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REVISITING *ROOKER-FELDMAN*: EXTENDING THE DOCTRINE TO STATE COURT INTERLOCUTORY ORDERS

DUSTIN E. BUEHLER*

ABSTRACT

The Rooker-Feldman *doctrine prohibits lower federal courts from exercising appellate jurisdiction over state court judgments. After decades of confusion, the Supreme Court recently clarified the scope and proper application of the doctrine in two cases,* Exxon Mobil Corp. v. Saudi Basic Industries Corp. *and* Lance v. Dennis. *However, the Court left a key question unanswered: which state court "judgments" trigger the protection of* Rooker-Feldman*? Does the doctrine prohibit lower federal courts from reviewing only final state court judgments? Or does it also prohibit review of state court interlocutory orders, such as stays, preliminary injunctions, rulings on pretrial motions, and discovery orders? The circuits are split on this issue. This Article examines the evolution and purpose of* Rooker-Feldman *and concludes that the doctrine should protect all state court judgments, including interlocutory orders. This is the only approach that respects interests vital to the interaction between state and federal courts, including separation of powers, federalism, and parity.*

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I. INTRODUCTION

Under 28 U.S.C. § 1257, the U.S. Supreme Court has jurisdiction to hear appeals from final state court judgments.[1] By comparison, under 28 U.S.C. § 1331, federal district courts can only exercise "original jurisdiction,"[2] not appellate jurisdiction.[3] In *Rooker v. Fidelity Trust Co.*[4] and *District of Columbia Court of Appeals v. Feldman*,[5] the Supreme Court interpreted these two statutes and held that lower federal courts do not have appellate jurisdiction over state court judgments.[6]

At first blush, this rule seems logical and straightforward. Over the years, however, an "impermeable cover of jurisprudential kudzu has grown" from this seemingly simple rule.[7] Judges and scholars have heaped scathing criticism on the "so-called *Rooker-Feldman* doctrine."[8] They argue that the doctrine is confusing,[9] that it serves no useful purpose,[10] and that it gets conflated with abstention and

1. 28 U.S.C. § 1257 (2006).
2. 28 U.S.C. § 1331 (2006).
3. *See id.*
4. 263 U.S. 413 (1923).
5. 460 U.S. 462 (1983).
6. *Feldman*, 460 U.S. at 486; *Rooker*, 263 U.S. at 416.
7. Allison B. Jones, Note, *The* Rooker-Feldman *Doctrine: What Does It Mean to Be Inextricably Intertwined?*, 56 DUKE L.J. 643, 643 (2006).
8. Indeed, the prevalent use of the phrase "so-called *Rooker-Feldman* doctrine" itself suggests that many judges and scholars view the doctrine as questionable or illegitimate. *See, e.g.*, Lance v. Dennis, 546 U.S. 459, 468 (2006) (Stevens, J., dissenting); Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 18 (1987) (Scalia, J., concurring); R.G. Fin. Corp. v. Vergara-Nuñez, 446 F.3d 178, 188 n.3 (1st Cir. 2006); Schiavo *ex rel.* Schindler v. Schiavo, 404 F.3d 1270, 1281 n.7 (11th Cir. 2005) (Tjoflat, J., dissenting from the denial of rehearing en banc); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1022 (2002).
9. *See, e.g.*, Jones, *supra* note 7, at 643.
10. *See, e.g.*, Jack M. Beermann, Comment, *Comments on* Rooker-Feldman *or Let State Law Be Our Guide*, 74 NOTRE DAME L. REV. 1209, 1209 (1999) ("The *Rooker-Feldman* doctrine is an oddity in the law. In fact, I have been unable to think of another legal doc-

preclusion doctrines.[11] Some even argue that the doctrine should be abolished outright.[12] After the Supreme Court recently emphasized the narrowness of the doctrine,[13] a few critics gleefully announced that *Rooker-Feldman* was finally dead.[14]

Alas, to the annoyance of those intent on hauling *Rooker-Feldman* off for burial, the corpse keeps shouting, "I am not dead yet!"[15] Lower federal courts continue to use the doctrine as a "docket-clearing workhorse."[16] During the year following the Supreme Court's most recent *Rooker-Feldman* decision, lower federal courts invoked the doctrine more than 500 times and used it to bar federal jurisdiction in approximately seventy percent of those cases.[17] Despite the wishful thinking of the doctrine's many detractors, these numbers highlight an inconvenient truth—the *Rooker-Feldman* doctrine is alive and here to stay.[18]

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trine that lacks both a clear role and a clear justification."); Gary Thompson, Note, *The* Rooker-Feldman *Doctrine and the Subject Matter Jurisdiction of Federal District Courts*, 42 RUTGERS L. REV. 859, 861 (1990) ("[T]he *Rooker-Feldman* doctrine is unnecessary and potentially harmful.").

11. *See, e.g.*, Rachel Thomas Rowley, *The* Rooker-Feldman *Doctrine: A Mere Superfluous Nuance or a Vital Civil Procedure Doctrine? An Analysis of the Tenth Circuit's Decision in* Johnson v. Rodrigues, 78 DENV. U. L. REV. 321, 321 (2000) ("Rooker-Feldman is often misapplied as an abstention or preclusion doctrine and courts exacerbate the problem by continually using the three doctrines interchangeably.").

12. *See, e.g.*, Barry Friedman & James E. Gaylord, Rooker-Feldman, *from the Ground Up*, 74 NOTRE DAME L. REV. 1129, 1133 (1999) ("Our conclusions may be summarized simply: *Feldman* itself should be overruled. The *Rooker-Feldman* doctrine should be abolished."); Thompson, *supra* note 10, at 862 (calling for "the end to recognition of *Rooker-Feldman* as an independent doctrine of federal court jurisdiction").

13. *See* Lance v. Dennis, 546 U.S. 459, 464 (2006) (per curiam); Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005).

14. One commentator published a mock obituary for the *Rooker-Feldman* doctrine, dating its death as February 21, 2006, the day of the Supreme Court's decision in *Lance v. Dennis*. *See* Samuel Bray, *Rooker Feldman (1923-2006)*, 9 GREEN BAG 2D 317, 317 (2006). Speaking for the many detractors of "Mr. Feldman," the obituary opined: "It is hoped that he leaves no survivors. Funeral services will be held in the National Cathedral on Friday, February 24, 2006, at 2:00 p.m." *Id.* at 318. Supreme Court Justice John Paul Stevens has proclaimed the death of *Rooker-Feldman* at least twice. *See* Marshall v. Marshall, 547 U.S. 293, 318 (2006) (Stevens, J., concurring in the judgment); *Lance*, 546 U.S. at 468 (Stevens, J., dissenting).

15. The author confesses this is a not-so-subtle reference to Broadway's *Spamalot*, and, reaching farther back, to *Monty Python and the Holy Grail*.

16. Susan Bandes, *The* Rooker-Feldman *Doctrine: Evaluating Its Jurisdictional Status*, 74 NOTRE DAME L. REV. 1175, 1175 (1999).

17. A Westlaw search of all federal cases in which the word "Rooker" and "Feldman" appeared in the same sentence showed that between February 22, 2006, and February 22, 2007—the year immediately following the Supreme Court's decision in *Lance v. Dennis*—lower federal courts cited *Rooker-Feldman* in 682 decisions and addressed whether the doctrine was applicable in 524 of those decisions. Lower federal courts used *Rooker-Feldman* to bar jurisdiction for at least some of the litigants' claims in 381 cases, representing 72.7% of the cases in which the doctrine was analyzed.

18. *See, e.g.*, O'Callaghan v. Harvey, 233 F. App'x 181, 183 (3d Cir. 2007); Chapman v. Oklahoma, 472 F.3d 747, 749 (10th Cir. 2006).

If we are stuck with *Rooker-Feldman*, we should at least understand what it is and what role it plays. Unfortunately, this is not an easy task. Lower federal courts disagree on the doctrine's scope and proper application[19] and often confuse it with preclusion doctrines, especially res judicata.[20] Given how frequently courts use *Rooker-Feldman* to bar federal jurisdiction, it is surprising how muddled it is and how infrequently scholars analyze it.[21]

The Supreme Court attempted to clarify *Rooker-Feldman* in two recent decisions—*Exxon Mobil Corp. v. Saudi Basic Industries Corp*.[22] and *Lance v. Dennis*.[23] In these cases, the Court held that the doctrine is confined to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."[24] In other words, entry of a state court judgment triggers the doctrine. After the state court files its judgment, the losing party must appeal through the state court system and cannot attempt to overturn the judgment by filing a new lawsuit in federal district court.

Unfortunately, the Supreme Court left a key question unanswered: which state court "judgments" trigger the protection of *Rooker-Feldman*?[25] Does the doctrine prohibit federal district courts from reviewing only *final* state court judgments? Or does it also prevent federal district courts from exercising appellate jurisdiction over state court *interlocutory* decisions, such as stays, preliminary injunctions, rulings on pretrial motions, and discovery orders? Federal cir-

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19. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1440 (5th ed. 2003) ("The lower courts, which have often found the Rooker-Feldman doctrine relevant and even dispositive, have not agreed on its proper scope or application."); Adam McLain, Comment, *The* Rooker-Feldman *Doctrine: Toward a Workable Role*, 149 U. PA. L. REV. 1555, 1573 (2001) ("[C]ourts are confused and consequently are misapplying the doctrine."); Thompson, *supra* note 10, at 880 ("Lower court interpretations of *Feldman* have been mixed.").

20. *See, e.g.*, Moccio v. N.Y. State Office of Court Admin., 95 F.3d 195, 199-200 (2d Cir. 1996) ("[W]here a federal plaintiff had an opportunity to litigate a claim in a state proceeding . . . , subsequent litigation of the claim will be barred under the *Rooker-Feldman* doctrine if it would be barred under the principles of preclusion."), *abrogated by* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005); United States v. Owens, 54 F.3d 271, 274 (6th Cir. 1995) (characterizing *Rooker-Feldman* as "a combination of the abstention and res judicata doctrines").

21. *See* Bandes, *supra* note 16, at 1175-76 ("Federal courts scholars and casebook authors, most likely taking their cue from the Supreme Court's lack of attention to the doctrine, have themselves given it little or no attention.").

22. 544 U.S. 280 (2005).

23. 546 U.S. 459 (2006) (per curiam).

24. *Id.* at 464; *Exxon Mobil*, 544 U.S. at 284.

25. *See* 18 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 133.30[3][c][ii] (3d ed. 2006); Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 144 (2006) [hereinafter Sherry, *Logic Without Experience*].

cuit courts are split on this question,[26] and scholars have not analyzed the issue in depth.[27] There is no resolution on this aspect of the *Rooker-Feldman* doctrine, despite its importance.[28]

This Article bridges that gap. Part II examines the evolution of the *Rooker-Feldman* doctrine from the Supreme Court's decision in *Rooker* to its recent decisions in *Exxon Mobil* and *Lance*. This analysis shows that the Supreme Court has clarified the scope of *Rooker-Feldman*, but it has not addressed whether the doctrine applies only to final state court judgments or also to state court interlocutory orders. We must look beyond existing case law for an answer.

Part III of this Article examines the purposes of the *Rooker-Feldman* doctrine. The doctrine enforces separation of powers and the limited jurisdiction of federal courts, advances interests of federalism by protecting state court judgments, and advances interests of parity by recognizing that state courts are fully competent to adjudicate federal claims. This portion of the Article concludes that courts should reason from these underlying principles when analyzing unanswered questions about *Rooker-Feldman*.

Part IV examines the current circuit split on whether the *Rooker-Feldman* doctrine bars suits in federal district court that challenge state court interlocutory orders. The Fifth, Seventh, and Eleventh Circuits use a narrow approach, applying *Rooker-Feldman* only to final state court judgments. The Second, Fourth, Sixth, and District of Columbia Circuits use a broad approach, extending *Rooker-Feldman* to all state court judgments, including interlocutory orders. The First, Eighth, Ninth, and Tenth Circuits use an intermediate approach, applying *Rooker-Feldman* to some—but not all—state court interlocutory orders.

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26. *E.g., compare* TruServ Corp. v. Flegles, Inc., 419 F.3d 584, 591 (7th Cir. 2005) (emphasizing that *Rooker-Feldman* protects only final state court judgments), *and* Amos v. Glynn County Bd. of Tax Assessors, 347 F.3d 1249, 1265 n.11 (11th Cir. 2003) (same), *and* FDIC v. Meyerland Co. (*In re* Meyerland Co.), 960 F.2d 512, 516 (5th Cir. 1992) (same), *with* Am. Reliable Ins. Co. v. Stillwell, 336 F.3d 311, 320 (4th Cir. 2003) (same), *and* Pieper v. Am. Arbitration Ass'n, Inc., 336 F.3d 458, 462 (6th Cir. 2003) (applying *Rooker-Feldman* to state court interlocutory orders), *and* Richardson v. D.C. Court of Appeals, 83 F.3d 1513, 1515 (D.C. Cir. 1996) (same), *and* Campbell v. Greisberger, 80 F.3d 703, 707 (2d Cir. 1996) (same).

27. Recent scholarship offers only brief analysis on whether *Rooker-Feldman* extends to state court interlocutory orders post-*Exxon Mobil*. *See, e.g.*, Thomas D. Rowe, Jr. & Edward L. Baskauskas, *"Inextricably Intertwined" Explicable at Last?* Rooker-Feldman *Analysis After the Supreme Court's* Exxon Mobil *Decision*, 2006 FED. CTS. L. REV. 1, 21-23 (2006), http://www.fclr.org/fclr/articles/html/2006/fedctslrev1.pdf; Sherry, *Logic Without Experience*, *supra* note 25, at 144.

28. With federal courts invoking *Rooker-Feldman* in more than 500 cases each year, *supra* note 17, any split in circuit authority on the doctrine's scope has far-reaching consequences for hundreds of litigants.

Finally, Part V concludes that the Supreme Court should resolve this circuit split by adopting the broad approach, extending *Rooker-Feldman* to state court interlocutory orders. The broad approach is the only rule that is consistent with the purposes of the doctrine. It keeps lower federal courts within the boundaries of their statutory jurisdiction, advances principles of federalism, and recognizes that state courts are fully competent to adjudicate federal claims. By adopting this approach, the Supreme Court can ensure that *Rooker-Feldman* reflects the limits of the statutory jurisdiction of federal courts. Under those statutes, lower federal courts lack appellate jurisdiction over state court judgments, including those judgments that are interlocutory in nature.

II. EVOLUTION OF THE *ROOKER-FELDMAN* DOCTRINE

The *Rooker-Feldman* doctrine arises from two cases decided sixty years apart, in which the Supreme Court held that federal district courts have no appellate jurisdiction over state court judgments.[29] After more than twenty years of confusion in the lower federal courts,[30] the Supreme Court clarified the doctrine's scope in its recent decisions in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*[31] and *Lance v. Dennis*.[32] However, these decisions fail to address whether the doctrine applies only to final state court judgments or also protects state court interlocutory orders.[33]

A. A Simple Rule Erects a Gate Against Jurisdiction: The Supreme Court's Decision in Rooker

The Supreme Court laid the cornerstone of the *Rooker-Feldman* doctrine in its 1923 decision in *Rooker v. Fidelity Trust Co.*[34] Dora and William Rooker owned real estate in Indiana.[35] Financial embarrassment from the prohibitive cost of improvements to their property[36] led the Rookers to deed their land to Fidelity Trust Company in exchange for a loan that they failed to repay.[37] The result of

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29. D.C. Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16 (1923); *see also infra* Parts II.A., Part II.B.

30. *See infra* Part II.C.

31. 544 U.S. 280 (2005).

32. 546 U.S. 459 (2006) (per curiam); *see also infra* Part II.D.

33. *See infra* Part II.E.

34. 263 U.S. at 415-16.

35. Rooker v. Fidelity Trust Co., 131 N.E. 769, 770 (Ind. 1921).

36. *See* Rooker v. Fidelity Trust Co., 261 U.S. 114, 115 (1923); Rooker v. Fidelity Trust Co., 109 N.E. 766, 766 (Ind. 1915).

