Deference And Doubt: The Interaction of AEDPA §§ 2254(d)(2) & (e)(1)

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The deference owed to state findings of fact under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, is hopelessly unclear. This Article identifies the two deference provisions, § 2254(d)(2) and (e)(1), and reviews their interaction, ultimately concluding that the treatment of (e)(1) as a superficial gloss on (d)(2) is misguided and undermines the purpose of collateral review of state convictions by federal courts. After addressing both the scope of review and standard of review problems, the Article concludes that the text, structure, and purpose of these provisions require a conclusion that only those state findings of fact that comport with minimum standards of procedural regularity should be afforded deference. Additionally, extrinsic evidence must be available for review by a federal court to permit a determination of whether a state’s findings of fact may be rebutted.

I. INTRODUCTION .............................................................. 389

II. THE TEXT OF § 2254(D)(2) AND (E)(1) ...................... 394

III. INTERPRETATIONS OF THE TEXT BY FEDERAL COURTS .... 396

IV. TREATING (D)(2) AND (E)(1) AS A SINGLE PROVISION GIVES RISE TO TWO PROBLEMS: (1) A STANDARD OF REVIEW PROBLEM AND (2) A SCOPE OF REVIEW PROBLEM ............... 403

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V. INTERPRETIVE APPROACHES FOR UNDERSTANDING THE RELATIONSHIP BETWEEN (D)(2) AND (E)(1) ........................................ 407
   A. The Procedural Fairness Approach to (d)(2) and (e)(1) ........................................................................ 407
   B. The “Decision” versus “Determination” Approach .......... 414

VI. EVALUATING THE APPROACHES UNDER THE STRUCTURE AND HISTORY OF THE STATUTE ................................................... 423
   A. Standard of Review Problem: Is a “Full and Fair Hearing” Required? ........................................ 424
      1. Statutory Structure ........................................................................ 424
      2. Legislative History ...................................................................... 427
   B. The Scope of Review Problem: Is Extrinsic Evidence Permissible? ........................................ 432
      1. The Structure of § 2254 with Regard to Extrinsic Evidence ...................................................... 433
      2. The Right to Extrinsic Evidence Under Pre-AEDPA Rules ........................................................................ 437

VII. CONCLUSION ........................................................................... 440

The purpose of AEDPA is not obscure. It was to eliminate the interminable delays in the execution of state and federal criminal sentences, and . . . to streamline and simplify [habeas corpus].


[D]oes the confusion around [AEDPA’s] limitations—as evidenced by the split in the circuits—constitute an “extraordinary circumstance,” entitling the diligent defendant to equitable tolling . . . ?

—Petition for Writ of Certiorari (2006)

A newly appointed federal judge sits down to review a state prisoner’s request for habeas corpus relief. The judge instantly recognizes that the prisoner’s constitutional claims will either fail or succeed on the basis of the state court’s factual findings. Recognizing that the Antiterrorism and Effective Death Penalty Act (AEDPA) applies to the case, the judge flips to the section of 28 U.S.C. § 2254


2. Petition for Writ of Certiorari at ii, Lawrence v. Florida, 547 U.S. 1039 (2006) (No. 05-8820). The specific issue raised in Lawrence regarding equitable tolling under AEDPA is a topic for another day. The fact that AEDPA is sufficiently confusing so as to justify a viable claim of equitable tolling, however, is illustrative of the general state of perplexity surrounding the application of AEDPA, even after ten years.
addressing the deference owed to state findings of fact. Realizing that there are in fact two separate provisions addressing the review of state findings of fact, § 2254(d)(2) and (e)(1), each of which seems to provide for a slightly different standard and scope of review, the new judge looks to his circuit’s case law for guidance as to the interaction of the two provisions. To the great surprise of the new judge, more than ten years after AEDPA’s enactment, federal appellate courts continue to languish in the lack of United States Supreme Court guidance on the issue by simply glossing over it. This Article is concerned with the fact that although AEDPA is now over a decade old, courts, commentators, and practitioners all continue to struggle to make sense of the Act’s key provisions dealing with questions of fact in federal habeas proceedings.

Section 2254, “the centerpiece of AEDPA’s habeas corpus reform,” contains competing and/or redundant provisions as to the question of how state findings of fact are to be reviewed by federal courts, an issue of paramount importance to the adjudication of habeas corpus petitions. That is to say, quite unlike the general ambiguities that arise as to collateral matters under a statute, under AEDPA, the fundamental issue as to when to defer to state court findings of fact, and how much deference to afford such findings, is unclear on the face of the statute. Moreover, the absence of clear textual guidance has been exacerbated by the Supreme Court’s failure to expound

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6. Compare 28 U.S.C. § 2254(d)(2) (2000) (asserting that state findings of fact may be set aside if they are “unreasonable” based on evidence presented to the state court) with 28 U.S.C. § 2254(e)(1) (providing that state findings may be set aside based on any evidence that demonstrates that the state findings were clearly and convincingly erroneous).

7. 28 U.S.C. § 2254(d)(2) provides: A petitioner is entitled to relief if the state adjudication of the claim “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(e)(1) provides: “[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.”
meaningfully on the relationship between § 2254(d)(2) and § 2254(e)(1).\textsuperscript{8}

It is now time that the scope of deference embodied in AEDPA, at least in the context of factual development, be clarified. This Article sets out to analyze the effects that various interpretations of the relationship between (d)(2) and (e)(1) would have and, ultimately, suggests the most appropriate interpretation of the interaction of these two provisions.\textsuperscript{9} In short, this Article clarifies the confusion that characterizes this discrete area of law, as evidenced by, among other

\textsuperscript{8} See Valdez v. Cockrell, 274 F.3d 941, 968 (5th Cir. 2001) (Dennis, J., dissenting) (noting that the Supreme Court has failed to make it “clear how § 2254(d)(2)’s ‘invitation to decide whether the state fact determinations were reasonable . . . fit[s] with the presumption that the state fact determinations are correct’ [under § 2254(e)(1)]” (quoting 17B Charles Alan Wright et al., Federal Practice and Procedure § 4265.2, at 357 (2d ed. 1988 & Supp. 2001)).

\textsuperscript{9} In the ten years since AEDPA’s enactment, there certainly has been no dearth of insightful commentary as to the scope and effect of § 2254’s new provisions. To date, however, this literature has roughly fallen into two general categories: (1) the constitutionality and application of § 2254(d)(1), see, e.g., Vicki C. Jackson, Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy, 86 Geo. L.J. 2445, 2469-70 (1998) (stressing that by depriving the opinions of federal appellate courts of precedential value, AEDPA is inconsistent with the “ordinary stare decisis requirements”); James S. Liebman & William F. Ryan, “Some Effectual Power”: The Quantity and Quality of Decisionmaking that Article III and the Supremacy Clause Demand of the Federal Courts, 98 Colum. L. Rev. 696, 864-84 (1998) (providing a vast historical survey in support of the view that § 2254(d)(1) must not be read as requiring deference to state court decisions that are inconsistent with federal law); Evan Tsen Lee, Section 2254(d) of the New Habeas Statute: An (Opinionated) User’s Manual, 51 Vand. L. Rev. 103, 134-35 (1998) (“It is not necessarily sufficient, then, for Congress to defend an attempt to influence substantive results on the ground that it is merely exercising its constitutionally mandated power over federal court jurisdiction.”); and (2) issues regarding tolling, opt-in, or other sui generis topics under § 2254, see Burke W. Kappler, Small Favors: Chapter 154 of The Antiterrorism and Effective Death Penalty Act, the States and the Right to Counsel, 90 J. Crim. L. & Criminology 467, 469-70 (2000) (describing the historical background and various problems with the opt-in provisions); Celestine Richards McConville, The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel, 2003 Wis. L. Rev. 31, 35-39 (highlighting the need for effective postconviction counsel in federal habeas corpus proceedings); N. Noelle Francis, Recent Development, Chasing Finality: Federal Collateral Relief in the Wake of Pace v. DiGuglielmo, 29 Harv. J.L. & Pub. Pol’y 373, 373-74 (2005) (discussing AEDPA’s statute of limitations and tolling provisions). By contrast, this Article examines the issue of factual deference under § 2254(d)(2) and (e)(1) and concludes that the questions raised by the interaction of these two provisions are the next important frontier of analytic inquiry under AEDPA. To date, the commentary has been primarily limited to noting the lack of authority on this question. See, e.g., Blume, supra note 5, at 295 (noting that one question that “could significantly affect § 2254(d)’s bite,” and is significantly underanalyzed, is the question of “whether the lack of full and fair process in state postconviction proceedings renders § 2254(d) inapplicable”).
things, the fact that nearly every federal court of appeals has 

sheepishly glossed over this critical question of habeas corpus law.\textsuperscript{10}

I. \textbf{INTRODUCTION}

The writ of habeas corpus has a lofty goal and a considerable pedigree.\textsuperscript{11} Alexander Hamilton, widely considered to be one of the more conservative Founding Fathers, wrote that “[a]rbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism.”\textsuperscript{12} The only protection against this “fatal evil,” is in the writ of habeas corpus,\textsuperscript{13} which in Hamilton’s view was the greatest protection of “liberty and republicanism” contained in the Constitution.\textsuperscript{14}

On a theoretical level, even today, few would directly dispute the important role the writ of habeas corpus plays insofar as it is, effectively, the only mechanism through which a state prisoner can challenge the constitutional propriety of his trial in federal court.\textsuperscript{15} That is, habeas corpus—for all of its flaws and delays—is the only safeguard we have for many of the rights guaranteed to us in the

\begin{itemize}
  \item \textsuperscript{10} See infra notes 57-59 and accompanying text.
  \item \textsuperscript{11} Nonetheless, in this era of PATRIOT Act legislating, it is increasingly common to find federal legislators who are uncomfortable with the process required to effectuate the writ. An illustrative example is Senator Jon Kyl of Arizona, the author of several recent habeas reform bills. Senator Kyl, along with Representative Dan Lungren, has repeatedly staked out the position that respecting the rights of victims requires that habeas corpus appeals be curtailed. See, e.g., Jon Kyl & Dan Lungren, Letter to the Editor, \textit{Victims’ Families are Reason for Death-Penalty-Appeals Reform}, \textsc{The Hill} (Wash., D.C.), Nov. 8, 2005, available at http://thehill.com/index2.php?option=com_content&do_pdf=1&id=62858 (“These perpetual appeals are grossly unfair to the families of murder victims. It is because of appeals from such victims that we first decided to introduce a reform bill . . . . [The victims’ families] literally are denied closure, the right to forget about the person who killed their loved one and to move on with their lives. And this frequently goes on for more than 20 years. A system that treats crime victims this way is intolerable.”); see also Mark Tushnet & Larry Yackle, \textit{Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act}, \textsc{47 Duke L.J.} 1, 1 (1997) (“Criminals are not popular. No politician in recent memory has lost an election for being too tough on crime. In 1996, the Republican Congress and the Democratic President collaborated [to enact AEDPA] . . . .”).
  \item \textsuperscript{12} \textsc{The Federalist} No. 83, at 464-65 (Alexander Hamilton).
  \item \textsuperscript{13} U.S. Const. art. I, § 9, cl. 2 (“[T]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).
  \item \textsuperscript{14} \textsc{The Federalist} No. 84, at 474 (Alexander Hamilton).
  \item \textsuperscript{15} As the Supreme Court has emphasized, “[t]he writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.” Harris v. Nelson, 394 U.S. 286, 290-91 (1969).
\end{itemize}
Without the writ, there would be no federal vehicle for challenging a judge’s bias, a prosecutor’s secret deal to hide a witness, or many of the other liberties enshrined in the Fifth and Sixth Amendments. Without the writ, these Amendments would be of no legal force and effect, at least as a federal matter.

Accordingly, the interpretive clarity and continued protections for meritorious claims promised by the proponents of AEDPA are of immense significance. There are two basic types of interpretive issues that arise under AEDPA. First, there are important questions as to whether the state court’s adjudication of the claim was substantively unreasonable under existing federal law. The second general set of questions that arise under AEDPA address whether the findings of fact upon which the state court rested its substantive decision were reasonable.

This Article is concerned with the latter of these two problems. Even more so than the questions of substantive law, AEDPA’s specific provisions governing factual development and deference are

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16. *Id.*
17. *Id.* at 292 (“There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law.”).
18. *See id.* at 290-91.
19. Senator Orrin Hatch, the floor manager for debate on habeas reform, unequivocally stated that “[i]t is absolutely false” to conclude that § 2254 requires deference to state court decisions “even if the State is wrong about the U.S. Constitution.” 141 CONG. REC. S7846 (daily ed. June 7, 1995) (statement of Sen. Hatch). In other words, § 2254’s deference does not entail blind acquiescence.
20. The question of what constitutes an “unreasonable application” of federal law is heavy on the current Supreme Court’s mind. Specifically, the Court’s anemic docket for 2007 includes several cases raising potential opportunities for the Court to clarify the degree of substantive deference owed to state courts under § 2254(d)(1). *See, e.g.,* Petition for a Writ of Certiorari at i, Roper v. Weaver, 127 S. Ct. 763 (2006) (No. 06-313) (“Since this court has neither held a prosecutor’s penalty phase closing argument to violate due process, nor articulated, in response to a penalty phase claim, what the standard of error and prejudice would be, does a court of appeals exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning a capital sentence on the ground that the prosecutor’s penalty phase closing argument was ‘unfairly inflammatory?’”).
21. The questions of factual deference under (d)(2) and (e)(1) are noticeably underanalyzed in contrast to the questions of legal deference arising under (d)(1). *See discussion supra note 9; see also* Evan Tsen Lee, *Section 2254(d) of the Federal Habeas Statute: Is It Beyond Reason?*, 56 HASTINGS L.J. 283, 285-86 (2004) (addressing the circuit split on the issue of how federal habeas courts should review “silent” state court decisions); Ezra Spilke, Comment, *Adjudicated on the Merits?: Why the AEDPA Requires State Courts To Exhibit Their Reasoning*, 39 J. MARSHALL L. REV. 995, 1004-17 (2006) (addressing the question of whether state court determinations of the law (i.e., (d)(1)) are entitled to deference when the state court opinion is silent as to its reasoning).
unworkably opaque. In light of the paramount importance of findings of fact to the adjudication of a habeas petition, the ambiguity as to the appropriate scope and application of deference to state findings of fact is a threshold question of habeas procedure.\(^2\)

To be clear, state fact-finding is of paramount importance to the adjudication of these claims. One constant among the many judicially and legislatively created variables is that the availability of habeas relief will hinge, more than anything else, on how the fact finder has appraised the relevant facts.\(^3\) The questions regarding what facts may be considered by a federal court and how much deference the court must afford to certain facts are typically dispositive as to whether the prisoner will obtain relief.\(^4\) To illustrate one of the many scenarios that could raise issues as to the relationship between the provisions discussed in this Article, § 2254(d)(2) and (e)(1), it is useful to consider a basic hypothetical.

Jim Doe is convicted of first degree murder in a politically charged crime. The prosecution did not have any real motive evidence and the conviction hinged on testimony from an expert. The expert testified that he was 100% certain that the teeth marks and body fluids found on or around the victim matched Jim. For his part, Jim asserts that he was passed out from a forty-eight-hour drug binge at the time of the crime.

After being sentenced to death and having his sentence and conviction affirmed by the state supreme court, Jim learns that the same expert that testified against him has fabricated or exaggerated evidence in other capital trials. Seeking to have his conviction overturned on the basis that the evidence supporting his conviction may have been fabricated, Jim files an application for habeas corpus relief in state court.

Recognizing that he has a difficult reelection coming up, and afraid that he will be labeled as soft on crime, the state court judge summarily denies Jim’s habeas corpus petition. Indeed, to speed the execution along, the judge does not even hold an evidentiary hearing. But even without the benefit of a hearing, the judge makes specific findings of fact that the expert, for purposes of Jim’s trial, provided reliable and scientifically sound testimony. In support of his findings of fact, the judge states on the record that he reviewed the trial transcript and the

\(^2\) Townsend v. Sain, 372 U.S. 293, 312 (1963) (“It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.”).

\(^3\) See, e.g., Wingo v. Wedding, 418 U.S. 461, 474 (1974) (“[T]he outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents.” (quoting Speiser v. Randall, 357 U.S. 513, 520 (1958))).

\(^4\) Id. at 468.
related exhibits. Notably, however, the judge admits that he did not read all of the relevant testimony, but just enough to “get a feel”, and, moreover, the judge admits that he was unable to locate all of the relevant exhibits.  

Still maintaining his innocence, and seeking an adjudication of his claim that his Fifth and Sixth Amendment rights to a fair trial and due process were violated, Jim files a federal habeas application in federal district court. Because AEDPA applies to Jim’s habeas application, the federal court is required to determine whether the state’s findings of fact regarding the veracity of the expert are entitled to a presumption of correctness under § 2254(e)(1) such that Jim would have to rebut the findings by clear and convincing evidence. A related question that must be answered by the federal court is whether Jim should be able to introduce “new” evidence discovered for the first time during the federal proceedings (e.g., a declaration from an investigator that suggests fraud or deception on the part of the expert). If the federal court determines that § 2254(e)(1)’s deference applies to all state findings of fact, regardless of whether the petitioner was afforded a “full and fair hearing” in state court, and if the federal court concludes that § 2254(d)(2) precludes federal courts from considering any “new” evidence, then Jim’s conviction would have to be affirmed and Jim would have to be executed, despite the fact that no procedurally fair process has been conducted in order to assess the veracity and validity of the expert’s testimony, and despite “new” evidence suggesting that the expert was providing deceptive testimony.

Using this hypothetical as a starting point for appreciating the practical significance of questions of factual deference, this Article sets out the relationship between § 2254(d)(2) and § 2254(e)(1) by examining the text, structure, and legislative history of the provisions and by assessing the intuitive and analytic appeal of the various

25. This portion of the hypothetical is related to the case discussed in detail later in the article, Valdez v. Cockrell, 274 F.3d 941, 944-54 (5th Cir. 2001), which deferred to state findings of fact in spite of the fact that the state habeas judge did not read the trial transcript or relevant exhibits.

26. As this Article points out, the presumption of correctness under (e)(1) is not inconsequential. Certainly, there are findings of fact that could be said to be questionable, or wrong, that are not wrong by “clear and convincing evidence” as required by (e)(1). Thus, a critical question is when should (e)(1)’s presumption of correctness apply.

