COMMENTS

Review and Vacatur of Certificates of Appealability Issued After the Denial of Habeas Corpus Petitions

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After a criminal defendant has been convicted and sentenced, and has exhausted his appeals, he may challenge his detention by applying for a writ of habeas corpus in federal district court. In his application, the prisoner may allege that his conviction and subsequent incarceration violated federal law or the Constitution. If the district court determines that the prisoner's conviction violated the Constitution or federal statute, the court may grant the writ and order the prisoner's release. However, if the district court denies a prisoner's application, the prisoner may appeal the denial only if he receives a certificate of appealability (COA) from the district court or the circuit court. The standard the court uses to determine whether a COA should issue is set forth by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). First, AEDPA requires that the prisoner make a substantial showing of the denial of a constitutional right in order to receive a certificate. Thus, under AEDPA, a prisoner may not appeal the denial of a habeas petition that raises only statutory issues but no constitutional issues. Second, AEDPA requires the issu-

2 Dressler, Understanding Criminal Procedure § 1.03 at 14–15 (cited in note 1). When a district court grants a habeas petition and orders the release of the petitioner, the government may usually try the petitioner again. See Steven L. Emanuel, Criminal Procedure ch 1, II.E.1 at 5 (Aspen 24th ed 2003).
5 28 USC § 2253(c)(2); Miller-El, 537 US at 335–36 ("[Section] 2253(c) permits the issuance of a COA only where a petitioner has made a 'substantial showing of the denial of a constitutional right.'").
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ing court to specify individual claims raised by the prisoner that meet the substantial showing standard.⁶

When a court issues a COA, the circuit court usually will decide the merits of the appeal. However, after a court has issued a COA, the government appellee may argue that the circuit court should vacate the COA and refuse to decide the merits of the appeal on the ground that the COA was improperly issued. Seven circuit courts have addressed the question of whether to vacate an improvidently granted certificate. Those courts disagree about two points: what circumstances, if any, allow a circuit court to vacate a COA as improvidently granted; and whether a proper COA is required for a circuit court to have jurisdiction over a habeas appeal.

The Third, Second, and Tenth Circuits have taken absolute approaches to this issue. For example, the Third Circuit held that a properly issued COA is a prerequisite for an appellate court to have jurisdiction over a habeas appeal, so the appellate court must always review the propriety of the COA before considering the merits.⁷ At the other end of the spectrum, the Second and Tenth Circuits concluded that an appellate court must review the merits of a habeas appeal if a COA has been issued, because jurisdiction vests in the appellate court when a COA is issued regardless of its propriety.⁸ Four other circuits have taken intermediate approaches and will vacate an improvidently granted COA under specific circumstances.⁹

This divergence of approaches among the circuits has particular relevance to improvidently granted COAs that raise meritorious statutory claims but present no constitutional issues.¹⁰ In circuits where

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⁶ 28 USC § 2253(c)(3) ("The certificate of appealability... shall indicate [on] which specific issue or issues [the applicant made a substantial showing of the denial of a constitutional right].").
⁷ See United States v Cepero, 224 F3d 256, 260–62 (3d Cir 2000) (en banc) ("[W]e must reject the analysis of our sister circuits and decline the notion that this court is bound by the District Court's issuance of a [COA].").
⁸ See Soto v United States, 185 F3d 48, 52 (2d Cir 1999) ("[W]e must decide whether a [COA] issued without meeting the 'substantial showing of the denial of a constitutional right' requirement nonetheless suffices to confer appellate jurisdiction. We hold that it does."); LaFevvers v Gibson, 182 F3d 705, 710–11 (10th Cir 1999) ("The [certificate of probable cause] for an appeal having been granted [by the district court], the appellant must be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal.") (internal quotation marks and citation omitted).
⁹ See Phelps v Alameda, 366 F3d 722, 727–28 (9th Cir 2004) ("[A]lthough a merits panel generally need not examine the propriety of a COA, it nevertheless retains the power to do so."). See also Porterfield v Bell, 258 F3d 484, 485 (6th Cir 2001); Young v United States, 124 F3d 794, 799 (7th Cir 1997); Tiedeman v Benson, 122 F3d 518, 522 (8th Cir 1997).
¹⁰ This circuit split often has no effect on the ultimate disposition of the case because the claims appealed are meritless and will be rejected even if the appellate court decides the merits of the appeal. However, the circuit split creates disparities in the resources expended by the
the circuit court gives itself the ability to vacate improperly issued COAs, the circuit court will not decide the merits of the appeal and will leave the district court's denial of the habeas petition intact. However, when the appellate court must consider the merits of such cases, the result might be a reversal of the district court's denial of the habeas petition. For instance, the Third Circuit will dismiss appeals raising only statutory issues, but the Second and Tenth Circuits will decide such appeals on the merits.

This circuit split is problematic for three reasons. First, it creates unfairness to criminal defendants because the different circuits may dispose of a given appeal in drastically different ways. Consider a capital case raising a meritorious statutory issue but no constitutional issues. Issuance of a COA in such a case is improper. In circuits providing for the vacatur of such improperly issued COAs, such as the Third Circuit, the COA will be vacated, and the appeal will be foreclosed, paving the way for the prisoner's execution. In circuits where the appellate court must reach the merits in the case, such as the Second and Tenth Circuits, the district court's denial of the prisoner's habeas petition may be reversed, overturning his conviction and/or death sentence. Second, circuit courts that reach the merits of appeals pursuant to improvidently granted COAs are considering appeals and possibly overturning habeas denials that Congress has expressly excluded from appellate review. Finally, the circuit split creates disparities in the judicial resources expended at different points in the habeas appellate process and in the types of cases on which those resources are expended.

This Comment suggests that an intermediate approach permitting vacatur of facially invalid COAs is most consistent with Supreme Court precedent and Congress's purpose in requiring a COA in habeas appeals. This Comment proceeds in three parts. Part I provides a background of habeas corpus proceedings and the historical approaches to appealability of habeas decisions. Part II evaluates the absolute approaches requiring that an appellate court always review a COA before reaching the merits of a habeas appeal or precluding appellate review of a previously-issued COA and concludes that these approaches are inconsistent with Supreme Court precedent. Part III examines the intermediate approaches permitting vacatur under particular circumstances and proposes that an approach permitting vaca-
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The turn of COAs is preferable because it is most consistent with Supreme Court precedent and the purposes of the COA requirement.

I. HABEAS CORPUS PROCEEDINGS AND APPEALABILITY OF HABEAS CORPUS DECISIONS

This Part provides a basic background of the writ of habeas corpus and its role in American criminal procedure. Although the writ has served as a critical tool to address wrongful detentions, Congress has sought to narrow its use to well-defined circumstances. One of the major ways in which Congress has historically curtailed the writ is by placing restrictions on the appealability of denials of habeas petitions.

A writ of habeas corpus is a judicial order directing prison personnel to bring a prisoner's body before the court so that the court can determine if his incarceration is lawful. A habeas corpus proceeding is a post-conviction proceeding occurring after a prisoner exhausts all opportunities for appellate review. It is not a part of the criminal appeals process, but rather a civil action in which a prisoner collateral attacks his continued detention by attacking the presumptively valid conviction underlying his incarceration.

A. Federal Habeas Corpus

After a state or federal prisoner exhausts his appeals, he may file a petition for habeas corpus in a federal district court alleging that his conviction and, thus, his continued incarceration violate federal law or the Constitution. If the district court determines that a prisoner's conviction is illegal, it may grant the prisoner's petition for habeas corpus and vacate his conviction.

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12 See Barefoot v Estelle, 463 US 880, 892 n 3 (1983) (noting that Congress placed restrictions on appeals of denials of habeas petitions to curtail abuse of the writ).
13 See, for example, LaFave, Israel, and King, Criminal Procedure § 28.1 at 1312 (cited in note 11).
14 Dressler, Understanding Criminal Procedure § 1.03 at 14 (cited in note 1) (“After a defendant's appeals are exhausted ... she may file ... a petition for a writ of habeas corpus in a federal district court.”).
15 Id at 15. See also LaFave, Israel, and King, Criminal Procedure § 28.1 at 1312 (cited in note 11).
16 See Dressler, Understanding Criminal Procedure § 1.03 at 14–15 (cited in note 1).
The Suspension Clause of the Constitution authorizes the writ and states that it shall not be suspended absent certain conditions. The Judiciary Act of 1789 granted federal courts the power to issue the writ for federal prisoners. Congress extended this power to state prisoners by the Habeas Corpus Act of 1867. AEDPA provides the present statutory framework for federal habeas relief for both federal and state prisoners.

The Supreme Court has suggested that the constitutional right to habeas corpus requires courts to consider writs of habeas corpus. However, the Court permitted Congress to sharply limit habeas relief for prisoners who file successive habeas petitions. Thus, while the Court permits some limitations on the writ of habeas corpus under the Suspension Clause, the Clause imposes some restrictions on Con-

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17 US Const Art I, § 9, cl 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). The writ has been suspended several times in American history, most notably by President Lincoln during the Civil War. See Ira P. Robbins, The Law and Processes of Post-Conviction Remedies: Cases and Materials 112 (West 1982).

18 Judiciary Act of 1789, ch 20, 1 Stat 73.

19 Act of Feb 5, 1867, ch 28, § 1, 14 Stat 385. See also LaFave, Israel, and King, Criminal Procedure § 28.1 at 1313 (cited in note 11). For a detailed discussion of the history of the writ of habeas corpus from its common law roots to the present, see id § 28.1–28.2.

20 AEDPA substantially changes and narrows the basic provisions of the 1867 Act. Although many of these changes are beyond the scope of this Comment, for a detailed discussion of AEDPA and its differences from previous habeas corpus statutes, see LaFave, Israel, and King, Criminal Procedure § 28.1–28.2 (cited in note 11); Bryan A. Stevenson, The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases, 77 NYU L Rev 699 (2002); Larry W. Yackle, A Primer on the New Habeas Corpus Statute, 44 Buff L Rev 381 (1996).

Under AEDPA, the writ of habeas corpus for state prisoners is provided by 28 USC § 2254. Federal prisoners seeking habeas relief must file a motion to vacate a conviction or sentence pursuant to 28 USC § 2255 rather than a petition for habeas corpus. Despite the difference in name, a § 2255 proceeding is considered a habeas proceeding. See LaFave, Israel, and King, Criminal Procedure § 28.1 at 1312 ("[F]ederal habeas] provides the doctrinal framework for . . . motion[s] to vacate a sentence under 28 USC § 2255.").

21 See Ex parte Yerger, 75 US (8 Wall) 85, 95–96 (1868) ("The terms of [the Suspension Clause] necessarily imply judicial action. In England, all the higher courts were open to applicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them."). See also Note, The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions, 111 Harv L Rev 1578, 1588 n 63 (1998) (concluding that "some language in Ex parte Yerger supports the view that, by including the Suspension Clause in the Constitution, the Framers necessarily assumed that courts would be open to habeas petitions").

