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Aaron R. Petty
U.S. Department of Justice, Office of Immigration Litigation

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THE HIDDEN HARMONY OF APPELLATE JURISDICTION

AARON R. PETTY*

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* Appellate Attorney, U.S. Department of Justice, Office of Immigration Litigation; B.A., Northwestern University; J.D., The University of Michigan Law School. The views expressed in this Article are those of the author alone and do not necessarily represent the views of the United States or the Department of Justice. I thank Edward H. Cooper, Jeanne F. Long, Rachel Warnick Petty, and Julie M. Skelton for helpful comments on previous drafts.

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The division of authority between trial and appellate courts is demarcated by the final judgment rule.[1] Ordinarily, all appellate review of the orders made by a trial judge is postponed until the trial judge has rendered a final judgment.[2] The rule ensures that two courts do not attempt to exercise jurisdiction over the same case at the same time, permits the trial judge relative freedom to direct proceedings before judgment, discourages abuse of process, and conserves judicial resources by preventing piecemeal review and by preventing review of interlocutory orders that may be mooted later in the proceedings.[3] Because of its fundamental importance in dividing the work of a multi-tiered court system, the final judgment rule has been called "the dominant rule of appellate jurisdiction."[4]

In most cases, the rule is clear and its application unremarkable, but sometimes rigid adherence to the rule would result in unjust or even absurd results.[5] To mitigate against its occasional harshness, both Congress and the courts have developed a number of exceptions to the rule that permit appellate review of certain interlocutory orders.[6] But these exceptions are not without difficulties of their own.[7] And because the exceptions to the rule delineate the true scope of appellate jurisdiction,[8] it is essential that they be accurately mapped, that overlap among various exceptions to the rule be minimized, and that those exceptions be supported by strong principles so that their application to novel situations is as orderly and predictable as possible.

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1. Cobbledick v. United States, 309 U.S. 323, 330 (1940) ("The doctrine of finality is a phase of the distribution of authority within the judicial hierarchy.").

2. *See, e.g.*, 28 U.S.C. § 1257 (2006) (granting the Supreme Court jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State"); 28 U.S.C. § 1291 (2006) (granting federal courts of appeals jurisdiction over "appeals from all final decisions of the district courts"); Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1238 (2007) ("[The] final judgment rule . . . ordinarily postpones any appellate review until the district court reaches a final judgment.").

3. *See* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981); Riyaz A. Kanji, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 YALE L.J. 511, 512 (1990). Where the appeal is to the Supreme Court from a state court of last resort, the final judgment rule also preserves federalism interests. *See* Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 67 (1948).

4. Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 184 (2001).

5. *See* Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 90 (1975).

6. *See id.*

7. Steinman, *supra* note 2, at 1252 ("[T]he process for invoking [the collateral order doctrine] and determining whether it applies in particular situations is inefficient in a number of situations.").

8. *Id.* at 1238.

Predictability has been an elusive goal in the courts' implementation of the final judgment rule. Many commentators have severely criticized the rule[9] and, in particular, the courts' seemingly ad hoc application of one important exception: the collateral order doctrine.[10] Proposals for reform have tended to fall into two camps. The larger group proposes an expanded version of discretionary interlocutory review.[11] A smaller group has advocated for the entire abolition of appeals as of right.[12] The vast majority of commentators, however, agree that the current appellate system generally functions well.[13] The debate—and the problems—appear at the margins.[14] Accordingly, rather than wholesale revision or repudiation of the final judgment rule, I propose to examine the principles underlying its chief exceptions in relation to their current application. Harmonizing the rule's application with its foundational principles would bring considerable clarity to a much maligned area of law.[15]

This Article proceeds in three Parts. In Part I, I trace the history of the final judgment rule from its common law roots prior to the Judiciary Act of 1789 to its present incarnation in §§ 1291 and 1257 of the Judicial Code. I also lay out the major statutory and rule-based exceptions to the rule in this Part.

In Part II, I describe the evolution of the major judicially-crafted exceptions to the final judgment rule. In Part II.A, I divide the major exceptions into three functional groups: effective finality, practical finality, and partial effective finality. In Part II.A.1, I show that, consistent with the Supreme Court's early admonition that courts should give finality a practical construction, the courts of appeals have concluded that their jurisdiction extends to orders that effectively, though not technically, end the litigation at hand. Part II.A.2 introduces practical finality, a concept that has been all but rejected, but which, nonetheless, is important to an analysis of the current state of appellate jurisdiction. Part II.A.3 concerns partial effective finality, including the well-known and often criticized collateral order doctrine. Here, I show that the doctrine was initially a close cousin of other early practical constructions of finality. Over time, however, the

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9. Glynn, *supra* note 4, at 176, 180–81 (citing Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules*, 1 J. APP. PRAC. & PROCESS 285, 291 (1999); Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 LAW & CONTEMP. PROBS., Summer 1984, at 171, 172 (1984)); Redish, *supra* note 5, at 91 (citing DAVID P. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 308 (2d ed. 1975); CHARLES ALAN WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 101, at 455–58 (2d ed. 1970)); Steinman, *supra* note 2, at 1238–39 (noting various epithets scholars have used to describe federal appellate jurisdiction).

10. *See* Steinman, *supra* note 2, at 1252–57.

11. Glynn, *supra* note 4, at 178 n.7 (citing multiple commentators calling for an expanded version of discretionary review as a replacement or supplement to the exceptions of the current rule).

12. *Id.* at 184 n.33.

13. *See id.* at 185 ("There is general agreement that, on balance, the policies underlying the final judgment rule justify the costs it may impose in most cases.").

14. *Id.* at 203–04.

15. *Id.* at 204.

doctrine has become mired in judicial language and divorced from its underlying foundation. Loosed from its moorings, the Supreme Court has recently narrowed the scope of the collateral order doctrine, largely for lack of limiting principles. Today, the doctrine is the most significant judge-made exception to § 1291, and although its application is generally consistent, the underlying principles guiding that consistency are unclear. Part II.B introduces appellate mandamus, a judicial creation based on the ancient common law writ. In this part, I distinguish appellate mandamus from the device of the same name that may be sought in district courts against executive officers and discuss how the scope of this extraordinary remedy has expanded beyond the realm it was originally intended to fill.

In Part III, I suggest recasting the requirement that an order be "completely separate from the merits" (or, at least, "conceptually distinct") to qualify for appeal under the collateral order doctrine. Instead, I propose that, to qualify, an order simply must belong to a class of orders that are unlikely to be mooted by future orders downstream in the litigation. This small change would have several important advantages. First, it would bring the collateral order doctrine back into line with its original principles and with the other practical applications of the final judgment rule. Second, tying the doctrine to a principle rather than to judicial rhetoric provides a basis on which future cases can be soundly decided. Third, it would move a number of issues that are currently heard on petitions for writs of mandamus into the usual channels for appellate review. This shift would reduce the breadth of appellate mandamus, which has expanded beyond the realm it was initially intended to fill. Thus, a modest change—a simple reassessment of the grounds supporting the collateral order doctrine in light of the other doctrines of finality—has the potential to harmonize much of the current discord of appellate jurisdiction.

I. THE FINAL JUDGMENT RULE

A. Historical Origins

Systems of law that employ appellate tribunals must address the question of when appeals may be taken from a lower court to a higher one. The answer implicates a number of policy considerations regarding the administration of justice. Unfettered resort to appellate courts may increase judicial accuracy, but it does so at a high price: delay, increased cost to litigants, inefficient use of judicial time, and increased opportunity for bad faith appeals designed to harass opposing parties to name a few.[16] On the other hand, an inflexible requirement that all aggrieved parties in all situations must wait to appeal an erroneous interlocutory order may cause an action to be adjudicated "unjustly, slowly, and

16. *See* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981); Kanji, *supra* note 3, at 512.

expensively."[17] As the Supreme Court has explained, "the considerations that always compete in the question of appealability . . . are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."[18]

Prohibition of appeals from interlocutory orders extends back to Roman times.[19] The origin of the modern final judgment rule in the United States, however, appears to derive from the historic practice in England by which a judgment of one of the common law courts could be reviewed in the Court of King's Bench on a writ of error.[20] But there had to be a judgment and a record before the King's Bench could act.[21] Counsel in one case argued that the court could not proceed because the record from the court of first instance had not been produced, and the writ could not support two records in two courts simultaneously.[22]

By the time of Blackstone, pronouncements by the masters in the Court of Chancery were divided into orders, interlocutory decrees, and final decrees.[23] Unlike the King's Bench, however, the Chancellor awarded relief from all three types of pronouncements[24] and never applied the final judgment rule to suits in equity.[25] This was due in part to the unsuitability of the simple common law forms of action to the complicated cases that came before the Chancellor.[26]

The distinction between appealability in law and equity was not adopted in the United States, and the confusion in this country surrounding appealability began almost immediately.[27] American appellate courts were frequently established to hear both law and equity cases.[28] Often the common law writ of error was the method for review of equitable claims, and appellate courts, not surprisingly, tended toward application of the common law rule of finality to both legal and equitable matters because both came before the court through the

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17. *See* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3913, at 317 (2d ed. 1992); *cf.* FED. R. CIV. P. 1 ("[The federal rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

18. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

19. *See* Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 540–41 (1932) (citing ARTHUR ENGELMANN, A HISTORY OF CONTINENTAL CIVIL PROCEDURE §§ 84–85 (Robert Wyness Millar ed. & trans., 1927)).

20. *Id.* at 541, 543–44; John C. Nagel, Note, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200, 202 (1994) (citing 15A WRIGHT, MILLER & COOPER, *supra* note 17, § 3906, at 264).

21. *See* Crick, *supra* note 19, at 541–42.

22. *Id.* (citing Reports of Cases in Easter Term, 1343 Y.B. KING EDWARD III 226, 234).

23. *Id.* at 545–46.

24. *Id.* at 545.

25. *Id.* at 547.

26. *Id.* at 548.

27. *Id.* at 548–50.

28. *Id.* at 550.

common law writ process.[29] State courts were therefore forced to engineer "elaborate logical exercises in order to escape from the strict application of the restriction"[30]—a theme that would be repeated in the Supreme Court's later jurisprudence interpreting the federal final judgment rule.

B. Statutory Reach

The Judiciary Act of 1789[31] has been called "probably the most important and the most satisfactory Act ever passed by Congress."[32] The Act provided appellate jurisdiction in circuit courts over admiralty and maritime matters in excess of three hundred dollars or over civil actions in excess of fifty dollars.[33] The Act provided appellate jurisdiction in the Supreme Court over civil actions in excess of two thousand dollars.[34] Similarly, the Act provided for review upon a writ of error of a final judgment or decree of the highest court of a state.[35] The reason the early state practice of applying a strict finality requirement to appeals from both legal and equitable claims was incorporated into the Judiciary Act is unknown,[36] but Congress likely sought to emulate state practice in the federal courts.[37]

The finality provisions of the Judiciary Act remain largely unchanged today.[38] Section 1291 of Title 28 of the U.S. Code provides that "the courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."[39] Section 1257, which corresponds to the pertinent provisions in § 25 of the Judiciary Act, provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where [a federal

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29. *Id.* at 550 n.55 (citing Blaine v. Ship Charles Carter, 4 U.S. (4 Dall.) 22 (1800); Johnson's Adm'rs v. Henry's Ex'rs, 1 Minor 13 (Ala. 1820)).

30. *Id.* at 548.

31. An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789) [hereinafter "Judiciary Act of 1789"].

32. Aaron R. Petty, *Matters in Abatement*, 11 J. APP. PRAC. & PROCESS 137, 139 (2010) (quoting Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 52 (1923)) (internal quotation marks omitted).

33. Judiciary Act of 1789, §§ 21–22, 1 Stat. at 83–85.

34. *Id.*

35. § 25, 1 Stat. at 85–87.

36. Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 727 (1993) (citing Crick, *supra* note 19, at 548, 549 n.48).

37. *But see* WRIGHT, MILLER & COOPER, *supra* note 17, § 3906, at 264 n.4 (suggesting that a desire to avoid "interminable" delays possible in English chancery proceedings was influential in crafting the act); *cf.* CHARLES DICKENS, BLEAK HOUSE (Gordon N. Ray ed., Riverside Press 1956) (1853) (discussing fictional generations-long chancery case *Jarndyce and Jarndyce*).

38. Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989) (noting that the final judgment rule "has changed little" since the adoption of the Judiciary Act).

39. 28 U.S.C. § 1291 (2006).

question is raised]."[40] The Supreme Court has defined a "final decision" as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[41]

In light of this seemingly universal ban on interlocutory appeals, Congress has provided some relief. Section 1292(a) allows interlocutory review of certain listed orders, notably orders "granting, continuing, modifying, refusing or dissolving injunctions."[42] Section 1292(b), enacted by the Interlocutory Appeals Act of 1958,[43] allows for interlocutory appeal where the district judge certifies that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[44] Once certified, the court of appeals may, in its discretion, permit the appeal.[45] Rule 54(b) of the Federal Rules of Civil Procedure similarly provides for interlocutory review where the district judge enters final judgment as to one or more claims or parties and "expressly determines that there is no just reason for delay."[46] Section 1453(c)(1) grants the court of appeals discretion to accept appeals from orders granting or denying motions to remand class actions to state

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40. 28 U.S.C. § 1257(a) (2006). This Article concerns only appeals from district courts. Supreme Court review of state court decisions and other specialized proceedings, including finality of bankruptcy court orders, present additional considerations and are worthy of full treatment individually. *See generally* Carlos J. Cuevas, *Judicial Code Section 158: The Final Order Doctrine*, 18 SW. U. L. REV. 1 (1988) (discussing the application of the final order doctrine in corporate reorganization and liquidation cases); Timothy B. Dyk, *Supreme Court Review of Interlocutory State-Court Decisions: "The Twilight Zone of Finality,"* 19 STAN. L. REV. 907 (1967) (proposing that Congress should eliminate the finality requirement from Section 1257 in Supreme Court review of state court cases); Judy Beckner Sloan, *Appellate Jurisdiction of Interlocutory Appeals in Bankruptcy 28 U.S.C. Section 158(d): A Case of* Lapsus Calami, 40 CATH. U. L. REV. 265 (1991) (proposing a statutory solution providing for complete appellate jurisdiction, including over interlocutory appeals, in bankruptcy cases and proceedings); Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 HARV. L. REV. 1004 (1978) (examining the role and application of the finality principle in cases involving Supreme Court review of state court decisions); Joseph Mitzel, Note, *When Is an Order Final?: A Result-Oriented Approach to the Finality Requirement for Bankruptcy Appeals to Federal Circuit Courts*, 74 MINN. L. REV. 1337 (1990) (discussing a federal circuit split on interpretation of the finality requirement of 28 U.S.C. § 158(d) when a district court reverses and remands a case to a bankruptcy court, and proposing adoption of the pragmatic approach to interpreting finality used in other legal contexts as the solution); Note, *The Requirement of a Final Judgment or Decree for Supreme Court Review of State Courts*, 73 YALE L.J. 515 (1964) (discussing the Supreme Court's interpretation of the finality requirement for review of state court decisions following *Construction Laborers' Union v. Curry* and *Mercantile National Bank v. Langdeau*).

41. Catlin v. United States, 324 U.S. 229, 233 (1945) (citing St. Louis, Iron Mountain & S. R.R. Co. v. S. Express Co., 108 U.S. 24, 28 (1883)).

42. 28 U.S.C. § 1292(a)(1) (2006). This section also provides for interlocutory review of orders involving the appointment of receivers and the winding up of receiverships and of orders determining the rights and liabilities of parties to admiralty cases. § 1292(a)(2)–(3).

43. Pub. L. No. 85-919, 72 Stat. 1770 (1958) (codified at 28 U.S.C. § 1292(b) (2006)).

44. § 1292(b).

45. *Id.*

46. FED. R. CIV. P. 54(b).

court,[47] and from certain other rulings on subject-matter jurisdiction.[48] Finally, appeals may be taken from certain interlocutory orders under the Federal Arbitration Act.[49] Congress adds to this list from time to time.

In addition to these exceptions, two statutes grant the Supreme Court authority to promulgate rules defining when a ruling is final for purposes of § 1291 and authorizing appeals from additional categories of interlocutory orders.[50] The Supreme Court has used this authority just once, when it promulgated Federal Rule of Civil Procedure 23(f),[51] which authorizes discretionary appeals from orders granting or denying class certification.[52] The most significant exceptions to the final judgment rule, however, are not based in statutes or rules but instead are practical interpretations of the statutes governing appellate jurisdiction.[53]

II. JUDICIALLY-CRAFTED EXCEPTIONS TO THE FINAL JUDGMENT RULE

The Supreme Court has repeatedly recognized that finality "is to be given a 'practical rather than a technical construction.'"[54] Courts have applied this directive through two primary vehicles. The first and most commonly used is practical construction of § 1291 to allow appeals in situations where, although there is more to be done than simply enter judgment, there is nonetheless effective finality, partial effective finality, or (although it has now been disapproved) practical finality.[55] In addition, courts of appeals have interpreted

47. 28 U.S.C. § 1453(c)(1) (2006).

