THE COLLATERAL ORDER DOCTRINE: A NEW "SERBONIAN BOG" AND FOUR PROPOSALS FOR REFORM

Lloyd C. Anderson*

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I. INTRODUCTION

In 1949, the United States Supreme Court in Cohen v. Beneficial Industrial Loan Corp. created the collateral order doctrine of federal appellate jurisdiction. Congress has established the statutory requirement that a

* Professor of Law, University of Akron School of Law. B.A., 1969, University of Michigan; J.D., cum laude 1973, Harvard University. For their valuable assistance I would like to thank Professors Edward H. Cooper and Ann Woodley, and, for a second time, my research assistant Lisa Vitale. The views expressed in this Article, however, are my own. Financial support was provided by a Summer Research Fellowship of the School of Law.

litigant has the right to appeal only a "final decision," which the Court has defined generally as a final judgment that "ends the litigation on the merits." Over the years, however, the Court has crafted a number of exceptions to the final judgment rule by way of artful construction of the statutory term "final decision." The Court in Cohen construed "final decision" to permit immediate appeal of decisions that did not end the litigation but that conclusively determined claimed rights that were separate from the merits and that were effectively unreviewable after final judgment. The Court described this new doctrine as applying only to a "small class" of decisions. For some years this was an accurate description; the collateral order doctrine was confined to very narrow circumstances in relatively few cases.

Beginning in the early 1960s, however, the Court began the process of expanding the collateral order doctrine, culminating in the 1985 decision of Mitchell v. Forsyth. This doctrinal expansion has been replete with inconsistent opinions causing unacceptable confusion over which nonfinal rulings are appealable. This results in delay and disruption of ordinary trial processes and the expenditure of appellate resources. One Justice finally was led to complain that "our finality jurisprudence is sorely in need of limiting principles." The judges of the federal circuits joined the outcry, charging that the newly expanded, but inconsistent, collateral order doctrine had caused a "litigation explosion," fostered "regrettable expense and delay," and led judges into a "maze" of confused and contradictory doctrinal minutiae.

4. Some of these exceptions, which largely are beyond the scope of this Article, include orders transferring property, the "death knell" theory, and the doctrine of "practical finality." See generally 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3910, 3912-3914 (2d ed. 1992 & Supp. 1997) (noting that "there are many exceptions to the ordinary rule"). In addition to these judicially created exceptions, Congress itself has legislated statutory exceptions. See 28 U.S.C. § 1292. This battery of exceptions has created a final judgment rule of such complexity that one leading commentator has complained of "the unconscionable intricacy of the existing law, depending as it does on overlapping exceptions, each less lucid than the next." Paul D. Carrington, Toward A Federal Civil Interlocutory Appeals Act, 47 LAW & CONTEMP. PROBS. Summer 1984, at 165, 165-66. This Article focuses solely on the collateral order doctrine, however, because it has caused the greatest dissatisfaction.
6. Id. at 546.
10. Manhattan Beach Police Officers Ass'n v. Manhattan Beach, 881 F.2d 816, 817 (9th Cir. 1989).
In 1988, amid mounting concern over congestion, delay, and expense in the federal court system, including dissatisfaction with the collateral order doctrine, Congress created a Federal Courts Study Committee composed of judges, attorneys, and members of Congress. The committee submitted its report to Congress in 1990. One of its many recommendations was to authorize the Supreme Court to promulgate rules clarifying which decisions should be characterized as final for purposes of appellate jurisdiction. Congress promptly passed legislation authorizing the Court to do so.

Seven years have since passed and no rules for clarifying which decisions should be characterized as final have yet been proposed, much less adopted. A proposal to address the problems created by the final judgment rule, including the collateral order doctrine, is not even on the agenda of the Advisory Committee for the Federal Rules of Appellate Procedure. Why has this rulemaking authority remained dormant for so long, with no activity in sight, and what, if anything, should be done?

Part I of this Article gives a brief overview of the statutory basis for federal appellate jurisdiction and describes the early formulation of the collateral order doctrine from its genesis in Cohen through the narrow and infrequent applications of Cohen in the decades immediately thereafter. Part II provides a detailed narrative of the expansion of the collateral order doctrine, from its roots in a 1963 decision, Construction Laborers v. Curry, to its culmination in 1985 in Mitchell, followed by calls for reform in the late 1980s. Part III describes the problems, particularly associated with the collateral order doctrine, that led Congress to grant the Supreme Court rulemaking authority to clarify which decisions are sufficiently final to confer appellate jurisdiction. Part IV evaluates the Court’s recent collateral order jurisprudence and contends that the problems—explosion of purely procedural litigation over what orders are appealable—have only gotten worse, particularly in the area of qualified immunity. Part V proposes four alternative remedies: the Court should either return to the narrow collateral order doctrine of Cohen; candidly recognize that its current doctrine is best described as a flexible, multifactor test closely resembling a doctrine of discretionary interlocutory

14. Id. at 95.
appeal; overrule the Forsyth decision that has spawned the most procedural litigation; or promulgate a new rule permitting only one qualified immunity appeal per case.


A. The Statutory Framework of Federal Appellate Jurisdiction

Congress has plenary authority to control both the original and appellate jurisdictions of the federal courts. Pursuant to its constitutional authority, Congress has mandated that, as a general rule, a litigant has the right to appeal only after a final decision. This statutory requirement codified a long-established common-law precedent and the Supreme Court generally has given the statute a strict interpretation: "[A] final decision is one that ends the litigation on the merits, leaving the court nothing to do except execute the judgment." Legal rules derive meaning from the policies that such rules are designed to accomplish, and so it is with the final judgment rule. It is an instrument of congressional policy, not an end in itself. The rule serves four policies. First, it protects the authority of trial judges by forbidding piecemeal appeals of pretrial orders that would make a judge's every ruling subject to immediate intervention by an appellate tribunal. Second, it protects the appellate courts from the intolerable burden of conducting immediate review of countless pretrial orders. Third, the final judgment rule protects litigants with meritorious claims and defenses from the harassment and expense of multiple appeals by an adversary keen to avoid a decision on the merits. Fourth, it protects society's interest in having a legal system that resolves lawsuits as quickly and cheaply as possible. For these policy reasons, the general run of pretrial orders—denials of motions to dismiss, discovery orders, joinder decisions, denial of summary judgment, scheduling orders, and so on—cannot be appealed until the case is over.


19. 28 U.S.C. § 1291 (authorizing jurisdiction of appeals from final decisions of a federal district court to courts of appeals); id. § 1257 (authorizing jurisdiction of appeals from the final decisions of the highest court of a state to the United States Supreme Court).


21. See Cobblewick v. United States, 309 U.S. 323, 325-26 (1940) (holding that the denial of a motion to quash a subpoena is not immediately appealable because it is not a final decision).

22. Rule 54(b) of the Federal Rules of Civil Procedure provides a limited exception to this rule. If a case involves multiple claims for relief or multiple parties, the district court may
Congress has also recognized, however, that in some circumstances, countervailing policies outweigh the policies underlying the rule of finality. Congress has provided for an interlocutory appeal of the grant or denial of injunctive relief because the potential harm from an erroneous decision is great enough to justify the costs associated with piecemeal appeals. Congress also provided for discretionary interlocutory appeal of orders involving controlling questions of law as to which there is substantial ground for difference of opinion, and immediate appellate resolution could help terminate the litigation. Finally, Congress made available immediate appellate review in the form of an original action for a writ of mandamus. Mandamus actions, however, are limited to exceptional circumstances in which a district court has exceeded the scope of its authority or has so manifestly abused its discretion that it has, in effect, ignored the rules. In such circumstances, the very integrity of the judicial process is in jeopardy, justifying a departure from the finality requirement. The common policy underlying all these statutory exceptions to the final judgment rule is that the error-correcting benefits of immediate appeal from particular orders outweigh the general costs of piecemeal appeal.


In 1943, soon after the Supreme Court’s landmark choice-of-law decision in Erie Railroad Co. v. Tompkins, a small shareholder brought a shareholders’ derivative action in federal court against the company’s officers and directors, accusing them of raiding corporate coffers to enrich themselves. The corporation moved to require the plaintiff to post security to pay defense costs if the plaintiff lost, as required by state law. The district court held that a federal court was not bound to apply a state security law and

enter a final, appealable judgment on fewer than all the claims or parties if it determines that there is no just reason for delay. Fed. R. Civ. P. 54(b). In that event, the adjudicated portion of the case could be appealed while the remainder of the case proceeded in the district court.

24. See Doe v. Village of Crestwood, 917 F.2d 1476, 1477 (7th Cir. 1990).
25. 28 U.S.C. § 1292(b). This provision was adopted in 1958 so it was not an available avenue of appeal when the Supreme Court created the collateral order doctrine in 1948. Act of Sept. 2, 1958, Pub. L. No. 85-919, 72 Stat. 1770 (1958) (adding subsection (b)).
27. See, e.g., Kerr v. United States District Court, 426 U.S. 394, 402 (1976) (holding that a mandamus was improper for the review of a discretionary order compelling discovery of information claimed to be protected by the governmental secrets privilege). But see, e.g., La Buy v. Howes Leather Co., 352 U.S. 249 (1957) (holding that a mandamus was proper for the review of an order referring a case to a master for trial despite the claim of a constitutional right to a jury trial).
31. Id. at 544-45.
denied the motion.\textsuperscript{32} Even though this decision did not terminate the litigation, the defendants appealed immediately.\textsuperscript{33} The Third Circuit Court of Appeals reversed on the ground that the \textit{Erie} decision mandated the application of the state security requirement.\textsuperscript{34} The Supreme Court granted certiorari on both the appealability and the security issues.\textsuperscript{35}

The defendants, represented by the future Justice John M. Harlan,\textsuperscript{36} who years later as a Justice would protest expansion of the collateral order doctrine,\textsuperscript{37} persuaded the Court that denial of the motion to require security was appealable.\textsuperscript{38} The Court acknowledged that denial of the motion did not terminate the litigation,\textsuperscript{39} and none of the established statutory exceptions for interlocutory appeal was material.\textsuperscript{40} Nevertheless, the Court construed 28 U.S.C. § 1291 to permit the appeal as of right from the denial of security because it was a "final decision" within the meaning of the statute.\textsuperscript{41} The Court found that the district court's decision was final on the question of security, that it was not a step toward a decision on the merits, and after final judgment on the merits—in the key phrase that has provided the primary doctrinal battleground for nearly half a century—"it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."\textsuperscript{42} The Court provided this explicit construction of § 1291,\textsuperscript{43} which has come to be known as the collateral order doctrine:

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.\textsuperscript{44}

With respect to the merits of the issue presented on appeal, the Court held that the policy of the \textit{Erie} case and its progeny, particularly \textit{Guaranty Trust v. York},\textsuperscript{45} mandated federal application of the state security statute.\textsuperscript{46}

\begin{itemize}
\item[32.] \textit{Id.} at 545.
\item[33.] \textit{Id.}
\item[34.] Beneficial Indus. Loan Corp. v. Smith, 170 F.2d 44, 51-52 (3d Cir. 1948).
\item[35.] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 545.
\item[36.] \textit{Id.} at 543.
\item[37.] \textit{See} Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 574-75 (1963) (Harlan, J., dissenting).
\item[38.] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 546-47.
\item[39.] \textit{Id.} at 547.
\item[40.] \textit{Id.} at 546. An interlocutory appeal under 28 U.S.C. § 1292(b) was not available at this time. \textit{See supra} note 25 and accompanying text.
\item[41.] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 543.
\item[42.] \textit{Id.} at 546.
\item[43.] \textit{Id.}
\item[44.] \textit{Id.}
\end{itemize}
The *Cohen* decision appears to have been intended as a very narrow decision, but the seeds of later confusion and protracted procedural litigation were sown by the lack of clarity in the court’s stated reasoning.\(^{47}\) The Court explained its holding as a construction of the final decision requirement embodied in 28 U.S.C. § 1291, so that an appeal under the collateral order doctrine is an appeal as of right.\(^{48}\) Nevertheless, courts often describe such appeals as “interlocutory” in nature and the doctrine as an “exception” to the final judgment rule.\(^{49}\) The confusion is understandable because a collateral order appeal is not from a final decision in the ordinary sense of terminating a case. The difference is important because once a particular type of order is deemed collateral, it is appealable in every case in which such an order is made.

The *Cohen* Court cited three cases in support of this construction of § 1291,\(^ {50}\) but, as one commentator has noted, these cases “provide only remote support for this result.”\(^ {51}\) In the first-cited case, *Bank of Columbia v. Sweeney*,\(^ {52}\) the Court held that an action for a writ of mandamus could not be maintained to review a decision allowing a defendant to plead a statute of limitations defense because such an action would evade the requirement that only final judgments are appealable.\(^ {53}\) The Court emphasized that the final judgment rule is based on the policy against piecemeal appeals.\(^ {54}\) Thus, *Sweeney* provides no support whatsoever for the collateral order doctrine. In the second-cited case, *United States v. River Rouge Improvement Co.*,\(^ {55}\) the Court held that an appeal was properly taken from a judgment in favor of one set of defendants even though a new trial had been ordered with respect to another defendant, because the claims against the two sets of defendants were “entirely distinct.”\(^ {56}\) The appealed judgment, however, was on the merits of the claim rather than separate.\(^ {57}\) Thus, the *River Rouge* decision was an application of the principle that, if a case involves multiple parties and the court enters final judgment on the merits as to some but not all parties, an appeal

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47. *Id.* at 556-57.
48. *Id.*
49. See, e.g., *United States v. Bratcher*, 833 F.2d 69, 72 (6th Cir. 1987) (describing the *Cohen* “exception” as permitting “interlocutory appeal”); *Pan E. Exploration Co. v. Hufo Oils*, 798 F.2d 837, 838 (5th Cir. 1986) (describing the collateral order doctrine as an “exception” to the final judgment rule).
51. 15A WRIGHT, MILLER, & COOPER, *supra* note 4, § 3911, at 332.
53. *Id.* at 569.
54. *Id.*
56. *Id.* at 413-14.
57. *Id.*
may be taken from the partial final judgment. At most, River Rouge provided analogic support for a strict collateral order doctrine in which the collateral order must present an issue "entirely distinct" from the merits of the case. The third-cited case, Cobbledick v. United States, held that denial of a motion to quash a subpoena duces tecum is not immediately appealable because it is not a final judgment. In dictum, the Cobbledick Court noted that this requirement "has been departed from only when observance of it would practically defeat the right of any review at all." For example, when a defendant is sentenced to punishment for criminal contempt of court, disallowing immediate appeal would force the defendant either to capitulate or to serve the sentence; either way, an appeal of the contempt order after final judgment would be moot. Thus, at most, Cobbledick provides support for a narrow collateral order doctrine in which immediate appeal is allowed only if the issue would be moot after final judgment so that appeal would not be available at all at that time.

Although the Supreme Court's overriding concern in Cohen appeared to be that no appeal of the security issue would be available at all after final judgment, the Court failed to explain why it would be too late to effectively review the denial of security after final judgment in the derivative suit. It is necessary to examine the Court's discussion of the merits of the security issue in order to shed some light on the problem of reviewability. The Court explained that the purpose of the state security statute was to deter meritless lawsuits brought in the hope of obtaining a quick settlement based upon nuisance value, at no risk to the plaintiff. If security was denied and the case resulted in a final judgment for the defendants, including costs, it would be pointless for the defendants to appeal the denial of security because by then it would be too late for a court to order the plaintiff to post security.

Even if it was error to deny security, an appellate reversal would be of no practical value and the defendant would no longer have a personal stake in a decision on whether the plaintiff must post security. The Court stated none of this in its discussion of the appealability issue, yet it is the only sensible explanation for its conclusion that it would be too late to effectively review the security issue after final judgment. Thus, the collateral order doctrine at its genesis in Cohen appears to have been based upon a mootness rationale—a collateral order is appealable immediately if the issue would be moot after final judgment on the merits. Unfortunately, the Court failed to set forth this rationale in a clear manner, which opened the door years later for much

58. This principle was later codified in Rule 54(b) of the Federal Rules of Civil Procedure. See supra note 22 and accompanying text.
60. Id. at 325-26.
61. Id.
63. Id. at 548.
64. Id. at 556 (stating that the plaintiff's liability for costs "would be without meaning and value in many cases if it resulted in nothing but a judgment for expenses at or after the end of the case").
broader applications of the collateral order doctrine than the Court originally intended.

The Cohen Court did not hold that every collateral order is immediately appealable, but only those that involve issues "too important to be denied review." The Court failed to explain why the security issue was sufficiently important to justify the costs of piecemeal appeals, and so it is necessary to re-examine its discussion of the merits of that issue in order to shed some light on what the Court meant. The primary question in Cohen was whether a federal court in a diversity action must apply the forum state's security law. The Cohen case arose only a few years after the landmark decision in Erie in which the Court held that federal courts in diversity cases must apply state common law as well as state statutes. The Court thereby displaced a century-old body of general federal common law created under the authority of Swift v. Tyson.

A major issue left unresolved by Erie was the extent to which federal courts in diversity cases must apply state procedural, as well as substantive, law. In the years following Erie, the Court undertook to formulate standards by which state rules considered procedural in everyday meaning nevertheless would be deemed substantive as contemplated by Erie and thus applicable to federal diversity cases. Cohen was one of these cases. If the Court had held the decision to deny security unappealable until after final judgment, the Erie issue presented in Cohen—to what extent state procedural rules must be applied in federal diversity cases—might never have been resolved because, as previously discussed, an appeal of the security issue after final judgment would have been moot. It seems likely, then, that the Court meant that the issue was "too important to be denied review" because it involved this important Erie issue. The Court's failure to provide a clear explanation, however, fostered later confusion over what issues are sufficiently "important" to warrant immediate appeal.

Thus, the Cohen decision established a collateral order doctrine that is not an exception to the finality requirement, but instead a strained construction of 28 U.S.C. § 1291. This permits an appeal of right in every case in which a particular type of order deemed "collateral" is entered. The lack of substantial precedent and the Court's failure to explain how the denial of security met the requirements of the new doctrine, however, left the scope

65. Id. at 546.
66. Id. at 543. The Supreme Court also addressed the question of whether such a law violated the Constitution and concluded that it did not. Id. at 547-55.
68. Id. at 78-80.
of the doctrine uncertain. It appears that the Court intended to establish a narrow construction of the "final decision" requirement under which a pretrial order is immediately appealable as of right if it (1) involves an issue "entirely distinct" from the merits, and (2) the issue would be moot after final judgment and therefore unreviewable at all if immediate appeal were not available. Unfortunately, the Cohen Court's failure to explicitly set forth this narrow construction left the door open for a much broader doctrine, eventually leading to the costly confusion that exists today.

C. Strict Construction in the Early Years Following Cohen

For the first decade and a half following Cohen, the Supreme Court appeared to adhere to a narrow, mootness-based formulation of the collateral order doctrine, but it also continued to fail to be explicit about it. In Swift & Co. v. Compania Caribe,71 an admiralty case, Swift obtained an order attatching a foreign defendant's vessel in lieu of personal service of process.72 The district court vacated the attachment for lack of jurisdiction.73 The Supreme Court held that the order vacating the attachment, though it did not terminate the litigation, was appealable under Cohen because "appellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible."74 The Court distinguished an order upholding an attachment, which would not be appealable under Cohen, because "the rights of all parties can be adequately protected while the litigation on the main claim proceeds."75

As in Cohen, the Court failed to explain why a postjudgment appeal of an order dissolving an attachment would be "an empty rite."76 The Court appears to have meant that, if Swift had had to litigate its admiralty claim to the end and then appeal the dissolution of its attachment order, the vessel would be long gone.77 As soon as the attachment was dissolved with no stay pending appeal, the defendant would surely sail the vessel into foreign waters, beyond American jurisdiction, rendering a later appeal moot.78 By the same token, an order upholding an attachment is not an appealable collateral order because a later appeal would not be moot; if the defendant prevailed on an appeal after final judgment, the vessel would be released.79

72. Id. at 686.
73. Id. at 687.
74. Id. at 689.
75. Id.
76. Id.
77. Id.
78. Id.
79. See Roberts v. United States District Court, 339 U.S. 844, 845 (1950) (per curiam) (holding that an order denying permission to proceed in forma pauperis was immediately appealable under Cohen). Although the Court again did not explain its reasoning, presumably the Court meant that the in forma pauperis issue would be moot after final judgment and
The year after Swift, in Stack v. Boyle, the Supreme Court ruled that when a defendant challenges the amount of bail as being unconstitutional, denial of a motion to reduce bail is appealable as a final decision under 28 U.S.C. § 1291, as construed in Cohen. The Court's opinion did not explain this conclusion, but Justice Jackson, who authored the opinion in Cohen, gave a partial explanation in his concurring opinion for why such a denial is appealable under the collateral order doctrine: "But an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—and unless it can be reviewed before sentence, it can never be reviewed at all." Justice Jackson, however, failed to explain why such an order "can never be reviewed at all" after sentencing. It seems the Court meant that the bail issue is unreviewable even after termination of the criminal case because, by the time the defendant is convicted or acquitted, the bail issue is moot. Even if an appeals court found that the bail was excessive, it could provide no remedy because the pretrial detention would have already ended; therefore, there would be no purpose served by ordering a reduction of bail.

Perhaps because the intended narrowness of the collateral order doctrine was so well-understood, even if poorly explained, the Supreme Court appears to have given it no further consideration for some years. In 1956, however, the Court decided Parr v. United States. In Parr, the defendant was indicted for tax evasion in one division of federal district court but obtained a transfer to a second division because of local prejudice in the first division. The government then indicted the defendant in yet a third division therefore unreviewable. See id. at 845. If the plaintiff managed to produce the funds to proceed with the case to final judgment, there would no longer be a viable claim that he was entitled to proceed in forma pauperis in the first place. Id.

81. Id. at 6-7. In Stack, the district court set bail at $50,000 for each defendant. Id. at 3. The defendants moved to reduce bail on the ground that $50,000 violated the Eighth Amendment prohibition of excessive bail. Id. (citing U.S. Const. amend. VIII). The district court denied the motion and, instead of appealing, the defendants filed applications for habeas corpus. Id. at 4. The Stack Court held that the habeas corpus actions must be dismissed for failure to exhaust the remedy of appeal under 28 U.S.C. § 1291. Id. at 6-7. Thus, although the actual holding of Stack is that a habeas corpus action must be dismissed for failure to exhaust alternative remedies, the major premise of the holding is that the remedy of appeal under Cohen is available for denial of a motion to reduce excessive bail. Id. at 6. "As there is no discretion to refuse to reduce excessive bail, the order denying the motion to reduce bail is appealable as a 'final decision' of the District Court under 28 U.S.C. (Supp. IV) § 1291." Id. at 6 (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545-47 (1949)).
82. Id. at 12 (Jackson, J., concurring).
83. See, e.g., Ford Motor Co. v. Busam Motor Sales, 185 F.2d 531, 533 (6th Cir. 1950) (noting that the order in Cohen was appealable because of its "peculiar characteristics;" order denying motion for judgment notwithstanding the verdict held not appealable, where motion for new trial had been granted, until after entry of judgment following the new trial).
85. Id. at 514.
and obtained a dismissal of the first indictment. The Supreme Court held that the order dismissing the first indictment was not a final appealable order, reasoning in part that if the two indictments were viewed as part of a single prosecution, the dismissal did not terminate the litigation because the second indictment was still pending. Rejecting the argument that the dismissal nevertheless fell within the collateral order doctrine, the Court found that, unlike the orders in Cohen and Swift, this dismissal would be subject to effective review after trial in the third division. If convicted of tax evasion in the third division, the defendant could appeal on the ground that the first transfer precluded the indictment in the third division, and, if he prevailed on that argument, the judgment of conviction would be vacated. Thus, unlike the issues in Cohen and Swift, the issue in Parr would not be moot after termination of the case. Interestingly, the author of the Court's opinion in Parr was Justice Harlan who, as victorious counsel in Cohen, was surely aware of the intended narrowness of the collateral order doctrine.