22 See Felker v Turpin, 518 US 651, 664 (1996) (upholding AEDPA’s requirement that a prisoner obtain leave to file a second or successive habeas petition by reasoning that "[t]he added restrictions which the Act places on second habeas petitions are well within the compass of the evolutionary process [such] that they do not amount to a 'suspension' of the writ contrary to Article I, § 9").

23 Id.
gress's ability to attenuate habeas relief.\textsuperscript{24} For instance, the Court has indicated that a statute precluding a prisoner from raising particular issues of law in his habeas petition would likely run afoul of the Suspension Clause.\textsuperscript{25} Therefore, while the Court has not clearly defined the level of habeas review required by the Suspension Clause, the Court appears to require that a prisoner be allowed to file one habeas petition in which he may raise constitutional and federal statutory issues.

B. Appealability of Denials of Habeas Corpus Petitions

While a prisoner appears to have a constitutional right to the consideration of his habeas petition by a district court, he has no constitutional right to appeal its denial.\textsuperscript{26} Thus, the Court has long permitted Congress to significantly curtail a prisoner's right to appeal.\textsuperscript{27} This Part traces the evolving requirements instituted by Congress for appeals of denials of habeas petitions. It also describes the procedural devices Congress has employed to restrict appealability from the nineteenth century to the present.

The Habeas Corpus Act of 1867 permitted unfettered appeals of denials of habeas petitions.\textsuperscript{28} The Act also required a stay of execution

\textsuperscript{24} See, for example, \textit{INS v St. Cyr}, 533 US 289, 304-05 (2001) (indicating that a statute precluding consideration of habeas petitions raising a pure question of law affecting the detention of aliens would raise "a serious Suspension Clause issue").

\textsuperscript{25} See id.

\textsuperscript{26} See \textit{Miller-El v Cockrell}, 537 US 322, 335 (2003) ("As mandated by federal statute, a state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition.").

\textsuperscript{27} See, for example, \textit{Miller-El}, 537 US at 335; \textit{Barefoot}, 463 US at 892-93 & n 3 (accepting by implication Congress's ability to require that a prisoner obtain a certificate of probable cause to appeal); \textit{House v Mayo}, 324 US 42, 43-44 (1945) (per curiam) (same). Under AEDPA, § 2253(a) provides prisoners a qualified statutory right to appeal denials of habeas petitions. Long before AEDPA, courts held that the right to appeal a habeas denial exists only as a statutory right. See \textit{California v Lamson}, 80 F2d 388, 388-89 (9th Cir 1935) (rejecting the contention that a prisoner can appeal "as a matter of right"). As Congress may create a statutory right to appeal habeas denials, it may also repeal a right to appeal habeas denials that it had previously granted. See \textit{Ex parte McCord}, 74 US (7 Wall) 506 (1868).

\textsuperscript{28} Act of Feb 5, 1867, ch 28, § 1, 14 Stat at 386 ("From the final decision [in a habeas case], an appeal may be taken to the [appropriate] circuit court . . . and from the judgment of said circuit court to the Supreme Court."). Congress subsequently withdrew the statutory right to appeal denials of habeas appeals by circuit courts to the Supreme Court while leaving the right to appeal to a circuit court intact. Act of Mar 27, 1868, ch 34, § 2, 15 Stat 44 ("[S]o much of the [Habeas Corpus Act of 1867] as authorizes an appeal from the judgment of the circuit court to the Supreme Court . . . is, hereby repealed."). See also \textit{McCord}, 74 US (7 Wall) at 515 (finding constitutional this repeal of the statutory grant of Supreme Court appellate jurisdiction in habeas cases). However, the Court also found that Congress's repeal of the Supreme Court's statutory appellate jurisdiction in habeas cases did not affect its certiorari jurisdiction in habeas cases. See \textit{Yerger}, 75 US at 103 ("[T]his court, in the exercise of its appellate jurisdiction, may, by the writ of habeas corpus, aided by the writ of certiorari, revise the decision of the Circuit Court [in
pending the disposition of a habeas appeal in capital cases, which often resulted in delayed executions. By 1908, Congress became concerned that condemned prisoners were filing frivolous habeas corpus petitions to delay their executions. Congress sought to limit frivolous habeas appeals and the delays in executions caused by them and to separate meritorious from frivolous habeas appeals by requiring a prisoner to obtain a certificate of probable cause (CPC) from the district or circuit court to appeal the denial of a habeas petition.

The Supreme Court articulated its standard for the issuance of a CPC in *Barefoot v Estelle*, holding that a prisoner must make a "substantial showing of the denial of [a] federal right" for a CPC to issue. The Court stated, "[T]he [prisoner] need not show that he should prevail on the merits ... Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further."

In *House v Mayo*, the Supreme Court held that CPC denials were not appealable. Likewise, in *Nowakowski v Maroney*, the Court refused to allow the prosecution to appeal the issuance of a CPC. The Court held that an appellate court could not vacate a CPC, habeas proceedings]."

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29 See Act of Feb 5, 1867, ch 28, § 1, 14 Stat at 386; *Rogers v Peck*, 199 US 425, 436 (1905) (prohibiting state authorities from interfering with the full examination of a habeas petition by the federal courts); *Lambert v Barrett*, 159 US 660, 662 (1895) (noting that the pendency of a habeas appeal requires a stay of execution even though attorneys frequently file frivolous habeas appeals to procure such stays).

30 See HR Rep No 23, 60th Cong, 1st Sess 1-2 (1908) ("The purpose of this bill is to correct a very vicious practice of delaying the execution of criminals by groundless habeas corpus proceedings."); 42 Cong Rec 608-09 (1908).

31 See Act of Mar 10, 1908, ch 76, 35 Stat 40 ("[N]o appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal."); *Barefoot*, 463 US at 893 (indicating that a CPC may be issued by the district court or later by the circuit court).


33 Id at 893 (internal quotation marks and citation omitted).

34 Id at 893 n 4 (internal quotation marks and citations omitted).

35 324 US 42 (1945) (per curiam).

36 Id at 44 (suggesting that when a CPC is denied the case is not appealable to the Supreme Court because it "was never 'in' the court of appeals for want of a [CPC]"). The Court later disregarded *House* and reviewed CPC denials in individual cases raising important issues of federal law. See note 121 and accompanying text.

37 386 US 542 (1967) (per curiam).

38 Id at 543.
but rather was required to decide the merits of an appeal once a CPC had been granted.\(^\text{39}\)

In 1996, as part of AEDPA, Congress replaced the CPC with a new procedural device called a certificate of appealability (COA).\(^\text{40}\) The statute provides that a decision in a habeas corpus case is not appealable "[u]nless a . . . judge issues a [COA]."\(^\text{41}\) The Supreme Court has held that the statute requires a court to issue a COA in order to vest jurisdiction in a circuit court reviewing the prisoner's habeas petition.\(^\text{42}\) However, AEDPA does not specify whether the issuing court must have conformed precisely to the statutory requirements for the circuit court to have subject matter jurisdiction over the appeal. This ambiguity has resulted in the circuit split that is the subject of this Comment.

The requirements AEDPA imposes for issuance of a COA depart significantly from prior habeas practice inasmuch as the standard for issuance of a COA is more stringent than that for a CPC. First, courts may issue COAs "only if the applicant has made a substantial showing of the denial of a constitutional right";\(^\text{43}\) CPCs, in contrast, could be issued after the denial of a federal statutory right. Second, unlike a CPC, a COA must specify the claim(s) that meet the substantial showing standard. An issuing court may not simply find that the overall petition meets the standard.\(^\text{44}\) However, in *Slack v McDaniel*\(^\text{45}\) the Supreme Court held that the standards it previously used for CPC decisions applied to COA determinations.\(^\text{46}\) Thus, to obtain a COA, a prisoner must "make a substantial showing of the denial of a constitu-

\(^{39}\) Id ("[W]hen a district judge grants [a CPC], the court of appeals must grant an appeal . . . and proceed to a disposition of the appeal in accord with its ordinary procedure.").


\(^{41}\) 28 USC § 2253(c)(1). While the language of § 2253 suggests that a COA is required in all habeas appeals, including appeals by the government, Rule 22(b) of the Federal Rules of Appellate Procedure states that a COA is required only in appeals by the prisoner. See, for example, *United States v Pearce*, 146 F3d 771, 774 (10th Cir 1998) (reading § 2253, "together with [FRAP 22(b)] and the established case law," to indicate that there is "no doubt" that Congress intended the government to have the right to appeal a decision in a habeas case without a COA).

\(^{42}\) Miller-El, 537 US at 336 ("This is a jurisdictional prerequisite because the COA statute mandates that '[u]nless a circuit justice or judge issues a [COA], an appeal may not be taken to the court of appeals.'"), quoting 28 USC § 2253(c)(1).

\(^{43}\) 28 USC § 2253(c)(2).

\(^{44}\) See 28 USC § 2253(c)(3); Hertz and Liebman, 2 *Federal Habeas Corpus Practice and Procedure* § 35.4b at 1574 (cited in note 40).


\(^{46}\) Id at 483–84.
This showing includes a demonstration that reasonable jurists could disagree on whether the habeas petition should have been resolved differently, or whether the issues were "adequate to deserve encouragement to proceed further." The COA determination under the above standard is a threshold inquiry requiring "an overview of the claims in the habeas petition and a general assessment of their merits." It is a separate proceeding from the determination of the underlying merits of the appeal. This threshold inquiry does not require full consideration of the factual and legal bases for the claims, and the Supreme Court has held that courts should not deny COAs because they do not believe that the prisoner is ultimately entitled to relief.

Rule 22(b) of the Federal Rules of Appellate Procedure is designed to implement AEDPA's COA requirement. Despite the language of § 2253(c)(1), which states that only "a circuit justice or judge" may issue a COA, Rule 22(b) permits a district judge to issue a COA. Common practice is for a prisoner to first seek a COA in the district court that denied his habeas petition. If the district court denies the COA, the prisoner can then seek a COA from the circuit court.

