¹⁰⁵ Act of February 5, 1867, ch. 28, 14 Stat. 385.

¹⁰⁶ See Revised Statutes of 1874, 18 Stat. 1 (1873).

¹⁰⁷ Act of June 25, 1948, ch. 646, 62 Stat. 869 (revising and codifying Title 28 of the U.S. Code).

The law-and-justice language first appeared in the 1874 Revisions,¹⁰⁸ the predecessor to modern § 2243, and so that's the logical place to focus for clues as to statutory meaning. The 1874 Revisions were a complete reenactment — with some revisions to ensure consistent wording — of all federal statutes that had been in effect on December 1, 1873.¹⁰⁹ The 1874 Revisions were compiled by a presidential commission appointed in 1866,¹¹⁰ and the appointment contemplated that the Revisions would make no substantive changes in the reenacted law.¹¹¹ (The initial commission was terminated for having produced a draft with substantive changes.¹¹²) Decisions immediately following the 1874 revisions held *specifically* that the law-and-justice language changed nothing about preexisting habeas practice.¹¹³

The insistence that the 1874 Revisions were to make no substantive statutory changes is a *major* mark against the new negative habeas equity because the idea that courts had freestanding discretion to deny relief would have been a seismic change. After all, the Revisions incorporated the (recently passed) 1867 Habeas Corpus Act (1867 HCA), which was unmistakably mandatory: “[I]f it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she *shall* forthwith be discharged and set at liberty.”¹¹⁴ The nineteenth century's leading habeas treatise captured the public's understanding of the quoted language: relief for unlawful custody was mandatory.¹¹⁵

Timing of the 1874 Revisions also indicates what Congress meant, and what people understood the statute to mean, when Congress

¹⁰⁸ Revised Statutes of 1874, 18 Stat. 1 (1873).

¹⁰⁹ See *id.*; U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., 508 U.S. 439, 449 & n.4 (1993); see also John Townsend Rich, *A Bit More on Reading Statutes*, 10 GREEN BAG 2D 419, 420 (2007).

¹¹⁰ See Act of June 27, 1866, ch. 140, § 1, 14 Stat. 74, 74–75.

¹¹¹ See *Kush v. Rutledge*, 460 U.S. 719, 724 n.6 (1983); see also 2 CONG. REC. 1210 (1874) (statement of Rep. Poland) (“[W]e do not propose to alter the law one jot or tittle.”)

¹¹² See Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes — Their History and Use*, 22 MINN. L. REV. 1008, 1013 (1938); Erwin R. Surrency, *The Publication of Federal Laws: A Short History*, 79 LAW LIB. J. 469, 477–78 (1987).

¹¹³ See, e.g., *In re Stupp*, 23 F. Cas. 296, 298 (C.C.S.D.N.Y. 1875) (“The [law-and-justice] provision [cannot], . . . when properly construed, be regarded as intended to have the effect, or as having the effect, of prescribing to the court any different rules of decision, in disposing of a case on habeas corpus, from those which were the proper rules of decision in disposing of such case prior to the enactment of the Revised Statutes.”)

¹¹⁴ Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (emphasis added). Around the same time, the Supreme Court also held that relief for federal prisoners was nondiscretionary. See, e.g., *Ex parte Wilson*, 114 U.S. 417, 429 (1885) (holding prisoner was “entitled to be discharged” when district court “exceeded its jurisdiction”).

¹¹⁵ See, e.g., WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS § 351, at 479 (2d ed., San Francisco, Bancroft-Whitney Co. 1893) (“But where the judgment is unauthorized, and therefore void, the prisoner will be discharged on habeas corpus without a reversal of the judgment”); *id.* § 370 (“A prisoner detained under a void sentence will be discharged on habeas corpus”); *id.* § 370 (“If, however, the judgment upon review is found to be void, the prisoner will be discharged”).

empowered judges to dispose of “parties” by reference to “law and justice.” Work on the 1874 Revisions took place as Congress was passing the 1867 HCA and the 1866 Civil Rights Act¹¹⁶ (CRA), ratifying the Thirteenth Amendment, and addressing the rising problem of Black Codes.¹¹⁷ The 1867 HCA’s legislative history discloses that one of its primary objectives was the liberty of freedmen,¹¹⁸ and so does its text. The 1867 HCA adjusted crucial language, speaking not in terms of *discharge for prisoners* but in terms of *relief from restraints of liberty*.¹¹⁹ That slight reorientation reflected the fact that habeas had become a remedy for liberty that was impaired in ways other than by formal imprisonment — that is, it would reach freedmen who found themselves trapped in coerced labor relationships.¹²⁰

The idea that American habeas power reached further than discharge for unlawful imprisonment closely tracked prominent developments in English habeas practice. By the middle of the nineteenth century, English judges had been using creative habeas power to remedy non-jailing restraints on human freedom. These English innovations included habeas power to review military impressment, child custody, and coerced labor.¹²¹ In shifting beyond formal imprisonment, the 1867 HCA was just mimicking innovation from across the Atlantic.

That the 1867 HCA was worded to reach beyond imprisonment is also evident from the other procedures that the legislation enumerated. For example, the Act included express language dealing with a refusal to make a return and conferring upon claimants the right to traverse the respondent’s allegations.¹²² These were not substantial problems in the existing habeas practice for state jailers.¹²³ The need to codify these procedural protections arose instead because Congress was concerned about a new type of respondent: recalcitrant former slaveowners.¹²⁴ Indeed, the very first decision under the 1867 Act involved a formerly enslaved person who alleged that a coercive apprenticeship restrained her liberty.¹²⁵

Why does that reorientation matter? The 1867 HCA’s coverage is so interpretively significant because, in nonimprisonment scenarios, effective remediation required something other than a discharge order. The

¹¹⁶ Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

¹¹⁷ See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1121 (1997).

¹¹⁸ See Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 33–38 (1965).

¹¹⁹ See *id.* at 48.

¹²⁰ See Justin W. Aimonetti, *Confining Custody*, 53 CREIGHTON L. REV. 509, 516 (2020); Mayers, *supra* note 118, at 47.

¹²¹ See HALLIDAY, *supra* note 1, at 101.

¹²² See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 386.

¹²³ See Mayers, *supra* note 118, at 47.

¹²⁴ See *id.*

¹²⁵ See *In re Turner*, 24 F. Cas. 337 (Chase, Circuit Justice, C.C.D. Md. 1867) (No. 14,247).

1867 HCA was of the breadth necessary to reach formerly enslaved people subject to other restraints on liberty, so the “law and justice” language in the 1874 Revisions ensured flexibility to efficaciously redress harm in these non-discharge cases. This understanding of “law and justice” explains why the language is listed at the end of the procedural requirements for the habeas proceeding itself. It expanded the menu of available remedies upon a determination that the claimant was entitled to relief.

Subsequent statutory enactments didn’t change that meaning. In 1948, and as part of its comprehensive codification of the Judicial Code (in Title 28), Congress reenacted the “law and justice” language as part of a new § 2243.¹²⁶ The House Report accompanying the House bill makes clear that the main purpose of § 2243 was to incorporate sections 755 to 761 of the 1874 Revisions *without many substantive changes* — and that there were no substantive changes to what had been section 761 of the Revisions.¹²⁷ (Section 761 was the Revision section containing the law-and-justice power.) The Senate Report documented no pertinent amendments to the House bill.¹²⁸ William W. Barron was the 1948 Code’s Chief Reviser, and he said that “no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed” and that “[m]ere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised.”¹²⁹

Habeas amendments in 1966 and 1996 didn’t touch the law-and-justice clause, and so it’s at this juncture worth restating the full sweep of the statutory history. Because subsequent amendments haven’t altered the meaning or function of the law-and-justice power, it must mean the same thing that it meant in 1948, when Congress enacted Title 28. The text of the provision, the 1948 Revisers’ Notes, and Barron’s commentary insist, moreover, that the “law and justice” power in § 2243 meant the same thing that it meant in § 761 of the 1874 Revisions, which *also* made no substantive changes to prevailing habeas powers. The habeas power that prevailed in 1874 was from the 1867 Act, which

¹²⁶ Act of June 25, 1948, Pub. L. No. 80-773, § 2243, 62 Stat. 869, 965; *see also* *Wingo v. Wedding*, 418 U.S. 461, 468–69 (1974) (“The Revisers thus deleted some words from [the pertinent part of the 1874 Revisions], but the Revisers’ Notes accompanying § 2243, together with the reports of the Committee of the Judiciary of the Senate, and of the House, make abundantly clear that the word changes and omissions . . . were intended only as changes in form.” (footnotes omitted) (citing S. REP. NO. 1559, at 2 (1948); H.R. REP. NO. 308, at A178 (1947); JAMES WILLIAM MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE (1949); *Payne v. Wingo*, 442 F.2d 1192 (6th Cir. 1971))).

¹²⁷ *See* H.R. REP. NO. 308, at A178 (listing substantive revisions in § 2243 that did not include idea of negative equity, and reaffirming that changes in wording not designated as substantive were simply changes in “phraseology”).

¹²⁸ *See* S. REP. NO. 1559, at 8–10.

¹²⁹ William W. Barron, *The Judicial Code: 1948 Revision*, 8 F.R.D. 439, 445–46 (1949).

provided that a claimant demonstrating unlawful custody “shall” be discharged.¹³⁰

The amendments only reinforce the basic story — that the law-and-justice language was inserted to authorize non-discharge remedies, not to constrict relief. The 1948 reenactment provided that a court may dispose of the “matter” as law and justice require, but the 1874 Revisions provided that a court dispose of the “party” that way.¹³¹ When the common law spoke of “party” disposition, it was speaking of remedies. At the end of an English habeas proceeding, the remedy was the moment the body “underwent” something, and equitable principles were used to dictate the scope of that remedy.¹³² The 1874 Revisions were drafted to include rules for disposing of “parties” because non-discharge remedies would have been top of mind. And consider another, perhaps clearer indication that the law-and-justice language created non-discharge remedies: the 1966 Amendments to the habeas statute included a provision permitting judges to refuse to hear a ground for relief when the ground was omitted in a prior order refusing a discharge “or other remedy.”¹³³

Perhaps *Davenport* and *Ramirez* missed these interpretive clues because they are buried underneath legislative revisions. The 1966 amendments referencing non-discharge remedies no longer appear in the statute.¹³⁴ And, as mentioned above, Congress changed the language referring to disposition of a “party” to language referring to disposition of a “matter.”¹³⁵ Finally, Congress has retreated from the expansive vision of habeas corpus relief for all “restraints on liberty” present in the 1867 HCA, in favor of a habeas power that reaches only unlawful custody.¹³⁶ These subsequent changes might obscure the original meaning of § 2243’s law-and-justice language, but it’s still quite legible.

* * *

Section 2243’s reference to “law and justice” does not mean that federal district courts have freestanding discretion to deny relief. Instead,

¹³⁰ There is a potential negative-inference argument that the disappearance of the “shall be discharged” language meant that the mandatory nature of the remedy vanished along with it. But again, the language disappeared by way of the 1874 Revisions, which effected no substantive change, and which contains phrasing — the “law and justice” provision itself — that includes a discharge remedy.

¹³¹ This language appeared in § 761 of the 1874 Revisions. See 13 Rev. Stat. § 761.

¹³² See HALLIDAY, *supra* note 1, at 58–60.

¹³³ An Act Relating to Applications for Writs of Habeas Corpus by Persons in Custody Pursuant to Judgments of State Courts, Pub. L. No. 89-711, § 1(b), 80 Stat. 1104, 1104 (1966); see also *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968) (noting significance of reference to other remedies).

¹³⁴ See 28 U.S.C. § 2243 (omitting earlier reference to other remedies).

¹³⁵ Although there is little legislative history on that change, it almost certainly reflects the fact that the business of habeas corpus was carried out entirely through *nisi* process, see *supra* note 97, an approach based on show-cause orders rather than actual habeas writs moving bodies (parties) around. See, e.g., H.R. REP. NO. 308, at A178 (1947) (indicating change was nonsubstantive).

¹³⁶ See *Maleng v. Cook*, 490 U.S. 488, 490 (1989) (per curiam).

it reserves habeas power to order efficacious remedies. The statutory argument for the new negative habeas equity — what would be an impossibly consequential rule of adjudication — is especially odd coming from a modern Supreme Court famous for affirming that Congress does not stuff “elephants” in statutory “mouseholes.”¹³⁷ Congress just didn’t slip a major statutory font of negative equity at the very end of a procedural provision that otherwise specifies things like *nisi* process, the form for certifying documents, and the criteria for granting extensions on pleadings. And nobody would have understood it that way in 1874 or 1948.

B. Analyzing § 2241

Nor can § 2241 do the work that the new theory of negative habeas equity requires. On that theory, and because § 2241 says that judges “may” exercise habeas power, judges have discretion to refuse to relieve custody that otherwise requires discharge. But the “may” simply acknowledges statutory contingencies upon which the remedy depends; it does not enact free-floating judicial discretion to deny relief. In fact, it never seems to have even occurred to a Supreme Court Justice to *make* this argument until 1993, some forty-five years after Congress inserted the pertinent language into the statute.¹³⁸

Section 2241(a)’s text is adapted from the 1789 Judiciary Act,¹³⁹ the pertinent “may” appeared by way of the 1948 Judicial Code enactment,¹⁴⁰ and the provision represents the basic grant of habeas power to federal courts and judges. Subsection (a) isn’t about the *scope* of habeas power but about *which judicial entities* wield it:

Writs of habeas corpus *may* be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.¹⁴¹

But proponents of the new negative habeas equity cite the “may” from § 2241(a) as a source of a free-floating power to refuse relief.¹⁴²

¹³⁷ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018) (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)).

