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FOREWORD

THE FINALITY OF APPEAL

Even the most complex appeal eventually comes to an end. And the final decision establishing a principle, confirming an outcome, or determining which interests will prevail must inevitably favor one rule or theory over another. Yet, in what we should probably consider a miracle bequeathed to us by the gentlemen of Philadelphia and the pen of John Marshall, even those on the losing side of that decision will accept it and go on.[1] We agreed long ago that courts would make final decisions, would settle things, would enable us to treat some questions as closed and so to move ahead.

But as Faulkner pointed out, "[t]he past is never dead. It's not even past."[2] Important legal questions reappear in case after case until they are at last resolved. And even then, the rule of an ancient case may echo through later cases as the precedent on which an argument is based or the foundation for a hypothetical question from the bench. Finality is not death.

The bounds of finality have been much on my mind of late, for I read recently about a locally famous case that is once more on appeal. (It may well return—yet again—to the trial court, where it would be heard this time by a middle-aged judge who was a teenager when the case was filed.) And of course this

1. *See e.g. Marbury v. Madison*, 5 U.S. 137, 177 (1803) (Marshall, C.J.) ("It is emphatically the province and duty of the judicial department to say what the law is."). Justice Breyer often makes this point when speaking about the institutional prestige of the Supreme Court, which promotes political stability in the United States by prompting "people who would otherwise be in the streets fighting one another" to "submit their disputes to the rule of law." *See e.g.* Stephen G. Breyer, *Reflections on the Role of Appellate Courts*, 8 J. App. Prac. & Process 91, 98 (2006).

2. William Faulkner, *Requiem for a Nun* 86 (Random House, Inc. 1951).

issue's lead essay prompted me to reflect on finality in the context of rehearing in the Supreme Court. I am left to conclude that Professor Bruhl is right to remind us that in all things appellate "it ain't over til it's over."[3]

AND THE REST OF THE ISSUE

We present as always a variety of works here, among them a groundbreaking assessment of the changes that digital publication is making in courts' reporting of their decisions and a useful analysis of readability in appellate briefs. Nothing in this issue will be the last scholarly treatment of its topic, of course, but each piece is for now the final word.

NBM
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3. Aaron-Andrew P. Bruhl, *Rehearing and Resurrection at the Supreme Court*, 12 J. App. Prac. & Process 1, 1 (2011).