47 Id.
48 Id at 484, quoting Barefoot, 463 US at 893 & n 4. Examples of habeas appeals that are debatable among reasonable jurists include those raising issues on which a circuit split has developed, and those raising issues of fact or law that a court considers close, difficult, of first impression, subject to conflicting outcomes, or a matter of judgment beyond simple deductions from applicable legal precepts. See, for example, Franklin v Hightower, 215 F3d 1196, 1200 (11th Cir 2000) (holding that an issue on which a circuit split has arisen is debatable among reasonable jurists and warrants issuance of a COA); Besser v Walsh, 2003 US Dist LEXIS 21474, *55 (SD NY) (indicating that a circuit split or the fact that a rule is "new" demonstrates that reasonable jurists can disagree on a rule). For additional examples of circumstances that warrant issuance of a COA, see Hertz and Liebman, 2 Federal Habeas Corpus Practice and Procedure § 35.4c at 1590 (cited in note 40).
49 Miller-El, 537 US at 336.
50 See id at 342.
51 See id at 336–37 ("This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it.").
52 Wright, Miller, and Cooper, 16A Federal Practice and Procedure § 3968.1 at 421 (cited in note 40).
53 FRAP 22(b)(1) ("[T]he applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)."").
54 See id; Hertz and Liebman, 2 Federal Habeas Corpus Practice and Procedure § 35.4b at 1581 (cited in note 40) ("[E]very circuit court that has addressed the issue has concluded that district courts may, and should, issue COAs in the first instance.").
55 FRAP 22(b)(1). If a request for a COA is erroneously directed to a circuit court without being filed in the district court first, the circuit court may rule on the request for a COA. See Hertz and Liebman, 2 Federal Habeas Corpus Practice and Procedure § 35.4b at 1581–82 (cited in note 40). See also FRAP 22(b)(2) (allowing the circuit court to consider any COA request addressed to it). Depending on circuit rules, a request for a COA directed to a circuit court may be decided by a single circuit judge or a three-judge panel. See id; Wright, Miller, and Cooper, 16A Federal Practice and Procedure § 3968.1 at 427 (cited in note 40). Circuit courts "generally require the district court to pass on a request for a [COA] before the court of appeals does so"
In *Hohn v United States*, the Supreme Court held that a prisoner could appeal the denial of a COA, including one by a circuit court. The *Hohn* Court stated that it overruled the portion of *House* indicating that denials of CPCs were not appealable. However, the Supreme Court has addressed neither whether the government in a habeas case can appeal the COA’s issuance, nor if and under what circumstances an appellate court can vacate a previously granted COA.

When a COA is granted, the appellate court will usually decide the merits of claims certified in the COA. However, the appellee will sometimes raise the issue of whether the COA was statutorily inadequate under § 2253(c) and, thus, improvidently granted. Improperly issued COAs include those that do not raise any substantial constitutional issues or do not specify which of the prisoner’s claims raised a substantial constitutional issue. Seven circuit courts have considered the circumstances under which a circuit court may vacate a COA. These courts have employed several approaches to this issue. Some circuits have taken absolute approaches, which require the appellate court either to consider the propriety of the COA before reaching the merits of the appeal or to consider the merits of the appeal regardless of the propriety of the COA. Other circuit courts have developed intermediate approaches that permit vacatur of an erroneously granted COA under certain conditions. The hallmark of the intermediate approaches is that the appellate court retains the power to review COAs, but need not always do so.

II. ABSOLUTE APPROACHES TO VACATUR OF COAS

This Part evaluates two absolute approaches to the vacatur of COAs. First, this Part explains the mechanics of each approach. The Third Circuit considers a properly issued COA to be a jurisdictional prerequisite for a habeas appeal, and the court accordingly reviews the propriety of every COA before reaching the merits of the appeal. In contrast, the Second and Tenth Circuits always review the merits of a habeas appeal, regardless of whether the district court had properly issued the attached COA. Second, this Part critiques and ultimately

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and will remand cases not evaluated by the district court for this purpose when necessary. Hertz and Liebman, *2 Federal Habeas Corpus Practice and Procedure* § 35.4b at 1582.

57 Id at 253.
58 Id.
59 Within a given circuit, the rule concerning vacatur of a COA is the same if the COA is granted by a district or circuit court. See, for example, *Phelps v Alameda*, 366 F3d 722, 727–28 (9th Cir 2004).
rejects both approaches. While they may have some initial appeal, neither comports with Supreme Court guidance on the issuance of COAs.

A. Workings of Absolute Approaches

1. Proper issuance of a COA as a jurisdictional requirement.

The Third Circuit’s approach sets the most demanding standard for defendants seeking to appeal habeas petitions denied by the district court. In United States v Cepero,60 the Third Circuit required a COA to be properly issued in order to vest subject matter jurisdiction in a circuit court over an appeal of the denial of a habeas corpus petition.61 Under this approach, the presence of a substantial constitutional question is a jurisdictional prerequisite to a habeas appeal. Accordingly, the existence of such a question is an independent threshold issue that the circuit court must reach before considering the merits of the appeal.62 This reasoning suggests that an appellate court should raise and consider the validity of a COA sua sponte.63

The Third Circuit emphasized the subject matter jurisdiction of an appellate court due, in part, to its interpretation of Supreme Court precedent. The Third Circuit relied on the Supreme Court’s reasoning in Hohn to conclude that an appellate court is not “bound by the District Court’s issuance of a [COA].”64 In holding that it could review appeals of COA denials, the Hohn Court concluded that “[d]ecisions regarding applications for [COAs] . . . are judicial in nature” and are not administrative functions of courts.65 This distinction is important because decisions by judges acting in an administrative role are generally not appealable, while judicial decisions of cases in controversy can be appealed.66 The Court reasoned that decisions regarding COAs are judicial decisions because “[i]t is typical for both parties to enter appearances and to submit briefs at appropriate times and for the court of appeals to enter a judgment and to issue a mandate at the end of the proceedings.”67 The Court also indicated that a COA determina-

60 224 F3d 256 (3d Cir 2000) (en banc).
61 Id at 260–62, 268.
62 Id at 267 (“In determining whether the [COA] was proper and thus whether we have jurisdiction to review this petition, we examine whether Cepero had made (1) a substantial showing of a deprivation of (2) a constitutional right, so as to invoke our § 2253(c) jurisdiction.”).
63 See United States v Talk, 158 F3d 1064, 1068 (10th Cir 1998) (indicating that a circuit court should consider the validity of a COA sua sponte if a proper COA is a jurisdictional requirement, but concluding that while the issuance of a COA is a jurisdictional requirement, issuance of a valid COA is not).
64 Cepero, 224 F3d at 261–62.
65 Hohn, 524 US at 245–46.
66 See id at 245, citing United States v Ferreira, 54 US (13 How) 40, 51–52 (1852).
67 Hohn, 524 US at 245.
tion is not an unappealable threshold inquiry. Rather, the Court considered the request for a COA to constitute the institution of a suit and the denial of the COA to be an appealable judicial determination of a case in controversy. Thus, the Third Circuit concluded that the decision to issue a COA is not a gatekeeping function exercised by the courts, but rather a judicial determination of a case in controversy that is reviewable on appeal. The Third Circuit extended this reasoning to find that in determining whether the previous issuance of a COA was proper, a circuit court determines whether it has jurisdiction to review the merits of a habeas appeal. Thus, as a court "may not assume subject-matter jurisdiction to reach the merits of an appeal," the Third Circuit concluded that it would not reach the merits of an appeal pursuant to an improper COA.

2. Appellate jurisdiction vests at issuance of a COA.

In contrast to the Third Circuit's position, the Second and Tenth Circuits have held that appellate jurisdiction vests at issuance of a COA, and that after a COA has been issued by a district court or appellate court, the appellate court retains jurisdiction even if the COA was improvidently granted. Under this approach, a circuit court never reviews the propriety of a previously issued COA. Both the Second and Tenth Circuits extend to COAs the Supreme Court's holding in Nowakowski that an appellate court must consider the merits of a habeas appeal once a court issues a CPC. Unlike the Third Circuit, the Second Circuit considers a COA to be a screening and gatekeep-

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68 Id at 246, citing Ex parte Quirin, 317 US 1 (1942).
70 Copero, 224 F3d at 262, quoting Hohn, 524 US at 246.
71 See Copero, 224 F3d at 267.
72 Id at 260, citing Steel Co v Citizens for a Better Environment, 523 US 83, 94-95 (1998) (listing cases supporting the rule that courts cannot assume subject matter jurisdiction to reach an appeal's merits).
73 See Copero, 224 F3d at 260 ("[I]f we were to determine that we will not issue a [COA] because [petitioner] has not demonstrated that he is entitled to one . . ., then we would find that this court does not have jurisdiction to go forward in this appeal."); quoting United States v Williams, 158 F3d 736, 741-42 (3d Cir 1998).
74 See Soto v United States, 185 F3d 48, 53 (2d Cir 1999); LaFevers v Gibson, 182 F3d 705, 710-11 (10th Cir 1999).
75 See Buie v McAdory, 322 F3d 980, 982 (7th Cir 2003) (describing the approach taken by the Tenth Circuit).
76 Soto, 185 F3d at 52 (quoting Nowakowski for the proposition that when a district judge grants a CPC, the court of appeals "must grant an appeal" and proceed to its disposition because the CPC is a screening device, and noting that "this Court has also previously intimated the same 'gate-keeping' view of the [COA] requirement"); LaFevers, 182 F3d at 711, quoting Nowakowski, 386 US at 543 ("[W]hen a district judge grants [a CPC], the court of appeals must . . . proceed to a disposition of the appeal.").
ing device, not a judicial determination of a case in controversy." The Second Circuit also notes that after a COA has been issued, judicial and prosecutorial resources have been invested in screening the merits of the appeal. Thus, dismissal of "an appeal after a [COA] has already issued would be of little utility [because] installing [the circuit court] as a gate keeper for the gate keeper would be redundant." 77

Furthermore, to support its reasoning, the Second Circuit relies on Peguero v United States, 80 in which the Supreme Court reached a decision on the merits of a habeas appeal without addressing the COA even though the government raised the issue that it was improvidently granted. 81 Federal courts have a duty to examine subject matter jurisdiction sua sponte, so the Court must have implicitly considered the jurisdictional issue. As the Second Circuit explained:

Since jurisdiction is an issue that each federal court has a duty to examine sua sponte, and since jurisdiction cannot be created by consent of the parties, the Supreme Court's example [in Peguero] suggests that a [COA] that does not meet the denial of a constitutional right requirement—and hence, is erroneously issued—nevertheless suffices to confer appellate jurisdiction. 82

Relying on Peguero, the court concluded that an improvidently granted COA suffices to confer appellate jurisdiction. 83

B. Flaws of Absolute Approaches to COA Vacatur

Absolute approaches to the review of a previously issued COA may be appealing, but they have significant flaws. Unlike intermediate approaches, they arguably simplify the habeas appellate process and promote efficiency because the appellate court does not need to choose between evaluating the propriety of the COA and deciding the merits when it first confronts the case. However, both absolute approaches are inconsistent with Supreme Court precedent relating to the issuance of COAs in material ways. Neither the Supreme Court nor Congress has concluded that a properly issued COA is a jurisdictional requirement for a habeas appeal. Likewise, the Supreme Court

77 See Soto, 185 F3d at 52 ("The [COA] is a screening device.... Once a [COA] has issued,... there is little point in scrutinizing [it]."), quoting Young v United States, 124 F3d 794, 799 (7th Cir 1997).
78 See Soto, 185 F3d at 52.
79 Id.
82 Soto, 185 F3d at 52.
83 See id.
has never required an appellate court to consider the merits of a habeas appeal pursuant to an improvidently granted COA. Furthermore, such a requirement creates two disfavored results: unreviewability of COA issuance and undeserved appeals precluded by statute resulting from errors in COA issuance. Thus, this Comment rejects these absolute approaches.