37. *Rooker*, 131 N.E. at 771-72. Under the arrangement, Fidelity, as trustee, was to

> advance moneys for [the Rookers'] benefit, assist in procuring advances from others, protect the title, ultimately sell the land, use the proceeds in satisfying such mortgages or liens as might be superior to the rights of the trustee and in

this transaction was twenty-four years of litigation in state and federal courts.[38]

After two rounds of litigation in Indiana state courts,[39] the Rookers filed an action in federal district court, seeking to have the state court judgment "declared null and void."[40] The Rookers argued that the state court decision violated the U.S. Constitution because it gave effect to an unconstitutional state law and contradicted prior state court rulings.[41] The district court held that it lacked jurisdiction and dismissed the suit.[42]

On appeal, the U.S. Supreme Court affirmed the district court's dismissal of the case.[43] The Court held that federal district courts do not have appellate jurisdiction over state court judgments.[44] First, the Court drew a negative inference from its own statutory grant of appellate jurisdiction.[45] Because the statute explicitly vests only the *Supreme Court* with appellate jurisdiction over final state court

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> repaying moneys advanced by it and by others, and turn the residue over to the wife, her personal representatives or assigns.

Rooker, 261 U.S. at 115.

38. *See generally* McLain, *supra* note 19, at 1560-63 (describing the factual and procedural history of the *Rooker* litigation). The Rookers first filed suit in Indiana circuit court on October 30, 1912. *See Rooker*, 109 N.E. at 768. More than twenty-four years later, the final disposal in the litigation occurred when the Indiana Court of Appeals denied Dora Rooker's appeal from a judgment striking her complaint from the files. *See* Rooker v. Fidelity Trust Co., 5 N.E.2d 140, 140-41 (Ind. Ct. App. 1936) (en banc).

39. The first round of state court litigation focused on whether the contract was a trust agreement or mortgage, with the Indiana Supreme Court ruling that a trust had been created. *Rooker*, 109 N.E. at 768-70. In the second round of state court litigation, the trial court applied the law of trusts, holding that Fidelity had "faithfully performed its duties as trustee" and had a right to sell the property and distribute the proceeds according to the terms of the contract. *Rooker*, 131 N.E. at 773. After the Indiana Supreme Court affirmed the trial court's judgment, *id.* at 776, the U.S. Supreme Court reviewed the judgment on writ of error, concluded that it lacked jurisdiction, and dismissed the case. *See Rooker*, 261 U.S. at 118.

40. Rooker v. Fidelity Trust Co., 263 U.S. 413, 414-15 (1923).

41. *Id.* The Rookers argued that the Indiana state court judgment violated the Contracts Clause and the Fourteenth Amendment Due Process and Equal Protection Clauses. *See id.*

42. *See id.* at 415.

43. *Id.* ("[T]he suit is so plainly not within the District Court's jurisdiction as defined by Congress that the motion to affirm must be sustained.").

44. *Id.* at 416.

45. *See id.* At the time of the *Rooker* opinion, section 237 of the Judicial Code was the statutory basis for the Supreme Court's jurisdiction over final state court judgments. *See* Act of Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726, 726 (1916) ("A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, [implicating a federal question,] may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error."); *Rooker*, 263 U.S. at 416 (citing Judicial Code, section 237, as amended Act. of Sept. 6, 1916). Today, the relevant grant of statutory jurisdiction formerly conveyed by section 237 of the Judicial Code is contained in 28 U.S.C. § 1257 (2006). Gayle Gerson, Note, *A Return to Practicality: Reforming the Fourth* Cox *Exception to the Final Judgment Rule Governing Supreme Court Certiorari Review of State Court Judgments*, 73 FORDHAM L. REV. 789, 794-95 n.33 (2004).

judgments, federal *district courts* have no appellate jurisdiction over such judgments.[46] Second, the Court drew another inference from the statutory grant of jurisdiction for federal district courts, which is "strictly original."[47] Because the statute conveys only *original* jurisdiction, district courts cannot exercise *appellate* jurisdiction.[48] In other words, if Congress wanted federal district courts to have appellate jurisdiction over state court judgments, it would have said so. Congress did not convey such jurisdiction, so no jurisdiction exists.

For sixty years, courts and commentators largely ignored the *Rooker* decision or conflated its simple rule with other doctrines.[49] The Supreme Court cited the case only twice, both times while applying res judicata.[50] Lower federal courts cited the rule from *Rooker* infrequently,[51] and when they did, they often confused it with res judicata[52] or *Younger* abstention.[53] The only significant academic article

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46. *See Rooker*, 263 U.S. at 416 ("Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify [state court] judgment[s] . . . .").

47. *Id.* The Court based its premise of district court original jurisdiction on section 24 of the Judicial Code. *See* Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091 (1911) ("The district courts shall have *original jurisdiction* as follows . . . ." (emphasis added)); *Rooker*, 263 U.S. at 416 (citing Judicial Code, section 24). Today, the relevant grant of statutory jurisdiction formerly conveyed by section 24 of the Judicial Code is contained in 28 U.S.C. § 1331 (2006). *See* McLain, *supra* note 19, at 1563 ("[The *Rooker*] holding was based on inferences drawn from the precursors to 28 U.S.C. §§ 1257 and 1331, which grant jurisdiction to review certain state court judgments to the Supreme Court and original jurisdiction to federal district courts, respectively."). In addition to § 1331, other statutory provisions also convey *original* jurisdiction to federal district courts. *See, e.g.*, 28 U.S. § 1330(a) (2006) (actions against foreign states); 28 U.S.C. § 1332(a) (2006) (diversity of citizenship); 28 U.S.C. § 1333 (2006) (admiralty and maritime).

48. *See Rooker*, 263 U.S. at 416 ("To [allow district courts to review state court judgments] would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.").

49. *E.g.*, FALLON ET AL., *supra* note 19, at 1437 (*Rooker* was "largely forgotten" until 1980); Friedman & Gaylord, *supra* note 12, at 1133 ("*Rooker* . . . for the most part lay dormant for sixty years."); Suzanna Sherry, *Judicial Federalism in the Trenches: The* Rooker-Feldman *Doctrine in Action*, 74 NOTRE DAME L. REV. 1085, 1087 (1999) [hereinafter Sherry, *Judicial Federalism*] ("For six decades, lower courts applied *Rooker* sporadically, often using it interchangeably with doctrines of preclusion—which were themselves in some disarray."); McLain, *supra* note 19, at 1563 (noting that before the *Feldman* decision, "*Rooker* was not particularly influential, and it was cited infrequently over subsequent decades").

50. The Court cited *Rooker* in a decision holding that res judicata barred relitigation of a union's collective bargaining agreement. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 282-83 (1946). Justice White also cited *Rooker* in a case in which the petitioner argued that res judicata precluded federal court review of a state court judgment. *See* Fla. State Bd. of Dentistry v. Mack, 401 U.S. 960, 961 (1971) (White, J., dissenting from denial of certiorari). Given this context, it is not surprising that lower federal courts conflated *Rooker* and res judicata. *See* Bandes, *supra* note 16, at 1180 ("[*Rooker*] was cited sporadically in the following years, and was often mentioned interchangeably with res judicata.").

51. *See* Friedman & Gaylord, *supra* note 12, at 1133.

52. *See, e.g.*, Williams v. Washington, 554 F.2d 369, 371 (9th Cir. 1977); Hutcherson v. Lehtin, 485 F.2d 567, 569 (9th Cir. 1973); Hanley v. Four Corners Vacation Props., Inc., 480 F.2d 536, 538 (10th Cir. 1973); Bricker v. Crane, 468 F.2d 1228, 1231-32 (1st Cir.

to analyze the *Rooker* case during this period argued that the doctrine had a scope identical to res judicata.[54]

B. Extending the Rooker *Principle: The Supreme Court's Decision in* Feldman

With little warning, the dormant *Rooker* doctrine erupted in 1983 when the Supreme Court decided *District of Columbia Court of Appeals v. Feldman*.[55] The District of Columbia Court of Appeals denied two applications seeking waivers from a bar admission rule that made it difficult for graduates of unaccredited law schools to sit for the bar exam.[56] The rejected applicants, Marc Feldman[57] and Edward Hickey,[58] each filed suit in federal district court, contending that the ruling by the District of Columbia Court of Appeals violated federal constitutional rights and antitrust laws.[59] The district court dis-

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1972) (citing the rule from *Rooker* to support its holding that collateral estoppel bars appellant's claim).

53. *See, e.g.*, Duke v. Texas, 477 F.2d 244, 251-53 (5th Cir. 1973) (invoking *Rooker* to support its holding that *Younger* abstention bars plaintiff's federal action); Aristocrat Health Club of Hartford, Inc. v. Chaucer, 451 F. Supp. 210, 218-19 (D. Conn. 1978) (citing the rule from *Rooker* as one of several reasons for applying *Younger* abstention); Sole v. Grand Jurors, 393 F. Supp. 1322, 1331 n.17 (D.N.J. 1975); *see also* Younger v. Harris, 401 U.S. 37, 41 (1971) (establishing abstention doctrine based on "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances").

54. *See* Williamson B.C. Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HASTINGS L.J. 1337, 1341 (1980) ("Because any claim that the federal district courts would lack jurisdiction to hear under *Rooker* also would be barred by a previous judgment under principles of res judicata, the scope of claim preclusion is identical under the two doctrines.").

55. 460 U.S. 462 (1983).

56. *See id.* at 464-72. The rule required applicants for the District of Columbia bar exam to submit certificates verifying that they graduated from an accredited law school. *Id.* at 464-65. Alternatively, an unaccredited law school graduate could sit for the bar exam "only after receiving credit for 24 semester hours of study in a law school that at the time of study was approved by the American Bar Association and with Committee approval." *Id.* at 465 n.1.

57. Rather than attending law school, Feldman completed an alternative program offered by the Commonwealth of Virginia in which he worked in an attorney's office in Charlottesville, audited law classes at the University of Virginia, and served as a law clerk for a federal district court judge. *Id.* at 465. He passed the Virginia bar exam and began working as a staff attorney for a Baltimore legal aid bureau. *Id.* Although Maryland had a rule similar to the one used by the District of Columbia, Feldman had obtained a waiver and passed the Maryland bar exam. *Id.*

58. Hickey attended unaccredited Potomac School of Law in Washington, D.C. after spending twenty years in the Navy. *Id.* at 470. While Hickey was a student, the District of Columbia Court of Appeals granted waivers of the bar exam rule to graduates of another unaccredited law school, leading him to believe that he too would receive a waiver. *Id.* Immediately before Hickey graduated, however, the Court of Appeals announced that it would no longer grant such waivers. *Id.*

59. *Id.* at 467-69, 471-72.

missed both cases, concluding that it lacked jurisdiction to review an order of the highest court of the District of Columbia.[60]

The Court of Appeals for the District of Columbia Circuit reversed the district court with regard to the constitutional claims.[61] The circuit court acknowledged that "[r]eview of a final judgment of the highest judicial tribunal of a state is vested solely in the Supreme Court of the United States."[62] However, it held that the federal district court did have jurisdiction because the prior proceedings in the District of Columbia Court of Appeals were not judicial in nature.[63] The circuit court reasoned that Feldman and Hickey had merely petitioned for waiver of an admission requirement—"[t]hey did not seek review by the Court of Appeals of the decision of any other body or individual; they did not request the court to invalidate any rule; nor did they ask for anything as a matter of right."[64]

The Supreme Court vacated the circuit court's judgment, holding that the district court did not have subject matter jurisdiction over several of the federal claims.[65] The Court initially stated that "the United States District Court is without authority to review final determinations of the District of Columbia Court of Appeals in judicial proceedings."[66] Under 28 U.S.C. § 1257, "[r]eview of such determinations can be obtained only in this Court."[67] Next, the Court concluded that the proceedings before the District of Columbia Court of Appeals were judicial in nature.[68] Although court action on Feldman and Hickey's initial petitions "did not assume the form commonly associated with judicial proceedings,"[69] it nonetheless "involved a 'judicial

60. *See id.* at 470, 473.

61. Feldman v. Gardner, 661 F.2d 1295, 1298 (D.C. Cir. 1981) (reversing and remanding the district court's dismissal of the constitutional claims). The D.C. Circuit affirmed the district court's dismissal of Feldman and Hickey's antitrust claims. *Id.* at 1308.

62. *Id.* at 1310. Interestingly, the circuit court did not cite the *Rooker* decision in its opinion, and the Supreme Court's subsequent opinion in *Feldman* cites *Rooker* only once as part of a string citation. *See Feldman*, 460 U.S. at 476. The "*Rooker-Feldman* doctrine" label did not surface until three years later in a Second Circuit decision. *See* Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1142 (2d Cir. 1986), *rev'd*, 481 U.S. 1 (1987). The Supreme Court's reversal of this decision gave Justice Scalia an opportunity to label the pairing as the "so-called *Rooker-Feldman* doctrine." Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 18 (1987) (Scalia, J., concurring).

63. *Feldman*, 661 F.2d at 1310.

64. *Id.* at 1320. After concluding that the district court had jurisdiction, the circuit court also concluded that res judicata did not preclude the suit. *Id.* at 1319-20.

65. *See Feldman*, 460 U.S. at 486-87. The Court also denied Feldman and Hickey's cross-petitions for certiorari as to the antitrust claims. *Id.* at 474 n.11.

66. *Id.* at 476. Although the District of Columbia is not a state, its court of appeals is considered the equivalent of the highest court of a state for purposes of the U.S. Supreme Court's statutory jurisdiction. 28 U.S.C. § 1257(b) (2006) ("For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals.").

67. *Feldman*, 460 U.S. at 476; *see also* 28 U.S.C. § 1257(a).

68. *See Feldman*, 460 U.S. at 479.

69. *Id.* at 482.

inquiry' in which the [District of Columbia Court of Appeals] was called upon to investigate, declare, and enforce 'liabilities as they [stood] on present or past facts and under laws supposed already to exist.' "[70]

The Court attempted to define circumstances in which a litigant improperly seeks review of a state court judgment.[71] It held that district courts "have subject-matter jurisdiction over *general challenges* to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case."[72] However, the Court held that district courts lack jurisdiction "over challenges to state-court decisions, *in particular cases* arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional."[73] In other words, federal constitutional claims requiring review of a final state court decision in a particular case are "inextricably intertwined" with the state court judgment and may be appealed only to the U.S. Supreme Court.[74]

Applying this test, the Supreme Court concluded that Feldman and Hickey's due process and equal protection claims were "inextricably intertwined" with the District of Columbia Court of Appeals' decisions.[75] The district court did not have jurisdiction over these claims because they were as-applied challenges arising from the denial of the waiver petitions.[76] However, the Supreme Court held that district court jurisdiction was proper for Feldman and Hickey's general challenges to the constitutionality of the bar admission rule, because those claims did not require review of a judicial decision in a particular case.[77]

The *Feldman* decision clarified and expanded the rule from *Rooker*. First, the Supreme Court confirmed that the principle from *Rooker*—that federal district courts cannot hear appeals from state court judgments—is a *jurisdictional* bar.[78] Second, this jurisdictional rule

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70. *Id.* at 479 (first alteration added) (quoting Prentis v. Atl. Coast Line Co., 211 U.S. 210, 226 (1908)).

71. *See id.* at 482-86.

72. *Id.* at 486 (emphasis added).

73. *Id.* (emphasis added).

74. *Id.* at 486-87.

75. *Id.*

76. *Id.*

77. *Id.* at 487. However, the Court "expressly [did] not reach the question of whether the doctrine of res judicata forecloses litigation on these elements of the complaints." *Id.* at 487-88.

