Articles

Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications

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Countless articles and judicial opinions have been devoted to the task of deciphering the scope and application of the limitations on habeas corpus relief announced in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). Over the past ten years courts and scholars have developed an intricate framework of analysis for nearly every subsection of § 2254. The decade-long process of interpretation and commentary has been characterized by questions of statutory meaning and federalism that appear to be as irresolvable for courts as they are intriguing to academics. But in the rush to sort out the minutiae of the AEDPA, the hallmarks of our legal system—basic due process and constitutional supremacy—have been overlooked. This Article aims to re-focus the debate.

The application and discussion of the AEDPA's limitations on relief has devolved into a bitter argument over the meaning of a statute which lacks a discoverable meaning, much less an obvious or plain meaning. It is statutory esotericism or statutory obfuscation much more than it is statutory interpretation. The discussion has become so technical and specialized, not to mention politically polarized, that we are at risk of permanently overshadowing the historical and constitutional underpinnings of the Great Writ. The goal of this Article is to recast and simplify the habeas debate and achieve some much needed common ground. The thesis is simple: Where the aggregate of available state proceedings fail to provide a meaningful corrective process such that federal constitutional issues are not "fully and fairly" adjudicated, it is necessary for the federal courts to review the federal claims de novo. Deference to a procedural abyss is avoided. This modest procedural proposal is compelled by due process through a celebrated line of cases, and yet in the frenzy to interpret § 2254—in working out all of the (e)(2)s and the (d)(1)s—we have forgotten due process. It is time to return to it.

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> "If [the AEDPA] were read to deny litigants a meaningful opportunity to prove the facts necessary to vindicate Federal rights, it would raise serious constitutional questions. I do not read it that way."
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> —Statement of President William J. Clinton upon signing the Antiterrorism and Effective Death Penalty Act of 1996[1]

INTRODUCTION

In what has been described as an enduring legal story that "posed eternal dilemmas in a remarkably lucid and accessible fashion,"[2] Lon Fuller's *Speluncean Explorers* describes the legal fate of five fictional hikers who were trapped within a cave by a landslide and who chose to kill and eat one of their own in order that everyone else would not die.[3] Through a series of opinions, Lon Fuller addresses the question of whether the hikers are guilty of murder under the fictional statute that provides, "Whoever shall willfully take the life of another shall be punished by death."[4] Among the fictional justices was Justice Keen, the textualist, who lambasted his colleague for an admittedly creative reading of the statute that would have resulted in the acquittal of all involved:

> My brother Foster's penchant for finding holes in statutes reminds one of the story told by an ancient author about the man who ate a pair of shoes. Asked how he liked them, he replied that the part he liked best was the holes. That is the way my brother feels about statutes; the

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1. Pub L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.), *reprinted in* 1996 U.S.C.C.A.N. 961-1, 961-3, 1996 WL 517206.

2. David L. Shapiro, *The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium Forward: A Cave Drawing for the Ages*, 112 HARV. L. REV. 1834, 1836 (1999).

3. *See generally* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949) (deciding the case through the opinions of five fictional Justices: Foster, Handy, Keen, Tatting, and Truepenny).

4. *Id.* at 619; s*ee also* Alex Kozinski, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1876, 1913 (1999) (rejecting a plain textual reading of the statute in favor of an interpretation that permitted a necessity defense).

> more holes they have in them the better he likes them. In short, he doesn't like statutes.[5]

The quantity and creativity of academic attacks[6] on the application of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)[7] has prompted a similar response from some commentators.[8] There is a sense that defense lawyers, and a large part of academia, simply do not like the habeas limiting statutes.[9] Bringing to mind Justice Keen's call for judicial modesty, Kent Scheidegger concluded, "The prerogative to [limit habeas relief] belongs to the legislative branch," and "[t]he judiciary must respect its decision" as reflected in § 2254.[10] This debate over the text of the AEDPA will never produce intuitive and necessarily correct answers; the AEDPA has been aptly described as "less a legal text than a force of nature."[11] But missing from all of these discussions is an acknowledgement that due process cannot countenance

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5. Fuller, *supra* note 3, at 634.

6. *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) (concluding that the AEDPA is inconsistent with the "ordinary stare decisis requirements"); 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."); James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 873 n.848 (1998) (arguing that the Constitution forbids a robust reading of the limitations contained in § 2254); *see also* Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443 (2007); Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns That Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231 (2008) [hereinafter Marceau, *Un-Incorporating*].

7. Pub L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

8. *See, e.g.*, Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 890 (1998) ("Enactment of this landmark reform [AEDPA] has touched off a mad scramble to try to somehow salvage de novo review despite its repudiation by Congress. One tactic is to deny that Congress actually did what everyone involved understood it to be doing at the time.").

9. To be sure, very few come to the debate over the AEDPA with clean hands. I used to represent habeas corpus petitioners as an Assistant Federal Public Defender. Likewise, Kent Scheidegger actively litigates his limited view of federal habeas and his support for capital punishment through his role as the Legal Director of the Criminal Justice Legal Foundation. I hope, however, that courts and commentators will recognize that this Article is not beholden to my views on habeas generally, but rather, reflects a thorough and thoughtful application of the due process principles developed by the Court over the last term.

10. Scheidegger, *supra* note 8, at 960 (quoting Brief of Benjamin Civiletti et al. as Amici Curiae Supporting Respondent at 34, Wright v. West, 505 U.S. 277 (1992) (No. 91-542)) (internal quotation marks omitted); s*ee also* Brief for Respondent at 53, Bell v. Kelly, 129 S. Ct. 393 (2008) (mem.) (No. 07-1223), 2008 WL 4448251 (referring to habeas commentary as "agenda-driven" and inconsistent with the "the legislative history"). The petition for certiorari in *Bell* was ultimately dismissed as improvidently granted. *Bell*, 129 S. Ct. at 393.

11. Kovarsky, *supra* note 6, at 444.

the deference prescribed by the AEDPA when the state adjudication of a claim was not procedurally full and fair.[12]

In short, the application and discussion of the AEDPA's limitations on relief has devolved into a bitter argument over the meaning of a statute that lacks a discoverable meaning, much less an obvious or plain meaning. The complexity of the statute and overlapping principles of habeas corpus have generated interpretive gamesmanship of the highest order, and for good reason, because the stakes are very high both for the individual litigants and for the structure of our federal system. But this Article attempts to depart from the esotericism and obfuscation that have characterized the modern debate. The critique of the AEDPA's application advanced in this Article does not turn on an interpretive sleight of hand or technical nicety. The restrictions on the scope of the AEDPA expounded here turn on the uncontroversial principle that procedural fairness and regularity is a constitutional mandate.[13]

Because open and honest debates regarding the conclusions advanced in this Article are fundamentally important to our understanding of modern federalism and the constitutionality of the AEDPA, I have made every effort to present this discussion in a

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12. The previous commentary on this issue has made largely oblique references to a potential constitutional concern. For example, leading habeas scholar Professor Yackle noted in a summary of the AEDPA's factual provisions,

> One can imagine that, in some circumstances at least, serious constitutional questions would be raised by a rule that requires a federal court to accept a factual finding made in state court, . . . with no ability to assess the process out of which that finding emerged . . . .

Larry W. Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. 135, 140–41 (1996); *id.* at 41 n.21 (concluding that the AEDPA's deference must be conditioned on compliance with "ordinary constitutional standards," without defining what such standards entail); s*ee also* 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 32.5, at 1644 (5th ed. 2005). The importance of this issue is beginning to reach a head in habeas cases in the federal circuit courts and the Supreme Court. The amicus traffic on this issue at the Supreme Court alone suggests that it is a question of growing importance in federal habeas litigation. *See, e.g.*, Brief for the ACLU & the ACLU of Alabama as Amici Curiae in Support of Petitioner at 18–19, Wood v. Allen, 130 S. Ct. 841 (2010) (No. 08-9156), 2009 WL 2459590; Motion for Leave to File Brief and Brief for Nat'l Ass'n of Federal Defenders & Nat'l Ass'n of Criminal Defense Lawyers as Amici Curiae Supporting Petitioner at 21–32, *Bell*, 129 S. Ct. 393 (No. 07-1223), 2008 WL 3459585.

13. The position advanced in this Article can be considered uncontroversial, because, even among proponents of a very limited role for federal habeas review, it has become accepted dogma that federal review of a state conviction is defensible where there is some sort of "extreme inadequacy of the state's review process in that particular case." Eric M. Freedman, *Milestones in Habeas Corpus: Part II: Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions*, 51 ALA. L. REV. 1467, 1469–70 (2000). For those who support broad federal review of the constitutionality of state convictions, there is an expectation that state review must be *both* procedurally fair and substantively correct. *See id.* Thus, arguing that procedural fairness—full and fair review in the state court—is a precondition to limiting federal review represents a common denominator among the two warring camps over the proper scope of federal habeas review.

transparent and accessible fashion. To this end, it is useful to introduce my thesis through a basic syllogism.

Major Premise:	*Due Process* requires a *full and fair review* of the issues raised by a prisoner challenging the constitutionality of one's sentence or conviction.
Minor Premise:	*Federal review constrained by the AEDPA* does not, standing alone, amount to a *full and fair review* of one's constitutional challenges.
Conclusion:	*Federal review constrained by the AEDPA*, standing alone, *does not satisfy* the requirements of *Due Process*.

According to the rules of logic, the major premise of an argument must contain both the predicate of the conclusion and the middle term.[14] Similarly, the minor premise contains the subject of the conclusion and the middle term.[15] This Article sets forth to unpack and defend each of the terms and premises set forth in this syllogism. The major premise is explained and justified in Parts I and II; the recognition of a due process right to full and fair review is established in Part I, and the syllogism's middle term, "full and fair," is defined in Part II. Part III of the Article confirms the minor premise; by revisiting the literature and case law regarding the limited nature of federal habeas review under the AEDPA, the point is made that AEDPA review alone is not full and fair.[16] Part IV is devoted to elaborating on the syllogism's conclusion that AEDPA review alone does not satisfy due process.

Glaringly absent from my syllogism is any mention of state court proceedings. But as this Article will soon show, this omission is solely a reflection of my reluctance to subject the reader to a two-part syllogism. Much of the Article is devoted to the task of deciphering the relationship between the due process right to a full and fair review—developed in Part I—and the available state court procedures. Far from arguing that the AEDPA is simply unconstitutional, or that state procedures are irrelevant to the federal constitutional inquiry, this Article modestly suggests that constitutional problems arise under the AEDPA only when the state review was itself materially deficient as a matter of procedural fairness.

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14. BENSON MATES, ELEMENTARY LOGIC 207 (2d ed. 1972).

15. *Id.*

16. The point is often made that it is antithetical to the AEDPA to permit a robust factual and plenary legal review of a state prisoner's claims by a federal court. *See, e.g.*, Woodford v. Visciotti, 537 U.S. 19, 27 (2002) (per curiam); Scheidegger, *supra* note 8, at 892; *see also infra* Part IV.

My thesis, therefore, is straightforward: Due process forbids the substantive deference announced in § 2254 where a prisoner has not received a full and fair review of his constitutional claims, either in state or federal court. In practical terms, the tension between due process and AEDPA review arises only when the state courts utterly fail to provide a procedurally fair and full review of one's federal constitutional claims. That is to say, where a prisoner does not receive a full and fair review in (1) state direct appellate proceedings; (2) state postconviction proceedings; or (3) federal habeas review, due process is violated. The availability of at least one fundamentally fair—that is full and fair[17]—review at any of these stages, without more, satisfies due process, and thus leaves AEDPA deference intact for the vast majority of federal habeas cases.

I. RECOGNIZING "FULL AND FAIR" AS A RIGHT: LOCATING A RIGHT TO PROCEDURALLY MEANINGFUL AND FAIR REVIEW IN THE CONSTITUTION

The absence of a meaningful process for addressing procedural defects in the adjudication of a federal constitutional claim arising from a conviction or sentence presents a freestanding constitutional issue.[18] The origins of the right, whether it derives from substantive or procedural due process, are unclear.[19] But the constitutional pedigree of a right to full and fair review, so as to ensure fundamental fairness in the justice system, is beyond question.[20] Professor Bator, a leading figure in both the

17. As discussed *infra* in Part II, the phrase "full and fair" is just one proxy for the bundle of constitutional-procedural rights that are applicable when a prisoner contests the constitutionality of his conviction. I am not asserting that "full and fair" necessarily has a content that is distinct from the procedural rights sometimes expressed in terms of fundamental fairness. Instead, the conclusions presented in this Article turn on the well-established principle that federal courts must not defer to state postconviction proceedings if those procedures are not full and fair—that is to say, "fundamentally inadequate to vindicate the substantive rights provided." Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2320 (2009) ("[P]ostconviction relief procedures are constitutional if they 'compor[t] with fundamental fairness.'" (quoting Pennsylvania v. Finely, 481 U.S. 551, 556 (1987))).

18. *See, e.g.*, Wright v. West, 505 U.S. 277, 299 (1992) (O'Connor, J., concurring) (recognizing "full and fair" as "defin[ing][a] constitutional claim"); *see also* Daniels v. United States, 532 U.S. 374, 386–87 (2001) (Scalia, J., concurring in part) (recognizing that due process requires a procedurally adequate forum in which to contest constitutional claims bearing on one's sentence).

19. Full and fair, as an umbrella term, is neither intimately related to the procedural due process cases that protect unjustified deprivations, *see, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332 (1976), nor squarely within the Court's substantive due process jurisprudence that safeguards fundamental liberty interests. *See* Lawrence v. Texas, 539 U.S. 558, 564–65 (2003) (discussing the Court's substantive due process jurisprudence). Instead, the protections encompassed by the right to a full and fair review of the constitutionality of one's criminal conviction or sentence occupy a largely underdeveloped and sui generis field of constitutional law. The status of these protections as constitutional in nature is beyond question. *See infra* Parts I and II; s*ee also, e.g.*, *Osborne*, 129 S. Ct. 2308, 2320; Medina v. California, 505 U.S. 437, 451–52 (1992).

20. This project challenges the commonly-held understanding of the proper application of § 2254 by examining the AEDPA through the lens of the right to a full and fair adjudication. Subsequent

call to circumscribe Warren-era federal habeas review[21] and the so-called "legal process" school of thought,[22] concluded that it is not an exaggeration to say that "the essence of . . . due process [is] to furnish a criminal defendant with a full and fair opportunity" to litigate constitutional claims concerning the validity of his detention or sentence.[23] At the heart of the American federal constitutional system is the uncontroversial, though often overlooked, principle that due process guarantees "fair and just procedures" in the adjudication of constitutional rights.[24] It is not necessarily a promise of unlimited or duplicative proceedings; instead, as recognized in cases like *Frank v. Magnum* and *Moore v. Dempsey*, the full and fair bundle of rights promises that every prisoner shall have at least one full and fair

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research regarding the precise classification of the full and fair right would be a welcome addition to the habeas and criminal procedure literature. In addition to substantive and procedural due process rights, because this is a right that impacts the availability and scope of federal habeas review, future work would do well to consider whether the right to a full and fair review of one's claims could find a home within the Court's Suspension Clause jurisprudence. *Cf.* Boumediene v. Bush, 128 S. Ct. 2229, 2247 (2008) ("The [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account." (citing Preiser v. Rodriguez, 411 U.S. 475, 484 (1973))); *id.* at 2248 ("The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ." (citing INS v. St. Cyr, 533 U.S. 289, 300–01, (2001))); *see also* Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 796–97 (2009) (invigorating the academic debate regarding the scope of Suspension Clause protections by proposing a new, more limited habeas statute, and assessing its validity under the Suspension Clause).

21. Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 277 (1988) ("Bator's argument was that a prisoner should obtain access to a federal court to review a constitutional claim arising in state court proceedings only if the state itself failed to provide adequate process to correct the constitutional violation."); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 586 (1982) ("[Bator] emphatically articulates the incompatibility of broad federal habeas corpus relitigation with the process-oriented view of legality as fair institutional process rather than as substantively correct results."); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 585 (1993) ("According to Bator, questions of jurisdiction, together with the question of full and fair opportunity to litigate, exhausted the appropriate scope of collateral review of criminal convictions.").

22. Lee Kovarsky, *supra* note 6, at 503 ("Professor Paul Bator, the intellectual patriarch of modern habeas reform, was part of the Legal Process movement."); Evan Tsen Lee, *Section 2254(d) of the Federal Habeas Statute: Is It Beyond Reason?*, 56 HASTINGS L.J. 283, 296 (2004) ("Bator [is] one of the most ardent followers of the so-called 'Legal Process' school of thought."); *see also* Woolhandler, *supra* note 21, at 584–85 ("[In *Frank v. Magnum*,] the Court undertook what Bator saw as a salutary expansion of the concept of institutional competence by allowing federal courts to consider whether the state court system had provided a full and fair opportunity to litigate the federal constitutional issue.").

23. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 456 (1963).

24. *See* Case v. Nebraska, 381 U.S. 336, 344 (1965) (Brennan, J., concurring) (addressing the absence of fair postconviction procedures for the review of a Sixth Amendment claim); *id.* at 347 (suggesting that procedural fairness requires, inter alia, "full fact hearings" and reasoned legal conclusions); *see also* Daniels v. United States, 532 U.S. 374, 386–87 (2001) (Scalia, J., concurring in part) (reflecting on the role that due process might play in ensuring that a claim is adjudicated fully and fairly "*somewhere*").

adjudication of his federal constitutional claims.[25] Or, as Justice Scalia has recognized in a related context, "'due process' suggest[s] that a forum to litigate challenges [of this sort] must be made available *somewhere* . . . ."[26]

A. *FRANK* AND *MOORE*: AN EXPRESS RECOGNITION OF "FULL AND FAIR"

There seem to be as many interpretations of *Frank v. Magnum* as there are rings of hell in Dante's *Inferno*, and the Supreme Court has refused the role of Virgil, who might lead us out of this interpretive hell.[27] The case was decided in 1915, but nearly a century later there is no consensus regarding its proper interpretation. There is, for example,

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25. *See Frank*, 237 U.S. 309, 335 (1915); *see also Moore*, 261 U.S. 86, 91 (1923). This notion of an absolute right to a procedurally fair review of the constitutionality of one's conviction is, at least peripherally, related to the question of whether habeas jurisdiction can be stripped. Although this project lends support for the view that certain forms of constitutional review exist in addition to or regardless of the protections of "written law," Felker v. Turpin, 518 U.S. 651, 664 (1996), the question of the viability of habeas corpus jurisdiction-stripping is the subject of a separate and important debate among scholars. Other than noting that federal habeas corpus review is the only forum to litigate many of the constitutional protections incorporated against the states, and referencing Professor Hart's thesis that the Congress may not deny jurisdiction to the courts so as to undermine "essential role" of the Court, including federal supremacy and uniformity, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364–65 (1953), I save for another day the debate as to whether the Suspension Clause contains its own protection against jurisdiction-stripping. The present Article, instead, focuses on the due process protections that inhere in habeas proceedings, including whatever due process content the Suspension Clause includes. *Cf.* Martin H. Redish & Collen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. (forthcoming 2010) (arguing that due process and suspension are actually irreconcilably in tension, and that it is the due process right that must prevail). For a discussion of the possibility of jurisdiction-stripping in this context, compare Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 345 (1952), Scheidegger, *supra* note 8, at 919 (suggesting that Congress can strip habeas jurisdiction entirely because "[f]ederal habeas corpus for state prisoners is not constitutionally required"), and *id.* at 932 ("[T]he remedy of federal habeas corpus for state prisoners . . . is entirely a creation of Congress and subject to Congress's broad powers . . . ."), with *Boumediene*, 128 S. Ct. at 2271–77 (declaring unconstitutional the statute that stripped federal courts of habeas jurisdiction in the enemy combatant context), Hoffmann & King, *supra* note 20, at 839 ("Based on [*Boumediene*], we believe . . . the Court will acknowledge that the Suspension Clause provides at least some level of constitutional protection for federal judicial review of the constitutional rights of persons serving state sentences."), *id.* (acknowledging the relationship between "full and fair review" and the Suspension Clause), and Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 868 (1994) (arguing that the Suspension Clause was incorporated through the Fourteenth Amendment such that the Constitution, at least as of 1868, requires federal habeas review for state prisoners); *see also* 7 WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 28.2(a) (3d ed. 2007) (summarizing materials on the issue of whether habeas corpus is a "Constitutional right or legislative grace"); Martin J. Katz, *Guantanamo,* Boumediene*, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMMENT. 377, 395 (2009) (arguing that after *Boumediene* it is clear that Congress cannot strip jurisdiction from all federal courts in "cases involving constitutional questions").

26. *Daniels*, 532 U.S. at 386–87 (Scalia, J., concurring in part).

27. DANTE ALIGHIERI, THE DIVINE COMEDY: VOLUME 1: INFERNO (Mark Musa, trans., Penguin Books 2003).

marked disagreement as to whether *Frank* expanded the scope of federal habeas review to cases that might previously have been unreviewable.[28] Nonetheless, some important common ground in the ongoing debate over habeas review can be gleaned from the *Frank* decision. Even those who advocate for a very narrow scope of federal habeas review recognize *Frank* as setting a constitutional floor. As a matter of due process, *Frank* acknowledges that federal habeas review must, at an absolute minimum, provide the sort of scrutiny of state court decisions that res judicata dictates in the realm of civil litigation.[29] And to be sure, a judgment is not given res judicata effect if there is reason to doubt the "fairness of [the] procedures followed in prior litigation."[30]

In *Frank*, a case in which a state prisoner alleged that the vocal and active presence of an angry mob rendered his capital trial unfair, the Court engaged in an examination of the "fairness" of the procedures.[31] The Supreme Court denied the federal habeas petition, not because a mob-dominated trial is constitutionally permissible, but because the state

28. There is a longstanding debate as to whether *Frank* was in fact a significant expansion of the Court's exercise of habeas jurisdiction. *Compare* Danforth v. Minnesota, 128 S. Ct. 1029, 1036 (2008) ("In 1915, the realm of violations for which federal habeas relief would be available to state prisoners was expanded to include state proceedings that 'deprive[d] the accused of his life or liberty without due process of law.'" (quoting *Frank*, 237 U.S. at 335)), *and* Bator, *supra* note 23, at 487 (describing *Frank* as a favorable expansion of federal habeas review insofar as it furthered the goal of institutional competence among state courts); *with* 2 HERTZ & LIEBMAN, *supra* note 12, § 2.4(e) n.322 ("[T]he writ was never limited to jurisdictional claims . . . . Although the jurisdiction-only description of claim historically cognizable on habeas corpus is Professor Bator's most enduring contribution to the debate over the writ, it is shibboleth."), *and* Freedman, *supra* note 13, at 1488 n.89 (explaining that *Frank*'s argument was, in essence, that there was no trial "in the legal sense" and thus, that the Court lacked lawful jurisdiction, and noting that this was "more solid than it might appear"). For purposes of this Article, it does not matter whether *Frank* marked a dramatic point in the evolution of habeas corpus or not; all that matters is that the constitutional significance of full and fair state proceedings was expressly recognized by the Court.

