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Discontent and Indiscretion: Discretionary Review of Interlocutory Orders

Timothy P. Glynn

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DISCONTENT AND INDISCRETION:
DISCRETIONARY REVIEW OF INTERLOCUTORY ORDERS

Timothy P. Glynn*

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INTRODUCTION

Any experienced litigator knows how frustrating—and hence important—the rules governing the timing of appeals can be. The hardship cuts both ways: a party unable to appeal immediately from an erroneous decision faces litigating the rest of the case before the grievance can be heard; a party receiving a favorable interlocutory ruling that is immediately appealable faces the expense, delay, and risks of appellate review before a final resolution at the trial level.

In federal court, the final judgment rule requires parties to wait until the conclusion of the proceedings at the district court level before appealing to the circuit court of appeals.1 While delaying appellate involvement until after final judgment is appropriate in most circumstances, some interlocutory orders warrant immediate review.2 The vexing question is how to distinguish those interlocutory orders that are worthy of immediate review from those that are not.

The current regime of statutory, rule-based, and judge-made exceptions to the final judgment rule is under attack.3 Critics decry the regime's incoherence and the burdensome litigation that certain exceptions—such as the collateral order doctrine—create.4 Many also

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1 The "final judgment rule" derives from 28 U.S.C. § 1291 (1994), which provides that the federal circuit courts of appeals have jurisdiction only over "final decisions" of the district courts. The rule reflects a narrow construction of the statute; except in rare circumstances, a district court's decision or order is generally not final unless it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945).

2 An "interlocutory order" is an order that does not resolve (and hence, end) the entire litigation before the district court. For the purposes of this Article, "interlocutory orders" include the narrow set of orders falling within one of the "interpretive doctrines" discussed in Part I. See infra text accompanying notes 35–69. Such orders are deemed "final decisions" under § 1291 and hence immediately appealable, even though they do not terminate the entire litigation before the district court.

3 See, e.g., Howard B. Eisenberg & Alan B. Morrison, Discretionary Appellate Review of Non-Final Orders: It's Time To Change the Rules, 1 J. App. Prac. & Process 285, 291 (1999) (stating that there is widespread dissatisfaction with the present appealability regime); Robert J. Martineau, Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution, 54 U. Pitt. L. Rev. 717, 729, 748 (1993) (suggesting that there is a consensus among scholars that the final judgment rule and its exceptions are in need of refining and reform).

4 See, e.g., Lloyd C. Anderson, The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform, 46 Drake L. Rev. 539, 540–41 (1998) (criticizing the Supreme Court's collateral order doctrine jurisprudence as confusing and contending that it has created an unacceptable amount of litigation); Eisenberg & Morrison,
contend that the exceptions are inadequate because they fail to capture numerous orders that will inflict severe irreparable harm unless immediately reviewed. Moreover, the existing regime inhibits the development of the law on various issues that often are resolved in interlocutory orders and tend to evade review after final judgment.

 supra note 3, at 291 (characterizing the current scheme as “freakish and inconsistent in application” and decrying the collateral litigation it spawns); Lawyers Conference Comm. on Fed. Courts and the Judiciary, The Finality Rule: A Proposal for Change, Judges J., Fall 1980, at 33, 35 [hereinafter Lawyers Conference Comm.] (stating that the current exceptions to the final judgment rule have developed in an ad hoc and confusing manner); Martineau, supra note 3, at 748, 773–74, 785 (contending that the current exceptions are in need of clarification and expressing concern about the amount of litigation caused by judge-made exceptions to the final judgment rule); Michael E. Solimine, Revitalizing Interlocutory Appeals in the Federal Courts, 58 Geo. Wash. L. Rev. 1165, 1166 (1990) (echoing others who have described the law in this area as an “unacceptable morass” of doctrines and other exceptions); John C. Nagel, Note, Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review, 44 Duke L.J. 200, 201 (1994) (lamenting the lack of clarity in the current regime and the effort spent arguing about appealability).

5 See, e.g., Michael J. Davidson, A Modest Proposal: Permit Interlocutory Appeals of Summary Judgment Denials, 147 Ml. L. Rev. 145, 212–15 (1995) (advocating discretionary appeal of denials of summary judgment in part to avoid the delay and expense of preparing for and participating in trial when summary judgment should have been granted); Note, Appealability in the Federal Courts, 75 Harv. L. Rev. 351, 352–53 (1961) (suggesting that the current regime is flawed because certain orders that impose hardships are not appealable immediately); Jordan L. Kruse, Comment, Appealability of Class Certification Orders: The “Mandamus Appeal” and a Proposal To Amend Rule 23, 91 Nw. U. L. Rev. 704, 705 (1997) (advocating discretionary review of class certification orders to alleviate the potential hardship caused by the final judgment rule); Randall J. Turk, Note, Toward a More Rational Final Judgment Rule: A Proposal To Amend 28 U.S.C. § 1292, 67 Geo. L.J. 1025, 1026 (1979) (stating that the current set of exceptions “fails to effectively or consistently afford appellate review in all hardship cases”).

6 See Eisenberg & Morrison, supra note 3, at 291 (criticizing the current regime because it denies review of interlocutory decisions that would aid in the development of the law); Kenneth S. Gould, Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions, 1 J. App. Prac. & Process 309, 310–11 (1999) (stating that one of the reasons Rule 23(f) was adopted was to enable circuit courts to develop clear certification standards); Solimine, supra note 4, at 1182 (arguing for increased interlocutory review under § 1292(b) in part because issues typically arising in pretrial matters are likely to evade review); see also Fed. R. Civ. P. 23(f) advisory committee’s note (1998) (suggesting that Rule 23(f) may be utilized to provide appellate review where a class certification decision “turns on a novel or unsettled question of law”); 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3907, at 280 (3d ed. 1992) (“Some matters of procedure, such as discovery, may elude review on appeal from final judgments; if the courts of appeals are to participate in the process of developing the law, interlocutory appeal may prove the only effective means available.”).
The fashionable response to these perceived woes is discretionary interlocutory review. Discretionary review vests in the circuit courts unfettered authority to decide which interlocutory orders to review. Commentators favor this approach for a variety of reasons, including that it avoids potential interpretive problems and litigation over reviewability associated with mandatory review. Moreover, discretionary review allows circuit courts to intervene when orders contain probable errors that may cause irreparable harm if not immediately corrected. Likewise, circuit courts can employ discretionary review to address substantive areas where development of the law is needed. Finally, and perhaps most importantly, by selecting only those interlocutory orders that are truly worthy of immediate review, circuit courts are able to limit the impact of interlocutory review on their already strained dockets. Rule 23(f) of the Federal Rules of Civil Procedure, which provides for discretionary review of grants or denials of class certification motions, represents the first foray into unfettered discretionary review at the circuit level. Additional reform is largely attainable.

7 Over the last quarter century, many commentators have called for discretionary review to replace and/or supplement the current exceptions. See, e.g., ABA Comm’N ON STANDARDS OF JUDICIAL ADMIN., STANDARDS RELATING TO APPELLATE COURTS § 3.12, at 21 (1977) [hereinafter ABA Comm’n] (stating that final judgment rule should remain intact, but advocating discretionary review of all interlocutory orders); Edward H. Cooper, Timing as Jurisdiction: Federal Civil Appeals in Context, LAW & CONTEMP. PROBS., Summer 1984, at 157, 157–64 (proposing the eventual elimination of the current exceptions and replacing them with pure discretionary review resulting from district court certification or independent circuit court acceptance of review); Davidson, supra note 5, at 214–15 (advocating that circuit courts be granted the authority to review denials of summary judgment on a discretionary basis); Eisenberg & Morrison, supra note 3, at 301–02 (proposing that the Supreme Court adopt a rule allowing discretionary appellate review of non-final orders); Martineau, supra note 3, at 776–88 (advocating that the final judgment rule and the right to appeal thereafter remain intact, but advocating discretionary review of all interlocutory orders); Nagel, supra note 4, at 201 (agreeing with other commentators that the federal courts should adopt a discretionary review model similar to that in the Wisconsin state court system); Turk, supra note 5, at 1040 (advocating adoption of another subsection of § 1292 that would allow a circuit court to choose to review various orders). A small number of commentators have proposed abandoning or limiting appeals of right and adopting a discretionary regime for both interlocutory and final orders. See infra note 33.

8 See, e.g., Eisenberg & Morrison, supra note 3, at 287, 306 (arguing that mandatory criteria set forth in a statute or rule cannot significantly control essentially discretionary decisions). “Mandatory review” is review the circuit court is obliged to undertake.

9 Id. at 287.

10 Federal Rule of Civil Procedure 23(f) as amended became effective December 1, 1998, providing as follows:
able, since rulemaking now can be utilized to alter the current regime.\textsuperscript{11}

Discretionary review, however, is not the answer. First, the current regime is in far better shape than commonly appreciated. The existing exceptions to the final judgment rule, although narrow, are clear, coherent, and produce limited collateral litigation. In addition, discretionary review—whether generally or in category-based rules like Rule 23(f)—will not result in dramatic increases in the correction of errors that threaten to inflict irreparable harm nor enhance significantly the development of legal standards in areas that have traditionally evaded appellate review. Furthermore, discretionary review is more problematic than its advocates foresee: it will impose substantial new burdens on circuit courts and litigants, and will grant to the circuit courts a new kind of power that threatens the integrity of the courts' error correction and lawmaking functions. On balance, any benefits of discretionary review are outweighed by the added burdens and dangers.

There is a superior approach to reform. Because the current regime is working well, it should not be dismantled. Rather, rulemaking should be utilized to supplement the current exceptions with narrowly drawn categories of mandatory review. Properly targeted, these categories of review will enhance error correction, reduce irreparable

\textsuperscript{11} In 1990, Congress amended the Rules Enabling Act, 28 U.S.C. § 2072, to allow the Supreme Court to prescribe rules that define when a district court ruling is "final" for the purposes of appeal under 28 U.S.C. § 1291. See Pub. L. No. 101-650, 104 Stat. 5115 (codified as amended at 28 U.S.C. § 2072(e)) ("Such rules [of procedure] may define when a ruling of a district court is final for the purposes of appeal under § 1291 of this title."). In 1992, Congress enacted 28 U.S.C. § 1292(e), pursuant to which the Supreme Court may prescribe rules in accordance with the Rules Enabling Act that provide for appeals of interlocutory decisions not otherwise available under § 1292. See Pub. L. No. 102-572, 106 Stat. 4506. Rule 23(f) was promulgated pursuant to the Court's § 1292(e) authority.
harm, and promote needed development of the law to the extent practicable, while avoiding the pitfalls of discretion.

Part I of this Article reviews the current regime, including the final judgment rule and the existing exceptions. It then details why the existing exceptions, although affording very limited opportunities to appeal, are clear and not the source of significant collateral litigation. Moreover, it discusses why the current regime, on the whole, draws sensible distinctions between those orders that are appealable and those that are not.

Part II critiques discretionary review. It demonstrates that a discretionary regime will not live up to expectations regarding error correction and the development of the law, will impose significant burdens on the circuit courts, and will threaten the integrity of the courts' error correction and lawmaking functions. It also shows why category-based discretionary review—such as Rule 23(f)—largely suffers from the same ills as general discretionary review.

Part III offers an alternative approach to reform. Fundamental reform is neither necessary nor advisable. Rather, strategic use of mandatory review is the best way to maximize error correction, irreparable harm avoidance, and development of the law, without intolerably burdening the circuit courts. Specifically, rulemaking should be utilized to provide for mandatory review of interlocutory orders confronting “problem areas”—such as class certification and certain privilege issues—that have received insufficient appellate attention and in which errors are probable and often cause significant, irreparable harm. When these categories cannot be narrowed sufficiently to avoid overburdening the circuit courts, district court certification, rather than circuit court discretion, provides the most fair and effective mechanism for weeding out orders that are not worthy of immediate appellate attention. These and other consistent reforms offer the greatest benefits for litigants and ultimately, the federal courts.

I. THE ADEQUACY OF THE CURRENT REGIME

The current regime governing the appealability of district court orders consists of the final judgment rule and a number of judge-made, statutory, and rule-based exceptions. For the last twenty years, this regime has come under heavy and consistent attack. For example, in 1984, Professor Rosenberg wrote that this area is an “unacceptable morass,” and a “kind of crazy quilt of legislation and judicial decisions.”12 Professor Carrington likewise lamented the “uncon-

scionable intricacy" of the federal courts’ finality jurisprudence. In its 1990 report to Congress, the Federal Courts Study Committee expressed similar concerns, noting that this area "has produced much purely procedural litigation." In their recent article, Howard Eisenberg and Alan Morrison observed "widespread dissatisfaction with the law regarding appeals from non-final orders." They went on to describe the current regime as "freakish and inconsistent in its application," and as the cause of an unacceptable amount of collateral litigation on the issue of appealability.

Some of the exceptions to the final judgment rule have created significant confusion in the past. Today, however, this regime works better than its critics acknowledge. Obviously, no operative rule or standard is entirely clear or without nuances in application. Yet the existing exceptions are governed by relatively clear rules or standards that make the outcome of appealability questions predictable and create insignificant collateral litigation. Also, although the opportunities for appellate review of interlocutory orders are extremely limited, the regime embodying these exceptions usually draws sensible distinctions between those district court decisions that are appealable and those that are not. Although there are good reasons to seek modest reforms of interlocutory review, serious trouble within the current regime—in theory or practice—is not one of them.

15 Eisenberg & Morrison, supra note 3, at 291.
16 Id. (stating that the current regime "leads to protracted collateral litigation on questions of ‘finality’ and the courts of appeals’ jurisdiction to review non-final orders"); cf. 19 James Wm. Moore et al., Moore’s Federal Practice § 202.02 (3d ed. 1999) (stating that the doctrinal confusion surrounding finality exists mainly around the edges). Other commentators have offered similar criticisms. See supra note 4 (listing commentators).
17 The Supreme Court has recognized as much, stating that prior finality decisions cannot be explained with "unerring accuracy," and that such decisions cannot "provide an utterly reliable guide for the future." See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974).
A. The Current Regime

Congress's general grant of jurisdiction to the federal circuit courts of appeals, embodied in 28 U.S.C. § 1291, provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."18 In interpreting "final decisions," the Supreme Court has articulated the "final judgment rule."19 Pursuant to this rule, there is no final decision until there is a "decision by the district court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"20 Parties therefore may appeal only at the very end of the litigation in the district court or, in other words, after the district court has determined the rights of the parties and granted all corresponding relief. In this way, the rule prevents appeals from decisions that are "tentative, informal or incomplete."21

The final judgment rule promotes efficiency and fairness in a number of ways. By precluding appeals of nonfinal determinations, it prevents "piecemeal adjudication," which reduces delays for the par-

18 Section 1291 is the principal source of appellate jurisdiction in both the civil and criminal contexts. This Article will focus on the application of § 1291 in the civil context and the exceptions to the statute that apply in civil cases. Appeals to the Federal Circuit are expressly exempted from § 1291, but such appeals are governed by a parallel rule containing identical language. See 28 U.S.C. § 1295.

19 The final judgment rule has also been called the "final decision rule" and the "final order rule." For a discussion of the statutory antecedents to § 1291, see Martineau, supra note 3, at 726–29. The term "final decisions" was first included in the Evarts Act, ch. 517, 26 Stat. 826 (1891), which established the Federal Circuit Courts of Appeals. See id. at 728–29. This term replaced language limiting appeals to those sought from "final judgments and decrees." See id. Indeed, the Supreme Court stated early in this century that the "words 'final decisions in the district courts' mean the same thing as 'final judgments and decrees' as used in former acts regulating appellate jurisdiction." In re Tiffany, 252 U.S. 32, 36 (1920). Nevertheless, long before the Evarts Act, the Supreme Court had held that "final judgments and decrees" should be given a practical interpretation and that, in certain narrowly confined circumstances, an appeal could be taken in advance of final judgment or the absolute end of the litigation at the district court. See Forgay v. Conrad, 47 U.S. (6 How.) 201, 203–04 (1848) (holding that an order setting aside deeds and directing the defendant to immediately deliver property to the plaintiff was a final, appealable order, even though a final accounting and distribution of funds relevant only to other defendants remained).


21 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) ("The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion on appeal.").
ties and the trial court during the litigation, avoids gaming the system, and ensures that all issues will be consolidated in a single, final appeal. Likewise, it reduces appellate court interference in the district courts’ management of pending litigation. Moreover, it saves enormous costs by preventing interlocutory appeals of alleged errors that later become harmless or moot.

Yet, the final judgment rule also imposes significant hardships. Because trial court errors that otherwise would be dispositive must remain uncorrected until after the litigation, parties victimized by such errors will have to bear the cost of litigating matters to their conclusion before having the opportunity to appeal. In addition, erroneous decisions prior to the entry of final judgment may, as a practical matter, inflict harm that is irreparable or incurable after final judgment. Nevertheless, the Supreme Court has concluded that, in enacting § 1291, Congress made a policy determination that, on

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22 See Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430 (1985) (declaring that the final judgment rule avoids the delay and excessive costs that repeated appellate interruptions would cause); Eisen, 417 U.S. at 170 (stating that the final judgment rule prevents “the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy”); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945) (emphasizing that the final judgment rule is supported by considerations such as avoiding economic waste and delayed justice). It is worth noting that the Supreme Court recognized this underlying purpose—preventing expense and delay—for requiring finality prior to the enactment of § 1291, when the current statute’s predecessor limited appeals to those from “final judgments and decrees.” See Canter v. Am. Ins. Co., 28 U.S. (3 Pet.) 307, 318 (1830) (stating that appeals prior to final judgment would cause great delays and “oppressive expenses”).

23 See Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (“Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system.”); Solimine, supra note 4, at 1168 (“Any other rule potentially undermines the authority and independence of trial judges, who may otherwise exercise their discretion to alter a prior decision, absent an appeal.”).

24 See 15A Wright et al., supra note 6, § 3907 (describing how settlement and other intervening events that moot issues save the time of the appellate courts and parties).

25 See Kruse, supra note 5, at 711–12 (stating that the final judgment rule, despite strong rationales supporting the doctrine, can result in severe hardships).

26 See Martin H. Redish, The Pragmatic Approach to Appealability in the Federal Courts, 75 Colum. L. Rev. 89, 89–92 (1975) (arguing for a more practical approach to finality because strict adherence to the final judgment rule often will preclude review because, by that time, it will be of little or no avail).
balance, the benefits of deferring appeals until after completion of the litigation at the trial level outweigh the costs.\textsuperscript{27}

The final judgment rule is the dominant rule of appellate jurisdiction in the federal courts.\textsuperscript{28} Although there are exceptions to the rule which provide for immediate appeal of orders that do not end the litigation, only a small percentage of all interlocutory orders fall within one of these exceptions.\textsuperscript{29} Thus, the vast majority of such orders are not appealable immediately under the current regime.\textsuperscript{30} Most state court systems apply their own brand of the final judgment rule.\textsuperscript{31} The most notable exception is New York, where, as a practical matter, virtually any trial level decision or order, no matter how early or tentative, is appealable immediately as of right.\textsuperscript{32}

Few have advocated abandoning the final judgment rule.\textsuperscript{33} Indeed, I am not aware of anyone who advocates that Congress adopt an

\textsuperscript{27} See, e.g., Abney v. United States, 431 U.S. 651, 656 (1977) ("[T]here has been a firm congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy."); see also Carson v. Am. Brands Inc., 450 U.S. 79, 84 (1981).

\textsuperscript{28} See Robert J. Martineau, Modern Appellate Practice § 4.1 (1983). Most state court systems have a similar rule. Id. § 4.2.

\textsuperscript{29} See Richard Posner, Federal Courts: Crisis and Reform 72-73 (1985) (discussing a sample of appellate court opinions that indicated that twelve percent of appeals were not appeals after final judgment).

\textsuperscript{30} See Martineau, supra note 28, § 4.3.

\textsuperscript{31} See id. §§ 4.1, 4.10.

\textsuperscript{32} See id. § 4.12 ("New York places virtually no restrictions on the right to appeal."); David Scheffel, Comment, Interlocutory Appeals in New York—Time Has Come for a More Efficient Approach, 16 Pace L. Rev. 607, 615-20 (1996) (describing New York's interlocutory review regime and, in particular, how judicial interpretation of N.Y. C.P.L.R. 5701(a)(2) has resulted in an appeal of right from virtually any interlocutory order); see also N.Y. C.P.L.R. 5701(a)(2)(iv)-(v) (McKinney Supp. 2001) (providing for appeals of right from orders that involve some part of the merits or affect a substantive right).

\textsuperscript{33} See, e.g., Eisenberg & Morrison, supra note 3, at 293, 301-02 (stating that most commentators assume that appeals of right from final judgments will continue to exist and advocating discretionary review only for interlocutory orders). The few commentators that have suggested abandoning the final judgment rule have done so as part of larger proposals to rid the federal courts of all appeals of right. See, e.g., Carleton M. Crick, The Final Judgment as a Basis for Appeal, 41 Yale L.J. 539, 563 (1932) (discussing possible ways to replace the final judgment rule if it is discarded); Harlon L. Dalton, Taking the Right To Appeal (More or Less) Seriously, 95 Yale L.J. 62, 93-96, 106-07 (1985) (concluding that appeal of right should be scrapped and restored in a number of cases). Also, Chief Justice Rehnquist suggested in a 1984 speech that "the time has come to abolish appeal as a matter of right from the district courts" and to move instead to an entirely discretionary system. Judith Resnik, Precluding Appeals, 70 Cornell L. Rev. 603, 605-06 (1985) (quoting then-Chief Justice Rehnquist's Address at the seventy-fifth anniversary of the University of Florida College of Law and Dedication of
appealability regime like New York's. There is general agreement
that, on balance, the policies underlying the final judgment rule jus-
tify the costs it may impose in most cases. The debate focuses in-
stead on the various exceptions to the final judgment rule.

There are several types of exceptions applicable to civil litigation
in the federal courts. They may be judge-made, statutory, or rule-
based, but all allow for immediate appeal of orders that do not end
the litigation before the district court and therefore are not appeala-
ble under the final judgment rule. I categorize these exceptions as
(1) interpretive doctrines, (2) certification exceptions, (3) category-
based exceptions, and (4) review by extraordinary writ.

1. Interpretative Doctrines

Although the final judgment rule generally precludes appeals
prior to the termination of the district court proceedings, the Su-
preme Court has held that a few types of decisions or orders are final
for purposes of § 1291 before the end of the litigation. These various
"interpretive doctrines" reflect the Court's willingness to adopt a prac-
tical interpretation of "final decisions" in a few narrowly confined cir-
cumstances where, as a practical matter, an order or decision
constitutes a final determination even though it does not terminate
the litigation before the district court.

Bruton-Greer Hall (Sept. 15, 1984)). Professor Martineau and others who have advo-
cated significant reforms have strongly criticized such proposals. See, e.g., Martineau,
supra note 3, at 775–76.

The drawbacks [to such a proposal], however, far outweigh the advantages.
First and foremost, the proposal would eliminate the right to appeal a final
judgment. This right has been a basic part of the American judicial process
since colonial times and has been part of the federal judicial system since it
was established in 1789 . . . . To do away with this right other than for the
most compelling reasons cannot be justified.

Id. 34 See, e.g., Martineau, supra note 3, at 771 (recognizing that, although significant
reform is needed, the final judgment rule "has continued in existence because in
most cases it serves the purposes of some or most litigants and prospective litigants,
their lawyers, the trial court, the appellate court, and ultimately the public").