48. 28 U.S.C. § 1441(e)(3) (2006).

49. 9 U.S.C. § 16 (2006).

50. 28 U.S.C. §§ 1292(e), (2072(c) (2006).

51. ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 7:38, at 108 (4th ed. 2002) (quoting FED. R. CIV. P. 23(f)).

52. FED. R. CIV. P. 23(f). This rule was promulgated under § 1292(e). CONTE & NEWBERG, *supra* note 50. Section 2072(c) has gone unused "because it invites the question whether a particular rule truly 'defines' or instead expands appellate jurisdiction." Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 833 (7th Cir. 1999). Section 1292(e) authorizes expansion. *Id.*

53. Steinman, *supra* note 2, at 1246–47. The Supreme Court has cautioned that practical constructions of the final judgment rule are not truly "exceptions" to it. Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 41–42 (1995) (quoting Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994)). The semantics make no difference for the purposes of this Article.

54. Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152 (1964) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)); *see also* Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 306 (1962) ("A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action . . . .'" (quoting FED. R. CIV. P. 1)); Bronson v. R.R. Co., 67 U.S. (2 Black) 524, 531 (1862) ("[T]his Court has not therefore understood the words 'final decrees,' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction . . . ." (quoting Forgay v. Conrad, 47 U.S. (6 How.) 201, 203 (1848)) (internal quotation marks omitted)).

55. *See* discussion *infra* Part II.A.

the All Writs Act[56] to invest them with mandamus power over the district courts that, although it stops short of a generalized discretionary power of review, extends well beyond merely compelling or prohibiting actions in the district court.[57]

A. Judicial Interpretation of 28 U.S.C. § 1291

The final judgment rule has been applied pragmatically for more than 150 years. The Supreme Court's first foray into finality, in *Forgay v. Conrad*,[58] established for the first time that a flexible approach to finality might be appropriate under certain circumstances. Because proceedings were effectively, though not technically, final, and because the order in question required immediate delivery of property, the Supreme Court held that the order was final for purposes of § 1291.[59] Although *Forgay* itself has largely been superseded by rule, the proposition that orders that effectively end the litigation are appealable has remained as the standard.[60]

Recent cases applying this framework, however, have cautioned that the legal effect that an effectively final order has on a party's ability to proceed as a legal matter must be distinguished from the practical effect that a given interlocutory order may have on a party's willingness to proceed, for example, as a financial matter.[61] Although for a time some courts concluded that orders that effectively terminate litigation as a legal matter are final,[62] the Supreme Court has held that orders that simply make it undesirable or financially unwise to continue are not immediately appealable under § 1291.[63]

The most important and most contentious exception to the final judgment rule is partial effective finality. A partial effectively final order, like an

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56. *See* Pub. L. No. 61–475, 36 Stat. 1156 (1911) (codified as amended at 28 U.S.C. § 1651 (2006)).

57. *See* discussion *infra* Part II.B.

58. 47 U.S. (6 How.) 201 (1848).

59. *Id.*

60. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 715 (1996) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)) (holding that an abstention-based remand order was appealable as a final decision despite the fact that it did "not meet the traditional definition of finality"); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp. 460 U.S. 1, 10 (1983) (holding that a district court's stay order was final for purposes of appellate jurisdiction because the stay amounted to dismissal of the suit).

61. *See Moses H. Cone*, 460 U.S. at 10 n.11 (contrasting the situation where "the district court *refuses to allow* the plaintiff to litigate his claim in federal court" from the "death knell" situation where a plaintiff "might terminate a suit as a practical matter because the named plaintiff would lack an economic incentive to pursue his individual claim").

62. *See* Gillespie v. U.S. Steel Corp., 379 U.S. 148, 154 (1964) (finding that a "marginal case [was] final and appealable"); United States v. Wood, 295 F.2d 772, 778 (5th Cir. 1961) ("[A]n order, otherwise nonappealable, determining substantial rights of the parties which will be irreparably lost if review is delayed until final judgment may be appealed immediately under section 1291.").

63. Coopers & Lybrand v. Livesay, 437 U.S. 463, 469–77 (1978).

effectively final order, leaves something more to do than simply enter judgment, but does so with regard to fewer than all parties or claims.[64] This category includes the collateral order doctrine derived from the Supreme Court's opinion in *Cohen v. Beneficial Industrial Loan Corp.*,[65] along with most contempt orders and the somewhat obscure *Perlman* doctrine.[66] Although initially the collateral order doctrine operated similarly to *Forgay* and other effective finality decisions, the Supreme Court has subsequently narrowed the scope of the doctrine to the point where today it is largely limited to immunities from trial. Further expansion appears unlikely.[67]

1. Effective Finality

The Supreme Court's practical interpretation of the final judgment rule began with the notion of what I call "effective finality." The first such decision came in 1848 in *Forgay v. Conrad*.[68] *Forgay*, however, was soon limited,[69] and later was largely eclipsed by statute.[70] But it did establish two important principles: first, that effective finality, at least in some circumstances, could be a basis to conclude that the final judgment rule was satisfied, and second, that hardship to the parties should not be ignored.[71] Hardship appears again in the mid-twentieth century practical finality cases.[72] Other, more recent cases apply *Forgay*'s notion of effective finality to orders that similarly effectively end litigation in federal court or require immediate transfer of property.[73] By the 1960s, a move was underway to make finality more dependent on the immediate

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64. *See, e.g.*, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545–47 (1949) (discussing the appealability of an order that addressed only the defendant's right to protection under a state statute and that was separate from the merits of the case).

65. *See id.* at 546. ("This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.").

66. *See* Perlman v. United States, 247 U.S. 7, 12 (1918) (holding that the denial of a non-party's claim of privilege may be immediately appealed).

67. Glynn, *supra* note 4, at 212 ("[T]wo recently emphasized limitations . . . effectively preclude expansion of the doctrine.").

68. 47 U.S. (6 How.) 201 (1848).

69. WRIGHT, MILLER & COOPER, *supra* note 17, § 3910, at 308 (citing Pulliam v. Christian, 47 U.S. (6 How.) 209 (1848); Perkins v. Fourniquet, 47 U.S. (6 How.) 206 (1848)) ("[*Perkins* and *Pulliam*] gave clear notice that [*Forgay*'s] principle was not to become a broad one.").

70. Glynn, *supra* note 4, at 187–88 (noting the disuse of *Forgay* as a basis for appellate jurisdiction in light of 28 U.S.C. §§ 158(d) & 1292(a)(2)).

71. WRIGHT, MILLER & COOPER, *supra* note 17, § 3910, at 306–307.

72. *See infra* Part II.A.2.

73. *See, e.g.*, Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711–15 (1996) (holding that the lower court's abstention-based remand order was appealable as a final decision); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp. 460 U.S. 1, 8–9 (1983) (holding a court order denying a party's arbitration rights to be "final for purposes of appellate jurisdiction").

effects of the order under review,[74] and it saw fruition in the Court's practical finality cases.[75]

a. Forgay v. Conrad

The Supreme Court's 1848 decision in *Forgay v. Conrad* was the Court's first exposition on the final judgment rule.[76] The circuit court had ordered the defendants to deliver to the plaintiff, assignee in bankruptcy, property that the debtor had previously fraudulently conveyed to the defendants.[77] The lower court's order "not only decide[d] the title to the property in dispute, and annul[ed] the deeds under which the defendants claim[ed], but also direct[ed] the property in dispute to be delivered to the complainant, and award[ed] execution."[78] The lower court, however, retained jurisdiction to complete an accounting.[79]

The Supreme Court held that the order was final.[80] The Court concluded that the lower court's decree resolved all matters as to all parties—the accounting being merely a determination of what was owed rather than who was legally in the right.[81] The Court noted that no further action in the lower court, apart from a motion for reconsideration, would affect the outcome of the case.[82] The Court was particularly troubled that, because the legal rights of the parties had been established and the lower court's order was given immediate effect, postponing review could subject the defendants to irreparable injury.[83] If the lower court's order to turn over the property was carried out and the property was sold to pay the debtor's creditors, the defendants would not be able to defend their rights to the property on appeal.[84]

The Court was careful to distinguish this case from those cases where the money or property is kept within the jurisdiction of the court for the pendency of proceedings.[85] And, indeed, several decisions following *Forgay* establish that the holding cannot be applied where the order in question does not call for the immediate transfer of property.[86] Subsequent cases applied *Forgay* by holding

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74. *See* discussion *infra* Part II.A.1.c.

75. *See* discussion *infra* Part II.A.2.

76. WRIGHT, MILLER & COOPER, *supra* note 17, § 3910, at 306 (citing Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848)) ("*Forgay* . . . provided the first secure basis for interpreting the final judgment requirement flexibly . . . .") (emphasis added).

77. *Forgay*, 47 U.S. (6 How.) at 203.

78. *Id.* at 204.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 204–05.

86. *See, e.g.*, Craighead v. Wilson, 59 U.S. (18 How.) 199, 202 (1855) (distinguishing between a case involving only an accounting and the situation in *Forgay*, which included an

that orders are final when they require immediately divesting of or restoring possession of property.[87] But the early cases limiting *Forgay*'s reach ensured that it would never become a widely used basis for appellate jurisdiction, and lower courts have largely followed the Supreme Court's admonition that orders directing the immediate transfer of property generally should not be entered as interlocutory.[88] In any event, the current utility of *Forgay* has largely been overtaken by statutory developments. Congress has now provided for discretionary interlocutory appeal of bankruptcy orders in the courts of appeals,[89] and orders directing the immediate transfer of property are rare outside of the bankruptcy context.[90]

Despite its lack of practical application today, the importance of *Forgay* as a watershed decision in the development of the law of appellate jurisdiction cannot be underestimated. Most importantly, *Forgay* established that "[the Supreme Court] ha[d] not heretofore understood the words 'final decrees' in [a] strict and technical sense, but ha[d] given to them a more liberal, and . . . a more reasonable construction, and one more consonant to the intention of the legislature."[91] How liberal a construction Congress provided for remains the focus of all further development of final judgment jurisprudence. *Forgay* also established two foundational principles of effective finality. First, it attempted a "reasonable construction" of the final judgment rule by declaring that ministerial acts remaining to be completed by the trial court will not prevent finality when all other proceedings have concluded.[92] Second, *Forgay* explained that hardship to the parties may be a relevant criterion in determining whether the final judgment rule has been satisfied.[93] Hardship, however, did not come into full

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immediate divesting of property); Pulliam v. Christian, 47 U.S. (6 How.) 209, 212 (1848) (holding that a decree involving an accounting of matters arising under a trust is not final and cannot be appealed); Perkins v. Fourniquet, 47 U.S. (6 How.) 206, 208–09 (1848) (distinguishing between an ordinary interlocutory order in preparation of a final hearing and *Forgay*).

87. *See, e.g.*, Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 127 (1945) ("Since, by awarding an execution, the Nebraska Supreme Court directed immediate possession of the property to be transferred, the case comes squarely within *Forgay v. Conrad*, and *Carondelet Canal Co. v. Louisiana*, and the challenge to our jurisdiction cannot be sustained." (citations omitted) (citing Forgay, 47 U.S. (6 How.) 201; Carondelet Canal Co. & Navigation Co. v. Louisiana, 233 U.S. 362 (1914))); *Carondelet*, 233 U.S. at 371 ("The judgment disposes of and orders the delivery of practically all of the property sued for . . . . That is, all was decreed that it was the purpose of the suit to have decreed and which not only constituted its success, but which involved and disposed of the Federal right asserted by the canal company. The judgment, therefore, has a substantial finality.").

88. *See Forgay*, 47 U.S. (6 How.) at 205–06.

89. *See* 28 U.S.C. § 158(d)(2)(A) (2006).

90. Glynn, *supra* note 4, at 188. Outside of the bankruptcy context, 28 U.S.C. § 1292(a)(1) provides for appellate jurisdiction over orders in the nature of injunctions. Federal Rule of Civil Procedure 54(b) may also provide some relief in similar situations. *See* Glynn, *supra* note 4, at 188 n.44 ("54(b) may also provide a vehicle for review in certain contexts . . . .").

91. *Forgay*, 47 U.S. (6 How.) at 203.

92. *Id.* at 203–04.

93. *Id.* at 204; WRIGHT, MILLER & COOPER, *supra* note 17, § 3910, at 307.

fruition as a criterion of finality until the Court began to apply a practical approach.[94]

b. Moses H. Cone *and* Quackenbush

Effective finality was largely limited to *Forgay* and its progeny for nearly 150 years until 1983, when the Supreme Court found effective finality in a slightly different context in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[95] The hospital entered into a contract with a construction contractor.[96] The contract specified that certain disagreements would first be submitted to the architect, and his decisions, or disputes he failed to decide, could be submitted for binding arbitration.[97] Although Mercury notified the architect of its claims for delay and impact costs, the hospital filed suit in state court instead, seeking a judicial declaration that Mercury had lost any right it may have had to arbitration.[98] Mercury countered by filing suit in the district court, seeking an order compelling arbitration.[99] On the hospital's motion, the district court granted a stay (really an abstention under the *Colorado River* doctrine[100]) pending resolution of the state court action because the two cases involved the identical issue of the arbitrability of Mercury's claims.[101]

The Supreme Court held that the district court's stay order was final because the appellant was "effectively out of court."[102] The Court went on to explain that normally when a federal court abstains in favor of a state court action, the expectation is that the federal action will resume if the plaintiff does not win relief in the state forum.[103] By contrast, the district court here based its stay on the fact that the state court would also rule on the question of the arbitrability of Mercury's claims.[104] The Supreme Court concluded that the district court's ruling was final and that it was an abuse of discretion.[105]

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94. *See* discussion *infra* Part II.A.2.

95. 460 U.S. 1 (1983).

96. *Id.* at 4.

97. *Id.* at 4–5.

98. *Id.* at 6–7.

99. *Id.* at 7.

100. *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–21 (1976) (holding that a federal court may, in its discretion, abstain from exercising jurisdiction where duplicative litigation is underway in state court).

101. *Moses H. Cone*, 460 U.S. at 7.

102. *Id.* at 10 (quoting Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 n.2 (1962)) (internal quotation marks omitted); *cf.* United States v. Wood, 295 F.2d 772, 774, 777–78 (5th Cir. 1961) (holding that an order denying the government's motion for a temporary restraining order prohibiting a state court trial against a black man arrested for breach of the peace in the course of registering voters was final because the practical effect of the district court's order was to moot the government's civil rights case against the state).

103. *Moses H. Cone*, 460 U.S. at 10.

104. *Id.*

105. *Id.* at 10, 13–28. The Court also held, in the alternative, that the order was appealable under the collateral order doctrine. *Id.* at 11–13.

Thirteen years later, the Supreme Court extended its holding in *Moses H. Cone* to orders remanding (in addition to staying) cases based on abstention doctrines.[106] Concluding that *Moses H. Cone* controlled, the Supreme Court held that "[t]he District Court's order remanding on grounds of *Burford* abstention [was] in all relevant respects indistinguishable from the stay order [it] found to be appealable in *Moses H. Cone*."[107] The Court noted that the order put the plaintiffs "effectively out of court"[108] and that its effect, like the order in *Moses H. Cone*, was to "surrender jurisdiction of a federal suit to a state court."[109] Indeed, the Court explained that finality was even clearer in the case of a remand because unlike a stay, "the district court disassociates itself from the case entirely, retaining nothing of the matter on the federal court's docket."[110]

c. Brown Shoe Co. v. United States

A third variant on the theme of effective finality is found in *Brown Shoe Co. v. United States*.[111] Two companies agreed to merge, and the United States sought to enjoin the merger under § 7 of the Clayton Act.[112] The district court agreed with the government and ordered the surviving corporation to refrain from acquiring any further interest in the target corporation, to divest the target's stock and assets, and to propose a plan for carrying out the divestiture order.[113] The company appealed directly to the Supreme Court under the Expediting Act of 1903.[114] At oral argument, the Court raised the issue of appellate jurisdiction, observing that the district court had reserved a ruling on the specific plan for implementation of the divestiture order.[115]

The Court began its jurisdictional inquiry with broad language explaining that "it ha[d] adopted essentially practical tests for identifying those judgments which [were], and those which [were] not, to be considered 'final.'"[116] The Court continued, noting that "[a] pragmatic approach to the question of finality ha[d] been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure."[117]

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106. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 715 (1996) (citing Catlin v. United States, 324 U.S. 229, 233 (1945)).