1. Proper issuance of a COA is not required for appellate jurisdiction in habeas cases.

The Third Circuit’s conclusion that a properly issued COA is a jurisdictional prerequisite for a habeas appeal is compelled by neither Supreme Court precedent nor congressional mandate. This Part first examines the Supreme Court’s statements regarding the nature of COA decisions. Second, this Part applies to COAs the analysis employed by the Supreme Court to determine whether a statutory prerequisite for suit is jurisdictional in nature and concludes that a properly issued COA is not a jurisdictional prerequisite for a habeas appeal.

a) The Supreme Court does not require a COA to be properly issued to confer appellate jurisdiction. In Miller-El v Cockrell, the Supreme Court established that a COA was a jurisdictional prerequisite in habeas appeals. AEDPA mandates that an appeal in a habeas case “may not be taken to the court of appeals” unless a COA is issued. The Supreme Court concluded that this language precludes jurisdiction over a habeas appeal from vesting in an appellate court unless a COA is issued by a district court or by the appellate court. In Miller-El, the Court went on to say that a “COA will issue only if the requirements of § 2253 have been satisfied.” Taken together with the conclusion that a COA is a jurisdictional requirement, this statement provides the strongest argument in favor of the Third Circuit’s position, as it might be construed to suggest that the Supreme Court considers a properly issued COA to be a jurisdictional prerequisite for a habeas appeal.

However, the Miller-El Court did not explicitly require a COA to be properly granted to confer appellate jurisdiction. The Court merely articulated that a district or circuit court must issue a COA before a circuit court of appeals may assume jurisdiction over a habeas appeal.

85 Id at 335–36 ("Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA .... This is a jurisdictional prerequisite.").
86 Id, quoting 28 USC § 2253(c)(1).
87 Miller-El, 537 US at 335–36.
88 Id at 336.
The Court did not mandate that the circuit court’s jurisdiction pursuant to a COA evaporate if the circuit court later determined that the COA was improvidently granted because the requirements of § 2253(c) were not met. Indeed, the Supreme Court has never explicitly required a COA to be properly issued to confer appellate jurisdiction.

Miller-El was decided after the Third Circuit decided Cepero. Although the Third Circuit relied on Hohn to reject the conclusion that an improvidently granted COA could confer appellate jurisdiction,9 not in Hohn requires this result. To conclude that the propriety of a COA was a jurisdictional requirement necessitating appellate review, the Third Circuit relied on the Supreme Court’s finding in Hohn that the issuance of a COA was a reviewable judicial act.90 However, while the Hohn Court described the issuance of a COA as a judicial rather than an administrative act and permitted appellate review of decisions regarding COAs,9 it did not conclude that a properly issued COA was a jurisdictional prerequisite for a habeas appeal. Furthermore, the fact that the issuance of a COA is a judicial act does not mean that a properly issued COA is a prerequisite for appellate jurisdiction.92 Thus, Hohn does not “compel[] the conclusion that the issuance of a complying [COA] is jurisdictional.”93

b) A properly issued COA is not a jurisdictional prerequisite for appeal. While the Supreme Court has not required a valid COA for appellate jurisdiction in a habeas case, nothing in Hohn, Miller-El, or any other Supreme Court case dealing with COAs bars such a requirement. In Zipes v Trans World Airlines, Inc,94 the Supreme Court articulated three factors to which courts should look in determining whether a prerequisite for suit or appeal set forth by Congress is subject matter jurisdictional in nature: (1) the structure of the statute, (2) the congressional policy underlying the statute, and (3) the reasoning of previous cases.95 The use of the term “jurisdictional” by Congress in the statute creating a prerequisite for appeal cuts strongly in favor of a

89 Cepero, 224 F3d at 260–61 (rejecting the approach of the Seventh Circuit that allows appellate review of COAs under some circumstances but does not consider a properly issued COA to be a jurisdictional requirement for a habeas appeal).
90 See id at 261–62 (“The issuance of the certificate in the case before us is not merely an exercise of judicial gate-keeping, but rather ... is the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals.”), quoting Hohn, 524 US at 245–46.
91 524 US at 245–46.
92 See Buie, 322 F3d at 982 (“[J]udicial’ is not a synonym for ‘jurisdictional.’”).
93 Id.
95 Id at 393 (relying on these factors to find that filing a timely charge of discrimination with the Equal Employment Opportunity Commission is not a jurisdictional prerequisite). See also Cepero, 224 F3d at 268 (Rendell dissenting) (citing Zipes for the same proposition).
finding that the prerequisite is a jurisdictional requirement. Although the Third Circuit did not address the Zipes factors in concluding that a properly issued COA was necessary for appellate jurisdiction, the Zipes analysis indicates that a properly issued COA is not a jurisdictional prerequisite for a habeas appeal.

Under the first Zipes factor, the language of § 2253(c) does not support the conclusion that a valid COA is a jurisdictional requirement for a habeas appeal. The statute prohibits habeas appeals “unless a . . . judge issues a [COA].” While this language suggests that the issuance of a COA is a prerequisite for consideration of a habeas appeal, nothing in the statute suggests, let alone requires, that the COA must be properly issued for an appellate court to have jurisdiction over and consider the merits of a habeas appeal. Congress demonstrated that it knew how to limit appellate jurisdiction in § 2253(c)(1), which limits jurisdiction to cases in which a COA is granted. Thus, if Congress had intended to limit jurisdiction to cases involving a valid COA, it easily could have done so.

Furthermore, under the second Zipes factor, no clear evidence exists that considering a properly issued COA to be a jurisdictional requirement would serve the congressional policy underlying the COA requirement. Although there is no legislative history specific to § 2253(c) and no committee reports describing AEDPA, a Conference Committee report indicates that the Act was intended to curb abuse

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96 See Shendock v Director, Office of Workers' Compensation Programs, 893 F.2d 1458, 1462 (3d Cir. 1990) (en banc) (finding a statutory time limit for filing an appeal to be jurisdictional, in part because the statute used the term “jurisdiction”).
97 See Cepero, 224 F.3d at 268 (Rendell dissenting).
98 See id at 268–69 (emphasis added):

I submit that neither the statutory language of § 2253(c) nor the habeas statute in its entirety can support the conclusion the majority reaches on the threshold issue. Section 2253(c)(1) simply states that: “Unless a circuit justice or judge issues a [COA], an appeal may not be taken to the court of appeals.”
99 28 USC § 2253(c)(1).
100 Although the term “jurisdiction” is not used in § 2253(c), the statutory language clearly prohibits habeas appeals in the absence of a COA. Furthermore, a COA requirement is consistent with the congressional purpose of AEDPA to curb unnecessary delay and abuse in habeas appeals. See HR Conf Rep No 104-518, 104th Cong, 2d Sess 111, 111 (1996), reprinted in 1996 USCCAN 944 (calling the problem of habeas delays “acute”). Thus, although the term “jurisdictional” is not included in § 2253(c), the Supreme Court’s holding in Miller-El that the COA requirement is a jurisdictional one is consistent with the Court’s analysis in Zipes.
101 See Cepero, 224 F.3d at 269 (Rendell dissenting).
102 See id (“It should be noted that two other provisions of § 2253 describe and proscribe our jurisdiction, demonstrating that Congress knew how to limit appellate jurisdiction if it wanted to do so.”).
103 Consider id at 268–69 (“[N]either the statutory language of § 2253(c) nor the habeas statute in its entirety can support the conclusion the majority reaches.”).
of the writ of habeas corpus and to prevent unnecessary delay in capital cases. Thus, a requirement that the COA must be valid to confer appellate jurisdiction might serve the goal of curbing abuse of habeas appeals and delay. Such a requirement prevents review of habeas appeals that Congress has concluded should not be reviewed. However, a jurisdictional requirement may instead create further delay because the appellate court must engage in potentially duplicative review of the propriety of every COA before reaching the merits.

Turning to the third Zipes factor, the reasoning of prior Supreme Court cases does not require a COA to be properly issued to confer appellate jurisdiction. Therefore, the analysis set forth in Zipes indicates that courts should not consider a valid COA to be a jurisdictional requirement for a habeas appeal as there was no clear directive from Congress for them to do so.

2. Appellate courts have the power to review COAs.

Although the Supreme Court does not consider a properly issued COA to be a jurisdictional requirement for a habeas appeal, and thus does not mandate appellate review of every COA, the Court does not consider COA issuances unappealable. This Part first demonstrates that the Supreme Court has suggested that COA issuances are appealable. Second, it argues that the Supreme Court's holding in Nowakowski that CPC issuances are unappealable does not apply to COAs. Finally, this Part suggests that an approach precluding appellate review of COA issuances is not viable because it engenders disfavored results.

a) The Supreme Court considers decisions regarding COAs reviewable on appeal. The Supreme Court's language in Hohn suggests that COA issuances are appealable. While the Supreme Court did not require a properly issued COA for appellate jurisdiction in a habeas appeal in Hohn, the Court did hold that “[d]ecisions regarding applications for [COAs] ... are judicial in nature” and are thus subject to

104 See HR Conf Rep No 104-518 at 111 (cited in note 100). The Supreme Court has indicated that Congress had a similar purpose in enacting the COA requirement in AEDPA. See Miller-El, 537 US at 337 (indicating that in enacting the COA requirement, “Congress confirmed the necessity and the requirement of differential treatment for meritorious and frivolous appeals” to combat frivolous habeas appeals resulting in delayed executions). This rationale is quite similar to the reasons underlying Congress's enactment of the CPC requirement in 1908. See notes 30–31 and accompanying text.

105 See Young, 124 F3d at 799 (“An obligation to determine whether a [COA] should have been issued ... would increase the complexity of appeals in collateral attacks and the judicial effort required to resolve them, the opposite of the legislative plan.”).

106 See Part II.B.1(a).
The term "decision" applies to both denials and issuances, indicating that the Supreme Court considers COA issuances, as well as denials, appealable. Thus, Hohn seems to foreclose the Second and Tenth Circuits' approach, which precludes an appellate court from evaluating the propriety of a previously issued COA. However, Hohn explicitly held only that the denial of a COA was appealable to the Supreme Court and did not discuss the appealability of the issuance of a COA. Thus, the statements in Hohn that are applicable to COA issuance are dicta. While outside of Hohn there is no rule or statute that would constitute a grant of appellate jurisdiction to review the issuance of a COA, the Supreme Court's language in Hohn strongly suggests that the Court believes that COA issuances, as well as denials, are appealable.