35 Since these doctrines constitute alternative interpretations of § 1291, they are
not technically "exceptions" to that provision or the final judgment rule. See Swint v.
Chambers County Comm'n, 514 U.S. 35, 41–42 (1995) ("The collateral order doc-
trine is best understood not as an exception to the 'final decision' rule laid down by
Congress in § 1291, but as a 'practical construction' of it") (quoting Digital Equip.
Corp. v. Desktop Digital, Inc., 511 U.S. 863, 867 (1994)); Coopers & Lybrand v. Live-
say, 437 U.S. 463, 468 (1978). Nevertheless, for ease of reference, I shall refer to
them as exceptions.
The oldest example of such a doctrine that still receives attention originated in *Forgay v. Conrad*.[36] In this 1848 decision, the Supreme Court held that an order setting aside deeds and directing the immediate delivery of property is a final, appealable order.[37] The Court noted that while the order was not final in the "strict, technical sense of that term," it would give "final" a "more liberal and . . . a more reasonable construction."[38] The order in question had conclusively resolved all issues as to these particular defendants, and the case was only pending to allow the assignee to perform a final accounting and distribution of funds, which would have no effect on the defendants seeking appeal.[39] Moreover, the Court noted that the defendants would face irreparable injury if, while waiting to appeal until after the court confirmed the accounting, the property was taken from their possession and sold.[40]

Today, the *Forgay* doctrine remains viable in theory, although it is almost never used as a basis for appeal and is rarely addressed or even mentioned by the circuit courts.[41] The courts that have recently dis-

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36 47 U.S. (6 How.) 201 (1848).
37 See id. at 203–04. The appellants were defendants in a lawsuit brought by an assignee in bankruptcy for recovery of rents from property allegedly fraudulently conveyed to the defendants by the debtor, Thomas Banks. Id. at 202. The lower court found that the property was fraudulently conveyed and ordered that defendants deliver the property to the assignee/plaintiff. Id. at 203. The court also ordered one of the defendants to pay $11,000 and dismissed all other matters without prejudice, ordering defendants to pay costs. Id. at 202–03. The defendants appealed that portion of the order which required defendants Ann Fogarty and Samuel Forgay to return two lots in the city of New Orleans and "sundry slaves" to the assignee for the benefit of the debtor's creditors. Id. at 203. The Court concluded that the order directing Fogarty and Forgay to return the property to the assignee was final and appealable. Id. at 204.
38 Id. at 203.
39 See id. at 204.
40 See id.
41 See Martineau, supra note 3, at 738–39. (recognizing that the *Forgay* rule is not a major exception to the final judgment rule). Indeed, research has revealed only nineteen federal decisions between October 1995 and October 2000 that have cited *Forgay*. Of these, thirteen did not apply or discuss it. Three circuit courts addressed the possible application of *Forgay* and concluded that the exception did not apply. See Petties v. District of Columbia, 227 F.3d 469, 473 (D.C. Cir. 2000); RMT, Inc. v. BHAT Indus., Inc., No. 98-1573, 1999 LEXIS 5649, at *2 (Fed. Cir. Mar. 1, 1999); Clev. Hair Clinic v. Puig, 104 F.3d 123, 126 (7th Cir. 1997). In only three cases discussing *Forgay* have circuit panels concluded that the exercise of appellate jurisdiction was proper. See Nat'l Am. Ins. Co. v. Centra, Inc., 151 F.3d 780, 785 (8th Cir. 1998); United States v. Davenport, 106 F.3d 1333, 1334 (7th Cir. 1997); OB/GYN Solutions v. Six, 80 F.3d 452, 455 (11th Cir. 1996). However, only one of these panels relied solely on *Forgay* as the basis for appellate jurisdiction. See Davenport, 106 F.3d at 1334–35 (agreeing with
cussed the doctrine tend to oversimplify it, but this is of little practical consequence. In the last five years—since September 1995—only one circuit court has actually relied on Forgay as the sole basis for exercising appellate jurisdiction. Resort to this doctrine is no longer

both parties that it had jurisdiction to hear an appeal under Forgay that the defendant's home be turned over and sold. In the other two cases, there were alternative avenues available for interlocutory review, but the courts utilized Forgay for the proposition that finality was to be given a more flexible or reasonable interpretation. See Nat'l Am. Ins. Co., 151 F.3d at 785; OB/GYN Solutions, 80 F.3d at 455.

42 A few recent circuit opinions have suggested that the doctrine provides for an immediate appeal of an order requiring delivery of property or sale of property prior to final judgment, if that order would subject a party to "irreparable harm." See, e.g., Davenport, 106 F.3d at 1335 ("The doctrine has been judicially shaped to allow the immediate review of orders directing delivery of property where such an order would subject the losing party to irreparable harm."); see also RMT, 1999 U.S. App. LEXIS 5649, at *2 (rejecting the application of Forgay because appellant failed to allege any threat of irreparable harm in connection with payment of attorneys' fees as sanctions); Lawyers Conference Comm., supra note 4, at 33, 36 (suggesting that an immediate appeal is available upon the pre-judgment transfer of property to prevent irreparable harm). The courts' focus on irreparable harm oversimplifies the doctrine. A close reading of Forgay reveals that the threat of irreparable harm was not the sole determining factor leading the Court to conclude that the underlying order was immediately appealable. The Supreme Court also emphasized the fact that, aside from a final accounting by the bankruptcy trustee, nothing remained for the lower court to do. See Forgay, 47 U.S. at 204. While the Court discussed irreparable harm, it did so primarily in its admonishment to the lower courts to refrain from ordering the delivery of property before all issues before it have been resolved. See id. at 205.

Indeed, one year after Forgay, the Court rejected the contention that finality can be found in any order that threatens irreparable injury. See Barnard v. Gibson, 48 U.S. (7 How.) 650, 657–58 (1849). Moreover, in a much more recent case involving a pre-judgment transfer of property and a pending accounting, the Court, relying on Forgay, emphasized the distinctiveness of the property transfer and the unresolved accounting, rather than the threat of irreparable harm in addressing finality for purposes of reviewing a state-court decision pursuant to 28 U.S.C. § 1257. See Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 126 (1945) (concluding that the rationale of the Forgay line of cases is that "a judgment directing immediate delivery of physical property is reviewable and is to be deemed dissociated from a provision for an accounting" and that "such a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled"). Thus, while the Forgay Court discussed the harm resulting from orders requiring turnover of property in circumstances in which the court could wait until all issues have been decided, the threat of irreparable harm should not be viewed as an independently decisive basis for its determination that the order at issue was final in nature. See Forgay, 47 U.S. at 204; cf. 15A WRIGHT ET AL., supra note 6, § 3910, at 310 (discussing the Court's reasoning in Radio Station WOW but warning that it would "be a mistake to extrapolate for appeals within the federal system a test that ignores the element of hardship").

43 See Davenport, 106 F.3d at 1334 (stating that neither party disputed jurisdiction under Forgay); see also supra note 41.
necessary in most circumstances in which it might otherwise apply because there is now easier access to appellate review in the bankruptcy and receivership context, and outside of that context, orders transferring property prior to the entry of judgment are rare.

The Supreme Court established another interpretive doctrine in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, holding that an order staying a federal diversity suit pending the completion of a declaratory judgment action proceeding in state court is a final decision within the meaning of § 1291. The district court had issued the stay because the federal and state actions involved an identical issue of arbitrability. The Supreme Court found that the stay had ensured that there would be no further litigation in federal court because the state court's judgment would have a preclusive effect on any such litigation. Thus, the stay constituted a final, appealable order because Mercury Construction was "effectively out of [federal] court," and the stay order "amount[ed] to a dismissal of the suit."

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44 See 28 U.S.C. §§ 158(d), 1292(a)(2) (1994); see also infra notes 70–76, 85 and accompanying text (discussing these exceptions). Federal Rule of Civil Procedure 54(b) may also provide a vehicle for review in certain contexts in which a party might otherwise have relied on *Forgay* to seek an immediate appeal. See infra notes 77–81 and accompanying text.

45 Indeed, the *Forgay* Court criticized the trial court for issuing such a decree and counseled trial courts to wait until the end of the entire proceeding before ordering the transfer of property. See *Forgay*, 47 U.S. at 205–06.


47 See id. at 9. Moses H. Cone had entered into a contract with Mercury Construction Corporation. Id. at 4. After a dispute over claims under the contract arose, Cone filed a complaint in state court seeking a declaratory judgment that there was no right to arbitration. Id. at 4–5. Mercury responded by filing a complaint in federal court, premised on diversity jurisdiction, seeking an order compelling arbitration. Id. at 7. The district court stayed the federal court action, concluding that the state and federal actions involved the same issue of arbitrability of claims. Id.

48 See id. at 10.

49 See id.

50 Id. After concluding that the stay order is final within the meaning of § 1291, the Court held, in the alternative, that the stay order fit into the *Cohen* exception (or collateral order doctrine) to the final judgment rule. Id. at 11 (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). The Court concluded that the order satisfies all three elements of the doctrine. Id. at 12–13. The court reasoned that the stay "amounts to a refusal to adjudicate on the merits" and therefore is separate from the merits, and, because of the preclusive effect of the state court judgment, would be "entirely unreviewable if not appealed now." Id. at 12. After questioning why the district court chose to stay the case rather than dismiss it, the Court also concluded that the "practical effect of his order was entirely the same [as a dismissal]" and, thus, is sufficiently final to satisfy the other prong of the doctrine. See id. at 13. Because the
The *Moses H. Cone* Court carefully circumscribed the rule to apply only to stay orders that put a party effectively and permanently out of federal court\(^5\)—where "the object of the stay is to require all or an essential part of the federal suit to be litigated in a state forum."\(^6\) Given the narrowness of the doctrine, circuit courts rarely have applied or even discussed it.\(^7\) Recently, however, the Supreme Court recognized a limited extension of the doctrine, relying on *Moses H. Cone* for the proposition that an abstention-based remand order—which the Court found to be the functional equivalent of an abstention-based stay order—is a final decision under § 1291.\(^8\)

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\(^5\) See id. at 10 n.11.

\(^6\) Id. In addition, the Court distinguished this case from those invoking the "death knell" doctrine, an interpretive doctrine the Court rejected in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469-70 (1978). See id. The Court distinguished the likely, practical effect of ending the suit that is the basis of the death knell doctrine from the "legal effect" that the stay order in this case had on the plaintiff's right to proceed. See id. The Court concluded by noting that it holds "only that a stay order is final when the sole purpose and effect of the stay are precisely to surrender jurisdiction of a federal suit to a state court." Id.

In a later case, the Court refused to extend the reasoning in *Moses H. Cone* to circumstances in which a district court denies a motion to stay or dismiss a federal action on abstention grounds while a similar suit is pending in state court. See *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277-78 (1988). Focusing on the requirements of the collateral order doctrine (the alternative basis for appeal in *Moses H. Cone*), the Court concluded in *Gulfstream Aerospace* that such a denial is "inherently tentative" and therefore cannot be appealed immediately because it does not conclusively resolve the disputed question. Id.

\(^7\) While *Moses H. Cone* has been cited over 3000 times, online research conducted through October 2000 reveals fewer than seventy published and unpublished decisions that have addressed its rule regarding appealability. See Martineau, *supra* note 3, at 743 (stating that this doctrine is a narrow exception of limited applicability).

\(^8\) See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711-15 (1996). The Supreme Court affirmed the circuit court's conclusion that an abstention-based remand order is appealable under § 1291. See id. at 715. The Court first reiterated that a decision is generally appealable under § 1291 only "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Id. at 712 (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). However, the Court then stated that "the application of these principles to the appealability of the remand order before [it] is controlled by [the Court's] decision in [*Moses H. Cone.*]" Id. After a review of both bases for appealability in *Moses H. Cone*, the Court concluded that the district court's remand order based on *Burford* abstention is "in all relevant respects indistinguishable from the stay order . . . appealable in *Moses H. Cone.*" Id. at 713-14. The Court also distinguished the remand order at issue from other, unappealable remand orders—such as those that remand based on a lack of subject matter jurisdiction—governed by 28 U.S.C. § 1447(d) (1994). See id. at 711-12.
In other contexts, the Court has held that a few types of orders are "final decisions" under § 1291 prior to final judgment. For example, certain contempt orders—which may arise out of ongoing civil litigation—are "final decisions" because contempt proceedings are sufficiently independent from the underlying action and result in sanctions that require immediate review.\(^5\) Likewise, the "Perlman doctrine" allows a third-party intervenor claiming privilege to appeal immediately from an order enforcing a subpoena for the information

\(^5\) Federal courts distinguish between civil contempt orders issued against parties and all other contempt orders; the latter are appealable immediately, the former are not. See, e.g., Hicks v. Feiock, 485 U.S. 624, 631–35 (1988) (distinguishing civil from criminal contempt orders); Shillitani v. United States, 384 U.S. 364, 368–70 (1966) (distinguishing civil from criminal contempt orders); 15B Wright et al., supra note 6, § 3917 (explaining the rules governing the appeal of contempt orders). The categorization of civil or criminal contempt hinges upon the "character and purpose" of the sanction imposed. See Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911). A contempt order is civil in nature when the sanction is remedial or intended to coerce the contemnor to do what she has refused to do. See id. at 442. In contrast, if the sanctions imposed are punitive—designed to punish a past wrong—rather than coercive, the order is criminal in nature. See id. at 442–43.

All contempt orders are immediately appealable final decisions except civil contempt orders issued to parties in the pending proceeding. See Appeal of Licht & Semonoff, 796 F.2d 564, 568 (1st Cir. 1986) ("A nonparty witness may refuse to comply with a discovery order, be held in contempt, and then appeal the contempt order, which is considered a ‘final judgment’ under Section 1291. A party, however, may appeal only an order of criminal contempt before final judgment, not one of civil contempt.") (citations omitted). Criminal contempt orders are appealable immediately because they are the result of criminal proceedings separate from the original, underlying civil proceeding and impose a punishment for a past wrong that cannot be corrected later. See Petroleos Mexicanos v. Crawford Enter., Inc., 826 F.2d 392, 398 (5th Cir. 1987). Nonparties may appeal from civil contempt orders because such orders conclusively resolve the issue with regard to the nonparty, the contempt proceeding against the nonparty is sufficiently separate from the merits of the underlying dispute between the parties, and the nonparty will not have access to appeal after final resolution of the main proceeding. See U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 76–77 (1988); Lawyers Conference Comm., supra note 4, at 37 ("Contempt orders against nonparties, whether civil or criminal, are regarded as final and immediately appealable."). Courts do not permit parties to a pending action to appeal immediately a civil contempt order for two reasons. First, parties have the opportunity to appeal a civil contempt citation after the final decision. See IBM Corp. v. United States, 493 F.2d 112, 114–15 (2d Cir. 1974). In addition, a civil contempt penalty against a party is closely related to the underlying action. See id. The courts' characterization and disparate treatment of different kinds of contempt orders has been the subject of some criticism. See, e.g., Joan Meier, The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests, 70 Wash. U. L.Q. 85, 93–99 (1992).
against another party, because the intervenor has no other means to prevent such discovery.\textsuperscript{56}

The Supreme Court also has recognized that an order ending the litigation on the merits is appealable immediately, even though a collateral issue—such as the award of attorneys’ fees or the taxing of costs—remains unresolved, as long as the resolution of that issue would not moot or otherwise revise the decisions embodied in the order.\textsuperscript{57} The Court most recently traced the history of this doctrine in \textit{Budinich v. Becton Dickinson & Co.},\textsuperscript{58} in which it held that the district court’s decision on the merits was a “final decision” under § 1291, even though the plaintiff’s request for attorneys’ fees had not yet been decided.\textsuperscript{59} At first blush, this doctrine does not seem to contradict the

\textsuperscript{56} See generally Perlman v. United States, 247 U.S. 7 (1918). In \textit{Perlman}, the Court reasoned that the third party’s ability to protect his rights would be thwarted if he could not appeal immediately. \textit{Id.} at 13. The cases since \textit{Perlman} have identified two reasons for allowing such interlocutory appeals. First, courts have stated that interlocutory appeals are appropriate in these circumstances because a later appeal is impossible; a court order that forces someone to testify or produce evidence is “effectively final” with respect to another nonparty (the intervenor claiming privilege) who is otherwise powerless to prevent compliance with the order. See, e.g., Cobbleduck v. United States, 309 U.S. 323, 328–29 (1940) (stating that efficiency concerns must not outweigh the ability to appeal a final order); \textit{In re Grand Jury Subpoenas}, 123 F.3d 695, 696–97 (1st Cir. 1997) (stating that the \textit{Perlman} doctrine exists to protect the rights of appeal of otherwise powerless parties). For example, the intervenor cannot force the other party to resist discovery through risking contempt. See \textit{id.} at 697. Second, courts have made clear that permitting immediate appeal under the \textit{Perlman} doctrine is appropriate because the intervenor’s motion is a “collateral matter” and is “distinct from the general subject of the litigation.” See \textit{Cogen v. United States}, 278 U.S. 221, 222–23 (1929); see also United States v. Hubbard, 650 F.2d 293, 309 (D.C. Cir. 1980).


\textsuperscript{58} See \textit{id.}

\textsuperscript{59} See \textit{id.} at 199–200 (“A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order. We have all but held that an attorney’s fees determination fits this description.”) (citations omitted). The Court held that attorneys’ fees are not part of the merits of the action to which they pertain because an award of fees does not remedy the injury giving rise to the action. See \textit{id.} at 200. The Court recognized, however, that there may be circumstances in which the underlying substantive law makes plain that fees are to be part of the merits judgment. See \textit{id.} at 201. Nevertheless, the Court adopted a bright-line rule—to create operational consistency and aid in the smooth functioning of the judicial system—that particular fee awards are not to be viewed as part of the merits. See \textit{id.} at 202–03. This latter holding in \textit{Budinich} (the Court’s categorization of all attorneys’ fees awards as collateral from the merits) has been the subject of some critical commentary. See, e.g., Martineau, supra note 3, at 744–45 (criticizing the Court’s “arbitrary abandonment” of its previous efforts to classify attorneys’ fee requests and awards).
final judgment rule, since courts often enter judgment following a verdict and before performing certain other tasks, such as taxing costs. Nevertheless, the recognition of finality in this circumstance is properly characterized as an exception to the final judgment rule in its strictest form, because it allows an appeal while the district court retains unfinished business beyond the mere execution of the judgment. Although this "full resolution of the merits doctrine" remains a viable exception, its direct effect in the attorneys' fees context has been somewhat limited by recent changes to the Federal Rules of Civil and Appellate Procedure.60

The interpretive doctrine that has produced the most litigation is the "collateral order doctrine," or "Cohen rule." The Supreme Court first recognized this doctrine in Cohen v. Beneficial Industrial Loan Corp.61 In that case, the Court found that a district court's denial of a defendant's motion to require a plaintiff to give security for reasonable expenses was appealable immediately as a "final" order under § 1291, even though it did not end the litigation before the trial court.62 Subsequent Supreme Court decisions have parsed the Cohen rule, articulating three criteria to satisfy the doctrine. An order that does not end the litigation below is nevertheless appealable as a collateral order if it: (1) conclusively determines the issue and is not subject to revision; (2) resolves an important issue completely separate from

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60 See Fed. R. App. P. 4(a)(4)(iii); Fed. R. Civ. P. 54(d); Fed. R. Civ. P. 58 (1993 amendments). Rule 54(d)(2) now provides that, unless the substantive law clearly provides for the recovery of attorneys' fees and related nontaxable expenses as damages in the action, parties must seek such fees and expenses via motion filed and served no later than fourteen days after the entry of judgment. Under Rule 58, the district court shall enter judgment upon a verdict, or upon another decision of the court that denies all relief or awards a sum certain or other specified relief to parties seeking it. The entry of judgment "shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees," but the court is permitted to order that a timely motion for the award of attorneys' fees under Rule 54(d)(2) has the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59 (for a new trial or to amend the judgment). Such an order tolls the time for appeal of the judgment until after the motion for attorneys' fees or related costs is decided. See 19 Moore et al., supra note 16, § 202.02.

61 337 U.S. 541 (1949).

62 See id. at 545–47. The Court reasoned as follows:

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.

Id. at 546.
the merits of the action; and (3) is effectively unreviewable after appeal from the final judgment. If these three requirements are satisfied, the order is “final” for purposes of § 1291, and the circuit courts may not deny review of the matter. Although the Supreme Court has addressed the collateral order doctrine many times in the last twenty-five years, it has found that it applies to only a few types of orders in civil matters. It has rejected its application in a far greater variety of circumstances.

63 See Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). The doctrine does not allow appeal of even conclusively resolved decisions that are related to an ongoing controversy over the merits, or in other words, are but mere “steps towards final judgment in which [such decisions] will merge.” See Cohen, 337 U.S. at 546.

64 See Coopers & Lybrand, 437 U.S. at 468. Thus, for example, the Supreme Court concluded (in the criminal context) that a pre-trial order denying a motion to dismiss an indictment on double jeopardy grounds is immediately appealable because it satisfies the first two prongs of the doctrine—it is a final decision addressing an important issue separate from the merits of the action—and satisfies the third prong because the very protection the clause affords would be irretrievably lost if the case were allowed to proceed to trial. See Abney v. United States, 431 U.S. 651, 659–60 (1977). In contrast, the Court held that an order denying a motion for class certification is not immediately appealable under the collateral order doctrine because it fails all three prongs: a certification decision is always subject to revision and therefore is not final; it is inherently tied to the merits because it is “enmeshed in the factual and legal issues comprising the plaintiff’s cause of action,” and such an order is subject to effective review following final judgment. See Coopers & Lybrand, 437 U.S. at 469 (quoting Mercantile Nat’l Bank v. Langdeau, 371 U.S. 555, 558 (1963)).

65 See, e.g., P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993) (applying doctrine to order denying motion to dismiss state agency based on Eleventh Amendment immunity); Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (applying doctrine to order denying qualified immunity defense advanced by a state official in a civil rights action); Nixon v. Fitzgerald, 457 U.S. 751, 742–43 (1982) (applying doctrine to order denying defense of absolute immunity in civil rights action); Helstoki v. Meanor, 442 U.S. 500, 506–07 (1979) (applying doctrine to order denying the guarantees of the speech or debate clause); Nat’l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43, 44 (1977) (applying doctrine to order denying stay of injunction prohibiting Nazi party from marching in Skokie). The Court also found that the collateral order doctrine was satisfied in Moses H. Cone, although as an alternative basis for appeal. See supra note 50. In Quackenbush, the Court likewise analyzed appealability under the collateral order doctrine, although essentially held that it would allow an appeal of an abstention based remand order because of the holding in Moses H. Cone. See supra note 54 and accompanying text.

Finally, in the 1960s and 1970s, several circuit courts recognized another, potentially expansive interpretive doctrine known as the "death knell doctrine." They determined that immediate review is appropriate when an interlocutory order would have the practical effect of terminating the litigation. In 1978, however, the Supreme Court rejected this doctrine, declaring that "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." Thus, the death knell doctrine is undeniably dead.


See, e.g., Hooley v. Red Carpet Corp. of Am., 549 F.2d 643, 644–46 (9th Cir. 1977); Ott v. Speedwriting Pub'l Co., 518 F.2d 1143, 1149 (6th Cir. 1975); Hartmann v. Scott, 488 F. 2d 1215, 1223 (8th Cir. 1973); Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 121 (2d Cir. 1966).

See Eisen, 370 F.2d at 121. The court stated that "where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed." Id. For example, the Second Circuit held that a denial of class action certification is appealable because, in the absence of class treatment, no lawyer would undertake such a costly case, and thus, the denial spelled the death knell for the action. See id. For a detailed discussion of the history of the death knell doctrine, see 15A Wright et al., supra note 6, § 3912.

Coopers & Lybrand, 437 U.S. at 477. The Court indicated that the death knell doctrine defies congressional intent by vesting in appellate courts the discretion to permit interlocutory appeals under § 1291. See id. at 474. It further stated that such an approach to finality is inappropriate because it "reduced the finality requirement of § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal." Richardson-Merrell, 472 U.S. at 439 (describing the thrust of the Court's ruling in Coopers & Lybrand). For further discussion of the circuits' use of the death knell doctrine in the context of class certification decisions, see Michael E. Solimine & Christine Oliver Hines, Deciding To Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f), 41 WM. & MARY L. REV. 1531, 1552–54 (2000).
2. Certification Exceptions

The second type of exception to the final judgment rule provides for immediate review of otherwise unappealable decisions when the district court certifies an appeal. Currently, the two such "certification exceptions" are embodied in 28 U.S.C. § 1292(b) and Rule 54(b) of the Federal Rules of Civil Procedure.\(^70\)

Section 1292(b) provides that a district court judge may certify an appeal from orders in civil actions not otherwise appealable under § 1292, provided that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and the judge finds that an immediate appeal may "materially advance the ultimate termination of the litigation."\(^71\) District courts exercise broad (but not unlimited) discretion in determining whether certification under § 1292(b) is appropriate.\(^72\) However, even if the district court grants certification, the appellate court must decide whether to accept review.\(^73\) The statute sets no standards to guide the appellate court's exercise of this discretion, although some circuits have held that review should be granted only in big or exceptional cases.\(^74\)

Predictably, parties face a significant hurdle in convincing a district court judge that a decision should be reviewed immediately, and thus, judges rarely grant certification under this provision.\(^75\) Actual

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\(^70\) Rule 54(b) does not use the term "certification," but I include it in this category because, like § 1292(b), Rule 54(b) requires a party to receive permission from the district court before seeking appellate review of an order.


\(^72\) There is some dispute in the circuits over the scope of the first and third elements of this exception. See Solimine, supra note 4, at 1172–73. For example, the circuits disagree whether an order can "involve a 'controlling question of law'" if its disposition would not lead to reversal of a final judgment on appeal. Id. at 1172 & nn.45–46 (discussing cases). The more significant dispute between the circuits, discussed below, involves whether certification under this provision should be reserved only for big or exceptional cases. See id. at 1172–74, 1193–96.

\(^73\) The courts of appeals have absolute discretion to decide whether to accept an appeal under § 1292(b). See Coopers & Lybrand, 437 U.S. at 475. Their refusal thus may be for any reason, including docket congestion concerns. See id.

\(^74\) See, e.g., Milbert v. Bison Lab., Inc., 260 F.2d 431, 433 (3d Cir. 1958) (stating that Congress intended § 1292(b) to be used rarely, and thus, review should be granted only in exceptional cases); see also Solimine, supra note 4, at 1172–74 (describing the narrow construction some circuit courts have given this exception). Professor Solimine criticizes those circuits that have placed this judicial gloss on the statute, without basis in his view, and advocates greater utilization of this exception. Id. at 1193–96.