29. There is some debate about the relationship between the modern writ and res judicata. On the one hand, the Court has repeatedly concluded that "[p]rinciples of res judicata are, of course, not wholly applicable to habeas corpus proceedings." Preiser v. Rodriguez, 411 U.S. 475, 497 (1973); *see also* Brown v. Allen, 344 U.S. 443, 458 (1953); Salinger v. Loisel, 265 U.S. 224, 230 (1924); Bator, *supra* note 23, at 483–88 (recognizing *Frank* as illustrative of a process-model of habeas corpus jurisprudence). On the other hand, commentators have rightly questioned whether the modern limitations on federal habeas relief render, as a practical matter, federal review functionally analogous to civil res judicata. *See, e.g.*, Phillip C. Chronakis, *Cold Comfort for Change: Trends of Preclusion in Habeas Corpus Litigation*, 76 U. DET. MERCY L. REV. 17, 21–22 (1998) (arguing that "we run dangerously close to returning habeas litigation" to a restrictive res judicata model of review). My claim, however, is that even assuming that due process requires no more than a deferential res judicata model of federal habeas review, such a review poses considerable constitutional problems for the current application of the AEDPA. In essence, I argue that the modern habeas reforms have effectively shrunken habeas review to its pre-*Brown* form, and as such, the older, more basic protections of the res judicata model—full and fair review—take on renewed importance. *See infra* Part IV.B.1.

30. Montana v. United States, 440 U.S. 147, 164 n.11 (1979) (discussing the appropriate scope of preclusion doctrines in federal litigations).

31. 237 U.S. at 314–16.

appellate and postconviction system[32] had provided Frank with a corrective process that complied with the strictures of "due process of law."[33] In short, the state system may not have reached the correct result, but the issue was resolved through a state process that was adjudged full and fair.[34]

Relevant to the Court's disposition was the fact that the State's habeas procedures allowed "a motion for a new trial followed by an appeal to its Supreme Court, not confined to the mere record of conviction but going at large, and upon evidence adduced outside of that record" into the constitutional question at issue.[35] Perhaps most significant to the Court's view that the state system had complied with due process was the evidence suggesting that the State's corrective process had a proven track record of affording due process to allegations of constitutional deprivations: "Repeated instances are reported of verdicts and judgments set aside and new trials granted for [constitutional defects with the trial]."[36]

The Court's express interest in the fairness of the process afforded to the adjudication of constitutional rights was reiterated less than a decade later in *Moore v. Dempsey*.[37] Because the facts of the two cases

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32. It appears that Georgia's appellate system was something of a hybrid of the standard direct appeal and what most states now consider postconviction appeals. *Id.* at 335 ("Georgia has adopted the familiar procedure of a motion for a new trial followed by an appeal to its Supreme Court, not confined to the mere record of conviction but going at large, and upon evidence adduced outside of that record.").

33. *Id.* This reading of *Frank* is not accepted by some commentators. For some, such as leading habeas scholar Eric Freedman, *Frank* does not stand for the proposition that federal courts *could not* review the merits of a procedurally adequate state adjudication. The outcome in the case, he concludes, reflects no more than a discretionary determination by the Court as to whether they *should* order a relitigation of the merits in that particular case. ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 86–88 (2001); *id.* at 87 ("[*Frank* is the case] whose poor reputation among friends of habeas corpus surely owes more to the drama of the surrounding facts than to the legal doctrine it articulated."). The authority to relitigate a procedurally fair state determination was never in doubt. For purposes of this Article, however, I will accept at face value the "conservative" reading of *Frank*, that it limited habeas review in federal court to situations where the state process had been unfair. *Id.* at 86. Even this more limited reading of the meaning of *Frank* presents substantial problems for the current application of the AEDPA.

34. *See Frank*, 237 U.S. at 335 ("We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term."); *id.* (framing the issue as whether the State, in light of all its procedures, deprived an individual due process of law); *see also* Bator, *supra* note 23, at 486.

35. *Frank*, 237 U.S. at 335.

36. *Id.* From this language, one might argue that the due process right is limited to systemic failures, and some courts have taken this view. S*ee infra* notes 180–81. It is a sort of equal protection approach to due process in the sense that a due process violation, under this view, only lies when one receives an abridged version of the otherwise adequate and generally provided state procedures.

37. *See* 261 U.S. 86, 91 (1923). Professor Freedman has observed that "four of the eight Justices who would be deciding *Moore* had ascended to the bench [after] *Frank*" was decided. Freedman, *supra* note 13, at 1499.

are so similar—some would say "identical"[38]—there is a longstanding debate among scholars as to what these two cases, which most seem to agree are of seminal importance to the modern writ, actually mean.[39] As Professor Freedman has noted, liberals "have generally taken the view that the cases are inconsistent" and that the later decision, *Moore*, correctly calls for a more "searching [federal] inquiry" into the constitutionality of the state conviction.[40]

This Article does not engage that debate, much less resolve it. For purposes of resolving the intricate questions of habeas review discussed in this piece, it is possible to bypass the potentially irresolvable *Frank*/*Moore* controversy and focus exclusively on the undisputed and longstanding common denominator among these two opinions: the need for procedural fairness in state adjudications. Writing for the Court in *Moore*, Justice Holmes, who had dissented against the denial of habeas relief in *Frank*, explained that the absence of a procedurally fair review of constitutional allegations serves to "deprive[] the accused of his life or liberty without due process of law."[41] In Holmes's uniquely declarative style, *Moore* provides precious little detail or reasoning, and instead simply concludes, "We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself."[42] Almost a century later, it is this simple conclusion that compels the significant, and presently unrealized, limitations of the AEDPA presented in this Article.[43]

It is this "duty" of federal judges in the face of unfair state procedures that this Article is concerned with: In the absence of a procedurally adequate state process, federal review must be full and fair. Historically, this has not been a controversial position.[44] In fact, Bator,

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38. Freedman, *supra* note 13, at 1468.

39. *Id.* at 1469–71 (recounting the two main readings of *Moore* and *Frank* among commentators); *see also id.* at 1530–35.

40. *Id.* at 1469, 1470 ("Those seeking to limit habeas corpus have argued that the cases are consistent and that the Court should adhere to the doctrine [of procedural fairness] they perceive as governing both.").

41. *Moore*, 261 U.S. at 91 (suggesting that due process does not require the correction of run-of-the-mill legal errors, but instead requires that fundamental constitutional rights be afforded a procedurally adequate forum for review).

42. *Id.* at 92.

43. By staking out this moderate, expressly procedural reading of *Moore* and *Frank*, I do not mean to diminish the impressive legal and historical work that has led other scholars to conclude that these cases provide a definitive right to "searching federal habeas corpus review of state convictions." Freedman, *supra* note 13, at 1473. The analysis advanced in this Article is entirely consistent with these conclusions. The difference is that the analysis in this Article expressly relies on the narrow interpretation of *Frank* and *Moore* advanced by conservatives in order to demonstrate that even this limited view of habeas rights has dramatic implications for the proper application of the AEDPA.

44. As Professor Lee has enthused, in view of their historical adherence to the Bator model, "[i]t would be more than ironic if conservatives now were to advocate review for reasonableness of the

who famously stated that "the abrasions and conflicts created by federal interference with the states' administration of criminal justice should be avoided in the absence of felt need,"[45] had a similar reading of *Moore*. In Bator's view, *Moore* stands for the unremarkable proposition that if the state court's adjudication of a constitutional claim is "to count, [there] must be reasoned findings rationally reached through fair procedures."[46]

To be sure, some have read *Moore*'s holding as requiring a much broader entitlement to process for a state prisoner than that advanced by Bator.[47] For purposes of this Article, however, it is sufficient to recognize that, at a minimum, *Moore* entrenched the role of federal courts, through the Due Process Clause, as the ultimate "regulator of state procedures" in the context of safeguarding federal constitutional rights.[48] In short, even those interested in substantially limiting federal habeas review have, as a historical matter, readily conceded that *Frank* and *Moore* enshrined as a first principle of federal jurisdiction that "federal collateral jurisdiction [was] a [necessary] 'backstop' for inadequacies of state process."[49] The absence of fair and full procedures in this context was nothing short of a due process violation.[50]

B. After *Frank* and *Moore*: "Full and Fair" Is Forgotten But Not Lost

Frank and *Moore* reflect the importance of full and careful review of state convictions when the state's underlying procedures and corrective

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result rather than review for reasonableness of the process." Lee, *supra* note 22, at 307. Lee further observes, "The principled position for conservatives would be to embrace review for reasonableness of the process because such a doctrine would dovetail with the process orientation of their reform proposals since the early 1960s." *Id.*

45. Bator, *supra* note 23, at 525.

46. *Id.* at 489 (internal quotation marks omitted).

47. *Id.* at 489–92 (responding to broad readings of *Moore*); *see also* 2 Hertz & Liebman, *supra* note 12, § 2.4(e), at 83; Peller, *supra* note 21, at 646–48.

48. Curtis R. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315, 1329–31 ("[*Moore* is] the case which gave birth to the modern aspect of due process."). Of course, the full scope of federal habeas review would not be realized until after the Court had incorporated the Bill of Rights. *See* Stephen Semeraro, *Two Theories of Habeas Corpus*, 71 Brook. L. Rev. 1233, 1258–62 (2006) (describing the impact of "mass incorporation of criminal procedure rights" on habeas jurisprudence).

49. Bator, *supra* note 23, at 492 (concluding that, rather than forcing the state to provide adequate collateral proceedings, procedural fairness was insured by allowing a de novo determination of the federal claim in federal court).

50. In addition to Bator, other well-known proponents of limited federal intervention in state criminal convictions, such as Justice Sandra Day O'Connor, have unequivocally observed the role that federal habeas review must play when the state process is so lacking in fairness as to trigger due process concerns. Wright v. West, 505 U.S. 277, 299 (1992) (O'Connor, J., concurring) (citing *Frank* and *Moore* in support of the view that due process requires a fair and full adjudication of constitutional questions); *see also* Sandra Day O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm. & Mary L. Rev. 801, 815 (1981).

process are inadequate as a matter of due process.[51] The legacy of these landmark decisions, however, has been distorted or overlooked because of the parallel developments in criminal procedure jurisprudence that followed *Frank* and *Moore*. Less than a half-century after the date of the decision in *Moore*, the Court had radically expanded the scope of protections available to state prisoners by "selectively" incorporating nearly all of the protections of the Bill of Rights,[52] and (perhaps as a necessary antecedent step to incorporation) expanding the scope of federal habeas corpus.[53]

The Court's selective incorporation jurisprudence ushered in a view of federalism that regarded the protection of federal constitutional rights "as a matter of national concern, outweighing considerations of judicial self-restraint and deference to the values of local control."[54] It was the substance of constitutional rights, their content, and their meaning that was at issue, not the procedural niceties involving when and in what forums they could be adjudicated. The Court was focused on the meaning of rights announced in the Constitution, not the appropriate procedural posture for litigating these cases.[55]

But it was not just a rapid and unprecedented expansion in the scope and content of federal rights that overshadowed the *Moore* and *Frank* duo.[56] In conjunction with its incorporation revolution, the Court

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51. Bator, *supra* note 23, at 486–87.

52. Marceau, *Un-Incorporating*, *supra* note 6, at 1245–51 (tracing the history of Fourteenth Amendment incorporation); *see also* Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 292–300 (1982) (listing and describing the selective incorporation cases).

53. *See* Fay v. Noia, 372 U.S. 391, 398–99 (1963); Brown v. Allen, 344 U.S. 443, 463–65 (1953). As Professors Fallon and Meltzer have observed, "in [federal] cases involving review of state criminal convictions[] the scope of review underwent an accordion-like expansion following the Civil War and through the Warren Court era before contracting under the Burger and Rehnquist Courts even though the underlying statute remained essentially unchanged." Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2042–43 (2007) (citations omitted); *see also* Jerold Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 305 (2001) (asserting that there continues to be a dearth of literature regarding the freestanding content of due process).

54. Israel, *supra* note 52, at 316.

55. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 5–6 (1964); Gideon v. Wainwright, 372 U.S. 335, 341 (1963); Mapp v. Ohio, 367 U.S. 643, 654–55 (1961). Capturing the mood of the Court as to federal constitutional rights during this era, Justice Goldberg posited, "to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual." Pointer v. Texas, 380 U.S. 400, 414 (1965) (Goldberg, J., concurring).

56. In addition to commentary and decisions regarding the content of the constitutional rights, the debate over incorporation was the central focus for many commentators and, no doubt, rightfully pulled a great deal of academic and judicial resources away from *Frank* and *Moore*. For a complete picture of the rich debate, see Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949), Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963), and Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949).

simultaneously recognized that federal habeas corpus was an appropriate forum for the litigation (and even the discovery[57]) of new federal rights.[58] Many scholars and courts point to the Court's 1953 decision in *Brown v. Allen* as a major turning point in the willingness of federal courts to review the merits of constitutional claims. The conventional wisdom is that *Brown* revolutionized federal habeas review by requiring de novo review of the constitutional claims raised by state prisoners.[59] In view of the Court's willingness to revisit the merits of federal constitutional litigation impacting a state conviction, regardless of the adequacy of the state process,[60] the diminished role of federal courts in reviewing the *Frank* question—whether the state court's process was full and fair—was inevitable.[61] In short, the focus on substantive review dictated by the selective incorporation cases, and the Warren Court's habeas jurisprudence, overshadowed *Frank* and *Moore*.[62] But neither

57. Although *Teague v. Lane*, 489 U.S. 288, 310–11 (1989) (plurality opinion), substantially erodes the possibility for discovering rights on habeas review, at earlier points in the Court's history, the discovery of rights and remedies on habeas review was not uncommon. *See, e.g.*, *Gideon*, 372 U.S. at 342–345; *Mapp*, 367 U.S. at 654–55.

58. *Brown*, 344 U.S. at 463.

59. At least one prominent scholar has rightfully challenged this characterization of the writ's evolution. Professor Freedman has summarized the cases leading up to *Brown* and he concludes, "*Brown* did not change the scope of review a prisoner could obtain, but rather was designed to make sure that, whatever its scope, the review would be meaningful . . . ." FREEDMAN, *supra* note 33, at 96; *see also* Wainwright v. Sykes, 433 U.S. 72, 87 (1977). Freedman notes that there is "[n]o evidence for the proposition that *Brown* inaugurated some new and more intrusive level of federal scrutiny of state court proceedings"; instead, "*Brown* was an exceedingly minor event." FREEDMAN, *supra* note 33, at 140. In view of Freedman's reasoned rejection of the apocryphal reading of *Brown*, it may be appropriate to treat cases like *Fay v. Noia*, 372 U.S. 391 (1963), as truer reflections of the substantive revolution that characterized the Warren years. Regardless, it is fair to say that the Warren Court's jurisprudence reflected a marked focus on the substance rather than the procedure of habeas petitions filed by state prisoners.

60. *Fay*, 372 U.S. at 398–99 (holding that a prisoner who failed to litigate his federal constitutional claims in state court could nonetheless do so on federal habeas review, so long as the prisoner did not deliberately bypass the corrective processes).

61. Professor Bator has explained that the widening scope of federal habeas review in the 1960s strongly undercut the role (and need) for federal courts to consider the procedural fairness of the state process. He argues, for example, that *Brown v. Allen* was a "step in the wrong direction" and notes that in effect, *Brown*'s broad mandate for federal courts to review the merits of the constitutional question "tells the states that not much will turn on whether or not they provide corrective process: no matter how conscientiously and fairly they apply themselves to the consideration of the merits of the federal claims." Bator, *supra* note 23, at 522–23; *id.* (suggesting that the institutional factors in support of improving state procedures are undermined when state courts are "automatically second-guessed").

62. Other fundamental rights have been discovered, and then promptly overshadowed when apparently related rights have been recognized, only to return to prominence once again when the apparently superseding right is limited through subsequent decisions or legislation. For example, in *Massiah v. United States*, the Court held that the Sixth Amendment right to counsel was violated when the police deliberately elicited information from an accused who had already been indicted. 377 U.S. 201, 206 (1964). But this right was largely ignored for over a decade because lawyers and courts assumed that the more recent decision, *Miranda v. Arizona*, 384 U.S. 436 (1966), superseded and rendered *Massiah* superfluous. *See, e.g.*, Brewer v. Williams, 430 U.S. 387, 397, 401 (1977) (refusing to

incorporation nor the expansion of the federal writ cast any doubt on the viability of the due process rights announced in the Court's earlier decisions. It simply made them less important and less litigated, at least until the modern legislative reforms of federal habeas corpus.[63]

Although overshadowed by the more visible aspects of the criminal procedure revolution, the due process bread crumbs leading back to the *Frank*/*Moore* legacy are still visible. In the context of analyzing when a federal habeas petitioner is entitled to a factual development through an evidentiary hearing, the Court, in *Townsend v. Sain*, unanimously agreed that the absence of a fair opportunity to develop a non-record-based claim in state court necessitated a federal hearing.[64] Justice Stewart dissented on the grounds that he did not believe the state court had failed to provide a constitutionally adequate proceeding, but he acknowledged that the absence of fair state procedures directly implicated due process.[65] Specifically, Justice Stewart concluded that there was no due process violation because the state court's review of the prisoner's allegation of constitutional injury was "fully and fairly determined in the [state] courts of Illinois."[66] Thus, in both the majority and dissenting opinion, "full and fair" remained in the foreground of due process analysis.

The import of *Townsend* as a landmark for understanding the constitutional content of the full and fair right remained a significant part of the modern due process discussion, even by advocates for habeas reform. The Department of Justice under President Reagan, for example, proposed a bill that would have limited federal habeas review

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find a *Miranda* violation, but holding that the accused's right to counsel was violated under *Massiah*); YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 160 (1980) ("[*Massiah*] was apparently lost in the shuffle of fast-moving events that reshaped constitutional-criminal procedure in the 1960s."); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 889 (1981).

63. *Compare Brown*, 344 U.S. at 463–64, *with* 28 U.S.C. § 2254(d) (2000). Commentators have observed that the Warren Court's criminal procedure revolution was not concerned with mere procedural fairness, but rather with grander substantive goals. Professors Hoffman and King have described the Warren/Brennan approach as a two-tiered strategy: (1) "incorporate, one by one, . . . specific constitutional provisions," and (2) "expand the availability and scope of federal habeas review." Hoffman & King, *supra* note 20, at 801.

64. 372 U.S. 293, 312–13, 318 (1963) (mandating that federal courts hold a hearing if the state courts had denied the prisoner a full and fair hearing, and permitting, as a matter of discretion, evidentiary hearings when the state process had been procedurally adequate).

65. *Id.* at 334 (Stewart, J., dissenting).

66. *Id.* (noting that "the record of the state proceedings clearly shows that the petitioner received a full and fair hearing as to the factual foundation for his constitutional claim," and stressing that this is a question of due process with which each State must conform). The trial court admitted a confession into evidence and charged the jury with determining whether the confession was voluntary, which was permitted by Illinois state law because such determination goes to the credibility of a witness. *Id.* at 296 (majority opinion). The Cook County Criminal Court dismissed the petition for postconviction collateral relief without an evidentiary hearing, and the Supreme Court of Illinois denied certiorari, "holding that the issue of coercion was res judicata." *Id.*

to the extent permitted by the Constitution; the bill called for a presumption of correctness to attach to all "full and fair determination[s]" by the state court.[67] The Department of Justice "explained that 'full and fair' in this context would mean rough compliance with the *Townsend* standards."[68]

Similar reasoning underlies the Court's seminal case limiting the availability of federal habeas relief for violations of the Fourth Amendment, *Stone v. Powell*. In *Stone*, the Court held that federal habeas relief was not available for state prisoners seeking to vindicate a Fourth Amendment right so long as the prisoner received a "full and fair" opportunity to litigate the Fourth Amendment claims in state court.[69] It is significant that the Court's groundbreaking limitation on the vindication of Fourth Amendment rights on habeas review was limited by precisely the same form of procedural safeguard mandated by *Frank* and *Moore*. As it had done before, the Court appears to conclude that, in the absence of a full and fair review of the constitutional claim, "due process . . . demands that [the state court's] conclusions of fact or law should not be respected."[70] A compelling reading of *Stone* is that its refusal to completely bar habeas relief for Fourth Amendment claims turns on a recognition that the "denial of an opportunity for full and fair hearing constitutes an independent denial of due process, i.e., what Justice Brandeis referred to as 'due process in the primary sense,—whether [a litigant] has had an opportunity to present its case and be heard in its support.'"[71]

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67. Yackle, *supra* note 12, at 141 n.23.

68. *Id.* Some will attempt to discredit the conclusion that full and fair review is required by noting that proposals for habeas reform like that offered by the Reagan administration expressly included a requirement that federal habeas review be curtailed only when the state review was full and fair. Indeed, the version of § 2254 that was in effect when the AEDPA was enacted conditioned certain forms of deference on a full and fair state process. *See, e.g.*, 28 U.S.C. § 2254(d)(2) (1994 & Supp II 1996). These arguments, however, overlook, ignore, or refuse to acknowledge the constitutional nature of the full and fair right. If full and fair review is constitutionally protected, then statutory abrogation of this protection is of no effect.

69. 428 U.S. 465, 494 (1976); *see also id.* at 475–76 (recognizing *Frank* as a turning point in expanding the role of federal courts sitting in habeas).

70. Bator, *supra* note 23, at 456; *see also Stone*, 428 U.S. at 494 n.35 (relying on Bator for the proposition that finality serves the interests of comity and federalism).

71. Philip Halpern, *Federal Habeas Corpus and the* Mapp *Exclusionary Rule After* Stone v. Powell, 82 COLUM. L. REV. 1, 17 n.115 (1982) (quoting Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681 (1930)). Some commentators have suggested that the Court's characterization of the exclusionary rule as a non-constitutional right undermines the view that *Stone*'s "full and fair" limit is derived from a due process protection. *Id.* ("It is unlikely, however, that the *Stone* Court intended to base the exception on due process, given its underlying premises that the admission of illegally seized evidence implicates neither a personal constitutional right of the accused nor the basic fairness of the trial."). Interestingly, however, it is not just the (non-constitutional) exclusionary rule that is sacrificed if a prisoner never receives a "full and fair" adjudication of his claim in state court, but also the Fourth Amendment itself. The Fourth Amendment right, not merely its remedy, if any, will *never* be litigated in federal habeas proceedings after *Stone* in the absence of a state process that is not "full and fair." In

Other examples from Supreme Court precedent show that, in the context of challenges to criminal convictions or sentences, the constitutional pedigree of the full and fair right remained intact. Writing for herself and two other Justices in a badly fractured plurality decision, *Wright v. West*, Justice O'Connor emphasized that the "full and fair . . . rule . . . defines [a] constitutional claim."[72] More precisely, Justice O'Connor explained that due process mandates that every prisoner receive at least one full and fair review of his constitutional claims, either through direct or collateral proceedings, and either in state or federal court.[73] Similarly, in a decision from the 2007 term, in *Panetti v. Quaterman*, the Supreme Court recognized that the Constitution mandates minimally fair procedures in assessing the constitutional propriety of an execution.[74] The Court held that there was a constitutionally cognizable harm based not necessarily on the substance of Panetti's legal claim, but on the deficiency of the state court's procedures for assessing competence.[75] And even Justice Scalia has recognized that "precepts of fundamental fairness inherent in 'due process' suggest that a forum to litigate [constitutional] challenges like petitioner's must be made available *somewhere* for the odd case in which the challenge could not have been brought earlier."[76]

The Supreme Court has also directly affirmed the existence of a freestanding right to a full and fair review of constitutional rights outside of the context of federal habeas review.[77] For example, in deciding

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short, the due process protections corresponding to the "full and fair" right may be designed to ensure the fair and complete review of the Fourth Amendment, not merely the exclusionary rule. *Cf.* Drummond v. Ryan, 572 F. Supp. 2d 528, 535 (D. Del. 2008) (relying on a case expressly involving questions of due process and procedural fairness, *Wright v. West*, 505 U.S. 277, 293 (1992), in assessing *Stone*'s "full and fair" requirement).

