

Washington University Law Review

Volume 91 | Issue 3

2014

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Recommended Citation

Michael E. Harriss, *Rebutting the Roberts Court: Reinventing the Collateral Order Doctrine Through Judicial Decision Making*, 91 WASH. U. L. REV. 721 (2014).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol91/iss3/7

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REBUTTING THE ROBERTS COURT: REINVENTING THE COLLATERAL ORDER DOCTRINE THROUGH JUDICIAL DECISION-MAKING

A civil procedure revival has quietly been underway since the inception of the Roberts Court in 2005.¹ Unnoticed and sweeping changes may be in the works following the “dramatic theoretical and doctrinal shifts”² resulting from the Court’s rulings in more than twenty cases concerning core areas of civil procedure.³ Even considering the civil procedure revolution that has gone largely undetected, far less attention has been drawn to the Roberts Court’s decisions interpreting the Court’s role in determining the scope of the collateral order doctrine.⁴ The significance is practical as well as theoretical because the Court’s redefined role in shaping the collateral order doctrine has a direct effect on the immediate

1. See Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 314 (2012) (citing *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx>). See also *id.* at 315–16 (suggesting that “having civil procedure on the doctrinal agenda will not draw the attention or ire of the popular media or the public Indeed, it may not draw the attention of many beyond the civil procedure professoriate, and even then only with a modicum of sarcasm” but noting the importance of the Court’s “re-engagement with civil procedure”). Blogger Amy Howe, reporting on the Court’s decision in *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), demonstrated the principal reason that such doctrinal changes have gone unnoticed. Howe reported that Justice Kagan introduced the case by calling it a “complicated procedural ruling,” but translated Justice Kagan’s introduction as: “if you understand anything I say, you have a law degree AND you had your cup of coffee.” Howard Wasserman, *Federal Procedure Day at the Supreme Court*, PRAWFSBLAWG (June 16, 2011, 12:16 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/06/federal-procedure-day-at-the-supreme-court.html> (describing SCOTUSBlogger Amy Howe’s reporting on the Court’s treatment of *Smith*).

2. Wasserman, *The Roberts Court*, *supra* note 1, at 318.

3. See *id.* at 314–15 (summarizing the cases as those concerning, “pleading, summary judgment, relation back of amended pleadings, personal jurisdiction, federal question jurisdiction, diversity jurisdiction, jurisdictionality, removal procedure, class actions, civil representation, arbitration of civil and civil rights claims in lieu of litigation, appealability, remedies, and the *Erie-Hanna* doctrine” and suggesting these cases “have been significant and potentially far-reaching”) (internal citations omitted).

4. The collateral order doctrine operates as a limited exception to the final judgment rule. See generally CHARLES ALAN WRIGHT ET AL., 15A FEDERAL PRACTICE AND PROCEDURE § 3911 (2d ed. 1992). Generally, this rule forces litigants to wait for the court to enter a final judgment before either litigant may appeal any of the trial court’s rulings in the case. See generally *id.* § 3907. In *Cohen v. Beneficial Industrial Loan Corp.*, the Supreme Court created the collateral order doctrine, holding that those orders 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.” 337 U.S. 541, 546 (1949). As such, those orders that qualify as collateral orders allow litigants to circumvent the strict requirements of the final judgment rule and bring an immediate appeal of certain orders issued by the trial court during the course of the trial. See *id.*

appealability of pre-judgment orders issued in both civil and criminal cases on a daily basis.

To put the significance of the issue in context, imagine yourself as the attorney for an allegedly wrongfully terminated employee.⁵ A district court has ordered you to disclose information concerning your client's pre-termination interview with his previous employer's attorney. You opposed such a disclosure on grounds of attorney-client privilege but were overruled. Considering the dilemma, you can identify only a few courses of action.⁶

First, you could disclose the information. That approach, however, may not only adversely affect your client but also constitute an ethical violation for a breach of the attorney-client privilege. Second, you could refuse to disclose the information. This course would certainly justify the court in issuing both a contempt order and sanctions.⁷ Third, you could immediately appeal the disclosure order. There are various methods to pursue an immediate appeal; none of them, however, are likely to work.

In an increasingly small number of cases, an immediate appeal may be allowed under the certification procedures outlined in 28 U.S.C. § 1292(b).⁸ Under the certification procedure you would first have to persuade the district court to certify the issue, by showing the appeal would involve “‘a controlling question of law’ the prompt resolution of which ‘may materially advance the ultimate termination of the litigation.’”⁹ Even then, you still must persuade the court of appeals to accept the appeal. An alternative route to an immediate appeal would be to attempt the herculean task of showing such an extraordinary circumstance of manifest injustice to persuade the court of appeals to issue a writ of mandamus.¹⁰

The last method of securing an immediate appeal is available only if the adverse disclosure order fell within “that small class” of cases that are exempted from the final judgment rule—those non-final orders qualifying as elite members of the collateral order doctrine.¹¹ Although the Supreme

5. This scenario is based on the facts of *Mohawk Indus., Inc., v. Carpenter*, 558 U.S. 100, 103–05 (2009).

6. The potential courses of action are based on the “several potential avenues of review apart from collateral order appeal” identified by Justice Sotomayor in *Mohawk Indus.*, 558 U.S. at 110–12.

7. *Id.* at 111.

8. 28 U.S.C. § 1292(b) (2006).

9. *Mohawk Indus.*, 558 U.S. at 110–11 (quoting 28 U.S.C. § 1292(b)).

10. *See id.* at 111 (noting that mandamus is reserved for “extraordinary circumstances”) (referencing *Cheney v. United States Dist. Ct. for D.C.*, 542 U.S. 367, 390 (2004)).

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

Court has determined that a public official may immediately appeal an order denying his immunity defense,¹² the Court has slammed the door on attempts to immediately appeal an adverse disclosure order.¹³

This hypothetical situation frequently occurs in courts throughout the country. The obvious hardship of a wrongfully imposed disclosure order coupled with the difficulty and unpredictability of securing an immediate appeal leaves both the attorney and the client in an unnecessarily precarious position. The question has been asked before,¹⁴ but is worth asking again: why does our judicial system tolerate delayed appellate review of non-final orders, such as disclosure orders, but allow immediate appellate review of other orders, such as those concerning immunity defenses? The Court has provided a variety of attempted explanations and clarifications of its finality jurisprudence and the scope of the collateral order doctrine since its inception in 1949.¹⁵ But only recently—under the Roberts Court’s civil procedure revolution—has the Court resorted to invoking its rulemaking authority under 28 U.S.C. §§ 2072(c) and 1292(e) to steadfastly reject any novel attempts to expand the contours of the collateral order doctrine.¹⁶

In *Mohawk Industries*, the Supreme Court reaffirmed its principled refusal to expand the list of immediately appealable non-final orders.¹⁷ The Court rested its conclusion on an interpretation that Sections 1292(e) and 2072(c) were designed as statutory limitations to prevent judicial expansion of the collateral order doctrine.¹⁸ The Court mistakenly used the statutes as a shield, defying both legislative history and prudential concerns.¹⁹ Instead, the Court should articulate a more flexible, balanced approach to the *Cohen* conditions²⁰—emphasizing the implicit similarities

12. See *infra* text accompanying notes 54–59.

13. *Mohawk Indus.*, 558 U.S. at 109.

14. Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1255–56 (2007) (asking why immediate review of a denied *res judicata* defense based on a prior judgment or settlement is barred, but immediate review of a denial of qualified immunity is allowed).

15. See discussion *infra* Part I.C.

16. See *Mohawk Indus.*, 558 U.S. at 113–14.

17. See *id.* at 114.

18. See *id.* at 113 (“[W]e reiterate that the class of collaterally appealable orders must remain ‘narrow and selective in its membership.’ This admonition has acquired special force in recent years with the enactment of legislation designating rulemaking, ‘not expansion by court decision,’ as the preferred means for determining whether and when prejudgment orders should be immediately appealable.”) (internal citations omitted).

19. See discussion *infra* Part II.A–B.

20. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The Supreme Court has interpreted the language from *Cohen*—limiting the collateral order doctrine to those orders 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

to the standards of relief for a preliminary injunction—that would inevitably expand, through judicial decision-making, the currently settled, strict confines of the collateral order doctrine.²¹

This Note will focus on the Court’s invocation of its rulemaking authority under Sections 1292(e) and 2072(c), specifically analyzing the merits of the Court’s use of this authority as a shield to any attempted expansion of the collateral order doctrine. Part I provides a contextual background of the collateral order doctrine, tracking its trajectory of judicial expansion and contraction as an exception to the final judgment rule. Part II reviews the legislative history of Congress’s grant of rulemaking authority to the Court and argues the Court is mistaken to interpret these sources as support for a bar on judicial expansion of the collateral order doctrine. Part III examines the codification of Rule 23(f) of the Federal Rules of Civil Procedure to explain how the collateral order doctrine is unsuited for codification as a federal rule and argues the Court should refrain from invoking its rulemaking authority even though Congress has granted it. Finally, Part IV proposes the collateral order doctrine is best understood and most useful as a flexible standard.

I. AN EXCEPTION TO THE FINAL JUDGMENT RULE: THE HISTORY OF THE COLLATERAL ORDER DOCTRINE FROM JUDICIAL INVENTION TO A DORMANT RULEMAKING AUTHORITY

A. *The Final Judgment Rule*

“Do you have a final decision?”²² Judge Aldisert posed this question to appellate litigators in his chapter on jurisdiction in *Winning on Appeal*.²³ Section 1291 of the United States Code grants jurisdiction to federal appellate courts “from all final decisions of the district courts . . . except

consideration be deferred until the whole case is adjudicated”—as creating separate “*Cohen* conditions” that must be independently satisfied for an order to fall within the scope of the collateral order doctrine. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468–69 & n.10 (1978) (quoting *Cohen*, 337 U.S. at 546). The first of these “*Cohen* conditions” requires that the decision “conclusively determine the disputed question.” *Id.* at 468. Second, the decision must “resolve an important issue completely separate from the merits of the [underlying] action.” *Id.* And third, the decision must “be effectively unreviewable on appeal from a final judgment.” *Id.* The Court has also suggested that there are four *Cohen* conditions rather than three because it has emphasized that the right to be reviewed must have independently sufficient “importance.” See *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 878 (1994); see also discussion *infra* Part I.A–B.