¹³⁸ See *Withrow v. Williams*, 507 U.S. 680, 716 (1993) (Scalia, J., concurring in part and dissenting in part). Justice Scalia’s *Withrow* opinion doesn’t cite to anything for this textual argument (other than the statute itself), and I’ve seen no pre-*Withrow* version of it. The earlier framings of the negative equity positions instead center on § 2243.

¹³⁹ Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81.

¹⁴⁰ Act of June 25, 1948, ch. 646, 62 Stat. 869 (revising and codifying Title 28 of the U.S. Code).

¹⁴¹ 28 U.S.C. § 2241 (emphasis added).

¹⁴² See *supra* section I.B, pp. 2229–32.

I. Statutory Structure. — Balancing too many interpretive pins on the needle’s head of a “may” is always fraught.¹⁴³ But a more specific problem with § 2241(a)–grounded negative equity arguments, and especially those of the free-floating variety, is that the “may” seems to reflect other limitations *in the habeas statute*. Section 2241(b), for example, immediately gives appellate judges discretion to refuse relief — not because all relief can be denied equitably, but because appellate courts can transfer habeas cases to district courts with territorial jurisdiction over the jailer.¹⁴⁴ In the context of § 2241(a), then, “may” signals a contingency, not discretion.

The thickest set of statutory restrictions in § 2241 appears in subsection (c), which bars habeas relief for all claim categories other than those that it enumerates:

- (c) The writ of habeas corpus shall not extend to a prisoner unless —
 - (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
 - (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
 - (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
 - (4) [He is a foreign national in custody for acting under color of his country’s laws]; or
 - (5) It is necessary to bring him into court to testify or for trial.¹⁴⁵

Habeas review of state convictions is typically undertaken under the auspices of § 2254 and by reference to § 2241(c)(3), which permits habeas relief for anyone whose custody violates federal law.

I won’t go through every subsection of § 2241, but my point should already be clear. Section 2241 is structured in a manner one would expect of power-specifying statutes. Power would be granted to an institutional entity in one provision, and the exercise of that power would be

¹⁴³ See LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 9 (2014), <http://www.fas.org/sgp/crs/misc/97-589.pdf> [<https://perma.cc/UCN5-JMAJ>] (observing that “may” is permissive *ordinarily*, but that it “must be read in . . . statutory context”); see also, e.g., *Moore v. Illinois Cent. R.R.*, 312 U.S. 630, 635 (1941) (“This difference in language, substituting ‘may’ for ‘shall,’ was not, we think, an indication of a change in policy, but was instead a clarification of the law’s original purpose.”); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995) (“Though ‘shall’ generally means ‘must,’ legal writers sometimes use, or misuse, ‘shall’ to mean ‘should,’ ‘will,’ or even ‘may.’” (citing DAVID MELLINKOFF, *MELLINKOFF’S DICTIONARY OF AMERICAN LEGAL USAGE* 402–03 (1992); BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 939 (2d ed. 1995))). The ambiguity in shall-versus-may usage is reflected in leading legal dictionaries. See, e.g., GARNER, *supra*, at 939 (“[C]ourts in virtually every English-speaking jurisdiction have held — by necessity — that shall means may in some contexts, and vice versa.”); MELLINKOFF, *supra*, at 402–03 (explaining that “shall” and “may” are “frequently treated as synonyms” and that context dictates statutory meaning).

¹⁴⁴ 28 U.S.C. § 2241(b).

¹⁴⁵ *Id.* § 2241(c).

contingent upon other statutorily specified conditions. The rub: in conventionally structured power-specifying statutes, the power-granting language must always be permissive when the statute also specifies limits or contingencies. A permissive “may” doesn’t necessarily entail discretion if the conditions for exercising the underlying power are satisfied.

To be more concrete, a version of § 2241(a) providing that courts, judges, and Justices “must” exercise habeas power would have been syntactically fraught in view of subsequent subsections that identify conditions under which habeas power “may not” or “shall not” be exercised. Take a stylized power-specifying provision:

- (a) Habeas relief *must* be awarded by Article III judges and courts when a prisoner’s custody violates federal law.
- (b) — Habeas relief *need not* issue when a federal appeals court or judge can transfer the case to a district court with personal jurisdiction over the jailer.
- (c) — Habeas relief *shall not* issue when the prisoner files his petition more than two years after a state criminal conviction becomes final.

The inclusion of the word “must” in subsection (a) makes the collection of provisions irreconcilable. If subsection (a) is mandatory, then it is logically inconsistent with subsection (b), which is a contingency and describes circumstances under which habeas power “need not” be exercised, and with subsection (c), which is a contingency and describes circumstances under which it “must not.” That § 2241(a) says “may” and not “must” is in recognition of the fact that other provisions in the statute make the exercise of habeas power contingent.

Nor is it the case that the “may” in § 2241(a) reflects only statutory limits within § 2241. Textual limits on habeas relief marble Title 28 of the U.S. Code and include restrictions based on the type of custody,¹⁴⁶ the identity of the prisoner,¹⁴⁷ the nature of the underlying claim,¹⁴⁸ and the timing of the petition.¹⁴⁹ These limits would be impossible to reconcile with a version of § 2241(a) that *required* judges, Justices, and courts to grant relief in all cases of unlawful custody. The reason § 2241(a) uses “may” rather than “must” is therefore a boring principle of statutory coherence, and not a general reservation of discretionary power for district judges to deny relief.

¹⁴⁶ See, e.g., *id.* § 2255 (specifying relief for prisoners serving federal sentences).

¹⁴⁷ See, e.g., *id.* § 2241(e), *invalidated in part* by *Boumediene v. Bush*, 553 U.S. 723 (2008) (barring habeas relief in cases where detainees are properly designated as enemy combatants).

¹⁴⁸ See, e.g., *id.* § 2254(a) (permitting relief to people serving state criminal sentences only for claims based on violations of federal statutes, treaties, or the Constitution).

¹⁴⁹ See, e.g., *id.* § 2244(d) (statute of limitations applicable to claims made by people serving state criminal sentences); *id.* § 2255(f) (same for those serving federal sentences).

The *expressio unius est exclusio alterius* canon also cuts against the new negative habeas equity.¹⁵⁰ Section 2241(d) expressly awards some habeas discretion involving the court in which the habeas proceeding is to take place: “The district court for the district wherein such an application is filed *in the exercise of its discretion and in furtherance of justice* may transfer the application to the other district court for hearing and determination.”¹⁵¹ New negative equity exponents would have a statutory interpreter presume that § 2241(a) silently embeds far-reaching discretion to deny relief even though § 2241(d) includes express language of discretion to govern a far-lower-stakes rule of permissive venue.¹⁵²

Finally, the new negative equity runs into trouble when it comes into contact with federal custody. Section 2255(b), which more specifically instructs district courts what to do in federal-prisoner cases, does not recognize discretion to deny post-conviction relief to people serving federal sentences: “If the court finds that the judgment was [unlawful] . . . the court *shall vacate* and set the judgment aside and *shall discharge* the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.”¹⁵³ At the time Congress ratified the pertinent language in §§ 2241 and 2255, moreover, the power to award relief to otherwise-entitled claimants was supposed to be the same.¹⁵⁴ And to the extent one still insists that the powers are different, one would actually expect § 2241 remedies to be more potent than those in § 2255 — given that the latter deals with custody supported by far more substantial process.¹⁵⁵

2. *Statutory History.* — Section 2241(a)’s history *also* indicates that “may” recognizes a statutory contingency, and that it does not authorize discretion to deny relief to an otherwise-entitled claimant. Congress added “may” as part of the 1948 consolidation of the Judicial Code (in Title 28), and that change was not designated as substantive. Section 2241 consolidated 1874 Revisions sections 751 through 753, “with changes in phraseology necessary to effect the consolidation.”¹⁵⁶ Recall that the operative statute, the 1867 HCA, was unmistakably mandatory.¹⁵⁷ Before 1948, section 751 provided that all *courts* “shall have power” to issue habeas writs,¹⁵⁸ section 752 also provided that all

¹⁵⁰ The *expressio unius* canon captures the idea that “[w]hen Congress includes particular language in one section of a statute and omits it from a neighbor, the Court normally understands that difference in language to convey a difference in meaning.” *Bittner v. United States*, 143 S. Ct. 713, 716 (2023).

¹⁵¹ 28 U.S.C. § 2241(d) (emphasis added).

¹⁵² Section 2246 also includes an express reservation of discretion regarding whether to take evidence orally, by deposition, or by affidavit. *Id.* § 2246.

¹⁵³ *Id.* § 2255(b) (emphases added).

¹⁵⁴ See *infra* notes 165–68 and accompanying text.

¹⁵⁵ See 28 U.S.C. § 2255.

¹⁵⁶ See H.R. REP. NO. 308, at A177 (1947).

¹⁵⁷ See *supra* note 104 and accompanying text.

¹⁵⁸ See Judiciary Act of 1789, ch. 20. § 14, 1 Stat. 73, 81.

Justices and judges “shall have power” to issue those writs,¹⁵⁹ and section 753 precluded habeas jurisdiction over jailed prisoners other than those in specified categories.¹⁶⁰

With that context, the function of the word “may” is clearer. Sections 751 to 753 consolidated the upstream powers to order responses from jailers (to send writs) and the statutory exemptions from that power — but did not include the downstream power to order discharge upon a determination that custody was unjustified.¹⁶¹ In fact, section 755 still required that the writ be awarded “unless it appears from the petition itself that the party is not entitled thereto.”¹⁶² In view of the fact that § 2241(a) was to make no substantive change, the “may” in that provision simply allows a court to discontinue proceedings when it appears on the face of a pleading that a habeas claimant wouldn’t be entitled to recover. There’s no “discretion” to deny recovery if the claimant is entitled to it.

The “may” also makes more sense in light of the 1948 legislation’s big substantive change to the pertinent statutory content: 28 U.S.C. § 2241(b). Section 2241(b) was a new provision permitting the Supreme Court and its Justices, and circuit courts and their judges, to transfer habeas cases to district courts.¹⁶³ The “may” in subsection (a) was necessary to recognize subsection (b)’s language specifying situations in which certain judges needed not send the writ, thereby commencing the habeas proceeding. The House Report to the 1948 Act explains that the point of § 2241(b) was to ensure that circuit judges did not “unnecessarily entertain[] applications which should be addressed to the district court” and that Supreme Court Justices “not be burdened with applications for writs cognizable in the district courts.”¹⁶⁴ If the major substantive revision to § 2241 was to funnel habeas litigation to district courts, then the propriety of habeas power was contingent on the court to which the habeas petition was addressed. The “may” in § 2241(a) had to recognize that contingency.

Finally, it is quite significant that the “may” in § 2241(a) appeared in the same 1948 legislation as did § 2255 — the provisions dealing with people convicted of federal crimes — and everyone understood that the two provisions *did not specify different powers*.¹⁶⁵ The only difference

¹⁵⁹ 13 REV. STAT. § 752 (1873).

¹⁶⁰ *Id.* § 753. As of 1940, sections 751 to 753 of the 1874 Revisions had been codified at 28 U.S.C. §§ 451 to 453. See H.R. REP. NO. 308, at A177.

¹⁶¹ See 13 REV. STAT. §§ 751–753.

¹⁶² See *id.*

¹⁶³ 28 U.S.C. § 2241(b).

¹⁶⁴ See H.R. REP. NO. 308, at A178.

¹⁶⁵ See *United States v. Hayman*, 342 U.S. 205, 219 (1952) (“[T]he sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in another and more convenient forum.” (emphasis added)); *Davis v. United States*, 417 U.S. 333, 343 (1974)

was that, in § 2255 cases, the post-conviction litigation took place in the sentencing court, rather than in the judicial district containing the prison.¹⁶⁶ And recall from above that § 2255(b) makes relief upon a determination of unlawful custody mandatory.¹⁶⁷ It is difficult to insist that “may” creates discretion to award relief upon a determination of unlawful custody when the habeas power is “identical in scope” to a more specifically worded power that excludes such discretion.¹⁶⁸

3. *The Problem of Generalization.* — There is another issue with the idea that § 2241(a) vests district court judges with discretion to deny relief. Call it a problem of generalization. By 1948, when the “may” appeared in the statute, the provision applied to claims by people subject to *any* custody — it was not language reserved for people subject to criminal convictions. The provision applied, for instance, to claims by those in military detention,¹⁶⁹ pretrial custody,¹⁷⁰ and immigration proceedings.¹⁷¹ Whatever story one might tell about the interests at play in post-conviction cases, the attempt to link the new negative habeas equity to § 2241(a) strains under the necessary generalization.

Imagine the tenets of the new negative equity operating outside of the post-conviction context. There is no English or early American tradition under which a court with habeas power concluded that custody was unlawful but, for equitable reasons, denied relief.¹⁷² If the English

(“[Section] 2255 was intended to afford federal prisoners a remedy *identical in scope* to federal habeas corpus.” (emphasis added)). Chief Judge Parker was the chair of the Judicial Conference Committee on Habeas Procedure that produced the 1948 legislation, and he affirmed that the scope of post-conviction relief did not differ across state and federal custody. See John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 175 (1949).

¹⁶⁶ Parker, *supra* note 165, at 175.

¹⁶⁷ See *supra* note 153 and accompanying text.

