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Cover Page Footnote

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NOTE

A RETURN TO PRACTICALITY: REFORMING THE FOURTH *COX* EXCEPTION TO THE FINAL JUDGMENT RULE GOVERNING SUPREME COURT CERTIORARI REVIEW OF STATE COURT JUDGMENTS

*Gayle Gerson**

INTRODUCTION

On the last day of the Supreme Court's 2002-2003 term, corporate and media interests eagerly awaited a decision that would provide a long-overdue clarification of the commercial speech doctrine.[1] At issue in *Nike, Inc. v. Kasky*[2] was whether statements made by Nike in defense of its labor practices should be protected by the First Amendment as contributions to a public debate over a controversial issue, or should instead be considered merely commercial speech.[3] If the latter, the company could be held liable for factual inaccuracies in its statements under California's Unfair Competition Law and False Advertising Law.[4]

The trial court had dismissed plaintiff Mark Kasky's complaint that Nike engaged in unfair and deceptive practices by making false statements intended to facilitate its sales.[5] Nike had defended the statements, made in press releases and letters to newspapers and universities, as responses to allegations that it was mistreating and

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1. *See, e.g.*, Thomas Clarke and Deborah Glass, *Will Free Speech be Cowed?*, Nat'l L.J., Apr. 28, 2003, at A12 (referring to the "long-awaited" oral argument that took place, and imploring the Court to "use the opportunity to clarify and elaborate upon the concept of commercial speech").

2. 539 U.S. 654 (2003).

3. *Id.* at 656 (Stevens, J., concurring).

4. *Id.* Under California's Unfair Competition Law and False Advertising Law, a private individual may bring suit to enforce California law on behalf of the general public of the State of California. Cal. Bus. & Prof. Code §§ 17200, 17500 (West 1997).

5. *Nike*, 539 U.S. at 656.

underpaying its workers at foreign facilities.[6] The California Court of Appeal affirmed, holding that Nike's statements were "part of a public dialogue on a matter of public concern within the core area of expression protected by the First Amendment."[7] The California Supreme Court reversed and remanded for further proceedings, holding that "[b]ecause the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products . . . [the] messages are commercial speech."[8]

Many observers expected the Supreme Court to seize upon what appeared to be a perfect opportunity to reject and replace a "doctrinally inconsistent, analytically flawed" test for defining commercial speech.[9] Instead, the Court issued a terse statement announcing that "[t]he writ of certiorari is dismissed as improvidently granted."[10] Scholars, practitioners and journalists decried the Court's decision as one that would have dire consequences for all companies doing business in California, and for corporate America in general.[11] What happened?

While the Court did not elaborate on its decision, Justice Stevens' lengthy concurrence suggested the Court was concerned that, because the California Supreme Court had not yet rendered a final decision in the case, an assertion of appellate jurisdiction would have run afoul of 28 U.S.C. § 1257 of the United States Code.[12] The statute limits the

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6. *Id.*

7. *Id.* at 656-57.

8. *Id.* at 657 (quoting Kasky v. Nike, Inc., 45 P. 3d 243, 247 (Cal. 2002)).

9. J. Wesley Earnhardt, Nike, Inc. v. Kasky*: A Golden Opportunity to Define Commercial Speech - Why Wouldn't the Supreme Court Finally "Just Do It"?*, 82 N.C. L. Rev. 797, 800 (2004).

10. *Nike*, 539 U.S. at 655. The Court issued a *per curiam* opinion. Justice Stevens concurred in a written opinion, joined by Justices Ginsburg and Souter (Souter concurring only as to part III); Justice Kennedy dissented, without opinion; and Justice Breyer dissented in a written opinion, joined by Justice O'Connor.

11. *See* Adam Liptak, *Nike Move Ends Case Over Firms' Free Speech*, N.Y. Times, Sept. 13, 2003, at A8 (reporting that "First Amendment experts said they were dismayed that the California court's decision would stand"); Anitha Reddy, *Nike Settles With Activist in False-Advertising Case*, Wash. Post, Sept. 13, 2003, at E01 (reporting that "[t]he case was considered by consumer advocates, businesses and legal experts to be an important battle that could have clarified a murky area of First Amendment law"); Robert J. Samuelson, *The Tax on Free Speech*, Newsweek, July 14, 2003, at 41 ("To anyone concerned about free speech, the failure of the Supreme Court to rule on a case brought by Nike Inc. is more than disappointing. It's a disaster. . . . [T]he practical effect is to expose Nike and other companies to expensive trials and huge economic risks. Their choice may be to shut up or pay up.").

12. *Nike,* 539 U.S. at 657-58. Stevens stated:

> In my judgment, the Court's decision to dismiss the writ of certiorari is supported by three independently sufficient reasons: (1) the judgment entered by the California Supreme Court was not final within the meaning of 28 U.S.C. § 1257; (2) neither party has standing to invoke the jurisdiction

Court's review to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had."[13] Justice Breyer's dissent, urging that the California Supreme Court judgment was final in the pragmatic sense in which the statute is typically construed,[14] underscored the lack of consensus among the Justices over how far the Court should go in reading flexibility into the final judgment rule. The debate is a longstanding one. Indeed, even before the turn of the twentieth century, the Court had observed that "[p]robably no question of equity practice has been the subject of more frequent discussion in [the Court] than the finality of decrees."[15]

While the final judgment rule is rooted in bedrock principles of federalism, constitutional avoidance, and judicial efficiency,[16] the Court has long recognized that rigid adherence to the rule is often unrealistic. Struggling to give the statute "[a] practical rather than a technical construction,"[17] the Court has attempted to forge exceptions where the dangers of adhering to a strict interpretation of finality—such as prejudicing the petitioner or foregoing the most efficient resolution of the dispute—outweigh the costs.[18]

Over time the Court has favored an increasingly liberal interpretation of finality, expanding the number and scope of exceptions and provoking criticism that it has allowed the rule to become dispensable, "yielding when need be to the exigencies of particular situations."[19] Some feared that what had begun as a reluctant acknowledgment that a "penumbral area" surrounds the otherwise strict concept of a final judgment[20] had become instead an eager willingness to prematurely interfere with state judicial proceedings.

One of the most controversial exceptions allows the Court to construe a judgment as final for purposes of appeal if the Court determines that the judgment "might seriously erode federal policy."[21] Under this exception, the Court has reviewed cases in which the appealing party may well have prevailed in subsequent state court proceedings on nonfederal grounds, rendering the federal issue moot,

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of a federal court; and (3) the reasons for avoiding the premature adjudication of novel constitutional questions apply with special force to this case.

Id.

13. 28 U.S.C. § 1257 (2000).
14. *Nike*, 539 U.S. at 670-71 (Breyer, J., dissenting).
15. McGourkey v. Toledo & Ohio Cent. Ry. Co., 146 U.S. 536, 544-45 (1892).
16. *See infra* Parts I.A-I.B.
17. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).
18. *See infra* Parts I.C-I.D.
19. Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 572 (1963) (Harlan, J., dissenting).
20. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).
21. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 482-83 (1975).

and in which there was no concern that delaying review would have subjected the petitioner to irreparable harm.[22] It was this exception, institutionalized in *Cox Broadcasting Corp. v. Cohn*,[23] that was at issue in *Nike*. The company argued that a refusal to immediately review the state court judgment that it was subject to liability for its statements would threaten the federal policy of protecting First Amendment speech.[24]

The argument was a strong one, as the Supreme Court has applied the fourth *Cox* exception in many First Amendment cases, holding that the risk posed by a state law abridging the exercise of free speech was simply too great to allow a court judgment upholding its validity to stand.[25] The Court has been similarly solicitous of other federal policies that do not rise to the level of constitutional rights.[26] Yet never has it satisfactorily explained why certain policies and rights deserve to be fast-tracked to Supreme Court review, circumventing traditional appellate routes, while others fall short of this favored status. The Court has failed to articulate a limiting principle to restrain its application of the fourth *Cox* exception.[27] This is a concern, critics argue, because the exception abandons principles of federalism and comity, as well as the doctrine of avoiding constitutional adjudication whenever possible, by preventing state courts from potentially resolving disputes on independent state grounds, and undermines judicial efficiency by promoting general uncertainty about the availability of appeal.[28]

This Note argues that the fourth *Cox* exception to the final judgment rule of 28 U.S.C. § 1257 is an untenable doctrine that is fundamentally at odds with the policies underlying the statute and is unworkable in practice. Part I reviews the history of, and policies behind, the final judgment rule, emphasizing the unique concerns that accompany Supreme Court certiorari jurisdiction over appeals of state court judgments to the Supreme Court, as compared to the jurisdiction of the courts of appeals over judgments of the federal district courts. Part I then introduces the major exceptions the Court has developed to the finality rule in both contexts, and outlines common arguments for and against them.

Part II traces the development of the fourth exception to the final judgment rule of § 1257, highlighting the Court's evolution in terms of its willingness to find that the potential harm of delaying review outweighs the risks inherent in granting an interlocutory appeal. The

22. *See infra* Part II.B.
23. 420 U.S. 469 (1975).
24. Nike, Inc. v. Kasky, 549 U.S. 654, 658 (2003).
25. *See infra* Part II.C.
26. *See infra* notes 252-56 and accompanying text.
27. *See infra* Part II.C.
28. *See infra* Part II.B.3.

cases discussed demonstrate how the Court's balancing approach, through which it purported to inject fairness and practicality into an otherwise rigid rule, gave way to a virtual disregard of the statute's basic underlying policy rationales. After examining this evolution, Part II looks at how the Court has applied the exception in the years since *Cox*, presenting a picture of general inconsistency regarding the doctrine's scope.

Part III argues that the fourth *Cox* exception is an irrational and impractical doctrine that undermines the policies of § 1257 without requiring the existence of compelling countervailing interests. While the Court has applied the exception to expedite review of interlocutory judgments in certain deserving situations, the battle of opinions in the *Nike* case demonstrates that there remains support on the Court for a very expansive and problematic application of the exception.[29] Part III offers a critique of the exception, using Justice Stevens' concurrence in *Nike* to explicate its shortcomings. First, the exception is "virtually formless,"[30] lacking clarity and predictability. Its language seems to contemplate the availability of review for any interlocutory order, as long as it implicates an important federal policy. As such, the exception does not strike an appropriate balance between the benefits of providing interlocutory review and the potential harms, such as fostering uncertainty among litigants about the availability of review and interfering with harmonious relations between state and federal judicial systems. Second, the exception contravenes the doctrine of constitutional avoidance by specifically allowing for review of interlocutory judgments that resolve federal questions even though the federal question may be mooted by subsequent proceedings. Third, since it is possible in some cases that additional federal questions could arise in subsequent state court proceedings, the exception creates a risk that the Court will engage in piecemeal review of federal issues, thus undermining the efficiency benefits that the final judgment rule was meant to foster. Finally, in applying the fourth *Cox* exception, the Court must necessarily flout the traditional judicial process by considering the merits of a case prior to determining that it has jurisdiction to hear the matter in the first place.

Part III then proposes an alternative approach to the fourth *Cox* exception. Specifically, it proposes rejecting the prong of the test that permits the Court to base its assertion of jurisdiction on a determination that there is some risk that a state court judgment "might seriously erode federal policy,"[31] and replacing it with a concern for the degree to which a longstanding and erroneous state

29. *Nike*, 539 U.S. at 655-65 (Stevens, J., concurring).
30. Cox Broad. Corp v. Cohn, 420 U.S. 469, 505 (1975) (Rehnquist, J., dissenting).
31. *Id.* at 483.

court judgment would irreparably impair the petitioner's rights. Part III suggests that this test would weigh in favor of interlocutory review in two situations: when a state court has upheld, refused to consider appeal from, or refused to issue a stay of, a preliminary injunction against speech that is of dubious constitutionality; and when a state court judgment has rejected the petitioner's federal argument regarding venue or jurisdiction.

A pre-trial sanction threatens immediate, ongoing, and irreparable harm to a litigant. Rather than merely "chilling" speech, an injunction effectively "freezes" it, preventing the exercise of the right for an indefinite amount of time. It could be years until a trial is completed and appeals make their way through the court system, at which point a vindication of one's speech rights may be, at best, bittersweet, and at worst, irrelevant. Similarly, a court's determination that it has the power to subject a litigant to proceedings is one that can be effectively challenged only prior to the commencement of those proceedings.

I. EVOLUTION OF THE FINAL JUDGMENT RULE

The final judgment rule governing appeals from state courts to the United States Supreme Court was incorporated into section 25 of the Judiciary Act of 1789,[32] and was carried forth in substantially the same form in every subsequent revision of the Judicial Code.[33] Today, it is

32. Judiciary Act of 1789, § 25, 1 Stat. 73, 85-86 (codified as amended at 28 U.S.C. § 1257 (2000)). The section reads:

> And be it further enacted, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . . .

Id. The roots of the final judgment rule may be found in the English writ of error, a means by which litigants could petition the King's Court to correct errors of judgment. *See* Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 Yale L.J. 539, 541 (1932). The common law concept of the judicial unit precluded the reviewing court from issuing a writ of error before completion of the suit below. *Id.* at 543. A "conception of unity of the formal record" may explain why proceedings in the lower court and in the reviewing court could not take place simultaneously. *Id.*

33. *See* Richard H. Fallon et al., Hart & Weschler's The Federal Courts and the Federal System 466-69 (5th ed. 2003) [hereinafter Hart & Weschler]; Charles Alan Wright et al., Federal Practice and Procedure: Jurisdiction and Related Matters § 4006 (2d ed. 1996). The language of section 25 of the Act was amended in 1867, and was subsequently reenacted as section 709 of the Revised Statutes in 1874, and as section 237 of the Judicial Code in 1911. Hart & Weschler, *supra,* at 466 n.3. Revisions to the Code in 1948 reformulated the basic provisions conferring jurisdiction to review state court decisions in 28 U.S.C. § 1257. *Id.* at 468 n.15. In the

codified in 28 U.S.C. § 1257, which limits Supreme Court appellate review of state court decisions to "final judgments or decrees rendered by the highest court of a State in which a decision could be had."[34] A similar rule for appeals from federal district courts to the federal courts of appeals, originating in section 22 of the Judiciary Act,[35] is codified in § 1291 of the Code. It provides that "[t]he courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States."[36]

From a literal standpoint, a final decision is "one which ends the litigation on the merits and leaves nothing for the court to do but to execute the judgment."[37] Yet the Court has preferred to give the final judgment rule a "practical rather than a technical construction,"[38] one that is purportedly "more consonant to the intention of the legislature."[39] Precisely what the legislature intended, and what constitutes a "practical," rather than a gratuitous, degree of flexibility in defining finality, has been a subject of considerable debate.

Part I.A discusses the fundamental policy considerations underlying the final judgment rule in general, including a desire to increase judicial efficiency and to avoid adjudicating constitutional questions unless absolutely necessary. Part I.B provides an overview of the additional unique concerns supporting the final judgment rule governing certiorari review of state court decisions by the Supreme Court, such as federalism and adherence to the adequate and independent state grounds doctrine. Parts I.C and I.D highlight the Court's early exceptions to the rule, both in the federal and state court contexts. Finally, Part I.E summarizes the Court's articulation of its final judgment rule jurisprudence in *Cox*, where it outlined the four *Cox* categories of exception to the rule.

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intervening years, Congress had gradually shifted all proceedings from mandatory review by writ of error to discretionary review by writ of certiorari, and expanded the availability of review to include all federal questions properly presented to state courts (rather than only those judgments ruling against the validity of a federal statute or in favor of the validity of a state statute). Wright, *supra*, at § 4006. The Act of June 27, eliminated all remaining appeal-as-of-right bases for review by the Court and made all state court judgments reviewable only by writ of certiorari. *Id.*

34. 28 U.S.C. § 1257.

35. Judiciary Act of 1789, § 22, 1 Stat. 73, 84 (codified as amended at 28 U.S.C. § 1291). The section reads, "[a]nd be it further enacted, That final decrees and judgments in civil actions in a district court . . . may be re-examined and reversed or affirmed in a circuit court . . . ." *Id.*

36. 28 U.S.C. § 1291.