72. 505 U.S. 277, 299 (1992) (O'Connor, J., concurring) (citing *Frank* and *Moore* in support of the view that due process requires a fair and full adjudication of constitutional questions); *see also* O'Connor, *supra* note 50, at 814–15 (calling for deference to state court judgments out of regard for finality and federalism, but only where the federal constitutional question represents a full and fair adjudication of the rights in question).

73. *Wright*, 505 U.S. at 298–99.

74. 551 U.S. 930, 948–49 (2007).

75. *Id.* at 950–52. The constitutional right identified in *Panetti* is grounded in the Eighth Amendment and corresponding procedures that were identified in a prior decision regarding the constitutionality of executing the incompetent. *See* Ford v. Wainwright, 477 U.S. 399, 401 (1986). Consequently, *Panetti* does not expressly address the procedural rights in terms of the "full and fair" notion that derives from cases like *Frank* and *Magnum*.

76. Daniels v. United States, 532 U.S. 374, 386 (2001) (Scalia, J., concurring in part). Notably, Justice Scalia's solution to the absence of a fair proceeding in state court would involve returning the case to the state for an opportunity to provide fair procedures anew. *See id.* at 387. From this, one could infer that he would not support expanding federal habeas review to embrace this model of fairness-correction review.

77. In addition, outside of the field of federal habeas corpus review, every federal circuit appears to have recognized the right to a full and fair procedural review of one's constitutional claims. *See, e.g.*, Miller v. French, 530 U.S. 327, 350 (2000) ("[D]ue process . . . principally serves to protect the personal

whether the Prison Litigation Reform Act of 1995 (PLRA)[78] was unconstitutional, the Court expressly recognized that an unreasonably short time limit for judicial decisionmaking, in the form of that imposed by the PLRA, might infringe on the due process right to a fair adjudication of the underlying constitutional right.[79] Specifically, the Court noted that it was required to review the PLRA as a matter of due process because "due process . . . serves to protect the personal rights of litigants to a full and fair hearing."[80] Further reinforcing the constitutional pedigree of the right to a full and fair review of constitutional claims is the Court's jurisprudence regarding collateral estoppel, res judicata,[81] and full faith and credit: the Court has held that none of these doctrines may be relied upon when the initial adjudication is not "full and fair."[82] In *Kremer v. Chemical Construction Corp.*, the Court held that due process prohibits a court from giving preclusive effect to a "constitutionally infirm judgment."[83] Elaborating on this

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rights of litigants to a full and fair hearing . . . ."); Hepp v. Astrue, 511 F.3d 798, 804 (8th Cir. 2008) ("Procedural due process under the Fifth Amendment also requires full and fair hearings for disability benefits."); Singh v. Gonzales, 432 F.3d 533, 541 (3rd Cir. 2006) ("Aliens are 'entitled to a full and fair hearing of [their] claims and a reasonable opportunity to present evidence.'" (alteration in original) (quoting Chong v. Distr. Dir., INS, 264 F.3d 378, 386 (3d Cir. 2001))); Colmenar v. INS, 210 F.3d 967, 971 (9th Cir. 2000) ("The Fifth Amendment guarantees due process in deportation proceedings. As a result, an alien who faces deportation is entitled to a full and fair hearing of his claims . . . ." (citation omitted)); Aguilar-Solis v. INS, 168 F.3d 565, 569 (1st Cir. 1999) ("[A] party to an immigration case, like any other litigant, is entitled to a full and fair hearing—not an idyllic one."); Yancey v. Apfel, 145 F.3d 106, 112 (2d Cir. 1998) ("Generally, due process requires that a social security disability hearing must be full and fair." (citing Richardson v. Perales, 402 U.S. 389, 401–02 (1971))); Frazier v. Kutz, 139 F.2d 380, 383 (D.C. Cir. 1943) ("[T]he court should afford a full and fair hearing . . . . Less than this would not be due process.").

78. Pub. L. No. 103-134, tit. VIII, 110 Stat. 1321-66 (2006) (codified in scattered sections of 11, 18, 28, and 42 U.S.C.).

79. Miller v. French, 530 U.S. 327, 350 (2000). The Court ultimately concluded that the PLRA did not impose decisionmaking deadlines on federal courts that were incompatible with due process. *Id.* Notably, it is an open question whether the limitations on federal review under the, so called, "opt-in" provisions of the AEDPA would amount to such an unreasonable limit as to constitute a freestanding due process violation.

80. *Id.*

81. The analogies between the preclusion doctrines and federal habeas remedies warrant careful attention. Under the *Stone v. Powell* rule, preclusion is warranted so long as the prisoner had an opportunity to fully and fairly adjudicate his Fourth Amendment grievances, regardless of whether he exercised these rights. *See* 428 U.S. 465, 482 (1976). In this sense, *Stone* tracks the doctrine of claim preclusion or res judicata. By contrast, the limitations of § 2254(d) are triggered only by actual state court adjudication, thus suggesting an analog to the concept of issue preclusion or collateral estoppel. *See* 28 U.S.C. § 2254(d) (2000).

82. Traditionally, the doctrines of preclusion and full faith and credit arise in the context of civil litigation. It is beyond the scope of this Article to conclusively analyze whether the adjudication of constitutional rights in the criminal context warrants more careful or sure procedures than in civil adjudications, but historically, commentators have regarded this as a truism. *See, e.g.*, Bator, *supra* note 23, at 508 ("[I]t might be argued that constitutional rights in criminal cases have a particular sanctity and importance.").

83. 456 U.S. 461, 482–83 (1982) (barring a federal discrimination action under Title VII because

principle, the Court explained that a "full and fair opportunity to litigate" is synonymous with "the procedural requirements of due process."[84]

In sum, there is a freestanding due process right to a full and fair review. And full and fair review means having constitutional questions relating to one's sentence and conviction reviewed through a procedurally adequate process "*somewhere*."[85] Due process alone does not require duplicative layers of full and fair review; "one full bite" is required either in state or federal court, but not necessarily in both.[86] By recognizing some freestanding form of "due process in the primary sense," this Article calls for limiting the current reach of the federal deference prescribed by the AEDPA.[87]

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relief had already been sought and denied through procedurally adequate state proceedings).

84. *Id.* at 483 n.24; *see also* Sherrer v. Sherrer, 334 U.S. 343, 348 (1948) ("It is not suggested that his rights to introduce evidence and otherwise to conduct his defense were in any degree impaired; nor is it suggested that there was not available to him the right to seek review of the decree by appeal to the Florida Supreme Court. . . . [Accordingly], there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate [the issue]." (citing Baldwin v. Iowa Traveling Men's Ass'n, 283 U.S. 522, 524 (1931))).

85. *See* Daniels v. United States, 532 U.S. 374, 386 (2001) (Scalia, J., concurring in part).

86. *See* 2 HERTZ & LIEBMAN, *supra* note 12, at 120 (applying the "one full bite" metaphor in the context of § 2255 petitions, 28 U.S.C. § 2255 (2006), which are the federal analogues to § 2254 petitions). The reasoning provided by Hertz and Liebman surely extends to § 2254 petitions based on the analysis provided. *Id.* As Professor Lee has observed, the central concern of the full and fair model is whether there was some unforgivable "corruption of the state court process." Lee, *supra* note 22, at 301. Consequently, the full and fair protections have been traditionally associated with conservatives. *Id.* ("[T]here have been many conservatives throughout the years who favored just such a rule, or something very close to it." (citations omitted)).

87. This notion that basic or fundamental due process is relevant to a determination of whether (and how much) federal habeas review is required has, as a matter of history, not been controversial, even among the greatest proponents of limiting the Great Writ. Bator, who was one of the first and most famous opponents to the expansion of federal habeas review, concluded that state adjudications that were not full and fair "should not be respected." Bator, *supra* note 23, at 456. Likewise, former Attorney General Alberto Gonzalez defended the military proceedings against suspected terrorists on the grounds that such proceedings complied with due process insofar as they were "full and fair." Alberto Gonzalez, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27. In addition, Justice Scalia has recently expressed grave concerns about the due process issues that might arise from deferring to a state postconviction process that was not "full and fair." Transcript of Oral Argument at 49–51, Bell v. Kelly, 129 S. Ct. 393 (2008) (No. 07-1223), 2008 WL 4892842 (describing a state postconviction procedure that appeared patently inadequate as a matter of procedural fairness, and noting that it was the unconstitutionality of the procedures, not the substance of the claim, that was "sticking in [his] craw").

II. A TAXONOMY OF THE "FULL AND FAIR" RIGHT: CLASSIFYING THE TYPES OF DUE PROCESS VIOLATIONS THAT ARISE

A. "FULL AND FAIR" CONTRASTED WITH OTHER PROCEDURAL DUE PROCESS PROTECTIONS

For as long as there have been calls for limiting federal review for habeas cases, awareness that such limitations must be tempered by due process has increased.[88] But the modern debate over the scope of federal habeas corpus review seems to have lost sight of this common ground.[89] As Professor Woolhandler has framed the habeas debate, there are essentially two extremes.[90] There are those who argue that federal habeas must always provide a "full review" of the federal question presented on the theory that federal courts are the better and most proper final arbiters of federal rights.[91] Then there are those who argue that habeas ought to serve a more limited purpose as a check on the institutional competence of state adjudications.[92] But lost in the translation of the AEDPA's limits is the common ground shared by these two positions. Even if the more restrictive state's rights-oriented view of habeas—as espoused by the likes of Bator and Justice O'Connor—is adopted, the current application of the AEDPA by some federal circuits is in tension

88. *See* Bator, *supra* note 23, at 456 (stressing that due process of law requires a forum for the fair and full litigation of federal constitutional rights relating to one's conviction or sentence). *See generally* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1976–77) (recognizing a role for redundant processes in achieving fundamental fairness in criminal cases); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) (linking innocence to the eligibility for habeas relief in most cases, but providing an exception for certain limited classes of procedural inadequacies, such as the denial of a direct appeal on the issue in question); Peller, *supra* note 21.

89. At least one recent article has overlooked the role of due process in limiting the scope of impediments that Congress may impose on federal habeas review. In a wonderful and provocative essay suggesting that federal habeas review for non-capital cases should be strictly limited to instances of innocence or retroactive applications of law, two scholars posit that due process imposes no limits on the states and federal courts. Hoffman & King, *supra* note 20, at 834–36. In fact, Hoffman and King go so far as to suggest that, if a state's postconviction system is "[in]adequate to adjudicate defendants' constitutional claims," then the remedy would be to "reinstate the existing, post-AEDPA version of habeas for state prisoners" from that state. *Id.* at 843.

90. Woolhandler, *supra* note 21, at 577–79.

91. This model is reflected in the Warren Court's approach to federal habeas adjudications. *See, e.g.*, Brown v. Allen, 344 U.S. 443, 458, 463–65 (1953). This view is famously expounded in several articles. *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977); Peller, *supra* note 21, at 583–86, 690; Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 992 (1985). For an alternative justification for broad federal habeas review based on the doctrinal underpinning of selective incorporation, see Marceau, *Un-Incorporating*, *supra* note 6, at 1232.

92. *See, e.g.*, Bator, *supra* note 23, at 509–10 (rejecting the notion that federal courts are inherently better at determining the "correct" answers); Friendly, *supra* note 88, at 151–53 (calling for federal habeas review to be limited to those situations where a state prisoner was either denied a full and fair process, or where he could make a colorable showing of innocence).

with due process.[93] Accordingly, although few topics in law have produced more polarized and irreconcilable positions,[94] there is room now in the shadow of the AEDPA for a transcendent discussion about the role of procedural fairness in federal habeas review. The starting point, of course, is attempting to ascertain the meaning of the full and fair standard. When does an application of AEDPA deference conflict with fundamental fairness?

One logical reference point for defining the procedural requirements of due process in this context is *Mathews v. Eldridge*.[95] In *Eldridge*, the Supreme Court announced a readily adaptable balancing test for determining whether any particular procedure violates due process.[96] Under this test, lower courts are instructed to balance a set of familiar factors in order to ascertain whether due process has been violated.[97] Given that the *Eldridge* balancing test has been acculturating in the lower courts for three decades, and in view of the Court's own characterization of the doctrine as "a general approach for testing challenged state procedures under a due process claim,"[98] there was ample reason to believe that *Eldridge* would govern in this context.

However, in *Medina v. California*, the Court expressly rejected the invitation to apply the coherence of *Eldridge* to criminal cases.[99] Instead,

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93. *See* Woolhandler, *supra* note 21, at 576–80 (recognizing a basic overlap as to issues of procedural fairness among all of the divergent theories of habeas jurisdiction).

94. *Compare* Liebman & Ryan, *supra* note 6, at 885 (contending that a reading of § 2254(d)(1) that narrows the scope of habeas review contravenes Article III principles), Peller, *supra* note 21, at 666–69 ("[T]he federal judiciary should always have the 'last word' on constitutional claims"), *and* Reitz, *supra* note 48, at 1373 (concluding that "in light of the problems and purposes thus far exposed," abortive state proceedings should not preclude federal courts from hearing constitutional claims), *with* Bator, *supra* note 23, at 523–28 (asserting that comity and finality call for strictly limiting the availability and the scope of habeas review), Friendly, *supra* note 88, at 142 ("[Wi]th a few important exceptions, convictions should be subject to [federal habeas review] only when the prisoner supplements his constitutional plea with a colorable claim of innocence."), *and* Scheidegger, *supra* note 8, at 891–92 (positing that Congress possessed the necessary authority to pass the AEDPA, which appropriately limits habeas review to "cases where the state court decision is clearly wrong").

95. 424 U.S. 319 (1976).

96. *See id.* at 335; *see also* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 29–30 (1976).

97. *Eldridge*, 424 U.S. at 335 ("First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

98. Parham v. J.R., 442 U.S. 584, 599 (1979).

99. 505 U.S. 437, 443 (1992). Prior to *Medina*, the Court had expressed a willingness to adjudicate due process claims arising in the context of criminal cases under the *Eldridge* test. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 77 (1985). As one commentator put it,

> The Court considered the standard that should apply in determining the requirements of due process in the criminal context and declined to apply the balancing approach of *Mathews v. Eldridge* that it had used to measure the requirements of due process in a

the Court held that the proper inquiry for assessing procedural failures in the criminal context is an assessment of whether the procedure in question "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as *fundamental*."[100] Consequently, after *Medina*, an assessment of potential due process harms in the criminal context involves not a balancing of the three factors announced in *Eldridge*, but rather a more limited review as to whether the state's procedures were so inadequate as to infringe on traditional notions of "fundamental fairness."[101]

This, of course, raises the question as to the relationship between fundamental fairness and the right to a full and fair opportunity to adjudicate one's claims.[102] As a practical matter, there does not appear to be any value in attempting to distinguish these obviously related—if not perfectly synonymous—concepts: the basic inquiry is one of due process.[103] Nonetheless, because the phrase full and fair enjoys a longer marriage with procedural due process,[104] and because the term "fundamental fairness" is often (and correctly) associated with the long debate over incorporation under the Fourteenth Amendment,[105] this

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number of areas, including two criminal cases.

Bruce J. Winick, *Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of* Medina v. California *and the Supreme Court's New Due Process Methodology in Criminal Cases*, 47 U. MIAMI L. REV. 817, 823 (1993).

100. *Medina*, 505 U.S. at 446 (emphasis added) (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)) (internal quotation marks omitted).

101. Israel, *supra* note 53, at 421 (recognizing that fundamental fairness will oftentimes be a "narrower inquiry"). Although "[i]n the course of applying the traditional fundamental fairness standard . . . a court . . . is likely to consider many of the same factors as it would in applying *Mathews*," *id.* at 423–24, it seems likely that the fundamental fairness inquiry is somewhat more limited and deferential. *See Medina*, 505 U.S. at 445–48.

102. *See* Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) (describing due process as a safeguard for our "deepest notions of what is fair and right and just").

103. Framing the due process right also involves the complexity of determining whether the Fifth or the Fourteenth Amendment applies. Both amendments provide that no person shall be deprived of life, liberty, or property, without due process of law. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. Given that the Fourteenth Amendment is a limitation on state powers, it would be highly unusual to impose duties on federal actors under the Fourteenth Amendment. And yet, recognizing that there is a state prisoner, and that due process harm is, at least in the first instance, the state's failure to provide a full and fair review of the claim in question, imposing a full and fair requirement on federal courts under the Fourteenth Amendment is possible. Alternatively, the failure to ensure a fair process could trigger due process limits under the Fifth Amendment that would require a federal court to provide a fair review when such a review was denied by the state court.

104. *Compare* Lisenba v. California, 314 U.S. 219, 236 (1941) (equating for the first time the right to due process with the right to fundamental fairness in a criminal proceeding), *with* Hughes v. Blake, 19 U.S. 453, 459 (1821) (recognizing a relationship between "full and fair" review and procedural due process).

105. In short, my use of the label "full and fair" is not at odds or incompatible with the rights that are understood as embodied by fundamental fairness. I use the phrase "full and fair," not because it is more inclusive, but because it tends to reflect a more precise articulation of the rights addressed in this Article. Fundamental fairness, by contrast, is used as a generic shorthand by commentators to address

Article refers primarily to the due process protection in question as the full and fair right.[106] This is not to say that the full and fair right necessarily encompasses a broader bundle of protections than those associated with fundamental fairness.[107] But my presentation leaves open the possibility that the Court might recognize the full and fair right as it relates to, or triggers access to, fair postconviction proceedings to be derived from the Suspension Clause of the Constitution,[108] in which case its protections could extend more broadly than the general fundamental fairness requirements imposed in criminal adjudications.[109]

B. The Content of a Full and Fair Right

The right to a full and fair adjudication of one's constitutional rights holds a place of honor among other constitutional protections because it is the gateway between finality and fairness.[110] As one lower federal court explained its role in federal habeas litigation: "The existence of a full and fair hearing on constitutional claims under federal standards is the

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the essences of due process. *See, e.g.*, James J. Tomkovicz, *The* Massiah *Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C. L. Rev. 751, 762 (1989) (recognizing that the admission into evidence of an involuntary confession would violate due process because such conduct "contravenes the promise of fundamentally fair procedure that is the essence of due process").

106. Moreover, the history of "full and fair" is more closely connected with the evolution of habeas corpus protections. *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229, 2268 (2008) (tracing the history of habeas corpus in America and noting the influence of the expectation of a "full and fair" proceeding); *id.* at 2273 (distinguishing the executive detentions at issue from conventional federal habeas review under § 2254 by noting that deference is permitted when the prisoner "already has had a full and fair opportunity to develop" his constitutional claims); *see also* Bator, *supra* note 23, *passim*. *But see* Pennsylvania v. Finley, 481 U.S. 551, 556–57 (1987) (evaluating a state's postconviction proceeding as an issue of "fundamental fairness mandated by the Due Process Clause").

107. Recently, the Court has suggested that it prefers the label "fundamental fairness." *See, e.g.*, Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2320 (2009) ("[P]ostconviction relief procedures are constitutional if they 'comport with fundamental fairness.'" (quoting *Finley*, 481 U.S. at 556)). Framed in terms of fundamental fairness, the thesis of this Article is equally easy to articulate: Due process forbids the AEDPA's shell of deference from attaching to state processes that are not fundamentally fair.

108. U.S. Const. art. I, § 9, cl. 2. At least some commentators seem to adopt an understanding of the Suspension Clause that is, if not in tension with the dictates of due process identified in this Article, certainly a stingier form of constitutional protection. *See* Hoffman & King, *supra* note 20, at 835–47 (construing the Suspension Clause as prohibiting only systemic failures of process, rather than providing protection in any particular case where a process was not "full and fair").

109. It is also useful to distinguish the two concepts because commentators have urged an understanding of fundamental fairness that is materially broader than the interpretation of "full and fair" presented in this Article. *See e.g.*, 2 Hertz & Liebman, *supra* note 12, at 348; *see also id.* at 348–52 (arguing that as a matter of fundamental fairness there is an absolute requirement that state postconviction procedures be procedurally adequate and arguing for the right to counsel and other rights based on fundamental fairness).

110. Distinguished scholars of habeas jurisprudence have made a persuasive case that the Court's due process jurisprudence should be understood as recognizing a freestanding right to a fair state postconviction process. *Id.* at 352.

keystone of the unclimbable wall protecting the finality of a prior state habeas adjudication. In its absence, that wall crumbles."[111] The enthusiasm with which the AEDPA has been applied in a wide variety of contexts reflects, if only implicitly, an awareness of the fact that the previous version of § 2254, contained an express provision calling for deference to state findings only when those findings were "full and fair."[112]

However, federal courts, including the Roberts Court, have been less than eager in their efforts to restrain the impact of the AEDPA.[113] Stated another way, changes in the federal habeas statute, including the omission of any requirement that the state proceeding be full and fair, have fostered an environment that is not particularly hospitable to claims of procedural entitlement. By exposing the constitutionally-grounded nature of fair and full proceedings, I hope that courts will recognize that the absence of the full and fair language in the statute does not render due process superfluous or optional.[114] An understanding of what full and fair means has the direct benefit of illuminating a path between the twin goal posts of due process and the strictures of the AEDPA. Presently, the path is obscured by an overgrowth of habeas jurisprudence, but it need not be given up as lost.

In seeking to reveal the shrouded content of due process rights[115] in this context, it is useful to look to the three decades of litigation following *Stone v. Powell*.[116]

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111. Silverton v. Dep't of Treasury, 644 F.2d 1341, 1346 (9th Cir. 1981) (citing Townsend v. Sain, 372 U.S. 293 (1963)).

112. 28 U.S.C. § 2254 (1966) (amended 1996).

113. A notable exception to the view that the AEDPA's application is unwavering is that of Judge Guido Calabresi. Judge Calabresi has explained that federal courts' unflinching application of the AEDPA's deference is not always in the interest of state courts. *See* Washington v. Schriver, 255 F.3d 45, 62 (2d Cir. 2001) (Calabresi, J., concurring) ("But in spite of these sympathetic purposes, the AEDPA runs the risk of imposing a heavy, and sometimes unwanted and unmanageable, burden on State courts. Specifically, if AEDPA deference were deemed automatically and universally to apply, then that law would require extremely busy State court judges to figure out what can be very complicated questions of federal law at the pain of having a defendant incorrectly stay in prison should the State court decision of these complex questions turn out to be mistaken . . . .").

114. I have previously discussed why the omission of the "full and fair" language from the habeas statute does not signal an intent to omit that requirement, and I observed that even if such an intent existed, congressional efforts to override constitutional principles are impermissible. Justin F. Marceau, *Deference and Doubt: The Interaction of AEDPA § 2254(d)(2) and (e)(1)*, 82 TUL. L. REV. 385, 424–32 (2007).

115. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961); *see also* Hurtado v. California, 110 U.S. 516, 532 (1884) ("[Due process] must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property."); Davidson v. New Orleans, 96 U.S. 97, 101–02 (1877) (regarding due process as a set of rights that defies definition). For purposes of the argument, it is sufficient that the reader agree that due process requires *one* forum, either federal or state, that provides a full and fair review of the constitutional questions.