The Second Circuit's reliance on Peguero to support its conclusion that an improvidently granted COA confers appellate jurisdiction in a habeas appeal and that an appellate court should never review the propriety of a previously issued COA is unwarranted. In Peguero, the Supreme Court decided the merits of a habeas appeal without

107 524 US at 245–46.
108 Id at 253.
109 See Cepero, 224 F3d at 270 n 1 (Rendell dissenting) ("I can locate no rule or statute that would constitute a grant of appellate jurisdiction to review the order issuing a [COA].").
110 The Second and Tenth Circuits have suggested that they might retreat from their position that an appellate court should never review a COA. The Tenth Circuit has questioned its conclusion that a proper COA is not a jurisdictional prerequisite for a habeas appeal (and that accordingly a circuit court is obligated to hear the merits of a habeas appeal once a COA is granted) in light of the Supreme Court's statement in Miller-El that a COA is a jurisdictional prerequisite for an appeal. See United States v Harms, 371 F3d 1208, 1210 (10th Cir 2004) (questioning the pre-Miller-El conclusion in Talk, 158 F3d at 1068, that a proper COA is not a jurisdictional prerequisite for a habeas appeal). However, the Tenth Circuit declined to expressly alter its position that COAs should never be reviewed, and the court has not passed on its continued validity in the wake of Miller-El. See Harms, 371 F3d at 1210. Furthermore, the Tenth Circuit probably would not begin evaluating the propriety of COAs on the basis of Miller-El because the Miller-El Court merely stated that a COA was required for appellate jurisdiction but did not explicitly require a valid COA for appellate review of the merits of a habeas appeal. See Part II.B.1(a). Additionally, after Miller-El was decided, the Seventh and Ninth Circuits held that appellate courts are not required to examine the propriety of a COA and that a properly issued COA was not a jurisdictional prerequisite for a habeas appeal. See Phelps v Alameda, 366 F3d 722, 726 (9th Cir 2004); Buie, 322 F3d at 982. However, these courts did not address Miller-El in their decisions. The Second Circuit has not consistently enforced the rule it set forth in Soto, 185 F3d 48, that it does not have the power to review the propriety of COAs after they have been issued. Id at 51–53. In Rhagi v Artuz, 309 F3d 103 (2d Cir 2002) (per curiam), the Second Circuit declined to address the merits of a habeas appeal when the COA was incomplete because it failed to encompass the district court's finding that the substantive issues it raised were procedurally barred. Id at 105. However, Rhagi might be questionable as it was a per curiam opinion and never mentioned the conflict with Soto. In addition, the Second Circuit has explicitly followed Soto on at least one occasion. See Lucidore v New York State Division of Parole, 209 F3d 107, 112–13 (2d Cir 2000) (holding Soto still valid after Slack, 579 US 473).
reviewing the propriety of the COA. When a question of jurisdiction is passed on sub silentio, the Supreme Court does not consider itself bound when a subsequent case brings the jurisdictional issue before it. As the Peguero Court never addressed the propriety of the COA issued in the case, Peguero does not constitute binding precedent requiring appellate jurisdiction to vest upon issuance of an improper COA, nor does it hold that appellate courts cannot review previously issued COAs.

Furthermore, the Supreme Court permits dismissal of other writs authorizing an appeal in cases where the writ is issued improperly or erroneously. In these cases the Supreme Court will dismiss a writ of certiorari as improvidently granted. Although there are major differences between a COA and a writ of certiorari, such dismissals demonstrate that the Court allows review of a writ permitting an appeal after it has been issued and avoidance of the merits if the writ granting the appeal was improperly issued.

b) The Supreme Court's holding that the issuance of a CPC is not appealable does not necessarily apply to COAs. The Supreme Court's language in Hohn permitting appellate review of the issuance of a COA appears to conflict with its holding in Nowakowski that an appellate court must address the merits of a habeas appeal once a CPC has issued. The Second and Tenth Circuits heavily rely on the Court's holding in Nowakowski. While Nowakowski might not apply to COA issuance because a COA must identify a specific denial of a constitutional right while a CPC need not, this argument is unconvincing because a CPC required the denial of a federal right. Although it is tempting to distinguish Nowakowski from Hohn because the former involves a CPC and the latter involves a COA, such an explanation is unsatisfactory because the CPC and COA are similar procedural devices that were both employed by Congress to combat delay in capital cases caused by frivolous habeas appeals. However, as Nowakowski does not address COAs, it is not controlling as to COA issuance. Hohn was decided thirty-one years after Nowakowski and after AEDPA replaced the CPC with the COA. Therefore, the Supreme Court's language in Hohn permitting appeal of COA issuances

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113 See, for example, The Monrosa v Carbon Black Export, Inc, 359 US 180, 183 (1959) (dismissing writ of certiorari because of the Court's new understanding of the circumstances of the case).
114 See note 76 and accompanying text.
115 See Buie, 322 F3d at 982 (saying that a COA, but not a CPC, must identify "a particular constitutional issue").
indicates that the Court would likely hold that COA issuances are appealable if it squarely faced and decided the issue.\footnote{The Supreme Court has denied certiorari on this issue on at least four occasions. See Cepero v United States, 531 US 1114 (2001); Marcello v United States, 531 US 878 (2000); Lucidore v New York State Division of Parole, 531 US 873 (2000); Talk v United States, 525 US 1164 (1999). The Court has left approaches intact that give appellate courts the power to review COAs on at least two occasions. See Cepero, 531 US 1114; Marcello, 531 US 878.}

Furthermore, the Supreme Court's different treatment of COA and CPC denials further undermines the relevance of Nowakowski to COAs. While the Court concluded in \textit{Hohn} that denials of COAs are appealable, it had previously held that the denial of a CPC is not appealable in \textit{House}.\footnote{See \textit{Hohn}, 524 US at 253; \textit{House}, 324 US at 43.} However, the \textit{Hohn} Court did not explicitly differentiate between COAs and CPCs but rather overruled \textit{House} and suggested that the rules regarding appeals that would have been applicable to CPCs should be employed for COAs.\footnote{\textit{Hohn}, 524 US at 251.}

Nonetheless, some of the same reasoning the \textit{Hohn} Court employed in overturning \textit{House} suggests that \textit{Nowakowski} should be overturned, especially given the Court's statements in \textit{Hohn} indicating that issuances of COAs are appealable. For instance, stare decisis plays a reduced role in the case of procedural rules that do not serve as guides to lawful behavior.\footnote{See, for example, \textit{United States v Gaudin}, 515 US 506, 521 (1995).} Courts accord even less weight to stare decisis when a decision has proven to be erroneous and its underpinnings have been eroded by subsequent Supreme Court decisions.\footnote{\textit{Id}.} Thus, the \textit{Hohn} Court pointed out that the Supreme Court had disregarded \textit{House} several times and reviewed denials of CPCs in particular cases raising "significant issues of federal law."\footnote{\textit{Hohn}, 524 US at 252, citing \textit{Lynce v Mathis}, 519 US 433, 436 (1997) (holding that the Ex Post Facto Clause of the Constitution, US Const Art I, § 9, cl 3, was violated by granting certiorari, in spite of the district court's denial of a CPC, in order to review the cancellation of early release credits), and \textit{Allen v Hardy}, 478 US 255, 257–58 (1986) (per curiam) (granting certiorari, in spite of the district court's denial of a CPC, in a case where the district court refused to apply \textit{Batson v Kentucky}, 476 US 79 (1986), which prohibits the prosecution from exercising challenges to remove persons from a jury solely on the basis of race).} Such deviations lead litigants and the legal community to question a rule, and they weaken the argument that Congress relied on a decision.\footnote{\textit{Id} at 245–46.} Likewise, the Supreme Court and other courts have disregarded \textit{Nowakowski}. For instance, in \textit{Hohn}, the Supreme Court indicated that decisions regarding COAs, including issuances, were judicial acts that could be appealed.\footnote{See \textit{Hohn}, 524 US at 252.} While this conclusion might be explained as representing a difference between COAs and CPCs, the \textit{Hohn} Court chose to over-
House and suggested that the rules regarding appealability for COA and CPC denials were the same, rather than draw this distinction. Even if the rules regarding appeals involving COAs and CPCs are the same, the Supreme Court’s language in Hohn served to erode its decision in Nowakowski.

However, the erosion of Nowakowski might be less pronounced than the erosion of the prohibition of appeal of CPC denials. The Hohn Court did not explicitly overrule Nowakowski, and its statements concerning COA issuance were dicta. However, the Court expressly disregarded House and considered appeals of CPC denials before it overruled House in Hohn with regard to COAs. Furthermore, in Kramer v Kemna, the Eighth Circuit disregarded Nowakowski explicitly and vacated an improperly issued CPC without reaching the merits of the appeal. The Supreme Court disregarded House in Hohn while, in Kramer, a circuit court disregarded Nowakowski, a Supreme Court decision. Thus, Kramer might be an incorrect decision where a circuit court failed to follow binding Supreme Court precedent. Also, the Supreme Court expressly followed Nowakowski several times and forbade appellate review of CPCs, suggesting that Congress was more likely to rely on Nowakowski than on House when it elected not to explicitly require appellate review of COAs in AEDPA. However, this argument is weakened by the fact that the Supreme Court followed Nowakowski thirty years before Hohn.

c) Precluding review of COAs by appellate courts creates disfavored results. The Second and Tenth Circuits’ rule requiring appellate courts to address the merits of a habeas appeal once a COA has been issued—regardless of the propriety of its issuance—means that the decision to grant a COA is “effectively unreviewable on appeal.” Unreviewability of trial court decisions is highly disfavored in the federal courts. Without circuit court review of the proper issuance of COAs,

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124 21 F3d 305 (8th Cir 1994).
125 Id at 307 (“Good faith and lack of frivolousness, without more, do not serve as sufficient bases for issuance of a [CPC].”).
126 Supreme Court decisions remain binding precedent until the Supreme Court reconsideres them. See Rodriguez de Quijas v Shearson/American Express, Inc, 490 US 477, 484 (1989). Kramer was decided prior to Hohn. The Supreme Court’s statements in Hohn permitting appeals of decisions regarding COAs without differentiating COAs and CPCs might indicate that the Court has reconsidered appellate review of COA issuance.
127 See, for example, Garrison v Patterson, 391 US 464, 466 (1968) (per curiam) (articulating that once a prisoner “persuades [a court] that probable cause for an appeal exists, he must then be afforded an opportunity to address the underlying merits”); Carafas v LaVallee, 391 US 234, 242 (1968) (following Nowakowski).
128 See Phelps, 366 F3d at 728, quoting Batz v Smith, 333 F3d 1018, 1025 (9th Cir 2003) (asserting jurisdiction in an interlocutory appeal because to do otherwise would insulate the lower court’s ruling from any appellate review).
the statutory limits on habeas appeals in § 2253(c) may be underenforced.\textsuperscript{129} Also, review of COAs allows appellate courts to provide district courts with guidance as to when issuance of a COA is appropriate.\textsuperscript{130}

Furthermore, a rule requiring appellate review of the merits of a habeas appeal even if the COA in the case is improvidently granted creates a "windfall" for the habeas appellant, as he is given an opportunity to appeal that he is not entitled to receive under § 2253(c). Courts consider results causing a criminal defendant to receive an undeserved windfall to be disfavored.\textsuperscript{131} A rule allowing habeas appellants to receive an undeserved appeal when the district court erroneously grants a COA contravenes the purpose of the COA requirement to reduce the number of frivolous appeals leading to delays in executions. Such a rule permits the appellate process to proceed in cases identified by Congress as likely to raise frivolous claims and other cases that Congress intended to remove from the habeas appellate process.