107. *Id.* at 714.

108. *Id.* (quoting *Moses H. Cone*, 460 U.S. at 11 n.11) (internal quotation marks omitted).

109. *Id.* (quoting *Moses H. Cone*, 460 U.S. at 11 n.11) (internal quotation marks omitted).

110. *Id.*

111. 370 U.S. 294 (1962).

112. *Id.* at 296.

113. *Id.* at 304.

114. *Id.* at 304–305 (citing Expediting Act of 1903, Pub. L. No. 57–82 § 2, 32 Stat. 823, 823 (1903) (codified as amended at 15 U.S.C. § 29 (2006)).

115. *Id.* at 305.

116. *Id.* at 306.

117. *Id.* (quoting FED. R. CIV. P. 1).

The Court concluded that the district court's decree had "sufficient indicia of finality" to vest the Court with appellate jurisdiction.[118] First, the Court noted that because the company contended that no order of divestiture could have been proper, the issues of how to carry out divestiture still pending before the district court were "sufficiently independent of, and subordinate to, the issues presented by [the] appeal."[119] Because the question of how to carry out divestiture was independent of whether the order compelling divestiture was correct, the Court's conclusion that it was vested with appellate jurisdiction would not risk repetitive consideration of the same question.[120] Second, the Court observed that withholding review could impede implementation of the district court's divestiture order because changing market conditions could make the order "impractical or otherwise unenforceable."[121] Finally, the Court noted that it had recently taken jurisdiction in similar cases and that experience showed that piecemeal appeals did not typically result.[122]

Thus, *Brown Shoe Co.* bridges, temporally and analytically, the reasoning in *Forgay* and *Moses H. Cone*. *Brown Shoe Co.*'s holding that the lack of a complete divestiture plan did not stand in the way of appellate jurisdiction mirrors *Forgay*'s holding that an accounting will not prevent jurisdiction where the court has otherwise conclusively determined all claims as to all parties. *Brown Shoe Co.*'s concern that the denial of review might impede the ability of the divestiture plan to be executed foreshadowed the Court's similar holding in *Moses H. Cone*, namely, that finality exists where the effect of the order is to put a party out of court.

Effective finality, therefore, comes in two varieties. First, there is the *Forgay*-style order that resolves all claims against all parties but leaves some technical or ministerial matter, "independent of, and subordinate to"[123] the ruling on the merits, to be done apart from the entry of judgment, where delay in resolving the substantive issue would endanger the availability of the relief sought. This reasoning has been employed to hold that a pending request for attorney's fees or costs does not prevent the appealability of an otherwise final order, so long as it would not moot or revise the underlying order.[124] Second, there is the *Moses H. Cone/Quackenbush*-style order, which effectively puts a party out of court or endangers the right to federal review of the claims and is

118. *Id.* at 308.
119. *Id.* at 308–09.
120. *Id.* at 309.
121. *Id.*
122. *Id.* at 309–11.
123. *Id.* at 308.
124. *See* Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199, 202–03 (1988). Amendments to the federal rules subsequently limited the scope of *Budinich*. *See* Glynn, *supra* note 4, at 192 n.60.

therefore final, but which masquerades as an interlocutory order.[125] *Brown Shoe Co.* employs some reasoning from both.

The broad language employed in *Brown Shoe Co.* also heralded a trend prevalent throughout the 1960s and 1970s toward analyzing finality with a greater eye on its effects on the parties.[126] *Brown Shoe Co.*'s conclusion that there were "sufficient indicia of finality"[127] signals the balancing approach the Supreme Court would take in one contentious case two years later.[128] And its strong language in support of a "pragmatic approach"[129] prefigured the death knell doctrine—the flagship of practical finality.[130]

2. *Practical Finality*

The Supreme Court's practical interpretation of the final judgment rule reached its zenith in what I call the "practical finality" cases. Unlike effective finality, practical finality is derived from circumstances external to the order sought to be reviewed—most often the ability or willingness of the appellant to continue the litigation in the face of a devastating adverse interlocutory ruling (i.e., an order that "sounds the death knell" of the action). The furthest the Court ever took practical finality was a one-time endorsement of an ad hoc balancing test.[131] The Court has since repudiated the death knell doctrine and limited the one case applying a balancing test to its facts.[132] Although practical finality is no longer a basis for invoking the jurisdiction of the courts of appeals,[133] it provides important context to any discussion suggesting further tinkering with the final judgment rule.

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125. *See, e.g.*, *Moses H. Cone*, 460 U.S. at 10 (holding that an interlocutory stay order effectively amounted to a "dismissal of the suit" for one of the parties and therefore was appealable as a final judgment).

126. *See, e.g.*, Ott v. Speedwriting Publ'g Co., 518 F.2d 1143, 1145–49 (6th Cir. 1975) (analyzing whether an order denying a plaintiff's request to prosecute her case as a class action rises to the level of a final order based on the practical effects to the plaintiff); Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 121 (2d Cir. 1966) ("Dismissal of the class action . . . will irreparably harm Eisen and all others similarly situated, for, as we have already noted, it will for all practical purposes terminate the litigation.").

127. *Brown Shoe Co.*, 370 U.S. at 308.

128. Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152–53 (1964).

129. *Brown Shoe Co.*, 370 U.S. at 306.

130. *See* discussion *infra* Part II.A.2.a.

131. *See* Gillespie, 379 U.S. at, 152–53.

132. Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 n.30 (1978) (citing *Gillespie*, 379 U.S. at 154) ("[I]f *Gillespie* [was] extended beyond the unique facts of that case, § 1291 would be stripped of all significance.").

133. *Id.* at 477; Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 439 (1985) (citing *Coopers & Lybrand*, 437 U.S. at 473–75) (explaining that case-by-case determination of finality was in conflict with 28 U.S.C. § 1291).

a. The Death Knell Doctrine

A classic example of the death knell doctrine is a ruling denying class certification where the claims of the individual class members are too small for the case to proceed. For example, in *Eisen v. Carlisle & Jacquelin*,[134] the "sole question presented [was] whether [the] appellant [could] take an appeal from an order of the district court dismissing his class action, but permitting him to litigate his individual claims."[135] The Second Circuit concluded that "[t]he alternatives [were] to appeal now or to end the lawsuit for all practical purposes [because] . . . no lawyer of competence [would] undertake this complex and costly case to recover $70 for Mr. Eisen."[136] The court summarized its holding by stating that "[w]here the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed."[137]

The death knell doctrine, because it was predicated on a reckoning of the improbability of further litigation, caused problems for courts attempting to determine the certainty of an action's imminent demise.[138] A few circuits rejected the doctrine entirely.[139] Judge Friendly called for intervention by the Supreme Court.[140]

In *Coopers & Lybrand v. Livesay*,[141] the Court resolved the circuit split, disapproving of appellate jurisdiction under the death knell doctrine.[142] In that case, investors who had sustained a loss in the stock market sued, "on behalf of themselves and . . . similarly situated purchasers," the corporation and the accounting firm that had audited the corporation's prospectus.[143] The district court determined that the case could not be maintained as a class action, and the investors filed a notice of appeal.[144] The court of appeals, after concluding that the individual claims would not be litigated, concluded that appellate jurisdiction existed under the death knell doctrine and reversed the denial of class certification.[145] After noting that the parties' policy arguments were irrelevant, the Supreme Court observed that, although class actions are a special type of litigation, the rules governing class actions contained no special provisions for appeals.[146]

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134. 370 F.2d 119 (2d Cir. 1966).
135. *Id.* at 119.
136. *Id.* at 120.
137. *Id.* at 121.
138. *See* Redish, *supra* note 5, at 97 n.57.
139. *See, e.g.*, King v. Kan. City S. Indus., Inc., 479 F.2d 1259, 1260 (7th Cir. 1973) (per curiam) (holding that an interlocutory order denying class action status was not appealable); Hackett v. Gen. Host Corp., 455 F.2d 618 625–26 (3d Cir. 1972) (same).
140. Korn v. Franchard Corp., 443 F.2d 1301, 1307 (2d Cir. 1971) (Friendly, J., concurring).
141. 437 U.S. 463 (1978).
142. *See id.* at 469–76.
143. *Id.* at 465.
144. *Id.* at 466.
145. *Id.* at 466–67 (citing Livesay v. Punta Gorda Isles, Inc., 550 F.2d 1106 (8th Cir. 1977)).
146. *Id.* at 470.

The Court reasoned that "if the 'death knell' doctrine ha[d] merit, it would apply equally to . . . many interlocutory [rulings] in ordinary litigation . . . that may have such tactical economic significance that a defeat is tantamount to a 'death knell' for the entire case."[147] The Court gave a litany of reasons for rejecting the doctrine: (1) setting an amount-in-controversy requirement for appellate jurisdiction was "a legislative, not a judicial, function" (and when it depends on aggregated claims, it may depend on joinder decisions rather than finality); (2) the doctrine is deleterious to the administration of justice because it requires building a record regarding the factors relevant to the doctrine; (3) it provides a potential avenue for successive appeals on the same issue; (4) "it authorizes *indiscriminate* interlocutory review;" and (5) it "operates only in favor of plaintiffs."[148] Thus, the Court held that where the litigation ends because of the plaintiffs' response to the court's ruling, rather than because of the ruling itself, the ruling cannot be final for purposes of appeal.[149]

The petitioners in *Coopers & Lybrand* relied in part on an earlier decision in *Gillespie v. United States Steel Corp.*,[150] which suggested that a balancing approach to finality might be appropriate under certain circumstances.[151] *Gillespie* has been roundly criticized as enfeebling the final judgment rule to the point where it was unrecognizable,[152] and the Supreme Court in *Coopers & Lybrand* limited *Gillespie* to its facts.[153]

b. Gillespie *Balancing*

In *Gillespie*, the plaintiff, the adminstratrix of her son's estate, sued her deceased son's employer on behalf of herself and the decedent's siblings under the Jones Act and general maritime law for negligence, wrongful death, and the son's pain and suffering.[154] The district court determined that the Jones Act supplied the exclusive remedy and struck all parts of the complaint that referred to wrongful death under state law or to recovery for the decedents' siblings, who, the court determined, were not "entitled to recovery under the Jones Act while

147. *Id.*

148. *Id.* at 472–74, 476.

149. *See id.* at 477.

150. 379 U.S. 148 (1964).

151. *See id.* at 152–53.

152. Nagel, *supra* note 20, at 204 n.27 (quoting Randall J. Turk, Note, *Toward a More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. § 1292*, 67 GEO. L.J. 1025, 1034 (1979)); Redish, *supra* note 5, at 118, 128 (noting that "*Gillespie* is astounding for its clouded reasoning and enigmatic conclusions" and "devoid of any persuasive analysis," but advocating for a similar result).

153. *Coopers & Lybrand*, 437 U.S. at 477 n.30 ("If *Gillespie* were extended beyond the unique facts of that case, § 1291 would be stripped of all significance.").

154. *See Gillespie*, 379 U.S. at 149–50 (quoting 46 U.S.C. § 30104 (2006) (originally enacted as Jones Act, Pub. L. No. 66–261, § 20, 41 Stat. 988, 1007 (1920)); OHIO REV. CODE ANN. §§ 2125.01, 2305.21 LexisNexis 2007).

their mother was living."[155] The mother immediately appealed, and the employer moved to dismiss for lack of appellate jurisdiction.[156] Without addressing the jurisdictional issue, the court of appeals addressed the merits and affirmed the district court.[157]

The Supreme Court observed that finality is an elusive concept that has often been given a practical construction.[158] The Court noted the competing considerations involved in determining whether an order is final for purposes of appeal, including "the inconvenience . . . of piecemeal review on the one hand and the danger of denying justice by delay on the other."[159] The Court acknowledged that the mode of proceeding by the court of appeals could [have been] considered "piecemeal" but that "it [did] not appear that the inconvenience and cost of trying [the] case [would] be greater."[160] The Court therefore concluded that it could not say that the court of appeals "chose wrongly under the circumstances."[161]

Gillespie, therefore, appeared to countenance finality in "any situation in which on balancing the competing practical factors a court [felt] it [was] in the interests of justice to allow an interlocutory appeal."[162] Despite this seemingly broad invitation to find finality where justice requires, the courts of appeals never made much of *Gillespie*.[163] Some commentators believe *Gillespie* was an attempt to articulate a standard by which the Supreme Court could review "the merits of appeals . . . mistakenly . . . taken from nonfinal decisions."[164]

In any event, the Court later limited *Gillespie* to its facts.[165] In addition to its repudiation of practical finality in *Coopers & Lybrand*, it also clarified that:

> In *Gillespie*, [it] upheld an exercise of appellate jurisdiction of what it considered a marginally final order that disposed of an unsettled issue of national significance because review of that issue unquestionably "implemented the same policy Congress sought to promote in § 1292 (b)," and the arguable finality issue had not been presented to [the] Court until argument on the merits, thereby ensuring that none of the

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155. *Id.* at 150–51.

156. *Id.* at 151 (quoting 28 U.S.C. § 1291 (2006)).

157. *Id.* at 151–52 (quoting Gillespie v. U.S. Steel Corp., 321 F.2d 518, 532 (6th Cir. 1963)).

158. *See id.* at 152 (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545–46 (1949)).

159. *Id.* at 152–53 (quoting Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)) (internal quotation marks omitted).

160. *Id.* at 153 (internal quotation marks omitted).

161. *Id.*

162. Redish, *supra* note 5, at 119.

163. WRIGHT, MILLER & COOPER, *supra* note 17, § 3913, at 479 ("Several other sources underscore the failure to develop the expansionist possibilities of the *Gillespie* decision.") (emphasis added).

164. *Id.* § 3913, at 484.

165. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 n.30 (1978).

> policies of judicial economy served by the finality requirement would be achieved were the case sent back with the important issue undecided.[166]

More succinctly, in *Coopers & Lybrand* the Court explained that "[i]f *Gillespie* were extended beyond the unique facts of that case, § 1291 would be stripped of all significance."[167]

Although *Coopers & Lybrand* definitively shut the door on practical finality in the context of judicial exceptions to the final judgment rule,[168] the death knell doctrine has recently made a resurgence as a major consideration in whether a court of appeals will accept a discretionary appeal from an order granting or denying class certification under Federal Rule of Civil Procedure 23(f).[169] The definitiveness of *Coopers & Lybrand*, however, is not characteristic of finality jurisprudence generally, nor of its most contentious and most litigated exceptions in the partial effective finality cases.

3. *Partial Effective Finality*

Partial effective finality is the most enigmatic corner of a cryptic area of law. The Supreme Court first construed the final judgment rule to permit an appeal from an order directing the clerk of court to produce documents to the grand jury where the lower court's order was neither truly final nor effectively final as to all parties and all claims.[170] Considerations of the effectiveness of a later appeal and the tangential nature of the subject matter of the appeal to the underlying action have prompted many courts to extend this holding to contempt orders other than those against parties to civil proceedings. Courts have concluded that partial effective finality may be sufficient to permit an appeal from a contempt order where the order is independent of the underlying proceedings, the object of the order is a tangential player in the underlying proceedings, or both.

Partial effective finality did not become a major player in finality jurisprudence until the Supreme Court's decision in *Cohen v. Beneficial Industrial Loan Corp.*[171] introduced what has come to be known as the collateral order doctrine.[172] The doctrine is one of the most dominant fixtures on the

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166. *Id.* (citation omitted).

167. *Id.*

168. *See* Glynn, *supra* note 4, at 194 ("[T]he death knell doctrine is undeniably dead.").

169. *See, e.g.*, Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999) (considering the death knell doctrine when ruling on whether to permit a Rule 23(f) appeal of a district court order denying reconsideration of a class certification).

170. *See* Perlman v. United States, 247 U.S. 7, 12–15 (1918). *See generally* Michael R. Lazerwitz, Comment, *The* Perlman *Exception: Limitations Required by the Final Decision Rule*, 49 U. CHI. L. REV. 798 (1982) (explaining the implications of the *Perlman* holding).

171. 337 U.S. 541 (1949).