Four Justices dissented in Parr, however, and in so doing foreshadowed the coming expansion of the collateral order doctrine. Chief Justice Warren's dissenting opinion argued that the dismissal of the first indictment was an appealable final order: "If he had, as we believe he had, a right to be tried in [the first division] or not at all, clearly he was aggrieved by the dismissal under the circumstances." Implicit in this reasoning is the notion that if a defendant asserts a "right not to be tried," a decision denying that "right" is immediately appealable because it is effectively unreviewable after final judgment, when the "right not to be tried" has already been lost. The dissenters did not dispute the majority's conclusion that an appeals court could overturn a conviction if the dismissal was erroneous, but argued that the defendant should not be subjected to the "harassment" of a second indictment that might turn out to be invalid. As will be seen, this notion of a "right not to be tried," which would be harmed if an appeal were postponed, became the primary rationale, two decades later, for expansion of the

86. Id. at 515.
87. Id. at 516-17. The Court's alternative rationale was that, if the two indictments were viewed as separate prosecutions, the defendant was not "aggrieved" because dismissal of the first indictment was in his favor. Id. at 516.
88. Id. at 519.
89. The Parr Court stated:

If petitioner is correct in his contention that the Laredo transfer precluded the Government from proceeding elsewhere, he could not be tried in Austin, and, if petitioner preserves the point, he will certainly be entitled to have the Corpus Christi dismissal reviewed upon an appeal from the judgment of conviction under the Austin indictment.

Id.

90. Id. at 519-20.
91. Id. at 514.
92. Id. at 521 (Warren, C.J., dissenting, joined by Black, Douglas, Clark, JJ.).
93. Id. at 522.
94. Id. at 523.
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collateral order doctrine. Thus, less than a decade after Cohen, its mootness rationale was already under attack by Justices calling for a broader “right not to be tried” rationale. Nevertheless, the lower federal courts continued to follow the strict Cohen doctrine, rejecting arguments for appealability based upon asserted rights not to be subjected to trial.


A. Ascendance of the “Right Not to Be Tried” Theory

Expansion of the collateral order doctrine did not occur in a straight line or in a single climactic case, but rather it evolved in a zigzag pattern filled with inconsistencies, in which the expansionary trend only gradually became clear. Proponents of the expansion began to gain the upper hand by 1963, in Local No. 438, Construction & General Laborers’ Union v. Curry, written by Justice White, who was later to author the most expansive collateral order opinion of all, Mitchell v. Forsyth. Curry involved a labor dispute in which the union placed a single picket at the job site. The employer sued the union in state court for a violation of a state right-to-work law and moved for a temporary injunction to stop the picketing. The union claimed that the state court lacked jurisdiction on the ground that the dispute was within the exclusive jurisdiction of the National Labor Relations Board (NLRB). The court denied the injunction and the employer appealed to the state supreme court, which reversed and ordered issuance of the temporary injunction. The union appealed to the United States Supreme Court, which held that even though the temporary injunction did not terminate the case, the state supreme court’s decision was a final judgment and therefore appealable under 28 U.S.C. § 1257. Because the issue on appeal was whether the state court had

95. See infra Part III.A-B.
96. See infra Part III.A-B.
97. See, e.g., Northern v. United States, 300 F.2d 131, 132 (6th Cir. 1962) (holding that an order overruling a motion for judgment of acquittal and granting a new trial is not appealable because effective review of the order will be available in the event the new trial results in conviction; Cohen is limited to claimed rights which would never be reviewed if appeal were postponed until final judgment).
100. Local No. 438, Constr. & Gen. Laborers’ Union v. Curry, 371 U.S. at 544.
101. Id.
102. Id. at 543.
103. Id. at 545.
104. 28 U.S.C. § 1257 is the counterpart to 28 U.S.C. § 1291 for appeals to the United States Supreme Court from “final judgments” of a state’s highest court. 28 U.S.C. §§ 1257, 1259 (1994). Interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1)—allowing immediate appeal from the grant or denial of injunctive relief—was not available in Curry because it does
jurisdiction, the matter was separate from the merits of the case.\textsuperscript{105} Purporting to rely on \textit{Cohen}, the United States Supreme Court found that the state supreme court’s decision upholding state jurisdiction was conclusive and not subject to further review in state court, and most significantly, the temporary injunction might destroy the union’s asserted right to picket, without any effective review in the United States Supreme Court.\textsuperscript{106} “The truth is that authorizing the issuance of a temporary injunction, as is frequently true of temporary injunctions in labor disputes, may effectively dispose of petitioner’s rights and render entirely illusory his right to review here as well as his right to a hearing before the Labor Board.”\textsuperscript{107} The Court did not explain why the union’s asserted right would be destroyed, but simply concluded that postponing review would seriously erode national labor policy, which required disputes of this type to be heard by the NLRB rather than state courts.\textsuperscript{108}

Justice Harlan wrote a concurring opinion in which he noted that the Court’s decision would “strain [the collateral order doctrine] to the breaking point.”\textsuperscript{109} In his view, “For here, unlike \textit{Cohen}, the question now raised would be merged in the final judgment and would be open to review by this Court at that time.”\textsuperscript{110} Justice Harlan was correct in this regard. In \textit{Cohen}, if the defendants had had to wait until the case was terminated before appealing the denial of security, the issue of security by that time would have been moot, thus denying any review at all. In \textit{Curry}, however, if the defendants had been required to wait until a permanent injunction was granted, the issue whether the NLRB had jurisdiction to the exclusion of state courts would not have been moot; if the United States Supreme Court were to rule on appeal that the state courts lacked jurisdiction, the injunction would be vacated and the union would be free to resume picketing.

Justice White’s majority opinion did not contend that an appeal after termination of the case would be moot, as required by \textit{Cohen}, but instead relied on substantive policy: national labor policy would be undermined if immediate appeal were not allowed.\textsuperscript{111} Why this is so is not explained clearly, but presumably Justice White meant that unions might have to endure state
court litigation over a permanent injunction, appeal to the United States Supreme Court, obtain a reversal, and then relitigate the entire case before the NLRB; all of which would discourage union efforts to organize. Thus, Curry began the process of changing the collateral order doctrine from a rule based upon mootness to a rule designed to further substantive policy.

The Curry case contains a second striking feature: the tendency of collateral order appeals to bypass well-established, alternative avenues of appeal. Justice White’s opinion advanced an alternative reason for allowing immediate appeal. The union had conceded that lack of jurisdiction was its only defense to the state court action, so that once the state supreme court ruled the state courts had jurisdiction, entry of a permanent injunction was a mere formality. Thus, Curry fell squarely within the rule that where entry of final judgment is a mere formality, proceedings in the trial court are effectually terminated and an appeal may be taken without waiting for formal entry of judgment. Because this established basis for appeal was so clear, there was no need to “strain [the collateral order doctrine] to the breaking point.”

Curry represents the same fuzzy jurisdictional thinking that characterizes Gillespie v. United States Steel Corp., decided the next year. A mother, administrator of her deceased son’s estate, sued a ship owner, both on her own behalf and on behalf of his siblings under the Jones Act, and on behalf of his estate, under a state wrongful death statute. The district court struck the siblings’ Jones Act claim and the estate’s wrongful death claim. Even though the mother’s Jones Act claim remained for trial and the stricken claims were inseparable from the merits; the Supreme Court ultimately held that the order was final for practical purposes and thus, immediately appealable. The Court’s reasoning appeared to be that the cost of allowing an immediate review would be less than requiring the parties to try the mother’s Jones Act claim before appealing and that the issues concerning the siblings’ Jones Act and the estate’s wrongful death claims were fundamental to the case. The Court cited Cohen, but as Justice Harlan pointed out in the

112. Id. at 550-51.
113. Id. at 551.
114. Id. at 550 (citing Pope v. Atlantic Coast Line R.R. Co., 345 U.S. 379, 382 (1953)). Justice Harlan would have permitted appeal on this ground alone. Id. at 554 (Harlan, J., concurring).
115. Id. at 554; see also Theodore D. Frank, Requiem for the Final Judgment Rule, 45 TEX. L. REV. 292, 304 (1966) (arguing that Curry’s reliance on the collateral order doctrine was “confusing” and that the alternative rationale should have been the sole basis for the decision).
118. Gillespie v. United States Steel Corp., 379 U.S. at 150.
119. Id.
120. Id. at 152.
121. Id. at 153-54. The Gillespie Court stated that “the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided.” Id. at 153.
dissent, the mother could have proceeded to trial on her Jones Act claim and, win or lose, appealed the decision striking the other claims, at which time the issues would not have been moot.123

The logic of the Gillespie decision suggests an ad hoc case-specific balancing approach to appealability. If the cost and delay of deferring appellate review and the importance of the issue presented outweigh the cost of allowing piecemeal review, an interlocutory decision is appealable. Commentators uniformly criticized the decision,124 few cases followed it, and over a decade later, the Court itself recognized that the Gillespie approach would strip the final judgment rule of all significance.125 Nevertheless, the Court resurrected Gillespie in Mitchell v. Forsyth,126 the most expansive collateral order decision of all, illustrating that the Court’s broadened doctrine has brought it very close to an individualized, case-by-case determination of appealability.127

Once the seed was planted in Curry, expansion accelerated throughout the mid-1970s beginning with Eisen v. Carlisle & Jacquelin.128 Eisen was a class action brought on behalf of all odd-lot traders on the New York Stock Exchange. The plaintiffs claimed that the defendants, who handled ninety-nine percent of the Exchange’s odd-lot business, violated the federal antitrust and securities laws by imposing a commission surcharge on odd-lot traders.129 After years of skirmishing over whether the class should be certified under Rule 23 of the Federal Rules of Civil Procedure, the district court ruled that the class should be certified under Rule 23(b)(3).130 Rule 23(c)(2) requires notice to members of 23(b)(3) class actions, but the district court found that the cost of notifying every identifiable member of a class of more than six million individuals would be prohibitive and, therefore, ruled that not every class member needed to be notified.131 Instead, the court ordered that notice be given to exchange firms, large bank trust departments, frequent odd-lot traders, and a random sample of five thousand odd-lot traders, as well as providing notice in the newspaper. The court also ordered the defendants to pay ninety percent of the cost of the notice.132

122. Id. at 152, 154.
123. Id. at 169 (Harlan, J., dissenting).
127. For a discussion of how the Court’s broadened collateral order doctrine nearly approaches case-specific determinations of appealability, see infra notes 261-266 and accompanying text.
129. Id. at 159.
130. Id. at 164-65.
131. Id. at 167.
132. Id.
The Supreme Court held that the district court's order that defendants pay ninety percent of the notice cost was immediately appealable under the collateral order doctrine of *Cohen*. Such jurisdiction also extended to whether all class members must be given individual notice, presumably based upon a theory, not explicated, of pendent appellate jurisdiction. In finding the case controlled by *Cohen*, the Court explained that the district court had conclusively decided the cost issue and that such an issue was unrelated to the merits of plaintiffs' claim that the odd-lot surcharge was illegal.

*Cohen* also noted that if immediate review of an issue was not allowed, there would be no review at all; however, *Eisen* does not contain one word about the unreviewability requirement. Perhaps the Court thought the point was too obvious to require mention, but as a matter of law, if defendants won a final judgment on the merits, they could appeal the cost issue at that time and, if successful, obtain a reversal and order for reimbursement of costs. Because the Court ignored the unreviewability requirement, *Eisen* can be interpreted as dropping the requirement altogether, leaving only a two-part test: (1) a conclusive determination of an issue that is (2) separate from the merits. The *ad hoc* balancing approach of *Gillespie* appears to be lurking in this analysis—if the collateral issue is important enough to the litigants in a particular case and immediate review could save enough time and effort in the case, the costs engendered by piecemeal appeal are acceptable.

Litigants quickly seized upon the implication of *Curry*, *Gillespie*, and *Eisen* and put forth additional candidates for collateral order appeal. Discovery orders and subpoenas generally are not appealable until sanctions have been imposed for failure to obey. If, however, disclosure of information would chill the exercise of constitutional rights, did not *Curry* teach that immediate appeal must be allowed lest the asserted rights be destroyed if one had to await until final judgment? If *Eisen* taught that an order imposing

133. *Id.* at 172.
134. *Id.* at 171-72. Presumably, the Court meant that the order for less-than-individual notice did not itself meet the requirements of collateral order appeal, but that the issue was sufficiently related to the cost issue to provide pendent jurisdiction. For discussions of the Supreme Court's approach to pendent appellate jurisdiction in the collateral order context, see infra notes 166-67, 510-11 and accompanying text.
137. Perhaps the Court had in mind that the named plaintiffs would be unable to reimburse the cost of notice so that an order for reimbursement would be of no practical value. It is not necessarily true, however, that the named plaintiffs would in fact be judgment-proof, and the practical reality is that law firms finance such litigation, and in the end, it probably would be the firm, not the client, that would reimburse the cost of notice.
139. *See*, e.g., *Dow Chem. Co. v. Taylor*, 519 F.2d 352, 354 (6th Cir. 1975). The *Dow* court held that a denial of a motion to quash a subpoena is not immediately appealable under *Cohen*, despite the contention that enforcement of the subpoena would chill the exercise of First Amendment rights because effective review may be had by disobeying the subpoena—if held in contempt, a litigant could appeal the contempt order. *Id.*
notice costs on defendants in a class action was immediately appealable, and that such jurisdiction extended to the related issue of who must be notified, would not an order deciding other class action issues be immediately appealable?\footnote{140} Lower federal courts generally rejected such arguments, declining to "invite the inundation of appellate dockets with what have heretofore been regarded as nonappealable matters"\footnote{141} and insisting that "the collateral order doctrine should be sparingly applied."\footnote{142}

A sparing application of the collateral order doctrine seemed to be laid to rest, however, by a pair of decisions in 1977 that diluted both the separability and unreviewability requirements of \textit{Cohen}. In \textit{Abney v. United States},\footnote{143} the defendants were charged with conspiracy and attempt to obstruct interstate commerce by means of extortion.\footnote{144} They were convicted, but the court of appeals ordered a new trial.\footnote{145} The government elected to retry the defendants solely on the conspiracy charge.\footnote{146} The defendants moved to dismiss on the ground that retrial would violate the Double Jeopardy Clause.\footnote{147} The district court denied the motion.\footnote{148} On appeal, the Supreme Court held that denial of a motion to dismiss based on double jeopardy was immediately appealable under \textit{Cohen}.\footnote{149} The Court interpreted \textit{Cohen} as setting forth three requirements—not two, as indicated in \textit{Eisen}—and found that all three were satisfied.\footnote{150} First, the appealed order must be a final

\footnote{140} See, e.g., \textit{Cotten v. Treasure Lake, Inc.}, 518 F.2d 770, 771-72 (6th Cir. 1975) (holding that an order denying certification of a class action is not immediately appealable under \textit{Cohen} because the order may be revised at any time and thus is not a conclusive determination of the issue). The Supreme Court definitively rejected such appeals a few years later in \textit{Coopers & Lybrand v. Livesay}, 437 U.S. 463, 477 (1978). It should be noted, however, that an amendment to Rule 23 of the Federal Rules of Civil Procedure has been adopted that permits discretionary interlocutory appeal of class certification orders. \textit{Fed R. Civ. P. 23(f)}.\footnote{141}

\footnote{142} \textit{Dow Chem. Co. v. Taylor}, 519 F.2d at 354 (quoting \textit{Borden Co. v. Sylk}, 410 F.2d 843, 846 (3d Cir. 1969)).\footnote{143}

\footnote{143} \textit{Abney v. United States}, 431 U.S. 651 (1977).\footnote{144}

\footnote{144} \textit{Id.} at 653.\footnote{145}

\footnote{145} \textit{Id.} at 655.\footnote{146}

\footnote{146} \textit{Id.} at 657.\footnote{147}

\footnote{147} \textit{Id.} at 651.\footnote{148}

\footnote{148} \textit{Id.} at 657.\footnote{149}

\footnote{149} \textit{Id.} at 658.\footnote{149}

\footnote{150} \textit{Id.}
rejection of the appellant’s claim. In Abney the district court had finally rejected the double jeopardy claim and the defendants could not take any more steps to avoid a retrial.151 Second, the order must resolve an issue completely separate from the merits, and the Court reasoned that the claim that double jeopardy bars prosecution is separate because it is not an assertion of innocence.152

Even so, double jeopardy claims present significant potential for the entanglement with the merits of the criminal charges. For example, if the issue is whether the same conduct is the basis of both prosecutions, there may be a need to determine, based upon evidence presented at trial, precisely the conduct in which the defendant engaged. Likewise, if the issue is whether the defendant will be subjected to multiple punishment, the sentencing phase of the trial must be completed in order to determine this issue. In such cases, double jeopardy claims can only be assessed after a trial on the merits. Thus, Abney is the first case in which the Supreme Court departed from the strict requirement that the appealed issue be completely separate from the merits and substituted a diluted requirement that the issue not be identical to the merits.

The third requirement, that the order must be effectively unreviewable after final judgment, also proved troublesome. Cohen held that orders involving claims of right that would be unreviewable after final judgment were appealable because by then it would be too late to review the order at all.153 The Court in Abney subtly restated this definition to require merely that the order involve “an important right which would be ‘lost, probably irreparably,’ if review had to await final judgment.”154 Thus, the Court changed the standard from a requirement that appeal after termination of a case would come too late to permit any review at all, as Cohen established, to whether the appellant was asserting an important right that would be adversely affected if appeal were postponed.155

This change of the standard enabled the Court to circumvent the mootness rationale of Cohen. If the defendants in Abney had been required to undergo a second trial before appealing, the double jeopardy issue would not have been moot. If they had been convicted, they could have appealed

151. Id. at 659.
152. Id. at 658-60.
154. Abney v. United States, 431 U.S. at 658 (quoting Cohen v. Beneficial Indus. Loan Corp. 337 U.S. at 546); see also Helstoski v. Meanor, 442 U.S. 500 (1979). The Helstoski Court held that mandamus was not an appropriate remedy for challenging the validity of an indictment based on the Speech or Debate Clause, U.S. CONST., art. 1, § 6, because the alternative remedy of collateral order appeal was available. Helstoski v. Meanor, 442 U.S. at 506. The Court reasoned that the Speech or Debate Clause, like the Double Jeopardy Clause, protects a defendant against the burdens of defending himself, a protection that would be lost if appeal were postponed until final judgment. Id. at 506-08.
based on double jeopardy and, if successful, had their convictions overturned. The Court conceded as much, but then asserted that the Double Jeopardy Clause "is a guarantee against being twice put to trial for the same offense," and this guarantee assures that a defendant will not be required "to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense." The guarantee against another trial would already be lost, the Court reasoned, if the defendant had to stand trial and, if convicted, appeal. Even if the appeal was successful, he would have already been forced to stand trial; thus, the defendant lost the very right guaranteed by the Double Jeopardy Clause. The Court concluded that a double jeopardy claim must be reviewable before the trial occurs. By substituting the nature of the right asserted for the mootness of an appeal after final judgment, the Court made the twenty-year-old dissent in Parr v. United States, which had advocated that the test be whether the appellant claimed a right not to be tried at all, the law of federal appellate jurisdiction.

Surprisingly, however, having broadened the doctrine, the Abney Court also held that appellate jurisdiction over the double jeopardy claim did not extend to other issues. In addition to raising the double jeopardy claim, the defendants had also challenged the sufficiency of the indictment. The Court ruled that the collateral order doctrine does not extend to other claims. "Rather, such claims are appealable if, and only if, they too fall within Cohen's collateral-order exception to the final-judgment rule." The Court reasoned that to allow consideration of noncollateral issues would encourage defendants to assert frivolous double jeopardy claims in order to gain immediate appellate review of nonappealable issues. If the Abney Court meant to hold that there is no pendent issue jurisdiction in collateral order appeals, its decision contradicts Eisen, which appears to hold that appellate jurisdiction extended to other related issues. The contradiction is surprising because Abney otherwise followed the expansionary trend exemplified by cases like Eisen.

The Court also diluted the separability requirement in National Socialist Party of America v. Skokie. A state court enjoined a Nazi group, over their First Amendment objection, from marching in the predominantly Jewish town.

156. Id. at 661.
157. Id. at 660-61.
158. Id.
159. Id. at 662.
161. Id. at 523 (Warren, J., dissenting).
163. Id. at 663.
164. Id. at 662-63.
165. Id. at 663.
166. Id.
of Skokie, Illinois.\textsuperscript{169} The Nazis appealed and also moved for a stay of injunction pending appeal.\textsuperscript{170} The Illinois Supreme Court denied the Nazis’ application for a stay, and the Nazis appealed the denial to the United States Supreme Court.\textsuperscript{171} The Court held it had jurisdiction over the stay issue based on \textit{Cohen} and \textit{Abney}.\textsuperscript{172} The Court reasoned that, during the year or more that it would take to decide the Nazis’ appeal on whether they had a right to march, the Nazis would be deprived of their right to strict procedural safeguards against restraint of their First Amendment rights.\textsuperscript{173} In the abstract, the issue whether strict procedural safeguards were required is not identical to the underlying issue whether the Nazis had a right to march, but neither can it be said the two issues are completely separate, as required by \textit{Cohen}. To decide whether strict procedural safeguards are necessary requires at least a determination of whether the underlying First Amendment claim is facially valid.\textsuperscript{174} In practical terms, a decision of the stay issue would determine the merits, because if the stay were granted, the Nazis could march.\textsuperscript{175}

The dilution of the separability and unreviewability requirements created the potential for wholesale evasion of the final judgment rule. In particular, \textit{Abney} advanced the proposition that if a litigant is asserting rights that would be adversely affected if appellate review were postponed until after termination of the case, immediate appeal is available as a matter of right, even though the litigant would have the opportunity to prosecute a successful appeal after an adverse final judgment.\textsuperscript{176} A vast array of pretrial orders can be characterized as affecting “important rights,” so that if this proposition achieved general acceptance, the final judgment rule and its attendant policies would be near collapse.