37. Catlin v. United States, 324 U.S. 229, 233 (1945).

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

39. Forgay v. Conrad, 47 U.S. (6. How.) 201, 203 (1848).

A. *The Policy Rationales Underlying the Final Judgment Rule*

1. Judicial Efficiency

The primary purpose of the finality rule, since its inception, has been to foster judicial efficiency by preventing piecemeal review of lower court judgments.[40] Reviewing a matter in its entirety, rather than on successive appeals of interlocutory judgments, avoids unnecessary delays and preserves the continuity of litigation.[41] It lessens the burden on judicial dockets by weeding out cases in which alleged errors prove to be inconsequential to the outcome of, or are rendered moot by, subsequent proceedings.[42] Avoiding piecemeal review also improves the quality of judicial decision making by increasing the likelihood that the Supreme Court will have a complete record, with all of the relevant facts necessary to make an informed judgment.[43]

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40. *See* Balt. Contractors, Inc. v. Bodinger, 348 U.S. 176, 178 (1955) ("Congress has long expressed a policy against piecemeal appeals."); *Forgay*, 47 U.S. (6 How.) at 205 ("In limiting the right of appeal to final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit; and to have the whole case and every matter in controversy in it decided in a single appeal."); Canter v. Am. Ins. Co., 28 U.S. (3 Pet.) 307, 318 (1830) (stating that it is "in furtherance of the manifest intention of the legislature . . . that causes should not come up here in fragments, upon successive appeals"); Patrick Edward McGinnis, *Civil Procedure—New Insight on Finality of State Court Judgments*, 1975 Ariz. St. L.J. 627, 628 ("The rule was fashioned to preclude the delay and harassment resulting from incessant appeals from interlocutory orders.").

41. *See* McLish v. Roff, 141 U.S. 661 (1891). The decision highlights the policy underlying the final judgment rule:

> It is a matter of public history, and is manifest on the face of [the Judiciary Act], that its primary object was to facilitate the prompt disposition of cases in the Supreme Court, and to relieve it of the enormous overburden of suits and cases resulting from the rapid growth of the country and the steady increase of its litigations.

Id. at 666; *see also* Theodore D. Frank, *Requiem for the Final Judgment Rule*, 45 Texas L. Rev. 292, 292 (1966) (explaining that the final judgment rule "effectuates . . . an efficient utilization of judicial manpower and permits the initial stage of litigation to operate in a smooth, orderly fashion without disrupting appeals").

42. *See* Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 Notre Dame L. Rev. 175, 182-83 (2001); Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 Harv. L. Rev. 1004, 1006 (1978) [hereinafter, *The Finality Rule*].

43. *See* Timothy B. Dyk, *Supreme Court Review of Interlocutory State-Court Decisions: "The Twilight Zone of Finality,"* 19 Stan. L. Rev. 907, 938 (1967) (explaining that this is a factor even when a full trial was completed and the state court remanded for a new trial, because the record from the new trial could be substantially different in several respects); Frank, *supra* note 41, at 318 (noting that when the appellate court has only a portion of the record before it, "[t]he opportunity for a short-sighted decision is manifest"); *The Finality Rule*, *supra* note 42, at 1006 (noting that by awaiting a completed case, the Court can review a federal question "within the context of a developed factual record and the articulated reasoning and legal conclusions of the trial judge"); Note, *The Requirement of a Final Judgment or*

In the words of Justice Frankfurter, the finality rule "avoids the mischief of economic waste and of delayed justice" that results from incessant appeals from interlocutory orders.[44] Justice Story likewise agreed that it is "of great importance to the due administration of justice" to prohibit fragmentary review of cases, as successive appeals would lead to great delays and "oppressive expenses" for the parties.[45]

The final judgment rule also lends certainty to the judicial process, making it clear to litigants when appellate review is available.[46] An appeal to the Supreme Court of a state court judgment must be taken within 90 days of the judgment, or the appellant forfeits the appeal.[47] Uncertainty over when an appeal of an unfavorable state court decision may be filed would burden the Court with appeals filed at every stage of the litigation by over-cautious litigants who fear losing their right to appeal by not filing in a timely manner.[48] Lack of clarity regarding the availability of review also tends to encourage the filing of interlocutory appeals merely as a dilatory tactic designed to weaken the opposing side.[49]

Decree for Supreme Court Review of State Courts, 73 Yale L.J. 515, 516 (1964) [hereinafter *Requirement of a Final Judgment*].

44. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945); *see also* Waverly Mut. & Permanent Land, Loan & Bldg. Ass'n v. Buck, 64 Md. 338, 342 (1885) (observing that the final judgment rule "prevent[s] the protraction of litigation to an indefinite period" by multiple appeals that would "create vexatious delay, and might eventually result in a ruinous accumulation of costs"); Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 Colum. L. Rev. 89, 89 (1975).

45. Crick, *supra* note 32, at 551 (quoting Justice Story in Canter v. Am. Ins. Co., 28 U.S. (3 Pet.) 307, 318 (1830).

46. *The Finality Rule*, *supra* note 42, at 1009.

47. 28 U.S.C. § 2101(c) (2000); Sup. Ct. R. 13; *see also* McGinnis, *supra* note 40, at 628.

48. *See* Wright, *supra* note 33, at § 4010 (explaining that an expanded finality doctrine that lacks clarity may result in a denial of appellate justice to a litigant "whose only fault was a failure to expand imaginatively enough on the now-elusive finality principle"). Wright adds that "the danger of precluded review [c]ould encourage many ill-founded protective applications by parties who do not even wish present review, but who fear that it must be sought now-or-never." *Id.*; Frank, *supra* note 41, at 317 (arguing that vagueness and uncertainty in the final judgment rule subjects litigants to harassment and the added costs of incessant appeals, as lawyers unsure of the finality of a decision are forced to appeal from it as a precautionary measure to insure a timely appeal); *Requirement of a Final Judgment*, *supra* note 43, at 517 (arguing that an expanded definition of finality "will not only permit more appeals, but will also require them" because, while few litigants would likely be deprived of review due to a failure to make a timely appeal, "the threat may be sufficient to burden the courts with premature appeals"). *But see* McGinnis, *supra* note 40, at 640 (arguing that the problem of uncertainty could be resolved by making appeals from interlocutory state court judgments permissive, rather than mandatory, so that litigants would not be penalized for failing to make a timely appeal).

49. *See* Wright, *supra* note 33, at § 4010 ("Expanded finality doctrines entail . . . apparent risks that the Court will be burdened with applications filed for deliberate purposes of delay and may at times grant review prematurely."); *The Finality Rule*, *supra* note 42, at 1006; *Requirement of a Final Judgment*, *supra* note 43, at 516

2. Constitutional Avoidance Doctrine

In addition to promoting efficiency in the judicial process, the final judgment rule effectuates the doctrine of constitutional avoidance, a doctrine which carries both prudential and constitutional weight.[50] Articulated by Justice Brandeis in his concurrence in *Ashwander v. Tennessee Valley Authority*,[51] the doctrine, which reflects principles of justiciability such as standing, ripeness, and mootness,[52] encompasses several tenets. Among these are the policies that the Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it," and "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[53] The Court strives to sustain or reverse a decision on non-constitutional grounds, and preferably on the narrowest grounds possible.[54] Awaiting the final judgment of a lower court before hearing an appeal increases the possibility that an appellate court, with a more fully-developed record, will be able to decide the case on an issue less weighty than the constitutional issue that might otherwise be raised in an interlocutory posture.[55]

(arguing that the danger in an expansive finality rule comes not so much from the increase in the number of cases on the appellate docket, but from "an ill-defined rule which, lacking clarity, both lends itself to dilatory appeals and leads prudent counsel to appeal any order which may appear final"). *But see* McGinnis, *supra* note 40, at 644 (arguing that a liberal use of sanctions for frivolous appeals would be a "far more effective device for relieving congestion than complete denial of interlocutory appeals").

50. *See generally* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. Rev. 1003, 1018-24 (1994) (construing the avoidance doctrine as laid out in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936)).

51. 297 U.S. 288 (1936).

52. *See* Kloppenberg, *supra* note 50, at 1016-24. The doctrines of mootness, ripeness, and standing are related to Article III "case or controversy" requirements, and therefore are of constitutional importance. *Id.* at 1018.

53. *Ashwander*, 297 U.S. at 346-47 (Brandeis, J., concurring).

54. *Id.* at 347 (stating that the Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied" (citations omitted)). The decision further explained that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Id.*

55. *See* Dyk, *supra* note 43, at 937 (explaining that a significant consideration with regard to the final judgment rule of § 1257 is that the Supreme Court should decide constitutional questions only when necessary); Frank, *supra* note 41 at 319 (noting that exceptions to the final judgment rule "bring[] into question" the policy of avoiding unnecessary constitutional issues); *The Finality Rule*, *supra* note 42 at 1013 (arguing that the finality rule facilitates the development of alternative grounds for the disposition of cases, thus enabling the Court to avoid unnecessary constitutional adjudication).

B. *Unique Concerns Underlying the Finality Rule Governing Certiorari Review of State Court Judgments by the Supreme Court*

Pursuant to 28 U.S.C. § 1257, the finality requirement governing appeals from state courts to the Supreme Court is grounded on even "more serious concerns" than that governing appeals within the federal system, under 28 U.S.C. § 1291.[56] This is demonstrated by the fact that Congress has enacted many legislative exceptions to § 1291,[57] while conspicuously declining to do so for § 1257.[58]

1. Federalism and Comity

The final judgment rule of § 1257 is in large part a doctrine of federalism.[59] It reflects a concern that excessive federal judicial interference with state administrative and judicial functions could have undesirable consequences for our federal system.[60]

Maintaining the smooth functioning of our judicial system has been a primary theme since the beginning of the Republic.[61] The Judiciary

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56. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 502-03 (1975) (Rehnquist, J., dissenting).

57. For example, § 1292(a) of the Code provides for appeals as of right from orders granting, continuing, modifying, refusing, or dissolving injunctions. 28 U.S.C. § 1292(a) (2000). Appeal as of right is also permitted, pursuant to the Federal Rules of Civil Procedure, in actions involving more than one claim if the district court judge directs the entry of a final judgment as to one or more claims "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b). Since 1998, the Federal Rules also provide for interlocutory appeal of decisions to grant or deny class certification. Fed. R. Civ. P. 23(f). Section 1292(b) of the Judicial Code permits a district court judge to certify a question to the court of appeals for interlocutory review if the judge determines that it is a controlling question of law over which there is a substantial ground for a difference of opinion, and that the resolution may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). The Bankruptcy Act allows for interlocutory appeals in bankruptcy proceedings. Bankruptcy Act, ch. 541, § 24, 30 Stat. 553 (1898). For a complete discussion of appealability in the federal system, see Glynn, *supra* note 42.

58. *Requirement of a Final Judgment*, *supra* note 43, at 523 ("Amendments or statutory exceptions to [§1257] have never been attempted, in striking contrast to the tendency toward statutory liberalization within the federal and state judiciaries.").

59. *See* McGinnis, *supra* note 40, at 630 (explaining that an important aspect of the final judgment rule is "exhaustion of state remedies, based on the doctrines of comity and federalism"); *The Finality Rule*, *supra* note 42, at 1012 (noting that "the invocation of section 1257 not only requires attentiveness to the functional concerns underlying the congressionally mandated principle of finality; it also implicates the relationship between the states and the federal government, and hence the special concerns of federalism and comity"); *Requirement of a Final Judgment*, *supra* note 43, at 530 ("The very fact that the final judgment or decree requirement [of § 1257] has rested unaltered in the Judicial Code since 1789, while finality requirements have been varied in other contexts, suggests that finality is partially a doctrine of federalism, and not solely a rule of convenience.").

60. *Cox*, 420 U.S. at 503 (Rehnquist, J., dissenting).

61. Bennett Boskey, *Finality of State Court Judgments Under the Federal Judicial Code*, 43 Colum. L. Rev. 1002, 1002 (1943) ("The delicacy of the relationship between

Act of 1789 represented a compromise between those who favored a strong federal court system and those who feared that an independent federal judiciary would threaten state courts and restrict civil liberties.[62] One of the most controversial provisions of the Act was section 25, granting the Supreme Court jurisdiction to hear appeals from decisions of the high courts of the states when those decisions involved questions of the constitutionality of state or federal laws or authority.[63] Early decisions that firmly established the Supreme Court's jurisdiction to review state court decisions did so by recognizing an "intrinsic interest" in achieving a uniform disposition of federal questions.[64] Yet principles of federalism and comity require that federal courts respect the dignity of state courts as those of another sovereign and avoid creating friction between the two judiciaries.[65]

Accordingly, many Justices and scholars have counseled a "more restrictive approach" with respect to § 1257 than § 1291 finality.[66] Early in the Court's experimentation with exceptions to the finality rule, Justice Frankfurter warned:

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the states and the federal government has from the beginning given emphasis to the desirability of limiting federal revision of state court judgments to the minimum consistent with the proper execution of the constitution, statutes and treaties of the United States.").

62. The Fed. Judicial Ctr., Landmark Judicial Legislation: The Judiciary Act of 1789, *at* http://air.fjc.gov/history/landmark/02a_bdy.html (last visited Aug. 8, 2004).

63. *Id.*; *see also* Hart & Weschler, *supra* note 33, at 479-80 (documenting strong resistance by several states to the authority of the Supreme Court to decide cases on writs of error to state courts, culminating in the doctrines of secession, that each state had an equal right to stand on its interpretation of the Constitution); Wright, *supra* note 33, at § 4006 n.20 (referring to "[t]he frequency and bitterness of . . . attacks on the Supreme Court's jurisdiction, and the parallel efforts to achieve congressional limitation of the jurisdiction").

64. Wright, *supra* note 33, at § 4006.

65. *See* Frank, *supra* note 41, at 318 (stating that an overly expansive concept of finality "involves an intrusion into the state court procedures that is opposed to the notions of federalism and represents a serious subversion of well-established rules of Court review which are designed, at least in part, to assist in the maintenance of harmonious state-federal relations"); *The Finality Rule*, *supra* note 42, at 1012-13 (noting that federalism dictates the need for "a heightened solicitude for the integrity of the trial process because of possible state sensitivity about interlocutory supervision by the federal judiciary"). The Court has manifested its understanding of this need in other ways as well. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 41-45 (1971) (articulating the *Younger* abstention doctrine, by which federal courts are prohibited from enjoining state court proceedings). *But see* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. Rev. 233, 280-83 (1988) (arguing that, although the principle of comity is often used to justify circumscribing federal court jurisdiction to reduce friction with state courts, the very existence of federal courts is an offense to state court judges as it is implicitly based on a distrust of the state judiciaries).

66. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 503 (1975) (Rehnquist, J., dissenting); Boskey, *supra* note 61, at 1002-03 (suggesting that the term "final decision" should be more strictly construed under § 1257 because considerations of federalism dictate federal restraint in interfering with state judicial actions).

> [The] prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after "the highest court of a State in which a decision in the suit could be had" has rendered a "final judgment or decree." This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.[67]

2. Adequate and Independent State Grounds Doctrine

By requiring a final judgment in a case before accepting an appeal of a decision therein, the Court gives effect to the adequate and independent state grounds doctrine ("State Grounds doctrine").[68] An outgrowth of the constitutional avoidance doctrine,[69] the State Grounds doctrine precludes the Supreme Court from reviewing state court determinations of federal law when there is an independent state law ground that is adequate to sustain the judgment in the case.[70] When an order is presented on interlocutory appeal, the state court has not yet had the opportunity to develop a state law ground upon

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67. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945) (citations omitted); *see also* Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 67 (1948). In *Republic Natural Gas,* the Court stated:

> [The] prerequisite [of finality] for the exercise of the appellate powers of this Court is especially pertinent when a constitutional barrier is asserted against a State court's decision on matters peculiarly of local concern. Close observance of this limitation upon the Court is not regard for a strangling technicality. History bears ample testimony that it is an important factor in securing harmonious State-federal relations.

Id.

68. *See, e.g.*, Frank, *supra* note 41, at 319.

69. *See* Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 572 (1963) (Harlan, J., dissenting) (arguing that foreclosing the Court from prematurely deciding issues of constitutional significance "keep[s] to a minimum undesirable federal-state conflicts," by providing state courts with the opportunity to render their own judgments on federal questions, and to potentially resolve disputes on independent state grounds); Frank, *supra* note 41, at 319 (noting that the Court, by reviewing an interlocutory order and circumventing the operation of the State Grounds doctrine, faces a federal, and often constitutional, issue that might have been avoided); Kloppenberg, *supra* note 50, at 1027 (explaining that the State Grounds doctrine is an application of the "last resort rule," one of the tenets of constitutional avoidance doctrine). For a general discussion of the avoidance doctrine, see *supra* note 51 and accompanying text.