172. *Id.* at 546 ("This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be

appellate jurisdiction landscape and is certainly the root of much of the recent criticism of appellate jurisdiction generally.[173] After initial expansion of appellate jurisdiction from the 1940s to the 1960s, the Court has restricted its application since the mid-1980s.[174] This development, however, has clouded the basic tenets of appellate jurisdiction.

a. The Perlman *Doctrine*

The *Perlman* doctrine permits immediate appeal by a non-party claiming a privilege when the district court has denied the non-party's claim.[175] This exception to the final judgment rule is narrow and lacking in clearly identified bounds.[176] It does, however, remain a viable avenue to appellate review.[177]

Perlman was the inventor of a device called a demountable rim.[178] He sued a company for infringing his patent and won a judgment.[179] During the trial, he produced certain exhibits in support of his case.[180] After the case concluded, Perlman formed the Perlman Rim Corporation and assigned his patent to it.[181] Some time later, the corporation sued a different company for infringing the patent.[182] Prior to trial, Perlman Rim Corporation moved to dismiss the action without prejudice.[183] The court granted the motion on the condition that the exhibits Perlman had produced in the earlier case be impounded in the custody of the clerk.[184] Thereafter, the U.S. Attorney sought access to the exhibits in his investigation of Perlman personally for possible crimes against the United States.[185] Perlman filed for an injunction against the government on the grounds that turning over possibly incriminating evidence without his consent infringed his rights under the Fourth and Fifth Amendments, but the court denied relief.[186]

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denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.").

173. *See* Steinman, *supra* note 2, at 1238–39.

174. *See* Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539, 540 (1998) (citing Mitchell v. Forsyth, 472 U.S. 511 (1985)) ("Beginning in the early 1960s, however, the Court began the process of expanding the collateral order doctrine, culminating in the 1985 decision of *Mitchell v. Forsyth*."); Glynn, *supra* note 4, at 206 n.120 ("Indeed, *Mitchell* marked both the high point and the end of a period of expansive use of the doctrine.").

175. Lazerwitz, *supra* note 170, at 798.

176. *See id.* at 802–03.

177. *See id.* at 798.

178. Perlman v. United States, 247 U.S. 7, 8 (1918).

179. *Id.* (citing Perlman v. Standard Welding Co., 231 F. 453, 461 (S.D.N.Y. 1915)).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 9.

185. *Id.*

186. *Id.* at 10–11.

Perlman appealed, and the government moved to dismiss the appeal for lack of appellate jurisdiction.[187]

The Supreme Court found the government's position that the lower court's order was not final "somewhat strange."[188] The Court noted that the government's contention, if accepted, would mean "that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way."[189] The Court also noted that Perlman's request for injunctive relief was "independent" of the underlying proceedings.[190]

Courts have discerned two bases for applying the *Perlman* doctrine to allow immediate appeal from the rejection of a non-party's claim of privilege. First, the order is effectively final as to the non-party because he is "powerless to prevent compliance with the order."[191] Unlike a party, a non-party has no option to prevent compliance by disobeying the order and risking contempt.[192] Doing so would both avert the mischief and enable an appellate court to review the propriety of the lower court's decision.[193] Second, the non-party's claim "is a 'collateral matter' . . . 'distinct from the general subject of the litigation.'"[194]

b. Contempt

The idea that partial effective finality may support appellate jurisdiction where the court resolves all claims against a particular party (or non-party), or where the issues resolved are collateral to the underlying merits of the litigation, took greater shape and definition in the contempt cases. Contempt proceedings, like other litigation, are divided into criminal and civil sides. Criminal contempt consists of sanctions imposed to "vindicate the court's authority and punish disobedience." Civil contempt, by contrast, is "designed to coerce compliance for the benefit of an opposing party or provide compensation for injuries arising from past disobedience."[195] The distinction is crucial because appellate jurisdiction of appeals from contempt sanctions may turn on the nature of the

187. *Id.* at 12.
188. *Id.* at 12–13.
189. *Id.* at 13.
190. *Id.* at 12.
191. Glynn, *supra* note 4, at 191 n.56.
192. *Id.* The Court has similarly suggested that the impossibility of later review is a basis for the doctrine, *see* United States v. Ryan, 402 U.S. 530, 533 (1971); Cobbledick v. United States, 309 U.S. 323, 324, 328–29 (1940), but contempt itself is a means to gain appellate review, Alexander v. United States, 201 U.S. 117, 121–22 (1906), so these reasons are not analytically distinct.
193. *See* Lazerwitz, *supra* note 170, at 801 (citing *Perlman*, 247 U.S. at 13).
194. Glynn, *supra* note 4, at 191 n.56.
195. WRIGHT, MILLER & COOPER, *supra* note 17, § 3917, at 377.

sanction imposed.[196] In addition, an order may be final as to a particular person where the person is not a party to the underlying proceedings.[197]

i. Non-Party Contemnors

The Supreme Court, in *Bessette v. W.B. Conkey Co.*,[198] first held that a non-party can appeal a contempt adjudication where the underlying proceedings have become final.[199] The Court, however, went out of its way to explain that had there been an appeal from the underlying case it would not have brought up the contempt order because the contemnor was a non-party.[200] Because the order was final as to the non-party, it "[could not] be regarded as interlocutory."[201]

The Court applied the dicta in *Bessette* that criminal contempt orders against non-parties are final decisions when it held in *Lamb v. Cramer*[202] that a non-party can appeal from a civil contempt order.[203] In *Lamb*, the Court reasoned that the contempt order was a final adjudication of the rights asserted and that it was independent of the underlying proceedings.[204] But it was not until 1988 that the Court put the two together and conclusively held that "[t]he right of a nonparty to appeal an adjudication of contempt cannot be questioned. The order finding a nonparty witness in contempt is appealable notwithstanding the absence of a final judgment in the underlying action."[205]

ii. Party Contemnors

The appealability of contempt orders against parties has undergone a different evolution. First, in *In re Christensen Engineering Co.*,[206] the Court extended *Bessette* to hold that a criminal contempt citation is immediately appealable regardless of whether it is directed against a party or a non-party.[207]

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196. *See id.* § 3917, at 379.

197. *See id.* § 3917, at 383.

198. 194 U.S. 324 (1904).

199. *Id.* at 338.

200. *Id.* at 329–30.

201. *Id.* Partial effective finality as to parties has been applied in contexts other than contempt. *See, e.g.*, Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 513 (1950) ("[I]t is hard to see why the exclusion of an intervenor from the case should be less final when it is based upon the evidence than when it is based upon pleadings. In either case, the lawsuit is all over so far as the intervenor is concerned.").

202. 285 U.S. 217 (1932).

203. *See id.* at 220–21.

204. *Id.*

205. U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 76 (1988) (citing United States v. Ryan, 402 U.S. 530, 532 (1971); Cobbledick v. United States, 309 U.S. 323, 328 (1940)).

206. 194 U.S. 458 (1904).

207. *Id.* at 461; *see also* Alexander v. United States, 201 U.S. 117, 121 (1906) ("In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving to him no

Civil contempt orders against parties are treated differently and are the only category of contempt order that is not independently appealable.[208] The Court first held that the right to review of criminal contempt citations was derived from the statute conferring appellate jurisdiction over criminal matters generally.[209] There being no equivalent authority in the civil context, the Court held that review of a civil contempt order must await final judgment.[210]

The contempt cases illustrate two bases for partial effective finality. First, the cases establish that criminal contempt is always appealable because that issue is independent of the underlying litigation.[211] As a corollary of that independence, an appeal from the underlying litigation would not bring up the contempt order, so awaiting final judgment would not enable later review.[212] Contempt orders against non-parties, whether civil or criminal, are similarly final.[213] In those cases, finality exists as to the non-party contemnor because the contemnor is not sufficiently connected to the parties in the underlying litigation.[214] Thus, a contempt decree is final unless it is both tied up with the merits of the underlying litigation and reviewable on appeal of the final judgment on the merits—a situation present only with regard to civil contempt sanctions against a party to the underlying proceeding.[215]

Although the special treatment of civil contempt of parties has been criticized,[216] the Court's identification of separate parties and separate issues as indicative of finality is typical of the Court's partial effective finality jurisprudence. As under the *Perlman* doctrine, contempt orders, although not effectively final, may be partially effectively final because the issues are collateral to the underlying litigation, either because of the nature of the proceedings or because of the relation of the contemnor to those proceedings.[217]

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alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go further and punish the witness for contempt of its order, then arrives a right of review . . . .").

208. *See generally* Doyle v. London Guarantee & Accident Co., 204 U.S. 599, 603–04, 607 (1907) (citing *Christensen*, 194 U.S. 458) (indicating that civil contempt proceedings against non-parties and all criminal contempt orders are immediately appealable, but that civil contempt orders against parties are only appealable upon the court entering a final decree in the underlying action).

209. *Id.* at 604.

210. *Id.* at 608; Fox v. Capital Co., 299 U.S. 105, 107 (1936) ("The rule is settled in this Court that except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt.").

211. *See* Petroleos Mexicanos v. Crawford Enters., Inc., 826 F.2d 392, 398 (5th Cir. 1987); Glynn, *supra* note 4, at 190 n.55.

212. *See* Glynn, *supra* note 4, at 190 n.55.

213. *See id.*

214. *See id.*

215. *See id.*

216. *See* Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85, 92–99 (1992).

217. *See* Perlman v. United States, 247 U.S. 7, 12–13 (1918).

Partial effective finality, however, is expressed most dramatically in the collateral order doctrine.

c. The Collateral Order Doctrine

The genesis of the most important judicially-crafted exception to the final judgment rule is the Supreme Court's decision in *Cohen v. Beneficial Industrial Loan Corp.*[218] The *Cohen* Court held that § 1291 did not prevent immediate review of rulings that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[219] Determining what classes of orders fall within this definition has been one of the most often addressed issues by the Supreme Court by the last half-century.[220]

Shortly after the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*,[221] Sol Cohen, a shareholder in the Beneficial Industrial Loan Corporation, brought a derivative action in federal court against the corporation's officers and directors under the court's diversity jurisdiction.[222] The company moved to require Cohen to post security to pay the costs of defense if he lost, as required under New Jersey law.[223] The district court denied the motion, concluding that a federal court was not bound to apply the state law security requirement.[224] The corporation appealed,[225] and the Third Circuit, after concluding that, under *Erie*, the underlying order was appealable, reversed on the merits.[226] The Supreme Court granted certiorari on both the appealability of the district court's order and on the application of the state law security requirement.[227]

The Court held that although the appellate function is one of review and not intervention, "the [d]istrict [c]ourt's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken."[228] The Court explained that the district court's order

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218. 337 U.S. 541 (1949).

219. *Id.* at 546.

220. *See* Glynn, *supra* note 4, at 204 ("[T]he collateral order doctrine and mandamus review have had the most troubled history."); Steinman, *supra* note 2, app. at 1296–97 (listing forty-two Supreme Court cases addressing the issue of appellate jurisdiction from 1980 to 2007).

221. 304 U.S. 64 (1938).

222. *Cohen*, 337 U.S. at 543; Anderson, *supra* note 174, at 543 (citing *Cohen*, 337 U.S. at 543; *Erie*, 304 U.S. 64). After Sol's death, his widow, Hannah, prosecuted the action as the executrix of his estate. Beneficial Indus. Loan Corp. v. Smith, 170 F.2d 44, 47 (3d Cir. 1948).

223. *Cohen*, 337 U.S. at 544–45.

224. Cohen v. Beneficial Indus. Loan Corp., 7 F.R.D. 352, 354–55 (1947).

225. *Cohen*, 337 U.S. at 545.

226. *Beneficial Indus. Loan Corp.*, 170 F.2d at 49–50, 59.

227. *Cohen*, 337 U.S. at 543, 545.

228. *Id.* at 546.

> did not make any step toward final disposition of the merits of the case and [would] not be merged in final judgment. When that time [came], it [would] be too late effectively to review the present order, and the rights conferred by the statute, if it [was] applicable, [would] have been lost, probably irreparably.[229]

Thus, where the particular issue decided by the district court was conclusive as to that issue and was not a step toward the final judgment, and where later review would be unavailing, appellate jurisdiction attached. The Court summarized its holding by stating that the case "appear[ed] to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[230]

Applying this standard has not resulted in a uniform body of law.[231] Indeed, even the standard itself has undergone change over the years.[232] Instead of linear development, the collateral order doctrine has been formed by successive waves of expansion and contraction.[233] The overlapping and doctrinally discordant precedent that resulted from this process has led many commentators, and at least one Justice, to call for change.[234] Recently, the Court's jurisprudence has made application of the doctrine more predictable,[235] but its new, narrow interpretation comes at the expense of distancing the doctrine from the logic underlying the other types of effective finality.

i. The Early Confusion: A Failure to Explain and Define

Scholars disagree on the breadth of the Supreme Court's early application of the collateral order doctrine, calling it both "liberal" and "narrow."[236] What is

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229. *Id.*

230. *Id.*

231. *See* Anderson, *supra* note 174, at 547.

232. *Id.* at 548–85 (chronicling the early construction of the collateral order doctrine and its later expansion).

233. *See id.* at 551.

234. *E.g.*, Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 292 (1988) (Scalia, J., concurring) ("I do think . . . that our finality jurisprudence is sorely in need of further limiting principles, so that *Cohen* appeals will be, as we originally announced they would be, a 'small class [of decisions] . . . too important to be denied review." (alteration in original) (quoting *Cohen*, 337 U.S. at 546)), *superseded by statute*, Civil Justice Reform Act of 1990, Pub. L 101–650, 104 Stat. 5089; Anderson, *supra* note 174, at 606–14 (proposing four remedies to the problems associated with application of the collateral order doctrine).

235. *See* Glynn, *supra* note 4, at 209.

236. *Compare* Anderson, *supra* note 174, at 548 ("For the first decade and a half following *Cohen*, the Supreme Court appeared to adhere to a narrow, mootness-based formulation . . . ."), *with* Martineau, *supra* note 36, at 740 ("For two decades the Supreme Court did not interfere with the liberal use of the collateral order doctrine.").

certain is that in the years following the birth of the doctrine, the Court paid little attention to fleshing out its component parts,[237] and the requirement that the order in question be "too important to be denied review" was largely ignored.[238] Several early cases focused on the ineffectiveness of later review. In *Swift & Co. Packers v. Compania Colombiana Del Caribe*,[239] the plaintiff was granted an order attaching the defendant's ship.[240] "The district court vacated the attachment for lack of jurisdiction," and the plaintiff appealed.[241] The Supreme Court held that the district court's order was appealable under *Cohen* because of the likelihood that a later appeal would be ineffective after the ship had sailed and left American waters.[242] Similarly, in *Stack v. Boyle*,[243] the Court held that a challenge to bail as excessive under the Eighth Amendment was appealable under the collateral order doctrine.[244]

Lloyd Anderson has suggested that these cases, together with the question of pretrial security at issue in *Cohen*, demonstrate that the collateral order doctrine is substantially premised on mootness.[245] Anderson sees the possibility of the court being unable to provide a remedy as the main criterion for determining whether a given order can effectively be reviewed on appeal from a true final judgment and, thus, whether the doctrine applies.[246] A court cannot attach a ship once it has left the jurisdiction;[247] pretrial bail cannot be reduced after a defendant is sentenced;[248] and security for ongoing litigation is useless after the litigation has ended.[249]

Mootness is relevant, to be sure, but there is a great deal of uncertainty surrounding the question of what effective reviewability entails. The collateral

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237. *See* Anderson, *supra* note 174, at 548 (noting that the Court "fail[ed] to be explicit" about the formulation of the doctrine).

238. Martineau, *supra* note 36, at 740 (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)) (internal quotation marks omitted) (noting that the Court "largely ignored" the "serious and unsettled question" prong of the test announced in *Cohen* (internal quotation marks omitted)).

239. 339 U.S. 684 (1950).

240. *Id.* at 685–86. Maritime attachment is a feature of admiralty law that permits a court to gain jurisdiction over an absent defendant and to assure satisfaction of judgment (up to the value of the vessel) by authorizing the marshal to take custody of the vessel during the pendency of proceedings. *See* FED. R. CIV. P. Supp. R. E; ProShipLine, Inc. v. Aspen Infrastructures, Ltd., 585 F.3d 105, 111 (2d Cir. 2009) (quoting Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434, 437, 443 (2d Cir. 2006)).

241. Anderson, *supra* note 174, at 548 (citing *Swift*, 339 U.S. at 687–88).

242. *Swift*, 339 U.S. at 688–89.

243. 342 U.S. 1 (1951).

244. *See id.* at 6–7 (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545–47 (1949)).

245. *See* Anderson, supra note 174, at 548–49 (citing *Stack*, 342 U.S. at 6–7, 12 (Jackson, J., concurring); *Swift*, 339 U.S. at 686–87, 689).

246. *Id.* at 549.

247. *Id.* at 548 (citing *Swift*, 339 U.S. at 689).

248. *Id.* at 549 (citing *Stack*, 342 U.S. at 6–7, 12 (Jackson, J., concurring)).