¹⁶⁸ *Davis*, 417 U.S. at 343.

¹⁶⁹ See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 475 (1963).

¹⁷⁰ See Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 864 (1994).

¹⁷¹ See James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward A First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 969 (1997).

¹⁷² See Recent Case, *Habeas Corpus — Right to Release Pending State’s Appeal from Decree of Discharge*, 48 HARV. L. REV. 513, 513 (1935) (explaining that “[g]enerally at common law, . . . [the] prisoner was *ipso facto* entitled to release” upon “a final adjudication of the detention’s legality”); see also, e.g., 28 U.S.C. § 2241 (2012) (making discharge mandatory); *Stallings v. Splain*, 253 U.S. 339, 343 (1920) (“Unless the lawful arrest was promptly followed by such proceedings the prisoner would be entitled to his discharge.” (citing *In re Fetter*, 23 N.J.L. 311, 321 (1852))); *Pettibone v. Nichols*, 203 U.S. 192, 211 (1906) (phrasing habeas inquiry as one into whether a claimant is “entitled to release”); *In re Bonner*, 151 U.S. 242, 256 (1894) (suggesting that infirmities in judgments may “entitle” a claimant to “discharge”); *In re Savage*, 134 U.S. 176, 177 (1890) (reasoning in terms of whether claimant is “entitled to have his liberty”); *Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (“[T]he prisoner who shows that his sentencing was unconstitutional is actually entitled to release, because the judgment pursuant to which he is confined has been invalidated.”). There is no history of pre-*Davenport* practice — to my knowledge, anywhere — under which a court with habeas

Crown unlawfully detained a political prisoner without trial — the quintessential habeas scenario — then there was no “equitable” discretion to remand the prisoner to the dungeon.¹⁷³ The 1679 Habeas Corpus Act,¹⁷⁴ which primarily targeted executive custody, literally provided that prisoners “shall be discharged” if they were either acquitted or languishing without trial.¹⁷⁵ In early American practice, unlawfully detained civilians were entitled to release without an inquiry into, for example, national security concerns.¹⁷⁶ No less a figure than Joseph Story summarized the Anglo-American tradition this way, in his *Commentaries on the Constitution of the United States*: “[The habeas writ is] the great bulwark of personal liberty; since it is the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is *entitled* to his immediate discharge.”¹⁷⁷

In 1948, when Congress reconfigured § 2241(a) to include the word “may,” nobody understood it to make relief permissive for these other categories of detainees. And a single instance of the exact same word cannot mean one thing for one category of detainees and something different for another. Text-centered interpreters are justified in being sensitive to the dynamic Justice Scalia captured in a 2005 case involving a

power could refuse to relieve unlawful pretrial or military confinement for “equitable” reasons. Post-*Davenport* is a different story. See, e.g., *Santucci v. Commandant*, 66 F.4th 844, 859 n.13 (10th Cir. 2023) (holding that *Davenport* imposes rule of discretion in court martial cases too).

¹⁷³ There were situations where a prisoner subject to an unlawful detention order was not discharged or bailed, but only where the court exercising habeas power *also* had jurisdiction to issue entirely original process under which, analytically speaking, new custody could be undertaken. See ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS 411–16 (2d ed. 1876). That practice appeared to continue in American states through at least the middle of the nineteenth century. See *id.* at 418–21. Of course, federal courts do not have jurisdiction to commit prisoners for state crimes, so those practices do not run parallel to the discretion that the new negative equity asserts. See CHURCH, *supra* note 115, § 288 (“But it must be distinctly understood, that if the court granting the habeas corpus does not have the power of a committing magistrate over the offense shown in the depositions, it must discharge the prisoner if the commitment can not be sustained.”).

¹⁷⁴ 31 Car. 2, c. 2 (Eng.).

¹⁷⁵ As Justice Scalia memorably described English habeas practice under the 1679 Statute: “That remedy was *not* a bobtailed judicial inquiry into whether there were reasonable grounds to believe the prisoner had taken up arms against the King. Rather, if the prisoner was not indicted and tried within the prescribed time, ‘he shall be discharged from his Imprisonment.’ The Act does not contain any exception for wartime.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 564 (2004) (Scalia, J., dissenting) (quoting 1679 Habeas Corpus Act, 31 Car. 2, c. 2, § 7 (Eng.)).

¹⁷⁶ See James E. Pfander, *Dicey's Nightmare: An Essay on the Rule of Law*, 107 CALIF. L. REV. 737, 741 (2019); see also Ingrid Brunk Wuerth, *The President's Power to Detain “Enemy Combatants”*: Modern Lessons from Mr. Madison's Forgotten War, 98 NW. U. L. REV. 1567, 1580–85 (2004) (sketching several extreme examples from the War of 1812). Interestingly, there does seem to be evidence that, under colonial analogues to the 1679 Act, courts would not always discharge a prisoner kept beyond the timelines specified in the statutes — although that's because the custody was considered to be lawful rather than because of discretion to remand a prisoner to unlawful custody. See HURD, *supra* note 173, at 559–63.

¹⁷⁷ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 675, at 483 (Carolina Acad. Press 1987) (1833) (emphasis added).

different part of § 2241: “To give these same words a different meaning for each category [of detainees] would be to invent a statute rather than interpret one.”¹⁷⁸ Justice Scalia was particularizing Professor Edward Corwin’s more abstract assertion that it is “a novelty to the science of hermeneutics and probably to that of linguistics as well” when a word should be assigned “two quite different meanings in a single short sentence in which it occurs but once.”¹⁷⁹

4. *The Declaratory Judgment Act Analogy.* — Justice Gorsuch’s *Edwards* concurrence includes a footnote insisting on new negative equity because it follows from the interpretation of “nearly identical text” in the Declaratory Judgment Act¹⁸⁰ (DJA).¹⁸¹ The DJA provides that, when a plaintiff sues for declaratory judgment, the district court “may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”¹⁸² In *Wilton v. Seven Falls Co.*,¹⁸³ the Supreme Court was asked to overturn the longstanding practice under which declaratory judgment relief was permissive.¹⁸⁴ In refusing to do so, the Court held that the longstanding practice was consistent with the presence of the word “may” in the DJA.¹⁸⁵

The DJA analogy to § 2241 vanishes in *Davenport*, and advisedly so. First, analogical attempts to assert consistent meaning across the U.S. Code are most problematic when the common terms are in unrelated provisions that Congress enacted at different times.¹⁸⁶ Second, *Wilton*

¹⁷⁸ *Clark v. Martinez*, 543 U.S. 371, 378 (2005); cf. Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1150 (2003) (“As a matter of conventional English usage, it seems far more likely that a word or phrase has the same meaning throughout a single clause or sentence than that a word or phrase used in two or more different contexts in a document has the same meaning in each context.”). This principle is not that the same words in *different parts of the statute* should have the same construction, but an even stronger rule that the *exact same text of the statute* should have the same meaning across different detention categories. Cf., e.g., *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (“The substantial relation between the two programs presents a classic case for application of the ‘normal rule of statutory construction that ‘identical words used in different parts of the same act are intended to have the same meaning.’” (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)) (citing *Sorenson v. Sec’y of Treasury*, 475 U.S. 851, 860 (1986))); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (describing a related technique of interpretation dubbed “intratextualism”).

¹⁷⁹ EDWARD S. CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS* 50 (1936) (emphasis omitted). *But see* Prakash, *supra* note 178, at 1151 (rejecting that Corwin’s rule should prevail in every single interpretive conflict).

¹⁸⁰ 28 U.S.C. §§ 2201–2202.

¹⁸¹ *Edwards v. Vannoy*, 141 S. Ct. 1547, 1570 n.3 (2021) (Gorsuch, J., concurring).

¹⁸² 28 U.S.C. § 2201(a).

¹⁸³ 515 U.S. 277 (1995).

¹⁸⁴ *Id.* at 286–87.

¹⁸⁵ *See id.*

¹⁸⁶ *See, e.g., Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008) (rejecting the so-called “whole-code canon” where “relevant provisions were not considered or enacted together”); *see also* William W.

involved a status quo ante in which there was a long tradition of permissive DJA jurisdiction, plus fifty years of Supreme Court case law affirming it.¹⁸⁷ *Wilton* explicitly noted that the presence of the word “may” in the DJA validated the existing declaratory judgment practice.¹⁸⁸ But the status quo ante in habeas cases is flipped; there is no history of new negative habeas equity, and there is certainly no history of decisional support for the practice. *Wilton* itself underscored that declaratory judgment discretion differs from discretion potentially exercised elsewhere because of “the breadth of leeway *we have always understood it to suggest*.”¹⁸⁹ Third, it’s clear why declaratory judgment jurisdiction would be permissive and habeas jurisdiction wouldn’t. In the declaratory judgment context, there is some future judgment capable of resolving the subject matter of the underlying dispute.

* * *

The bottom line is that the Supreme Court is placing too much interpretive weight on a single instance of the word “may” in § 2241(a). Other parts of the habeas statute strongly contraindicate § 2241(a) as a source of free-floating discretion to deny relief. Congress might have used the word “may” for any number of reasons, all of them far more realistic explanations for the word’s presence than what the new negative equity requires.

C. Decisional Pedigree

In setting forth the new negative habeas equity, *Davenport* and *Ramirez* don’t perform serious analysis of statutory text. The opinions attempt to justify the rule in other ways. I don’t mean to shortchange reliance on decisional law, which contains data points for those who regard precedent as an important input for statutory construction.¹⁹⁰ The problem is that the pre-*Davenport* cases don’t support the new

Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 204 (2000) (“Even without embracing public choice arguments about legislative incoherence in the context of group voting, one can comfortably state that no theory of statutory interpretation can sensibly be based on the claim of an identical congressional drafter and coalition behind two different statutes.”); Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76, 143 (2021) (“In short, one significant problem with the Court’s current approach to whole code comparisons is that the Court has essentially transformed an interpretive canon that is based on making sense out of legislative policy across similar subject areas into one that is based on linguistic consistency across the U.S. Code.”); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court’s First Decade*, 117 MICH. L. REV. 71, 135 (2018) (noting that the whole-code canon does not “actually approximate[] congressional preferences” nor “serve[] an important external value”).

¹⁸⁷ See *Wilton*, 515 U.S. at 282–88.

¹⁸⁸ *Id.* at 286 (emphasizing “[t]he statute’s textual commitment to discretion”).

¹⁸⁹ *Id.* at 286–87 (emphasis added).

¹⁹⁰ See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 703–04 (1999).

negative equity either. In fact, a relatively unbroken string of precedents points squarely in the other direction.¹⁹¹

Several 1890 decisions held straightforwardly that a finding of unlawful custody required relief of some sort. *In re Medley*¹⁹² involved a prisoner whom Colorado had sentenced to death and who was subject to solitary confinement before his execution.¹⁹³ It became apparent that the solitary confinement violated the ex post facto clause because it was imposed pursuant to a statute that post-dated Medley's conviction.¹⁹⁴ The Supreme Court held that release was *required*, deploying the law-and-justice language:

But under the writ of habeas corpus *we cannot do anything else than discharge the prisoner* from the wrongful confinement in the penitentiary under the statute of Colorado invalid as to this case.

. . . Section 761 of the Revised Statutes declares that the court . . . shall proceed in a summary way to determine the facts of the case by hearing the testimony and argument, *and thereupon to dispose of the party as law and justice require.*

What disposition shall we now make of the prisoner, *who is entitled to his discharge* from the custody of the warden of the penitentiary under the order and judgment of the court, because . . . he is in custody in violation of the Constitution of the United States, but who is, nevertheless, guilty . . . of the crime of murder in the first degree? We do not think that we are authorized to remand the prisoner to the custody of the sheriff . . .¹⁹⁵

Medley makes clear that the law-and-justice language doesn't affect the mandatory nature of the obligation to relieve unlawful detention, and *Medley* is no minor case. It is both a major habeas decision affirming a remedy for ex post facto violations and the first case in which the Court reached the constitutionality of solitary confinement.¹⁹⁶ That same day, and in a companion case out of Colorado, the Court ordered

¹⁹¹ To be fair to any counterargument, one might read *Ex parte Royall*, 117 U.S. 241 (1886), as at least gesturing in that direction. In *Royall*, the Supreme Court established the exhaustion requirement in state-prisoner cases, meaning that it permitted federal courts to defer habeas consideration until no state remedies remained. *See id.* at 250–54. As a result, it permitted federal courts to refuse to assume custody over state prisoners before state criminal trials. *See id.* *Royall* referenced the “law and justice” standard several times, *see id.*, and so someone might misinterpret the case to suggest that there was discretion to deny relief in habeas cases. But *Royall* was about the discretion to time the consideration of issues, not the discretion to deny relief entirely: “The injunction to hear the case summarily, and thereupon ‘to dispose of the party as law and justice require,’ does not deprive the court of discretion as to the *time and mode* in which it will exert the powers conferred upon it.” *Id.* at 251 (emphasis added). Exhaustion operates that way to this day; it remains a rule of sequencing.

¹⁹² 134 U.S. 160 (1890).

¹⁹³ *Id.* at 161–62.

¹⁹⁴ *See id.* at 171.

¹⁹⁵ *Id.* at 173–74 (emphasis added).