21. See discussion *infra* Part IV.

22. RUGGERO J. ALDISERT, *WINNING ON APPEAL: BETTER BRIEFS & ORAL ARGUMENT* 43 (1992).

23. *Id.*

where a direct review may be had in the Supreme Court.”²⁴ The Supreme Court has described a final decision as one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment,”²⁵ or similarly, those decisions that “trigger the entry of judgment.”²⁶ Because the final judgment rule has been the “heart of appellate jurisdiction in the federal system” for over two centuries, Judge Aldisert sensibly presented this as his first question to litigators considering bringing an appeal.²⁷

The policy justifications for the final judgment rule are, in a broad sense, matters of judicial efficiency and preservation of the traditional trial process.²⁸ Preventing piecemeal litigation is often seen as a means of promoting judicial efficiency and respecting the traditional role of the trial judge.²⁹ According to this rationale, the cost of a wrong decision by a trial judge is typically outweighed by either the benefit provided by uninterrupted trial proceedings or the assurance that the issue is adequately reviewable through alternatives to an immediate appeal.³⁰ The Supreme Court has also expressed a fear that immediate appealability of non-final orders may be used as a harassment tool by a litigant seeking to increase the time and cost of litigation at the expense of the opposing party.³¹

The final judgment rule, however, also has flaws. In its attempt to strike a balance between efficient judicial administration, deference to the lower courts, and litigant protection, the final judgment rule often produces a disparate impact on parties. Judge Aldisert recognized such an

24. 28 U.S.C. § 1291 (2006).

25. *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 497 (1989) (internal quotations omitted).

26. *Mohawk Indus., Inc., v. Carpenter*, 558 U.S. 100, 103 (2009).

27. *WRIGHT ET AL.*, *supra* note 4, § 3907.

28. *See id.* (“[C]ourts speak of ‘efficiency,’ protecting the role of the trial judge, and the need to avoid such evils as interference with the trial court, deciding unnecessary issues, and deliberate delay or harassment”).

29. *See, e.g., Mohawk Indus.*, 558 U.S. at 106 (“Permitting piecemeal, prejudgment appeals, we have recognized, undermines ‘efficient judicial administration’ and encroaches upon the prerogatives of district court judges, who play a ‘special role’ in managing ongoing litigation.”) (internal citations omitted); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (“Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system.”); *Cobbledick v. United States*, 309 U.S. 323, 325 (1940) (“To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.”).

30. *Mohawk Indus.*, 558 U.S. at 110–12 (suggesting that parties may seek certification via § 1292(b), petition the appellate court for a writ of mandamus, or defy the court’s order and incur whatever sanctions may result).

31. *See Cobbledick*, 309 U.S. at 325. *See also* Lloyd C. Anderson, *The Collateral Order Doctrine: A New “Serbian Bog” and Four Proposals for Reform*, 46 *DRAKE L. REV.* 539, 542 (1998) (contending the final judgment rule protects litigants with the stronger claim from delay by a weaker litigant).

impact and advised practitioners accordingly: “If it appears that you lack finality, argue the justice side. If it appears that your opponent has prematurely brought an appeal, argue the inconvenience and costs of piecemeal review side.”³² Based on these concerns, the 1949 Supreme Court addressed the practical effects of the balance struck by the final judgment rule—in favor of deference and efficiency. The Court invented the collateral order doctrine to shift that balance.

B. The Collateral Order Doctrine’s Inception as a Judicial Invention

The Supreme Court, recognizing the hardships occasionally resulting from the final judgment rule,³³ carved out an exception to the rule when it decided *Cohen v. Beneficial Industrial Loan Corp.*³⁴ In that case, the Court held that a district court’s ruling that it was not bound to apply a state law requiring the plaintiffs in a shareholder derivative action to post a bond before proceeding to trial was immediately appealable.³⁵ In reaching its decision, the Court gave the term “final disposition” a practical rather than strictly technical definition—and, in doing so, invented the collateral order doctrine.³⁶ It reasoned that this decision fell into “that small class” of cases which warrant an exception from the final judgment rule because it “finally determine[d] 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.”³⁷

32. ALDISERT, *supra* note 22, at 43–44.

33. Congress has also recognized that the costs of not allowing an immediate appeal of a judicial error will sometimes outweigh the benefits provided by uninterrupted litigation. In response, Congress has provided for interlocutory appellate review of matters involving injunctive relief. See 28 U.S.C. § 1292(a)(1) (2006). Additionally, Congress enacted a certification procedure by which a trial judge may certify an order not otherwise appealable if it “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b) (2006). Under this procedure, the certified non-final order is still subject to discretionary approval or disapproval by the appellate court. *Id.* Finally, Congress provided another escape clause to the final judgment rule under the All Writs Act. 28 U.S.C. § 1651(a) (2006). While a writ of mandamus avoids the final judgment rule, the Supreme Court has instructed that “only exceptional circumstances amounting to a judicial ‘usurpation of power’ will justify the invocation of this extraordinary remedy.” *Will v. United States*, 389 U.S. 90, 95 (1967). For a general overview of congressionally authorized interlocutory appeals, see WRIGHT ET AL., *supra* note 4, at § 3920 and GEOFFREY C. HAZARD, JR. ET AL., CIVIL PROCEDURE §§ 15.11–15.13 (6th ed. 2011).

34. 337 U.S. 541 (1949).

35. *Id.* at 544–47.

36. See *id.* at 546. See also *Abney v. United States*, 431 U.S. 651, 658 (1977) (“That term, the Court held, was to be given a ‘practical rather than a technical construction.’”).

37. *Cohen*, 337 U.S. at 546.

This decision, and the other “small class” of cases exempted from the final judgment rule were now members of the collateral order doctrine. Subsequent courts broke the broad formulation devised by the Supreme Court into three—sometimes four—separate conditions that a litigant must satisfy before an appellate court may immediately review a non-final order.³⁸

The first of these “*Cohen* conditions” is the decision must “conclusively determine the disputed question.”³⁹ Second, the decision must “resolve an important issue completely separate from the merits of the [underlying] action.”⁴⁰ And third, the decision must “be effectively unreviewable on appeal from a final judgment.”⁴¹ Some courts have redefined the collateral order doctrine as encompassing four conditions—splitting the second condition into two separate requirements: that the issue be “important” and that the issue be distinct from the underlying merits.⁴²

The Court decided *Cohen*—and invented the collateral order doctrine—in 1949.⁴³ For nearly three decades after that decision the Court embraced a hands-off approach to its judicial invention, allowing the lower courts to flesh out the contours of the doctrine.⁴⁴ In 1978, however, the Court

38. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468–69 (1978) (delineating, for the first time, three separate conditions from *Cohen*’s general formulation).

39. *Id.* at 468.

40. *Id.*

41. *Id.*

42. See *United States v. Sorren*, 605 F.2d 1211, 1213 (1st Cir. 1979) (deriving “[f]our requisites of appealability” from the *Cohen* opinion).

43. Adam Steinman provides a useful overview of the practical procedures involved with the collateral order doctrine:

Because the collateral order doctrine provides an appeal as of right, a litigant invoking it must simply file a notice of appeal. The notice of appeal states only the parties who are appealing, the judgment or order being appealed, and the court to which the appeal is being taken. The notice of appeal does not even need to specify that the collateral order doctrine is the basis for appellate jurisdiction. Unless the party opposing the appeal files a preliminary motion to dismiss the appeal for lack of jurisdiction, the appeal will proceed to full briefing on the merits as well as on the appellate court’s jurisdiction, and the jurisdictional issue will not be resolved until full briefing is complete. A notice of appeal must be filed within the time limits set by Federal Rule of Appellate Procedure 4, which, for civil appeals, is typically thirty days after the district court enters the order being appealed.

Steinman, *supra* note 14, at 1252 (internal footnotes omitted).

44. Scholars agree that the Supreme Court took a hands-off approach during this period, but disagree on whether the doctrine was liberally or strictly applied. Compare Anderson, *supra* note 31, at 548 (finding the early years after *Cohen* to be a period of strict constructionism for the doctrine with the Court “fail[ing] to be explicit about it”), with Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 740 (1993) (“For two decades the Supreme Court did not interfere with the liberal use of the collateral order doctrine.”).

intervened in *Coopers & Lybrand* to provide a clear delineation of the separate *Cohen* conditions.⁴⁵ This initial involvement triggered a period of heightened Supreme Court interest in attempting to provide clarity to its judicially invented, final judgment exception.⁴⁶

C. *The Collateral Order Doctrine's Expansion and Contraction as a Judicial Tool*

Although the collateral order doctrine developed in two different contexts—civil and criminal—the trajectory of the doctrine in each context followed a similar path. After its inception in *Cohen* and reformulation in *Coopers & Lybrand*, the doctrine went through periods of both expansion and contraction. In the beginning, this judicial tool infrequently returned to its inventors' desks—the Supreme Court discussed the doctrine in only four cases between 1949 and 1974.⁴⁷ Once the Court expanded the contours of the doctrine, however, creative appellate litigators began exploring potential paths around the thorny confines of the final judgment rule.⁴⁸

From 1974 to 1988, the Court decided whether certain non-final orders could be immediately appealed approximately once per year.⁴⁹ The frequency of the issue commanding the Court's attention was a result of its own muddling of the parameters of the doctrine, which encouraged litigators to push the limits in the lower courts.⁵⁰ Although the Court selectively expanded the collateral order doctrine, the dominant result was a narrowing approach. That is, the Court denied most attempts to carve out further exceptions to the final judgment rule by expanding the scope of the collateral order doctrine.

45. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (“To come within the ‘small class’ of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.”).

46. The Supreme Court granted certiorari and decided twenty-seven appellate jurisdiction cases dealing with an interlocutory order issue between 1980 and 1990. See Steinman, *supra* note 14, at 1296–97 (providing a table of “Supreme Court Appellate Jurisdiction Cases Since 1980”).

47. See *Local No. 438 Constr. & Gen. Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542, 549 (1963); *Parr v. United States*, 351 U.S. 513, 519 (1956); *Stack v. Boyle*, 342 U.S. 1, 6 (1951); *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 688–89 (1950).

48. Theodore D. Frank, Comment, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292, 317–18 (1966) (exploring the negative implications of the rise of the collateral order doctrine as an exception to the final judgment rule and concluding that “[l]awyers unsure of the finality of the decision” will file more frequent appeals).

49. Anderson, *supra* note 31, at 581 (“[D]uring the era of expansion from 1974 to 1988, the issue commanded the Court's attention fourteen times, or once a year.”).