249. *Id.* at 544 (citing *Cohen*, 337 U.S. at 546).

order doctrine did not develop in isolation, and its development must be viewed with an eye to the greater context of appellate jurisdiction generally. There are several reasons to think that the Court did not intend *Cohen* to apply only in situations where the denial of appellate jurisdiction would moot the relief sought. First, other instances of partial effective finality are split on the question of whether the ineffectiveness of later review is a necessary prerequisite to interlocutory review. The *Perlman* doctrine appears to require it; appeals of contempt citations do not. Contemporaneous application of similar doctrines therefore shed little light on the question. Second, it seems likely that the Court would want to shore up its new, practical construction of the final judgment rule with relatively straightforward cases where firm analogies to other permissible interlocutory appeals could be drawn before proceeding to extend a new doctrine into new territory. Third, new rules typically do not emerge with their final limitations in place. Instead, future cases and future courts are left to make those determinations in the usual way common law is made. Indeed, it is generally thought improper for a court to decide more than the case before it actually requires. The Court's early decisions applying the collateral order doctrine left it open-ended for possible further expansion and much needed clarification.

ii. The Middle Confusion: Expansion, Contraction, and the Growing Distance from Other Doctrines of Finality

From the early 1960s to the late 1970s the collateral order doctrine underwent significant development. Two themes from this period stand out. First, whatever connection the doctrine had to the other judicially-created exceptions largely disappeared. Second, the requirement that an order be effectively unreviewable after final judgment on the merits was significantly weakened. Effective unreviewability no longer meant a reasonable probability of mootness (if it ever was so limited); when the requirement was enforced at all, it encompassed a broader spectrum of orders.

Local No. 438 Construction & General Laborers' Union v. Curry[250] illustrates both of these trends.[251] In *Curry*, an employer sued a union in state court for violating a state right-to-work law and requested a temporary injunction against picketing.[252] The union responded that the state court lacked jurisdiction because the dispute was within the exclusive jurisdiction of the National Labor Relations Board.[253] The state court denied the injunction, the state high court

250. 371 U.S. 542 (1963).

251. *Curry* involves Supreme Court review of a state court decision under 28 U.S.C. § 1257. *Id.* at 543. Finality in this context involves concerns separate from those present regarding finality under 28 U.S.C. § 1291 and has grown differently in some respects on account of those differences. *See supra* note 40.

252. *Curry*, 371 U.S. at 544.

253. *See id.* at 543.

reversed, and the Supreme Court granted certiorari.[254] The Court held that the state supreme court's decision was appealable under *Cohen* because the state court's decision was effectively final and because the issue of the state court's jurisdiction was separate from the merits.[255]

Curry is notable in two respects. First, the Court relied on *Cohen* for a decision that could have more comfortably fit under the rationale of *Forgay*.[256] Indeed, it is difficult to distinguish the facts of *Curry* from the Court's later decisions in *Moses H. Cone*[257] and *Quackenbush*.[258] In all three, an interlocutory order had the possibility of mooting the relief sought. *Forgay*, of course, concerned finality when ministerial matters remained to be completed,[259] but the facts of *Curry* seem to fit more precisely with the overall notion of effective finality than with the collateral order doctrine.

In order to make the collateral order doctrine work in *Curry*, the Court had to (1) ignore the requirement that later review be ineffectual and (2) weaken the separability requirement to the point where questions of jurisdiction are separate from the merits.[260] Justice Harlan concurred but noted his disagreement that jurisdiction was sufficiently separate from the merits to be reviewable.[261] Justice Harlan explained that jurisdiction merges in the final judgment and that it therefore is reviewable on appeal from a true final judgment.[262] I will return to the question of jurisdiction merging in the final judgment in Part III. For now, it is sufficient to note that rather than rely primarily on *Forgay* where it might have made better use of the case, the Court instead stretched the collateral order doctrine, as Justice Harlan put it, "to the breaking point."[263]

In *Eisen v. Carlisle & Jacquelin*,[264] the Court added to the confusion it began in *Curry*'s uneasy application of the doctrine by ignoring the question of unreviewability. The district court ruled in *Eisen* that not every member of a Rule 23(b)(3) class needed to be notified of the action; the court specified how notice was to be given and ordered the defendants to pay ninety percent of the cost.[265] The Court concluded that the order requiring the defendants to pay

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254. *Id.* (citing Curry v. Constr. & Gen. Laborers Union Local No. 438, 123 S.E. 2d 653 (Ga. 1962)).

255. *Id.* at 548–49 (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)).

256. The Court cited *Forgay* in a footnote but did not distinguish between the various methods of determining finality. *See id.* at 549 n.6 (citing Carondelet Canal & Navigation Co. v. Louisiana, 233 U.S. 362 (1914); Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848)).

257. 460 U.S. 1 (1983).

258. 517 U.S. 706 (1996).

259. *Forgay*, 47 U.S. at 204.

260. *See* Anderson, *supra* note 174, at 552 (citing *Curry*, 371 U.S. at 553–54 (Harlan, J., concurring)).

261. *Curry*, 371 U.S. at 553 (Harlan, J., concurring).

262. *Id.*

263. *Id.* at 554 (Harlan, J., concurring).

264. 417 U.S. 156 (1974).

265. *Eisen v. Carlisle & Jacquelin*, 54 F.R.D. 565, 567 (S.D.N.Y. 1972).

ninety percent of the cost was appealable under the collateral order doctrine.[266] Like *Curry*, *Eisen* diluted the doctrine's requirements as they had been established in earlier cases.[267] The decision does not mention unreviewability. Anderson suggests that "*Eisen* can be interpreted as dropping the requirement altogether, leaving only a two-part test: (1) a conclusive determination of an issue that is (2) separate from the merits."[268] Furthermore, he suggests that like in *Gillespie*, ad hoc balancing may be a significant element of the Court's rationale.[269]

And like the Court's swift retreat from *Gillespie*, *Eisen* did not hold sway for long. Three years later, in *Abney v. United States*,[270] the Court returned to a doctrinal formulation that included an element of irreparability.[271] The government charged Abney with a federal crime.[272] After Abney's conviction, the court of appeals ordered a new trial.[273] Abney objected that a new trial would violate the Fifth Amendment prohibition on double jeopardy.[274] The Court held that the denial of the motion to dismiss on double jeopardy grounds was appealable as a collateral order.[275] This time, the Court announced three standards that must be satisfied for appellate jurisdiction to attach under *Cohen*: the order must be a final rejection of the claim, the issue must be completely separate from the merits, and the order must involve "an important right which would be 'lost, probably irreparably,' if review had to await final judgment."[276] The Court observed first that the district court's rejection of Abney's motion to dismiss was a final determination.[277] Next, the Court noted that the double jeopardy claim was collateral to the merits because "he [was] contesting the very authority of the Government to hale him into court to face trial on the charge against him," and that claim was "completely independent of his guilt or innocence."[278] Finally, the Court explained that later appellate review would be ineffectual because the Fifth Amendment's prohibition on double jeopardy protected a defendant not just against a second punishment for the same crime,

266. *Eisen*, 417 U.S. at 171–72.
267. *See* Anderson, *supra* note 174, at 555.
268. *Id.*
269. *Id.*
270. 431 U.S. 651 (1977).
271. Anderson, *supra* note 174, at 556 (citing *Abney*, 431 U.S. at 658–59).
272. *Abney*, 431 U.S. at 653 (citing 18 U.S.C. § 1951 (2006)).
273. *Id.* at 655 (citing United Stated v. Starks, 515 F.2d 112 (3d Cir. 1975)).
274. *Id.*
275. *Id.* at 659.
276. *Id.* at 658 (quoting and citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546–47 (1949)).
277. *Id.* at 659 ("There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee. Hence, *Cohen*'s threshold requirement of a fully consummated decision is satisfied.").
278. *Id.* at 659–60 (citing Menna v. New York, 423 U.S. 61 (1975); Blackledge v. Perry, 417 U.S. 21, 30 (1974); Robinson v. Neil, 409 U.S. 505, 509 (1973)).

but against a second trial as well.[279] Vindication of that right after the trial had taken place would not provide relief.[280]

The following year, the Court crystallized the standard for appellate jurisdiction under the collateral order doctrine. In *Coopers & Lybrand v. Livesay*,[281] the district court refused to certify a class under Rule 23.[282] The Court held that the denial of class certification met none of the requirements for appealability under *Cohen*.[283] First, the Court explained that class certification is inherently tentative and, under Rule 23(c)(1), may be revised at any time.[284] Thus, the district court's ruling was not a final decision on the issue.[285] Second, the Court reasoned that certification, rather than being completely separate from the merits, is necessarily "enmeshed" with them.[286] Finally, the Court determined that the order "[was] subject to effective review after final judgment" because the named plaintiffs could raise the denial of class certification on appeal from a final judgment.[287] The *Coopers* formulation of the *Cohen* standard continues to hold sway; the *Abney* interpretation of the irreparability requirement—that assertion of a right not to be tried is sufficient—has had the single most important influence on the development of the collateral order doctrine over the last thirty years and has led to what some commentators have seen as an increasing internal consistency.[288]

iii. The Recent Confusion: Immunity and Otherwise

Abney's identification of the double jeopardy clause as a defense that could be appealed under the collateral order doctrine spawned a line of cases concluding that immunities from suit that encompass a right not to be tried are immediately appealable. In addition to double jeopardy immunity, between 1979 and 2007 the Supreme Court held that claims of state sovereign immunity,[289] executive immunity,[290] immunity under the Speech or Debate

279. *Id.* at 660.
280. *Id.* at 662.
281. 437 U.S. 463 (1978).
282. *Id.* at 464–66.
283. *Id.* at 468–69.
284. *Id.* at 469 & n.11 (citing FED. R. CIV. P. 23(c)(1)).
285. *See id.* at 468–69.
286. *Id.* at 469 (quoting Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963)) (internal quotation marks omitted).
287. *Id.* (citing United Airlines, Inc. v. McDonald, 432 U.S. 385, 386 (1977)).
288. *See* Glynn, *supra* note 4, at 211–13.
289. *See* P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 147 (1993) ("We hold that States and state entities . . . may take advantage of the collateral order doctrine to appeal . . . [an] order denying a claim of Eleventh Amendment immunity.").
290. *See* Nixon v. Fitzgerald, 457 U.S. 731, 743 (1982) ("[W]e conclude that [the issue of Presidential immunity] present[s] a 'serious and unsettled' and therefore appealable question to the Court of Appeals.").

clause,[291] qualified immunity,[292] and immunity under the Westfall Act[293] all fell under the collateral order doctrine. Indeed, the only substantial departure during this period from the Court's apparent unwillingness to classify anything other than an immunity order as collateral was the Court's 2003 decision, over a vigorous dissent, concluding that an order directing a criminal defendant to be involuntarily medicated was collateral.[294]

Nearly all other orders presented to the Court during this period were excluded from the collateral order club. For instance, the Court held that motions to dismiss on grounds other than immunity are not collateral because a right to dismissal is not necessarily a right not to stand trial; failure of the district court to dismiss a case that does not involve an immunity from trial can be corrected on appeal after a final judgment.[295] In another set of cases, the Court concluded that the conduct of attorneys generally does not result in a collateral order.[296]

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291. *See* Helstoski v. Meanor, 442 U.S. 500, 508 (1979) ("We hold that if Helstoski wished to challenge the District Court's denial of his motion to dismiss the indictment [under the Speech or Debate Clause], direct appeal to the Court of Appeals was the proper course . . . .").

292. *See* Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) ("[W]e hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. §1291 notwithstanding the absence of a final judgment."). *But see* Johnson v. Jones, 515 U.S. 304, 319–20 (1995) ("[W]e hold that a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial.").

293. *See* Osborn v. Haley, 549 U.S. 225, 239 (2007) ("Tellingly, the Courts of Appeals are unanimous in holding that orders denying Westfall Act certification and substitution are amenable to immediate review under *Cohen*. We confirm that the Courts of Appeals have ruled correctly on this matter." (citations omitted)).

294. *See* Sell v. United States, 539 U.S. 166, 177 (2003) ("We add that the question presented here, whether Sell has a legal right to avoid forced medication, . . . differs from the question whether forced medication *did* make a trial unfair. . . . An ordinary appeal comes too late for a defendant to enforce the first right; an ordinary appeal permits vindication of the second. We conclude that the District Court order from which Sell appealed was an appealable 'collateral order.'").

295. *See* Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 496 (1989) (holding that an interlocutory order denying dismissal of a damages claim based on a forum selection clause was not immediately appealable as a collateral order); Midland Asphalt Corp. v. United States, 489 U.S. 794, 795, 802 (1989) (holding that an order denying a criminal defendant's dismissal motion for alleged Rule 6(e) violations was not immediately appealable); Van Cauwenberghe v. Biard, 486 U.S. 517, 527 (1988) (holding that an order denying a motion to dismiss based on forum inconvenience was "not immediately appealable as of right"); United States v. Hollywood Motor Car Co., 458 U.S. 263, 264, 270 (1982) (per curiam) (holding that an interlocutory order refusing a motion to dismiss for prosecutorial vindictiveness was not immediately appealable).

296. *See* Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 609 (2009) ("[T]he collateral order doctrine does not extend to disclosure orders adverse to the attorney-client privilege. Effective appellate review can be had by other means."); Cunningham v. Hamilton Cnty., 527 U.S. 198, 210 (1999) ("[W]e conclude that a sanctions order imposed on an attorney is not a 'final decision' under § 1291 . . . ."); Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 440 (1985) ("We hold that orders disqualifying counsel in civil cases . . . are not collateral orders subject to appeal as 'final judgments . . . ."); Flanagan v. United States, 465 U.S. 259, 269 (1984) ("[A] disqualification order does not

Mitchell v. Forsyth,[297] which held that denial of qualified immunity on a question of law is collateral,[298] is undoubtedly the most important of the group both because it is employed far more frequently than any other type of immunity[299] and because the Court adjusted the separability requirement. Qualified immunity concerns whether the defendant violated a clearly established right and whether a reasonable person would have known the person was violating that right.[300] Accordingly, it is not "completely separate from the merits."[301] Instead, the Court concluded that the question of immunity was "conceptually distinct from the merits."[302] The Court did not provide further guidance on what constituted conceptual distinction and has yet to do so.

As it was happening, the Court's collateral order jurisprudence was difficult to discern and prompted much criticism.[303] But now, as the Court appears increasingly close to settling the doctrine, and notwithstanding *Mitchell*'s "conceptually distinct" factor, the Court appears to be applying the collateral order doctrine in a predictable and uniform manner.[304] Timothy Glynn, writing in 2001, identified circuit splits over application of the doctrine in only three situations: "orders rejecting protection for allegedly privileged attorney–client communications; orders refusing protection for claimed trade secrets; and orders denying the appointment of counsel."[305] In 2009, the Court resolved the first circuit split, holding that such orders are not collateral,[306] and cast significant doubt on the second.[307] Since *Abney*, the Court has essentially concluded that immunities from suit are collateral, but very little else.

One, perhaps unintended, consequence of the Court's recent limitation of the doctrine to immunity defenses is an uncertainty surrounding the sometimes-used requirement that the right asserted be important. *Cohen* itself suggested that the

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qualify as an immediately appealable collateral order in a straight forward application of the necessary conditions laid down in prior cases."); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981) ("[An] order denying a motion to disqualify counsel is not appealable under § 1291 prior to final judgment in the underlying litigation.").

297. 472 U.S. 511 (1985).

298. *Id.* at 530.

299. *See* Anderson, *supra* note 174, at 571 (noting that civil rights cases against public officials for violation of federal rights constitute "one of the largest elements of the federal civil caseload").

300. *See Mitchell*, 472 U.S. at 526–28.

301. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (citing United States v. MacDonald, 435 U.S. 850, 855 (1978); Abney v. United States, 431 U.S. 651, 658 (1977)).

302. *Mitchell*, 472 U.S. at 527–28 (citing *Abney*, 431 U.S. at 659–60).

303. *See* Anderson, *supra* note 174, at 585; Glynn, *supra* note 4, at 204 n.112; Steinman, *supra* note 2, at 1238–39.

304. Glynn, *supra* note 4, at 205, 209 (noting that "criticism may have been warranted a decade ago, but the collateral order doctrine is now both coherent and easy to apply" and that "despite . . . a few remaining, unresolved issues, the collateral order doctrine has emerged as a relatively clear and well-defined exception that leads to predictable results.").

305. *Id.* at 215–16 (citations omitted).

306. Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 609 (2009).

