THE *ROOKER-FELDMAN* DOCTRINE: WHAT DOES IT MEAN TO BE INEXTRICABLY INTERTWINED?

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INTRODUCTION

The principle behind the *Rooker-Feldman* doctrine[1] seems simple enough: of all the federal courts, only the United States Supreme Court has appellate jurisdiction over state court judgments.[2] Yet from this innocuous principle rooted in our country's federalist foundations, a seemingly impermeable cover of jurisprudential kudzu has grown. A primary source of the doctrine's expansion and the consequent confusion has been the "inextricably intertwined" inquiry introduced by *District of Columbia Court of Appeals v. Feldman*.[3] Supreme Court opacity concerning what it means to be inextricably intertwined[4] has resulted in significant incongruity in the lower federal courts,[5] which is all the more troubling in light of the

1. The doctrine is named for the two cases that created it: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), discussed *infra* at Part I.A, and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), discussed *infra* at Part I.B.

2. *See* 28 U.S.C. § 1257 (2000) (conferring on the Supreme Court certiorari jurisdiction over final judgments of the highest courts of the states); *cf., e.g.*, *id.* § 1331 (giving federal district courts original jurisdiction over federal question suits); *id.* § 1332 (giving federal district courts original jurisdiction over diversity suits).

3. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 483–84 n.16 (1983).

4. *See* Moccio v. N.Y. State Office of Court Admin., 95 F.3d 195, 198 (2d Cir. 1996) ("Since *Feldman*, the Supreme Court has provided us with little guidance in determining which claims are 'inextricably intertwined' with a prior state court judgment and which are not."); Ritter v. Ross, 992 F.2d 750, 754 (7th Cir. 1993) ("There is, unfortunately, no bright line that separates a federal claim that is 'inextricably intertwined' with a state court judgment from a claim that is not so intertwined."); Razatos v. Colo. Supreme Court, 746 F.2d 1429, 1433 (10th Cir. 1984) ("[T]his [inextricably intertwined] language by itself does not provide district courts with a bright line rule . . . .").

5. *See infra* Part III.

frequency with which these courts employ the concept, often to deny federal jurisdiction.[6]

Attention recently returned to the *Rooker-Feldman* doctrine via the Court's decision in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*[7] Observing that lower courts had greatly expanded the doctrine, the Court scaled back *Rooker-Feldman* and explicitly clarified many aspects of the doctrine that had troubled federal courts, except for what it means to be inextricably intertwined.[8] This Note first presents an account of the *Rooker-Feldman* doctrine and its recent clarification;[9] it then explores the different approaches taken to interpreting the "inextricably intertwined" concept;[10] and lastly it speculates about what *Exxon Mobil* might mean for the future of the "inextricably intertwined" inquiry.[11]

I. THE *ROOKER-FELDMAN* DOCTRINE

At its most basic, the *Rooker-Feldman* doctrine, named after the two cases from which it sprung,[12] is the principle that lower federal courts do not have jurisdiction to review state court judgments.[13] It is based on the congressional grant, in 28 U.S.C. § 1257,[14] of appellate

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6. *See* Thomas D. Rowe, Jr., Rooker-Feldman*: Worth Only the Powder to Blow It Up?*, 74 NOTRE DAME L. REV. 1081, 1083 (1999) (observing the "notable frequency" with which federal courts invoke *Rooker-Feldman* to find that they lack jurisdiction).

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

8. *See infra* Part III.

9. *See infra* Parts I–II.

10. *See infra* Part III.

11. *See infra* Part IV.

12. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), discussed *infra* at Part I.A; D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983), discussed *infra* at Part I.B.

13. *See* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291 (2005) ("*Rooker* and *Feldman* exhibit the limited circumstances in which [the Supreme] Court's appellate jurisdiction over state-court judgments precludes a United States district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate . . . ." (internal citation omitted)).

14. The full text of 28 U.S.C. § 1257 (2000) provides:

> (a) 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 where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
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> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

jurisdiction over state court judgments to the United States Supreme Court and the grant of original jurisdiction over certain suits to United States district courts.[15] Read together, these statutes indicate that the Supreme Court's appellate jurisdiction over state court judgments is exclusive and the jurisdiction[16] of the federal district courts is purely original.[17] In addition to these statutory bases, prudential considerations such as judicial federalism[18] and system consistency[19] also underlie the doctrine. Because these limits are statutory and prudential rather than constitutional, Congress can and has made exceptions to the doctrine, most notably in granting district courts jurisdiction over the habeas corpus petitions of state prisoners.[20]

Although the Supreme Court has never found a case to be barred by the *Rooker-Feldman* doctrine aside from the two for which it is named,[21] lower federal courts regularly employ an expansive version of the doctrine to dismiss federal actions.[22] Understanding the

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Id.

15. *E.g.*, *id.* § 1330 (suits against foreign states); *id.* § 1331 (federal question jurisdiction); *id.* § 1332 (diversity jurisdiction).

16. As a jurisdictional bar, the *Rooker-Feldman* doctrine may be raised at any time, by either party or sua sponte by the court. Garry v. Geils, 82 F.3d 1362, 1364 (7th Cir. 1996). Like other limits on the subject matter jurisdiction of the federal courts, it cannot be waived. 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 133.30[3][b], at 133-26 (3d ed. 2006).

17. *See* Benjamin Smith, Case 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, 629 (1987) (calling the *Rooker-Feldman* doctrine "the product of two negative inferences").

18. *See* Suzanna Sherry, *Judicial Federalism in the Trenches: The* Rooker-Feldman *Doctrine in Action*, 74 NOTRE DAME L. REV. 1085, 1085, 1089–1108 (1999) (describing *Rooker-Feldman* as one of the doctrines created to address the "aggregation of issues arising from the existence of two sets of American courts").

19. *See* Williamson B.C. Chang, *Rediscovering the* Rooker *Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HASTINGS L.J. 1337, 1350 (1980) ("[I]f trial courts could readily annul the judgment of each other on the merits, the prerequisite of finality in the judicial system would be destroyed. This is the system-consistency basis of *Rooker*.").

20. 28 U.S.C. § 2254 (2000) gives district courts jurisdiction over state prisoner habeas petitions. Although exceptions are rare, other statutory exceptions to the *Rooker-Feldman* doctrine include bankruptcy jurisdiction and 25 U.S.C. § 1914 (2000), which concerns jurisdiction to invalidate the results of custody proceedings regarding an Indian child. *See* Doe v. Mann, 415 F.3d 1038, 1043, 1047 (9th Cir. 2005) (noting these exceptions to the doctrine).

21. *See* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 283 (2005) (remarking that the Court has applied the *Rooker-Feldman* doctrine only twice: first in *Rooker* and then sixty years later in *Feldman*).

22. *See* Susan Bandes, *The* Rooker-Feldman *Doctrine: Evaluating Its Jurisdictional Status*, 74 NOTRE DAME L. REV. 1175, 1175 (1999) ("The doctrine has emerged as perhaps the primary

cases that initially gave rise to the *Rooker-Feldman* doctrine is essential to recognizing its intended scope.

A. Rooker v. Fidelity Trust Co.

The plaintiffs in *Rooker v. Fidelity Trust Co.*[23] asked that the federal court declare null and void the judgment of an Indiana circuit court, which had been affirmed by the state's supreme court; they also sought "to obtain other relief dependent on that outcome."[24] The Rookers were unhappy with the state court decision in favor of Fidelity, and they believed that errors in the state court's judgment were to blame. After the judgment, they filed suit in federal district court, claiming that the state court decision violated the Contracts Clause, due process, and equal protection in that it gave effect to a supposedly unconstitutional state statute and did not give effect to a prior decision by the Indiana Supreme Court, which was alleged to have become "the law of the case."[25]

The district court dismissed the case, finding it not to be within its jurisdiction as defined by Congress, and the United States Supreme Court agreed.[26] After first noting that the state court properly had jurisdiction over the case and that the plaintiffs had a full hearing there, the Court concluded:

> If the constitutional questions stated in the bill [the federal suit] actually arose in the cause [the state suit], it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the 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.[27]

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docket-clearing workhorse for the federal courts . . . ."). Commentators have taken their cue from the Supreme Court, leaving the *Rooker-Feldman* doctrine largely overlooked in the scholarly literature. This was the case, at least, until the Notre Dame Law Review's 1999 publication of a thoughtful symposium on the doctrine. *See* Symposium, *The* Rooker-Feldman *Doctrine*, 74 NOTRE DAME L. REV. 1081 (1999).

23. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

24. *Id.* at 414.

25. *Id.* at 415.

26. *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.").

27. *Id.*

The Court then emphasized that lower federal courts are not the "appropriate appellate proceeding" in which to correct state court errors.[28] No federal court other than the Supreme Court had been given authority by Congress to reverse or modify state court judgments, the Court held; to do so would be an exercise of appellate jurisdiction, and "[t]he jurisdiction possessed by the District Courts is strictly original."[29]

Rooker's holding, that federal district courts are not the correct place for parties to appeal issues decided against them in state court, is a narrow and uncontroversial principle.[30] After *Rooker*, lower federal courts applied this principle with regularity, usually to bar actions with facts closely analogous to those of *Rooker* itself.[31] The Supreme Court cited *Rooker* only once, in passing,[32] in the sixty years between the *Rooker* decision and its companion case, *District of Columbia Court of Appeals v. Feldman*.[33]

B. District of Columbia Court of Appeals v. Feldman

Feldman[34] brought suit in federal court against the District of Columbia Court of Appeals[35] after that court denied his request for a

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28. *Id.* at 415–16.

29. *Id.* at 416.

30. Bandes, *supra* note 22, at 1177.

31. *See, e.g.*, Anderson v. Lecon Props., Inc., 457 F.2d 929, 930 (8th Cir. 1972) (per curiam) (district court had no jurisdiction over § 1983 action alleging violation of constitutional rights by the state supreme court); Ash v. N. Ill. Gas Co., 362 F.2d 148, 151 (7th Cir. 1966) (district court could not exercise appellate jurisdiction over state court eminent domain proceedings); Williams v. Tooke, 108 F.2d 758, 759 (5th Cir. 1940) (district court had no jurisdiction to reverse or modify the state court judgment); Daniel B. Frazier Co. v. Long Beach Twp., 77 F.2d 764, 765 (3d Cir. 1935) (per curiam) (district court did not have jurisdiction over issues decided adversely to plaintiff by highest court of the state); Reese v. Louisville Trust Co., 58 F.2d 638, 638 (6th Cir. 1932) (per curiam) (district court did not have jurisdiction to set aside state court judgment even though federal constitutional questions were involved); Fryberger v. Parker, 28 F.2d 493, 496–97 (8th Cir. 1928), *vacated per stipulation of the parties*, 31 F.2d 1012 (8th Cir. 1928) (district court had no jurisdiction over suit to enjoin enforcement of a state court judgment on due process grounds). For a more thorough synopsis of the application of the *Rooker* principle by lower courts in the interim between *Rooker* and *Feldman*, see Gary Thompson, Note, *The* Rooker-Feldman *Doctrine and the Subject Matter Jurisdiction of Federal District Courts*, 42 RUTGERS L. REV. 859, 863–71 (1990).

32. *See* Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 283 (1946) (citing *Rooker* in reference to the finality of prior judgments).

33. 460 U.S. 462 (1983).