Perhaps the Supreme Court became aware of the precipice that its fifteen-year expansion of the collateral order doctrine had caused, because the very year after \textit{Abney} and \textit{Skokie} the Court retreated to a strict formulation of the doctrine. Unfortunately, in so doing, it also created costly inconsistencies and uncertainties in this area. In \textit{United States v. MacDonald},\textsuperscript{177} after court-martial charges of murder against a military officer had been dismissed, the officer was indicted for the same murders after he was discharged from the military.\textsuperscript{178} The defendant moved to dismiss the indictment based on double jeopardy and on a claimed violation of the Sixth Amendment right to a

\textsuperscript{169} \textit{Id.} at 43.
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Id.} at 44.
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.}
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} On the merits, the Court held that the denial of the stay violated the Nazis’ right to strict procedural safeguards against restraint of the exercise of their First Amendment rights. \textit{Id.}
\textsuperscript{176} \textit{Abney v. United States}, 351 U.S. 651, 662 (1977).
\textsuperscript{177} \textit{United States v. MacDonald}, 435 U.S. 850 (1978).
\textsuperscript{178} \textit{Id.} at 851-52.
speedy trial. The district court denied the motion. The Supreme Court unanimously held that even though the court of appeals had jurisdiction over the double jeopardy claim, it did not have jurisdiction over the speedy trial claim. The Court first noted that, although denial of the double jeopardy claim was appealable under Abney, the court of appeals lacked pendent jurisdiction over the speedy trial claim. The court then ruled that the collateral order doctrine did not provide an independent basis for appeal of the speedy trial claim because none of the three requirements was met. First, a denial of a motion to dismiss for violation of the speedy trial guarantee is not a final disposition of the issue because the prejudice resulting from a delay is best assessed after trial, at which time a speedy trial claim can again be raised. Second, the Court stated that a speedy trial claim is not separable from the merits, because prejudice to the defense usually is revealed by events at trial, and even if prejudice could be gauged prior to trial, a valid speedy trial claim would be remedied by acquittal. Acquittal would also remedy a valid double jeopardy claim in the sense that the defendant would have been tried, but the Court explained that an acquittal would not eliminate the defendant’s grievance at facing the same charges twice. The problem with this explanation is that the same logic would lead to the conclusion that acquittal of a defendant who raised a speedy trial claim would not eliminate his grievance at being subjected to prejudicial delay; win or lose, delay unfairly hampered his defense.

This inconsistency is most apparent in the Court’s discussion of the third requirement: that important rights will be lost if appeal must await termination of the case. Characterizing Abney as involving an asserted right not to be tried at all, which would be destroyed if defendant first had to stand trial before appealing, the Court stated that a speedy trial claim does not encompass a right not to be tried. Rather “[i]t is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial.” If the Court meant that only a “right not to be tried” is protected

179. Id. at 852.
180. Id.
181. Id. at 857.
182. Id. at 857 n.6. The Court followed its reasoning in Abney, rejecting pendent issue jurisdiction and did not mention its decision in Eisen, which upheld pendent issue jurisdiction. See id. at 857.
183. Id.
184. Id. at 858-59. The intricacies of the law of double jeopardy are beyond the scope of this Article. It should be noted, however, that double jeopardy claims may also, at least in some cases, best be assessed after trial. See supra note 152 and accompanying text. Thus, at least in some cases, pretrial double jeopardy determinations are no more conclusive than speedy trial determinations. Thus, the Court’s distinction between double jeopardy and speedy trial claims is not entirely consistent with respect to the conclusive determination factor.
186. Id. at 859-60.
187. Id. at 860.
188. Id. at 861.
by collateral order appeal, Abney itself contradicts that proposition because Abney identified personal strain, public embarrassment, and expenses as interests protected by the Double Jeopardy Clause—interests that are at stake in pretrial stages, as well as trial stages.\textsuperscript{189} Moreover, in stating that the Speedy Trial Clause does not encompass a "right not to be tried," the Court contradicted its own Sixth Amendment jurisprudence, which holds that pretrial dismissal is required if the defendant demonstrates prejudicial delay.\textsuperscript{190} The Court's attempt to distinguish Abney was, to say the least, unsatisfactory.

The Court's decision would have been far more persuasive if it had followed the reasoning originally set forth in Cohen: that collateral order appeal should be permitted only if postponing an appeal of an issue until after the termination of the case would bar any review at all.\textsuperscript{191} If a motion to dismiss for violation of the Speedy Trial Clause is denied, the opportunity for appellate review will be available if and when the defendant is convicted at trial. If the appellate court determines that the defendant was prejudiced by delay, the conviction will be overturned. By this time, however, the Court had become a prisoner of its own expansion of the collateral order doctrine.

Perhaps cognizant of the glaring inconsistencies in its analysis of the technical Cohen factors, the MacDonald Court added a new level of analysis: independent policy considerations.\textsuperscript{192} The Court identified two policies in support of its holding.\textsuperscript{193} First, the Speedy Trial Clause protects not only a defendant's interest in effective presentation of his defense, but also society's interests in prosecuting cases effectively, minimizing the costs of pretrial detention, and minimizing the release time for defendants out on bail.\textsuperscript{194} The flaw in that reasoning is that if there has been a speedy trial violation in a case, society has no legitimate interest in a prosecution or pretrial detention.

The second policy consideration probably reveals the actual reason for the decision—a speedy trial claim can be made in every criminal case and, if a collateral order appeal was available, there could be an immediate appeal in every case in which the claim was denied.\textsuperscript{195} Unfortunately, a double jeopardy claim can also be raised in virtually every case, so that the potential for immediate appeal in every case is equally great. The concern with opening the floodgates to collateral order appeals is certainly legitimate, but the source of the problem is the Court's own expansion of the collateral order doctrine, not speedy trial claims.

\textsuperscript{189} In cases subsequent to MacDonald, the Court again identified the general burdens of defending litigation—not limited to a "right not to be tried"—as interests protected by collateral order appeal. See infra notes 260-82, 535-55 and accompanying text.


\textsuperscript{192} United States v. MacDonald, 435 U.S. at 861-62.

\textsuperscript{193} Id.

\textsuperscript{194} Id.

\textsuperscript{195} Id. at 862.
Shortly after Abney and MacDonald, the Court decided Coopers & Lybrand v. Livesay\(^{196}\) and again retreated from its expanded collateral order doctrine. The Court held that a district court's refusal to certify a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure is not appealable as of right under the collateral order doctrine.\(^{197}\) The Court explained that denial of class certification meets none of the three collateral order requirements.\(^{198}\) First, such a decision may be revised at any time under Rule 23(c)(1) and is, therefore, not a final disposition of the issue, but rather is inherently tentative.\(^{199}\) Second, class certification issues are enmeshed in the merits because the court must consider whether the named plaintiffs' claims are typical of the class members' claims, whether common questions of law or fact are present, and, especially in Rule 23(b)(3) class actions, whether common questions predominate over questions affecting only individuals.\(^{200}\) Third, the order is subject to effective review after final judgment of the individual claims, presumably because the named plaintiffs are free to litigate their individual claims and, after final judgment on those claims, appeal the denial of class certification.\(^{201}\)

In practical terms, as Coopers illustrates, denial of a class certification will often induce the plaintiff with a small claim to drop the case for lack of incentive to continue in which event there will never be effective appellate review of the class action issue.\(^{202}\) Nevertheless, denial of class certification will not be moot as a matter of law after final judgment on the named plaintiff's claim if the plaintiff chooses to continue the case.\(^{203}\) Thus, Coopers is best understood as a case in which the Court returned to the original, strict Cohen doctrine.\(^{204}\)

The implication of MacDonald and Coopers was that the Court might be prepared to return to the original, mootness-based rationale of the collateral order doctrine. This was reinforced a few years later in Firestone Tire & Rubber Co. v. Risjord.\(^{205}\) Once again, however, the Court sent contradictory signals. The issue in Firestone was whether an order refusing to disqualify opposing counsel for a conflict of interest in a civil case is an immediately appealable final decision.\(^{206}\) The Court held that it was not.\(^{207}\)

\(^{197}\) Id. at 465.
\(^{198}\) Id. at 468-69.
\(^{199}\) Id.
\(^{200}\) Id.
\(^{201}\) Id. at 465. The Court also held that the order was not appealable on the theory that, as a practical matter, the order sounded the "death knell" of the case. Id. at 469-77.
\(^{202}\) Id. at 465.
\(^{203}\) Id. at 469-70.
\(^{204}\) Although neither the grant nor denial of class certification is immediately appealable as of right, the Federal Rules of Civil Procedure have been amended to permit discretionary interlocutory appeal of such orders on a case-by-case basis. Fed. R. Civ. P. 23(f).
\(^{206}\) Id. at 369.
\(^{207}\) Id. at 370.
placing special emphasis upon the three major policies served by the final judgment rule: preserving the authority and independence of trial judges,\textsuperscript{208} avoiding the obstruction of meritorious claims that results from the harassment and cost of multiple appeals,\textsuperscript{209} and promoting efficient judicial administration in general.\textsuperscript{210} Applying the technical Cohen requirements in light of these policies, the Court concluded that an order refusing to disqualify counsel is effectively reviewable after final judgment.\textsuperscript{211}

Unfortunately, the opinion is internally inconsistent as to precisely what "effective unreviewability" means. On one hand, the Court stated that it means review after termination would be impossible or moot, but the Court also stated that the requirement is satisfied "where the appeal involves a right the value of which would be destroyed if not vindicated before trial."\textsuperscript{212}

The Supreme Court's application of the standard was also unclear. The Court stated that if the case went to trial and judgment, after which an appeal was taken on the disqualification issue and the court of appeals ruled that it was a prejudicial error not to disqualify opposing counsel, the judgment could be vacated and a new trial ordered.\textsuperscript{213} In other words, the issue would not be moot. In response to petitioner's argument that immediate review was necessary because opposing counsel might shape the litigation so as to increase petitioner's burden, the Court, however, also stated that the burden of defending litigation is not the type of irreparable harm that justifies a collateral order appeal.\textsuperscript{214} Any other conclusion would waste judicial resources and invite broad disregard of the final judgment rule.\textsuperscript{215} Implicit in that analysis is the notion that, even if the issue is not moot, irreparable harm can justify a collateral order appeal in some circumstances. Compounding the confusion, the Firestone Court contradicted its own conclusion in Abney that the burden of defending litigation is the type of irreparable harm that can justify immediate appeal.\textsuperscript{216}

Despite the less generous attitude toward collateral order appeals reflected in MacDonald, Coopers, and Firestone, there continued to be no shortage of candidates for admission to the collateral order club, primarily because the Court refused to repudiate its "right not to be tried" definition of the effective unreviewability requirement. In United States v. Hollywood Motor Car Co.,\textsuperscript{217} the Court added to the confusion. The defendants who had been indicted for making false statements to customs officials moved to dismiss the indictments on the ground that they were motivated by prosecutorial

\textsuperscript{208} Id. at 374.
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} Id. at 377.
\textsuperscript{212} Id. at 376.
\textsuperscript{213} Id. at 378.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} Compare id., with Abney v. United States, 431 U.S. 651 (1977).
vindictiveness. The district court denied the motion, and the Supreme Court held the denial was not immediately appealable under Cohen on the ground that the denial was effectively reviewable after trial and conviction. The Court’s own precedent had characterized the vindictive prosecution defense as conferring a right not to be tried at all, so that under the logic of Abney, if a defendant had to stand trial before appealing, the asserted right would already be destroyed.

Confronted with this logic, the Court first reasoned that the vindictiveness defense does not involve a right to be free of trial on nonvindictive charges. This point was irrelevant, however, because the Hollywood defendants made no such claim. Secondly, the Court made a distinction between “a right not to be tried and a right whose remedy requires dismissal of the charges,” and explained that a claim of prosecutorial vindictiveness involves a right to dismissal rather than a right not to be tried; if convicted, defendants could appeal based on prosecutorial vindictiveness and, if successful, the conviction would be overturned. This second reason was inconsistent with the Court’s own precedent concerning the interest, protected by the vindictiveness defense, in not being haled into court at all. Moreover, the distinction between a right not to be tried and a right to dismissal of charges defies common sense and surely would confound any prosecutor or defense attorney.

The Hollywood Court also provided a policy justification for denying immediate appeal: if collateral order appeal of prosecutorial vindictiveness claims were available, numerous other criminal defense claims would also be immediately appealable, thus undermining the finality requirement altogether. Such a policy reason, however, fails to explain why denial of a double jeopardy claim is immediately appealable but prosecutorial vindictiveness claims are not. Under the original Cohen rationale, the analysis would have been a straightforward means of implementing the same policy—denial of a vindictiveness claim is effectively reviewable after trial and conviction because, if the appeals court finds the indictment was vindictive, the conviction would be overturned. The Court, however, was trapped by an expansionist doctrine that it refused to repudiate, thereby rendering a decision inconsistent with precedent and based upon a distinction unrelated to policy or common sense.

218. Id. at 264.
219. Id.
220. See, e.g., Blackledge v. Perry, 417 U.S. 21, 30 (1974) (“[T]he right that he asserts and that we today accept is the right not to be haled into court at all.”).
222. Id. at 269.
223. Id. at 269-70.
224. See id. at 263; Blackledge v. Perry, 417 U.S. at 30.
A new set of candidates for collateral order appeal was introduced in *Nixon v. Fitzgerald*—governmental immunities. In *Nixon v. Fitzgerald*, a former defense cost analyst sued former President Nixon, among others, for money damages claiming that he had been fired in retaliation for his congressional testimony on cost overruns, which violated the First Amendment. Nixon moved for summary judgment on the ground that he was entitled to absolute immunity from damage claims based on presidential actions. The district court denied the motion. The Supreme Court held that denial of summary judgment based on absolute immunity is immediately appealable under *Cohen*. The Court skipped over the established three requirements for collateral order appeal and set forth yet another factor: the appeal must present a "serious and unsettled question." The Court then concluded that Nixon’s appeal met this requirement because damage claims for presidential actions presented a serious threat to the constitutional separation of powers, and the Court itself had never ruled on the immunity issue.

Under the original *Cohen* formulation, the order denying immunity was not immediately appealable because it was reviewable after final judgment. If the former president were found liable for damages, he could appeal based on absolute immunity, and if the appeal were successful, the judgment for damages would be vacated. The Court ignored this point. Additionally, it failed to analyze whether absolute immunity involved a "right not to be tried" that would be destroyed if appeal were postponed. Why the Court did so is unclear. Having just made the *Hollywood Motors* distinction between a right not to be tried and a right to dismissal, perhaps the Court was uncertain how to characterize immunity, or perhaps the matter was so clear as not to warrant a discussion. Moreover, although it described the "serious and unsettled question" standard as an "additional factor," the Court actually may have held that a "serious and unsettled question" alone is sufficient to permit appeal, because it is the only factor the Court addressed.

If that is so, however, *Nixon* represents one of the most troubling features of the current collateral order doctrine: the tendency to bypass congressionally authorized avenues of appeal. If absolute immunity for presidential actions presented a "serious and unsettled question" concerning the separation of powers, interlocutory appeal under 28 U.S.C. § 1292(b) should be available. Absolute immunity presents a controlling legal issue and an appellate ruling in favor of immunity would help terminate the litigation by eliminating any damages claim based on presidential action. Even if §

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228. *Id.* at 740.
229. *Id.*
230. *Id.* at 740-41.
231. *Id.* at 742-43.
232. *Id.* at 742.
233. *Id.* at 743.
234. *See id.*
1292(b) appeals were limited to exceptional cases.\textsuperscript{235} Damage claims for presidential actions would surely fit the bill. In that light, expansion of the collateral order doctrine to permit an appeal on issues of vital national importance is unnecessary. As will be discussed shortly, appeals based upon governmental immunities have proven to be the single most troublesome and costly area of the collateral order doctrine.\textsuperscript{236} Some of the troubles—confusion and conflict with congressional policy—are apparent in Nixon, the first of these cases.

In Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,\textsuperscript{237} the Court was confronted with a nonimmunity appeal and reverted back to a strict, mootness-based analysis.\textsuperscript{238} In Moses H. Cone, a hospital and building contractor got into a dispute over cost overruns.\textsuperscript{239} Their contract required that disputes must be referred to a mediator and then to binding arbitration.\textsuperscript{240} Despite this provision, the hospital brought suit in state court for a declaratory judgment that the contractor had no right to binding arbitration and that the hospital bore no liability.\textsuperscript{241} The contractor brought a parallel suit in federal court to compel arbitration.\textsuperscript{242} The district court stayed the federal suit pending resolution of the state court action.\textsuperscript{243}

The Supreme Court held that the stay was an appealable collateral order, relying exclusively on the three Cohen requirements.\textsuperscript{244} First, the stay order was a final disposition of the issue.\textsuperscript{245} Second, the order was separate from the merits because it was tantamount to a refusal to adjudicate the merits of the arbitration issue.\textsuperscript{246} Third, the order was effectively unreviewable after final judgment.\textsuperscript{247} The Court stated, “Once the state court decided the issue of arbitrability, the federal court would be bound to honor that determination as res judicata.”\textsuperscript{248}

\textsuperscript{235} For a discussion of judicial construction that limits § 1292(b) interlocutory appeals to “big cases,” see 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3929 (2d ed. 1996 & Supp. 1997) (indicating that the “big case” construction has been and should be replaced by a more flexible approach).

\textsuperscript{236} See infra notes 564-68 and accompanying text.


\textsuperscript{238} See id. at 8-13.

\textsuperscript{239} Id. at 4-6.

\textsuperscript{240} Id. at 5.

\textsuperscript{241} Id. at 6-7.

\textsuperscript{242} Id. at 7.

\textsuperscript{243} Id. at 4. The stay was based on Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), which held that the federal courts may stay actions in deference to parallel state court actions under exceptional circumstances. Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp., 460 U.S. at 4, 19.

\textsuperscript{244} Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp., 460 U.S. at 8-9.

\textsuperscript{245} Id. at 12-13.

\textsuperscript{246} Id. at 12.

\textsuperscript{247} Id.

\textsuperscript{248} Id.
The *Moses H. Cone* opinion made no reference to the fourth “serious and unsettled question” factor, although *Nixon* had just held that it was an “additional factor.” \(^{249}\) Moreover, the *Moses H. Cone* opinion made no reference to whether the hospital was asserting a “right” that would be “destroyed” if appellate review were postponed, as was done in *Abney, Skokie, MacDonald*, and *Hollywood Motors*. Instead, the Court viewed the stay order as a classic candidate for appeal under the original *Cohen* formulation. \(^{250}\) If an appeal were postponed until after final judgment, the state court would decide the arbitration issue and the federal suit would then be dismissed on the ground that res judicata barred relitigation of the arbitration issue in federal court. At that point, the hospital would have an adverse final judgment to appeal from, but there would be no review at all of the arbitration issue because relitigation of the issue would be barred.

The Court employed both strands of its analysis—mootness and rights—in *Flanagan v. United States*, \(^{251}\) in which it held that an order disqualifying counsel in a criminal case is not immediately appealable. \(^{252}\) This result was foreshadowed by the *Firestone* ruling that an order refusing to disqualify counsel in a civil case is not immediately appealable, \(^{253}\) but the Court’s analysis contains the same ambiguities as the *Firestone* opinion. First, applying the strict doctrine, the Court stated that “a constitutional objection to counsel’s disqualification is in no danger of becoming moot upon conviction and sentence.” \(^{254}\) If the defendants, represented by substitute counsel, were tried and convicted, and if a successful appeal of the disqualification order did not require a showing of prejudice, then the convictions could be overturned if the appellate court found that the order violated the defendant’s right to counsel. \(^{255}\) If, on the other hand, a showing of prejudice were required, the defendants’ claim would not be separate from the merits because the effect of disqualification could not be assessed prior to trial. \(^{256}\) Second, applying the broad doctrine, the defendants were not asserting a “right not to be tried,” but “merely a right not to be convicted in certain circumstances.” \(^{257}\) The Court explained that such a right is not destroyed if the appeal is postponed until after the conviction because, if the appeal is successful, the conviction can be overturned. \(^{258}\)

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252. *Id.* at 270.
255. *Id.* at 268-69.
256. *Id.*
257. *Id.* at 267.
258. *Id.* at 266-67. The *Flanagan* Court also emphasized that important policies served by the final judgment rule—preserving the authority of the trial judge by minimizing appellate interference and preventing litigants from harassing their opponents and clogging the courts with repeated appeals—have special force in criminal cases. *Id.* at 263-64.
The twenty-year period just reviewed reveals a general, but inconsistent, trend toward expansion of the collateral order doctrine. The broadened formulation permitted immediate appeal if the appellant was asserting a “right not to be tried” that would be “lost” if the appeal was postponed until after final judgment. The Supreme Court failed to explain how this formulation could be reconciled with the policies underlying the final judgment rule. The unspoken justification for the doctrinal expansion must have been a policy judgment that the benefit of protecting particular interests against irreparable harm is greater than the costs of disrupting the trial process, harassing opponents with multiple appeals, and increasing appellate burdens. At least one federal appellate court observed, however, that expansion of the collateral order doctrine had caused a “litigation explosion” and predicted that the Supreme Court would restrict the rule in order to cut back on the expansion.259 Perhaps aware of this concern over the “explosion” in appellate litigation, the Supreme Court retreated in some cases to the strict formulation of the collateral order doctrine in which immediate appeal is permitted only if the issue would be moot after the termination of the trial process, thus preventing any review at all. These strict cases reflect a willingness to tolerate some harm to asserted interests in order to protect the interests underlying the final judgment rule. At times, the Court commingled both broad and strict doctrine in the same case. This doctrinal instability was the result of the Court’s uncertainty over how to reconcile the need to prevent irreparable harm if the appeal was postponed with the need to preserve the authority of trial judges, to avoid the use of multiple appeals as harassment, and to prevent inundation of appellate dockets. Much like Mark Twain’s reported death, however, predictions of an imminent restriction of the collateral order doctrine soon proved premature.260

B. Qualified Immunity Appeals: Opening the Floodgates

Expansion of the collateral order doctrine reached its highwater mark in 1985, when the Supreme Court decided *Mitchell v. Forsyth*.261 In 1970, United States Attorney General Mitchell authorized a wiretap, without first obtaining a warrant, based upon a perceived domestic threat to national security.262 Forsyth learned that federal agents overheard three conversations in which he participated.263 In 1972, the Supreme Court ruled in 1972 that warrantless wiretaps in cases involving domestic threats to national security violate the Fourth Amendment.264 Based upon this decision, Forsyth sued Mitchell for money damages, claiming that it was an illegal wiretap.265

259. *In re* United States, 733 F.2d 10, 14 (2d Cir. 1984).
260. A telegram sent by Mark Twain from England to America after his death had been reported in newspapers stated, “The report of my death was an exaggeration.” JOHN BARTLETT, *FAMILIAR QUOTATIONS* 528 (Justin Kaplan ed., 16th ed. 1992).
262. *Id.* at 513.
263. *Id.*
Mitchell moved for summary judgment on alternative grounds claiming that either he was entitled absolute prosecutorial immunity from a suit for damages, or he was entitled to qualified good faith immunity.\textsuperscript{266} The district court ruled that Mitchell was not entitled to absolute immunity because authorization of the wiretap was an investigative rather than a prosecutorial function.\textsuperscript{267} Instead, Mitchell was entitled to assert qualified immunity,\textsuperscript{268} a doctrine that was undergoing change at this time. Initially, qualified immunity had both an objective and a subjective component—an official had to prove that he acted with a reasonable belief that his actions were legal and that he actually believed, in good faith, that his actions were legal.\textsuperscript{269} Under this standard, the district court ruled that there was an issue of fact as to Mitchell’s subjective state of mind and denied summary judgment on qualified immunity.\textsuperscript{270}

Then the Supreme Court released a decision in which it eliminated the subjective component and attempted to make qualified immunity an entirely objective standard—officials are immune from damages if they did not violate clearly established constitutional rights of which a reasonable person would have known.\textsuperscript{271} The district court reconsidered its decision in light of the new standard, but again rejected qualified immunity based on the general rule that electronic surveillance constitutes a search subject to the warrant requirement of the Fourth Amendment.\textsuperscript{272} The Supreme Court had not yet ruled on the specific question of whether a warrant was required if the wiretap involved a domestic threat to national security at the time Mitchell authorized the wiretaps.\textsuperscript{273}

Mitchell appealed both issues, absolute and qualified immunity.\textsuperscript{274} The court of appeals affirmed the rejection of absolute immunity and held that it lacked jurisdiction over the qualified immunity issue.\textsuperscript{275} The Supreme Court granted review and rendered a severely fractured decision in which only seven Justices participated.\textsuperscript{276} In its opinion, the Court first held that Mitchell was not entitled to absolute immunity,\textsuperscript{277} three Justices dissenting.\textsuperscript{278} Secondly, the Court held the denial of qualified immunity was appealable under the collateral order doctrine, using reasoning that further expanded the

\begin{thebibliography}{9}
\bibitem{266} Id. at 515.
\bibitem{267} Id. at 516.
\bibitem{268} Id.
\bibitem{270} Mitchell v. Forsyth, 472 U.S. at 516.
\bibitem{271} Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982).
\bibitem{272} Mitchell v. Forsyth, 472 U.S. at 531 (discussing Katz v. United States, 389 U.S. 347, 350-53 (1967)).
\bibitem{273} Id. at 530.
\bibitem{274} Id. at 517.
\bibitem{275} Id. at 517-18.
\bibitem{276} Id. at 520.
\bibitem{277} Id.
\bibitem{278} Justices Burger, Stevens, and O’Connor dissented on this issue. See id. at 536-42.
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doctrine. With respect to the requirement that the order be effectively unreviewable after final judgment, it is quite clear that the issue would not be moot after final judgment because if damages were awarded at trial and the appeals court ruled that the official did not violate clearly established rights, the award of damages would be vacated. Thus, under the original Cohen formulation, denial of qualified immunity would not be immediately appealable. Instead, the Court followed Abney and Nixon and reasoned that qualified immunity, like double jeopardy and absolute immunity, is an entitlement not to stand trial because its purpose is to protect officials against the burdens of discovery and trial, not merely to provide a defense to liability. If a case goes to trial erroneously, the Court reasoned that the right not to stand trial has been lost and a successful appeal cannot undo that damage; therefore a denial of qualified immunity is effectively unreviewable after final judgment. Thus, with respect to the unreviewability requirement, the Mitchell Court rejected the mootness-based strict formulation of the collateral order doctrine and embraced the broad, rights-based formulation.