¹⁹⁶ *See* David Polizzi & Bruce Arrigo, *Cruel but Not Unusual: Solitary Confinement, The 8th Amendment, and Agamben's State of Exception*, 21 NEW CRIM. L. REV. 615, 622 & n.6 (2018).

a death-sentenced prisoner discharged, observing that he was “entitled to have his liberty.”¹⁹⁷

Also in 1890, the Supreme Court decided *In re Neagle*,¹⁹⁸ the bizarre case in which a federal marshal shot and killed a man he believed to be attempting to assassinate Justice Field.¹⁹⁹ Among other things, *Neagle* is the decisional source of federal-official immunity for conduct undertaken within the scope of federal duty.²⁰⁰ But *Neagle* was also a habeas case. After having determined the custody of Neagle to be unlawful, and on the question of remedy, the Court *directly* interpreted the meaning of the law-and-justice language from the 1874 Revisions.²⁰¹ Specifically, it held that the language “means that if [the prisoner] is held in custody in violation of the Constitution or a law of the United States, or for an act done or omitted in pursuance of a law of the United States, he *must be discharged*.”²⁰²

That understanding persisted throughout the twentieth century, with multiple Supreme Court decisions affirming that the law-and-justice power involved discretion to craft a remedy — not to deny relief. This principle most frequently appeared when the Court needed to affirm the authority of inferior federal judges to order conditional discharges, which in turn gave state courts power to correct defects in the pertinent convictions. *Hilton v. Braunskill*²⁰³ expressly cited the law-and-justice power in holding that “th[e] Court has repeatedly stated that federal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court.”²⁰⁴ The power to delay discharge pending state corrective process dates back nearly a century before *Braunskill* to *In re Bonner*.²⁰⁵ And *Bonner* also cited the law-and-justice power from the 1874 Revisions, explaining that “this court might well delay the discharge of the petitioner for such reasonable time as may be necessary to

¹⁹⁷ *In re Savage*, 134 U.S. 176, 177 (1890).

¹⁹⁸ 135 U.S. 1 (1890).

¹⁹⁹ *See id.* at 5.

²⁰⁰ *See* Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2232 (2003) (referring to *Neagle* as “[t]he leading Supreme Court precedent”).

²⁰¹ *Neagle*, 135 U.S. at 41.

²⁰² *Id.* (emphasis added).

²⁰³ 481 U.S. 770 (1987).

²⁰⁴ *Id.* at 775.

²⁰⁵ 151 U.S. 242 (1894). The Court also exercised the power several times in the interim. *See, e.g.,* *Rogers v. Richmond*, 365 U.S. 534, 549 (1961) (“The case is remanded to the Court of Appeals to be held in order to give the State opportunity to retry petitioner within a reasonable time. In default thereof the petitioner is to be discharged.”); *Dowd v. United States ex rel. Cook*, 340 U.S. 206, 210 (1951) (citing the law-and-justice power to justify order that “allow[s] the State a reasonable time in which to afford respondent the full appellate review he would have received but for the suppression of his papers”).

have him taken before the court where the judgment was rendered, that the defects . . . in that judgment may be corrected.”²⁰⁶

The specific authority to defer discharge pending corrective state-court process was just a particular application of the more abstract principle that the law-and-justice power was for creative and efficacious remediation, not for denying relief entirely. As the Supreme Court put it in *Dowd v. United States ex rel. Cook*,²⁰⁷ the law-and-justice power prevented federal courts from “having to choose between ordering an absolute discharge of the prisoner and denying him all relief.”²⁰⁸ That interpretation of law-and-justice discretion therefore accounts for rules permitting habeas relief after custody concludes,²⁰⁹ the idea that habeas power can be exercised to restore good-time credits,²¹⁰ and the aforementioned discretion to defer discharge until other courts can cure defects in detention orders.²¹¹ In 2005, even Justice Scalia (joined by Justice Thomas) opined that § 2243 contained “broader remedial language to permit relief short of release.”²¹²

Braunskill, Dowd, Bonner, Cunningham, Savage, and Medley undercut any argument that lower courts had free-floating discretion to deny habeas relief. Each case affirmed the orthodox interpretation of habeas discretion, which involved discretion to fashion remedies and not discretion to deny relief. In fact, before *Davenport* and *Ramirez*, no Supreme Court majority had even *suggested* that §§ 2241 and 2243 gave district courts such discretion.²¹³ The proposition had appeared with varying degrees of clarity in auxiliary opinions,²¹⁴ and then there were

²⁰⁶ *Bonner*, 151 U.S. at 261 (citing *In re Medley*, 134 U.S. 160, 174 (1890)).

²⁰⁷ 340 U.S. 206.

²⁰⁸ *See id.* at 209–10.

²⁰⁹ *See, e.g.*, *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968).

²¹⁰ *See, e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 487–88 (1973).

²¹¹ *See Bonner*, 151 U.S. at 261.

²¹² *Wilkinson v. Dotson*, 544 U.S. 74, 85 (2005) (Scalia, J., concurring).

²¹³ Quite the opposite, in fact. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (“Williams is therefore *entitled to relief* if the Virginia Supreme Court’s decision rejecting his ineffective-assistance claim was either ‘contrary to, or involved an unreasonable application of,’ that established law.” (emphasis added) (quoting 28 U.S.C. § 2254(d)(1)); *Anderson v. Nelson*, 390 U.S. 523, 525 (1968) (observing that claimant was “entitled to relief” after demonstrating unlawful conviction); *Townsend v. Sain*, 372 U.S. 293, 312 (1963) (“State prisoners are *entitled to relief* on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution.” (emphasis added)), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 123 (1956) (“Under the allegations here petitioner is *entitled to relief* if he can prove his charges.” (emphasis added)).

²¹⁴ *See, e.g.*, *Edwards v. Vannoy*, 141 S. Ct. 1547, 1570 (2021) (Gorsuch, J., concurring) (“The statute provides that ‘writs of habeas corpus *may* be granted’ — not that they *must* be granted.” (quoting 42 U.S.C. § 2244(a))); *Hamdan v. Rumsfeld*, 548 U.S. 557, 676 n.9 (2006) (Scalia, J., dissenting) (“The exercise of habeas jurisdiction has traditionally been entirely a matter of the court’s equitable discretion . . .”); *Collins v. Byrd*, 510 U.S. 1185, 1186 (1994) (Scalia, J., dissenting from denial of application to vacate stay of execution) (“The decision whether to assert jurisdiction over

majority opinions that invoked the older version of negative habeas equity — the idea that it empowered the Supreme Court to create new barriers to relief.²¹⁵

Most of the new-negative-equity precedent derives, in some form or another, from Justice Scalia's partial concurrence in *Withrow v. Williams*.²¹⁶ For that reason, the strength of the *Withrow* concurrence warrants some elevated scrutiny. Three things about Justice Scalia's partial *Withrow* concurrence are worth mentioning, and none of them flatter *Davenport* and *Ramirez*. First, the opinion reflects all the interpretive problems recited above. That is, Justice Scalia's argument spliced together the "may" from § 2241 with the "law and justice" language from § 2243 without discussing statutory context, structure, or history.²¹⁷ His *Withrow* opinion is the inch-deep textualism of *Davenport*, circa 1993.²¹⁸

Second, the *Withrow* concurrence drew critical inferences that do not follow from accurately stated historical premises. For example, Justice Scalia's observation that courts denied orders to produce prisoners in court does not mean that judges had a reservoir of equitable discretion to deny relief in cases where a habeas proceeding later revealed custody to be unlawful.²¹⁹ Additionally, the fact that that habeas was once a

a habeas petition calls for an exercise of the court's equitable discretion . . ."); *Withrow v. Williams*, 507 U.S. 680, 699 (1993) (O'Connor, J., concurring in part and dissenting in part) ("As the Court explains today, federal courts exercising their habeas powers may refuse to grant relief on certain claims because of 'prudential concerns' such as equity and federalism. This follows not only from the express language of the habeas statute, which directs the federal courts to 'dispose of [habeas petitions] as law and justice require,' but from our precedents as well." (alteration in original) (citations omitted) (quoting *id.* at 686 (majority opinion); 28 U.S.C. § 2243)); *Kaufman v. United States*, 394 U.S. 217, 236 (1969) (Black, J., dissenting) ("[W]e recognize a limited discretion in the federal judge to deny relief to an applicant under certain circumstances." (quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963), *overruled by* *Wainwright v. Sykes*, 433 U.S. 72 (1977))).

²¹⁵ See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (invoking 28 U.S.C. § 2243 as authority for judge-made rule of harmless error); *Fay*, 372 U.S. at 438 (invoking § 2243 as authority for judge-made rule that deliberately bypassed claims are procedurally defaulted).

²¹⁶ 507 U.S. 680 (1993); see, e.g., *Brown v. Davenport*, 142 S. Ct. 1510, 1523 (2022) (citing *Withrow* 507 U.S. at 716 (Scalia, J., concurring in part and dissenting in part)).

²¹⁷ See *Withrow*, 507 U.S. at 716–17 (Scalia, J., concurring in part and dissenting in part).

²¹⁸ As I indicated in note 16, *supra*, my major interpretive commitment is my rejection of literalism. The residual band of text-centered interpretation is wide and quite differentiated, but I am not committed to any specific approach. Cf. Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 82 (2017) ("The problem is that even textualism, which is relatively constrained compared to pragmatism or purposivism, does not have an algorithm.")

²¹⁹ See *Withrow*, 507 U.S. at 716–17 (Scalia, J., concurring in part and dissenting in part) ("And even where the writ was issued to compel production of the prisoner in court, the standard applied to determine whether relief would be accorded was equitable: The court was to 'determine whether the case of [the prisoner's] commitment be just, and thereupon do as to justice shall appertain.'" (alteration in original) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *131)). It is true that English judges did not send the writ and order the prisoner to court in every case where the prisoner petitioned for it, but it was refused only when the face of the petition demonstrated that

“prerogative writ” issued at the Crown’s discretion ignores subsequent history — namely, that when courts and Parliament seized that prerogative from the Crown in the 1600s, discharge upon a finding of unlawful custody became mandatory.²²⁰ Finally, when Justice Scalia recited language from *Ex parte Watkins*,²²¹ he badly confused the proposition that a *lawfully* detained prisoner need not be physically produced in court with the proposition that an *unlawfully* detained prisoner need not have a remedy.²²²

The third feature of *Withrow*, however, is the most salient here. Even Justice Scalia’s partial concurrence did not urge a free-floating judicial prerogative to deny habeas relief.²²³ Instead, Justice Scalia was explaining the *Supreme Court’s* authority to announce rules governing habeas adjudication in lower courts.²²⁴ Specifically, he was advocating that the Court invoke its equitable authority to declare *Miranda* claims

custody was lawful. See CHURCH, *supra* note 115, § 77, at 103–04. If a petition disclosed unlawful custody, however, judges were obligated to send the writ. See *id.* at 104 n.1; *Ex parte Farley*, 40 F. 66, 71 (C.C.W.D. Ark. 1889) (“When it appears to a court having jurisdiction to issue the writ of *habeas corpus* that a petitioner for the same is restrained of his liberty contrary to the constitution and laws of the United States, the writ becomes one of right, belonging to the citizen, and a court has no right to refuse it to him. The court can exercise no discretion against issuing it, but it must go as a matter of right.”).

²²⁰ See *supra* notes 174–75 and accompanying text (discussing 1679 Habeas Corpus Act).

²²¹ 28 U.S. (3 Pet.) 193 (1830); see *Withrow*, 507 U.S. at 717 (Scalia, J., concurring in part and dissenting in part).

²²² See *Withrow*, 507 U.S. at 717. Justice Scalia cited this sentence from *Watkins*: “No doubt exists respecting the power; the question is, whether this be a case in which it ought to be exercised.” *Watkins*, 28 U.S. (3 Pet.) at 201. He omitted the next sentence, which made clear that the Court was simply referring to the idea that courts need not bring in prisoners with futile claims: “The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently the writ ought not to be awarded, if the court is satisfied that the prisoner would be remanded to prison.” *Id.*

²²³ Justice Scalia seemed to shift positions — often — on the degree of discretion that §§ 2241 and 2243 gave to the district court. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), for example, he repeatedly insisted that the only remedy upon a determination of unlawful executive detention was either a trial or discharge. See *id.* at 573, 575–76 (Scalia, J., dissenting). Along the same lines, he argued that equity had never permitted a federal court to time bar a habeas petition. See *Day v. McDonough*, 547 U.S. 198, 215 (2006) (Scalia, J., dissenting). And in 2005, Justice Scalia interpreted § 2243 to grant authority to customize remedies, not authority to discretionarily deny relief. See *Wilkinson v. Dotson*, 544 U.S. 74, 85 (2005) (Scalia, J., concurring) (“We have interpreted this broader remedial language to permit relief short of release.”). Other times, however, he emphasized the idea that equity permitted the Supreme Court to develop judge-made rules restricting relief. See, e.g., *Reed v. Farley*, 512 U.S. 339, 356 (1994) (Scalia, J., concurring in part and concurring in the judgment) (“*This Court* has long applied equitable limitations to narrow the broad sweep of federal habeas jurisdiction.” (emphasis added)). And in still other cases, Justice Scalia sounded as though all federal courts had discretion to deny relief whenever they wanted. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 676 n.9 (2006) (Scalia, J., dissenting) (“The exercise of habeas jurisdiction has traditionally been entirely a matter of the court’s equitable discretion” (citing *Withrow*, 507 U.S. at 715–18 (Scalia, J., concurring in part and dissenting in part))).