70. *See* Herb v. Pitcairn, 324 U.S. 117, 125 (1945) (stating that since the time of its foundation the Supreme Court has refused to review judgments of state courts that are based on adequate and independent state grounds). *See generally* Larry W. Yackle, Federal Courts 177-92 (2d ed. 2003).

which it may ultimately resolve the matter.[71] By providing a federal forum prior to the final judgment in the case, the Court inhibits the state court's ability to exercise its own judicial authority, and considers constitutional questions "in advance of the necessity of deciding [them]."[72] While postponing appellate review pending the completion of state court proceedings and the development of any possible independent state grounds may result in the insulation of a state court's mistaken interpretation of federal law from review altogether,[73] comity and a desire to avoid unnecessary adjudication weigh in favor of exercising this restraint.[74]

The State Grounds doctrine is widely believed to have a constitutional dimension as a necessary corollary to the ban on advisory opinions.[75] The advisory opinion ban is mandated by Article

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71. *See* Frank, *supra* note 41, at 319.

72. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (internal quotation omitted); *see also* Richard Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 Colum. L. Rev. 1291, 1354-55 n.338 (1986) (explaining that when the Court assumes jurisdiction because its reversal of the federal issue might avoid further state proceedings and would clarify federal law, it "cut[s] at the very heart of the adequate and independent state grounds rule").

73. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 481 (1975) (articulating an exception to the final judgment rule that enables Supreme Court review of an interlocutory judgment where subsequent state court proceedings would insulate the federal question altogether, regardless of the outcome); *infra* Part I.E.3. Matasar and Bruch posit that the Court is justified in creating such exceptions to the final judgment rule to ensure the review of federal questions of law, because doing so "further[s] the primary mission Congress contemplated for the Court as a vigilant guardian of federal supremacy and uniformity." Matasar & Bruch, *supra* note 72, at 1355. The State Grounds doctrine, they assert, should not impose a barrier to the Court in fulfilling this role by precluding it from reviewing federal issues on appeal from state courts. *Id.* at 1314-15. Therefore, the Court should preserve jurisdiction over federal issues that could otherwise slip from its grasp were it to delay immediate review of a state court judgment. *Id.* at 1354-55 nn.338-39.

74. *See* Cardinale v. Louisiana, 394 U.S. 437, 439 (1969). *Cardinale* stated,

> in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, they should be given the first opportunity to consider them.

Id. (citation omitted); *Requirement of a Final Judgment*, *supra* note 43, at 530 (arguing that increasing the prevalence of review of state court determinations prior to a final judgment gives the federal system too much "power to effectuate its view of the law").

75. *See* Pope v. Atl. Coast Line R.R., 345 U.S. 379, 381 (1953) ("Congress has limited our power . . . lest the Court's jurisdiction be exercised in piecemeal proceedings to render advisory opinions."); *Herb*, 324 U.S. at 125-26 (linking the origins of the State Grounds doctrine to the ban on advisory opinions by stating that the Court may not correct a state court's interpretation of federal law unless that correction would mandate a different outcome in the case, because the Court's review

III's "case or controversy" requirement, which precludes a federal court from rendering a decision in a case that lacks a justiciable question (one that involves a real dispute between truly adverse litigants which can be redressed by the court).[76] The court may not give a "hypothetical" opinion that does not have a substantial likelihood of affecting the outcome of the case.[77] When litigation may be resolved on the basis of adequate state law grounds that are independent of any federal questions, a Supreme Court determination of the federal issues would amount to an advisory opinion because there is no actual dispute remaining between adverse litigants, and a Supreme Court decision resolving the federal issues would not be likely to have an effect in the case.[78]

Imbued as it is with constitutional significance, the State Grounds doctrine may not be lightly cast aside. Yet, as the doctrine is premised on avoidance of federal review, it is necessarily at odds with the policy considerations that underlie the exceptions to the final judgment rule.[79] This conflict has posed a significant dilemma to the Court as it has considered the compelling interests that often counsel in favor of

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would otherwise amount to nothing more than an advisory opinion); Cynthia L. Fountaine, *Article III and the Adequate and Independent State Grounds Doctrine*, 48 Am. U. L. Rev. 1053, 1055 (1999) ("[T]he Constitution dictates the boundaries of the State Grounds Doctrine."); Richard W. Westling, Comment, *Advisory Opinions and the "Constitutionally Required" Adequate Independent State Grounds Doctrine*, 63 Tul. L. Rev. 379, 390-403 (1988) (arguing that the State Grounds doctrine is an application of the advisory opinion ban, which is itself constitutionally grounded in Article III). *But see* Martin H. Redish, Federal Courts: Cases, Comments and Questions 932 (4th ed. 1998) (pointing out that the advisory opinion rationale for the State Grounds doctrine "has been criticized by commentators").

76. *See* 22 James Wm. Moore et al., Moore's Federal Practice § 406.03[1] (3d. ed. 2004) (explaining that the restriction prevents the Court from encroaching on the legislative branch of government by rendering an opinion intended to affect the law on an abstract level); Kloppenberg, *supra* note 50, at 1010-11. *But see* Matasar & Bruch, *supra* note 72, at 1390 (characterizing the State Grounds doctrine as federal common law that was "developed from erroneous constitutional jurisprudence, misconstructions of federal statutes, and historical happenstance").

77. *See* Kloppenberg, *supra* note 50, at 1011; Westling, *supra* note 75, at 397 ("When a complete resolution of the parties' rights can take place without addressing the federal question presented and when the resolution of the federal question cannot effect the final disposition of the parties' claims, an answer to the federal question would be hypothetical."). The ban on advisory opinions was first articulated in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), which declared that it would be a violation of the separation of powers principle for Supreme Court Justices to *recommend* to the Secretary of War what amount of benefits should be paid to a veteran if the Secretary could refuse to follow the Court's recommendation. Kloppenberg, *supra* note 50, at 1011 n.42.

78. *See* Fountaine, *supra* note 75, at 1077. For example, in cases where the petitioner would have prevailed on state law grounds, a Supreme Court reversal of the state court on the federal issue becomes irrelevant. The outcome—the petitioner's victory—is the same either way.

79. *See* Matasar & Bruch, *supra* note 72, at 1294, 1351-54.

making such exceptions, and has attempted to strike the proper balance.

C. *Development of the Traditional Exceptions to the Final Judgment Rule: Arguments Against Rigid Adherence*

For many years the Court subscribed to a rigid approach, insisting on a narrow definition of finality that made the "face of the judgment" determinative of the right to review.[80] Only when the judgment on appeal concluded the entire litigation, save for formal entry of the judgment, was it deemed final.[81]

The Court soon acknowledged, however, that practical concerns often counsel against strict application of the rule. In response, the Court began interpreting the rule to allow appeals of realistically final orders that effectively sounded the "death knell" of the litigation, even though technical finality has not been established.[82] The Court's next step was to carve out a true exception to the final judgment rule with the collateral order doctrine, first articulated in *Cohen v. Beneficial Industrial Loan Corp.*[83] Under the doctrine, the Court may review decisions that are clearly interlocutory, but which are conclusive of the sole federal issue in a case, when that issue is separate from the merits of the suit and when review at a later date may be difficult or impossible.[84] The Court therefore seeks to immediately correct a highly prejudicial error that could cause the petitioner irreparable harm.[85] In such cases, the Court has determined that "the danger of denying justice by delay" outweighs the "inconvenience and costs of piecemeal review."[86]

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80. *See, e.g.*, La. Navigation Co. v. Oyster Comm'n of La., 226 U.S. 99 (1912) (holding that the test of finality is the face of the judgment, because the Court cannot be called upon to review an action of a state court in piecemeal fashion); Haseltine v. Cent. Bank, 183 U.S. 130, 131 (1901) (announcing that the Court has "always made the face of the judgment the test of its finality").

81. *See* Dyk, *supra* note 43, at 910.

82. Wright, *supra* note 33, at § 4010 (describing "practical finality cases" as including those in which the federal question presented on appeal has been finally decided by the highest state court available to consider it); Redish, *supra* note 44, at 92.

83. 337 U.S. 541 (1949); *see also* Redish, *supra* note 44, at 94 (noting that the *Cohen* Court enunciated the collateral order doctrine).

84. *See* Redish, *supra* note 44, at 94.

85. *See* Wright, *supra* note 33, at § 4010 (noting that cases in which an interlocutory judgment was held final "have presented varying mixtures of elements that may be labeled as severability and hardship"); Glynn, *supra* note 42, at 183 (explaining that in some cases, "erroneous decisions prior to the entry of final judgment may, as a practical matter, inflict harm that is irreparable or incurable after final judgment"); *The Finality Rule*, *supra* note 42, at 1007 (explaining that permitting interlocutory review is particularly important when the "harm flowing from the error [of the state court] may not be susceptible to later repair").

86. Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152-53 (1964) (internal quotation omitted) (holding that a court of appeals was correct in reviewing a federal district

For example, the Court has agreed to review a lower court decree for the immediate transfer of land, even though an accounting of rents and profits remained to be completed.[87] The Court reasoned that the accounting was collateral to the merits of the case, and that if review were delayed pending its completion, the petitioner could suffer irreparable harm.[88] The Court has also held that an order improperly relieving the plaintiff in a shareholder derivative action of the requirement to post bond, thereby depriving the defendant of procedural protection against "strike suits," was not remediable at a later time in the litigation.[89] In cases in which a state court has issued a temporary injunction preventing the exercise of free speech, the Court has determined that this may effectively extinguish altogether the First Amendment rights the petitioner seeks to protect, as where the injunction is in place for many years,[90] or prematurely ends a labor dispute by preventing union picketing.[91] In short, the Court has long

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court's judgment, although further proceedings remained at the trial level, because interlocutory review would not in any way increase the inconvenience and cost of trying the case, and because a delay of perhaps several years in having the petitioner's rights determined might work a great injustice).

87. Forgay v. Conrad, 47 U.S. (6 How.) 201, 205 (1848). The decision is commonly thought to have originated the "irreparable harm" exception. *See* Dyk, *supra* note 43, at 915; *Requirement of a Final Judgment*, *supra* note 43, at 521.

88. *Forgay*, 47 U.S. (6 How.) at 205. In *Forgay*, a federal circuit court issued a decree declaring certain deeds void, and directing money and property to be delivered to the plaintiff upon an accounting by the master. *Id.* at 202-03. Despite the ministerial duty of carrying out the decree that remained to be done, which rendered the judgment not final "in the strict, technical sense of that term," the Supreme Court determined that the judgment effectively settled the case. *Id.* at 203. Because the bankruptcy assignee planned to seize the property and immediately distribute the proceeds to the bankrupt's creditors, if review were delayed until after the accounts had been adjusted by the master the appellant would be "subjected to irreparable injury." *Id.* at 204; *see also* Carondelet Canal & Navigation Co. v. Louisiana, 233 U.S. 362 (1914) (order directing transfer of property back to the state would not have been remediable if reviewed at a later date, as sovereign immunity would have barred recovery of the property from the state).

89. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). *Cohen*, the decision that established the collateral order doctrine, involved a shareholder derivative action in which a district court denied the defendant corporation's motion to require the plaintiff to post security to pay for defense costs in the event the plaintiff lost, as required by state statute. *Id.* at 544-45. Although the denial did not terminate the litigation, the Supreme Court found that the district court's decision was final as to the question of security. *Id.* at 546-47. The Court held that the judgment "finally determine[d] claims of right separable from, and collateral to rights asserted in the action," and that those claims were "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." *Id.* at 546. After a final judgment on the merits, it would have been "too late effectively to review the present order, [as] the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." *Id.*

90. *See, e.g.*, Org. for a Better Austin v. Keefe, 402 U.S. 415 (1971). For a discussion of the case, see *infra* note 187.

91. *See, e.g.*, Local No. 438 Constr. & Gen'l Laborers' Union v. Curry, 371 U.S. 542 (1963). For a discussion of the case, see *infra* Part II.A.

recognized that the "right of appeal is of very little value to [the petitioner if] he may be ruined before he is permitted to avail himself of the right."[92]

D. *Application of the Exceptions to Appeals from State Courts*

The collateral order/irreparable harm exception was developed in cases involving appeals within the federal system.[93] The Court acknowledged early on that its willingness to forego a strict reading of the final judgment rule in favor of countervailing policy concerns stemmed from a recognition that the legislature itself contemplated a balancing approach for appeals within the federal system.[94] It was therefore with great reluctance that the Court initially began applying the exceptions in the context of appeals from state courts.

In *Radio Station WOW, Inc. v. Johnson*, for example, the Court granted review of a state court judgment that finally disposed of a federal right and remanded for an accounting of profits before property changed hands.[95] The Court asserted jurisdiction despite its acknowledgment that a conventional interpretation of "final judgment" would preclude reviewability "where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State."[96]

Justice Frankfurter conceded that most of the cases on which he relied involved appeals within the federal system.[97] While admonishing that the "requirement [of finality] is not one of those technicalities to be easily scorned," as it is a critical element in the smooth working of our federal system, Frankfurter recognized that a

92. *Forgay*, 47 U.S. at 205. Over time, the Court has significantly expanded its conception of what constitutes irreparable harm in order to justify ever-broader exceptions to the final judgment rule. *See infra* notes 177-79 and accompanying text.

93. *See Cohen*, 337 U.S. at 541; *Forgay*, 47 U.S. at 201.

94. *See Cohen*, 337 U.S. at 545 (noting that, as a threshold matter, its willingness to grant review was based on the fact that 28 U.S.C. § 1292 indicates a congressional "purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties"); *supra* notes 58-60 and accompanying text.

95. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945). *Radio Station WOW* involved a judgment by the Supreme Court of Nebraska directing that a lease and license to operate a radio station was to be set aside for fraud and that the original position of the parties was to be restored. *Id.* at 121-22. The state court rejected petitioner's argument that the Federal Communications Commission had exclusive jurisdiction over the subject matter of the suit. *Id.* at 123. All that remained to be done at the trial level was an accounting of the station's operations. *Id.* at 127. The Court concluded that the requirement of finality had been satisfied in prior cases by judgments with characteristics very similar to those presented by the Nebraska decree. *Id.* at 125-26 (citing Carondelet Canal & Navigation Co. v. Louisiana, 233 U.S. 362 (1914) and *Forgay*, 47 U.S.(6 How.) at 201).

96. *Radio Station WOW*, 326 U.S. at 124.

97. *Id.* at 126 n.2.

"penumbral area" inevitably surrounds the otherwise rigid concept.[98] He was careful to erect boundaries around that area, allowing it to encompass only situations where there had been a "conclusive adjudication" of rights and liabilities, with an order for immediate delivery of possession of the subject matter of the suit.[99]

Over time, however, the Court appeared to grow increasingly comfortable with expanding the penumbral area around § 1257. It confined its discussion of Frankfurter's concerns to ever-smaller portions of its opinions,[100] and cited cases construing §§ 1291 and 1257 interchangeably, obscuring the important differences between them.[101]

With a pair of cases decided on the same day in 1963, the Court finally closed the gap that had existed between the availability of Supreme Court review of state court decisions, and review within the federal system.[102] In *Local No. 438 Construction & General Laborers' Union v. Curry*[103] and *Mercantile National Bank v. Langdeau*[104] the Court applied and expanded upon the principles enunciated in *Cohen*, significantly broadening its conception of the types of orders that may be considered collateral to the merits, as well as of what constitutes irreparable harm sufficient to warrant immediate appellate intervention.[105] Subsequent decisions would reflect this expansion.[106]

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98. *Id.* at 124.

99. *Id.* at 126. Such a judgment is "independent of, and unaffected by," a provision for accounting, even if it is part of the same decree. *Id.* Further, if appellants had to wait for the completion of the accounting, they would be subjected to irremediable injury. *Id.* The Court never made clear why a judgment directing immediate delivery of physical property would necessarily cause irremediable injury if immediate review were to be denied. In fact, three years later, the Court came to the opposite conclusion. *See* Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 70 (1948) (holding that "[m]erely because a party to a litigation may be temporarily out of pocket, is not sufficient to warrant immediate review of an incomplete [s]tate judgment," as there is no reason to assume the petitioner's loss would not be recoverable).

100. *See infra* notes 283-85 and accompanying text.

101. *See* Frank, *supra* note 41, at 295 (observing that, by the mid-twentieth century, cases "demonstrated no added rigidity in defining section 1257 finality, and cases decided under sections 1291 and 1257 [were increasingly] cited interchangeably as authority for each other"); *Requirement of a Final Judgment*, *supra* note 43, at 524 (noting that the Court has used principles from *Forgay* and *Cohen*, two cases decided in the federal system, in resolving questions of reviewability of state court decisions "without apparent recognition that such a use could be considered an extension of doctrine"); *see also* Local No. 438 Constr. & Gen'l Laborers' Union v. Curry, 371 U.S. 542, 549 (1963) (citing *Cohen* as authority for granting an exception to § 1257 under otherwise similar factual circumstances).