50. See *id.* at 576; Frank, *supra* note 48, at 317–18.

In both the civil and criminal context, the greatest expansion of the doctrine was the result of different orders relating to the applicability of immunity defenses reaching the Supreme Court. For example, from *Helstoski v. Meanor*⁵¹ in 1979 to *Osborn v. Haley*⁵² in 2007, the Court has held that six different immunities qualify as immediately appealable collateral orders:⁵³ immunity under the Speech or Debate clause,⁵⁴ executive absolute immunity,⁵⁵ judicial immunity,⁵⁶ qualified immunity,⁵⁷ state sovereign immunity,⁵⁸ and Westfall Act immunity for a federal employee.⁵⁹ Generally, the Court reasoned that these different defenses, each of which invokes immunity from a specific source, embody a right not to stand trial.⁶⁰ As a result, a trial court's order denying immunity to suit is essentially unreviewable on appeal because the immunity from suit "is effectively lost if a case is erroneously permitted to go to trial" against the immune official.⁶¹

Although the collateral order doctrine has been selectively expanded to include those orders generally affecting a litigant's right not to stand trial—principally in the immunity context—the trend has been to narrowly confine the doctrine.⁶² The Court drew a limit on its expansionist strand of right-not-to-stand-trial collateral orders in *Lauro Lines S.R.L. v. Chasser*.⁶³ That case was brought in a New York federal district court against an Italian owner of a cruise ship that was hijacked in the Mediterranean.⁶⁴

51. 442 U.S. 500 (1979).

52. 549 U.S. 225 (2007).

53. See Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353, 383–84 (2010); see generally Steinman, *supra* note 14, at 1250, 1296 (describing instances where court orders affecting immunity have been immediately appealed under the collateral order doctrine).

54. See *Helstoski*, 442 U.S. at 506–08.

55. See *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982).

56. See *Claiborne v. United States*, 465 U.S. 1305, 1305–06 (1984).

57. See *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (holding that a ruling denying summary judgment when a qualified-immunity defense is raised is sometimes appealable). *But see* *Johnson v. Jones*, 515 U.S. 304, 317–18 (1995) (clarifying *Mitchell*, holding that a trial court's summary judgment decision involving an issue of the sufficiency of the evidence is not immediately appealable simply because the underlying action involves a qualified-immunity defense); *Ortiz v. Jordan*, 131 S. Ct. 884, 889 (2011) (holding that, after a full trial on the merits, an order denying a motion for summary judgment on qualified immunity grounds is not immediately appealable).

58. See *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993).

59. See *Osborn v. Haley*, 549 U.S. 225, 238–39 (2007).

60. See *Mitchell*, 472 U.S. at 525 (classifying the issue before the Court as whether "qualified immunity shares this essential attribute of absolute immunity" as an "entitlement not to stand trial under certain circumstances").

61. *Id.* at 526.

62. See Steinman, *supra* note 14, at 1250 (stating that "the Supreme Court has rejected the use of the collateral order doctrine" in most other cases outside the immunity context).

63. 490 U.S. 495 (1989).

64. *Id.* at 496.

The passengers' tickets included a forum-selection clause intended to obligate passengers to initiate any suit in connection with the cruise in Naples, Italy.⁶⁵ When the suit was brought in the New York federal district court, the ship owner filed a motion to dismiss.⁶⁶ The district court denied his motion, and the ship owner attempted to immediately appeal that decision.⁶⁷ The appellate court, however, denied his immediate appeal, reasoning that the district court's order did not fall within the *Cohen* collateral order doctrine.⁶⁸

The Supreme Court affirmed the appellate court's decision, carefully distinguishing the right not to stand trial and the right not to stand trial *in a particular forum*.⁶⁹ The Court invoked the third prong of the collateral order doctrine—the effective unreviewability of the order—and decided the ship owner's claim was “adequately vindicable” in an appellate court, in spite of the acknowledgement that it would not be “perfectly secured by appeal after final judgment.”⁷⁰ The Court, however, failed to explain in what ways the appellate court could adequately vindicate the ship owner's right.⁷¹ Additionally, the Court failed to explain at what point a right that is not “perfectly secured by appeal after final judgment” may cross the unannounced threshold and enter the not “adequately vindicable” arena. In doing so, the Court left the following question unanswered: at what point is a right that is not perfectly secured by appeal after a final judgment not also sufficiently vindicable on appeal to warrant an *immediate* appeal?

When considering the initial rationale for embracing the right not to stand trial in the collateral order doctrine, the distinction the Court drew between the right not to stand trial and the right not to stand trial in a particular forum appears to be a distinction without a difference. Claims of immunity are designed to protect a party from standing trial and bearing the burdens of litigation.⁷² Similarly, a forum-selection clause is intended to provide certainty and convenience to the party who most valued the determined forum, presumably in acknowledgement of the burdens of litigation that party would face in a non-selected forum.⁷³ And thus, since

65. *Id.*

66. *Id.*

67. *Id.* at 497.

68. *Id.*

69. *Id.* at 501.

70. *Id.*

71. Anderson, *supra* note 31, at 584.

72. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

73. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) and M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) for the Supreme Court's determinations as to the validity and purpose of forum-selection clauses.

the Court purports to consider the interests protected by the denied defense—in both cases, the burdens of litigation—in determining whether the right is effectively unreviewable on appeal, the distinction drawn in *Lauro Lines* appears contradictory. A natural reaction to such a contradiction is to call into question the relevance of the standard to determine whether the right is effectively unreviewable or the third *Cohen* condition itself.

In his concurrence, Justice Scalia provided an alternative rationale to reach the same conclusion, arguing the second prong of the collateral order doctrine⁷⁴ should be bifurcated into separate “important” and “separable from the merits” conditions.⁷⁵ Under that formulation, the distinction between the right not to stand trial and the right not to stand trial in a particular forum was warranted, he argued, because the ship owner’s right to choose the forum is “not sufficiently important to overcome the policies militating against interlocutory appeals.”⁷⁶ Presumably, those policies must have tipped in favor of protecting the right not to stand trial in the immunity context.⁷⁷

Interestingly, Justice Scalia confronted the contradiction identified in the majority’s rationale by acknowledging that the ship owner’s right “is not fully vindicated—indeed, to be utterly frank, is positively destroyed—by permitting the trial to occur and reversing its outcome.”⁷⁸ Justice Scalia himself recognized the lack of meaning in the Court’s distinction because in both cases—in substance—the right could not be wholly vindicated on appeal. For Justice Scalia, the difference in “importance” between the right to not stand trial in a non-preferred venue and the right to not stand trial at all provides a meaningful distinction and warrants that the former is

74. Note also, Justice Scalia rested his concurrence analysis on the second *Cohen* condition, rather than the third *Cohen* condition that guided the majority’s analysis. See *Lauro Lines*, 490 U.S. 495 at 502–03.

75. *Id.* at 502 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). The Court in *Coopers & Lybrand* lumped together the “importance” of the issue and the severability of the issue from the merits of the action as a single requirement—the second *Cohen* condition. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). In *Lauro Lines*, however, Justice Scalia noted that the caveat that the issue be “too important to be denied review” was a “significant requirement” that “must” be involved in order for an order to qualify for immediate appeal.” *Lauro Lines*, 490 U.S. at 502 (internal citations omitted). Because Justice Scalia emphasized—and only analyzed—whether the issue was too important to be denied review, Justice Scalia suggested that the second *Cohen* condition consists of two separate requirements: that the issue have the requisite “importance” and that it be separable from the merits of the underlying action.

76. *Lauro Lines*, 490 U.S. at 503.

77. I assert this presumption because Justice Scalia did not suggest his proposed focus on the “importance” of the right would call into question any of the previous *Cohen* exceptions the Court recognized in the immunity line of cases.

78. *Lauro Lines*, 490 U.S. at 502–03.

“vindicat[ed] enough” at the appellate stage.⁷⁹ As a result, Justice Scalia’s rationale seems to answer the question left unanswered by the majority: a right—neither perfectly secured by appeal nor sufficiently vindicable on appeal—warrants inclusion as a *Cohen* exception when it is “sufficiently important to overcome the policies militating against interlocutory appeals.”⁸⁰

Only a few years later, Justice Scalia’s suggestion that the second prong of the collateral order doctrine consisted of two separate requirements—with much of the analysis focusing on the “importance” of the right asserted—became the majority opinion in *Digital Equipment Corp. v. Desktop Direct, Inc.*⁸¹ In *Digital*, the Court was asked to decide whether the “right not to stand trial” line of cases provided a basis for an immediate appeal of a lower court’s order vacating a dismissal predicated on a settlement agreement between the parties.⁸² The Court refused to broaden that line of cases, holding that “rights under private settlement agreements can be adequately vindicated on appeal from final judgment.”⁸³ Only a few years after *Lauro Lines*, one would expect the Court to have analyzed the case under the distinction they drew between the right to not stand trial at all and the right not to stand trial in a particular forum. But the Court in *Digital* focused on the importance of the right asserted, going so far as to characterize the issue as “the bone of the fiercest contention in the case.”⁸⁴ Adding to the confusion, the Court condemned *Digital*’s position that it was irrelevant whether the issue is “important,” and declared that the third *Cohen* condition “simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.”⁸⁵ Now, the “importance” of the right asserted may be both a dispositive inquiry into both the second and third *Cohen* conditions.⁸⁶

79. *Id.* at 503.

80. *Id.* (emphasis added). Justice Scalia also cited *Abney v. United States*, for the proposition that “importance” means the right “would be ‘lost, probably irreparably,’ if review had to await final judgment.” *Id.* at 502 (quoting *Abney v. United States*, 431 U.S. 651, 658 (1977)).

81. 511 U.S. 863 (1994).

82. *Id.* at 865.

83. *Id.* at 869.

84. *Id.* at 878.

85. *Id.* at 878–79.