\(^75\) See Kruse, supra note 5, at 717–18 (stating that trial court "veto power" has severely limited the potential effectiveness of this section as a "safety valve from the rigors of the final judgment rule"); see also Redish, supra note 26, at 108–09 (same);
appeals are even rarer, because the appellate courts refuse to accept review of a significant percentage of certified orders.\textsuperscript{76}

Rule 54(b) provides the other basis for a district court to permit an immediate appeal of an otherwise unappealable interlocutory order. Rule 54(b) was adopted to address the potential for unnecessary delay for parties who have received a final adjudication on some or all of their claim(s) in multiple claim and multiple party actions, while other, unresolved claims proceed to final judgment.\textsuperscript{77} The rule therefore provides that, when more than one claim or more than one party is involved in an action, the district court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties, upon the "'express determination that there is no just reason for delay' and 'an express direction for the entry of judgment.'"\textsuperscript{78}

Unlike § 1292(b), the appellate court does not have the discretion to deny review of a Rule 54(b) appeal. It will review for abuse of discretion the district court's order to determine whether there was

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\textsuperscript{76} See Solimine, supra note 4, at 1173–74 ("Perhaps the most telling characteristic of section 1292(b) appeals, however, is how few certified appeals are accepted by the circuit courts."); see also Martineau, supra note 3, at 733 (stating that, because this section requires permission by both the district and circuit courts, it is the most limited of the exceptions to the final judgment rule). Professor Solimine summarized some of the data that has been collected on the use of § 1292(b) by district and circuit courts as follows:

During the 1960s, it was reported that approximately 53% of over 1000 applications were accepted. These figures average out to be roughly fifty acceptances per year. More recent data presents an even more chary attitude by appellate courts . . . . [W]hile the number of applications filed in the appellate courts has increased three-fold since the 1960s, the number of acceptances (i.e., the number transferred to the regular appellate docket) has less than doubled. In the 1980s, the acceptance rate has been about 35%. The number of acceptances represents about 0.3% of the appeals terminated on the merits.

Solimine, supra note 4, at 1174 (footnotes and citations omitted).

\textsuperscript{77} See Martineau, supra note 28, § 4.5 (stating that the rule was promulgated to avoid confusion and potential hardship to the litigant whose claims have been resolved early in a complex case).

\textsuperscript{78} Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 435 (1956). In Sears, the Supreme Court confirmed that this rule does not violate § 1291 because it "merely administers that requirement in a practical manner in multiple claims actions and does so by rule instead of judicial decision." Id. at 438. The Court further noted that the Federal Rules of Civil Procedure provide for more liberal joinder of parties and claims than had previously existed, and Rule 54(b) merely addresses that situation rather than altering the historical requirement of finality in the traditional, single claim context. See id. at 432–33.
no just reason to delay the appeal and review de novo whether multiple claims are presented. The Supreme Court has made clear that as long as dismissed counts are capable of being decided independently from the remaining counts in the case, they are appealable, even if they are based on facts underlying the remaining counts. As with § 1292(b), permission to appeal immediately under Rule 54(b) is rarely granted by district courts.

3. Category-Based Exceptions

The third type of exception to the final judgment rule includes statutes or rules of procedure that provide for immediate review of particular categories of orders. Some categories address certain substantive areas of the law, while others are transubstantive, premised instead on the type of remedy or relief embodied in the order.

Section 1292(a) contains the most prominent examples of category-based exceptions. Subsection 1292(a)(1) authorizes interlocutory appeals from orders “granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.” Subsection (a)(2) provides for immediate appeal of orders “appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof.” Finally, orders or decrees in admiralty proceedings that determine “the rights and liabilities of the parties” are appealable immediately under subsection (a)(3).

Other statutes provide for review of categories of interlocutory orders. For example, certain bankruptcy orders are immediately appealable under 28 U.S.C. § 158(d). In addition, orders denying

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79 See Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 (1976), for a general discussion of the distinction between § 1292(b) and Rule 54(b).
80 See Sears, 351 U.S. at 427.
81 Indeed, the Supreme Court suggested that Rule 54(b) certifications should be infrequent, noting that “sound judicial administration does not require that Rule 54(b) requests be granted routinely.” Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 10 (1980).
84 Id. § 1292(a)(3).
85 Appellate jurisdiction over appeals from bankruptcy courts is conferred upon the district court or a bankruptcy appellate panel by 28 U.S.C. § 158(d) (1994). The statute provides that the “courts of appeals shall have jurisdiction of appeals from all
(but not granting) motions to compel arbitration are appealable under § 16 of the Federal Arbitration Act.\textsuperscript{86}

Finally, Rule 23(f) of the Federal Rules of Civil Procedure is the newest category-based exception to the final judgment rule. It provides for discretionary review of a discrete category of interlocutory orders: orders granting or denying class certification motions. As discussed previously, the circuit courts' sole and unfettered discretion to accept or deny review makes Rule 23(f) unique among the existing exceptions.\textsuperscript{87}
4. Review by Extraordinary Writ

The fourth exception to the final judgment rule is review by extraordinary writ. The federal appellate courts derive their authority to issue extraordinary writs from the All Writs Act. Today, the same standards govern the two primary writs—mandamus and prohibition—and the circuit courts rarely use the term prohibition alone. As a technical matter, these writs provide a means of review that is not an "appeal," but rather an original proceeding a petitioner brings in the appellate court seeking a directive to the trial judge to enter or vacate a particular order.

The Supreme Court has made clear that such authority shall be used only in "extraordinary circumstances." The two requirements for issuance of a writ of mandamus are: (1) a showing that the petitioner has no other adequate means to obtain the relief sought; and (2) a showing that petitioner's right to the writ is "clear and indisputable." The circuit court articulations of what constitutes a "clear and indisputable" right to the writ vary to some degree, but virtually all suggest that some blatant or unconscionable misstep by the district court is needed. For example, some circuits have echoed the Supreme Court's admonition that the district court's order must have so far exceeded the proper bounds of judicial discretion as to be "legiti-
mately considered usurpative in nature."\textsuperscript{94} Other courts have held that some shocking abuse of discretion, exercise of power in excess of jurisdiction, or other outrageous behavior by the trial court is needed to grant the writ.\textsuperscript{95} Only the Ninth Circuit consistently articulates a standard that suggests something less than exceptional circumstances may be sufficient to justify issuing the writ.\textsuperscript{96} In practice, however, the Ninth Circuit rarely finds that the writ is justified.\textsuperscript{97}

Because of the variety of circumstances in which extraordinary relief may be needed, and because issuance of the writ depends substantially on the particulars of each case, the governing standards defy

\textsuperscript{94} \textit{In re} Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1295 (7th Cir. 1995); see also \textit{In re} Pearson, 990 F.2d 653, 656 (1st Cir. 1993); \textit{In re} Int'l Precious Metals Corp., 917 F.2d 792, 793 (4th Cir. 1990).

\textsuperscript{95} See, e.g., \textit{In re} Chambers Dev. Co., 148 F.3d 214, 223 (3d Cir. 1998) ("The writ of mandamus is a drastic remedy that a court should grant only in extraordinary circumstances in response to an act amounting to a judicial usurpation of power."); \textit{In re} Sealed Case No. 98-5062, 141 F.3d 337, 339 (D.C. Cir. 1998) (granting the writ where district court acted beyond its authority to transfer case); \textit{Williams-El v. Hawk}, No. 94-5341, 1996 U.S. App. LEXIS 14217, at *1 (D.C. Cir. Apr. 17, 1996) (issuing the writ where district court was without authority to transfer claims to Superior Court); Boughton v. Cotter Corp., 10 F.3d 746, 751 (10th Cir. 1993) (stating that exercise of the writ is appropriate "only in exceptional circumstances to correct 'a clear abuse of discretion, an abdication of judicial function, or the usurpation of judicial power'") (quoting \textit{Paramount Film Distrib. Corp. v. Civic Ctr. Theatre}, Inc., 333 F.2d 358, 361 (10th Cir. 1964))).

\textsuperscript{96} In \textit{Bauman v. United States District Court}, the Ninth Circuit set forth five factors to consider in determining whether mandamus jurisdiction is proper: (1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems, or issues of law of first impression. 557 F.2d 650, 654–55 (9th Cir. 1977). One commentator has argued that the factors set forth in \textit{Bauman} do not reflect the Supreme Court's holding in \textit{Wills} that mandamus should not be employed as a substitute for appeal. \textit{See} \textit{Kruse}, supra note 5, at 723. He notes that the Sixth and Eleventh Circuits have applied the \textit{Bauman} test and issued writs of mandamus to overturn class certification orders. \textit{Id.} at 724–27 (discussing \textit{In re Bendectin Prods. Liab. Litig.}, 749 F.2d 300 (6th Cir. 1984); and \textit{In re Temple}, 851 F.2d 1269 (11th Cir. 1988)). Nevertheless, the other circuits generally articulate far more stringent standards.

\textsuperscript{97} A review of published and unpublished cases available on Lexis and Westlaw indicates that, in a recent years, the Ninth Circuit has issued the writ on average about twice a year. \textit{See infra} notes 164–69 (listing all cases from September 17, 1995 to October 1, 2000 in which the circuit courts have issued the writ).
Nevertheless, circuit courts do not retain unfettered discretion to decide whether to issue the writ. The Supreme Court can review an issuance or refusal to issue for abuse of discretion and has overturned circuit court decisions in both circumstances.

B. Clear Rules, Little Collateral Litigation

Perhaps cognizant of the constant criticism, the Supreme Court recognized over a decade ago the need for predictability and limiting principles in its finality jurisprudence. Today, contrary to common belief, the existing exceptions are relatively clear and easy for federal courts and litigants to understand and apply. They therefore produce little controversy or collateral litigation in the circuit courts.

A number of the exceptions are so unambiguously narrow, or so rarely utilized, that they cause few application problems. Among these are the Forgay, Moses H. Cone, and Perlman doctrines. Section 1292(b) also produces few appeals and minimal litigation at

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98 See Solimine & Hines, supra note 69, at 1570–72 (stating that mandamus is governed by standards, and standards require intense factual inquiries and cannot be stated with precision).


100 See Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202 (1988) (stating that the application of § 1291 should be consistent and uniform); see also Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 292 (1988) (Scalia, J., concurring) ("I do think . . . that our finality jurisprudence is sorely in need of further limiting principles."). In Budinich, the Court elaborated: "The time of appealability, having jurisdictional consequences, should above all be clear . . . . Courts and litigants are best served by the bright-line rule . . . ." Budinich, 486 U.S. at 202.

101 See supra notes 40–44 and accompanying text (explaining that the Forgay doctrine is exceedingly narrow because orders transferring property prior to final judgment usually are otherwise appealable). Although it has little practical significance, Forgay still receives more than its share of critical commentary, perhaps because it is viewed as the case that planted the seeds for more troublesome interpretive doctrines, like the collateral order doctrine. The Supreme Court and circuit courts have misapplied and misused the Supreme Court’s language in Forgay, including the Court’s occasional suggestion that it would apply a "practical interpretation" of final decision to address "irreparable harm." See, e.g., Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152–53 (1964) (relying on Forgay as it adopted a balancing of hardships approach in determining whether an order that did not end the litigation on the merits was final). As I discuss in the next subpart, Forgay, properly construed, is even more narrow and should apply only when there is a pre-judgment transfer of property that effectively ends the litigation on the merits (at least as to the victimized party in question). See discussion supra note 42; see also Forgay v. Conrad, 47 U.S. (6 How.) 201, 204 (1848) (finding finality in the context of an order that transferred property and resolved all of the issues as to the particular defendant and left for the court only the ministerial
the circuit level because district court judges are hesitant to certify appeals, and circuit courts have discretion to deny review and often do, without comment. Similarly, district courts rarely grant Rule 54(b) severance, and once granted, severance is rarely disputed at the circuit level.

Other exceptions with somewhat greater potential application similarly provide clear guidance and produce limited collateral litigation. These include the exception for certain contempt orders, task of readjusting accounts of other parties). Nevertheless, Forgay, as currently understood and applied, creates almost no interpretive problems or litigation.

102 See supra note 53 and accompanying text (describing how rarely applied this doctrine is and how little it is cited as a potential source of appellate jurisdiction). In practice, this doctrine has proven to be both narrow and relatively easy to apply.

103 See supra note 56 and accompanying text. Some commentators have criticized the Perlman doctrine’s lack of clarity. See, e.g., Michael R. Lazerwitz, Comment, The Perlman Exception: Limitations Required by the Final Decision Rule, 49 U. Chi. L. Rev. 798, 802–05 (1982) (arguing, for example, that the doctrine is unclear because the Court has not resolved whether it applies only to constitutional privileges or all claims of privilege). In practice, however, the doctrine confined narrowly to the circumstance in which a third-party intervenor seeks to prevent discovery aimed at another based on some claim of privilege. Because the circumstances giving rise to the doctrine are rare, it rarely produces litigation or controversy.

104 See supra notes 75–76 and accompanying text (indicating that although there are a few differences among the circuit courts with regard to the standards governing certification, the number of appeals under § 1292(b) is minute). Of course, the certification and petition processes themselves impose some burden on the parties and courts.

I agree with Professor Solimine that the circuit courts should grant review under § 1292(b) more often, and that the certain circuit courts that will grant review only in exceptional or big cases are limiting the doctrine inappropriately. See supra note 74 and accompanying text. Moreover, the three standards set forth in the rule have not been defined with precision. See Solimine, supra note 4, at 1192. Nevertheless, administering the rule consumes little of the circuit courts’ time.

105 See supra note 78 and accompanying text. The lack of circuit level review of Rule 54(b) certifications is likely due to the deferential standard set forth by the Court in Curtis-Wright Corp. v. General Electric Co., 446 U.S. 1, 10 (1980). The Court concluded as follows:

[T]he discretionary judgment of the district court should be given substantial deference, for that court is “the one most likely to be familiar with the case and with any justifiable reasons for delay.” The reviewing court should disturb the trial court’s assessment of the equities only if it can say that the judge’s conclusion was clearly unreasonable.

Id. (quoting Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437 (1956) (citation omitted)). While some have criticized the Supreme Court’s reasoning in Sears—affirming that the rule does not conflict with the final judgment rule—the rule itself spawns little controversy or litigation.

106 See supra note 55 and accompanying text. There is little litigation over the issue of appealability of such orders because the basic rules are clear. Nonparties can
§ 16 of the Federal Arbitration Act,107 and the "full resolution of the merits" doctrine.108

Still other exceptions initially created interpretation problems that are now largely resolved. For example, there remain few disputes over which types of orders qualify as orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions" under § 1292(a)(1). The Supreme Court has construed this category strictly; for instance, temporary restraining orders are not "injunctions" under this section.109 In addition, preliminary orders that are not expressly injunctive, but which produce potentially injunctive effects, are appealable only if they relate to the merits of the action and will inflict serious harm that is preventable only by immediate appeal.110 While the circuit courts occasionally appeal contempt orders issued against them, whether civil or criminal; parties may only immediately appeal criminal contempt sanctions. While the finer distinctions between civil and criminal contempt may not be entirely clear, it is an issue that is litigated rarely. Moreover, in its recent decision in Cunningham v. Hamilton County, the Supreme Court indicated that it will not extend the exception for contempt orders to non-contempt sanctions, such as discovery sanctions under Rule 37(a). 527 U.S. 198, 204–10 (1999).


108 See supra note 60 and accompanying text. Indeed, the Court's central aim in Budinich was to create a "bright-line rule" that attorneys' fee awards are distinct from the merits, and therefore, a full resolution of the merits of the controversy prior to the award of fees is immediately appealable. See Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202–03 (1988). As discussed previously, changes to the Rules of Civil and Appellate Procedure allow district courts some flexibility in determining whether the judgment on the merits and an award of attorneys' fees should be consolidated for purposes of appeal. See supra note 60 and accompanying text.

109 See Martineau, supra note 28, § 4.4, at 50–51; see also Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981) (stating that § 1292(a)(1) is intended to carve out a very narrow exception to the final judgment rule).

110 See Carson, 450 U.S. at 84–85 (holding that an order that has the "practical effect" of an injunction may be appealed pursuant to § 1292(a)(1) only if it relates to the merits of the action and has "serious, perhaps irreparable consequence[s]" effectively challenged only by immediate appeal); Switz. Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23, 25 (1966) (holding that an order denying plaintiff's summary judgment motion in an action seeking a permanent injunction is not appealable under § 1292(a)(1) because the order merely decided that there were unresolved issues of fact and therefore related to procedural matters not touching on or deciding the merits of the claim). Because Carson focuses on the limited application of § 1292(a)(1), a few courts have questioned whether the requirements of Carson apply to orders that explicitly grant, deny, or modify injunctions, in addition to those with the practical effect of an injunction. See, e.g., Sherri A.D. v. Kirby, 975 F.2d 193, 195 (5th Cir. 1992); United States v. Bayshore Assocs., 934 F.2d 1391, 1396 (6th Cir. 1991). Nevertheless, these and other circuit courts have confirmed that the standards enunciated in Carson do not apply to orders that explicitly address motions for pre-
must address issues of interpretation, these disputes occur around the margins; the vast majority of the time, whether an order is appealable under § 1292(a)(1) is not genuinely disputed.\textsuperscript{111}

Among the exceptions to the final judgment rule, the collateral order doctrine and mandamus review have had the most troubled history. The circuit courts and, at times, the Supreme Court, have treated the collateral order doctrine and mandamus review unevenly and twisted them in ways that defy recognition. Nevertheless, in recent years, courts, and in particular the Supreme Court, have brought order and predictability to these doctrines. Today, these exceptions are governed by clear rules or standards and do not produce excessive litigation on the issue of appealability.

1. The Collateral Order Doctrine

The collateral order doctrine is the most maligned of the exceptions.\textsuperscript{112} Indeed, in its 1990 report to Congress, the Federal Courts

\textsuperscript{111} For example, while there is no easily articulated formula for which orders that are not facially injunctive have the "practical effect" of injunction under Carson, decisions illuminate the distinction. Compare United States v. Brown, 218 F.3d 415, 422 & n.7 (5th Cir. 2000) (holding that a "gag order" restricting extrajudicial discussion of a case involving the State Commissioner of Insurance in Louisiana did not have the "practical effect" of an injunction because it in no way addresses the merits of the case), with Consol. Edison Co. v. United States, No. 99-6239, 2000 U.S. App. LEXIS 9967, at *5 (2d Cir. May 11, 2000) (concluding that an order denying discovery does not have the "practical effect" of an injunction because it does not grant or withhold substantive relief), and United States ex rel. Rahman v. Oncology Assocs., 201 F.3d 277, 283 (4th Cir. 1999) (declaring that a writ of mandamus directing insurance carriers to make overpayment determinations had the "practical effect" of an injunction because the order released funds to defendants who were accused of disposing of assets previously). Besides these types of cases on the outer edges, this exception creates little collateral litigation on the issue of appealability.

112 Many commentators have contended that the collateral order doctrine is unclear and its application unpredictable. See, e.g., Anderson, supra note 4, at 548–606 (describing in detail the history of, and problems with, the collateral order doctrine); Eisenberg & Morrison, supra note 3, at 286 (pointing to the collateral order doctrine as the reason the federal courts' finality jurisprudence is not working well); Martineau, supra note 3, at 773–74; Solimine, supra note 4, at 1187–88; Nagel, supra note 4, at 208–09 (contending that the collateral order doctrine has been applied inconsistently and produced mixed results); see also Solimine & Hines, supra note 69, at 1549 ("The collateral order doctrine has had a tortured history.").
Study Committee held out the doctrine as the prime example of the problems then existing in the federal courts' finality jurisprudence. Such criticism may have been warranted a decade ago, but the collateral order doctrine is now both coherent and easy to apply.

Undeniably, the doctrine has had a troubled history. Although the Supreme Court often has repeated that the doctrine must be construed narrowly and its three prongs applied strictly, it has produced significant litigation on the issue of appealability since Cohen was decided in 1949. Moreover, the Supreme Court has applied the doctrine inconsistently. Gillespie v. United States Steel Corp contains the most egregious example. In that case, the Court relied on Cohen but abandoned strict adherence to its three prongs. Instead, the Court adopted a balancing test—weighing the inconvenience and costs of piecemeal review against the "danger of denying justice"—to find appealable a pretrial order that the Jones Act supplied the exclusive remedy for the estate of a seaman. The Court later limited Gillespie

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113 See FCSC Report, supra note 14, at 95-96 ("Decisional doctrines—such as 'practical finality' and especially the 'collateral order' rule—blur the edges of the finality principle, require repeated attention from the Supreme Court, and may in some circumstances restrict too sharply the opportunity for interlocutory review."). Thus, the confusion surrounding the collateral order doctrine in the late 1980s played a significant role in the movement for reform that led ultimately to the adoption of §§ 2072(c) and 1292(e).

114 See Anderson, supra note 4, at 548-606 (tracing the history of the doctrine); see also cases cited supra notes 65-66 (listing collateral order doctrine decisions since 1975). Commentators have decried the volume of litigation. See, e.g., Anderson, supra note 4, at 540 (stating that the doctrine has caused a litigation explosion and imposed significant costs and delays); Eisenberg & Morrison, supra note 3, at 286 (contending that even after the Supreme Court has narrowed the doctrine, battles over the doctrine will continue to consume federal judges' time); Martineau, supra note 3, at 773-74 (stating that the three-part collateral order doctrine test has multiplied litigation because, in each case, it must be tested by a court of appeals); Nagel, supra note 4, at 208-09 (contending the doctrine has been costly).


116 See id. The Court found that the circuit court had properly exercised jurisdiction over an appeal from a partial dismissal on the pleadings in a Jones Act case, even though the court conceded that the dismissed claims were not severable or separate from the rest of the underlying action. Id.

117 See id. at 150, 152-54.
to its facts. Yet it has, on other occasions, applied the doctrine somewhat unevenly.

Furthermore, in the wake of the Supreme Court's 1985 *Mitchell v. Forsyth* decision, the doctrine looked potentially unwieldy. In *Mitchell*, the Court held that a denial of a government official's defense of qualified immunity is appealable under the collateral order doctrine. The Court had no trouble finding that the first (conclusiveness) prong of the test was satisfied. As to the third (effective unreviewability) prong, the Court found that the decision to deny immunity was effectively unreviewable because qualified immunity, like absolute immunity, is an immunity from suit, not just from liability. Thus, this denial would be effectively unreviewable on appeal because the right at stake—not to be subjected to suit—would be irretrievably lost if the official were required to proceed through the litigation (discovery, trial, etc.) before appealing the decision.

118 See Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 n.30 (1978) ("If Gillespie were extended beyond the unique facts of that case, § 1291 would be stripped of all significance."); see also Anderson, supra note 4, at 554 (criticizing the Gillespie court's ad hoc balancing approach). I disagree with Professor Anderson that *Mitchell v. Forsyth*, 472 U.S. 511 (1985), "resurrected" Gillespie. See Anderson, supra note 4, at 554. While *Mitchell* may have been wrongly decided due to possible misapplication of the doctrine's second and third prongs, see discussion infra note 125, the Court did not reduce the doctrine to an ad hoc balancing of hardships like it had in Gillespie.

119 See generally Anderson, supra note 4, at 551-76 (contending that there was an enormous amount of inconsistency in the Supreme Court's approach to the doctrine from the 1960s to the 1980s).

120 472 U.S. 511 (1985). Indeed, *Mitchell* marked both the high point and the end of a period of expansive use of the doctrine. See Anderson, supra note 4, at 551-76 (describing the expansion of the collateral order doctrine from 1963 to 1988 and contending that *Mitchell* constituted the "highwater mark").

121 See 472 U.S. at 530. Prior to *Mitchell*, the Supreme Court had held that denials of substantive claims of absolute governmental immunity are appealable under the doctrine. See Nixon v. Fitzgerald, 457 U.S. 731, 741-43 (1982) (hearing the President's immediate appeal regarding his entitlement to absolute immunity); Helstoski v. Meanor, 442 U.S. 500, 508 (1979) (holding that a member of Congress was entitled to immediate appeal of the court's denial of his motion to dismiss).

122 See *Mitchell*, 472 U.S. at 527.

123 See id.

124 See id. at 526-27.

The entitlement [to qualified immunity] is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court's decision is effectively unreviewable on appeal from a final judgment.
The Court's treatment of the second prong—the "separate from the merits" requirement—proved most controversial. In order to determine whether an official is entitled to immunity, the district court must inquire whether the right asserted by the plaintiff was clearly established at the time of the official's actions and whether a reasonable person would have realized that he was violating that right. This inquiry is inherently related to the merits of the action, requiring an analysis of the particular circumstances to determine the applicability of the right and whether it was clearly established. Nevertheless, the Court found that the second prong was satisfied because the issue of immunity is "conceptually distinct" from the merits. This constituted a significant and unclarified dilution of the separability requirement.

Today, a few unresolved issues remain with regard to the limits of the collateral order doctrine. The Supreme Court has yet to define adequately what "conceptually distinct" from the merits means, although it recently sought to clarify the distinction between "facts and

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Id. (emphasis omitted).

125 See Solimine, supra note 4, at 1188 ("The Mitchell opinion has been persuasively criticized.") (citing commentators); see also Anderson, supra note 4, at 570 ("The Mitchell Court eviscerated the separability requirement. . . ."). Professor Anderson also criticizes the Mitchell Court's approach to the third prong. See Anderson, supra note 4, at 574 (stating that the Court's decision to loosen the "effectively unreviewable" requirement lacked clarity because the Court failed to explain the policy justification for the decision).

126 See Mitchell, 472 U.S. at 528; Solimine, supra note 4, at 1187–88 ("Qualified immunity should be granted as long as the defendant's actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").


[A] claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated. An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law. . . .