34. Although not technically consolidated, Feldman's case was reviewed simultaneously with a similar suit brought by plaintiff Hickey because the allegations and requested relief in both were "virtually identical." *Id.* at 472–73.

waiver of its bar admission rule requiring all applicants to have graduated from a law school accredited by the American Bar Association.[36] Taking an alternative path to his legal career, as provided by the Commonwealth of Virginia, Feldman had studied with a practicing attorney, audited classes, and served as a law clerk instead of attending law school.[37] After passing the state bar exam, he was admitted to the Virginia Bar and later to the Maryland Bar, after Maryland waived its requirement that all applicants must be graduates of an ABA-approved law school.[38]

After the District of Columbia Court of Appeals denied Feldman's petition for waiver, he brought an action against the court, seeking declaratory and injunctive relief.[39] Feldman's complaint alleged both that the court's action in denying his petition violated due process and equal protection, and that the bar admission rule itself violated due process and equal protection.[40] The federal district court dismissed the complaint for lack of subject matter jurisdiction,[41] but the circuit court reversed this decision on appeal. Although the circuit court agreed that district courts do not have the authority to review "determinations by the District of Columbia Court of Appeals in judicial proceedings," the court held that a denial of a request for waiver of a bar rule was not a judicial proceeding; therefore, the district court properly had jurisdiction.[42]

After determining the denial of waiver to be a judicial proceeding, the Supreme Court reaffirmed 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.[43] Such review may only be had in the Supreme Court.[44] Thus, to the extent that Feldman

35. As the highest court for the District of Columbia, the District of Columbia Court of Appeals is treated as a state supreme court.

36. *Feldman*, 460 U.S. at 467–68.

37. *Id.* at 465.

38. *Id.*

39. *Id.* at 468–69.

40. *Id.* at 469 n.3. In addition to these Fifth Amendment claims, Feldman also alleged that the defendants violated the Sherman Act, but the federal Court of Appeals dismissed the antitrust claims as insubstantial, and the Supreme Court denied certiorari as to those claims. *Id.* at 474 n.11.

41. *Id.* at 470.

42. *Id.* at 474.

43. *Id.* at 486.

44. *Id.* at 482.

sought review of the denial of his petition for waiver, the district court lacked subject matter jurisdiction.[45] However, the Court distinguished review of the state court's application of the rule to a particular proceeding from review of the rule itself. Because state supreme courts act in a nonjudicial capacity in promulgating rules regulating the bar, challenges to the constitutionality of the rules themselves do not require a federal district court to review a state court judgment in a judicial proceeding.[46] Therefore, to the extent that Feldman mounted a general challenge to the constitutionality of the rule, the district court had jurisdiction.[47]

In denying the district court jurisdiction over Feldman's challenge to the judgment of the state court, the Court held:

> If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision. This the district court may not do.[48]

Unlike the Rookers, Feldman did not ask the federal district court to declare a state judgment null and void; in fact, he did not raise his constitutional challenges in the state court at all (aside from arguing that the rule was invalid).[49] Nevertheless, finding that these claims were "inextricably intertwined" with the District of Columbia court's ultimate decision to deny the waiver, the Court held that entertaining the constitutional challenges would require the district court to review a final judicial decision of a state court in a particular case, which was beyond the district court's jurisdiction.[50]

The inclusion of inextricably intertwined claims marked an expansion of the *Rooker* principle, and to understand the meaning of the phrase, it is important to examine more closely the context in which it arose. After determining Feldman's federal suit to be an

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45. *Id.*

46. *Id.* at 485–86.

47. *Id.* at 486–87. The Court noted that in deciding that the district court had jurisdiction over the elements of the complaints that involved a general challenge to the constitutionality of the rule, it "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.

48. *Id.* at 483–84 n.16.

49. *Id.* at 480.

50. *Id.* at 486–87.

impermissible appeal from the highest state court to a federal district court, Justice Brennan, writing for the Court, stated that the correct court in which to bring such an appeal was the United States Supreme Court.[51] Then, in a footnote, he observed the possibility that even that Court might lack jurisdiction over this action, due to Feldman's failure to raise his constitutional claims in the state court.[52] However, the fact that the Supreme Court might not have jurisdiction over the action did not indicate that a district court should exercise jurisdiction over the claims.[53] Brennan seized the opportunity to correct this flawed reasoning, which was being used by the Fifth Circuit at the time.[54] In a case with facts similar to those of *Feldman*, the Fifth Circuit had pointed out that, because the plaintiff did not raise her constitutional claims in the state court, the Supreme Court would not be able to review her constitutional claims.[55] The circuit court reasoned that, in such a situation, a federal district court was not entertaining an impermissible appeal if it exercised jurisdiction over the case, both because it would not be infringing on the Supreme Court's exclusive jurisdiction over state appeals and because the specific federal constitutional claims had not been raised in the state court proceeding.[56]

Decrying this reasoning, the Court reaffirmed that "lower federal courts possess no power whatever to sit in direct review of state court decisions."[57] If the constitutional claims presented in the district court, although not raised in the state court, are inextricably intertwined with the state court's decision, then the district court is "in essence being called upon to review" the state court judgment, which it may in no way do.[58] Feldman's constitutional claims alleging that the District of Columbia court, by denying his petition for waiver, violated due process and equal protection were so inextricably

51. *Id.* at 482.

52. *Id.* at 483 n.16. In *Cardinale v. Louisiana*, 394 U.S. 437 (1969), the Court held that "[i]t was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions," *id.* at 438.

53. *Feldman*, 460 U.S. at 484 n.16.

54. The particular case the Court sought to correct was *Dasher v. Supreme Court of Texas*, 658 F.2d 1045 (5th Cir. 1981).

55. *Feldman*, 460 U.S. at 483 n.16.

56. *Id.*

57. *Id.* (quoting Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 296 (1970)).

58. *Id.* at 483–84 n.16.

intertwined with the court's decision to deny the waiver that his claimed injury essentially was the court's decision itself. Feldman was in essence asking the district court to review the District of Columbia court's judgment.[59] By failing to raise his constitutional claims in state court, such a plaintiff may forfeit his right to obtain review of the state court decision in any federal court, a result that the Court found "eminently defensible on policy grounds."[60]

Feldman's "inextricably intertwined" language thus broadened the reach of the *Rooker* principle to those plaintiffs who knew better than to ask that the district court declare the state judgment null and void, but who in essence sought just such relief under cloak of constitutional claims. As will be seen, however, *Feldman* has been used by the lower courts at times to greatly circumscribe the jurisdiction of the federal courts, beyond *Feldman*'s unique circumstances.[61] 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.[62] With so little exposition on the phrase[63]—the Court introduced it in a footnote without definition and only mentioned it one more time, to conclude that it applied to Feldman's claims—the lower courts have been left to their own devices and have come to significantly different conclusions about this pivotal element of the *Rooker-Feldman* doctrine.[64]

C. Supreme Court Development of the Doctrine since Feldman

After *Feldman*, the Court did not comment on the *Rooker-Feldman* doctrine at any length[65] until it decided *Exxon Mobil Corp.*

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59. *Id.* at 486–87.

60. *Id.* at 484 n.16.

61. *See infra* Parts I.D, II.B, and III.

62. *See* Barry Friedman & James E. Gaylord, Rooker-Feldman, *From the Ground Up*, 74 NOTRE DAME L. REV. 1129, 1136 (1999) (asserting that these distinctions have proven "impossibly difficult to understand, as is apparent from the widespread confusion in the lower courts"); Sherry, *supra* note 18, at 1108 (suggesting courts have had difficulty sorting out these differences).

63. *See* Bandes, *supra* note 22, at 1183 ("Unfortunately, nothing in *Feldman* explains the rationale for the [inextricably intertwined] language or gives any indication of its proper scope.").

64. *See infra* Part III.

65. The Court cited the *Rooker-Feldman* doctrine in only six cases between *Feldman* and *Exxon Mobil*. *See* Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 644 n.3 (2002)

v. Saudi Basic Industries Corp.[66] in March 2005. Although the Court did not find that the *Rooker-Feldman* doctrine applied to any suits it considered during this time, three cases in which the Court mentions *Rooker-Feldman* may be helpful for interpreting "inextricably intertwined" in its larger doctrinal context. In *ASARCO Inc. v. Kadish*,[67] the United States, as intervener, suggested that the petitioners should sue in federal trial court to readjudicate the same issues that were determined in the state court proceeding instead of appealing to the Supreme Court, because their standing for the state suit did not meet federal standing requirements.[68] The Court rejected this suggestion, saying that such a federal suit would in essence be an attempt to obtain direct review of the state supreme court's decision in the district court, which would represent a "partial inroad on *Rooker-Feldman*'s construction of 28 U.S.C. § 1257."[69]

A few years earlier, in *Pennzoil Co. v. Texaco Inc.*,[70] a majority of the Court agreed that Texaco's challenge to Texas procedures for enforcing judgments did not implicate the *Rooker-Feldman* doctrine. Pennzoil had prevailed in the state court with an unprecedented jury

(holding that *Rooker-Feldman* does not apply when a party seeks federal review of a state agency action); Johnson v. De Grandy, 512 U.S. 997, 1005–06 (1994) (holding that *Rooker-Feldman* does not bar the United States from bringing a federal action when it was not a party to and does not directly attack the state proceedings); Howlett v. Rose, 496 U.S. 356, 370 n.16 (1990) (citing *Rooker* and *Feldman* for the proposition that a district court "cannot entertain an original action alleging that a state court violated the Constitution by giving effect to an unconstitutional state statute"); ASARCO Inc. v. Kadish, 490 U.S. 605, 622–23 (1989) (noting that if petitioners sued in federal district court instead of appealing to the Supreme Court, the federal action would be a "partial inroad on *Rooker-Feldman*'s construction of 28 U.S.C. § 1257"); Martin v. Wilks, 490 U.S. 755, 784 n.21 (1989) (Stevens, J., dissenting) (citing *Rooker* and *Feldman* for the proposition that it would be anomalous to allow courts to review judgments entered by courts of equal or greater authority); Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 6–10 (1987) (abstaining under *Younger v. Harris*, 401 U.S. 37 (1971), instead of dismissing under *Rooker-Feldman*); *id.* at 18 (Scalia, J., concurring) (maintaining that the "so-called *Rooker-Feldman* doctrine" does not apply to Texaco's challenge to Texas procedures for enforcing judgments); *id.* at 21 (Brennan, J., concurring in judgment) (asserting that *Rooker-Feldman* does not apply because Texaco did not file its federal action to challenge the merits of the Texas suit); *id.* at 25–26 (Marshall, J., concurring in judgment) (maintaining that *Rooker-Feldman* should apply because Texaco's claims necessarily call for review of its state appeal).

66. 544 U.S. 280 (2005).

67. ASARCO Inc. v. Kadish, 490 U.S. 605 (1989).

68. *Id.* at 622.

69. *Id.* at 622–23.

70. Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987).

verdict,[71] and Texas rules stipulated that unless the judgment debtor posted bond (which would have been around thirteen million dollars), the judgment creditor could place liens on the debtor's property while the case was appealed.[72] Texaco brought suit in federal court seeking a stay of judgment pending appeal, and the Court declined to dismiss the case under *Rooker-Feldman*,[73] holding instead that the district court should abstain according to *Younger v. Harris*.[74] The majority opinion's assumption of jurisdiction clearly demonstrated that the *Rooker-Feldman* doctrine did not apply; however, a majority of the Justices wrote separately to explicitly affirm why the *Rooker-Feldman* doctrine did not bar this suit.[75]

These Justices emphasized that in resolving Texaco's challenge to the Texas rules, the Court did not need to decide any issue "either actually litigated in the Texas courts or inextricably intertwined with issues so litigated."[76] Justice Brennan, the author of the *Feldman* opinion, explained that Texaco filed the federal action only "to protect its federal constitutional right to a meaningful opportunity for appellate review," not to challenge the merits of the underlying state suit.[77] Texaco's federal action was therefore "separable from and collateral to" the merits of the state court judgment.[78]

Justice Marshall, however, did not agree with the rest of the Court concerning *Rooker-Feldman*'s applicability.[79] In his concurrence, he presented the following definition of "inextricably intertwined," which many lower courts subsequently adopted:[80]

> [I]t is apparent, as a first step, that the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the

71. *See* Smith, *supra* note 17, at 627 ("This unprecedented damage award [$12 billion], Texaco claims, is over forty times larger than the largest private civil judgment ever upheld in any prior case of any kind.").

72. *Pennzoil*, 481 U.S. at 4–5.

73. *Id.* at 6.

74. *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny stand for the proposition that federal courts may not enjoin pending state court proceedings in certain circumstances.

75. These Justices were Scalia, joined by O'Connor; Brennan, joined by Marshall; Blackmun; and Stevens, joined by Marshall.

76. *Pennzoil*, 481 U.S. at 18 (Scalia, J., concurring).

77. *Id.* at 21 (Brennan, J., concurring).

78. *Id.* (quoting Nat'l Socialist Party v. Skokie, 432 U.S. 43, 44 (1977)).

79. *Id.* at 23 (Marshall, J., concurring).

80. *See infra* Part III.B.

> issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.[81]

Marshall opined that Texaco's request for an injunction necessarily involved some review of the merits of its state appeal, so it followed from his definition that Texaco's constitutional claims were inextricably intertwined with the merits of the state judgment and that the district court lacked jurisdiction.[82]

One final case during this time period shed some light on the meaning of the *Rooker-Feldman* doctrine. In *Johnson v. De Grandy*[83] the Court held that *Rooker-Feldman* did not bar a Voting Rights Act suit by the United States, despite a prior decision by a state supreme court, because the United States was not a party to the state suit and did not directly attack the state court judgment in the federal action.[84] More illuminating than this, however, is the Court's description of *Rooker-Feldman* as the doctrine "under which 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."[85] By indicating that the *Rooker-Feldman* doctrine might apply only to suits brought by state court losers for whom the state court judgment itself is the alleged injury, *De Grandy* suggested that the Court ascribed to a narrow view of the doctrine. But not until *Exxon Mobil* would the Court explicitly clarify its perspective on the boundaries of the *Rooker-Feldman* doctrine.

D. Critiques of the Doctrine

The majority of commentators on the *Rooker-Feldman* doctrine sharply criticize it, and many have suggested that it be abandoned

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81. *Pennzoil*, 481 U.S. at 25 (Marshall, J., concurring).

82. *Id.* at 26.

83. Johnson v. De Grandy, 512 U.S. 997 (1994).

84. *Id.* at 1006. The Court had already determined that the state proceeding should be given no res judicata effect, *id.* at 1005, so it is unclear which of these three alternative rationales was the driving force behind the Court's decision. A number of lower courts did not interpret the Court's brief conclusory statements in *De Grandy* to be binding precedent that would prevent application of *Rooker-Feldman* to nonparties. Sherry, *supra* note 18, at 1112 n.108.

85. *De Grandy*, 512 U.S. at 1005–06.

entirely.[86] The critics assert that to the extent that the current conception of the *Rooker-Feldman* doctrine overlaps with existing doctrines of preclusion and abstention, it is redundant and unnecessary,[87] and to the extent that it reaches beyond the preclusion and abstention doctrines, it is harmful and even illegitimate.[88] Some commentators, on the other hand, acknowledge that *Rooker-Feldman* plays a necessary, albeit narrow, role that neither existing preclusion nor abstention doctrines fill.[89] For example, imagine that a plaintiff

86. *See, e.g.*, Jack Beermann, *Comments on* Rooker-Feldman *or Let State Law Be Our Guide*, 74 NOTRE DAME L. REV. 1209, 1233 (1999) (suggesting that "the doctrine should be abandoned altogether"); Friedman & Gaylord, *supra* note 62, at 1174 ("*Feldman* should be overruled, and the *Rooker-Feldman* doctrine is going to have to be renamed or abandoned."); Smith, *supra*, note 17, at 630 ("[O]ne may reasonably reach the conclusion that the Court in both *Rooker* and *Feldman* was simply wrong . . . ."); Thompson, *supra* note 31, at 862 (calling for an end to recognition of *Rooker-Feldman* as an independent doctrine of federal court jurisdiction).

87. *See* MARTIN H. REDISH & SUZANNA SHERRY, FEDERAL COURTS: CASES, COMMENTS, AND QUESTIONS 577–79 (4th ed. 1998) (noting that courts and commentators alike are in disarray as to what, if anything, *Rooker-Feldman* adds to the other doctrines: "If *Rooker-Feldman* and res judicata are largely co-extensive, does *Rooker-Feldman* merely elevate res judicata from an affirmative defense to a jurisdictional bar, making it less subject to the vagaries of litigation and the arguments of the parties?"); Friedman & Gaylord, *supra* note 62, at 1138–67 (demonstrating that the *Rooker-Feldman* doctrine does not "do any work" independent of that accomplished by existing preclusion and abstention doctrines in federal suits involving nonparties to the state suit, state criminal defendants, state civil defendants, state administrative defendants, or involuntary state plaintiffs).

88. Susan Bandes argues that *Rooker-Feldman* is neither harmless nor interchangeable with doctrines of preclusion or abstention. Instead, she asserts, *Rooker-Feldman* is inflexible and does not contain the exceptions that soften these other doctrines. Bandes, *supra* note 22, at 1177–78. As a jurisdictional doctrine, *Rooker-Feldman* may trump important nonjurisdictional policies. Even more troubling, lower courts seem to use the doctrine's jurisdictional status to avoid balancing the doctrine against countervailing doctrines or articulating the rationales behind their dispositions. *Id.* at 1176–78. Professor Beermann, likewise, sees *Rooker-Feldman* as an illegitimate expansion of preclusion rules. Beermann, *supra* note 86, at 1212. According to the Full Faith and Credit Statute, 28 U.S.C. § 1738 (2000), federal courts are to give prior state judgments the same preclusive effect as the state court would—no more and no less. Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985). Beermann believes that *Rooker-Feldman* allows federal courts to give greater preclusive effect to a state court judgment than the state would in some instances "because the characterization of the federal claim as an appeal is a matter of federal, not state, law." Beermann, *supra* note 86, at 1212. Finally, Professors Friedman and Gaylord point out that as far as *Rooker-Feldman* is a doctrine that fills the gaps left by traditional preclusion and abstention doctrines, it is troublesome because the exceptions left by existing doctrines "tend to be there for a reason." Friedman & Gaylord, *supra* note 62, at 1130.

89. *See* Sherry, *supra* note 18, at 1089–90 (emphasizing that there are undesirable gaps in preclusion and abstention doctrines which *Rooker-Feldman* is necessary to fill); Adam McLain, Comment, *The* Rooker-Feldman *Doctrine: Toward a Workable Role*, 149 U. PA. L. REV. 1555,

brings a federal suit, not seeking to enjoin state proceedings, but seeking what is essentially review of a state judgment while state appeals are still pending. *Younger* abstention[90] does not apply, and in some states interlocutory or appealable orders have no preclusive effect.[91] *Rooker-Feldman* would be necessary to prevent the inappropriate federal appeal of the state court judgment. An even better example is the situation in which a losing state court defendant brings a federal suit seeking to rectify harms done by the state suit itself. Such a challenge raises claims that do not arise from the same transaction as the original state suit; indeed, these claims could not have been raised in the state proceedings because the injury did not occur until the announcement of the unfavorable state judgment.[92] These new claims would not be barred by res judicata, but federalism certainly counsels that federal courts should not entertain these challenges to state court decisionmaking; the *Rooker-Feldman* doctrine is necessary to protect state courts in these instances.[93]

The few scholars who find some value in the *Rooker-Feldman* doctrine perhaps have been vindicated by the *Exxon Mobil* decision, in which the Court demonstrated that it still perceived a niche for *Rooker-Feldman* not covered by any other existing doctrine.[94] Despite the apparent academic consensus that the *Rooker-Feldman* doctrine might be "worth only the powder to blow it up,"[95] the Court in 2005 reaffirmed that it is here to stay, a holding that counsels lower courts and scholars to attempt to learn how to apply the doctrine and its central "inextricably intertwined" language correctly.

1557 (2001) (concluding that the scholarly criticisms of *Rooker-Feldman* are misguided and that the doctrine, properly applied, avoids the problems currently associated with it).

90. *See supra* note 74 and accompanying text.

91. *See* Sherry, *supra* note 18, at 1092 & n.35 (taking note of states in which interlocutory orders have no preclusive effect).

92. *Id.* at 1093 (raising this hypothetical).

93. Federal courts may protect their judgments from state court interference by enjoining state suits under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283 (2000). But state courts have no analogous power to protect themselves and their judgments from federal court interference. The *Rooker-Feldman* doctrine can be understood to promote comity as a functional equivalent of the relitigation exception. For further analysis, see McLain, *supra* note 89, at 1582–84.

94. *See* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005) ("*Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions.").

95. Rowe, *supra* note 6, at 1081.

II. THE COURT'S RECENT CLARIFICATION OF THE DOCTRINE

A. Exxon Mobil Corp. v. Saudi Basic Industries Corp.

In March 2005, the Supreme Court took the opportunity in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*[96] to rein in the *Rooker-Feldman* doctrine.[97] The parties were engaged in a dispute over royalties charged to a joint venture they had formed years earlier.[98] Saudi Basic sued ExxonMobil in Delaware Superior Court, and approximately two weeks later ExxonMobil countersued Saudi Basic in the U.S. District Court for the District of New Jersey.[99] The state suit went to trial, with the jury returning a verdict in favor of ExxonMobil, and Saudi Basic appealed to the Delaware Supreme Court.[100]

Before trial, Saudi Basic had moved to dismiss the federal suit, alleging immunity under the Foreign Sovereign Immunities Act of 1976.[101] The district court denied the motion and Saudi Basic took an interlocutory appeal; the Court of Appeals heard arguments in December 2003, over eight months after the state court jury verdict.[102] The Court of Appeals raised the *Rooker-Feldman* doctrine sua sponte and concluded that it did not have jurisdiction, hypothesizing that if Saudi Basic won on appeal in Delaware, ExxonMobil would be attempting in the federal action to "invalidate" the state court judgment, "the very situation contemplated by *Rooker-Feldman*'s 'inextricably intertwined' bar."[103]

The Supreme Court unanimously reversed, holding that federal jurisdiction was proper.[104] America's dual system of courts allows for

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96. 544 U.S. 280 (2005).

97. *See id.* at 283 (noting that the *Rooker-Feldman* doctrine has been variously interpreted by the lower courts, sometimes "to extend far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law pursuant to 28 U. S. C. § 1738").

98. *Id.* at 289.

99. *Id.* When ExxonMobil later answered Saudi Basic's state court complaint, it asserted as counterclaims the same claims it made in the federal district court. *Id.*

100. *Id.*

101. Federal Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1601–1611 (2000).

102. *Exxon Mobil*, 544 U.S. at 290. At ExxonMobil's request, the Court of Appeals had stayed its consideration of the appeal awaiting resolution of the state trial court proceedings. *Id.*

103. Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 364 F.3d 102, 106 (3d Cir. 2004).