III. INTERMEDIATE APPROACHES TO VACATUR OF COAs

This Part evaluates the intermediate approaches taken by circuit courts in deciding when COA vacatur is appropriate. These approaches are distinguishable from the absolute approaches because they give an appellate court the power to vacate a COA but do not deprive the appellate court of jurisdiction to decide the merits of the appeal if a COA is improvidently granted. These intermediate approaches fall into two general categories: (1) those focusing on considerations of judicial economy, especially as evidenced by whether the merits of the appeal have been briefed, in determining whether a COA should be vacated; and (2) those permitting vacatur of COAs that are grossly defective, such as those that are facially invalid, without considering the resources invested in individual cases. First, this Part describes the workings of the approaches within each category. Second, this Part evaluates the merits of these approaches and con-

\textsuperscript{129} See Ramunno v United States, 264 F3d 723, 725 (7th Cir 2001) (noting that if appellate courts lacked COA review power, "district judges [would] have the authority to issue [COAs] for any reason at all, and as open-ended as they please").

\textsuperscript{130} See Porterfield v Bell, 258 F3d 484, 485 (6th Cir 2001).

\textsuperscript{131} See, for example, United States v Nelson-Rodriguez, 319 F3d 12, 42 (1st Cir 2003) (refusing to overturn a conviction where the defense counsel had a conflict of interest that probably had no effect on the trial because to do so would be to "grant[] an undeserved 'windfall'" to the defendant). The windfall for the habeas appellant here does not safeguard a public right, unlike the windfall defendants receive when the Court applies the exclusionary rule in Fourth Amendment cases. See, for example, United States v Calandra, 414 US 338, 348 (1974) ("[T]he exclusionary rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."). Thus, an undeserved appeal for the appellant here is especially disfavored.
cludes that permitting vacatur of facially invalid COAs is the approach most consistent with Supreme Court precedent and the purpose of the COA requirement, as well as the approach that most effectively promotes judicial efficiency.

A. Mechanics of Intermediate Approaches

1. Approaches turning on judicial economy.

   a) Improvidently granted COAs may be vacated if the appeal has not been briefed. The Seventh Circuit's approach focuses on conservation of judicial resources and requires a decision on the merits of a habeas appeal regardless of the validity of the COA if the parties have briefed the merits of the appeal. While the Seventh Circuit has rejected the proposition that the proper issuance of a COA is a jurisdictional requirement for an appeal, it has held that the appellate court has the power to vacate an improperly granted COA in appropriate cases. The Seventh Circuit considers a COA a screening device to conserve judicial and prosecutorial resources by screening out weak issues. If a valid COA were a jurisdictional requirement, an appellate court would have an obligation to determine whether the COA in a habeas appeal was properly issued. Such a finding would increase the complexity of habeas appeals and the judicial effort required to resolve them, which contradicts the legislative intent underlying the COA requirement. Once an appeal has been briefed after the issuance of a COA, substantial judicial and prosecutorial resources have already been invested. The Seventh Circuit holds that there is little point in reviewing the propriety of the COA at that point. A circuit court, therefore, should vacate an improvidently granted COA only if the appeal has not been briefed.

   In determining when vacatur of a COA is appropriate in cases where the appeal has not been briefed, the Seventh Circuit concluded that it possesses discretion to review a COA's validity or to go straight
to the merits of a habeas appeal. However, this discretion should be exercised only in rare circumstances because the determination of the validity of a previously granted COA increases the complexity of habeas appeals and the judicial effort required to resolve them. Thus, in cases that have not been briefed, the Seventh Circuit will consider vacating an invalid COA when two conditions are met: (1) vacatur will produce savings of resources for the court and litigants; and (2) the issuance of the COA was an “obvious blunder, so that the [appellate court] need not traverse the same ground twice.” Therefore, vacatur is appropriate only in extreme cases, such as those where a COA identifies only a clearly nonconstitutional issue or no issue at all.

Even when the parties have not begun briefing the merits of the appeal, vacatur of a COA in a case raising a constitutional issue of dubious substantiality is inappropriate because deciding the merits in such cases will conserve judicial resources more effectively than deciding substantiality. Also, the Seventh Circuit has indicated that the more important a statutory issue raised by an improperly issued COA is to other cases, the more likely it is to exercise its discretion to decline to vacate the COA even if the appeal has not been briefed.

b) Improvidently granted COAs may be reviewed if the district court has not engaged in any individualized assessment of the claims in the appeal and the parties have not briefed the merits. The Sixth Circuit employs an approach similar to that used by the Seventh Circuit permitting review of a COA only if two conditions are met: (1) the appeal has not been briefed, and (2) the district court has not engaged in any individualized assessment of whether jurists of reason would find it debatable whether the district court’s denial of the appeal was appropriate. The Sixth Circuit concluded that “[u]nder normal circumstances, considerations of judicial economy will discourage review of [COAs].” Usually, the district court will have invested substantial

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138 See United States v Marcello, 212 F3d 1005, 1007–08 (7th Cir 2000) (reasoning that “even an unfounded [COA] gives us jurisdiction”). See also Ramunno v United States, 264 F3d 723, 725 (7th Cir 2001).

139 See Marcello, 212 F3d at 1008, citing Young, 124 F3d at 799.

140 Davis v Borgen, 349 F3d 1027, 1028 (7th Cir 2003) (vacating a COA when it failed to specify any issue for appeal and briefs had not yet been filed).

141 See Buie, 322 F3d at 982 (finding that when an issue's nonconstitutionality is "probable, ... but not certain," vacatur is inappropriate).

142 See id.

143 See Ramunno, 264 F3d at 725 (noting also that “when the [COA] presents nothing but a simple ... statutory issue, dismissal should be the norm”).

144 See Porterfield v Bell, 258 F3d 484, 485 (6th Cir 2001).

145 Id (explaining that “[t]he parties have not submitted merits briefs to this court and the district court has not engaged in any individualized assessment of whether ... jurists of reason would find it debatable whether the district court was correct in its procedural ruling” to justify
time in the certification process, and the parties may have already briefed the merits of the claims. Thus, review of a COA by the appellate court will not only result in unnecessary duplication of judicial efforts; it will cause further delay in the lengthy process of appeals in capital cases. However, when the Sixth Circuit’s conditions permitting COA vacatur are met, the reasons not to review a previously granted COA disappear. Thus, considering that appellate review of COAs will provide guidance to district courts addressing issuance of COAs, the Sixth Circuit concluded that review of COAs (and vacatur of those that are improvidently granted) is appropriate in these cases.

2. Approaches permitting vacatur of grossly inadequate or facially invalid COAs.

a) Vacatur of facially deficient COAs is appropriate. Unlike circuit courts permitting COA vacatur only when it would further the goal of judicial economy, in *Tiedeman v Benson*, the Eighth Circuit held that vacatur of a COA is permissible only when the COA is facially defective because it does not specify any issues indicating a substantial showing of the denial of a constitutional right. Subsequently, in *Khaimov v Crist*, the Eighth Circuit extended this analysis to conclude that it may dismiss a previously granted COA raising meritless constitutional claims. *Khaimov* indicates that a COA should be vacated if it is invalid under the standards set forth by the Supreme Court in *Slack*, which preclude issuance of a COA when constitutional claims presented by an appeal are meritless but provide for the issuance of a COA when constitutional claims are debatable among reasonable jurists. Thus, the Eighth Circuit will vacate a COA if it de-
terminates that a habeas appeal does not substantially implicate the denial of a constitutional right even after the appeal has been briefed and argued.\textsuperscript{154}

\textit{b) Vacatur of a COA is appropriate only in exceptional circumstances irrespective of resources invested in the case.} Like the Eighth Circuit, the Ninth Circuit does not consider briefing or express considerations of judicial economy in determining whether to vacate a COA. The Ninth Circuit considers vacatur of a COA to be appropriate only in exceptional circumstances, such as when a COA is facially invalid, regardless of how much time and energy is invested in the case.\textsuperscript{155} While the only extraordinary circumstance thus far identified by the Ninth Circuit is a facially invalid COA, this approach is broader than the Eighth Circuit's explicit restriction of vacatur to facially invalid COAs in \textit{Tiedeman} because it permits extension of vacatur to other situations. Under the Ninth Circuit's approach, the circuit court has the power to examine the propriety of a COA, though it generally need not do so.\textsuperscript{156} For instance, if a COA were arguably improvidently granted, the appellate court should reach the merits of the appeal rather than review the propriety of the COA.

The Ninth Circuit set forth several arguments in support of its conclusion that COAs were reviewable. First, the court pointed out that issuance of a COA is not immune from appellate court scrutiny. Appellate courts can grant COAs that were previously denied and can

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\textsuperscript{154} See \textit{Tiedeman}, 122 F3d at 522. As \textit{Tiedeman} was decided before \textit{Slack}, the Eighth Circuit might have extended the scope of COA vacatur to reflect the standards for issuance of a COA set forth in \textit{Slack}. See text accompanying notes 45–48. However, nothing in \textit{Slack} indicates that an appellate court should vacate an improvidently granted COA. It is possible that these decisions can be reconciled if the Eighth Circuit considered at least some COAs raising meritless constitutional claims to be facially invalid. A COA might involve constitutional issues that are so patently meritless that it is facially invalid. In such cases, vacatur of the COA would be appropriate. In cases involving COAs presenting constitutional claims that are meritless, but aren't flagrantly so, such that they warrant at least minimal reflection by the appellate court, summary affirmation of the denial of the habeas petition would be preferable to vacatur of the COA. Alternatively, the reference to meritless constitutional issues in \textit{Khaimov} might refer to facially invalid COAs. This interpretation is dubious as the Eighth Circuit has suggested that a COA can raise meritless constitutional issues without being facially invalid. See \textit{Tiedeman}, 122 F3d at 522.

\textsuperscript{155} See \textit{Tiedeman}, 122 F3d at 522.

\textsuperscript{156} See id. The Ninth Circuit has suggested that it will not review COAs \textit{sua sponte} and will review them only when challenged by the government. See id ("[I]n exceptional circumstances the vacatur of a COA may be appropriate regardless of the investment of time and energy into the case. For example, the issuance of a COA may have been so far off the mark that the certificate is simply invalid on its face.").
add claims that were denied to an issued COA.\textsuperscript{157} Furthermore, while the Ninth Circuit acknowledged the gatekeeping and efficiency functions of the COA, it concluded that "the pursuit of efficiency alone does not support an absolute bar against examining the validity of a COA."\textsuperscript{158} In many cases, few legal resources are expended prior to challenge or review of a COA. If the appellate court had no power to review a facially invalid COA, it would be unable to properly administer § 2253(c) because deciding the merits would be contrary to the statutory requirements for appealability of a habeas appeal.\textsuperscript{159} Finally, if a circuit court could not review the issuance of a COA, a COA would be rendered effectively unreviewable on appeal, a highly disfavored result.\textsuperscript{160}

B. Reaching a Preferred Approach to COA Vacatur

The intermediate approaches trump the absolute approaches because they fit better with Supreme Court precedent and the purposes of the COA requirement while providing appellate courts with needed flexibility. Because the intermediate approaches give appellate courts the power to review issued COAs, they avoid the disfavored result of unreviewability of COA issuances. Also, these approaches more closely track the Supreme Court's statements in\textit{Hohn} than do the absolute approaches. While\textit{Hohn} suggests that decisions on COAs are reviewable on appeal, the Supreme Court did not mandate that a proper COA is required for appellate jurisdiction, as claimed by the Third Circuit.\textsuperscript{161}

This Part analyzes the advantages and disadvantages of the intermediate approaches. First, this Part examines approaches turning on judicial economy and concludes that both the consideration of conservation of judicial resources and the use of briefing as a touchstone for it in determining whether a COA should be vacated have questionable underpinnings. Second, this Part argues that the best approach to COA vacatur is to permit it in cases where the COA is facially invalid because this approach is consistent with Supreme Court precedent and faithful to the purposes of AEDPA and its COA requirement. This approach best prevents the consideration of appeals in cases that Congress intended to exclude from the appellate process.