Id. (citation omitted). As Professor Anderson points out, the Court had earlier found that an order denying a double jeopardy claim satisfies the second prong, even though the determination of whether the same conduct is the basis of both prosecutions arguably is inherently entangled with the merits. See Anderson, supra note 4, at 557 (discussing Abney v. United States, 431 U.S. 651, 659 (1977)). This treatment of the second prong opened the door for similar treatment of qualified immunity.

129 See Anderson, supra note 4, at 570–72.
law" discussed in *Mitchell*.130 Moreover, in a few recent decisions, the
Court has breathed new life into the requirement that the issue or
underlying interests at stake be "important."131 While the Court sug-
gests that an interest must be sufficiently important to justify immedi-

to pure questions of law with regard to qualified immunity). In *Johnson*, the qualified
immunity issue on which the defending police officers sought appellate review was
one of fact, namely, whether the evidence presented at the summary judgment stage
was sufficient to create a triable issue. *Id.* The Court held that an order that denies
summary judgment because the record reveals genuine issues of material fact with
regard to qualified immunity (whether the officers violated clearly established law) is
not appealable under the collateral order doctrine because, unlike the pure legal
question in *Mitchell*, such a fact-based inquiry is not "conceptually distinct" from the
merits. *See id.* at 313–14. Thus, *Johnson* clarifies some of the doctrinal problems of
*Mitchell*'s treatment of the second prong created in the qualified immunity context,
although at least one commentator has suggested that this distinction may prove un-

(1994) (emphasizing that importance is a consideration in all three elements of the
doctrine); Lauro Lines v. Chasser, 490 U.S. 495, 502 (1989) (Scalia, J., concurring)
("The importance of the right asserted has always been a significant part of our collat-
eral order doctrine."). The Justices' subjective assessment of what constitutes an "im-
portant" interest should not play a significant role in the analysis, because it promises
both unpredictability and confusion. *See Anderson, supra* note 4, at 588. The danger
should not be overstated, however. For example, in *Digital Equipment Corp.*, the Court
ultimately found that the order at issue did not survive the third prong of the collat-
eral order doctrine, even if "importance" were removed entirely from the analysis.
*Digital Equip. Corp.*, 511 U.S. at 881–82. Moreover, I disagree with Professor Anderson
that the Court elevated this factor to primacy in *Puerto Rico Aqueduct & Sewer v. Metcalf
& Eddy, Inc.*, 506 U.S. 139, 146 (1993). *See Anderson, supra* note 4, at 588 (contend-
ing that the importance of the claimed right became the prime consideration). In
fact, the Court discussed the importance of a state entity's dignitary interest not as an
independent factor, but rather as a response to appellee's contention that Eleventh
Amendment immunity is not a "right not to stand trial" and therefore does not satisfy
the doctrine's third prong. *See P.R. Aqueduct*, 506 U.S. at 146 (concluding that the
collateral order doctrine applies to such claims for immunity because, "to prevent
indignity of subjecting a State to the coercive process of judicial tribunals," the Elev-
enth Amendment protects states from suit and not just liability). Finally, in *Cunning-
ham v. Hamilton County*, the Court's most recent foray into the collateral order
doctrine area, the unanimous Court undertook an analysis of the three prongs of the
doctrine without discussing the importance of the underlying interests at stake. 527

The "importance" inquiry may play a dispositive role only in the rare circum-
stance in which the three prongs otherwise clearly are satisfied and the Court believes
that application of the doctrine in that circumstance would pose too many practical
problems. For example, if orders denying protection for allegedly privileged com-
munications, *see discussion infra* note 154, otherwise satisfy the doctrine's requirements,
allowing appeals of such orders may prove sufficiently troublesome that the Court
perhaps would refuse to apply the doctrine on "importance" grounds.
ate review under the doctrine, it has not articulated standards for determining which interests might satisfy this requirement.\textsuperscript{132}

Nevertheless, despite its tortured history and a few remaining, unresolved issues, the collateral order doctrine has emerged as a relatively clear and well-defined exception that leads to predictable results. Since the mid-1980s, the Supreme Court has focused on two unambiguous limiting principles that have largely clarified the doctrine and drastically limited its potential application.

First, the Court has repeated many times that the collateral order doctrine is to be applied on a category-wide basis, and thus, an order will be appealable under the doctrine only if every order addressing the same issue or rejecting an alleged right satisfies the doctrine's three prongs. The Court began emphasizing the category-wide approach when rejecting the "death knell" doctrine in Coopers & Lybrand.\textsuperscript{133} The Court refused to recognize that doctrine in part because it would reduce the finality requirement to a case-by-case determination of whether a particular ruling should be appealable.\textsuperscript{134} In three later decisions, the Court reiterated this principle while refusing to extend the collateral order doctrine to new classes of orders.\textsuperscript{135} In the Court's most recent collateral order doctrine decision, the Justices again emphasized the "category-wide" principle in holding that orders imposing sanctions on attorneys for discovery violations are not appealable under the doctrine.\textsuperscript{136} In discussing the second prong, the Court stated that "[p]erhaps not every discovery sanction will be inextricably intertwined with the merits, but we have consistently eschewed

\textsuperscript{132} See Anderson, supra note 4, at 589-90; Solimine, supra note 4, at 1191 (discussing Lauro Lines in which Justice Scalia, in his concurring opinion, suggests a functional approach to the collateral order doctrine that emphasizes the importance of the right).

\textsuperscript{133} See 437 U.S. 463, 474-77 (1978).

\textsuperscript{134} See id. at 473. The Court further stated as follows:

[Allowing appeals of right from nonfinal orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final judgment rule—"that of maintaining the appropriate relationship between the respective courts ... This goal, in the absence of most compelling reasons to the contrary, is very much worth preserving."

Id. at 476.


\textsuperscript{136} See Cunningham, 527 U.S. at 205-06.
a case-by-case approach to deciding whether an order is sufficiently collateral.” The categorical approach severely limits the potential application of the doctrine because individual orders that would appear to satisfy the requirements of the doctrine, when viewed in isolation, are unappealable if any order addressing the same issue would not satisfy the requirements.

Second, the Court now has defined the circumstances in which it would be willing to recognize that the third requirement—the “effectively unreviewable” prong—is satisfied. In earlier decisions, the Court suggested that it might extend the notion of effective unreviewability to orders that, although reviewable after final judgment, cause some irreparable harm in the interim or would be unlikely, as a practical matter, to be corrected after final judgment. Beginning with Coopers & Lybrand and then repeatedly in decisions thereafter, the Court has stated that the third prong is, in fact, far narrower.

137 Id. at 206 (citing Digital Equip. Corp., 511 U.S. at 868; Richardson-Merrell, 472 U.S. at 439). For example, a district court might impose sanctions for unexcused delay in responding to discovery requests, which has nothing to do with the merits of the underlying controversy. Nevertheless, the Court held that no order imposing discovery sanctions on an attorney is appealable under the collateral order doctrine, because some such orders address the merits. See id. at 205-06.

138 Thus, those who suggest that the Court’s approach to the collateral order doctrine requires a case-by-case analysis of appealability are mistaken. See, e.g., Eisenberg & Morrison, supra note 3, at 286 (assuming that battles over application of the doctrine will continue to consume too much time after Cunningham because the Court simply was attempting to decide, on a “case-by-case” basis which orders are immediately appealable). Moreover, I disagree with commentators who have suggested that Cunningham did nothing more than decide the narrow question of appealability in the context of attorney sanction orders. See, e.g., Eisenberg & Morrison, supra note 3, at 286. On the contrary, the unanimous Cunningham decision reiterated that the collateral order doctrine is to be applied categorically—a reaffirmation that unambiguously and significantly restricts the potential application of the doctrine in other contexts.


140 See Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 (1978) (stating, in rejecting the death knell doctrine, that “the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a ‘final decision’ within the meaning of § 1291”); see also Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 378 (1981) (rejecting the argument that a showing of irreparable harm, even when resulting from an erroneous decision, is sufficient to satisfy the third prong of the collateral order doctrine). Indeed, even in Cohen v. Beneficial Industrial Loan Corp., in which the Supreme Court referred to irreparable effects, the Court required more than mere irreparable harm; it was concerned that the rights conferred by statute, if applicable, would have been completely lost. See 337 U.S. 541, 546 (1949). Thus, while the Court’s recently expressed requirement that an asserted right face destruction if not vindicated before trial sharpens the analysis
An order must do more than threaten irreparable harm to be "effectively unreviewable"; it must implicate a right of the party seeking an immediate appeal that would be, by definition, "irretrievably lost" absent such an appeal.141 Other recent decisions have made this stringent standard even clearer: the third prong is only satisfied where the order at issue addresses "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial."142

Since the mid-1980s, the Court has been unyielding in its adherence to this narrow view of effective unreviewability.143 Indeed, the

under the third prong, it is not inconsistent with Cohen. Cohen was intended to be a very narrow decision, though it suffers from a lack of clarity. See Anderson, supra note 4, at 545 ("The Cohen decision appears to have been intended as a very narrow decision, but the seeds of later confusion and protracted procedural litigation were sown by the lack of clarity in the Court's stated reasoning."). Cohen and the collateral order doctrine therefore cannot be construed as opening the door to immediate appeals of orders that merely may cause irreparable harm. But see Martineau, supra note 3, at 742-43 (recognizing that more recent decisions seem to have narrowed the third prong, but suggesting that the mere threat of the loss of a legal right is sufficient to satisfy the third prong and that Justice Jackson's opinion in Cohen created a judicial exception to the final judgment rule that could cover virtually any order that might cause irreparable harm).


But the final-judgment rule requires that except in certain narrow circumstances in which the right would be "irretrievably lost" absent an immediate appeal, litigants must abide by the district court's judgments, and suffer the concomitant burden of a trial until the end of the proceedings before gaining appellate review.

Id.; Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 376-77 (1987) (holding that effective review would be irretrievably lost if petitioner had to wait until final judgment).

142 Midland Asphalt Corp. v. United States, 489 U.S. 794, 799 (1989) (emphasis added) (quoting United States v. MacDonald, 435 U.S. 850, 860 (1978)); see also Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 872 (1994) (indicating that the identification of some interest that will be irretrievably lost is not enough to satisfy the third prong; rather, a party must point to a right that unquestionably will be lost or destroyed without immediate review); Lauro Lines v. Chasser, 490 U.S. 495, 499 (1989) ("[W]e have insisted that the right asserted be one that is essentially destroyed if its vindication must be postponed until trial is completed."); Firestone Tire & Rubber Co., 449 U.S. at 376 (stating that the third prong has been satisfied when the order at issue "involved an asserted right the legal and practical value of which could be destroyed if it were not vindicated before trial") (quoting United States v. MacDonald, 435 U.S. 850, 860 (1978)).

143 For example, the Court recognized in Stringfellow that a dispute over the right to intervene usually must be resolved before trial if it is to have any practical significance because a judgment is not likely to be reversed on this basis. See 480 U.S. at 376-77. Nevertheless, the Court held that the denial of a motion to intervene does not satisfy the third prong because the right to intervene is not destroyed—a challenge to the denial can be raised after trial, at least in theory. See id. Likewise, in
Court has openly acknowledged that erroneous decisions often sound the death knell for certain claims, yet absent the destruction of a right, such irreparable effects are insufficient to satisfy the third prong. While district court orders rejecting defenses of double jeopardy and immunity from suit will satisfy this stringent requirement, few others will.

These two recently emphasized limitations have created clarity and predictability largely because they effectively preclude expansion of the doctrine. It is hard to conceive of more than a handful of orders not already classified as collateral that might satisfy these requirements. Indeed, since Mitchell, the Supreme Court has found

cases in which parties sought review of orders denying motions to dismiss or stay based on improper forum arguments, the court held that the third prong was not satisfied; even though, as a practical matter, the denial was unlikely to be corrected or perfectly correctable on appeal from final judgment. See, e.g., Lauro Lines, 490 U.S. at 500–01 (holding that the denial of a motion to dismiss based on a contractual forum selection clause did not satisfy the third prong even though the right at issue cannot be vindicated fully on appeal after final judgment); Van Cauwenbergh, 486 U.S. at 526–27, 529 (rejecting arguments that an order denying motions to dismiss based on immunity from service of process, personal jurisdiction, and forum non conveniens are appealable immediately, even though such an order is unlikely to be corrected later). These decisions reflect not only the Court’s unwillingness to predict how likely error correction will be for a class of orders, but also its stubborn refusal to expand the concept of a “right not to stand trial” beyond the double jeopardy and governmental immunity contexts.

144 See, e.g., Digital Equip. Corp., 511 U.S. at 872.
145 See Solimine & Hines, supra note 69, at 1548 (stating that more recently the Court has “shown fidelity to the virtues of the final judgment rule by only rarely finding that the doctrine’s criteria are met”); Solimine, supra note 4, at 1170–71 (recognizing that, since Coopers & Lybrand, the Supreme Court generally has required strict adherence to the three prongs of the doctrine and that the collateral order doctrine will not be a rich source of interlocutory appeals); cf. Anderson, supra note 4, at 576–602 (contending that the doctrine remains unclear and inconsistent, while recognizing that the Supreme Court has demonstrated some retrenchment since Mitchell v. Forsyth).

146 There are few types of interlocutory orders that will satisfy the second prong in all circumstances, even under the Mitchell articulation, and fewer that can survive the rigid requirements of the third prong. Professor Martineau has suggested that the order at issue in Cohen would not be appealable under the Court’s recent articulation of the requirements of the third prong. See Martineau, supra note 3, at 742. He may be correct, although the answer would depend on the characterization of the right at issue. If the posting of a security requirement is analogous to a form of immunity from suit—namely, prospective defendants in a shareholder derivative action have a right not to have to answer for their conduct in any judicial proceeding unless the complaining stockholder posts the required security—then Cohen likely would come out the same way today. See Mitchell v. Forsyth, 472 U.S. 511, 525 (1985) (stating that the question is whether the essence of the claimed right is a right not to stand trial).
orders addressing issues other than immunity from suit satisfy the collateral order doctrine in only one context.\(^{147}\)

Yet these extraordinarily stringent limitations also produce principled distinctions between orders. First, what constitutes a "final decision" under § 1291 should be a categorical rather than ad hoc or case-by-case determination. Whether an order is "final" does not depend on differing probabilities of error or hardship; thus, disparate treatment of orders of the same type seems at odds with the statute. Moreover, bright-line rules that draw categorical distinctions provide predictability, which ought to be a guiding value in defining appellate jurisdiction.\(^{148}\) Likewise, the destruction of a right requirement distinguishes decisions that are truly final from those that are "merely" harmful. Decisions on issues necessarily mooted by further litigation are truly final on those issues; decisions that merely threaten to spell

Indeed, Professor Anderson argues that Cohen, sensibly construed, was premised upon this type of mootness rationale. See Anderson, supra note 4, at 546–47.

147 See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 714 (1996). Quackenbush also may be characterized as embodying a different exception to the final judgment rule, since the decision is premised primarily on Moses H. Cone. See supra note 54. I disagree with Professor Anderson that the Court's treatment of the third prong in Abney (double jeopardy) and Mitchell (qualified immunity) made the prong less stringent than first articulated in Cohen. See Anderson, supra note 4, at 557–58, 574 (stating that the focus on the "right not to stand trial" in these contexts allowed the court to circumvent Cohen's mootness rationale). On the contrary, it is out of respect for the narrowness of the third prong—hence, the requirement that the issue would be mooted automatically if not immediately appealable—that the Court turned to an inquiry of whether double jeopardy and qualified immunity constitute immunity from suit (being subjected to trial) rather than merely from criminal or civil liability. While many have disagreed with the Court's characterization of qualified immunity as immunity from suit—and its characterization of other rights as not protecting against subjection to suit—I have no doubt that the Court's demanding such an inquiry ensures that the third prong will remain exceedingly narrow. Requiring the inherent destruction or mootness of a right rules out application of the doctrine in virtually all non-immunity contexts.

148 See Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202 (1988) (emphasizing the importance of "operational consistency and predictability in the overall application of Section 1291"); see also 15A Wright et al., supra note 6, § 3901, at 27 (stating that the virtues of clarity with regard to rules governing appellate review are manifest). Clarity and predictability serve a number of values, including making the costs and length of litigation somewhat more foreseeable to the parties. Moreover, because finality is a requirement for appellate jurisdiction (absent the application of some other exception), clear rules reduce the chances of parties wasting resources on appeals that are improper and waiving the right to appeal by failing to recognize that an order is appealable.

149 Thus, Professor Anderson is correct that the third prong, as initially articulated in Cohen, is aimed at addressing prejudgment decisions that affect rights that will be mooted but for an opportunity for an immediate appeal. See Anderson, supra note 4,
the death knell of the litigation or inflict some other form of harm that is imperfectly reparable are not. Indeed, the definition of "final decision" cannot encompass orders that merely threaten to cause irreparable harm if not immediately appealed. Such a construction would make the final judgment rule "pretty puny," in the words of the Supreme Court, given the limitless number of ways in which interlocutory orders can inflict such harm.

at 548. In fact, the Cohen court relied on Cobbledick v. United States, 309 U.S. 323, 324-25 (1940), in which it had stated—in finding that denial of a motion to quash a subpoena duces tecum is not appealable—that it would depart from the final judgment rule only when the lack of immediate review meant no review. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). Professor Anderson and I disagree about whether the Court's recent collateral order doctrine jurisprudence has been true to this requirement. See Anderson, supra note 4, at 548. He argues that Mitchell and its progeny significantly dilute the mootness requirement. See id. Yet, the Court's recent emphasis on the effective destruction of a right is premised on and consistent with this mootness rationale. In addition, the Court applied this rationale in Abney and Mitchell when it drew distinctions between rights not to be subjected to suit or trial (which will be moot if not immediately appealed) and other types of rights. See id.

See Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 872 (1994). Professor Anderson suggests that in some of the Court's more recent decisions, it has not been clear about the role of irreparable harm. See Anderson, supra note 4, at 563. For example, he suggests that one can infer from the Court's analysis in Firestone Rubber Co. that irreparable harm can justify a collateral order appeal in some circumstances. See id. Yet, the Court clearly rejected the appellant's contention that the irreparable harm entailed by delayed review justifies immediate review. See Firestone Rubber Co. v. Risjord, 449 U.S. 368, 378 (1981). Indeed, the Court suggested that, to the extent a party might suffer severe irreparable harm, it could seek other extraordinary avenues to appeal, such as certification under § 1292(b) and mandamus review. See id. In my view, the Court did not imply that some forms of threatened irreparable harm may support a collateral order appeal in the absence of a mootness problem. See Digital Equip. Corp., 511 U.S. at 872. Some have criticized the Court's formalism in this regard, arguing, for example, that there is little distinction between those rights—such as immunity from suit—that the Court has determined would be destroyed if no appeal were allowed, and those rights that will, as a practical matter, be lost if an immediate appeal is not available—such as the contract-based right to litigate in a chosen forum at issue in Lauro Lines or the forum-based objections raised in Van Cluwenberghe. See, e.g., Anderson, supra note 4, at 578-79 (criticizing as disingenuous the Court's attempts to distinguish the various forum-based rights asserted in Van Cluwenberghe from the immunity from suit cases); Solimine, supra note 4, at 1187 (“A distinction between immunity from suit and entitlement to be sued only in a particular forum, for example, is apt to be lost on the typical litigant. Both rights are equally lost once denied and the case proceeds to trial in the forum not chosen.”) (citation omitted). In most cases, the harm of delayed review is the same, namely, no review. Yet this is beside the point: delayed review of the denial of any right will mean no review, as a practical matter, in most circumstances. That consequence of delayed review therefore cannot serve as a basis for an exception to the final judgment rule.
Finally, the Supreme Court's clear and principled application of the doctrine has reduced disagreement and litigation over this exception. The members of the Court now appear largely in agreement over its scope; for example, Cunningham v. Hamilton County\textsuperscript{152} was a unanimous decision. Also, contrary to the suggestion of other commentators, there are few unresolved controversies and corresponding litigation over the doctrine in the circuit courts.\textsuperscript{153} Research reveals that the circuits are split over the application of the doctrine as to only three types of orders: orders rejecting protection for allegedly privileged attorney-client communications;\textsuperscript{154} orders refusing protection Rather, whether an adverse determination with regard to an alleged right is "final" requires that the right cannot be vindicated under any circumstances and despite any expenditure or cost, if the litigation proceeds without correcting that determination. In such a circumstance, and not others that may result in similar hardships, a determination as to a purported right will be "final" prior to the end of the litigation. The nature of the right itself therefore is the key inquiry, not the practical consequences of the unavailability of immediate review.

Of course, the nature of the right is not easily determined in all cases. For example, some critics of the Mitchell decision, in addition to criticizing the Court for its treatment of the second prong, have argued that the Court erred in determining that qualified immunity is immunity from suit rather than merely immunity from liability. See Anderson, supra note 4, at 577-78; Solimine, supra note 4, at 1188 (reasoning that because the qualified immunity determination often requires extensive discovery, "[i]t hardly sounds like an immunity from suit"). I tend to agree with the Court as to the nature of qualified immunity, but the matter is open to debate. Likewise, the Court's less generous characterization of other rights has come under attack. See, e.g., Anderson, supra note 4, at 578 (criticizing the Court for characterizing immunity from service of process as not conferring a "right not to stand trial" comparable to the rights conferred by double jeopardy and qualified immunity protections). Even if the Court has incorrectly characterized the right in certain circumstances, its overall approach to the third prong—attempting to distinguish between orders implicating rights or protections that will be destroyed from those that are merely unlikely to be corrected after final judgment—is sound.

\textsuperscript{152} 527 U.S. 198 (1999).

\textsuperscript{153} Cf. Anderson, supra note 4, at 603-04 (suggesting there are a number of unresolved issues in the circuits); Nagel, supra note 4, at 208-09 (stating that the collateral order doctrine "often is applied inconsistently from circuit to circuit"); see also Eisenberg & Morrison, supra note 3, at 286, 288 (suggesting that, in the wake of Cunningham, much remains unresolved with regard to the collateral order doctrine).

\textsuperscript{154} Discovery orders generally are not immediately appealable under the collateral order doctrine. See, e.g., Misc. Docket Matter #1 v. Misc. Docket Matter #2, 197 F.3d 922, 925 (8th Cir. 1999); Starcher v. Corr. Med. Sys., Inc., 144 F.3d 418, 422 (6th Cir. 1998); In re Kessler, 100 F.3d 1015, 1016 (D.C. Cir. 1996); Simmons v. City of Racine, 37 F.3d 325, 327 (7th Cir. 1994); Atl. Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F.2d 371, 377 (11th Cir. 1989); Admiral Ins. Co. v. U.S. Dist. Ct., 881 F.2d 1486, 1490 (9th Cir. 1989); M.A. Mortenson Co. v. United States. 877 F.2d 50, 51-52 (Fed. Cir. 1989); Corporacion Insular de Seguros v. Garcia, 876 F.2d 254, 256 (1st Cir. 1989); Am. Tobacco Co. v. Mount Sinai Sch. of Med., 866 F.2d 552, 554.
for claimed trade secrets;\textsuperscript{155} and orders denying the appointment of counsel.\textsuperscript{156} Whether the collateral order doctrine applies in the privilege context is a close question.\textsuperscript{157} However, there is little doubt that the Supreme Court now would find that the trade secrets and appointment of counsel questions do not fall within the scope of the doctrine.\textsuperscript{158} Outside of these areas, the circuit courts now invest little time in resolving disputes over the applicability of the doctrine.

\textsuperscript{155} Compare Smith v. Bic Corp., 869 F.2d 194, 196 (3d Cir. 1989) (holding that orders denying protection for trade secrets are immediately appealable under the collateral order doctrine), with MDK, Inc. v. Mike's Train House, Inc., 27 F.3d 116, 120 n.2 (4th Cir. 1994) (holding that the "general rule of nonappellability" applies to trade secrets).

\textsuperscript{156} See Ficken v. Alvarez, 146 F.3d 978, 980–81 (D.C. Cir. 1998) (reviewing the "extensive debate" between the circuits over appealability of orders denying the appointment of counsel for a pro se litigant and ultimately siding with those circuits that have found such orders unappealable under the collateral order doctrine).

\textsuperscript{157} Indeed, the Third Circuit makes a strong case that this category of orders satisfies the prongs of the doctrine. \textit{See Bacher}, 211 F.3d at 54 (finding an order rejecting a claim of privilege to be collateral because it is final, completely separate from the merits, protects important interests, and cannot be effectively reviewed after final judgment because the communications already would have been disclosed) (citing \textit{Ford}, 110 F.3d at 958–64). \textit{But see} Mark A. Kromkowski & Jonathan J. Van Handel, \textit{The Collateral Order Doctrine as Applied to Discovery Requests—The Third Circuit's Kelly v. Ford Motor Co. (In Re Ford Motor Co.), 75 NOTRE DAME L. REV. 1119, 1126–30 (1998) (criticizing the Third Circuit's decision in Ford). With regard to the destruction of a right, the Ford court noted that appeal after final judgment "cannot remedy the breach in confidentiality occasioned by erroneous disclosure of protected materials . . . [a]t that point . . . the cat is already out of the bag." \textit{Ford}, 110 F.3d at 965.