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

parallel state and federal litigation, and *Rooker-Feldman* does not support the notion "that properly invoked concurrent jurisdiction vanishes" if a state court reaches judgment on the same or related question while the federal suit remains under consideration.[105] In parallel litigation, a federal court may be bound by state preclusion law, but preclusion is not a jurisdictional bar.[106] The Court held that even if a party attempts to litigate in federal court a matter previously litigated in state court, if the federal plaintiff presents some independent claim, "albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party," then the federal court has jurisdiction and "state law determines whether the defendant prevails under principles of preclusion."[107] The Court significantly narrowed the general understanding of the *Rooker-Feldman* doctrine:

> The *Rooker-Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: 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. *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions.[108]

This restatement of the doctrine provides lower courts with significant clarifications for employing *Rooker-Feldman*.

B. What Exxon Mobil *Clarified*

Primary to *Exxon Mobil*'s definition of the *Rooker-Feldman* doctrine is the stipulation that it only be used against state court losers.[109] In this way the Court spelled out for the conflicting circuit courts[110] that the doctrine does not apply to nonparties to the state

105. *Id.* at 292.

106. *Id.*

107. *Id.* (quoting GASH Assocs. v. Vill. of Rosemont, 995 F.2d 726, 728 (7th Cir. 1993)).

108. *Id.* at 284.

109. *Id.*

110. *Compare* Skrzypczak v. Kauger, 92 F.3d 1050, 1051 (10th Cir. 1996) (affirming, on other grounds and without comment to the *Rooker-Feldman* issue, an unpublished lower court decision using *Rooker-Feldman* to bar a nonparty to the state action from bringing a federal

suit. Likewise, the Court made it clear to the divided circuits that the alleged federal injury must be caused by the state court judgment itself[111] and that *Rooker-Feldman* is not implicated simply because a party brings to federal court a matter it previously litigated in state court.[112] *Exxon Mobil* demonstrated to the uncertain lower courts that the doctrine does not bar parallel litigation,[113] and the Court's exposition elucidated the mysterious relationship between *Rooker-Feldman* and the preclusion doctrines.[114]

C. What Exxon Mobil *Did Not Clarify: "Inextricably Intertwined"*

Despite these helpful clarifications, the one issue the Court did not explicate in *Exxon Mobil* was what it means to be inextricably intertwined for purposes of the *Rooker-Feldman* doctrine. Indeed, the Court only mentioned the phrase when it described the *Feldman* case[115] and the erroneous decision of the Court of Appeals below.[116] The Court's affirmation of *Feldman*'s "inextricably intertwined"

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suit), *with* United States v. Owens, 54 F.3d 271, 274 (6th Cir. 1995) (refusing to apply *Rooker-Feldman* to a nonparty because there is no obligation to intervene to protect one's rights).

111. *Exxon Mobil*, 544 U.S. at 284. *Compare* Moccio v. N.Y. State Office of Court Admin., 95 F.3d 195, 202 (2d Cir. 1996) (finding that *Rooker-Feldman* bars plaintiff's federal challenges to his employer's termination procedures), *with* Nelson v. Murphy, 44 F.3d 497, 497 (8th Cir. 1995) (concluding that the plaintiffs avoid *Rooker-Feldman* by challenging the action of an adverse party rather than the state court's approval of that action).

112. *Exxon Mobil*, 544 U.S. at 293. *Compare* Friedman's, Inc. v. Dunlap, 290 F.3d 191, 196 (4th Cir. 2002) ("Under the *Rooker-Feldman* doctrine, lower federal courts may not consider . . . 'issues actually presented to and decided by a state court'" (quoting Plyler v. Moore, 129 F.3d 728, 731 (4th Cir. 1997))), *with* ITT Corp. v. Intelnet Int'l Corp., 366 F.3d 205, 210–11 (3d Cir. 2004) ("The 'actually litigated' test . . . is potentially misleading in this case because of its close relationship to the concepts of claim and issue preclusion.").

113. *Exxon Mobil*, 544 U.S. at 292–93. *Compare* Gilbert v. Ferry, 401 F.3d 411, 418 (6th Cir. 2005), *vacated in part*, 413 F.3d 578 (6th Cir. 2005) (holding that the *Rooker-Feldman* doctrine divested the district court of jurisdiction upon the entrance of a judgment by the state court in parallel litigation), *with* Vulcan Chem. Techs., Inc. v. Barker, 297 F.3d 332, 338 n.2 (4th Cir. 2002) ("It would be a novel application of the already beleaguered *Rooker-Feldman* doctrine to divest a federal court of subject matter jurisdiction simply because a parallel case was later filed in State court seeking to decide the same question.").

114. *See Exxon Mobil*, 544 U.S. at 293 (explaining that preclusion is not a jurisdictional matter and is distinct from and subsequent to the *Rooker-Feldman* inquiry). *Compare* Vargas v. City of N.Y., 377 F.3d 200, 205 (2d Cir. 2004) ("The [*Rooker-Feldman*] doctrine is generally applied coextensively with principles of res judicata (claim preclusion) and collateral estoppel (issue preclusion)."), *with* Parkview Assocs. P'ship v. City of Lebanon, 225 F.3d 321, 329 (3d Cir. 2000) (asserting that *Rooker-Feldman* is not simply a jurisdictional version of preclusion).

115. *Exxon Mobil*, 544 U.S. at 286.

116. *Id.* at 291.

holding[117] would seem to indicate continued support for the principle, but the Court itself did not use the "inextricably intertwined" concept in its analysis of the *Exxon Mobil* case at all.[118] Such avoidance of what could be considered the main element of the *Rooker-Feldman* doctrine[119] not only fails to clarify the meaning of the phrase but also further confuses the issue by calling into question the concept's continued use.[120]

III. CURRENT APPROACHES TO "INEXTRICABLY INTERTWINED"

Without much guidance from the Supreme Court[121] concerning the meaning and application of the abstruse "inextricably intertwined" concept,[122] federal courts have formulated their own criteria and rules, resulting in a rather large body of diverse standards. These various formulas can be reduced to at least four basic approaches, each with some amount of internal diversity and almost none with a consistent circuit-wide application. For simplicity in examination and critique, this Note characterizes these as the res judicata approach, the Marshall approach, the *GASH* approach, and the *Noel* approach.

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117. *Id.* at 286 & n.1.

118. *See id.* at 291–94 (analyzing *Rooker-Feldman*'s application to the case).

119. *See* Rowe, *supra* note 6, at 1081–82 (defining the "main point" of the *Rooker-Feldman* doctrine thusly: "that federal district courts lack jurisdiction to entertain claims that are 'inextricably intertwined' with the merits of a judgment already rendered by a state court system").

120. For analysis of what the Court's treatment of "inextricably intertwined" in *Exxon Mobil* may mean for the future of the *Rooker-Feldman* doctrine, see *infra* Part V.

121. *See* Moccio v. N.Y. State Office of Court Admin., 95 F.3d 195, 198 (2d Cir. 1996) ("Since *Feldman*, the Supreme Court has provided us with little guidance in determining which claims are 'inextricably intertwined' with a prior state court judgment and which are not.").

122. *See* Taylor v. Fed. Nat'l Mortgage Ass'n, 374 F.3d 529, 533 (7th Cir. 2004) ("'[I]nextricably intertwined' is a somewhat metaphysical concept . . . .").

A. The Res Judicata Approach

The res judicata[123] approach equates "inextricably intertwined" with the traditional "could have been raised" standard of preclusion.[124] Under this approach, a challenge in federal court is inextricably intertwined with a previous state court judgment if the federal plaintiff had a full and fair opportunity to raise the claim in the state proceeding, whether the plaintiff actually raised the claim or not;[125] accordingly, a "claim will be barred under the *Rooker-Feldman* doctrine if it would be barred under the principles of preclusion."[126] Courts that use this approach rely on *Feldman* and its rejection of *Dasher v. Supreme Court of Texas*[127] for the proposition that a plaintiff who fails to raise a challenge in the state court may forfeit federal review of that challenge.[128]

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123. Also known as claim preclusion, res judicata is used here in its narrow sense, referring to "the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984). Courts that use this approach end up with a *Rooker-Feldman* doctrine that encompasses both claim and issue preclusion, however, because they interpret *Rooker-Feldman*'s general prohibition of appeals as a bar on raising issues that have already been litigated (issue preclusion, or collateral estoppel) and its "inextricably intertwined" language as barring claims that have not been litigated but should have been (claim preclusion, or res judicata). *See, e.g.*, Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell, 363 F.3d 1072, 1075 (10th Cir. 2004) (explaining how "the *Rooker-Feldman* doctrine mirrors claim and issue preclusion").

124. *See* Goetzman v. Agribank, FCB (*In re* Goetzman), 91 F.3d 1173, 1178 n.6 (8th Cir. 1996) ("[T]he *Rooker-Feldman* doctrine, like the doctrine of preclusion, applies to claims which were not brought before the state court but could have been raised in the state court action.").

125. *See* Robinson v. Ariyoshi, 753 F.2d 1468, 1472 (9th Cir. 1985) ("[W]e view the res judicata requirement of full and fair opportunity to litigate, and the *Feldman* 'inextricably intertwined' barrier to federal jurisdiction as two sides of the same coin."); Wood v. Orange County, 715 F.2d 1543, 1547 (11th Cir. 1983) ("[W]e hold that the *Rooker* bar can apply only to issues that the plaintiff had a reasonable opportunity to raise.").

126. *Moccio*, 95 F.3d at 199–200.

127. Dasher v. Supreme Court of Tex., 658 F.2d 1045 (5th Cir. 1981). The Court in *Feldman* rejected *Dasher*'s holding that a district court had jurisdiction over direct challenges to a state court judgment simply because the particular cause of action that the federal plaintiff brought (§ 1983) was not raised in the state proceeding. The *Dasher* court reasoned that because the Supreme Court could not review the § 1983 action because it had not been raised in the state court, district court jurisdiction was not an impermissible appeal in violation of *Rooker*'s interpretation of § 1257. In rejecting this argument, the Court introduced the phrase "inextricably intertwined." D.C. Court of Appeals v. Feldman, 460 U.S. 462, 483 n.16 (1983).

128. *See, e.g.*, Barefoot v. City of Wilmington, 306 F.3d 113, 120 (4th Cir. 2002) (citing *Feldman*'s footnote 16 for the proposition that "the *Rooker-Feldman* doctrine bars issues that *could* have been raised in the state court proceeding"); *Wood*, 715 F.2d at 1546 (citing *Feldman*'s footnote 16 for the proposition that "the *Rooker* bar also operates where the plaintiff fails to raise his federal claims in state court").