\textsuperscript{157} See id.
\textsuperscript{158} Id.
\textsuperscript{159} See id.
\textsuperscript{160} See id.
\textsuperscript{161} See Parts II.A.1, II.B.1(a). Likewise, in\textit{Miller-El}, the Supreme Court only concluded that a COA was required for appellate jurisdiction and did not explicitly require the COA to be properly issued. See Part II.B.1(a).
It also lets the appellate court refuse to vacate erroneously granted COAs that are not obviously invalid and promotes the efficient use of judicial resources in habeas appeals.

1. The questionable role of conservation of judicial resources in COA vacatur.

The Sixth and Seventh Circuits accord the conservation of judicial resources a prominent role in deciding whether to vacate an improvidently granted COA. To support its position, the Seventh Circuit notes that in instituting the COA requirement, Congress intended to reduce judicial effort in resolving habeas appeals. The Sixth Circuit points out that consideration of judicial economy and duplication in decisions regarding vacatur of COAs reduces delay in executions. However, the Sixth and Seventh Circuits cite no authority supporting the conclusion that a circuit court’s decision to review the validity of a COA or to decide directly the merits when a COA appears to be improvidently granted should turn on whether the appeal has been briefed or on the judicial resources involved in each of the possible decisions.

On the other hand, support can be drawn for consideration of conservation of judicial resources in determining whether an improvidently granted COA should be vacated. Congress’s original rationale for instituting the CPC requirement and for enacting AEDPA was to reduce frivolous appeals that cause delays in capital cases. Furthermore, the Supreme Court considers reduction in delay caused by frivolous appeals to be the purpose of the COA requirement. As conservation of judicial resources in decisions regarding vacatur of COAs would serve the goal of reducing delay, it is consistent with Congress’s purpose in enacting AEDPA and its COA requirement. However, nothing in the text of § 2253(c) or any other authority indicates a place for consideration of judicial efficiency in COA determinations. Therefore, the role of judicial efficiency is questionable.

162 See Porterfield, 258 F3d at 485. See also Young, 124 F3d at 799. Reduction of delay in executions is perhaps the seminal purpose of AEDPA and the CPC and COA requirements. See note 104 and accompanying text.

163 See Cepero, 224 F3d at 270 n 1 (Rendell dissenting) (“I can locate no rule or statute that would constitute a grant of appellate jurisdiction to review the order issuing a [COA].”).

164 See HR Conf Rep No 104-518 at 111 (cited in note 100); HR Rep No 23 at 1-2 (cited in note 30); 42 Cong Rec 608-09 (cited in note 30). See also note 104 and accompanying text.

165 See Miller-El, 537 US at 337 (“Congress established a threshold prerequisite to appealability in 1908, in large part because it was concerned with the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process.”) (internal quotation marks omitted).
2. Effectively promoting judicial efficiency through rules concerning COA vacatur.

Even if consideration of judicial efficiency and conservation of judicial resources were appropriate in crafting rules controlling when a COA should be vacated, the approaches purported to further judicial economy are not the most efficient means to do so. This Part evaluates the extent to which various intermediate approaches promote judicial efficiency. First, this Part asks whether approaches permitting the appellate court to decide whether determining the validity of the COA or reaching the merits actually serve the goal of judicial efficiency. Second, this Part considers whether briefing serves well as a touchstone for conservation of judicial resources. Although the courts considering judicial economy to be the paramount factor in determining whether COA vacatur is appropriate employ approaches largely dependent on briefing status, this Part argues that the “briefing rule” ineffectually promotes the conservation of judicial resources. This Part also suggests that some of the inefficiencies the “briefing rule” creates, as well as those it was designed to prevent, are not present under an approach only permitting review of facially invalid COAs.

a) Discretion of the appellate court to decide whether determination of COA validity or decision on the merits best serves the efficiency goal. The Seventh Circuit’s approach is likely not the most efficient approach. In cases that have not been briefed, this approach requires the appellate court to decide that a COA was improperly issued and that vacatur of the COA would conserve judicial resources in order to vacate a COA. Judicial resources might be more efficiently conserved if the circuit court did not have to expend time and effort in deciding which disposition more effectively conserved them. In addition, the circuit court might develop a true appreciation for the issues raised by the appeal and the respective amount of effort required to dispose of them in different ways only after beginning to confront them. Thus, determining which disposition would be more efficient before the court has invested substantial resources in resolving the merits or determining the propriety of the COA might be difficult and/or error prone. Incorrect decisions as to which disposition more effectively conserves judicial resources do not conserve them. Thus, the efficacy of the Seventh Circuit’s approach might turn on the institutional competency of circuit courts to determine accurately and with minimal effort which disposition would entail a smaller expenditure of

166 Even if, after embarking on review of the merits or the propriety of the COA, the circuit court determines that switching to the other mode of review would conserve judicial resources, judicial resources prior to the switch would be wasted.
In contrast, the Sixth and Eighth Circuits limit their discretion in deciding which disposition to employ when faced with an improper COA. Thus, these courts do not expend considerable judicial resources in determining if they will reach the merits of a habeas appeal or vacate the COA.¹⁶⁶

b) **Briefing is an ineffective touchstone for conservation of judicial resources.** The approaches taken by the Sixth and Seventh Circuits, which consider vacatur of a COA inappropriate if the parties have briefed the merits of the appeal,¹⁶⁹ present inconsistencies with the purpose of the COA requirement and might not effectively promote the conservation of judicial resources. Such approaches require circuit courts to reach the merits of statutory claims in the absence of substantial constitutional claims if the merits have been briefed. A COA issued in such a case is invalid because it raises no constitutional issue.¹⁷⁰ Yet, in restricting COAs to constitutional issues, Congress clearly intended to foreclose appeals of statutory claims—even those that are meritorious.

Although the Sixth and Seventh Circuits’ “briefing rule” requires the circuit court to decide the merits of appeals raising meritorious statutory claims but no constitutional issues, considerable judicial effort may be required to resolve the merits of such appeals. For instance, the Eighth Circuit has noted that a facially invalid COA raising no constitutional issues can raise debatable and difficult issues of state and statutory law.¹⁷¹ Thus, a requirement that the appellate court de-

¹⁶⁷ As courts are self-interested, reviewing courts defer to the decision of a court determining which of two courses of action best furthers judicial economy. Consider *United States v Mendoza-Salgado*, 964 F2d 993, 1016 (10th Cir 1992) (indicating that the district court “was free to weigh the potential for judicial economy” of one course of action against the potential for judicial economy of an alternative course of action).

¹⁶⁸ The Sixth Circuit permits review of a COA only when the parties have not submitted briefs on the merits of the appeal and the district court has not engaged in any individualized assessment of the claims presented in the COA; the court concludes that review of COAs in cases not meeting these criteria would not further the goal of judicial efficiency. See *Porterfield*, 258 F3d at 485. The Eighth Circuit restricts its discretion to review the propriety of COAs by reviewing only those that are facially inadequate, while the Ninth Circuit affords itself more discretion by permitting review in extreme circumstances. See Parts III.A.2(a)–(b). A facially inadequate COA is obviously invalid, and little effort is required to determine that it was improperly issued.

¹⁶⁹ See Parts III.A.1(a)–(b).

¹⁷⁰ See, for example, *Young*, 124 F3d at 799 (addressing a COA that was invalid because it neither made a substantial showing of the denial of a constitutional right nor indicated which specific issues satisfied the showing requirement, and concluding that a motion to dismiss an appeal on the ground that a COA was improperly issued would serve some function, but that once briefs have been written there is little use in scrutinizing a COA).

¹⁷¹ See *Khaimov*, 297 F3d at 785 (revoking an invalid COA and noting that if the court were to consider the merits of the case, it would have to address “the debatable issue” of whether Minnesota appellate courts followed their own procedural rules).
cide the merits of the appeal if it has been briefed results in a potentially large expenditure of judicial resources that Congress expressly strove to prevent. In addition, such expenditures of judicial resources are inconsistent with Congress's purpose in enacting the COA requirement of reducing delay. By contrast, approaches that allow for vacatur of a facially invalid COA avoid expenditure of judicial resources on resolving the merits of these cases.

Furthermore, approaches requiring a decision on the merits once a habeas appeal has been briefed allow a prisoner's receipt of an undeserved appeal to turn on whether the appellate court finds that the COA was improvidently granted before or after the appeal has been briefed. When a prisoner raises a meritorious statutory claim on appeal, a decision on the merits could result in the reversal of the district court's denial of his habeas petition, even though a COA should never have been granted and the appellate court should not have considered the appeal under § 2253(c). Thus, these approaches create unfairness as they distinguish between appellants in an arbitrary manner. Under these approaches, whether an appellant who received an improvidently granted COA gets the benefit of an undeserved appeal turns on factors such as the briefing schedule of the case and how quickly the circuit panel noticed the error. The Sixth and Seventh Circuits might reply that such undeserved appeals for habeas appellants are acceptable consequences of the conservation of judicial resources that occurs as a result of deciding briefed cases on the merits. However, the above discussion indicates that the efficacy of the "briefing rule" in promoting the conservation of judicial resources is questionable.

Despite the inefficiency created by the Sixth and Seventh Circuits' approach requiring decisions on the merits after the cases have been briefed when an invalid COA raises a meritorious statutory issue, a counterargument supporting their approach is that reaching the merits of frivolous claims might dispose of them efficiently. The Supreme Court has permitted appellate courts to adopt expedited procedures in resolving the merits of habeas appeals and has held that frivolous habeas appeals may be dismissed in a summary and abbrevi-

172 The absolute approaches of the Second and Tenth Circuits requiring the appellate court to decide the merits of a habeas appeal whenever a COA is issued also cause judicial resources to be expended in such cases.

173 Consider Young, 124 F3d at 799 (indicating that a district court may consider a habeas petition based on a statutory issue but that a denial of such a petition may not be appealed). In a case in which the merits had not been briefed, the Seventh Circuit used language suggesting that it might permit vacatur after briefing if vacatur would prevent a substantial expenditure of judicial resources. See Marcello, 212 F3d at 1008 (saying that it would exercise its discretion to do so "only in rare cases"). However, the Seventh Circuit has never actually deviated from the "briefing rule" in a published decision.
Thus, in such cases, judicial resources might be best conserved by summary decisions on the merits rather than by reviewing the propriety of the COA, especially once the merits have been briefed.