\textsuperscript{158} Orders denying protection for alleged trade secrets cannot satisfy the second prong of the collateral order doctrine on a category-wide basis. Whether trade secrets are discoverable will depend in some circumstances on determinations with regard to the relevance of such secrets. Relevance determinations, in turn, often are inextricably linked to the merits of the underlying action. Likewise, orders denying the appointment of counsel cannot satisfy the third prong of the doctrine. Although the denial of appointment of counsel may, as a practical matter, spell the death knell for
Thus, despite its somewhat troubled history, the collateral order doctrine has emerged as a straightforward and principled exception to the final judgment rule, producing predictable outcomes and limited litigation. It no longer holds the threat of chaos and uncertainty that sparked calls for reform in the late 1980s and early 1990s.

2. Mandamus

In contrast to the collateral order doctrine, mandamus review is only appropriate where some kind of blatant error is probable. Application of the collateral order doctrine depends only on a finding that an order is collateral; its parameters therefore are susceptible to definition by a set of rules. The writ of mandamus, in contrast, depends upon standards sufficiently flexible to allow courts to utilize it whenever extraordinary relief is needed.\textsuperscript{159} Although the Supreme Court has declared that the writ should be granted sparingly,\textsuperscript{160} the circumstances warranting such relief are inherently case-specific and therefore are not susceptible to classification. Thus, mandamus review, unlike collateral order review, must be governed by standards—rather than rules—that cannot be articulated with precision.\textsuperscript{161}

Given the case-specific nature of this inquiry, there always will be circumstances in which there is a genuine dispute over whether use of the writ is an appropriate exercise of authority. Yet even though some uncertainty is inherent, in recent years circuit courts have conformed to the narrow parameters of extraordinary writ power. As set forth in the previous Section, the circuit courts articulate somewhat differing

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\bibitem{159} See Solimine & Hines, \textit{supra} note 69, at 1572 (stating that mandamus review is governed by standards, not rules).
\bibitem{160} See Will v. United States, 389 U.S. 90, 107 (1967) (stating that the writ of mandamus is a remedy to be invoked only in extraordinary circumstances); De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945) ("[W]hen a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of [a writ of mandamus].").
\bibitem{161} See Solimine & Hines, \textit{supra} note 69, at 1571 ("Rules are meant to be narrow and precise, and in theory yield an answer quickly, and rather mechanically, once applied to the facts of a case. Standards, in contrast, are broad and vague and inevitably require the decision maker to ponder and weigh the facts to reach a result."). As set forth in note 91, \textit{supra}, the Court has enunciated somewhat general standards for mandamus review, including what conduct rises to the level of a "usurpation of judicial power."
\end{thebibliography}
standards. In practice, however, all now tend to reserve the writ power for truly extraordinary circumstances.

Despite concerns about the expansion or misuse of the writ power, circuit courts have issued the writ sparingly in recent years. Research reveals that thirteen circuits issued the writ as to proceedings in district courts only sixty-four times in a five-year period between September 17, 1995 and October 1, 2000. This averages out to less than one grant per circuit per year. Most of these writs were issued in a few, discrete types of circumstances. For example, fifteen writs address orders granting or denying remand to state court, abstention, or transfer. Others address assertions of privilege or work-product protection, recusal and censure of judges or disqualifications of

162 See supra notes 93–97 and accompanying text. Only the Ninth Circuit consistently articulates a standard that suggests something less than exceptional circumstances may be sufficient to justify granting the writ. In practice, however, the Ninth Circuit rarely finds that the writ is justified. See supra note 97 and accompanying text.

163 See, e.g., Eisenberg & Morrison, supra note 3, at 291 ("[T]he law on mandamus as a substitute for interlocutory appeal is wildly inconsistent, contradictory, and outcome-driven."); Solimine & Hines, supra note 69, at 1560–61 n.161 (discussing criticisms of Judge Posner’s use of the writ in In re Rhone-Poulenc Rorer, Inc.); Charles Alan Wright, The Doubtful Omniscience of Appellate Courts, 41 MINN. L. REV. 751, 774–78 (1957) (expressing serious concerns about the potential overuse of extraordinary writs); Nagel, supra note 4, at 210 ("Despite the drastic nature of a mandamus writ, some circuit courts use it as a general method of hearing appeals of interlocutory orders.").

164 Online research was conducted on a circuit-by-circuit basis, using a “terms and connectors” search on both Lexis and Westlaw to find both published and unpublished opinions available on those services. Every circuit opinion mentioning “mandamus” or “writ of prohibition” during the relevant five-year period was reviewed to determine if the writ issued. The searches captured thousands of cases and many hundreds of refusals to issue the writ.

165 See In re U.S. Healthcare, 159 F.3d 142 (3d Cir. 1998) (remand); In re Loudermilch, 158 F.3d 1143 (11th Cir. 1998) (remand); In re Sealed Case No. 98–5062, 141 F.3d 337 (D.C. Cir. 1998) (transfer); In re Bethesda Mem’l Hosp., 123 F.3d 1407 (11th Cir. 1997) (remand); In re Dow Corning Corp., 113 F.3d 565 (6th Cir. 1997) (abstention); In re Excel Corp., No. 96-41220, 1997 U.S. App. LEXIS 12792 (5th Cir. Feb. 19, 1997) (remand); In re Lowe, 102 F.3d 731 (4th Cir. 1996) (remand); In re Chimenti, 79 F.3d 534 (6th Cir. 1996) (remand); In re City of Mobile, 75 F.3d 605 (11th Cir. 1996) (remand); In re Bristol Myers-Squibb Co., No. 96-10743, 1996 U.S. App. LEXIS 24760 (5th Cir. June 28, 1996) (remand); Williams-El v. Hawk, No. 94-5341, 1996 U.S. App. LEXIS 14217 (D.C. Cir. Apr. 17, 1996) (transfer); In re Skupniewitz, 73 F.3d 702 (7th Cir. 1996) (remand); In re First Nat’l Bank of Boston, 70 F.3d 1184 (11th Cir. 1995) (remand); In re Warrick, 70 F.3d 736 (2d Cir. 1995) (transfer); In re Balsimo, 68 F.3d 185 (7th Cir. 1995) (transfer).

166 See Baker v. GMC, 209 F.3d 1051 (8th Cir. 2000) (work product doctrine and attorney-client privilege); In re Spalding Sports Worldwide, 203 F.3d 800 (Fed. Cir. 2000) (attorney-client privilege); In re Medtronic, Inc., 184 F.3d 807 (8th Cir. 1999)
counsel, and the failure of district courts to follow clear mandates of the circuit courts. The remaining grants tend to fall into a number of other categories.


167 See In re Hatcher, 150 F.3d 631 (7th Cir. 1998) (recusal of judge); In re Barnett, 97 F.3d 181 (7th Cir. 1996) (disqualification of counsel); In re Edgar, 93 F.3d 256 (7th Cir. 1996) (disqualification of judge); In re Antar, 71 F.3d 97 (3d Cir. 1995) (recusal of judge). In In re McBryde, a writ of mandamus issued to prevent the chief judge of the district court from reassigning cases away from a sitting district court judge as an act of censure. 117 F.3d 208, 230 (5th Cir. 1997).

168 See Lindland v. USA Wrestling Ass'n., 228 F.3d 782, 783 (7th Cir. 2000); In re FCC, 217 F.3d 125, 141 (2d Cir. 2000); Vizzaino v. U.S. Dist. Ct., 175 F.3d 713, 719 (9th Cir. 1999); In re Chambers Dev. Co., 148 F.3d 214, 224 (3d Cir. 1998); In re Willis, No. 98-2652, 1998 U.S. App. LEXIS 16951, at *2 (7th Cir. July 21, 1998); In re Phillips, 133 F.3d 770, 771 (10th Cir. 1998).

169 The Ninth Circuit has granted the writ three times to address discovery orders in the context of a petition for writ of habeas corpus. See Calderon v. Hill, 120 F.3d 927 (9th Cir. 1997); Calderon v. Roberts, 113 F.3d 149 (9th Cir. 1997); Calderon v. Nicolaus, 98 F.3d 1102 (9th Cir. 1996). Two Ninth Circuit writs address the issue of whether or not the Private Securities Litigation Reform Act stays initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) where a motion to dismiss the action is pending. See SG Cowen Sec. Corp. v. U.S. Dist. Ct., 189 F.2d 909 (9th Cir. 1999); Medhekar v. U.S. Dist. Ct., 99 F.3d 325 (9th Cir. 1996). Two writs address whether members of the media have a constitutional right of access to court records. See San Jose Mercury News v. U.S. Dist. Ct., 187 F.3d 1096 (9th Cir. 1999); United States v. Gonzales, 150 F.3d 1246 (10th Cir. 1998). Of the remaining cases, fourteen deal with extraordinary procedural issues. See In re United States, 197 F.3d 310 (8th Cir. 1999) (holding mandamus appropriate to control subpoenas against high government officials); In re Grand Jury Subpoena, 190 F.3d 375 (5th Cir. 1999) (holding mandamus appropriate where district court retook possession of documents, thereby preventing attorneys from refusing production to stand in contempt and establish appellate jurisdiction); In re Sealed Case No. 98-3077, 151 F.3d 1059 (D.C. Cir. 1998) (holding mandamus appropriate to vacate order authorizing sealed party to subpoena documents from Independent Counsel's office during ongoing investigation of government official in light of grand jury secrecy rule); United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir. 1998) (holding mandamus appropriate where district court entered preliminary injunction without notice to major computer operating system manufacturer preventing it from marketing its internet browser with its operating system); In re Minister Papandreou, 139 F.3d 247 (D.C. Cir. 1998) (holding mandamus appropriate to vacate discovery order where district court failed to consider less intrusive means of obtaining information from Greek government officials); In re Wilkinson, 137 F.3d 911 (6th Cir. 1998) (finding writ issued where district court in-
Among the grants, few have caused controversy. Most appear consistent with the Supreme Court’s articulated standards, namely, that mandamus be granted only when the district court has done something egregious and the petitioner has no other adequate means to obtain relief. Research reveals few circuit disagreements over correctly held that inmate was entitled to be present at deposition in civil case brought by the inmate); In re Terra Int’l, Inc., 134 F.3d 302 (5th Cir. 1998) (holding mandamus granted where party failed to make specific demonstration of facts warranting sequestration of fact witnesses); In re Wiesner, No. 97-5089, 1997 U.S. App. LEXIS 28479, at *1 (D.C. Cir. Sept. 8, 1997) (finding writ issued where district court improperly ‘insulate[d] its decision imposing sanctions by conditioning an appeal on petitioner seeking leave from another district court’); Credit Suisse v. U.S. Dist. Ct., 130 F.3d 1842 (9th Cir. 1997) (finding writ of mandamus appropriate to reverse discovery order where compliance with the order would force petitioner to violate Swiss law); Taiwan v. U.S. Dist. Ct., 128 F.3d 712 (9th Cir. 1997) (holding writ issued where district court improperly compelled testimony of Taiwanese official without affording requisite immunity); In re Yamaha Motor Co., No. 518, 1997 U.S. App. LEXIS 26595, at *8 (Fed. Cir. Aug. 27, 1997) (holding writ issued where district court erred in finding patent invalidation action justiciable because no real threat of suit existed); In re Impact Absorbent Tech., No. 96-3496, 1996 U.S. App. LEXIS 35322, at *4 (6th Cir. Dec. 18, 1996) (holding that district court clearly erred in finding personal jurisdiction over a defendant who had no minimum contacts in forum state); Univ. of Tex. v. Vratil, 96 F.3d 1337 (10th Cir. 1996) (finding that writ issued where district court improperly ordered non-parties to respond to interrogatories); In re Collins, 73 F.3d 614 (6th Cir. 1995) (holding that writ granted where district court abused its discretion in ordering that an inmate be allowed to attend depositions of prison officials in connection with civil action where officials had established inmate as a high security risk). Three other cases address petitions for writs of habeas corpus, and two deal with other criminal issues. See In re Justices of the Superior Court, 218 F.3d 11 (1st Cir. 2000) (habeas corpus); In re Page, 170 F.3d 659 (7th Cir. 1999) (habeas corpus); Calderon v. Kelly, 127 F.3d 782 (9th Cir. 1997) (habeas corpus); Daniels v. U.S. Dist. Ct., No. 94-70295, 1995 U.S. App. LEXIS 38375 (9th Cir. Dec. 29, 1995) (investigative funds for death penalty case); Torres-Ruiz v. U.S. Dist. Ct., 120 F.3d 933 (9th Cir. 1997) (detained aliens). Three other cases deal with extraordinary issues in cases that are either “complex” or class actions. See Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997) (holding that mandamus issued where district court allowed representative plaintiffs to solicit potential class members via communications order prior to certifying a class); In re Chevron U.S.A., 109 F.3d 1016 (5th Cir. 1997) (dealing with writ issued where district court improperly ordered trial of thirty plaintiffs’ cases in a “complex” case consisting of 3000 claimants without determining the “representativeness” of the thirty plaintiffs); In re Am. Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996) (dealing with writ issued where district court failed to consider adequacy of representation or variances in state law in deciding class certification motion).

170 A review of the aforementioned categories reveals that the writ usually is being issued only when the petitioner has no other adequate means of relief. Also, in many of the listed cases, the extraordinary and troublesome nature of the circumstances are self evident. The facts in other cases reveal that the district judges’ actions or missteps
the use of the writ in parallel circumstances, few issuances that have produced dissents, and no Supreme Court reversals.\textsuperscript{171}

Furthermore, much of the recent criticism of the circuit courts' use of mandamus has focused on a small number of pre-Rule 23(f) class action cases, most notably \textit{In re Rhone-Poulenc Rorer, Inc.}\textsuperscript{172} These controversial uses of the writ now appear isolated. Indeed, recent experience belies the contention that \textit{In re Rhone-Poulenc Rorer} and other controversial uses of the mandamus in the class action context are symptomatic of a general trend toward overuse or misuse of the writ.

In short, the standards governing mandamus are unambiguously stringent, relatively easy to apply in most circumstances, and not a source of costly collateral litigation. Writs are issued rarely, and, except for some questionable grants of petitions in isolated circumstances, circuit courts have not used writs to avoid the strictures of the final judgment rule. Although one can hypothesize dangers of abuse of mandamus, such dangers have not been realized.

\textsuperscript{171} As set forth in notes 165–69, \textit{supra}, most of the writs were issued in a few discrete circumstances. Only four of the cases produced dissents. \textit{See Baker}, 209 F.3d at 1056; \textit{Hatcher}, 150 F.3d at 638; \textit{Perrigo Co.}, 128 F.3d at 442; \textit{Calderon}, 127 F.3d at 787. \textsuperscript{172} 51 F.3d 1293, 1295 (7th Cir. 1995); \textit{see}, e.g., Solimine & Hines, \textit{supra} note 69, 1560–61 & nn.160–61 (discussing \textit{In re Rhone-Poulenc Rorer} and citing to numerous commentators who have criticized or agreed with Judge Posner's use of the writ in that circumstance); \textit{Kruse}, \textit{supra} note 5, at 721–31 (criticizing several uses of mandamus in the class action context as defying the Supreme Court's articulated standards).

In addition to \textit{In re Rhone-Poulenc Rorer}, the controversial use of the writ in \textit{Bauman v. United States District Court}, 557 F.2d 650, 654–55 (9th Cir. 1997), in which the Ninth Circuit adopted its five factor test, and \textit{In re Bendictin Product Liability Litigation}, 749 F.2d 300 (6th Cir. 1984), occurred in the context of class actions and certifications. There have been a few controversial uses of the writ outside the class action context. For example, at least one court has articulated a standard for issuing a writ in the privilege context that does not appear to comport with the traditionally stringent standards. \textit{See} Chase Manhattan Bank v. Turner & Newall, PLC, 964 F.2d 159, 163 (2d Cir. 1992).
C. A Coherent Regime

The individual exceptions to the final judgment rule are relatively clear, produce predictable outcomes, and impose few burdens on the federal courts. These exceptions, along with the final judgment rule, also form a coherent framework that generally draws sensible distinctions between orders that warrant immediate appeal and those that do not. Although there are good reasons to expand the current list of exceptions, the existing regime is a sound base on which to build.

The current regime begins with the final judgment rule. Few dispute its wisdom.\(^{173}\) In most cases, the rule best serves the interests of litigants, prospective litigants, and the trial and appellate courts.\(^ {174}\) Thus, piecemeal appeals generally should be avoided: unless there is a substantial justification for creating piecemeal litigation—some justification beyond the typical hardships resulting from application of the final judgment rule—appellate review should wait until the end of the litigation in the district court.\(^ {175}\)

Congress and the federal courts have sought to alleviate the harm associated with the delayed review inherent in the final judgment rule by fashioning exceptions in certain circumstances.\(^ {176}\) This accounts for some of the category-based exceptions, the death knell doctrine, the ad hoc balancing approach in Gillespie, and the once-expansive application of the collateral order doctrine. However, critics often suggest that all of the exceptions—or at minimum, all of the interpretive doctrines—exist to allow immediate review of district court errors that otherwise will inflict significant hardships or irreparable harm.\(^ {177}\)

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173 See supra note 33 and accompanying text (discussing the few commentators that have suggested the federal courts move to an entirely discretionary regime and the responses to these commentators).

174 See Martineau, supra note 3, at 771 (recognizing that, although significant reform is needed, the final judgment rule "has continued in existence because in most cases it serves the purposes of some or most litigants and prospective litigants, their lawyers, the trial court, the appellate court, and ultimately the public").

175 This echoes the Supreme Court's admonition in Coopers that only compelling reasons justify altering the relationship between the respective courts established by the final judgment rule. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978).

176 When I refer to irreparable harm, I do so in a general rather than technical sense. Irreparable harm may include any kind of harm, cost, burden, or hardship that is imperfectly correctable (in whole or in part) after final judgment. The severity of the harm or threatened harm and the level of irreparability (correctability) may vary greatly from case to case, order to order.

177 See, e.g., Lawyers Conference Comm., supra note 4, at 35 (stating that generally the exceptions to the final judgment rule "involve situations in which a litigant may be seriously harmed by an order entered during the course of litigation and for which
From this perspective, the current mix of exceptions looks arbitrary because it provides for immediate review of a select number of interlocutory decisions that may cause hardships but not others.\textsuperscript{178}

Yet, as the previous sections of this Article demonstrate, the mere threat of hardship or irreparable harm is not the touchstone for \textit{any} of the \textit{existing} interpretative doctrines, the certification exceptions, or mandamus review.\textsuperscript{179} Such a threat is not enough alone because—as
discussed more fully in Part II, infra—irreparable harm is a typical, not exceptional, cost of delayed appellate review. By rejecting both the death knell doctrine and extreme irreparable harm as the benchmark for the third prong of the collateral order doctrine, the Supreme Court made clear that irreparable harm or hardship is not the talisman of immediate review. Likewise, by confining Gillespie to its facts, and by emphasizing in Budinich and recent collateral order doctrine decisions that appealability must be governed by bright-line, categorical rules, the Court has demonstrated its unwillingness to allow appellate courts to engage in an ad hoc balancing of hardships when determining whether an interlocutory order is an appealable “final decision.” The threat of irreparable harm alone is not the sole basis for any—much less all—of these exceptions.

Rather, the certification exceptions, mandamus review, and the existing interpretive doctrines address other extraordinary circumstances in which upsetting the balance struck by the final judgment rule is warranted. The certification exceptions—§ 1292(b) and Rule 54(b)—provide for immediate review of interlocutory orders in two defined circumstances in which the district court judge—who has every incentive not to do so—has decided that appellate interference before the end of the litigation is, on balance, warranted. Manda-
mus review is by definition reserved for the extraordinary: circuit
courts may utilize the extraordinary writ power to prevent district
courts from acting in ways that are truly abusive or blatantly erroneous
and where no other means exists for effective review of such an
action.\textsuperscript{184}

Although tougher to trace, the existing interpretive doctrines
likewise provide for review only in extraordinary circumstances.
These doctrines fall within three conceptually related subsets. Each
allows immediate review of categories of interlocutory orders that are
completely conclusive and separable from the unresolved matters,\textsuperscript{185}
and that, for some compelling reason—beyond the mere threat of ir-
reparable harm—should be viewed as "final."\textsuperscript{186}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{184} See supra notes 92–95 and accompanying text.
\item \textsuperscript{185} Conclusiveness and some form of separateness from the unresolved matters
are necessary but insufficient prerequisites for treating a decision as final while other
matters remain before the district court. The need for conclusiveness is obvious; a
decision cannot be "final" if it is tentative or until the trial judge has no intention of
further considering the decision. See 15A \textsc{Wright et al.}, supra note 6, § 3907, at 276
("At a minimum, appellate review ordinarily should not occur before it is clear that
the judge had no intention of further considering the challenged ruling."). Separateness
is related to conclusiveness; this requirement ensures that immediate appellate
review of an issue will not be affected by a later district court determination, is not a
mere step in a series of decisions leading to a single, final resolution, and avoids
duplicative appeals on the same issue. See id. § 3911 (discussing the separability re-
quirement in the collateral order doctrine context and stating that this requirement
relates closely to the basic purposes of the final judgment rule); see also \textsc{Cohen v.}
Beneficial Indus. Loan Corp.}, 337 U.S. 541, 546 (1949) (stating that the requirement
of finality precludes immediate appellate considerations of decisions that are subject
to revision and are "but steps towards final judgment in which they will merge").
However, conclusiveness and separateness—without more—have never been deemed
sufficiently compelling to make a decision final.
\item \textsuperscript{186} A compelling justification common to many, but not all of the interpretive
doctrines, is the unavoidable specter of mootness; namely, the right or interest sought
to be vindicated necessarily will be mooted or entirely unreviewable after final judg-
ment. This justification forms part of the basis for the Moses H. \textsc{Cone} doctrine, the
exception for certain contempt orders, the Perlman doctrine, and the collateral order
doctrine. Again, this mootness rationale is more stringent than the mere threat or
likelihood of irreparable harm. While irreparable harm obviously is a by-product of
the inability to appeal immediately circumstances where a right or issue necessarily
will be mooted, it also will result from many other pre-judgment orders that do not
meet the mootness requirement. Indeed, in early decisions rejecting expansion of
the finality requirement into new areas, the Court made clear that the prospect of
mootness rather than mere hardship is needed. See, e.g., \textsc{Cobbledick v. United States},
309 U.S. 323, 324–25, 327 (1940) (holding nonfinal an order denying a motion to
quash made by persons served with subpoenas duces tecum because they had not
been held in contempt and exceptions to the finality requirement have been recog-
The first subset of interpretive doctrines provides that an order is a final decision because it has ended entirely the litigation on the merits, and, while other matters potentially remain to be resolved before the district court, the resolution of additional business will not moot or revise the "merits-ending" decision. The Supreme Court planted the seeds of this subset of doctrines in Forgay, when it emphasized that the trial court decree at issue in that case was final because it conclusively resolved all issues as to the relevant defendants, and the case only remained open to allow the assignee to perform a final accounting and distribution of funds among the other parties.\textsuperscript{187} Today, this subset includes the Moses H. Cone and "full resolution of the merits" doctrines.\textsuperscript{188}

\textsuperscript{187} See supra notes 36-43 and accompanying text.

\textsuperscript{188} See supra notes 45-54, 58-59 and accompanying text. The orders addressed by these doctrines are both conclusive and separate from the remaining proceedings, and resolution of the remaining issues before the district court will not moot or revise such orders. It makes sense to treat these kinds of decisions as final because they fully resolve the merits, precluding piecemeal appeals of the merits determinations. Thus, although there remains more to be done than "execute the judgment," allowing an appeal upon the final resolution of the merits of the controversy substantially conforms to the primary aims of the final judgment rule. In addition, with regard to abstention-based stay orders falling within the Moses H. Cone doctrine, immediate review is justified because the preclusive effect of the state court judgment precludes the possibility of appeal after final judgment. See supra notes 49-50 and accompanying text.

The Supreme Court may have erred in characterizing attorneys' fee awards as "nonmerits" decisions in Budinich. Nevertheless, the "final resolution of the merits" doctrine does not defy the purpose of § 1291 simply because it creates the possibility of more than one appeal. That possibility exists whenever an exception to the final judgment rule applies and is always present anyway, since some aspect of the execution of a judgment may be appealed in certain circumstances. Rather, the goal of avoiding piecemeal appeals is more properly viewed as aimed at avoiding successive appeals on decisions leading to a resolution of the merits of the action.

Finally, the "full resolution of the merits" doctrine—unlike the Moses H. Cone doctrine—might appear to constitute a significant winnowing of the final judgment rule, but in fact, its impact likely is limited. It does affect many civil cases since the taxing of costs could occur in nearly every such matter. Yet the taxing of costs, which is almost always a ministerial matter, is relatively unique. Besides allowing an appeal prior to the taxing of costs, the primary effect of the doctrine is to allow an appeal from a judgment entered on the merits prior to the award of non-sanction-based attorneys' fees, such as awards pursuant to statutory fee-shifting provisions. Such an award is atypical. In addition, as previously discussed, rule changes facilitating a single appeal of the merits and attorneys' fee issues limit the potential effects of Budinich. See supra note 60. Finally, pursuant to Rule 58, only the taxing of costs and
The second subset includes orders that conclusively resolve a matter that is related to ongoing litigation on the merits, but is sufficiently independent of the underlying litigation to be viewed as a separate proceeding and is otherwise worthy of independent appellate review. Contempt orders are one type of order falling within this category.