27. The question of whether Jim would be entitled to an evidentiary hearing is related to, but distinct from the question of whether any “new” evidence would be admissible. As a general matter, an evidentiary hearing will only be allowed if, among other things, a showing of diligence is made by the petitioner. Williams v. Taylor, 529 U.S. 420, 432 (2000). This Article is concerned with the question of whether “new” evidence may be considered by federal courts regardless of whether the petitioner is entitled to a federal hearing, and with the related question of what level of deference the state findings of fact deserve.
interpretable schemes. Only by illuminating the relationship between (d)(2) and (e)(1) is it possible to address meaningfully the problems raised in the hypothetical as to how much deference the state court findings are entitled to and whether the federal court is entitled to review “new” evidence during the course of its habeas review. In the absence of a judicially created framework for understanding the standard of review and scope of review that federal courts are subject to under AEDPA’s related factual provisions, § 2254(d)(2) and (e)(1), the finality and clarity desired under AEDPA are unattainable.

Specifically, in order to resolve the interpretive void created by the Supreme Court’s ten years of silence as to the issues raised in the hypothetical, this Article sets out to examine the text, structure, and legislative history of § 2254(d)(2) and (e)(1). This Article suggests an interpretive scheme that is at once mindful of federalism and comity concerns, and basic due process requirements. More precisely, this Article suggests interpretive solutions to the two related problems stemming from confusion over the relationship between (d)(2) and (e)(1): (1) a standard of review problem and (2) a scope of review problem. As to the standard of review problem, this Article concludes that the text, structure, and history of § 2254 dictate that (e)(1)’s presumption of correctness must be considered independent from the (d)(2) reasonableness analysis; in this way, no presumption of

28. These are questions federal courts should be considering on an almost daily basis, and the relationship between (d)(2) and (e)(1) is the key to resolving them.

29. See Hohn v. United States, 524 U.S. 236, 254 (1998) (Scalia, J., dissenting) (stressing the importance of finality); 141 CONG. REC. 15,095 (1995) (statement of Sen. Dole) (“These landmark reforms will go a long, long way to streamline the lengthy appeals process . . . . It is dead wrong that we must wait 8, or 9, or even 10 years before a capital punishment is carried out.”).

30. See, e.g., Channer v. Brooks, 320 F.3d 188, 194 (2d Cir. 2003) (emphasizing that the relationship between § 2254(d)(2) and § 2254(e)(1) is still undetermined); Green v. White, 232 F.3d 671, 672 n.3 (9th Cir. 2000) (“The relationship between § 2254(d)(2) and § 2254(e)(1) is not entirely clear”); see also Chapman, supra note 4, at 1406 n.129 (“There is some disagreement as to the precise interaction between § 2254(d)(2) and § 2254(e)(1).”).

31. See Taylor v. Maddox, 366 F.3d 992, 999-1000 (9th Cir. 2004) (“Principles of comity and federalism counsel against substituting our judgment for that of the state courts, a deference that is embodied in the requirements of the federal habeas statute, as amended by AEDPA.”).

32. The question of when (e)(1)’s deference applies, or the standard of review problem as it is referred to throughout this Article, has been raised but never resolved by members of the Supreme Court. Justice Thomas, for example, has unequivocally announced his view that the omission of the language “full and fair” from the AEDPA version of § 2254(d) and (e) compels the conclusion that a petitioner may no longer raise “procedural complaints” as a basis for avoiding the presumption of correctness that attaches to state findings of fact under § 2254(e)(1). See, e.g., Miller-El v. Cockrell (Miller-El I), 537 U.S. 322, 358-59 (2003) (Thomas, J., dissenting).
correctness applies to substantively or procedurally deficient state findings of fact, and reasonable findings of fact may be rebutted by clear and convincing evidence.\textsuperscript{33} As to the scope of review problem, this Article concludes that it is inconsistent with the text and structure of § 2254(d)(2) and § 2254(e)(1) to interpret the two provisions as barring federal courts from reviewing evidence of constitutional harm that is only discovered for the first time in federal court.\textsuperscript{34}

II. THE TEXT OF § 2254(D)(2) AND (E)(1)

AEDPA contains two provisions that address the deference owed to findings of fact made by a state court. The first, § 2254(d)(2), is one of the two provisions that expressly limits the availability of habeas corpus relief.\textsuperscript{35}

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.\textsuperscript{36}

The second provision dealing with state findings of fact, § 2254(e)(1), is located in the only portion of § 2254 that expressly relates to the use of extrinsic evidence.\textsuperscript{37} This provision provides:

\textsuperscript{33} 28 U.S.C. § 2254(d)(1), (e)(2) (2000). Notably, the pre-AEDPA version of § 2254 expressly provided for two layers of inquiry: (1) was there an adequate basis for deferring to the state’s findings of fact—e.g., a “full and fair hearing,” and if so (2) had the petitioner overcome the presumption of correctness that would attach to such a finding of fact. \textit{Id.} § 2254(d) (1994) (repealed 1996) (“[U]nless . . . the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.”). That two tiers of inquiry were intended is also clear under the AEDPA version of § 2254. See \textit{id.} § 2254(d)(2), (e)(1) (Supp. II 1996) (providing two separate provisions, (d)(2) and (e)(1), for assessing the correctness of state findings of fact and providing no textual support for the notion that (d)(2) and (e)(1) were intended as merely different articulations of the same general standard).

\textsuperscript{34} \textit{id.} § 2254(d)(2), (e)(1) (2000).

\textsuperscript{35} Under § 2254, habeas corpus relief is limited by (d)(1) and (d)(2).

\textsuperscript{36} 28 U.S.C. § 2254(d)(2).

\textsuperscript{37} 28 U.S.C. § 2254(e) consists of two provisions, (e)(1) and (e)(2). Only (e)(2), the provision dealing with the availability of evidentiary hearings where a petitioner was not diligent in state court, expressly anticipates the use of extrinsic evidence when its rigorous standards are satisfied. On its face, (e)(1) does not explicitly provide for the use of extrinsic evidence; however, the placement of (e)(1) within the same subsection of the statute as the provision dealing with evidentiary hearings, as well as subtle textual cues, as discussed below, strongly suggest that (e)(1) anticipates the use of extrinsic evidence.
(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. 38

The relationship between these two provisions gives rise to two critical unresolved questions: (1) whether the presumption of correctness that attaches to state court findings of fact under (e)(1) attaches to all findings, or only those that are substantively and procedurally reasonable under (d)(2); and (2) whether a federal petitioner is required to establish his entitlement to relief based exclusively on the “facts . . . presented . . . in [s]tate court” 39 when he is attempting to rebut the presumption of correctness that attaches to state findings under § 2254(e)(1).

Standing alone, § 2254(d)(2) does not appear particularly difficult to interpret or apply. 40 The provision specifies that a state court’s findings of fact will be assessed only in light of the evidence available to the state court. 41 It also provides that a petitioner will be entitled to relief if material factual determinations were unreasonable. 42 Of course, there is room for debate as to what constitutes an “unreasonable determination of the facts,” 43 but federal courts are called upon to make reasonableness determinations in a variety of legal contexts, and this has not created a genuine hurdle in the application of this provision. 44 Indeed, federal courts appear to have

38. Id. § 2254(e)(1).
39. Id. § 2254(d)(2).
40. Professor Frederic Bloom has commented: “At first blush, section 2254(d) appears to do very little work. It seems merely to posit a set of standards of review, defining the manner in which federal courts assess the merits of particular state court decisions.” Frederic M. Bloom, Unconstitutional Courses, 83 WASH. U. L.Q. 1679, 1706 (2005) (footnote omitted). Ultimately, however, Professor Bloom worries that the cure for habeas confusion, at least in the context of legal adjudications, is worse than the disease insofar as “it forges a kind of constitutional purgatory, a doctrinal nether-region in which federal courts are required to ratify constitutional error.” Id at 1686.
42. Id.
43. Id.
44. See, e.g., Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2409 (2006) (“‘[The antiretaliation] provision covers those . . . employer actions that would be materially adverse to a reasonable employee . . . .’” (emphasis added)); Yarborough v. Alvarado, 541 U.S. 652, 662-63 (2004) (stressing that a person is in custody, for purposes of the Fifth Amendment protections, if a reasonable person would not have felt at liberty to leave the interrogation); Oliver v. United States, 466 U.S. 170, 177 (1984) (noting that the touchstone of Fourth Amendment analysis is the question of whether one has a ‘‘reasonable
applied the reasonableness requirement in a manner that can fairly be described as faithful to the plain text of the provision.\footnote{45}

The problem, in other words, is not with the plain text of § 2254(d)(2); rather, the confusion arises when (d)(2) is read in light of the next provision in § 2254, (e)(1).\footnote{46} There is simply no intuitive way to read these alternative statements regarding the proper review of state findings of fact.\footnote{47} A reconciling of the two provisions requires a review of the structure and history of the provisions.\footnote{48} Notably, however, federal courts across the country have not engaged in the laborious process of trying to meaningfully square (d)(2) and (e)(1).\footnote{49}

III. INTERPRETATIONS OF THE TEXT BY FEDERAL COURTS

Circuit courts across the country, with only one notable exception,\footnote{50} have simply adopted a straightforward interpretation of the relationship between (d)(2) and (e)(1) that combines the two provisions into a single inquiry.\footnote{51} This approach, assumes, without deciding, that

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\begin{itemize}
\item \footnote{45} See, e.g., Wiggins v. Smith, 539 U.S. 510, 520-22 (2003) (defining the test for unreasonableness in the context of a § 2254(d)(1) issue). Notably, (d)(2) is so underutilized that there has been virtually no debate or explanation regarding the term “unreasonable” as it applies to findings of fact under (d)(2).
\item \footnote{46} See, e.g., Babb v. Crosby, F. App’x 885, 887-88 (11th Cir. 2006) (“To the extent that Babb contends that the state court’s decision ‘was based on an unreasonable determination of the facts in light of the evidence presented,’ Babb has not met his burden of proving by clear and convincing evidence that the state court’s factual finding—that Farrar made a strategic decision in keeping Edwards on the jury—was incorrect. See 28 U.S.C. § 2254(d)(2), (e)(1).”); Trussell v. Bowersox, 447 F.3d 588, 591 (8th Cir. 2006) (“Trussell is only entitled to federal habeas relief if the state court made ‘an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,’ 28 U.S.C.
\end{itemize}
there is no tension between (d)(2) and (e)(1); to date, the view of most federal courts is that § 2254(e)(1) merely clarifies the standard for relief set forth in § 2254(d)(2).

The United States Court of Appeals for the Seventh Circuit’s Harding v. Walls opinion is representative of this view. In Harding, the court defined the standard for reviewing factual determinations in the following manner: “Under Section 2254(d)(2), relief may be had where the petitioner can show by clear and convincing evidence that the state court’s factual determinations were unreasonable.” In other words, the clear and convincing standard announced in (e)(1) is read into (d)(2)’s reasonableness analysis. Under this interpretation, the best method of reconciling (d)(2) and (e)(1) is to affirmatively suppose that no reconciliation is needed.

This approach appears to enjoy broad support across the circuits. The norm among federal courts addressing factual findings seems to be a purely pro forma recitation of the language of

§ 2254(d)(2), which requires clear and convincing evidence that the state court’s presumptively correct factual finding lacks evidentiary support. 28 U.S.C. § 2254(e)(1).”

52. That is to say, most circuits have refused to acknowledge any tension between § 2254(d)(2) and (e)(1). See, e.g., Hunterson v. Disbato, 308 F.3d 236, 245-46 (3d Cir. 2002) (referring to the statutory standards of 2254(d)(2) and (e)(1) together as the “unreasonable determination of the facts standards”); Harding v. Walls, 300 F.3d 824, 828 (7th Cir. 2002) (“Under section 2254(d)(2), relief may be had where the petitioner can show by clear and convincing evidence that the state court’s factual determinations were unreasonable.”); Hunterson, 308 F.3d 236, 245-46 (3d Cir. 2002) (merging (d)(2) and (e)(1) in the context of an ineffective assistance of counsel claim); Sallahdin v. Gibson, 275 F.3d 1211, 1221-22 (10th Cir. 2002) (treating 2254(d)(2) and (e)(1) as “constraint[s] on the power of a federal habeas court” (internal quotation marks omitted)); Mastroacchio v. Vose, 274 F.3d 950, 957-98 (1st Cir. 2001) (interpreting 2254(d)(2) in light of the language used in 2254(e)(1)); Valdez v. Cockrell, 274 F.3d 941, 951 n.17 (5th Cir. 2001) (“[A] district court may find by clear and convincing evidence that the state court erred with respect to a particular finding of fact, thus rebutting the presumption of correctness with respect to that fact. See § 2254(e)(1). It is then a separate question whether the state court’s determination of facts was unreasonable in light of the evidence presented in the state court proceeding.”); Coe v. Bell, 209 F.3d 815, 823 (6th Cir. 2000) (combining the provisions easily by stating that the state court’s presumption is entitled to a presumption of correctness and that relief will be granted if the state court’s decision was based on an unreasonable determination of the facts).

53. Id.

54. Id.

55. Id.

56. See Lenz v. Washington, 444 F.3d 295, 300 (4th Cir. 2006); Lynn v. Bliden, 443 F.3d 238, 246-47 (2d Cir. 2006); Sera v. Norris, 400 F.3d 538, 543 (8th Cir. 2005); Guidry v. Dretke, 397 F.3d 306, 324-25 (5th Cir. 2005); Rutherford v. Crosby, 385 F.3d 1300, 1308 (11th Cir. 2004); Creighton v. Hall 310 F.3d 221, 226 (1st Cir. 2002); Harding, 300 F.3d at 828; Fields v. Gibson, 277 F.3d 1203, 1220-21 (10th Cir. 2002); Coe, 209 F.3d at 823; see also Chapman, supra note 4, at 1407 n.129 (“The majority of Circuits, however, ignore [this] conflict and appear to view § 2254(d)(2) and (e)(1) as fairly straightforward . . . .”).
§ 2254(d)(2) followed by the language of § 2254(e)(1). The United States Court of Appeals for the Second Circuit defined the standard in the following manner: “[A] state court’s determination of a factual issue is presumed to be correct, and is unreasonable only where the petitioner meets the burden of ‘rebutting the presumption of correctness by clear and convincing evidence.’” Thus, in most cases, other than linking the two provisions with an “and” or a “furthermore,” there is no further attention paid to the interaction between (d)(2) and (e)(1).

In other words, the most common interpretation of these two distinct provisions for dealing with state findings of fact is to treat them as essentially redundant. The courts simply cherry-pick the standard of review language—“clear and convincing”—that is noticeably absent from (d)(1) and (d)(2) and read it into the “unreasonableness” standard. This creates a troubling double deference that is inconsistent with the plain text of the statutes.

Read independently, (d)(2) requires that habeas relief be granted when a state decision is based on an unreasonable finding of fact. There is no requirement that the “unreasonableness” be proven to any specific degree of certainty. By contrast, (e)(1) is not concerned with

57. See, e.g., Creighton, 310 F.3d at 226 (“AEDPA also provides habeas relief when the state court decision was based on ‘an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’” 28 U.S.C. § 2254(d)(2). However, the federal habeas court shall presume that the state court’s determination of factual issues is correct and petitioner has ‘the burden of rebutting the presumption of correctness by clear and convincing evidence.’” Id. § 2254(e)(1)).


59. Some opinions feign analysis of the complicated issue, but, like the other opinions, ultimately amount to nothing more substantive than a blind recitation of the two statutory provisions. See, e.g., Sanna v. Dipaolo, 265 F.3d 1, 7 (1st Cir. 2001) (“The AEDPA also allows collateral relief in a quite different situation: when a federal habeas court determines that a state court adjudication ‘resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding’” 28 U.S.C. § 2254(d)(2). It is worth noting, however, that these words cannot be read in a vacuum; they must be interpreted in conjunction with a companion subsection specifying that ‘a determination of a factual issue made by a State court shall be presumed to be correct,’ and that ‘[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.’” Id. § 2254(e)(1)).

60. See, e.g., Harding, 300 F.3d at 828.

61. See id.

62. See Sera v. Norris, 400 F.3d 538, 543 (8th Cir. 2005) (“Finally, a state court decision involves ‘an unreasonable determination of the facts in light of the evidence presented in the state court proceedings’ only if it is shown that the state court’s presumptively correct factual findings are rebutted by ‘clear and convincing evidence’ . . . .” (emphasis added) (quoting 28 U.S.C. § 2254(e)(1))).


64. See id.
questions of reasonableness; rather, it provides that as a general matter, state findings of fact are entitled to a presumption of correctness that may be overcome by presenting “clear and convincing evidence.”\textsuperscript{65} If (d)(2) and (e)(1) are read as clarifying each other in the manner suggested by cases like \textit{Harding}, then petitioners are required to prove the “unreasonableness” of a state finding by “clear and convincing” evidence.\textsuperscript{66} This is not the same interpretive result that would flow from treating (d)(2) and (e)(1) as independent provisions.\textsuperscript{67}

Thus, although it is seemingly the most straightforward and certainly the most simplistic interpretation of the interaction between (d)(2) and (e)(1), the conflation of these two separate provisions (contained in distinct subsections of the statute) is not the most faithful reading of the plain text of § 2254.\textsuperscript{68} It runs counter to the ordinary rules of interpretation to read two separate statutory provisions, each with its own standard of review and scope of review limitations, as inextricably wedded.\textsuperscript{69} That is, these two separate provisions cannot be amalgamated into a generic rule—namely, state court findings of fact are entitled to deference—so as to subtly ignore the text and scope of (e)(1).\textsuperscript{70} However, this approach adopted by default in so many federal opinions cannot be dismissed out of hand insofar as the Supreme

\textsuperscript{65} See \textit{id.} § 2254(e)(1).
\textsuperscript{66} Harding \textit{v}. Walls, 300 F.3d 824, 828 (7th Cir. 2002).
\textsuperscript{67} This is particularly clear when the (d)(2) and (e)(1) standard is conflated into a single sentence. See, \textit{e.g.}, Fields \textit{v}. Gibson, 277 F.3d 1203, 1221 (10th Cir. 2002) (“\textit{If} we treat the issue as a factual determination under § 2254(d)(2) and (e)(1) \textit{we ask} whether Fields has rebutted the presumption of correctness by showing, by clear and convincing evidence, that the state court's decision was an unreasonable determination of the facts.”); \textit{see also} Sera, 400 F.3d at 543 (“\textit{A} state court decision involves ‘an unreasonable determination of the facts in light of the evidence presented in the state court proceedings’ only if it is shown that the state court's presumptively correct factual findings are rebutted by ‘clear and convincing evidence’ . . . .” \textsuperscript{28} U.S.C. § 2254(e)(1))); Rutherford \textit{v}. Crosby, 385 F.3d 1300, 1308 (11th Cir. 2004) (“\textit{Petitioner} has not shown by clear and convincing evidence that the Florida Supreme Court's factual finding . . . [was] unreasonable in light of the evidence in the state court record.”); Foster \textit{v}. Johnson, 293 F.3d 766, 776 (5th Cir. 2002) (“\textit{To establish} that habeas relief is warranted on the § 2254(d)(2) ground that the state court's decision was based on an ‘unreasonable determination of the facts in light of the evidence presented in the State court proceeding,’ a petitioner must rebut by clear and convincing evidence the § 2254(e)(1) presumption that a state court's factual findings are correct.” \textsuperscript{28} U.S.C. § 2254(d)(2)).