86. While it is clear that the Court emphatically embraced Justice Scalia’s suggestion that “importance” be a critical component of the *Cohen* analysis, it is unclear whether the “importance” of the right should be considered under the third condition, as the court in *Digital* suggested, or whether it should be considered under the second condition, as Justice Scalia in *Lauro Lines* suggested. Unfortunately, the text from *Cohen* is equally ambiguous, as the “too important to be denied review” language is sandwiched between both the second and third *Cohen* conditions. *Cohen v. Beneficial*

Unlike in *Lauro Lines*, the Court provided some guidance as to whether an asserted right has enough “importance” to warrant immediate review by an appellate court. The Court explained that “[w]here statutory and constitutional rights are concerned, ‘irretrievabl[e] los[s]’ can hardly be trivial,” i.e., constitutional and statutory rights will almost universally satisfy the “importance” requirement.⁸⁷ On the other hand, privately conferred rights, such as rights embodied in a settlement agreement or a forum-selection clause, are not sufficiently important to overcome the policies militating against immediate appealability.⁸⁸ The Court explicitly pointed to the policy of the final judgment rule to “avoid piecemeal litigation,” and declared that such a policy should not be “trumped routinely by the expectations or clever drafting of private parties.”⁸⁹

But the Court only weighed the value of allowing immediate appeals of privately conferred rights against the policy of avoiding piecemeal litigation,⁹⁰ and the disruptiveness it would cause to the “orderly administration of justice.”⁹¹ Of course, there are countervailing benefits of allowing the immediate appeal.⁹² For example, a court could conserve sparse judicial resources by allowing an immediate appeal if the alternative is conducting a full trial that is eventually vacated on appeal due to the lower court’s erroneous ruling as to the settlement agreement.

While the Court struggled to define the contours of the collateral order doctrine and the precise role of “importance” in the analysis, the Federal Courts Study Committee filed their Report on April 2, 1990.⁹³ The Report

Indus. Loan Corp., 337 U.S. 541, 546 (1949) (“[S]eparable from, and collateral to, rights asserted in the action [which is the second condition], *too important to be denied review* and too independent of the cause itself . . .” [which is the third condition]) (emphasis added).

87. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994) (alteration in original) (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) and *United States ex rel. Milwaukee Social Democratic Public Co. v. Burleson*, 255 U.S. 407, 437–38 (1921) (Holmes, J., dissenting)). The Court also suggested that rights “more deeply rooted in public policy” are more likely to be immediately appealable. *Digital*, 511 U.S. at 884. The Court, however, failed to identify which rights are rooted in public policy, other than suggesting it includes those constitutional and statutory rights previously discussed. *See id.*

88. For example, in Justice Scalia’s concurrence, he concluded that the right not to stand trial in a particular forum embodied in a forum selection clause between private parties was not “sufficiently important to overcome the policies militating against interlocutory appeals.” *Lauro Lines*, 490 U.S. at 502–03.

89. *Digital*, 511 U.S. at 879–80.

90. *Id.* at 879.

91. *Id.* at 884.

92. *See Anderson, supra* note 31, at 589–90 (contending the Court’s grounding of a right’s importance in explicit constitutional or statutory rights, “undermines the rationale of some of the Court’s past decisions”).

93. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990), available at [http://www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/\\$file/repfsc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/repfsc.pdf/$file/repfsc.pdf).

suggested a variety of alterations to the federal court system, including a particularly relevant recommendation that the Supreme Court be delegated rulemaking authority under 28 U.S.C. § 1291 to define what constitutes a final decision for appeal as of right, and to define circumstances in which non-final orders may be immediately appealed.⁹⁴

Quite clearly, this recommendation would add another wrinkle to the Court's already murky collateral order jurisprudence by adding a new source of authority. A brief look into the legislative history of the Report and Congress's subsequent legislation will lead us to the Court's eventual confrontation of their newfound rulemaking authority. This confrontation took nearly two decades and, interestingly, occurred when Justice Sotomayor—the only member of the Supreme Court to serve as a district court judge who confronted issues of immediate appeals—penned her first opinion as a Supreme Court Justice in *Mohawk Industries, Inc. v. Carpenter*.⁹⁵

II. THE LEGISLATIVE HISTORY OF SECTIONS 1292(E) AND 2072(C)

A. *The History*

In 1988, Congress authorized, and Chief Justice Rehnquist appointed, a fifteen-member Federal Courts Study Committee as a response to “mounting public and professional concern with the federal courts’ congestion, delay, expense, and expansion”⁹⁶ The final Report of the Committee consists of 220 pages of various recommendations for a Federal Courts Study Committee Implementation Act of 1990. It spans from the revolutionary suggestion to “abolis[h] federal diversity jurisdiction”⁹⁷ to the less monumental, but equally important suggestion that “Congress should amend 28 U.S.C. § 331 to recognize the [Judicial] Conference’s authority to issue administrative rules”⁹⁸—two paragraphs had the power to fundamentally alter the collateral order doctrine. In a section aimed at “Reducing Litigation’s Complexity and Expediting Its Flow”⁹⁹ the Committee recommended that Congress delegate rulemaking

94. *Id.* at 95.

95. 558 U.S. 100 (2009).

96. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 93, at 3.

97. *Id.* at 14. Although, the Report does include certain exceptions where federal courts would still retain diversity jurisdiction in the most important of instances. *See id.* at 38–42.

98. *Id.* at 148.

99. *See id.* at 89.

authority to the Supreme Court to define what constitutes a final decision and declare when non-final orders may be immediately appealed.¹⁰⁰

In the text explaining the recommendation, the Committee pointed to the “difficulties arising from definitions of an appealable order”¹⁰¹ suggesting the Court’s continued deliberations and lack of precision concerning the collateral order doctrine may have been a primary driving force behind their decision. Even more direct, the Committee declared that “[t]he state of the law . . . strikes many observers as unsatisfactory in several respects.”¹⁰² And then, no doubt reflecting on the Court’s recent docket, the Committee noted that this area of the law has “produced much purely procedural litigation.”¹⁰³ In turn, this recognition spurred the Committee to report that the Court’s repeated attention has “blur[ed] the edges of the finality principle” and “may in some circumstances restrict too sharply the opportunity for interlocutory review.”¹⁰⁴ These specific factors seem to have motivated the Committee to propose its recommendation, but not without further guidance on what was to be expected.

The Committee, for example, made two specific proposals in the text accompanying its recommendation. First, they suggested the rulemaking authority should include the ability to broaden, narrow, or systematize the law created by the Court’s previous decisions concerning finality.¹⁰⁵ And second, the Committee suggested that the rulemaking authority leave room to “add to—but not subtract from—the list of categories of interlocutory appeal permitted by Congress” in Section 1292.¹⁰⁶

Only five months after the Report of the Federal Courts Study Committee was published, Congress passed the Judicial Improvements Act of 1990.¹⁰⁷ Unsurprisingly, the stated purpose of the legislation in the House was to “implement several of the more noncontroversial

100. The Committee summarized its recommendation as follows:

To deal with difficulties arising from definitions of an appealable order, Congress should consider delegating to the Supreme Court the authority under the Rules Enabling Act to define what constitutes a final decision for purposes of 28 U.S.C. § 1291, and to define circumstances in which orders and actions of district courts not otherwise subject to appeal under acts of Congress may be appealed to the courts of appeals.

Id. at 95.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 96.

106. *Id.*

107. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified as amended in scattered sections of 28 U.S.C.).

recommendations” of the Committee’s Report.¹⁰⁸ Congress, however, only implemented the first recommendation from the Committee. In Section 104, Congress amended 28 U.S.C. § 2072 to include a new subsection (c), granting the Supreme Court rulemaking authority for “[s]uch rules [that] shall define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.”¹⁰⁹ Congress pointed to the “continuing spate of procedural litigation” as a driving force behind this amendment, including their hope that such litigation could be “reduced, if not eliminated” by the Court promulgating a rule that clarifies the scope of a final decision.¹¹⁰

While Congress provided a new rulemaking authority for the Supreme Court to define finality per the first recommendation from the Committee, it took Congress another two years to pass legislation amending the scope of interlocutory appeals in Section 1292 in accordance with the Committee’s second recommendation.¹¹¹ In the first section of the legislation, Congress amended Section 1292 to include a new subsection (e), granting the Supreme Court further rulemaking authority to “provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided” in Section 1292.¹¹² Now, the Court has the additional power of defining, by rule, the scope of finality in determining what non-final orders may be immediately appealable. The stated purpose from the House Report was to “permit the Supreme Court, pursuant to its rulemaking authority . . . to expand the appealability of interlocutory determinations by the courts of appeals.”¹¹³

108. H.R. REP. NO. 101-734, at 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6861.

109. H.R. REP. NO. 101-734, at 2. *See* 28 U.S.C. § 2072(c) (2006). Recall, § 1291 is the basic statute outlining the scope of appellate jurisdiction, permitting the appeal of a “final” decision from a district court to an appellate court. 28 U.S.C. § 1291 (2006).

110. The entirety of the Section 104 “Analysis” provided by the House of Representatives is as follows:

This section implements a recommendation of the Federal Courts Study Committee found on page 95 of its Report, that authorizes the promulgation of rules which define when a decision by the district court is final for purposes of appeals. Pursuant to 28 U.S.C. 1291, appeals may be had from final decisions. Considerable uncertainty exists, however, as to the scope of a final decision. The result is a continuing spate of procedural litigation that could be reduced, if not eliminated, by the promulgation of clarifying rules. This section gives the Supreme Court the authority to promulgate such rules. As with the Court’s rulemaking power generally, the Supreme Court’s power to clarify the scope of a final decision is circumscribed by the requirement that its rules “shall not abridge, enlarge or modify any substantive right.”

H.R. REP. NO. 101-734, at 18.

111. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992) (codified as amended in scattered sections of the U.S.C.).

112. *Id.*; *See* 28 U.S.C. § 1292(e) (2006).

113. H.R. REP. NO. 102-1006, pt. 1, at 18 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3921, 3927.

While the legislative history is limited, the purpose behind the Supreme Court's newly created rulemaking authority can be gleaned by piecing together the House Reports and the Report from the Federal Courts Study Committee. First, Congress was clear in its dissatisfaction with the current flux in the Court's finality jurisprudence—chiefly, the collateral order doctrine.¹¹⁴ Congress intended for the Court to take responsibility and put its house in order by making use of the power, granted by Congress, to define the scope of finality and promulgate a rule to outline what non-final orders could be immediately appealed.

Second, Congress intended—as evidenced by the amendment to Section 1292—for the Court to *expand* the list of immediately appealable non-final orders. Section 1292 itself contains the statutory list of immediately appealable non-final orders—it is a small one.¹¹⁵ Congress explicitly granted the Court, through the text of subsection (e), the power to enlarge the list of appealable non-final orders, while prohibiting the Court from subtracting from the list. The House Report reaffirmed this textual interpretation, specifically declaring its desire for the amendment to “expand the appealability of interlocutory determinations by the courts of appeals.”¹¹⁶

On the whole, the history suggests that Congress intended this new rulemaking authority to be an alternative mechanism for the Court to expand the collateral order doctrine to new situations.¹¹⁷ The Supreme Court, however, would think differently.

114. See Joan Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After Swint*, 49 HASTINGS L.J. 1337, 1362–63 (1998) (“The Committee's primary concern appears to have been the problems created for litigants and for the courts by the uncertainty surrounding ‘finality.’”).