But construing this language as an expansion of the *Rooker-Feldman* doctrine is a misinterpretation of the Court's discussion in *Feldman*. The Court began by commenting that, according to *Cardinale v. Louisiana*,[129] it may not have jurisdiction to review a state court decision if a petitioner failed to raise his constitutional claims in the state court. After rejecting *Dasher*'s suggestion that this meant that a district court could therefore hear such an appeal even if it directly challenged a state court judgment, the Court concluded that if a party failed to raise his constitutional challenges in the previous state court proceedings, he "may forfeit his right to obtain review of the state-court decision in any federal court."[130] Courts that subscribe to the res judicata approach interpret this language to mean that *Rooker-Feldman*'s "inextricably intertwined" bar prevents any federal court from having jurisdiction over any claim that could have been raised in the state court proceedings.[131] But the *Feldman* Court was simply referring to the limits on its own certiorari jurisdiction.[132] The fact that a constitutional claim was not raised in the state court precludes Supreme Court jurisdiction over the state court judgment, but it does not prevent the plaintiff from bringing the constitutional challenge in a federal district court, unless that challenge is inextricably intertwined with the state court judgment itself so that the district court is in essence being asked to exercise appellate review of the state court decision.[133]

Furthermore, the res judicata approach contradicts *Feldman*'s holding[134] that a general challenge to the constitutionality of a rule is not inextricably intertwined with the state court's application of that rule to a particular plaintiff.[135] In holding that the district court had

129. Cardinale v. Louisiana, 394 U.S. 437 (1969).

130. *Feldman*, 460 U.S. at 482 n.16.

131. *See supra* notes 123–27 and accompanying text.

132. *See Feldman*, 460 U.S. at 484 n.16 (discussing in the context of "the requirement that constitutional claims be raised in state court as a predicate to our certiorari jurisdiction").

133. *See id.* at 483–84 n.16 ("If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's [decision], then the district court is in essence being called upon to review the state-court decision."). For a different take on the interplay between "could have been raised" and "inextricably intertwined" in *Feldman* that reaches the same conclusion, see Smith, *supra* note 17, at 646–47.

134. *See Feldman*, 460 U.S. at 487 (holding that the general attack on the constitutionality of the rule was not barred by *Rooker-Feldman*).

135. *See* Parkview Assocs. P'ship v. City of Lebanon, 225 F.3d 321, 327 (3d Cir. 2000) ("Such a reading [that *Rooker-Feldman* precludes lower federal court jurisdiction over all claims that could have been raised in a previous state court proceeding] would be inconsistent with the

jurisdiction over the general attacks, the Court expressly did not reach "the question of whether the doctrine of res judicata foreclose[d] litigation" of those claims,[136] an explicit indication that the Court differentiated between res judicata and "inextricably intertwined."[137] Certainly the general attacks in *Feldman* could have been raised in the state court, but this did not prevent the Court from allowing the district court to exercise jurisdiction over those claims.[138]

Confusing res judicata with the *Rooker-Feldman* doctrine's "inextricably intertwined" element is understandable insofar as both doctrines "define the respect one court owes to an earlier judgment."[139] But the two are founded on different principles: res judicata rests on the Full Faith and Credit Statute,[140] which requires federal courts to give a judgment the same effect as the rendering state would,[141] whereas the *Rooker-Feldman* doctrine rests on the principle that district courts only have original jurisdiction.[142] *Rooker-Feldman* is a jurisdictional bar, whereas res judicata determines which party prevails after the court has assumed jurisdiction over the suit.[143]

Court's other holding in *Feldman* that the district court *did* have jurisdiction over the general challenge to the constitutionality of the rule.").

136. *Feldman*, 460 U.S. at 487–88.

137. *See Parkview Assocs. P'Ship*, 225 F.3d at 329 ("In *Feldman*, the Supreme Court *sub silentio* acknowledged the difference between the doctrines when, after directing remand of the plaintiffs' general constitutional challenges, it expressly refrained from considering res judicata, leaving that question to the district court.").

138. *See* Ritter v. Ross, 992 F.2d 750, 754 (7th Cir. 1993) (explaining that if a constitutional claim is inextricably intertwined merely because it could have been raised in the earlier state proceeding, "the Court would not have allowed the litigants in *Feldman* to bring their general constitutional challenges to the bar admission rule in federal district court"). The Court's treatment of *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 7–10 (1987), indicating that *Rooker-Feldman* did not bar a district court from exercising jurisdiction over a constitutional challenge that could have been brought in the state court proceedings, further buttresses this conclusion. *See Ritter*, 992 F.2d at 754.

139. GASH Assocs. v. Vill. of Rosemont, 995 F.2d 726, 728 (7th Cir. 1993). Indeed, ever since *Rooker* was decided, courts have conflated its jurisdictional principle with preclusion. *See* Thompson, *supra* note 31, at 866 & n.27 (citing cases in which *Rooker* was used as a principle of res judicata, not a doctrine of federal jurisdiction).

140. 28 U.S.C. § 1738 (2000).

141. Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985).

142. *See supra* Part II.

143. *See GASH Assocs.*, 995 F.2d at 728 (emphasizing that the jurisdictional question precedes the determination of whether the defendant prevails under preclusion principles); Sherry, *supra* note 18, at 1101–02 ("*Rooker-Feldman* . . . tell[s] federal courts *when* they may review state court decisions; preclusion rules tell them *how* to treat those decisions. The former issue sounds purely in federalism, while the latter can arise in any context, including between states.").

Conflating "inextricably intertwined" with preclusion elevates res judicata from an affirmative defense to a jurisdictional bar[144] and results in an entirely redundant *Rooker-Feldman* doctrine that has no independent meaning of its own.[145] Moreover, because preclusion is governed by state law, such an approach allows state law to determine the contours of federal jurisdiction and govern a doctrine based entirely on federal law.[146] This interpretation of "inextricably intertwined" is a blunt instrument and reaches far beyond the circumstances of the *Rooker* and *Feldman* cases, often denying plaintiffs their choice of forum,[147] or worse, denying them a chance to bring their action (which does not seek to overturn the state court judgment) at all. Taken to its logical end, this approach makes the *Rooker-Feldman* doctrine superfluous and abrogates our dual system of courts.

B. The Marshall Approach

The Marshall approach generally finds a claim to be inextricably intertwined with a previous state court judgment if, for the plaintiff to prevail, the district court must make a determination that indicates that the state court was wrong about some matter.[148] This approach is

144. By essentially giving res judicata jurisdictional status, this approach prevents courts from considering the nuances of preclusion and of the case at hand, which litigation might bring to the fore. *See* REDISH & SHERRY, *supra* note 87, at 578 (suggesting that if res judicata becomes a jurisdictional bar it is less subject to "the vagaries of litigation and the arguments of the parties").

145. This interpretation is the source of many of the problems critics find with the *Rooker-Feldman* doctrine. *See, e.g.*, Friedman & Gaylord, *supra* note 62, at 1129 (criticizing *Rooker-Feldman* to the extent that it does not seem to add anything not already supplied by preclusion doctrine); Thompson, *supra* note 31, at 911 (concluding that any possible difference between *Rooker-Feldman* and preclusion is purely academic).

146. *See* Vargas v. City of N.Y., 377 F.3d 200, 205 (2d Cir. 2004) (using New York's preclusion rules to determine whether *Rooker-Feldman* bars jurisdiction over the federal plaintiff's claim); Randolph v. Lipscher, 641 F. Supp. 767, 775 (D.N.J. 1986) (using New Jersey res judicata law to determine if *Rooker-Feldman* bars the plaintiff's federal constitutional claim); *cf.* Kenman Eng'g v. City of Union, 314 F.3d 468, 479 (10th Cir. 2002) (distinguishing between res judicata, which is based largely on state common law, and *Rooker-Feldman*, which is concerned with federalism and based squarely on federal law).

147. *See* Bandes, *supra* note 22, at 1176 (discussing the significant amount of forum shifting created by such a broad understanding of *Rooker-Feldman*).

148. *See* Walker v. Horn, 385 F.3d 321, 329 (3d Cir. 2004) (explaining that a federal claim is inextricably intertwined if "federal relief can only be predicated upon a conviction that the state court was wrong" (quoting Desi's Pizza, Inc. v. City of Wilkes Barre, 321 F.3d 411, 419 (3d Cir. 2003))); ITT Corp. v. Intelnet Int'l Corp., 366 F.3d 205, 211 (3d Cir. 2004) ("If the relief requested in the federal action requires determining that the state court's decision is wrong or

reflected in Justice Marshall's *Pennzoil* concurrence: "[I]t is apparent, as a first step, that the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it."[149] With so little clear guidance from the Supreme Court concerning "inextricably intertwined," many lower courts have embraced this lucid definition from Justice Marshall.[150]

This approach, however, can lead courts to some absurd conclusions. For example, in *Kamilewicz v. Bank of Boston Corp.*,[151] the Seventh Circuit held that the plaintiffs' malpractice claims[152] against their former attorney were inextricably intertwined with the state court's approval of a settlement between the attorney and an adverse party and were therefore barred.[153] In the state court proceedings, the plaintiffs were out-of-state members of a class that brought a suit against the bank.[154] The state court approved a proposed settlement between the class and the bank, including attorney's fees.[155] But because the attorney sought his fees out of each individual's refund from the settlement rather than directly from the bank's funds, some class members, including the Kamilewiczs, suffered a net loss despite the settlement.[156] When the plaintiffs

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would void the state court's ruling, then the issues are inextricably intertwined . . . ." (quoting FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 840 (3d Cir. 1996))); Safety-Kleen, Inc. v. Wyche, 274 F.3d 846, 858 (4th Cir. 2001) ("A federal claim is 'inextricably intertwined' with a state court decision if 'success on the federal claim depends upon a determination that the state court wrongly decided the issues before it.'" (quoting Plyler v. Moore, 129 F.3d 728, 731 (4th Cir. 1997))); Doe & Assocs. Law Offices v. Napolitano, 252 F.3d 1026, 1030 (9th Cir. 2001) ("Where the district court must hold that the state court was wrong in order to find in favor of the plaintiff, the issues presented to both courts are inextricably intertwined."); Charchenko v. City of Stillwater, 47 F.3d 981, 983 (8th Cir. 1995) ("A claim is inextricably intertwined if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.").

149. Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring).

150. *See* Sherry, *supra* note 18, at 1097 (calling Marshall's definition the "most useful—and most frequently quoted").

151. Kamilewicz v. Bank of Boston Corp., 92 F.3d 506 (7th Cir. 1996).

152. The plaintiffs brought numerous claims, including those against their former attorney, against the Bank (the opposing party in the underlying state litigation), and against the Bank's lawyers. *Id.* at 509. The claims that are pertinent here are the claims against their attorney for malpractice, breach of fiduciary duty, and fraud.

153. *Id.* at 511.

154. *Id.* at 508.

155. *Id.*

156. *Id.* at 508–09. To be specific, Kamilewicz recovered $2.19 in the settlement and was charged $91.33 in attorney's fees. *Id.* at 508.

brought a malpractice suit against the attorney, the court held that the *Rooker-Feldman* doctrine barred jurisdiction.[157]

The circuit court, concerned that allowing the plaintiffs to seek recompense from the class attorney would force the district court to "run directly into the state court finding . . . that the fees were reasonable," concluded that the suit was inextricably intertwined with the state court judgment.[158] If the plaintiffs prevailed against their former attorney in federal court, that outcome would indicate that the state court was wrong in finding that the settlement, including attorney's fees, was fair and reasonable. According to the Marshall approach, then, the malpractice suit was inextricably intertwined with the state court decision.