\textsuperscript{68} As a general matter, “statutory interpretation should proceed in a manner that avoids redundancy.” Murphy Exploration \& Prod. Co. \textit{v}. U.S. Dep’t of the Interior, 252 F.3d 473, 484 (D.C. Cir. 2001); \textit{see also} Gustafson \textit{v}. Alloyd Co., 513 U.S. 561, 574 (1995) (stressing that the Supreme Court will, whenever possible, avoid reading provisions in a manner that suggests redundancy).

\textsuperscript{69} \textit{Cf.} Gustafson, 513 U.S. at 575 (“Congress did not write the statute that way . . . and we decline to say it included . . . words . . . for no purpose.”).
\textsuperscript{70} \textit{Id.}
Court, through its silence on the issue, has affirmed the simplistic reading of (e)(1) that views it as a mere repetitive clarification of (d)(2).  

In addressing the deference owed to certain state findings of fact, the Supreme Court, in Miller-El (II), adopted an approach that was familiar to most federal courts. Rather than independently analyzing the roles that (d)(2) and (e)(1) play in the federal review of state findings of fact, the Court parroted back the confused language of AEDPA in lieu of an analysis:

> Under the [AEDPA], Miller-El may obtain relief only by showing the Texas conclusion to be ‘an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’ 28 U.S.C. § 2254(d)(2). Thus we presume the Texas court’s factual findings to be sound unless Miller-El rebuts the ‘presumption of correctness by clear and convincing evidence.’ § 2254(e)(1).

The remainder of the opinion appears to deliberately avoid the question of how courts should interpret § 2254(d)(2) and § 2254(e)(1).

For those looking to support the view that (e)(1) merely clarifies what constitutes “unreasonableness” for purposes of (d)(2), the Miller-El (II) opinion’s use of the word “thus” is significant. Indeed, the use of “thus,” even more than terms like “and” or “furthermore” that are often employed by circuit courts, provides an arguable basis for understanding (e)(1) and (d)(2) as but two parts of the same rule. However, the two sentences regarding (d)(2) and (e)(1) in Miller-El (II)

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72. See id.
73. If the Supreme Court believed that (d)(2) and (e)(1) were of no independent effect, in light of the circuit split on this issue, discussed infra Part V, the Court should have held this directly. Indeed, viewed in the context of the circuit split, the Supreme Court’s lack of analysis as to this question suggests that no controlling authority can be inferred from the opinion on this point.
74. Miller-El (II), 545 U.S. at 240 (emphasis added).
75. Although the conflation that circuit courts, and the Supreme Court in Miller-El (II), engage in only expressly addresses the standard of review problem—i.e., what level of deference is required—the same conflation generally propounds the scope of review problem as well. As a general rule, courts are simply failing to explore the interaction of the two provisions, as evidenced most clearly by the “analysis” as to the standard of review issue. See infra Part IV.
76. Miller-El (II), 545 U.S. at 240.
77. See id.
are a tenuous foundation for the claim that (e)(1) merely reiterates and clarifies the standard expounded in (d)(2).  

To characterize *Miller-El (II)*'s interpretation of this critical open question as cursory would be generous; in light of the review the Court provided, it is more accurate to view *Miller-El (II)* as effectively silent on the issue of the relationship between (d)(2) and (e)(1).  The opinion does not attempt to reconcile or interpret these two provisions, much less serve as a conclusive holding on the issue.  As one federal appellate judge described this portion of the opinion: “[T]he Supreme Court in *Miller-El v. Dretke ... intimates* that the standards under § 2254(d)(2) and (e)(1) may merge. However, the Court’s *passing recitation* of the AEDPA standard [cannot be treated] [a]s binding on us.” Accordingly, it is reasonable to conclude that the Court has yet to

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78. In his dissent, Justice Thomas points out that the practical effect of the majority opinion is not to conflate (d)(2) and (e)(1) as the two sentences discussed above suggest. *Id.* at 274 (Thomas, J., dissenting). In Justice Thomas’s view, (d)(2) and (e)(1) should be conflated such that all state findings of fact must be reviewed exclusively on the basis of the record that was before the state court, as required by (d)(2). *Id.* (“[E]vidence does not, much less ‘clear[ly] and convincing[ly],’ show that the State racially discriminated against potential jurors. 28 U.S.C. § 2254(e)(1).  However, we ought not even to consider it:  In deciding whether to grant Miller-El relief, we may look only to ‘the evidence presented in the State court proceeding.’  § 2254(d)(2).”). In light of Justice Thomas’s dissent, the majority opinion, without more elaboration, cannot fairly be read as an endorsement of conflating (e)(1) and (d)(2).

79. Indeed, much of the Court’s opinion seems to actively evade this interpretive question. For example, as to the scope of review question raised by the interplay of these two provisions—i.e., whether “new” evidence discovered for the first time during federal proceedings may be considered—the *Miller-El (II)* majority inexplicably refuses to address this issue, though it was squarely before them. Throughout the opinion there are footnotes explaining why it was acceptable in this case to review the “new” evidence without deciding whether a federal court could, as a general question of § 2254 interpretation, rely on “new” evidence. See, e.g., *id.* at 241 n.2 (majority opinion). It is clear that the majority, at least when presented with clear facts of racial stereotyping, did not wish to announce the bright-line rule urged by Justice Thomas that would have conclusively barred all “new” evidence from federal proceedings. See *id.* at 280 (Thomas, J., dissenting). On the other hand, Justice Thomas’s dissent has been persuasive authority for some circuits in light of the fact that the majority simply made excuses for not addressing the issue. See *id.* at 256 n.15 (majority opinion) (addressing the question of whether “new” evidence may be considered by a federal court by simply saying that in this case “it is not clear to what extent the [new] material expands upon what the state judge knew”).

80. As federal appellate courts have recognized, in many situations it is not necessary to consider whether (e)(1) and (d)(2) proscribe different standards and, if so, which standard would apply. See, e.g., *Green v. Travis*, 414 F.3d 288, 298 n.6 (2d Cir. 2005) (“This Court has not yet addressed whether a petitioner seeking habeas relief must prevail under both § 2254(d)(2) and § 2254(e)(1) ... . We need not resolve the issue [in this case] because [the petitioner] easily rebuts the presumption of correctness established in § 2254(e)(1).”).

81. *Edwards v. Lamarque*, 439 F.3d 504, 517 n.1 (9th Cir. 2005) (Rymer, J., dissenting) (emphasis added) (citation omitted). Judge Rymer’s concern was that a conflation of (d)(2) and (e)(1) could serve as a basis for ignoring some of the deference called for under
address the issue of the interaction of (d)(2) and (e)(1). Indeed, at other times, the Court has explicitly rejected the argument that AEDPA requires a petitioner to prove that the state court decision was objectively unreasonable by clear and convincing evidence.

Nonetheless, there are appellate decisions that treat Miller-El (II) as conclusively foreclosing the argument that (e)(1) and (d)(2) involve distinct inquiries. In Lenz v. Washington, for example, the Fourth Circuit held that regardless of the harm suffered by him, the petitioner’s argument that the district erred by conflating (e)(1) and (d)(2) was foreclosed by Miller-El (II). Thus, although the basic canons of interpretation instruct courts to avoid redundancy and/or contradiction, because the Supreme Court has recited the two provisions without grappling with their purpose in the greater statutory scheme, more analysis is needed to conclusively explain why (d)(2) and (e)(1) should be read as independent provisions. If a reading of (d)(2) and (e)(1) that is different than that impliedly adopted in Miller-El (II) is to become law, it is necessary for courts to go beyond the plain text of the statute and consider the structure and legislative history of the two provisions. However, before addressing in detail the legislative history and structure of these provisions, it is important to elaborate on the practical problems that may result from the confusion over (d)(2) and (e)(1)’s interaction.

(d)(2) by allowing the panel to skip neatly to a “clear error” review. Id. at 517-18. Just as Justice Thomas tends to blur (e)(1) and (d)(2) in a manner that treats (d)(2)’s limitations as trumping, Judge Rymer’s view that the reverse could also occur is certainly not without foundation. See Lenz v. Washington, 444 F.3d 295 (4th Cir. 2006). Where a state court’s findings are procedurally and substantively reasonable under (d)(2), it would seem odd to allow a petitioner relief under the lower standard of deference embodied in (e)(1). It is, in other words, imperative to impartial justice that the two provisions be read independently.

82. See Edwards, 439 F.3d at 517 n.1.
83. Miller-El v. Cockrell (Miller-El I), 537 U.S. 322, 341 (2003). The Court went so far as to state expressly that “[i]t was incorrect for the Court of Appeals . . . to merge the independent requirements of §§ 2254(d)(2) and (e)(1).” Id. If this were any other case, it would likely be treated as foreclosing the conflation interpretation applied by many circuit courts. Confusingly, however, this analysis is found in the Court’s other Miller-El opinion. Id. Nonetheless, the discussion of the relationship between (d)(2) and (e)(1) contained in Miller-El (I) should not be overlooked as it is the Court’s most complete analysis of this issue to date.
84. See, e.g., Lenz, 444 F.3d at 300-01.
85. See id.
88. As the court noted in Miller-El (I), it is “incorrect . . . to merge the independent requirements of §§ 2254(d)(2) and (e)(1).” 537 U.S. at 341.
IV. TREATING (d)(2) AND (e)(1) AS A SINGLE PROVISION GIVES RISE TO TWO PROBLEMS: (1) A STANDARD OF REVIEW PROBLEM AND (2) A SCOPE OF REVIEW PROBLEM

Statutory interpretation is always subject to a certain degree of inertia, so it is not altogether surprising that federal courts have, with few exceptions, blindly recited the common interpretation of (d)(2) and (e)(1). However, the energy needed to overcome this interpretation would be well-spent. In certain circumstances, the current interpretation of (d)(2) and (e)(1) will result in a fundamentally unfair adjudication of habeas corpus petitions. Specifically, by merging the (d)(2) and (e)(1) analyses into a single step, certain fundamental procedural and substantive protections are lost.

This Article is concerned with two specific problems that arise when (d)(2) and (e)(1) are not analyzed as independent (though related) provisions: a standard of review problem and a scope of review problem.

First, serious questions as to the appropriate standard of review arise when a federal court's review of state factual findings hinges on a conflation of the (d)(2) and (e)(1) standards. There are situations in which (e)(1)'s presumption of correctness could apply to state findings that were otherwise objectively unreasonable under (d)(2). For example, a state finding of fact might be treated as "unreasonable" if

89. See cases cited supra note 51.
90. On the other hand, it is possible that in certain instances when an appellate court blindly recites the (e)(1) and (d)(2) standards in tandem, the petitioner is benefited. For example, a finding that the state court was "unreasonable" for purposes of § 2254 has been interpreted as requiring a finding that no reasonable jurist could have reached the same conclusion. This standard is almost certainly more exacting than the clear and convincing standard of review announced in (e)(1), yet circuit courts continue to blur the two provisions. See, e.g., Dugas v. Coplan, 428 F.3d 317, 333 (1st Cir. 2005) (holding that a state court finding was an "unreasonable determination of the facts" because the petitioner demonstrated that it was "incorrect by clear and convincing evidence" (internal quotation marks omitted)).
91. Notably, the dearth of judicial attention as to this issue is not entirely surprising in light of the relatively narrow class of cases in which the standard of review would be affected by a blurring of (d)(2) and (e)(1). After all, the "unreasonable" standard set out in § 2254(d)(2) is treated as a higher bar to relief than the traditional "clear and convincing evidence" burden set forth under § 2254(e)(1). Locke v. Andrade, 538 U.S. 63, 75 (2003) (distinguishing the unreasonableness standard from the clear error standard and stressing that the clear error standard will often fail to give proper deference to state court decisions). Thus, in most instances where a state court's findings are determined to be unreasonable for purposes of (d)(2), the presumption will necessarily also be satisfied for purposes of (e)(1). Stated another way, it is quite common that a petitioner will either satisfy both (d)(2) and (e)(1) or neither. See, e.g., Green v. Travis, 414 F.3d 288, 299 (2d Cir. 2005).
the state court's adjudication of the claim was procedurally unfair.\textsuperscript{92} There is after all, a certain intuitive appeal to an analytic approach that would recognize procedurally unfair findings as "unreasonable."\textsuperscript{93} Notably, however, a reading of § 2254 blurring (d)(2) and (e)(1) would, regardless of whether a state finding was procedurally unfair, apply a presumption of correctness to the finding under (e)(1).

This can be illustrated by reflecting on the way AEDPA should be applied to the hypothetical presented in the introduction. The state court's adjudication of the prisoner's claim that the expert was providing fraudulent testimony did not consist of a mere coin toss\textsuperscript{94} but by losing portions of the trial record, refusing to read the available transcripts, and failing to conduct a hearing on the issue, the state court's findings were subject to a fair degree of arbitrariness. Accordingly, if federal courts defer to this state court judgment by attaching (e)(1)'s presumption of correctness to all of the court's findings of fact, there is a realistic possibility that our innocent hypothetical petitioner would be precluded from habeas relief.\textsuperscript{95} In other words, by treating (e)(1) as a refinement or additional prong of the (d)(2) analysis,\textsuperscript{96} and thereby attaching (e)(1)'s presumption of correctness to the final order, the prisoner would not have the necessary factual basis to overcome the state court's findings of fact under (e)(1).

\begin{itemize}
  \item \textsuperscript{92} See infra Part VI.A.2 (discussing the legislative history of § 2254(d) and the interpretive effect of Congress's omission of an express requirement that state proceedings be "full and fair").
  \item \textsuperscript{93} In discussing the application of AEDPA deference in other contexts, commentators have observed that "courts' specific decisionmaking [procedures] merit serious inquiry—not simply as a nod to 'procedure for procedure's sake,' but as a critical record of the rise and fall of the 'judicial Power.'" See, e.g., Bloom, supra note 40, at 1693 (footnotes omitted). This is precisely because the fairness of the process matters, not just the result. Professor Bloom provides a colorful illustration of this basic principle: "Imagine that the Supreme Court required all civil rights claims to be decided by flipping a coin. Or that all antitrust issues were to be resolved by consulting a 'Delphic oracle.' Or even that all copyright questions were to be answered by 'studying the entrails of a dead fowl.'" Id. at 1687 (footnotes omitted). Just as a coin may provide the "correct" substantive answer, so might a state habeas court in the absence of a "full and fair hearing," but the adjudication of habeas claims requires more than a mere chance that the "right" result will be reached. As Professor Bloom notes, "[s]omething about [flipping a coin or consulting an oracle] seems—even feels—wrong, if still curiously close to reality." Id. Similarly, if a factual decision is reached through an "untenable decisionmaking course," why should a court presume it correct and afford it deference under (e)(1)? Id. at 1680.
  \item \textsuperscript{94} See id. at 1687.
  \item \textsuperscript{95} Even if a finding is procedurally unfair (unreasonable), this does not dictate that the petitioner will be able to rebut the substance of these procedurally unfair findings by clear and convincing evidence as required under (e)(1). That is, the mere procedural unfairness of a finding does not necessarily provide a petitioner with a factual basis for overcoming that finding by clear and convincing evidence.
  \item \textsuperscript{96} It is not entirely clear whether it is more accurate to characterize the conflation as a mere blurring of standards or as a mandate to conduct an additional layer of deferential review. See, e.g., Miller-El v. Dretke (Miller-El (II)), 545 U.S. 231, 240 (2005) ("Miller-El
correctness to procedurally unfair state findings, prisoners that were
denied a procedurally fair adjudication of their claims by the state
court will be forced to rebut these (unfair) findings by clear and
convincing evidence. This sort of deference to blatantly unfair
procedures is, unlike the facts surrounding the man who was
confronted by a fraudulent expert, anything but hypothetical. Indeed,
this view has been emphatically endorsed by Justice Thomas. Indeed,
this view has been emphatically endorsed by Justice Thomas. In his
dissent from the majority’s opinion in Miller-El (I), Justice Thomas
remarked that “to ‘presume’ facts ‘correct’ means a court cannot allow
a habeas applicant to evade § 2254(e)(1) by attacking the process
employed by the state factfinder rather than the actual factfindings.”

In addition to the standard of review problem, the blurring of
(d)(2) and (e)(1) may result in confusion as to the scope of review—i.e., the type of evidence that may be reviewed. Both (d)(2) and
(e)(1), like the other provisions of AEDPA, substantially limit the
circumstances in which a petitioner can obtain relief based on the
factual findings of a state court. But (d)(2) and (e)(1) are separate

\[\text{(d)(2) and (e)(1) are separate but (d)(2) and (e)(1) are separate}}\]

may obtain relief only by showing the Texas conclusion to be ‘an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’ 28 U.S.C. § 2254(d)(2). Thus we presume the Texas court’s factual findings to be sound unless Miller-El rebuts the ‘presumption of correctness by clear and convincing evidence.’ § 2254(e)(1).” (emphasis added).