115. See 28 U.S.C. § 1292 (2006). Generally, Congress determined only a few non-final orders could be appealed as of right—for example, injunctions § 1292(a)(1)—or, by permission—via the certification process, § 1292(b). For a more thorough treatment of these sections, see Martineau, *supra* note 44, at 729–35.

116. H.R. REP. NO. 102-1006, pt. 1, at 18.

117. See generally Steinman, *supra* note 114, at 1363 (describing Congress's and the Federal Court Study Committee's intent to expand, not contract, the scope of interlocutory appeals, and finding, for a variety of reasons, that Congress did not intend to undermine the Court's previous authority to do so). See also, Martineau, *supra* note 44, at 772 (explaining how the amendments will expand the list of which non-final orders may be immediately appealable). But Martineau also strongly opposes the amendments because he contends they will defeat the Committee's stated goals

to reduce litigation on issues of finality and appealability, to avoid dismissal of appeals as premature, and in particular, to avoid instances in which an appeal of an order not truly final but immediately appealable is held to be untimely because the appeal was not taken until after the final judgment was entered.

Id.

B. *The Supreme Court's Mistaken Interpretation*

The Supreme Court first confronted its newfound rulemaking authority in *Swint v. Chambers County Commission*,¹¹⁸ three years after Congress amended the statutes governing finality and appeals of non-final orders. Here the Court was asked to expand the collateral order doctrine to include a district court's denial of a motion for summary judgment.¹¹⁹ The Court issued a "firm No."¹²⁰

Writing for the Court, Justice Ginsburg recognized the new authority granted by Congress, and interpreted the statute as a prohibition of "expansion by court decision" of the collateral order doctrine.¹²¹ Instead of extrapolating a sweeping authority for Court action from the legislative history,¹²² Justice Ginsburg read Congress's amendments as a requirement that any subsequent clarification by the Court as to when a decision qualifies as "final," or any expansion of which non-final orders may be immediately appealable, must *only* be accomplished through the rulemaking process.¹²³ In essence, it would seem that the Court, possibly recognizing the futility of its previous attempts at defining the scope of the collateral order doctrine, suggested that Congress or the formal rulemaking process should have exclusive control over the future of the collateral order doctrine and the Court's finality jurisprudence.¹²⁴

Unfortunately, rather than address the legislative history of the amendments—as fully addressed above¹²⁵—Justice Ginsburg chose to suggest a flat prohibition against the Court's future role in expanding the collateral order doctrine. Such historical evidence, however, would have suggested that this was not Congress's intention.¹²⁶ Joan Steinman, a leading academic in the field of appellate courts and jurisdiction, has explained that the Report of the Federal Courts Study Committee "make[s]

118. 514 U.S. 35 (1995).

119. *Id.* at 41.

120. *Id.* (internal quotations omitted). Interestingly, although *Swint* was decided barely a year after *Digital*, where the Court embraced the significance of the "importance" of the right at issue, the Court in *Swint* conducted a *Cohen* analysis, yet the Court made no mention of the "importance" of the right. See Anderson, *supra* note 31, at 595.

121. *Swint*, 541 U.S. at 48 ("The procedure Congress ordered for such changes, however, is not expansion by court decision, but by rulemaking under § 2072.").

122. See discussion *supra* Part II.A.

123. *Swint*, 541 U.S. at 48 ("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.").

124. See Steinman, *supra* note 114, at 1360–61.

125. See discussion *supra* Part II.A.

126. Steinman, *supra* note 114 at 1363. See also discussion *supra* Part II.A.

clear that the Committee was focusing on a shift of responsibility from Congress to rule makers,” but that Congress “certainly did not view the regime it proposed as one that would preempt the field and prevent other players . . . from having a continuing role in working out the law of appealability.”¹²⁷

Although Justice Ginsburg’s opinion in *Swint* suggests that the Court is prohibited from expanding the collateral order doctrine through judicial decision-making, the legislative history suggests the opposite: that expansion through both judicial decision-making and rulemaking is the goal. While the Court’s interpretation in *Swint* appears mistaken, the Supreme Court reaffirmed its interpretation in Justice Sotomayor’s first opinion for the Court.

In *Mohawk Industries*, the Court was asked whether a lower court’s disclosure order for sensitive information adverse to the attorney-client privilege qualified as an immediately appealable non-final order under the collateral order doctrine.¹²⁸ The Court¹²⁹ refused, reasoning that “[p]ostjudgment appeals, together with other review mechanisms, suffice to protect the rights of litigants and preserve the vitality of the attorney-client privilege.”¹³⁰ In effect, Justice Sotomayor seemingly introduced a new factor in the *Cohen* analysis: the availability of conceivable alternatives to a collateral order appeal.¹³¹ At the same time, however, the Court reaffirmed its strict confinement of the collateral order doctrine, noting, “it must ‘never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.’”¹³² The Court buttressed its position by stating, “[o]ur admonition reflects a healthy respect for the virtues of the final-judgment rule.”¹³³ Justice Sotomayor made the Court’s position very

127. *Id.* Of practical note, the Court would necessarily be involved in any rulemaking process because the Rules Enabling Act grants the judicial branch primary responsibility for any rules promulgated pursuant to Congress’s scheme. 28 U.S.C. § 2072 (2006). *See also* Steinman, *supra* note 114, at 1360, n.84. As a result, the Supreme Court is the body with the rulemaking power.

128. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009).

129. Of note, Justice Sotomayor issued her first opinion as a Supreme Court Justice in *Mohawk Industries*. Adhering to the custom of first opinions, the decision was unanimous—although, Justice Thomas issued a separate concurrence. *See* Tony Mauro, *Sotomayor Announces Her First Opinion on Busy Day at Supreme Court*, BLOG OF LEGAL TIMES (Dec. 8, 2009, 1:22 PM), <http://legaltimes.typepad.com/blt/2009/12/sotomayor-announces-her-first-opinion-on-busy-day-at-supreme-court.html>.

130. *Mohawk Indus.*, 558 U.S. at 103.

131. *Id.* at 110 (“[W]ere attorneys and clients to reflect upon their appellate options, they would find that litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of review apart from collateral order appeal.”).

132. *Id.* at 106 (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)).

133. *Id.*

clear: the *Cohen* factors will be narrowly interpreted to strictly confine the collateral order doctrine by both adding new limitations and liberally invoking policy justifications to support these limitations of the scope of the collateral order doctrine.¹³⁴

The Court not only relied on perceived policy justifications¹³⁵ for its refusal to expand the doctrine, but also invoked its rulemaking authority under Sections 1292(e) and 2072(c) as a shield in declining to apply the collateral order doctrine to new situations.¹³⁶ Justice Sotomayor devoted a separate portion of the opinion to confront Congress's grant of rulemaking authority "in recent years,"¹³⁷ and she made clear that the Court would be out of the business of creating judge-made exceptions to the collateral order doctrine.¹³⁸

This position against any further judicial-carving-out of *Cohen* exceptions was bolstered by Justice Thomas's concurring opinion, which actually derided the Court for conducting a *Cohen* analysis at all.¹³⁹ Rather, Justice Thomas suggested, since the disclosure order at issue did not fall into any category of previously-recognized *Cohen* exceptions, the rulemaking authority granted by Congress prohibited the Court from even considering including such a non-final order within the collateral order doctrine.¹⁴⁰

Commentators have modestly interpreted the two opinions, read together, to "suggest the emergence of a fairly strong preference for the development of rules through the rulemaking process."¹⁴¹ Justice Sotomayor's opinion read with Justice Thomas's concurrence actually

134. While the Court effectively set the odds against expanding the collateral order doctrine, Justice Sotomayor, in her application of the *Cohen* analysis, actually invoked a balancing approach. *Id.* at 112 ("[T]he limited benefits of applying 'the blunt, categorical instrument of § 1291 collateral order appeal' to privilege-related disclosure orders simply cannot justify the likely institutional costs . . .") (quoting *Digital*, 511 U.S. at 883).

135. *Mohawk Indus.*, 558 U.S. at 106 ("Permitting piecemeal, prejudgment appeals, we have recognized, undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation") (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).

136. *Id.* at 113–14.

137. *Id.* at 113.

138. *Id.* at 114 ("Any further avenue for immediate appeal of such rulings should be furnished, if at all, through rulemaking . . .").

139. *Id.* at 115 (Thomas, J., concurring) ("We need not, and in my view should not, further justify our holding by applying the *Cohen* doctrine, which prompted the rulemaking amendments in the first place. In taking this path, the Court needlessly perpetuates a judicial policy that we for many years have criticized and struggled to limit.")

140. *Id.*

141. James E. Pfander & David R. Pekarek Krohn, *Interlocutory Review by Agreement of the Parties: A Preliminary Analysis*, 105 NW. U. L. REV. 1043, 1053 (2011).

appears to sound a death-knell on further expansion of the collateral order doctrine through either judicial decision-making or rulemaking.¹⁴² From Justice Sotomayor's single statement that, "[a]ny further avenue for immediate appeal of such rulings should be furnished, if at all, through rulemaking,"¹⁴³ the Court has entrenched itself in two separate and mistaken interpretations of Congress's intentions behind the finality amendments.

First, Justice Sotomayor reaffirmed the Court's mistaken interpretation from *Swint* that Congress intended the rulemaking process to be the sole mechanism for introducing changes to either the definition of "finality" or the scope of non-final, immediately appealable orders under the collateral order doctrine.¹⁴⁴ As shown by the legislative history, taken from both Congress and the Committee's Report,¹⁴⁵ a more accurate interpretation of Congress's intent behind the amendments was to provide an *alternative* mechanism for the Court to clear the confusion surrounding its murky finality jurisprudence. Even worse, Justice Sotomayor commingled the Court's interpretation of the legislative history in *Swint* with the text of the legislation itself. Rather than citing to the text of the legislation or its history as support for the contention that Congress's amendments constituted "legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable," Justice Sotomayor cited solely to *Swint*.¹⁴⁶ Neither the text of the legislation nor its legislative history supported such a contention, yet the Court, by singularly relying on *Swint*, entrenched itself in its mistaken interpretation.¹⁴⁷

142. See James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. PA. L. REV. 493, 498–99 (2011) (suggesting "Justice Thomas would eschew all future judge-made expansions in the collateral order doctrine" from his position in *Mohawk Industries*).

143. *Mohawk Indus.*, 558 U.S. at 114.