While the Seventh Circuit contends that reviewing a COA after the merits have been briefed would "increase the complexity of appeals in collateral attacks and the judicial effort required to resolve them," this conclusion might be unfounded, especially when the COA is facially invalid. A decision about a COA involves a threshold inquiry that might be made with minimal effort after briefing or other efforts to resolve the merits of the appeal. The determination of whether a COA should be issued does not require full consideration of the legal or factual bases of the claims presented. The standard for COA issuance is lower than that for a successful appeal. Thus, the prisoner need not convince the court that he would prevail on the merits for a COA to issue. Given the limited nature of the COA inquiry and the lower standard involved, efforts on the merits would likely simplify appellate review of a COA. Furthermore, little effort is required to determine that a COA is facially invalid. Thus, the waste and complication envisioned by the Seventh Circuit would not occur, especially when vacatur is restricted to facially invalid COAs.

However, courts have difficulty in determining whether certain claims raised in a COA implicate constitutional rights. For instance, evidentiary rulings usually depend on state law but may involve federal constitutional rights. In such cases, it might be more efficient for an appellate court to reach the merits regardless of the briefing status of the case rather than to decide if the appeal raises a substantial constitutional issue. Thus, briefing does not serve as a touchstone for

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174 See Barefoot, 463 US at 894.
175 Young, 124 F3d at 799.
176 See Miller-El, 537 US at 336 ("The COA determination . . . requires an overview of the claims . . . and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason.").
177 See id.
178 See id at 337. See also Part I.B.2.
179 See, for example, Buie, 322 F3d at 982 (declining to vacate a COA because of uncertainty over whether state evidentiary rules could violate federal constitutional rights).
180 In cases raising dubious constitutional issues that have not been briefed, the Seventh Circuit will permit the merits to be briefed and decide the merits of the appeal since it considers reaching the merits to more effectively promote judicial efficiency than determining whether the COA raised a substantial constitutional issue. See id. In contrast, the Sixth Circuit has suggested that reviewing the propriety of a COA is always appropriate in the absence of briefing and particularized findings. See Porterfield, 252 F3d at 485. This approach creates inefficiency when a COA raises dubious constitutional issues, unlike the Seventh Circuit's approach, which allows discretion in the absence of briefing. Likewise, the Third Circuit's rule requiring a decision on the
conservation of judicial resources in these cases. Furthermore, in-depth analysis of whether an issue might involve a constitutional right is inconsistent with the threshold determination at the stage of COA issuance.\footnote{See Miller-El, 537 US at 336 ("This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it."). Accurate determination of whether such cases raise a substantial constitutional issue and thus whether the COA is improper might require full consideration of the factual and/or legal issues raised by the appeal, contrary to the threshold COA determination under Miller-El.} In cases such as this, a rule permitting vacatur only if a COA is facially invalid protects the appellant's statutory right of appeal because it permits review on the merits if there is a chance that the certified claims raise a constitutional issue, and it promotes the conservation of judicial resources.\footnote{See Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp Pres Doc 719, 720 (Apr 24, 1996) (implying that the president would not have signed AEDPA if he thought it would undercut meaningful habeas corpus review).}

3. Vacatur of facially invalid COAs is the approach most consistent with Supreme Court precedent and the purpose of the COA requirement.

This Comment recommends the approach delineated by the Eighth Circuit in Tiedeman, permitting vacatur of facially invalid COAs despite previous expenditures of judicial resources. This approach is most consistent with Supreme Court precedent and the purpose of the COA requirement. It also avoids disfavored results while more effectively promoting judicial efficiency than the other intermediate approaches.

This approach is consistent with Supreme Court precedent concerning COAs, and its justification does not require extension of such precedent. An approach permitting vacatur of facially invalid COAs allows—but does not mandate—review of the propriety of previously issued COAs. Thus, it is consistent with the Supreme Court's language in Hohn indicating that decisions concerning COAs are appealable.\footnote{See Part II.B.2(a).} At the same time, the approach does not consider a properly issued COA to be a jurisdictional requirement for a habeas appeal. Thus, the Supreme Court's reasoning in this area need not be extended to support this approach, in contrast to the Third Circuit's approach.

Furthermore, this approach is also most consistent with the text and purpose of § 2253(c). An approach permitting vacatur of facially invalid COAs prevents the consideration of habeas appeals in cases
obviously falling into the category that Congress excluded from the appellate process as a result of erroneously granted COAs. Thus, unlike other intermediate approaches, this approach obviates the possibility that a habeas appeal raising only a meritorious statutory claim but no constitutional claim pursuant to an improperly issued COA will result in the reversal of the district court’s denial of the habeas petition because a COA raising no cognizable constitutional issue is facially invalid. Therefore, when a COA is erroneously issued for a habeas appeal raising claims that are frivolous or otherwise unappealable under § 2253(c), allowing review of facially invalid COAs permits an appellate court to rapidly dispose of the case without a decision on the merits. This serves the goal of preventing unnecessary delay and abuse in the habeas appellate process. Finally, this approach safeguards a habeas appellant’s right to appeal when the COA arguably raises constitutional issues, as such COAs are not facially invalid.

An approach restricting appellate review to facially invalid COAs also avoids the disfavored results inherent in other approaches. First, it prevents appellants from receiving undeserved appeals as a result of an error by the issuing court. Thus, the unfairness and arbitrariness inherent in some other approaches is absent. Second, this approach avoids the generally disfavored result of unreviewability. Assuming that judicial efficiency in COA vacatur is a legitimate goal, this approach promotes efficiency and conservation of judicial resources more effectively than approaches focusing solely on purported indicia of judicial economy such as briefing. Unlike approaches requiring the appellate court to reach the merits of an appeal based on an invalid COA once the appeal has been briefed, an approach permitting vacatur of facially invalid COAs, regardless of effort already invested in the case, avoids potentially difficult and time-consuming determinations of the merits in cases raising meritorious statutory claims but no constitutional claims as well as delay stemming from such determinations. Approaches resulting in expenditure of judicial resources on such cases are especially problematic because Congress excluded such cases from the appellate process. Further-

184 See text accompanying note 173. In the scant legislative history of AEDPA, Congress did not explain why it restricted the issuance of a COA to habeas appeals raising substantial constitutional issues and excluded those involving meritorious statutory claims. AEDPA and its COA requirement were intended to curb abuse of the writ of habeas corpus and prevent unnecessary delay and abuse in capital cases. See notes 30–31 and accompanying text. Thus, Congress might have required that a habeas case raise a constitutional issue to be appealable to reduce the number of habeas appeals and thereby streamline the process and reduce delay.

185 Protecting legitimate habeas rights was an important consideration in the enactment of AEDPA. See note 182.

186 See Part III.B.1.
more, unlike the Seventh Circuit's approach, limiting review to facially invalid COAs does not require the expenditure of resources in determining whether reaching the merits or evaluating the propriety of the COA would be more efficient. Thus, the risk of inefficiency resulting from an erroneous judicial economy determination is obviated.

This approach also promotes efficiency in cases raising a questionable constitutional issue by allowing review of the merits without expenditure of effort in determining the validity of the COA. Very little judicial effort is required to determine that a COA is facially invalid. However, sometimes it is very difficult or impossible to determine whether a substantial constitutional issue is raised by an appeal without reaching the merits. Such COAs raising dubious constitutional issues are not facially invalid. In such cases, review of the propriety of COAs may require expenditure of considerable judicial resources. Thus, an approach allowing review of more COAs than those that are facially invalid may require the expenditure of considerable judicial effort in review of the COAs and runs the risk of creating inefficiency and the potential for duplication. Therefore, an approach permitting review and vacatur of COAs only when they are facially invalid is more closely tailored to promote efficiency and reduce delay than the Sixth and Seventh Circuits' "briefing rule." It allows the appellate court to avoid reviewing the merits in cases where the COA is invalid but a review of the merits will be difficult and time consuming while foreclosing review of COAs that will entail a substantial expenditure of judicial resources.

Perhaps the strongest argument against limiting vacatur of COAs to those that are facially invalid is that appellate courts will review the merits of habeas appeals when the COA is arguably valid but would be determined to be invalid if the court closely examined its validity. However, the Supreme Court does not require a COA to be properly issued for an appellate court to review the merits of a habeas appeal. In fact, an in-depth analysis of a previously granted COA is inconsis-

187 See notes 150–53 and accompanying text.
188 While the Ninth Circuit permits vacatur of a COA in "extraordinary circumstances" and thus leaves open the possibility that it might extend vacatur of COAs beyond those that are facially invalid, the only extraordinary circumstance it identified was the facial invalidity of a COA. Phelps, 366 F.3d at 728. Review of COAs for facial invalidity creates the potential for duplication inasmuch as the circuit court must review the merits of an appeal if it determines that the COA is facially valid. However, few judicial resources are expended in determining that a COA is not facially valid. Thus, the duplication here results in very little waste of judicial resources. In contrast, the Third Circuit's approach requiring review of the validity of all COAs before reaching the merits results in considerable duplicative expenditure of judicial resources as the court must review the merits of the appeal after it reviews the propriety of the COA and concludes that the COA is valid.
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...tent with the Supreme Court's pronouncement that the issuance of a COA involves a "threshold inquiry." A valid counterargument is that appellate review of a COA is simply review of the threshold determination under Miller-El. However, in some cases, especially those raising a questionable constitutional issue, the determination that a COA was improvidently granted might require full review of the legal and factual issues raised by the appeal, which is inconsistent with a threshold determination. Thus, no opportunity for an undeserved appeal is created by limiting review to facially invalid COAs because this standard suggests that the appellate court should review the merits in cases where the COA is questionable but not facially invalid.

CONCLUSION

The best approach to COA vacatur is to permit appellate courts to review and vacate the issuance of a COA when the COA is facially invalid. This approach is most consistent with Supreme Court precedent. It also serves the purpose of AEDPA and its COA requirement: to curb abuse of the writ of habeas corpus by promoting efficiency in the disposition of habeas appeals and minimizing judicial effort expended in resolving cases where the COA is improvidently granted. Thus, this approach is preferable to the other approaches taken by circuit courts.

189 Miller-El, 537 US at 336. Some of the Eighth Circuit's language in Khaimov indicating that a COA raising meritless constitutional claims should be vacated suggests that the Eighth Circuit might be willing to vacate COAs that are not facially invalid but that the court would ultimately conclude do not raise substantial constitutional issues if it considered their propriety. See notes 153-54 and accompanying text.

190 See note 176 and accompanying text.

191 To the extent that such analysis requires in-depth examination of the propriety of a COA, it might be inconsistent with the threshold COA determination. See note 181 and accompanying text. Thus, this Comment rejects the Eighth Circuit's approach to the extent that it allows review of COAs beyond those that are facially invalid.