98. Id.
99. Id. (first emphasis added). This interpretation also garnered three votes in 2005. Justice Thomas, joined by Justices Rehnquist and Scalia, stressed that the “presumption of correctness afforded factual findings on habeas review does not depend on the manner in which the [state] court reaches its factual findings.” Miller-El (II), 545 U.S. at 274, 285 (Thomas, J., dissenting). This conclusion flows directly from Justice Thomas’s view that (d)(2) and (e)(1) are merely redundant expressions of the “deference” owed to state findings under AEDPA. See id. (implying that the level of deference due state courts’ factual findings is found under both (d)(2) and (e)(1)); see also Saiz v. Ortiz, 392 F.3d 1166, 1176 (10th Cir. 2004) (stressing that a federal court is only permitted to review the substance of the state court’s result, “not its rationale” (quoting Gipson v. Jordan, 376 F.3d 1193, 1197 (10th Cir. 2004))). The combined effect of holding that federal courts may only review the findings (and not the process) and holding that no extrinsic evidence may be considered during this review is, to say the least, troubling. See Valdez v. Cockrell, 274 F.3d 941, 948 (5th Cir. 2001) (rejecting expressly the claim that a petitioner is entitled to a full and fair hearing in state court and, therefore, refusing to disturb a judge’s findings that were admittedly made without reviewing the trial transcripts).
100. Unlike the standard of review problem, the scope of review problem that arises because of the confusion as to the relationship between (d)(2) and (e)(1) has relevance in nearly all cases. There is not, in other words, a ready excuse for the failure of federal courts to explore the relationship of these two provisions with regard to this problem.
provisions and their respective limitations on relief are not identical.\textsuperscript{102} Notably, the shorthand for these two provisions when they are simply conflated into a single standard tracks the restrictive language from each provision—e.g., the finding must be “unreasonable” by “clear and convincing evidence”—but it fails to reflect the fact that only (d)(2) mandates that the federal court’s review in assessing whether relief is available be limited to the evidence contained in the state court record alone.\textsuperscript{103} The failure to recognize (d)(2) and (e)(1) as independent provisions has as one of its effects a drastic limitation on the type of evidence that a federal court may review in adjudicating a habeas petition.

In other words, by imposing the limitations of (d)(2) onto (e)(1), a federal court’s scope of review would be strictly limited to the evidence that was presented to the state court. However, as explained in the body of this Article, the absence of a requirement under (e)(1) that the federal habeas court base its review entirely on evidence that was before the state court both provides a structural reason for viewing (d)(2) and (e)(1) as distinct, and, more importantly, suggests that the substance of a petitioner’s claim could be fundamentally undermined if a federal court treats its review under (e)(1) as limited to the state court record.\textsuperscript{104}

In light of the standard of review and scope of review problems that arise from merely conflating (d)(2) and (e)(1), it is important to consider alternative interpretations of § 2254. Obviously, these alternative interpretations must be consistent with the statutory structure and history of § 2254. If an interpretation is at once more consistent with the structure and purpose of the statute and able to resolve the scope of review and standard of review problems discussed above, such an approach should be adopted as the governing law. There are two alternative interpretations of the independent relationship between (d)(2) and (e)(1) that deserve serious attention.

\textsuperscript{102} See, e.g., Lockyer v. Andrade, 538 U.S. 63, 75 (2003) (distinguishing the deference required by “unreasonableness” from the clear and convincing standard).

\textsuperscript{103} 28 U.S.C. § 2254(d)(2) (noting that relief must be available “in light of the evidence presented in the State court proceeding”).

\textsuperscript{104} Justice Thomas has also provided a poignant example of the substantive harm that can befall petitioners if (d)(2)’s requirements are conveniently blurred into the (e)(1) analysis. In Miller-El (II), the Supreme Court granted a prisoner habeas relief on the grounds that there was substantial evidence that the prosecutor had dismissed jurors on the basis of race. 545 U.S. 231, 235 (2005). In Justice Thomas’s view, the majority’s willingness to grant relief based on “new” evidence presented for the first time in federal court was appalling. Id. at 280 (Thomas, J., dissenting) (“The majority’s willingness to reach outside the state-court record and embrace evidence never presented to the Texas state courts is hard to fathom.”).
consideration: (1) the procedural fairness approach\textsuperscript{105} and (2) the “decision” versus “determination” approach. Both warrant debate, but ultimately the procedural fairness approach is more consistent with congressional intent and due process.

V. INTERPRETIVE APPROACHES FOR UNDERSTANDING THE RELATIONSHIP BETWEEN (D)(2) AND (E)(1)

A. The Procedural Fairness Approach to (d)(2) and (e)(1)

Section 2254(d)(2) provides that a petitioner is entitled to relief if the state court’s determinations of fact are unreasonable.\textsuperscript{106} Obviously related, (e)(1) provides that state court determinations of fact are entitled to a presumption of correctness that can only be overcome by clear and convincing evidence.\textsuperscript{107} Theoretically, then, if all determinations of fact are entitled to a presumption of correctness under (e)(1), even an objectively unfair or unreasonable finding of fact would have to be presumed correct. Although such a harsh result will only happen in certain circumstances,\textsuperscript{108} in an effort to avoid this result altogether, Judge Kozinski provided the first sketch of a comprehensive alternative interpretation of the relationship between (d)(2) and (e)(1).\textsuperscript{109}

In Taylor v. Maddox, Judge Kozinski, writing for a three-judge panel, posited an explanation for the fact that § 2254 has two separate provisions dealing with the deference owed to state findings of fact.\textsuperscript{110} The approach is not the most intuitive, but it enjoys an undeniable logical appeal. Under the Taylor framework, there is an important distinction to be drawn between the intrinsic review of state court findings, which is governed by (d)(2), and the extrinsic review of the record, which is governed by (e)(1).\textsuperscript{111} More precisely, an intrinsic review is a review that is based entirely on the evidence that was before

\textsuperscript{105} This approach has its origins in an opinion authored by Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit. As will become obvious in the discussion that follows, Judge Kozinski’s approach in Taylor v. Maddox, though somewhat unrefined and greatly underanalyzed by commentators and courts, provides an essential springboard for the procedural fairness approach suggested in this Article. 366 F.3d 992, 999-1000 (9th Cir. 2004). Indeed, the approach could fairly be characterized as the Kozinski thesis.


\textsuperscript{107} Id. § 2254(e)(1).

\textsuperscript{108} See, e.g., discussion supra Part IV.

\textsuperscript{109} Taylor, 366 F.3d at 999-1000.

\textsuperscript{110} Id.

\textsuperscript{111} Id.
the state court,112 and an extrinsic review is a review which requires the court to assess the state court’s fact-finding in light of evidence presented for the first time in federal court.113

Moreover, the Taylor opinion identifies certain indicators of unreasonableness; that is, the opinion sets forth a number of triggering conditions that, if present, would give rise to a determination that the state court’s findings were (“intrinsically”) unreasonable for purposes of (d)(2).114 Of course, a petitioner can raise an intrinsic challenge to the sufficiency of the evidence supporting a state’s findings of fact.115 More interesting, however, is the suggestion that other forms of challenge must also be viewed as satisfying the intrinsic review standard set forth in (d)(2).116 Specifically, a finding of fact is unreasonable when: (1) a state court fails to make any specific findings as to a material factual issue; (2) when a legal error by the state court infects the fact-finding of the court; (3) where the state court, in rendering its findings, ignores material evidence that supports the petitioner’s claim; or (4) where the state’s fact-finding process was procedurally defective.117

The procedural fairness approach embraced by this Article regards the fact that the existence of any one of these conditions renders a state court finding unreasonable for purposes of (d)(2) to be of paramount importance to the proper interpretation of the relationship between (d)(2) and (e)(1).118 That is to say, treating as a given that procedurally unfair findings constitute unreasonableness under (d)(2), this approach uses Taylor to flesh out a comprehensive interpretation of the relationship between (d)(2) and (e)(1).119

112. Id. at 999 (defining intrinsic claims as those that are “based entirely on the state record”). “What the ‘unreasonable determination’ clause teaches us is that, in conducting this kind of intrinsic review of a state court’s processes, we must be particularly deferential to our state-court colleagues.” Id. at 999-1000.

113. Id. at 1000.

114. Id. at 1000-01 (“[I]ntrinsic challenges to state-court findings pursuant to the ‘unreasonable determination’ standard come in several flavors . . . .”).

115. To succeed on such a challenge, the petitioner must demonstrate that the state’s finding was not merely wrong, but actually unreasonable. Lockyer v. Andrade, 538 U.S. 63, 75 (2003).


117. Id. at 1000-01.

118. See id.

119. A concise summary of the Taylor approach is contained in Edwards v. Lamarque, 439 F.3d 504, 517-18 (9th Cir. 2005) (Rymer, J., dissenting) (“[A]s we explained in Taylor, when a federal habeas petitioner introduces no new evidence and relies solely on the state court record in challenging a state court factual determination, the proper inquiry is whether the state court made ‘an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’ 28 U.S.C. § 2254(d)(2). Only if a state court factual
Under the procedural fairness approach, whenever a state court’s findings of fact are intrinsically unreasonable—i.e., unreasonable on the basis of the state court record alone—the AEDPA deference embodied in (e)(1) does not apply. Accordingly, this approach avoids the standard of review problem associated with the blurring of (d)(2) and (e)(1) that is commonplace among federal courts. To illustrate, consider the hypothetical petitioner presented in the introduction to this Article who was denied a full and fair opportunity to develop his claim in state court. Under the procedural fairness approach, the prisoner would not be forced to overcome the state court’s findings of fact by clear and convincing evidence as required under (e)(1). Having been denied a procedurally fair opportunity to develop his claim that the expert who testified against him was presenting fraudulent testimony, the petitioner in the hypothetical would not be saddled with the onerous burden of rebutting by clear and convincing evidence a state finding that was procedurally unfair. Instead, the petitioner would be entitled to relief if he could establish by a preponderance of the evidence the facts that were material to his claim.

Comity and federalism are not served by deferring to a state finding where the fact-finding process itself was defective. More precisely, a state finding of fact is “unreasonable” whenever the state court makes specific findings in the absence of a hearing or some other opportunity for the petitioner to present evidence and whenever a state court simply ignores evidence in support of the petitioner’s determination survives this intrinsic review and the petitioner presents new evidence in district court that was not in the state court record may the district court proceed to the extrinsic review contemplated by § 2254(e)(1) and ask whether the new evidence clearly and convincingly shows that the state court factual determination was incorrect.”; see also Rewriting the Great Writ, supra note 4, 1874-76 (suggesting an interpretation that is consistent with the bifurcated analysis applied in Taylor).

120. In other words, Taylor rejects Justice Thomas’s interpretation of § 2254(e)(1), which suggests that a habeas petitioner no longer has a right to “attack[] the process employed by the state [habeas court].” Miller-El v. Cockrell (Miller-El (I)), 537 U.S. 322, 358 (2003) (Thomas, J., dissenting); see also Taylor, 366 F.3d at 1001 (asserting that procedural deficiencies will necessarily render a finding of fact “unreasonable”).

121. See supra notes 93-101 and accompanying text (describing the standard of review problem resulting from federal courts conflating the two provisions).

122. Indeed, a finding based on a procedurally unfair state process would not be entitled to the presumption of correctness afforded to findings under § 2254(e)(1).

123. It remains an open question as to whether a petitioner who overcomes the limitations in (d)(2) and/or (e)(1) must also satisfy the substantive limitations announced in (d)(1). A plain reading of § 2254(d), however, suggests that a de novo (pre-AEDPA) review is sufficient when (d)(2) is satisfied. See 28 U.S.C. § 2254(d) (2000) (requiring unreasonableableness under (d)(1) “or” (d)(2)); Taylor, 366 F.3d at 1013 n.16.

124. See Taylor, 366 F.3d at 999-1001.
To this end, the procedural fairness approach makes sense in light of the facts of Taylor. In the Taylor case, the state court simply failed to consider the only evidence presented by Taylor that tended to support his allegation that his confession had been coerced by police misconduct. As Judge Kozinski made clear, the state court’s failure to adjudicate the claim in light of highly relevant evidence rendered that court’s findings unreasonable under (d)(2). Stressing the nature of a federal court’s duty with regard to inadequate or unfair state fact-finding, Judge Kozinski noted: “In passing section 2254(d)(2), Congress has reminded us that we may no more uphold such a factual determination than we may set aside reasonable state-court fact-finding.” In sum, the procedural effect of Taylor’s disaggregation of (d)(2) and (e)(1) is to stress that the fortifying force of the (e)(1) presumption (“clear and convincing evidence”) only applies when the state finding of fact is premised on a procedurally fair and adequate process. Thus, there is no standard of review problem under this interpretive approach.

The procedural fairness approach to the relationship between (d)(2) and (e)(1), extrapolated to its logical end, also addresses the scope of review concerns that arise when the two provisions are merely conflated. Remember, the scope of review concern is that by blurring the two provisions, federal courts will read the limitation as to what type of evidence may be considered contained in (d)(2) into the (e)(1) analysis. The fear is that all review of state findings will be limited to “the evidence presented in . . . State court.” The procedural fairness approach, as outlined in Taylor, precludes such a narrow reading of the review afforded to a petitioner under (e)(1). Specifically, under this interpretative framework, each factual finding

125. Id. at 1001.
126. Id. at 996-99.
127. Id. at 1005.
128. Id. at 1001. Judge Kozinski notes, however, that the ignored evidence must be “highly probative and central to petitioner’s claim,” insofar as a court is not unreasonable merely because it fails to “address every jot and title of proof suggested to them.” Id.
129. Id. at 1008.
130. As the Ninth Circuit recognized on a separate occasion, when “the state court . . . refuse[s] . . . an evidentiary hearing, we need not of course defer to the state court’s factual findings—if that is indeed how [findings made in the absence of a hearing] should be characterized.” Nunes v. Mueller, 350 F.3d 1045, 1055 (9th Cir. 2003).
131. See supra Part IV (describing the effects of conflating the two provisions).
133. Taylor, 366 F.3d at 999-1000.
must be subjected to an intrinsic review and, if and only if, the finding survives the intrinsic review, an extrinsic review.\footnote{134}{Id.}

Specifically, because the very definition of extrinsic review—“\textit{i.e.,} evidence presented for the first time in federal court”\footnote{135}{Id. at 1000.}—anticipates the use of evidence that was not before the state court, the procedural fairness approach also avoids the scope of review pitfalls inherent in blurring \((d)(2)\) and \((e)(1)\). To illustrate, consider again the hypothetical petitioner who was convicted on the basis of fraudulent expert testimony. Under the procedural fairness approach, nothing precludes the petitioner from introducing affidavits, documents, and other “new” evidence that was not presented to the state habeas court during his federal habeas proceedings. If, for example, the prisoner’s federal lawyer successfully subpoenaed paperwork from the expert and discovered evidence suggesting his fraudulent scheme, this evidence would be considered by the federal court in determining whether he was entitled to habeas corpus relief. This is consistent with basic concerns about federalism insofar as the petitioner would still bear an onerous burden of proof.\footnote{136}{Whether the petitioner would have to satisfy a preponderance of the evidence or clear and convincing evidence standard of review would depend on whether the state court’s adjudication of the claim was procedurally fair. \textit{Taylor}, 366 F.3d at 1013 n.16 (“Where [(e)(1)’s] presumption [of correctness] does not attach, it may be more appropriate to require the petitioner to prove his factual contentions by a preponderance of the evidence.”). Notably, as presented in the hypothetical, the state court did not provide the petitioner with a procedurally fair opportunity to present his claims and, thus, (as an unreasonable finding) deference under § 2254(e)(1) would not be appropriate. In such a case, the petitioner would merely need to rebut the state’s findings by a preponderance of the evidence. In other words, the state’s findings of fact only need to be rebutted by clear and convincing evidence to the extent they are reasonable under § 2254(d)(2), but in either situation “new” extrinsic evidence must be considered by a federal court.}

That is, the petitioner would not get relief merely on the basis of the state court’s unreasonableness, but neither would the state court’s procedural unfairness be rewarded with the deference prescribed in § 2254(e)(1).\footnote{137}{It is important to note that under this approach, a state court’s fact-finding might be unreasonable, or even rebutted by clear and convincing evidence under \((e)(1)\), and yet the petitioner would still not be entitled to habeas corpus relief. In order for a federal court to grant habeas relief, there must be a constitutional violation. 28 U.S.C. §§ 2254(a), 2241 (2000). For example, imagine that the hypothetical judge made two findings of fact: (1) the expert is credible, and (2) the forensic evidence (described by the expert) conclusively links the prisoner to the crime. Imagine further, the petitioner presents evidence demonstrating that the expert lacked all credibility and that he did not really understand the science about which he was testifying. In this situation, the hypothetical petitioner would not be entitled to relief if, despite his lack of credibility, the expert happened to be right, and the petitioner could be conclusively linked to the crime. In such a scenario, there is likely no constitutional harm,
In light of textual support for the procedural fairness approach, and the fact that it addresses the relevant scope of review and standard of review concerns, this interpretation is a compelling alternative to the simplistic and commonplace blurring of (d)(2) and (e)(1). The rough form of this approach as presented in Taylor is not, however, without a potential interpretative problem. There is an interpretive gap that needs further consideration. The problem with the procedural fairness approach's two-tiered interpretive scheme—intrinsic review under (d)(2) and extrinsic review under (e)(1)—is understanding (e)(1)'s relationship to habeas relief.

Under the procedural fairness system of review, a state finding of fact that survives the intrinsic review called for under (d)(2) might, in the second step of the inquiry, be rebutted by clear and convincing evidence under (e)(1). That is, a finding might survive a (d)(2) review insofar as it is intrinsically reasonable, but nevertheless be rebutted by clear extrinsic evidence under (e)(1). Unfortunately, (e)(1) does not expressly provide a basis for granting the habeas corpus petition and Judge Kozinski did not address this problem. Indeed, the prefatory text to § 2254(d) specifically states that a “writ of habeas

138. The text of § 2254(d)(2) does limit the review to a review of the “evidence presented in . . . State court.” Obviously, it would defy the statutory language to read the “unreasonable determination” analysis as involving a review of the evidence discovered through a federal hearing (extrinsic evidence). Likewise, it makes little sense to argue that (d)(2)'s “State court” language is meant to deprive federal courts of conducting an (e)(1) analysis—i.e., following a hearing—of the opportunity to review extrinsic evidence.