The third subset of interpretive doctrines addresses certain "nonmerits" orders that are separate and distinct from the unresolved merits of the underlying claims. While the majority of nonmerits orders are not "final" until they merge into the judgment following the the award of fees are mentioned as actions for which the entry of judgment shall not be delayed. 189 Forgay likewise may be viewed as the forerunner of this set of doctrines because of the Court's focus on the distinctiveness of the decree being appealed and its independence from the remaining accounting proceedings. See supra notes 39–42 and accompanying text. Indeed, in the context of the finality provision governing the appealability of matters from state courts to the Supreme Court, see 28 U.S.C. § 1257, the Court found, in circumstances somewhat reminiscent of Forgay, that a claim for delivery of property was sufficiently disassociated and independent from an uncompleted accounting that an immediate appeal with regard to the property was warranted. See Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 126 (1945). Of course, the fact that an order resolves some claims on the merits and not others is insufficient alone to warrant a finding of this type of separateness. Rule 54(b) may apply in such a circumstance, but only at the discretion of the district court. 190 See supra note 55 and accompanying text. Criminal contempt orders fit neatly within this subset. Such contempt citations issue at the end of criminal proceedings and subject the contemnor to criminal punishment. See, e.g., Hicks ex rel. Feiock v. Feiock, 485 U.S. 624, 632–33 (1988). Thus, a criminal contempt citation is both conclusive and separate from the underlying civil action and, as a form of immediate criminal punishment, requires immediate, independent appellate review. See Anderson, supra note 4, at 546 ("[W]hen a defendant is sentenced to punishment for criminal contempt of court, disallowing immediate appeal would force the defendant either to capitulate or to serve the sentence; either way, an appeal of the contempt order after final judgment would be moot.").

Civil contempt orders against nonparties likewise are worthy of exceptional treatment. In Cunningham v. Hamilton County, the Supreme Court distinguished civil contempt sanctions against nonparties from non-contempt sanctions against attorneys, suggesting that nonparties' interests are separate from those of parties (and their attorneys) and that a nonparty must be able to appeal a civil contempt sanction immediately in order to avoid turning the materials over, incarceration, or steadily mounting fines. 527 U.S. 198, 207–08 (1999) (quoting E. Maico Distrib., Inc. v. Maico-Fahrzeugfabrik, G.m.b.H., 658 F.2d 944, 949–50 (3d Cir. 1981)). Moreover, the Cunningham Court suggested that nonparties may not appeal from a judgment in the underlying proceeding. See id. at 206 (citing Karcher v. May, 484 U.S. 72, 77 (1987)). Hence, civil contempt citations against nonparties are both "conclusive and separate," and require independent appellate review since no such review will be available after judgment in the underlying proceeding.
final resolution of the merits, some such orders must be viewed as "final" because they touch on rights independent of the merits that would be destroyed if not immediately corrected. The collateral order and Perlman doctrines are the primary examples. ¹⁹¹

Unlike the certification exceptions, mandamus review, and the existing interpretive doctrines, some of the category-based exceptions function, in substantial part, to prevent or to alleviate the potential for irreparable harm.¹⁹² Yet even these exceptions—including the § 1292(a) exceptions, the separate rules governing bankruptcy orders, and Rule 23(f)—thus far have been limited to extraordinary circumstances. For example, they include orders addressing extraordinary forms of relief, such as injunctions and the appointment of receivers, or distinct and unique forms of civil litigation, such as bankruptcy proceedings and class actions. In these limited contexts, there is an uncommonly high probability that severe irreparable harm will result from uncorrected errors. Consistent with the other exceptions, the current category-based exceptions address rare circumstances in which straying from the final judgment rule is warranted.

The current regime is imperfect.¹⁹³ Yet it is not merely a hodgepodge of exceptions that address some but not all forms of irreparable harm or hardship. On the contrary, the regime generally draws sensible distinctions: the final judgment rule applies unless a rare, substantial justification supports immediate review of an interlocutory order, and the existing exceptions are supported by such justifications. There are good reasons—such as preventing discrete forms of severe irreparable harm and clarifying troublesome areas of the law—to add

¹⁹¹ Orders appealable under the collateral order and Perlman doctrines are both "conclusive and separate," see supra notes 56, 142 and accompanying text, and worthy of immediate appeal because they involve rights that will be destroyed—and not merely threatened, imperfectly correctable, or likely to go unappealed—without an immediate appeal.

¹⁹² See Fed. R. Civ. P. 23(f) advisory committee's note (indicating that Rule 23(f) can address concerns regarding severe forms of irreparable harm—death knell effects and forced settlements—in the class certification context).

¹⁹³ Indeed, some of the lines demarcating the boundaries of various exceptions are controversial; for example, I agree with other commentators that the Court drew the line between "merits" and "nonmerits" in the wrong place in Mitchell and perhaps in Budinich. Likewise, perhaps there are yet-to-be-recognized interpretive doctrines and other situations—besides those contemplated under § 1292(b) and Rule 54(b)—in which district courts should have the discretion to certify immediate appellate review. Moreover, there are certainly other categories of orders besides those embodied in the current exceptions worthy of immediate review. Finally, as I discuss below, although I believe class certification orders warrant immediate review, I am critical of Rule 23(f) in its current form.
exceptions, but in doing so, the existing, sound structure should not be abandoned.

II. THE FOLLY OF DISCRETIONARY REVIEW

Among the many proposals to alter the current regime, discretionary review of interlocutory orders is the most popular. However, while limited reform is warranted, discretionary review is the wrong approach.

The American Bar Association (ABA) led the way in advocating discretion. In its 1977 Standards Relating to Appellate Courts, the ABA Commission on Standards of Judicial Administration proposed that appellate courts be given discretionary power to review interlocutory orders if immediate review would “(1) [m]aterially advance the termination of the litigation or clarify further proceedings therein; (2) [p]rotect a party from substantial and irreparable injury; or (3) [c]larify an issue of general importance in the administration of justice.” 194 Although this proposal contains guiding standards, the exercise of discretion would be unfettered because the appellate panel need not articulate reasons for granting or denying immediate review. 195 Professor Martineau, John Nagel, and Eisenberg and Morrison have advocated that the federal courts adopt the ABA’s approach. 196 Other commentators have proposed similarly broad grants of discretionary authority. 197 Still others have called for discretionary review of discrete categories of interlocutory orders. 198 Rule 23(f), which became effective December 1, 1998, represents the first foothold of circuit-level unfettered discretion in the federal system. 199

Discretionary review offers several purported benefits. First, such review avoids interpretive problems and collateral litigation that may

194 ABA COMM'N, supra note 7, at 21.
195 See id. at 29–30.
196 See Eisenberg & Morrison, supra note 3, at 298, 301–02; Martineau, supra note 3, at 776–89; Nagel, supra note 4, at 201.
197 See, e.g., Cooper, supra note 7, at 157–64 (proposing the eventual elimination of the current exceptions and replacing them with pure discretionary review resulting from district court certification or independent circuit court acceptance of review); Turk, supra note 5, at 1040 (advocating adoption of another subsection of § 1292 that would allow a circuit court to choose to review various orders).
198 See, e.g., Davidson, supra note 5, at 214–15 (advocating that circuit courts be granted the authority to review denials of summary judgment on a discretionary basis); Kruse, supra note 5, at 705 (advocating discretionary review of class certification orders to alleviate the potential hardship caused by the final judgment rule).
199 See supra notes 10, 87 and accompanying text.
result from the application of mandatory rules.\textsuperscript{200} Moreover, as the ABA standards suggest, discretionary review allows circuit courts to review orders that contain probable errors that may cause “substantial and irreparable injury” if not immediately corrected.\textsuperscript{201} Circuit courts also can review interlocutory orders that address substantive areas where development and clarification of the law is needed.\textsuperscript{202} Finally, and perhaps most importantly, discretionary review appears to promote efficiency in a time in which there is general agreement that the court continues to face a “crisis of volume.”\textsuperscript{203} By selecting

\begin{itemize}
\item \textsuperscript{200} See Martineau, \textit{supra} note 3, at 786 (stating that further exceptions to the final judgment rule will “almost inevitably increase[ ] litigation over what is appealable of right, whether final or interlocutory”). Professor Martineau further asserts that “[e]ach exception will breed its own subset of doctrinal analysis, with narrow or broad interpretations involving the same considerations that have made the current final judgment rule and its exceptions so unsatisfactory both in theory and in practice.” \textit{Id.}
\item \textsuperscript{201} See ABA Comm’n, \textit{supra} note 7, at 21. Professor Martineau advocates discretionary review in part because “[i]t is impossible to predict when in a particular case the relative interests of the parties, the prospects for early termination of the case, or the public significance of the case will dictate the advisability of an earlier rather than later review of an interlocutory order.” Martineau, \textit{supra} note 3, at 775; see also \textit{Fed. R. Civ. P. 23(f)} advisory committee’s note (indicating that Rule 23(f) may be utilized to grant an appeal where the absence of immediate review will spell the death knell of the litigation or force a settlement by exposing a defendant to potentially ruinous liability).
\item \textsuperscript{202} See Eisenberg & Morrison, \textit{supra} note 3, at 291 (criticizing the current regime and advocating discretionary review because interlocutory review aids in the development of the law); Gould, \textit{supra} note 6, at 310–11 (stating that one of the primary reasons for the adoption of Rule 23(f) was to enable circuit courts to develop clear certification standards).
\item \textsuperscript{203} See Davidson, \textit{supra} note 5, at 214–15 (advocating, in light of the caseload crisis, that circuit courts be granted the authority to review denials of summary judgment on a discretionary basis); Eisenberg & Morrison, \textit{supra} note 3, at 294, 301–02 (recognizing that the size of the circuit courts’ workload is an important consideration that weighs in favor of discretionary appellate review of interlocutory orders); Martineau, \textit{supra} note 3, at 777–87 (using data from the Wisconsin state court system—which has adopted the ABA’s recommendations regarding discretionary appellate review—to argue that the workload in a discretionary interlocutory regime may be manageable); \textit{see also Fed. R. Civ. P. 23(f)} advisory committee’s note (suggesting that the concerns about increased review of class certification orders can be “met at relatively low cost” by establishing in the court of appeals discretionary power to hear such appeals). The crisis of volume in the federal courts of appeals has been a concern for many years. \textit{See Thomas E. Baker, Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals 31–43 (1994)} (summarizing the various studies and calls to address the crisis of volume); Lawyers Conference Comm., \textit{supra} note 4, at 33–34 (discussing the caseload crisis and the various calls for reform over the previous thirty years). In its report to Congress in 1990, the Federal Courts Study Committee (FCSC) indicated that the total number of cases filed in the courts of appeals increased tenfold from 1958 to 1988. FCSC Report, \textit{supra} note 14, at 5. Although the number of
only those interlocutory orders that are truly worthy of immediate re-
view, circuit courts are able to correct errors and develop the law,
while controlling the impact of interlocutory review on their
workload.204

Yet discretionary review of interlocutory orders is neither needed
nor advisable. Many of the aforementioned proponents of discretion
seek to replace or largely displace the exceptions to the final judg-
ment rule in part because of perceived problems with the current re-
gime.205 As Part I demonstrated, however, the existing exceptions
work well.

Moreover, discretionary review will neither result in dramatic in-
creases in the correction of errors that threaten to inflict irreparable
harm nor enhance significantly the development of legal standards in
underdeveloped areas. Indeed, if discretion were to replace the cur-
rent exceptions, there would be even less meaningful and effective in-
terlocutory review. Furthermore, discretionary review is more
troublesome than its proponents foresee. It will impose substantial,
new burdens on circuit courts and litigants, including an additional
step—petitions for review—in the appellate process. Discretion also
grants to the circuit courts a new kind of power that threatens the
integrity of the courts' error correction and lawmaking functions.

appeals (both civil and criminal) has continued to rise in recent years, the rate of
increase has slowed. For example, from 1995 to 1999, the number of cases filed in
the circuit courts increased from 50,072 to 54,693. Fed. Judicial Ctr., Judicial Busi-
civil matters have leveled off, and actually declined slightly in 1999. Nevertheless,
the sheer number of appeals continues to pose significant challenges for the courts of
appeals, particularly since the number of federal circuit judges has not been ex-
panded significantly for decades. Appeals in civil cases remains of primary concern
since the bulk of appeals to the circuit courts are in civil matters. See Charles W.
Nihan & Harvey Rishikof, Rethinking the Federal Court System: Thinking the Unthinkable,
14 Miss. C. L. Rev. 349, 359 (1994) (stating that seventy-six percent of all appeals in
the federal system in 1990 were in civil matters).

204 See Eisenberg & Morrison, supra note 3, at 302 (stating that discretionary re-
view will impose only modest burdens on courts because there is no need to perform
research or determine whether an appeal is appropriate); Martineau, supra note 3, at
777 (arguing that one of the benefits of a discretionary system is that jurisdiction of
the appellate court is never an issue and no interlocutory appeal will ever be dis-
missed as premature). Proponents of discretion also contend that the savings to both
the courts and parties in terms of avoiding collateral litigation and full appellate re-
view in circumstances in which it is not necessary outweigh any burden imposed by
the petition process. See, e.g., Eisenberg & Morrison, supra note 3, at 302.

205 See Cooper, supra note 7, at 157, 162–64; Eisenberg & Morrison, supra note 3,
at 291–92, 301; Martineau, supra note 3, at 779–75; Nagel, supra note 4, at 201.
Category-based discretionary review, like that embodied in Rule 23(f), suffers from many of the same ills.

A. Error Correction

The final judgment rule ensures that the circuit courts will review district court errors, if at all, after the litigation below has ended. Although there is general agreement that application of the rule is appropriate in most circumstances, resulting hardships are particularly acute when parties cannot seek immediate review of perceived errors that are likely to inflict severe irreparable harm unless corrected prior to the final judgment. Because the existing exceptions undoubtedly capture only a small number of these kinds of errors, facilitating interlocutory error correction to prevent irreparable harm is a central theme of proposed reforms, including discretionary review. For example, the ABA's proposal explicitly includes pro-

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206 See supra notes 33–34 and accompanying text.

207 Other proposed reforms include: (1) significantly expanding the list of category-based exceptions to include other types of orders that would, if erroneous, inflict irreparable harm; and (2) adding an exception which provides for immediate appellate review of orders that, if erroneous, would inflict irreparable harm or which are otherwise effectively unreviewable on appeal. See, e.g., H.R. 3152, 100th Cong. § 702(a) (1987) (containing proposed legislation that would have allowed an interlocutory appeal when it was “essential to protect substantial rights which cannot be effectively enforced on review” after final judgment); Lawyers Conference Comm., supra note 4, at 35–38 (proposing a codified list of statutory and judicially created exceptions as well as other categories of orders worthy of immediate review); Note, Federal Civil Appellate Jurisdiction: An Interlocutory Restatement, 47 LAW & CONTEMP. PROBS., Spring 1984, at 13, 81–82 (proposing a statutory scheme that would embody a certification procedure like that contained in § 1292(b) and interlocutory appeals of right for a long list of orders to protect specific rights of the appellant “which cannot be adequately enforced by review after final decision”).

Advocates of discretionary review argue, convincingly, that these proposed solutions have serious flaws. By expanding the list of exceptions, the first proposal cannot solve the problem of irreparable harm because there is no way, in advance, to anticipate all types of errors in interlocutory orders that will cause such harm. See Martineau, supra note 3, at 774–75 (endorsing the view that, given the variety of circumstances in different cases, it is “impossible to identify in advance classes or types of interlocutory orders that should be appealable immediately”); Nagel, supra note 4, at 216 (“A broad discretionary exception avoids the difficult, perhaps intractable, problem of defining in advance all the categories of orders that should be appealable before final decision.”). In addition, these proposals are likely to produce a substantial amount of additional work in the circuit courts, and these courts cannot handle further, significant increases in their workload. See Martineau, supra note 3, at 773–74 (criticizing proposals to add more categories of “final orders” because they would increase litigation and defeat one of the purposes of the FCSC, finding ways to manage the appellate workload); Nagel, supra note 4, at 220 (“Broad categories in
tecting a party from "substantial and irreparable injury" as a reason for granting review in a particular case.\(^{208}\)

Discretionary review, however, cannot result in correction of all errors that threaten "substantial and irreparable injuries," even if discretion completely supplants the current exceptions. Additionally, discretionary review will not even significantly enhance error correction. Indeed, it ultimately will harm the error correction function.

1. The Limitless Reach of Irreparable Harm

As the ABA standards indicate, discretionary review of interlocutory orders is aimed, in significant part, at reducing error-induced irreparable harm. Yet, contrary to what these standards suggest, appellate review in every circumstance in which there is a threat of "substantial and irreparable injury" is impossible.

The universe of interlocutory orders that cause or threaten to cause irreparable harm is vast. Virtually every interlocutory order threatens some type of irreparable harm. For example, any order that allows legally insufficient claims or defenses to continue to trial erroneously expands the scope of discovery, or increases other pretrial burdens will inflict irreparable harm by forcing the victims of the errors to expend additional resources and time (which will not be reimbursed upon reversal after final judgment).\(^ {209}\)

Moreover, other types of irreparable harm—in addition to increased litigation costs—are frequent byproducts of errors that are not immediately reviewable. All of the following interlocutory orders would inflict various forms of severe irreparable harm—"substantial and irreparable injury"—if uncorrected before final judgment: an erroneous refusal to enter an order protecting privileged communications or trade secrets; an erroneous denial of a motion to dismiss that forces the defendant to file an answer containing admissions that

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\(^{208}\) See ABA Comm’n, supra note 7, at 21.

\(^{209}\) The original beneficiary of the error will suffer harm as well, if the erroneous decision is reversed after trial, and the beneficiary spent extra time and money litigating the erroneous claims or defenses or conducting ultimately unhelpful discovery.
cause public relations problems; an erroneous disqualification of plaintiff’s counsel that sounds the death knell of the litigation; an inappropriately broad license to conduct discovery that reveals truly irrelevant facts that may lead to other lawsuits; an erroneous denial of summary judgment in a context in which the costs and risks of litigating through trial are so great that the defendant must, as a practical matter, settle the case; and an erroneous dismissal of some claims or theories that reduces scope of discovery or changes the litigation posture in ways that cannot be rectified later (particularly after trial, where the appellate court is not likely to find harmful error). Far from being rare, such hardships are common in many types of civil litigation.210 Likewise, in nearly every case in which a party seeks discretionary review of an interlocutory order, it can argue in good faith that it will suffer some kind of irreparable harm—such as forced settlement—unless it receives immediate review.

Thus, “substantial and irreparable injury” knows few bounds. It cannot serve as a helpful or effective guideline for exercising discretion. Given the hundreds of thousands of civil cases proceeding in the federal district courts,211 and the potential for multiple, important interlocutory decisions in each case (particularly in large and complex cases), if the risk of severe irreparable harm were the benchmark for immediate appellate review, the number of potential interlocutory ap-

210 The Supreme Court offered a similar assessment in the collateral order doctrine context when it rejected irreparable harm as the touchstone for demonstrating an order is effectively unreviewable:

A fully litigated case can no more be untried than the law’s proverbial bell can be unrung, and almost every pretrial order or trial order might be called “effectively unreviewable” in the sense that relief from error can never extend to rewriting history. Thus, erroneous evidentiary hearings, grants or denials of attorney disqualification, and restrictions on the rights of intervening parties may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment; and other errors, real enough, will not seem serious enough to warrant reversal at all, when reviewed after a long trial on the merits. In still other cases, an erroneous district court decision will, as a practical matter, sound the “death knell” for many plaintiffs’ claims that might have gone forward if prompt error correction had been an option. But if immediate appellate review were available every such time, Congress’s final decision rule would end up a pretty puny one, and so the mere identification of some interest that would be “irretrievably lost” has never sufficed to meet the third Cohen requirement.


211 In both 1998 and 1999, there were over 250,000 civil cases filed in the United States District Courts. 1999 FJC Rep., supra note 203, at 16. This figure excludes bankruptcy court filings, which exceed a million a year.
peals would be overwhelming, even if the circuit courts had unlimited resources. Discretionary review therefore cannot promise a complete solution for, or even make a significant dent in, the mass of otherwise unreviewable orders that threaten to inflict irreparable harm.

2. Probable Error

Because irreparable harm is an ineffective benchmark for determining when to grant leave to appeal, circuit courts exercising discretion will have to determine whether an order contains error or "probable error." Certainly, not all interlocutory orders that threaten to inflict irreparable hardship contain probable errors; probable errors therefore limit the universe of interlocutory orders appropriate for immediate review. Yet, this limitation is far from sufficient to reduce the number of appeals to workable levels.

I am unaware of any study that has determined district court error rates in interlocutory orders in civil matters. The reversal rate (most often after final judgment) for all matters in the federal courts is probably somewhere between fourteen and twenty percent. Of

212 I therefore disagree with those who suggest that severe hardships warranting immediate review will be rare. See, e.g., Turk, supra note 5, at 1039 (stating that discretionary review can provide relief to litigants in those "rare cases" in which the unavailability of immediate review will result in severe hardship).

213 By "probable error," I mean legal or factual conclusions embodied in an interlocutory order that, upon first review, appear more-like-then-not erroneous and likely to lead to a reversal, vacation, or corrective remand (upon immediate appeal).

214 As discussed below, in certain circumstances, circuit courts may be willing to accept review even if error is not probable. I believe this will be true only in a small number of cases, however, since orders that are likely to be affirmed do not pose a significant risk of inflicting unjustified hardships. Some supporters of discretionary review have suggested that an evaluation of the merits to determine whether there is an important issue is a factor circuit panels should consider in deciding whether to grant review. See, e.g., Solimine & Hines, supra note 69, at 1581.

215 See ADMIN. OFF. OF THE U.S. CTs., 1990 ANNUAL REPORT 177 tbl.B-5 (1991) [hereinafter 1990 ANNUAL REPORT] (reporting a reversal rate—including outright reversals and corrective remands—in all matters of 13.6%); see also Posner, supra note 29, at 68–69; Solimine, supra note 4, at 1177 & n.72 (citing several sources, including Posner, for the proposition that the reversal rate in civil cases is somewhat less than twenty percent). But see Jon O. Newman, A Study of Appellate Reversals, 58 BROOK. L. REV. 629, 632 (1992) (studying the reversal rate in the Second Circuit from July 1989 to June 1991 and concluding that the court reversed in whole or in part twenty-four percent of the total dispositions from the district court). Judge Newman's study of Second Circuit reversals suggests that the rate of reversal in civil matters is greater than the rate in criminal matters. See id. at 632–33 (finding that the Second Circuit reversed district court dispositions in civil matters twenty-seven percent of the time, while reversing in criminal matters only nineteen percent of the time).
course, the reversal rate may not reflect the rate of error or probable error. Yet, if the probable error rate in interlocutory orders even approaches the reversal rate—and it may be higher—the appellate courts would be unable to review all orders containing probable errors that threaten to inflict serious irreparable harm. Moreover, given the current docket congestion in the federal system, review of a sizable percentage of such orders simply is not possible.

Although some parties will not seek immediate review of such orders, many will. If a disgruntled party foresees that an interlocutory order will cause some type of irreparable harm to its interests, the party, acting rationally, would petition for review if the potential harm, discounted by the likelihood of affirmance (by denial of review or on the merits), exceeds the cost of filing the petition and preparing the appeal. When the party views the probability of error as high, petitioning for review often will be worth the investment. Thus, the circuit courts are likely to see significant numbers—many thousands—of petitions for interlocutory review every year.

In his article advocating that the federal system adopt the ABA’s model, Professor Martineau uses data from the Wisconsin state court system—which adopted the ABA approach in 1978—to support his contention that the number of petitions may be reasonable. His data, from 1988 to 1990 demonstrates that during that period, the number of appeals of right in Wisconsin outnumbered petitions for discretionary appeal approximately nine to one.

In their more recent article, Eisenberg and Morrison discuss the Wisconsin experience...

216 I do not suggest that the error rate can be determined from the reversal rate. However, the rate of probable error in interlocutory decisions likely will be higher than that of actual error because some decisions that appear to contain error at first blush will be affirmed upon closer inspection.

217 In 1998 and 1999, there were over 250,000 civil actions filed annually in the district courts. See 1999 FJC REP., supra note 203, at 16. If the district courts make one or more important interlocutory decisions in a significant number of these cases prior to settlement, abandonment, or final resolution (at trial or pre-trial), the number of currently unappealable probable errors must be staggering. The potential number of such orders is particularly overwhelming when one considers that the circuit courts are struggling with their current caseload—slightly less than 55,000 total appeals annually (civil and criminal) in 1998 and 1999. See id.

218 Of course, the group of potential petitioners would not include parties who, faced with such a probable error, simply do not have the resources to prepare the petition and appeal. In this respect, discretion likely would favor defendants, who tend to have greater resources than plaintiffs.

219 See Martineau, supra note 3, at 784.

220 See id. Professor Martineau also noted that the Wisconsin courts construe finality narrowly, and hence, there may be fewer appeals of right than in the federal system. See id. Of the petitions for review, the rate of acceptance (per year) by the
from 1994 to 1997.221 During these years, the ratio of petitions to appeals of right was about the same.222

If the federal system experienced comparable petition rates in civil matters, there would be roughly 4000 to 6000 petitions per year, given current caseload levels.223 Reviewing even this number of petitions would impose a fairly significant burden on the circuit courts, as discussed below. Nevertheless, use of the Wisconsin rates, while helpful, may underestimate significantly the number of petitions in civil cases in the federal system. The data, which includes petitions in civil and criminal cases, does not reveal the various types of cases or the nature of the parties proceeding through the Wisconsin system during the relevant period.224 I suspect that the percentage of larger, more complex civil matters is greater in federal court, as are the resources of federal litigants, particularly defendants. Larger, complex civil cases are likely to produce more interlocutory orders, creating additional fodder for petitions, and litigants with greater resources are more likely to take advantage of available avenues of appeal. Thus, although the Wisconsin experience is worth considering, the data from that system may not predict accurately how many petitions would be filed if the federal courts adopted a similar regime.225 The number of petitions in the federal system easily could exceed these expectations.