But clearly the plaintiffs were not, in their malpractice suit, seeking to overturn the state court judgment. Their suit could in no way be styled as an appeal of the state court decision; therefore, it did not implicate the rationale behind the *Rooker-Feldman* doctrine. The entitlements of the adverse state court parties vis-à-vis each other were fixed by the judgment, and the plaintiffs did not seek to change those.[159] Instead, they asserted that they suffered independent harms due to their attorney's breach of loyalty and care, which were concealed both from the class and from the state judge.[160] But because a holding for the plaintiffs in federal court would depend on finding that the state court was wrong about the reasonableness of the attorney's fees, the suit was barred.[161]

The *Kamilewicz* holding suggests that the Marshall approach is too broad a definition of "inextricably intertwined," a suggestion that is confirmed by *Pennzoil*. Justice Marshall was the only Justice who was of the opinion that the *Rooker-Feldman* doctrine barred Texaco's federal suit—five Justices[162] explicitly rejected the application of

157. *Id.* at 510.

158. *Id.* at 511.

159. Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1351 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing).

160. *Id.* at 1352.

161. Judge Easterbrook's approach is more harmonious with the rationales behinds the *Rooker-Feldman* doctrine. *See id.* at 1353 ("Were [plaintiff] merely claiming that the decision of the state court was incorrect, even that it denied him some constitutional right, the doctrine would indeed bar his claim. But if he claims, as he does, that people involved in the decision violated some independent right of his . . . then he can, without being blocked by the *Rooker-Feldman* doctrine, sue to vindicate that right." (quoting Nesses v. Shepard, 68 F.3d 1003, 1004 (7th Cir. 1995))).

162. Justices Scalia, O'Connor, Brennan, Blackmun, and Stevens.

Rooker-Feldman and the remaining three[163] did so *sub silentio* by joining the majority opinion, which assumed jurisdiction was proper.[164] Marshall appears to have been correct in asserting that the federal court had to conduct some inquiry into the merits of the state appeal in order to make the requisite determinations of irreparable injury and likelihood of success of the merits.[165] But unlike Marshall, the other Justices, most notably Justice Brennan,[166] did not find that this made the federal claims inextricably intertwined with the state court judgment. Brennan, the author of *Feldman*, opined that because Texaco did not file its federal suit to challenge the merits of the state court decision, its pursuit of a stay of judgment pending appeal was "'separable from and collateral to' the merits of the state court judgment."[167] Marshall's broad approach would have prevented Texaco, on *Rooker-Feldman* grounds, from being able to bring a challenge in federal court that was not seeking an appeal of or even implicated by the merits of the state court judgment.

Inconsistent with *Pennzoil* itself, the Marshall approach can be used to bar actions that, although possibly requiring inquiry into state court issues, do not seek to upset a state court judgment. The Marshall approach to "inextricably intertwined" seems to have at its core a healthy interest in protecting state court judgments and promoting comity; however, it covers too broad a spectrum of claims, resulting in undesirable outcomes such as *Kamilewicz*. The overbreadth of this approach prevents these and other worthy plaintiffs from bringing their independent challenges in federal court.

C. The GASH *Approach*

A third approach to "inextricably intertwined" currently in use among lower federal courts is the *GASH* approach,[168] which focuses on the injury alleged by the federal plaintiff.[169] According to this

163. Justices Powell, Rehnquist, and White.

164. *See* Thompson, *supra* note 31, at 888–89 (dissecting the *Rooker-Feldman* opinions in *Pennzoil*).

165. Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 26 (1987) (Marshall, J., concurring in the judgment).

166. *Id.* at 21 (Brennan, J., concurring in the judgment).

167. *Id.* (quoting Nat'l Socialist Party v. Skokie, 432 U.S. 43, 44 (1977)).

168. The approach is so labeled here because one of the most frequently cited articulations of this approach is in *GASH Associates v. Village of Rosemont*, 995 F.2d 726 (7th Cir. 1993).

169. *See* Garry v. Geils, 82 F.3d 1362, 1365 (7th Cir. 1996) ("In order to determine the applicability of the *Rooker-Feldman* doctrine, the fundamental and appropriate question to ask

approach, the "inextricably intertwined" determination "hinges on whether the federal claim alleges that the injury was caused by the state court judgment, or, alternatively, whether the federal claim alleges an independent prior injury that the state court failed to remedy."[170] If the federal claim alleges an injury that was caused by the state court judgment, then the *Rooker-Feldman* doctrine bars jurisdiction over that inextricably intertwined claim, whether it was argued in the state court or not.[171] When a plaintiff suffers an injury out of court and then fails to get relief from the state court, a subsequent federal suit is not inextricably intertwined; only if the plaintiff complains of an injury which was caused by the state court judgment would *Rooker-Feldman* prohibit federal jurisdiction.[172] Under this approach, if a plaintiff is not seeking to set aside the state court judgment but rather presents "some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party," then the federal court has jurisdiction.[173]

This approach interprets the rationale behind the *Rooker-Feldman* doctrine primarily to be the prevention of collateral attacks on state court judgments.[174] The *Rooker* and *Feldman* cases are about the inappropriateness of district courts entertaining state court appeals, so this approach declines to extend the "inextricably intertwined" inquiry beyond asking if the "district court is in essence being called upon to review the state-court decision."[175] This method is also in accord with the Supreme Court's indications of its post-*Feldman* (and therefore after the addition of "inextricably

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is whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment.").

170. Taylor v. Fed. Nat'l Mortgage Ass'n, 374 F.3d 529, 533 (7th Cir. 2004).

171. *See* Remer v. Burlington Area Sch. Dist., 205 F.3d 990, 996 (7th Cir. 2000) (explaining that *Rooker-Feldman*'s bar against federal jurisdiction when a plaintiff alleges an injury caused by a state court judgment reaches to inextricably intertwined claims even if those claims were not argued in the state court).

172. *See GASH Assocs.*, 995 F.2d at 729 (holding *GASH*'s claim barred because its injury came from the state court judgment—it did not "suffer an injury out of court and then fail to get relief from state court").

173. *Id.* at 728.

174. *See id.* at 727 ("Litigants cannot file collateral attacks on civil judgments; instead they must seek review in the Supreme Court. The *Rooker-Feldman* doctrine creates a jurisdictional obstacle to collateral review, one we must respect even if the parties do not present the issue for decision.").

175. D.C. Court of Appeals v. Feldman, 460 U.S. 462, 483 n.16 (1983).

intertwined") understanding of the *Rooker-Feldman* doctrine as continuing to be a doctrine about appellate review.[176]

The *GASH* approach to "inextricably intertwined" is consistent with the *Rooker-Feldman* result in *Pennzoil* as well. In that case, Texaco's federal suit did not allege that the state court judgment was Texaco's injury but rather that something other than the court's judgment, namely the Texas statute, caused its injury.[177] If the *Kamilewicz* court had taken this approach, Kamilewicz would have been allowed to bring his malpractice suit, because the injury he alleged was not caused by the state court judgment but rather by the class attorney.[178] However, in both of these cases, although the plaintiffs did not seek to undermine the state court judgment, aside from that adverse judgment they would not have had independent federal claims to bring—that is, the adverse state court judgment gave them standing to bring their independent challenges.[179] The causation requirement, therefore, cannot be a simple but-for connection;[180] it

176. *See* Johnson v. De Grandy, 512 U.S. 997, 1005–06 (1994) ("[U]nder this Court's *Rooker*/*Feldman* abstention 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, based on the losing party's claim that the state judgment itself violates the loser's federal rights."); ASARCO Inc. v. Kadish, 490 U.S. 605, 622–23 (1989) (noting that a federal suit attempting to "obtain direct review of the Arizona Supreme Court's decision . . . would represent a partial inroad" on *Rooker-Feldman*).

177. Texaco challenged the constitutionality of the Texas lien and bond requirements. Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 6 n.6 (1987).

178. *See* Kamilewicz v. Bank of Boston, 100 F.3d 1348, 1351 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing) (The malpractice suit was "a suit against a nonparty (the lawyer) alleging harm from incompetent or deceitful acts. That the lawyer's misconduct occurred in a judicial proceeding doesn't insulate the lawyer from liability, even when the *Rooker-Feldman* doctrine insulates the *judgment*").

179. *See* McLain, *supra* note 89, at 1576 ("[I]n both cases, the injury alleged in federal court would not have occurred but for the state court judgment, but in neither case did the plaintiff seek to undermine that judgment in any way. The injury in both cases was proximately caused by someone or something other than the state court . . . .").

180. *But see* Richardson v. D.C. Court of Appeals, 83 F.3d 1513, 1515–16 (D.C. Cir. 1996) (using a but-for causation analysis to bar federal jurisdiction of the plaintiff's general challenge to the constitutionality of a bar rule). The *Richardson* court doubted that without the adverse state court judgment Richardson would have standing to challenge the constitutionality of the bar rule. *Id.* According to this "but-for" analysis, the state court judgment is the cause of his general complaint, and therefore his general attack is inextricably intertwined with the state court judgment. *Id.* But this result is not consistent with *Feldman*. Although the court tried to distinguish *Feldman* by pointing out that Feldman could again attempt to apply for the bar, so he might still have standing to challenge the rule aside from the state court judgment denying him a waiver, *id.*, this argument is unconvincing. If the D.C. court in *Feldman* had come to the opposite conclusion, granting his waiver, then he would not have had standing to challenge the

instead asks whether the state court judgment both actually and proximately caused the injury for which the federal plaintiff seeks redress.[181] As in *Pennzoil*, if the plaintiff would not have standing to pursue his federal challenge aside from the adverse state court judgment, this fact alone does not make his federal claim inextricably intertwined with the state court judgment.[182] Only if the state court judgment is both the actual and proximate cause of his alleged injury is the plaintiff's federal claim barred.

Although there are some internal variations among courts that use the *GASH* approach,[183] they agree that the rationale behind the *Rooker-Feldman* doctrine only supports a definition of "inextricably intertwined" that hinges on whether the federal claim alleges an injury caused by the state court judgment.[184] This approach is significantly narrower than the previous two, more common, approaches, and for that reason it may be more appealing to critics of the *Rooker-Feldman* doctrine.[185]

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rule. And this is precisely the case with Richardson—if the state court had decided not to suspend him, he would not have standing to challenge the suspension rules.

181. Kenman Eng'g v. City of Union, 314 F.3d 468, 476 (10th Cir. 2002).

182. In the *GASH* opinion itself, Judge Easterbrook supports a previous Seventh Circuit decision finding that if the adverse state court judgment was the only reason the plaintiff had standing to bring the independent challenge then the independent claim was inextricably intertwined and was outside federal jurisdiction. *See* GASH Assocs. v. Vill. of Rosemont, 995 F.2d 726, 728 (7th Cir. 1993) (supporting Leaf v. Supreme Court of Wis., 979 F.2d 589 (7th Cir. 1992)). For a demonstration of why this approach is inconsistent with *Feldman*, see *supra* note 180.

183. In addition to differing opinions regarding the federal plaintiff's standing, some courts that subscribe to the *GASH* approach disagree on whether they should add a "full and fair opportunity to litigate" requirement to the "inextricably intertwined" inquiry. *Compare, e.g.*, Taylor v. Fed. Nat'l Mortgage Ass'n, 374 F.3d 529, 533 (7th Cir. 2004) ("Once we have determined that a claim is inextricably intertwined, i.e., that it indirectly seeks to set aside a state court judgment, we must then determine whether 'the plaintiff did not have a reasonable opportunity to raise the issue in state court proceedings.'" (quoting Brokaw v. Weaver, 305 F.3d 660, 668 (7th Cir. 2002))), *with Kenman Eng'g*, 314 F.3d at 478–79 (rejecting the full and fair opportunity to litigate inquiry because "[i]njecting the full-and-fair-opportunity-to-litigate inquiry into the *Rooker*-Feldman [*sic*] analysis tends to blur the distinction between res judicata and *Rooker-Feldman*").