139. Taylor, 366 F.3d at 999 (stressing that interpretations that fail to disaggregate the two provisions suffer from “contradiction or redundancy”).

140. Id. at 1000.

141. The importance of extrinsic or “new” evidence to habeas relief cannot be overstated. Whether it is introduced through an evidentiary hearing or through a mere request to supplement the record, evidence discovered for the first time during federal habeas review will quite often be determinative as to whether relief is available in a particular case. In Miller-El (II), for example, Justice Thomas aptly noted that “no one believes” that Miller-El could have proved racial bias by the prosecutors without the benefit of new evidence “unearthed during his federal habeas proceedings.” 545 U.S. 231, 279, 284 (2005) (Thomas, J., dissenting). In Justice Thomas's view, AEDPA requires federal courts to ignore obvious evidence of racial bias that is not discovered until federal proceedings, and thus, he voted to deny Miller-El relief. See id. at 307. But his observation as to the role of “new” evidence is correct. Without the benefit of extrinsic evidence, many valid habeas claims will have to be denied. Thus, considering whether an interpretation of (d)(2) and (e)(1) that avoids this scope of review problem is available is of paramount importance to the writ.

142. See Taylor, 366 F.3d at 992 (focusing on the presumption of validity of state findings under (e)(1) that can be rebutted by a showing of clear and convincing evidence, and notably failing to address the fact that (e)(1) does not expressly provide a basis for relief, like (d)(1) and (d)(2)).
corpus . . . shall not be granted . . . unless” either § 2254(d)(1) or § 2254(d)(2) are satisfied. It is possible to view (e)(1) as providing a basis for habeas relief based on the notion that it defies general notions of due process to deny relief to a petitioner who has proven by clear and convincing evidence that the findings of fact upon which the state court rested its denial of relief were erroneous. But such an abstraction seems, to say the least, tenuous.

The better view is probably that once a petitioner rebuts the presumption under (e)(1), relief may be available under § 2254(d)(1). Under § 2254(d)(1), a petitioner is entitled to relief when a state court’s legal (as opposed to factual) adjudication was “contrary to, or involved an unreasonable application of, clearly established Federal law.” Notably, there is no limitation in (d)(1), like there is in (d)(2), requiring that the adjudication be judged solely on the basis of the facts presented to the state court. Moreover, when federal discovery provides a basis for rebutting state fact findings by clear and convincing evidence—i.e., when the state adjudication rested on facts that were clearly erroneous—it will often follow that the state’s legal adjudication, measured in light of the new facts, will be clearly unreasonable. That is to say, when a state court adjudication of the legal claims was based on material factual errors, relief under (d)(1) will generally be available.

143. 28 U.S.C. § 2254(d) (2000). Relief is available under (d)(1) when the state adjudication of the claim involved “an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” Id. § 2254(d)(1).

144. Notably, Professors Liebman and Hertz are confident that relief is available under either provision. Specifically, a petitioner is entitled to relief under § 2254(d)(2) when a finding is procedurally or substantively unreasonable, and a petitioner is entitled to relief under § 2254(e)(1) if the petitioner can demonstrate by clear and convincing evidence that the finding was incorrect. 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRÁCTICE AND PROCEDURE § 32.4, at 1640 (5th ed. 2005). This Article, by contrast, views § 2254(d) as providing limitations on the forms of available relief, rather than affirmative vehicles for relief; this seems particularly true of (d)(2).


146. See id. § 2254(d).

147. Questions of federal law such as claims of ineffective assistance of counsel are highly fact specific. See e.g., Rompilla v. Beard, 545 U.S. 374, 383-85 (2005) (reviewing the factual scenario that gave rise to an ineffective assistance of counsel claim); Wiggins v. Smith, 539 U.S. 510, 523-25 (2003) (discussing evidence of counsel’s performance in court). Relatedly, it seems wrong to treat (d)(2) is an independent vehicle for habeas corpus relief. Contra RANDY HERTZ & LIEBMAN, supra note 144, § 32.4, at 1639-43 (noting the conditions that must be satisfied for a court to grant relief under (d)(2)). Because it is possible for a petitioner to establish that state findings of fact were “unreasonable” for purposes of (d)(2) and yet still be ineligible for habeas relief, the better view is probably that (d)(2) is simply one of the limitations imposed on courts considering habeas petitions post-AEDPA. In this way, suggesting that relief might be available to a petitioner who rebuts the (e)(1) presumption is
B. The “Decision” versus “Determination” Approach

The second alternative to conflating (d)(2) and (e)(1) requires fewer inferential steps but hinges instead on a very technical reading of the applicable statutory text. Specifically, whereas under § 2254(d)(2), a state court’s decision is reviewed for reasonableness based on the factual findings, under § 2254(e)(1) a state court’s factual determinations are presumed correct and reviewed under a clear and convincing evidence standard. Accordingly, this interpretive approach stresses the distinction between a state court decision and a state court factual determination.

Under this interpretation of the relationship between (d)(2) and (e)(1), a state court’s individual findings of fact are reviewed under (e)(1) and a state court’s ultimate decision is reviewed under (d)(2). That is to say, every individual disputed fact is presumed correct under (e)(1), and every ultimate decision is reviewed for reasonableness under (d)(2).

Thus, analytically this approach is analogous to the

not so different than noting that a petitioner who shows (under (d)(2)) that the state court’s findings are unreasonable based on the state record might be entitled to relief. The critical question in both cases is whether the state court error gives rise to a constitutional error. Cf. Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) (noting that a state’s substantive adjudication need not cite “our cases—indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them”). Of course, if the limitations announced in (d)(2) or (e)(1) are satisfied, it is plausible that the substantive constitutional claim ought to be reviewed de novo and not subject to (d)(1).

148. This approach was labeled the “obvious” interpretation by at least one commentator. Rewriting the Great Writ, supra note 4, at 1874.

149. 28 U.S.C. § 2254(d)(2), (e)(1).

150. In a footnote, the Fifth Circuit purported to apply this interpretation to the interaction between (d)(2) and (e)(1). Valdez v. Cockrell, 274 F.3d 941, 951 n.17 (5th Cir. 2001). As explained infra Part VB, however, the court did not seriously consider the implications of this approach and, therefore, failed to apply the rule to the facts of the case in a meaningful manner.

151. See Valdez, 274 F.3d at 951 n.17.

152. A disputed fact could include any “recital of external events and the credibility of their narrators.” Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963) (quoting Brown v. Allen, 344 U.S. 443, 506 (1953)). However, (e)(1)’s presumption does not apply to determinations of mixed questions of law and fact. See, e.g., Cockrum ex rel. Welch v. Johnson, 934 F. Supp. 1417, 1450 (E.D. Tex. 1996); Wilkins v. Bowersox, 933 F. Supp. 1496, 1506 (W.D. Mo. 1996); see also Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980) (recognizing the distinction between historical facts and mixed questions of fact and law under the very similar “determination of facts” language contained in pre-AEDPA § 2254). That is to say, only findings as to historical facts are entitled to the deference prescribed in (e)(1).

153. The Fifth Circuit described the interpretation similarly: “[A] district court may find by clear and convincing evidence that the state court erred with respect to a particular finding of fact, thus rebutting the presumption of correctness with respect to that fact. See 28 U.S.C. § 2254(e)(1). It is then a separate question whether the state court’s determination of
fairness approach suggested by Judge Kozinski insofar as it calls for two tiers of inquiry; notably, however, the chronological order of the two tiers of analytic inquiry is reversed.\footnote{154}

To illustrate the significance of the bifurcated analysis that is called for under this approach, consider another hypothetical scenario. Assume that a state court decision regarding an ineffective assistance of counsel claim at a capital sentencing hearing is based on a series of factual findings. For example, assume that the state court found:

(1) the defendant waived his right to present mitigation evidence through his conduct and express statements during the sentencing hearing, and (2) the defense counsel’s representation was consistent with the norms of the profession regarding capital representation. On these facts, even if the state court’s findings as to the waiver issue was rebutted by clear and convincing evidence, this would not necessarily entitle the petitioner to relief because there would not be any constitutional harm to the defendant unless his lawyer’s representation was in fact deficient under the Sixth Amendment.\footnote{155} That is to say, rebutting the finding of waiver by clear and convincing evidence would not, without more, render unreasonable the state court’s decision that counsel’s performance was adequate, and the petitioner would not be entitled to relief on his ineffective assistance of counsel claim.\footnote{156}

The hypothetical illustrates the basic principle that “it is possible that, while the state court erred with respect to one factual finding facts was unreasonable in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d)(2).” Valdez, 274 F.3d at 951 n.17.

154. Under the fairness approach, a federal court is required first to assess the reasonableness of the state court’s findings (intrinsic review). Taylor v. Maddox, 306 F.3d 992, 999-1000 (9th Cir. 2004). Only when the findings are intrinsically reasonable does the court proceed to the extrinsic review under (e)(1). Id. In contrast, under the decision versus determination approach, each individual finding is first reviewed under (e)(1) and only if a finding is rebutted by clear and convincing evidence would a court need to reach the (d)(2) analysis. Valdez, 274 F.3d at 951 n.17. That is, under the second prong of the decision versus determination approach, a finding (determination) that is rebutted by (e)(1) provides a basis for relief only when the state court relies on that erroneous finding in support of its ultimate decision. Id.

155. U.S. CONST. amend. VI.

156. The key to this bifurcated analysis is that a petitioner would only be entitled to relief if the factual finding he was able to rebut directly contributed to a constitutional injury. Where, as in the hypothetical posed in this paragraph, the petitioner rebuts a finding of fact that is collateral to the constitutional harm, relief is not available. In this case, the question of waiver might be a threshold determination insofar as a petitioner who waives mitigation is not entitled to habeas relief, but only by showing that both the findings as to waiver and deficient performance were erroneous would the petitioner be entitled to relief. The fairness approach would dictate a substantially similar result; whether the finding of waiver was found to be unreasonable under (d)(2), or rebutted under (e)(1), the petitioner would not be entitled to relief on this basis alone.
under § 2254(e)(1), its determination of facts resulting in its decision in the case was reasonable under § 2254(d)(2).” From a practical standpoint, however, an erroneous factual finding will generally entitle the petitioner to habeas relief. As the Supreme Court reminded lower courts in *Wiggins*, any “reliance on an erroneous factual finding . . . highlights the unreasonableness of the state court’s decision.” Accordingly, the value of the decision versus determination approach, in large part, depends on whether the initial inquiry under (e)(1) is interpreted so as to allow the use of extrinsic evidence, and if so, whether the resulting rebuttal of a finding of fact has effect under (d)(2).

To date, the only federal opinion that has expressly acknowledged this interpretation is the United States Court of Appeals for the Fifth Circuit’s *Valdez* decision. This is unfortunate because the *Valdez* opinion, which relegates this important issue to a couple sentences at the end of a lengthy footnote, does not showcase the potential of this interpretive approach. In *Valdez*, the court was confronted with an important question as to the deference owed to a state court’s habeas decision. The state court’s denial of relief was based on a decision that was issued by a judge who: (1) did not read the record and (2) lost some of the trial exhibits. Addressing these facts head-on, the Fifth Circuit held “that a full and fair hearing is not a precondition to

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157. *Valdez*, 274 F.3d at 951 n.17. This quote reveals what is probably the fundamental flaw of the decision versus determination approach, as it is presented in the *Valdez* opinion. Under this view, it seems that a rebutted factual determination (under (e)(1)) would only trigger a (d)(2) review of the state court’s ultimate decision. In fact, however, it will generally make more sense for a federal court to review a state court’s decision under (d)(1) insofar as (d)(1) is the ultimate gatekeeper for legal/constitutional relief.


159. *Id.* Accordingly, if a state court *decision* relies on a single erroneous factual finding, the state court’s decision is unreasonable under § 2254(d)(2). Of course, this begs a critical question: What sort of evidence may be reviewed—i.e., extrinsic evidence in assessing whether the state court’s individual findings were unreasonable? And equally important, is the fact of an unreasonable state court decision (under (d)(2)), without more, a basis for habeas relief?

160. See *Valdez*, 274 F.3d 941, 951 n.17.

161. See *id.* Notably, however, the *Valdez* decision rested its holding that procedural fairness is no longer a prerequisite for the presumption of correctness to attach on the fact that the term “adjudication” has a very broad definition under § 2254(d). *Id.* at 950. Specifically, in *Valdez*, the petitioner alleged that a state court does not “adjudicate” a claim for purposes of § 2254(d) unless its findings are based on a full and fair hearing. *Id.* at 944-45. By contrast, the approach suggested in this Article is that the full and fair requirement is still part of the analysis, not as a question of adjudication, but as a question of whether the state’s findings were unreasonable under § 2254(d)(2).

162. *Id.* at 944-46.

163. *Id.* at 944.
accorded § 2254(e)(1)’s presumption of correctness to state habeas court findings of fact.\[164\] Fortunately, the question of whether AEDPA deference applies to a state finding that was rendered in the absence of a full and fair hearing is an issue of statutory interpretation, not a defining feature of the decision versus determination approach. Accordingly, although \textit{Valdez} is the only case that purports to apply this interpretive approach, the ultimate holding of the case does not necessarily follow from this general interpretive approach.\[165\]

Indeed, it is possible for the textually technical decision versus determination approach to be applied so as to alleviate the very standard of review concerns that the Fifth Circuit refused to resolve in \textit{Valdez}. As discussed above, the mere conflation of (e)(1) and (d)(2) may result in state findings that are derived from inherently unfair state proceedings being entitled to an exacting level of deference.\[166\] The procedural fairness approach addresses this standard of review concern by expressly recognizing that a procedurally unfair state finding fails to satisfy the reasonableness strictures of (d)(2).\[167\] Arguably, the decision versus determination approach could be interpreted in an analogous manner so that all procedurally defective findings would be recognized as, per se, ineligible for deference. Unfortunately, a per se rejection of deference to procedurally unfair proceedings is not as analytically clear under the decision versus determination approach.

It is easy to understand how a procedurally unfair finding fails under the first prong of the procedural fairness model’s two-tiered approach; it is rather intuitive to recognize procedurally unfair findings as per se unreasonable.\[168\] By contrast, the first tier of inquiry under the

\[164\] \textit{Valdez}, 274 F.3d at 951; see also Miller-El v. Cockrell (\textit{Miller-El (I)}), 537 U.S. 322, 358 (2003) (Thomas, J., dissenting) (asserting that procedural complaints can no longer be used to determine the appropriate level of deference to be given to findings of fact); \textit{Valdez}, 274 F.3d at 949 (“These amendments jettisoned all references to a ‘full and fair hearing’ from the presumption of correctness accorded state court findings . . . .”). \textit{Valdez} is truly an important example of what can happen if AEDPA is interpreted as entitling state court findings to deference in the absence of a full and fair process. The \textit{Valdez} decision applied the (e)(1) presumption of correctness to state findings when: (1) “the state habeas court lost the exhibits admitted into evidence,” and thus could not consider that evidence, and (2) the state habeas judge stated that he “did not intend to” read the trial record because he “did not have the time.” \textit{Id.} at 944 (internal quotation marks omitted).

\[165\] It is, however, a serious note of caution for practitioners arguing that this interpretive approach should be applied. There is a realistic danger that a careless court might treat the \textit{Valdez} opinion's holding as to the “full and fair hearing” issue as fundamentally linked to the court’s purported view that (d)(2) and (e)(1) provide for two distinct types of analysis.

\[166\] \textit{See supra} Part IV (discussing the impacts of conflating (d)(2) and (e)(1)).

\[167\] Taylor v. Maddox, 366 F.3d 992, 1000-01 (9th Cir. 2004).

\[168\] \textit{See id.}
decision versus determination approach is an assessment of whether the finding has been rebutted by clear and convincing evidence.\textsuperscript{169} It is obviously much less clear that a procedurally unfair factual finding is per se rebutted by clear and convincing evidence.\textsuperscript{170} That is to say, if individual findings of fact are reviewed under (e)(1) rather than (d)(2), there is a requirement that a presumption of correctness be rebutted by clear and convincing evidence.\textsuperscript{171}

Nonetheless, the decision versus determination approach does not necessarily foreclose the possibility that procedurally unfair findings will be stripped of the deference traditionally afforded to state court findings of fact under AEDPA. The Supreme Court has recognized that even “partial reliance on an erroneous factual finding . . . highlights the unreasonableness of the state court’s decision.”\textsuperscript{172} By analogy, it is logical to conclude that any decision, for purposes of (d)(2), is unreasonable if it relies on a procedurally unfair (unreasonable) finding of fact.\textsuperscript{173} There is not, in other words, any

\begin{footnotesize}
\begin{enumerate}
\item 169. \textit{Valdez}, 274 F.3d at 951 n.17.
\item 170. Indeed, part of the procedural fairness approach’s intuitive appeal is that it avoids concealing procedurally unfair findings in a cloak of deference.
\item 173. In other words, in order to avoid a system that rewards a state for denying prisoners a meaningful opportunity to develop their constitutional claims, under either interpretive approach, it is necessary to recognize that findings made in the absence of a full and fair hearing are per se unreasonable. This does not mean that every petitioner who is denied a hearing is entitled to relief, simply that findings made in the absence of a hearing are not entitled to heightened deference. See \textit{Nunes v. Mueller}, 350 F.3d 1045, 1055 (9th Cir. 2003); \textit{Bryan v. Mullin}, 335 F.3d 1207, 1214-15 (10th Cir. 2003); \textit{Valdez}, 274 F.3d at 961-68 (Dennis, J., dissenting). In \textit{Bryan v. Mullin}, for example, the Tenth Circuit, sitting en banc, rejected the application of § 2254(d) deference in certain contexts. 335 F.3d at 1214-15. The en banc court stressed that deference under § 2254(d)(2) is not appropriate when the state court has failed to hold an evidentiary hearing. \textit{Id.} at 1216. As the court put it, “because the state court did not hold any evidentiary hearing, we are in the same position to evaluate the factual record as it was.” \textit{Id.} (internal quotation marks omitted). Skeptics of a per se approach will likely point to the language in cases like \textit{Nunes} that note that “there may be instances where the state court can determine without a hearing that a criminal defendant’s allegations . . . would not justify relief even if proved.” \textit{Nunes}, 350 F.3d at 1055. This language does not, however, undermine the need for a per se entitlement to an evidentiary hearing whenever a colorable claim is alleged. Even under the per se approach urged by this Article, a state court need not, of course, hold an evidentiary hearing when the facts alleged by the petitioner would not entitle him to relief. \textit{See Townsend v. Sain}, 372 U.S. 293, 312 (1963) (recognizing that a petitioner alleging a colorable claim is entitled to an evidentiary hearing if he was denied a full and fair hearing in state court). That is to say, there is no reason to require state courts to hold an evidentiary hearing as to a claim that is facially meritless. On the other hand, it is incongruous to allow a federal district court to conduct a full evidentiary hearing under \textit{Townsend} so as to permit the petitioner to rebut findings of fact under (e)(1), only to require the court to defer to state findings of fact made in the absence of adequate proceedings.
\end{enumerate}
\end{footnotesize}
reason to treat a procedurally unfair decision as reasonable simply because none of the factual determinations underlying the decision can be substantively rebutted. In this way, the decision versus determination interpretation would end up looking a great deal like the procedural fairness approach on this particular interpretive point: All state court decisions based on findings made in the absence of adequate procedures are deemed “unreasonable” and deference under (e)(1) would not apply.174 Perhaps the decision versus determination approach resolves the standard of review problem with somewhat less interpretive fidelity—i.e., it requires bypassing or ignoring the first prong of the inquiry—but ultimately the fairness approach also requires a reviewing court to ignore (e)(1) as to instances of procedural unfairness. More to the point, this strained reading of (e)(1) must be forgiven in view of the legislative history of the act.175

The decision versus determination approach may also translate into a solution for the scope of review problem presented by merely blurring (d)(2) and (e)(1). One serious concern that arises when the two provisions are blurred is that contrary to the plain text of (e)(1), all review of state court findings would have to be based exclusively on the evidence presented to the state court.176 As noted above, the decision versus determination approach provides for two separate tiers of analysis, starting with (e)(1) as the first level of inquiry and ending with a reasonableness analysis under (d)(2).177 Because the plain text of (e)(1) does not contain any limitations on the sort of evidence that may be considered when a federal court assesses whether the state court’s individual findings could be rebutted by clear and convincing evidence, it stands to reason that an analysis under (e)(1) could rely on extrinsic evidence presented for the first time in federal court.178 And if extrinsic evidence is relevant to the first prong, (e)(1), of the inquiry—i.e., for demonstrating the inaccuracy of a finding of fact—it would be odd indeed to exclude this evidence in the second and relief-determinative prong of the analysis—i.e., whether the state court’s decision was unreasonable under (d)(2).