102. *Requirement of a Final Judgment*, *supra* note 43, at 524.

103. 371 U.S. 542 (1963).

104. 371 U.S. 555 (1963).

105. *See* Dyk, *supra* note 43, at 920 (observing that with *Curry* and *Langdeau*, the Court "seemingly reversed itself" on the traditional distinctions it had drawn between final and non-final judgments); *Requirement of a Final Judgment*, *supra* note 43, at 526 (observing that the *Curry-Langdeau* rule had "a wide sweep"); *infra* Part II.A.

106. *See infra* notes 187-90, 252-55 and accompanying text.

E. *The Four* Cox *Categories*

From the "deceptively simple" language of § 1257 limiting Supreme Court review to "final judgment or decrees," the Court had "spun a complicated web" indeed.[107] The Court itself acknowledged the confusion its decisions had created, conceding that it found it "impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality."[108] The Court seized an opportunity to clarify and institutionalize its finality doctrine in *Cox*,[109] in which it articulated four categories of exception to § 1257.

1. *Cox* One: Practical Finality

The so-called "first *Cox* category" includes cases in which, although further state-court proceedings—even entire trials—remain, the federal question has been finally decided and is likely to be decisive in the outcome of the litigation.[110]

For example, in *Pope v. Atlantic Coast Line Railroad*,[111] the appellant sought review of a Georgia Supreme Court decision which rejected his claim that the Federal Employers' Liability Act ("FELA") allowed him to sue his employer in another state, and remanded to the trial court to grant the employer's motion for injunctive relief.[112] As the appellant conceded that his case rested entirely upon this federal claim, all that remained to be done on remand to the trial court was "the mechanical entry of judgment."[113] Sending the case back to the state courts would be a waste of judicial resources because no other federal issues would arise that would create a situation of piecemeal review, and there were no independent and adequate state grounds on which the petitioner might prevail, mooting the federal issue.[114] The Supreme Court would therefore ultimately be faced with the very same issue on appeal at a later date.[115]

More than a decade later, the Court applied this reasoning in *Mills v. Alabama*,[116] another case classified in *Cox* as falling into the first

107. Hart & Weschler, *supra* note 33, at 594.
108. Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152 (1964).
109. 420 U.S. 469 (1974).
110. *Id.* at 479.
111. 345 U.S. 379 (1953).
112. *Id.* at 381.
113. *Id.* at 382.
114. *Id.*
115. The Court explained that, while judgments such as an overruling of a demurrer or the granting of a temporary injunction are ordinarily not reviewable, the federal question in this case is "ripe for adjudication when tested against the policy of § 1257." *Id.*
116. 384 U.S. 214 (1966).

category of exceptions to § 1257.[117] The editor of a newspaper in Alabama had been arrested for violating a state statute prohibiting the publication on election day of any editorial for or against any proposition or candidate involved in the election.[118] The Alabama Supreme Court held that the statute was not an unconstitutional abridgement of freedom of speech and press as guaranteed by the First Amendment, and remanded for further proceedings.[119] Noting that the state court had rendered a binding judgment ordering the trial court to convict the petitioner under the state statute if it found that he wrote the editorial, and that the petitioner conceded he did write it, the Supreme Court explained that a trial would inevitably end with a conviction, and the case would "then once more wind its weary way back to us as a judgment unquestionably final and appealable."[120] Unwilling to cause both an "inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court," as well as a "completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets," the Court held the judgment to be final.[121]

This exception to the final judgment rule for "practical finality" has been fairly uncontroversial,[122] as it furthers goals of judicial efficiency without circumventing the policies of federalism and comity.[123] The exception waves the "formal indicia of finality," saving both the judicial system and the petitioner the burden of awaiting final judgment and then once again bringing an appeal.[124] There is clearly no risk of piecemeal review because there is no possibility that other federal issues will be raised in subsequent state court proceedings.[125]

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117. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 479 n.8 (1975). In addition to *Pope* and *Mills*, the *Cox* decision cited *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) and *Local No. 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542 (1963) as cases within the first category.

118. *Mills*, 384 U.S. at 215-17.

119. *Id.* at 216.

120. *Id.* at 217.

121. *Id.* at 217-18.

122. *See The Finality Rule*, *supra* note 42, at 1016 (explaining that cases in which "practical finality" has been achieved at the time of appeal constitute "the least problematic category under finality doctrine because the departure [from finality] is merely technical"). *See* Pierce County v. Guillen, 537 U.S. 129 (2003) (state court held an amendment to a congressional act regarding admission of evidence to be invalid, leaving nothing to be determined on remand but the amount of attorney's fees to which respondents were entitled); Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989) (state court finally adjudicated the constitutionality of a state act that provided specific rules regarding electric utility rate increases, leaving the outcome of further proceedings preordained).

123. *See supra* Part I.B.1.

124. *The Finality Rule*, *supra* note 42, at 1016.

125. *Id.* Yet the exception has not gone completely uncriticized. In *Mills*, Justice Harlan issued a separate opinion in which he questioned whether the outcome of the state proceedings really was preordained, noting that it is possible that a jury could disregard the judge's instructions and acquit. *Mills*, 384 U.S. at 222 (Harlan, J.,

2. *Cox* Two: The Collateral Order Doctrine

The second *Cox* category is essentially an embodiment of the collateral order doctrine, comprising cases in which the federal issue has been finally decided and will survive regardless of the outcome of subsequent proceedings.[126] There is no possibility that future proceedings will give rise to additional federal questions, which would present a problem of piecemeal review, nor will future proceedings foreclose or make unnecessary decisions on the federal question.[127] Cases in this category, including *Radio Station WOW, Inc. v. Johnson*[128] and *Carondelet Canal & Navigation Co. v. Louisiana*,[129] also arguably involve the likelihood that delayed review could result in irreparable harm to the petitioner.[130]

This exception has created little controversy, as it fosters efficiency without sacrificing the benefits of the finality rule.[131]

3. *Cox* Three: Federal Issue Insulation

In the third category are cases in which the federal claim has been finally decided and subsequent state court proceedings will *insulate* the federal issue from later review, *regardless* of the outcome.[132] If the

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separate opinion). If that were to occur, the Court's adjudication of the constitutional issue would have been premature. *Id.* Harlan also urged that, regardless of what were to happen at trial, the limitations on the Court's jurisdiction contained in § 1257 "should be respected and not turned on and off at the pleasure of its members or to suit the convenience of litigants." *Id.* at 223 (citation omitted). Others have also suggested that it is possible that a petitioner, after stipulating to certain issues to have his appeal heard, could change his mind. *See The Finality Rule*, *supra* note 42, at 1016-17. The Court cannot possibly be expected to examine, in every case, whether the petitioner might be able to raise other claims in further proceedings. *Id.* One proposed solution to this problem is to predicate interlocutory appeal under this category upon the petitioner's renunciation of any additional claims and defenses. *Id.*

126. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 480 (1975). However, in *Cohen v. Beneficial Industrial Loan Corp.*, it was not certain that the federal issue would have survived, rather than been mooted by, subsequent proceedings. 337 U.S. 541 (1949). *See also* Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 Drake L. Rev. 539, 545 (1998) (explaining that, had the petitioner/corporation ultimately prevailed on the merits of the shareholder suit, the trial court's judgment to deny him security would have become moot).

127. *See Cox*, 420 U.S. at 480.

128. 326 U.S. 120 (1945); *see supra* notes 96-100 and accompanying text.

129. 233 U.S. 362 (1914).

130. *See* Hart & Weschler, *supra* note 33, at 595.

131. *See The Finality Rule*, *supra* note 42, at 1017-20 (describing the second category as "theoretically proper" because the only federal issues have been determined by the highest possible court, precluding the possibility of piecemeal review, the federal question will definitely not be mooted by subsequent proceedings, and there is no danger of evading the independent and adequate state grounds doctrine). However, the difficulty in determining with certainty whether the federal question would in fact survive further state court proceedings could lead to excessive appeals by cautious litigants. *Id.* at 1019.

132. *Cox*, 420 U.S. at 481.

party seeking review were to prevail in court on state law grounds, the federal issue would be mooted, while if the party were to lose on the merits, the law of the state would preclude an appeal.[133]

This exception typically applies in criminal cases where double jeopardy prevents the state from appealing an acquittal.[134] *Cox* cited *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*[135] as the rare civil example of this situation.[136] The North Dakota Supreme Court held that a state statute pursuant to which the petitioner Board had denied the respondent pharmacy an operating permit was unconstitutional.[137] The court remanded the case so that the Board could conduct a hearing to consider the pharmacy's application for a permit pursuant instead to the state's Administrative Agencies Practice Act.[138] Showing its apparent discomfort with its decision to review the state court judgment, the Supreme Court was painstaking in its review of precedent and its consideration of the purposes of the finality rule—namely, avoiding piecemeal review and advisory opinions, and "limit[ing] review of state court determinations of federal constitutional issues to [minimize] federal intrusion into state affairs."[139] Ultimately, the Court concluded that the case fit within the penumbral area of § 1257 that Justice Frankfurter

133. *Id.*

134. For example, the *Cox* Court cited *California v. Stewart*, 384 U.S. 436 (1966), which held that a state court's reversal of a conviction on federal constitutional grounds and remand for new trial was a final decision. *Cox*, 420 U.S. at 481. If the state, the party seeking review, prevailed at trial, the federal issue would be mooted, whereas if the state lost at trial, state law would have prohibited the government's appeal of defendant's conviction. *Id.*; *see also* Arkansas v. Sullivan, 532 U.S. 769 (2001) (noting that if the state (the petitioner) were to obtain a conviction at trial, its claim that certain evidence was wrongfully suppressed would be moot, while if the respondent was acquitted, the state would be precluded from pressing its federal claim again on appeal); Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (holding as final a state court judgment deciding that the withholding of certain evidence was a violation of defendant's Sixth Amendment rights and remanding for determination of whether a new trial was necessary, because the federal issue would be unreviewable regardless of outcome of proceedings on remand). The Court in *Ritchie* explained that if the trial court were to find the withholding of evidence to be non-prejudicial, or if it were to order a new trial and the defendant was again convicted, the state would have prevailed and would have no need to appeal. *Id.* at 48. If the defendant were acquitted in a new trial, the Double Jeopardy Clause would bar the state from appealing. *Id.* Justice Stevens, however, pointed out that a different scenario was possible: the state could immediately appeal an order for a new trial. *Id.* at 74 (Stevens, J., dissenting). Since this was a possibility, Stevens argued, the federal issue would not necessarily be mooted and the third *Cox* exception should not apply. *Id.*

135. 414 U.S. 156 (1973).

136. *See Cox*, 420 U.S. at 481-82.

137. *Snyder's Drug Stores*, 414 U.S. at 157-58. The statute required that that the applicant for a permit to operate a pharmacy be a "registered pharmacist in good standing," or a "corporation or association whose majority stock is owned by registered pharmacists in good standing." *Id.*

138. *Id.*

139. *Id.* at 159.

identified in *Radio Station WOW*,[140] stating two reasons. First, there was no risk that the subsequent state court litigation would raise other federal questions that may later come up to the Court, leading to fragmentary review.[141] Second, whatever the outcome of the dispute, the constitutional question would be lost. [142] If the Licensing Board were to determine in its adjudication that the administrative statute required it to grant the license to the pharmacy, the Board would not be permitted to appeal this decision, as a matter of state procedural law.[143] If, on the other hand, the Board were to find that the pharmacy did not meet the necessary safety standards required under the statute, it would deny the license and have no need to seek Supreme Court review on the federal question.[144]

The third *Cox* exception clearly does not rest on a desire to prevent irreparable harm to the petitioner; it was just as likely that the petitioner Board would prevail as it was that it would lose.[145] Nor does the exception achieve efficiency benefits by expediting review that would inevitably occur at a later time; it was quite possible that the matter would be resolved on independent state grounds, removing any need for the Court to consider the federal issue. The Court's primary concern was instead to preserve its review of the constitutionality of the stock-ownership statute, even at the cost of circumventing entirely the state grounds doctrine.[146] This exception, therefore, represented a considerable expansion of the finality doctrine.[147]

Accordingly, the exception has been challenged in some cases. Justice Stevens has derided it as being "wholly contrary to our long tradition of avoiding, not reaching out to decide, constitutional decisions when a case may be disposed of on other grounds."[148] Stevens has also criticized the Court for what he has deemed to be an inconsistent application of the exception.[149] Yet others have accepted

140. *Id.* at 160 (citing Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945)).

141. *Id.* at 163.

142. *Id.* at 162 ("[W]e have discovered no way which the licensing authority in North Dakota has of preserving the constitutional question now ripe for decision.").

143. *Id.* at 163-64. If the Board granted the license in accordance with the state supreme court determination that the statute permitting a denial was unconstitutional, and then sought to appeal its own grant on the grounds that the state statute is in fact valid, the appeal would likely be dismissed on the independent state ground that North Dakota procedural law does not provide the agency the right to appeal. *Id.*

144. *Id.* at 163.

145. Even if irreparable harm to the petitioner was a factor in the Court's decision to grant review of the state court's decision, it is far from clear that this exception was intended to benefit government entities or, by extension, the public interest.

146. *See The Finality Rule*, *supra* note 42, at 1021-23.

147. *Id.*

148. Pennsylvania v. Ritchie, 480 U.S. 39, 75 (1987) (Stevens, J., dissenting).

149. Jefferson v. Tarrant, 522 U.S. 75, 84 (Stevens, J., dissenting) (criticizing the

the rationale of preserving a constitutional question as a viable one.[150] Alternatively, as one commentator has theorized, the Court's action in reviewing an interlocutory order in this posture may be seen less as an attempt to prevent the development of independent, substantive state law grounds, and more as a reluctance to allow merely procedural state law to serve as a barrier to review of federal issues.[151] Regardless, the exception is not terribly troublesome as its scope is finite and its boundaries are clear.[152]

4. The Fourth *Cox* Category: Erosion of Federal Policy

Lastly, the Court will treat as final a decision in which the party seeking review might prevail on nonfederal grounds in subsequent state court proceedings, rendering Supreme Court review unnecessary, but where a reversal of the state court on the federal issue would be preclusive of any further litigation.[153] In such situations, "if a refusal immediately to review the state-court decision might seriously erode federal policy," the Court will entertain the case.[154] *Cox* itself fell into this category.

It is the application of the fourth *Cox* exception with which the remainder of this Note is concerned. It has become the most controversial of the four, as evidenced by the battle of opinions in *Nike, Inc. v. Kasky*.[155] Part II traces how the exception evolved from the Court's earlier decisions. It then examines how it has been applied, discussing the benefits the Court has emphasized—primarily, preventing erroneous state court judgments from eroding important federal policies. Part II then outlines the primary criticisms of the doctrine—namely, that the exception is formless, encouraging incessant appeals and allowing the Court to circumvent traditional constraints on its jurisdiction.

Court for reaching a different decision in *Jefferson* than in *Ritchie*, even though the facts of the cases are similar).

150. *See* Yackle, *supra* note 70, at 168.

151. *The Finality Rule*, *supra* note 42, at 1022 (explaining that the "Court need not observe state procedural law as scrupulously as it must state substantive grounds," and that the third exception is therefore palatable).

152. *See Jefferson*, 522 U.S. at 83 (declining to apply the third *Cox* exception, distinguishing *Ritchie* as being an "extraordinary case" that presented an "unusual" situation that should be "confine[d] to the precise circumstances the Court there confronted").

153. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 482-83 (1975).

154. *Id.* at 483.

155. 539 U.S. 654 (2003); *see supra* notes 12-16 and accompanying text.

II. REDEFINING FINALITY: THE EVOLUTION AND APPLICATION OF THE FOURTH *COX* EXCEPTION TO THE FINAL JUDGMENT RULE

The Court's articulation and application in *Cox* of the fourth exception to the final judgment rule was foreshadowed by its increasingly irreverent approach to finality in preceding cases. The careful balancing of competing interests that had characterized earlier opinions[156] had given way to a more cursory consideration of the final judgment rule's underlying policies. Dissenting Justices and legal scholars were outspoken in their criticism along the way.

Part II.A traces this trend toward greater flexibility, beginning with two important cases in which the Court markedly altered its treatment of the final judgment rule and greatly expanded the realm of state court judgments that it was willing to consider reviewable. Part II.B discusses *Miami Herald* and *Cox*—the two cases in which the Court developed its most controversial exception to the rule—and outlines arguments of how this doctrine plainly undermined the spirit of the final judgment rule and its carefully constrained traditional exceptions. Finally, Part II.C reviews post-*Cox* case law, which has reflected general inconsistency and confusion in applying the new doctrine.