The Mitchell Court eviscerated the separability requirement, which had already been diluted in Abney and Skokie. Qualified immunity is not collateral at all, but is inextricable from the merits. Unlike absolute immunity, for example, which merely requires examination of the capacity in which the defendant was acting, qualified immunity requires careful analysis of the plaintiff’s claim on the merits in order to determine whether the defendant is accused of violating a clearly established right and whether a reasonable person would have realized that he was violating that right. The Court did not pretend that qualified immunity is separate from the merits, but instead it reformulated the doctrine—the issue on appeal must be “conceptually distinct” from the merits.

The Court then distinguished between facts and law. The Court stated that an appellate court reviewing a denial of qualified immunity will not assess whether the plaintiff’s allegations of fact are true, but only whether the constitutional right asserted by the plaintiff was clearly established at the time of the defendant’s actions. The Court spun this distinction into a conclusion that the denial of qualified immunity is immediately appealable to the extent that it turns on an issue of law. Presumably, having said that conceptual distinctness depends upon considering only a pure question of

279. Id. at 524-30.
280. Id. at 525-26.
281. Id. at 528-29.
282. Id. at 525.
283. Id. at 524-27.
284. Id. at 528-30.
285. Id. at 525-27.
286. Id. at 526-27.
287. Id.
288. Id. at 527-28.
289. Id. at 528.
290. Id. at 530.
law, if the qualified immunity issue is whether a plaintiff has produced sufficient evidence that the asserted right was violated, it would not be immediately appealable. Thus, at the same time that the Court further expanded the collateral order doctrine by replacing “separate from the merits” with “conceptually distinct” it also created a category of orders—denial of qualified immunity—that sometimes is and sometimes may not be immediately appealable. If, as a leading commentator has observed, one benefit of the collateral order doctrine is to identify clear categories of orders that either are or are not appealable, that benefit does not exist with respect to qualified immunity. With uncertainty comes litigation, and thus Mitchell opened the door for increased expenditure of appellate resources devoted to the question in every appeal from denial of qualified immunity—whether appellate jurisdiction exists.

It is fair to assume that there would be many such appeals because civil rights cases, often involving claims for money damages against public officials for violations of federally protected rights, represent one of the largest elements of the federal civil caseload. The defendants could be expected to assert qualified immunity as a defense in every such case, particularly after the Supreme Court broadened the defense in Harlow v. Fitzgerald. In cases where pretrial assertion of the defense was denied, an immediate appeal could be expected. One federal circuit has observed that “government defendants apparently now deem it mandatory to bring these appeals from any adverse ruling, no matter how clearly correct the trial court’s decision.”

Mitchell also opened the door for multiple appeals of the qualified immunity issue in individual cases. Because the immunity issue is not separate from the merits, the basis for the assertion of the defense can shift with the development of the record. The defense can be raised on a motion to dismiss for failure to state a claim, a motion for summary judgment, and other motions; each time such motion is denied, an immediate appeal can be

291. Id. at 528 n.9.
292. Id. at 528.
293. Id. at 528-30.
294. See 15A WRIGHT, MILLER, & COOPER, supra note 4, § 3911, at 356-57 (“Substantial values are served by ruling that appeal is always available, or never available, as to identifiable categories of orders.”).
295. For further discussion of the distinction between law and facts with respect to qualified immunity appeals, see infra notes 470-97 and accompanying text.
296. See, e.g., CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 132 (5th ed. 1994) (noting that the civil rights cases constituted nearly 24% of civil cases filed in 1992).
298. Schwartzman v. Valenzuela, 846 F.2d 1209, 1210 (9th Cir. 1988).
299. See, e.g., Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (“Accordingly, we hold that a district court’s denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable ‘Final decision’ within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.”).
taken. The purpose behind the requirement that the issue be completely separate from the merits was to safeguard against multiple appeals in individual cases as development of the record occurred, thus striking a proper balance between preventing irreparable harm if appeal were postponed and protecting the values served by the final judgment rule. When the Court in Mitchell abandoned the separateness requirement, however, it also weakened the underlying purpose of narrowly limiting the number of collateral order appeals in individual cases.

Once again, however, the Court failed to explain how its expansion of the collateral order doctrine constituted sound appellate policy. What benefit is achieved by the "conceptually distinct" test that would justify the costs associated with an enormous increase in collateral order appeals? Part of the answer may be found in the context of the Mitchell case itself. In Mitchell, the nation’s chief law enforcement officer, a member of the president’s cabinet, was threatened with personal liability for an official act. The Court’s overriding concern was to protect that cabinet officer against vexatious litigation. There was strong sentiment within the Court for affording the attorney general absolute immunity from damage claims, no matter how clear the violation of established law. If only qualified immunity was available and pretrial denial was not immediately appealable, it was conceivable that the attorney general could be subjected to wide-open discovery and a full-scale trial, only to be found innocent in the end. If such were the case, there might well have been a majority vote in favor of absolute immunity in Mitchell. It appears likely then that a compromise was reached in Mitchell—instead of affording absolute immunity, qualified immunity would be immediately appealable, thus providing nearly the same protection against vexatious claims as absolute immunity.

Concern for protecting the nation’s chief law enforcement officer from vexatious litigation does not provide, however, a complete answer to why the Court abandoned the separateness requirement because the decision is not limited to suits against the attorney general. The collateral order appeal is available to every public official—police, social worker, prison guard, administrator—that asserts qualified immunity in a damages action. Therefore, it

302. Id. at 515.
303. Id. at 524.
304. Two of the seven participating Justices would have accorded the Attorney General absolute immunity. Id. at 536-42 (Burger, C.J., concurring in part and Stevens, J., concurring in the judgment). Justice O’Connor dissented from deciding the issue of absolute immunity because the Court decided on the merits to afford Mitchell qualified immunity. Id. at 537-38 (O’Connor, J., concurring in part). One of the nonparticipating Justices, Chief Justice Rehnquist, had previously expressed strong support for absolute immunity for cabinet officials. See Butz v. Economou, 438 U.S. 478, 517-30 (1978) (Rehnquist, J., dissenting).
306. Id. at 520.
appears that the Court’s broader concern was to protect every public official against burdensome lawsuits. If such was the concern that prompted the Court to risk undermining the interests served by the final judgment rule, the premise for allowing immediate appeal is that federal district court judges would not provide sufficient protection. A primary purpose of an appeal is to correct error. The Court seems to have embraced an unspoken assumption that there was a substantial enough likelihood that federal district judges would err in pretrial denial of qualified immunity that the benefit of appellate intervention to correct such errors would be worth the cost of such intervention.

Perhaps, the Court would assumed that there was a greater risk of reversible error with respect to qualified immunity cases than in other cases, because the law of qualified immunity at the time of Mitchell was in a process of change. The Court had very recently abandoned the subjective component of the defense, leaving only the objective component. There was great uncertainty over what the new standard—the official did not violate “clearly established” constitutional rights of which a reasonable person would have known—meant and how to apply it in particular cases. Most importantly, at what level of generality was the relevant constitutional right to be evaluated? In Mitchell itself, for example, the district court ruled that the general right to be free of warrantless wiretaps was clearly established at the time the attorney general authorized the wiretap; thus, he was not entitled to qualified immunity. The Supreme Court reversed, holding that the specific right to protection against warrantless wiretaps involving domestic security was an open question at the time, and therefore qualified immunity applied. It is evident that the reason the district court was reversed is that the law of qualified immunity was in the process of change. The relevant level of generality was unclear, and the district court picked a level that proved incorrect, but only in hindsight.

Mitchell is very similar in this regard to Cohen, the source of the collateral order doctrine. Like qualified immunity, choice of law—concerning the extent to which federal courts must apply state procedural law—was in a process of change, at the time Cohen was decided. In Cohen itself, one of the issues was whether a state security requirement was procedural or substantive. The district court ruled that the security requirement was procedural and therefore not applicable, which was a reasonable conclusion because requiring a bond would not affect a decision
on the merits. The Supreme Court, however, ruled that the district court erred because the bond requirement was substantive in the context of a policy served by the *Erie* doctrine—without the bond requirement, plaintiffs would engage in unfair forum shopping, suing in federal court in order to avoid the security requirement.\(^{317}\) Thus, the choice of law doctrine at the time of *Cohen*, like the qualified immunity doctrine at the time of *Mitchell*, was in the process of dramatic change. The standards were not yet clear, and therefore the risk of reversible error was greater than in ordinary cases. It appears that an important rationale underlying both *Cohen* and *Mitchell* is that the error-correcting benefits of immediate appeal in an era of extensive change in legal standards is worth the increased costs in disruption of trial processes, harassment through multiple appeals, and burdens on appellate courts.

*Mitchell v. Forsyth* expanded the collateral order doctrine beyond previously understood limits. On the doctrinal level, the Court abandoned the “completely separate from the merits” requirement in favor of a “conceptually distinct” requirement, which appears to be satisfied if the issue on appeal is not identical to the merits, even if they are inextricably intertwined.\(^{318}\) The Court also followed the broad, “right not to stand trial” interpretation of the “effectively unreviewable” requirement previously established in cases like *Abney*, rather than the strict, mootness-based interpretation of cases like *Cohen*.\(^{319}\) On the policy level, the decision is much less clear because the Court’s decision failed to explain how its loosening of technical requirements struck a proper balance between the need to avoid irreparable harm if an appeal was postponed and the opposing needs to preserve the authority of trial judges, to avoid the use of interlocutory appeals as a tactic to harass opponents with meritorious claims, and to keep appellate caseloads under control. It is reasonably clear that the loosening of technical requirements created an enormous risk to the latter interests, so the policy calculation, if there was one, must have been that there was an unusually great need to avoid irreparable harm in the context of qualified immunity. A close examination of the context in which *Mitchell* was decided reveals that the decision on appealability was the product of two intersecting concerns: public officials must be shielded from the burdens of defending meritless damage claims and the district courts were less likely than in other cases to provide such protection, because the law of qualified immunity was in the process of changing and the standards were not clear. If this is so, then on the doctrinal level, *Mitchell* invited an avalanche of collateral order appeals by litigants claiming “conceptually distinct” rights not to be tried. Whether the Court would allow this to occur, however, was much less clear as a matter of policy because the concern for shielding public officials would not be present in private litigation.

After *Mitchell* was decided, the Court quickly made clear that its broad collateral order doctrine was not to be applied in all cases, thus ensuring con-


continued doctrinal instability. In *Richardson-Merrell, Inc. v. Koller*, the Court held that an order disqualifying counsel in a civil case is not immediately appealable under *Cohen*. The petitioner advanced a policy reason for allowing immediate appeal: motions to disqualify counsel had become an abusive delay tactic designed to harass opponents, fostered in part by insulation from appellate scrutiny. The Court shared that concern, but concluded that delays engendered by erroneous disqualification rulings did not outweigh the disruption that an immediate appeal would cause to the trial process. Instead of weighing the relative costs of denying and granting immediate appeal on a case-by-case basis, the Court explained that the test was whether the rights affected by a particular type of ruling ought to be protected by immediate appeal, as measured by the three conditions set forth in *Coopers*.

A disqualification order affected the right to counsel of one’s own choice. In the Court’s view, however, if establishing a violation of that right does not require a showing of prejudice, a disqualification order is effectively reviewable after final judgment on the merits. If a litigant, represented by substituted counsel, lost on the merits, an appellate court could reverse and order a new trial if it was persuaded that it was error to disqualify original counsel. If, on the other hand, a showing of prejudice were required, a disqualification order is not separate from the merits because prejudice can be assessed only after examination of the entire record. The Court thus ignored the change in doctrine announced in *Mitchell*. It is clear that the issue of attorney disqualification is “conceptually distinct” from the client’s claim on the merits because the two issues are not identical; therefore, under the analysis of *Mitchell*, an order of disqualification would be immediately appealable. To avoid this result, the Court reverted to the original separability condition of *Cohen*. The reason the Court resorted to such doctrinal *legerdemain* was to avoid the delays and costs that would result from allowing immediate appeal on every disqualification order.

Despite the Court’s wavering between the broad and strict formulations of the collateral order doctrine and the Court’s uncertainty over how to strike the policy balance between irreparable harm resulting from postponing appellate review until after final judgment and the costs of allowing piecemeal appeals prior to final judgment, the Court’s periodic willingness to expand the doctrine in cases like *Curry, Eisen, Skokie, Abney, Nixon, and Mitchell* created

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321. *Id.* at 430.
322. *Id.* at 433.
323. *Id.* at 434, 436.
325. *Id.* at 473.
326. *Id.* at 473-74.
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.* at 434-35.
a long list of new candidates for collateral order appeal. If the effective unreviewability condition no longer meant that the issue would have to be moot after final judgment, but instead meant that the issue implicated a “right not to stand trial,” the many grounds for pretrial dismissal could be characterized as implicating such a right; therefore, such issues might be immediately appealable.332 If the separability requirement no longer meant that the issue must be completely separate from the merits, but instead meant the issues need only be “conceptually distinct”—not identical—from the merits, almost any issue could be so characterized.333 If the Court as a policy matter was willing to tolerate increased costs of piecemeal appeal to prevent irreparable harm, many litigants could describe harm that they would suffer from an adverse ruling that success on appeal could not fully remedy.334 Thus, the stage was set for an avalanche of attempts at collateral order appeal on many new issues. Moreover, because the Court’s doctrinal formulation varied from case to case, appellate courts, including the Supreme Court, were burdened repeatedly with the necessity of deciding whether such appeals should be allowed. In the nine years from 1977 to 1985, there was a “litigation explosion” over the appealability of collateral orders, and the Court itself wrestled with the collateral order doctrine in eleven cases—more than one a year. This litigiousness soon proved durable, as did the doctrinal instability.

C. Post-Mitchell Retrenchment: A Call for Reform

Seizing on the notion that a pretrial order may be immediately appealable if it affects a “right” that will be “irretrievably lost” if appeal was postponed, the petitioners in Stringfellow v. Concerned Neighbors in Action335 sought to intervene in a government suit to clean up a hazardous waste site near their homes.336 The district court denied intervention as of right but granted permissive intervention subject to conditions such as not filing damage claims.337 In an attempt to appeal the denial of their asserted right to intervene, the petitioners argued that this right would be “irretrievably lost” if the appeal had to await final judgment.338 In a complex suit with numerous parties and years of projected litigation, once a district court entered a remedial order an appeals court almost certainly would refuse to undo the results simply because one party was denied full-scale intervention; an appeal would be academic.339 The Court nevertheless held that the denial of

332. See, e.g., Fed. R. Civ. P. 12(b) (listing seven grounds for dismissal); Fed. R. Civ. P. 41(b) (listing additional grounds for dismissal).
334. For a discussion of some issues that arguably implicate a “right not to stand trial” or a form of irreparable harm, see infra notes 546-69 and accompanying text.
336. Id. at 372.
337. Id. at 373.
338. Id. at 376.
339. Id.
intervention was not an appealable collateral order. The Court accepted the premise that appeal after final judgment was doomed to fail as a practical matter, but reasoned that such a concern was irrelevant. The practical difficulties of winning an appeal are encountered by any litigant adversely affected by a pretrial order, but appeal generally is allowed only after a final judgment. Absent from the Court’s analysis is any attempt to distinguish the asserted right to intervene from other asserted rights—the denial of which are immediately appealable. Implicit in the Court’s analysis is a reversion to the strict, mootness-based doctrine of Cohen. Therefore, as a matter of law, if the case proceeded to final judgment and the appeals court were persuaded that it was prejudicial error to deny intervention as of right, it could vacate the judgment and petitioners could intervene with the right of unconditional participation.

The Stringfellow intervenors were soon followed by a foreign citizen asserting immunity from service of process, as well as the defense of forum non conveniens. In Van Cauwenbergh v. Biard, a Belgian citizen promoted a real estate development that failed. He was indicted for criminal fraud in the United States and extradited from Switzerland. After he was convicted, he was served with process in a civil racketeering suit. He moved to dismiss the civil action on two grounds: (1) that an extradited defendant is immune from civil service of process, and (2) that an American forum was inconvenient. The district court denied each claim. Relying on the concept that immunity from suit entails a “right not to stand trial” that is effectively destroyed if a defendant must stand trial before appealing, the Belgian defendant sought immediate collateral order review of both issues.

Under the strict conditions set forth in the Cohen line of cases, neither issue was appealable prior to judgment because both were effectively reviewable after final judgment in the sense that they would not be moot. If the defendant was found liable for damages, he could appeal on the ground that it was an error not to dismiss on the grounds of immunity from service or forum non conveniens. If successful on appeal, the judgment would be vacated and the suit dismissed.

By 1988, however, the Court was mired in its own bog of precedent and obliged to address whether either the immunity issue or the forum non conveniens issue fell within the broad doctrinal formulation of the Mitchell line of

340. Id. at 375 (citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).
341. Id. at 376.
342. Id.
346. Id. at 519.
347. Id. at 520.
348. Id.
349. Id. at 520-21.
350. Id. at 521.
351. Id. at 523 (citing Mitchell v. Forsyth, 472 U.S. 511, 525-26 (1984)).
cases. With respect to the immunity issue, the Court first reasoned that an extradited individual's immunity from civil service does not entail a "right not to stand trial" because its goal is not to protect the individual from the burdens of litigation, but rather to ensure that the extraditing sovereign does not abuse the extradition process. 352 Second, faced with the contention that a court lacks personal jurisdiction over a defendant that is immune from service of process, the Court retorted that the due process limitations on personal jurisdiction are meant to protect individuals from binding judgments, not from trial or other burdens of litigation, thus it is a right that is effectively reviewable after final judgment. 353 The Court concluded that the immunity from service issue was not immediately appealable under either an immunity theory or a personal jurisdiction theory. 354

The Court's manipulation of its broad collateral order doctrine with respect to the immunity issue in Van Caumenbergh is, to put it politely, disingenuous. The first assertion, that an extradited foreign citizen's immunity from service does not entail a "right not to stand trial," 355 mischaracterized the Court's own leading precedent on the issue. In United States v. Rauscher, 356 the Court stated over a century ago that the limitations imposed on the extraditing sovereign by immunity from service conferred upon the extradited individual the right to be tried only for the offense upon which extradition was based, and no others. 357 The second assertion, that lack of personal jurisdiction does not comprehend a "right not to stand trial," also mischaracterized the leading precedents on personal jurisdiction. The Court has repeatedly stated that due process restrictions on personal jurisdiction are designed to protect individuals from the burdens of defending litigation in distant forums with which they lack sufficient contact or, more recently, in which the exercise of jurisdiction would impose unfair burdens. 358 This is the

352. Id. at 525.
353. Id. at 526-27.
354. Id. at 527.
355. Id. at 526.
357. Id. at 430.
358. See, e.g., Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985) ("The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no [minimum contacts] . . . ."); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest."); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (finding that the concept of minimum contacts "protects the defendant against the burdens of litigating in a distant or inconvenient forum"); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.").
very logic that the Court used to conclude that double jeopardy and qualified immunity confer a "right not to be tried."\textsuperscript{359}

Turning to the forum non conveniens issue, the Court concluded that it was not separate from the merits.\textsuperscript{360} The Court reasoned that consideration of this issue would require analysis of what proof will be needed, what evidence will be crucial, and whether the forum has an interest in resolving the substantive merits of the case.\textsuperscript{361} Having opted to apply the broad formulation of the collateral order doctrine in this case, one might have expected the Court to consider whether the forum non conveniens issue was "conceptually distinct" from the merits as it did in Mitchell, not whether it was "completely separate" from the merits. Had it done so, the conclusion would have been unavoidable that forum non conveniens is "conceptually distinct" from the merits because they are not identical. A court must consider the nature of the plaintiff's claim in order to determine what evidence is relevant and critical, but it need not decide whether the plaintiff should, or even is likely to, win the case. Thus, with respect to the forum non conveniens issue, the Court applied a mixture of the strict and broad collateral order doctrine.