174. See Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004). Accordingly, the petitioner introduced in the hypothetical could fare just as well under this approach as he does under the Kozinski approach. In either case, the deference of (e)(1) simply does not apply when the state’s findings of fact are made through a procedurally unfair process. Likewise, a state court decision based on such findings is inherently unreasonable.
175. See discussion infra Part VI.
176. See supra notes 102-106 and accompanying text.
177. See supra notes 153-156 and accompanying text.
The problem, of course, is that § 2254(d)(2)’s reasonableness analysis is expressly limited to evidence presented to the state court. 179  

The simplest formulation of this problem is: should the permissibility of extrinsic evidence under (e)(1) trump the impermissibility of extrinsic evidence under (d)(2)? It is tenable to argue that if (e)(1)’s review of individual findings (based on extrinsic evidence) is plugged back into § 2254(d)(2), as opposed to § 2254(d)(1), the express limitations contained in (d)(2) govern the federal court’s adjudication. 180  

And this is likely the decision versus determination approach’s greatest weakness, from the perspective of those who view resolving the scope of review problem as essential to the preservation of the writ. 181  

But this problem is not without remedy. Even aside from the obvious approach, arguing that (e)(1)’s broader scope of review cannot merely be read out of the statute by combining (d)(2) and (e)(1) into a two-tiered inquiry, there is another analytic step that can be taken in order to salvage the decision versus determination approach.  

Specifically, to the extent a state court’s rebutted findings of fact under (e)(1) are plugged back into (d)(1) rather than (d)(2) for purposes of assessing a petitioner’s eligibility for relief, the scope of review problem could be avoided. Section 2254 provides two alternative limitations on the availability of relief: (1) a petitioner is not entitled to relief unless he can prove the unreasonableness of the state court’s legal analysis under (d)(1), or (2) a petitioner is not entitled to relief under (d)(2) if he fails to establish the unreasonableness of the state court’s factual findings. 182  

It is not surprising, then, that federal courts typically link the question of whether factual findings were rebutted under (e)(1) with the question of whether relief is available under (d)(2) insofar as these are the only two provisions in AEDPA dealing with state findings of fact. 183  

A question that has gone remarkably unanalyzed, however, is whether a petitioner could seek relief under § 2254(d)(1) after rebutting a state court’s findings of fact on the basis of extrinsic evidence under § 2254(e)(1).

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179. See id. § 2254(d)(2).  
180. See id. § 2254.  
181. Obviously, if the limitation in (d)(2) is given conclusive force under the decision versus determination approach so that procedurally unfair findings will be adjudicated without benefit of extrinsic evidence, the procedural fairness approach is the only solution that resolves the standard of review problem discussed throughout this Article.  
183. See id. § 2254 (d)(2), (e)(1).
Because a prisoner is only entitled to relief if he is able to prove a constitutional harm, arguably § 2254(d)(1) is always relevant to a determination of whether habeas corpus relief is available. Stated another way, a prisoner could be entitled to relief without satisfying the strictures of (d)(2)—i.e., state court record limitation—but it seems unlikely that relief is available to a prisoner who satisfies (d)(2) absent some sort of inquiry under (d)(1). Whether a finding of fact is unreasonable under (d)(2) will, in many cases, be irrelevant to the question of whether relief is available. In any given habeas case, a state court judge might make dozens of findings of fact, but it is only those findings of fact that, if rebutted, would demonstrate a constitutional harm that could entitle a petitioner to relief. In other words, a petitioner’s ability to rebut nonmaterial or frivolous findings of fact under the standard set forth in (d)(2) does not, as a matter of law, entitle him to relief. Instead, the petitioner must demonstrate that the factual error somehow infected the adjudication of the constitutional issues. In short, although (d)(2) provides an independent basis for denying a petitioner’s claim for relief, it is less clear that this provision alone would allow for relief.

Recognizing that (e)(1) determinations can (and probably should) ultimately be evaluated under § 2254(d)(1), it is easy to understand

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184. Admittedly, this is uncharted territory. Courts typically do not analyze (d)(2), much less grant relief on the basis of an unreasonable finding of fact alone. Habeas relief, almost without exception, turns on whether there was an unreasonable application of Supreme Court precedent. Id. § 2254(d)(1). It seems odd (even pernicious) to suggest reading the “or” out of § 2254(d), but in light of the fact that there must be a constitutional—i.e., legal—claim, some will conclude that all petitions for relief have to be cycled through some form of a (d)(1) analysis. The (preferable) alternative to reading (d)(1) as perhaps the exclusive vehicle for relief would be to suggest that by satisfying (d)(2) a petitioner is entitled to a de novo review of the legal claims. This may be the most equitable result; however, it is probably on tenuous ground in light of the Supreme Court’s extreme reluctance to avoid deferring to a state court decision, even when the state’s decision fails to cite or apply the applicable federal law. See Early v. Packer, 537 U.S. 3, 10-11 (2002) (per curiam).

185. 28 U.S.C. § 2254(d). At a minimum, a de novo review of the constitutional claim would be required.

186. Id. § 2254(a).

187. See id.

188. See id.

189. For example, it seems implausible to suggest that an unreasonable finding of fact could entitle a petitioner to relief on a colorable constitutional claim that is not, as (d)(1) requires, clearly established federal law. But see Davis v. Grigas, 443 F.3d 1155, 1159 (9th Cir. 2006) (suggesting the availability of relief even when (d)(1) could not be satisfied).

190. From the perspective of habeas corpus petitioners, it would seem dubious to ignore the “or” between (d)(1) and (d)(2) and treat (d)(1) as the only vehicle for habeas relief. But to the extent this interpretive trade-off gives up the possibility of relief under (d)(2) in exchange for clarity as to the issue of whether extrinsic evidence is relevant to federal habeas
how (e)(1) can provide an avenue for habeas relief under the decision versus determination approach. Just as an unreasonable finding of fact under (d)(2) does not, without more, give rise to relief, neither would a petitioner’s ability to rebut a nonmaterial fact by clear and convincing evidence under (e)(1) entitle him to relief. ¹⁹¹ But just as a petitioner who proves a finding of fact unreasonable would be entitled to relief if that finding illuminates constitutional error on the part of the state court, if a petitioner rebuts a finding of fact through the use of extrinsic evidence and, in light of the rebutted fact, a state court’s adjudication of the clearly established law would be unreasonable for purposes of (d)(1), that petitioner is entitled to relief. There is no reason to view the relationship between (e)(1) and (d)(2) as more relevant than the interaction between (e)(1) and (d)(1) for purposes of relief. ¹⁹²

Thus, to the extent that courts acknowledge the relationship between (d)(1) and (e)(1), rather than simply blurring (d)(2) and (e)(1), the decision versus determination approach is capable of addressing the scope of review problem. Notably, however, if (d)(1) provides the critical second step in the inquiry—i.e., first an analysis under (e)(1) claims, on the whole habeas petitioners will be much better off. As noted above, even a claim that arises under (d)(2) must present an issue of constitutional harm. See discussion supra note 156. That is to say, a petitioner seeking relief for erroneous factual findings under (d)(2) must still demonstrate that these erroneous findings of fact somehow infected the state’s constitutional inquiry. Notably, not even the Taylor decision, which holds that procedural unfairness constitutes unreasonableness for purposes of (d)(2), holds that relief is available on this basis alone. Taylor v. Maddox, 366 F.3d 992, 1001 (9th Cir. 2004). Instead, Judge Kozinski suggests that after a state’s findings are deemed unreasonable per (d)(2), the federal court should make its own findings and then assess whether in light of the federal court’s findings the state court’s adjudication was “an objectively unreasonable application of Supreme Court precedent.” Id. at 1014. Thus, even under Taylor, if a state court’s adjudication of the facts is unreasonable: (1) the federal court’s review of the facts is de novo, and (2) the federal court’s review of the state court’s legal conclusion is reviewed (on the basis of the newly found facts) under the (d)(1) standard. Id. at 999-1001. In short, there is little to gain and much to lose by clinging to the promises of relief contained in the “or” separating § 2254(d)(1) and § 2254(d)(2). Habeas scholars and practitioners will be better served if they acknowledge the ubiquitous role (d)(1) plays in habeas relief determinations and focus on the fact that (d)(1) does not limit them to the state’s factual record.

¹⁹¹. See 28 U.S.C. § 2254(a) (requiring a constitutional harm).

¹⁹². There is no direct authority for the proposition that relief might be available on the basis of (d)(2) even when the basic strictures of (d)(1) are not also satisfied. But see Davis v. Grigas, 443 F.3d 1155, 1159 (9th Cir. 2006). Although factual unreasonableness by a state court seems to justify a de novo review of the factual record by a federal court, it is unclear whether factual unreasonableness dictates de novo review of the substantive claim. To the extent that Davis is a correct interpretation of § 2254(d)(2), then (d)(2) represents a freestanding and independent basis for habeas relief, and it would be a mistake to merely ignore it.
and then (d)(1)—then the “decision” at issue for purposes of the
decision versus determination approach is that of (d)(1), not (d)(2).\textsuperscript{193}

Because there is no Supreme Court case on point, federal
appellate courts across the country continue to disagree over the
precise relationship between (d)(2) and (e)(1).\textsuperscript{194} Particularly troubling,
a number of federal circuits seem to view the fact that (d)(2) and (e)(1)
are independent provisions as entirely irrelevant and act, on the basis
of this assumption, as though the standards simply can be blurred.\textsuperscript{195}
The confusion and conflation over these two provisions has created
great risk of harm for petitioners with valid constitutional claims.\textsuperscript{196}
Accordingly, while it is analytically tedious, the Supreme Court should
expressly adopt one of the two analytic approaches discussed above.

The adjudication of the Great Writ cannot countenance interpretations
that affirmatively reward state courts for rendering their findings
through a procedurally unfair process\textsuperscript{197} or that preclude a petitioner
from presenting convincing new evidence discovered for the first time
during federal proceedings.\textsuperscript{198} Indeed, the general aims of comity and
federalism embodied in AEDPA are not served by such readings of the
§ 2254.\textsuperscript{199} More to the point, as the next section discusses, the
legislative history and statutory structure strongly suggest that courts
are obliged to interpret the relationship between (d)(2) and (e)(1) in a
manner that addresses the standard of review and scope of review
problems raised in this Article.

VI. EVALUATING THE APPROACHES UNDER THE STRUCTURE AND
HISTORY OF THE STATUTE

Having introduced two analytic models for considering the
interaction between (d)(2) and (e)(1) that are plausible under the text of
§ 2254, it is now appropriate to consider whether these proposed
interpretations are consistent with the statute’s structure and legislative
history. To justify a bold, bright-line statutory construction suggested

\textsuperscript{193}. Like the decision versus determination approach, the procedural fairness
approach will only yield relief when the state’s unfair process contributed to a constitutional
harm.

\textsuperscript{194}. See cases cited supra note 30.

\textsuperscript{195}. See discussion supra Part III.

\textsuperscript{196}. See discussion supra Part IV.

\textsuperscript{197}. See Valdez v. Cockrell, 274 F.3d 941, 951 (5th Cir. 2001) (holding that a state
court is not required to afford petitioners a full and fair opportunity to develop their claims).

that the relationship between (d)(2) and (e)(1) is at the heart of the a resolution of the scope of
review problem).

\textsuperscript{199}. See Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004).
as to the standard of review and scope of review problems, the suggested interpretations must enjoy a foundation in the structure and/or statutory history of § 2254.200

As a general matter, there is little useful legislative history concerning § 2254(d)(2) and (e)(1).201 As one commentator noted: “This statutory language had no habeas pedigree; for example, it was not taken from any Supreme Court decision, like other AEDPA provisions, nor was it part of any previous habeas reform proposal offered by Congress or a habeas scholar.”202 However, the limited notes and debate available on § 2254(d) as a whole, combined with the structure of the statute, provide reasonably strong support for the two key aspects of the interpretive approaches suggested in this Article. Specifically, the history and structure reinforce the view that (1) § 2254 requires a state to have afforded the petitioner a “full and fair” opportunity to present his claims before the state findings will be entitled to deference, and (2) it is permissible for petitioners to rebut the state’s findings of fact based on newly discovered evidence presented for the first time in federal court.

A. Standard of Review Problem: Is a “Full and Fair Hearing” Required?

1. Statutory Structure

There is currently a circuit split as to a fundamental question of habeas practice: whether the state must afford the petitioner a full and fair hearing on his claim in order for the state’s findings of fact as to that claim to be entitled to deference.203 The two interpretations of (d)(2) and (e)(1) detailed in this Article are compatible with the conclusion that the full and fair adjudication of a claim is a prerequisite

200. See United Steelworkers of Am. v. Weber, 443 U.S. 193, 253-54 (1979) (noting that when the correct interpretation is not clear, the court will look to the statute’s legislative history).

201. It appears that there are no real debates or notes as to § 2254(e)(1).


203. Compare Valdez v. Cockrell, 274 F.3d 941, 951 (5th Cir. 2001) (refusing to require a full and fair hearing), with Nunes v. Mueller, 350 F.3d 1045, 1055-56 (9th Cir. 2003) (“If the state had first conducted an evidentiary hearing and had then arrived at the same inferences and credibility determinations, we would not be second-guessing those procedures and results as objectively unreasonable.”), and Killian v. Poole, 282 F.3d 1204, 1208 (9th Cir. 2002) (“Having refused Killian an evidentiary hearing on the matter, the state cannot argue now that the normal AEDPA deference is owed the factual determinations of the California courts.”).
to deference.\textsuperscript{204} The limited legislative history and the structure of § 2254 suggest that this is the correct interpretation.