184. *See* Cory v. Fahlstrom, 143 Fed. App'x 84, 87 (10th Cir. 2005) ("This is a claim that [the plaintiff] was injured by the state court judgment, which is precisely the type of claim prohibited by the *Rooker-Feldman* doctrine.").

185. For example, Jack Beermann has argued that the *Rooker-Feldman* doctrine should have no application "when the complaint in federal court is about conduct outside of the state court, because it is inaccurate to characterize such a claim as an appeal from the state court's judgment. It may be an attempt to relitigate, but it is not an appeal." Beermann, *supra* note 86, at 1214.

D. The Noel *Approach*

The most recently developed approach to the *Rooker-Feldman* doctrine's "inextricably intertwined" language is that articulated by the Ninth Circuit in *Noel v. Hall*.[186] The *Noel* approach has two steps: First, the court determines if the federal plaintiff is seeking to bring a "forbidden de facto appeal" of the state court judgment.[187] Then, and only then, the court considers if the plaintiff is seeking to litigate an issue that is inextricably intertwined with the state court judicial decision from which the forbidden appeal is brought.[188] "Only when there is already a forbidden de facto appeal in federal court does the 'inextricably intertwined' test come into play."[189] The *Noel* court emphasized that a federal suit "is not a forbidden de facto appeal because it is 'inextricably intertwined' with something."[190] That is, federal suits should not be dismissed based on *Feldman*'s "inextricably intertwined" standard alone—if the court does not first determine that the suit seeks an impermissible appeal of the state court judgment, none of the issues the suit raises can be considered inextricably intertwined.[191]

The majority of the *Noel* court's *Rooker-Feldman* analysis thus focuses on whether the plaintiff seeks a forbidden de facto appeal, which the court finds to occur "when the plaintiff in federal district court complains of a legal wrong allegedly committed by the state court, and seeks relief from the judgment of that court."[192] In *Kougasian v. TMSL, Inc.*[193] the Ninth Circuit found that, although the plaintiff sought relief from the state court judgment, she did not complain of a legal wrong committed by the state court.[194] Instead, she alleged that wrongful acts of the defendants were responsible for the court's erroneous judgment.[195] Because her complaint only satisfied one prong of the "forbidden de facto appeal" test, the court held that

186. Noel v. Hall, 341 F.3d 1148 (9th Cir. 2003).

187. *Id.* at 1158.

188. *Id.*

189. *Id.*

190. *Id.*

191. *See* Manufactured Home Cmtys. Inc. v. City of San Jose, 420 F.3d 1022, 1030 (9th Cir. 2005) ("Under *Noel*, claims are dismissed as 'inextricably intertwined' only when an improper appeal under *Rooker-Feldman* is already before the district court.").

192. *Noel*, 341 F.3d at 1163.

193. Kougasian v. TMSL, Inc., 359 F.3d 1136 (9th Cir. 2004).

194. *Id.* at 1139.

195. *Id.*

Kougasian was not seeking a forbidden appeal and therefore it had no occasion to inquire into whether any of her claims were inextricably intertwined with issues before the state court.[196] Although in "an ordinary language sense, the issues in Kougasian's claims [were] indeed 'inextricably intertwined' with issues in [the state court proceedings],"[197] the court held that "[b]ecause she is not bringing a forbidden de facto appeal, there are no issues with which the issues in her federal claims are 'inextricably intertwined' within the meaning of *Rooker-Feldman*."[198]

This approach shifts "inextricably intertwined" to the back burner of the *Rooker-Feldman* doctrine based on a close reading of the *Feldman* case, in which the phrase was introduced. In *Feldman*, the Court first determined that the plaintiffs were seeking impermissible appellate review of the state court decision; it then held that those Fifth Amendment claims that were inextricably intertwined with the impermissible appeal were also barred, but those Fifth Amendment claims that related to the general challenge (which was not an impermissible appeal) were not inextricably intertwined with an impermissible appeal and therefore not barred.[199] The "inextricably intertwined" limitation only served to prevent Feldman "from raising, in the non-appeal part of his suit, issues that he was prevented from litigating in his forbidden de facto appeal."[200] The *Noel* court's reluctance to dismiss actions for being inextricably intertwined was heightened by the Supreme Court's caution in employing the doctrine.[201] Furthermore, the court found preserving the possibility for simultaneous litigation and not overstepping the bounds of preclusion to be important reasons for hedging in the *Rooker-Feldman* doctrine in this way.[202]

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196. *Id.* at 1143.

197. *Id.* at 1142.

198. *Id.* at 1143; *see also* Maldonado v. Harris, 370 F.3d 945, 950 (9th Cir. 2004) (finding that "inextricably intertwined" does not come into play because the federal plaintiff is not alleging a legal wrong of an erroneous state court decision).

199. *See* Noel v. Hall, 341 F.3d 1148, 1156–57 (9th Cir. 2003) (analyzing the *Feldman* court's use of "inextricably intertwined").

200. *Kougasian*, 359 F.3d at 1142.

201. *See Noel*, 341 F.3d at 1158–59 (emphasizing that the Supreme Court has not used the *Rooker-Feldman* doctrine to deny jurisdiction in any case other than those two).

202. *See id.* at 1159 (encouraging caution "in light of two well-established rules that would be in tension with an overly broad reading of the *Rooker-Feldman* doctrine . . . first, the rule that overlapping or even identical federal and state court litigation may proceed simultaneously, limited only by doctrines of abstention and comity; and, second, the rule of 28 U.S.C. § 1738,

Perhaps because of its relative youth, the *Noel* approach has not been substantively critiqued by courts that employ other approaches, but the Ninth Circuit itself has compared its method to those of other circuits. The court has correctly observed that the res judicata approach is much broader than this approach, effectively barring any claim that is inextricably intertwined, in the ordinary language sense,[203] with issues already decided in the state court.[204] Similarly, the Marshall approach is also more expansive than the *Noel* approach.[205] The court has noted that the *GASH* approach presents a "similar formulation" of the injury requirement,[206] although the *Noel* approach seems to be more restrictive in its use of the "inextricably intertwined" concept.

The *Noel* approach seriously constrains not only the "inextricably intertwined" inquiry but also the *Rooker-Feldman* doctrine as a whole. To the extent that this approach cuts away much of the overlap with and intrusion upon the doctrines of preclusion and abstention, those who criticize the *Rooker-Feldman* doctrine for not "doing any work"[207] may be attracted to this approach. However, the emphasis this approach places on the relief the federal plaintiff seeks and the formal structure of the approach's stages may make it possible for plaintiffs to pass the requirements and get into federal

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under which a federal court must give the same preclusive effect to a state court judgment" as the courts of that state would give to that judgment).

203. The court distinguishes between the "ordinary language sense" of inextricably intertwined and its "narrow and specialized meaning in the *Rooker-Feldman* doctrine." *Kougasian*, 359 F.3d at 1142.

204. *See id.* at 1142–43 (distinguishing the *Noel* approach from one that equates "inextricably intertwined" with principles of preclusion).

205. For example, imagine a federal plaintiff who brings a due process challenge to the revocation of a medical license without challenging the state court judgment that affirmed the license revocation on the merits. According to the Marshall approach, *see supra* Part III.B, if the federal plaintiff succeeded in the due process challenge, it would indicate that the state court was wrong about the appropriateness of the revocation; therefore, the challenge is inextricably intertwined with the state court judgment and must be dismissed. But according to the *Noel* approach, the federal plaintiff does not both complain of a legal wrong allegedly committed by the state court and seek relief from the judgment of that court; therefore, the plaintiff advances no forbidden appeal with which the claim could be inextricably intertwined, and the federal court has jurisdiction. *See Kougasian*, 359 F.3d at 1142 (distinguishing the *Noel* approach from a case in which a due process challenge to revocation of a medical license was dismissed as "inextricably intertwined with a state court judgment affirming revocation of the license on the merits" (citing Wang v. N.H. Bd. of Registration in Med., 55 F.3d 698, 703 (1st Cir. 1995)).

206. *Noel*, 341 F.3d at 1164.

207. *See* Friedman & Gaylord, *supra* note 62, at 1132 (finding that *Rooker-Feldman* does little work independent of preclusion and abstention doctrines).

court yet run afoul of the spirit and purpose of the *Rooker-Feldman* doctrine. It remains to be seen if the *Noel* approach may be too narrow to properly respect and protect state courts.

IV. IMPLICATIONS OF *EXXON MOBIL* FOR "INEXTRICABLY INTERTWINED"

Having surveyed the approaches the circuit courts have taken toward the *Rooker-Feldman* doctrine's "inextricably intertwined" language, what guidance can be gleaned from the Supreme Court's *Exxon Mobil* decision? Recall that in *Exxon Mobil* the Court restricted *Rooker-Feldman* to the narrow ground[208] of the *Rooker* and *Feldman* cases, both of which involved federal plaintiffs calling upon district courts to "overturn an injurious state-court judgment."[209] The unanimous Court specified four requirements for invocation of the doctrine: 1) the case must be brought by a state court loser; 2) the injury alleged must be caused by the state court judgment; 3) the judgment must have been rendered before the district court proceedings commenced; and 4) the case must invite district court review and rejection of that judgment.[210]

Finding that *Exxon Mobil* did not satisfy all four aspects of this exposition and therefore escaped application of the *Rooker-Feldman* doctrine, the Court did not have occasion to consider whether ExxonMobil's claims were inextricably intertwined.[211] The Court did mention "inextricably intertwined" in its account of the *Rooker-Feldman* doctrine[212] and did not repudiate the concept, indicating that it is still a part of the doctrine. But by not using the concept in its analysis of the case, the Court seemed to show that a determination as to whether a claim is inextricably intertwined or not is not essential to every *Rooker-Feldman* inquiry. It could be that by leaving "inextricably intertwined" out of its distilled definition of the *Rooker-*

208. *See* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005) ("In the case before us, the Court of Appeals for the Third Circuit misperceived the narrow ground occupied by *Rooker-Feldman*.").

209. *Id.* at 292.

210. *Id.* at 284; *see also* Hoblock v. Albany County Bd. of Elections, 422 F.3d 77, 85 (2d Cir. 2005) (dividing *Exxon Mobil*'s four requirements into two substantive components and two procedural components).

211. *See Exxon Mobil*, 544 U.S. at 293–94 (finding that ExxonMobil filed the federal action before judgment was rendered in the state court and that ExxonMobil was the winner in the state court proceedings).

212. *Id.* at 286 n.1.

Feldman doctrine and not using it in its analysis in *Exxon Mobil* the Court was indicating that the concept has no independent meaning and instead simply states a conclusion.[213] However, it is also possible that, because this case dealt primarily with and was resolved on the issues of timing and parallel litigation, the *Rooker-Feldman* doctrine was never triggered,[214] and thus, there was no need to inquire into the substance and possible intertwinement of ExxonMobil's claims.[215]

So what does *Exxon Mobil* mean for the four approaches to "inextricably intertwined" examined in this Note? It is clear that the res judicata approach is no longer a viable option. The Court explicitly differentiated between preclusion, which is not a jurisdictional matter,[216] and *Rooker-Feldman*, which "does not otherwise override or supplant preclusion doctrine,"[217] even citing a Second Circuit case that equated res judicata with "inextricably intertwined" as an example of an interpretation that extends the doctrine "far beyond" its proper contours.[218] Courts that had been using a res judicata approach have already begun to notice that their understanding of the doctrine must be "substantially altered,"[219] recognizing that after *Exxon Mobil* their inquiry can no longer be whether an issue was or could have been litigated in the state court,[220] but rather should be whether the federal plaintiff alleges an injury due to the state court judgment itself.[221] To make this point crystal

213. *See Hoblock*, 422 F.3d at 87 ("[T]he phrase 'inextricably intertwined' has no independent content. It is simply a descriptive label attached to claims that meet the requirements outlined in *Exxon Mobil*.").