²²⁴ See *Withrow*, 507 U.S. at 717–18 (Scalia, J., concurring in part and dissenting in part) (positioning procedural default, nonretroactivity, and harmless error rules as instances where the Supreme Court exercised its equitable discretion to craft judge-made restrictions on relief).

beyond the scope of habeas remediation, on the theory that the Court had historically announced such rules “by [equitable] means.”²²⁵

Aside from Justice Scalia’s *Withrow* opinion, *Davenport*’s other cited authority is *Danforth v. Minnesota*,²²⁶ which held that state courts could give new Supreme Court decisions greater retroactive effect than those decisions are to receive in federal habeas proceedings.²²⁷ In explaining the source of authority for the retroactivity rule applicable in federal courts, *Danforth* said: “This Court has interpreted that congressional silence — along with the statute’s command to dispose of habeas petitions ‘as law and justice require,’ — as an authorization to adjust the scope of the writ in accordance with equitable and prudential considerations.”²²⁸ In *Danforth*, as Justice Scalia had urged in *Withrow*, the Court cited equity as a source of *its own* authority to declare a raft of equitable rules about the “scope of relief” to be applied in lower courts.

In terms of the doctrinal basis for negative habeas equity, that’s it — Justice Scalia’s *Withrow* opinion, *Danforth*, and the *Ramirez* citation to *Davenport* itself. This collection of decisional authority wholly ignores other, often older cases that interpret the statute in the way that I do.²²⁹

* * *

The full view of this precedent, combined with a more thoroughgoing inquiry into statutory text, reveals an exceedingly thin legal justification for negative habeas equity.²³⁰ To the extent that there is

²²⁵ *Id.* at 718.

²²⁶ 552 U.S. 264 (2008).

²²⁷ *See id.* at 266.

²²⁸ *Id.* at 278 (citation omitted) (quoting 28 U.S.C. § 2243).

²²⁹ Until recently, lower courts also operated under this understanding of the “law and justice” language. *See, e.g.*, *Lujan v. Garcia*, 734 F.3d 917, 933–35 (9th Cir. 2013) (remanding to the state court to consider making downward modification of conviction, *id.* at 935); *Johnson v. Uribe*, 700 F.3d 413, 425–28 (9th Cir. 2012) (conditionally granting relief to vacate plea deal and retry, *id.* at 428); *Gentry v. Deuth*, 456 F.3d 687, 696 (6th Cir. 2006) (remanding to district court to consider courses of action, including expunction); *Kravitz v. Pennsylvania*, 546 F.2d 1100, 1102 n.5 (3d Cir. 1977) (linking “law and justice” language to recent decision to order federal court to retain jurisdiction over habeas case while identification hearing went forward in state court); *Murray v. Wainwright*, 450 F.2d 465, 472 (5th Cir. 1971) (remanding to the district court and suggesting expunction as a proper remedy). In all of American history, I have found only a single district court case in which a federal court invoked “law and justice” as a threatened reason to deny relief entirely — where an escaped prisoner refused to turn himself in unless he obtained relief. *See Lewis v. Del. State Hosp.*, 490 F. Supp. 177, 182–83 (D. Del. 1980).

²³⁰ At one point in his *Edwards* concurrence, Justice Gorsuch seemed to suggest that negative habeas equity is justified doctrinally as a corrective to the Supreme Court’s decision in *Brown v. Allen*, 344 U.S. 443 (1953) — which, according to Justice Gorsuch, was wrongly decided. *See Edwards v. Vannoy*, 141 S. Ct. 1547, 1568–71 (2021) (Gorsuch, J., concurring). This argument does not reappear in *Davenport* or *Ramirez*, but I nevertheless offer a quick response. If one is a textualist, then these doctrines work as a clawback against *Brown* only if they are supported by the text

controlling precedent that anchors negative equity to the habeas statute, it has *never* been the version propounded in the last several Supreme Court terms. If there is a credible argument that free-floating discretion to deny relief sprung from §§ 2241 and 2243, then one would expect someone to have made it carefully and at length before 2022. Yet no such form of that argument exists.

D. A Note on the Normative Value of Discretion

I have thus far focused on information significant to good-faith textualists and text-centered purposivists — things like plain meaning, statutory context, precedent interpreting text,²³¹ and so forth. I don't want to make more contestable normative arguments against discretion because I would not want that focus to undermine the (overwhelming) doctrinal argument. I nonetheless tender a brief normative objection to the discretion at the heart of the negative equity project.

I assume a bedrock norm of Western legal thought — that the law should treat similarly situated people similarly.²³² Discretion doesn't necessarily create inequality; it just depends on how the discretion operates in the real world. On the one hand, judicial discretion might capture material differences that rigid categories of enacted law and existing precedent don't. On the other hand, judicial discretion might be used to evade rules that otherwise produce similar outcomes in similar cases. The new negative habeas equity contemplates discretion of the second sort.

The remedial scope of habeas corpus is highly contested, as are many of the underlying constitutional rights made subject to that remedy. Virtually standardless discretion to implement contested rights and remedies is a recipe for an equality disaster. Under such circumstances, discretion tends not to ensure that material similarities are treated the

invoked. And the text invoked is §§ 2241 and 2243, which, for the reasons set forth above, doesn't support the argument. And if one espouses a more common law approach to statutory interpretation, then justification rooted in correcting *Brown* shrinks considerably because *Brown* becomes more defensible as a point in a common law evolution.

²³¹ Textualists embrace statutory precedent to different degrees and for different purposes, although there are good reasons for ordinary-public-meaning textualists to do so. See generally Tara Leigh Grove, *Is Textualism at War with Statutory Precedent?*, 102 TEX. L. REV. 649 (2024) (using a typology of statutory precedent to encourage textualist reliance thereupon).

²³² See, e.g., U.S. CONST. amend. XIV, § 1 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542–43 & nn.17–19 (1982) (collecting sources); Christopher J. Peters, *Response, Outcomes, Reasons, and Equality*, 80 B.U. L. REV. 1095, 1097–99 (2000) (contrasting the deontological and consequentialist paradigms of equality); Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 613 (1983) (offering a response to Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983), and Anthony D’Amato, *Comment, Is Equality a Totally Empty Idea?*, 81 MICH. L. REV. 600 (1983)) (“Their equality or inequality is nothing but a derivative and conclusory statement of what it means to have compared them to one another by reference to a given descriptive standard.”).

same way but to enable district judges to take divergent positions on what material similarities should be.

Examples of the mischief that follows from law-and-justice discretion are plentiful and easy to understand. On the substantive side, judges could refuse relief on the ground that new trials aren't "equitable" remedies for violations of certain constitutional rights. Lower-court relief for *Miranda* claimants, for example, feels especially vulnerable to unequal treatment.²³³ Even if the underlying substantive right is contested, the new negative habeas equity empowers lower courts to be stingier with the remedy. For an example of this type of problem, look no further than the content of Part III, which discusses the Fifth Circuit's attempt to use law-and-justice discretion to bar relief for claimants lacking sufficient evidence of innocence.²³⁴

We know something about how district court discretion works out for criminally convicted people because of experience with the federal sentencing guidelines.²³⁵ For many years, federal courts operated with mandatory sentencing guidelines specified by a federal sentencing commission.²³⁶ Under those guidelines, district court judges had to make certain findings about the offense and the offender, and then the judge would give the convicted defendant a sentence that fell within a range computed from the findings.²³⁷ In *United States v. Booker*,²³⁸ however, the Supreme Court held that a mandatory guidelines regime violated the Sixth Amendment.²³⁹ The guidelines became "advisory,"²⁴⁰ creating something of a natural experiment — with *Booker* as the discontinuity — about what happens when district courts are empowered to exercise discretion over treatment of convicted offenders.

Scholars who have looked at the post-*Booker* data have concluded that sentencing discretion has substantially undermined equal-treatment norms.²⁴¹ The Sentencing Commission *itself* performed several

²³³ That is because the *Miranda* right is especially controversial. See Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 4 (2021).

²³⁴ See *infra* section III.A, pp. 2260–62.

²³⁵ For a current version of the guidelines, see U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2023), <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2023/GLMFull.pdf> [<https://perma.cc/Z5W4-33S4>].

²³⁶ See Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 261, 265–69 (2009).

²³⁷ See *Mistretta v. United States*, 488 U.S. 361, 367–68 (1989) (summarizing pre-2005 operation of guidelines).

²³⁸ 543 U.S. 220 (2005).

²³⁹ See *id.* at 244.

²⁴⁰ See *id.* at 245; Gertner, *supra* note 236, at 269.

²⁴¹ See, e.g., Ryan W. Scott, *Inter-judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 1 (2010) ("The data [from the district of Massachusetts] indicate a clear increase in inter-judge sentencing disparity, both in sentence length and in guideline sentencing patterns."); Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker*, 89 N.Y.U. L. REV. 1268, 1333 (2014) (finding that, across judges within districts, the standard deviations of sentences roughly doubled).

multivariate regression analyses and concluded that post-*Booker* discretion produced not only substantial variation across judicial districts but also substantial variation among judges within a single district.²⁴² And the post-*Booker* data discloses something even more sinister, albeit predictable. The variation captures considerable discrimination against Black defendants.²⁴³

I say that *Booker* was “something of a natural experiment” because, in virtually every way that matters, post-*Booker* discretion — which is exercised at the moment of sentencing — is more cabined than what the new negative habeas equity contemplates.²⁴⁴ With respect to the post-*Booker* data: sentencing is still constrained by statutory maximums and minimums,²⁴⁵ the Guidelines are formally advisory but still “anchor” sentencing judges,²⁴⁶ they still offer a detailed framework for differentiating punishment by reference to material differences,²⁴⁷ post-*Booker* discretion doesn’t pertain to *legal* questions,²⁴⁸ and so forth. The point is that the law-and-justice discretion exercised pursuant to new negative habeas equity could produce variation that swamps the variation observed after *Booker*.

All of this is to say that the data on a reasonably comparable phenomenon confirms some basic intuitions about how law-and-justice discretion would play out.²⁴⁹ Empowering district court judges with standardless, free-floating habeas discretion would produce substantial inequality. That inequality would be evident not only across jurisdictions but also among judges within the same jurisdiction. And worst of

²⁴² See U.S. SENT’G COMM’N, INTER-DISTRICT DIFFERENCES IN FEDERAL SENTENCING PRACTICES: SENTENCING PRACTICES ACROSS DISTRICTS FROM 2005–2017, at 5–7 (2020) [hereinafter 2020 Commission Report]. *But see* Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1703–12 (2012) (taking issue with earlier Commission findings about aggravated interdistrict and interjudge disparities).

²⁴³ See 2020 Commission Report, *supra* note 242, at 5; Yang, *supra* note 241, at 1324 & n.197. *But see* Baron-Evans & Stith, *supra* note 242, at 1685–1703 (disputing earlier Commission findings that *Booker* aggravated racial disparities in sentencing).

²⁴⁴ I hedge somewhat only because I am referring to discretion on a margin. One might argue that the observed effect of additional discretion might be reduced because the ability to deny relief discretionarily simply reproduces a denial that would otherwise result from less visible, interstitial discretion.

²⁴⁵ See *United States v. Booker*, 543 U.S. 220, 233 (2005).

²⁴⁶ See Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 513 (2014).

²⁴⁷ See, e.g., Gertner, *supra* note 236, at 269 (explaining that judges are still instructed “to weigh a number of factors, including ‘the nature and circumstances of the offense and the history and characteristics of the defendant’” (quoting 18 U.S.C. § 3553(a))).

²⁴⁸ See *Booker*, 543 U.S. at 233.

²⁴⁹ Of course, *Booker* had benefits, but the most significant wouldn’t be reproduced in the habeas context. Specifically, the abandonment of mandatory guidelines led to a rise in below-guidelines sentences — that is, a reduction in the length of sentences that many found excessive, especially for lower-level drug offenses. See Paul J. Hofer, *Federal Sentencing After Booker*, 48 CRIME & JUST. 137, 145–48 (2019). The only discretion that the new negative equity contemplates, however, is discretion resulting in more punishment, so no such mercy dividend materializes.

all, it would systematically work to the disadvantage of Black people and other out-groups. If there is no legislative supremacy story working in favor of the discretion, then why would any institutional designer want to invite such inequality?

III. THE FACTUAL INNOCENCE RULE

Among the problems with the new negative habeas equity are its indeterminate boundaries. Some federal jurisdictions have interpreted the new negative equity to work a lot like the old version, by which I mean that equity only justifies the Supreme Court-made restrictions on habeas relief.²⁵⁰ On the other end of the spectrum sit approaches that belie the writ's historic function — and quite a bit of positive law. I consider one such approach at length: an “innocence rule” that some appellate judges are promoting as a form of negative habeas equity in post-*Ramirez* decisions. Relying on *Davenport* and *Ramirez*, for example, the Fifth Circuit has tentatively held that relief should ordinarily be withheld when the claimant is not “factually innocent.”²⁵¹ (That holding is now on pause as the circuit considers the question en banc.²⁵²)

Although Part III references the Fifth Circuit's version of the innocence rule, my concern is with the rule more generally, and not with the Fifth Circuit's more specific articulation of it. The innocence rule warrants elevated scrutiny because it is the next plausible frontier of judge-made habeas restrictions. The Fifth Circuit is, after all, a leading indicator of restrictive approaches to habeas relief. (At least one other jurisdiction has already cited the rule favorably.²⁵³) And the upshot of my assessment is this: even if the vision of negative equity set forth in *Davenport* and *Ramirez* were defensible, a factual innocence rule is not.

A. *The Trial Balloon*

The Fifth Circuit has sent up a trial balloon testing the position I examine here: that there can (or should) be no habeas relief without a demonstration of “factual innocence,” which means a showing that the claimant did not commit an element of the offense. The Fifth Circuit announced that rule in a panel opinion, *Crawford v. Cain*,²⁵⁴ the facts of

²⁵⁰ See *supra* note 74 (collecting cases).