Requiring that habeas petitioners be afforded a fair opportunity in state court to develop the facts of their claims seems like a laudable approach in that it provides for deference consistent with our system of federalism, but restrained by certain first principles of due process. For decades prior to the enactment of AEDPA, § 2254 specifically provided that a presumption of correctness only attached to state court findings of fact that were developed through a “full and fair hearing.”\textsuperscript{205} Specifically, the statute provided that a state’s findings were not entitled to a presumption of correctness if “the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing.”\textsuperscript{206} In 1996, AEDPA omitted the express requirement of a full and fair hearing from the text of § 2254(d) and § 2254(e).\textsuperscript{207} The confusion, therefore, centers on what, if any, effect the omission of the “full and fair hearing” language from the new version of § 2254(d) and (e) should have on a court’s interpretation of statute.\textsuperscript{208}

As an initial matter, it is unlikely that the omission of the “full and fair hearing” language could, standing alone, fairly be construed as an affirmative repudiation of a basic requirement of procedural fairness.\textsuperscript{209} Generally speaking, courts may not infer that a legislative enactment is “intend[ed] to overthrow long-established principles of law unless that intention is made clear, through appearing either by

\begin{itemize}
\item \textsuperscript{204} See supra Part V.
\item \textsuperscript{205} 28 U.S.C. § 2254(d)(2) (1994) (repealed 1996) (refusing to presume that a state’s findings of fact are correct if the state court did not provide a “full and fair hearing”). In \textit{Valdez}, the Fifth Circuit rested its conclusion that petitioners need not be afforded “a full and fair hearing” on the fact that the new version of § 2254 does not explicitly contain such a requirement. \textit{Valdez}, 274 F.3d at 949-50.
\item \textsuperscript{207} Id. § 2254 (Supp. II 1996).
\item \textsuperscript{208} For the sake of clarity, it should be noted that AEDPA replaced the former § 2254(d) with two new provisions: § 2254(d)(2) and § 2254(e)(1). \textit{6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 28.7(a), at 105 (rev. 2d ed. 2004)}.
\item \textsuperscript{209} \textit{Valdez}, 274 F.3d at 973 (Dennis, J., dissenting) (“My greatest disappointment with the majority opinion concerns my colleagues’ apparent belief that silence in the text of the AEDPA signifies affirmative repudiation by Congress of the pre-existing body of habeas corpus law, including ‘general notions of procedural regularity and substantive accuracy.’ Although the majority’s approach may constitute sound statutory construction in appropriate instances, in the present case it ignores the delicate balance struck by the Supreme Court among competing concerns of federalism, due process, Article III jurisdiction, faithfulness to Congressional enactments, and the importance of the Great Writ to our legal tradition.” (footnotes omitted)).
\end{itemize}
express declaration or by necessary implication."\(^{210}\) There is no such explicit declaration or implicit necessity in the context of § 2254.\(^{211}\)

Quite the contrary, reading the new § 2254 as imposing a requirement on federal courts that they “accept state court findings at face value—no questions asked,”\(^{212}\) requires a shoddy form of textual analysis that fails to account for several omissions from the text of the new § 2254. Specifically, in addition to the omission of the “full and fair hearing” language, the new § 2254 does not expressly require that the state’s findings be in writing, that the proper parties be before the court, or even that the state court had jurisdiction over the matter.\(^{213}\) Like the full and fair hearing requirement, each of these other procedural requirements were expressly provided for in the previous version of § 2254 and omitted from the 1996 version.\(^{214}\) It is simply not reasonable to conclude that the new § 2254 preserves the presumption of correctness while eliminating every procedural contingency that justified the presumption.\(^{215}\) Nor is it reasonable to simply cherry-pick the “full and fair hearing” requirement as the single omission that is operative.\(^{216}\) Thus, in light of the overall text and


\(^{211}\) 28 U.S.C. § 2254 (2000). There does not appear to be any case that has simultaneously recognized a state proceeding as unfair and applied (e)(1) deference, at least not explicitly. But a slight dose of judicial realism dictates that in the cases involving the worst of the worst, where our constitutional checks are of the utmost importance, this presumption under (e)(1) will undoubtedly serve the interest of a chambers or a panel bent on denying relief. See JEROME FRANK, LAW AND THE MODERN MIND 100-01 (1930) (stating that judges’ decisions are often based on a conclusory process). Moreover, courts will oftentimes be able to avoid the question of whether the state proceedings were procedurally unfair by simply treating that issue as immaterial. See, e.g., Valdez, 274 F.3d at 946 (“We need not address [whether the petitioner was denied a fair hearing] because we find that even if the state habeas court denied Valdez such a hearing, a full and fair hearing is not a prerequisite to the operation of AEDPA’s [deference].”).

\(^{212}\) Larry W. Yackle, Developments in Habeas Corpus (Part 2), CHAMPION, Nov. 21, 1997, at 16, 17.


\(^{214}\) See discussion supra note 213.

\(^{215}\) Yackle, supra note 212, at 17. But see Lambert v. Blackwell, 387 F.3d 210, 239 (3d Cir. 2004) (“In other words, the extent to which a state court provides a ‘full and fair hearing’ is no longer a threshold requirement before deference applies; but it might be a consideration while applying deference under § 2254(d)(2) and § 2254(e)(1).”).

\(^{216}\) See 17B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, FEDERAL PRACTICE AND PROCEDURE § 4265.2, at 354-55 (2007) (noting that the new statute does not require the state court to have been a “court of competent jurisdiction,” the applicant for the writ and the State to be parties, or the state findings to be made in writing); see also Valdez, 274 F.3d at 966 (Dennis, J., dissenting)
structure of the two versions of § 2254, the omission of the “full and fair” language from the new version of § 2254 may not, as a matter of sound statutory interpretation, dictate that basic requirements of procedural fairness (“reasonableness”) are no longer required.

2. Legislative History

In addition to the structure of the statute, the limited relevant statutory history also compels the conclusion that the omission of the “full and fair” language was not intended to signal a desire on the part of Congress to afford deference to procedurally unfair state court proceedings. There are four pieces of legislative history that, particularly in the aggregate, support the conclusion that procedural fairness in state court is a prerequisite for deference to factual findings. Specifically, the committee statement, the presidential signing statement, the floor debate, and, in particular, the proposals that were rejected in favor of the version of § 2254 that was eventually enacted, all indicate that the omission of the “full and fair” language was not intended to eliminate the requirement that state courts render their fact-findings in a procedurally fair manner.

First, it is generally acknowledged that AEDPA does not displace the whole of habeas law as it existed prior to 1996; rather, AEDPA refines certain aspects of habeas law while leaving intact the general corpus of law. That is, AEDPA operates so as to construe the “preexisting habeas landscape as its baseline.” Read in light of this
general guidance, the rather generic legislative history is considerably more illuminating.\textsuperscript{222}

At bottom, federal habeas jurisdiction has long afforded federal courts the right to award relief to prisoners who are held in violation of federal law.\textsuperscript{223} This right to review state convictions for errors of federal law is the touchstone of habeas law, and the debates and text of § 2254 stress that the core of this review remains intact.\textsuperscript{224} As the floor manager for debate in the Senate, Senator Orrin Hatch stressed to his colleagues that the new § 2254 must be read as fundamentally “preserving and protecting the constitutional rights of those who are accused.”\textsuperscript{225} Other senators and congressmen made similar statements.\textsuperscript{226} In 1996 when he signed AEDPA into law, President Clinton issued a statement suggesting that the basic fairness of procedure expected of state habeas courts would remain intact.\textsuperscript{227} Specifically, in expressing his understanding of the bill, President Clinton stated that he did not read § 2254 to “deny litigants a meaningful opportunity to prove the facts necessary to vindicate Federal rights.”\textsuperscript{228}

It is quite difficult to understand how a reading of § 2254 that requires deference to state findings of fact made in the absence of a “full and fair” hearing can be understood as preserving a petitioner’s right to a “meaningful opportunity” to develop the facts supporting his claim.\textsuperscript{229} Indeed, President Clinton expressly noted that there would be “serious constitutional questions” if § 2254 were read as imposing limits on a petitioner’s right to develop the record outside of the express limitations requiring petitioner diligence contained in

\begin{itemize}
\item \textsuperscript{222} 1 HERTZ & LIEBMAN, supra note 144, § 3.2, at 114-17 (summarizing the changes to longstanding habeas law effected by AEDPA).
\item \textsuperscript{224} Obviously, it is significant that § 2254(d) limits relief to those cases where the state court’s adjudication of the claim was “contrary to, or involved an unreasonable application of, clearly established Federal law” or “resulted in a decision that was based on an unreasonable determination of the facts.” Id. § 2254(d) (2000). However, there was genuine fear among commentators that § 2254 would be amended so as to strip federal courts of the right to review the substance of a claim that was fairly adjudicated in state court. See, e.g., Yackle, supra note 218, at 438-39.
\item \textsuperscript{225} 141 CONG. REC. S7479 (daily ed. May 25, 1995) (statement of Sen. Hatch).
\item \textsuperscript{227} William J. Clinton, Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 PUB. PAPERS 630, 631 (Apr. 24, 1996).
\item \textsuperscript{228} Id. (emphasis added).
\item \textsuperscript{229} See, e.g., Valdez v. Cockrell, 274 F.3d 941, 949-50 (5th Cir. 2001).
\end{itemize}
§ 2254(e)(2). Thus, in general terms, both the presidential signing statement and the legislative debate strongly suggest that reading the requirement of minimal procedural fairness out of § 2254, as the Fifth Circuit did, is inconsistent with the interpretation given to the statute by its drafters and the signatory who executed it into law.

Other important sources of insight regarding the congressional intent behind the decision to omit an explicit reference to the “full and fair hearing” requirement are the alternative versions of § 2254 proposed by members of Congress. Commentators have pointed out that the current language of § 2254 does not enjoy any “habeas pedigree” insofar as it was not taken from case law (as many other provisions were), and it was not taken from a habeas reform proposal offered by habeas scholars. That said, the competing habeas reform proposals that were circulating at the time when the AEDPA compromise was reached are of unquestionable significance. Far too little attention has been paid to the wording and purpose of the habeas reform proposals that were rejected by Congress when it enacted AEDPA. In other words, by considering what AEDPA is not, it becomes much easier to understand the meaning of § 2254 as it was enacted.

Habeas commentators had actually expected the Republican Congress to pass a more aggressive and far-reaching reform. Chief among the habeas reform models that were rejected in favor of the current text of § 2254 was the approach suggested by Professor Paul Bator. Notably, the Bator approach was nicknamed the “full and fair” (or process) model in light of the fact that Bator’s model suggested complete deference to a state finding so long as the state’s process was full and fair. For decades, proponents of habeas reform

230. See Clinton, supra note 227, at 631.
231. See Valdez, 274 F.3d at 949-50.
232. See, e.g., Yackle, supra note 218, at 422 (“The language in § 2254(d) reflects a compromise solution to a controversy that had gripped the executive and legislative branches of the national government for more than fifty years.”). Yackle begins his discussion of the legislative history in the mid-1940s with a habeas initiative drafted by the Judicial Conference of Senior Circuit Judges that called for the elimination of federal courts’ jurisdiction to grant relief to state prisoners. Id. at 423-24. Next, Yackle introduces Professor Bator, discussed infra notes 242-244 and accompanying text, and explains how Bator’s 1963 thesis on habeas reform continued to frame the habeas debate in the 1990s. Id. at 424-30.
233. Blume, supra note 5, at 272.
234. Yackle, supra note 218, at 383 (“I had expected this Congress to attack the conventional role of federal habeas more vigorously.”).
235. Id. at 424-25.
236. Id. at 424; see also Paul M. Bator, Finitality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 454-57 (1963) (applying the law of
introduced bills modeled on Bator’s approach: “An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings.”

In the end, Congress expressly and repeatedly rejected the Bator (full and fair) approach. This is significant for two reasons. First, by refusing to limit federal habeas review to a review of the adequacy and fairness of the state court’s procedures, federal courts retained their right to review the substantive merits of a habeas petition. Second, and more importantly, between 1948 and the ultimately successful habeas reform of 1996, the phrase “full and fair” had been irreparably sullied by decades of association with Bator’s preclusion model of habeas relief. Throughout the floor debate regarding habeas reform, the phrase “full and fair” became a well-known shorthand for the aggressive sort of habeas reform that would never garner the requisite votes to pass the Senate. In short, “full and fair” emerged as the tag phrase for a model of habeas reform that would not pass Congress. Indeed, by the time of AEDPA’s enactment, proponents and opponents
of reform alike were united in their interpretation of the phrase “full and fair” to refer to the model first proposed by Bator.\footnote{243}{See, e.g., 137 \textit{Cong. Rec.} H8001 (daily ed. Oct. 17, 1991) (statement of Rep. Fish) (noting that the attempts to redefine “full and fair” do not adequately address his concern that the reform will have the effect of stripping federal courts’ power to review the merits of state habeas decisions); 137 \textit{Cong. Rec.} H8003 (daily ed. Oct. 17, 1991) (statement of Rep. Hughes) (speaking to the fact that “full and fair” is inextricably linked to procedural rights alone); 137 \textit{Cong. Rec.} H7894 (daily ed. Oct. 17, 1991) (statement of Rep. Edwards) (noting that “full and fair” has always meant a limited review of the procedural fairness and nothing more).}

In light of the broad consensus that Congress should not strip federal courts of the right to substantively review the findings and conclusions of law rendered by state habeas courts, the drafters of AEDPA no doubt were anxious to avoid any confusion over whether the proposed § 2254 implicitly adopted the “full and fair” approach. As Professor Yackle explained, the use of “full and fair” was so tainted by the time AEDPA was being debated that Congress seemed worried that any use of the phrase would dominate the provision’s interpretation such that “nothing in the legislative history would persuade the courts to read it in another, unfamiliar [un-Bator] way.”\footnote{244}{Yackle, supra note 218, at 429 (citing \textit{The Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the S. Comm. on the Judiciary}, 97th Cong. 153-54 (1982) (testimony of Phylis Skloot Bamberger)).}

Thus, it is not too surprising that Congress dropped all references to “full and fair” from the proposed § 2254. And it is simply not consistent with the legislative history of AEDPA to suggest, as some courts have, that reading a requirement of procedural fairness into § 2254 renders the AEDPA amendments a “nullity.”\footnote{245}{See \textit{Valdez v. Cockrell}, 274 F.3d 941, 950 (5th Cir. 2001).}

In short, the legislative history of § 2254 provides a critical context for understanding the omission of the “full and fair” language from AEDPA's version of § 2254. There were important historical reasons for omitting the phrase “full and fair” that had absolutely nothing to do with a desire to release states from their obligation to provide petitioners with procedurally fair opportunities to prove their claims. It is reasonable that compromise legislation, which was expressly intended to avoid the consequences of a model nicknamed the “full and fair” approach, would omit any use of the phrase “full and fair.” It is not, however, reasonable to conclude that the omission of this language implicitly signals a desire to omit the requirement of procedural fairness.\footnote{246}{Ensuring the fairness of the state court proceedings was always within the ambit of the federal courts’ review. Even the most aggressive proposals for curtailing habeas corpus, which Senator Kyl’s proposal certainly was included among, left unchallenged the...}
federal courts are allowed to review the substance of a state court’s decision but precluded from requiring procedural fairness. There is no suggestion in the legislative history that this was an either/or decision between the right to review the substance and the process of a state’s findings, and basic logic dictates that the greater necessarily includes the lesser. It is, therefore, an erroneous interpretation of § 2254 to suggest that the right to conduct substantive review was somehow earned at the expense of the right to ensure procedural fairness. Accordingly, it is necessary to adopt a comprehensive interpretation of § 2254(d) and (e), such as those suggested in the previous Parts of this Article, that would address the standard of review problem.

B. The Scope of Review Problem: Is Extrinsic Evidence Permissible?

An interpretation of § 2254 that views it as conclusively foreclosing the use of extrinsic evidence is inconsistent with the structure and purpose of the statute. This Subpart provides two explanations as to why the language in § 2254(d)(2), limiting a federal court’s review to facts in the state record, does not apply to a petitioner’s effort to rebut by clear and convincing evidence state court findings under § 2254(e)(1). First, extended to its logical conclusion, the reasoning that would apply (d)(2)’s state-court-record limitation to (e)(1) would necessarily strip federal evidentiary hearings of their legal effect, a result clearly not intended by the statute. Second, reading assumption that the state adjudication of the claim would have to be “full and fair.” Specifically, Kyl stated that he was not interested in merely “play[ing] with [habeas corpus] at the edges” by simply calling “for deference to State court proceedings.” 141 CONG. REC. S7830 (daily ed. June 7, 1995) (statement of Sen. Kyl). Kyl was also clear that federal courts must always retain the right to ensure that state procedures were “adequate and effective.” Id. S7836.

247. Blume, supra note 5, at 296 (“Even under the most restrictive conceptions of habeas corpus, i.e., the Bator process model, robust habeas review is warranted when the habeas petitioner does not receive adequate process in the state courts.” (footnote omitted)).

248. The relationship between (d)(2) and a petitioner’s right to a federal evidentiary hearing has also been ignored by federal courts. This Part discusses, among other things, the fact that it would defy due process and basic rules of interpretation to suggest that (d)(2)’s limitation as to what type of evidence can be reviewed effectively deprives federal courts of the opportunity to review evidence presented during a federal evidentiary hearing. There are, however, other important analytic considerations to consider. For example, if findings were substantively and procedurally reasonable based on the state court record, see 28 U.S.C. § 2254 (d)(2) (2000), a petitioner might still be entitled to an evidentiary hearing in federal court if he alleges facts that would entitle him to relief as to a properly exhausted federal claim. In such a case, this Article suggests that (e)(1) provides the proper measure of AEDPA deference that governs the federal courts’ analysis of habeas claims following a federal
(d)(2) and (e)(1) in this way would place § 2254 needlessly in tension with the preexisting Rules Governing Section 2254 Cases (Habeas Rules) regarding discovery and the expansion of the record.\textsuperscript{249}

1. The Structure of § 2254 with Regard to Extrinsic Evidence

There is no legislative history supporting the idea that an (e)(1) review must be limited to the state court record, the plain text of (e)(1) indicates that such review should not be limited to the state court record,\textsuperscript{250} and, most instructive, the structure of § 2254 belies the view that (e)(1) is limited to the state court record.\textsuperscript{251} The structure of § 2254 is instructive in two ways. First, the two provisions at issue, (d)(2) and (e)(1), are contained in separate subsections of the statute.\textsuperscript{252} If Congress had intended (d)(2) and (e)(1) to be redundant in the sense that they are both speaking of precisely the same review, it is odd that Congress would have spread the different standards between two different provisions. Moreover, it would be illogical for Congress to divide the review procedure for a single review between two separate subsections of the statute—i.e., § 2254(d) and § 2254(e).\textsuperscript{253} Related, but somewhat more complex, is the fact that § 2254(e), unlike § 2254(d), specifically provides for the use of extrinsic evidence in certain circumstances.\textsuperscript{254}

Under § 2254(e)(2), Congress prescribed certain narrow parameters under which a petitioner who is not diligent in state court would be entitled to an evidentiary hearing.\textsuperscript{255} The conditions of (e)(2)
rarely will be satisfied; however, when they are, a petitioner is statutorily entitled to develop factual evidence in support of his claim under § 2254. Moreover, circuit courts have uniformly held that when § 2254(e)(2) does not apply because the petitioner has been diligent, the more lenient pre-AEDPA standards governing the granting of evidentiary hearings continue to operate. More precisely, when a petitioner who was diligent in state court is seeking a federal evidentiary hearing, Townsend v. Sain continues to govern the question of whether an evidentiary hearing is permissible. There are, in other words, a variety of circumstances in which a post-AEDPA petitioner is entitled to develop “new” factual evidence for the first time in federal court. No court or commentator has gone so far as to suggest that the evidence obtained through an evidentiary hearing should be disregarded on the basis of (d)(2)’s requirement that the reasonableness of a state court decision be based on evidence that was presented to the state court.

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.


257. By its text, § 2254(e)(2) creates a four-tiered inquiry: (1) whether the facts were adequately developed in state court, (2) whether the lack of factual development was attributable to some failure on the part of the petitioner, (3) whether the claim relies on a “new” rule of constitutional law or a new factual predicate, and (4) whether the facts alleged substantially undermine the conviction for the underlying offense. Each of these prongs is a threshold inquiry in that a failure to satisfy any of these conditions either renders (e)(2) inapplicable, or the petitioner ineligible for a hearing. 28 U.S.C. § 2254(e)(2).