78. *See id.* at 482 ("[T]o the extent that Hickey and Feldman sought review in the District Court of the District of Columbia Court of Appeals' denial of their petitions for waiver, the District Court lacked subject-matter jurisdiction over their complaints."); *see also* Rowley, *supra* note 11, at 324 (explaining that *Feldman* "upheld the idea that Rooker was a doctrine grounded in jurisdictional theories").

prohibits district courts from reviewing state court *judicial* decisions, but it does not prevent review of state court administrative or legislative rulings.[79] Third, *Feldman* prevents district courts from hearing not only blatant appeals of state court decisions (as in *Rooker*), but also claims that a party raises for the first time in federal district court that are *inextricably intertwined* with prior state court judgments.[80] After *Feldman*, plaintiffs could no longer make an end run around *Rooker* merely by recasting an appeal as a "new" claim in federal district court.[81]

C. Fleeting References and Widespread Confusion: Federal Courts Apply (and Misapply) the Rooker-Feldman *Doctrine*

The expanded *Rooker-Feldman* rule caused mass confusion in the lower federal courts.[82] For more than two decades, the Supreme Court provided little guidance on the *Rooker-Feldman* doctrine.[83] Two Supreme Court decisions were marginally helpful. In *Johnson v. De Grandy*,[84] the Court narrowly characterized *Rooker-Feldman* and

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79. *See* Bandes, *supra* note 16, at 1182-83.

80. *See Feldman*, 460 U.S. at 482 n.16; *see also* Rowley, *supra* note 11, at 325 ("By adding this additional inquiry, the Feldman court extended the Rooker doctrine from issues that were actually decided by the state court proceedings, to also include claims that were *not* litigated in the state court, and are inextricably intertwined with the merits of the state court.").

81. *See* Thompson, *supra* note 10, at 875 ("[I]f plaintiffs who lose in state court recast their claims in federal court under the guise of federal constitutional claims that were not raised or actually decided by the state court, *Rooker* and *Feldman* will nonetheless preclude jurisdiction if the constitutional claims are 'inextricably intertwined' with the merits of the state court judgment.").

82. *See* Bandes, *supra* note 16, at 1183 ("Unfortunately, nothing in *Feldman* explains the rationale for the language ['inextricably intertwined'] or gives any indication of its proper scope."); Friedman & Gaylord, *supra* note 12, at 1136 ("*Feldman* muddied more waters than it cleared."); Jones, *supra* note 7, at 651 ("After *Feldman*, district courts were left wondering how to apply its new standards—how to differentiate between general and particular challenges, and especially, how to identify when a claim is inextricably intertwined with a challenge to a state court judgment.").

83. Between its 1983 decision in *Feldman* and its 2005 decision in *Exxon Mobil*, the Supreme Court briefly mentioned the *Rooker-Feldman* doctrine in only six cases. *See* Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 644 n.3 (2002); Johnson v. De Grandy, 512 U.S. 997, 1005-06 (1994); Howlett v. Rose, 496 U.S. 356, 370 n.16 (1990); Martin v. Wilks, 490 U.S. 755, 784 n.21 (1989) (Stevens, J., dissenting); ASARCO Inc. v. Kadish, 490 U.S. 605, 622–23 (1989); Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 7-8 (1987); *id.* at 18 (Scalia, J., concurring); *id.* at 21 (Brennan, J., concurring in judgment); *id.* at 28 (Blackmun, J., concurring in judgment); *id.* at 31 n.3 (Stevens, J., concurring in judgment).

84. 512 U.S. 997 (1994). *Johnson* involved a challenge to a Florida state legislative reapportionment plan. *See id.* at 1000-01. Plaintiffs argued that the legislative districts violated § 2 of the Voting Rights Act of 1965 by unlawfully diluting the voting strength of Hispanics and blacks. *Id.* at 1001-02; *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973 (2006)). The Florida Supreme Court reviewed the plan, as required by the state constitution. *See Johnson*, 512 U.S. at 1001. Plaintiffs filed suit in federal district court. *Id.* at 1000-02. The U.S. Supreme Court held, in part, that the Florida Supreme Court decision did not preclude the plaintiffs' federal suit. *See id.* at 1004-05.

seemed to suggest that only parties to the underlying state court proceeding could invoke the doctrine in federal court.[85] The Court also implied that the doctrine bars suits only if the federal plaintiff lost in state court and complained of an injury caused by the state court judgment itself, rather than a prior injury caused by an adverse party.[86] Similarly, a footnote in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*[87] downplayed the role of the doctrine, stating that it "merely recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to this Court."[88] The Court did note, however, that "[t]he doctrine has no application to judicial review of executive action, including determinations made by a state administrative agency."[89] Although these decisions used dicta to hint at *Rooker-Feldman*'s proper scope, they gave little guidance on how lower courts should apply the doctrine.[90]

Despite the lack of Supreme Court elaboration, there was an "explosive growth" of the *Rooker-Feldman* doctrine in the lower federal

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85. *See Johnson*, 512 U.S. at 1006 ("[T]he invocation of *Rooker/Feldman* is just as inapt here, for unlike Rooker or Feldman, the United States *was not a party in the state court*." (emphasis added)).

86. *See id.* ("[A] party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." (emphasis added)).

87. 535 U.S. 635 (2002). *Verizon* involved litigation under the Telecommunications Act of 1996, which required existing local-exchange carriers to share their networks with competitors by entering into interconnection agreements and reciprocal compensation agreements with new market entrants. *See id.* at 638. The Act required carriers to submit these agreements to a state utility commission for approval. *Id.* at 639. A dispute arose as to whether Internet Service Provider traffic was "local traffic" subject to an existing reciprocal compensation agreement. *Id.* (internal quotation marks omitted). WorldCom filed a complaint with the Public Service Commission of Maryland, which ruled against Verizon. *Id.* After unsuccessfully appealing the Commission's order in state court, Verizon filed suit in federal district court, naming the Commission and WorldCom as defendants. *Id.* at 639-40. The Court held in part that the Telecommunications Act did not divest the federal district court of its jurisdiction to review the Commission's determination. *Id.* at 641-42.

88. *Id.* at 644 n.3.

89. *Id.* The Court presumably was emphasizing a distinction made in the *Feldman* decision, which held that *Rooker-Feldman* only bars federal court review of decisions rendered in state court proceedings that are judicial in nature. *See* D.C. Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983) ("[T]he United States District Court is without authority to review final determinations of the District of Columbia Court of Appeals in judicial proceedings.").

90. *See* FALLON ET AL., *supra* note 19, at 1440 ("[T]he Supreme Court, which has applied the doctrine only twice (in the Rooker and Feldman cases themselves), has done virtually nothing to give [lower federal courts] guidance."); Thomas D. Rowe, Jr., Rooker-Feldman: *Worth Only the Powder to Blow It Up?*, 74 NOTRE DAME L. REV. 1081, 1083 (1999) (noting "the lack of focused Supreme Court attention since the *Feldman* decision in 1983").

courts.[91] Confusion was prevalent on many issues.[92] Not surprisingly, courts disagreed on the meaning of the phrase "inextricably intertwined."[93] Some circuits conflated *Rooker-Feldman* with preclusion doctrines (especially res judicata),[94] while others insisted that *Rooker-Feldman* is a distinct and independent doctrine.[95] Many courts concluded that *Rooker-Feldman* applies only to litigants who were parties to the prior state court proceedings,[96] while other courts applied the doctrine to suits by nonparties.[97] Although most circuits held that

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91. *See* McLain, *supra* note 19, at 1573.

92. *See* FALLON ET AL., *supra* note 19, at 1440 ("The lower courts, which have often found the Rooker-Feldman doctrine relevant and even dispositive, have not agreed on its proper scope or application."); McLain, *supra* note 19, at 1573 ("[C]ourts are confused and consequently are misapplying the doctrine."); Thompson, *supra* note 10, at 880 ("Lower court interpretations of *Feldman* have been mixed.").

93. *See* Jones, *supra* note 7, at 643 ("Supreme Court opacity concerning what it means to be inextricably intertwined has resulted in significant incongruity in the lower federal courts . . . ." (citation omitted)).

94. *See, e.g.*, Moccio v. N.Y. State Office of Court Admin., 95 F.3d 195, 199-200 (2d Cir. 1996) (" '[I]nextricably intertwined' means, at a minimum, that where a federal plaintiff had an opportunity to litigate a claim in a state proceeding . . . , subsequent litigation of the claim will be barred under the *Rooker-Feldman* doctrine if it would be barred under the principles of preclusion."), *abrogated by* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005); Davis v. Bayless, 70 F.3d 367, 376 (5th Cir. 1995) ("[O]ur Circuit has not allowed the *Rooker-Feldman* doctrine to bar an action in federal court when that same action would be allowed in the state court of the rendering state." (citing Gauthier v. Cont'l Diving Serv. Inc., 831 F.2d 559, 561 (5th Cir. 1987))); United States v. Owens, 54 F.3d 271, 274 (6th Cir. 1995) (characterizing *Rooker-Feldman* as "a combination of the abstention and res judicata doctrines"); Robinson v. Ariyoshi, 753 F.2d 1468, 1472 (9th Cir. 1985) ("[W]e have read *Rooker* not as a jurisdictional barrier but as an application of res judicata." (citing Williams v. Washington, 554 F.2d 369, 371 (9th Cir. 1977); Hutcherson v. Lehtin, 485 F.2d 567, 569 (9th Cir. 1973); Francisco Enters., Inc. v. Kirby, 482 F.2d 481, 485 (9th Cir. 1973))), *vacated on other grounds*, 477 U.S. 902 (1986).

95. *See, e.g.*, Centres, Inc. v. Town of Brookfield, 148 F.3d 699, 703 (7th Cir. 1998) ("[A]lthough the *Rooker-Feldman* doctrine and principles of preclusion may be easily confused with each other because they both define the respect one court owes to an earlier judgment, the two are not coextensive." (citing GASH Assocs. v. Vill. of Rosemont, 995 F.2d 726, 728 (7th Cir. 1993))); Garry v. Geils, 82 F.3d 1362, 1365 (7th Cir. 1996) ("We have consistently emphasized the distinction between *res judicata* and *Rooker-Feldman* and insisted that the applicability of *Rooker-Feldman* be decided before considering *res judicata*."); Charchenko v. City of Stillwater, 47 F.3d 981, 983 n.1 (8th Cir. 1995) ("We note that *Rooker-Feldman* is broader than claim and issue preclusion because it does not depend on a final judgment on the merits.").

96. *See, e.g.*, Johnson v. Rodrigues (Orozco), 226 F.3d 1103, 1109 (10th Cir. 2000) ("[T]he *Rooker-Feldman* doctrine should not be applied against non-parties."); Bennett v. Yoshina, 140 F.3d 1218, 1224 (9th Cir. 1998) ("[S]ince the new plaintiffs were not parties to the state suit, their suit is not barred by the *Rooker/Feldman* doctrine."); *Owens*, 54 F.3d at 274 ("The *Rooker-Feldman* doctrine does not apply to bar a suit in federal court brought by a party that was not a party in the preceding action in state court." (citing Valenti v. Mitchell, 962 F.2d 288 (3d Cir. 1992))); Roe v. Alabama, 43 F.3d 574, 580 (11th Cir. 1995) ("[T]he plaintiffs in this case are not, by the admission of all parties, parties to the circuit court action. The *Rooker-Feldman* doctrine does not apply to such circumstances." (citing Johnson v. De Grandy, 512 U.S. 997 (1994))).

97. *See, e.g.*, Kenmen Eng'g v. City of Union, 314 F.3d 468, 478 (10th Cir. 2002), *overruling recognized by* Tal v. Hogan, 453 F.3d 1244, 1256 n.10 (2006) ("*Rooker-Feldman* bars any suit that seeks to disrupt or 'undo' a prior state-court judgment, regardless of whether

Rooker-Feldman applies to lower state court judgments,[98] they vigorously debated whether the doctrine applies only to final state court judgments or whether it also protects interlocutory orders.[99]

These divergent approaches demonstrate that two decades of near silence from the Supreme Court caused mass confusion regarding *Rooker-Feldman*.[100] Scholars begged the Court to weigh in on the doctrine, with the hope that it would clarify the scope and proper application of the doctrine.[101]

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the state-court proceeding afforded the federal-court plaintiff a full and fair opportunity to litigate her claims." (citing Facio v. Jones, 929 F.2d 541, 544 (10th Cir. 1991); Anderson v. Colorado, 793 F.2d 262, 264 (10th Cir. 1986))); Lemonds v. St. Louis County, 222 F.3d 488, 495 (8th Cir. 2000) ("[Lower federal] courts are simply without authority to review most state court judgments—regardless of who might request them to do so." (citing Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923); Sherry, *Judicial Federalism*, *supra* note 49, at 1112-23)); *Garry*, 82 F.3d at 1367 n.8 (7th Cir. 1996) ("[U]nder res judicata we must determine whether the party against whom the defense is raised had a full and fair opportunity to pursue its claim in the previous state proceeding. . . . *Rooker-Feldman* does not contain analogous limitations." (citation omitted)).

98. *See, e.g.*, Gisslen v. City of Crystal, 345 F.3d 624, 628-29 (8th Cir. 2003) ("The [*Rooker-Feldman*] doctrine does not apply exclusively to decisions from a state's highest appellate court of right, but also applies with equal force to decisions from a state trial court."); Pieper v. Am. Arbitration Ass'n, 336 F.3d 458, 463 (6th Cir. 2003) ("[W]e do not believe that lower federal courts should be prohibited from reviewing judgments of a state's highest court but should somehow have free rein to review the judgments of lower state courts."); Rolleston v. Eldridge, 848 F.2d 163, 165 (11th Cir. 1988) (using *Rooker-Feldman* to dismiss federal suit challenging state trial court judgment and noting that an "[a]ppeal in the state courts is the proper channel through which [plaintiff] was entitled to seek relief"); *see also* Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U. PA. L. REV. 91, 141-42 (1998) ("Although it could be argued that *Rooker-Feldman* only bars federal court action as to decisions that have been ruled upon by a state's highest court, courts and commentators have generally applied *Rooker-Feldman* to decisions by lower state courts as well." (citations omitted)).

99. *E.g.*, *compare Pieper*, 336 F.3d at 462 (holding that *Rooker-Feldman* doctrine bars federal district courts from reviewing state court interlocutory orders), *and* Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 199 (4th Cir. 2000) (same), *and* Campbell v. Greisberger, 80 F.3d 703, 707 (2d Cir. 1996) (same), *with* Cruz v. Melecio, 204 F.3d 14, 21 n.5 (1st Cir. 2000) (holding that interlocutory state court judgment lacking finality does not trigger *Rooker-Feldman* doctrine), *and* H.C. *ex rel.* Gordon v. Koppel, 203 F.3d 610, 612-13 (9th Cir. 2000) (same); *see also* Sternlight, *supra* note 98, at 142 ("[I]t is not entirely clear whether the *Rooker-Feldman* doctrine applies only to final judgments, or also to interlocutory rulings.").

100. *See* Susan Bandes, *Judging, Politics, and Accountability: A Reply to Charles Geyh*, 56 CASE W. RES. L. REV. 947, 958 n.55 (2006) ("[S]ince the [Supreme] Court had almost nothing to say about [*Rooker-Feldman*] from 1983 to 2005, the courts had ample room to improvise."). Indeed, in a classic example of the strange "improvisation" by lower federal courts, at one point the Eighth Circuit mistakenly confused *Rooker-Feldman* with the *Erie* doctrine and refused to apply state law in a diversity case. *See* Sherry, *Judicial Federalism*, *supra* note 49, at 1088 n.17 (citing First Commercial Trust Co. v. Colt's Mfg., 77 F.3d 1081 (8th Cir. 1996)).

101. *See, e.g.*, Rowe, *supra* note 90, at 1084 ("[T]he proliferation of lower court case law with many different emphases and some highly questionable decisions suggests that the time may be nigh for the Supreme Court to take an opportunity to clarify the doctrine." (citation omitted)).

D. Clarification of a Narrow Doctrine: The Supreme Court's Recent Decisions in Exxon Mobil *and* Lance

The Supreme Court finally stepped in to clarify the *Rooker-Feldman* doctrine in its 2005 decision in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*[102] In July 2000, Saudi Basic Industries Corporation (SABIC) sued two ExxonMobil subsidiaries in Delaware state court, seeking declaratory relief in a royalties dispute.[103] Two weeks later, ExxonMobil and its subsidiaries countersued SABIC in federal district court.[104] In March 2003, a jury rendered a verdict in the state suit in favor of ExxonMobil's subsidiaries.[105] At the time of the state trial court judgment, the parallel federal suit was on appeal before the Third Circuit.[106] The Third Circuit held that the suit was a " 'paradigm situation in which *Rooker-Feldman* precludes a federal district court from proceeding' " because the federal and state claims were identical.[107] The Third Circuit also concluded that it was irrelevant that the federal suit had been filed before entry of the state court judgment.[108]

The Supreme Court reversed.[109] The Court made several observations in an attempt to clear up confusion in the lower federal courts.[110] It initially stated that *Rooker-Feldman* is a narrow doctrine, "confined to . . . cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the dis-

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102. 544 U.S. 280 (2005).