Eisenberg and Morrison also contend that the circuit courts can handle growth in interlocutory appeals because they will save time on the back end of the process by reducing the number of appeals after judgment is entered below.226 Some appeals after final judgment will

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appellate courts varied from approximately twenty-two percent to thirty-three percent. See id. at 782–83.

221 See Eisenberg & Morrison, supra note 3, at 299–301.

222 See id. The rates of acceptance of appeals also were about the same (twenty-two percent to thirty-four percent) as the earlier period. Id.

223 This figure is based on the total number of civil appeals in the federal system. See supra note 203 (indicating that the number of appeals in the federal system was approximately 55,000 in 1999 and that appeals in civil matters make up approximately seventy-five percent of total appeals).

224 The data includes petitions in both civil and criminal cases, and does not indicate the number of petitions in civil matters only.

225 See Nagel, supra note 4, at 220 (advocating that the federal courts adopt Wisconsin’s approach, but conceding that the Wisconsin numbers “tell little of what impact this discretionary scheme would have on the federal system”).

226 See Eisenberg & Morrison, supra note 3, at 301 (stating that any increase in the number of interlocutory appeals will be more than offset by decreases in appeals from final judgments); see also Solimine, supra note 4, at 1178 (stating, in advocating increased use of § 1292(b), that an increase in interlocutory appeals may decrease the
be averted, both directly and indirectly. However, there will still be a substantial net gain in the number of attempted appeals (appeals of right plus petitions for appeals). First, in a discretionary regime, there will be the possibility of multiple appeals, reducing gains in foreclosing appeals after final judgment. Moreover, in the current regime, final judgment will never be entered in most cases because two-thirds will settle or be abandoned. In many other cases that do reach final judgment, an appeal on a particular issue will not be taken because it has been mooted. Thus, in a discretionary regime, the circuit courts will face probable errors that they never would have confronted in the current regime.

Finally, in addition to this net gain in possible appeals, the added work of reviewing petitions for probable error will further burden the circuit courts. This would be true even if review of individual petitions usually were not onerous. While petition review will not require the drafting of opinions, it often will involve the remaining aspects of actual appellate review. Many errors are subtle, involving the inap-

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227 For example, interlocutory review will directly avert an appeal after trial of a denial of a Rule 12(b)(6) motion to dismiss or motion for summary judgment. Interlocutory review also will prevent a later appeal if it moves the parties towards settlement.

228 See Admin. Off. of the U.S. Cts., Explanation of Judicial Caseload Profiles, in Federal Court Management Statistics (1998) [hereinafter 1998 FCMS]. Nearly a third are resolved prior to trial. See id. Less than five percent of civil matters proceed to trial. 1990 Annual Report, supra 215, at 212 (indicating that the trial rate has hovered between 4.3 percent and five percent); see also Theodore Eisenberg et al., Litigation Outcomes in State and Federal Court: A Statistical Portrait 7 (1995) (finding in a national study that 2.99% of all civil cases filed in both state and federal court go to trial). I believe discretionary review will produce no net increase in settlements. As Professor Solimine discussed in reviewing the settlement literature, both certainty and uncertainty can promote settlements within individual cases. See Solimine, supra note 4, at 1180–81. He argues, nevertheless, that certainty in the law ultimately will promote more settlements. See id. at 1181. Enhanced clarity of legal standards eventually would promote pre-trial resolutions, including settlements. Yet the limited and uneven interlocutory review that will result in a discretionary regime is unlikely to significantly enhance development of clear legal standards.

229 Eisenberg and Morrison, therefore, are incorrect when they state that, in most cases, "the question is not whether, but when" the issues will reach the court of appeals. See Eisenberg & Morrison, supra note 3, at 301. Given the huge percentage of cases that settle and number of issues that are mooted prior to an appealable final judgment, most issues that would be raised in petitions for interlocutory review otherwise would never reach the appellate courts.

230 In criticizing proposals for abandoning appeals of right, Professor Carrington makes a similar observation:
appropriate extension of a legal principle or a misapplication of the law to a given set of facts. Careful review may be necessary to determine whether there is probable error. Reviewing orders for possible abuses of discretion will be particularly time consuming and ultimately may involve a significant review of the factual record, if that is allowed at the petition stage.\textsuperscript{231}

If the circuit courts fail to undertake such exacting petition review, they face risks on both sides. If they find probable error too often, they will add too many appeals to their crowded dockets. If they fail to spot probable errors, they will defeat the goal of preventing irreparable harm caused by erroneous interlocutory decisions.\textsuperscript{232}

All of this—the sheer number of probable errors in interlocutory orders that threaten to inflict irreparable harm, the number of resulting petitions for review, and other workload pressures on the circuit courts—demonstrates a relatively straightforward point: discretionary interlocutory review cannot substantially alleviate the hardships associ-
ated with the final judgment rule. Under a discretionary regime, the circuit courts will be unable to review more than a small percentage of probable errors in interlocutory orders that threaten to inflict irreparable harm.\textsuperscript{233}

3. Even Less Review

One potential benefit of discretionary review is that the circuit courts can screen out orders containing no probable errors. For example, if discretionary review were to replace many of the current exceptions, rather than merely supplement them, resources the courts now expend on reviewing appealable orders containing no probable errors could be reallocated to address probable errors in currently unappealable orders.\textsuperscript{234} The additional work associated with reviewing petitions would reduce the net savings, but, at least in theory, discretion could result in somewhat greater probable error review.

Such benefits will not be forthcoming. The circuit courts are struggling to manage their caseload. Realistically, circuit court judges will take into account that denying review means less work. If given the choice, they will choose to review fewer orders than they are currently reviewing. Indeed, this would be consistent with the experiences of courts—including the Supreme Court and the Virginia appellate courts—that exercise discretionary review in an environment of rising caseloads.\textsuperscript{235} Likewise, current circuit court practices

\begin{itemize}
\item \textsuperscript{233} See Dalton, supra note 33, at 72 (recognizing that certiorari—or discretionary review—has never been a way of assuring error correction in individual cases).
\item \textsuperscript{234} There are significant obstacles in the way of implementing a purely discretionary interlocutory regime. Entirely replacing the current exceptions with discretionary review cannot be achieved through rulemaking, since some of these exceptions—i.e., § 1292(a), § 1292(b), and § 16 of the Federal Arbitration Act—are statutory. Capturing Congress's attention and convincing it to abrogate all or even some of these exceptions is unlikely. Moreover, because the interpretive doctrines provide for appeals of right pursuant to § 1291, in order to replace these doctrines with discretionary review, the rulemakers would first have to utilize their § 2072(c) authority to abrogate the doctrines. Whether the Supreme Court would be willing to accept abrogation of all of the existing interpretive doctrines is an open question.
\item \textsuperscript{235} See Martha J. Dragich, Once a Century: Time for a Structural Overhaul of the Federal Courts, 1996 Wis. L. Rev. 11, 14 (stating that as appeals to the circuit courts have risen, fewer and fewer of these cases are being heard by the Supreme Court); Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill, 100 COLUM. L. REV. 1643, 1646 (2000) (pointing out that the number of cases the Supreme Court chooses to decide has declined since the early part of this century); Graham C. Lilly & Antonin Scalia, Appellate Justice: A Crisis in Virginia?, 57 VA. L. REV. 2, 4 (1971) (identifying a significant discrepancy between the increases in total workload and petitions for review in Virginia and the grants of review from 1959–1969); see also Bernard G. Barrow, The Discretionary Appeal: A Cost Effective Tool of Appellate
\end{itemize}
suggest this result. During the last two decades, the circuit courts—on their own initiative—have implemented various rules and practices to reduce their work. In addition, the circuit courts’ surprisingly low rate of review of orders certified under § 1292(b) suggests that the circuit courts resist giving themselves more work, even when the total impact on their caseloads would be minimal. Moreover, as discussed more fully below, review of class certification orders under Rule 23(f) has been sparse. Indeed, research reveals that from its effective date (December 1, 1998) to March 21, 2001, the circuit courts have granted review under this provision only eighteen times. Even discounting the first six months after the rule became effective, that amounts to less than one grant per circuit per year. Thus, while discretion may provide the opportunity for more frequent review of probable

Justice, 11 Geo. Mason L. Rev. 31, 35–36 (1988) (stating—in advocating reform—that later history in Virginia confirms a strong inverse relationship between the total number of petitions for review considered by the state’s supreme court and the percentage of those granted).

The two studies of Wisconsin’s discretionary system revealed that the courts of appeals in that state granted review between twenty-two and thirty-four percent of the time. See supra notes 220, 222. Again, I question whether the Wisconsin experience is a helpful predictor of how the federal circuit courts might respond in a discretionary regime. Unlike some of the other aforementioned courts and court systems, there is no indication that the Wisconsin courts of appeals were experiencing similarly strained dockets.

In the last three decades, the circuit courts have significantly altered their internal rules and procedures to facilitate speedier resolution of cases. See Baker, supra note 203, at 106–50 (describing various “intramural reforms” the circuit courts have utilized to assist in managing their caseload, including limiting oral argument and issuing fewer written and published opinions); Dragich, supra note 235, at 28–30 (discussing various internal reforms in the circuit courts, including eliminating oral arguments, investing less time studying the case, and writing fewer opinions). This trend supports the hypothesis that, given the opportunity, circuit panels will avoid conducting a thorough appellate review. Moreover, as discussed previously, circuit courts rarely choose to review district court orders via mandamus. See supra notes 164–69.

See Solimine, supra note 4, at 1174 (stating that the acceptance rate of certified orders in the 1980s was approximately thirty-five percent). Professor Solimine’s survey of one circuit’s treatment of § 1292(b) indicated that parties’ failure to comply with the requirements of the statute was the basis for denial of a significant number of appeals. See id. at 1199–1200. These procedural failings, however, did not explain most denials. See id. at 1200–01 (stating that many denials were attributable to that fact that the cases were not sufficiently “exceptional” to justify immediate review). Professor Solimine ultimately concluded that there is a high level of reluctance among circuit courts to accept appeals under the statute. See id. at 1201.

See infra notes 261–65 and accompanying text. During the same period, additional interlocutory review of class certification orders pursuant to § 1292(b) occurred four times.
error in interlocutory orders, circuit courts are not likely to take advantage of that opportunity.

Discretion therefore is likely to result in less review. Under a discretionary regime, the circuit courts generally would limit their grants to three types of interlocutory orders: those containing (1) obvious and unburdensome errors; (2) probable errors in big or exceptional cases; and (3) intolerable probable errors.

The courts are likely to grant review of obvious and unburdensome errors because such errors, by definition, will be easy to spot and easy to correct. Review of this group may make sense given the low transaction costs, but it is a limited universe of orders. Unfortunately, however, the opposite is also true: courts are far less likely to grant review when determining whether there is probable error is difficult or where correcting such error will be burdensome. In such circumstances, the court would have to invest more time to determine whether the order contains probable errors and then would have to expend significant time and resources correcting any such error. Such disincentives are troubling because district courts are more likely to make errors when the legal issues or application of legal principles are difficult, and, as discussed in the next Section, they need greater guidance in such areas.

239 In the context of crowded dockets, circuit judges would tend to avoid review that would require significant amounts of additional work. See Mito Gulati & C.M.A. McCauliff, On Not Making Law, 61 LAW & CONTEMP. PROBS., Summer 1998, at 157, 160–61, 173–74 (1998) (indicating that circuit judges may utilize the “judgment order” in hard cases to save judicial resources and avoid scrutiny). For example, circuit courts may avoid review of more complex legal doctrines, heavily fact-based inquiries, and determinations that involve several levels of legal or factual analysis.

240 In critiquing the practices of the circuit courts (in the mid-1980s) and calling into question the propriety of abandoning appeals of right for a discretionary system, Professor Carrington observed that appellate courts have removed themselves to some extent from the “humdrum” work of reading transcripts and determining the accuracy of the work done by the trial court. See Carrington, supra note 230, at 428–29. The courts are likely to exercise the same option in a discretionary interlocutory regime, in which avoidance is even easier.

241 Indeed, one of the bases for adoption of Rule 23(f) was to clarify the law with regard to the standards for class certification. See FED. R. CIV. P. 23 advisory committee’s note. Yet class certification decisions are intensively fact-based and left to the sound discretion of the district judge. See Kruse, supra note 5, at 705–10 (describing the standards under Rule 23 governing class certification and notice, and stating that the decision to certify the class is left to the discretion of the trial judge and involves a practical application of the standards to the facts of the case). Circuit judges may think twice about accepting review of such decisions, which will require a significant amount of work and attention.
The circuit courts also are likely to grant review of some probable errors in certain big or exceptional cases—cases that are truly extraordinary in terms of participants, monetary or other stakes, regional or national impact, or public attention.\textsuperscript{242} Granting review in these cases may be appropriate, but it will not assist parties seeking review in most cases.\textsuperscript{243}

Finally, the circuit courts are likely to limit their remaining grants to probable errors they find to be intolerable, in other words, probable errors (or certain types of irreparable harm threatened by such errors) that so offend a majority of the reviewing judges that they are willing to increase their own workload to review them. Those probable errors that are not intolerable to the reviewing panel, or are not intolerable enough to justify the added work, will go uncorrected.

4. Intolerable Error and the Darker Side of Discretion

Up to this point, I have questioned the advantages and detailed the potential costs of discretionary review. Having reached the conclusion that circuit courts are likely to limit their review in most circumstances to intolerable error, I now contend that discretion is undesirable because it affords the circuit courts a new and dangerous kind of power.

Much criticism already exists of various institutional changes circuits have adopted to allow greater control of their workload at the expense of full appellate review.\textsuperscript{244} These changes include submitting

\textsuperscript{242} Even if the probable error at issue in a big case is not troubling or particularly interesting to the appellate panel, the panel may be willing to accept the burden of review given the case's overall importance. Indeed, several circuits have suggested that review of orders under § 1292(b) is only appropriate in big and exceptional cases. See supra note 74 and accompanying text. Although I agree with Professor Solimine that this limitation is an inappropriate judicial gloss on § 1292(b), it evinces the circuit courts' willingness to become involved in certain aspects of big cases proceeding in the district courts. See Solimine, supra note 4, at 1173. However, the circuits' sparse use of Rule 23(f) suggests that simply because a case is a class action does not mean that it is sufficiently big or exceptional to capture the circuits' attention.

\textsuperscript{243} Such an investment of resources may make sense if it advances a case that will affect many people, but it also may mean that the courts will be less likely to expend resources reviewing probable errors in other cases.

\textsuperscript{244} See Carrington, supra note 230, at 424–28 (criticizing the changes in appellate procedures—while noting that the caseload crisis cannot be blamed on the judiciary—and de-emphasis on ensuring that district court errors are corrected); Gulati & McCauliff, supra note 239, at 160 (discussing the dangers to the integrity of the judicial function posed by the use or misuse of "short form" dispositions); Thomas Kallay, The Dismissal of Frivolous Appeals by the California Courts of Appeal, 54 CAL. ST. B.J. 92, 92 (1979) (arguing that if a party can perfect an appeal as a matter of right, he should
various types of matters to administrative prescreening, more frequent denials of oral argument, greater use of summary affirmances and judgment orders, and issuance of unpublished and nonbinding opinions. Some commentators contend that such reforms give circuit courts something close or analogous to "certiorari power."

Discretionary review of interlocutory orders goes further: it is certiorari power. There are few, if any, institutional constraints on its exercise. Such unfettered authority to decide whether to correct reversible error departs from the traditional framework within which the circuit courts have operated. The circuit courts—unlike the Su-

necessarily be entitled to the benefits of the entire deliberative process offered by the forum to which he has taken his appeal). See generally Martha J. Dragich, Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions To Explain and Justify Judicial Decisions Pose a Greater Threat, 44 AM. U. L. REV. 757 (1995) (concluding that the increased incidence of unpublished opinions, summary dispositions, and vacatur upon settlement has dire implications for the development of a coherent body of law and would ultimately exacerbate the litigation explosion in the federal courts); Donald P. Lay, A Proposal for Discretionary Review in Federal Courts of Appeals, 34 Sw. L.J. 1151, 1153 (1981) (describing the significant danger of one-judge opinions in circuits who decide no-argument cases without collegial conference of the three judges meeting together and exchanging divergent views).

See Gulati & McCauliff, supra note 239, at 159 ("Constrained by a lack of resources, the circuit courts have turned to shortcuts."); see also Dalton, supra note 33, at 63 & n.6 ("[T]he right to appeal has in practice begun to shrink to a mere formality in many jurisdictions as appellate judges severely restrict oral argument, deliberate alone, write skeletal opinions, write unpublished opinions, affirm without opinion, and in some cases rule from the bench."); Kirt Shuldberg, Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals, 85 CAL. L. REV. 541, 543 (1997) (examining the original justifications for limiting the publication of federal appellate opinions, concluding that many of the limited publication/no citation plans currently in use are suboptimal in light of modern day storage and research capabilities). For example, the circuit courts now resolve far more appeals without opinions or in unpublished orders. See 1998 FCMS, supra note 228, at 49 tbl.S-3 (indicating that 78.1 percent of the opinions and orders filed in cases terminated by the circuit courts from October 1998 to September 1999 were unpublished).

See generally William M. Richman & William L. Reynolds, Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition, 81 CORNELL L. REV. 273 (1996) (arguing for an increase in the size of the appellate system); Carl Tobias, The New Certiorari and a National Study of the Appeals Courts, 81 CORNELL L. REV. 1264 (1996) (arguing that because judicial expansion is a potentially ineffective and unrealistic solution to multiplying appeals, a national commission should be appointed to evaluate the appellate system).

See Fed. R. Civ. P. 23(f) advisory committee’s notes (stating that discretionary review under Rule 23(f) is unfettered and akin to the Supreme Court’s certiorari power).

See Dalton, supra note 33, at 63 n.6 (describing various criticisms of changes to appellate review, including the loss of checks on the appellate courts’ power).
preme Court—have always been courts of error. As part of this cor-
rective function, they have been obliged to determine whether there is error and to correct reversible errors properly before them. Indeed, some argue that this obligation is inherent in the traditional notion of judicial review.

It is unwise to abandon this tradition, even for interlocutory orders alone. What constitutes intolerable probable error is subjective and unchecked by formal or informal constraints in a pure discretionary regime. Circuit judges often will employ legitimate factors in determining whether to grant review, such as determining whether alleged errors defy newly-created circuit precedent or will result in some kind of uncommonly severe irreparable harm. However, judges also may employ other, troublesome considerations—consciously or unconsciously—in deciding which probable errors to review. For example, judges may allow personal preferences regarding certain outcomes, plaintiffs or defendants, or types of claims or defenses to creep into their decision whether to grant review. In addition, circuit judges may be more or less likely to tolerate errors made by particular district court judges or magistrates. Also, based on preference, per-

249 See Carrington, supra note 230, at 416 (stating that at the time of the Evarts Act in 1891, the appellate courts were perceived as error correctors and that it was not until later that they even took on their additional role as lawmakers).
250 Cf. Gulati & McCauliff, supra note 239, at 174 (stating that, unlike the Supreme Court, the courts of appeals do not have the power to deny review to a properly submitted claim of error); James Boyd White, What's an Opinion For?, 62 U. CHI. L. REV. 1363, 1367-68 (1995) (arguing that the judicial opinion is a central and important feature of the law).
251 See, e.g., Hartnett, supra note 235, at 1713-26 (questioning whether the Supreme Court’s unfettered discretion to involve itself or not involve itself in cases defies our traditional notions of judicial review and power, and discussing the views of other commentators).
252 Cf. Gulati & McCauliff, supra note 239, at 163, 166 (commenting on the lack of formal and external monitoring of the use of short form dispositions such as judgment orders).
253 See Nagel, supra note 4, at 220–22 (advocating discretionary review but conceding that discretion may lead to certain, isolated injustices).
254 See id. at 222 (conceding that appellate courts may be more receptive to requests for interlocutory review of orders issued by district court judges with an unfavorable history and may look less carefully at requests from cases before judges viewed more favorably). In his early article warning about the increasing power of the federal circuit courts, Professor Wright expressed concern about appellate panels substituting their own judgment of what is just in a particular case for that of the trial judge. See Wright, supra note 163, at 779–81. Although it is beyond dispute that one role of circuit courts is to correct errors committed below, discretion would allow circuit panels to decide, without constraints, whether and when to substitute their particular brand of judgment for that of the district court with regard to interlocutory orders. If
personal experience, or even bias, judges may have a greater distaste for certain types of irreparable harm than others.

The level of risk of improper use of discretion cannot be quantified. However, the circuit courts' treatment of petitions under § 1292(b)—their only opportunity to exercise discretion prior to Rule 23(f)—may provide some tentative insights. As stated above, the rate at which circuit courts grant review of orders certified under § 1292(b)—fifty percent in the 1960s and only thirty-five percent in the 1980s—is surprisingly low. This rate is troubling because certified orders are likely to be worthy of immediate review. The certifying judge is familiar with the case, and her determination that review is warranted is inherently trustworthy, since she is voluntarily relinquishing control of the litigation, inviting further delay, and subjecting her own order to possible reversal. Because they need not state their reasons for denying review, how individual panels decide whether to accept review is largely unknown. Given the trustworthiness of the district court's determination, the low rate of grants, and the lack of a discernable pattern of grants and denials, it is possible that inappropriate or undesirable criteria are being employed.

Studying the circuit courts' response to Rule 23(f)—the first foray into unlimited and unfettered discretion—would be the best way to test these hypotheses regarding discretionary review. At this stage, however, Rule 23(f) is too new to support any definitive conclu-
sions.\textsuperscript{260} In addition, a thorough study of the courts’ treatment of Rule 23(f) petitions is difficult because circuit courts do not keep records on the number of Rule 23(f) petitions filed, granted, or denied, and many dispositions without opinions—virtually all denials, I suspect—are not accessible online.

Nevertheless, it is worth noting the potentially disturbing, albeit inconclusive trend. Online research reveals that, as of March 21, 2001, circuit courts have granted review under Rule 23(f) in only eighteen cases:\textsuperscript{261} The courts have (1) reversed or vacated class certification in eleven cases;\textsuperscript{262} (2) affirmed class certification in three cases;\textsuperscript{263} (3) reversed and remanded the denial of class certification in two cases;\textsuperscript{264}

\textsuperscript{260} During the hearings on Rule 23(f), at least a few commentators opposed to the rule expressed fears regarding the effect of discretion (in addition to concerns about cost, delay, and the need for appellate review). See infra note 296 and accompanying text.

\textsuperscript{261} This research covered the period of the rule’s effective date, December 1, 1998, to March 21, 2001. Online searches were conducted on both Lexis and Westlaw, using various terms and connectors queries. For example, the following terms and connectors search was performed on both services: “23(f) or interlocutory and class and certifi” More general searches were performed to determine whether there were other class certification determinations that received interlocutory review during the relevant period. In addition to the eighteen cases in which review was granted, these searches produced six cases in which Rule 23(f) was discussed, but review ultimately was denied. See Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1196 (9th Cir. 2000); Z-Seven Fund, Inc. v. Motorcar Parts & Accessories, 231 F.3d 1215, 1219 (9th Cir. 2000); Blaney v. City of Va. Beach, No. 99-7598, 2000 U.S. App. LEXIS 18293, at *2 (4th Cir. July 14, 2000); Scott v. Dennis Reimer Co., 205 F.3d 1341, 1341 (6th Cir. 2000); Richardson Elecs., Ltd. v. Panache Broad, Inc., 202 F.3d 957, 959 (7th Cir. 2000); Gary v. Sheahan, 188 F.3d 891, 893 (7th Cir. 1999).

\textsuperscript{262} See Murray v. Auslander, 244 F.3d 807, 811 (11th Cir. 2001); Kirkland v. Midland Mortgage Co., 243 F.3d 1277, 1282 (11th Cir. 2001); In re Life USA Holding, 242 F.3d 136, 150 (3d Cir. 2001); Patterson v. Mobil Oil Corp., 241 F.3d 417, 419 (5th Cir. 2001); Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 972 (5th Cir. 2000); Mitchell v. Ky. Dep’t of Corr., No. 98-6548, 2000 U.S. App. LEXIS 26160, at *13 (6th Cir. Oct. 12, 2000); Carter v. West Pub’l g Co., 225 F.3d 1258, 1267 (11th Cir. 2000); Lemon v. Int’l Union of Operating Eng’rs Local No. 139, 216 F.3d 577, 582 (7th Cir. 2000); Rustein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1234 (11th Cir. 2000); Pickett v. Ia. Beef Processors, 209 F.3d 1276, 1279–80 (11th Cir. 2000); Jefferson v. Ingersoll Int’l, Inc., 195 F.3d 894, 900 (7th Cir. 1999).

\textsuperscript{263} See Bertulli v. Indep. Ass’n of Cont’l Pilots, 242 F.3d 290, 299 (5th Cir. 2001); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 298–99 (1st Cir. 2000); Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 837 (7th Cir. 1999).