214. *See Exxon Mobil*, 544 U.S. at 292 ("When there is parallel state and federal litigation, *Rooker-Feldman* is not triggered simply by the entry of judgment in state court.").

215. Indeed, the Court never looked into or even listed what claims ExxonMobil brought in the federal court, except to say they were the same as its state court counterclaims. *See id.* at 289 (ExxonMobil answered Saudi Basic's state court complaint by asserting counterclaims that were the same as those claims it made in the federal suit).

216. *See id.* at 293 ("Preclusion, of course, is not a jurisdictional matter.").

217. *Id.* at 284.

218. *See id.* at 283 (citing Moccio v. N.Y. State Office of Court Admin., 95 F.3d 195, 199–200 (2d Cir. 1996), as an example of an overbroad interpretation of the *Rooker-Feldman* doctrine).

219. Federacion de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R., 410 F.3d 17, 19 (1st Cir. 2005).

220. *See* Washington v. Wilmore, 407 F.3d 274, 279–80 (4th Cir. 2005) (distinguishing between res judicata and *Rooker-Feldman* and citing *Exxon Mobil*, 544 U.S. at 292, for the proposition that the question for *Rooker-Feldman* purposes is not simply whether an issue has been litigated in state court).

221. *See* Mercury v. S. Liberty Realty Corp. (*In re* Mercury), 153 Fed. App'x 756, 757 (2d Cir. 2005) (noting that after *Exxon Mobil*, *Rooker-Feldman* applies only "if the federal suit is brought to remedy an injury whose source is the state-court judgment itself").

clear, the Court issued a per curiam opinion less than a year after *Exxon Mobil*, explicitly stating that "*Rooker-Feldman* is not simply preclusion by another name."[222]

Although some courts are still using Marshall-esque language alongside the *Exxon Mobil* formulation of the *Rooker-Feldman* doctrine,[223] the Marshall approach to "inextricably intertwined" does not appear to survive *Exxon Mobil* any better than the res judicata approach. The Court, quoting *GASH*, held that, as long as a plaintiff presents some independent claim, "albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party," the federal court has jurisdiction.[224] Contrary to the Marshall approach, the *Exxon Mobil* Court would allow a federal court to entertain a suit in which success for the plaintiff would deny a legal conclusion reached by the state court. *Exxon Mobil*'s requirement of "review and rejection"[225] of a state court judgment further indicates that the Marshall approach to "inextricably intertwined" inappropriately bars independent challenges from federal court.[226]

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222. Lance v. Dennis, 126 S. Ct. 1198, 1202 (2006) (per curiam). In this case, the plaintiffs were not parties to the underlying state-court proceeding, but the district court determined that they were in privity with the state-court plaintiff according to preclusion law and thus their federal suit should be barred by *Rooker-Feldman*. The Court admonished the district court for "erroneously conflat[ing] preclusion law with *Rooker-Feldman*. . . . The *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." *Id.* In so holding, the Court agreed with the doctrine's critics that "[i]ncorporation of preclusion principles into *Rooker-Feldman* risks turning that limited doctrine into a uniform *federal* rule governing the preclusive effect of state-court judgments, contrary to the Full Faith and Credit Act." *Id.* at 1202–03. *See supra* note 88 and accompanying text.

223. *See* Johnson v. Ohio Sup. Ct., 156 Fed. App'x 779, 782 (6th Cir. 2005) (quoting Marshall's definition from *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987) (Marshall, J., concurring), alongside the footnote in *Exxon Mobil*, 544 U.S. at 286 n.1, on inextricably intertwined); Indus. Commc'ns & Elecs., Inc. v. Monroe County, 134 Fed. App'x 314, 317 (11th Cir. 2005) (quoting *Exxon Mobil*'s definition of the *Rooker-Feldman* doctrine, *Exxon Mobil*, 544 U.S. at 292, alongside a circuit case saying federal courts lack jurisdiction over suits in which "'the relief requested . . . requires determining that the state court's decision is wrong'" (quoting Desi's Pizza, Inc. v. City of Wilkes-Barre, 321 F.3d 411, 419 (3d Cir. 2003))); Chajkowski v. Bosick, 132 Fed. App'x 978, 979 (3d Cir. 2005) (defining a federal claim as "inextricably intertwined" if it "succeeds only to the extent that the state court wrongly decided the issues before it" (quoting FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 840 (3d Cir., 1996))).

224. *Exxon Mobil*, 544 U.S. at 293 (quoting GASH Assocs. v. Vill. of Rosemont, 995 F.2d 726, 728 (7th Cir. 1993)).

225. *Id.* at 284, 291.

226. *See, e.g.*, Sheppard v. Welch, No. 1:05-cv-0467-DFH-TAB, 2005 U.S. Dist. LEXIS 15451, at *8 (S.D. Ind. July 5, 2005) ("The language of 'review and rejection' in *Exxon Mobil*

Perhaps, then, the *Exxon Mobil* decision affirms the *Noel* approach: because the Court did not find ExxonMobil to be seeking an impermissible appeal of a state court judgment, it did not move on to the second step to consider whether any of ExxonMobil's claims might be inextricably intertwined with the judgment from which appeal was sought. Perhaps, like the *Noel* court, the *Exxon Mobil* Court was focusing on the relief sought, as opposed to the issues raised, by the federal plaintiff.[227] The *Noel* approach is certainly still viable, even strengthened, after *Exxon Mobil*;[228] but although the Court did not inquire into the issues ExxonMobil raised, it did not focus on the relief ExxonMobil sought either. One comes away from *Exxon Mobil* with the sense that it is a procedural, rather than substantive, decision—in applying *Rooker-Feldman* to the facts of the case, the Court focused almost entirely on the fact of the parallel litigation.[229] So, although the bases of the *Noel* approach are confirmed by the *Exxon Mobil* decision, it is a stretch to say that the Court embraced its detailed approach.[230] The lower court in *Exxon*

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shows that a mere reading of a state court decision to determine its contents will not be sufficient to trigger the *Rooker-Feldman* doctrine." (quoting *Exxon Mobil*, 544 U.S. at 284)).

227. *See* MOORE ET AL., *supra* note 16, § 133.30[3][c][iii] (predicting one possible interpretation of "inextricably intertwined" after *Exxon Mobil* to be that "it is relevant only if at least one claim in a federal suit asserts an injury caused by a prior state-court judgment and seeks review and rejection of that judgment," an interpretation they found "consistent with that adopted by the Ninth Circuit" in *Noel*).

228. *See* Manufactured Home Cmtys. Inc. v. City of San Jose, 420 F.3d 1022, 1029–30 & n.9 (9th Cir. 2005) (noting that in *Exxon Mobil*, the Supreme Court affirmed the substance of *Noel*'s formulation of *Rooker-Feldman* as violated when a plaintiff seeks relief from a state court judgment by asserting as his injury a legal wrong in the judgment itself).

229. *See Exxon Mobil*, 544 U.S. at 293–94 (discussing the relation between *Rooker-Feldman* and parallel litigation, and deciding the case based on the fact that "*Rooker-Feldman* did not prevent the District Court from exercising jurisdiction when ExxonMobil filed the federal action, and it did not emerge to vanquish jurisdiction after ExxonMobil prevailed in the Delaware courts"); *see also* Dornheim v. Sholes, 430 F.3d 919, 923 (8th Cir. 2005) (observing that determining whether state court proceedings were complete is the first step of a post-*Exxon Mobil Rooker-Feldman* analysis).

230. *But see* 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, 13 (May 2006), http://fclr.org/2006fedctslrev1.htm (last visited Oct. 22, 2006) (advancing the *Noel* approach and finding it "consistent with *Exxon Mobil*"). This article, published in the interim between the creation and publication of this Note, suggests that although *Exxon Mobil* does not endorse or logically mandate the *Noel* approach, it is "consistent with the *Exxon Mobil* Court's reading of *Feldman* and its overall analytical approach." *Id.* at 16. Rowe and Baskauskas confirm the conclusions of this Note, however, when they assert that "the 'inextricably intertwined' formulation, although not expressly repudiated or limited, appears to have been relegated to—at most—some secondary role and in any event no longer to be a general or threshold test." *Id.* at 3–4.

Mobil based its decision on the "inextricably intertwined" inquiry,[231] so if the Supreme Court sought to introduce the circuits to a structured approach in which "inextricably intertwined" is only considered after it is determined on the basis of another claim that *Rooker-Feldman* applies, this was the case in which to do it. But instead the Court only briefly mentioned "inextricably intertwined" and its connection with the doctrine, giving no indication that it envisioned a bifurcated approach to the concept.

The *GASH* approach, then, which is quite similar to but less structured than *Noel*, may be most in line with the Court's indications in *Exxon Mobil*. The *Exxon Mobil* formulation of the *Rooker-Feldman* doctrine centers on the key requirement that the federal plaintiff alleges an injury caused by the state court judgment,[232] which is the heart of the *GASH* approach to "inextricably intertwined." In addition, the Court quoted the analysis from *GASH* with approval in its analysis and disposition of *Exxon Mobil*, noting that *Noel* was in agreement with the quoted passage.[233]

CONCLUSION

Looking ahead to future invocations of *Rooker-Feldman*'s "inextricably intertwined" concept, lower courts would be well advised to follow the lead of the *GASH* court and its progeny. In *Exxon Mobil* the Court dramatically narrowed the common understanding of the *Rooker-Feldman* doctrine as a whole, an indication that it envisions a more narrow use of "inextricably intertwined." An approach that employs "inextricably intertwined" not as an alternative bar to jurisdiction independent from the central *Rooker-Feldman* analysis, but rather as a partner with such analysis and subject to the *Exxon Mobil* requirements, will not run afoul of

231. *Exxon Mobil*, 544 U.S. at 291.

232. *See id.* at 284, 291–92 (confining *Rooker-Feldman* to cases in which the state court judgment caused the alleged injury, as in the *Rooker* and *Feldman* cases); *see also* Mercury v. S. Liberty Realty Corp. (*In re* Mercury), 153 Fed. App'x 756, 757 (2d Cir. 2005) (concluding that after *Exxon Mobil*, "*Rooker-Feldman* applies only if the federal suit is brought to remedy an injury whose source is the state-court judgment itself"); Hoblock v. Albany County Bd. of Elections, 422 F.3d 77, 87 (2d Cir. 2005) (The key to *Rooker-Feldman* lies in *Exxon Mobil*'s "second substantive requirement: that federal plaintiffs are not subject to the *Rooker-Feldman* bar unless they complain of an injury caused by a state judgment. Indeed, this is the core requirement from which the others derive; focusing on it helps clarify when the doctrine applies").

233. *Exxon Mobil*, 544 U.S. at 293.

the Court's pronouncements on the doctrine thus far. However, courts should now be careful not to go to the opposite extreme of creating too narrow a role for "inextricably intertwined" in their analysis, thereby obliterating *Feldman*'s expansion of the doctrine. Although *Exxon Mobil* cut away at much of *Rooker-Feldman*'s ground cover, it left the doctrine's federalist roots intact.