The key to understanding the Van Cauwenberghe decision is not the Court's dithering over doctrinal minutiae, but rather its desire to protect the interests served by the final judgment rule. As the Court noted at the outset, all litigants that assert a substantial ground for dismissal can claim that they are asserting a "right not to stand trial" because dismissal means that there will be no trial.\textsuperscript{362} Because some ground for dismissal could be asserted in every lawsuit, allowing immediate appeal from any refusal to dismiss would open the door to collateral order appeal in every case, which would destroy the final judgment rule.\textsuperscript{363} This is sensible policy, but unfortunately the Court's standards bear little relationship to these interests. The requirement that the issue be effectively unreviewable after final judgment was designed to protect against allowing immediate appeal every time a litigant claims that an error has been committed.\textsuperscript{365} Yet, as the Court conceded, "in some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial,"\textsuperscript{366} and therefore a right to immediate appeal. The requirement that the issue be separate from the merits was designed to prohibit multiple appeals of the same issue as discovery and other pretrial proceedings revealed new information that arguably would shed additional


\textsuperscript{360} Van Cauwenberghe v. Biard, 486 U.S. at 527.

\textsuperscript{361} Id. at 528-29.

\textsuperscript{362} Id. at 524.

\textsuperscript{363} See, e.g., Fed. R. Civ. P. 12(b) (permitting preanswer dismissal for lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, insufficient process, insufficient service of process, failure to state a claim, and failure to join an indispensable party).

\textsuperscript{364} Van Cauwenberghe v. Biard, 486 U.S. at 524.

\textsuperscript{365} Id. at 521 n.3.

\textsuperscript{366} Id. at 524.
light on the issue. The “conceptually distinct” standard, however, under which the effective unreviewability requirement is met, if the issue is not identical to the claim on the merits, permits such multiple appeals.\textsuperscript{367} Perhaps recognizing this potential, the Court shed away from this standard in favor of the “completely separate” standard, which is well-designed to protect against multiple appeals of the same issue because it admits no examination of what evidence will be important to resolve the merits.\textsuperscript{368} Thus, the Court’s reversion to the strict standard with respect to the forum non conveniens issue reflected adherence to an underlying policy, while sticking to the broad standard with respect to the immunity from service issue led the Court to misstate its own law on immunity from service.

The same year as \textit{Van Cauwenberghe}, another litigant asserting a “right not to stand trial” drew the Court’s attention in \textit{Gulfstream Aerospace Corp. v. Mayacamas Corp.}\textsuperscript{369} Gulfstream sued Mayacamas in state court for breach of contract.\textsuperscript{370} Mayacamas sued Gulfstream in federal court, based on diversity of citizenship, for breach of the same contract.\textsuperscript{371} Gulfstream moved to stay the federal case on the ground that the parallel state court action constituted an exceptional circumstance justifying a stay.\textsuperscript{372} The district court denied the stay and Gulfstream sought immediate review both under the collateral order doctrine and under 28 U.S.C. § 1292(a)(1) as an interlocutory appeal from the denial of injunctive relief.\textsuperscript{373} With respect to the collateral order doctrine, Gulfstream had two reasons to be optimistic. First, because the stay doctrine was designed to protect a state court plaintiff from the burdens of defending against parallel federal proceedings,\textsuperscript{374} Gulfstream could assert a plausible “right not to stand trial” akin to double jeopardy and qualified immunity.\textsuperscript{375} Second, in the recent \textit{Moses H. Cone} case, the Court had held that an order \textit{granting} a stay because of parallel state court proceedings was immediately appealable;\textsuperscript{376} therefore, Gulfstream could argue plausibly that denial of a stay should be appealable in the interests of even-handed justice.

In \textit{Moses H. Cone}, the Court had applied the strict collateral order doctrine and found that, even under the strict standards, the grant of a stay was

\textsuperscript{367} See \textit{Behrens v. Pelletier}, 116 S. Ct. 834, 841 (1996); see also infra notes 524-45 and accompanying text.

\textsuperscript{368} Behrens v. Pelletier, 116 S. Ct. at 842.

\textsuperscript{369} Gulfstream Aerospace Corp. v. Mayacamas Corp. 485 U.S. 271 (1988).

\textsuperscript{370} Id. at 273.

\textsuperscript{371} Id.

\textsuperscript{372} Id. (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)).

\textsuperscript{373} Id. at 273-74. In part, 28 U.S.C. § 1292(a)(1) provides that courts of appeals shall have jurisdiction of appeals from interlocutory orders of the district courts refusing injunctions. Gulfstream argued that the order refusing a stay constituted a refusal of an injunction against proceeding with the federal case. \textit{Id.}

\textsuperscript{374} See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 819-21 (1976) (holding that a dismissal was required in order to avoid piecemeal litigation).


immediately appealable; the stay issue would be moot after final judgment, because the state court judgment would be res judicata in the federal case, regardless of whether the stay should have been granted in the first place.\textsuperscript{377} By that standard, the denial of a stay is quite different from the granting of a stay; if the federal court enters judgment on the merits against the defendant, the stay issue, far from being moot, would be grounds for reversal on appeal.

By the time of the \textit{Gulfstream} case, however, mootness-based analysis had been replaced by the “right not to stand trial” metaphor.\textsuperscript{378} Rather than once again strain to explain why the denial of a stay does not implicate such a “right,” as it had done in the \textit{Van Cauwenberghe} case, the \textit{Gulfstream} Court focused on the requirement that the district court must have conclusively determined the issue being appealed.\textsuperscript{379} Unlike the grant of a stay, which is conclusive because it reflects a determination that the state court litigation will fully resolve the controversy, denying a stay is inherently tentative. The federal judge may be merely uncertain whether the state litigation will lead to a full resolution, and therefore is likely to reconsider the stay issue in light of later developments in state court.\textsuperscript{380} Although this distinction between the grant and denial of a stay is far from clear,\textsuperscript{381} it provided the Court with an opportunity to duck the “right not to stand trial” problem.

Perhaps reflecting a sense that too much judicial effort was being expended on the litigation explosion over collateral order issues, the Court observed that, since the \textit{Cohen} decision in 1949, it had revisited the collateral order doctrine on “many occasions.”\textsuperscript{382} Actually, in the era of strict construction from 1949 to 1974, the Court revisited the doctrine only four times, or once every six years.\textsuperscript{383} In contrast, during the era of expansion from 1974 to 1988, the issue commanded the Court’s attention fourteen times, or once a year. It is clear, then, that the “many occasions” to which the Court referred were the product of its own loosening of jurisdictional standards.

Justice Scalia was candid about the problem in his concurring opinion in \textit{Gulfstream}, stating that “our finality jurisprudence is sorely in need of further limiting principles,” so that collateral appeals could be limited to a small class of cases.\textsuperscript{384} Justice Scalia observed that Gulfstream was asserting a right to be free in pursing its state court action from the obstruction of parallel federal proceedings—a “right” that is irretrievably lost so long as the

\begin{itemize}
\item[377.] \textit{Id.} at 12-13.
\item[378.] \textit{Van Cauwenberghe v. Biard}, 486 U.S. at 524.
\item[379.] \textit{Gulfstream Aerospace Corp. v. Mayacamas Corp.}, 485 U.S. 271, 278 (1988).
\item[380.] \textit{Id.}
\item[381.] A judge that grants a stay may later dissolve it. Conversely, a judge that denies a stay may do so in a decision that is intended to be the final word.
\item[382.] \textit{Id.} at 275-76.
\item[383.] \textit{See supra} notes 72-79 and accompanying text. Although the 1963 decision in \textit{Curry} planted the seeds for later expansion of the doctrine, the period of 1963-1974 properly belongs to the era of strict construction because the Court did not revisit the doctrine until 1974. \textit{See supra} notes 98-115 and accompanying text.
\item[384.] \textit{Gulfstream Aerospace Corp. v. Mayacamas Corp.}, 485 U.S. at 292 (Scalia, J., concurring).
\end{itemize}
denial of stay is in effect.\textsuperscript{385} It was an oversimplification, in his view, to conclude that the denial was tentative rather than conclusive.\textsuperscript{386} Justice Scalia instead suggested an alternative approach. The question presented for appeal, whether it was error to deny a stay of the federal case in deference to the state proceedings, was not important enough to justify an immediate appeal.\textsuperscript{387} Implicit in this analysis is the conclusion that the right being asserted, the right to sue in state court free of obstruction by parallel federal proceedings, is not important enough to justify immediate appeal.\textsuperscript{388} Unfortunately, he offered no reason why such a right is not important enough. Nevertheless, with dissatisfaction over the current doctrine growing within the Court, it is not surprising that a search for alternative standards would soon lead to the important rights analysis suggested by Justice Scalia.\textsuperscript{389}

The second ground for immediate appeal in \textit{Gulfstream}—that the denial of a stay constituted a denial of injunctive relief within the meaning of 28 U.S.C. § 1292(a)(1)—did not involve the collateral order doctrine. The Court's discussion is valuable, however, because it demonstrates how loose interpretation of appealability requirements can lead to such confusion and cost that the Court, out of sheer frustration, is led to abandon its interpretation. Gulfstream's argument that the denial of a stay is equivalent to the denial of injunctive relief was based upon the \textit{Enelow-Ettelson} doctrine,\textsuperscript{390} named after its two leading cases.\textsuperscript{391} According to this doctrine, a grant or denial of a stay constituted a grant or denial of injunctive relief, if the action sought to be stayed would have been historically an action at law and the basis for a stay historically would have been asserted in an action in equity.\textsuperscript{392} Thus, an immediate appeal was allowed if the action to be stayed was legal in nature, but the defense or counterclaim asserted as the basis for a stay was equitable in nature.\textsuperscript{393} Over the years, a chorus of federal appellate courts denounced the \textit{Enelow-Ettelson} doctrine, characterizing it in terms such as an "Alice's Wonderland"\textsuperscript{394} and a "Serbian Bog,"\textsuperscript{395} in which whole cases have sunk from sight. The criticism was traceable to the necessity for distinguishing

\textsuperscript{385} \textit{Id.} at 291.

\textsuperscript{386} \textit{Id.} Justice Scalia explained that the Court's reasoning was an oversimplification because denial of the stay, however tentative, was conclusive of Gulfstream's asserted right to the extent that Gulfstream would suffer irretrievable obstruction of its state court action until such time as the district court reconsidered the stay issue. \textit{Id.}

\textsuperscript{387} \textit{Id.} at 291-92.

\textsuperscript{388} \textit{Id.}

\textsuperscript{389} For a discussion of the Court's experiment with an "important right" standard to replace the bankrupt "right not to stand trial" standard, see \textit{infra} notes 434-47, 487-501, 512-44 and accompanying text.

\textsuperscript{390} Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. at 279.


\textsuperscript{392} Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. at 279.

\textsuperscript{393} \textit{Id.} at 279-80.

\textsuperscript{394} Beaumit Mills, Inc. v. Eday Fabric Sales Corp., 124 F.2d 563, 565 (2d Cir. 1942).

\textsuperscript{395} Hartford Fin. Sys. v. Florida Software Serv., 712 F.2d 724, 727 (1st Cir. 1983).
between the legal and equitable claims, defenses, and counterclaims when the underlying system of law and equity courts no longer existed.\textsuperscript{396} Conceding that the law-equity distinction had "bred a doctrine of curious contours,"\textsuperscript{397} the Gulfstream Court concluded that "the rule is unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals."\textsuperscript{398} The most important of these three considerations was that the rule bore little, if any, relation to appellate policy; whether the claims and defenses were legal or equitable in nature had nothing to do with whether there was a special need to depart from the final judgment rule.\textsuperscript{599}

The broad, rights-based collateral order doctrine is very similar to the now-defunct Enelow-Ettelson doctrine in that by 1988, its standards were proving unworkable, and it had never been explained how the standards bore any relation to appellate policy. Whether the broad doctrine will meet the same fate as Enelow-Ettelson, and whether it will take a half-century, are matters of conjecture. It is clear, however, that by 1988, the "conceptually distinct" standard was rarely, if ever, mentioned, and the "right not to stand trial" standard was on shakier ground.

Continuing its now biennial revisititation of the collateral order doctrine, the Court considered yet another asserted "right not to stand trial" the year after Van Cauwenberghe and Gulfstream. In Lauro Lines S.R.L. v. Chasser,\textsuperscript{400} an Italian shipping firm moved to dismiss a federal diversity action for wrongful death based upon a forum-selection clause in the passengers’ tickets that required the passengers to sue in Naples, Italy, and nowhere else.\textsuperscript{401} The firm sought to appeal the district court’s denial of their motion as a collateral order.\textsuperscript{402} Just as in Gulfstream, Van Cauwenberghe, Richardson, Flanagan, Firestone, Hollywood Motors, and MacDonald, the denial of the motion clearly did not satisfy the unreviewability condition as originally formulated in Cohen. The denial of immediate review did not constitute a denial of any review at all. If final judgment on the merits was entered against the firm but the appellate court concluded that the forum selection clause mandated dismissal, the judgment would be vacated. Seizing on the "right not to stand trial" theory, however, the firm asserted that the forum selection clause conferred upon it a contractual "right not to stand trial" in the United States or anywhere else except Naples.\textsuperscript{403} If it nevertheless had to stand trial in the United States before it could appeal, its "right" would already have been destroyed by the trial itself.\textsuperscript{404} The argument was supported by the Court’s own leading precedent concerning forum selection clauses, in which it stated

\begin{itemize}
\item \textsuperscript{396} For a detailed discussion of the difficulties posed by the Enelow-Ettelson doctrine, see WRIGHT, MILLER, & COOPER, supra note 235, § 3923.
\item \textsuperscript{397} Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. at 280.
\item \textsuperscript{398} Id. at 283.
\item \textsuperscript{399} Id. at 285.
\item \textsuperscript{400} Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989).
\item \textsuperscript{401} Id. at 496.
\item \textsuperscript{402} Id. at 497.
\item \textsuperscript{403} Id. at 500.
\item \textsuperscript{404} Id.
\end{itemize}
that forum selection clauses protect the compelling interest of global businesses in having a certain, convenient, and neutral forum to resolve disputes.405

Despite the logic of this argument, the Court drew a fine distinction, between the right not to stand trial at all and the right not to stand trial in a particular forum.406 Denial of the former is immediately appealable, but the latter is not because an asserted right not to stand trial in a particular forum is “adequately vindicable” on appeal after final judgment.407 The Court did not explain why such a right is “adequately vindicable” after final judgment. Certainly, by that time, the defendant has already suffered the uncertainty and inconvenience the forum selection clause was designed to prevent. Instead, the Court said that the policy favoring enforcement of such clauses is irrelevant to the issue of appealability.408 Herein lies yet another contradiction. The Court’s own recent precedents had stated that the interests protected by the asserted defense would determine whether the defense could be characterized as an appealable “right not to stand trial.”409

Justice Scalia’s concurring opinion in Lauro Lines recognized the fallacy of the Court’s reasoning: “The ‘right not to be sued elsewhere than in Naples’ is not fully vindicated—indeed, to be utterly frank, is positively destroyed—by permitting the trial to occur and reversing its outcome.”410 As in the Gulfstream case, he repeated an alternative rationale for dismissing the appeal.411 In his view, the right conferred by a forum selection clause is not important enough to overcome the policies underlying the final judgment

405. Id. at 501 (citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-15 (1972)).
406. Id. at 500-01. 407. Id. at 501. Compare Lauro Lines with Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989), the Supreme Court’s second 1989 collateral order adventure, in which the Court held that denial of a motion to dismiss an indictment based upon government disclosure of grand jury matters is not immediately appealable. Id. at 802. The Court reasoned that violation of the prohibition upon disclosure entails a right to dismissal of charges rather than a right not to stand trial because the latter “rests upon an explicit statutory or constitutional guarantee that trial will not occur” and the prohibition against disclosure did not so rest. Id. at 801. If that is the standard, of course, Mitchell v. Forsyth should be overruled because qualified immunity does not rest upon an explicit constitutional or statutory guarantee. MacDonald should also be overruled because a speedy trial claim does rest upon an explicit constitutional guarantee.
408. Id. at 501.
409. See, e.g., Mitchell v. Forsyth, 472 U.S. 511, 525-26 (1985) (holding that qualified immunity protects officials against being subjected to distraction from duties, inhibition of action, and deterrence from service); Abney v. United States, 431 U.S. 651, 660-61 (1977) (holding that the guarantee against double jeopardy protects the defendant’s interests in not being forced “to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense”).
411. Id.
rule. Once again, however, Justice Scalia failed to explain why this right lacked the requisite importance.

By the end of the decade, the Supreme Court’s collateral order jurisprudence had taken on a “Serbonian Bog” quality similar to that which had prompted the Court to abandon the Enelow-Ettelson doctrine. The Court sometimes utilized the strict, three-pronged, mootness-based analysis of the Cohen-Coopers and Lybrand line of cases. Other times it appeared to be a two-pronged test, or even a one-factor test. Other times the Court embraced the broad, three-pronged, rights-based analysis of the Abney-Mitchell line of cases. Occasionally a fourth condition would appear: the issue appealed must be sufficiently important. The Court cobbled together a hybrid test, mixing elements of both the strict and the broad doctrinal formulation. In applying the broad formulation, the Court misstated its own leading precedents. The doctrinal chaos was such that the Court now felt obliged to revisit the collateral order doctrine on a biennial basis, an expenditure of judicial effort that almost certainly paled in comparison to the burdens shouldered by the courts of appeals. There was no end in sight to the chaos, because more candidates were lined up to assert a “right not to stand trial” that, like qualified immunity, was “conceptually distinct” from the merits. Congress finally decided to step into this new “Serbonian Bog.”

IV. CONGRESSIONAL AUTHORIZATION TO PROMULGATE RULES DEFINING FINALITY

In 1988, the same year that the Supreme Court struggled to decide Van Cauwenbergh v. Baird and Gulfstream Aerospace Corp., Congress passed the Judicial Improvements Act of 1988 and Access to Justice Act of 1988, to address various problems created by escalating caseloads in the federal courts. Title I of the Act created a Federal Courts Study Committee to study the caseload problems and file a report. The Chief Justice of the United States Supreme Court appointed the committee members, consisting of federal and state judges, members of Congress, and attorneys. After publishing a preliminary report with tentative recommendations and holding public hearings on the tentative recommendations, the committee filed the Report of the Federal Courts Study Committee (Report) on April 2, 1990.

Among the Report’s many recommendations for addressing the congestion, delay, and costs created by the growing federal caseload was a recommendation that Congress delegate to the Supreme Court the authority to define what constitutes a final decision for appeal as of right under 28 U.S.C.
§ 1291. The stated reason for this recommendation was to remedy “difficulties arising from definitions of an appealable order.” The Report specifically stated that the law on when a ruling is “final” and appealable as of right is unsatisfactory in a number of ways, two of which directly pertain to collateral order appeals. Second, the caselaw—especially the collateral order doctrine—does not place clear limits on which rulings are appealable, thus requiring “repeated attention from the Supreme Court.” The Report further stated that the recommended rulemaking authority should include the authority to change the law created by the Court’s finality jurisprudence, either by broadening, narrowing, or systematizing the opportunities for appeal.

Within months of the Report, Congress adopted the committee’s recommendation. In section 315 of the Judicial Improvements Act of 1990, Congress added paragraph (c) to 28 U.S.C. § 2072, granting the Supreme Court the authority to promulgate rules defining “when a ruling of a district court is final for the purposes of appeal under section 1291” of Title 28. The sparse legislative history of this provision makes clear that Congress’s intent was to implement the recommendation of the committee. The stated reason for adopting the recommendation is that uncertainty over the definition of a “final decision” had spawned a great increase in procedural litigation and that promulgation of clear rules could reduce such litigation.

419. Id. at 95.
420. Id.
421. Id.
422. Id.
423. Id. The third problem—that opportunities for immediate appeal have, at times, been restricted too sharply—appeared to be directed primarily at discretionary interlocutory appeals under 28 U.S.C. § 1292. Id. The Committee’s express recommendation with respect to such appeals was to expand the list of orders eligible for immediate interlocutory appeal. Id. at 95-96.
424. Id. at 96.
427. H.R. Rep. No. 101-734, at 18 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6864. One commentator has argued that this recommendation was made in an “almost casual manner” with virtually no scrutiny by Congress and, therefore, should be repealed. See Robert J. Martineau, Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution, 54 U. PITT. L. REV. 717, 726, 789 (1993). This author does not agree that the legislation should be repealed because the problems with the final judgment rule are so evident, but certainly sweeping attempts at reform through rulemaking should be undertaken with great care. Id. at 726.
This rulemaking authority, however, has lain dormant to this day. The Supreme Court has not promulgated a rule to define what constitutes a final decision under 28 U.S.C. § 1291, the Judicial Conference of the United States has not recommended a rule, the Committee on Practice and Procedure has not transmitted a proposed rule to the conference, and the Advisory Committee for the Federal Rules of Appellate Procedure has not proposed a rule, nor has it even undertaken to consider such a rule. The reasons for such inaction are unclear, but two possibilities come to mind. Either the problems created by the collateral order and other judicially created doctrines are no longer sufficiently severe to require rulemaking, or members of the committees have been unable to formulate an appropriate response to the problems. Recent experience with the collateral order doctrine demonstrates, however, that its problems continue to plague the federal courts; therefore, a need to address the problem in some manner still remains.

V. CURRENT STATUS OF THE COLLATERAL ORDER DOCTRINE

A. Litigation in the Supreme Court

After a brief lull, perhaps because of a hope that the rulemaking process would address the problems, the Supreme Court has revisited the collateral order doctrine seven times in the last five years. In the first of these cases, Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., the Supreme Court held that the denial of a motion to dismiss by a state agency, based on Eleventh Amendment immunity from suit in federal court, is immediately appealable as a collateral order. Such a ruling is effectively reviewable after final judgment in the sense that the issue is not moot—if final judgment is entered against the state agency, an appellate court can vacate the judgment if persuaded that the agency is entitled to Eleventh Amendment immunity from suit in federal court. The Court nevertheless concluded that such a ruling is effectively unreviewable after final judgment in the sense that the central benefit of Eleventh Amendment immunity will be lost if the litigation proceeds to final judgment. The Court reasoned that the Eleventh Amendment deprives the federal courts of jurisdiction over claims against the states and thus, confers an immunity from suit. Denial of a motion to

428. For a discussion of the federal rulemaking process, see 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1007 (2d ed. 1987 & Supp. 1997). It is presumed that any proposed rule to define a final decision under § 1291 would come from the Advisory Committee for the Federal Rules of Appellate Procedure because appeal from a final decision is a matter of right; therefore, any ruling on appealability would be by a court of appeals, not a district court. The statement that this Advisory Committee has not undertaken to consider a proposal is based upon a telephone interview with its Reporter, Professor Carol Ann Mooney.
430. Id. at 147.
431. Id. at 144-45.
432. Id.
dismiss for lack of jurisdiction, however, is not, as the Court itself ruled, an immediately appealable collateral order.\textsuperscript{433} To avoid this conceptual difficulty, the Court explained that the purpose of the Eleventh Amendment was to prevent the indignity of subjecting a state to suit in federal court, and therefore, the ultimate justification for allowing collateral order appeal "is the importance of ensuring that the States' dignitary interests can be fully vindicated."\textsuperscript{434}

The Puerto Rico Aqueduct decision has doctrinal significance in two respects. First, the Court rejected the use of the strict, Cohen formulation of the collateral order doctrine in favor of the broad, Mitchell formulation, despite assertions by some observers that the Court had narrowed the doctrine and limited additional opportunities for collateral order appeal.\textsuperscript{435} Second, the Court modified its definition of the unreviewability condition in its statement that the importance of the interest asserted is the prime consideration, rather than the burdens of litigation that had been the rationale of cases like Abney and Mitchell.\textsuperscript{436} So it was Justice Scalia's call for an alternative approach based upon the importance of the claimed right, that attained the status of law.\textsuperscript{437} Once again, just as Justice Scalia had failed to do, the Court failed to explain why protecting a state's dignitary interest is sufficiently important to outweigh the costs of piecemeal appeals while other interests such as speedy trial, prohibition of vindictive prosecution, choice of counsel, and due process limitations on personal jurisdiction are not.\textsuperscript{438} As barren of policy analysis as the "right not to stand trial" metaphor, the "important interests" standard was equally likely to increase confusion and procedural litigation rather than provide clarity. Just like the "right not to stand trial," many pretrial orders arguably implicate "important interests."\textsuperscript{439}

\textsuperscript{433} See supra notes 148-54 and accompanying text.