²⁵¹ See *Crawford v. Cain*, 68 F.4th 273, 287 (5th Cir. 2023).

²⁵² See *Crawford v. Cain*, 72 F.4th 109 (5th Cir. 2023) (mem.) (order granting rehearing en banc).

²⁵³ See, e.g., *Shockley v. Crews*, No. 19-CV-02520, 2023 WL 6381445, at *78 (E.D. Mo. Sept. 29, 2023) (“Yet, nowhere in that vast sea of briefing does Shockley argue for or even clearly assert factual innocence.”); *Cody v. Mesmer*, No. 20-CV-00857, 2023 WL 6214817, at *5 (E.D. Mo. Sept. 25, 2023) (“The Petitioner has not . . . explained how ‘law and justice’ could require habeas relief for her given that she is factually guilty. Our justice system has long recognized that ‘to do justice’ means ‘to shield the innocent and punish the guilty.’” (citation omitted) (quoting 28 U.S.C. § 2243; *United States v. Macomb*, 26 F. Cas. 1132, 1134 (C.C.D. Ill. 1851))).

²⁵⁴ 68 F.4th 273.

which²⁵⁵ are largely immaterial to my discussion.²⁵⁶ (When I refer to *Crawford* here, I refer to the panel opinion that has been vacated pending en banc reconsideration.²⁵⁷)

According to that version of the innocence rule, *Davenport* and *Ramirez* set up a “two-prong framework” for adjudicating habeas petitions.²⁵⁸ “The first prong is business as usual: whether the state prisoner satisfies AEDPA and the usual equitable and prudential doctrines (e.g., procedural default and prejudicial error). The second prong is whether law and justice require granting habeas relief.”²⁵⁹ In justifying the “second prong,” *Crawford* relies in significant part on now-familiar arguments about §§ 2241 and 2243.²⁶⁰

But the innocence rule doesn’t stop with *Davenport* and *Ramirez*. It also declares that “law and justice” do not require relief when a habeas claimant is “factually guilty.”²⁶¹ In recognizing a version of this equitable rule, the Fifth Circuit cited various pieces of *Davenport* and *Ramirez* that describe how innocence shaped the Supreme Court’s judge-made rules,²⁶² a policy interest in federalism,²⁶³ and some sources discussing the way the habeas privilege worked at English common law.²⁶⁴ The version of the innocence rule appearing in *Crawford* relies most substantially, however, on a famous article by Judge Henry J. Friendly, which argued that innocence should be the touchstone of federal habeas proceedings.²⁶⁵

If embraced broadly and natural inferences followed, the innocence rule would be the most important change to habeas law since AEDPA. It would also be the most important decisional move since 1953, when

²⁵⁵ See *id.* at 279–80.

²⁵⁶ Shortly after it was decided, the panel’s opinion was vacated and rehearing en banc was granted. *Crawford*, 72 F.4th at 109.

²⁵⁷ 68 F.4th at 273.

²⁵⁸ *Id.* at 286.

²⁵⁹ *Id.* (citation omitted) (citing *Shinn v. Ramirez*, 142 S. Ct. 1718, 1731 (2022)).

²⁶⁰ See *id.* at 286–87.

²⁶¹ *Id.* at 287.

²⁶² See *id.*

²⁶³ See *id.*

²⁶⁴ See *id.*

²⁶⁵ See *id.* at 287–88 (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142, 157 (1970)). *Crawford* also took a position on what qualified as “factual innocence,” holding that proof that a claimant would have prevailed on an insanity defense did not. See *id.* at 289. Questions of factual innocence, *Crawford* reasoned, are resolved entirely by elements of the criminal offense itself, not by reference to affirmative defenses. See *id.* at 288. And so when I refer to the rule of factual innocence, I reference a rule under which federal courts can (or should) deny relief in cases where habeas claimants do not sufficiently disprove elements of the offenses for which they were convicted. *Crawford* itself is not entirely clear on whether a district court is *permitted* to deny relief when claimants fail to make a sufficient showing of factual innocence or whether it is *required* to do so. Nevertheless, subsequent decisions have interpreted it as a mandatory rule. See, e.g., *Medina v. Lumpkin*, No. 09-CV-3223, 2023 WL 3852813, at *7 & n.17 (S.D. Tex. June 6, 2023).

the Supreme Court decided *Brown v. Allen*.²⁶⁶ Perhaps sensitive to the revolution it implies, *Crawford* itself attempts to sand down two very jagged edges. In footnotes, it states that its factual innocence rule does not formally apply to people convicted of federal crimes or to those challenging their sentences.²⁶⁷

Such language notwithstanding, this Article takes the innocence rule seriously. If §§ 2241 and 2243 mean that only factually innocent people should get relief, then there is no reason why that principle wouldn't logically apply to federal prisoners or to people challenging their sentences. Those carve-outs make little sense conceptually, and they would be doctrinal precariousities. I focus more on the idea behind the innocence rule and the arguments likely to support it, and less on the formal limits of a particular opinion embracing it.

B. Legal Authority

Any traditional variant of doctrinal analysis excludes the innocence rule. And that analysis is consistent with the more abstract decisional principle that both innocent and guilty people enjoy the Constitution's protection. As Chief Justice Chase put it in his famous concurrence from *Ex parte Milligan*,²⁶⁸ the canonical habeas case on the wartime operation of civilian courts: "The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice."²⁶⁹

The first three sections nested below are about common law history, text, and Supreme Court decisions, but these three indicia of statutory meaning are not so neatly separated. Congress has enacted and reratified habeas power in view of prior decisional construction and a specific understanding of the writ's history.²⁷⁰ And to the extent history is part of the interpretive enterprise, it points in a clear direction: During the nearly five hundred years that King's Bench forged the Great Writ in the crucible of English institutional conflict, innocence was never a

²⁶⁶ 344 U.S. 443 (1953).

²⁶⁷ *Crawford*, 68 F.4th at 286 n.3, 288 n.5.

²⁶⁸ 71 U.S. (4 Wall.) 2 (1866).

²⁶⁹ *Id.* at 132 (Chase, C.J., concurring). See also, e.g., *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986) ("The constitutional rights of criminal defendants are granted to the innocent and the guilty alike."); *Hill v. Texas*, 316 U.S. 400, 406 (1942) ("Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty."); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (holding that defendant had right to impartial judge even when "the evidence shows clearly that the defendant was guilty").

²⁷⁰ See, e.g., Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 457 (2010) (with respect to 1789 Habeas Corpus Act); Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1086 (1995) (with respect to the 1867 Act); see also *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("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.").

precondition for relief.²⁷¹ Habeas power instead described a judge's power to consider whether detention (or some other restraint on liberty) was *lawful*.²⁷²

English habeas process focused not a whit on innocence, and even the modern writ's fiercest critics acknowledge that state of affairs.²⁷³ Early American judges and lawmakers likewise understood that lawfulness was not a question of innocence,²⁷⁴ and Congress has operated with that understanding — an understanding that the Supreme Court has reinforced repeatedly in its most important habeas cases for two-and-a-half centuries.²⁷⁵ The statute now specifies several innocence-based

²⁷¹ See LARRY W. YACKLE, *POSTCONVICTION REMEDIES* § 3, at 5 (1981) (“The writ in theory has nothing to do with the prisoner’s guilt or innocence, but is concerned only with the process employed to justify the detention under attack.”); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 323 (1988) (explaining that habeas’s focus on “actual innocence” is a purely modern phenomenon); Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2535 (1998) (describing judges’ indifference to innocence as a “venerable” feature of the common law writ).

²⁷² See David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 707 (2009) (“The writ of habeas corpus [was] a preexisting common law right to challenge the legality of detention in court”); Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 58 (2012) (explaining that the common law habeas privilege “require[d] the jailer to justify the legality of the detention”); Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1187 (“The 1641 and 1679 Habeas Corpus Acts codified . . . the common-law standard for issuing habeas relief, the lack of a valid cause of detention”); Andrew Kent, *Judicial Review for Enemy Fighters: The Court’s Fateful Turn in Ex Parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. 153, 170 (2013) (describing habeas as “a writ dating back to ancient English common law used to test the legality of a prisoner’s detention”); Kovarsky, *supra* note 27, at 757–58 (“[T]he authority of a judge to determine what counted as ‘lawful’ custody was perhaps the signal feature of the habeas writ that emerged from the seventeenth-century English Civil Wars.”); Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1411–12 (2010) (“[C]ontemporary English legal scholars began to equate the right to be free from unlawful detention with the central role of habeas corpus in guaranteeing that right.”); see also Preiser v. Rodriguez, 411 U.S. 475, 484 (1973) (“It is clear . . . from the common-law history of the writ[] that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody”).

²⁷³ See, e.g., Forsythe, *supra* note 270, at 1100 (“[H]abeas corpus at common law — as received by the Supreme Court in [early canonical cases] — was not concerned with establishing guilt or innocence.”).

²⁷⁴ See *id.* at 1095–100 (describing early Supreme Court decisions).

²⁷⁵ The Supreme Court has often made the point expressly. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (“[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution — not to correct errors of fact.”); *In re Yamashita*, 327 U.S. 1, 8 (1946) (“[O]n application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged.”); *Ex parte Quirin*, 317 U.S. 1, 25 (1942) (“We are not here concerned with any question of the guilt or innocence of petitioners. Constitutional safeguards . . . are not to be disregarded in order to inflict merited punishment on some who are guilty.”); *Moore v. Dempsey*, 261 U.S. 86, 87–88 (1923) (“[W]hat we have to deal with is not the petitioners’ innocence or guilt but solely the question whether their constitutional rights have been preserved.”); *Frank v. Mangum*, 237 U.S. 309, 334 (1915) (“[T]he essential question before us . . . is not the guilt or innocence of the prisoner, or the truth of any particular fact asserted by him, but whether the State, taking into view

gateways to allow merits consideration of claims that are procedurally defective,²⁷⁶ but Congress has never even entertained the idea that innocence could be a condition for relief on claims that lack such defects.²⁷⁷ The idea that innocence might be a condition for relief in such cases should whipsaw those familiar with the writ's history and statutory expression.

I. English History. — Judicial decisions applying American habeas statutes are saturated with references to English habeas practice,²⁷⁸ and for good reasons. First, enacting Congresses labored under a reasonably shared understanding about how habeas corpus worked, at least in broad strokes.²⁷⁹ Second, the Supreme Court has repeatedly indicated that statutory interpretation should proceed that way.²⁸⁰

Habeas corpus was a prerogative writ originally issued to ensure that custody exercised in the Crown's name was actually authorized.²⁸¹ It formally issued out of King's Bench, but the Bench — sometimes allied with Parliament — took habeas power from the Crown over the course of the seventeenth century.²⁸² The defining seventeenth-century episode

the entire course of its procedure, has deprived him of due process of law.”). The proposition is also evident in the many canonical cases in which the Court ordered habeas relief for allegations of unconstitutionality having nothing to do with innocence. *See, e.g.,* Johnson v. Zerbst, 304 U.S. 458, 469 (1938) (holding that relief should be granted when there is no knowing and intelligent waiver of the right to counsel); *Ex parte* Wilson, 114 U.S. 417, 429 (1885) (explaining that man found guilty of counterfeiting was “entitled to be discharged” after government's failure to file an indictment or presentment before the grand jury); *Ex parte* Nielsen, 131 U.S. 176, 190–91 (1889) (granting relief for double jeopardy violation).

²⁷⁶ *See infra* notes 313–14 and accompanying text.

²⁷⁷ For thorough histories of the federal habeas statute generally, and AEDPA in particular, see, for example, Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 459–65 (2007); Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 543–53 (2006); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 422–43 (1996).

²⁷⁸ *See, e.g.,* Fay v. Noia, 372 U.S. 391, 422–23 (1963) (“The breadth of the federal courts’ power of independent adjudication on habeas corpus stems from the very nature of the writ, and conforms with the classic English practice.”), *overruled by* Wainwright v. Sykes, 433 U.S. 72 (1977); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 80–81 (1807) (“Accordingly we find that the court of common pleas in England, though possessing no criminal jurisdiction of any kind, original or appellate, has power to issue this writ of habeas corpus.”).

²⁷⁹ *See infra* note 306 and accompanying text; Goldstein, *supra* note 272, at 1188; *see also* HALLIDAY, *supra* note 1, at 15–16 (discussing how the “popular imagination” has connected habeas corpus with Magna Carta since the early seventeenth century).

²⁸⁰ *See, e.g.,* Rasul v. Bush, 542 U.S. 466, 481 (2004) (“Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus.”); Jones v. Cunningham, 371 U.S. 236, 238 (1963) (“[T]his Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country.”); Townsend v. Sain, 372 U.S. 293, 311 (1963) (“[T]he historic conception of the writ [is] anchored in the ancient common law We pointed out, too, that the Act of February 5, 1867 . . . restated what apparently was the common-law understanding.” (citing *Fay*, 372 U.S. at 416 n.27)), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

²⁸¹ *See* HALLIDAY, *supra* note 1, at 75.