103. *Id.* at 289. Two ExxonMobil subsidiaries had formed joint ventures in 1980 with SABIC to produce polyethylene in Saudi Arabia. *Id.* (citing Saudi Basic Indus. Corp. v. ExxonMobil Corp., 194 F. Supp. 2d 378, 384 (D.N.J. 2002)). The dispute focused on SABIC's royalties for sublicenses for a polyethylene manufacturing method. *Id.* (citing Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 364 F.3d 102, 103 (3d Cir. 2004)).

104. *Id.*

105. *See* Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., 866 A.2d 1, 10-11 (Del. 2005). In January 2005, the Delaware Supreme Court affirmed the jury's verdict. *Id.* at 40.

106. *Exxon Mobil*, 364 F.3d at 102-03 (Third Circuit decision submitted on March 24, 2004); *Saudi Basic Indus. Corp.*, 194 F. Supp. 2d at 378 (district court judgment rendered on April 3, 2002); *Mobil Yanbu*, 866 A.2d at 11 (state trial court jury verdict returned on March 21, 2003).

107. *Exxon Mobil*, 364 F.3d at 104 (quoting E.B. v. Verniero, 119 F.3d 1077, 1090-91 (3d Cir. 1997)).

108. *See id.* at 104-05. The Third Circuit stated that "[t]he only timing relevant is whether the state judgment precedes a federal judgment on the same claims." *Id.* at 105. The court expressed its concern about the policy effects of a ruling to the contrary—if it held that *Rooker-Feldman* did not apply to federal actions filed prior to the state court's final judgment, it "would be encouraging parties to maintain federal actions as 'insurance policies' while their state court claims were pending." *Id.*

109. *Exxon Mobil*, 544 U.S. at 294.

110. *See id.* at 291 ("We granted certiorari to resolve conflict among the Courts of Appeals over the scope of the *Rooker-Feldman* doctrine." (citation omitted)); Rowe & Baskauskas, *supra* note 27, at 3 ("Sweeping extensions and conflicting interpretations of *Rooker-Feldman* finally led to a clarifying Supreme Court decision last year in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*").

trict court proceedings commenced and inviting district court review and rejection of those judgments."[111] The doctrine does not bar jurisdiction if the federal plaintiff presents "some independent claim."[112] The Court also stated that the *Rooker-Feldman* analysis is separate from preclusion and abstention doctrines.[113] Finally—and most relevant to the facts of *Exxon Mobil*—"[w]hen there is parallel state and federal litigation, *Rooker-Feldman* is not triggered simply by the entry of judgment in state court."[114] Parallel state and federal suits are governed by preclusion law, not *Rooker-Feldman*.[115] Applying these principles, the Court noted that ExxonMobil filed suit in federal district court "well before any judgment in state court."[116] Thus, the *Rooker-Feldman* doctrine "did not emerge to vanquish jurisdiction after ExxonMobil prevailed in the Delaware courts."[117]

The following year, in *Lance v. Dennis*, the Supreme Court once again emphasized the narrow scope of the *Rooker-Feldman* doctrine.[118] In May 2003, Colorado's attorney general filed suit in state court challenging the General Assembly's congressional redistricting plan.[119] After the General Assembly intervened as a defendant, the Colorado Supreme Court struck down the plan on state constitutional grounds.[120] Several Colorado citizens who were unhappy with the state court judgment then filed suit in federal district court.[121] The district court held that *Rooker-Feldman* barred the plaintiffs' federal

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111. *Exxon Mobil Corp.*, 544 U.S. at 284.

112. *Id.* at 293 (quoting GASH Assocs. v. Vill. of Rosemont, 995 F.2d 726, 728 (7th Cir. 1993)). An independent federal claim will foreclose application of the *Rooker-Feldman* doctrine even if it "denies a legal conclusion that a state court has reached." *Id.* (quoting *GASH Assocs.*, 995 F.2d at 728).

113. *See id.* at 284.

114. *Id.* at 292. The Court's rationale recognizes that a more expansive reading of the scope of *Rooker-Feldman* would infringe on the concurrent jurisdiction of the federal courts. *See id.* ("[N]either *Rooker* nor *Feldman* supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court.").

115. *See id.* at 293.

116. *Id.*

117. *Id.* at 294. The Supreme Court also rejected the policy rationale behind the Third Circuit's decision. *See id.* at 294 n.9 ("The Court of Appeals criticized ExxonMobil for pursuing its federal suit as an 'insurance policy' against an adverse result in state court. There is nothing necessarily inappropriate, however, about filing a protective action." (citations omitted)).

118. Lance v. Dennis, 546 U.S. 459 (2006) (per curiam).

119. *See* People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1227 (Colo. 2003).

120. *See id.* at 1243. The Colorado Supreme Court struck down the General Assembly's redistricting plan after concluding that Article V, Section 44, of the Colorado Constitution limited redistricting to once every ten years. *Id.* at 1242-43.

121. *Lance*, 546 U.S. at 461. The federal plaintiffs alleged that the Colorado Supreme Court's interpretation of Article V, Section 44 of the Colorado Constitution violated the Elections Clause of Article I, Section 4 of the U.S. Constitution. *Id.*

suit.[122] Applying Tenth Circuit precedent, the district court stated that *Rooker-Feldman* can bar suit when the federal plaintiff was a party in the state court proceedings *or* stands in privity with the state court loser.[123] Although the federal plaintiffs had not been parties to the state court suit, the court held that they stood in privity with the General Assembly because redistricting is a "matter of public concern."[124]

The Supreme Court disagreed, vacating the district court's judgment.[125] As in *Exxon Mobil*, the Court initially emphasized the narrowness of the *Rooker-Feldman* doctrine.[126] It then emphasized that *Rooker-Feldman* is independent from preclusion law.[127] Rejecting the Tenth Circuit's privity analysis, the Court stated that "[t]he *Rooker-Feldman* doctrine does not bar actions by nonparties to the earlier state-court judgment simply because, for purposes of preclusion law, they could be considered in privity with a party to the judgment."[128] The doctrine did not apply in *Lance* because "plaintiffs were plainly not parties to the underlying state-court proceeding."[129]

Thus, *Exxon Mobil* and *Lance* clarified several aspects of the *Rooker-Feldman* doctrine. First, the *Rooker-Feldman* analysis is completely separate from preclusion law and the abstention doctrines.[130] In particular, the Supreme Court emphasized in *Lance* that "*Rooker-Feldman* is not simply preclusion by another name."[131] Second, the doctrine applies only if the federal suit is filed *after* the state court renders its judgment.[132] In other words, *Rooker-Feldman* does not bar federal suits that a party files while state court proceedings

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122. Lance v. Davidson, 379 F. Supp. 2d 1117, 1123 (D. Colo. 2005), *vacated*, *Lance*, 546 U.S. at 467.

123. *See id.* ("[T]he Tenth Circuit has permitted the [*Rooker-Feldman*] doctrine to be used against parties who were in privity with parties to the original state-court suit." (citing Kenmen Eng'g v. City of Union, 314 F.3d 468, 481 (10th Cir. 2002), *partial overruling recognized by* Tal v. Hogan, 453 F.3d 1244, 1256 n.10 (10th Cir. 2006))).

124. *See id.* at 1125.

125. *Lance*, 546 U.S. at 462-63. The Supreme Court reviewed the case under the statutory provision allowing direct appeals from decisions of three-judge district court panels. *See* 28 U.S.C. § 1253 (2006); *Lance*, 546 U.S. at 462-63.

126. *See Lance*, 546 U.S. at 464 ("Neither *Rooker* nor *Feldman* elaborated a rationale for a wide-reaching bar on the jurisdiction of lower federal courts, and our cases since *Feldman* have tended to emphasize the narrowness of the *Rooker-Feldman* rule." (citing Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 292 (2005); Verizon Md., Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635, 644 n.3 (2002); Johnson v. De Grandy, 512 U.S. 997, 1005-06 (1994))).

127. *Id.* at 466.

128. *Id.* (footnote omitted).

129. *Id.* at 465.

130. *See id.* at 466; *Exxon Mobil*, 544 U.S. at 284; *see also* Rowe & Baskauskas, *supra* note 27, at 17 (noting that federal courts should avoid "general resort to preclusion law even as an aid in determining applicability of *Rooker-Feldman*").

131. *See Lance*, 546 U.S. at 466.

132. *Exxon Mobil*, 544 U.S. at 284; *see id.* at 293.

are still ongoing.[133] Finally, *Rooker-Feldman* is inapplicable when the federal plaintiff was not a party to the state suit.[134] After *Lance*, privity is not enough in most cases.[135]

E. The Supreme Court Has Not Addressed Whether Rooker-Feldman *Protects State Court Interlocutory Orders*

Even though *Exxon Mobil* and *Lance* clarified the scope of *Rooker-Feldman*, the Supreme Court did not specify which state court "judgments" trigger the *Rooker-Feldman* doctrine.[136] In particular, the Court did not address whether the doctrine applies only to final state court judgments or also protects state court interlocutory orders.[137] There is no doubt that *Rooker-Feldman* bars a federal district court from exercising appellate jurisdiction over a final state court judgment on the merits.[138] But does *Rooker-Feldman* also prevent federal district courts from reviewing stays, preliminary injunctions, rulings on pretrial motions, discovery orders, and other interlocutory decisions rendered by state courts?

There is no easy answer. None of the Supreme Court's *Rooker-Feldman* decisions involve an attempt by a federal district court to review a state court interlocutory order. One can interpret isolated dicta from the Court's opinions either way. The *Feldman* decision re-

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133. *See id.* at 293-94.

134. *Lance*, 546 U.S. at 465.

135. *Id.* at 466. The Supreme Court qualified its holding in *Lance*, stating that "we need not address whether there are *any* circumstances, however limited, in which *Rooker-Feldman* may be applied against a party not named in an earlier state proceeding," and it gave the example of an estate taking a de facto appeal in district court from an earlier state court decision involving a decedent. *Id.* at 466 n.2.

136. *See* Rowe & Baskauskas, *supra* note 27, at 21-23; Sherry, *Logic Without Experience*, *supra* note 25, at 144.

137. Although it is beyond the scope of this Article, it is also worth noting that after *Exxon Mobil* and *Lance*, the role of the "inextricably intertwined" inquiry is uncertain as well. *See* Rowe & Baskauskas, *supra* note 27, at 3-4. Although *Exxon Mobil* mentioned the language "inextricably intertwined" while giving background on the *Feldman* decision, *see* 544 U.S. at 286 & n.1, it played no role in the Court's holding, *id.* at 293-94. *Lance* mentioned the phrase "inextricably intertwined" only while describing the flawed rationale of the district court in that case. 546 U.S. at 462-63. Scholars disagree on whether the "inextricably intertwined" inquiry remains a meaningful part of the *Rooker-Feldman* analysis. *Compare* Sherry, *Logic Without Experience*, *supra* note 25, at 121 ("The Court [in *Exxon Mobil*] appeared to abandon the 'inextricably intertwined' part of the doctrine."), *with* Rowe & Baskauskas, *supra* note 27, at 11-12 (suggesting that the "inextricably intertwined" concept occupies a secondary role in the *Rooker-Feldman* analysis, but noting that "we do not think it appropriate to conclude that the phrase can be entirely discarded").

138. The *Rooker* decision itself confirms this. In *Rooker*, the federal suit challenged a final state court judgment on the merits—the Indiana Supreme Court had previously affirmed the state trial court's judgment that the trustee had a right to sell the Rookers' property and distribute the proceeds under the terms of the contract. *See* Rooker v. Fidelity Trust Co., 263 U.S. 413, 414-15 (1923) (holding federal district court had no jurisdiction to review Indiana Supreme Court's judgment); Rooker v. Fidelity Trust Co., 131 N.E. 769, 773, 776 (Ind. 1921) (affirming trial court's decision on the merits).

fers to the doctrine as a bar against federal district court review of "final" state court decisions.[139] However, other language casts *Rooker-Feldman* as a more expansive prohibition against lower federal court review of state court "judgments."[140]

Contradictory language in *Exxon Mobil* exacerbates this problem. In the first part of its opinion, the Court holds that *Rooker-Feldman* bars federal suits filed "by state-court losers complaining of injuries caused by *state-court judgments* rendered before the district court proceedings commenced."[141] Under this language, the doctrine conceivably protects interlocutory orders that a state court enters before the commencement of a similar federal action.[142] However, *Exxon Mobil* later states that the *Rooker* and *Feldman* cases exhibit the limited circumstances in which the doctrine bars jurisdiction—"[i]n both cases, the losing party in state court filed suit in federal court *after the state proceedings ended*."[143] This language suggests that *Rooker-Feldman* may protect only final state court judgments.[144]

Given the lack of clarity in the Supreme Court's language, it would be a mistake to overread *Exxon Mobil* as restricting *Rooker-Feldman* to final state court decisions.[145] The Court did not define when state court proceedings have "ended" for purposes of the *Rooker-Feldman* doctrine,[146] and the distinction between final and interlocutory state court orders was not at issue in the case.[147] Indeed, the decision itself notes that ExxonMobil filed suit in federal district court "well before *any judgment* in state court."[148] *Exxon Mobil* simply

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139. *See* D.C. Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983) ("The District of Columbia Circuit properly acknowledged that the United States District Court is without authority to review *final determinations* of the District of Columbia Court of Appeals in judicial proceedings." (emphasis added)).

140. *See, e.g.*, Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 644 n.3 (2002) (noting that *Rooker-Feldman* "does not authorize district courts to exercise appellate jurisdiction over state-court *judgments*" (emphasis added)); Johnson v. De Grandy, 512 U.S. 997, 1005-06 (1994) (noting that under the *Rooker-Feldman* doctrine, "a party losing in state court is barred from seeking what in substance would be appellate review of the *state judgment* in a United States district court" (emphasis added)); *Rooker*, 263 U.S. at 415 ("If the [state court] decision was wrong, that did not make *the judgment* void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding." (emphasis added)).

141. *Exxon Mobil*, 544 U.S. at 284 (emphasis added).

142. *See* Rowe & Baskauskas, *supra* note 27, at 22 (noting that "[a] state-court 'judgment' might be construed to include the likes of a grant of a preliminary injunction, which could be viewed as a non-final judgment").

143. *Exxon Mobil*, 544 U.S. at 291 (emphasis added).

144. Rowe & Baskauskas, *supra* note 27, at 22.

145. *Id.* at 22-23.

146. *See* Sherry, *Logic Without Experience*, *supra* note 25, at 144.

147. Instead, the Court analyzed a fact pattern in which a state trial court judgment was issued *after* the commencement of a suit in federal district court. *See Exxon Mobil*, 544 U.S. at 289.

148. *Id.* at 293 (emphasis added).

holds that *Rooker-Feldman* does not apply when a litigant files suit in federal court *before* the state court enters a judgment.[149] It does not address whether the doctrine bars federal suits filed *after* entry of state court interlocutory orders.

In sum, the *Rooker-Feldman* doctrine generally holds that federal district courts have no appellate jurisdiction over state court judgments. The Supreme Court's decisions in *Exxon Mobil* and *Lance* provide clarification to some questions relating to the scope of the doctrine. However, these decisions fail to indicate which state court "judgments" trigger *Rooker-Feldman*, and the Court has not addressed whether the doctrine applies only to final state court judgments or also protects state court interlocutory orders. We must turn elsewhere for an answer.