\textsuperscript{434} Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. at 146.

\textsuperscript{435} See Michael E. Solimine, Revitalizing Interlocutory Appeals in the Federal Courts, 58 GEO. WASH. L. REV. 1165, 1171 (1990). Professor Solimine observes, correctly, that the Supreme Court has limited the list of orders eligible for collateral order appeal. Id. The Court has not done so by narrowing the doctrine itself, but rather by applying the unreviewability and separability conditions in an inconsistent manner. See id.

\textsuperscript{436} Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. at 146-47.

\textsuperscript{437} See supra notes 387-89, 411 and accompanying text.

\textsuperscript{438} The subsequent proceedings in Puerto Rico Aqueduct illustrate the costs ignored by the Court. On remand, the First Circuit stated, "Notwithstanding that trial is still some distance away, this diversity case alights on our doorstep for the second time." Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth., 991 F.2d 935, 937 (1st Cir. 1993). The First Circuit then affirmed the district court's ruling denying immunity and remanded. Id. at 943. Thus, after three years, this case was still at the motion to dismiss stage, the plaintiff was facing years of delay in getting to trial, and the court of appeals was likely to see at least one more appeal after final judgment.

\textsuperscript{439} For example, a discovery order compelling production of information asserted to be protected from disclosure as a "trade secret" arguably will cause irreparable harm to an "important interest" in protecting trade secrets if appeal is postponed. Therefore, collateral
Resuming its annual re-examination of the collateral order doctrine, the Supreme Court held in *Digital Equipment Corp. v. Desktop Direct, Inc.*, that an order vacating a voluntary dismissal and rescinding a settlement agreement was not an appealable collateral order. Just as in *Puerto Rico Aqueduct*, such an order is effectively reviewable after final judgment in the sense that the issue is not moot. An appeals court can vacate the judgment if it concludes that it was an error to vacate the dismissal and rescind the settlement agreement. Digital, however, like numerous litigants before it, asserted that the settlement agreement conferred upon it a "right not to stand trial" that would be irretrievably lost if appeal were postponed until after final judgment. The Court was candid in recognizing that the "right not to stand trial" standard, established by *Abney* and *Mitchell*, did not afford a reliable way to characterize any particular asserted right. The Court then appeared to abandon this standard altogether in favor of the "importance" standard first suggested by Justice Scalia and adopted in *Puerto Rico Aqueduct*. The Court concluded that the right conferred by a settlement agreement "does not rise to the level of importance needed for recognition under § 1291." In response to Digital's argument that a relative ranking of rights in order of their importance is a rogue factor that has no place in interpretation of a congressional grant of jurisdiction, the Court answered that whether an asserted right is effectively reviewable after final judgment "cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement."

Having decisively established the "importance" of the asserted right as the standard for determining whether effective review is available after final judgment, it certainly is incumbent upon the Court to explain what it means by "important." Such a value judgment, the Court suggested, would be based on whether the asserted right is created by a constitutional or statutory provision. Grounding "importance" in explicit constitutional or statutory rights, however, undermines the rationale of some of the Court's past decisions and would provide the basis for reconsideration and overruling those decisions. For example, a speedy trial claim is based on the Sixth Amend-

order appeal should be permitted as a matter of right every time a "trade secret" objection is overruled.

441. *Id.* at 865.
442. *Id.* at 867-69.
443. *Id.* at 869.
444. *Id.*
445. *Id.* at 873-74. Indeed, Digital had a plausible argument that one of the interests promoted by settlement is to relieve litigants of the burdens of continued litigation, so that a settlement agreement confers a "right not to stand trial." *Id.*
446. *Id.* at 878.
447. *Id.* at 878-79.
448. *Id.* at 879.
449. *Id.*
ment and is therefore “important” as defined in Digital Equipment. On that basis, United States v. MacDonald,450 which held that denial of a speedy trial claim is not immediately appealable,451 should be overruled. Conversely, a claim of qualified immunity is not based on any constitutional or statutory provision, but on the Court’s own public policy preferences. On this basis, Mitchell v. Forsyth,452 which held denial of a qualified immunity claim immediately appealable,453 should be overruled. Thus, this initial attempt to inject content into the newly pre-eminent “importance” standard promised to add even more confusion and instability into an area greatly in need of clarification.

The Digital Equipment opinion advanced an additional reason for denying the collateral order appeal: the availability of alternative remedies.454 The Court reasoned that Digital’s claimed rights under the settlement agreement could be vindicated in two ways. First, if the settlement agreement was valid, Digital could sue Desktop for breach of contract.455 Second, if enforceability of the settlement agreement raised serious questions of law, a discretionary interlocutory appeal under 28 U.S.C. § 1292(b) might be available.456 The Court explained that such an approach would have the advantage of allowing appeals only in cases presenting truly serious legal questions instead of allowing mandatory appeal from an entire category of orders no matter how minor or well-settled the issue being appealed.457

The alternative of the availability of interlocutory appeal would be a source of relief from the costs generated by the Court’s collateral order jurisprudence. One puzzling aspect of the expansive collateral order cases is the Court’s tendency to ignore the availability of discretionary interlocutory appeal. Denial of qualified immunity, for example, would be a candidate for interlocutory appeal. The issue presented by such a defense is whether the constitutional right asserted by the plaintiff was clearly established at the time of the defendant’s alleged conduct, which the court has characterized as a question of law. That question could control whether the defendant is liable for damages and could help terminate the litigation because, if the asserted rights were not clearly established, the claim for damages must be dismissed. The discretionary nature of such an appeal would permit the courts to take into account the seriousness of the defense and refuse to certify for appeal those cases in which the defense clearly lacks merit. Thus, it avoids many of the costs of allowing mandatory appeal every time a pretrial qualified immunity claim is denied, no matter how insubstantial the claim. The availability of alternative avenues of appeal should be, as Digital suggests, an important factor in the collateral order doctrine. If so, some categories of

451. Id. at 861.
453. Id. at 530.
455. Id.
456. Id. at 883-84.
457. Id. at 884.
orders now appealable as of right in every case should lose that status, resulting in significant reduction in the costs of piecemeal appeals.

The year after Digital Equipment, the Supreme Court reviewed collateral order appeals not once, but twice. In Johnson v. Jones,458 the Court, for the first time, limited the availability of qualified immunity appeals. The plaintiff sued five police officers for excessive use of force, alleging that they arrested, beat, and injured him while he was having an epileptic seizure.459 Three of the officers moved for summary judgment on the ground that the plaintiff had produced no evidence that they personally had beaten him.460 In response, the plaintiff relied on his own deposition testimony that he had been beaten and the three officers’ own deposition testimony indicated that they were present when the plaintiff was injured.461 The district court denied summary judgment on the ground that it was clearly established law that the officers are liable if they stand by during a beating and the plaintiff had sufficient evidence to create an issue whether the three officers were, in fact, present.462 The defendants appealed, not on the ground that the stand-by theory was not clearly established law, but solely on the ground that the plaintiff’s evidence was insufficient to create a triable issue of fact.463

The Supreme Court held that an order that resolves the fact-related question of whether the evidence in the pretrial record is sufficient to show a genuine issue for trial is not an immediately appealable collateral order.464 The Court gave three reasons. First, Mitchell was not controlling because it was explicitly limited to qualified immunity appeals presenting pure questions of law.465 Second, whether the plaintiff’s evidence is sufficient to create a triable issue is not “conceptually distinct” from the merits of the underlying claim because such a question is not likely to be significantly different from the factual issues relevant to the plaintiff’s claim.466 Third, the policies underlying the final judgment rule would be undermined significantly with relatively little gain in the error-correcting benefits of an immediate appeal.467 Appellate judges have no greater expertise in resolving sufficiency of the evidence issues than trial judges, who confront such matters almost daily.468 Thus, the error-correcting benefits of an immediate appeal on sufficiency of the evidence issues are less likely to occur than when pure questions of law are appealed.469 The Court conversely said that factual issues can impose enormous burdens on appellate judges because they may have to read an

459. Id. at 2153.
460. Id.
461. Id. at 2153-54.
462. Id. at 2154.
463. Id.
464. Id. at 2156.
465. Id.
466. Id. at 2156-57.
467. Id. at 2158.
468. Id.
469. Id. at 2157-58.
enormous record, including many documents, in order to decide whether the plaintiff had produced sufficient evidence.470 Finally, allowing such appeals would likely lead to multiple appeals of the same issue.471 If the appellate court affirms the denial of summary judgment and the defendant loses at trial, the defendant can appeal again on the ground that the plaintiff produced insufficient evidence at trial, thus forcing the appeals court to consider the same issue and the same record all over again.472

The Johnson opinion is a shaft of light in this dark bog of appellate procedure because it explains how the decision is consistent with sound appellate policy. The purpose of allowing a collateral order appeal is to protect especially important interests against irreparable harm. The risk of error is much lower, however, when a trial judge has ruled on the sufficiency of the evidence rather than on a question of law.473 On the other hand, the primary reason for the condition that the issue must be collateral to the merits—and one of the interests served by the final judgment rule—is to prevent multiple appeals on the same issue. Sufficiency of the evidence issues would present at least two opportunities for appeal: (1) denial of a motion for summary judgment and (2) denial of a motion for judgment as a matter of law. Moreover, each such appeal is likely to be particularly burdensome to appellate judges because they would have to review the evidence in a record with which they are totally unfamiliar, at least the first time around.

Few of the Court’s opinions concerning the collateral order doctrine provide any explanation, much less cogent ones, of how the interests served by the final judgment rule are, or are not, outweighed by the interests served by the collateral order doctrine. Instead, the opinions focus on one or more of the “conditions” of the doctrine with little, if any, explanation of how those conditions are related to policy. The Johnson opinion affords greater confidence that the decision is grounded in sound appellate policy. It explicitly identifies the policy considerations—multiple appeals, low risk of error, and high expenditure of appellate resources—that affected the decision.474

Although it is a wise decision and one that was foreshadowed in Mitchell itself,475 the Court’s distinction between appeals on pure questions of law and appeals on questions of fact is likely to prove unworkable. First, defendants

470. Id. at 2158.
471. Id. at 2158-59.
472. Id. at 2158.
473. It is for this reason that the standard of review for judicial findings of fact is the deferential “clearly erroneous” standard of Rule 52(a) of the Federal Rules of Civil Procedure whereas, the standard of review for conclusions of law is de novo. Cf. Anderson v. Bessemer City, 470 U.S. 564, 573-75 (1985) (holding that an appellate court must defer to the trial judge’s findings of fact because the trial judge occupies a superior position to assess the credibility of witnesses and has greater expertise in making findings of fact, so that the appellate duplication of the fact finding effort is likely to correct few errors at a huge cost in judicial resources).
474. See supra notes 467-68 and accompanying text.
475. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (stating that the denial of qualified immunity was immediately appealable “to the extent that it turns on an issue of law”).
can manipulate the rule rather easily by appealing on both grounds: the plaintiffs’ asserted right was not clearly established and, even if it was, the plaintiffs failed to produce sufficient evidence that the defendant engaged in the alleged conduct. The appellate court would have jurisdiction over the first ground under Mitchell and pendent-issue jurisdiction over the second. The Johnson Court indicated that appellate courts should not exercise pendent jurisdiction over the evidentiary issue when the defendant appeared to be using the legal issue as a ploy to gain review of the factual issue. It is difficult to imagine, however, how an appellate court could make such a determination. Whether the plaintiff’s asserted right was clearly established at the time of the alleged conduct would seem always to be a debatable proposition.

Second, where a district court denies summary judgment without stating its reasons or specifying which facts are undisputed, appeals courts will have great difficulty separating purely legal issues from factual issues. The Supreme Court conceded that such cases may well arise and that appellate judges would then be required to review the entire record to determine, based on the evidence, which facts are undisputed. The Court concluded, however, that such occasional reviews are preferable to a rule that would require determinations of evidentiary sufficiency in every case. Nevertheless, one of the very policies sought to be advanced by the Johnson decision—avoiding appellate burdens associated with factual determinations—will prove illusory in cases where the district court does not state its reasons for denying summary judgment based on qualified immunity.

Third, the Johnson decision is premised upon a clear distinction between pure questions of law and questions of fact. It is often impossible, however, to characterize an issue as purely legal or factual. There are issues, described as mixed questions of law and fact, that have both legal and factual

476. Id. at 528.
477. For a discussion of pendent-issue jurisdiction, see infra notes 487-511 and accompanying text.
479. For example, one circuit has taken the position that the determination of clearly established law is a “fact-sensitive” inquiry in which a court must identify the precise alleged facts of the case, compare those facts to the facts of prior cases, and then determine whether the facts of the two cases are so similar that the asserted legal right must be deemed clearly established. Dolihite v. Maughon, 74 F.3d 1027, 1033-35 n.3 (11th Cir.), cert. denied, 117 S. Ct. 185 (1996). Because the facts of the two cases will never be identical, under this approach, the comparison of facts necessarily will be an open question in all cases.
481. Id.
482. Id.
483. This very problem arose the year after Johnson in Behrens v. Pelletier, 116 S. Ct. 834 (1996). See infra notes 524-44 and accompanying text.
components. For example, if a plaintiff sues a police officer for using unreasonable force during an arrest, and the defendant moves for summary judgment on the ground that a competent officer in the same situation could have believed the level of force was reasonable, he is entitled to qualified immunity. The issue does not fit into a neat legal or factual box. Instead, resolution of the issue requires that inferences be drawn from the evidence, and it is unclear whether denial of summary judgment on that ground would be appealable under the Mitchell-Johnson rule.

The unworkability of the Mitchell-Johnson rule promises to deprive the collateral order doctrine of one benefit. Despite the inconsistent standards and inadequate policy analysis of the Court’s decisions, the doctrine affords some clarity in that it identifies certain categories of orders that either are, or are not, appealable. After Mitchell and Johnson, even that benefit does not exist with respect to pretrial denials of qualified immunity. Such orders are immediately appealable if they present a pure question of law under Mitchell, not if they present a question of evidentiary sufficiency under Johnson, and maybe or maybe not if they present a mixed question of law and fact.

The Court’s second 1995 discussion of collateral order appeals, Swint v. Chambers County Commission, also involved a qualified immunity issue, as well as a municipal liability issue. After a police raid on a black nightclub in Alabama, various plaintiffs sued the county commission, the city, and individual officers, claiming that the raid, which was authorized by the county sheriff, violated their civil rights. The officers moved for summary judgment based on qualified immunity and the county moved for summary judgment on the ground that the sheriff had not acted pursuant to county policy in authorizing the raid because he was not the final policymaker for the county. Therefore, the county was not liable for the sheriff’s conduct. The district court denied both motions.

484. See Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657, 663 (1873) (“Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts.”).

485. The opinion in Johnson indicates that the Court itself is uncertain on this issue. The Court stated, “We hold that the defendants cannot immediately appeal this kind of fact-related district court determination.” Johnson v. Jones, 115 S. Ct. at 2153 (emphasis added). The hedged nature of the holding implies that some kinds of fact-related determinations may be immediately appealable. See generally Nicole B. Lieberman, Note, Post-Johnson v. Jones Confusion: The Granting of Back-Door Qualified Immunity, 6 B.U. PUB. INT. L.J. 567 (1997) (arguing that some courts have continued to allow collateral order appeals of evidence-sufficiency issues under the guise of determining the “legal” question of whether the plaintiff has stated a claim).

486. See supra note 294 and accompanying text.


488. Id. at 1206-07.

489. Id. at 1205-06.

490. Id. at 1206.

491. Id. at 1206-07. A municipality is liable for constitutional violations by its employees only if the employee acted pursuant to municipal policy that contributed to the
Appellate jurisdiction over denial of the officers' qualified immunity was not disputed, but the Court held that the municipal liability issue was not immediately appealable, either as an independent collateral order or as pending to the qualified immunity appeal. The county argued, as had others previously, that it had a "right" to be free of the burdens of trial if municipal policy did not cause an alleged civil rights violation, a right that would be destroyed if an appeal were postponed until after trial. The Court, however, made clear that it meant what it had said the previous year in Digital Equipment. The Court had abandoned the "right not to stand trial" rationale of Abney and Mitchell because there was no principled way to define such a "right." Instead, the Court relied on a distinction between an immunity from suit and a defense to liability. Denial of the former is immediately appealable, but the latter is not. Because the contention that the sheriff was not the county's final policymaker ranks as a defense to liability rather than an immunity from suit, it is effectively reviewable after final judgment. This explanation is no more satisfactory, however, than the now-abandoned "right not to stand trial" theory. The Court made no attempt to explain why the county's contention ranked as a defense rather than an immunity. This latest definition of the unreviewability condition is just as devoid of content as the now-discarded "rights" definition. The most surprising feature of this analysis, however, is that, having just established the "importance" of the asserted right as the definition of the unreviewability condition in Digital Equipment, the Court made no mention of it. Thus, having abandoned the "right not to be tried" definition for the "importance of the asserted right" definition, the Court appeared to abandon its new definition for yet a third definition, all within two years. Such doctrinal promiscuity would be acceptable if based on sound policy, but the immunity from suit or defense to liability distinction has no obvious relationship to appellate policy and the Court failed to provide one.

The second basis for the county's appeal concerned the proper scope of a collateral order appeal. Because appellate jurisdiction over the officers' qualified immunity appeal was not disputed, the county contended that there

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493. The Court's opinion does not indicate why there was no dispute on this point.
494. Id. at 1212.
495. Id. at 1208.
496. Id.
497. Id.
498. Id.
499. Id.
500. Id.
501. See supra notes 448-51 and accompanying text.
was pendent appellate jurisdiction over the municipal liability issue. The Court characterized this theory as a species of pendent party jurisdiction. The county, which does not have an independent right to appeal, attempted to appeal its appeal to the appeal of the officers who had a right to appeal. The Court rejected pendent party jurisdiction for three reasons. First and most important, permitting the exercise of pendent party jurisdiction would undermine the statutory scheme of 28 U.S.C. § 1292(b). The issue of municipal liability may present a controlling question of law and the proper, congressionally authorized route for seeking review is to request that the district court certify the issue for interlocutory appeal, not to append the issue to a coparty’s appeal.

The Court’s concern, previously raised in Digital Equipment, that litigants should not be permitted to bypass the jurisdictional requirements mandated by Congress is well-founded, but highlights a major contradiction in the Court’s finality jurisprudence. Issues such as double jeopardy, abstention, absolute immunity, qualified immunity, and sovereign immunity are controlling questions of law that would be candidates for discretionary interlocutory appeal under 28 U.S.C. § 1292(b). Yet, the Court for the past two decades had bypassed that route in favor of the collateral order appeal as of right. The Court’s recognition in Swint and Digital Equipment that a broad scope for collateral order appeals tends to undermine congressional policy applied with equal force to the Court’s broad formulation of the collateral order doctrine.

The Court’s second reason for rejecting pendent party appellate jurisdiction concerned Congress’s recent grant of rulemaking authority. The Court stated that “Congress’ designation of the rulemaking process as the way to define or refine when a district court ruling is ‘final’ and when an interlocutory order is appealable warrants the Judiciary’s full respect.” In this rationale lies the Court’s recognition that its judicially created finality jurisprudence, particularly the collateral order doctrine, was in need of reform. It also indicates that the rulemaking process should be used to address the problems of uncertainty, excessive procedural litigation, and repetitive appellate attention created by that jurisprudence.

Finally, the Court expressly left open the question of pendent issue jurisdiction—whether an issue that is extricably intertwined with the qualified immunity issue or that must be reviewed in order to assure meaningful review of the qualified immunity issue may be appended to the collateral order appeal. The Court’s own precedents on this question are not entirely

503. Id. at 1208-09.
504. Id.
505. See id.
506. See id. at 1208-12.
507. Id. at 1210.
508. Id.
509. Id. at 1211.
510. Id. at 1212. It was not necessary to address this question in Swint because the immunity issue was unrelated in any way to the municipal liability issue. Even under the
consistent.\textsuperscript{511} It is clear, however, that if the Court does permit some degree of pendent issue jurisdiction, it will add yet another layer of uncertainty to this already confused area. Courts reviewing collateral order appeals will also have to decide what additional issues are, or are not, related to the collateral issue and, of the related issues, which ones are sufficiently related to justify appellate review.

The unending parade of collateral order issues in the Supreme Court continued into 1996 with two more cases. Having just stated in \textit{Swint} that the rulemaking process for defining finality deserved full respect from the judiciary, the Court in \textit{Quackenbush v. Allstate Insurance Co.}\textsuperscript{512} expanded once again the list of orders eligible for collateral order appeal. The Court held that an order remanding a previously removed case back to state court on the ground that a federal court should abstain from deciding a case in which its decision might interfere with a complex state regulatory scheme, was an immediately appealable collateral order.\textsuperscript{513} The Court found that the jurisdictional issue was controlled by its earlier decision in \textit{Moses H. Cone},\textsuperscript{514} but there was one significant difference in analysis between the two cases. \textit{Moses H. Cone} was decided under the strict, mootness-based formulation of the collateral order doctrine and, like the stay order in \textit{Moses H. Cone}, the stay order in \textit{Quackenbush} met the requirements of that formulation.\textsuperscript{515} First, the stay order was completely separate from the merits because the order was a determination that the federal court should refuse to consider the merits in order to avoid entanglement with state regulation.\textsuperscript{516} Second, the abstention issue would be effectively unreviewable after final judgment in federal court because the state court's judgment on the merits would be res judicata, thus rendering the abstention issue moot.\textsuperscript{517} Instead of applying this straightforward analysis of the unreviewability condition, however, the Court in \textit{Quackenbush} applied the modified rights-based analysis of \textit{Puerto Rico and Digital Equipment}.\textsuperscript{518} The Court explained that the rights asserted on an appeal of the abstention decision were important enough to justify immediate appeal.\textsuperscript{519} The Court did not specify what these important rights were, but


\textsuperscript{514} Id. at 1719. The Court also held that such an order is appealable on the alternative ground that it constitutes a surrender of jurisdiction to the state court. Id.

\textsuperscript{515} Id.

\textsuperscript{516} See id. at 1719-20.

\textsuperscript{517} Id. at 1719.

\textsuperscript{518} Id. at 1719-20.