258. See, e.g., Insyxiengmay v. Morgan, 403 F.3d 657, 669-70 (9th Cir. 2005); Davis v. Lambert, 388 F.3d 1052, 1060-61 (7th Cir. 2004); Bryan v. Mullin, 335 F.3d 1207, 1214-15 (10th Cir. 2003); Perillo v. Johnson, 79 F.3d 441, 444-45 (5th Cir. 1996).

259. 372 U.S. 293 (1963). Under Townsend, if a petitioner alleges a claim that is not patently frivolous and which, if true, entitles him to relief, then he is entitled to a federal hearing on the matter. Id. at 312, 317.

260. Id.

261. See discussion infra note 262.

262. At this point, it is probably appropriate to comment on one of the lingering analytic elephants in the room, the relationship between evidentiary hearings and the standard of review (“full and fair”) problem. To date, courts have only expressed two views as to the relationship between (e)(1) deference and the granting of an evidentiary hearing. First, there is the view that (e)(1)’s presumption always applies regardless of whether an evidentiary
Because the right of petitioners to develop facts through federal evidentiary hearings is, as a pure question of law, uncontroversial, it is fair to consider what effect, if any, the broad readings of (d)(2) offered by Justice Thomas would have on this right.\(^{263}\) In *Miller-El (II)*, for example, Justice Thomas dissented from the majority’s decision to review evidence of racial discrimination in the jury selection process that was uncovered for the first time during federal habeas review.\(^{264}\) In Justice Thomas’s view, (d)(2)’s requirement that the reasonableness of a state court finding must be based on the state court record applies with equal force to a review of extrinsic evidence under (e)(1).\(^{265}\) No attempt has been made to explain the tension between this interpretation of (d)(2) and the fact that AEDPA expressly provides for the development of new evidence through federal evidentiary hearings.\(^{266}\)

In *Miller-El (II)*, of course, the evidence of racial discrimination by the prosecutor was not developed through an evidentiary hearing; rather, it was simply evidence that only became available to the petitioner during federal habeas review.\(^{267}\) That said, it is not clear why (d)(2)’s prohibition on extrinsic evidence—i.e., materials outside of the state record—should be interpreted as barring the use of extrinsic hearing was granted in federal court and regardless of whether the state process was full and fair. *Miller-El v. Dretke (Miller-El (II)),* 545 U.S. 231, 274 (2005) (Thomas, J., dissenting); *Valdez v. Cockrell,* 274 F.3d 941, 949 (5th Cir. 2001). The second interpretation is that when a petitioner is entitled to a federal evidentiary hearing, (e)(1) never applies. *Monroe v. Angelone,* 323 F.3d 286, 297-98 (4th Cir. 2003); *Killian v. Poole,* 282 F.3d 1204, 1208 (9th Cir. 2002). Under the view of (e)(1) urged in this Article, these approaches are underinclusive and overinclusive, respectively. Under the approach set forth in this Article, the critical question is not whether an evidentiary hearing was granted but whether the state process was full and fair (“reasonable” per (d)(2)). If a state’s adjudication of a claim was unreasonable, then the presumption under (e)(1) does not apply even if the petitioner is not entitled to a federal evidentiary hearing—e.g., because he was not diligent in state court as required by § 2254(e)(2). Likewise, if a petitioner is entitled to an evidentiary hearing because he was diligent in state court and satisfies *Townsend,* this does not necessarily dictate that (e)(1)’s presumption would apply. An evidentiary hearing is allowed under *Townsend* if, for whatever reason, “material facts were not . . . developed [in] state-court,” and the (e)(1) presumption would still apply unless the state court’s findings were not procedurally fair or reasonable. *Townsend,* 372 U.S. at 313. Thus, it is not *Townsend* or the granting of a federal hearing, that dictates whether (e)(1) does or does not apply, but the absence of a “full and fair” state proceeding. From the standpoint of analytic clarity, the distinction between one’s eligibility for an evidentiary hearing under *Townsend* and the applicability of the (e)(1) presumption is significant.

\(^{263}\) *Miller-El (II),* 545 U.S. at 274-75.

\(^{264}\) *Id.* at 280 (noting that he cannot “fathom” the “majority’s willingness to reach outside the state-court record” to review evidence never presented to the state court).

\(^{265}\) *Id.*


\(^{267}\) *Id.; Miller-El (II),* 545 U.S. at 279.
evidence developed through federal discovery procedures, but not the use of evidence developed through an evidentiary hearing. Section 2254(e)(1) provides an interpretive framework for dealing with extrinsic evidence, whether the evidence is developed through an evidentiary hearing or through discovery. Under (e)(1), the petitioner is required to show by clear and convincing evidence that the state’s findings were incorrect. And unlike the reasonableness review of state findings under (d)(2), the review under (e)(1) lacks the requirement that the federal court look only to evidence contained in the state court record. Accordingly, it makes no sense to treat extrinsic evidence developed through a hearing differently than evidence developed through discovery. In either case, the court should apply the clear and convincing standard under (e)(1).

In sum, the fact that AEDPA specifically provides for the right of petitioners to have federal evidentiary hearings strongly suggests that new evidence, whether it be the product of a federal evidentiary hearing or discovery, must be considered when a federal court assesses

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269. Id.
270. See id. One might argue that evidence discovered through an evidentiary hearing is distinct from federal discovery insofar as the evidence uncovered through a hearing will, in most cases, be used to establish the petitioner's eligibility for relief under § 2254(d)(1), not § 2254(d)(2). That is to say, the new evidence does not evade AEDPA deference insofar as the (d)(1) framework still applies as to the substance of the legal claim. But this is a false distinction. In fact, a petitioner seeking relief on the basis of new evidence obtained through discovery, like a petitioner who is entitled to a hearing, is generally seeking relief under (d)(1) as well. In other words, regardless of whether the evidence enters into a federal court's analysis via discovery or a hearing, the petitioner is typically arguing for relief on the basis of the (d)(1) standard of review, not a de novo review premised on the unreasonableness of state fact-finding under (d)(2).
271. Perhaps if Justice Thomas and the circuit courts that share his interpretive view of (d)(2) considered the implications of separating (d)(2) and (e)(1), there would be less resistance to the use of "new" evidence. Justice Thomas's view that all extrinsic evidence is barred from review might be premised on a fear that extrinsic evidence provides a petitioner with the right to circumvent all AEDPA deference in favor of de novo review of state findings and a de novo review of the substance of the legal claims. After all, the Fourth Circuit implicitly adopted this view by holding "AEDPA's deference requirement does not apply when a claim made on federal habeas review is premised on . . . material that has surfaced for the first time during federal proceedings." Monroe v. Angelone, 323 F.3d 286, 297 (4th Cir. 2003). Under the approaches proposed in this Article, however, the "new" evidence could be considered by the federal court, but it would generally be reviewed in accordance with the deference afforded to state findings under (e)(1). In other words, rather than creating a vacuum in which AEDPA simply would not apply, it is much more consistent with the structure and purpose of § 2254 to recognize that extrinsic evidence, like that presented in Monroe, should be considered, but unless the state's findings were procedurally unfair for the purposes of (d)(2), the new evidence should not be used as a basis for relief unless it demonstrates by clear and convincing evidence that state's findings were erroneous.
whether a petitioner can establish that the state court unreasonably applied Supreme Court precedent.

2. The Right to Extrinsic Evidence Under Pre-AEDPA Rules

As a general rule, Congress is presumed to be knowledgeable about existing law that is pertinent to the legislation that it enacts. Because the longstanding Habeas Rules provide petitioners with the right to federal discovery and the right to supplement the record—in other words, the right to use extrinsic evidence—it is important to understand Congress’s intent with regards to § 2254(e)(1) with this framework in mind. More to the point, reading § 2254(e) to impose a requirement that the petitioner develop his federal habeas claim exclusively on the basis of evidence contained in the state court record creates needless tension between the Habeas Rules and § 2254. Such a reading is, therefore, prohibited. As the Supreme Court has noted, courts are required to interpret new statutory provisions in a manner that is consistent with the existing statutory scheme.

Under Habeas Rule 6, which has remained substantially unchanged since its ratification in 1976, a habeas corpus petitioner is permitted “for good cause . . . to conduct discovery under the Federal Rules of Civil Procedure.” As the committee notes emphasize, when specific allegations “show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally . . . it is the duty of the court to provide the necessary facilities

274. A separate but related question is whether the limitations of § 2254(e)(2) should be read into Rule 7’s otherwise liberal right to supplement the record during federal habeas procedures. The Supreme Court, in an extremely terse opinion, has suggested that (e)(2)’s demanding limitations apply to requests to supplement the record, just as they apply to requests to expand the record. See Holland v. Jackson, 542 U.S. 649, 652-53 (2004) (per curiam). In light of the fact that (e)(2), by its own terms, is limited to evidentiary hearings, this reasoning seems to lack any textual or structural legitimacy. See 28 U.S.C. § 2254 (2000).
275. See, e.g., Richards v. United States, 369 U.S. 1, 10 (1962). In essence, interpretations “which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.” Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982).
276. 28 U.S.C. § 2254 app. (Supp. IV 2004). In 2004, more than eight years after AEDPA was enacted, “[t]he language of Rule 6 [was] amended as part of a general restyling of the rules to make them more easily understood.” Id. (Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts committee notes on rules—2004 amendments).
277. Id. (Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts).
and procedures for an adequate inquiry.” 278 By providing for a right to discovery that is distinct from the right to an evidentiary hearing, Rule 6 strongly indicates that things like depositions and other discovery tools are to be considered a necessary facility and procedure for developing habeas corpus claims. 279 To treat the right to discovery (Rule 6) as merely subsumed within the specific right to a hearing (Rule 8) seems inconsistent with the plain text of the Habeas Rules. Therefore, Habeas Rule 6 is substantially undermined if § 2254(d)(2) is read as prohibiting the use of any extrinsic evidence—i.e., evidence uncovered through federal habeas discovery. Just as the right to an evidentiary hearing must mean something, namely the right to develop and rely on new evidence in federal court, the right to federal discovery means something; it means that otherwise reasonable findings of fact may be rebutted by clear and convincing evidence that is discovered for the first time in federal court. 280

Similarly, under Habeas Rule 7, a habeas corpus petitioner is expressly permitted to supplement the state court record with materials relevant to the federal court’s resolution of the petition. 281 Rule 7 provides:


279. The committee notes make the astute observation that discovery will likely not be as “frequently sought” or as useful as an evidentiary hearing, but adds that there will “nonetheless [be cases in which it] serve[s] a valuable function.” Id.; see also id. (Supp. IV 2004) (Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts) (providing rules regarding the expenses for depositions).

280. Reasonable jurists might fear that granting habeas petitioners a right to discovery will create an endless wormhole of expense and time. This, no doubt, drives Justice Thomas’s view that the limitations contained in § 2254(e)(2) apply to federal evidence offered outside of the scope of an evidentiary hearing. See, e.g., Miller-El v. Dretke (Miller-El (II)), 545 U.S. 231, 280 (2005) (Thomas, J., dissenting). However, the right to discovery contains its own separate limitation. A petitioner is only entitled to discovery if the district court finds “good cause.” 28 U.S.C. § 2254 app. (2000) (Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts advisory committee note) (“[P]rior court approval of all discovery is necessary to prevent abuse, so this requirement is specifically mandated in the rule.”). It is highly unlikely that district court judges will countenance frivolous claims for discovery any more than they provide evidentiary hearings to facially meritless claims.

281. 28 U.S.C. § 2254 app. (Supp. IV 2004). Notably, this rule was republished after AEDPA without any substantive changes. Id. (Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts committee notes on rules—2004 amendments). Moreover, the fear that federalism and comity are undermined in the face of a robust right to supplement the federal record is simply overstated in light of the limited number of petitioners that are ever able to secure the sort of factual evidence that would support a habeas claim. See 1 HERTZ & LIEBMAN, supra note 144, § 2.4b, at 35 n.26 (noting that only about 1.17% of habeas petitioners receive an evidentiary hearing).
(a) **IN GENERAL.** If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.  

(b) **TYPES OF MATERIALS.** The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.²⁸²

At bottom, therefore, Rule 7 provides a vehicle through which a petitioner may, without an evidentiary hearing, submit evidence and have it “considered as part of the record.”²⁸³ This is a significant right, particularly in light of the restrictions placed on the right to an evidentiary hearing under § 2254(e)(2).²⁸⁴ Notably, a court’s discretion to grant a petitioner’s request to supplement the record is oftentimes severely limited.²⁸⁵ In many instances, a federal court’s discretion to grant discovery has been interpreted as a legal duty under Rule 7.²⁸⁶ The right to supplement the record, in other words, is a well-established component of habeas law. Accordingly, Congress’s action would have to be clear and unequivocal if it were intended to repeal this deeply rooted rule of procedure.²⁸⁷ Neither the text of § 2254 nor the legislative history of the statute provides any clear basis for asserting that the right to expand the record was implicitly overruled; indeed, Rule 7 has been repeatedly repromulgated since 1996.²⁸⁸

In sum, as a general matter, where two statutes are capable of coexistence, “it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”²⁸⁹ There is simply nothing in the legislative debate to suggest that Congress intended to curb the right of a petitioner to discover and use evidence in federal court as permitted under Habeas Rules 6 and 7. Section 2254(d)(2) does provide that in assessing the reasonableness of

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²⁸³. *Id.*
²⁸⁶. See Turner v. Chavez, 586 F.2d 111, 113 (9th Cir. 1978) (stating that the Habeas Rules “give district courts flexibility to expand the materials before it where appropriate”); 1 Hertz & Liebman, supra note 144, § 19.5, at 881 (“[C]ourts may abuse their discretion by failing to utilize the [Rule 7] procedure in compelling circumstances.”).
²⁸⁷. Rodriguez v. United States, 480 U.S. 522, 524 (1987) (emphasizing that intent to repeal must be “clear and manifest” (internal quotation marks omitted)).
²⁸⁸. 28 U.S.C. § 2254 app..
a state court's findings, a federal court may only look to evidence presented to the state court.\textsuperscript{290} However, in light of the fact that § 2254(e)(1) expressly provides petitioners with a right to rebut a reasonable state finding by “clear and convincing evidence,” the most generous thing that can be said as to whether § 2254, on the whole, prohibits the use of extrinsic evidence, is that the statute is ambiguous.\textsuperscript{291} To be sure, an intent to subvert Habeas Rules 6 and 7 is not clear and manifest, as the Supreme Court has required in situations of implicit repeal.\textsuperscript{292} Therefore, it is antithetical to the structure and history of § 2254, when considered in light of the preexisting Habeas Rules, to treat § 2254(d)(2) as effectively prohibiting petitioners from developing the record during federal habeas proceedings. Accordingly, an interpretation of the relationship between (d)(2) and (e)(1) that addresses this important scope of review problem is of paramount importance to habeas review.

VII. CONCLUSION

After more than ten years, AEDPA’s two provisions addressing the deference owed to state findings of fact, § 2254(d)(2) and § 2254(e)(1), remain largely opaque. In light of the fact that habeas claims are intensely fact-specific, the Supreme Court’s failure to squarely address the issue of (d)(2) and (e)(1)’s interaction is particularly troubling.\textsuperscript{293}

To recap, the undefined nature of the relationship between (d)(2) and (e)(1) gives rise to two serious analytic questions, one as to the appropriate scope of review and one as to the standard of review problem.\textsuperscript{294} As to the latter, the former § 2254(d) was replaced by two provisions, § 2254(d)(2) and § 2254(e)(1), and because neither of the new provisions contain the express phrase “full and fair hearing,” circuit courts are split as to the question of whether state habeas courts are required to make their findings in a procedurally fair manner.\textsuperscript{295}

\textsuperscript{291} Id. § 2254.
\textsuperscript{292} See Rodriguez, 480 U.S. at 524.
\textsuperscript{293} Wingo v. Wedding, 418 U.S. 461, 474 (1974) (stressing that the ultimate resolution of a legal claim will, in most cases, depend on the fact finder’s appraisal of the relevant facts).
\textsuperscript{294} See discussion supra Part IV.
\textsuperscript{295} Compare Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004) (holding that state court findings of fact will not be second-guessed by federal courts unless such findings are determined to be unreasonable), with Valdez v. Cockrell, 274 F.3d 941, 942 (5th Cir. 2001) (asserting that a full and fair trial is not a precondition to according deference to state findings of fact).
Likewise, there is a growing substantive debate as to whether (d)(2) and (e)(1) should merely be read as a single provision such that a state court finding of fact can only be reviewed on the basis of the record before the state court, as (d)(2), but not (e)(1), requires.\footnote{296}{See, e.g., Miller-El v. Dretke (\textit{Miller-El II}), 545 U.S. 231, 281 (2005) (Thomas, J., dissenting); \textit{cf.} Holland v. Jackson, 542 U.S. 649, 652-53 (2004) (per curiam) (suggesting that (e)(2)'s limitations apply to requests to supplement the record, just as they apply to requests to expand the record).}

To the extent that a meaningful right to federal habeas corpus is to persist, it is difficult to think that § 2254 could be interpreted in a manner that would: (1) reward state habeas courts that refuse a petitioner a fair opportunity to develop his claim or (2) refuse to allow a petitioner to establish an obvious constitutional harm on the basis of newly discovered evidence. But general pleas to due process are likely to fall on deaf ears in many federal courts today. That is why this Article has, instead, painstakingly reviewed the text, structure, and history of § 2254. Ultimately, the burden falls on federal courts to begin carefully analyzing the relationship between § 2254(d) and § 2254(e), rather than merely treating (e)(1) as a superficial gloss on (d)(2). If this analysis is undertaken, then courts will recognize, as this Article does, that the text, structure, and purpose of § 2254(d)(2) and (e)(1) compel the conclusion that state findings still must comport with minimum standards of procedural regularity, and extrinsic evidence may be considered by a federal court in assessing whether a state’s finding of fact might be rebutted.\footnote{297}{A state court’s findings of fact must be rebutted by clear and convincing evidence, (e)(1), if the state findings are procedurally and substantively reasonable for purposes of (d)(2), but a state’s findings need only be rebutted by a preponderance of the evidence if the findings were unreasonable under (d)(2).}