III. PURPOSE OF THE *ROOKER-FELDMAN* DOCTRINE

Given the lack of clarity in existing case law, the best way to discern whether *Rooker-Feldman* protects state court interlocutory orders is to reason from the principles underlying the doctrine itself.[150] There are three fundamental principles behind *Rooker-Feldman*.[151] First, the doctrine enforces constitutional separation of powers and the limited jurisdiction of federal courts.[152] Second, *Rooker-Feldman* advances interests of federalism by protecting state court judgments.[153] Third, the doctrine recognizes that state courts are fully competent to adjudicate federal claims.[154]

A. Rooker-Feldman *Enforces Separation of Powers and the Limited Jurisdiction of Federal Courts*

Courts have recognized that "the *Rooker-Feldman* doctrine is rooted in the principle of separation of powers."[155] Congress has ex-

149. *Id.*

150. Rowe & Baskauskas, *supra* note 27, at 22 ("Arguing from [*Exxon Mobil*'s] fine linguistic differences, . . . does not seem . . . to be a fruitful exercise. It makes sense instead to start from a foundational principle undergirding *Rooker-Feldman*: the only federal court to which Congress has given any statutory authority to review state-court judgments is the Supreme Court." (footnotes omitted)).

151. This analysis is not meant to be exhaustive. Commentators have cited other worthy purposes behind *Rooker-Feldman*. *See, e.g.*, Chang, *supra* note 54, at 1350 (noting that *Rooker-Feldman* protects "finality in the judicial system"); George L. Proctor et al., *Rooker-Feldman and the Jurisdictional Quandary*, 2 FLA. COASTAL L.J. 113, 114 (2000) (recognizing that the doctrine "protect[s] the integrity of state court judgments"); Sherry, *Judicial Federalism*, *supra* note 49, at 1117 (arguing that the doctrine is a "forum-shifting device"). By examining the *primary* purposes behind the *Rooker-Feldman* doctrine, this Article aims to contribute significantly to existing literature on the subject.

152. *See infra* Part III.A.

153. *See infra* Part III.B.

154. *See infra* Part III.C.

155. Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 198 (4th Cir. 2000).

clusive authority to define the jurisdiction of the lower federal courts,[156] and those courts *cannot* hear a case unless Congress has affirmatively granted jurisdiction by statute.[157] This principle has been the driving force behind *Rooker-Feldman* since the *Rooker* decision itself.[158] The doctrine ensures that federal courts stay within the boundaries of their limited statutory jurisdiction.[159]

It is important to stress the *statutory* nature of *Rooker-Feldman*. Congressional legislation granting federal district courts appellate jurisdiction over state court judgments almost certainly would be within the *constitutional* limitations of Article III. When Alexander Hamilton discussed the constitutional limitations of federal judicial power in *The Federalist*, he perceived "no impediment to the establishment of an appeal from the state courts to the subordinate national tribunals."[160] The Fifth and Tenth Circuits cite this language as evidence that *Rooker-Feldman* is a *statutory* limitation, rather than a constitutional requirement.[161] In other words, Congress could pass a statute granting lower federal courts appellate jurisdiction over state court judgments, which would abolish the *Rooker-Feldman* doctrine.

But Congress has not done so. Although the Judiciary Act of 1789 created lower federal courts and defined their jurisdiction, "they were not given any power to review directly cases from state courts, and they have not been given such powers since that time."[162] The language of 28 U.S.C. § 1257 is clear: only the U.S. Supreme Court may review state court judgments.[163] The grant of jurisdiction in 28 U.S.C.

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156. *See* Keene Corp. v. United States, 508 U.S. 200, 207 (1993); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850); Bandes, *supra* note 16, at 1189.

157. Robert B. Funkhouser et al., Comment, Texaco Inc. v. Pennzoil Co.*: Some Thoughts on the Limits of Federal Court Power over State Court Proceedings*, 54 FORDHAM L. REV. 767, 774 (1986).

158. *See* Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923) ("*Under the legislation of Congress*, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. . . . The jurisdiction possessed by the District Courts is strictly original." (emphasis added) (citation omitted)).

159. *See* Chang, *supra* note 54, at 1349 ("The federal district courts, as courts of limited jurisdiction, have only that jurisdiction which Congress determines is appropriate. Congress has yet to give the lower federal courts jurisdiction to review state court judgments." (citation omitted)); Rebecca Schmucker, *Possible Application of the Rooker-Feldman Doctrine to State Agency Decisions: The Seventh Circuit's Opinion in* Van Harken v. City of Chicago, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 333, 333 (1997) ("The Rooker-Feldman doctrine is an extension of the principle that federal courts are courts of limited jurisdiction . . . .").

160. THE FEDERALIST No. 82, at 403 (Alexander Hamilton) (Terence Ball ed., 2003).

161. *See* Mo's Express, LLC v. Sopkin, 441 F.3d 1229, 1233 (10th Cir. 2006); *In re Meyerland Co.*, 910 F.2d 1257, 1261 n.5 (5th Cir. 1990).

162. Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 286 (1970).

163. *See* 28 U.S.C. § 1257 (2006) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the *Supreme Court* by writ of certiorari . . . ." (emphasis added)); *see also* Schmucker, *supra* note 159, at 335

§ 1331 is equally clear: federal district courts can only exercise "original jurisdiction," not appellate jurisdiction.[164]

The *Rooker-Feldman* doctrine keeps lower federal courts from straying outside these statutory boundaries. Because the Constitution gives Congress the *exclusive* power to expand federal court jurisdiction, it would be wholly inappropriate for courts to do so on their own initiative.[165] As Professor Williamson Chang argues, "[s]uch a delicate issue of fundamental federal-state relations must be left to a representative forum, such as Congress, where the justifications for state judicial sovereignty can be fully represented."[166] Entrusting Congress with decisions regarding federal court jurisdiction is not only a good idea—it is constitutionally mandated.[167] Thus, the *Rooker-Feldman* doctrine enforces separation of powers and recognizes that federal courts are courts of limited jurisdiction.

B. Rooker-Feldman *Preserves Federalism by Preventing Lower Federal Courts from Reviewing State Court Judgments*

The *Rooker-Feldman* doctrine is also based on principles of federalism.[168] Loosely defined, "federalism" is a system which divides sovereignty between two or more political units, each of which governs

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("Because Congress gave only the Supreme Court the explicit right to review the decisions of a state court, Congress meant to deny all other federal courts that power.").

164. 28 U.S.C. § 1331 (2006) ("The district courts shall have *original jurisdiction* of all civil actions arising under the Constitution, laws, or treaties of the United States." (emphasis added)); *see also* Am. Reliable Ins. Co. v. Stillwell, 336 F.3d 311, 316 (4th Cir. 2003) ("Congress has empowered the federal district courts to exercise only original jurisdiction." (quoting Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 199 (4th Cir. 2000))); McLain, *supra* note 19, at 1572 n.111 ("If a district court lacks appellate jurisdiction under § 1331 . . . , then clearly it cannot hear 'appeals' from lower state courts."). *But see* Beermann, *supra* note 10, at 1229 (arguing that *Rooker-Feldman* misinterprets § 1331, which is "permissive, not restrictive" and that "[s]ection 1331's use of the word 'original' should be understood merely to direct plaintiffs to the proper court to file their cases").

165. *See, e.g.*, Bandes, *supra* note 16, at 1189 ("Congress has the responsibility for determining the precise contours of federal jurisdiction and *Rooker-Feldman* is premised on the notion that Congress has defined those contours, through 28 U.S.C. § 1257 and § 1331, to preclude lower federal courts from hearing appeals from state court decisions." (footnote omitted)); Chang, *supra* note 54, at 1376 ("Just as the lower federal courts may not on their own enlarge their jurisdiction, the Supreme Court may not, without congressional permission, share its exclusive jurisdiction with the lower courts." (citation omitted)).

166. Chang, *supra* note 54, at 1376.

167. *See* FALLON ET AL., *supra* note 19, at 7-9 (describing the "Madisonian Compromise," in which the Constitutional Convention agreed that Congress would have the power to create lower federal courts).

168. *See, e.g.*, *Stillwell*, 336 F.3d at 316 (citing Plyler v. Moore, 129 F.3d 728, 731 (4th Cir. 1997)); *Brown & Root, Inc.*, 211 F.3d at 198; Chang, *supra* note 54, at 1341; Schmucker, *supra* note 159, at 336; Benjamin Smith, Note, Texaco, Inc. v. Pennzoil Co*.: Beyond a Crude Analysis of the* Rooker-Feldman *Doctrine's Preclusion of Federal Jurisdiction*, 41 U. MIAMI L. REV. 627, 636 (1987); Blake A. Snider, Recent Case, *Ninth Circuit Ignores Principles of Federalism and the* Rooker-Feldman *Doctrine:* Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997) (en banc)*, 21 HARV. J.L. & PUB. POL'Y 881, 893 (1998).

the same populace.[169] As Justice Anthony Kennedy notes, the Framers of the U.S. Constitution "split the atom of sovereignty" by creating a system in which "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."[170] In other words, the basis for the concept of federalism is the coexistence of two sovereign entities and the competing concerns of state and federal power.

The derivative concept of *judicial federalism* recognizes the independence and sovereignty of the state and federal court systems.[171] State and federal courts are separate legal systems that proceed independently of each other, with ultimate review in the U.S. Supreme Court.[172] As one federal circuit court bluntly stated, "[j]udicial errors committed in state courts are for correction in the state court systems, at the head of which stands the United States Supreme Court; such errors are no business of ours."[173] State courts have a long tradition of jealously guarding their independence.[174]

Assertion of jurisdiction and entry of judgment by a court are exercises of sovereign power,[175] and tension arises when lower federal courts intrude upon the sovereignty and independence of state courts. This tension is inevitable to some extent because state and federal courts possess concurrent jurisdiction over many claims.[176]

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169. *See, e.g.*, WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 11 (1964) ("A constitution is federal if (1) two levels of government rule the same land and people, (2) each level has at least one area of action in which it is autonomous, and (3) there is some guarantee (even though merely a statement in the constitution) of the autonomy of each government in its own sphere.").

170. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

171. *See, e.g.*, Sherry, *Judicial Federalism*, *supra* note 49, at 1085 ("Judicial federalism is the aggregation of issues arising from the existence of two sets of American courts, state and federal.").

172. Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 286 (1970).

173. Hale v. Harney, 786 F.2d 688, 691 (5th Cir. 1986).

174. Professor Chang makes this observation:

> Today, when refiling a claim in federal court may be almost an automatic response to an unsatisfactory state court result, it is easy to forget how reluctantly the states acquiesced to any federal review of state court judgments. The power of the Supreme Court to review state court decisions, first challenged in *Martin v. Hunter's Lessee*, has been attacked repeatedly.

Chang, *supra* note 54, at 1345 (footnotes omitted).

175. *Id.* at 1375 ("The effect of allowing the lower federal courts to act as the appellate courts of the state not only contravenes the statutory grants of jurisdiction to the federal courts but undermines state judicial sovereignty.").

176. For example, federal courts can entertain state-law claims when the parties are citizens of different states. *See* 28 U.S.C. § 1332 (2006) (allowing federal district courts to exercise diversity jurisdiction); *see also* James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 15 (1964) ("The traditional view is that diversity jurisdiction was established to provide a forum for the determination of controversies between citizens of different states which would be free from lo-

However, our dual judicial system would cease to function "if state and federal courts were free to fight each other for control of a particular case."[177] Congress was well aware of this inherent tension, and it passed jurisdictional statutes establishing "lines of demarcation between the two systems."[178]

Rooker-Feldman enforces one of these lines of demarcation. The doctrine preserves the delicate balance of judicial federalism by preventing lower federal courts from reviewing state court judgments.[179] *Rooker-Feldman* "ensures that the federal and state systems remain sovereign, with the Supreme Court the sole federal court with the power to rule on federal questions raised in either forum."[180] Thus, at its core the doctrine is "an obligatory, statutorily-based expression of federalism"[181] that recognizes the "competing concerns of state judicial sovereignty and federal power."[182]

C. Rooker-Feldman *Recognizes that State Courts Are Fully Competent to Adjudicate Federal Claims*

The *Rooker-Feldman* doctrine also acknowledges that state courts are just as capable of deciding federal claims as federal courts.[183] Scholars often describe this concept as "parity" between state and federal courts.[184] Several Supreme Court cases—including *Feldman* itself—emphasize that state courts are fully competent to adjudicate

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cal prejudice or influence."). State courts also are fully competent to adjudicate federal claims. *See infra* Part III.C.

177. *Atl. Coast Line R.R.*, 398 U.S. at 286.

178. *Id.*

179. *See, e.g.*, Am. Reliable Ins. Co. v. Stillwell, 336 F.3d 311, 316 (4th Cir. 2003) ("*Rooker-Feldman* . . . preserves a fundamental tenet in our system of federalism that . . . appellate review of state court decisions occurs first within the state appellate system and then in the United States Supreme Court." (citing Plyler v. Moore, 129 F.3d 728, 731 (4th Cir. 1997))); Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 198 (4th Cir. 2000) ("*Rooker-Feldman* is one of a number of doctrines that safeguards our dual system of government from federal judicial erosion." (citing *Atl. Coast Line R.R.*, 398 U.S. at 286)).

180. Bandes, *supra* note 16, at 1184 (citing David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 323 (1978)).

181. Chang, *supra* note 54, at 1341 (citations omitted).

182. *Id.* at 1337.

183. *See, e.g.*, *id.* at 1366; Schmucker, *supra* note 159, at 336; Smith, *supra* note 168, at 636. *But see* Bandes, *supra* note 16, at 1187 (stating that "*Rooker-Feldman* conflicts with other jurisdictional mandates . . . which reflect a congressional judgment that state court vehicles for the vindication of federal rights and interests are inadequate." (footnote omitted)).

184. *See generally* FALLON ET AL., *supra* note 19, at 322-26 (discussing the parity of state and federal courts and citing empirical studies and academic literature on the topic); *see also* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 233 n.1 (1988) (defining parity as "whether, overall, state courts are equal to federal courts in their ability and willingness to protect federal constitutional rights").

federal constitutional issues.[185] In *Stone v. Powell*,[186] the Court noted that "[s]tate courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law."[187] Endorsing the concept of parity, the Court said it was "unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States."[188]

Proponents of expansive federal court jurisdiction contest this assumption and argue that state courts underenforce federal rights.[189] Professor Burt Neuborne advances three reasons why federal courts generally are more sympathetic to federal claims.[190] First, the federal judiciary supposedly attracts judges with greater technical competence because the position is better paid and more prestigious.[191] Second, "[a]s heirs of a tradition of constitutional enforcement, federal judges feel subtle, yet nonetheless real pressures to uphold that tradition."[192] Third, the life tenure of federal judges insulates them from "majoritarian pressures," allowing them "to enforce the Constitution without fear of reprisal."[193]

Advocates of parity respond with two arguments. First, the structure of Article III suggests that parity is an indispensable concept in our federal system, if not constitutionally mandated.[194] The Constitution gave Congress complete discretion to establish (or not establish) lower federal courts.[195] From this premise, scholars have argued that

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185. *See, e.g.*, Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 149-50 (1988) ("[W]hen a state proceeding presents a federal issue, . . . the proper course is to seek resolution of that issue by the state court."); Deakins v. Monaghan, 484 U.S. 193, 203 (1988) (rejecting the "assumption that the States cannot be trusted to enforce federal rights with adequate diligence" as "inappropriate" (citing Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976))); D.C. Court of Appeals v. Feldman, 460 U.S. 462, 484 n.16 (1983) ("We have noted the competence of state courts to adjudicate federal constitutional claims." (citing Sumner v. Mata, 449 U.S. 539, 549 (1981); Allen v. McCurry, 449 U.S. 90, 105 (1980); Swain v. Pressley, 430 U.S. 372, 383 (1977))).

186. 428 U.S. 465 (1976).

187. *Id.* at 494 n.35 (citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 341-44 (1816)).

188. *Id.*

189. Chemerinsky, *supra* note 184, at 233-34 (citations omitted).

190. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121-28 (1977); *see also* FALLON ET AL., *supra* note 19, at 323-24 (summarizing Neuborne's analysis).

191. *See* Neuborne, *supra* note 190, at 1121-22.

192. *Id.* at 1124.

193. *Id.* at 1127 (citation omitted).

194. *See* FALLON ET AL., *supra* note 19, at 325-26.

195. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers."); *see also* FEDERALIST No. 82 (Alexander Hamilton), *supra* note 160, at 401 (concluding "that the

"[s]ince Congress need not create any lower federal courts at all, Article III must be indifferent whether adjudication occurs in state or federal court."[196] Thus, the Constitution seems to assume that parity exists between state and federal courts on matters of federal law.[197] Second, several empirical studies suggest that there is no meaningful difference between state and federal courts when it comes to the adjudication of federal claims.[198]

The *Rooker-Feldman* doctrine relies heavily on the concept of parity. By prohibiting lower federal court interference with state court judgments, the doctrine assumes that state courts will fully and fairly adjudicate federal claims.[199] Proponents of *Rooker-Feldman* argue that state appellate courts "have a record equal to that of the federal courts in protecting constitutional rights."[200] Ultimately, when errors are made in *either* the state or federal court systems, discretionary review by the U.S. Supreme Court is available,[201] even if it is rare in either case.

In sum, the *Rooker-Feldman* doctrine advances the important interests of separation of powers, federalism, and parity, and courts analyzing unanswered questions about the doctrine's scope should reason from these underlying principles. Unfortunately, federal courts have not always made this inquiry. As Professor Susan Bandes notes, "Courts have too often used the jurisdictional stature of the doctrine as a convenient way to avoid reasoning through the policies underlying it."[202] As we shall see, nowhere is this more apparent than the current split among federal circuit courts as to whether *Rooker-Feldman* protects state court interlocutory orders.

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organs of the national judiciary should be one supreme court and as many subordinate courts as congress should think proper to appoint").

196. FALLON ET AL., *supra* note 19, at 325-26.

197. *See* FEDERALIST No. 82 (Alexander Hamilton), *supra* note 160, at 402 ("[T]he inference seems to be conclusive that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited."). Indeed, the presumption that state courts are competent to adjudicate federal claims is further supported by the fact that Congress did not grant statutory federal question jurisdiction to the lower federal courts until 1875. *See* FALLON ET AL., *supra* note 19, at 828-29.

198. *See, e.g.*, Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of* Nollan v. California Coastal Commission, 23 HARV. J.L. & PUB. POL'Y 233, 238-39 (1999); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 214-15 (1983). *But see* Chemerinsky, *supra* note 184, at 273 (suggesting that "[a]lthough parity is an empirical question, no empirical answer seems possible").

199. *See* Schmucker, *supra* note 159, at 336; Smith, *supra* note 168, at 636.

200. Chang, *supra* note 54, at 1366 (footnote omitted).

201. Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1142 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987); *see also* 28 U.S.C. § 1254 (2006) (providing that the Supreme Court may review cases from the federal court of appeals); 28 U.S.C. § 1257 (2006) (providing that the Supreme Court may review final state court judgments on federal claims).

202. Bandes, *supra* note 16, at 1192.

IV. CIRCUITS ARE SPLIT ON WHETHER *ROOKER-FELDMAN* PROTECTS INTERLOCUTORY ORDERS

The circuits are split on whether the *Rooker-Feldman* doctrine bars suits in lower federal courts that challenge state court interlocutory orders.[203] The Fifth, Seventh, and Eleventh Circuits use a narrow approach, applying *Rooker-Feldman* only to final state court judgments.[204] The Second, Fourth, Sixth, and District of Columbia Circuits use a broad approach, extending *Rooker-Feldman* to all state court judgments, including interlocutory orders.[205] The First, Eighth, Ninth, and Tenth Circuits use an intermediate approach, applying *Rooker-Feldman* to some—but not all—state court interlocutory orders.[206]

A. The Narrow Approach: Rooker-Feldman *Does Not Extend to State Court Interlocutory Orders*

The Fifth,[207] Seventh,[208] and Eleventh[209] Circuits have held that *Rooker-Feldman* protects only final state court judgments.[210] In these

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203. *See* Rowe & Baskauskas, *supra* note 27, at 21 ("Federal courts have been somewhat divided about whether *Rooker-Feldman* can bar lower federal-court jurisdiction when a state court has made an interlocutory ruling, such as granting a preliminary injunction."); Sherry, *Logic Without Experience*, *supra* note 25, at 144 ("[L]ower courts are struggling to define the 'end' of state-court proceedings. . . . [and] have, understandably, reached a variety of inconsistent conclusions." (citation omitted)).

204. *See infra* Part IV.A.

205. *See infra* Part IV.B.

206. *See infra* Part IV.C. This Article intentionally does not classify the approach used by courts within the Third Circuit because application of *Rooker-Feldman* to state court interlocutory orders has been inconsistent. *Compare* Warren v. Baker, No. 4:07-cv-188, 2007 WL 2264099, at *3 (M.D. Pa. Aug. 7, 2007) (holding that *Rooker-Feldman* barred federal claim challenging a state court interlocutory ruling on a party's preliminary objections), *with* RegScan, Inc. v. Brewer, No. Civ.A. 04-6043, 2005 WL 874662, at *1-3 (E.D. Pa. Apr. 13, 2005) (holding that *Rooker-Feldman* was inapplicable after federal plaintiff argued that "*Rooker-Feldman* should not apply" to an "interlocutory and procedural" state court judgment).

207. *See, e.g.*, *In re* Meyerland Co., 960 F.2d 512, 516 (5th Cir. 1992) (limiting *Rooker-Feldman* to final state court judgments). *But see, e.g.*, Hale v. Harney, 786 F.2d 688, 691 (5th Cir. 1986) ("We hold no warrant to review even final judgments of state courts, let alone those which may never take final effect because they remain subject to revision in the state appellate system.").

208. *See, e.g.*, TruServ Corp. v. Flegles, Inc., 419 F.3d 584, 591 (7th Cir. 2005); Brown v. JPMorgan Chase Bank, No. 2:07-CV-221 PS, 2008 WL 711721, at *3 (N.D. Ind. Mar. 13, 2008).

209. *See, e.g.*, Amos v. Glynn County Bd. of Tax Assessors, 347 F.3d 1249, 1265 n.11 (11th Cir. 2003) (providing that the *Rooker-Feldman* doctrine requires a "prior state court ruling [that] was a final or conclusive judgment on the merits"); *see also* Siegel v. Lepore, 234 F.3d 1163, 1172 (11th Cir. 2000) ("No party has called to our attention any final judgments in the Florida state courts upon which a Rooker-Feldman bar reasonably could be based . . . .").

210. Courts in other circuits occasionally have applied this narrow rule as well. *See, e.g.*, H.C. *ex rel.* Gordon v. Koppel, 203 F.3d 610, 612-13 (9th Cir. 2000) (noting that abstention principles rather than *Rooker-Feldman* apply when there are ongoing state proceedings and no final state court judgment (citation omitted)); *RegScan*, 2005 WL 874662,

circuits, the *Rooker-Feldman* doctrine does not prevent federal district courts from exercising de facto appellate jurisdiction over state court interlocutory orders,[211] nor does it protect state court judgments that are either subject to modification[212] or appealable in state court.[213] The Eleventh Circuit even requires a final state court judgment on the merits before it will consider *Rooker-Feldman*.[214]

Two rationales support this narrow approach. First, some argue that *Rooker-Feldman* should protect only those final state court judgments that are reviewable by the Supreme Court under 28 U.S.C. § 1257.[215] Because the *Rooker-Feldman* doctrine itself arose from judicial interpretation of § 1257,[216] "denying jurisdiction based on a state court judgment that is not eligible for review by the United States Supreme Court simply would not follow from the jurisdictional statute that invigorated the Rooker-Feldman doctrine in the first place."[217] Thus, "the *Rooker-Feldman* doctrine is only necessary to effectuate the negative implication of 28 U.S.C. § 1257—it is needed only to prevent lower federal courts from considering cases that the

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at *1-3 (refusing to apply *Rooker-Feldman*, despite a prior state court interlocutory order denying party's motion to amend complaint).

211. *See, e.g.*, *TruServ*, 419 F.3d at 591 (stating that because *Rooker-Feldman* only applies after the state proceedings ended, "an interlocutory ruling does not evoke the doctrine or preclude federal jurisdiction"); Main St. Bank & Trust v. Saltonstall, No. 06-1114, 2006 WL 2385274, at *4 (C.D. Ill. Aug. 17, 2006) ("[A]n interlocutory state court order does not evoke the *Rooker-Feldman* doctrine because the state court proceedings are still pending." (citing *TruServ*, 419 F.3d at 591)).

212. *See In re* Hodges, 350 B.R. 796, 801 (Bankr. N.D. Ill. 2006) (stating that although state court had entered a judgment of foreclosure prior to the federal suit, *Rooker-Feldman* did not preclude federal jurisdiction because the foreclosure judgment was modifiable by the trial court until the sale was confirmed).

213. *See, e.g.*, Rowley v. Wilson, 200 F. App'x 274, 275 (5th Cir. 2006) ("The state case was on appeal to the Louisiana appellate court. Accordingly, the *Rooker-Feldman* doctrine is inapplicable."); *In re* Meyerland Co., 960 F.2d 512, 516 (5th Cir. 1992) (stating that *Rooker-Feldman* did not apply because "[t]wo higher courts within the state judiciary could hear appeals" of the state court judgment).

214. The Eleventh Circuit applies *Rooker-Feldman* only if four conditions are met, including the requirement that "the prior state court ruling was a final or conclusive judgment on the merits." *Amos*, 347 F.3d at 1265 n.11 (11th Cir. 2003). Eleventh Circuit decisions after *Exxon Mobil* continue to use the *Amos* test. *See, e.g.*, Burt Dev. Co. v. Bd. of Comm'rs, 230 F. App'x 910, 912-13 (11th Cir. 2007); Morris v. Wroble, 206 F. App'x 915, 918 & n.3 (11th Cir. 2006); Force v. Kolhage, 198 F. App'x 827, 829 (11th Cir. 2006); Herskowitz v. Reid, 187 F. App'x 911, 913 (11th Cir. 2006); Ransom v. Georgia, 181 F. App'x 776, 777 (11th Cir. 2006).

215. *See, e.g.*, *In re Meyerland Co.*, 960 F.2d at 516.

216. *See* D.C. Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983) (interpreting 28 U.S.C. § 1257 (1976)); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415 (1923) (interpreting the statutory antecedent to § 1257); *see also* Sherry, *Logic Without Experience*, *supra* note 25, at 144 ("*Rooker-Feldman* is derived from an interpretation of § 1257, which reserves to the Supreme Court the right to review state-court judgments . . . .").

217. Cruz v. Melecio, 204 F.3d 14, 21 n.5 (1st Cir. 2000), *abrogated by* Federación de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R., 410 F.3d 17, 27-28 (1st Cir. 2005).

Supreme Court is permitted to hear under the statute."[218] The Fifth Circuit relies on this reasoning.[219]

Second, courts cite language from *Exxon Mobil* for the proposition that *Rooker-Feldman* is limited to federal suits that are filed "after the state proceedings ended"[220]—in other words, federal suits challenging *final* state court judgments.[221] As noted above, the Supreme Court stated in *Exxon Mobil* that the *Rooker* and *Feldman* cases demonstrate the rare circumstances in which the doctrine bars jurisdiction.[222] The Court noted that "[i]n both cases, the losing party in state court filed suit in federal court *after the state proceedings ended*."[223] Although this language from *Exxon Mobil* is pure dictum,[224] the Fifth and Seventh Circuits nonetheless give it binding effect and refuse to apply *Rooker-Feldman* unless state proceedings have ground to a complete halt.[225]

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218. Pieper v. Am. Arbitration Ass'n, Inc., 336 F.3d 458, 462 (6th Cir. 2003) (summarizing appellant's argument before rejecting it).

219. *See In re Meyerland Co.*, 960 F.2d at 516 (implying that the *Rooker-Feldman* doctrine is inapplicable unless there is a "final state court judgment[]" under § 1257 (internal quotation marks omitted)). The First Circuit also initially tied the scope of *Rooker-Feldman* to appealability under § 1257. *See Cruz*, 204 F.3d at 21 n.5; Hill v. Town of Conway, 193 F.3d 33, 40-41 (1st Cir. 1999). However, the First Circuit changed course after *Exxon Mobil* and stated that appealability under § 1257 was no longer necessary to trigger *Rooker-Feldman*. *See Federación*, 410 F.3d at 26-27.

220. Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291 (2005).

221. *See, e.g.*, Rowley v. Wilson, 200 F. App'x 274, 275 (5th Cir. 2006); TruServ Corp. v. Flegles, Inc., 419 F.3d at 591 (7th Cir. 2005).

222. *See Exxon Mobil*, 544 U.S. at 291.

223. *Id.* (emphasis added).

224. As noted earlier in this Article, there were absolutely no state court interlocutory orders at issue in *Exxon Mobil*. *See* Rowe & Baskauskas, *supra* note 27, at 22 ("Arguing from these kinds of fine linguistic differences, in an opinion in which the Court was not focusing on the final-versus-interlocutory distinction, does not seem to us to be a fruitful exercise."). Indeed, when the Court did hold that *Rooker-Feldman* was inapplicable, it merely noted that ExxonMobil had filed its federal suit "well before *any* judgment in state court." *Exxon Mobil*, 544 U.S. at 293 (emphasis added).

225. *See, e.g.*, *Rowley*, 200 F. App'x at 275 ("*Exxon Mobil* tells us when a state court judgment is sufficiently final for operation of the *Rooker-Feldman* doctrine: when 'the state proceedings [have] ended.' " (quoting *Exxon Mobil*, 544 U.S. at 291) (alteration in original)); *TruServ*, 419 F.3d at 591 ("The doctrine only applies to cases like *Rooker* and *Feldman* where 'the losing party in state court filed suit in federal court *after the state proceedings ended* . . . .' " (quoting *Exxon Mobil*, 544 U.S. at 291)).

B. The Broad Approach: Rooker-Feldman *Protects State Court Interlocutory Orders*

The Second,[226] Fourth,[227] Sixth,[228] and District of Columbia[229] Circuits extend the protection of *Rooker-Feldman* to interlocutory orders and decisions by lower state courts.[230] Courts within these circuits have applied this broad approach even after the Supreme Court's decision in *Exxon Mobil*.[231] As a result, *Rooker-Feldman* has been used to prevent federal collateral attacks on a variety of state court interlocutory orders, including stays,[232] preliminary injunctions,[233] preliminary orders,[234] rulings on pretrial motions,[235] and discovery orders.[236]

Several arguments support this broad approach. First, some courts reject the premise that the *Rooker-Feldman* doctrine applies

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226. *See* Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126, 138 (2d Cir. 1997); Campbell v. Greisberger, 80 F.3d 703, 707 (2d Cir. 1996); Gentner v. Shulman, 55 F.3d 87, 89 (2d Cir. 1995); Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1142-43 (2d Cir. 1986), *rev'd on other grounds* 481 U.S. 1 (1987).

227. *See* Am. Reliable Ins. Co. v. Stillwell, 336 F.3d 311, 320 (4th Cir. 2003); Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 199 (4th Cir. 2000); Jordahl v. Democratic Party of Va., 122 F.3d 192, 199 (4th Cir. 1997). *But see* Martin v. Ball, Civil Action No. 5:06CV85, 2008 WL 2120931, at *7 (N.D.W. Va. May 20, 2008) (applying an intermediate approach (citing Federación de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R., 410 F.3d 17, 24 (1st Cir. 2005))).

228. *See* Pieper v. Am. Arbitration Ass'n, Inc., 336 F.3d 458, 462 (6th Cir. 2003).

229. *See* Richardson v. D.C. Court of Appeals, 83 F.3d 1513, 1515 (D.C. Cir. 1996).

230. Before *Exxon Mobil*, the Seventh, Eighth, Ninth, and Tenth Circuits also held that *Rooker-Feldman* protected state court interlocutory orders and lower state court decisions. *See* Schmitt v. Schmitt, 324 F.3d 484, 487 (7th Cir. 2003); Kenmen Eng'g v. City of Union, 314 F.3d 468, 474-75 (10th Cir. 2002), *abrogation recognized by* Guttman v. Khalsa, 446 F.3d 1027, 1031 (10th Cir. 2006); Doe & Assocs. Law Offices v. Napolitano, 252 F.3d 1026, 1030 (9th Cir. 2001); Keene Corp. v. Cass, 908 F.2d 293, 297 n.2 (8th Cir. 1990). These circuits abandoned the broad approach after *Exxon Mobil*. *See supra* Part IV.A and *infra* Part IV.C.