1. Stone v. Powell*'s "Full and Fair" Shadow*

For those in favor of drastically limiting federal habeas review, it has long been acknowledged that the outer limits of such curtailment are defined by due process.[117] Justice O'Connor and Professor Bator both defined due process as coterminous with access to a single full and fair review of one's constitutional claims.[118] It was the absence of a full and fair review, cautioned Bator, which warranted federal intervention.[119]

As the source of the longest line of cases litigating the meaning of full and fair, the Court's 1976 decision in *Stone v. Powell* is a useful resource for unpacking the content of full and fair. As discussed above,[120] by relying on *Frank* and the understanding of due process announced in that case, the Court in *Stone* held that a violation of the Fourth Amendment—or more precisely, the failure to exclude evidence based on a Fourth Amendment violation—was not cognizable on federal habeas review unless the "State had failed to provide [an] adequate 'corrective process' for the full and fair litigation of federal claims."[121] The Court expressly embraced the model of limited review espoused more than a decade earlier by Bator, generally refusing federal review of Fourth Amendment claims but accepting that where the state courts have failed to fully and fairly adjudicate the federal constitutional claim, federal review is de novo.[122]

As distilled immediately below, the federal court decisions applying the *Stone* rule generate a four-tier taxonomy of full-fair violations:

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116. 428 U.S. 465 (1976).

117. *See* Bator, *supra* note 23, at 456 (regarding a full and fair review as a minimum requirement of due process such that finality should attach only to state judgments that are minimally procedurally fair); O'Connor, *supra* note 50, at 814–15 (calling for deference to state adjudications that comport with minimal fairness).

118. Bator, *supra* note 23, at 456 ("It is, after all, the essence of the responsibility of the states under the due process clause to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case . . . ."); *id.* at 488–89 ("What is striking is that in *Moore*, unlike in *Frank*, the state supreme court did not conduct any proceeding or make any inquiry into the truth of the allegations [of constitutional injury]."); O'Connor, *supra* note 50, at 815.

119. *Id.* at 456–57.

120. *See supra* Part I.B.

121. Stone v. Powell, 428 U.S. 465, 476 (1976). When *Stone v. Powell* was decided, there were very few limits on the ability of federal courts to grant habeas relief for violations of the criminal procedure protections announced in the Bill of Rights. *See* Friedman, *supra* note 21, at 253 ("Since *Brown* the increase in the scope of habeas jurisdiction has created sharp controversy among courts and commentators, and to this day, commentators observe that no single satisfactory rationale exists for the broad scope of habeas jurisdiction."); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 877–84 (1984) (summarizing the Warren Court's habeas jurisprudence, and describing it as providing federal courts with "unlimited review").

122. *See Stone*, 428 U.S. at 481–82. As noted previously, the Court has never expressed the limitation on *Stone*'s holding in terms of a due process violation. *See supra* note 71. However, the Court begins its discussion of the constitutional right to habeas review by noting that, beginning in *Frank* and extending to many other cases, the Court has recognized a constitutional right to a full and fair review of one's constitutional claims. *Stone*, 428 U.S. at 476.

(1) willful legal errors, (2) substantive-procedural errors, (3) procedural traps, and (4) deficiencies in the scope or form of the factual development.

2. Willful Legal Errors May Reflect the Absence of a Full and Fair Adjudication

The first and most simplistic application of *Stone* involves the recognition that merely incorrect applications of the Fourth Amendment do not, as a matter of law, dictate that the process was not full and fair.[123] But even this seemingly obvious application of the "full and fair" rule is not without controversy. Several federal courts have recognized that a gross or willful misapplication of controlling Fourth Amendment precedents constitutes a denial of a full and fair process.[124] Utterly defying the procedural and substantive dichotomy, these courts have recognized that gross substantive errors mark procedural inadequacy.[125]

As the Tenth Circuit framed the rule, the requirement of a full and fair review or consideration of a claim "includes, but is not limited to, the procedural opportunity to raise or otherwise present a Fourth Amendment claim."[126] Instead, the court held that "a federal court is not precluded from considering Fourth Amendment claims in habeas corpus proceedings where the state court willfully refuses to apply the correct and controlling constitutional standards."[127] Under this view,[128] the Tenth Circuit held that full and fair federal habeas review of a claim was required, even under *Stone*, where the state court applies the incorrect "constitutional standard," or where the state court applies "the correct

123. It seems that nearly every circuit is in accord that errors of law, without more, do not create a due process harm. Halpern, *supra* note 71, at 17 ("The lower federal courts generally agree that an erroneous [F]ourth [A]mendment decision by the state courts, without more, does not constitute a denial of an 'opportunity for full and fair litigation.'"); *see also* Palmigiano v. Houle, 618 F.2d 877, 882 (1st Cir. 1980); Cole v. Estelle, 548 F.2d 1164, 1165 (5th Cir. 1977); Holmberg v. Parratt, 548 F.2d 745, 746 (8th Cir. 1977); Corley v. Cardwell, 544 F.2d 349, 351 (9th Cir. 1976).

124. Gamble v. Oklahoma, 583 F.2d 1161, 1165 (10th Cir. 1978); *see also* Grimsley v. Dodson, 696 F.2d 303, 307 (4th Cir. 1982) (Ervin, J., concurring) (concluding that the reasoning of *Gamble* is highly persuasive); Riley v. Gray, 674 F.2d 522, 526 (6th Cir. 1982) (recognizing that *Gamble* requires a substantive review of the State court's Fourth Amendment analysis, but declining to apply this rule); United States *ex rel.* Maxey v. Morris, 591 F.2d 386, 390 (7th Cir. 1979) (distinguishing *Gamble* on the facts, but suggesting that in the event that a state court simply ignores or refuses to apply binding law, the full and fair requirement might not be satisfied).

125. Currently, there is no question that the circuit courts continue to apply this view of "full and fair." *See* Sanchez v. Ulibarri, 308 F. App'x 280, 283–84 (10th Cir. 2009) ("The determinative question, [is] whether [the state court] recognized and made 'at least [a] colorable application of the correct Fourth Amendment constitutional standards.'" (quoting *Gamble*, 583 F.2d at 1165)).

126. *Gamble*, 583 F.2d at 1165.

127. *Id.*

128. This view, that the limits on a federal court's substantive review of a federal constitutional claim under the AEDPA track with the minimum requirements of due process, eerily foreshadowed the deference later prescribed by § 2254(d)(1). *Compare id.* (permitting federal review under *Stone* when the state misapprehends or grossly misapplies the federal constitutional rule), *with* 28 U.S.C. § 2254(d)(1) (2006) (curtailing federal habeas relief based on legal errors unless the state court applied the wrong standard, or applied the correct standard in an unreasonable manner).

federal standard . . . but in a manner so unconscionable as to deny a defendant the opportunity for full and fair litigation."[129] In fact, the court went so far as to explain that the state court's failure to fully and fairly adjudicate the issue was evidenced by the state court's failure to explicitly or implicitly reference the controlling Supreme Court decision as to the Fourth Amendment question at issue.[130] Accordingly, when the state court's resolution of an issue is "inconceivable" under the controlling constitutional precedent, then the adjudication is not full and fair as required by due process.[131]

Applying similar reasoning, the Third Circuit has noted that a state's "failure to give at least *colorable application* of the correct Fourth Amendment constitutional standard" could amount to a denial of the opportunity for full and fair litigation.[132] In short, procedures that condone and uphold patent and material violations of a constitutional right have been recognized, by at least some federal courts, to amount to a deprivation of one's right to a full and fair review.[133]

The more common reading of *Stone* appears to be that "full and fair" embodies a right to procedural fairness, not a review of the substantive merits of one's claim. In other words, the most common interpretation of *Stone*, contrary to decisions from the Tenth and Third Circuits, is that "[u]nless the petitioner alleges that some procedural defect impaired litigation of his [F]ourth [A]mendment claim," then federal habeas review of a Fourth Amendment claim is barred.[134] However, even the substance and procedure dichotomy is unilluminating. There are both substantive-procedural defects and pure procedural defects that might give rise to a due process injury.

3. Substantive-Procedural Failings That Render an Adjudication Less than Full and Fair

By substantive-procedural failings, I refer to those failures of procedure that are grounded in a misunderstanding of the governing procedural rules.[135] If, for example, a state court erroneously shifts the

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129. *See Gamble*, 583 F.2d at 1165 n.3.

130. *Id.* at 1165 (explaining that the relevant Supreme Court decisions were not even cited).

131. *Id.* at 1166.

132. Gilmore v. Marks, 799 F.2d 51, 57 (3d Cir. 1986) (emphasis added); *see also* Marshall v. Hendricks, 307 F.3d 36, 82 (3d Cir. 2002) (recognizing that *Gilmore* recognizes a need for a minimally colorable application of the Fourth Amendment).

133. 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.7(g), at 499 (4th ed.) (recognizing that some circuits have rejected the *Gamble* approach and noting that even under a *Gamble* standard, petitioners will have difficulty showing "'willful refusal.' It is not enough, for example, that the state court 'disposed of the issue in a terse fashion'" (quoting Sonnier v. Maggio, 720 F.2d 401, 409 (5th Cir. 1983))).

134. Halpern, *supra* note 71, at 19; *see also supra* note 123.

135. *Cf.* Taylor v. Maddox, 366 F.3d 992, 1001 (9th Cir. 2004) ("A somewhat different set of considerations applies where the state court does make factual findings, but does so under a misapprehension as to the correct legal standard. Obviously, where the state court's legal error infects

burden to the defendant to disprove law enforcement's proffered probable cause for a public arrest, and the error is not corrected through the appellate process, then the state procedures would be substantively irreconcilable with due process.[136] The error is a procedural one (burden of proof), but it relates to the substantive law governing the procedures. An uncorrected error of this type constitutes a denial of full and fair review.

Likewise, if a state court applied the wrong constitutional test in evaluating a Sixth Amendment claim of ineffective assistance of counsel[137]—for example, by requiring that the prisoner prove that it is *more likely than not* that the outcome of his trial would have been different but-for the deficient performance of his attorney[138]—an adjudication premised on this defective understanding of the Constitution would not comply with the minimum expectations of fairness embodied within the "full and fair" bundle of rights.[139] Another example of state procedures that have been deemed to be procedurally lacking as a substantive matter are situations involving the retroactive application of new rules.[140] It is well settled that a conviction does not become final until either the time for filing a certiorari petition with the Supreme Court has passed, or if a petition is filed, when certiorari is denied.[141] If a conviction is not final and new law is created—for example, a new and more expansive interpretation of the Fourth Amendment is

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the fact-finding process, the resulting factual determination will be unreasonable and no presumption of correctness can attach to it." (citations omitted)).

136. Halpern, *supra* note 71, at 20 ("[For purposes of *Stone*,] if a trial court erroneously requires a defendant to prove the absence of probable cause, but the error is subsequently corrected on appeal without change in the result, then habeas corpus review may be denied.").

137. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (prescribing a two-part test for assessing deprivations of the right to counsel under the Sixth Amendment).

138. Under *Strickland*, a prisoner is entitled to relief based on the deficient performance of his attorney if he can prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *see also* Allen v. Chandler, 555 F.3d 596, 601 (7th Cir. 2009) (implying that if a state required a prisoner to demonstrate that prejudice was "more likely than not," it would be directly contrary to the requirements of the Sixth Amendment); Romero v. Morgan, 271 F. App'x 673, 674 (9th Cir. 2008) (recognizing that Washington state court's use of an "actual and substantial prejudice" standard rather than the *Strickland* definition of prejudice was a contrary application of clearly established federal law).

139. Similarly, a state court's application of the incorrect "harmless error" standard to an alleged constitutional violation has been held to deprive the petitioner of a full and fair review by at least one circuit court. Herrera v. Lemaster, 225 F.3d 1176, 1178 (10th Cir. 2000) (holding that the state court's failure to apply the correct standard, *Chapman*, in assessing the harmlessness of the Fourth Amendment violation rendered the state proceeding insufficient as a matter of law under the full and fair standard). *But see* Fry v. Pliler, 551 U.S. 112, 121–22 (2007) (holding that the more deferential form of harmless error review—"substantial and injurious"—must be applied by the federal court even when the state court failed to apply the more lenient, "harmless beyond a reasonable doubt" standard).

140. *See* Anderson v. Calderon, 232 F.3d 1053, 1067–71 (9th Cir. 2000).

141. Teague v. Lane, 489 U.S. 288, 295 (1989); Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987).

provided by the Supreme Court—then a prisoner is entitled to rely on this "new" law as a basis for habeas relief. At least one circuit court has expressly held that where new law arises before a conviction becomes final, the state court's failure, or inability,[142] to consider a claim under the new law compels the conclusion that the state process is not full and fair.[143] In short, the patent refusal or inability to apply the governing federal standard amounts to a substantive-procedural error that is irreconcilable with the right to a full and fair review of one's constitutional claims.[144]

4. Pure Procedural Errors: Procedural Traps

Distinct from the substantive-procedural failings discussed immediately above, a state court's mechanism for reviewing federal constitutional claims may be flawed in a purely procedural manner such that the strictures of the full and fair requirement are not satisfied.[145] As with substantive errors of law, run-of-the-mill or trivial defects in a state's procedures will not create the sort of core unfairness sufficient to trigger a due process violation. On the other end of the spectrum, procedural failures evincing a "complete breakdown in the state

142. If the new rule was announced by the Supreme Court after state review was complete but before the prisoner's petition for certiorari had been denied, then the state court literally would have been unable to apply the new law, and yet the new rule must be applied to the prisoner's case under the governing retroactivity rules. Whorton v. Bockting, 549 U.S. 406, 416 (2007); Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004); *see also* Lawrence v. Florida, 549 U.S. 327, 333 (2007) (construing the AEDPA statute of limitations and observing that a conviction is not final until Supreme Court review is complete); 7 LAFAVE, *supra* note 25, § 28.6(c) ("A petitioner's state conviction is final only after the time has expired for filing a petition for certiorari from the state judgment affirming the conviction, or after the Court has denied certiorari."). As such, the state law would be deemed to have denied the prisoner a full and fair review of this new claim. *Anderson*, 232 F.3d at 1069 (noting that the "new" law did not even exist at the time of the prisoner's state court appeals because the Court issued a new rule for Fourth Amendment purposes while the prisoner's petition for certiorari was pending in the U.S. Supreme Court).

143. *Id.* at 1068–69 (concluding that the inability of the state court to consider a new interpretation of the *Gerstein* rule dictated that the state process was not procedurally full and fair as required by *Stone*); *see also* Lawhorn v. Allen, 519 F.3d 1272, 1289 (11th Cir. 2008) (conducting a similar retroactivity analysis).

144. The Supreme Court recently refused to recognize a due process right in the context of a substantive-procedural failure grounded in state law. Rivera v. Illinois, 129 S. Ct. 1446, 1454 (2009). In *Rivera*, the Court held that a state court's erroneous application of its peremptory challenge rules did not amount to a federal due process violation. *Id.* Specifically, the Court held that the "Due Process Clause safeguards not the meticulous observance of state procedural prescriptions, but the fundamental elements of fairness." *Id.* (quoting Spencer v. Texas, 385 U.S. 554, 563–564 (1967)) (internal quotation marks omitted). Accordingly, only substantive-procedural errors of a federal dimension, such as mistaking the burden of proof or the standard of proof for a constitutional claim, will yield a full and fair violation of this sort. *See id.*

145. Halpern, *supra* note 71, at 19 ("Given the dichotomy between process and substance, the classification of an alleged error as procedural or substantive is critical to the availability of habeas review."); *id.* at 19–20 (examining cases where the prisoner had attempted to characterize a substantive claim under the Fourth Amendment as a procedural defect).

procedure" represent clear deprivations of the full and fair adjudication right.[146]

Just one year after *Stone* was decided, the Second Circuit provided a framework for understanding the procedural "full and fair" limitation that continues to be applied: A state system will be deemed to be full and fair so long as the state procedures provide a reasonable opportunity for a prisoner to litigate his claims in a general sense, and so long as there was no "unconscionable breakdown in that process" as to the prisoner's particular claims.[147] In essence, *Stone* is satisfied if the state courts gave the individual a fair chance to litigate an exclusionary rule argument, whether or not he took advantage of it.

In *Boyd v. Mintz*, the Third Circuit applied this definition and provided an illustrative set of facts for understanding the sort of procedural defects that will amount to a denial of due process.[148] Boyd had been charged with various crimes relating to an alleged rape, and he sought to have certain critical items of evidence suppressed.[149] The New Jersey courts denied Boyd's motion to suppress as untimely, even though the public defender's office was appointed only one day before the suppression motion was due, and there was a conflict regarding exactly what the local rules required from defense counsel in these circumstances.[150] Of particular importance to the Third Circuit, the State defended its refusal to consider Boyd's constitutional claim on the merits on the basis of "informal," imprecise, and perhaps even unwritten court rules.[151] Adjudication by selective enforcement of an unwritten rule, the

146. *See, e.g.*, Boyd v. Mintz, 631 F.2d 247, 248 (3d Cir. 1980) (concluding that the state process had suffered an unconscionable breakdown such that it could be said that the state process was not "full and fair" for purposes of *Stone*).

147. Gates v. Henderson, 568 F.2d 830, 840 (2d Cir. 1977) (en banc).

148. 631 F.2d at 250–51. In *Boyd*, the court recognized that *Stone* is satisfied when a fundamentally fair procedure for vindicating federal constitutional rights exists, even if it is bypassed by the prisoner. *Id.* However, the existence of a generally adequate system will not insulate from federal review a discrete and prejudicial application of a procedure in a particular case. Summarizing this understanding, the Eighth Circuit has explained, "Under this test, a Fourth Amendment claim is *Stone*-barred, and thus unreviewable by a federal habeas court, unless either the state provided no procedure by which the prisoner could raise his Fourth Amendment claim, or the prisoner was foreclosed from using that procedure because of an unconscionable breakdown in the system." Willett v. Lockhart, 37 F.3d 1265, 1273 (8th Cir. 1994).

149. *Boyd*, 631 F.2d at 248–49.

150. *Id.* at 250–51 (noting also that the State was defending the denial of Boyd's claims without review on the basis of informal and unwritten policy changes).

151. *Id.* at 251 ("Boyd was denied the opportunity to present his [F]ourth [A]mendment claim. We hold that federal habeas corpus relief is therefore not precluded and that he should at a minimum be given the opportunity to have his day in court on the legality of the search and seizure."). Another example of an "unconscionable" breakdown in the system such that the adjudication was not full and fair is *Riley v. Gray*, 674 F.2d 522, 527 (6th Cir. 1982) (finding a fundamental breakdown in the process where an appellate court held that the prisoner lacked standing to challenge the police search without briefing on the issue and without remanding the issue for review and factual development by the trial court); *see also* Cabrera v. Hinsley, 324 F.3d 527, 530–32 (7th Cir. 2003) (applying the Seventh Circuit

court held, was ineligible for the sort of deference promised in *Stone v. Powell*.[152]

There are other examples where the federal courts have been concerned with federalism and its possible tension with due process.[153] A recent Fifth Circuit decision, for example, described the fact that a particular county in Texas seemed unwilling or unable to file the pleadings of state postconviction petitioners seeking to have their convictions overturned.[154] Quoting from a magistrate's findings, the court noted that it is unclear whether the state court "simply discards state prisoners' mail, ignores it, loses it, or is so disorganized that filings are lost before they reach the file."[155]

Another example of the sort of procedural unfairness that belies the concept of fundamental fairness is the federal district court's opinion in *Holloway v. Woodward*.[156] In *Holloway*, the court held that the application of an ordinarily legitimate procedural rule requiring that motions to suppress be accompanied by affidavits stating the facts in support of the Fourth Amendment claim could, in certain circumstances, deprive an individual of a full and fair adjudication.[157] Holloway had failed to file an affidavit in support of his suppression motion, but the court noted that requiring him to do so would have been little more than "a barren exercise in formalism," insofar as Holloway would have simply "reproduced the detailed allegations of his motion in affidavit form."[158] Ultimately, the North Carolina Supreme Court held that Holloway's Fourth Amendment claim was barred by his failure to comply with the formal requirement to attach an affidavit, but it did so only after: (1) the state had failed to object to Holloway's failure to attach the affidavit; (2)

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standard that *Stone* would not bar habeas review where a State provided a flimsy mechanism for litigating a claim, and holding that the petitioner "had a full and fair opportunity to litigate his claim"); United States *ex rel.* Bostick v. Peters, 3 F.3d 1023, 1027–28 (7th Cir. 1993); O'Berry v. Wainwright, 546 F.2d 1204, 1217 n.18 (5th Cir. 1977) (rejecting novel procedural traps as incompatible with full and fair review).

152. *Boyd*, 631 F.2d at 250–51.

153. The vast majority of these procedural traps probably arise in the context of unreported state court proceedings, perhaps with a pro se postconviction petitioner. It is probably fair to assume that many of these issues never see the light of the open pages of the Federal Reporter.

154. *See* Critchley v. Thaler, 586 F.3d 318, 321 (5th Cir. 2009).

155. *Id.* at 319.

156. 655 F. Supp. 1245, 1249–50 (W.D.N.C. 1987); *see also* Bailey v. Duckworth, 699 F.2d 424, 425–26 (7th Cir. 1983) (holding that the defendant was denied a full and fair hearing when the state appellate court denied Fourth Amendment relief on the basis that the accused lacked standing, an issue that had not been briefed or addressed by the petitioner); Bator, *supra* note 23, at 456 ("It is, after all, the essence of the responsibility of the states under the due process clause to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case."); O'Connor, *supra* note 50, at 814–15 (calling for deference to state adjudications that comport with minimal fairness).

157. 655 F. Supp. at 1249–50.

158. *Id.* at 1250.

the trial court had awarded Holloway a suppression hearing without the affidavit; and (3) the evidence presented at the suppression hearing compelled the conclusion that Holloway's Fourth Amendment rights had been violated.[159] In view of the State's failure to object to Holloway's procedurally inadequate motion at the time of the hearing, and in light of the compelling evidence of a Fourth Amendment violation presented by Holloway, the federal court held that the North Carolina Supreme Court's backdoor application of the procedural rule as a vehicle for denying relief amounted to a "procedural ambush," and therefore was inconsistent with the strictures of fundamental fairness or a full and fair review.[160]

Moreover, the notion that unfair state procedures obviate the need for federal deference—this notion that deference and procedural adequacy have a quid pro quo relationship—has an established history in the context of procedural default litigation.[161] The Court has recognized that a state's procedural rules, if not followed by a prisoner, may serve to permanently bar federal litigation of an issue, but it has nonetheless also signaled there are limits on the procedural default rules that appear to be of constitutional dimension.[162] If, for example, a state rule is not regularly followed, or if the rule is inconsistently applied by state courts, or, most significantly, if the state rule merely operates unfairly, then the Court has recognized that it will not be regarded as "adequate" for purposes of establishing an independent and adequate basis for procedural default.[163] If due process limits the application of the procedural default doctrine by

159. *See id.* at 1248.

160. *Id.* at 1250. There are other examples where lower courts have determined that the state process operated in an unexpectedly unfair manner. In *Cruz v. Alexander*, for example, the district court refused to apply the *Stone* bar where the state system had utterly and inexplicably failed to address the Fourth Amendment claim. 477 F. Supp. 516, 523 (S.D.N.Y. 1979) ("The result of this procedural journey through the state judicial system is that neither the trial nor appellate courts addressed the merits of Cruz's wiretap claim because each believed that the other had done or would do so. Cruz thus became the victim of what his counsel aptly calls a 'procedural "catch-22."' Cruz's opportunity to litigate his claim cannot have been full or fair when he was deprived in this way of a hearing in any court."); *see also* Agee v. White, 809 F.2d 1487, 1490 (11th Cir. 1987) (holding that *Stone* does not apply to unaddressed claims). *Contra* Williams v. Brown, 609 F.2d 216, 220 (5th Cir. 1980) (recognizing that procedural mistakes that "thwart the presentation of [F]ourth [A]mendment claims" do not render a particular prisoner's adjudication to litigate less than "full and fair," unless he can show that the state routinely or systemically applies the unfair procedures).

161. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (establishing the current procedural default rules).

162. *See, e.g.*, Lee v. Kemna, 534 U.S. 362, 376 (2002) ("There are, however, exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." (citing Davis v. Wechsler, 263 U.S. 22, 24 (1923)).

163. *See* James v. Kentucky, 466 U.S. 341, 348 (1984); Henry v. Mississippi, 379 U.S. 443, 447–48 (1965); *see also* LARRY YACKLE, POSTCONVICTION REMEDIES § 6:19 n.79 (1981) ("If a state ground is merely unfair, or lacking substantial support in state law, it may be found inadequate—though not necessarily invalid."); *id*. (cataloguing cases recognizing unfairness as a form of procedural inadequacy in the procedural default context).

requiring fair, and fairly-applied, rules, then it ought to be understood to similarly restrict the application of the AEDPA such that state court decisions are not steeled with deference unless the State is able to prove the adequacy of the state court process.[164]

In short, there are unfair procedures, and then there are fair procedures that are occasionally applied unfairly; deference to a state adjudication of either type is not required by *Stone* and is inconsistent with due process.[165] When a state procedural rule is applied sporadically or unfairly, it cannot affect a procedural default, and when the state process is guided by procedures, formal or informal, that render the process inhospitable to basic fairness, due process requires uninhibited federal review.[166] Describing this class of pure procedural errors, Professor LaFave has commented that certain state practices will, in the right circumstances, function as a procedural trap.[167] Accordingly, LaFave has concluded that, "federal habeas relief should be available with respect to a [constitutional] claim if the state court by some stratagem or procedural device unfairly prevented the petitioner from presenting argument on the legal issues."[168] Simply put, a procedural stratagem, trap, or ambush is inconsistent with the mandate of full and fair review.[169]

5. Pure Procedural Errors: Deficiencies in Fact-Finding Procedures

Finally, the right to a full and fair review of one's claim necessarily includes rights relating to the factual development of one's constitutional claim, and the deprivation of such a right constitutes a pure procedural abridgement of the full and fair rights.[170] As with all aspects of the full and fair definition set forth in this Article, there is room for disagreement at the margins;[171] however, there appears to be general

164. *Cf.* Bennett v. Mueller, 322 F.3d 573, 585 (9th Cir. 2003) (recognizing that the burden of proving adequacy of a procedural rule falls on the State). As at least one federal circuit has expressly recognized, "there is good reason to place the burden of proving adequacy on the state." *Id.*

165. Willett v. Lockhart, 37 F.3d. 1265, 1269–75 (8th Cir. 1994) (summarizing the various approaches used by circuit courts in defining "full and fair" and noting the controversy over how much federal oversight is actually permitted under this standard of review).

166. *See* YACKLE, *supra* note 163.

167. 6 LAFAVE, *supra* note 133, § 11.7(g), at 497–98.

168. *Id.*

169. For an oppositional view, see *infra* notes 180–81 (explaining the Fifth Circuit's approach to procedural fairness questions in this context).

170. *See, e.g.*, Winston v. Lee, 470 U.S. 753, 758 n.3 (1985) (noting that when he was arbitrarily denied adequate time and opportunity to develop crucial facts, the accused had "not had a full and fair opportunity to litigate in state trial court" and applying the previous version of § 2254 and concluding that no deference was owed to the state's findings of fact because the state process was not full and fair); *see also* Andrews v. Collins, 21 F.3d 612, 631 (5th Cir. 1994) (recognizing that an unreliable factual determination will be regarded as a factual determination that is not full and fair).

171. Any effort to announce agreement as to the definition of full and fair is somewhat tenuous. For over twenty years, commentators have recognized what might be considered a three-way split on this question, just in the context of interpreting *Stone*. *See* Roger K. Bechtel, Note, *New York University Supreme Court Project, Part IV: Criminal Law III*, 59 N.Y.U. L. REV. 1272, 1273–74 (1984);

agreement that "full and fair" requires an opportunity to develop the appropriate facts through full and fair procedure.[172] It has been observed, for example, that the mere provision of a hearing and an opportunity to develop one's constitutional claims will not be adequate if, in assessing a Fourth Amendment violation, the state court "excludes important relevant evidence on the issue of probable cause."[173] In essence, the inquiry is related to the due process determination called for in *Frank v. Magnum*: It is a review of whether the state's process functioned in a fundamentally defective manner as to the development of key factual issues.[174]

There are few bright-line rules as to what constitutes a pure procedural failure of the actual fact-gathering process.[175] But this is the problem with due process generally, not a specific problem with the full and fair right. And limited but illustrative examples exist that help provide content to this determination of whether factual adjudication amounted to the sort of reasoned inquiry required by due process.

There is, for example, express recognition by some federal courts that a state process that fails to provide a hearing for the development of contested material facts cannot be considered a full and fair review.[176] As the Eleventh Circuit has explained, "'full and fair consideration' in the context of the Fourth Amendment includes 'at least one evidentiary

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accord 17B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4263.1, at 224–25 (3d ed. 2007) (calling for the Supreme Court to grant certiorari to resolve the circuit split).

172. Whether the accuracy of the factual determinations may also serve as a basis for inferring that the factual review was not full and fair is somewhat less certain. *Compare* Weber v. Murphy, 15 F.3d 691, 694 (7th Cir. 1994) (concluding that federal courts conducting a full and fair review under *Stone* must assess whether the state court carefully and thoroughly analyzed the facts at issue), *and* Howard v. Pung, 862 F.2d 1348, 1350 (8th Cir. 1988) ("[A] state court evidentiary hearing may be less than full and fair if it yields factual determinations not fairly supported by the record . . . ."), *with* Willett v. Lockhart, 37 F.3d 1265, 1271 (8th Cir. 1994) ("[D]etermining whether the state court 'carefully and thoroughly analyzed the facts' and then 'applied the proper constitutional law' would require the very review of the state court record that the *Stone* rule is intended to circumvent.").

173. *Willett*, 37 F.3d at 1273 (Arnold, J., concurring). For advocates of broad federal habeas review, the strength of this Article's thesis—its close nexus to the narrow constitutional strictures of due process—has an unfortunate downside. The focus on procedure, of course, comes at a cost to the pursuit of pure and unbridled substantive review. A process can be entirely fair, at least from an external vantage point, and still produce heinously wrong substantive results. Along these lines, if a state court purports to "assume" that the allegations of fact made by the prisoner are true, and nevertheless denies habeas relief, it is difficult to conceive of a challenge to the state court's fact-finding procedures. While cursory, they purport to have taken all allegations made by the prisoner as true, a position that is more than can be expected from a full determination of all the factual issues in a case. Of course, the sort of procedural traps, substantive errors, or substantive-procedural errors, discussed *supra* Part II.B, would still reveal a state process that is not full and fair.

174. *See* Gates v. Henderson, 568 F.2d 830, 840 (2d Cir. 1977).

175. *See* Valtin v. Hollins, 248 F. Supp. 2d 311, 317 (S.D.N.Y. 2003) (concluding that a reasoned judgment following a procedurally fair suppression hearing is, without question, a full and fair process).

176. *See* Bradley v. Nagle, 212 F.3d 559, 565 (11th Cir. 2000).

hearing in a trial court and the availability of meaningful appellate review when there are facts in dispute, and full consideration by an appellate court when the facts are not in dispute.'"[177] There will, of course, be instances where a hearing is not required because the prisoner's constitutional claim is patently frivolous from the record, or where there are no material facts in need of development through a hearing, or perhaps when the state court resolves all factual discrepancies in the defendant's favor without a hearing but still denies relief.[178] As a general rule, however, where there are material facts in dispute that cannot be resolved on the record alone, a process that fails to provide a meaningful opportunity to discover and produce evidence, fails to provide an opportunity to confront witnesses where necessary, and fails to make relevant findings of fact will not be full and fair.[179]

It must be noted that at least one circuit appears to have rejected the view that the strictures of a full and fair review require even minimal procedural fairness in a particular case.[180] The Fifth Circuit has concluded that "in the absence of allegations that the processes provided by a state to fully and fairly litigate [F]ourth [A]mendment claims are *routinely or systematically* applied in such a way as to prevent the actual litigation of [F]ourth [A]mendment claims on their merits," the *Stone* bar applies.[181]

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177. *Id.* (quoting Caver v. Alabama, 577 F.2d 1188, 1191 (5th Cir. 1978)); *accord* Tukes v. Dugger, 911 F.2d 508, 514 (11th Cir. 1990) ("The trial court's failure to make explicit findings on matters essential to the [F]ourth [A]mendment issue, combined with the fact that the state appellate court issued only a summary affirmance, precludes a conclusion in this case that the state provided the meaningful appellate review necessary to erect a *Stone v. Powell* bar to our review of the claim."); *Caver*, 577 F.2d at 1191.

178. *See* Blackledge v. Allison, 431 U.S. 63, 76 (1977) (recognizing that a prisoner is not entitled to a hearing when his allegations are "palpably incredible" or "patently frivolous or false"); *Tukes*, 911 F.2d at 514 n.6 (acknowledging that summary disposition is not a per se violation of one's right to a full and fair review of a claim); *see also* Schriro v. Landrigan, 550 U.S. 465, 481 (2007) (holding that evidentiary hearings are not required where the prisoner has asserted a basis for relief that is patently inconsistent with the transcripts and record).

179. *See, e.g.*, Lawhorn v. Allen, 519 F.3d 1272, 1289 (11th Cir. 2008); Sanders v. Oliver, 611 F.2d 804, 808 (10th Cir. 1979) (concluding that full and fair requires a "procedural opportunity to raise a claim," and that this "includes a full and fair hearing"); Cruz v. Alexander, 477 F. Supp. 516, 522 (S.D.N.Y. 1979) (recognizing that the state court's failure to allow the prisoner to collect and present key evidence amounted to an adjudication that was not full and fair); *cf.* Pignone v. Sands, 589 F.2d 76, 80 (1st Cir. 1978) (recognizing that so long as the factual record is complete, a state appellate court's correction of legal error without ordering an additional hearing will satisfy full and fair). This understanding of the requirements of due process is consistent with the view that § 2254(e)(2) does not displace *Townsend v. Sain*, which mandates federal hearings when the state process did not provide for a full hearing. 372 U.S. 293, 312–13 (1963).

180. *See, e.g.*, Williams v. Brown, 609 F.2d 216, 220 (5th Cir. 1980).

181. *Id.* (emphasis added) (recognizing that procedural mistakes that "thwart the presentation of [F]ourth [A]mendment claims" do not violate the full and fair requirement absent a showing that the state is routinely or systemically making such mistakes); *see also* Moreno v. Dretke, 450 F.3d 158, 167 (5th Cir. 2006) (citing and following the *Williams* approach); Mitchell v. Epps, No. 1:04CV865(LG), 2010 WL 1141126, at *16 (S.D. Miss. Mar. 19, 2010) ("The Fifth Circuit has interpreted *Stone* to require a litigant attempting to overcome it to show 'that the processes provided by a state to fully and

But this view seems incompatible with *Frank v. Magnum*,[182] not to mention *Moore v. Dempsey*, which regarded the "full and fair" right as a sort of equal protection form of due process and recognized a due process harm, at least, in those circumstances when a particular prisoner received a slimmed down version of the typically available, systematic protections.[183] Moreover, the inquiry into whether there is a systemic defect, distinct from, and unrelated to, the process in an individual case, seems to miss the point of *Stone* and due process. For example, LaFave has criticized this model of inquiry by noting,

> [I]t is useful to remember that the critical language in *Stone* . . . refers to "an opportunity for full and fair litigation of a *Fourth Amendment claim*" . . . and thus appears to require assessment of what was done in the particular case rather than what is customarily done.[184]

In addition, the view that certain procedural prerequisites, such as a hearing, will oftentimes be required by due process is in accord with the applications of the full and fair concept as a due process right outside of the habeas corpus context.[185] In *Montana v. United States*, for example, the Supreme Court defined "full and fair" in terms of the "unfairness or inadequacy in the state procedure[]" for purposes of collateral estoppels.[186] Specifically, the Court recognized that due process could not countenance deferring to a previous adjudication "if there is reason to doubt the quality, extensiveness, or fairness of the procedures followed in [the] prior litigation."[187] Thus, the Fifth Circuit's approach of looking merely for systematic unfairness is inconsistent with the due process

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fairly litigate fourth amendment claims are routinely or systematically applied in such a way as to prevent the actual litigation of fourth amendment claims on their merits . . . .'" (quoting *Williams*, 609 F.2d at 220)).

182. 237 U.S. 309 (1915).

183. 261 U.S. 86, 91 (1923).

184. 6 LAFAVE, *supra* note 133, § 11.7(g), at 495 (quoting Stone v. Powell, 428 U.S. 465, 481–82 (1976)); *see also* YACKLE, *supra* note 163, § 7:16 n.37 ("To refuse to inquire into the procedural regularity of proceedings in the individual case is to make of Stone an engine of destruction for [the] Fourth Amendment . . . .").

185. As Professor Israel has explained, freestanding due process has always required "the basics of a trial-type adjudication—notice of the charges, an opportunity to challenge the other side's case and present your own, a competent tribunal rendering decision on consideration of the evidence and the application of the general standing law." Israel, *supra* note 53, at 348 (summarizing the core procedural protections of *Hurtado v. California*, 110 U.S. 516 (1884), the first case to define the application of due process in the context of criminal procedure); *see also* Tumey v. Ohio, 273 U.S. 510, 511 (1927) (looking to due process without expressly invoking the phrase "full and fair"); Stephen G. Gilles, Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. CHI. L. REV. 1380, 1410 (1983) ("That due process of law guarantees criminal defendants a 'fair trial' has been clear at least since *Powell v. Alabama*, where the Supreme Court held that it is 'the duty of the court . . . to see that [the defendants] were denied no necessary incident of a fair trial.'" (alteration in original) (citations omitted)).

186. 440 U.S. 147, 163 (1979).

187. *Id.* at 164 n.11.

mandate that unfair processes not be deferred to, either as a matter of civil res judicata law, or federal habeas review.

III. The Problem with the AEDPA: § 2254 Significantly Impairs the Review of Constitutional Claims in Federal Courts

As discussed immediately above, there are four principal defects in state court review that can be understood as depriving the prisoner of a full and fair review of his constitutional claims. A state court adjudication of a federal claim that suffers from one or more of the above defects cannot fairly be understood to have satisfied the requirements of full and fair review.[188] The requirement of a full and fair review presents a unique predicament for the limitations on relief contained in the AEDPA. Under the AEDPA, a prisoner's ability to have an unconstitutional conviction or sentence set aside is simultaneously hindered by provisions limiting the development of factual evidence in support of a constitutional claim,[189] and by the fact that federal courts are required to defer to state court interpretations of federal law when assessing whether a sentence or conviction was unconstitutional.[190] In short, the impact of the AEDPA on federal review of state convictions was monumental, both as to questions of law and factual determinations. Because the literature contains an adequate summary of the extremely cramped and incomplete nature of federal habeas review constrained by the AEDPA,[191] my survey of the law illustrating that modern federal habeas review, standing alone, does not amount to a full and fair review will be limited.

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188. Prominent scholars hypothesizing about collateral proceedings that are not full and fair have, without providing the systematic framework provided in this Article, relied on similar symptoms of procedural inequity in adjudging a proceeding less than full and fair. *See, e.g.*, Curtis R. Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461, 467–70 (1960) (exploring state inadequacies that are not full and fair).

189. *See, e.g.*, 28 U.S.C. § 2254(e)(2) (2006); *see also* Marceau, *supra* note 114, at 432–34.

190. *See* 28 U.S.C. § 2254(d)(1); *see also* Lee, *supra* note 6, at 136–37.

191. It is generally accepted that the limitations on relief contained in § 2254(d)(1) drastically limit a prisoner's access to relief in federal court. *See, e.g.*, Phelps v. Alameida, 569 F.3d 1120, 1123 (9th Cir. 2009) ("[*H*]*abeas* petitioners—including petitioners who may have suffered severe deprivations of their constitutional rights—now face myriad procedural hurdles specifically designed to restrict their access to the once-Great Writ."); Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 Buff. Crim. L. Rev. 537, 540 (1999) ("§ 2254(d)(1) . . . [is] a deferential standard that dramatically limits the federal courts' power to review prisoners' constitutional claims."); *see also* Lee, *supra* note 6, at 136 ("There is no denying that Congress has purposefully made the [habeas] process more difficult for petitioners . . . ."); Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 Ariz. L. Rev. 227, 232 (2008) (noting that federal habeas review has "withered" since the enactment of the AEDPA). *Contra* John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 Cornell L. Rev. 259, 260 (2006) ("[W]hile § 2254(d) has made the difference in a handful of cases, the writ of habeas corpus lives on.").

A. Limitations on the Analysis of Questions of Law Under § 2254

In the landmark decision *Cooper v. Aaron*, the Supreme Court definitively held that no state legislature, executive officer, or court may "war against the Constitution," because if the several states merely ignore the federal law, then the "[C]onstitution itself becomes a solemn mockery."[192] More recently, the Supreme Court has reiterated the role of judicial review in giving effect to the Supremacy Clause by stressing that it is imperative "that state courts . . . not be the final arbiters of important issues under the federal Constitution."[193] After the enactment of the AEDPA, however, the distance between the lofty goal of constitutional supremacy and uniformity, and the practical reality of constitutional adjudication in the context of the Fourth, Fifth, Sixth and Eighth Amendments is considerable.[194] Under § 2254, the right of a prisoner to insist upon a correct, or even uniform, application of the federal constitution has been largely eroded.[195]

The core of the AEDPA's substantive deference derives from § 2254(d). As amended in 1996, the text of § 2254 provides that a federal court is not permitted to grant habeas corpus relief to a state prisoner unless the state court adjudication of the constitutional dispute was "contrary to, or involved an unreasonable application of, clearly established Federal law."[196] Looking to the clause permitting relief when state decisions were "contrary to" federal law, many assumed that this mandated habeas relief whenever a state court's decision was decided "incorrectly."[197] Thus, seizing on the fact that § 2254(d) is written in the

192. 358 U.S. 1, 18 (1958) (quoting United States v. Peters, 9 U.S. (5 Cranch) 115, 136 (1809)).

193. Arizona v. Evans, 514 U.S. 1, 9 (1995) (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940)). Chief Justice Roberts recently stressed that the Supremacy Clause represents a defining characteristic of our constitutional democracy: "[A] single sovereign's law should be applied equally to all." Danforth v. Minnesota, 552 U.S. 264, 302 (2008) (Roberts, C.J., dissenting) (quoting Sandra Day O'Connor, *Our Judicial Federalism*, 35 Case W. Res. L. Rev. 1, 4 (1985)).

194. *See* Marceau, *Un-Incorporating*, *supra* note 6, at 1235 (discussing the fact that federal supremacy in the context of the criminal procedure rights is largely a myth after the enactment of the AEDPA).

195. *See id.* at 1285 ("Not only is uniformity impossible to impose as a practical matter under the constraints of AEDPA, but the Supreme Court has gone so far as to suggest that the details of federal constitutional jurisprudence are largely irrelevant to state courts.").

196. 28 U.S.C. § 2254(d)(1) (2006). Commentators and lower courts quickly sought to decipher this new provision, and initially there was a sense that the new language contained in § 2254 did not materially alter the course of federal habeas adjudications. *See* Liebman & Ryan, *supra* note 6, at 884–86; Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 Duke L.J. 1, 3 (1997); *see also* Hall v. Washington, 106 F.3d 742, 748 (7th Cir. 1997) (rejecting the argument that § 2254(d)(1) required deference to erroneous state court judgments and applying de novo review to both pure questions of law and to mixed questions of law and fact); Chen, *supra* note 191, at 554–95 (1999) (discussing comprehensively the divergent interpretations of the meaning of § 2254(d)(1)).

197. Tushnet & Yackle, *supra* note 196, at 45.

alternative, there was cautious optimism that the "unreasonable" prong was entirely "superfluous."[198]

In *Williams v. Taylor*, the view that the "unreasonable" prong of § 2254(d)(1) was superfluous in view of the fact that the provision was written in the disjunctive was resoundingly rejected.[199] In *Williams*, the Court interpreted the statute so as to provide independent content to both the "unreasonable" and the "contrary" prongs of (d)(1).[200] Interpreting the AEDPA as fundamentally undermining at least fifty years of habeas corpus jurisprudence that called for de novo legal oversight of constitutional questions, the Court rejected the view advanced by commentators, lower courts, and four Justices of the Court, holding that this view, in essence, "fail[ed] to give independent meaning to both the 'contrary to' and 'unreasonable application' clauses of the statute."[201] Writing for a bare majority, Justice O'Connor explained that the "contrary to" clause applies only to pure questions of law, but the "unreasonable application" clause applies more broadly to all allegations by a prisoner that the state court improperly applied the governing constitutional rule to the facts at hand.[202] Simply stated: "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable."[203]

If there was any doubt as to the extremely limited nature of federal habeas review following *Williams*, as some circuits remarkably concluded,[204] the Court put to rest the confusion in a series of summary reversals of grants of habeas relief by lower federal courts, sometimes without *any* discussion of the merits of the claim. First, in *Lockyer v. Andrade*, the Court expressly rejected the view that "clear error" review was sufficiently protective of state court judgments as to questions of

198. *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 437 (1996).

199. 529 U.S. 362, 403–05 (2000).

200. *Id.* at 402–13.

201. *Id.* at 404 (noting that depriving "unreasonable" of independent meaning would result in giving "the 1996 amendment no effect whatsoever").

202. *Compare id.* at 405–06 (explaining that a state adjudication runs afoul of the "contrary to" clause only if the state fails to apply the correct legal test, by, for example, misapprehending the meaning of the right to counsel as clearly defined in precedent, or applies the correct legal test but confronts facts that are "materially indistinguishable from a decision of this Court and nevertheless arrives at a [contrary] result."), *with id.* at 409 (explaining that only an *unreasonable* application of federal law to a particular, new set of facts will warrant habeas relief under § 2254(d)(1)).

203. *Id.* at 409.

204. *See, e.g.*, Francis S. v. Stone, 221 F.3d 100, 109 n.12 (2d Cir. 2000) (struggling to define "reasonable application" in the wake of *Williams*); Van Tran v. Lindsey, 212 F.3d 1143, 1151 (9th Cir. 2000) (holding that the Supreme Court had embraced an interpretation of the AEDPA that provided for "robust habeas review").

constitutional law.[205] Subsequently, the Court went to even greater lengths to convey how oppressive the limitations contained in (d)(1) are, and correspondingly, how extraordinary the circumstances must be in order for habeas relief to be warranted. In *Woodford v. Visciotti*,[206] for example, the Court issued a per curiam opinion holding that "the federal court's interpretation of the Sixth Amendment was . . . of no moment"[207] because, "under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision . . . incorrectly" applied the Constitution.[208] Likewise, in *Price v. Vincent*, the Court held that "[e]ven if we agreed . . . that the Double Jeopardy Clause should be read to prevent continued prosecution of a defendant under these circumstances, it was at least reasonable for the state court to conclude otherwise."[209]

As a practical matter, then, the question of whether the state court's application of the Constitution is correct, or the most reasonable application of controlling precedent, is irrelevant to the adjudication of a state prisoner's federal habeas petition. For better or for worse, the AEDPA limits federal habeas review so as to allow a person to be imprisoned or executed based on an unconstitutional trial or investigative procedure.[210] In the words of Professor Bloom, federal oversight is so limited in the context of federal habeas review of state convictions that, as a practical matter, state courts may, without fear of being overruled, view "reaching correct doctrinal answers [as] . . . a strenuous and avoidable chore."[211] Very recently, the Supreme Court itself sounded a similar theme by concluding that federal habeas relief under (d)(1) requires a "substantially higher threshold" than mere constitutional error.[212] Lower courts have fallen into line and announced their intention to leave state convictions based on unconstitutional proceedings undisturbed.[213]

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205. 538 U.S. 63, 75–76 (2003).