A. *Shifting the Balance: Favoring Greater Flexibility*

Two important cases exemplified this trend. In *Local No. 438 Construction & General Laborers' Union v. Curry*,[157] the Georgia Supreme Court had granted to a construction company temporary injunctive relief against workers picketing in violation of a state statute.[158] The union appealed to the U.S. Supreme Court, arguing that its activities were within the exclusive jurisdiction of the National Labor Relations Board ("NLRB").[159] The Court held that the state court's decision that it had jurisdiction to issue the injunction was final under § 1257, despite the fact that the case would continue in the lower courts.[160]

Several reasons supported this conclusion. First, the judgment finally determined claims of right that were separable from, and collateral to, other rights asserted in the action, making it unnecessary to defer consideration until the entire case was adjudicated.[161]

156. *See, e.g.*, Pope v. Atl. Coast Line R.R., 345 U.S. 379 (1953); Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co., 344 U.S. 178 (1952); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945).

157. 371 U.S. 542 (1963); *see supra* notes 104-06 and accompanying text.

158. *Curry*, 371 U.S. at 545.

159. *Id.*

160. *Id.* at 549-50.

161. *Id.* (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)). The Court failed to address the fact that *Curry* involved the judgment of a state court and thus implicated § 1257, while *Cohen* was governed by § 1291, which does not

Second, the Court was concerned that the issuance of a temporary injunction would "render entirely illusory" the petitioner's right to Supreme Court review or to a hearing before the NLRB.[162] Third, the Court could not allow § 1257, although it counseled against fragmenting and prolonging litigation, to serve as a barrier to granting an appeal "when postponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard by the NLRB, not by the state courts."[163]

In concurrence, Justice Harlan exhorted that denials of jurisdictional challenges had never been considered final judgments before.[164] The opinion, he said, "strain[ed] . . . precedents to the breaking point."[165]

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present the same kinds of federalism concerns as its counterpart. *See Cohen*, 337 U.S. at 545-46.

162. *Curry*, 371 U.S. at 550. If several years were interposed between the issuance of the temporary injunction and the eventual resolution of the matter, a vindication of the union's right to picket would be essentially meaningless. *Id.* While the issuance of a temporary injunction is ordinarily not reviewable because of its interlocutory posture, *see* Pope v. Atl. Coast Line R.R., 345 U.S. 379, 381 (1953), the Court emphasized that the judgment being appealed was not the order of injunction, but rather the state court's assertion of jurisdiction. *Curry*, 371 U.S. at 548. As the Georgia court had finally determined its jurisdiction in a ruling that was collateral to the merits of the case and not subject to later alteration, the Court determined it was a final judgment. *Id.* at 549-50.

163. *Curry*, 371 U.S. at 550.

164. *Id.* at 553-54 (Harlan, J., concurring). Harlan denied that any of the Court's precedents "could be interpreted to suggest that a state court's determination as to state versus federal jurisdiction could, without more, be considered a final judgment subject to . . . review when further proceedings on the merits were still pending." *Id.* at 553. He did not seem troubled by the fact that the jurisdictional ruling was coupled with the issuance of a temporary injunction against picketing during a labor dispute, a restraint that could effectively break the strike and moot the union's case by the time a final judgment was rendered. *Id.* at 536. For authority, Harlan cited *Montgomery Building & Construction Trades Council v. Ledbetter Erection Co.*, 344 U.S. 178 (1952), a case presenting nearly identical facts as *Curry*, yet reaching the opposite conclusion. The Court in *Montgomery* refused to review an order of temporary injunction against labor picketers, even though the petitioner challenged the state court's assertion of jurisdiction. *Id.* at 180-81. From its earliest days, the Court explained, it has refused to review interlocutory decrees such as preliminary injunctions. *Id.* at 181. The Court was not swayed by the fact that a temporary injunction in a labor dispute may have the same effect as a permanent injunction, and that to await the outcome of the final hearing would be "to moot the question and to frustrate the picketing." *Id.* While the argument was "appealing," the Court was emphatic that only Congress can enlarge the Court's jurisdiction. *Id.* Note that in *Montgomery*, the majority framed the question on appeal as being the propriety of the state court's issuance of an injunction. In *Curry*, eleven years later, the Court framed the question as being whether the state possessed the *power* to issue an injunction of this kind in a labor dispute, or whether that power is reserved to the NLRB. *Curry*, 371 U.S. at 549-50. It was presumably easier to conclude that a jurisdictional decision is a final determination that is wholly separable from the merits of the underlying litigation, than to argue the same regarding an order of injunction.

165. *Curry*, 371 U.S. at 554 (Harlan, J., concurring).

As if acknowledging this, the majority provided an entirely independent reason for sustaining jurisdiction.[166] The petitioner in *Curry* had conceded that it had no factual or legal issues to present in court beyond its claim that federal law bars the court's authority to adjudicate the matter[167]—circumstances similar to those presented in *Pope v. Atlantic Coast Line Railroad Co.*[168]

In *Mercantile National Bank v. Langdeau*,[169] the companion case to *Curry*, the Texas Supreme Court had ruled that a state statute permitting a plaintiff to sue two national banks in a particular venue was not preempted by a federal statute that would have enabled the banks to transfer the action to another county.[170] The U.S. Supreme Court provided only a very brief justification for its decision to grant review of the state court judgment, concluding simply that the case was "quite similar" to *Curry* and deferring to the more lengthy discussion in that case.[171]

In both cases, the petitioner claimed that a federal rather than a state statute governed the court in which proceedings could take place[172]—an issue that is separate and independent from the merits.[173] The Court concluded in *Langdeau* that it would serve the policy underlying the final judgment rule of § 1257 to resolve the venue question immediately "rather than to subject [the parties] to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings."[174]

In his dissent in *Langdeau*, Justice Harlan echoed the concerns he voiced in *Curry*, arguing that a determination that venue was properly laid in a particular county is "tantamount to a denial of a motion to dismiss, [and] is a classic example of an interlocutory ruling that is

166. *Id.* at 550.

167. *Id.*

168. 345 U.S. 379 (1953); *see supra* notes 112-16 and accompanying text.

169. 371 U.S. 555 (1963); *see supra* notes 104-06 and accompanying text.

170. *Langdeau*, 371 U.S. at 558.

171. *Id.* at 557-58. While the Court was quite confident in proclaiming *Curry* and *Langdeau* to be susceptible to the same analysis, there was one key difference that rendered the latter a more unsettling decision. As Justice Harlan highlighted in his dissent, *Langdeau*, unlike *Curry*, was not a case in which "the appellant's whole case must stand or fall on the federal claim." *Id.* at 573 (Harlan, J., dissenting). The petitioner in *Curry* had no arguments to press based on state law, which meant the federal issue would inevitably come up for review at some later time. *Curry*, 371 U.S. at 550-51. Yet it was possible in *Langdeau* for the petitioner to prevail on independent and adequate state grounds, which would have made consideration of the federal issue unnecessary. *Langdeau*, 371 U.S. at 573-74 (Harlan, J., dissenting).

172. In *Curry* the question pertained to the jurisdiction of any and all state courts, while in *Langdeau*, the issue was only which state court has proper venue.

173. *See* Wright, *supra* note 33, at § 4010; Frank, *supra* note 41, at 309.

174. *Langdeau*, 371 U.S. at 558.

only a step towards ultimate disposition and is not in itself reviewable as a final judgment."[175]

Curry and *Langdeau* demonstrated that a clear shift in the Court's finality jurisprudence had taken place.[176] In determining whether to make an exception to the final judgment rule, the Court had always weighed the policy rationales underlying the rule against interests in efficiency and in protecting the petitioner from irreparable loss of an important right. Yet with *Curry* and *Langdeau*, the Court broadened its notion of what constitutes an "important" right and what amounts to "irreparable harm."[177] As one scholar opined, the requirement that a claim be "important" now seemed to encompass any right conferred by statute or by the Constitution, and the "threat of injury" to that right that is required for the Court to intervene seemed to be minimal.[178] In addition, *Curry* and *Langdeau* introduced a new factor into the balance—the risk that a standing state court judgment might erode federal policy.[179] The federal policy in *Curry* was one providing for the NLRB to have exclusive jurisdiction over labor disputes.[180] In *Langdeau*, it was a policy providing special venue rules for cases against national banks—although the Court in *Langdeau* did not actually purport to act out of concern for preserving this policy.[181] In

175. *Id.* at 572 (Harlan, J., dissenting).

176. *See id.* ("The Court's opinion in these appeals, and some of the things said in [*Curry*], cut deeply into the statutory requirement of 'finality' limiting our jurisdiction to review state court judgments.").

177. Both cases suggested that the right to be free from unnecessary proceedings was an important right in and of itself, and that being forced to litigate in an improper forum constituted sufficiently irreparable harm—even though review in the proper forum would still ultimately be available. *See Langdeau*, 371 U.S. at 558 (suggesting that neither petitioner nor respondent should be subject to "long and complex litigation which may all be for naught"); *Curry*, 371 U.S. at 548 (noting that, without immediate review, petitioner would remain subject to proceedings which the state courts have no power to conduct). If one accepts the notion that a litigant has a "right" not to be subjected to trial in a forum that lacks jurisdiction over the matter, or that is the improper venue, then it is indeed a right that necessarily must be protected, if at all, before the litigation proceeds. *See* Redish, *supra* note 44, at 98 (suggesting that hardship exists where a trial court judgment "may require the parties to expend substantial physical, financial and emotional effort in the preparation and conduct of a trial which may later prove to have been worthless"). Other commentators, however, disagree that such a right exists. *See* Frank, *supra* note 41, at 308-09 (arguing that expediting review to alleviate the hardship of being subjected to trial would "do away with the distinction between interlocutory and final orders" (internal quotation omitted)).

178. *Requirement of a Final Judgment*, *supra* note 43, at 526-27; *see also* Frank, *supra* note 41, at 301-02 (arguing that cases after *Curry* and *Langdeau* "seem to indicate that the element of harm is only incidental," as long as the state court judgment is collateral to the merits, in that the "harm" is often simply the fact that the order denies an asserted right).

179. *Langdeau*, 371 U.S. at 558; *Curry*, 371 U.S. at 550.

180. *Curry*, 371 U.S. at 550.

181. *Langdeau*, 371 U.S. at 558.

subsequent cases, this list would expand.[182] Finally, the Court significantly altered the finality analysis by signaling a retreat from the solemn considerations of federalism inherent in the final judgment rule of § 1257; it simply did not discuss them, an omission which Justice Harlan sharply criticized.[183]

In sum, the considerable breadth of the *Curry-Langdeau* rule led to general confusion over what types of judgments were reviewable, and for what reasons. Critics lamented that there was "no apparent limitation to seeking review under the new doctrine," provided that the state court judgment presented a federal question that is reviewable within the state system.[184] As a result, the cases broadened the definition of final judgment to include decisions long considered distinctly interlocutory.[185]

In subsequent cases, the Court would continue to hold decisions overruling a venue or jurisdictional objection to be final judgments.[186] In addition, it would deem final judgments such as the grant or denial of a preliminary injunction;[187] the denial of a litigant's claim where a

182. *See infra* notes 251-55 and accompanying text.

183. *See Langdeau*, 371 U.S. at 572 (Harlan, J., dissenting) (chastising the majority in *Curry* and *Langdeau* for apparently forgetting that the final judgment rule is "a long-standing and healthy federal policy that protects litigants and courts from the disruptions of piecemeal review and forecloses this Court from passing on constitutional issues that may be dissipated by the final outcome of a case, thus helping to keep to a minimum undesirable federal-state conflicts").

184. *Requirement of a Final Judgment*, *supra* note 43, at 527-28; *see* Dyk, *supra* note 43 at 910-11, 921-23 (noting that until 1963, the Court's finality jurisprudence had been largely predictable, and that *Curry* and *Langdeau* signaled a significant expansion of finality doctrine).

185. *See, e.g.*, Catlin v. United States, 324 U.S. 229, 236 (1945) (stating that "denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable"); Gibbons v. Ogden, 19 U.S. (6 Wheat.) 448 (1821) (considering, for the first time, the question of whether the Court may accept jurisdiction of interlocutory decrees).

186. *See, e.g.*, Burlington N. R.R. Co. v. Ford, 504 U.S. 648 (1992) (holding to be final a Montana Supreme Court determination that a state venue statute was not preempted by the venue provisions of the Federal Employers' Liability Act); Am. Motorists Ins. Co. v. Starnes, 425 U.S. 637 (1976) (holding as final the Texas Supreme Court's dismissal of appellant's application for writ of error on a Court of Civil Appeals decision that the state's general venue statute does not violate the Equal Protection Clause of the Fourteenth Amendment); *see also* Wright, *supra* note 33, at § 4010 (stating that the cases following *Curry* and *Langdeau* "clearly support the conclusion that review is available whenever the highest state court finally rejects a federal claim of immunity from state venue or jurisdiction rules").

187. *See, e.g.*, Org. for a Better Austin v. Keefe, 402 U.S. 415 (1971). A trial court enjoined petitioners from distributing leaflets to protest conduct by the respondent, a local real estate broker, and the appellate court affirmed, finding that petitioners' activities invaded respondents' right of privacy. *Id.* at 416-18. The state supreme court denied the petitioner's motion for leave to appeal from the appellate court's order. *Id.* at 422 (Harlan, J., dissenting). By the time the petitioners' appeal reached the U.S. Supreme Court, the temporary injunction had been in place for three years. *Id.* at 418. The Court, in granting the appeal, explained that the temporary injunction was, for all practical purposes, permanent, and had already had "marked impact" on petitioners'

counterclaim remained unadjudicated;[188] an order affirming a murder conviction and awarding a new trial as to the sentence;[189] and an order overruling a demurrer and remanding for trial.[190]

Finality of state court judgments was no longer precluded by the fact that the decision being appealed would ultimately merge into the final judgment and therefore be reviewable at a later time, or that the federal question being reviewed might be mooted by resolution of the controversy on independent and adequate state grounds in subsequent proceedings.

B. *Tipping the Scales: The Court Articulates the Most Controversial Exception to the Final Judgment Rule*

1. *Miami Herald*: The First Amendment in the Balance

In *Miami Herald Publishing Co. v. Tornillo*,[191] the Court broke new ground when it accepted an appeal from a state court decision whose

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First Amendment rights. *Id.* at 418 n.1. While conceding that the matter was not "entirely free from doubt," the Court concluded that it had the power to decide the case. *Id.* Justice Harlan dissented, reiterating his argument that a preliminary injunction is a classic form of interlocutory order, which Congress has not authorized the Supreme Court to review. *Id.* at 421 (Harlan, J., dissenting). Harlan further argued that the particular circumstances of this case—the fact that the state supreme court had chosen not to rule on the issue—added to the inappropriateness of review at the time. *Id.* at 422. Not only was the judgment not final, but it also did not emerge from the "highest court of the [s]tate in which a decision could be had." *Id.* (quoting 28 U.S.C. § 1257(a) (2000)). Noting that the state had a strong policy against review of interlocutory orders, Harlan argued that by intervening at this juncture, the Supreme Court infringed on the state's autonomy over its own judicial processes. *Id.* at 422-23. The Court should respect the policy decisions of states, regardless of how flagrant the state error appears. *Id.* at 423.

188. *See, e.g.*, Hudson Distrib. v. Eli Lilly, 377 U.S. 386 (1964). Hudson, a drug distributor, sought a declaratory judgment that the Ohio Fair Trade Act, allowing pharmaceutical makers to establish minimum retail prices, was unconstitutional. *Id.* at 387. Eli Lilly filed cross-petitions seeking injunctive relief and damages for Hudson's failure to comply with the Act. *Id.* at 388. The Ohio Supreme Court upheld the validity of the Act and remanded for further proceedings on Lilly's cross-petition to enforce it. *Id.* at 388-89. Hudson appealed to the Supreme Court. *Id.* In a one-sentence footnote, the Court sustained its jurisdiction by stating that, "[t]he fact that separate and unresolved issues are pending in the Ohio courts and subject to 'further proceedings' therein on the cross-petition does not render the judgment of the Ohio Supreme Court on the issue here considered and decided nonfinal or unappealable within the meaning of 28 U.S.C. § 1257." *Id.* at 389 n.4 (citations omitted).

189. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 85 (1963) (contravening the traditional rule that a final judgment in a criminal case is the sentence, because "[i]t is the right to a trial on the issue of guilt that presents a serious and unsettled question" (internal quotation omitted)).