231. *E.g.*, Vizgrand, Inc. v. Supervalue Holding, Inc., No. 07-13430-BC, 2007 WL 2413102, at *3 (E.D. Mich. Aug. 21, 2007); Delmarva Power & Light Co. v. Morrison, 496 F. Supp. 2d 678, 685 n.11 (E.D. Va. 2007); Hann v. Michigan, No. 05-CV-71347-DT, 2007 WL 892413, at *6 (E.D. Mich. Mar. 2, 2007); Field Auto City, Inc. v. Gen. Motors Corp., 476 F. Supp. 2d 545, 553 (E.D. Va. 2007); Galtieri v. Kelly, 441 F. Supp. 2d 447, 458 n.9 (E.D.N.Y. 2006); Sinclair v. Bankers Trust Co., No. 5:05-CV-072, 2005 WL 3434827, at *3 (W.D. Mich. Dec. 13, 2005). *But see* Phillips *ex rel.* Green v. City of New York, 453 F. Supp. 2d 690, 714-15 (S.D.N.Y. 2006).

232. *E.g.*, *Pieper*, 336 F.3d at 459, 464-65 (order staying litigation pending arbitration); *Stillwell*, 336 F.3d at 319-20 (denial of motion to stay judicial proceedings).

233. *E.g.*, *Kenmen*, 314 F.3d at 473-75 (grant of temporary and permanent injunctions).

234. *E.g.*, Gentner v. Shulman, 55 F.3d 87, 89 (2d Cir. 1995) (sua sponte order disqualifying attorneys from representing clients due to ethical constraints).

235. *E.g.*, Gilbert v. Ferry, 401 F.3d 411, 418 (6th Cir. 2005) (denial of motion for recusal); *Stillwell*, 336 F.3d at 319-20 (denial of motion to compel arbitration); Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 202 (4th Cir. 2000) (denial of motion to compel arbitration).

236. *See, e.g.*, Keene Corp. v. Cass, 908 F.2d 293, 297 (8th Cir. 1990) (grant of motion to compel production of documents during discovery).

only when Supreme Court review is available under § 1257.[237] For example, the Sixth Circuit reasons that "the statement that lower federal courts should not have jurisdiction where the Supreme Court has jurisdiction (the *Rooker-Feldman* doctrine) does not logically imply that lower federal courts *should always have* jurisdiction when the Supreme Court *does not*."[238] If anything, "a natural reading of 28 U.S.C. § 1257 suggests that *no federal court* (neither inferior nor Supreme) has jurisdiction over appeals from non-final state-court orders or from orders and decisions of lower state courts."[239]

Second, courts applying a broad rule note that *Rooker-Feldman*'s purpose is intertwined with principles of federalism,[240] parity,[241] and judicial economy.[242] Under this rationale, the doctrine recognizes that "state courts are just as obligated and competent as federal courts to decide federal constitutional questions."[243] Additionally, courts reason that "a path is available through the state appellate system to the Supreme Court" under the existing federal structure.[244] Finally, these courts emphasize that the doctrine avoids "waste of judicial resources and unnecessary friction between state and federal courts [that] might ensue if a federal district court intervened to overrule a state court decision."[245]

C. The Intermediate Approach: Rooker-Feldman *Protects Some (but Not All) State Court Interlocutory Orders*

The First,[246] Eighth,[247] Ninth,[248] and Tenth[249] Circuits follow an intermediate approach, extending *Rooker-Feldman* to some—but not

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237. *E.g.*, *Pieper*, 336 F.3d at 462; Doe & Assocs. Law Offices v. Napolitano, 252 F.3d 1026, 1030 (9th Cir. 2001).

238. *Pieper*, 336 F.3d at 464; *accord Doe & Assocs. Law Offices*, 252 F.3d at 1030 ("[T]he *Rooker-Feldman* doctrine is not premised on the availability of Supreme Court review of the state court decision.").

239. *Pieper*, 336 F.3d at 464 n.5 (emphasis added); *see also* 18B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4469.1, at 146-47 (2d ed. 2002) ("Of course the prospect that there may never be Supreme Court jurisdiction may support the further conclusion that district court subject-matter jurisdiction is even less appropriate.").

240. *See, e.g.*, *Stillwell*, 336 F.3d at 316 (citing Plyler v. Moore, 129 F.3d 728, 731 (4th Cir. 1997)).

241. *See, e.g.*, Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 198 (4th Cir. 2000); Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1142 (2d Cir. 1986), *rev'd on other grounds* 481 U.S. 1 (1987).

242. *See, e.g.*, *Texaco*, 784 F.2d at 1142.

243. *Id.* (citing Moore v. Sims, 442 U.S. 415, 430 (1979); Huffman v. Pursue, Ltd., 420 U.S. 592, 610-11 (1975)).

244. *Id.*

245. *Id.* (citing Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 286 (1970)).

246. *See* Federación de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R., 410 F.3d 17, 23-25 (1st Cir. 2005).

247. *See* Dornheim v. Sholes, 430 F.3d 919, 924 (8th Cir. 2005) (applying *Federación* test). *But see* Friends of Eudora Pub. Sch. Dist. of Chicot County v. Beebe, No. 5:06CV0044

all—state court interlocutory orders. This approach has its origins in *Federación de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*,[250] a First Circuit case decided less than two months after the Supreme Court's decision in *Exxon Mobil*.[251]

Federación involved a suit in federal district court challenging an interlocutory judgment by the Puerto Rico appellate courts.[252] A labor union had filed an unfair labor practices grievance before the Puerto Rico Labor Relations Board against an employer.[253] The employer moved to dismiss, contending that the Board lacked jurisdiction because the National Labor Relations Act preempted Puerto Rico labor law.[254] After the Board denied the motion, the employer unsuccessfully appealed the interlocutory order in the Puerto Rico courts.[255] Undeterred, the employer filed suit in federal district court, seeking "an injunction ordering the Board to terminate its proceedings for lack of jurisdiction."[256] The district court held that it lacked jurisdiction under the *Rooker-Feldman* doctrine.[257] Although the employer argued that *Rooker-Feldman* does not apply to interlocutory orders,[258] the First Circuit affirmed the district court's judgment.[259]

In its analysis, the First Circuit started from the premise that "*Exxon Mobil* tells us when a state court judgment is sufficiently final for operation of the *Rooker-Feldman* doctrine: when 'the state proceedings [have] ended.' "[260] Elaborating on the meaning of this dictum from *Exxon Mobil*, the court held that state proceedings have "ended"

SWW, 2008 WL 828360, at *6 (E.D. Ark. Mar. 25, 2008) (stating that *Rooker-Feldman* applies to interlocutory orders, without mentioning intermediate approach from *Federación*).

248. *See* Mothershed v. Justices of the Supreme Court, 410 F.3d 602, 604 n.1 (9th Cir. 2005) (applying *Federación* test).

249. *See* Guttman v. Khalsa, 446 F.3d 1027, 1032 & n.2 (10th Cir. 2006) (applying *Federación* test). *But see* Tal v. Hogan, 453 F.3d 1244, 1257 (10th Cir. 2006) ("The state condemnation proceeding need not be final in order to serve as grounds for *Rooker-Feldman* preclusion." (citing Kenmen Eng'g v. City of Union, 314 F.3d 468, 474 (10th Cir. 2002))); Stubblefield v. Egelhoff, No. 08-cv-00619-BNB, 2008 WL 2011865, at *2 (D. Colo. May 8, 2008) ("[T]he *Rooker-Feldman* doctrine bars review not only of final judgments entered by state courts, but also of their interlocutory orders." (citing Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 199 (4th Cir. 2000))).

250. 410 F.3d 17 (1st Cir. 2005).

251. *See* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 280 (2005) (decided March 30, 2005); *Federación*, 410 F.3d at 17 (decided May 27, 2005).

252. *Federación*, 410 F.3d at 19-20.

253. *Id.* at 19.

254. *Id.*

255. *Id.* at 19-20.

256. *Id.* at 20.

257. Federación de Maestros de P.R., Inc. v. Junta de Relaciones del Trabajo de P.R., 265 F. Supp. 2d 186, 188-89 (D.P.R. 2003).

258. *Federación*, 410 F.3d at 20.

259. *Id.* at 29.

260. *Id.* at 24 (alteration in original) (quoting Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291 (2005)).

under *Rooker-Feldman* in three situations.[261] First, state proceedings have ended "when the highest state court in which review is available has affirmed the judgment below and nothing is left to be resolved."[262] In other words, *Rooker-Feldman* undoubtedly applies when there is a final state court judgment under § 1257.[263] Second, state proceedings have ended "if the state action has reached a point where neither party seeks further action"[264] For example, *Rooker-Feldman* applies when the losing party does not timely appeal a lower state court judgment, even though the judgment may not be sufficiently final to trigger Supreme Court review under § 1257.[265] Third, state proceedings have ended when they "have finally resolved all the federal questions in the litigation, but state law or purely factual questions (whether great or small) remain to be litigated."[266] This third situation relies on *Cox Broadcasting Corp. v. Cohn*.[267] In *Cox Broadcasting*, the Supreme Court outlined four situations in which nonfinal state court judgments are considered "final" for purposes of § 1257 because all federal issues have been resolved.[268] The First Circuit applied this test to the facts of *Federación* and held that *Rooker-*

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261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at 25.
267. 420 U.S. 469 (1975).
268. *See Federación*, 410 F.3d at 25-27 & n.11. *Cox Broadcasting* outlined four situations in which nonfinal state court judgments nonetheless qualify as "final" judgments for Supreme Court review under 28 U.S.C. § 1257 (2006):

> In the first category are those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. . . .
>
> Second, there are cases . . . in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings. . . .
>
> In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. . . .
>
> . . . .
>
> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. . . . [And,] a refusal immediately to review the state-court decision might seriously erode federal policy . . . .

Cox Broadcasting, 420 U.S. at 479-83.

Feldman barred the employer's federal suit because the Puerto Rico judgment fell within one of the *Cox Broadcasting* situations.[269]

Two rationales support *Federación*'s intermediate approach. First, the First Circuit repeatedly emphasizes that a state court proceeding can "end" under *Exxon Mobil* even when the Supreme Court does *not* have appellate jurisdiction under § 1257.[270] This echoes the rationale of circuits that use the broad approach.[271] Second, the First Circuit gives binding effect to *Exxon Mobil*'s dictum that state proceedings must have "ended" for *Rooker-Feldman* to apply.[272] This mirrors the rationale of those circuits that use the narrow approach.[273] *Federación* resolves any tension between these two rationales by stating that "appealability under § 1257 is not *necessary* to satisfy the *Exxon Mobil* 'ended' test, [but] it will almost always be *sufficient*."[274] In other words, "if a state court decision is final enough that the Supreme Court *does* have jurisdiction over a direct appeal, then it is final enough that a lower federal court *does not* have jurisdiction over a collateral attack on that decision."[275]

In sum, the circuits are split on whether *Rooker-Feldman* bars federal suits challenging state court interlocutory orders. Circuits using the narrow approach apply *Rooker-Feldman* only to final state court judgments. Circuits using the broad approach extend the doctrine to all state court judgments, including interlocutory orders. Circuits using the intermediate approach apply *Rooker-Feldman* to some—but not all—state court interlocutory orders.

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269. *Federación*, 410 F.3d at 28-29.

270. *See id.* at 24 (holding that, under *Federación*'s second situation, a proceeding has "ended" under *Exxon Mobil* "if the state action has reached a point where neither party seeks further action," even though it may not be an appealable final judgment under § 1257); *id.* at 26 ("[W]e hasten to repeat that a proceeding may have 'ended' under *Exxon Mobil* even when § 1257 jurisdiction would not have been available.").

271. *E.g.*, Pieper v. Am. Arbitration Ass'n, Inc., 336 F.3d 458, 463 (6th Cir. 2003); Doe & Assocs. Law Offices v. Napolitano, 252 F.3d 1026, 1030 (9th Cir. 2001).

272. *See Federación*, 410 F.3d at 24 ("*Exxon Mobil* tells us when a state court judgment is sufficiently final for operation of the *Rooker-Feldman* doctrine: when 'the state proceedings [have] ended.' " (alteration in original) (quoting Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291 (2005))).

273. *See, e.g.*, Rowley v. Wilson, 200 F. App'x 274, 275 (5th Cir. 2006) ("*Exxon Mobil* tells us when a state court judgment is sufficiently final for operation of the *Rooker-Feldman* doctrine: when 'the state proceedings [have] ended.' " (alteration in original) (quoting *Exxon Mobil*, 544 U.S. at 291)); TruServ Corp. v. Flegles, Inc., 419 F.3d 584, 591 (7th Cir. 2005) ("The doctrine only applies to cases like *Rooker* and *Feldman* where 'the losing party in state court filed suit in federal court *after the state proceedings ended* . . . .' " (quoting *Exxon Mobil*, 544 U.S. at 291)).

274. *Federación*, 410 F.3d at 26-27.

275. *Id.* at 27.

V. THE SUPREME COURT SHOULD HOLD THAT *ROOKER-FELDMAN* PROTECTS STATE COURT INTERLOCUTORY ORDERS

When an appropriate case presents itself, the Supreme Court should resolve the split in circuit authority by holding that *Rooker-Feldman* extends to all state court judgments, including interlocutory orders. Under this interpretation, the doctrine would prohibit federal district courts from exercising de facto appellate jurisdiction over state court preliminary injunctions, stays, rulings on pretrial motions, discovery orders, and other interlocutory decisions.[276] The Court should adopt this broad approach because it is the only rule that is consistent with the fundamental purposes underlying the *Rooker-Feldman* doctrine. First, the broad approach requires lower federal courts to enforce separation of powers by staying within the boundaries of their limited statutory jurisdiction.[277] Second, the broad approach advances principles of federalism by requiring litigants to seek appellate review of state court decisions in the state court system.[278] Third, the broad approach recognizes that state courts are fully competent to adjudicate federal claims.[279]

A. Extending Rooker-Feldman *to State Court Interlocutory Orders Ensures Separation of Powers by Keeping Lower Federal Courts Within Their Limited Jurisdictional Role*

The most important reason why lower federal courts should not exercise de facto appellate jurisdiction over state court interlocutory orders is that Congress has not given explicit authority for such jurisdiction.[280] The Constitution entrusts Congress with the exclusive power to set the jurisdictional boundaries of the lower federal

276. *See supra* Part IV.B.
277. *See infra* Part V.A.
278. *See infra* Part V.B.
279. *See infra* Part V.C.
280. *See, e.g.*, Am. Reliable Ins. Co. v. Stillwell, 336 F.3d 311, 316 (4th Cir. 2003) (" 'Congress has empowered the federal district courts to exercise only *original* jurisdiction.' " (emphasis added) (quoting Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 199 (4th Cir. 2000))); Pieper v. Am. Arbitration Ass'n, Inc., 336 F.3d 458, 464 n.5 (6th Cir. 2003) ("[A] natural reading of 28 U.S.C. § 1257 suggests that *no federal court* (neither inferior nor Supreme) has jurisdiction over appeals from non-final state-court orders." (emphasis added)); Schmucker, *supra* note 159, at 335 ("Because Congress gave only the Supreme Court the explicit right to review the decisions of a state court, Congress meant to deny all other federal courts that power.").

courts.[281] As a result, "[f]ederal district courts have no power to hear a case unless expressly authorized to do so."[282]

The Supreme Court currently is the *only* federal court with the authority to exercise any jurisdiction over state court judgments.[283] Congress has granted the Supreme Court limited jurisdiction over certain state court judgments—specifically, under 28 U.S.C. § 1257, "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" that involve a federal question.[284] Because this grant of jurisdiction is limited to the Supreme Court, lower federal courts "possess *no power whatever* to sit in direct review of state court decisions."[285]

This conclusion is further supported by Congress' limited grant of "original" jurisdiction to federal district courts under 28 U.S.C. § 1331. Professor Chang notes that "[a]s used in the statutes, the term 'original' jurisdiction is employed in direct contrast to 'appellate' jurisdiction."[286] Because Congress did not expressly grant *appellate* jurisdiction to federal district courts, those courts simply lack jurisdiction to review state court decisions, regardless of whether the state court decisions are final judgments or interlocutory orders.