144. See *supra* discussion accompanying notes 118–30.

145. See discussion *supra* Part II.A.

146. *Mohawk Indus.*, 558 U.S. at 113 (citing *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 48 (1995)).

147. Justice Thomas went even further in his interpretation of Congress's intention behind granting the Court rulemaking authority, finding that Congress acted upon its recognition that "such value judgments are better left to the 'collective experience of bench and bar' and the 'opportunity for full airing' that rulemaking provides." *Id.* at 118–19 (Thomas, J., concurring) (quoting Sotomayor's majority opinion at 114). The "value judgments" meaning the decision as to what non-final orders should be immediately appealable.

Second, Justice Sotomayor refused to correct the Court's mistaken position that the collateral order doctrine is not to be expanded,¹⁴⁸ even though Congress specifically intended such expansion to occur.¹⁴⁹ Although Justice Sotomayor conducted a full *Cohen* analysis, such an analysis would be irrelevant if we take the Court at its word that its rulemaking authority prevents it from expanding the collateral order doctrine even if it wanted to. Justice Thomas properly stretched the Court's position in *Swint*—as adopted by Justice Sotomayor—to its logical conclusion by invoking the rulemaking authority as a complete shield to any appellate litigator's attempt to persuade the Court to expand the collateral order doctrine, when he refused to even conduct the *Cohen* analysis. Quite correctly, however, if the Court is without power to judicially expand the *Cohen* exceptions due to its rulemaking authority, it is rather unnecessary to apply the *Cohen* analysis at all.

Of more concern, however, if the Court continues to invoke its rulemaking authority as a complete shield to expansion of the collateral order doctrine, the only mechanism to effectuate Congress's stated intent—to clarify the finality jurisprudence while expanding the number of immediately appealable non-final orders—is the rulemaking process. This process, however, has been largely dormant since Congress empowered the Court in 1990—barring the sole exception of Rule 23(f).¹⁵⁰ Indeed, the Court has referenced its power to define the scope of immediately appealable non-final orders granted by Section 1292(e) in only five cases.¹⁵¹ Although a complete contravention of Congress's stated intent for

148. *Id.* at 114 (“Any further avenue for immediate appeal of such rulings should be furnished, if at all, through rulemaking . . .”) (emphasis added).

149. The House Report reaffirms this textual interpretation, specifically declaring its desire for the amendment to “expand the appealability of interlocutory determinations by the courts of appeals.” H.R. REP. NO. 102-1006, pt. 1, at 18 (1992), reprinted in 1992 U.S.C.C.A.N. 3921, 3927. See also *supra* text accompanying note 113.

150. 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.

See Anderson, *supra* note 31, at 587. Although Anderson published this quote in 1998, it still is factually correct. See *infra* note 154 and accompanying text. The Supreme Court and the rulemaking bodies have, however, invoked the authority granted under § 1292(e) to promulgate Rule 23(f), which grants the courts of appeals the discretion to allow an immediate appeal of an order granting or denying a class-action certification. FED. R. CIV. P. 23(f).

151. See Alexandra B. Hess et al., *Permissive Interlocutory Appeals at the Court of Appeals for the Federal Circuit: Fifteen Years in Review (1995–2010)*, 60 AM. U. L. REV. 757, 764 n.37 (2011) (noting that by 2011 the Court had only referenced its power under § 1292(e) in only five cases and

the Court to expand the scope of immediately appealable non-final orders, it is quite clear that the suggestion in *Mohawk Industries* that the Court was going out of the business of judicially expanding the collateral order doctrine has become the definitive law.

At this point, the state of the Court's finality jurisprudence regarding the collateral order doctrine is at an impasse. The Court refuses to judicially expand the collateral order doctrine, while simultaneously invoking its rulemaking authority as a non-penetrable shield against any expansion attempt.¹⁵² Congress intended the Court to revise its finality jurisprudence.¹⁵³ The Court, however, has not only limited itself to the rulemaking authority as the only mechanism to effectuate revision, but also has only once since 1990 invoked its rulemaking authority to promulgate such a rule.¹⁵⁴ Because the collateral order doctrine is unsuited for codification as a federal rule, the collateral order doctrine and the Court's finality jurisprudence are in a precarious position.¹⁵⁵ That is why the Court should reverse course and rectify the situation by reading Congress's intent into the interpretation of the statutory amendments governing finality and the scope of interlocutory appeals. In doing so, the Court should simultaneously release the collateral order doctrine from its currently strict confinement by providing the lower courts with a workable, flexible standard for determining the scope of immediately appealable non-final orders.

III. THE UNSUITABILITY OF THE COLLATERAL ORDER DOCTRINE AS A FEDERAL RULE

After *Mohawk Industries*, the path to expanding the collateral order doctrine must either navigate the rulemaking process or be specifically addressed by Congress through legislation. Rule 23(f) of the Federal Rules of Civil Procedure¹⁵⁶ provides the lone example of how expansion can be

citing to *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 691 (2010) (Ginsburg, J., dissenting); *Mohawk Indus.*, 558 U.S. at 114; *Cunningham v. Hamilton Cnty., Ohio.*, 527 U.S. 198, 210 (1999); *Johnson v. Jones*, 515 U.S. 304, 310 (1995); and *Swint*, 514 U.S. at 48).

152. See *Ortiz v. Jordan*, 131 S. Ct. 884 (2011) (declining to allow an appeal from a denial of summary judgment after a full trial on the merits).

153. See discussion *supra* Part II.A.

154. See Carey M. Erhard, Note, *A Discussion of the Interlocutory Review of Class Certification Orders Under Federal Rule of Civil Procedure 23(f)*, 51 *DRAKE L. REV.* 151, 157 (2002) ("Rule 23(f) is the only Federal Rule of Civil Procedure created under § 1292(e)").

155. See discussion *infra* Part III.

156. "A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14

accomplished through the rulemaking process.¹⁵⁷ While the structure and subsequent application of Rule 23(f) in the appellate courts may serve as a model for future codification of immediately appealable non-final orders, the rule also exemplifies the inadequacy of solely relying on the rulemaking process to effectuate Congress's purpose of clarifying the Court's finality jurisprudence while expanding the scope of the collateral order doctrine.¹⁵⁸ Rather than designate rulemaking as the exclusive avenue for expansion, the Court should break from their self-imposed handcuffs and embrace the alternative route for expansion through judicial decision-making.¹⁵⁹

A. *The Codification Story of Rule 23(f)*

While Rule 23(f) is a prime example of how the rulemaking authority granted by Section 1292(e) can be used to expand the contours of the collateral order doctrine, it also illustrates the inadequacies of sole reliance on the rulemaking authority to determine the scope of the doctrine. Certainly, the promulgation of Rule 23(f) is a positive development for those parties seeking to immediately appeal a court order granting or denying class-action certification. But Rule 23(f) also illustrates the inadequacies of such an approach for two reasons. First, the circuit courts have adopted a variety of standards to determine what orders qualify, confusing both courts and litigants.¹⁶⁰ Second, it proves that such an approach is only workable if the rulemakers are prepared to address and apply the same process for every other prejudgment order. As a result, while Rule 23(f) has expanded the scope of the collateral order doctrine, it has, at the same time, sounded the death-knell for future use of the approach due to its unintended consequences.

A full description of the formal rule-making process is beyond the scope of this Note,¹⁶¹ but as a previous Chair of the Civil Rules Advisory

days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders." Fed. R. Civ. P. 23(f).

157. See discussion *infra* Part III.A.

158. See discussion *infra* Part III.B.

159. See discussion *infra* Part IV.

160. See Christopher A. Kitchen, Note, *Interlocutory Appeal of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal for A New Guideline*, 2004 COLUM. BUS. L. REV. 231, 244–52 (detailing the variety of standards the circuit courts have adopted and applied in determining appealability under Rule 23(f)).

161. For a full description of the rulemaking process and its contextual background, see generally Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M.L. REV. 261 (2009).

Committee summarized: “Suffice it to say that it is slow, deliberate and utterly transparent—and purposely so.”¹⁶² Generally, the advisory committees that work under the direction of the Standing Committee on Rules of Practice and Procedure receive suggestions from both the bench and the bar—among other interested groups—regarding potential rule changes.¹⁶³ Then, proposed changes are recommended and sent from the standing committees, to the Judicial Conference, and then to the Supreme Court and to Congress.¹⁶⁴ As Judge Kravitz noted, it is a time-consuming process with most rules navigating the process for at least three years, but in many cases “for quite a bit longer.”¹⁶⁵

At the same time Congress was implementing the recommendations of the Federal Courts Study Committee in the early 1990s,¹⁶⁶ the Advisory Committee on the Federal Rules of Civil Procedure took under consideration a variety of proposals that suggested amendments to Rule 23,¹⁶⁷ with a final draft of the proposed amendments published in 1996.¹⁶⁸ The comments to the proposed amendment shed light on both the motivations behind proposing Rule 23(f) and a broader debate concerning the merits of allowing immediate appeals of non-final orders.¹⁶⁹ The supporters of Rule 23(f) advanced similar arguments to those put forward for expanding the collateral order doctrine generally. For example, a

162. Mark R. Kravitz, *To Revise, or Not to Revise: That Is the Question*, 87 DENV. U. L. REV. 213, 216 (2010). Judge Kravitz served as Chair of the Civil Rules Advisory Committee from June 2007 until his death in September 2012. He also served as a member of the Standing Committee on Rules of Practice and Procedure from 2001–2007, and was a United States District Judge for the District of Connecticut.

163. *Id.* (describing the general rulemaking structure, including the relationship between Congress, the Judicial Conference of the United States, the Supreme Court, the Standing Committee, and the advisory committees).

164. *Id.* at 215–17.

165. *Id.* at 216 (“Most rules that make it through this process have been considered for at least three years; many rules are considered for quite a bit longer.”).

166. *See supra* text accompanying notes 107–16.

167. The history of the draft proposals, including internal comments from advisory committee members and external comments from interested members of the bench and bar, are reprinted in RULES COMM. SUPPORT OFFICE, ADMIN. OFFICE OF THE U.S. COURTS, 1–4 WORKING PAPERS OF THE ADVISORY COMM. ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23 (1997) [hereinafter WORKING PAPERS], available at <http://www.uscourts.gov/RulesAndPolicies/rules/archives/fjc-studies-and-related-publications.aspx>.

168. For the text of the proposed amendments, see *Proposed Amendments to the Federal Rules of Civil Procedure*, 167 F.R.D. 559, 559–60 (1996). *See id.* at 560–66 for the advisory committee note corresponding to the proposed amendments to Rule 23 [hereinafter Committee Note].