\textsuperscript{519} Id. at 1720.
instead referred to the interests weighed in deciding whether to abstain.\footnote{520} Those interests, however, are the obligation of the federal courts to exercise the jurisdiction conferred by Congress and the states’ interest in exercising their regulatory authority free of federal interference, not the rights of the litigants.\footnote{521} Perhaps, the Court had in mind the right of litigants to invoke federal jurisdiction to enforce their federal rights.\footnote{522} If that is so, however, the Court failed to explain why the specific right asserted in \textit{Quackenbush}—the right to enforce arbitration agreements—ranked on a sufficiently higher level of importance than other asserted rights deemed not important enough.\footnote{523} If the Court meant to say, as suggested in \textit{Digital Equipment}, that rights created by constitutional or statutory provisions, including the right to enforce arbitration agreements, have the requisite level of importance, then a new dilemma has been created: either all constitutional and statutory rights are sufficiently important to warrant immediate appeal, in which event some of the Court’s prior cases must be overruled and many new candidates for collateral order appeal will come knocking, or only some such rights are important enough, in which event the Court will have to define further what it means by “important enough.” Thus, the “important rights” definition of the unreviewability condition will lead to just as much uncertain, procedural litigation and repeated appellate attention as the “right not to stand trial” definition.

The illusory quality of attempting to define which rights are sufficiently important to warrant immediate appeal is demonstrated by the Court’s second 1996 collateral order decision. In \textit{Behrens v. Pelletier},\footnote{524} the defendant first appealed, unsuccessfully, the partial denial of his motion to dismiss based on qualified immunity.\footnote{525} After discovery, the defendant moved for summary judgment, again based on qualified immunity.\footnote{526} The district court denied the motion, simply stating that issues of fact existed.\footnote{527} The defendant brought a second appeal on the issue of qualified immunity, but the court of appeals dismissed for lack of jurisdiction, ruling that only one qualified immunity appeal is permitted.\footnote{528}

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\begin{itemize}
\item \footnote{520} See \textit{id.} at 1720-21.
\item \footnote{521} \textit{Id.} at 1721, 1726.
\item \footnote{522} \textit{See id.} at 1727. The defendant, after removing the case to federal court, had moved to compel arbitration pursuant to the Federal Arbitration Act. \textit{Id.} at 1717.
\item \footnote{523} For a discussion of other rights found to lack the requisite importance, see \textit{supra} notes 429-46 and accompanying text.
\item \footnote{524} \textit{Behrens v. Pelletier}, 116 S. Ct. 834 (1996).
\item \footnote{525} \textit{Id.} at 837. Part of the motion to dismiss based on qualified immunity was granted. \textit{Id.}
\item The plaintiff had two claims, one based on termination of employment and one based on continuing efforts to deny him other employment. \textit{Id.}
\item The district court granted the motion to dismiss the termination claim but denied the motion to dismiss the continuing efforts claim. \textit{Id.}
\item Thus, the defendant sought to appeal only denial of qualified immunity on the continuing efforts claim. \textit{Id.}
\item \footnote{526} \textit{Id.} at 838.
\item \footnote{527} \textit{Id.}
\item \footnote{528} \textit{Id.}
\end{itemize}
The Supreme Court, however, rejected the one-appeal rule for two reasons. First, the Court stated that Mitchell itself contemplated multiple qualified immunity appeals in a single case. A defendant could first appeal a denial of his motion to dismiss on the ground that the constitutional right allegedly violated was not clearly established at the time of the defendant’s alleged conduct. If the first appeal is unsuccessful, the defendant can go through discovery, move for summary judgment on the ground that the evidence is insufficient to demonstrate a violation of clearly established law, and upon denial of that motion, appeal a second time. The difficulty with this reasoning is that, as the Court recently had held in Johnson v. Jones, sufficiency of the evidence rulings are not immediately appealable, so that the Court’s second envisioned appeal would be dismissed for lack of jurisdiction. Thus, assuming that Johnson is still good law, it is difficult to imagine the ground upon which a second appeal could be brought, unless the Court had in mind that the second appeal would involve a mixed law-fact question.

The second reason for rejecting a one-appeal rule directly concerns the importance of the interest at stake. In response to the argument that a denial of a motion to dismiss is not a conclusive determination of qualified immunity because the defendant can later move for summary judgment on the same issue and appeal a denial, the Court stated that qualified immunity confers a right to avoid discovery, as well as trial. A denial of a motion to dismiss conclusively determines the right to avoid discovery; therefore, it is just as appealable as a denial of summary judgment. Thus, in the course of establishing a rule permitting multiple appeals of qualified immunity issues in one case, the Court in Behrens appears to have established a more general proposition that there is an independent right to avoid discovery that, in and of itself, warrants immediate appeal.

An independent “right to avoid discovery” promises to add uncertainty, procedural wrangling, and docket burdens to an area in which these problems are already endemic. First, with respect to the unreviewability condition of the collateral order appeal, it appeared that the Court had recently abandoned a “right not to stand trial” definition in favor of a “sufficiently important rights” definition, only to swing back to a rights-based analysis in Behrens, this time a “right to avoid discovery.” Having done so, questions concerning what other litigation-avoiding “rights” warrant immediate appeal are likely to continue to plague appellate courts. Second, it appears that such questions must still be resolved by reference to whether the asserted right is

529. See id. at 838-41.
530. Id. at 839.
531. Id.
532. Id. at 839-40.
534. For a discussion of the distinction between legal, factual, and mixed questions and the possibly uncertain reach of Johnson, see supra notes 458-63 and accompanying text.
536. Id. at 839-40.
“important enough” to justify immediate appeal. Justice Scalia’s majority opinion in Behrens did not explain why an independent right to avoid discovery attains the requisite level of importance, but Justice Breyer’s dissenting opinion argued that it is not important enough. The history of the Court’s “importance” jurisprudence leading to the Scalia-Breyer debate in Behrens has been described by one distinguished appellate jurist, Judge Posner, as a “maze.”

Third, in a qualified immunity appeal, an official’s right to avoid discovery is not founded on any constitutional or statutory provision, previously suggested by the Court as the basis for evaluating “importance,” but rather on the policy to avoid disruption of government. New questions will surely arise as to what constitutional or statutory objections to discovery, as well as other policy-based objections, are immediately appealable. For example, if a defendant objects to a document request on the ground that the information is protected by the Fifth Amendment privilege against self-incrimination but is ordered to produce it, is the discovery order immediately appealable on the ground that the defendant is asserting a constitutional “right to avoid discovery” that is at least as important as the policy-based right in Behrens? Because there are many constitutional, statutory, and policy objections to discovery, the Supreme Court’s endorsement of an appealable “right to avoid discovery” will either cause an avalanche of collateral order appeals of discovery issues or consume inordinate amounts of appellate resources in explaining how the “right to avoid discovery” is limited to qualified immunity, or at least to immunities in general.

Finally, the Behrens multiple-appeal rule coupled with its “right to avoid discovery” rationale creates, in practical terms, the potential for an

537. Id. at 840 (stating that the defendant’s asserted right was “important enough” to justify multiple appeals).

538. Id. at 844 (Breyer, J., dissenting).

539. Board of Educ. v. Illinois State Bd. of Educ., 79 F.3d 654, 659 (7th Cir. 1996); see also In re Ford Motor Co., 110 F.3d 954, 958-62 (3d Cir. 1997). “In all of these cases, the [Supreme] Court has compared the apple of the desire to avoid piecemeal litigation to the orange of, for example, federalism.” Id. at 960. Nevertheless, the court concluded that the attorney-client privilege was a sufficiently important “orange” rooted in policy—protecting confidentiality. Id. at 961-62. But see United States v. Section 17 Townsend 23 North, 40 F.3d 320, 322 (10th Cir. 1994) (recognizing that the Supreme Court now requires a judgment about the value of the asserted interest and concluding that an asserted interest in lifting a stay in order to defend an action immediately rather than later is not sufficiently important without explaining the basis for its value judgment).


541. The Court’s “right not to stand trial” standard led to a litigation explosion over which of the many possible grounds for pretrial dismissal were encompassed within such a “right” and therefore immediately appealable. The Court’s new “right to avoid discovery” arguably encompasses many discovery objections and therefore has the potential to cause a similar litigation explosion. See, e.g., In re Ford Motor Co., 110 F.3d at 963 (holding that denial of the attorney-client privilege objection to discovery is an immediately appealable collateral order).
unending string of qualified immunity appeals in individual cases—ranging from a denial of a motion to dismiss, from any number of discovery orders, from a denial of summary judgment, from a denial of summary judgment after further discovery, from a denial of a motion in the midst of trial for judgment as a matter of law, and perhaps others as well. The multiple-appeal rule threatens to undermine every policy behind the final judgment rule, and thus the rule itself. It undermines the trial judge’s independence with repeated appellate intervention. It is a weapon with which to wear down plaintiffs with meritorious claims, and it requires repeated appellate consideration of the same issue, merely in different forms. These threats to the final judgment rule highlight the underlying defect of the Behrens analysis—the absence of appellate policy analysis. After making an essentially conclusory statement that the “right to avoid discovery” is “important,” the Court’s opinion fails to explain how the threat of irreparable harm to this “right” outweighs the threat that an immediate appeal would pose for disrupting trial processes, obstructing just claims, and consuming appellate resources.

The plaintiff in Behrens advanced a second reason for dismissing the appeal, and the Court’s rejection of it indicates that the Mitchell-Johnson rule is likely to consume inordinate amounts of appellate resources. The district court denied summary judgment on the ground that material issues of fact remained, without further explanation; therefore, the plaintiff argued that under Johnson, the appeal should be dismissed because it was fact-related.542 It was predicted in Johnson itself that such unelaborated denials of summary judgment would make the rule unworkable because it would force appellate courts to undertake a cumbersome review of the record in order to determine which allegations were supported by sufficient evidence.543 The prediction proved accurate in Behrens: “That is the task now facing the Court of Appeals in this case.”544 What is missing, once again, is any policy analysis such as whether the threat of irreparable harm to the interest in avoiding discovery is worth the costs of such cumbersome appellate reviews that are likely to occur over and over again.

The Supreme Court’s recent collateral order jurisprudence indicates that none of the problems that prompted Congress in 1990 to grant rulemaking authority in this area has gone away.545 Instead, the problems have gotten

544. Behrens v. Pelletier, 116 S. Ct. at 842. The Court also rejected the argument that the denial of qualified immunity should not be immediately appealable if there are other, nonappealable claims in the case, such as a claim for injunctive relief. Id. The circuits appear to have been unanimous in this conclusion. See id. at 841 n.5. Nevertheless, the ability to appeal qualified immunity while other claims remain pending in the district court demonstrates how disruptive such appeals can be; they raise many questions. The questions include whether the district court loses jurisdiction while the appeal is pending or whether litigation of the nonappealable claims must be stayed pending a decision on the appeal.
545. The Court’s most recent decision in this area, Johnson v. Fankell, 117 S. Ct. 1800 (1997), is beyond the scope of this Article because it concerns state courts, but it further illus-
worse. Purely procedural litigation over what constitutes an appealable collateral order continues, involving questions such as the following: how to define the unreviewability condition; if the importance of the asserted interest is the proper definition, how to determine which interests are important enough, and which are not; to what extent the availability of alternative remedies is a relevant factor; if immunity from suit is the proper definition of unreviewability, how to distinguish between an immunity from suit and a defense to liability; the contours of the newfound “right to avoid discovery;” and to what extent the scope of a collateral order appeal includes pendent issues not independently appealable. Qualified immunity appeals promise to be an especially troublesome source of procedural litigation because questions still exist such as: to what extent sufficiency of the evidence issues may be appended to an appeal on whether the law was clearly established; where summary judgment has been denied without explanation, how to glean from the record which allegations of fact were likely deemed not in dispute; how to treat mixed questions of law and fact and; whether sufficiency of the evidence issues are appealable on a second appeal, if not the first. Moreover, the very existence of such issues demonstrates that the limits on what rulings are appealable collateral orders are even less clear than in 1990, and the

trates the continuing problems with the collateral order doctrine. In *Fankell*, the Court held that a state court's interpretation of its own final judgment rule, denying immediate appeal of a pretrial denial of qualified immunity, is not preempted by the *Mitchell* rule. *Id.* at 1807. Two reasons were given to support this conclusion. First, a state's denial of immediate appeal is not a great interference with the federal qualified immunity defense because “the claim will be reviewable by the Idaho Supreme Court after the trial court enters a final judgment, thus providing the petitioners with a further chance to urge their immunity. Consequently, the postponement of the appeal until after final judgment will not affect the ultimate outcome of the case.” *Id.* at 1806. This reason is consistent with the original, strict collateral order doctrine, but it belies the rationale of *Mitchell and Behrens*, which hold that an official's right to avoid discovery and trial will be destroyed if an immediate appeal is denied. Thus, doctrinal confusion over the effective unreviewability condition of the collateral order doctrine will continue. Second, the Court stated that the officials' interest in avoiding the burdens of litigation were outweighed by the “countervailing consideration” that states have the right to decide for themselves how to structure the operation of their own courts by the use of neutral procedural rules. *Id.* at 1807. Because Idaho did not single out qualified immunity for denial of immediate review, but merely did so as an application of its general rule requiring a final judgment, its rule was not preempted. *Id.* at 1805. This rationale promises to provoke further litigation over what other “countervailing considerations” outweigh the need for immediate appeal. In addition, *Mitchell* and *Fankell* provide a strong incentive for forum-shopping based on applicable law. A plaintiff that wishes to assert a § 1983 damages claim against a state official, in a state in which the courts do not afford immediate qualified immunity appeal, has a strong incentive to sue in state court in order to avoid the delays in federal court resulting from the *Mitchell-Behrens* rules. Thus, enforcement of the federal defense will vary according to whether the suit is brought in federal or state court because of differing legal rules. Cf. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938) (stating that one of the evils of the doctrine of general federal common law is that it made rights under common law “vary according to whether enforcement was sought in the state or in the federal court”).
Supreme Court, after a brief lull, has gone from annual to biennial review of the doctrine.

B. Litigation in the Lower Courts

Collateral order litigation in the lower federal courts and commentaries in this area indicate that there are many unresolved issues as to what additional orders qualify for immediate review. A sample of such orders includes:

denial of federal sovereign immunity;\(^{546}\) denial of intramilitary immunity;\(^{547}\) denial of state law immunity on state law claims;\(^{548}\) denial of state action antitrust immunity;\(^{549}\) denial of foreign sovereign immunity;\(^{550}\) denial of international comity;\(^{551}\) grant of state sovereign immunity;\(^{552}\) pretrial commitment;\(^{553}\) denial of separation of powers claims;\(^{554}\) dismissal of

\(^{546}\) See, e.g., Alaska v. United States, 64 F.3d 1352, 1355 (9th Cir. 1995) (holding that it is not appealable); Pullman Const. Indus., Inc. v. United States, 23 F.3d 1166, 1168 (7th Cir. 1994) (holding that it is not appealable).

\(^{547}\) Compare In re United States, 733 F.2d 10, 14 (2d Cir. 1984) (finding that it is not appealable), with Flohr v. Mackovjak, 84 F.3d 386, 390 (11th Cir. 1996) (finding that it is appealable), and Lutz v. Secretary of the Air Force, 944 F.2d 1477, 1484 (9th Cir. 1991) (finding that it is appealable).

\(^{548}\) The cases agree that whether a state-conferred immunity would be effectively unreviewable after final judgment depends upon the state's own assessment of the nature of that immunity. See, e.g., Boice v. Unisys Corp., 50 F.3d 1145, 1147 (2d Cir. 1995); In re City of Philadelphia Litig., 49 F.3d 945, 957-58 (3d Cir. 1995); Cummings v. DeKalb County, 24 F.3d 1349, 1355-56 (11th Cir. 1994). These cases, however, were decided in the era when the Supreme Court's "right not to be tried" and "immunity from suit" metaphors were in vogue. Now that the Court has created its new "importance of the asserted interest" test, the federal courts must make a value judgment about a state's value judgment, even when a state has not made a value judgment. This issue therefore promises to be a bog within a bog.

\(^{549}\) Compare Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth., 801 F.2d 1286, 1290 (11th Cir. 1986) (finding that it is appealable), with Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 567 (6th Cir. 1986) (finding that it is not appealable). See also Patrick E. Sweeney, Note, Interlocutory Appeals of Orders Denying Claims of State Action Antitrust Immunity, 49 OHIO ST. L.J. 653, 669 (1988) (concluding that it should be appealable).

\(^{550}\) Compare Eckert Int'l, Inc. v. Sovereign Democratic Republic of Fiji, 32 F.3d 77, 78 (4th Cir. 1994) (finding that it is appealable), and Stena Rederi AB v. Comision de Contractos de la Republica Mexicana, 923 F.2d 380, 385 (5th Cir. 1991) (finding that it is appealable), and Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 443 (D.C. Cir. 1990) (finding that it is appealable), with Transaero, Inc. v. La Fuerza Aerea Boliviana, 99 F.3d 538, 541 (2d Cir. 1996) (finding that it is not appealable, at least where the defendant's claims lack personal jurisdiction). cert. denied, 117 S. Ct. 1843 (1997).

\(^{551}\) See, e.g., Pan E. Exploration Co. v. Hufo Oils, 798 F.2d 837, 838-39 (5th Cir. 1986) (finding that it is not appealable).

\(^{552}\) See, e.g., Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 5 F.3d 147, 149 (6th Cir. 1993) (finding that it is not appealable). Denial of state sovereign immunity, by contrast, is immediately appealable. See supra note 430 and accompanying text.
indictment without prejudice;\textsuperscript{555} grant of security as a condition for preliminary injunction;\textsuperscript{556} discovery orders, especially after the Court found a “right to avoid discovery” in \textit{Behrens};\textsuperscript{557} grant of “stay-put” relief;\textsuperscript{558} reservation of ruling on, or denial of, a motion to withdraw a citation;\textsuperscript{559} denial of appointed counsel in civil cases;\textsuperscript{560} grant of attorney or party sanctions;\textsuperscript{561} denial of interim fees to appointed counsel;\textsuperscript{562} and judicial disqualification.\textsuperscript{563}


\textsuperscript{554} See, \textit{e.g.}, United States v. Rose, 28 F.3d 181, 186 (D.C. Cir. 1994) (finding that it is appealable).

\textsuperscript{555} See, \textit{e.g.}, United States v. Bratcher, 833 F.2d 69, 72 (6th Cir. 1987) (finding that it is not appealable).

\textsuperscript{556} See, \textit{e.g.}, Hitachi Zosen Clearing, Inc. v. Tel-Matik, Inc., 846 F.2d 27, 28-29 (6th Cir. 1988) (finding that it is not appealable).

\textsuperscript{557} See, \textit{e.g.}, \textit{In re Ford Motor Co.}, 110 F.3d 954, 958 (3d Cir. 1997) (finding that it is appealable). \textit{See generally} Nicole E. Paolini, Comment, \textit{The Cohen Collateral Order Doctrine: The Proper Vehicle for Interlocutory Appeal of Discovery Orders}, 64 \textit{Tul. L. Rev.} 215 (1989) (arguing that discovery orders that cause irreparable harm should be appealable).

\textsuperscript{558} Board of Educ. v. Illinois State Bd. of Educ., 79 F.3d 654, 656-57 (7th Cir. 1996) (finding that it is appealable).

\textsuperscript{559} Donovan v. United Steelworkers of Am. Local 2243, 731 F.2d 345, 347-48 (6th Cir. 1984) (finding that the reservation of a ruling is not appealable, but noting that the denial of a motion would be appealable).

\textsuperscript{560} \textit{Compare} Kuster v. Block, 773 F.2d 1048, 1049 (9th Cir. 1985) (finding that it is not appealable), and Smith-Bey v. Petsock, 741 F.2d 22, 26 (3rd Cir. 1984) (finding that it is not appealable), \textit{with} Robbins v. Maggio, 750 F.2d 405, 413 (5th Cir. 1985) (finding that it is appealable), \textit{and} Bradshaw v. Zoological Soc’y, 662 F.2d 1301, 1304-05 (9th Cir. 1981) (finding that it is appealable). \textit{See generally} Nicolas Swardloff, \textit{Note, Denial of a Pro Se Litigant’s Motion to Appoint Counsel: The Preclusive Effect of Refusing Immediate Review}, 50 \textit{Fordham L. Rev.} 1399 (1982) (arguing that the denial of a pro se litigant’s motion to appoint counsel should be immediately appealable); James P. Weygandt, \textit{Note, Motions for Appointment of Counsel and the Collateral Order Doctrine}, 83 \textit{Mich. L. Rev.} 1547 (1985) (arguing that the denial of motion to appoint counsel should be immediately appealable). \textit{But see} Jeffrey D. Hanslick, \textit{Comment, Decisions Denying the Appointment of Counsel and the Final Judgment Rule in Civil Rights Litigation}, 86 \textit{Nw. U. L. Rev.} 782 (1992) (proposing that the denial should not be appealable).

The most troublesome category of collateral order appeal—the denial of qualified immunity—promises to bedevil the federal courts well into the future, if recent cases are any indication. First, under the Mitchell-Johnson rule—whether the right asserted by the plaintiff was based on clearly established law is appealable, but whether the plaintiff produced sufficient evidence that the asserted right was violated is not—is a ruling on the sufficiency of plaintiff’s allegations of fact appealable? 564 Second, is the mixed question of law and fact—whether the plaintiff produced sufficient evidence that a reasonable official could not have believed his actions were lawful, in light of clearly established law and the information available to the official—immediately appealable, or must all sufficiency of the evidence issues await final judgment? 565 Third, if the defendant appeals the legal question of clearly established law, may the court of appeals exercise pendent jurisdiction over the sufficiency of the evidence issues? 566 Fourth, to what extent may a court of appeals exercise pendent jurisdiction over other,

1993, at 56, 57. (noting the possible conflict in the Circuits with respect to appealability of party sanctions).


564. See, e.g., Vaughan v. United States Small Bus. Admin., 82 F.3d 684, 684 (6th Cir. 1996) (finding that it is appealable). But see Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 166-67 (1993) (holding that a plaintiff in a civil rights damages action against a municipal entity is not required to set out in detail the facts upon which he bases his claim). See generally Lieberman, supra note 485 (arguing that some courts have continued to allow collateral order appeals of evidence-sufficiency issues under the guise of determining the “legal” question whether plaintiff has stated a claim).

565. At least five circuits have held that such issues are not immediately appealable. See, e.g., Winfield v. Bass, 67 F.3d 529 (4th Cir. 1995); Stella v. Kelley, 63 F.3d 71 (1st Cir. 1995); Sevier v. City of Lawrence, 60 F.3d 695 (10th Cir. 1995); Hale v. Townley, 45 F.3d 914 (5th Cir. 1995); Zorzi v. County of Putnam, 30 F.3d 885 (7th Cir. 1994). At least two circuits have held that such issues are immediately appealable. See, e.g., Salim v. Proulx, 93 F.3d 86 (2d Cir. 1996); Cottrell v. Caldwell, 85 F.3d 1480 (11th Cir. 1996). The Eighth Circuit appears to be split internally. See, e.g., Reece v. Groose, 60 F.3d 487, 490 (8th Cir. 1995) (finding that it is appealable, but noting that “[p]arts of the Supreme Court’s opinion in Johnson v. Jones can be read to prohibit the exercise of appellate jurisdiction over such issues on a pretrial appeal”); Sanders v. Brundage, 60 F.3d 484, 486 (8th Cir. 1995) (finding that it is not appealable).