²⁸² *See id.* at 139.

began with the *Case of the Five Knights*.²⁸³ In *Five Knights*, King's Bench signaled that it was reluctant to declare detention lawful simply because the Crown declared it so.²⁸⁴ The Petition of Right²⁸⁵ followed the next spring,²⁸⁶ and it reaffirmed that people could not be deprived of a habeas forum to test detention.²⁸⁷

Supplemented by even more powers specified in the 1679 Habeas Corpus Act, seventeenth-century English judges transformed *habeas corpus ad subjiciendum* into what we now consider the Great Writ.²⁸⁸ Judges used it to inspect virtually any form of custody.²⁸⁹ In all cases, the issue was whether the custody was *lawful*,²⁹⁰ which was generally defined by reference to whether arrest and detention were legally authorized.²⁹¹ The relevant questions were therefore about whether a particular custodian had valid power to arrest or detain,²⁹² and maybe whether they complied with certain procedures.²⁹³

There is a substantial dispute over the degree to which seventeenth- and eighteenth-century English judges used habeas process to inspect criminal proceedings, and some have concluded that there was no habeas power to review convictions entered by jurisdictionally competent courts.²⁹⁴ But there can be no dispute that judges used habeas writs to inspect whether indictments were lawful,²⁹⁵ and Halliday — far and away the expert on English habeas practice — has documented a number of cases in which writs were in fact used to inspect convictions lacking jurisdictional defects.²⁹⁶ I am aware of no evidence, however, that habeas claimants in these categories had to show anything like innocence.

In fact, Halliday's work is more generally inconsistent with an innocence rule. *Crawford* cited Halliday as support for the proposition that “[the innocence rule] comports with the historical office of the writ. For

²⁸³ *Darnel's Case* (1627) 3 Cobbett's St. Tr. 1 (KB) (Eng.); see also Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 925–29 (2012) (describing role of *Darnel's Case*).

²⁸⁴ See Halliday & White, *supra* note 29, at 620–21.

²⁸⁵ 1627, 3 Car., c. 1 (Eng.).

²⁸⁶ See Tyler, *supra* note 283, at 926 (*The Five Knights* “set the stage for parliamentary debates the next year which led to the Petition of Right.”).

²⁸⁷ Petition of Right, 1627, 3 Car., c. 1, §§ 5, 8 (Eng.).

²⁸⁸ See HALLIDAY, *supra* note 1, at 139–40.

²⁸⁹ See *id.*

²⁹⁰ See *id.* at 95.

²⁹¹ See *supra* note 272 (collecting sources).

²⁹² See Tyler, *supra* note 283, at 926–27.

²⁹³ See *supra* notes 273–77 and accompanying text; HALLIDAY, *supra* note 1, at 147–53.

²⁹⁴ See, e.g., Bator, *supra* note 169, at 466 (describing rule as “black-letter principle of the common law”).

²⁹⁵ See *Hartranft v. Mullowny*, 247 U.S. 295, 299–301 (1918) (describing how the Supreme Court used habeas corpus in conjunction with the writ of certiorari to inspect the cause of detention); *supra* notes 269–75 and accompanying text.

²⁹⁶ See HALLIDAY, *supra* note 1, at 116–21.

the first 500 or so years of the writ's existence, it generally could not be used to challenge a judgment of guilt."²⁹⁷ There are two *major* problems here. First, according to Halliday — and virtually everyone else to study the pertinent history — the modern privilege wasn't used to challenge guilt because innocence was not relevant to the question of lawfulness.²⁹⁸ Second, *Crawford* misread Halliday, who most certainly believed that English habeas process was used to review convictions and that "this practice was on the rise in the early seventeenth century."²⁹⁹ Halliday collects numerous examples, including one in which King's Bench used habeas power to reform a conviction for murder into manslaughter.³⁰⁰ *Crawford* overclaimed the historical record in order to establish a premise from which its conclusion does not even follow.

2. *Text.* — Statutory interpreters of all stripes should care about the writ's English history because judges and academics have always treated it as crucial information about what statutory references to habeas corpus mean.³⁰¹ But even without that history, text-centered interpreters should find a penumbral innocence rule troubling because it is inconsistent with a statute that carefully sites innocence inquiries in specific places. Those places, moreover, always involve gateways to merits consideration of procedurally defective claims.

The textual incompatibility of an innocence rule involves the distinction between, on the one hand, limits on procedurally defective claims and, on the other, limits on claims lacking such defects. For defect-bearing claims, Congress has enacted finely tuned requirements about when a sufficient showing of innocence disables a procedural bar. But for claims lacking procedural defects, Congress has always refused an innocence limitation.³⁰² Congress did not tinker extensively with the relationship between innocence and habeas relief and, at the same time, permit penumbral discretion to swamp the enacted linkage.

To make the point more thoroughly, let me say a little bit more about each category of claims. I'll start with claims *lacking* procedural defects. We know that Congress never seriously considered a rule in which innocence limits the habeas remedy because (1) English common law never made innocence a condition of habeas relief,³⁰³ and (2) the first sentence of the 1789 Judiciary Act required writs to be "agreeable to

²⁹⁷ *Crawford v. Cain*, 68 F.4th 273, 287 (5th Cir. 2023) (citing HALLIDAY, *supra* note 1, at 16–18).

²⁹⁸ See *supra* notes 271–72 and accompanying text; HALLIDAY, *supra* note 1, at 7–8, 95, 102–07, 144–47, 156, 184–87.

²⁹⁹ HALLIDAY, *supra* note 1, at 118.

³⁰⁰ See *id.* at 118–19.

³⁰¹ See, e.g., *supra* note 280 (collecting sources); cf. *Morissette v. United States*, 342 U.S. 246, 263 (1952) ("And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . .").

³⁰² See *supra* note 277 and accompanying text.

³⁰³ See *supra* notes 271–72 and accompanying text.

principals and usages of laws.”³⁰⁴ Chief Justice Marshall put it this way in his iconic *Ex parte Bollman*³⁰⁵ opinion, which interpreted the 1789 Act: “[W]here can we look for the definition . . . of [habeas power], but to the common law; to that code from whence we derive all our legal definitions, terms and ideas, and which forms the substratum of all our juridical systems, of all our legislative and constitutional provisions.”³⁰⁶

The second sentence of the 1789 Act’s habeas provision referred even more specifically to *habeas corpus ad subjiciendum*,³⁰⁷ which is the Great Writ inherited from English common law.³⁰⁸ That sentence now resides (in altered form) at 28 U.S.C. § 2241, which in turn contains the central cognizability criterion for people serving state criminal sentences: that they be “in custody in violation of the Constitution or laws or treaties of the United States.”³⁰⁹ That language reappears in § 2254, which is the new home of the 1867 HCA and provides that a state prisoner’s habeas application shall be entertained “only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”³¹⁰

The statutory reference to “custody in violation of the Constitution or laws or treaties of the United States” is the familiar concept of unlawful custody, and there’s no reason to believe that Congress ever meant to permit an innocence filter. In fact, AEDPA was the culmination of a half-century legislative effort to restrict habeas relief for claims lacking procedural defects, and even *that* Congress refused to make innocence a consideration.³¹¹ 28 U.S.C. § 2254(d) bars relitigation of claims decided on the merits in state court, with two exceptions having nothing to do with innocence.³¹² If Congress wanted innocence to be a condition for relief on claims lacking procedural defects, why didn’t § 2254(d) say so?

³⁰⁴ Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81. There is some disagreement about whether this sentence included *habeas corpus ad subjiciendum*, but in *Ex parte Bollman*, Chief Justice Marshall concluded that it did. 8 U.S. (4 Cranch) 75, 84 (1807). This sentence survives in the modern All Writs Act, 28 U.S.C. § 1651.

³⁰⁵ 8 U.S. (4 Cranch) 75.

³⁰⁶ *Id.* at 80.

³⁰⁷ See Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (authorizing writs “for the purpose of an inquiry into the cause of commitment”).

³⁰⁸ See BRIAN R. MEANS, POSTCONVICTION REMEDIES § 4:2 (“Without further guidance from Congress, the early decisions steered a conservative course, roughly following the English habeas practice.”); see also, e.g., *Stone v. Powell*, 428 U.S. 465, 474 n.6 (1976) (“It is now well established that the phrase ‘habeas corpus’ used alone refers to the common-law writ of *habeas corpus ad subjiciendum*, known as the ‘Great Writ.’” (citing *Bollman*, 8 U.S. (4 Cranch) at 95)); *id.* at 475 (“The courts defined the scope of the writ in accordance with the common law and limited it to an inquiry as to the jurisdiction of the sentencing tribunal.”).

³⁰⁹ 28 U.S.C. § 2241(c)(3).

³¹⁰ *Id.* § 2254(a).

³¹¹ See *supra* note 277 and accompanying text.

³¹² See 28 U.S.C. § 2254(d).

By contrast, Congress inserted innocence inquiries into adjudication of defect-bearing claims. For example, AEDPA permits a claimant to raise a constitutional claim omitted from a prior petition if new facts show that “no reasonable factfinder would have found the applicant guilty of the underlying offense.”³¹³ And for claims that were factually undeveloped in state court, claimants may introduce new federal evidence only if those facts sufficiently demonstrate that “no reasonable factfinder would have found the applicant guilty of the underlying offense.”³¹⁴ The statutory requirement for innocence showings in these places presumptively implies the absence of innocence rules in others.

One additional clue about AEDPA might escape attention because the provisions giving rise to it aren’t used. The 1996 legislation included “opt-in” provisions that were meant to facilitate a quid pro quo: a state gets the benefit of more favorable procedural defenses if it is certified to guarantee adequate state post-conviction representation.³¹⁵ No state has been certified, but the point is that the opt-in regime was meant to involve especially strict limits on habeas relief — on the theory that it only applied when confidence in state-court adjudication was particularly high. Yet, even within the opt-in regime, there is no innocence-based limit on relief for claims lacking procedural defects.³¹⁶

For anyone whose interpretive practices center statutory text, the case for the innocence rule is impossibly thin. Congress has always taken utmost care to specify the statutory linkage between innocence and habeas relief. AEDPA reflects heightened attention to the issue, yet Congress never hinted that innocence might be a condition for relief on claims lacking procedural defects. To recognize an innocence rule under such conditions, one must insist that the pertinent language in §§ 2241 and 2243 not only does what *Davenport* and *Ramirez* said it does but also that it trumps all the decisions Congress made when it actually thought about the relationship between innocence and the habeas remedy.³¹⁷

3. *Innocence Rules in Supreme Court Decisions.* — Various formulations of an innocence rule will doubtlessly insist that the Supreme Court has long justified innocence inquiry by reference to its equitable authority — and perhaps further that Congress has ratified that interpretation. There are two responses.

First, when the Supreme Court has invoked equity to link innocence to relief, the negative equity has been of the older vintage. Never have

³¹³ *Id.* § 2244(b)(2)(B)(ii).

³¹⁴ *Id.* § 2254(e)(2)(B).

³¹⁵ *See id.* §§ 2261–2265.

³¹⁶ *See id.* § 2264.

³¹⁷ *Crawford*’s definition of innocence, which is defined *only* by reference to the elements of a criminal offense, *see Crawford v. Cain*, 68 F.4th 273, 288 (5th Cir. 2023), is also inconsistent with the approach to innocence reflected in the habeas statute, *see, e.g.*, 28 U.S.C. § 2244(b)(2) (successive petitions); *id.* § 2254(e)(2) (new evidence).

the Justices given lower courts discretion to require innocence inquiries. In fact, the Supreme Court rejected something like such a rule in *Kaufman v. United States*,³¹⁸ which held that a Fourth Amendment violation was cognizable as a ground for relief under 28 U.S.C. § 2255.³¹⁹ (Recall that § 2255 is a habeas-like remedy for federal prisoners.³²⁰) *Kaufman* expressly rejected Justice Black’s extensive argument — made in dissent — that § 2243’s law-and-justice language keyed habeas relief to innocence.³²¹ Even though they dissented, Justices Harlan and Stewart wrote separately to “disassociate [themselves] from any implications [coming from Justice Black’s dissent] that the availability of this collateral remedy turns on a petitioner’s assertion that he was in fact innocent, or on the substantiality of such an allegation.”³²²

Second, when invoking equity as a source of authority to require innocence inquiries, the Supreme Court has generally done so by requiring a showing of innocence to excuse a bar to a procedurally defective claim. (There is one exception that I’ll discuss in a moment.) In some measure or another, this is true of the statute of limitations,³²³ successive petitions (before AEDPA),³²⁴ and procedural default.³²⁵ These innocence inquiries therefore work the same way that their statutory analogues do, at least insofar as they do not touch claims that lacked procedural defects.

Now, the potential counterargument. In *Stone v. Powell*,³²⁶ the Supreme Court invoked its equitable authority to hold that claimants who had a “full and fair” opportunity to argue Fourth Amendment exclusion in state court would no longer be able to obtain habeas relief on that basis.³²⁷ The Court felt comfortable placing this “particular categor[y] of constitutional claims”³²⁸ beyond habeas coverage because, in so many words, the claims in that category did not generally undermine guilt.³²⁹ *Powell* is almost certainly the best authority for an innocence rule.

³¹⁸ 394 U.S. 217 (1969).

³¹⁹ *Id.* at 231.

³²⁰ See *supra* note 165 and accompanying text.

³²¹ See *Kaufman*, 394 U.S. at 233–36 (Black, J., dissenting) (arguing that § 2243 permitted federal courts to condition habeas relief for Fourth Amendment violations on a sufficient showing of innocence); *id.* at 228–30 (majority opinion) (rejecting Justice Black’s innocence-based arguments).

³²² *Id.* at 242 (Harlan, J., dissenting).

³²³ See *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013).

³²⁴ See *McCleskey v. Zant*, 499 U.S. 467, 494–95 (1991).