190. *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 217 (1966) (holding that, since the defendant conceded he had no state law arguments to press, a conviction was certain and the case was essentially concluded). For a discussion of the case, see *supra* notes 116-21 and accompanying text.

191. 418 U.S. 241 (1974).

harmful impact on the petitioner's rights was merely potential, rather than immediate.

A candidate for public office had sued a newspaper for refusing to print, allegedly in violation of a state statute, his reply to an editorial that was critical of his qualifications.[192] The state supreme court reversed a trial court determination that the statute was unconstitutional on First and Fourteenth Amendment grounds.[193] It held that the constitution did not shield the petitioner from liability under state law and remanded for a trial on the merits.[194] Despite the remand for a full trial, the Supreme Court held that the judgment of the state court on the federal issue was final, citing *Snyder's Drug Stores* for authority.[195] In a footnote, the Court explained that, while there was no injunction, the *uncertainty* over the constitutional validity of the statute restricted the exercise of First Amendment rights.[196] The situation was considered particularly urgent given the upcoming elections.[197] The Court concluded that "it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment," and that "an uneasy and unsettled constitutional posture of [the state statute] could only further harm the operation of a free press."[198] No Justices dissented from the Court's decision regarding the final judgment rule.

The decision in *Miami Herald* originated, doctrinally, with Justices Douglas and Brennan's concurrence in *Mills v. Alabama*,[199] in which they argued forcefully that the potential abridgment of litigants' First Amendment rights is serious enough to justify federal court review of a non-final state court judgment.[200] While the majority in *Mills* rather succinctly established the Court's jurisdiction,[201] Justices Douglas and Brennan emphasized the "chilling effect" of the state court's judgment

192. *Id.* at 244.
193. *Id.* at 245.
194. *Id.* at 246.
195. *Id.* at 246-47 (citing N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 153 (1973)). However, *Miami Herald* differs in a significant way from *Snyder's Drug Stores*. The latter is a case in which a denial of interlocutory review would insulate the federal issue from Supreme Court review, as discussed in *Cox*. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 481-82 (1975). Such was not the case in *Miami Herald*.
196. *Miami Herald*, 418 U.S. at 247 n.6.
197. *Id.*
198. *Id.* (citations omitted).
199. 384 U.S. 214 (1966).
200. *Id.* at 220-22 (Douglas, J., concurring); *see also Cox*, 420 U.S. at 485 n.120 (stating that "[t]he import of the Court's holding in [*Miami Herald*] is underlined by its citation of the concurring opinion in *Mills v. Alabama*").
201. *Mills*, 384 U.S. at 217-18 (concluding that subsequent trial court proceedings would amount to nothing more than a formality "leading inexorably towards [petitioner's] conviction," and that delaying review of the federal issue would be an unnecessary waste of time); *see supra* notes 117-22 and accompanying text.

on the exercise of free speech, and argued that the "importance of the First Amendment rights at stake" dwarfed any regard for "some remote, theoretical interests of federalism."[202] The concurrence proved to be a harbinger of the direction in which the Court was heading.

2. *Cox Broadcasting Corp. v. Cohn*: Articulating the Doctrine

The exception to the final judgment rule that enabled the Court to review the state court decision in *Miami Herald* was institutionalized the following year in *Cox*, in which the Court synthesized its final judgment jurisprudence into a coherent doctrine.[203] The *Miami Herald* decision laid the foundation for the fourth, and most controversial, category of exception—a category into which the *Cox* decision itself also fell.

At issue in *Cox* was whether a state may extend a cause of action for invasion of privacy against a broadcaster for publicizing the name of a deceased rape victim which had already been publicly revealed in court papers.[204] A trial court in Georgia granted summary judgment in favor of the respondents, rejecting the petitioner's claims that a state statute, prohibiting the news media from naming or otherwise identifying a rape victim,[205] violated the petitioner's rights under the First and Fourteenth Amendments.[206] The Georgia Supreme Court sustained the statute's constitutionality, deeming it to be a "legitimate limitation on the right of freedom of expression," as it could discern no public interest that would support the need to reveal the identity of a rape victim.[207]

The United States Supreme Court reversed on the merits, holding that the First and Fourteenth Amendments preclude a state from recognizing a cause of action under these circumstances.[208] Before doing so, it made the procedural determination that the judgment on appeal was a final one.[209]

The Court proceeded by laying out four categories of cases in which it had treated as final a judgment of the highest court of a state that finally resolved the federal issue in a case, despite the fact that further proceedings were anticipated in the lower courts.[210] The first two categories include cases in which the federal issue "would not be mooted or otherwise affected by the proceedings yet to be had

202. *Mills*, 384 U.S. at 221 (Douglas, J., concurring).
203. *Cox*, 420 U.S. at 482-83.
204. *Id.* at 472-74.
205. *See id.* (citing Ga. Code Ann. § 26-9901 (1972)).
206. *Id.* at 474.
207. *Id.* at 475 (internal quotations omitted).
208. *Id.* at 496-97.
209. *Id.* at 485.
210. *Id.* at 477-83.

because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question."[211] The second two categories comprise cases in which it was possible that the federal question would be mooted were the petitioner to prevail on independent and adequate state grounds, yet policy considerations dictated the necessity of immediate review.[212]

The policy consideration controlling cases in the fourth category is that "a refusal immediately to review the state-court decision might seriously erode federal policy."[213] In addition, cases in the fourth category are characterized by the fact that reversal of the state court on the federal issue would *end* the litigation, as the Court would have determined that the state law under which the petitioner was being held liable is unconstitutional.[214] If the Court's reversal of the judgment would merely control the "nature and character of" subsequent state court proceedings, or affect the admissibility of evidence, then the judgment would not be considered final under this exception.[215]

The Court granted review of the interlocutory order in *Cox* after concluding that the case fell within this fourth category.[216] First, the judgment of the Georgia Supreme Court on the federal question—that the First and Fourteenth Amendments did not protect appellants from a common law tort claim for invasion of privacy—was plainly final.[217] Second, the Court observed that it was possible that in subsequent proceedings, the plaintiff would be unable to establish the elements of the state cause of action and appellants would prevail, thus mooting the constitutional question.[218] Third, a Supreme Court decision that the constitution bars civil liability for broadcasting the name of a rape victim would end the litigation.[219] And finally, a failure to immediately decide the question would "leave the press in

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211. *Id.* at 478; *see supra* Parts I.E.1-2.
212. *Cox*, 420 U.S. at 478-79; *see supra* Parts I.E.3-4.
213. *Cox*, 420 U.S. at 483.
214. *Id.* at 482-83.
215. *Id.* The opinion described the fourth category as covering those situations where:

> (1) the federal issue has been finally decided in the state courts; (2) further proceedings are pending in state court; (3) the party seeking review might prevail on the merits of nonfederal grounds, thus rendering review of the federal issue by the Court unnecessary; (4) reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come; and (5) refusal immediately to review the state-court decision might seriously erode federal policy.

Id. at 479-83.
216. *Id.* at 485.
217. *Id.*
218. *Id.*
219. *Id.* at 486.

Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt."[220]

Justice White, writing for the six-Justice majority, discussed three cases as evidence that the Court was not treading on completely new ground in concluding that the final judgment rule should be subordinated to concerns of other federal policies—that the exception articulated in *Cox* followed inexorably from precedent.[221] Yet each case was only tenuously applicable.[222]

3. Criticisms of the Fourth *Cox* Category

The strongest criticisms of the fourth exception to the final judgment rule are embodied in Justice Rehnquist's dissent in *Cox*.[223] First, he argued that the Court ignored the importance of the distinction between the final judgment rule of § 1291 and that of § 1257.[224] The former is based primarily upon an interest in efficiency,[225] whereas the latter is grounded on a concern for how federal judicial

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220. *Id.*

221. *Id.* at 483-85.

222. White cited *Curry*, in which the Court had determined that postponing review "would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard by the [NLRB], not by the state courts." *Cox*, 420 U.S. at 483 (quoting Local No. 438 Constr. & Gen'l Laborers' Union v. Curry, 371 U.S. 542, 550 (1963)). Yet *Curry* also rested on the fact that the petitioner had no defense other than its federal preemption claim, which meant that the matter was essentially concluded. *Id.* This characteristic arguably pushed *Curry* outside the confines of the fourth category, which includes cases in which it *is possible* for the federal question to be mooted by the petitioner's victory on nonfederal grounds. *See supra* note 216. Further distinguishing *Curry* was the fact that it involved a temporary injunction, which threatened to "effectively dispose of petitioner's rights." *Curry*, 371 U.S. at 550. White also cited *Langdeau* as stating that "it would serve the policy of the federal statute" to resolve the venue question immediately rather than to subject the parties to unnecessary litigation. *Cox*, 420 U.S. at 484 (citing Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963)). This language suggests that the Court in *Langdeau* was concerned with preventing the erosion of the federal venue policy. However, a closer look at the opinion reveals that the Court was actually concerned with effectuating the policy underlying the final judgment rule by expediting review. *See* Langdeau, 371 U.S. at 558 (stating, "we believe that it serves the *policy underlying the requirement of finality in 28 U.S.C. § 1257* to determine now in which state court appellants may be tried"(emphasis added)). Finally, White cited *Miami Herald* as support for the argument that an exception to the final judgment rule is warranted when important federal rights are at stake. *Cox*, 420 U.S. at 484. Yet the Court in *Miami Herald* was concerned with resolving the freedom of press questions prior to an upcoming election. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 247 n.6 (1974). There was an urgency, therefore, that arguably was not present in *Cox*. *See also The Finality Rule*, *supra* note 42, at 1024 (noting that neither *Curry* nor *Miami Herald*, two of the three cases cited by White, support the view that "the significance of the federal rights alone sustains an exception to finality rules").

223. *Cox*, 420 U.S. at 501-12 (Rehnquist, J., dissenting).

224. *Id.* at 502-05.

225. *Id.* at 503.

interference with state administrative and judicial functions could impact our federal system.[226] Rehnquist underscored his argument by summarizing the views that Justices Frankfurter and Harlan expressed in many past decisions regarding the sanctity of the principles of federalism and comity.[227]

Second, Rehnquist accused the Court of "totally abandon[ing]" the principle of constitutional avoidance.[228] In *Cox*, unlike in *Pope v. Atlantic Coast Line Railroad Co.*[229] and *Mills v. Alabama,*[230] appellants had not conceded that they were without any nonfederal defenses.[231] Therefore, it was possible for them to prevail on state law grounds, making it unnecessary to decide the constitutional issues.[232] Rather than allow the state court to develop independent state grounds, Rehnquist argued, the Court improperly "construe[d] § 1257 so that it may virtually rush out and meet the prospective constitutional litigant as he approache[d] [its] doors."[233] Rehnquist found this disregard for the doctrine of constitutional avoidance to be the "greatest difficulty with the test enunciated" by the Court.[234]

Third, Rehnquist was concerned about the degree to which the application of the fourth exception would require, or at least tempt, the Court to consider the merits of a case in advance of determining its jurisdiction over the matter.[235] The language of the exception provides that the state court judgment being appealed has to be one in which reversal "would be preclusive of any further litigation."[236] It was not clear from the Court's opinion, he said, whether the Court intended to apply the exception only to cases in which it was likely that it would reverse the state court and thus terminate the

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226. *Id.* at 502-03.
227. *Id.* at 503-05.
228. *Id.* at 509 ("[T]he greatest difficulty with the test enunciated today is that it totally abandons the principle that constitutional issues are too important to be decided save when absolutely necessary."). Rehnquist also quoted *Blair v. United States*, 250 U.S. 273, 279 (1919), a case that articulated the constitutional avoidance doctrine, stating that

> "[c]onsiderations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.

Id. at 509-10.
229. 345 U.S. 379 (1953); *see supra* Part I.E.1.
230. 384 U.S. 214 (1966); *see supra* Part I.E.1.
231. *Cox*, 420 U.S. at 510 (Rehnquist, J., dissenting).
232. *Id.*
233. *Id.*
234. *Id.* at 509.
235. *Id.* at 507.
236. *Id.* at 482-83.

litigation.[237] If so, Rehnquist argued, the Court would be "reversing the traditional sequence of judicial decisionmaking."[238]

Finally, Rehnquist found the new exception to be "virtually formless," one that was not supported by precedent and did not promote the policies that made prior exceptions acceptable.[239] While he found redeeming qualities in exceptions previously carved out by the Court,[240] he deemed the fourth exception to have insurmountable barriers of practical application. In particular, he singled out the Court's application of the "erosion of federal policy" prong of the test, mocking its statement about leaving the press in Georgia operating in "the shadow" of civil and criminal sanctions under a law whose constitutionality is in "serious doubt."[241] The problem with this test, Rehnquist argued, was that it did not require an inquiry into the consequences of permitting the Georgia court's judgment to remain undisturbed pending a final state court resolution of the case.[242] As a result, the majority "suggest[ed] that in order to invoke the benefit of [the] rule, the 'shadow' in which an appellant must stand need be neither deep nor wide."[243] The test also did not give any guidance for how to determine when the constitutionality of the state law is in "serious doubt."[244] In other words, the test did not address how clearly erroneous the state court judgment needed to be, or how grave its impairment of the petitioner's rights.[245] The "inevitable" result

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237. *Id.* at 507 (Rehnquist, J., dissenting).

238. *Id.* at 507-08.

> Heretofore, it has generally been thought that a court first assumed its jurisdiction of a case, and then went on to decide the merits of the questions it presented. But henceforth in determining our own jurisdiction we may be obliged to determine whether or not we agree with the merits of the decision of the highest court of a [s]tate.

Id. Subsequent cases, however, have shown that the Court will apply the exception regardless of whether reversal is likely. *See, e.g.*, Belknap, Inc. v. Hale, 463 U.S. 491, 491 n.5 (1983) (affirming the Kentucky Supreme Court's order that state law was not preempted by federal law, and explaining that this affirmance "is not tantamount to a holding that [the Court is] without power to render such a judgment; nor does it require [the Court] to dismiss this case for want of a final judgment").

239. *Cox*, 420 U.S. at 505 (Rehnquist, J., dissenting). Rehnquist explained that *Curry* and *Langdeau* were based on the "understandable principle" that resolving uncertainty, sooner rather than later, with respect to the proper forum for trying an issue was "sound judicial administration." *Id.* at 505-06.

240. *Id.* at 506. It is surprising that Rehnquist did not take issue with the third *Cox* exception. Possibly, he simply had decided to cut his losses and focus his energies on the *Cox* decision itself—a category four decision. Indeed, he did not provide a ringing endorsement in writing: "[E]ach of [the first three exceptions] is arguably consistent with the intent of Congress in enacting § 1257, if not with the language it used, and each of them is relatively workable in practice." *Id.*

241. *Id.* at 486.

242. *Id.* at 508 (Rehnquist, J., dissenting).

243. *Id.*

244. *Id.*

245. There was some support in the legal community for Rehnquist's argument that the fourth *Cox* exception is "susceptible of virtually limitless expansion." *See The*

would be increased burdens on the Court's docket, and serious delays of the state judicial process.[246]

Given this, Rehnquist wondered, what principles would guide the Court in applying the test to other cases?[247] Is it enough if the highest court of a state has ruled against any constitutional claim? If it is, he lamented, then "we will have completely read out of [§ 1257] the limitation of our jurisdiction to a 'final judgment or decree.'"[248]

Rehnquist then wondered if the Court intended to limit its new standard of finality to cases in which a First Amendment freedom is at issue.[249] This could not be so, he argued, because the language of § 1257 gives no indication that Congress intended to favor the First Amendment over any others.[250] Therein lay the problem that has continued to plague the Court's § 1257 finality jurisprudence since *Cox*.

C. *Inconsistency and Confusion: Application of the Fourth* Cox *Category*

The Court has applied the fourth *Cox* exception to a wide array of cases in which a refusal to immediately review the federal issue threatened to erode a significant federal policy. For example, the Court has deemed sufficiently important the constitutional policy against double jeopardy,[251] federal preemption of state safety rules for nuclear facilities,[252] the Federal Arbitration Act's preemption of state court jurisdiction,[253] the NLRB's exclusive jurisdiction over labor

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Finality Rule, *supra* note 42, at 1025 (arguing that the language does not clearly define the scope of the exception because it fails to specify which federal policies and what degree of erosion will trigger interlocutory review). *But see* McGinnis, *supra* note 40, at 628, 645 (arguing that the fourth *Cox* exception is only narrowly applicable, and represents a change that is "neither dramatic nor far-reaching").

246. *Cox*, 420 U.S. at 512 (Rehnquist, J., dissenting).