169. *See* WORKING PAPERS, *supra* note 167 (providing comments reprinted in full). For a useful summary of the arguments advanced by both supporters and opponents, see Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1565–66 (2000); *see also* Erhard, *supra* note 154, at 156 (providing a similar overview).

prominent argument put forth was that “class certification is ‘the whole ballgame’ and is an important issue that deserves an immediate appeal.”¹⁷⁰ Other supporters pointed to the inadequacy of the certification procedures and mandamus as provided in Section 1292(b) as alternatives, and contended that the immediate appeal provided by the proposal would be a “useful safety valve.”¹⁷¹ On the other hand, opponents of the proposal asserted that the inevitable result of Rule 23(f) would be “an increase in litigation expenses and further delays in resolving class actions”—the same argument generally made in opposition to expanding the collateral order doctrine.¹⁷²

Six years after the first draft was proposed in November 1992, Rule 23(f) went into effect on December 1, 1998.¹⁷³ The text of Rule 23(f) is as follows:

A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.¹⁷⁴

The committee note accompanying Rule 23(f) outlines the principal concerns that motivated the committee’s decision to expand the collateral order doctrine. The committee relied on a simple cost-benefit analysis showing that the identified concerns can be “met at low cost” if appellate courts have discretionary power to allow immediate appeals “in cases that show appeal-worthy certification issues.”¹⁷⁵ The committee note also acknowledged that Rule 23(f) was modeled on the certification procedure under Section 1292(b), but deliberately distinguished the two by

170. Solimine & Hines, *supra* note 169, at 1565 n.181 (citing 1 WORKING PAPERS, *supra* note 167, at 409 (summary of comments by William T. Coleman, Jr.)).

171. *Id.* at 1565 n.183 (citing 1 WORKING PAPERS, *supra* note 167, at 409 (summary of comments by Bartlett H. McGuire)).

172. Solimine & Hines, *supra* note 169, at 1566 (citing 1 WORKING PAPERS, *supra* note 167, at 408 (summary of comments by Richard A. Lockridge and Michael D. Donovan); *see also* 1 WORKING PAPERS, *supra* note 167, at 409, 413 (summary of comments by Stanley M. Chesley and Joseph Goldberg)).

173. *See Amendments to Federal Rules of Civil Procedure, Criminal Procedure, Evidence and Appellate Procedure*, 177 F.R.D. 530 (1998) (authorizing the Chief Justice to transmit Rule 23(f) to Congress in accordance with the Rules Enabling Act, and establishing the effective date of December 1, 1998). *See* Solimine & Hines, *supra* note 169, at 1564–65 n.180, for an explanation behind the withdrawal of the other proposed amendments to Rule 23.

174. Fed. R. Civ. P. 23(f).

175. Committee Note, *supra* note 168, at 565.

specifying that Rule 23(f) would operate more liberally by not requiring certification and by not being subject to the “potentially limiting requirements of Section 1292(b).”¹⁷⁶ And finally, the committee note instructed that, “[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive.”¹⁷⁷ On the whole, the committee note suggests that broadening the contours of the collateral order doctrine is a low-cost method of addressing trial court errors, and also that the courts of appeal should have broad discretion in determining immediate appealability on a case-by-case basis.

B. Rule 23(f) As Both A Model for Future Codification and Evidence Against Sole Reliance on the Rulemaking Process to Expand the Collateral Order Doctrine

The Seventh Circuit was the first court in which an application for appeal was filed under Rule 23(f),¹⁷⁸ and Judge Easterbrook’s opinion provides further evidence of both the purpose and application of the rule. The court first embraced the discretionary nature of its review, noting that “[n]either a bright-line approach nor a catalog of factors would serve well” in the court’s determination of whether the appeal should be granted.¹⁷⁹ Instead, the court suggested a case-by-case approach focusing on whether the “denial of class status seems likely to be fatal” and, if so, whether the “plaintiff has a solid argument in opposition to the district court’s decision.”¹⁸⁰

Notably, Judge Easterbrook dismissed the argument that the approach outlined above would result in greater litigation delays by drawing an analogy to the preliminary injunction analysis.¹⁸¹ Structurally, Rule 23(f) prevents delay because an application requesting an appeal does not stop the litigation at the trial level.¹⁸² Either the district court or the court of appeals can issue a stay, which would inevitably delay the litigation, but

176. *Id.*

177. *Id.* at 566.

178. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 833 (7th Cir. 1999) (“This rule became effective on December 1, 1998, and we have for consideration the first application filed in this circuit (and, so far as we can tell, the nation) under the new rule.”).

179. *Id.* at 834.

180. *Id.* Judge Easterbrook also instructed that “if the ruling is impervious to revision there’s no point to an interlocutory appeal.” *Id.* at 835. The court also acknowledged that an application for immediate appeal would be more likely to succeed if the appeal “may facilitate the development of the law.” *Id.*

181. *Id.*

182. Fed. R. Civ. P. 23(f) (“An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.”).

that determination is made on a similar basis as the approach outlined above, and similar to the analysis conducted in determining whether to issue a preliminary injunction.¹⁸³

In essence, Judge Easterbrook suggested taking a two-fold approach—considering both the irreparable harm to the parties and the likelihood of the appeal’s success. As will be more fully developed below, not only does such an approach properly recognize that a discretionary review is the best method for determining whether to grant or deny an immediate appeal, but it also capitalizes on the pragmatism of the elements of a preliminary injunction analysis in looking to evidence of both irreparable harm and the likelihood of success.¹⁸⁴

Although the standard developed by the Seventh Circuit to determine whether an immediate appeal should be granted under Rule 23(f) makes considerable sense, significant flaws still exist that suggest rulemaking is not the most satisfactory method for achieving Congress’s two-pronged goal of clarifying finality jurisprudence and increasing the number of immediately appealable non-final orders. For example, the path from proposal to adoption for Rule 23(f) provides new meaning to Judge Kravitz’s description of the rulemaking process as “slow, deliberate, and utterly transparent.”¹⁸⁵ Indeed, rather than the three years Judge Kravitz suggested was the minimum amount of time necessary, the process took at least six years before Rule 23(f) took effect.¹⁸⁶ Surely the rulemaking bodies could promulgate similar rules setting forth new classes of immediately appealable non-final orders, but the impracticality of such a proposal is evidenced by the fact that Rule 23(f) is the lone example of a rule promulgated under Section 1292(e) and through the formal rulemaking process.¹⁸⁷ By contrast, before the Supreme Court retired from the business of judicially expanding the collateral order doctrine, it decided the appealability of certain non-final orders on average once per year.¹⁸⁸ While an argument can be made that such an approach is simply passing the responsibility from rulemaking bodies to the Court, this

183. See *Blair*, 181 F.3d at 835 (noting that “a stay would depend on a demonstration that the probability of error in the class certification decision is high enough that the costs of pressing ahead in the district court exceed the costs of waiting,” and acknowledging that “[t]his is the same kind of question that a court asks when deciding whether to issue a preliminary injunction”).

184. See discussion *infra* Part IV.

185. Kravitz, *supra* note 162, at 216.

186. See *supra* text accompanying notes 166–75.

187. See *supra* note 154 and accompanying text.

188. Anderson, *supra* note 31, at 581 (“[D]uring the era of expansion from 1974 to 1988, the issue commanded the Court’s attention fourteen times, or once a year.”).

argument falls short in light of the Court's more efficient capabilities in addressing appellate litigators' novel attempts to expand the collateral order doctrine.¹⁸⁹

On the whole, while Rule 23(f) is limited to the appealability of class-action certification orders, it can provide a model for codifying a broad standard encompassing a flexible and largely discretionary approach to analyzing applications for appeal under the collateral order doctrine. At the very least, it is clear that the rigid judicial approach the Court applied to determine whether broad classes of non-final orders could be immediately appealed was both over and under inclusive. Subsequent opinions establishing standards for analyzing Rule 23(f) applications embrace the broad discretion granted to courts of appeal, while deriding any potential "rule that would clearly delineate every instance in which our interlocutory review . . . is appropriate."¹⁹⁰ Although Rule 23(f) illustrates the flaws in rulemaking, it also presents a method for expanding the collateral order doctrine that is better suited to the task than the Supreme Court's previous attempts at clarification, or any future attempt to codify a broad standard attempting to delineate every instance in which an immediate appeal is available.

While useful, Rule 23(f) also illustrates the limitations of codification as evidenced not only by its lengthy codification story¹⁹¹ but also by the fact that it is the only federal rule that has been codified under the authority of Section 1292(e).¹⁹² That is why the Court should revisit its reliance on a mistaken interpretation of Sections 2072(c) and 1292(e), and acknowledge the appropriateness of judicial expansion of the collateral order doctrine as a viable supplement to the rulemaking process. In doing

189. I assert that the frequency of issues regarding the scope of the collateral order doctrine reaching the Court's docket during the expansion era is evidence that the Court has "more efficient capabilities" than the rulemaking bodies, such as those involved in the promulgation of Rule 23(f) of the Federal Rule of Civil Procedure, given the time taken to dispose of issues regarding the scope of the collateral order doctrine.

190. *Vallario v. Vandehey*, 554 F.3d 1259, 1264 (10th Cir. 2009) (also noting that, "we emphasize that our discretion in granting or denying a petition for interlocutory review is broad, and necessarily so"); *see also Prado-Steiman v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000) (recognizing that its "authority to accept Rule 23(f) petitions is highly discretionary, and the . . . list of factors is not intended to be exhaustive; there may well be special circumstances that lead us to grant or deny a Rule 23(f) petition even where some or all of the relevant factors point to a different result"); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (noting that its discretionary review suggests that "[n]either a bright-line approach nor a catalog of factors would serve well . . . when courts necessarily must experiment with the new class of appeals").

191. *See* discussion *supra* Part III.A.

192. *See Erhard*, *supra* note 154, at 157 ("Rule 23(f) is the only Federal Rule of Civil Procedure created under § 1292(e).").

so, the Court should embrace Rule 23(f) as a model for future federal rules regarding the immediate appealability of non-final orders. But recognizing the flaws of the rulemaking process, the Court should also adopt a broad standard—one similar to Judge Easterbrook’s proposed approach to analyzing applications for appeal under Rule 23(f)—for courts to apply to all applications for appeal under the collateral order doctrine.