³²⁵ See *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

³²⁶ 428 U.S. 465 (1976).

³²⁷ *Id.* at 494.

³²⁸ *Id.* at 479.

³²⁹ See *id.* at 479, 489–95; see also Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 363 (1993) (endorsing this orthodox understanding of *Powell*).

Even *Powell*, however, is flimsy support. First, *Powell* was an affirmation that discretion belonged to the Justices, not to lower courts.³³⁰ Second, *Powell* didn't actually require an innocence showing in individual cases; it held that certain claim *categories* shouldn't trigger habeas remedies because the violations didn't sufficiently undermine guilt findings and because the remedies produced no incremental deterrent effect.³³¹ Third, unlike the approach that *Crawford* embraced, relief was precluded only if the claimant got full and fair process in state court.³³²

These are all serious problems with the idea that *Powell* alone can support an innocence rule. There is, however, a fourth reason that devastates the argument that § 2243 might do the necessary statutory work. Justices joining the *Powell* majority indeed appeared to believe that the Court's authority to restrict relief came from § 2243, which is cited in footnote 11.³³³ Subsequent case law repeatedly interpreted *Powell* narrowly, however, as a rule about violations of *non-trial* rights, including: *Reed v. Farley*³³⁴ (speedy trial laws), *Withrow*³³⁵ (*Miranda*), *Kimmelman v. Morrison*³³⁶ (ineffective assistance of counsel where deficiency is failure to seek Fourth Amendment exclusion), *Rose v. Mitchell*³³⁷ (grand jury selection), and *Jackson v. Virginia*³³⁸ (constitutional sufficiency of evidence to convict). After the Court spent nearly two decades wrestling with whether *Powell* might apply beyond the Fourth Amendment policing context, it observed in *Withrow*: “[W]e have repeatedly declined to extend the rule in [*Powell*] beyond its original bounds.”³³⁹

This lengthy thread of precedent seems to establish that an innocence rule cannot be among the discretionary practices that § 2243 unlocks. The closest the Supreme Court got to an innocence rule was Justice Black's dissent in *Kaufman*.³⁴⁰ The Court was able to reproduce Justice Black's preferred result in *Powell*, but primarily on the distinct ground that non-trial rights receiving a full-and-fair adjudication were non-cognizable.³⁴¹ And subsequent case law repeatedly reinforced that *Powell* was limited to Fourth Amendment claims for precisely that reason, not because of the relationship of that right to innocence.³⁴²

³³⁰ See Steiker, *supra* note 329, at 363 (explaining that “[t]he Court's refusal to entertain Fourth Amendment claims on habeas [wa]s rooted in [its] *own* equitable judgment” (emphasis added)).

³³¹ See *Powell*, 428 U.S. at 490, 493.

³³² See *id.* at 482.

³³³ See *id.* at 478 n.11.

³³⁴ 512 U.S. 339, 354 (1994).

³³⁵ *Withrow v. Williams*, 507 U.S. 680, 686–91 (1993).

³³⁶ 477 U.S. 365, 375–78 (1986).

³³⁷ 443 U.S. 545, 559–64 (1979).

³³⁸ 443 U.S. 307, 321–24 (1979).

³³⁹ *Withrow*, 507 U.S. at 687.

³⁴⁰ *Kaufman v. United States*, 394 U.S. 217, 231–42 (1969).

³⁴¹ See *Stone v. Powell*, 428 U.S. 465, 482 (1976).

³⁴² See *supra* notes 334–38 and accompanying text.

Congress didn't reject that understanding when it passed AEDPA just three years after *Withrow*.

And even *after* AEDPA, the Supreme Court continues to insist that guilt can't foreclose habeas relief. Perhaps the clearest example is *Lafler v. Cooper*,³⁴³ a 2012 decision involving defense counsel's deficient advice about a potential guilty plea.³⁴⁴ The question in *Cooper* involved the standard for Sixth Amendment prejudice in such scenarios.³⁴⁵ Invoking the principle that constitutional rights of criminal procedure belong "to the innocent and guilty alike,"³⁴⁶ the Court remarked that "[t]he fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining."³⁴⁷ And it listed three permissible variations on a remedy that required a new plea offer: to vacate and resentence the claimant pursuant to the plea, to vacate a subset of the convictions and sentence the claimant "accordingly," or to leave the original conviction and sentence "undisturbed."³⁴⁸ If denying relief entirely were an option, one would imagine *Cooper* — which deals with plea agreements for "guilty" claimants — would have mentioned it.

Cooper happens to be a particularly glaring example of a post-AEDPA case where one might have expected the idea of an innocence rule to make an appearance, but there are many others. If innocence were some unspoken consideration made salient by § 2243, one might have expected it to surface in, for example, any of the many post-AEDPA cases shaping the habeas remedy for Sixth Amendment violations at the sentencing phase of capital cases: *Sears v. Upton*,³⁴⁹ *Porter v. McCollum*,³⁵⁰ *Rompilla v. Beard*,³⁵¹ *Wiggins v. Smith*,³⁵² *Michael Williams v. Taylor*,³⁵³ and *Terry Williams v. Taylor*.³⁵⁴ Or in one of the many Eighth Amendment cases decided in a post-AEDPA habeas

³⁴³ 566 U.S. 156 (2012).

³⁴⁴ See *id.* at 160. Defense counsel told Cooper that the prosecution would be unable to prove intent to kill because Cooper shot the victim below the waist. *Id.* at 161.

³⁴⁵ *Id.* at 163.

³⁴⁶ *Id.* at 169 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986)).

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 174.

³⁴⁹ 561 U.S. 945, 956 (2010) (per curiam) (summarily holding that lower federal court had insufficiently considered mitigation evidence omitted from sentencing phase of capital case).

³⁵⁰ 558 U.S. 30, 44 (2009) (per curiam) (same).

³⁵¹ 545 U.S. 374, 389 (2005) (holding, in federal habeas posture, that trial counsel was deficient for failing to inspect available files that counsel expects the State to use to show death-worthiness at sentencing phase of capital case).

³⁵² 539 U.S. 510, 534 (2003) (holding, in federal habeas posture, that trial counsel was deficient for failing to investigate mitigation for sentencing phase of capital case).

³⁵³ 529 U.S. 420, 432 (2000) (announcing post-AEDPA approach to federal evidentiary hearings in capital sentencing-phase scenario).

³⁵⁴ 529 U.S. 362, 402–13 (2000) (announcing post-AEDPA approach to 28 U.S.C. § 2254(d) capital sentencing-phase scenario).

posture that went not to guilt but to the constitutionality of a sentence for people who were guilty of nonhomicide offenses,³⁵⁵ with intellectual disability,³⁵⁶ or with mental illness.³⁵⁷ To be clear, the issue isn't that the innocence rule was underdeveloped or undertheorized in these cases. The issue is that its very existence went without mention in precisely the cases that would have mentioned it.³⁵⁸

C. *Misunderstanding Friendly*

Finally, innocence rules are likely to reproduce the Fifth Circuit's heavy reliance³⁵⁹ on a famous article, *Is Innocence Irrelevant?*, by Judge Henry J. Friendly.³⁶⁰ There are several problems with reliance on Judge Friendly's article,³⁶¹ but one stands out: he was criticizing what he believed to be a legislative omission in the statute.³⁶² Citation to Judge

³⁵⁵ See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (announcing Eighth Amendment rule that a capital sentence cannot be imposed for crimes against individuals where killing did not result and, in accomplice-murder scenario, where it was not intended).

³⁵⁶ The case announcing the Eighth Amendment rule was *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), which was not itself a federal habeas case. But numerous Supreme Court decisions have interpreted *Atkins* in the federal habeas context. See, e.g., *Shoop v. Hill*, 139 S. Ct. 504, 508 (2019) (analyzing scope of "clearly established" *Atkins* law for the purposes of § 2254(d)(1)); *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) (analyzing the reasonableness of factual determinations under *Atkins* and § 2254(d)(2)).

³⁵⁷ See, e.g., *Panetti v. Quarterman*, 551 U.S. 930, 942–47 (2007) (analyzing how rule against the execution of insane people applied in federal habeas proceedings).

³⁵⁸ Another difficult post-AEDPA case to square with an innocence rule isn't an AEDPA case at all. In *Montgomery v. Louisiana*, 577 U.S. 190 (2016), the Supreme Court dealt with the retroactivity of *Miller v. Alabama*, 567 U.S. 460 (2012), the case barring mandatory sentences of life without parole for people who offended as minors, *id.* at 465. The pertinent issue in *Montgomery* was whether certain claimants were entitled to collateral relief in state court — retroactive application of *Miller* — because they would have been entitled to relief in a federal habeas proceeding. See *Montgomery*, 577 U.S. at 198–99. *Montgomery* repeatedly held that relief for new substantive law was mandatory in state collateral proceedings because it was mandatory in federal habeas proceedings. See, e.g., *id.* at 200 ("The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."). The dissent bitterly disputed the conclusion that state habeas relief was mandatory, see *id.* at 217 (Scalia, J., dissenting), but nobody disputed the premise that federal habeas relief was. *Montgomery* is simply impossible to square with an innocence rule.

³⁵⁹ See *supra* note 265 and accompanying text; *Crawford v. Cain*, 68 F.4th 273, 287 (5th Cir. 2023).

³⁶⁰ Friendly, *supra* note 265.

³⁶¹ Perhaps the most significant problem other than that discussed above the line is that Judge Friendly rejected the idea that an innocence rule ought to be used to screen out claims that could be practicably raised only in a collateral proceeding. See *id.* at 153. Another problem is that, according to Judge Friendly, the concept of "innocence" is to be litigated without evidentiary restrictions. See *id.* at 160. But Congress and the Supreme Court have severely restricted the body of evidence claimants can use to demonstrate anything, including innocence. See, e.g., 28 U.S.C. § 2254(d)(2) (factual unreasonability exception to the relitigation bar); *Shinn v. Ramirez*, 142 S. Ct. 1718, 1728 (2022) (excluding evidence supporting claims not factually developed in state court); *Cullen v. Pinholster*, 563 U.S. 170, 180–81 (2011) (interpreting legal unreasonability exception to the relitigation bar). Judge Friendly therefore struck a balance between innocence and finality that an innocence rule dropped into the current regime cannot strike.

³⁶² See Friendly, *supra* note 265, at 142–43.

Friendly therefore supports the opposite of the interpretive position that an innocence rule takes.

Along with Professor Paul Bator's *Finality in Criminal Law*,³⁶³ Judge Friendly's article frames the dominant arguments against thick post-conviction review.³⁶⁴ Whereas Bator links his preferred federal habeas rules to epistemic limits on the knowability of truth,³⁶⁵ Judge Friendly argues that a resource-intensive federal habeas machine should not churn in favor of those for whom guilt is certain.³⁶⁶ The Supreme Court has cited *Is Innocence Irrelevant?* twenty-eight times, and the law review citation count exceeds five hundred.³⁶⁷

The crucial point, again, is that Judge Friendly was not offering an interpretation of the habeas statute. His was an argument for a legislative revision. His introduction insists that "this position ought to be the law and that legislation can and should make it so."³⁶⁸ Or, as he more pithily put it later: "What Congress has given, Congress can partially take away."³⁶⁹ Judge Friendly's arguments are about policy, not about what the habeas statute means.

* * *

There is a reason why the Supreme Court has never endorsed an innocence rule: it is at odds with centuries of habeas practice, statutory text, and Supreme Court decisions. The innocence rule doesn't flow so much from law as it does from policy preference. A legal movement sympathetic to Justice Jackson's dissent in *Brown v. Allen* now views the concept of unlawful detention as too broad.³⁷⁰ And sure, an innocence rule might narrow it, but not because that rule aligns modern habeas law with the historical norms of writ practice.

CONCLUSION

Proponents of the new negative equity envision a reformed era of habeas practice in which judges may deny relief based on either authoritative law or equitable intuition. Equitable power to refuse relief might

³⁶³ Bator, *supra* note 169.

³⁶⁴ See John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 264 (2006).

³⁶⁵ See Bator, *supra* note 169, at 447.

³⁶⁶ See Friendly, *supra* note 265, at 142, 148.

³⁶⁷ Whenever the Supreme Court cited Judge Friendly in a majority opinion, it did so when considering how to link an innocence inquiry to excuses for procedural defects. See, e.g., *Bousley v. United States*, 523 U.S. 614, 623 (1998) (linking innocence inquiry to excuse for procedural default); *Schlup v. Delo*, 513 U.S. 298, 321–22 (1995) (to rule against successive habeas petitions); *Smith v. Murray*, 477 U.S. 527, 538–39 (1986) (to procedural default); *Engle v. Isaac*, 456 U.S. 107, 126 n.31 (1982) (same).

³⁶⁸ See Friendly, *supra* note 265, at 143.

³⁶⁹ See *id.* at 171.

³⁷⁰ See, e.g., Bator, *supra* note 169, at 447.

be consistent with “comity, finality, and federalism,”³⁷¹ as it were, but orphaned policy preferences are not law. Under the text-centered approach to law endorsed by most who favor habeas restrictions, such practice is impossible to justify. Although no interpreter can be perfectly certain of statutory meaning, the new negative equity is based on a least-plausible reading of the modern habeas statute.

³⁷¹ *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011) (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009)). These are the policy reasons that are typically intoned as a basis for restricting habeas relief. *See, e.g.*, *Shoop v. Twyford*, 142 S. Ct. 2037, 2043 (2022) (reciting interests); *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) (same).