247. *Id.* at 508 (noting the difficulty in applying to other cases the requirement that a federal right be exercised in the shadow of a law whose constitutionality is in "serious doubt").

248. *Id.*

249. *Id.*

250. *Id.*

251. *See, e.g.*, Harris v. Washington, 404 U.S. 55 (1971). The petitioner, who was acquitted of murdering a man by sending a bomb through the mail and then subsequently arrested and charged for another murder and an assault arising from the same conduct, argued that the Constitution forbids a second trial against him. *Id.* at 55-56. The state court rejected this argument, and the Supreme Court held this decision to be final for purposes of appeal. *Id.*

252. *See, e.g.*, Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988). The Ohio Supreme Court held that the federal Atomic Energy Act did not preempt Ohio from applying certain workers' compensation safety requirements. *Id.* at 177-78. The U.S. Supreme Court granted an appeal of the state court's decision, concluding that, if the petitioner were to prevail on independent state grounds, the unreviewed decision "might seriously erode federal policy in the area of nuclear production." *Id.* at 179.

253. *See, e.g.*, Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1988) (holding as final a state court judgment that the Federal

disputes,[254] and federal protection against being subjected to litigation in certain state court venues.[255] The Court has been especially willing to relax finality requirements to protect First Amendment free speech rights from erosion,[256] particularly where a state court has refused to act in the face of an apparently unconstitutional restraint on speech. For example, the Court has held as a final judgment a state court's refusal to lift a restraint on media coverage,[257] as well as a failure to lift an injunction preventing demonstrators from marching or to provide for immediate appellate review.[258] The *Cox* opinion suggests that the

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Arbitration Act does not preempt a state arbitration statute); Perry v. Thomas, 482 U.S. 483 (1987) (reiterating the ruling that a state court judgment holding that the Federal Arbitration Act does not preempt a state arbitration statute is final); Southland Corp. v. Keating, 465 U.S. 1 (1984) (reviewing a state court judgment that rejected petitioner's challenge to a state law as applied to invalidate a contract for arbitration made pursuant to the Federal Arbitration Act). The Court in *Keating* held that, without immediate review of the state judgment, "there may be no opportunity to pass on the federal issue and as a result there would remain in effect the unreviewed decision of the State Supreme Court holding that the California statute does not conflict with the Federal Arbitration Act." *Id.* at 6 (internal quotations omitted).

254. *See, e.g.*, Belknap, Inc. v. Hale, 463 U.S. 491 (1983). As in *Curry*, the petitioners appealed a state court decision holding that the National Labor Relations Act did not preempt respondents' state law claims. *Id.* at 493. The Court, quoting *Curry*, held that a failure to immediately resolve the preemption question would seriously risk eroding the federal statutory policy of requiring labor disputes to be heard by the NLRB, rather than by state courts. *Id.* at 497-98 n.5.

255. Burlington R.R. Co. v. Ford, 504 U.S. 648 (1992) (holding that the state court's decision that Montana's venue rules, permitting a plaintiff to sue an out-of-state corporation in any county, did not offend the Equal Protection Clause of the Fourteenth Amendment, was a final judgment).

256. Hart & Weschler, *supra* note 33, at 597; Redish, *supra* note 75, at 921 ("Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a "federal policy" that merits application of an exception to the general finality rule.").

257. *See, e.g.*, Neb. Press Ass'n v. Stuart, 423 U.S. 1327, 1330 (1975) (holding that, when a reasonable time in which to review a prior restraint on the news media has passed, the Court may "properly regard the state court as having finally decided that the restraint should remain in effect during the period of delay"). In other words, the decision to delay consideration is itself a final decision, because each passing day constitutes an irreparable injury to the petitioner's First Amendment rights. *Id.* at 1329.

258. *See, e.g.*, Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977). In *Skokie*, the state court enjoined petitioners, Nazi demonstrators, from marching in Skokie. *Id.* The appellate court denied an application for a stay pending appeal, and the Illinois Supreme Court denied both the stay and leave for an expedited appeal. *Id.* at 44. The U.S. Supreme Court treated the petitioner's application to stay the injunction as a petition for certiorari to review the *refusal* of the state supreme court to issue a stay, and considered this refusal to be a final judgment. *Id.* The right to be protected by the First Amendment during the period of appellate review, the Court held, is a right "separable from, and collateral to" the merits. *Id.* (quoting Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1949)). Furthermore, the Court added, "[i]f a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards." *Id.*; M.I.C. Ltd. v. Bedford Township, 463 U.S. 1341 (1983). In *Bedford Township*, a Michigan trial court had entered a temporary injunction against a drive-

sanctity of the freedom of speech may be enough to justify treating First Amendment rights as preferred over other constitutional claims for finality purposes, even without a prior restraint in place.[259]

The Court's preference for safeguarding the First Amendment seems apparent given its tendency to decline to apply the *Cox* exception in cases that implicate other constitutional rights. In *Flynt v. Ohio*,[260] for example, the Court refused to grant immediate review of a state court judgment denying a publisher's claim that criminal complaints issued against it for dissemination of obscenity subjected it to selective prosecution in violation of the Equal Protection Clause.[261] The Supreme Court held that the state court decision did not fall within the fourth *Cox* category because review could be delayed until final resolution of the case "without any adverse effect upon important federal interests."[262] Applying an exception to the final judgment rule in this case, the Court concluded, "would permit the fourth exception to swallow the rule."[263] The Court implied that, had the case implicated First Amendment rights (which it did not, as obscenity is not protected by the First Amendment), its decision would likely have been different.[264]

Assuming that the case did not implicate the First Amendment, the decision raises the question of why a state court judgment that allegedly violates a petitioner's rights under the Equal Protection

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in movie theater for showing obscene films. *Id.* The Court of Appeals considered the theater's application for a stay pending appellate review of the trial court's preliminary injunction, but ultimately denied the stay. *Id.* at 1342. The Michigan Supreme Court denied the petitioner's motion for review. *Id.* Justice Brennan conceded that, as the state courts would ultimately review the trial court's decision to enter an injunction, the judgment was "neither the final decision in [the] matter nor one rendered by the State's highest court." *Id.* But, comparing the case to *Skokie*, he explained that the Court has "repeatedly required" that when a [s]tate seeks to limit certain kinds of expression, it must provide "strict procedural safeguards," including immediate appellate review or a stay pending review. *Id.* at 1343 (internal quotations omitted).

259. *See* Wright, *supra* note 33, at § 4010; Dyk, *supra* note 43, at 940-41 (stating that orders of state courts chilling free speech are perhaps a "primary example" of the kinds of "special" constitutional policies that may at times counsel against strict application of the final judgment rule).

260. 451 U.S. 619 (1981).

261. *Id.* at 620.

262. *Id.* at 622.

263. *Id.*

264. *Id.* (explaining the fact that the case involves an obscenity prosecution does not alter its conclusion because obscenity "is beyond the protection of the First Amendment," and therefore the case involves merely a state effort to prosecute an unprotected activity). Justice Stevens, in dissent, argued that the federal policy affected by the state court judgment *does* fall squarely within the realm of the First Amendment. *Id.* at 623-24 (Stevens, J., dissenting) (explaining that the case implicates "the interest in protecting magazine publishers from being prosecuted criminally because state officials or their constituents are offended by the content of an admittedly non-obscene political cartoon").

Clause is any less problematic for the Court than a judgment that allegedly infringes on First Amendment rights or a national labor policy.

Eight years later, in *Fort Wayne Books, Inc. v. Indiana*,[265] the Court considered two consolidated actions that also involved obscenity prosecutions, yet this time concluded that judgments in both cases implicated the First Amendment and therefore properly fell within the fourth *Cox* category. Two adult bookstore operators were separately charged with violating Indiana's Racketeer Influenced & Corrupt Organizations ("RICO") statute by distributing obscene material.[266] In the first action, involving petitioner Sappenfeld, the Indiana Supreme Court upheld an Indiana Court of Appeals determination that the RICO statute was not unconstitutionally vague as applied to obscenity predicate offenses.[267] In the second action, involving petitioner Fort Wayne Books, the trial court invoked the state's Civil Remedies for Racketeering Activity ("CRRA") Act to grant the state's request for injunctive relief, "directing the immediate seizure" of the bookstore's property.[268] The Indiana Supreme Court upheld the constitutionality of the statute as well as of the pretrial seizure of Fort Wayne Books' property.[269]

The U.S. Supreme Court held that both cases fit within the fourth category described in *Cox*, noting that it has often recognized the clarification of the scope of the First Amendment as a "federal policy that merits application of an exception to the general finality rule."[270] Citing *Miami Herald*'s language about the intolerability of leaving important questions of freedom of the press unanswered,[271] the Court stated that "[r]esolution of this important issue of the possible limits the First Amendment places on state and federal efforts to control organized crime should not remain in doubt."[272]

Justice O'Connor concurred in the opinion as to Fort Wayne Books but dissented from the decision to grant review of the judgment in the matter of petitioner Sappenfeld.[273] While both actions involved an appeal from an interlocutory order, only in the *Fort Wayne* action had a pretrial sanction been imposed on the petitioner in the form of seizure of property.[274] O'Connor explained that interlocutory orders are immediately reviewable where First Amendment interests are

265. 489 U.S. 46 (1989).
266. *Id.* at 50.
267. *Id.* at 53.
268. *Id.* at 52-53.
269. *Id.* at 53.
270. *Id.* at 55 (citing Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43, 44 (1977)); Miami Herald Pub'l Co. v. Tornillo, 418 U.S. 241, 246-47 (1974)).
271. *Miami Herald*, 418 U.S. at 247.
272. *Fort Wayne Books*, 489 U.S. at 56.
273. *Id.* at 69-70 (O'Connor, J., concurring in part and dissenting in part).
274. *Id.* at 70.

"actually affected."[275] Indeed, the finality exception made in this case was unremarkable when considered in light of other cases in which the Court feared that a temporary injunction would stifle the petitioner's exercise of free speech.[276] The Sappenfeld action, however, did not involve an injunction of any sort. Therefore, in O'Connor's view, the Court's assumption of jurisdiction based on its desire to adjudicate the proper scope of the First Amendment was "completely unwarranted."[277] The disposition of the case, O'Connor believed, should have been governed by the Court's opinion in *Flynt*.[278]

In general, the cases since *Cox* demonstrate that the Court has been extremely inconsistent in its application of the final judgment rule governing appeals from decisions of the state courts.[279] It has alternatively expanded and constricted its review, often failing to provide any rationale for its decision and leaving it up to the dissenting and concurring Justices to explicate the decision.[280] The lack of a clear doctrine has perpetuated a regime of general uncertainty. The dueling opinions rendered in *Nike v. Kasky*[281] are a reminder that this uncertainty remains as the Court once more considers a more expansive reading of the final judgment rule.

III. THE FOURTH *COX* EXCEPTION TODAY AND A PROPOSAL FOR CHANGE

Part III.A argues that the fourth *Cox* exception to the final judgment rule is fundamentally flawed, because it encourages the U.S. Supreme Court to prematurely remove controversies from state courts and engage in unnecessary, and potentially piecemeal, review

275. *Id.*

276. *See, e.g.*, Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977); Org. for a Better Austin v. Keefe, 402 U.S. 415 (1971).

277. *Fort Wayne Books*, 489 U.S. at 69-70 (O'Connor, J., concurring in part and dissenting in part) (arguing that the court's assumption of jurisdiction "essentially expands the fourth *Cox* exception to permit review of any state interlocutory orders implicating the First Amendment").

278. *Id.* at 69.

279. *See* Wright, *supra* note 33, at § 4010 (discussing the "complications of finality analysis that have been introduced by the culminations of decisions before and since [*Cox*]").

280. 22 Moore, *supra* note 76, at § 406.03[3][e]; *see, e.g.*, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (certiorari dismissed as improvidently granted, without discussion, with lengthy concurring and dissenting opinions explaining the debate that likely led to the decision); Michigan v. Clifford, 464 U.S. 287, 289 (1984) (asserting jurisdiction to review appellate court reversal of a certified evidentiary ruling, without discussing finality); O'Dell v. Espinoza, 456 U.S. 430, 430 (1982) (holding that a state court decision was not final because the case had been remanded for trial, and noting without discussion that the case did not fall within one of the *Cox* categories); Armstrong v. Aiken, 429 U.S. 1078 (1977) (holding judgment not final, without discussion). *But see* Pierce County v. Guillen, 537 U.S. 129, 142 (2003) (providing a brief explanation of why tort case was not within any of the *Cox* categories).

281. 539 U.S. at 654.

of federal questions. Part III.B summarizes other scholars' proposals for altering the Court's exceptions to the rule, from procedural changes that might ease the administrative burden of an unclear rule on our judicial system, to a more substantive overhaul aimed at delineating more precise exceptions. Part III.B then presents a new proposal, adopting the general conclusion of past commentators that articulating more precise and rational boundaries will best remedy concerns about the unpredictable, and somewhat renegade, nature of the current fourth *Cox* exception. Specifically, the Court should reject the prong of the *Cox* test that encourages it to consider whether a state court judgment threatens to erode federal policy, and replace it with a consideration for whether the judgment threatens to irreparably infringe the petitioner's federal rights.

A. *A Critique of the Fourth* Cox *Exception*

The fourth *Cox* exception to the final judgment rule is fundamentally flawed. It is, in the words of Chief Justice Rehnquist, "virtually formless,"[282] attaching few constraints to the Court's ability to deem interlocutory judgments final for purposes of review, and providing little guidance to litigants regarding appealability.

It is instructive to consider how markedly the fourth exception differs from the first three, which were developed out of the Court's traditional efforts to mitigate the harsh, and often absurd, consequences of construing the final judgment rule too strictly.[283] The first exception encompasses cases in which the federal question would be conclusive of subsequent proceedings because the petitioner lacks any state law defenses to liability.[284] The second comprises cases in which the federal question would survive to be reviewed regardless of the outcome of the subsequent proceedings because it is collateral to the merits of the case.[285] In both of these situations, interests of time and efficiency weigh in favor of expedited review.[286] The third exception applies to cases in which state procedural laws would preclude Supreme Court review of the federal question, regardless of the outcome.[287] This exception is somewhat problematic given its application to cases in which the federal question could be later mooted, but it is carefully circumscribed to apply only in extraordinary circumstances.[288]

These three exceptions are well-defined, making it clear to litigants which characteristics make a judgment "final" for purposes of

282. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 506 (1975) (Rehnquist, J., dissenting).
283. *See supra* Part I.C.
284. *Cox*, 420 U.S. at 479; *see supra* Part I.E.1.
285. *Cox*, 420 U.S. at 480; *see supra* Part I.E.2.
286. *See supra* Parts I.E.1-2.
287. *Cox*, 420 U.S. at 481; *see supra* Part I.E.3.
288. *See supra* part I.E.3.

appeal.[289] They are also rational, striking an appropriate balance between the policies of § 1257 and compelling countervailing interests.[290] They promote the efficient resolution of disputes by allowing the state court to consider and rule on any federal questions that might arise in the case, precluding the danger of piecemeal review.[291] They foster sound judicial decision making by ensuring the Court has before it a complete record of the proceedings below that are relevant to the question before considering an appeal.[292] The exceptions are protective of state judicial autonomy, allowing federal intervention only after state courts develop any independent and adequate state grounds that might resolve the matter.[293] They prevent the Court from adjudicating constitutional questions prematurely.[294] And finally, in many of the cases in these categories, expedited review is further compelled by the fact that the state court's judgment threatens to rob the litigant of a right that must be vindicated immediately or be lost.[295]

Now consider the fourth exception. An analysis of the concurring and dissenting opinions in *Nike*[296] reveals its primary deficiencies and underscores the wisdom of the Court's decision to dismiss certiorari in the case as improvidently granted.

First, the fourth exception allows the Court to review judgments in cases in which it is possible that the petitioner will prevail in state court on nonfederal grounds, rendering review of the federal question unnecessary.[297] The judgment on appeal in *Nike* was one declaring that the company's statements were commercial speech, and that the company would therefore be liable if its statements were proven to be false and misleading.[298] If the plaintiff were unable to prove this, Nike would prevail and it would be unnecessary for the Court to consider the controversial commercial speech question. Application of the fourth *Cox* exception to review a judgment in this situation ensures that the Court wrests the controversy from the state court before it has had the opportunity to consider adequate and independent state grounds that may resolve the litigation. In doing so, the Court not only interferes with state judicial processes in contravention of principles of federalism and comity,[299] but renders what could amount to an advisory opinion that may not have a substantial impact on the

289. *See supra* Parts I.E.1-3.
290. *See supra* Parts I.E.1-3.
291. *See supra* Parts I.E.1-3.
292. *See supra* Parts I.E.1-3.
293. *See supra* Parts I.E.1-3.
294. *See supra* Parts I.E.1-3.
295. *See supra* Parts I.E.1-3.
296. 539 U.S. 654 (2003).
297. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 482-83 (1975).
298. *Nike*, 539 U.S. at 657.
299. *See supra* Part I.B.1.

outcome of the case.[300] If the state court in *Nike* were to determine after trial that the company's statements were not false or misleading after all, then the company would not have been found liable in the suit, regardless of whether the Supreme Court were to affirm or reverse the state court on the question of commercial speech. A Supreme Court opinion would therefore be advisory.