206. 537 U.S. 19 (2002).

207. Marceau, *Un-Incorporating*, *supra* note 6, at 1283.

208. *Visciotti*, 537 U.S. at 27.

209. 538 U.S. 634, 643 (2003).

210. The question of whether the limitations on relief contained in (d)(1) are normatively preferable, or even minimally constitutional, is beyond the scope of this Article. I summarize the limited nature of review under (d)(1) solely for the purpose of considering whether such review can, as a matter of due process, be considered full and fair when the preceding State court decision is not procedurally fair or reliable.

211. Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 542 (2008).

212. Schriro v. Landrigan, 550 U.S. 465, 473 (2007); *see also* Knowles v. Mirzayance, 129 S. Ct. 1411, 1420 (2009) (recognizing that the determination under the AEDPA is not whether the state court's determination was wrong, but whether it "was unreasonable—a substantially higher threshold" (quoting *Schriro*, 550 U.S. at 473)).

213. *See, e.g.*, Hereford v. Warren, 536 F.3d 523, 527 (6th Cir. 2008) ("Our task is not to determine whether the state court reached the correct outcome, but rather to determine whether the court's

In short, federal habeas review of legal questions under § 2254(d)(1) is emaciated and withered. The federal judge's review leans heavily on the analysis and conclusions of her state court brethren. Only those exceptionally, almost unimaginably, erroneous adjudications of the constitution are reversed. The AEDPA liberates state courts in a way that was inconceivable for much of the twentieth century,[214] but this express substantive freedom—without corresponding guidance as to whether procedural fairness is required—has created a constitutional vacuum that only a robust and clearly articulated theory of "full and fair" can fill.

B. The AEDPA's Limitations on Relief Relating to Factual Discovery and Deference

The AEDPA's limits on the ability of prisoners to develop factual support for their constitutional claims work independently and in concert with the substantive review limitations of § 2254(d)(1) to erode further the likelihood that a federal habeas court could serve as a meaningful mechanism for the review of state convictions. Specifically, the AEDPA limits a federal court's review of the facts supporting a constitutional claim in two ways: (1) by requiring that findings of fact made by the state court be afforded substantial deference, and (2) by limiting the scope of new evidence that may be introduced in federal court through hearings or other procedural mechanisms.[215]

1. The Factual Deference Provisions

With regard to factual deference, the AEDPA contains two separate provisions, § 2254(d)(2) and (e)(1).[216] There is a mature circuit split as to the precise interaction of these two provisions,[217] but for

application of clearly established federal law is objectively unreasonable—'a substantially higher threshold.'" (quoting *Schriro*, 550 U.S. at 473); *see also* Larry v. Branker, 552 F.3d 356, 365 (4th Cir. 2009) (quoting the same passage from *Schriro*); Buntion v. Quarterman, 524 F.3d 664, 670 (5th Cir. 2008) (same).

214. *See* Bloom, *supra* note 211, at 541 n.274; Todd E. Pettys, *Federal Habeas Relief and the New Tolerance for "Reasonably Erroneous" Applications of Federal Law*, 63 Ohio St. L.J. 731, 732 (2002); Larry Yackle, *Federal Habeas Corpus in a Nutshell*, 28 Hum. Rts. 7, 8 (2001) ("[T]he federal court can save the prisoner from execution only if the state court decision against the prisoner was not only wrong but unreasonably wrong.").

215. 28 U.S.C. § 2254 (d)(2), (e)(1) (2006); *see* Marceau, *supra* note 114, at 395; Yackle, *supra* note 12, at 140–41.

216. *See* Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 Harv. L. Rev. 1868, 1874–76 (1997) (recognizing the tension between the AEDPA's provisions addressing factual tension).

217. *See* Rice v. Collins, 546 U.S. 333, 339 (2006) (assuming arguendo that only (d)(2) applied to the case at hand, but noting that the question of "whether and when" (e)(1) also applied was unresolved); Channer v. Brooks, 320 F.3d 188, 194 (2d Cir. 2003) (reflecting on the confusion as to the interaction between § 2254(d)(2) and (e)(1)); Green v. White, 232 F.3d 671, 672 n.3 (9th Cir. 2000) (same). I have previously analyzed the text, structure, and legislative history, and various circuit court

purposes of this Article, it is sufficient to recognize that under any of the viable interpretations of (d)(2) and (e)(1), federal habeas review substantially limits the ability of state prisoners to rebut the findings of fact rendered by the state court.

As to (d)(2), a challenge of the state court's findings of fact must demonstrate the state court decision was "based on an *unreasonable* determination of the facts in light of the evidence presented in [the] State court proceeding[s]."[218] Basic canons of statutory interpretation suggest that the rigorous definition of "unreasonable" adopted in (d)(1) must also apply to the "unreasonable" phrasing contained in (d)(2).[219] In short, a prisoner with a colorable constitutional injury would not be entitled to federal habeas relief on the basis of (d)(2) unless the state court's findings of fact were not merely erroneous, but unreasonably erroneous.[220] Notably, several circuits have gone even further and adopted a reading of the AEDPA's factual provisions that makes the scope of factual deference imposed on federal courts even more strenuous than the review of the legal conclusions.

Specifically, several circuits have blurred § 2254's two sections regarding deference to factual findings, sections 2254(d)(2) and (e)(1), such that a federal court may not disturb state factual findings unless the prisoner can prove "by clear and convincing evidence" that the state court's factual finding was "unreasonable."[221] It is double-dipping deference, apparently with a statutory grounding.[222] Obviously, such a framework for understanding the role of federal courts in a post-AEDPA world reflects an overriding sense that federal habeas review under § 2254 is extremely limited in terms of a prisoner's ability to correct factual errors. Such deference cannot, standing alone, be understood to constitute a full and fair factual review.

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interpretations of (d)(2) and (e)(1). Marceau, *supra* note 114, at 440–41.

218. *Channer*, 320 F.3d at 193 (emphasis added) (quoting § 2254(d)(2)).

219. *See* Sorenson v. Sec'y of Treasury, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'" (quoting Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934))).

220. *See, e.g.*, Bruce v. Terhune, 376 F.3d 950, 954 (9th Cir. 2004) (concluding that the "same standard of objective unreasonableness" applies under both § 2254(d)(1) and § 2254(d)(2)).

221. *See* Rutherford v. Crosby, 385 F.3d 1300, 1308 (11th Cir. 2004) ("[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."); *see also* Fields v. Gibson, 277 F.3d 1203, 1221 (10th Cir. 2002).

222. I have previously examined why this reading of the AEDPA's two provisions regarding factual deference, (d)(2) and (e)(1), is textually and historically inappropriate. *See* Marceau, *supra* note 114, at 403–07 (discussing the proper interpretation of these provisions). However, the issue remains unresolved, and lower federal courts persist in stacking the deference provisions so as to create this seemingly insurmountable burden to overcoming state court fact-findings. Obviously, this view is relevant to the question of whether federal review under the AEDPA can comply with the full and fair mandate of due process.

2. *The Limits on the Development of Facts Outside of the State Record*

In addition to the deference afforded to the factual determinations of state courts, the AEDPA also substantially constrains the authority of federal courts to permit state prisoners to adduce new facts or evidence relevant to their constitutional claims. Section 2254(e)(2) places limitations on the authority of a federal court to conduct a hearing in order to assess the merits of a prisoner's constitutional claim.[223] Under § 2254(e)(2), when a state prisoner "has failed to develop the factual basis" for his claim in state court, a federal court sitting in habeas "shall not hold an evidentiary hearing" unless a set of nearly insurmountable requirements are satisfied.[224]

Most notably, in these circumstances, a federal court may never hold a hearing on an otherwise meritorious constitutional claim unless the *prisoner* can prove by "clear and convincing evidence that . . . no reasonable factfinder would have found the [prisoner] guilty" had the constitutional error not occurred.[225] Moreover, federal courts have applied (e)(2) so as to bar not only hearings as anticipated by the statute, but informal *discovery*[226] and the expansion of the record with facts in support of the constitutional claim.[227] In short, new evidence that tends to substantiate a constitutional violation will not be considered by a federal habeas court unless (e)(2) is satisfied.[228] To be sure, limitations on the ability of a federal court to develop and review facts in support of constitutional claim are in tension with a view of AEDPA-habeas review as procedurally full and fair.

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223. 28 U.S.C. § 2254(e)(2); *see* Yackle, *supra* note 12, at 143–51.

224. *See* 28 U.S.C. § 2254(e)(2).

225. *Id.* § 2254(e)(2)(B); *see also* Burris v. Parke, 948 F. Supp. 1310, 1326 (N.D. Ind. 1996) (adjusting § 2254(e)(2) to the penalty phase of a capital trial by framing the inquiry as whether any "reasonable factfinder would have *recommended the death penalty* for [the applicant]").

226. *See, e.g.*, Isaacs v. Head, 300 F.3d 1232, 1249–50 (11th Cir. 2002).

227. Holland v. Jackson, 542 U.S. 649, 653 (2004) (per curiam) (concluding that (e)(2)'s restrictions on a federal court's authority to provide an evidentiary hearing "apply *a fortiori* when a prisoner seeks relief based on new evidence *without* an evidentiary hearing"); *see also* Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir. 2005).

228. The true impact of § 2254(e)(2) in curtailing the ability of federal courts to consider relevant, potentially dispositive, evidence of a constitutional violation is at this point still largely unknown. Presently, the circuits are divided as to what constitutes a "failure" to develop the trigger for (e)(2)'s application. *Compare* Green v. Johnson, 515 F.3d 290, 306 (4th Cir. 2008) (Motz, J., concurring) (noting that a magistrate judge made extensive findings, as required by the AEDPA), Insyxiengmay v. Morgan, 403 F.3d 657, 670–71 (9th Cir. 2004) (recognizing the pre-AEDPA rule of a mandatory hearing applies if the petitioner *requests* a hearing or factual development in state court and the request is denied), *and* United States *ex rel.* Hampton v. Leibach, 347 F.3d 219, 233–34 (7th Cir. 2003) (permitting an evidentiary hearing even though petitioner had failed to present affidavits to the state court), *with* Dowthitt v. Johnson, 230 F.3d 733, 758 (5th Cir. 2000) (refusing the development of factual evidence in federal court unless the prisoner not only requested a hearing in state court, but also provided affidavits regarding the facts to be developed).

IV. The Tension Between Due Process and § 2254 Adjudications

If one accepts the existence of a freestanding due process right that entitles a prisoner to one full and fair review of his federal constitutional claims, either in federal or state court, and if one takes seriously the content of the full and fair right as it has been elucidated in the lower courts, then the conclusion is inescapable that the Supreme Court must hold the AEDPA's deference inapplicable when the state court adjudication of the claim was unfair or glaringly unreliable. Due process cannot abide deference to a proceeding that was not full and fair.[229] The following discussion attempts to reconcile the AEDPA with the requirements of due process. After concluding that many forms of state review that are not full and fair will nonetheless receive full federal review, even under the AEDPA, I specifically address those instances where the outcome under a pure-AEDPA system would be different than the outcome in a due-process-model-of-AEDPA system. Ultimately, I conclude that even those issues that are currently in tension with the common application of the AEDPA can be readily set aside under the doctrine of constitutional avoidance.

A. The Review of Substantive Legal Errors Under the AEDPA and Due Process

As discussed above, some courts have recognized that the due process entitlement to a full and fair review contains at least a minimal level of substantive legal oversight. In particular, when a state court system makes willful or unconscionable legal errors, or applies the wrong federal rule altogether, then the adjudication may be considered incompatible with the mandates of full and fair review. It is necessary, therefore, to consider whether such forms of legal error exist within the state processes of review, and, if so, whether the AEDPA constrains review by a federal court as to these claims such that it would impinge due process. While state courts certainly fail from time to time to even apply federal law colorably, the discussion that follows concludes that if fairly applied, the AEDPA appears to comport with the minimal requirements of due process by ensuring full de novo review when a state's legal errors are so egregious as to mark a violation of fundamental fairness.

As a threshold matter, it must be observed that state courts are not so perfect as to avoid legal errors of constitutional law that are so egregious as to constitute a deprivation of due process. For purposes of brevity, I include only a couple of unremarkable illustrations of the sort

229. Professors Hertz and Liebman have posited that "in most cases in which the state courts fail to vindicate the rights of the accused, they do so because of faulty fact-development procedures." 2 Hertz & Liebman, s*upra* note 12, at 888.

of errors that a state court might make, which are so lacking in a colorable legal basis as to appear willful. First, it is a well-settled principle that the Equal Protection Clause of the Fourteenth Amendment forbids racial discrimination by the prosecution in jury selection.[230] Consistent with this protection, the Court has held that "[o]nce the defendant makes a prima facie showing [of racial discrimination], the burden shifts to the State to come forward with a neutral explanation for challenging . . . jurors."[231] Under this standard, where a prosecutor peremptorily strikes ten out of eleven African Americans from a potential jury without a credible explanation,[232] and the state appellate system—either on direct appeal or postconviction—is unwilling or unable to correct this problem, the state's process is too substantively unfair to be considered full and fair.[233] Similarly, where a state system upholds a conviction that rests upon a confession that was secured in obvious violation of due process,[234] or where the state courts fail to provide even a colorable application of the Sixth Amendment right to counsel,[235] or where the states grievously misapply the Fourth Amendment,[236] or where the state simply fails to address the merits of the constitutional claim,[237] the state system must be understood to have provided a review of the constitutional claim that is not full and fair.

Due process, as developed in earlier sections of this Article, requires that the federal review of this form of egregious legal error by state

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230. Georgia v. McCollum, 505 U.S. 42, 59 (1992); Batson v. Kentucky, 476 U.S. 79, 100 (1986).

231. *Batson*, 476 U.S. at 97.

232. These facts are taken from *Miller-El v. Dretke*. 545 U.S. 231, 240–41 (2005) (finding that prosecutor used ten of his fourteen peremptory strikes to exclude ten of eleven eligible African American venire members). Nineteen out of twenty African Americans on the venire panel were not seated. *Id.* at 275 (Thomas, J., dissenting).

233. *Cf.* Gamble v. Oklahoma, 583 F.2d 1161, 1165 (10th Cir. 1978).

234. *See* Doody v. Schriro, 548 F.3d 847, 868–69 (9th Cir. 2008) (holding that the state system utterly failed to correct an obvious violation of federal law in the context of an unconstitutional interrogation).

235. *See* Rompilla v. Beard, 545 U.S. 374, 387–90 (2005); Wiggins v. Smith, 539 U.S. 510, 528–29 (2003).

236. *See* cases cited *supra* note 124.

237. Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001) (noting that § 2254(d) does not apply when a claim has not been adjudicated on the merits, meaning resolved "with res judicata effect"). Where the state court's failure to address a constitutional claim is grounded in an independent and adequate procedural bar, the prisoner will be deemed to have had a full and fair opportunity to litigate the claim. Engle v. Isaac, 456 U.S. 107, 128–29 (1982) (holding that denying federal habeas review on the basis of an adequate procedural bar did not violate fundamental fairness). When a claim is not addressed, and there is not a procedural bar, the state's denial of relief cannot be characterized as full and fair as to the claim in question. *See* DeBerry v. Portuondo, 403 F.3d 57, 67 (2d Cir. 2005) ("Thus, in many cases it will be necessary to determine whether the state court has adjudicated a claim on the merits to determine the standard of review. Because the [state] Appellate Division did not explain its basis for affirming the trial court on the Batson claims, we cannot conclude that it adjudicated those claims on the merits.").

courts must be de novo.[238] Where the state process is not full and fair, federal deference to that result would offend any sense, and any appearance, of justice.

Commentators have rightly drawn attention to the fact that federal courts, when applying the AEDPA, tend to invoke a general "interpretive mood disfavoring habeas relief," and to the extent that federal courts are willing to forego the rigorous task of correcting, de novo, seemingly willful or obvious substantive legal errors, then the AEDPA's provisions governing the review of substantive errors are in tension with the dictates of due process.[239] However, a careful review of the Supreme Court's instructions regarding the scope of substantive deference embodied in § 2254(d)(1) reveals that, if fairly applied, (d)(1)'s limitations should not conflict with the requirements of full and fair review when the state court's errors are of a substantive rather than a procedural nature.[240] The AEDPA precludes federal habeas relief when the state court decision is not either contrary to federal law or an unreasonable application of clearly established law.[241] The "unreasonable" and "contrary to" limitations on relief are properly read to mandate plenary federal review in circumstances that are coterminous with the scope of the full and fair right to substantively correct legal results. In other words, if "full and fair" is interpreted so as to impose minimal requirements of substantive correctness, then full and fair and the AEDPA are substantially, if not identically, overlapping for these purposes.

First, when a state court fails to apply the correct governing standard or rule, the state court decision is deemed "contrary to . . . clearly established precedent," and the federal court's review is de novo.[242] By way of illustration, a state court adjudication is *contrary* to federal law, and thus entitled to de novo federal review, if the state court fundamentally misconstrues the *Strickland v. Washington*[243] standard for reviewing claims of ineffective assistance of counsel by requiring that the prisoner prove by a "preponderance of the evidence" that his trial would have been different but for the errors of counsel.[244] Similarly, if a state

238. *See supra* Parts I and II.

239. Kovarsky, *supra* note 6, at 444 (reflecting on the abuse of general concepts like federalism in the service of affirming wildly errant state court decisions).

240. *See* Williams v. Taylor, 529 U.S. 362, 404–05 (2000). This is not to suggest that § 2254(d)(1) does not suffer from other freestanding constitutional infirmities. *See, e.g.*, Irons v. Carey, 505 F.3d 846, 856 (9th Cir. 2007) (Noonan, J., concurring) (arguing that the AEDPA impermissibly restricts the federal courts' power).

241. 28 U.S.C. § 2254(d)(1) (2006).

242. *Williams*, 529 U.S. at 405–06.

243. 466 U.S. 668 (1984).

244. The actual Sixth Amendment standard assesses only whether there is a "reasonable probability" of a different outcome. *Williams*, 529 U.S. at 405–06 ("If a state court were to reject a

court applied a harmless error review to a prisoner's claim that his right to self-representation had been violated, then the federal court's review of the claim would be unhindered by the AEDPA, because the state adjudication was utterly irreconcilable with the controlling constitutional rule.[245] Likewise, if the state court simply fails to address the claim in question, the AEDPA does not limit the federal court's first-instance review of the claim. Fairly applied, then, the AEDPA bars the application of deference when the state court makes, as I have called them in this Article, substantive-procedural errors.[246]

Moreover, the properly limited application of the AEDPA comports with the due process notion that federal courts must not defer to gross errors of law, even those unrelated to procedural questions such as the burden of proof. Simply put, state courts that willfully and

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prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be 'diametrically different,' 'opposite in character or nature,' and 'mutually opposed' to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a 'reasonable probability that . . . the result of the proceeding would have been different.'" (alteration in original) (quoting *Strickland*, 466 U.S. at 694)); *id.* at 406 ("On the other hand, a run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause.").

245. Ordinarily, an allegation of constitutional injury will entitle one to relief only if it can be proven that the error was harmless; however, if a trial court interferes with a defendant's right to represent himself, relief is automatically required under the Sixth Amendment, and a harmless error analysis is impermissible. McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984); Faretta v. California, 422 U.S. 806, 834–36 (1975). Accordingly, when a state court system evaluates an infringement of one's right to self-representation under a harmless error lens, the state process is tainted by a substantive-procedural error. *See* Frantz v. Hazey, 533 F.3d 724, 734 (9th Cir. 2008) (reviewing a state court's harmless error analysis of a *Faretta* claim). Other examples of state courts applying the wrong legal standard altogether, rather than merely misapplying the standard, abound. For example, state courts have held that the invocation of the right to silence under *Miranda* can be waived if the officers simply continue asking questions, and the suspect eventually answers. *See* Anderson v. Terhune, 516 F.3d 781, 791–92 (9th Cir. 2008) (recognizing that a request for silence must be "scrupulously honored" and questioning must immediately cease).

246. It is theoretically possible that a state court might apply the wrong legal standard such that the court's legal analysis is de novo, but because of procedural unfairness, the prisoner was also not permitted to develop the facts needed to support his claim in state court. Merely affording the prisoner de novo legal review may not be sufficient to ensure a full and fair review of his claim. Nonetheless, it is not clear what due process would require if the state process is grossly unfair (for example, it willfully misapplies federal constitutional rules), but the state prisoner was dilatory in attempting to develop facts in support of this claim. For example, what level of review is constitutionally required of a federal court sitting in habeas when the state court willfully fails to apply the legal standard, and the prisoner fails to seek the appropriate discovery and/or hearings? Based on its extreme substantive failures, the state court has not provided a full and fair review, and surely de novo legal review is warranted. However, some might justifiably argue that it would be a windfall to the prisoner if he received a full federal hearing on a claim that he did not diligently pursue in state court. On the other hand, the right to a full and fair review—both substantive and procedural—seems to be a direct outgrowth of the recognition by some courts that a substantively wrong result may, in certain instances, constitute a procedural due process violation. *Cf.* Gamble v. Oklahoma, 583 F.2d 1161, 1165 (10th Cir. 1978).

obviously fail to apply federal law are also denied any federal deference.[247] The Court has expressly held that "[a] state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case" is entitled to de novo federal review.[248] The Court's definition of "unreasonable" is certainly narrow; it prohibits "a federal habeas court [from issuing] the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly."[249] That is to say, mere errors of law are not sufficient to justify de novo federal review under the AEDPA. But neither are mere trivial errors of law sufficient to offend the due process notion of full and fair review. Only those applications of federal law that are so erroneous as to not even be "colorable," or "unconscionably" incorrect, can be considered deprivations of one's right to a full and fair hearing.

In sum, although the AEDPA's provisions requiring substantive deference are highly controversial, it is unlikely that § 2254(d)(1) violates the form of procedural due process enunciated in this Article. In fact, it seems that (d)(1)'s limits hew closely, perhaps precisely, to the minimal requirements of due process.[250]

B. The Review of Procedural Unfairness Under the AEDPA and Due Process

Regardless of whether the substantive limitations on federal review provided by the AEDPA appear compatible with the full and fair due process rights expounded in this Article, the same cannot be said of the AEDPA's interactions with the two types of pure procedural errors: procedural traps or ambushes, and raw procedural inadequacy. As currently applied, the AEDPA violates due process when federal courts engage in limited or deferential review of a state process that is not fundamentally fair. First, it is necessary to understand what sort of

247. *See Williams*, 529 U.S. at 407.

248. *See id.* at 407–08.

249. *Id.* at 411.