307. *See* Glynn, *supra* note 4, at 216 & n.158.

question presented must be "too important to be denied review,"[308] and the question presented in *Cohen* concerning application of the *Erie* doctrine suggests that the circumstances of the case, rather than the category of order, might be relevant in the evaluation of the question's importance.[309] In most cases, though, importance was an afterthought—too malleable to apply coherently to a doctrine not in need of further complication. In cases denying appealability, the court might add a lack of importance as a further reason to deny.[310] In cases allowing an appeal, the Court often simply ignored it.[311]

Beginning in the early 1990s, the Court relied on the importance requirement for a new purpose: not as an independent factor in determining appealability, but to assist in ascertaining, under *Abney*, what rights include a right not to stand trial.[312] Ultimately, this interpretation proved unworkable, and after the Court refined *Abney*'s right not to stand trial to "mean an immunity from suit rather than a mere defense to liability,"[313] the importance factor faded again into the background.[314] It now serves chiefly as a reminder of the difficulties the Court has faced in trying to implement the doctrine.[315]

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308. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

309. *See* Anderson, *supra* note 174, at 547. The *Cohen* opinion is unclear on this point. *Id.* The Court indicates that not all orders fixing security are subject to interlocutory review but does not thoroughly explain why. *Cohen*, 337 U.S. at 547. The best reading may be that *Cohen* concerned a conclusive question of law and distinguished the more common challenge to tentative and discretionary orders setting the amount of money necessary to secure the opposing party. *See id.*

310. *See, e.g.*, Atl. Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F.2d 371, 378 (11th Cir. 1989) ("Publication of the memorandum order does not constitute an issue of sufficient import to warrant disruptive interlocutory review.").

311. *See* Glynn, *supra* note 4, at 208 n.131.

312. *See, e.g.*, Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 878–79 (1994) ("Digital may validly question whether 'importance' is a factor 'beyond' the three *Cohen* conditions or whether it is best considered . . . in connection with the second, 'separability,' requirement . . . but neither enquiry could lead to the conclusion that 'importance' is itself unimportant. To the contrary, the third *Cohen* question, whether a right is 'adequately vindicable' or 'effectively reviewable,' simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement."); P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146–47 (1993) (noting that the collateral order doctrine's "ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated"); Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 502–03 (1989) (Scalia, J., concurring) (citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); Abney v. United States, 431 U.S. 651, 658 (1977); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)) ("While it is true . . . that the 'right not to be sued elsewhere than in Naples' is not fully vindicated—indeed, to be utterly frank, is positively destroyed—by permitting the trial to occur and reversing its outcome, that is vindication enough because the right is not sufficiently important to overcome the policies militating against interlocutory appeals.").

313. Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 42 (1995) (emphasis omitted) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)) (internal quotation marks omitted).

314. Cunningham v. Hamilton Cnty., 527 U.S. 198, 203–10 (1999).

315. *See* Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 610 (2009) (Thomas, J., concurring in part and concurring in the judgment) (opining that the Court should not apply the

B. Appellate Mandamus

If the collateral order doctrine is the most significant exception to the final judgment rule, appellate mandamus is the clear runner-up. Mandamus, one of the traditional common law prerogative writs, is generally employed to order a public official to perform some nondiscretionary function in connection with his office where the party aggrieved has no alternative recourse.[316] Perhaps most famously, mandamus was the tactic William Marbury employed in his endeavor to compel then-Secretary of State James Madison to deliver his commission as a justice of the peace.[317] Federal courts of appeals also use the writ as a means to confine district courts to their prescribed jurisdiction.[318] The mandamus power, however, is also used to review a broad array of interlocutory orders that are not appealable under an effective finality or partial effective finality construction of § 1291.[319] Although appellate mandamus has a longer history in the federal courts than the standard common law variety employed against executive officers, it is a significant departure from the original scope and purpose of the writ, and its use as a means to review substantive decisions of district courts, even if consonant with the governing statute, makes little sense in the context of finality generally.

At common law, the writ of mandamus issued from the Court of King's Bench to inferior courts "requiring them to do some particular thing 'which the King's Bench ha[d] previously determined, or, at least suppose[d] to be consonant to right and justice.'"[320] Although several writs contained the word "mandamus" ("we command"), the ancestor of what is now known as the writ of mandamus developed in the early seventeenth century as a means for the King's Bench to superintend inferior authorities in the boroughs and cities.[321] In the words of the Supreme Court:

> It is a writ, in England, issuing out of the king's bench, in the name of the king, and is called a prerogative writ, but considered a writ of right;

Cohen doctrine because it "needlessly perpetuates a judicial policy that [the Court] for many years [has] criticized and struggled to limit").

316. *See* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 614 (1838); Note, *Developments in the Law: Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 846–47 (1957).

317. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 137–38 (1803).

318. *See, e.g.*, *Ex parte* Simons, 247 U.S. 231, 240 (1918) ("[A]s the order may be regarded as having repudiated jurisdiction of the first count, mandamus may be adopted to require the District Court to produce and to give the plaintiff her right to a trial at common law.").

319. *See, e.g.*, *Mohawk*, 130 S. Ct. at 607 (citing Cheney v. U.S. Dist. Court, 542 U.S. 367, 390 (2004)) ("[A]ttorneys and clients . . . would find that litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of review apart from collateral order appeal. . . . [I]n extraordinary circumstances . . . a party may petition the court of appeals for a writ of mandamus.").

320. Crick, *supra* note 19, at 554 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *110).

321. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 147 (4th ed. 2002).

> and is directed to some person, corporation or inferior court, requiring them to do some particular thing, therein specified, which appertains to their office or duty, and which is supposed to be consonant to right and justice, and where there is no other adequate specific remedy.[322]

The writ was incorporated into early American practice in state courts,[323] and § 14 of the Judiciary Act of 1789 authorized the lower federal courts to grant "all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[324] This formulation underwent slight variation over the years[325] and was enacted into its present form in the All Writs Act of 1948 as part of the general codification of the Judicial Code that year.[326]

The Supreme Court held early on, in *McIntire v. Wood*[327] and *McClung v. Silliman*,[328] that the lower courts' mandamus power did not extend to actions against federal officers,[329] which remained the case for more than a century. When the Federal Rules of Civil Procedure were promulgated, they purported to abolish the writ.[330] But Rule 81(b) has been superseded in part, and the Supreme Court's decisions in *McIntire* and *McClung* superseded entirely, by the enactment of 28 U.S.C. § 1361,[331] which grants district courts mandamus power against executive officers.[332] It does not appear that Rule 81(b) has been used to

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322. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 614 (1838).

323. *See, e.g.*, *Ex parte* Breedlove, 24 So. 363, 363 (Ala. 1898) (granting writ of mandamus to allow a party to intervene in the suit); People *ex rel.* People's Gaslight & Coke Co. v. Smith, 113 N.E. 891, 893 (Ill. 1916) (denying writ of mandamus because the order complained of was issued within the trial judge's proper jurisdiction); Riverside Iron Works v. Hosmer, 58 N.W. 693, 693 (Mich. 1894) (granting writ of mandamus to set aside an intervention order); Woolley v. Wight, 238 P. 1114, 1116 (Utah 1925) (granting writ of mandamus against a trial judge to compel the deposition of a witness); State *ex rel.* Nash v. Superior Court, 144 P. 898, 899 (Wash. 1914) (granting writ of mandamus to avoid change of venue).

324. Judiciary Act of 1789, § 14, 1 Stat. 73, 81–82 (1789).

325. *See* Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401, 434 n.146 (1999).

326. *See id.* at 434; Petty, *supra* note 32, at 140 & n.17 (citing Act to Revise, Codify, and Enact into Law Title 28 of the United States Code entitled "Judicial Code and Judiciary," Pub. L. No. 80-773, 62 Stat. 869 (1948); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 451 n.1 (1996) (Scalia, J., dissenting)).

327. 11 U.S. (7 Cranch) 504 (1813).

328. 19 U.S. (6 Wheat.) 598 (1821).

329. *Id.* at 604; *McIntire*, 11 U.S. (7 Cranch) at 505–06 (holding that the Judiciary Act only granted mandamus power in aid of the court's jurisdiction, not to compel action by executive officers).

330. FED. R. CIV. P. 81(b).

331. Mandamus and Venue Act of 1962, Pub. L. No. 87-748 § 1(a), 76 Stat. 744 (codified at 28 U.S.C. § 1361) (2006)).

332. *Id.*; Travis Christopher Barham, *Congress Gave and Congress Hath Taken Away: Jurisdiction Withdrawal and the Constitution*, 62 WASH. & LEE L. REV. 1139, 1177 (2005). The rationale for enactment of the Mandamus and Venue Act is worth mentioning. In *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), the Court held that the Circuit Court for the

place any limitation on appellate mandamus[333] and, indeed, there has been a call for the rule to be significantly rewritten.[334]

The writ of mandamus, it is said, is an "extraordinary remed[y]"[335] and should only be used by an appellate court "where there is clear abuse of discretion or 'usurpation of judicial power.'"[336] Appellate mandamus is permitted exclusively under the All Writs Act, and as the jurisdiction of the court of appeals is appellate, a court's use of the writ must be in aid of its appellate jurisdiction.[337] The Supreme Court has interpreted this broadly, to include matters that might come within the jurisdiction of the court of appeals at some later time.[338] "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."[339] Importantly, the Court has held that the All Writs Act is not an independent grant of appellate jurisdiction.[340]

Like many rules, this one is perhaps honored more in the breach than in the observance. For the better part of the last century, appellate courts have used mandamus not just to compel action or inaction on the part of the district courts, but to substantively review certain decisions of the district courts. As early as 1932, commentators noted that courts used mandamus to review decisions regarding venue, joinder, and intervention; to compel a witness to testify; to vacate the appointment of an auditor; and to simplify questions for a jury.[341] All

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District of Columbia inherited the common law of Maryland as provided in the act of Congress that created the court. *Id.* at 619–20. Thus, while the federal circuit court sitting in the District of Columbia could issue writs of mandamus to executive officers in accordance with its power derived by federal statute from Maryland common law, no other federal courts had such power. *Id.* at 621. The Mandamus and Venue Act resolved "this historical anomaly [created by *Kendall*] and extended mandamus jurisdiction to all federal district courts." Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225, 1234–35 (10th Cir. 2005).

333. *See* FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.").

334. *See* Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761, 1774 (2004) (citing FED. R. CIV. P. 81(b)).

335. *Ex parte* Fahey, 332 U.S. 258, 259 (1947).

336. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953) (quoting De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945)).

337. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943).

338. *Id.*

339. *Id.* at 26 (citing *Ex parte* Republic of Peru, 318 U.S. 578, 584 (1943); Interstate Commerce Comm'n v. United States *ex rel.* Campbell, 289 U.S. 385, 394 (1933); *Ex parte* Sawyer, 88 U.S. (21 Wall.) 235, 238 (1874); *Ex parte* Newman, 81 U.S. (14 Wall.) 152, 165–66, 169 (1871)).

340. Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 41 (1985) (quoting U.S. Alkali Exp. Ass'n v. United States, 325 U.S. 196, 203 (1945)) ("The writs may not be used as a substitute for an authorized appeal . . . .").

341. Crick, *supra* note 19, at 555.

this notwithstanding the supposed "elementary" proposition that mandamus would not lie to correct errors or compel a certain result.[342]

Like the collateral order doctrine, appellate mandamus expanded in the mid-twentieth century, only to contract again a few decades later. The growth was subtle but steady. First, in *La Buy v. Howes Leather Co.*,[343] the Supreme Court permitted the court of appeals to issue a writ of mandamus to a district court to compel it to perform its judicial function. [344] Judge La Buy had referred two antitrust cases to a special master.[345] All parties objected to the referral, but the judge refused to vacate the order of referral because of his congested calendar.[346] The Supreme Court affirmed the Seventh Circuit's issuance of the writ on relatively narrow grounds that arguably adhered to the traditional view of the writ as compelling an inferior court to exercise mandatory jurisdiction.[347] The Court explained that there appeared to be a practice among the trial courts within the Seventh Circuit to make undue use of Rule 53 to refer cases to masters when they should not.[348] Thus, *La Buy* could have been decided simply on the judge's (apparently frequent) refusal to adjudicate matters that came before him. In coming to its holding, however, the Court also suggested that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system."[349] *La Buy* is widely seen as a watershed decision,[350] but the expansion of appellate mandamus was in fact a much more slow and subtle process.

Atlass v. Miner[351] took the expansion two steps further. In that case, the Seventh Circuit granted the writ to resolve a conflict between a local district court rule and the federal civil rules governing admiralty proceedings.[352] The Supreme Court affirmed, but the parties did not raise the propriety of mandamus, and the Court remained silent on the subject.[353] *Atlass*, despite the Supreme

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342. Steinman, *supra* note 2, at 1260 (quoting *Interstate Commerce Comm'n*, 289 U.S. at 393–94) (internal quotation marks omitted).

343. 352 U.S. 249 (1957).

344. *Id.* at 250–51.

345. *Id.* at 250.

346. *Id.* at 253–54.

347. *See* Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 376 (1961) ("Since the Court relied heavily on the existence of an established practice in the particular district of making such [referrals] . . . it apparently was attempting to cast its decision in the traditional mold.").

348. *La Buy*, 352 U.S. at 258.

349. *Id.* at 259–60.

350. *See* Robert S. Berger, *The Mandamus Power of the United States Courts of Appeals: A Complex and Confused Means of Appellate Control*, 31 BUFF. L. REV. 37, 50 (1982) ("[T]he case does represent a less restrictive attitude toward the use of the mandamus power."); Redish, *supra* note 5, at 115 ("[U]ndoubtedly some expansion has taken place [after *La Buy*] . . . ."); Steinman, *supra* note 2, at 1260 ("Following *La Buy*'s lead, the Supreme Court endorsed appellate mandamus in a number of other situations.").

351. 265 F.2d 312 (7th Cir. 1959), *aff'd*, 363 U.S. 641 (1960).

352. 265 F.2d at 319.

353. 363 U.S. at 651–52.

Court's silence, is notable in two respects. First, it supplemented *La Buy*'s holding that a recurring problem can be corrected by mandamus, by not reversing the Seventh Circuit for correcting a problem by mandamus *before* it recurred.[354] Second, and more importantly, it did this in the absence of an issue concerning the jurisdiction of the district court. This is significant. Until this point, the use of appellate mandamus, even in *La Buy* itself, was premised on the assumption that it existed to compel or restrain the exercise of jurisdiction by a lower court.

So if a question of the exercise of jurisdiction is not essential, and if an error does not need to have recurred before mandamus will issue to correct it, then mandamus should be available to correct just about any error that the petitioner can convince the court of appeals is serious enough to warrant an extraordinary remedy. Under *Atlass*, a general question applicable throughout a circuit was sufficient to meet this standard, and perhaps the Court might be willing to go further.

In *Schlagenhauf v. Holder*,[355] the Court followed *Atlass* and upheld the use of mandamus "to settle new and important problems."[356] There the issue, a question of first impression, was the application of the "good cause" requirement under Federal Rule of Civil Procedure 35 to order mental and physical examinations of defendants.[357] But appellate mandamus never expanded much beyond that as a general matter. In *Will v. United States*,[358] the Court explained that appellate mandamus as a supervisory tool was appropriate "where a district judge displayed a persistent disregard of the Rules of Civil Procedure,"[359] and in *Will v. Calvert Fire Insurance Co.*,[360] the Court added that appellate mandamus is appropriate "[w]here a district court obstinately refuses to adjudicate a matter properly before it."[361] *Will v. United States* returned to the traditional definition of mandamus, "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so,"[362] but it noted that because "the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' . . . only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of [mandamus]."[363] Thus, the Court's brief flirtation with appellate mandamus as a means to review "important questions" ended, though mandamus was still available for substantive review of those questions, such as

354. 265 F.2d at 319.
355. 379 U.S. 104 (1964).
356. *Id.* at 111.
357. *Id.* at 110–11.
358. 389 U.S. 90 (1967).
359. *Id.* at 96 (citing La Buy v. Howes Leather Co., Inc., 352 U.S. 249 (1957)).
360. 437 U.S. 655 (1978).
361. *Id.* at 666–67 (plurality opinion).
362. Will v. United States, 389 U.S. at 95 (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943)) (internal quotation marks omitted).
363. *Id.* (quoting De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945)).

disqualification of judges, for which mandamus had long been the standard means of review.