The narrow and intermediate approaches—which allow lower federal courts to review some or all state court interlocutory orders—misinterpret these jurisdictional statutes and violate the constitutional separation of powers. Both approaches mistakenly allow federal district courts to exercise de facto appellate jurisdiction over some or all state court interlocutory orders,[287] even though Congress has granted no such jurisdiction.[288] The narrow approach's error is rooted in its overly restrictive interpretation of *Rooker-Feldman*, un-

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281. *See, e.g.*, Keene Corp. v. United States, 508 U.S. 200, 207 (1993); Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 285 (1970); Bandes, *supra* note 16, at 1189; Chang, *supra* note 54, at 1376.

282. Funkhouser et al., *supra* note 157, at 774; *accord* Chang, *supra* note 54, at 1349 ("The federal district courts, as courts of limited jurisdiction, have only that jurisdiction which Congress determines is appropriate.").

283. *See* 28 U.S.C. § 1257 (2006). There are only a few circumstances in which Congress has expressly conveyed jurisdiction upon lower federal courts to review state court judgments. *See, e.g.*, 11 U.S.C. §§ 544, 547, 548, 549, 727, 1129, 1141, 1325, 1328 (2006) (federal bankruptcy courts have jurisdiction to avoid, modify, and discharge certain state court judgments); 25 U.S.C. § 1914 (2006) (federal district courts have jurisdiction to review Indian child custody proceedings); 28 U.S.C. § 2254 (2006) (federal district courts have jurisdiction over state prisoners' habeas corpus petitions in certain circumstances).

284. 28 U.S.C. § 1257.

285. *Atl. Coast Line R.R.*, 398 U.S. at 296 (emphasis added).

286. Chang, *supra* note 54, at 1346.

287. *See, e.g.*, Guttman v. Khalsa, 446 F.3d 1027, 1032 (10th Cir. 2006); Dornheim v. Sholes, 430 F.3d 919, 923-24 (8th Cir. 2005); TruServ Corp. v. Flegles, Inc., 419 F.3d 584, 591 (7th Cir. 2005); Amos v. Glynn County Bd. of Tax Assessors, 347 F.3d 1249, 1265 n.11 (11th Cir. 2003).

288. *See Atl. Coast Line R.R.*, 398 U.S. at 286; Schmucker, *supra* note 159, at 335.

der which the doctrine protects only "final" state court judgments that are reviewable by the Supreme Court under § 1257.[289] In other words, courts using the narrow approach presume that federal district courts have jurisdiction over suits challenging state court judgments *unless* the judgment qualifies for Supreme Court review.

This assumption is irrational because it implies that "the Supreme Court's lack of jurisdiction essentially 'creates' jurisdiction for the lower federal courts."[290] Under well-established principles, lower federal courts cannot hear a case unless Congress *affirmatively* grants jurisdiction by statute.[291] The idea that federal district courts somehow automatically have jurisdiction over cases that the Supreme Court cannot hear turns this principle on its head.[292] If anything, the absence of Supreme Court jurisdiction over most state court interlocutory orders means that federal district court jurisdiction is "even less appropriate."[293]

Although the intermediate approach recognizes this flaw in the narrow approach, it nonetheless errs by falling prey to the seductive song of *Exxon Mobil*'s dictum. In *Federación*, the First Circuit held that *Rooker-Feldman* bars federal district courts from reviewing some state court judgments that are not appealable under § 1257.[294] However, the *Federación* Court erred by assuming that *Exxon Mobil* restricts the doctrine to cases in which " 'the state proceedings [have] ended.' "[295] Reliance on this dictum led the First Circuit astray. Under *Federación*'s intermediate approach, federal district courts can exercise de facto appellate jurisdiction over state court interlocutory orders, except in those rare situations when the state action grinds to

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289. *See, e.g.*, *In re Meyerland Co.*, 960 F.2d 512, 516 (5th Cir. 1992).

290. Pieper v. Am. Arbitration Ass'n, Inc., 336 F.3d 458, 463 (6th Cir. 2003).

291. Funkhouser et al., *supra* note 157, at 774; *see also* Keene Corp. v. United States, 508 U.S. 200, 207 (1993); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850).

292. *See Pieper*, 336 F.3d at 464 (noting that a congressional grant of exclusive jurisdiction to the Supreme Court "does not logically imply that lower federal courts *should always have* jurisdiction when the Supreme Court *does not*").

293. 18B WRIGHT ET AL., *supra* note 239, § 4469.1, at 146-47; *accord Pieper*, 336 F.3d at 463 ("The Supreme Court's lack of jurisdiction . . . seems . . . actually to be a stronger argument *against* lower federal-court jurisdiction than in favor of it.").

294. *See* Federación de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R., 410 F.3d 17, 26 (1st Cir. 2005) (noting that "a proceeding may have 'ended' under *Exxon Mobil* even when § 1257 jurisdiction would not have been available"); *id.* at 26-27 (stating that "appealability under § 1257 is not *necessary* to satisfy the *Exxon Mobil* 'ended' test, [but] it will almost always be *sufficient*").

295. *Id.* at 24 (alteration in original) (quoting Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291 (2005)); *see also* Guttman v. Khalsa, 446 F.3d 1027, 1032 (10th Cir. 2006); Mothershed v. Justices of the Supreme Court, 410 F.3d 602, 604 n.1 (9th Cir. 2005). As noted above, this language from *Exxon Mobil* is pure dictum. *See supra* Part II.E.

a complete halt or the state judgment is sufficiently "final" to qualify for Supreme Court review under § 1257.[296]

This intermediate approach is nothing more than old wine in new bottles. *Federación* offers a more nuanced analysis,[297] but its effect is virtually the same as the narrow approach—the vast majority of state court interlocutory orders are subject to appellate review in federal district court, even though Congress has not granted such jurisdiction. Instead of reasoning from established jurisdictional principles—under which Congress *alone* has the power to define the jurisdiction of the lower federal courts[298]—the intermediate approach offers a convoluted analysis, based on Supreme Court dictum, which ultimately allows federal district courts to stray outside of the enumerated statutory authority authorized by Congress.

The bottom line is that, subject to a few exceptions, Congress has not granted federal court appellate jurisdiction over state court interlocutory orders.[299] The broad approach—which uses *Rooker-Feldman* to prohibit federal district courts from reviewing *both* final and interlocutory state court judgments—is the only rule that enforces separation of powers by ensuring that courts stay within their jurisdictional boundaries.

B. Applying Rooker-Feldman *to State Court Interlocutory Orders Advances Principles of Federalism*

Extending *Rooker-Feldman* to state court interlocutory orders preserves the delicate balance of judicial federalism.[300] Preventing federal district courts from reviewing *all* state court judgments meet-

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296. *See Federación*, 410 F.3d at 24-27. As explained above in Part IV.C, the First Circuit outlined three situations in which state proceedings have "ended" for purposes of the *Rooker-Feldman* doctrine: (1) the highest state court has rendered a final judgment that qualifies for Supreme Court review under § 1257; (2) neither party seeks further action in state court; or (3) the state judgment qualifies for Supreme Court review under § 1257 through one of the *Cox Broadcasting* situations. *See id.*; *see also* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 479-83 (1975).

297. For example, *Federación* correctly recognizes that § 1257 allows Supreme Court review of some technically nonfinal state court judgments. *See* 410 F.3d at 24-27 (citing the Supreme Court's analysis from *Cox Broadcasting*).

298. *See* Bandes, *supra* note 16, at 1189 ("Congress has the responsibility for determining the precise contours of federal jurisdiction . . . ."); Chang, *supra* note 54, at 1349 ("The federal district courts, as courts of limited jurisdiction, have only that jurisdiction which Congress determines is appropriate." (citation omitted)); *see also* Keene Corp. v. United States, 508 U.S. 200, 207 (1993); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850).

299. The exceptions include Supreme Court review of nonfinal state court judgments that qualify under *Cox Broadcasting* and federal district court review of state court judgments in the limited contexts of bankruptcy, habeas corpus, and Indian child custody proceedings. *See supra* note 283.

300. *See, e.g.*, Am. Reliable Ins. Co. v. Stillwell, 336 F.3d 311, 316 (4th Cir. 2003).

ing the *Exxon Mobil* criteria[301] is the only way to ensure that judicial review occurs separately in our two sovereign and independent court systems, with ultimate review in the U.S. Supreme Court.[302] Entry of judgment by a state court—including issuance of an interlocutory order—constitutes an exercise of sovereign power. A federal lawsuit challenging a state court interlocutory order is just as much of an "end run" around the state court system as a suit challenging a final state court judgment.[303] Both equally undermine the concept of federalism.

Extending *Rooker-Feldman* to state court interlocutory orders also avoids antagonism between the state and federal systems.[304] The Supreme Court has emphasized that our dual judicial system would cease to function "if state and federal courts were free to fight each other for control of a particular case."[305] This harmful tension between state and federal courts is inevitable if federal district courts can exercise de facto appellate jurisdiction over state court preliminary injunctions, stays, rulings on pretrial motions, discovery orders, and other interlocutory decisions.

For these reasons, the Supreme Court should reject the narrow[306] and intermediate[307] approaches used by several circuits. The narrow

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301. *See* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005) (holding that the *Rooker-Feldman* doctrine is confined to "cases [1] brought by state-court losers [2] complaining of injuries caused by state-court judgments [3] rendered before the district court proceedings commenced and [4] inviting district court review and rejection of those judgments").

302. *See, e.g.*, *Stillwell*, 336 F.3d at 316 ("The *Rooker-Feldman* doctrine . . . preserves a fundamental tenet in our system of federalism that . . . appellate review of state court decisions occurs first within the state appellate system and then in the United States Supreme Court." (citing Plyler v. Moore, 129 F.3d 728, 731 (4th Cir. 1997))); Port Auth. Police Benevolent Ass'n, Inc. v. Port Auth. of N.Y. & N.J. Police Dep't, 973 F.2d 169, 177 (3d Cir. 1992) ("[D]ismissal of the complaint [challenging a state court preliminary injunction] was appropriate under the *Rooker-Feldman* doctrine, which instructs us that the only courts empowered to review for constitutional error the New York trial court's preliminary injunction are the appellate New York courts and, ultimately, the Supreme Court of the United States.").

303. *See* Schmitt v. Schmitt, 324 F.3d 484, 487 (7th Cir. 2003) ("[F]iling suit with the district court [after an intermediate state-court interlocutory order] was the type of end run around an adverse state court ruling that we have explicitly rejected." (citing Maple Lanes, Inc. v. Messer, 186 F.3d 823, 825 (7th Cir. 1999))); *see also* Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 198 (4th Cir. 2000) (stating that "[t]he independence of state courts would surely be compromised" if state court interlocutory orders "merely rang the opening bell for federal litigation of the same issues").

304. *See, e.g.*, Worldwide Church of God v. McNair, 805 F.2d 888, 891 (9th Cir. 1986); Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1142-43 (2d Cir. 1986), *rev'd on other grounds* 481 U.S. 1 (1987).

305. Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 286 (1970).

306. *See supra* Part IV.A; *see also* TruServ Corp. v. Flegles, Inc., 419 F.3d 584, 591 (7th Cir. 2005) (using narrow approach in which "an interlocutory ruling does not evoke the [*Rooker-Feldman*] doctrine").

approach, under which *Rooker-Feldman* protects only final state court judgments, ignores concerns relating to federalism.[308] The intermediate approach, under which the doctrine protects *some* state court interlocutory orders, does not go far enough.[309] The broad approach is the only rule that preserves the essential attributes of judicial federalism by protecting final and interlocutory state court judgments from collateral attack in federal courts.

C. Extending Rooker-Feldman *to Interlocutory Orders Recognizes the Competence of State Courts on Federal Issues*

The broad approach also is the only rule consistent with the concept of parity between state and federal courts.[310] Although scholars debate whether state courts underenforce federal rights,[311] the Supreme Court has repeatedly emphasized that state courts are competent to decide federal claims.[312] The concept of parity underlies the entire *Rooker-Feldman* doctrine—by prohibiting federal district courts from reviewing state court judgments, the doctrine assumes that state courts will fully and fairly adjudicate federal claims.[313]

In light of this rationale, *Rooker-Feldman* should bar federal district courts from reviewing state court decisions, regardless of whether those decisions are final judgments or interlocutory orders. If state courts are competent to issue final judgments in cases involving federal claims, it defies logic to suggest that they are somehow not com-

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307. *See* Part IV.C; *see also* Federación de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R., 410 F.3d 17, 23-25 (1st Cir. 2005) (using intermediate approach in which some, but not all, interlocutory orders trigger *Rooker-Feldman*).

308. As noted above, the narrow approach has two rationales, neither of which involve principles of federalism. First, courts assume that *Rooker-Feldman* "is only necessary to effectuate the negative implication of 28 U.S.C. § 1257—it is needed only to prevent lower federal courts from considering cases that the Supreme Court is permitted to hear under the statute." Pieper v. Am. Arbitration Ass'n, Inc., 336 F.3d 458, 462 (6th Cir. 2003) (summarizing argument for narrow interpretation). Second, courts mistakenly treat the "state proceedings ended" dicta in *Exxon Mobil* as binding. *See, e.g.*, Rowley v. Wilson, 200 F. App'x 274, 275 (5th Cir. 2006); *TruServ*, 419 F.3d at 591.

309. Like the narrow approach, the failing of the intermediate approach stems from its mistaken treatment of the *Exxon Mobil* "state proceedings ended" dicta as binding language. *See Federación*, 410 F.3d at 24.

310. *See, e.g.*, Worldwide Church of God v. McNair, 805 F.2d 888, 891 (9th Cir. 1986) (stating that the *Rooker-Feldman* doctrine is based in part on the rule that "state courts are as competent as federal courts to decide federal constitutional issues" (citing Allen v. McCurry, 449 U.S. 90, 105 (1980); Huffman v. Pursue, Ltd., 420 U.S. 592, 610-11 (1975))).

311. *E.g.*, *compare* Neuborne, *supra* note 190, at 1121-28 (arguing that federal courts are more sympathetic to federal claims than state courts), *with* William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 599-600 (1999) (arguing that state courts offer institutional advantages for protecting federal rights).

312. *See, e.g.*, Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 149-50 (1988); Deakins v. Monaghan, 484 U.S. 193, 203 (1988); Stone v. Powell, 428 U.S. 465, 494 n.35 (1976).

313. *See* D.C. Court of Appeals v. Feldman, 460 U.S. 462, 484 n.16 (1983); Schmucker, *supra* note 159, at 336; Smith, *supra* note 168, at 636; *see also supra* Part III.C.

petent to issue interlocutory orders in those same cases. The broad approach is the only rule that makes sense because it treats state court decisions in a uniform manner.

VI. CONCLUSION

Courts have mangled the *Rooker-Feldman* doctrine since its inception. Given this tradition of confusion, it is perhaps not surprising that circuits currently disagree on whether *Rooker-Feldman* protects state court interlocutory orders.

This Article ends with a bold proposition: this particular facet of the *Rooker-Feldman* doctrine is not as complicated as it first appears. A state court judgment is an exercise of sovereign power, regardless of whether it is final or interlocutory in nature. The premise of our federal system is the notion that both state courts and federal courts are competent to adjudicate federal claims. The Constitution allows federal courts to review state court judgments only if Congress has expressly conveyed jurisdiction to do so. Under existing statutes, the *only* federal court with appellate jurisdiction over state court judgments is the Supreme Court, which can (and occasionally does) correct errors that occur in both state and federal courts.

The bottom line is that Congress has not granted lower federal courts jurisdiction to review state court judgments. As long as *Rooker-Feldman* guarantees that federal courts respect the true meaning of this congressional silence, it is more than worthy of its place among jurisdictional doctrines.