By preventing the operation of the adequate and independent state grounds doctrine, the fourth *Cox* exception also enables premature adjudication of the constitutional question.[301] Justice Stevens explained in his *Nike* concurrence that when a case presents a federal question of "novelty and importance,"[302] it is more likely that the correct answer will result "from the study of a full factual record, rather than from review of mere unproven allegations in a pleading."[303]

The *Nike* case demonstrates an additional concern with the fourth *Cox* exception: it presents a risk that the Court will engage in piecemeal review of federal issues, removing the efficiency benefits that the final judgment rule is meant to confer.[304] While the exception purports to require that a reversal of the state court decision by the Supreme Court would be preclusive of further litigation on the relevant cause of action,[305] matters are not always that simple. True, if the Court were to reverse outright the California Supreme Court's decision that Nike's speech was commercial and therefore unprivileged, it would be preclusive of further litigation because the state court would be unable to hold Nike liable for any false or misleading statements.[306] Yet Justice Stevens pointed out that the Court could actually take any one of several different paths in deciding the question, some of which would neither preclude further litigation nor finally resolve the First Amendment questions in the case.[307] It was possible that the Court might reverse the state court as to *some* of Nike's statements, while affirming it as to others.[308] This, in turn, would mean that some of Nike's statements would be considered

300. *See supra* notes 75-78.

301. *See supra* Parts I.A.3, I.B.2.

302. *Nike*, 539 U.S. at 664 (Stevens, J., concurring). Many interests of the "highest order" were at stake, such as the regulatory interest in protecting market participants from being misled by misstatements intended to generate sales, and the interest in protecting participants in a public debate about labor practices from the chilling effect of the threat of litigation. *Id.*

303. *Id.*

304. *See supra* Part I.A.1.

305. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 482-83 (1975) ("[R]eversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.").

306. *Nike*, 539 U.S. at 658-59 (Stevens, J., concurring).

307. *Id.* at 659-60.

308. *Id.*

commercial, leading to further state court proceedings on the legal standards governing commercial speech.[309] Alternatively, the Court could reverse the state court's decision by holding that, while Nike's statements may be commercial, they can only lead to liability if made with malice.[310] This decision would invite the plaintiff to amend his complaint to allege such malice, and a trial would still ensue.[311]

Given the proliferation of possibilities, Stevens concluded, it was not clear that a reversal by the Supreme Court would be preclusive of further litigation.[312] And, as additional First Amendment issues could yet arise in the case, it was not clear that providing immediate review of the federal question would serve the goal of efficiency.[313] In other words, it was likely that additional federal questions would come up to the Court in a piecemeal fashion, defeating one of the final judgment rule's earliest policy rationales.[314]

Justice Breyer, arguing in dissent, was apparently ready to overlook the deficiencies in the posture of the case.[315] His willingness to do so stemmed from his confidence that it was such a "highly realistic possibility" that the Court would flatly reverse the state court, that it was unnecessary to engage in idle theorizing about other potential dispositions of the case.[316] He then devoted the majority of his finality argument to discussing why this was so.[317] This line of argument underscores an additional problem with the fourth *Cox* exception: it invites the Court to consider the merits of a case in advance of determining its jurisdiction over the matter in the first place. If the Court sets out to apply the fourth exception only to cases in which it is likely that a decision will terminate the litigation, it is "reversing the traditional sequence of judicial decisionmaking," as Justice Rehnquist observed in his dissent from the *Cox* decision.[318] In addition, this determination can be nothing more than guesswork, as it is being

309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.*
314. *See supra* Part I.A.1.
315. Breyer conceded that it was possible for the Court to opt for some disposition other than full reversal. Yet he urged that this possibility was irrelevant, as the language of the third prong of the exception specifies "reversal," not some other disposition. *Nike*, 539 U.S. at 675 (Breyer, J., dissenting). He then went on to discuss why a full reversal was likely. Breyer further conceded that there is a likelihood that other related federal constitutional issues might arise upon remand for trial. Yet, he argued "some such likelihood is always present in ongoing litigation." *Id.* at 673. He pointed out that this likelihood was present in *Cox* to support his argument that it should not matter in *Nike*. *Id.* This admission, however, more readily serves as support for an argument that the prongs of the fourth exception are so susceptible to loose interpretation as to be vacuous.
316. *Id.* at 675.
317. *Id.* at 676-81.
318. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 507-08 (1975).

made without the benefit of a full record or a full consideration of all the possible outcomes.

Perhaps the most important concern with the fourth *Cox* exception is with its final prong—that the Court must determine that refusal to immediately review a state court judgment "might seriously erode federal policy."[319] This test has remained completely devoid of any limiting principle. The Court has never provided guidance regarding how important a federal policy must be, nor how serious the risk or how great the potential erosion, in order for a petitioner to benefit from the exception. Instead, litigants have been left to guess whether they should expend the time and energy appealing an interlocutory ruling, and the Court has been left with carte blanche to decide which policies are important enough to warrant special solicitude.

In practice, the Court has seemed particularly protective of First Amendment questions.[320] Yet it has never explained why it is less tolerable to allow the press to "operate in the shadow" of civil and criminal penalties of dubious constitutionality[321] than to allow any other party to operate in the shadow of restraints on other constitutional rights. This disparity might be explained by reference to the vast scholarly research arguing that the First Amendment occupies a "preferred position" within the hierarchy of constitutional values.[322] However, this preference for protection of First Amendment values does not account for expedited Court action where the exercise of free speech is not in imminent danger, as when there is no prior restraint in place. Nor does it account for elevated protection of other federal policies beyond the First Amendment. Furthermore, while some cases in this category have presented situations in which the petitioner would have suffered irreparable harm if the state court judgment was not immediately reviewed,[323] others have presented no harm beyond the disappointment encountered by all litigants who receive an unfavorable interlocutory ruling and must, as a result, continue litigating the matter.[324]

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319. *Id.* at 483.

320. *See supra* Part II.C.

321. *Cox*, 420 U.S. at 486.

322. *See* Kathleen M. Sullivan & Gerald Gunther, First Amendment Law 10 (1999) (explaining that Justice Black was a proponent of the "absolute" view of First Amendment rights, while Justices Frankfurter and Harlan advocated balancing these rights against competing interests); Robert B. McKay, *The Preference for Freedom*, 34 N.Y.U. L. Rev. 1182 (1959) (noting that a debate exists over whether the First Amendment "stands somehow apart from, and above, other provisions" to the Constitution, and arguing that it clearly does).

323. *See, e.g.*, M.I.C. Ltd. v. Bedford Township, 463 U.S. 1341 (1983); Nat'l Socialist Party of Am. v. Skokie, 432 U.S. 43 (1977); Neb. Press Ass'n v. Stuart, 423 U.S. 1327 (1975).

324. *See, e.g.*, Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988); *Cox*, 420 U.S. at 469; Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

In sum, the fourth *Cox* exception to the final judgment rule suffers from a lack of specificity that renders it grossly overinclusive, less an exception than a catch-all by which the Court may grant review of virtually any interlocutory judgment not falling within one of the first three *Cox* categories, as long as the Court determines that the judgment poses a risk to a federal policy. It is often applied in ways that fly in the face of constitutional avoidance doctrine and that disrupt the "smooth working of our federal system" of which Justices Frankfurter and Harlan spoke,[325] while serving neither efficiency nor litigant protection interests. In contravening Congress's clear intent to retain the finality requirement in all appeals from state courts to the Supreme Court,[326] the Court should require a demonstration of compelling reasons why it must do so.

B. *Modifying the Fourth* Cox *Exception to Increase Certainty and Practicality in the Application of the Final Judgment Rule*

1. Previous Proposals

Very little recent legal scholarship exists critiquing the appealability regime of § 1257. Yet a great deal was written during the period leading up to and immediately following *Cox*, a period during which the exceptions to the final judgment rule were substantially expanded. Many commentators argued that the Court's later exceptions to the final judgment rule are untenable for any number of reasons. One argued that the new rule was both underinclusive and overinclusive, and advocated an amendment to § 1257 that would clarify the availability of appeal in rare cases.[327] Another decried that expansive review ignores federalism concerns, and implored the Court to "retreat from [its] present position."[328] Another scholar stated that three of the four *Cox* categories create "disturbing unpredictability in application," sacrificing the "systemic benefit gained by predicating appellate jurisdiction upon finality."[329] This author proposed delineating precise exceptions for situations including practical finality, state court judgments that threaten time-bound rights, and assertions of rights to be free from the burdens of litigation or from injunctive orders.[330]

Other commentators were not convinced that wholesale change to the finality doctrine was warranted, suggesting that the problem with the Court's new interpretation of finality was largely administrative.

325. Radio Station WOW, Inc. v. Johnson, 320 U.S. 120, 124 (1945).
326. *See supra* notes 58-59 and accompanying text.
327. Dyk, *supra* note 43, at 944.
328. Frank, *supra* note 41, at 320.
329. *The Finality Rule*, *supra* note 42, at 1026.
330. *Id.* at 1027-32.

The impact of the *Cox* decision, one scholar said, would be "neither dramatic nor far-reaching."[331] While the definition of finality that it articulated could lead to a deluge of appeals, he suggested this could be remedied by making interlocutory appeals permissive rather than mandatory, thus quelling any fears of forfeiture, and by imposing sanctions to deter frivolous, dilatory appeals.[332] The problem with this reasoning, however, is that while a permissive appeal rule may eliminate a fear that one would risk making his appeal untimely if he waits too long, it would not remove the incentive to appeal sooner rather than later. Many litigants would likely deem the costs of appealing an adverse ruling to be far outweighed by the potential benefit of having their grievances heard before having to litigate an entire case. In addition, an ill-defined exception whose limits are unclear would make it difficult to determine whether an appeal is frivolous, warranting sanction, or simply opportunistic.

Even if one were to accept that procedural rules could mitigate administrative burdens, the fact remains that the fourth *Cox* exception is deficient for all of the substantive reasons outlined above. As *Nike* demonstrates, there are Justices on the Court who support a continued application of the exception it its most expansive form, inviting review of judgments solely out of a desire to weigh in sooner on a constitutional question. The time is therefore ripe to revisit it and to propose a change.

2. A New Proposal

The fourth *Cox* exception to the final judgment rule should be modified to reject the prong of the test that considers erosion to federal policy, and replace it with a consideration only for the petitioner's interests. When a litigant appeals an interlocutory state court judgment on a federal question, yet has a real opportunity to prevail on nonfederal grounds (including settlement), the Supreme Court should entertain the appeal only when expedited review is truly necessary to protect the petitioner from irreparable harm.

Such harm should not include the physical, financial, or emotional expenditures that a petitioner must undertake to prepare for and conduct litigation. In other words, the requirement is not met merely by claiming that a state court judgment will subject the petitioner to further litigation that might ultimately prove unnecessary if it turns out the state court was mistaken on the federal question. If it were, then any denial of a motion for summary judgment or motion to dismiss would be appealable.

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331. McGinnis, *supra* note 40, at 645.
332. *Id.*

It may be argued that this rule would contradict cases such as *Curry* and *Langdeau*, because challenges to venue and jurisdiction are merely arguments that the petitioner should not be subjected to litigation in a particular forum. Yet these cases may be distinguished from other pre-trial and interlocutory judgments by the fact that the right for which the petitioner seeks vindication is collateral to the merits of a case. Furthermore, the federal right asserted is a right specifically designed to protect the petitioner from being forced to litigate in a particular state forum.[333] Once the litigation has been concluded, the right has been lost irreparably.

Under the proposed rule, however, irreparable harm would not be deemed to flow from the fact that a state court judgment upholding the validity of a state statute against federal challenge will force the petitioner, and those similarly situated, to operate in an atmosphere of uncertainty over the legality of their behavior. Appeals of judgments such as those in *Cox*, *Miami Herald*, and *Nike*, which denied petitioners' First Amendment defenses and remanded for further proceedings, leaving intact a state law of questionable validity, would therefore be impermissible. Such judgments merely maintain the status quo, imposing no additional burdens on the petitioner that he had not already been subjected to—burdens which can be just as effectively vindicated at the conclusion of the litigation.

In contrast, a judgment of the highest state court refusing to stay a trial court's injunction, or to provide immediate appellate review of the injunction, should always be appealable under an irreparable harm exception.[334] This kind of pre-trial sanction alters the status quo, effecting a complete restraint on the litigant's conduct for what could be a period of years, such that even if the litigant ultimately vindicates his rights, significant damage will have already been done. The paradigm example involves an injunction against speech. If the petitioner violates the injunction by participating in the prohibited speech, the collateral bar rule provides that he would be held in contempt of court and would forfeit his right to challenge the validity of the law under which he was enjoined.[335] If he obeys the order, he may effectively lose his speech rights altogether, as preliminary injunctions can remain in effect long enough at least to render the right moot. It is therefore a complete restraint.

Contrast this to a judgment such as that in *Cox*, *Miami Herald*, or *Nike*, which simply rejects a petitioner's first amendment defense to liability and remands for further proceedings. The petitioner remains

333. *See The Finality Rule*, *supra* note 42, at 1030.

334. *See id.* at 1031 (suggesting that "when the litigant can point to a specific federal constitutional or statutory provision that deprives a state court of the authority to issue a preliminary injunction . . . he should be able to resolve his claim of privilege before the interlocutory injunction goes into effect").

335. Walker v. Birmingham, 388 U.S. 307 (1967).

free to speak and, while the threat of facing damages may have a chilling effect on his speech, he is not subjected to enforced silence. In other words, "although the threat of damages or criminal action may chill speech, a prior restraint 'freezes' speech before the audience has the opportunity to hear the message."[336]

It seems appropriate, therefore, for the Court to make an exception to the final judgment rule where the state courts have demonstrated an unwillingness to protect the petitioner's rights by either staying or providing expedited review of the injunction.[337] As the Court held in *Forgay*, a "right of appeal is of very little value" to a petitioner if "he may be ruined before he is permitted to avail himself of the right."[338]

Modifying the fourth *Cox* exception in this way would effectuate the Court's original desire to give a practical construction to an otherwise draconian rule, by allowing the Court to review a non-final state court judgment when, as a practical matter, review at a later date would be inefficient, difficult, or impossible. Yet it draws a sensible line, where none currently exists. This proposal recognizes that the final judgment rule is not merely a relic of the past, but a doctrine whose value is still apparent, and that the formality of our reasons for departing from it should mimic in magnitude the degree of that departure. In cases where it is clear that the state court judgment on the federal issue is determinative of the outcome of any subsequent state court litigation and will be sent up for review to the Court in short order, it is not as critical that the Court apply a methodical analysis to whether the decision is one that has, for time immemorial, been considered "final." It makes practical sense to expedite review. However, in cases where the state court judgment on the federal issue is plainly interlocutory, with an entire trial yet to be conducted in which the petitioner may well prevail on the merits, it is not at all clear that granting immediate review is the practical choice. In fact, it is decidedly *im*practical to grant review in such cases unless the parties will be unfairly and irreparably impacted by a delay. The fanciful goal of preserving the sanctity of ill-defined federal policies against merely hypothetical risks of erosion simply does not fit with the pragmatic spirit of the Court's traditional finality jurisprudence. If we are to return to that pragmatic approach, we must craft a finality doctrine that balances in each case the risks of abandoning the rule against tangible interests in the efficient and fair resolution of the controversy, in a way that provides clear guidance to litigants regarding when to seek and expect review of an interlocutory order.

336. *In re* Providence Journal Co., 820 F.2d 1342, 1346 (1st Cir. 1986).

337. *See* Wright, *supra* note 33, at § 4010 (explaining that while in most cases, "finality should be denied if later review will be available in a higher state court," there are "some pressing situations" in which it "may be sufficient that no *present* review is available in a higher state court"(emphasis added)).

338. Forgay v. Conrad, 47 U.S. (6 How.) 201, 205 (1848).

Notes & Observations