Unlike the collateral order doctrine, the standard for appellate mandamus is reasonably fluid.[364] This fluidity makes some sense, as mandamus is a discretionary remedy,[365] but it also has the potential to create confusion. The Court's most recent foray into appellate mandamus did little to make things clearer. In *Cheney v. United States District Court*,[366] the district court granted plaintiffs leave to take certain discovery of the Vice President.[367] The Vice President petitioned for a writ of mandamus directing the district court to vacate its order, which the court of appeals denied in light of the Vice President's failure to assert executive privilege.[368] The Supreme Court ultimately remanded for further consideration[369] but, in so doing, attempted to formulate a standard for when appellate mandamus is appropriate. The Court noted that mandamus is a "'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'"[370] The Court then explained that mandamus may be appropriate where (1) the petitioner has no other means of relief (a requirement designed to prevent the writ from circumventing the regular appeals process); (2) the petitioner shows that his right to the issuance of the writ is "clear and undisputable"; and (3) the issuing court is satisfied, in its discretion, that the writ is appropriate in that particular case.[371]

Commentators have noted that *Cheney*'s three-part test lacks a firm basis in Supreme Court precedent.[372] But the problems run much deeper and can be seen on the face of the standard itself. For one, it is difficult, if not impossible, to reconcile the Supreme Court's directive that the final decision regarding whether to issue the writ is purely discretionary (a determination that comports with historical practice) with its insistence that the petitioner demonstrate a clear and indisputable *right* to have the writ issue because there can be no right to discretionary relief.[373] The two are mutually exclusive. Moreover, the *Cheney*

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364. *See* Glynn, *supra* note 4, at 217 ("[M]andamus review, unlike collateral order review, must be governed by standards—rather than rules—that cannot be articulated with precision."); Steinman, *supra* note 2, at 1263 ("Unlike the collateral order doctrine's oft-cited multipart test, the Supreme Court has not provided a consistent set of requirements for appellate mandamus.").

365. *See* Schlagenhauf v. Holder, 379 U.S. 104, 112 n.8 (1964).

366. 542 U.S. 367 (2004).

367. *Id.* at 375.

368. *In re* Cheney, 334 F.3d 1096, 1098–99 (D.C. Cir. 2003).

369. 542 U.S. at 392.

370. *Id.* at 380 (quoting *Ex parte* Fahey, 332 U.S. 258, 259–60 (1947)).

371. *Id.* at 380–81 (quoting Kerr v. U.S. Dist. Court, 426 U.S. 394, 403 (1976)) (internal quotation marks omitted).

372. *See, e.g.*, Steinman, *supra* note 2, at 1269–70.

373. Perhaps what the Court actually meant was a clear and indisputable right to the relief the writ is sought to correct, rather than a right to the issuance of the writ itself. The statement in *Cheney* can be traced back to *United States ex rel. Bernardin v. Duell*, 172 U.S. 576 (1899), where the Court explained, "[M]andamus will not ordinarily be granted . . . *unless the duty sought to be*

test fails to account for the numerous classes of cases where courts have allowed review on a writ of mandamus, many of which involve issues of discretion or case management where it would be extremely difficult to show a clear and indisputable right to the relief sought.[374]

Notwithstanding this apparent confusion, Timothy Glynn has suggested the standard is "unambiguously stringent," and in any event, the courts of appeals are now appropriately conservative in their willingness to grant the writ.[375] Few grants are made, and those writs that are issued produce few dissents, few disagreements in parallel circumstances, and no reversals by the Supreme Court.[376] This may be so, but it does not explain how appellate mandamus ought to work or what its role in the larger scheme of appellate jurisdiction ought to be. The *Cheney* test is clearly problematic, and its predecessor, which suggested that mandamus should be "reserved for really extraordinary causes,"[377] is even less helpful. Thus, even if the courts have a good sense of when mandamus is and is not appropriate as a categorical matter, a more searching inquiry is necessary both to permit appellate mandamus to function most effectively and to prevent it from encroaching on certain types of orders that might be more suitably reviewed by other means.

III. HARMONIZING THE FINAL JUDGMENT RULE

The final judgment rule is in need of harmonization. Despite the fact that courts can more predictably apply the collateral order doctrine than they could in the early 1990s, and that appellate mandamus no longer plays the catch-all role that it sometimes has in the past, the Court has done little to explain the principles on which appellate jurisdiction's new predictability rests. What those principles are and how they work remains a mystery. The Court has rolled out multi-pronged tests from time to time, but identifying what must be established is a far cry from explaining why a particular proposition is meaningful in this context. Similarly, the Court's new found consistency in applying the collateral order doctrine and appellate mandamus say almost nothing (and certainly nothing new) about how the two doctrines relate to each other, to the other practical constructions of the final judgment rule, and to the governing statutes and rules to form a coherent overall scheme of appellate jurisdiction.

The effect of these gaps in the underlying theory is unclear. Until very recently the Court was more preoccupied with doctrinal minutiae than the underlying rationale for the existence of the doctrines. As precedent has

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enforced is clear and indisputable." *Id.* at 582 (emphasis added). But this is not the test the Supreme Court laid out in *Cheney*, nor has it been employed for some time.

374. Steinman, *supra* note 2, at 1273–75 (listing orders over which "appellate courts have exercised . . . discretionary review").

375. Glynn, *supra* note 4, at 221.

376. *Id.* at 220–21.

377. *Ex parte* Fahey, 332 U.S. 258, 260 (1947).

multiplied and answered most questions about applicability of the doctrines to particular factual situations, the time has come to take a step back and approach appellate jurisdiction from a broader perspective. With regard to the collateral order doctrine, especially as fewer avenues remain open to would-be petitioners, the Court is likely to see additional challenges to carelessly formulated standards based on the underlying purposes of the doctrine. Now is the time to review those policies and the accompanying doctrine, taking account of the other, more marginalized doctrines of finality, and assess how the whole can be improved. Given the Court's recent trends, adding new categories of appealable orders seems unlikely. However, rearranging the mode of review for orders already subject to interlocutory appeal and discarding doctrine based on concepts that may no longer be good law may significantly improve our understanding of how and when authority can be transferred from a court of first instance to a reviewing court. Harmonization of appellate jurisdiction is possible and can be accomplished using only the instruments currently available.

A. Recognizing the Difficulties

As far back as 1892, the Court conceded that "[p]robably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees . . . . The cases, it must be conceded, are not altogether harmonious."[378] Most of the discord (at least over the last sixty years) has concerned the collateral order doctrine. Justice Scalia noted two decades ago "that our finality jurisprudence is sorely in need of further limiting principles,"[379] and in 2009 Justice Thomas suggested abandoning the collateral order doctrine entirely, in large part because of the Court's difficulty in limiting it.[380]

Any reexamination of appellate jurisdiction must begin with the collateral order doctrine, simply because it is the basis of most litigation concerning finality.[381] The major problem in crafting sound limits for the collateral order doctrine is that the governing standard (whether announced in *Cohen*, *Coopers & Lybrand*, or *Mitchell*) is internally nonsensical.[382] Writing in 1986, Judge Posner noted:

> [A]s with so many multi-"pronged" legal tests [the collateral order doctrine] manages to be at once redundant, incomplete, and unclear. The second "prong" [conclusivity] is part of the third [unreviewability].

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378. McGourkey v. Toledo & Ohio Cent. Ry. Co., 146 U.S. 536, 544–45 (1892).

379. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 292 (1988) (Scalia, J., concurring), *superseded by statute*, Civil Justice Reform Act of 1990, Pub. L 101–650, 104 Stat. 5089.

380. *See* Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 610 (2009) (Thomas, J., concurring in part and concurring in the judgment).

381. *See* Anderson, *supra* note 174, at 576.

382. *See supra* Part II.A.3.c.

> If the order sought to be appealed is not definitive, an immediate appeal is not necessary to ward off harm; there is no harm yet. The first "prong" [separability] seems unduly rigid; if an order unless appealed really will harm the appellant irreparably, should the fact that it involves an issue not completely separate from the merits of the proceeding *always* prevent an immediate appeal?[383]

The Supreme Court has never adequately addressed these concerns. Perhaps the Court has not thought that explication of the theoretical basis of a fundamentally practical doctrine would be particularly useful. Not only would a theoretical basis for the collateral order doctrine be useful, however, a theoretical rationale that ties together the various elements of appellate jurisdiction is increasingly necessary. Given the longstanding recognition that the Court's finality jurisprudence is insufficiently developed,[384] and the frequency with which the Court hears such cases (and criticizes its own doctrines),[385] the current severely undertheorized state of appellate jurisdiction is somewhat surprising. A critical reappraisal of the standard used to analyze appeals brought under the collateral order doctrine may be useful in ascertaining why the doctrine and, to a larger extent appellate jurisdiction generally, has failed to achieve any semblance of a theoretical underpinning more nuanced than the unhelpfully general final judgment rule. Moreover, a renewed collateral order doctrine, premised on a broad theoretical understanding of the role it is meant to fill, might also alleviate pressure on appellate mandamus to provide review where review by writ no longer makes sense.

Because the Court has employed several standards for the collateral order doctrine over the years, it is necessary to articulate what the controlling standard is before attempting to refine it. In *Cohen*, the Court did not neatly summarize the requirements to invoke the doctrine. Instead, it provided a number of considerations that the Court has relied on to varying degrees in subsequent cases.[386] The clearest expression of the doctrine seems to come from *Coopers & Lybrand*. The Court explained:

> To come within the "small class" of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate

383. Palmer v. City of Chicago, 806 F.2d 1316, 1318 (7th Cir. 1986).

384. *See supra* notes 9–10 and accompanying text.

385. *See Mohawk Indus.*, 130 S. Ct. at 610; Steinman, *supra* note 2, app. at 1296–97 (listing Supreme Court cases addressing appellate jurisdiction since 1980).

386. *See supra* Part II.A.2.e.

from the merits of the action, and be effectively unreviewable on appeal from a final judgment.[387]

In *Mitchell*, the Court did scale back the requirement that the order be "completely separate" in favor of a "conceptually distinct" requirement,[388] but since *Mitchell*, the Court has continued to employ the *Coopers & Lybrand* formulation when discussing the requirements of the collateral order doctrine.[389]

Based on the standard articulated in *Coopers & Lybrand*, the collateral order doctrine, as it is currently understood, has four prongs: (1) conclusivity—the order must conclusively determine the disputed question; (2) separability—the subject matter of the order must be "completely separate" from the merits of the case; (3) unreviewability—the order must effectively be unreviewable on appeal from a final judgment; and (4) importance—the question to be resolved must present an issue of sufficient importance to warrant interlocutory review.

B. Deconstructing the Collateral Order Doctrine

Much of the difficulty in applying the doctrine, as Judge Posner noted, stems from the doctrine itself. The categories overlap, stand in opposition to generally applicable jurisdictional rules and, ultimately, are not sufficiently tied to any underlying principles to permit thoughtful application. Each prong of the test obfuscates a clear understanding of the doctrine in some way.

1. Importance

The importance of the order sought to be reviewed is the weakest element of the doctrine and therefore the easiest to dispose of. Indeed, some cases simply do away with the importance requirement altogether.[390] This has led at least one

387. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (citing United States v. MacDonald, 435 U.S. 850, 855 (1978); Abney v. United States, 431 U.S. 651, 658 (1977)).

388. Mitchell v. Forsyth, 472 U.S. 511, 527, 529 n.10 (1985) (quoting Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 431 (1985)) (internal quotation marks omitted).

389. *See, e.g.*, Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 433 (2007) (using the *Coopers & Lybrand* formulation); Will v. Hallock, 546 U.S. 345, 349 (2006) (quoting P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993)) (same); Sell v. United States, 539 U.S. 166, 176 (2003) (quoting *Coopers & Lybrand*, 437 U.S. at 468) (same); Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996) (quoting Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 431 (1985)) (same); Midland Asphalt Corp. v. United States, 489 U.S. 794, 799 (1989) (quoting *Coopers & Lybrand*, 437 U.S. at 468) (same); Van Cauwenberghe v. Biard, 486 U.S. 517, 522 (1988) (quoting *Coopers & Lybrand*, 437 U.S. at 468) (same).

390. *See* Anderson, *supra* note 174, at 567 (citing Nixon v. Fitzgerald, 457 U.S. 731, 742 (1982)) ("The *Moses H. Cone* opinion made no reference to the . . . 'serious and unsettled question' factor, although *Nixon* had just held that it was an 'additional factor.'").

Justice to suggest that the importance of the order should play a greater role in the collateral order calculation.[391]

Although facile avoidance of governing law is unlikely to clear anything up, the recent calls to reinvigorate the importance requirement should be rebuffed. First, "importance" is a highly malleable concept that leads one invariably to ask "importance of what?" and "important to whom?" Since importance gains meaning only from the context in which it arises, what kind of importance does the collateral order doctrine concern itself with?

Cohen explained that the order in question in that case was important because the question concerned application of the then-novel *Erie* doctrine, a procedural question of general relevance.[392] But in *Nixon* the Court deemed substantive issues to be important as well.[393] The issue in *Nixon* concerned presidential immunity[394]—a public concern—but there is little reason to suppose that preservation of trade secrets, a private interest, might not be important as well.

The problem with the importance factor, as Justice Thomas alluded to in his concurrence in *Mohawk Industries*,[395] is that any discussion of importance necessarily results in case-by-case adjudication because the nature of the importance can shift from one set of facts to another.[396] For example, a given procedural question might not seem particularly important as a general matter, but the same question might take on an entirely different color in the context of national security.[397] Thus, even approaching importance with a view to making that determination on a category-wide basis is never going to be entirely divorced from context. This is contrary to general propositions governing jurisdiction and suggests that the importance inquiry may not be all that useful. "Appeal rights," including the right to appeal itself, "cannot depend on the facts of a particular case."[398] Yet, because importance means very little out of

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391. *See* Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 502–03 (1989) (Scalia, J., concurring); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 291–92 (1988) (Scalia, J., concurring) (citing Boreri v. Fiat S.P.A., 763 F.2d 17, 21 (1st Cir. 1985)), *superseded by statute*, Civil Justice Reform Act of 1990, Pub. L 101–650, 104 Stat. 5089. *But see* Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 611 (2009) (Thomas, J., concurring in part and concurring in the judgment) (suggesting that by continually "raising the bar on" the importance factor, the Court perpetuates an unconvincing doctrine).

392. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 547 (1949); *see also* Anderson, *supra* note 174, at 547.

393. *See* Nixon v. Fitzgerald, 457 U.S. 731, 743 (1982) (holding that presidential immunity is important).

394. *Id.*

395. *See Mohawk Indus.*, 130 S. Ct. at 611.

396. *See* Anderson, *supra* note 174, at 589–90 (noting that the promotion of "importance" to a place of preeminence in the collateral order doctrine in *Digital Equipment* contributed to "confusion and instability in[] an area greatly in need of clarification" (internal quotation marks omitted)).

397. *See Nixon*, 457 U.S. at 743 (noting the "special solicitude" of a claim of national importance).

398. Carroll v. United States, 354 U.S. 394, 405 (1957); *see also* Behrens v. Pelletier, 516 U.S. 299, 311 (1996) ("[T]he question before us here . . . must be determined by focusing upon the

context, reliance on the importance factor necessarily requires dependence on specific facts.

The case-by-case determination of the importance factor has several additional negative consequences. First, because it is case-by-case, the determination that some particular category of orders is sufficiently important can provide almost no useful guidance. Given this, it is somewhat surprising that there has not yet been a woeful amount of collateral litigation concerning how to go about determining whether a particular category of orders is important. Perhaps the lack of litigation is due to the Supreme Court's less-than-uniform application of this factor.[399] At any rate, until such tests are devised, there is nothing against which importance can systematically be measured.

These problems suggest that importance should be removed from the collateral order calculus. It is unclear and malleable. Even when the Court attempts to limit importance to whole categories of orders, the requirement is still not exact enough to have a reasonable influence on a jurisdictional determination.[400] It is not particularly adept at providing future guidance and is likely to result in satellite litigation. In short, the importance factor is a crutch. It provides a back door for courts to permit or deny appeals and avoid the more difficult—but more insightful—questions. If the collateral order doctrine is to be revised, the importance factor should be the first prong to go.

2. *Conclusivity*

Of the remaining factors, conclusivity is the most straightforward. This factor simply requires that the order in question be final as to the issue in question.[401] It must be a miniature final judgment. The order may not, like a ruling on an evidentiary motion in limine or an order granting or denying class certification, be tentative or subject to review at a later time.

Judge Posner suggested that conclusivity is part of unreviewability.[402] This may be true in some cases but is not necessarily so in all. Conclusivity is only

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category of order appealed from, rather than upon the strength of the grounds for reversing the order."); *Digital Equip.*, 511 U.S. at 868 ("[T]he issue of appealability . . . is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a 'particular injustic[e]' averted, by a prompt appellate court decision." (alteration in original) (citation omitted) (quoting Van Cauwenberghe v. Biard, 486 U.S. 517, 529 (1988)); *Van Cauwenberghe*, 486 U.S. at 529 ("In fashioning a rule of appealability . . . we look to categories of cases, not to particular injustices."); Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 439 (1985) ("This Court . . . has expressly rejected efforts to reduce the finality requirement . . . to a case-by-case determination of whether a particular ruling should be subject to appeal.") (citing Coopers & Lybrand v. Livesay, 437 U.S 463, 473–75 (1978)).