250. Another question that remains unresolved is whether a summary state court decision would comply with the requirements of a full and fair review or with the mandates of the AEDPA. Although debatable, a compelling case can be made that a full and fair review is a review that ends in a reasoned, even if incorrect, decision. Only through a reasoned decision is a reviewing court able to know, for example, whether the state court's process applied the wrong legal standard. Given the parity between § 2254 and the requirements of due process discussed above, it is likely that § 2254 should be understood as conditioning its deference on the existence of a reasoned state decision. *See* Knowles v. Mirzayance, 129 S. Ct. 1411, 1418 n.2 (2009) (recognizing that it is an open question as to whether the absence of a "reasoned, written opinion" renders § 2254(d) inapplicable); *cf.* Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) ("[A proper state court substantive adjudication] does not require citation of 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.").

procedural failures may from time to time occur in state court. Then I will discuss the current application of the AEDPA to each of these procedural problems.

Although rare, courts and commentators have nonetheless observed that state court proceedings will, on occasion, resemble a procedural trap that is incompatible with the notion of full and fair review.[251] If a state law precluded a capital defendant from filing either a stay of execution or a challenge to the execution method until after the defendant's conviction became final and the appeals process concluded, a subsequent court's holding that a filing under these conditions was untimely would represent the Catch-22 that due process prohibits.[252] Likewise, if the statute of limitations for filing a state postconviction petition is six months, but the reality of the system is that transcripts, records, and even counsel (if provided) may not actually be available for the prisoner until after this time period has run because of deficiencies in state funding or inefficiencies in the administrating bureaucracy, then the strictures of due process are not satisfied.[253] Or if a state court failed to provide a prisoner with an attorney or resources to develop a technical and fact-specific defense to capital punishment, such as mental retardation, then it would be nothing short of a procedural trap to treat the putatively retarded prisoner as having waived the claim.[254] This sort of procedural trap, or "got you" justice, does not constitute full and fair review. Consequently, federal review under the highly deferential AEDPA regime would deprive such prisoners of their right to *one* full and fair review.[255]

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251. *See, e.g.*, 2 HERTZ & LIEBMAN, *supra* note 12, at § 22.1, at 1030–31 (noting that unfairness continues to permeate some state systems); Peller, *supra* note 21, at 582.

252. *See* Anthony Lewis, *Panel Discussion: The Death of Fairness? Counsel Competency & Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105, 1111 (1994) (remarking on the fact that Justice Scalia had harshly criticized an attorney for waiting until five days before her client's execution to file for a stay, even though under the applicable rules counsel had sought the stay the first day that she was legally permitted to do so); *see also* Van Zant v. Fla. Parole Comm'n, 308 F. App'x 332, 335, (11th Cir. 2009) (describing a state court's prejudicial application of a procedural rule to a prisoner's case when the rule in question was not "regularly followed").

253. *Cf.* Beardslee v. Woodford, 395 F.3d 1064, 1069 (9th Cir. 2005) (analyzing the State of California's arguments that a prisoner's challenge to lethal injection protocols was untimely, and taking into account the fact that California regulations prohibit challenges based on "anticipated action[s]," and that the prisoner brought his challenge as soon as he "viewed them as ripe"); *id.* (recognizing that the prisoner was being faulted although he "pursued his claims aggressively as soon as he viewed them as ripe").

254. Bradford v. Cockrell, No. 3:00-CV-2709-P, 2002 U.S. Dist. LEXIS 21898, at *13 n.9 (N.D. Tex. Nov. 8, 2002), *as adopted at* No. 3:00-CV-2709-P, 2003 U.S. Dist. LEXIS 554, at *1–2 (N.D. Tex. Jan. 14, 2003) (dismissing mental retardation claim on similar facts). For more on *Bradford*, see Peggy M. Toblowski, *The Road to* Atkins *and Beyond—the Tale of One Mentally Retarded Capital Offender*, 59 BAYLOR L. REV. 735 (2007).

255. *See generally* DAVID R. DOW, EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA'S DEATH ROW (2005) (recounting numerous procedural traps).

Even in the absence of a procedural ambush, when the adjudication of a prisoner's constitutional claim is characterized by inadequate, arbitrary, or ineffectual procedures, due process concerns arise. Within this procedural catch-all category are cases of systemic and individualized procedural deficiency. A state that has procedural rules that function so as to make a fair review of the federal claims unlikely by, for example, failing to provide meaningful procedures to develop material facts relating to postconviction claims, would represent a systemic failure of process.[256] A biased judge whose decision, while incorrect, is upheld by the state appellate system would reflect a more individualized deprivation of the full and fair right.

For example, in *Valdez v. Cockrell*, the Fifth Circuit provides the following details regarding the postconviction review of Valdez's federal constitutional claims: (1) the judge reviewing the prisoner's claim of ineffective assistance of counsel lost critical exhibits and failed to review the exhibits before adjudicating the claim; and (2) the judge did not read the trial transcripts from the prisoner's trial in assessing the claim of ineffective assistance of counsel.[257] When the fact-finder with respect to evidence that is material to deciding a constitutional claim fails to review that critical evidence, or even loses the evidence, it is fair to conclude that the state process as to that particular claim was deficient and, therefore, not full and fair.[258] Similarly, a recent Sixth Circuit decision, *Brown v. Smith*, describes a state postconviction proceeding where the constitutional claim had been denied on the merits in spite of the fact that the court had failed to review or provide counsel access to critical records in support of the Sixth Amendment right to counsel claim.[259] Finally, it remains an open question as to whether a state court's review of a claim in the most summary manner—such as, "Relief is Denied as to All Claims"—is a full and fair adjudication. Many have argued that in the absence of any adjudicative reasoning to review and critique, the state process is insufficient as a procedural matter;[260] however, it does not

256. *See, e.g.*, Wilson v. Workman, 577 F.3d 1284, 1287 (10th Cir. 2009) (en banc) (considering a habeas claim where the Oklahoma state court had failed to consider non-record evidence that, if true, would have entitled the prisoner to relief). Other decisions reflect an unwillingness to recognize (d)(1) as inapplicable when the state court process was not full and fair. *See* Gardner v. Galetka, 568 F.3d 862, 878 (10th Cir. 2009) (refusing to honor the State's waiver of deference on account of the state court's procedural failings).

257. 274 F.3d 941, 944–45 (5th Cir. 2001) (noting that the federal district court had made findings of fact as to these issues).

258. *Id.* at 949–50 (finding that the state process was not full and fair, but nonetheless applying the deference of the AEDPA).

259. 551 F.3d 424, 429–30 (6th Cir. 2008).

260. *See, e.g.*, Brittany Glidden, *When the State Is Silent: An Analysis of AEDPA's Adjudication Requirement*, 27 N.Y.U. REV. L. & SOC. CHANGE 177, 205–07 (2001–2002); Lee, *supra* note 22, at 285–86, 315–17; *see also* Harrington v. Richter, 130 S. Ct. 1506, 1507 (2010) (mem.) (granting certiorari and requesting argument on question of whether AEDPA deference applies "to a state court's summary

appear that any federal court has adopted this view, and this is probably not a particularly strong example of procedural unfairness for purposes of the model of due process developed in this Article.

In view of the reported cases and plausible hypotheticals discussed above, it is necessary to unravel the question of the AEDPA's application in contexts where, as discussed above, through procedural traps or unfairness, the state court process—direct appeals and postconviction—fails to meet the minimal standard of full and fair review. Notably, the Supreme Court has failed to provide any guidance as to the scope and application of federal deference to state proceedings when the state process for developing and reviewing a constitutional claim is procedurally unfair.[261] For the most part, lower courts have also avoided the question of how to apply the AEDPA when the state court process was procedurally infirm. In *Valdez*, however, the Fifth Circuit expressly addressed the relationship between full and fair review and the AEDPA, holding that the absence of a full and fair state proceeding is effectively irrelevant to the application of § 2254(d)(1).[262]

Emphasizing that the plain language of § 2254 no longer imposes a requirement of fairness on state courts, Judge Emilio Garza, writing the majority opinion in *Valdez*, was unequivocal: "[W]e hold that a full and fair hearing is not a prerequisite to the application of 28 U.S.C. § 2254's deferential scheme."[263] Judge Garza is quite right that the AEDPA "jettisoned all references to a 'full and fair'" requirement.[264] In fact,

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disposition of a claim").

261. *See* Rice v. Collins, 546 U.S. 333, 339 (2006) (reserving the question as to the interaction of (d)(2) and (e)(1)); *see also* Wood v. Allen, 129 S. Ct. 2389, 2389 (2009) (granting certiorari on the question of when factual deference is appropriate). *But see* Wood v. Allen, 130 S. Ct. 841, 849 (2010) (preserving the question for a future case).

262. 274 F.3d at 946–47. Other circuits have also endorsed this plain language reading of § 2254(d). *See* Wilson v. Mazzuca, 570 F.3d 490, 500 (2d Cir. 2009); Teti v. Bender, 507 F.3d 50, 59 (1st Cir. 2007); Matheny v. Anderson, 377 F.3d 740, 747 (7th Cir. 2004).

263. *Valdez*, 274 F.3d at 959. Judge Dennis wrote a thoughtful and lengthy dissent. *See id.* at 959–73 (Dennis, J., dissenting). In his dissent, Judge Dennis expressly recognized the conflict between the majority opinion and due process:

> 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.

Id. at 973 (emphasis added) (citations omitted).

264. *Id.* at 949 (majority opinion); *see* 28 U.S.C. § 2254(d) (2000); *see also Valdez*, 274 F.3d at 951 n.17 ("We disagree [that a full and fair hearing prerequisite must be interpreted from §§ 2254(d)(2) and (e)(1), as] . . . there is an easier way to harmonize § 2254(d)(2) and § 2254(e)(1). Whereas § 2254(d)(2) sets out a general standard by which the district court evaluates a state court's specific findings of fact, § 2254(e)(1) states what an applicant will have to show for the district court to reject a

Professor Yackle's reading of § 2254 in the months following the AEDPA's enactment, upon which few have been able to improve with time, includes an observation that the statute, as written, "preserves the [traditional] presumption in favor of state court findings, but eliminates . . . standards for the fact-finding process . . . in state court."[265] Notably, however, these observations about the statutory requirements regarding deference do not address the underlying constitutional issues developed in this Article.

Jettisoning the language from the statute, of course, does not free courts from the strictures of due process.[266] If the Court takes fundamental due process rights seriously, as recognized nearly a century ago in cases like *Frank* and *Moore*, then the absence of a full and fair review of one's federal claims by the relevant state court system presents a barrier of constitutional magnitude to the application of the AEDPA.[267] Due process does not require states to provide discretionary forms of review;[268] however, it does mandate that at some point, either in federal *or* in state court, on habeas *or* direct review, that all of a prisoner's constitutional claims receive one round of full and fair review.[269] Stated more plainly, deference to unfairness cannot itself be regarded as full and fair.[270] The application of AEDPA deference, and its corresponding

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state court's determination of factual issues.").

265. Yackle, *supra* note 12, at 140. Professor Yackle's prescient reading of the statute was adopted by Judge Garza in *Valdez*. Specifically, Yackle noted, "Bluntly stated, it appears that [under § 2254(e)(1)] the federal habeas courts must accept the state court findings at value—no questions asked." *Id.* Of course, Yackle was also able to anticipate the fundamental misconception that is embodied in such a reading of the statute: "One can imagine that, in some circumstances at least, serious constitutional questions would be raised by [such] a rule . . . ." *Id.*

266. Congress lacks the power to overturn or to limit a constitutional protection through statutory enactment. *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997). This is true even if the right at issue is only quasi-constitutional in nature. *See e.g.*, Dickerson v. United States, 530 U.S. 428, 437 (2000). *But see Valdez*, 274 F.3d at 951 n.17 ("We cannot, however, second guess the intent of Congress in this manner.").

267. *See* Wright v. West, 505 U.S. 277, 299 (1992) (O'Connor, J. concurring) (defining full and fair as a constitutional right); *see also* Marceau, *supra* note 114, at 404 n.93 (2007) ("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.").

268. McKane v. Durston, 153 U.S. 684, 687 (1894); *cf.* Rivera v. Illinois, 129 S. Ct. 1446, 1456 (2009) (recognizing that there are no per se due process violations when a state misapplies its own procedural rules; instead the question is whether the process harms amount to a federal due process violation).

269. *See* Bator, *supra* note 23, at 456 (recognizing that due process does not require the relitigation of federal claims in federal court if the state review was full and fair); *see also* Allen v. McCurry, 449 U.S. 90, 103–04 (1980) (rejecting the precept that individuals asserting their federal rights must be afforded one "unencumbered opportunity" to bring their claims in federal district courts, "*regardless* of the legal posture in which the federal claim arises," and recognizing instead the propriety of precluding litigation when the same claim has been subject to a full and fair opportunity for litigation in state court (emphasis added)).

270. Daniels v. United States, 532 U.S. 374, 386–87 (2001) (Scalia, J., concurring in part)

quick-look by federal courts, runs afoul of due process when the state process, both appellate and postconviction, is fundamentally unfair.[271] A reading of the AEDPA that is consistent with due process is urgently needed.

V. CONSTITUTIONAL AVOIDANCE: RESOLVING THE TENSIONS BETWEEN THE AEDPA AND DUE PROCESS

There is a large body of academic commentary critiquing the inequities and shortcomings of the AEDPA's limitations on federal habeas review.[272] And there is an equally impressive body of work that predates the AEDPA era and considers whether substantial limitations on federal habeas review are permissible and desirable.[273] Missing from the literature is a bridge between these two bodies of work, an effort to recognize the shared insights from two distinct eras of habeas scholarship.[274] This Article suggests that the model of habeas reform suggested by Bator in his famous 1963 article in the *Harvard Law Review*, though reviled by advocates of robust federal habeas review for

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(recognizing that due process requires at least one fundamentally fair opportunity to litigate constitutional claims bearing on one's sentence).

271. *Cf.* INS v. St. Cyr, 533 U.S. 289, 299–300 (2001) (emphasizing the importance of interpreting statutes so as to avoid constitutional problems).

272. The modern habeas literature is principally concerned with one of two issues:

(1) The constitutional and practical problems that arise under the AEDPA. *See* Bloom, *supra* note 211, at 540–42; Joseph M. Brunner, *Negating Precedent and (Selectively) Suspending Stare Decisis: AEDPA and Problems for the Article III Hierarchy*, 75 U. CIN. L. REV. 307, 321 (2006); Liebman & Ryan, *supra* note 6, at 864–87; Marceau, *Un-Incorporating*, *supra* note 6; *see also* Jackson, *supra* note 6, at 2448.

(2) The untangling and interpretation of one of the most complicated statutory systems known to modern American law. *See* Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 681–97 (2003); Kovarsky, *supra* note 6, at 470–71; Lee, *supra* note 6, at 134–35; Marceau, *supra* note 114, at 395–96; Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211, 222–28 (2008); *see also* Matthew K. Mulder, Note, *Finding the "Eternal and Unremitting Force" of Habeas Corpus: § 2254(d) and the Need for De Novo Review*, 86 DENV. U. L. REV. 1179, 1189–90 (2009) (providing a useful summary of the recent controversies involving the AEDPA's application).

273. *See, e.g.*, Bator, *supra* note 23, at 523–28; Cover & Aleinikoff, *supra* note 88, at 1042 (arguing that the Court chose redundancy and indirection as a remedial strategy to mediate between a pragmatic perspective of criminal administration and an idealistic vision of constitutional rights); Friedman, *supra* note 21, at 250; Peller, *supra* note 21, at 670–90; Reitz, *supra* note 188, at 464; Woolhandler, *supra* note 21, at 576; Larry W. Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609, 621, 629 (1983).

274. As one commentator summarized the debate: "Proponents of an expansive scope for the writ and those who would circumscribe, if not eviscerate, habeas review, generally premise their positions on: (1) radically opposing views of the history of habeas corpus, and (2) radically different views of the institutional relations between state and federal governments." Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 375–376 (Winter 1998).

decades, must be recognized as providing a critical common denominator between these two eras of habeas corpus jurisprudence and commentary. Reflection on the modern import of Bator's thesis is critical to both the developing literature in this field and the current constitutional dilemma posed by federal courts applying AEDPA deference to an unfair state proceeding.

Professor Hart summarized the Warren Court's habeas jurisprudence as a broad formula of federal review that mandated the correction of "any underlying constitutional error."[275] Bator responded with hostility to this expansive model of federal habeas review by arguing that if the state process was full and fair, then full relitigation of the constitutional issue in federal court was an affront to the foundations of our federal system.[276] Accordingly, it was not Bator's emphasis on a fair state process that was novel or controversial; instead, supporters of broad federal habeas review rejected his position that federal habeas review was *only* justified when the state process was procedurally inadequate.[277]

Given the robust literature that had developed thoughtfully condemning Bator's process model view of federal habeas, it is not surprising that the majority of academic responses to the AEDPA have somewhat rehashed the anti-Bator arguments that shaped the pre-AEDPA era.[278] However, in view of Bator's own acknowledgment that even the most dramatic overhaul of federal habeas review would require plenary federal review when the state adjudication failed to comport with due process,[279] it is necessary to recognize the renewed relevance of Bator's concern with full and fair adjudications. At this point in the writ's history, there is much to be gained by reflecting on nearly century-old decisions, like *Frank* and *Moore*, and returning the adequacy of process—the full and fair right—to a position of prominence in the habeas debate. By acknowledging that state systems can suffer from adjudicative infirmities that render proceedings in such courts something less than full and fair, the facial deficiencies of the AEDPA as a matter of due process are laid bare. Deference in the face of an unfair state

275. Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 106 (1959); *see also* Woolhandler, *supra* note 21, at 576.

276. Bator, *supra* note 23, at 504. Bator argued that federal jurisdiction should serve as a "'backstop' for inadequacies of state process." *Id.* at 492; *see also* Friedman, *supra* note 21, at 335; Woolhandler, *supra* note 21, at 580 n.28; *cf.* Fallon & Meltzer, *supra* note 53, at 2051 n.85.

277. Peller, *supra* note 21, at 582. As noted previously, some scholars have rejected broad readings of *Brown v. Allen* as ahistorical. *See supra* note 59. While the Warren Court surely advanced the substantive review of constitutional claims by state prisoners, in reality, "[T]he theory that independent federal habeas corpus review of the constitutional validity of state criminal convictions is a modern innovation attributable to *Brown* is simply inconsistent with the historical evidence." FREEDMAN, *supra* note 33, at 143.

278. *See supra* note 273.

279. *See* Bator, *supra* note 23, at 523–28.

proceeding fails to afford the prisoner a *single* full and fair review, and as such is incompatible with due process. A reading of the AEDPA that conforms with the strictures of due process is needed.

There are two principal methods of interpreting the AEDPA that are at once faithful to the general goals of the statutory scheme, and consistent with the specific due process requirements relating to the full and fair development of constitutional claims.[280] The first relies on a natural reading of § 2254(d)(2), and the second turns on a reasonable interpretation of the term "adjudication" as it is used in the prefatory clause of § 2254.[281] Either interpretive approach would render the AEDPA consistent with the minimum requirements of due process.[282]

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280. The rights enshrined in the Constitution are more likely to be realized when the Court acknowledges the continuing import of the full and fair requirement. However, one cannot suggest that mandating full and fair review as a principle will translate to complete agreement as to whether a particular proceeding was full and fair, and litigation on this issue will not immediately subside. *See, e.g.*, Freedman, *supra* note 13, at 1468–69 (noting that the Court seemed to reach opposite results regarding the question of whether a full and fair review existed in *Frank* and *Moore* despite "seemingly identical facts"); Pamela A. Mann, *Federalism Issues and Title VII:* Kremer v. Chemical Construction Corp., 13 N.Y.U. REV. L. & SOC. CHANGE 411, 413 (1984–85) (arguing that the Supreme Court misapplied the due process rule of full and fair, thereby undercutting Title VII of the Civil Rights Act in *Kremer v. Chemical Construction Corp.*).

281. It is possible that the Court could also craft a third way to address the problem of state court processes that fail to provide a minimally full and fair review of the constitutional claim. It may be possible for a federal court to grant some form of conditional writ that is contingent upon whether the state court itself reconsiders the constitutional claim at issue and provides a full and fair review. Justice Scalia appeared to express a preference for this approach to avoiding the constitutional stickiness of imposing the AEDPA deference on a procedurally unfair state process. Specifically, Justice Scalia has expressed concern about state procedures that were patently unfair and noted, "If [the state process] were unconstitutional, and I guess this is what is sticking in our craw—my craw anyway—if it were unconstitutional, it seems to me there ought to be a way to make the State take the first cut at it." Transcript of Oral Argument at 50, Bell v. Kelly, 129 S. Ct. 393 (2008) (No. 07-1223), 2008 WL 4892842; *see also* Daniels v. United States, 532 U.S. 374, 386–87 (2001) (Scalia, J., concurring in part) (suggesting a similar model). It is unclear exactly what sort of authority a federal court has to essentially remand a case to the state system for a redo of the constitutional adjudication. In adopting such a solution, the Court could look to *Rhines v. Weber*. 544 U.S. 269, 274, 277 (2005) (holding that a court may hold in abeyance exhausted claims while remanding the remaining unexhausted claims to the state court provided that there was "good cause" for the petitioner's previous failure to exhaust them).

282. The danger and delight of attempting to provide meaning to one of the most contested issues in our federal system through the use of a facially incomprehensible statute, § 2254, is that there is almost never certainty or finality with regard to a solution. One of the latent confusions that deserves further discussion in future papers relates to the appropriateness of de novo legal review when the state process is unfair as to the factual development.

Consider a hypothetical. The State of Texas summarily denies a prisoner's postconviction claim that the prosecution failed to turn over exculpatory evidence. The state's process was patently inadequate under the full and fair standards. For example, the court concludes (on the record) by flipping a coin that the prosecution did not withhold certain pieces of evidence. In circumstances analogous to these, does the full and fair element of due process require that the federal court review the substance of the legal claim de novo? If the AEDPA's factual limitations on relief do not apply, then the petitioner merely has to prove the facts in support of his claim by a preponderance of the evidence, *see* Sumner v. Mata, 449 U.S. 539, 551 (1981), but do the substantive limits of § 2254(d)(1)

A. If (d)(2) Imposes a Requirement of Procedural Fairness, the Full and Fair Requirement Is Satisfied.

One method of reconciling § 2254 with the mandate of a full and fair review of constitutional claims is to interpret § 2254(d)(2) as requiring procedural fairness. Under this reading of (d)(2), the absence of a full and fair review would ensure that factual development is permitted and that substantive review be de novo.

The AEDPA provides two alternative limitations on the availability of federal habeas relief. Section 2254(d)(1) provides substantive limitations on relief, while § 2254(d)(2), by contrast, dictates alternative procedural or fact-finding limitations on relief.[283] Because the limitations on relief are phrased in the disjunctive, when a prisoner overcomes the limitations in (d)(2), the limitations in (d)(1) do not apply, and vice versa.[284] That is to say, if a prisoner satisfies the strictures of (d)(2), then the federal review is de novo and unhindered by AEDPA deference.[285] Consequently, if (d)(2) is interpreted so as to impose a requirement of procedural fairness consistent with the minimum requirements of due process, the tension between the AEDPA's deference and the full and fair rights developed in this Article is averted.[286]

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continue to apply? In other words, does the fair development of facts in federal court suffice for purposes of providing the prisoner one full and fair review, or must the legal review also be free of deference?