IV. THE COLLATERAL ORDER DOCTRINE AS A FLEXIBLE STANDARD

In 1949 the Supreme Court invented the collateral order doctrine.¹⁹³ In 1992, Congress provided the Court with another tool to expand the list of immediately appealable non-final orders by granting the Court rulemaking authority.¹⁹⁴ Culminating in *Mohawk Industries* in 2009, the Court strictly confined the collateral order doctrine to its current state by refusing to expand the doctrine through judicial decision-making.¹⁹⁵ It is time for the Court to break the current impasse and reinvent the collateral order doctrine.¹⁹⁶ The Court should reverse course by finally effectuating Congress’s stated intent in enacting Sections 1292(e) and 2072(c) to expand the list of immediately appealable non-final orders through both judicial decision-making and the rulemaking authority.

Professor Steinman, urging a similar reconsideration of the collateral order doctrine and appellate mandamus, identified a “new model of adjudication”¹⁹⁷ that necessitates caution from the Court’s “return to strict adherence to the final judgment rule.”¹⁹⁸ This “new model of adjudication” is a simple reflection of modern pretrial litigation, in which there has been a significant decrease in the number of claims resulting in a true final judgment.¹⁹⁹ Rather, the non-final decisions, such as “interlocutory decisions relating to jurisdiction, alternative dispute resolution, pleadings, class actions, discovery, and summary judgment” are serving as the dispositive ruling in much litigation.²⁰⁰ As a result, many non-final orders are having the effect of finality without qualifying as a true final

193. See *supra* note 43 and accompanying text.

194. See *supra* note 110 and accompanying text.

195. *Mohawk Indus., Inc., v. Carpenter*, 558 U.S. 100, 113–14 (2009).

196. As one commentator has noted, this is not as revolutionary as it may seem. Steinman, *supra* note 14, at 1240 (recognizing that the collateral order doctrine is a creature of the Court’s own making, and, as a result, if the Court can *invent* the doctrine, the Court certainly can *reinvent* it).

197. *Id.* at 1241.

198. *Id.* 1240–41.

199. *Id.* at 1240.

200. *Id.* at 1241.

judgment.²⁰¹ In these situations, although the parties may have reached a final decision, neither party has an appealable final decision because there is no final judgment.²⁰² When considered in light of the broad purposes immediate appeals of non-final orders serve in the appellate court system, the problems created by this new model of adjudication warrant the Court's attention in revisiting the collateral order doctrine and adopting a more flexible approach to confronting these new issues.

In a broad sense, the immediate appealability of non-final orders serves three goals that coincide with the general purpose of the appellate court system. First, immediate appealability serves to "alleviat[e] . . . hardship by providing an opportunity to review orders of the trial court before they irreparably modify the rights of the litigants."²⁰³ Second, an immediate appeal allows appellate courts to perform a critical function in the "development of the law by providing a mechanism for resolving conflicts among trial courts on issues not normally open on final appeal."²⁰⁴ Third, an immediate appeal avoids the "waste of trial court time by providing an opportunity to review orders before they result in fruitless litigation and wasted expense."²⁰⁵

These broad purposes of both the collateral order doctrine and the appellate court system as a whole cannot be furthered by the Court's strict confinement of the doctrine by handicapping itself to expansion only through the formal rulemaking process. These broad purposes, however, can be fulfilled if the Court reinvents the collateral order doctrine by effectuating Congress's true intent in granting the Court rulemaking authority. Congress did not intend to handicap the Court; rather, Congress intended to empower the Court with an alternative armament to be used alongside the Court's judicial decision-making power to expand the list of immediately appealable non-final orders. But rather than burden itself with the task of formulating bright-line rules governing which broad class of non-final orders are immediately appealable, the Court should entrust the lower courts with this task by providing a workable, flexible standard to apply when analyzing applications for appeal under the collateral order doctrine.

201. Settlement agreements are unappealable, so to the extent such interlocutory decisions are used by litigants to work toward settlement they have the effect of achieving finality without qualifying as an appealable final judgment. *See id.* at 1240–41.

202. *See id.*

203. Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 609 (1975).

204. *Id.*

205. *Id.*

The collateral order doctrine has its roots in the formulaic *Cohen* conditions in which a non-final order, must conclusively determine the disputed question, be important and separate from the merits, and be effectively unreviewable after final judgment in order to qualify for immediate appealability.²⁰⁶ Since *Cohen*, however, the Court has altered *Cohen* and the collateral order doctrine by incorporating two additional requirements. First, in *Lauro Lines*, the Court included a separate requirement that the issue be sufficiently “important” to warrant an immediate appeal.²⁰⁷ And, most recently in *Mohawk Industries*, the Court imposed the requirement that there be no conceivable alternatives to a collateral order appeal available to the litigant.²⁰⁸ While the Court purported to analyze whether a non-final order qualified as an immediately appealable collateral order by mechanically applying the formulaic *Cohen* conditions, the Court, in fact, was already conducting the flexible test advocated in this Note.²⁰⁹

In an early rebuke of the collateral order doctrine as the “New ‘Serbonian Bog,’” Lloyd C. Anderson argued that the “formulaic approach is a fiction” and that the Court’s “wildly inconsistent” approach to determining what non-final orders qualify as immediately appealable is better explained by acknowledging that the “Court in fact employs a flexible test rather than a formula of set conditions.”²¹⁰ For example, in *Mohawk Industries*, although Justice Sotomayor principally refused to expand the collateral order doctrine through judicial decision-making, she did conduct a full *Cohen* analysis, in which she invoked elements of a more flexible cost-benefit analysis.²¹¹ Although effectively irrelevant because the Court was never going to include non-final disclosure orders

206. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). *See also* discussion *supra* Part I.B.

207. *See Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 502–03 (1989); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867–68 (1994). *See also* discussion *supra* Part I.C.

208. *Mohawk Indus., Inc., v. Carpenter*, 558 U.S. 100, 109 (2009). *See also* discussion *supra* Part II.B.

209. *See Anderson, supra* note 31, at 608 (contending that the Court’s purported formulaic application of the *Cohen* conditions is a “fiction,” in which “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.”).

210. *See id.* at 608–09 (“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.”).

211. *See Mohawk Indus.*, 558 U.S. at 112 (weighing the “limited benefits” of authorizing a collateral order appeal in this particular instance against the “likely institutional costs” of doing so).

in the list of immediately appealable collateral orders, Justice Sotomayor did conclude that “the limited benefits of applying ‘the blunt, categorical instrument of Section 1291 collateral order appeal’ to privilege-related disclosure orders simply cannot justify the likely institutional costs.”²¹² In effect, Justice Sotomayor, in her application of the *Cohen* analysis, actually invoked a cost-benefit balancing approach.

Justice Sotomayor’s application of the *Cohen* analysis is similar to the justification the Advisory Committee put forth in its committee note accompanying Rule 23(f). There the committee relied on a simple cost-benefit analysis showing that the identified concerns can be “met at low cost” if appellate courts have discretionary power to allow immediate appeals “in cases that show appeal-worthy certification issues.”²¹³ Judge Easterbrook also used this cost-benefit approach in articulating a standard to review applications for immediate appeals under Rule 23(f), in which he suggested taking a two-fold approach—considering both the irreparable harm to the parties and the likelihood of the appeal’s success. More specifically, Judge Easterbrook first embraced the discretionary nature of the court’s review, noting that “[n]either a bright-line approach nor a catalog of factors would serve well” in the court’s determination of whether the appeal should be granted.²¹⁴ Instead, he suggested a case-by-case approach, focusing on whether the “denial of class status seems likely to be fatal” and, if so, whether the “plaintiff has a solid argument in opposition to the district court’s decision.”²¹⁵

Taken together, the committee note accompanying Rule 23(f) combined with Justice Sotomayor’s opinion in *Mohawk Industries* and Judge Easterbrook’s opinion in the Seventh Circuit, indicate that a flexible approach, utilizing a simple cost-benefit analysis, is a low-cost method of addressing trial court errors and determining which non-final orders should qualify as immediately appealable collateral orders. When viewed in this light, the Court’s reinvention of the collateral order doctrine is not as revolutionary as it may sound. Rather, the reinvention is merely an open recognition of a flexible standard already employed by the lower courts, the rulemaking authorities, and the Court itself.

212. *Id.* (quoting *Digital*, 511 U.S. at 883).

213. Committee Note, *supra* note 168, at 565.

214. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999).

215. *Id.* Judge Easterbrook also instructed that “if the ruling is impervious to revision there’s no point to an interlocutory appeal.” *Id.* at 835. The court also acknowledged that an application for immediate appeal would be more likely to succeed if the appeal “may facilitate the development of the law.” *Id.*

V. CONCLUSION

“Each Chief Justice of the United States makes his mark on his Court, leading different jurisprudential projects and agendas, and moving and developing the law in some area.”²¹⁶ To the extent that “civil procedure and the Federal Rules comprise a significant part of the Roberts Court’s emerging jurisprudential agenda,” the civil procedure revival under the Roberts Court could not only be its legacy, but it could also dramatically shift the procedural landscape for future litigation.²¹⁷ True to form, the Roberts Court has issued important decisions determining the scope of the collateral order doctrine and strictly confining the list of immediately appealable non-final orders to its pre-Roberts Court era extent. The Court has effectuated its stranglehold on the collateral order doctrine by invoking its rulemaking authority granted by Congress as an impenetrable shield to creative appellate litigator’s novel attempts to expand the contours of the doctrine. Rather than give effect to Congress’s intent behind granting the Court rulemaking authority—to revise its finality jurisprudence while expanding the list of immediately appealable non-final orders—the Court misinterpreted Congress’s actions as a limit on their authority. As a result, the Roberts Court has made its mark on the collateral order doctrine by shutting its doors to its own judicial invention and delegating future responsibility for the doctrine to the formal rulemaking bodies.

While the rulemaking process can be used to expand the contours of the collateral order doctrine, the codification story of Rule 23(f) also provides evidence against sole reliance on the rulemaking process to expand the collateral order doctrine. To achieve the broad purposes behind allowing immediate appeals of non-final orders, and the goals of the appellate court system as a whole, the Roberts Court should revisit its interpretation of the rulemaking authority granted to it by Congress. In doing so, the Court should effectuate Congress’s stated intent by recognizing that the rulemaking authority is a supplement to the Court’s judicial decision-making power to determine the scope of the collateral order doctrine. Instead of using its rulemaking authority as a shield, defying both legislative directives and prudential concerns, the Court

216. Wasserman, *supra* note 1, at 313.

217. *Id.* at 316.

should articulate a more flexible, balanced approach to the *Cohen* conditions and the collateral doctrine as a whole.

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