399. *See supra* Part II.A.3.c.

400. *See* Anderson, *supra* note 174, at 565 (citing *Nixon*, 457 U.S. at 742–43).

401. *See, e.g.*, Will v. Hallock, 546 U.S. 345, 349 (2006) (quoting P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, 506 U.S. 139, 144 (1993)) (requiring that the "order . . . 'conclusively determine the disputed question.'").

402. *See* Palmer v. City of Chicago, 806 F.2d 1316, 1318 (7th Cir. 1986).

part of unreviewability when unreviewability is equated with mootness. The tentativeness of an order, standing alone, does not preclude appellate review. Orders granting or denying class certification, for instance, are reviewed under Federal Rule of Civil Procedure 23(f) notwithstanding the fact that the orders are tentative and subject to revision before final judgment.[403] In accordance with the other doctrines of partial effective finality, conclusivity must remain an integral part of the collateral order doctrine.

3. Separability

With conclusivity, separability and unreviewability form the heart of the collateral order doctrine. Perhaps because of its importance to the doctrine, separability has been the source of a great deal of confusion over application of the doctrine and the basis of much litigation. What is "completely separate from the merits"[404] (or, at least, "conceptually distinct"[405])? We know that a right not to stand trial passes this test, as does a right to not be involuntarily medicated.[406] But again, like the importance factor, the terminology is more of a hindrance than a help.

Take, for example, jurisdiction. Recently, the Supreme Court has explained regularly that jurisdiction is something quite apart from the merits of an action.[407] If anything is going to be "completely separate" from the merits, jurisdiction surely is it. At the very least, jurisdiction is without a doubt "conceptually distinct" from the merits.[408] But no one seriously contends that jurisdiction is the sort of ruling that might be appealable under the collateral order doctrine. Despite its difference from the merits of the action, it is not the right kind of difference. Thus, whether something is "completely separate" or "conceptually distinct" from the merits is not a full explanation of what the collateral order doctrine does or how it discriminates among different kinds of orders. Something different is needed to explain what the separability requirement actually does.

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403. FED. R. CIV. P. 23(f).

404. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (citing United States v. McDonald, 435 U.S. 850, 855 (1978); Abney v. United Sates, 431 U.S. 651, 658 (1977)).

405. Mitchell v. Forsyth, 472 U.S. 511, 527 (1985) (citing *Abney*, 431 U.S. at 659–60).

406. *See supra* notes 289–294 and accompanying text.

407. *See* Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1243–44 (2010) (discussing the distinction between jurisdictional issues and the merits of an action); Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 130 S. Ct. 584, 596–97 (2009) (same); Eberhart v. United States, 546 U.S. 12, 15–16 (2005) (per curiam) (same).

408. *But see* Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1614–15 (2003) (acknowledging that it is well-settled that jurisdiction and merits are distinct, but contending they are conceptually part of the same inquiry).

4. Unreviewability

What does it mean for an order to be unreviewable on appeal from a final judgment? *Cohen* can be read to suggest that an order is unreviewable if it would be moot on appeal from a final judgment.[409] But not long after *Cohen* was decided, the Court clouded the issue, holding that an order denying attachment of a ship was appealable under the doctrine.[410] Presumably, the Court concluded that the ship would sail out of the jurisdiction, rendering continued proceedings ineffectual. But whether the ship would depart raised a practical consideration. In *Cohen*, the order at issue concerned security.[411] The question would be moot as a matter of law if not decided before the litigation concluded.[412] The order denying attachment of the ship, by contrast, would not necessarily be moot on appeal from the final judgment.[413] The Court might lose jurisdiction over the vessel, so as a practical matter, the plaintiffs might no longer be able to prosecute the action, but that is not truly mooting the case in the sense that later proceedings obviate the need for or availability of preliminary relief.

Later, the Court appeared to abandon the unreviewability requirement entirely. In *Eisen v. Carlisle & Jacquelin*,[414] the Court applied only two factors, conclusivity and separability.[415] Thus, the Court has been less than clear about whether the unreviewability requirement demands legal mootness—a practical inability to further prosecute the action if an immediate appeal is not had—or if it even matters at all.

C. Finality's Hidden Harmony

The test for determining whether an order is appealable as a collateral order, as first announced in *Cohen* and later refined in *Coopers & Lybrand* and other cases, is itself the largest impediment to a clear understanding of the collateral order doctrine.[416] The poor construction appears to be the work of largely ad hoc, case-by-case formulation, which, until recently, lacked a theoretical grounding or policy-based rationale linking the doctrine to the goals of appellate

409. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546–47 (1949); Anderson, *supra* note 174, at 548.

410. *See* Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684, 688–89 (1950).

411. *See Cohen*, 337 U.S. at 545.

412. *See id.* at 546; *cf.* Stack v. Boyle, 342 U.S. 1, 6 (1951) (citing *Cohen*, 337 U.S. at 545–47) (holding that orders setting bail are appealable under *Cohen*).

413. *Cf. Swift*, 339 U.S. at 689 (speculating that "restoration of the attachment [would] only [be] theoretically possible").

414. 417 U.S. 156 (1974).

415. *See id.* at 172; Anderson, *supra* note 174, at 555.

416. *See supra* Part II.A.3.c.

jurisdiction more generally.[417] The more recent theory has made the doctrine more predictable and easier to apply by limiting its application to a handful of immunity defenses.[418] But this has come at the expense of any attempt to improve the theoretical basis and has resulted in, perhaps, a too-narrow reading of the doctrine.

Now that most of the doctrinal issues concerning application of the doctrine have been settled, a reexamination of the method by which the doctrine is applied is in order. At present, it appears that the semantics of the test, more than any other factor, drive its substantive application. I suggest that this model should be reversed. Application of the collateral order doctrine—an examination of what it actually does—should inform the test employed to determine whether it applies to a particular order. Applying that new standard might result in increased clarity in other aspects of appellate jurisdiction as well.

1. Defining the Doctrine

I suggest that the current three- or four-pronged test can be distilled into one simple inquiry: An order may not be appealed under the collateral order doctrine if it is the kind of order that may be mooted downstream in litigation, that is, if a judgment on the merits in the party's favor would obviate the need for the interlocutory appeal. This formulation is, in its essentials, largely the same as the current test (though the importance requirement is discarded),[419] but improves upon it in a number of respects. It leaves less room for litigation over the components of the test; it better explains the nature of the doctrine; it forces courts to confront the basis of the doctrine in deciding whether a particular order qualifies; and it better comports with the other doctrines of effective finality.

The new definition also exposes the underlying purpose of the doctrine. Permitting interlocutory review of orders that will not be mooted downstream in litigation permits review where the harm to be avoided is necessarily immediate, and where awaiting final judgment on the merits would serve no purpose, as the harm will have occurred and reversal at that point would not undo the harm.

This test disposes of one element of the current test (importance) and reduces the remaining three elements to one inquiry. Each of the remaining three elements of the collateral order doctrine is subsumed within the new inquiry. First, the conclusivity requirement remains essentially unchanged. Appellate jurisdiction must be determined on a category-wide basis.[420] An order will not necessarily be mooted downstream in litigation if it is tentative or subject to revision. Therefore, under my standard, as under the current standard, an order that is not conclusive will not be appealable.

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417. *See supra* Part II.A.3.c.
418. *See supra* Part II.A.3.c.iii.
419. *See supra* Part III.B.
420. *See* Glynn, *supra* note 4, at 209–10.

The separability requirement is also preserved. Under my standard an order cannot be appealed if it is of a kind that could be mooted downstream in litigation. Thus, if a judgment on the merits in the party's favor would render the requested interlocutory appeal unnecessary, the order cannot be appealed. Orders that merge in the final judgment, or that could be remedied by a final judgment in the party's favor, are not appealable.

Finally, unreviewability is maintained in the new standard. An order that cannot be mooted downstream in litigation and that cannot be remedied by a final judgment in the party's favor necessarily concerns rights that would be irretrievably lost if not corrected by interlocutory review. Review later will not be able to provide the relief sought.

This approach has some support in case law. In *Budinich v. Becton Dickinson & Co.*,[421] the Court explained that "[a] question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order."[422] The *Budinich* Court was referring to the doctrines of effective finality,[423] but applying the same logic to the collateral order doctrine—a question of partial effective finality—suggests that an order is collateral when it is not subject to revision and will not be mooted by events downstream in litigation. Thus, the new standard not only finds precedential support, but at the same time, better reflects effective finality jurisprudence as a general matter.

Indeed, a simplified collateral order doctrine would share much in common with the other doctrines of partial effective finality. The *Perlman* doctrine and the contempt cases have essentially two bases for appealability: the independence of the order to be reviewed from the general subject matter of the action, and the lack of efficacious review at a later time.[424] Separability and unreviewability are the corresponding elements of the current collateral order test. The suggested changes to the test, which focus on and distill those two elements, would bring the collateral order doctrine back in line with its partial effective finality cousins.

Cohen itself also offers support for the revised test, especially with regard to the separability requirement. The *Coopers & Lybrand* statement that an order must be "completely separate" from the merits[425] is a poor description of what the Court has actually required, and it finds little support in *Cohen* itself. Instead, *Cohen* instructed that an order may be sufficiently separate when it does not take a "step toward final disposition of the merits of the case," when it will not affect or be affected by the merits, and where it "is not an ingredient of the

421. 486 U.S. 196 (1988).

422. *Id.* at 199.

423. *See id.*.

424. *See supra* notes 191–194, 211–215 and accompanying text.

425. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (citing United States v. MacDonald, 435 U.S. 850, 855 (1978); Abney v. United States, 431 U.S. 651, 658 (1977)).

cause of action and does not require consideration with it."[426] Rather than being "completely separate" or even "conceptually distinct" from the merits, *Cohen* required separability only to the extent that the order in question not take a step toward a final judgment on the merits.[427] The new standard reaffirms *Cohen*'s requirement that the order in question simply be of a kind incapable of being mooted by events downstream in the litigation.[428]

On a practical level, the new definition would change little in terms of what type of orders would qualify for collateral treatment. Evidentiary rulings, for instance, are tentative and therefore would still fall outside the scope of the doctrine. Jurisdiction fails the test because reversal on appeal would remedy the harm from the error. Immunity defenses (rights not to stand trial but not rights to avoid liability), as now, would qualify because the reversal on appeal would not prevent the harm sought to be avoided (the trial).

Redefining collateral orders as those that are incapable of being mooted downstream in litigation or those that will not be remedied by a judgment on the merits in the party's favor simplifies the current test, reduces avenues for courts to engage in analysis divorced from the underlying principles of appellate jurisdiction, and harmonizes the collateral order doctrine with other doctrines of partial effective finality. Moreover, the new test accomplishes all this while preserving the essential elements of the current test, and does so in a manner consistent with precedent. It clarifies a confused doctrine by reference to underlying principles, rather than rewriting it entirely. In practical terms, the change would not have a significant effect on the type of orders reviewable under the collateral order doctrine, but at the margins, the doctrine would likely embrace some orders that currently fall outside of the its scope. The effect of slightly broadening the scope of the doctrine would likely be increased stability and predictability in appellate jurisdiction generally.

2. *Effects on Appellate Jurisdiction*

By reducing the degree of separability necessary for appealability under the collateral order doctrine and doing away with the importance factor entirely, certain classes of orders currently subject to interlocutory review by other means would become reviewable under the collateral order doctrine. This is especially valuable where the current means of review is of questionable propriety or, at least, clearly strained.

Take, for example, orders denying motions to transfer venue. These orders have traditionally been granted interlocutory review by means of appellate mandamus.[429] The reason for this is unclear but perhaps may result from courts'

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426. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546–47 (1949).

427. *See id.* at 546.

428. *Id.*

429. *See In re* LimitNone, LLC, 551 F.3d 572, 576 (7th Cir. 2008) (per curiam); Hicks v. Duckworth, 856 F.2d 934, 935 (7th Cir. 1988) (listing numerous cases in which "[t]he use of

former treatment of venue as jurisdictional.[430] In any event, federal courts no longer consider venue jurisdictional,[431] so any hold that venue may have had on the requirement that use of mandamus must be in aid of jurisdiction is no longer viable.

Revising the collateral order doctrine as described above would open a new avenue for review of transfer orders. An order granting or denying a motion to transfer is conclusive.[432] It is not tentative and cannot be changed later except upon a motion to reconsider, and even then not after the transfer is effectuated.[433] Moreover, transfer does not accomplish any step toward the resolution of the merits because the venue concerns only convenience and fairness to the parties.[434] Under the new standard, venue is collateral because it would not be mooted by events downstream in litigation, and a judgment on the merits in the party's favor would not undo the harm in being forced to litigate in an inconvenient forum—perhaps where the parties had agreed to litigate elsewhere.

Similarly, orders denying motions for recusal are often reviewed by appellate mandamus.[435] Under the revised collateral order doctrine, those orders would qualify for an interlocutory appeal. The orders themselves are conclusive (sometimes blisteringly so), and even if the losing movant ultimately prevails, the favorable judgment would not undo the damage—a case presided over by a biased judge or, at the very least, a proceeding tainted by the appearance of impropriety.

Reviewing substantive decisions such as denials of motions to transfer or motions for recusal under the collateral order doctrine rather than by extraordinary writ promises several advantages, both to appellate mandamus specifically and to appellate jurisdiction generally. With regard to appellate mandamus, reviewing substantive decisions under the collateral order doctrine rather than by mandamus would improve and clarify the scope of appellate mandamus. The statute is broad; limiting its reach to compelling or prohibiting actions would bring appellate mandamus closer in line with its counterpart in the district court and, arguably, with its historical forebears. The effect of this would

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mandamus to correct an erroneous transfer out of circuit ha[d] been approved"); People *ex rel.* People's Gaslight & Coke Co. v. Smith, 113 N.E. 891, 893 (Ill. 1916); Crick, *supra* note 19, at 554–55 (citing *Ex Parte* Wagner, 249 U.S. 465, 471–72 (1919)). *But see* Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 380–82 (1953) (holding appellate mandamus is not a permissible vehicle with which to challenge transfer under 28 U.S.C. § 1406(a)).

430. *See* Crick, *supra* note 19, at 554–55 (citing *People's Gas Light & Coke Co.*, 113 N.E. 891) (suggesting that erroneously granting or refusing to change venue is an example of an order issued without jurisdiction).

431. 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3801 (3d ed. 2007).

432. 15 *id.* § 3855.

433. *See id.* § 3846.

434. *See id.* § 3847.

435. *See, e.g.*, *In re* United States, 572 F.3d 301, 307 (7th Cir. 2009) ("[A] petition for writ of mandamus . . . is the proper . . . means of reviewing a district court's denial of a motion for recusal.").

also strengthen mandamus as a discretionary safety valve. Unlike the collateral order doctrine and other doctrines applying the final judgment rule, appellate mandamus is a true statutory exception to the general rule of appellate jurisdiction. Therefore, it need not apply a categorical approach to determining what orders come within its scope. Indeed, one might say that mandamus is not amenable to categorical application because its strength lies in its flexibility, provided the underlying basis for the writ is sufficiently egregious. By shifting to the collateral order doctrine responsibility for determining whether a particular category of orders may be subject to substantive interlocutory review, the discretionary function of appellate mandamus will be able to develop unencumbered by hazy distinctions between various grounds for eligibility.

IV. CONCLUSION

The many distinct grounds for appellate jurisdiction, particularly the judicial interpretations of § 1291, have not received adequate attention and are not well understood. The collateral order doctrine, the most important of these doctrines, has been similarly undertheorized for most of its existence. The recent clarity the Supreme Court has introduced is helpful, but ultimately of limited utility. Instead of reasoning from the doctrine's and appellate jurisdiction's underlying principles, drawing parallels to similar doctrines, the Court has all too often reasoned from its own earlier pronouncements without reference to policy, theory, or the context that gives meaning to the statute.

A reassessment of the language the Court uses to apply the collateral order doctrine is well past due. I suggest that the importance factor is inconsistent with the requirement that appellate jurisdiction be premised on category-wide rules.[436] The remaining factors can be collapsed into a single inquiry: Could a favorable judgment on the merits moot whatever interlocutory relief is sought? This inquiry balances the pragmatism necessary to blunt the effect of § 1291 with the necessity to apply jurisdictional rules categorically. It provides a stronger theoretical—and less semantic—basis for the collateral order doctrine. Finally, it paves the way for clearer application of other rules of appellate jurisdiction.

No full-fledged revision of appellate jurisdiction is necessary. Further legislative enactments and rule-making would most likely not help matters. The building blocks of a sensible regime of appellate review already exist. A few, however, remain out of place. A small change would bring significant clarity to a poorly understood, but vitally important, area of law.

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436. *See supra* Part III.B.1.

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