566. See McMillian v. Johnson, 88 F.3d 1554, 1562-63 (11th Cir. 1996) (upholding pendent jurisdiction over sufficiency of evidence issues), cert. denied sub nom. McMillian v. Tate, 117 S. Ct. 2514 (1997). But see Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir.), cert. denied, 117 S. Ct. 584 (1996); Mick v. Brewer, 76 F.3d 1127, 1129 (10th Cir. 1996); Ratliff v. DeKalb County, 62 F.3d 338, 341 (11th Cir. 1995) (expressing doubt that after Johnson, there would be pendent jurisdiction, and stating that, even if there were, discretion should be exercised to decline such review); Stoneking v. Bradford Area Sch. Dist., 856 F.2d 594, 595 (3d Cir. 1988) (rejecting pendent jurisdiction).
nonimmunity legal issues.\textsuperscript{567} Fifth, is the right to appeal based on qualified immunity waived by a failure to prosecute an earlier collateral order appeal?\textsuperscript{568}

Just as purely procedural litigation over the availability and scope of a collateral order appeal is likely to increase, uncertainty over the contours of the collateral order doctrine is likely to demand even greater attention from the Supreme Court. From a review once every six years in the strict, post-
Cohen era to annual review in the broad, post-Abney era, the Court is now grappling with the collateral order doctrine nearly twice a year, primarily over qualified immunity appeals. Commentators are unanimous in their criticism of the current doctrine as overly complex and replete with distinctions unrelated to appellate policy.\textsuperscript{569} The primary defense of the Court's decisions has been that, despite the doctrinal messiness, they have produced acceptable results. Whatever validity such a defense might once have had, by now it is clear the wave of purely procedural litigation will continue, requiring repeated attention from the federal courts. In the area of qualified immunity in particular, the sheer volume of cases and their entanglement with the merits ensure that the Mitchell-Johnson-Behrens rules will prove unworkable. Such costs to the federal judicial system are not acceptable. If the Supreme Court wishes to place further limits on its finality jurisprudence and if Congress intended to reduce purely procedural litigation in both the courts of appeals and the Supreme Court, then reform deserves serious consideration at this time.

VI. REMEDYING THE PROBLEMS OF THE WIDE COLLATERAL ORDER DOCTRINE: FOUR PROPOSALS

The nature of the problems with the collateral order doctrine suggests, in this author's view, four alternative remedies: (1) return to the original,

\textsuperscript{567} See Kincade v. City of Blue Springs, 64 F.3d 389, 394-95 (8th Cir. 1995), cert. denied, 116 S. Ct. 1565 (1996) (upholding pendent jurisdiction over the issue); Moore v. City of Wynnewood, 57 F.3d 924, 928-29 (10th Cir. 1995) (upholding pendent jurisdiction over the issue); Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1502-03 (11th Cir. 1990) (upholding pendent jurisdiction over the issue); Duran v. City of Douglas, 904 F.2d 1372, 1375-76 (9th Cir. 1990) (upholding pendent jurisdiction over other issues). \textit{But see} Rogge-Rodriguez v. Lema Moya, 926 F.2d 103, 104-05 (1st Cir. 1991) (rejecting pendent jurisdiction); Lundblad v. Celeste, 874 F.2d 1097, 1105 (6th Cir. 1989) (rejecting pendent jurisdiction). \textit{See generally} Riyaz A. Kanji, Note, \textit{The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context}, 100 YALE L. J. 515 (1990) (arguing that pendent jurisdiction should extend only to issues "logically antecedent" to the collateral order).

\textsuperscript{568} See Zayas-Green v. Casaine, 906 F.2d 18, 21-23 (1st Cir. 1990) (finding that it is waived); Edwards v. Cass County, 919 F.2d 273, 274-75 (5th Cir. 1990) (finding that it is waived).

strict collateral order doctrine of *Cohen*; (2) openly acknowledge that the current collateral order doctrine consists of several factors that vary in importance from issue to issue rather than a formula of set conditions; (3) overrule *Mitchell v. Forsyth*;⁵⁷⁰ or (4) permit only one, comprehensive qualified immunity appeal per case. These proposed remedies will be discussed in order, from the broadest—a return to strict doctrine—to the narrowest—one qualified immunity appeal.

### A. A Return to the Strict Collateral Order Doctrine

The most far-reaching remedy for the problem is to abandon the thirty-year experiment of broadening the collateral order doctrine and return to the original, strict requirements set forth in *Cohen*. A prejudgment order would be appealable as of right only if it (1) conclusively determines an issue; (2) the issue is completely separate from the merits; and (3) the order would be unreviewable at all after final judgment because the issue would be moot. In the era in which these requirements held sway, collateral order appeals truly were confined to a "small class of cases," and the Court was obliged to review the doctrine only once every six years. This experience is a strong indication that a return to the strict collateral order doctrine would provide the most complete remedy for the problems. The fastest way to implement this reform is to exercise the rulemaking authority granted by Congress and amend the Federal Rules of Appellate Procedure to include a rule setting forth the three strict *Cohen* requirements. In the absence of such action, the Court should embark upon the more gradual process of returning to the strict doctrine through caselaw evolution.

This reform would work substantial, but not universal, change throughout the categories of orders already eligible for collateral order appeal. All of the orders held ineligible for such appeal in the Court's decisions over the past thirty years would remain so under the strict doctrine, either because the issues would not be moot after final judgment or because the issues are not separate from the merits.⁵⁷¹ A few orders held eligible for collateral order appeal

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appeal would remain. Significant change would occur in the line of cases holding that orders affecting a "right not to stand trial," "important" rights, or a "right to avoid discovery" are immediately appealable as of right in every case, even though a successful appeal after final judgment would result in vacating an adverse judgment. These cases—Curry, Abney, Skokie, Nixon, Mitchell, Puerto Rico Aqueduct, and Behrens—would all be overruled on the ground that if an adverse final judgment is entered, the issue would not be moot and if an appeal is successful, the judgment would be vacated.

To the concern that irreparable harm to important interests would occur if appeal were postponed, there is a straightforward answer—discretionary interlocutory appeal under 28 U.S.C. § 1292(b) or a mandamus action under 28 U.S.C. § 1361. For example, if a public official who has been sued for money damages for violation of federal rights law is denied dismissal or summary judgment based on qualified immunity, he can seek certification of an interlocutory appeal on the ground that whether the plaintiff's asserted right was clearly established at the time of the alleged conduct presents a controlling question of law. If in fact there is a serious question whether the asserted right is based on clearly established law, interlocutory appeal would be proper. Although there are many limitations on the availability of § 1292(b) appeals under the current law and in practice, clear and timely dictum from the Supreme Court that these limitations should be relaxed in order to permit more § 1292(b) appeals as a less costly alternative to collateral order appeal as of right, ought to make § 1292(b) appeals more readily available in cases that truly merit such an appeal.

B. Open Recognition of a Flexible Standard

If the Court is reluctant to abandon its broad doctrine, it should at least acknowledge that limiting principles are needed. Their own standards have not provided a satisfactory explanation for why some orders qualify for a collateral order appeal and others do not. The fundamental reason for the lack of a satisfactory explanation is that the standards are a fiction that has become increasingly obvious in recent years. The fiction is that an order must satisfy a given set of stated conditions—separate from the merits, unreviewable after final judgment, and conclusive determination—and if any one condition is not satisfied, an appeal must await final judgment. This formulaic approach is a fiction because the set conditions do not exist in fact. With


573. The Supreme Court itself has recently indicated that the availability of discretionary § 1292(b) interlocutory appeal should be given serious consideration as an alternative to broad collateral order appeal. See supra notes 440-57 and accompanying text; see also In re Repetitive Stress Injury Litig., 11 F.3d 368, 372-73 (2d Cir. 1993) (holding that the order of consolidation was not immediately appealable under the strict collateral order doctrine, but consolidation of cases with widely varying individual issues was a sufficiently clear abuse of discretion to justify mandamus relief).
respect to the condition that the issue be completely separate from the merits, some orders hold eligible for immediate appeal are indeed completely separate, but others bear a close relationship to the merits. Qualified immunity is virtually indistinguishable from the merits and the Court has not pretended that it is. Instead, the Court formulated a new definition—“conceptually distinct” from the merits—tailored exclusively for qualified immunity. The condition that the issue be unreviewable after final judgment has provided the greatest difficulty of all. From the original Cohen definition that review after final judgment must be unavailable because the issue would be moot, the Court has staggered from definition to definition—substantive policy, the “right not to stand trial,” an “immunity from suit” rather than a “defense to liability,” an interest that is sufficiently “important,” and a “right to avoid discovery.” At times the Supreme Court has suggested that the “importance” of the asserted interest is a fourth, independent condition, yet the Court has failed to explain in any satisfactory way how to determine which interests are important enough to warrant immediate appeal.

The test actually employed by the Court is a flexible one, in which the weight accorded the relevant factors varies according to the issue presented for appeal. The Court has identified four such factors: the separability from the merits; the unreviewability after final judgment; the importance of the interest sought to be protected through immediate appeal; and the conclusiveness of the trial judge’s determination of the issue. The weight accorded the separability factor has varied from great (complete separation required) to intermediate (some relationship) to the merits tolerated to none (issue “conceptually distinct” from the merits). The weight accorded the unreviewability factor has also varied from great (issue must be moot after final judgment) to intermediate (a “right not to stand trial at all”) to minimal (a “right” to avoid general burdens of litigation such as discovery). The importance factor remains to be elaborated because it is relatively new as an independent factor. The Court has given some indication that “importance” is weighted according to whether the asserted interest is grounded in either constitutional or statutory provisions or in the Court’s policy preferences. Finally, the weight of the conclusiveness factor varies from great (inherently tentative) to intermediate (some indication of intent to revisit the issue). Recognition that the Court in fact employs a flexible test rather than a formula of set conditions explains the results of cases that otherwise are wildly inconsistent. For example, the Court has ordained appeals that are enmeshed in the merits where there has been a significant risk of harm to interests deemed sufficiently important, but not where the asserted interest, although separate from the merits, is deemed insufficiently important to the litigant.

Collateral order appeals are analogous to preliminary injunctions insofar as they seek to halt further proceedings while a case is still pending. The Court’s stated rationale for collateral order appeals is quite similar to that for preliminary injunctions: preventing irreparable harm to important interests. Judge Richard Posner, in attempting to sort out the maze created by the debate over which interests are sufficiently important to warrant immediate appeal, has suggested that importance should not be viewed as an independent
factor but as implicit in the element of unreviewability or irreparable harm.\textsuperscript{574} If a harm is irreparable but slight, the irreparable harm is not severe enough to justify a departure from the final judgment rule.\textsuperscript{575} Carrying the analogy to preliminary injunctions one step further, Judge Posner has also suggested that a collateral order appeal should depend upon the likelihood that the appeal will be successful.\textsuperscript{576} If there is little chance of reversal, the risk of irreparable harm is slight and an appeal should be disallowed.\textsuperscript{577}

It is well-established that the test for granting a preliminary injunction is a flexible one in which the weight accorded the relevant factors varies according to the context of the case. The relevant factors are the degree of irreparable harm to the plaintiff if the injunction is denied, irreparable harm to the defendant if the injunction is granted, the likelihood of success on the merits, and the public interest. Less irreparable harm is required if the likelihood of prevailing is great, and a lower likelihood of prevailing is acceptable if the irreparable harm is great.\textsuperscript{578} If preliminary injunctions are an apt analogy, it would be useful for the Court to recognize that its standards for collateral order appeal are similarly flexible.

The implications of the Court's collateral order jurisprudence have been recognized by scholars. Professor Michael Solimine has argued that while the logic of the collateral order doctrine is weak, the results of the cases are sound and the same results would and should be achieved by permitting more interlocutory appeals under 28 U.S.C. § 1292(b).\textsuperscript{579} Professor Robert Martineau has argued that the doctrine has fostered undue procedural litigation and has urged the adoption of the "ABA-Wisconsin" approach under which an appeal as of right would exist only after a true final judgment, and a broad discretionary interlocutory appeal would be available on a case-by-case basis.\textsuperscript{580}

Flexible standards are appropriate for preliminary injunctions, as well as other areas,\textsuperscript{581} but are they good appellate policy? Flexible standards are useful primarily because they are adaptable to the widely varying facts of individual cases, but an appeal as of right in the federal system is not, at this time, a discretionary determination based on the facts of individual cases. An appeal as of right instead requires either a truly classic final judgment or an order that fits into a category identified as appealable. Thus, a frank

\textsuperscript{574} Board of Educ. v. Illinois Bd. of Educ., 79 F.3d 654, 658-59 (7th Cir. 1996).
\textsuperscript{575} Id. at 658.
\textsuperscript{576} Id.
\textsuperscript{577} Id.
\textsuperscript{578} See generally John Leubsdorf, The Standard for Preliminary Injunctions, 91 Harv. L. Rev. 525 (1978) (suggesting ways to simplify the decision to grant or deny a preliminary injunction).
\textsuperscript{579} Solimine, supra note 435, at 1185.
\textsuperscript{580} Martineau, supra note 427, at 777-78.
\textsuperscript{581} See, e.g., Lloyd C. Anderson, United States v. Microsoft, Antitrust Consent Decrees, and the Need for a Proper Scope of Judicial Review, 65 Antitrust L.J. 1, 6 (1996) (arguing that the standards for judicial review of proposed antitrust consent decrees ought to be flexible).
recognition that the requirements for a collateral order appeal are not formulaic conditions, but rather are flexible standards that would be a big step in the direction of a discretionary appeal dependent upon the facts of individual cases. If, for example, as Judge Posner suggests, one element of appealability should be the likelihood of reversal, such a determination can only be made on a case-by-case basis. Professors Cooper and Carrington, some years ago, called for broad discretionary interlocutory appeal. The danger of this approach, frankly recognized by Professors Cooper and Carrington, is that the courts of appeals would be inundated with applications for interlocutory appeals by attorneys eager to reverse a vast array of unfavorable pretrial rulings. They foresaw that this problem would be remedied over time, as the courts of appeals refused to review the great majority of such appeals and attorneys became disciplined enough to attempt interlocutory appeal only when truly it was warranted in light of experience. If the “litigation explosion” over collateral order appeals is any indication, however, such discipline seems unlikely to occur. Thus, an open recognition of a flexible standard, while reflecting what the Supreme Court actually does, would likely continue, if not exacerbate, the current problems. As such, it is a less attractive remedy than the others discussed herein.

C. Overrule Mitchell v. Forsyth

A third alternative is to reconsider the one ruling that has caused the greatest mischief—Mitchell v. Forsyth. The unique feature of Mitchell is that that appeal concerned the issue of qualified immunity, which was not at all separate from the merits; and the Supreme Court did not pretend that it was. Instead, the Court manipulated the collateral order doctrine by substituting a “conceptually distinct” standard under which the issue was appealable as long as it was not identical to the merits. Qualified immunity is not an issue that occasionally crops up in odd cases, but rather is asserted routinely in one of the largest segments of the federal civil caseload—actions for money damages against public officials. Although statistics do not appear to be available, it is likely that the courts of appeals have been obliged to consider a very large number of collateral order appeals based on qualified immunity.

The policy underlying the requirement that the issue be separate from the merits prevents multiple appeals of the same issue in a single case. By abandoning that requirement in Mitchell, the Court invited multiple appeals because, as the factual record of a case develops, the same issue can be presented with different factual predicates. So it has been with qualified

582. Cooper, supra note 569, at 164; Carrington, supra note 4, at 165-66.
583. See Cooper, supra note 569, at 157; Carrington, supra note 4, at 166.
585. See id. at 520.
586. Id. at 547.
immunity, as revealed by the attempts of at least two circuits to impose a one-appeal rule for qualified immunity in an attempt to stop multiple appeals, a position rejected in Behrens v. Pelletier. Indeed, with its declaration of a new, independent “right to avoid discovery,” the Behrens Court invited yet another layer of appeals based on discovery orders arguably involving qualified immunity.

The Court has placed one limit on qualified immunity appeals with its decision in Johnson v. Jones, rejecting at least some immediate appeals based on the sufficiency of the evidence. The Mitchell-Johnson distinction between appeals on questions of law and appeals on questions of fact will create so much additional confusion, however, that there will be even more procedural litigation and consumption of appellate resources. In this respect, the Mitchell-Johnson rule resembles the Enelow-Ettelson doctrine, which was finally overruled by the Court in Gulfstream Aerospace Corp. v. Mayacas Corp., after a half-century of frustration. The Enelow-Ettelson doctrine was overruled because its distinction between law and equity proved unworkable and bore little relation to whether there were special reasons to allow an appeal before final judgment. Similarly, the Mitchell-Johnson distinction between pure questions of law and issues of fact will almost certainly prove unworkable and the maze of distinctions sure to develop will have little to do with the special needs to depart from the final judgment rule. The unanimous chorus of criticism from every circuit finally persuaded the Supreme Court to scuttle Enelow-Ettelson. Appellate criticism of Mitchell and its progeny is growing and it appears to be only a matter of time before Mitchell meets the same fate.

Even if the Mitchell doctrine had its intended benefit in its early years, it probably has outlived its usefulness. Mitchell was decided when the qualified immunity doctrine was undergoing major change—from a doctrine with both an objective and a subjective element to one with only an objective element. Because the change had occurred just the year before, the contours of the new test were unclear at the time of Mitchell. The most important open question concerned the level of generality at which “clearly established rights” should be determined. That question was answered in 1987 and few, if any, legal questions remain concerning the contours of the qualified immunity doctrine. One nonempirical study of qualified immunity appeals indicated that there was a much higher rate of reversal for such appeals than for appeals in general, but that study was conducted in the early years of the new objective test, when the misconception of new law is most likely to occur. Because the

588. See, e.g., Pelletier v. Federal Home Loan Bank, 968 F.2d 865, 871 (9th Cir. 1992); Sinclair v. Schriber, 834 F.2d 103, 105 (6th Cir. 1987).
592. See Anderson v. Creighton, 483 U.S. 635, 639 (1987) (holding that clearly established rights were those that a reasonable officer would understand and realize he or she is violating).
593. See supra note 435.
law of qualified immunity has been well-settled for a number of years, district court judges are less likely to err, and therefore, the error-correcting benefits of collateral qualified immunity appeals likely have diminished to the point where they are not worth their costs in disrupting trial processes, delaying and harassing litigants with meritorious claims, and burdening appellate dockets.

D. Rulemaking: One Qualified Immunity Appeal

If the Supreme Court is unwilling to reconsider and overrule *Mitchell*, serious consideration should be given to the promulgation of a new Federal Rule of Appellate Procedure that would permit one, and only one, qualified immunity appeal per case. Such a rule should permit the scope of the one appeal to include, in addition to the legal question of whether the plaintiff’s asserted right was based on clearly established law, all pendent issues. These would include whether the plaintiff has produced evidence sufficient to create a reasonable inference that the defendant engaged in the alleged conduct and that the defendant should have known that such conduct violated clearly established rights.

Such a rule, while reaffirming *Mitchell*, overruling both *Johnson* and *Behrens*, and not reducing the costs associated with routine qualified immunity appeals, would have two advantages. First, it would eliminate much of the confusion generated by *Mitchell* and its progeny, thereby braking the growth in purely procedural litigation. The elimination of the distinction between appealable questions of law and nonappealable questions of evidentiary sufficiency would preempt litigation over such qualified immunity issues. This would include: whether, on appeal of the legal question, pendent-issue jurisdiction may be exercised over the factual question; and whether appeal of the legal question is a ploy to gain review of the factual question; how to distinguish between purely legal and purely factual issues; whether mixed questions of law and fact are immediately appealable. Preempting such litigation could, in turn, avert the spawning of more general procedural litigation over the question of what pretrial orders threaten the newly discovered “right to avoid discovery” declared in *Behrens*. An one-appeal, all-issues rule would require the appellate courts, in some cases, to conduct exhaustive reviews of the evidence in often-complex records, but that prospect already exists because of the Supreme Court’s own decision in *Behrens*.

The second advantage of such a rule is that it would eliminate the costs of multiple appeals of the same issue in a single case. As the law stands, defendants that raise the defense of qualified immunity have the opportunity to command the resources of the federal and possibly state appellate courts on many issues. Such appeals include the denial of motions to dismiss, the denial of motions for summary judgment, the denial of additional motions for summary judgment after additional discovery, discovery orders involving qualified immunity issues, and the denial of any other motions crafted by talented attorneys to raise qualified immunity issues. An one-appeal rule would require defense attorneys to consider carefully the timing of an appeal. A decision such as this, however, is no more burdensome than many decisions forced upon attorneys by procedural rules. A defense counsel whose motion
to dismiss on the legal question of clearly established rights is denied might, if
certain of reversal, may appeal and forego later appeal on factual
questions. Alternatively, if the attorney is less certain, he might forego an
immediate appeal, conduct discovery, and if a motion for summary judgment
is denied, appeal on both the legal and factual issues. If the latter course is
chosen, perhaps in theory the defendant has foregone his “right to avoid
discovery,” but it was his choice to do so, not a mandatory requirement of the
rule. If the former course is chosen and the appeal is unsuccessful, the
defendant has theoretically foregone his “right not to stand trial” on the
ground that discovery has revealed no issue of fact on qualified immunity, but
again it was the defendant’s choice to do so. Affording all public officials
that are sued for money damages the unfettered choice of when and how
often to appeal a denial of qualified immunity has and will continue to
generate unacceptable costs to the federal judicial system and individual
litigants.

VII. CONCLUSION

The Supreme Court’s thirty-year expansion of the collateral order doc-
trine has come at too high a price. The contradictions and lack of clarity are
not merely an affront to doctrinal neatness, but instead have produced unac-
cetable results such as undermining the independence of trial judges,
obstructing the prosecution of meritorious claims, and burdening appellate
dockets.

The Court itself could take the boldest and most sweeping step, the one
that will produce the most desirable long-term outcome—rejecting the broad,
rights-based formulation developed in the past thirty years and returning to
the strict mootness-based formulation originally set forth in Cohen, accompa-
nied by a more generous allowance of discretionary interlocutory appeal. In
the long run, the strict doctrine would achieve the proper balance between
effectuating the policies underlying the final judgment rule and the need to
avoid truly irreparable harm resulting from no appellate review at all of issues
that, by their nature, would become moot after final judgment. Short of such
an ambitious reworking of the doctrine, the Court should at least recognize
the true nature of the current doctrine. It is not a formula of set conditions,
but a flexible test in which four factors are accorded different weight accord-
ing to the particular order at issue. Such recognition would be a long step
toward the “ABA-Wisconsin” approach advocated by some commentators
which allow appeal as of right only from true final judgments and
discretionary interlocutory appeal from prejudgment orders.

More modest, short-term reform should focus on the most troublesome
and costly area of collateral order appeals—denial of qualified immunity.
The Court, sooner rather than later, should overrule Mitchell and its progeny.
Short of that, the dormant rulemaking authority should be activated and
serious consideration should be given to the promulgation of a Federal Rule
of Appellate Procedure that would permit one, and only one, appeal from a
denial of qualified immunity; the scope of which should include both legal
and factual issues. Such a rule would eliminate the multiple appeals and
much of the procedural litigation that is the single most costly feature of qualified immunity appeals.