One approach to resolving this dilemma, though not conclusive, is to consider the analogy with the preclusion doctrines in the context of civil cases. For example, if a court resolves a civil matter in a patently arbitrary manner, it is well settled that due process bars the application of res judicata to the judgment. *See, e.g.*, Montana v. United States, 440 U.S. 147, 164 n.11 (1979). Likewise, it would seem unreasonable for the second court to afford preclusive deference to the legal conclusions of the first court *even if* the findings of fact rendered through arbitrary processes ultimately turn out to be correct. Simply because a reviewing court, such as a federal habeas court, ultimately agrees with the initial findings of fact does not lead to a conclusion that that due process would countenance deference under either res judicata principles or § 2254 in reviewing those findings of fact. Due process is simply incompatible with deference, factual or legal, to a proceeding that is poisoned with inequity to its very core.

283. *See* 28 U.S.C. § 2254(d) (2006).

284. Carlson v. Jess, 526 F.3d 1018, 1023–24 (7th Cir. 2008) (holding that the limitations announced in (d)(1) do not apply when the limits imposed by (d)(2) are satisfied); *accord* Jones v. Walker, 540 F.3d 1277, 1288 (11th Cir. 2008) (en banc); Davis v. Grigas, 443 F.3d 1155, 1159 (9th Cir. 2006).

285. Of course, even if the onerous limitations of § 2254(d)(1) do not apply, it is not clear that the limits on the ability of a federal court to grant an evidentiary hearing, embodied in § 2254(e)(2), would not remain applicable. The question is: When the state court has manifested procedural unfairness incompatible with due process, but the prisoner has failed to act diligently by simply requesting an evidentiary hearing in state court, is the federal review truly plenary such that the limits prescribed by (e)(2) do not apply?

286. The interaction of the AEDPA's various deference provisions remains unsettled. *See* Rice v. Collins, 546 U.S. 333, 338–39 (2006). As a matter of statutory interpretation, based on the text, structure, and history of the provision, I have previously concluded that (d)(2) should be read to impose a requirement of procedural fairness without regard to the due process issues raised in this Article. Marceau, *supra* note 114, at 441.

Applying § 2254(d)(2), a state prisoner is entitled to a de novo non-deferential review of his constitutional claims when the state court adjudication was "based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding."[287] The critical question, therefore, is how to interpret the phrase "unreasonable determination of the facts."[288] At least one federal court has expressly held that § 2254(d)(2) does not impose a requirement of procedural fairness.[289] Under this view, the substantive and factual deference of the AEDPA attaches to the procedurally unfair state proceeding, sealing the state's unfairness in the protective gloss of the AEDPA. The alternative approach is to recognize that a state process is "unreasonable" for purposes of § 2254(d)(2) where "the process employed by the state court is defective."[290] In their seminal habeas corpus treatise, Professors Hertz and Liebman endorse this reading of (d)(2): "The word 'determination' in § 2254(d)(2) has two meanings in common parlance—the *process* by which a decision is reached, and the *substance* of the decision that is reached."[291] Likewise, Judge Alex Kozinski has interpreted § 2254 so as to view the limitations contained in (d)(2) as satisfied whenever the state's "fact-finding process itself is defective."[292] According to Judge Kozinski:

> Closely related to cases where the state courts make factual findings infected by substantive legal error are those where the fact-finding process itself is defective. If, for example, a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an "unreasonable determination" of the facts.[293]

The import, then, of remedying the circuit split as to the meaning and scope of § 2254(d)(2) is beyond peradventure. If (d)(2)'s requirement of reasonable factual determinations is interpreted so as to impose absolutely no reasonableness of process, then federal courts might be permitted to defer to substantially unfair state processes, as in *Valdez*, thereby depriving prisoners of the opportunity to have a *single* forum fully and fairly review the constitutional claims at issue. Such a result is incompatible with fundamental fairness. Conversely, if the court interprets (d)(2) such that an unfair or unreliable state process is

287. 28 U.S.C. § 2254 (d)(2).

288. For one theory of how to interpret (d)(2), see Marceau, *supra* note 114, at 393–94.

289. Valdez v. Cockrell, 274 F.3d 941, 951 (5th Cir. 2001).

290. Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004); *see also* Earp v. Ornoski, 431 F.3d 1158, 1169 (9th Cir. 2005).

291. 2 HERTZ & LIEBMAN, *supra* note 12, § 20.2c at 923 n.78.

292. *Taylor*, 366 F.3d at 1000–01; *see also* Mayes v. Gibson, 210 F.3d 1284, 1289 (10th Cir. 2000) (noting that federal courts need not defer to a state court's findings of fact when "the habeas petitioner did not get a full, fair, and adequate hearing" in state court).

293. *Taylor*, 366 F.3d at 1001.

regarded as an "unreasonable determination of the facts," then the deference of (d)(1) will not apply to procedurally unfair state adjudications, and the AEDPA's application and deference will exist harmoniously with the due process requirement of a full and fair hearing.[294]

This question of the proper interpretation of § 2254(d)(2) remains to be decided.[295] The question has percolated among commentators and judges, and it is ripe for Supreme Court review.[296]

B. If an Unfair State Process is Not an "Adjudication" for Purposes of § 2254(d), then the Full and Fair Requirement Is Satisfied.

A second interpretation of the AEDPA that would avoid the due process problems inherent in deferring to unfair state processes derives from the prefatory language of § 2254(d). Even if the court does not read a requirement of minimal procedural fairness into § 2254(d)(2), if the court treats procedurally unfair state processes as non-adjudications for purposes of § 2254(d), then the AEDPA will not be in tension with due process.[297]

The prefatory language of § 2254(d) provides that "[a]n application for 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

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294. Significantly, the limitations on relief contained in provisions like § 2254(d)(1) do not, without more, appear to violate the right to a full and fair hearing. The substantive deference of the AEDPA is principally problematic when it is applied to an unfair state process.

295. In one of its most recent habeas decisions, *Landrigan v. Schriro*, the Court held that the Ninth Circuit had erred in its application of § 2254(d)(1). 550 U.S. 465, 481 (2007). Notably, however, the final paragraph of Justice Thomas's majority opinion concludes that (d)(1) is applicable *because* the limitations contained in (d)(2) were not satisfied. *Id.* If (d)(2)'s reasonableness requirement is understood to include an element of minimal procedural fairness (reasonableness), Justice Thomas's reasoning would remain correct, and would be clearer.

296. *See* Marceau, *supra* note 114, at 396–402. *Compare Taylor*, 366 F.3d at 999 ("We interpret these provisions sensibly, faithful to their text and consistent with the maxim that we must construe statutory language so as to avoid contradiction or redundancy."), *and id.* at 1000–01 (noting that state court errors of procedure that render an adjudication an "unreasonable determination" of the facts "come in several flavors"), *with* Valdez v. Cockrell, 274 F.3d 941, 959 (5th Cir. 2001) ("In sum, we hold that a full and fair hearing is not a prerequisite to the application of 28 U.S.C. § 2254's deferential scheme.").

297. Section 2254(d) applies to "adjudicat[ions] on the merits." 28 U.S.C. § 2254(d) (2006); *see* Mayes v. Gibson, 210 F.3d 1284, 1289 (10th Cir. 2000) (refusing to extend deference to state court decision because petitioner was denied an evidentiary hearing on his claim of ineffective counsel); Miller v. Champion, 161 F.3d 1249, 1254 (10th Cir. 1997) ("[W]e note that because the state court did not hold any evidentiary hearing, we are in the same position to evaluate the factual record as it was. Accordingly, to the extent the state court's dismissal of Mr. Miller's petition was based on its own factual findings, we need not afford those findings any deference.").

limitations on relief in either (d)(1) or (d)(2) are satisfied.[298] The question, then, is whether the phrase "adjudicated on the merits" can be read so as to limit the application of § 2254(d) to procedurally full and fair state court processes. In other words, is an unfair state process an adjudication on the merits? Like many of the AEDPA's provisions, the phrase "adjudication on the merits" in the postconviction context does not enjoy a clearly settled meaning. Nonetheless, there are reasoned bases for concluding that "adjudication," as the term is used in § 2254, implies a full and fair adjudication on the merits.

First, it is useful to analogize to the civil procedure context regarding litigation over issues of res judicata, which turn on determinations as to whether an adjudication on the merits has occurred.[299] Second, federal courts addressing the meaning of adjudication in the habeas context are increasingly willing to recognize the requirement of fair procedure as a precondition for regarding a state process as an adjudication; in fact, there appears to be an emerging trend among federal courts in favor of interpreting "adjudicated on the merits" to impose elements of procedural fairness.[300]

1. Res Judicata and Full and Fair

The analogy between res judicata and § 2254 review was expressly recognized for the first time by the Second Circuit in *Sellan v. Kuhlman*.[301] In *Sellan*, the majority explained that when Congress uses a term of art such as "adjudicated on the merits," the court presumes that it is consistent with the commonly understood meaning of this term. "Adjudicated on the merits," the court explained, "has a well settled meaning: a decision finally resolving the parties' claims, with res judicata effect."[302] On this view, understanding the conditions in which litigation is understood to enjoy res judicata effect is significant for recognizing when, and under what conditions, the limitations announced in § 2254 are triggered.[303] Unlike the term "adjudication," the Supreme Court has

298. 28 U.S.C. § 2254(d) (emphasis added).

299. *See* Mann, *supra* note 280, at 423.

300. *See, e.g.*, Brown v. Smith, 551 F.3d 424, 428–29 (6th Cir. 2008); Wilson v. Sirmons, 536 F.3d 1064, 1082 (10th Cir. 2008); Monroe v. Angelone, 323 F.3d 286, 297–98 (4th Cir. 2003). There are also signals in the Court's recent habeas jurisprudence suggesting that only procedurally fair state processes ought to be considered the AEDPA adjudications. Knowles v. Mirzayance, 129 S. Ct. 1411, 1418 n.2 (2009) (acknowledging that the habeas petitioner could have argued, but chose not to, that the "state court failed to reach an adjudication on the merits" when the state courts, arguably, failed to fully and fairly develop the factual record).

301. 261 F.3d 303, 311 (2d Cir. 2001).

302. *Id.* (internal quotation marks omitted).

303. At least one commentator has disagreed with the analogy, though for reasons that do not materially undermine the analysis presented in this Part. Scott Dodson, *Habeas Review of Perfunctory State Court Decisions on the Merits*, 29 AM. J. CRIM. L. 223, 232 n.48 (2002) (emphasizing that Congress expressly rejected a res judicata approach to federal habeas review as too severe). Even though Congress did not adopt a complete process model or res judicata approach to federal review, the

expressly addressed the meaning and limits of res judicata as used in § 2254(d).

Of particular relevance, the Supreme Court has expressly recognized the link between res judicata and the due process requirement of full and fair review.[304] In *Montana v. United States*, the Court held that a claim, though resolved on the merits, is not entitled to res judicata effect if the prior adjudication was not full and fair.[305] According to the Court, "if there is reason to doubt the quality, extensiveness or fairness of procedures followed in prior litigation," then res judicata deference is not appropriate.[306] Likewise, in *Allen v. McCurry*, the Court explained that res judicata deference was not available in § 1983 actions "where state [courts] did not provide fair procedures for the litigation of constitutional claims."[307] The focus in these cases is a pragmatic inquiry as to whether, in reality, the litigant had a "real ability" to litigate the constitutional claims in question.[308] Where inadequate procedures or the failure to "actually implement[]" existing procedures denied an individual the "real ability" to vindicate her constitutional right, the Court has recognized that the due process requirement of full and fair review is not satisfied, and thus the application of preclusion doctrines is impermissible.[309]

Obviously, the AEDPA does not provide for the same sort of pure preclusion that flows from a valid application of the res judicata doctrine,[310] but the deference enshrined in § 2254(d) is substantial and

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meaning of the phrase adjudication on the merits, as used in the res judicata context, is worthy of careful consideration.

304. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 502 (2001) ("[A decision] 'on the merits' triggers the doctrine of res judicata or claim preclusion."); Montana v. United States, 440 U.S. 147, 153 (1979) ("Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action."). *See generally* RESTATEMENT (SECOND) OF JUDGMENTS Introduction at 7 (1982) (noting that due process serves as the constitutional limit on res judicata principles).

305. 440 U.S. at 163–64 & n.11; *see also* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 480 (1982) (explaining that preclusive effect must be denied where the judicial review is "fundamentally flawed"); R. Jason Richards, Richards v. Jefferson County*: The Supreme Court Stems the Crimson Tide of Res Judicata*, 38 SANTA CLARA L. REV. 691, 699 (1998); Jan Hatcher Wolterman, Comment, *If You Do Not Succeed at First Do Not Bother Trying Again: Should Res Judicata Principles Prevent Title VII Claims That Are Unreviewed by the State Court from Proceeding to Federal Court?*, 54 U. CIN. L. REV. 649, 651 (1985) ("For res judicata to apply, the parties must have a full and fair opportunity to litigate the matter and the proceeding must have met the constitutional requirements of due process.").

306. *Montana*, 440 U.S. at 163–164 & n.11; *see also* Mann, *supra* note 280, at 446 (concluding that the "tenor" of the *Montana* decision suggests the importance of reviewing state procedures with a "critical eye").

307. 449 U.S. 90, 101 (1980)

308. Mann, *supra* note 280, at 446, 449 (observing the relationship between "full and fair" review and a "practical opportunity to obtain full state court consideration").

309. *Montana*, 440 U.S. at 163–64 & n.11; *see also Allen*, 449 U.S. at 101.

310. As to Fourth Amendment claims, however, under *Stone*, "a prior state judgment will bar [federal] habeas corpus [claims] in the same way as would res judicata or collateral estoppel." Mann,

rarely overcome. Accordingly, as the Second Circuit has recognized in a related context,[311] the analogy to res judicata should be viewed as instructive in assessing whether the limitations on relief contained in the AEDPA can be triggered by state court proceedings that failed to afford the prisoner a "full and fair opportunity to litigate the claim."[312] Absent the availability of full and fair procedures, a claim cannot be precluded for purposes of civil litigation, and § 2254(d) deference cannot similarly be applied to a federal habeas claim.

2. A Freestanding Definition of "Adjudication" in the Postconviction Context

There is also growing support among the federal courts for a recognition that a claim which has not been fully and fairly reviewed in state court will not be considered an adjudication on the merits for purposes of § 2254(d).[313] To date, the circuit courts have not relied on the requirement of a full and fair review expressly, but the relevant holdings are firmly in line with the reasoning suggested in this Article.[314] In *Brown v. Smith*, for example, the Sixth Circuit recently held that the limitations on relief contained in § 2254 did not apply because the federal record contained significant new evidence that had not been reviewed by the state courts.[315] Significantly, new federal evidence can be received by a federal habeas court reviewing the validity of a state prisoner's detention only when the prisoner is not himself at fault for failing to develop the factual record in state court.[316] Federal courts cannot receive "new" evidence into the record where the state court has provided a

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supra note 280, at 448.

311. Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001).

312. Mann, *supra* note 280, at 435 (discussing the concept of full and fair as a due process right in the context of res judicata determinations); *see also* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 481 (1982) (considering a preclusion issue and noting that full and fair defines the threshold procedural requirements under the Due Process Clause of the Fourteenth Amendment).

313. *See supra* notes 290, 293.

314. The judges and attorneys who make an "adjudication" argument tend to say that the existence of new evidence in the federal record renders the claim, as adjudicated on the merits in state court, materially different from the claim before the federal court. Stated another way, it has been urged that a claim supported with substantial new evidence is a "new" claim that has not been "adjudicated on the merits" by the state court, and thus that the limitations on relief provided in (d)(1) do not apply. *See* Brief for Petitioner at 26–27, Bell v. Kelly, 129 S. Ct. 393 (2008) (07-1223), 2008 WL 4448251. Applying the due process model advanced in this Article, however, it is unnecessary to say that the federal claim is new; instead, it is sufficient to say that the state court simply never conducted a full and fair review, which is implied in the well-settled meaning of the phrase "adjudicated on the merits."

315. 551 F.3d 424, 429–30 (6th Cir. 2008); *see also* Holland v. Jackson, 542 U.S. 649, 653 (2004) ("Where new evidence is admitted, some Courts of Appeals have conducted de novo review on the theory that there is no relevant state-court determination to which one could defer.").

316. Williams v. Taylor, 529 U.S. 420, 434 (2000) ("Interpreting § 2254(e)(2) so that 'failed' requires lack of diligence or some other fault [on the part of the prisoner] avoids putting it in needless tension with § 2254(d).").

procedurally full and fair opportunity to develop and litigate the constitutional claim in question.[317] Accordingly, the authority of the federal courts to review new evidence, as in *Brown*, implicitly signals a failure of state process justifying de novo federal review.[318]

In short, courts that apply de novo review to constitutional claims that were adjudicated in state court, because of the existence of "an incomplete factual record," are effectuating the mandate of full and fair review.[319] By granting an evidentiary hearing in federal court, or reviewing extra-record evidence, a federal court is implicitly holding that the state court's process was incompatible with the minimum requirements of due process.[320] As Judge Michael McConnell recently explained, where a state prisoner has "diligently sought to develop the factual basis underlying his habeas petition, but a state court prevented him from doing so," a federal court's review of the claim must be de novo.[321] If this approach to defining § 2254's adjudication on the merits requirement is adopted by the Supreme Court, then the due process requirements discussed throughout this Article would be satisfied, and

317. In fact, *Townsend v. Sain*, 372 U.S. 293, 312–13 (1963), the leading case defining the availability of federal evidentiary hearings, has been superseded by the AEDPA, except to the extent that factual development in federal court is required because of the absence of a full and fair opportunity to litigate in state court. For a helpful summary of *Townsend*'s continued application, see Insyxiengmay v. Morgan, 403 F.3d 657, 670 (9th Cir. 2005) ("In sum, for a post-AEDPA petitioner to receive an evidentiary hearing in federal court, he must first show that he has not failed to develop the factual basis of the claim in the state courts: if he has failed, he must meet one of the two narrow exceptions stated in the statute. Then he must meet one of the *Townsend* factors and make colorable allegations that, if proved at an evidentiary hearing, would entitle him to habeas relief." (citation omitted)).

318. *See* 28 U.S.C. § 2254(e)(2) (2006).

319. Wilson v. Sirmons, 536 F.3d 1064, 1079 (10th Cir. 2008); *see also* Yackle, *supra* note 12, at 141 n.23 (noting that habeas reformers, including the Reagan Department of Justice, tended to define "full and fair" by relation to the procedures required under *Townsend*).

320. *See, e.g.*, Killian v. Poole, 282 F.3d 1204, 1208 (9th Cir. 2002) (recognizing that by denying the prisoner a full and fair opportunity to litigate in state court, the state court had forfeited its right to AEDPA deference); *see also Brown*, 551 F.3d at 436 (Clay, J., concurring) ("This Court, however, has recognized that an important exception to the deference owed state courts under AEDPA exists where substantial new evidence in support of a petitioner's claim arises during federal habeas proceedings.").

321. *Wilson*, 536 F.3d at 1079 (quoting Miller v. Champion, 161 F.3d 1249, 1253 (10th Cir. 1998)). As discussed previously, the Tenth Circuit appears to have adopted the approach that new evidence of significance so fundamentally alters a claim as to dictate that the state court did not "adjudicate" the same claim. *See id*. This approach is consistent with the habeas jurisprudence on the topic of exhaustion. Typically, a claim is not regarded as "new" for purposes of exhaustion so long as the basic legal substance of the claim was presented to the state courts. Vasquez v. Hillery, 474 U.S. 254, 257–58, 260 (1986) (permitting new evidence because it did not fundamentally alter the legal claim presented to the state courts); *see also* Weaver v. Thompson, 197 F.3d 359, 364 (9th Cir. 1999) (noting that the exhaustion analysis should not devolve into "hairsplitting"; instead, the inquiry is simply whether, at bottom, the substance of the legal claim has remained the same). The question of whether asserting that a claim is so fundamentally different as to be un-adjudicated is compatible with asserting that the claim is exhausted, as required by § 2254(c), remains open.

deference would not be triggered without a full and fair process at the state level.[322]

CONCLUSION

In the context of interrogation law, commentators and courts have observed that the Court's groundbreaking *Massiah* decision, which provided a right to counsel under the Sixth Amendment, was quickly forced into an extended hibernation by the *Miranda* decision, which was handed down only two years later and provided a right to counsel under the Fifth Amendment.[323] But despite being overshadowed, the *Massiah* rule reemerged, more important than ever, when the limitations on the *Miranda* right came to be more fully explained and understood.[324] When the Fifth Amendment rights of *Miranda* began to recede, the independent prominence of the Sixth Amendment right was re-discovered. The right to a full and fair review of one's constitutional claims in the context of habeas proceedings has had a similar, though more drawn out trajectory.

The sort of freestanding due process embodied in *Frank* and *Moore*, though groundbreaking when the decisions were announced,[325] has been largely dormant for more than half a century. These precedents slept and slumbered through the criminal procedure revolution, which was marked by substantive advances in criminal procedure rights and parallel procedural advancements in the Supreme Court's willingness to entertain constitutional questions on federal habeas review.[326] Like the constitutional rule announced in *Massiah*, however, the passage of time has not diminished the importance of the full and fair right. Now that we are firmly entrenched in the criminal procedure counter-revolution, it is

322. The Supreme Court is showing some symptoms of recognizing the potential due process problem as well. In *Knowles v. Mirzayance*, the Court applied the ordinary "deferential approach" provided for in the AEDPA, but it expressly noted that counsel for the petitioner had not argued that the deficiencies in the state process such as a summary disposition of the case and the failure to provide "an adequate development of the factual record" justified a more complete federal review. 129 S. Ct. 1411, 1418 n.2 (2009). The Court expressly left open the possibility that the inadequacies of the state process might render § 2254(d) "entirely inapplicable" to his constitutional claims. *Id.* Interestingly, the Supreme Court voted nine-to-zero to reverse the Ninth Circuit in *Mirzayance*; however, Justices Scalia, Souter, and Ginsburg signaled their discomfort with applying the AEDPA deference by refusing to join only that section of the opinion that applied § 2254(d) to the constitutional claims in question. *Id.* at 1414.

323. *See* Massiah v. United States, 377 U.S. 201 (1964); *see also* Miranda v. Arizona, 384 U.S. 436 (1966); Schulhofer, *supra* note 62, at 884 (explaining that *Massiah* was essentially "lost in the shuffle" and excitement following *Miranda*).

324. *See, e.g.*, Brewer v. Williams, 430 U.S. 387, 400–01 (1977).

325. *See* Frank v. Mangum, 237 U.S. 309, 345 (1915); *see also* Moore v. Dempsey, 261 U.S. 86, 91 (1923); Bator, *supra* note 23, at 486–89.

326. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 440–41 (1963); Brown v. Allen, 344 U.S. 443, 463–65 (1953).

appropriate to revisit and reinvigorate the full and fair protections announced in *Frank* and *Moore*.

For commentators and courts, the AEDPA has brought delight and torture, respectively, with its seemingly endless stream of questions regarding parity between state and federal courts and its mind-bending exercises in statutory construction. Missing from all of these efforts, however, is an acknowledgement that basic due process compels a fundamentally fair and full review of a prisoner's federal constitutional claims. Because an adjudication constrained by § 2254(d) is by itself incapable of, indeed designed to avoid, such plenary review, the fairness of the state procedures becomes a question of constitutional magnitude that can no longer be avoided. This Article lays a foundation for recognizing that in certain contexts, a rigid adherence to the AEDPA will run afoul of due process, and it charts alternative interpretive courses for avoiding this dilemma. Fortunately, the Court has not yet directly addressed this question, and this Article provides a blueprint for reconciling the AEDPA with the due process mandate that a prisoner receive *one* round of full and fair review, either in state *or* in federal court.

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