\textsuperscript{264} See Wagner v. Prof’l Eng’rs, No. 00-15753, 2001 U.S. App. LEXIS 2340, at *4 (9th Cir. Jan. 11, 2001); Culver v. City of Milwaukee, No. 98-2079, 1999 U.S. App. LEXIS 26473, at *17 (7th Cir. Sept. 8, 1999).
and (4) affirmed the denial of class certification in two cases.\textsuperscript{265} Thus, review of orders granting class certification outpaces review of orders denying class certification fourteen to four, and reversals in favor of defendants outnumber reversals in favor of plaintiffs eleven to two.

These early results establish neither the existence of bias among circuit judges against plaintiffs or putative classes nor that most grants or denials of review were inappropriate. Since the courts do not keep track of grants and denials and need not give their reasons for granting or denying review, we probably will never know their reasoning.\textsuperscript{266} Nevertheless, at a minimum, this trend suggests that certification grants may be receiving closer scrutiny than denials. Indeed, at least one circuit court has expressed skepticism toward class claims of irreparable harm.\textsuperscript{267} Moreover, I am skeptical that, in over two years, the circuits have been presented with so few class certification orders worthy of review, particularly orders denying class treatment.

Thus, while the trend away from full appellate review in the federal circuits is troublesome, discretionary review of interlocutory orders should cause more concern. There is greater accountability where review is mandatory but limited (such as no oral argument, no opinion, etc.), including the risk of reversal, informal and formal peer


During this period, the circuit courts also granted interlocutory review of four other class certification orders pursuant to § 1292(b), one falling within each of the aforementioned categories. See Perrone v. GMAC, 232 F.3d 433, 440 (5th Cir. 2000) (fourth category); Wash. v. CSC Credit Servs., Inc., 199 F.3d 263, 270 (5th Cir. 2000) (first category); Mullen v. Treasure Chest Casino, 186 F.3d 620, 629 (5th Cir. 2000) (second category); Williams v. Block, No. 98-55609, 2000 U.S. App. LEXIS 8979, at *4 (9th Cir. May 3, 2000) (third category).

\textsuperscript{266} Some commentators who support discretionary review have suggested that circuit courts should demystify the process by explaining their reasons for denying review. See, e.g., Solimine & Hines, supra note 69, at 1585–86; Nagel, supra note 4, at 217.

\textsuperscript{267} See Blair, 181 F.3d at 834.

[W]e must be wary lest the mind hear a bell that is not tolling. Many class suits are prosecuted by law firms with portfolios of litigation, and these attorneys act as champions for the class even if the representative plaintiff would find it uneconomical to carry on with the case. These law firms may carry on in the hope of prevailing for a single plaintiff and then winning class certification (and the reward of larger fees) on appeal, extending victory to the whole class.

\textit{Id.} (citations omitted).
review, and the possibility of misinterpretation in later cases. There are fewer institutional constraints to minimize inappropriate considerations when the courts exercise unfettered discretion to decide whether to review an order. A circuit panel armed with such discretion can ignore reversible error for any reason, without comment, and without downstream consequences.

If discretionary review of interlocutory orders were the only way to enhance error correction, perhaps it would be worth these risks. For example, if Rule 23(f) will facilitate correction of errors in class certification orders that necessarily would go uncorrected otherwise, the fact that reversals may favor defendants disproportionately might be worth overlooking to ensure that some errors get addressed. Yet, this simply means discretionary review ought to be considered in the absence of other viable options. Since the foregoing analysis demonstrates that discretionary review will produce sparse error correction, and the health of the current regime suggests the feasibility of a mandatory approach, there are superior and more appropriate alternatives.

B. Developing the Law

In addition to error correction, circuit courts serve the institutional function of developing law by articulating and clarifying legal principles. Indeed, because the Supreme Court hears so few cases, the circuit courts have become the federal system’s primary source of

268 If the appellate panel does not like a result, it can accord less deference in a discretionary regime because, in later cases, the court can avoid the burden of consistent, searching review simply by denying review.

269 In his 1957 article, Professor Wright warned against allowing circuit courts to decide, in their discretion, whether to take review before final judgment and advocated instead legislation or rules imposing “tight conditions” for interlocutory review. See Wright, supra note 163, at 777–78. Although his particular concern about the misuse of extraordinary writ power has not come to pass, discretionary review would provide even greater freedom to circuit courts to decide what interlocutory decisions to review.

270 See Martineau, supra note 28, § 1.9 (stating that the institutional function serves the purposes of developing legal principles and enforcing them); Carrington, supra note 230, at 417 (stating that modern theorists have distinguished between the corrective and rule-directed or law-giving functions); Solimine, supra note 4, at 1175 (stating that appeals serve a number of values including permitting the law to be developed in a way applicable to geographically dispersed courts); Wright, supra note 163, at 779 (“Everyone agrees, as far as I know, that one function of an appellate court is to discover and declare—or to make—the law.”).
legal doctrine.\textsuperscript{271} Such lawmaking occurs largely in appeals from final judgments. Because of the limited opportunity for interlocutory review, some areas of the law that tend to evade review after final judgment have received inadequate appellate attention.\textsuperscript{272} As reflected in the ABA’s proposal,\textsuperscript{273} discretionary interlocutory review is supposed to be utilized to develop the law in important areas. The need to clarify the law with regard to class actions was one of the reasons Rule 23(f) was enacted.\textsuperscript{274}

Discretionary review, however, will produce neither the amount nor the type of appellate review needed to clarify the law in areas that historically have evaded review. It also poses significant dangers to the integrity of the lawmaking process and the role of precedent.

As discussed in the previous Section, circuit courts are likely to grant discretionary review sparingly.\textsuperscript{275} Sometimes they will grant review to address a novel or unresolved issue of law even if error below is improbable; for example, circuit judges are likely to be interested in issues arising in big and exceptional cases.\textsuperscript{276} Because review means increased work, however, circuit courts are likely to limit most of their

\begin{itemize}
\item \textsuperscript{271} See Dragich, \textit{supra} note 235, at 22 (stating that circuit courts have assumed a large share of the lawmaking burden).
\item \textsuperscript{272} Although greater appellate attention does not guarantee clear governing principles, consistent review usually will foster clearer standards over time, at least within a particular circuit. The standards governing the issuance of preliminary injunctions provide a good example. Although preliminary injunctions are interlocutory, they are subject to immediate appellate review under § 1292(a)(1). Given the significant appellate attention this form of interim relief has received, the standards governing the grant of such relief have become quite exacting. In contrast, the legal standards governing class action certifications (which were not subject to interlocutory review prior to Rule 23(f)) and various aspects of the attorney-client privilege are far from clear and are wrought with inconsistencies. These two areas, unlike preliminary injunctions, have received little appellate attention because no interlocutory appeal has been available. Significantly expanded interlocutory review in these areas eventually would lead to needed clarification.
\item \textsuperscript{273} See ABA Comm’n, \textit{supra} note 7, at 25 (including clarification of the law on important issues as one of the reasons for granting discretionary review); see also Eisenberg & Morrison, \textit{supra} note 3, at 291 (advocating discretionary review in part because interlocutory review aids in the development of the law).
\item \textsuperscript{274} See Gould, \textit{supra} note 6, at 310–11 (stating that one of the primary reasons for the adoption of Rule 23(f) was to enable circuit courts to develop clear certification standards); see also Fed. R. Civ. P. 23(f) advisory committee’s note (suggesting Rule 23(f) may be utilized to provide appellate review where a class certification decision “turns on a novel or unsettled question of law”).
\item \textsuperscript{275} See \textit{supra} notes 261–65 and accompanying text.
\item \textsuperscript{276} See \textit{supra} note 242 and accompanying text.
\end{itemize}
grants to circumstances in which review is unburdensome or the result below is intolerable.\textsuperscript{277} 

The universe of probable errors is vast. Given the small number of decisions the circuit courts are likely to review, review in any one area of the law will be sporadic. Even sporadic attention may be helpful in clarifying some aspects of the law. However, sporadic attention is unlikely to produce significant and meaningful guidance, since such guidance often requires working through doctrinal intricacies and varying circumstances.\textsuperscript{278} Pre-Rule 23(f) class certification orders provide an obvious example: although a few such orders received appellate review—via mandamus, § 1292(b), and review after final judgment—this amount of review was wholly inadequate to develop guiding legal standards. If discretionary review is similarly sporadic—and the small number of Rule 23(f) grants indicates that it might be—the law is unlikely to develop significantly.

In addition to sporadic attention is the problem of uneven attention. The circuit courts are likely to review obvious and unburdensome errors while avoiding harder questions that will require more of their limited time and resources.\textsuperscript{279} Serving the institutional function therefore is less likely in areas in which review will be more difficult, such as issues that require a detailed analysis of the factual record or a careful balancing of multiple factors. If appellate judges seek to avoid

\textsuperscript{277} Professor Solimine's review of orders certified under § 1292(b) from 1987 through 1989 reveals that the district court decisions were affirmed approximately half the time. See Solimine, supra note 4, at 1198. Despite the circuit courts' overall reluctance to grant review under this section, their affirmation rate (once they do grant review) might suggest that my prediction is unwarranted. This rate may indicate that the circuit courts are willing to take review even when error is not as likely and, thus, more affirmances may result. Nevertheless, several factors may have led to these results which will have limited or no effect on the exercise of unfettered discretion outside the § 1292(b) context. First, as Professor Solimine discusses, some circuit courts limit review to big or exceptional cases. See supra note 74 and accompanying text. In such circumstances, courts may be more willing to take review, even if error is not as probable. Moreover, the district court's determination that review is warranted—because there is a controlling question of law over which there is substantial disagreement—may capture the circuit court's attention, even if error does not appear probable. Finally, circuit courts are faced with far fewer petitions for review under § 1292(b) than they would be under a discretionary regime. Confronted with a far more overwhelming number of petitions, circuit courts will be more likely to limit their grants of review to circumstances in which probable error is present.

\textsuperscript{278} For example, it is difficult to imagine that the existing, thorough body of law governing preliminary injunctions would have developed without mandatory (and hence consistent) appellate attention, which would not have occurred in a discretionary regime.

\textsuperscript{279} See supra note 240 and accompanying text.
the burden of addressing difficult issues, they will not provide guidance in many areas where error is more likely, and hence, such guidance is needed.\textsuperscript{280}

Furthermore, I suggest that the circuit courts often cannot develop the law by only correcting errors. In certain circumstances, this institutional function is best served by affirmances. This is particularly true with regard to determinations that involve the balancing of various factors, detailed factual analyses, or the exercise of discretion. Often, the best guidance in such circumstances is an appellate affirmation of a district court's analytical approach to an issue or a confirmation that the lower court's approach fell within the proper bounds of discretion.\textsuperscript{281}

Unlike mandatory review, which produces a mixture of affirmances and reversals (and, indeed, mostly affirmances), a discretionary regime will produce few affirmances. Some affirmances will emerge from big and exceptional case review, and others will emerge unintentionally because some probable errors turn out not to be error. Such affirmances will be uncommon, however, if the circuit courts largely limit review to obvious and unburdensome errors and intolerable probable errors.\textsuperscript{282}

In addition to being largely ineffective in serving the lawmaking function, discretionary review is dangerous. In a mandatory regime, in which circuit panels are obligated to conduct a review, there is institutional accountability: a decision is subject to peer review, is exposed to possible reversal, and is either persuasive or binding in later cases.\textsuperscript{283} Because circuit precedent is binding in later cases within the

\textsuperscript{280} For example, in a purely discretionary regime, circuit courts would tend to avoid review of class certification decisions because these decisions often involve difficult factual and legal issues. See supra note 240 and accompanying text.

\textsuperscript{281} Also, error correction usually stops short of full, thorough review, because once the appellate court identifies dispositive error, it need not review the remainder of the district court's treatment of the legal issue in question. Affirmances, on the other hand, often include review of many aspects of the district court's treatment of the issue.

\textsuperscript{282} See Dalton, supra note 33, at 80 (citing to studies that suggest that courts exercising discretionary review have higher reversal rates than those that do not). Thus far the trend in Rule 23(f) grants has been consistent with this hypothesis. Grants have produced thirteen reversals and vacations, and five affirmances. See supra notes 261–65 and accompanying text.

\textsuperscript{283} Cf. Gulati & McCauliff, supra note 239, at 174 (arguing that current short form disposition practices allow circuit judges to avoid many formal and informal contraints).
circuit, eventually, in a mandatory regime, circuit judges must reach or reaffirm legal conclusions and enforce legal principles contrary to their individual preferences. In a discretionary regime, on the contrary, circuit judges easily can avoid articulating, reiterating, or enforcing legal principles or conclusions they dislike by denying review. Such avoidance weakens the coercive effect of existing circuit and Supreme Court precedent, not only by rendering its application "optional" in a particular case, but also because careful selection of orders for review will allow astute circuit judges with particular agendas to color the law more significantly. The power to decide what to decide therefore weakens the influence of precedent and allows personal views and preferences to have a greater impact on the application and substance of the law.

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See Douglas A. Berman & Jeffrey O. Cooper, In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin, 60 OHIO ST. L.J. 2025, 2031 n.20 (citing cases from each circuit stating that panels lack the authority to overrule decisions by prior panels, absent an intervening statute, Supreme Court opinion, or en banc decision).

For example, if several circuit judges disfavor class treatment of securities claims, they may seek to take review of erroneous certification grants in securities cases, while denying review of erroneous certification denials (and, of course, non-erroneous certification grants and denials). If successful, the reversals of the class certifications would comprise the principal source of law on these claims in the circuit. This set of reversals is unlikely to be counterbalanced by affirmances after final judgment because, as set forth above, class certification decisions often evade review after final judgment. These reversals would stand alone, sending a signal to district court judges regarding class treatment of such claims and fosters uncertainty about when granting certification would be appropriate. In response, district court judges would be more hesitant about granting certification in this area. Under a mandatory regime, circuit judges are unable to pick which set of orders to review. Although personal preferences regarding securities class actions will influence outcomes in some cases, these circuit judges are likely to encounter proper grants of class certification at some point, which they must begrudgingly affirm. These grants would then form part of the guiding law influencing district court behavior, along with the reversals.

One way to minimize this danger would be to separate petition review from merits review; one panel would decide whether immediate review is appropriate, while another would address the merits if an appeal is granted. Although there may be institutional pressures to avoid taking many cases, at least particular panels would not be able to pick and choose among cases to further their own preferences.

See Gulati & McCauliff, supra note 239, at 189–91, 194 (suggesting that the power and influence of individual circuit judges in certain subject areas may be enhanced by procedures that allow other judges to opt out of providing reasons for their decisions in such areas and that the ability to decide without providing reasons weakens precedent). In a recent article, Professor Hartnett expresses similar concerns about the Supreme Court's modern exercise of its certiorari power. He argues that certiorari's license to escape from the logistical implications of on-the-merits decisions has played a pivotal role in shaping substantive constitutional principles. See Hartnett, supra note 235, at 1730–33 (casting doubt on whether the Supreme Court
For similar reasons, discretionary review may influence the deference circuit courts afford district courts. Ironically, while discretionary review does not subject an interlocutory order to automatic review, it may allow circuit courts to accord less respect to trial court decisions. If an appellate panel has unfettered discretion to pick and choose the issues it wishes to confront, it can take aggressive action in those circumstances without concern for the effects on other litigation or their future workload. For example, it can essentially undertake de novo (or otherwise nondeferential) review where it should have applied an abuse of discretion standard and need not fear that it will have to apply the same type of rigorous review in other cases, since future review is contingent upon later discretion. Thus, the power to control what to decide creates control over how to decide.

Discretionary review of interlocutory orders therefore will produce limited benefits in terms of developing and clarifying the law. These limited benefits are largely outweighed by the dangers to the lawmaking function. At a minimum, as a means of enhancing the institutional function, discretionary review is an unattractive alternative.

C. Category-Based Discretionary Review

The ABA model and similar proposals call for general discretionary review of interlocutory orders. Under such a regime, which would replace most or all of the existing exceptions, any interlocutory order would be reviewable. Category-based discretionary review, like that embodied in Rule 23(f), limits the exercise of discretion to a specific type of order. Such review is intended to supplement, rather than replace the current exceptions. Although the category-based approach constitutes a more modest type of reform than the general approach, it suffers from many of the same drawbacks.

There are several important differences between these approaches. Unlike general discretionary review, the category-based approach has the potential to produce some collateral litigation over the issue of appealability, specifically, whether the order in question falls within the category covered by the rule. A small amount of such litigation already has emerged in the Rule 23(f) context. At the same
time, the category-based approach has some advantages. If the categories remain narrow, the number of petitions will be far smaller. Moreover, a category-based rule may focus the circuit courts' attention on an issue or area of the law, which, along with fewer petitions, could enhance acceptance rates. This may lead to greater error correction—and irreparable harm avoidance—in the particular category and greater development of the law.

However, while greater acceptance rates are possible, current practices suggest that circuit courts are likely to grant review infrequently. For example, even though high acceptance rates under both § 1292(b) and Rule 23(f) would have a marginal impact on the circuit courts' overall workload, review is granted sparingly. Sporadic grants—addressing mostly unburdensome errors, orders in big cases, and intolerable errors—will result in limited error correction and irreparable harm avoidance, and lead to limited development of the law. Intolerable error review in this context imposes the same dangers.

Several Rule 23(f) opinions attempt to articulate standards for determining whether review should be granted. In *Blair v. Equifax Check Services, Inc.*, Judge Easterbrook, writing for the Seventh Circuit, looked to the Rule's Advisory Committee note for guidance. He concluded that an appeal under the rule is appropriate when (1) the denial of class status sounds the death knell of the litigation, (2) the grant of class certification may have an *in terrorem* effects, forcing defendants to settle (even if the class's probability of success is slight), and (3) an appeal may facilitate the development of the law. The First and Eleventh Circuits, relying on *Blair*, have articulated similar standards.

288 See supra notes 261–65 and accompanying text.
289 In addition, commentators have offered proposed standards for guiding the exercise of circuit court discretion. See, e.g., Solimine & Hines, supra note 69, at 1574–96 (discussing a series of factors courts should take into account in light of the history and purposes of Rule 23(f)).
290 See 181 F.3d 832, 833–34 (7th Cir. 1999).
291 See id. at 833–35. Judge Easterbrook cautioned, however, that courts should not assume that denials of class certification sound the death knell, since firms bringing putative class actions often have sufficient resources to litigate individual claims to their conclusion. See id. at 834. For further discussion and commentary on the *Blair* criteria, see Solimine & Hines, supra note 69, at 1592–96 (agreeing generally with the criteria but advocating a finer delineation of the factors that should be taken into account in the exercise of discretion under Rule 23(f)).
292 See *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 283, 293 (1st Cir. 2000) (adopting *Blair*'s first two prongs but limiting the third to instances in which "an appeal will permit the resolution of an unsettled legal issue that is important to the
While these standards for exercising discretion may be appropriate, no formal or informal constraints stand in the way of later panels ignoring them. Indeed, the small number of grants of review under the rule—eighteen—suggests that these standards are not being followed. One of the first two Blair considerations probably is present in a significant percentage of cases. Given the severity of the resulting harm, parties on the losing end of a class certification order are likely to seek immediate review. Hence, contrary to articulated particular litigation as well as important in itself and is likely to escape effective re-
view” after final judgment); Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1273–76 (11th Cir. 2000) (adopting the Mowbray factors and adding that circuit panels also should consider the status and nature of the litigation before the district court, whether there is a substantial weakness in the certification decision, and the likelihood that future events may make appellate review more or less appropriate); see also Kruse, supra note 5, at 738 (proposing that 23(f) contain certain factors for the court to consider, including the hardship to the appellant without immediate appeal and the cost of delay to the appellant without an immediate appeal verses the cost of delay of trial for the appellee).

For the named plaintiff, who typically has a very small claim and is using the class mechanism as a means of bringing suit, denial of class certification can be disastrous. As a practical matter, without the possibility of class recovery, it would often be economically infeasible for the plaintiff to bring an individual action.

Id. (citation omitted). Likewise, under Judge Easterbrook’s articulation, any defendant in a significant class action should be able to demonstrate potential irreparable harm because each would be exposed to significant litigation costs and risks, and hence forced to consider settlement, if certification is granted. See Blair, 181 F.3d at 834. Defendants usually will have no trouble making such a good faith argument: “If we do not get immediate review, will have to settle this case because of the enormous costs and risks of litigating such a large class-action through trial.” Kruse, supra note 5, at 705 (“A hefty legal bill will result simply from the defendant’s decision to litigate. As a result, there will be incredible pressure to settle.”) (citation omitted); see also id. at 730 (arguing, in rejecting a more lenient approach to mandamus review, that a showing of hardship or forced settlement is an inadequate limiting principle because “every defendant challenging a class certification order could successfully make this argument”) (citation omitted).

If I am wrong, and the eighteen grants of review constitute a significant percentage of the total number of petitions, I still question why review should be discretionary and not mandatory. If the universe of potential appeals of certification orders is that limited, mandatory review would not burden the appellate courts significantly, and the courts and litigants would avoid the petition process and the various dangers of discretionary review.
Discontent and Indiscretion

standards, numerous certification orders that threaten to inflict irreparable harm probably are going unreviewed. Moreover, as discussed previously, the absence of cases in which circuit courts have agreed to review denials of class certification and Judge Easterbrook's expressed skepticism toward class (but not defense) claims of irreparable harm may be warning signs that discretionary review under Rule 23(f) will degenerate into review for "intolerable probable error" and that plaintiffs will rarely receive review, despite great hardship.295

Class counsel generally opposed Rule 23(f) and any interlocutory review of certification orders.296 In hindsight, this opposition seems warranted; up to this point, Rule 23(f) has largely benefited defendants. Looking forward, however, class counsel should be more concerned about discretionary review than mandatory review. Mandatory review would impose significant costs on putative classes and class counsel, but, by requiring review for both grants and denials of certification, it would promote more even scrutiny and avoid the downstream consequences of uneven treatment.297 Moreover, the costs of discretionary review will often approach the costs of mandatory review. Parties petitioning for review must, at a minimum, demonstrate

295 See supra notes 267 and accompanying text.
296 See Solimine & Hines, supra note 69, at 1568 (describing how the plaintiffs' bar generally opposed the rule). The plaintiffs' bar raised the majority of concerns about the rule. See 1 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, at 407-19 (1997) [hereinafter Working Papers]; Solimine & Hines, supra note 69, at 1568-69 (indicating that many lawyers associated with plaintiffs opposed the rule, while many associated with defendants supported it). This opposition was primarily based on the fact that the rule would provide (defendants) an unneeded opportunity for appellate review. See Working Papers, supra, at 407, 415-19. Many of those opposed to the rule feared it would prolong litigation and increase costs. See id. at 407; see also Solimine & Hines, supra note 69, at 1566. Some commentators did express concern about the unfettered or unguided nature of the discretion, although not a substantial number. See Working Papers, supra, at 407-19; Solimine & Hines, supra note 69, at 1566, 1576 n.234. A few legal scholars also objected to the rule, arguing that it is unnecessary and would lead to a large number of additional appeals and increased costs. See Working Papers, supra, at 407-19. A small number also suggested that it would disproportionately benefit defendants. See id.
297 Those who fear that circuit law on class actions will be less friendly to the interests of plaintiff classes should have far greater concern with regard to a discretionary regime than a mandatory one. Although mandatory review would expose more orders to circuit review, discretionary review appears to tend toward reversing grants of class certification. Mandatory review would include affirming some grants of certification and reversing some denials. The latter is more likely to lead to even-handed development of the law. Indeed, a body of circuit law comprised largely of reversals of class certifications may have a chilling effect on district court judges deciding whether to certify classes. See supra note 285.
that the district court probably erred. Because much of the fight over whether there is error will take place in the petition, preparing a petition or a response may require nearly the same resources as preparing appellate briefs. These investments will rarely result in review; when they do, it may benefit defendants disproportionately. Thus, plaintiffs and class counsel would be better off in many cases if certification orders were subject to mandatory interlocutory review.

In sum, category-based discretionary review suffers from many of the same ills as general discretionary review. Although there are categories of interlocutory orders—including class certification orders—that are worthy of immediate review, discretionary review will not serve adequately or appropriately the error correction or lawmaking functions in these areas. There is a better approach to reform.

III. AN ALTERNATIVE APPROACH

Part I demonstrated that the current appealability regime—which consists of the final judgment rule and a number of exceptions—has become relatively clear and coherent. It produces neither excessive collateral litigation on the issue of appealability nor arbitrary results. While this forms a solid foundation, interlocutory review should be expanded to the extent practicable to reduce error-inflicted severe irreparable harm and to increase development of the law in areas that typically evade review.

Part II established that discretionary review is not the way to achieve these goals. Discretionary review will not result in significant gains in error correction or clarification of the law, will impose additional costs on courts and litigants, and will pose significant dangers to the integrity of the error correction and institutional functions.

I propose another approach to reform. It begins with three propositions that I believe, given the previous discussion, are largely uncontroversial. First, the final judgment rule must remain the baseline principle in any appealability regime; it strikes the proper balance between competing costs, burdens, and benefits in most circumstances. Second, no exception or set of exceptions to the final judgment rule

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298 Defendants faced with forced settlements will have strong incentives and often the resources to "go all out" in seeking review.

299 In his critique of discretionary review, Professor Carrington offers a similar observation:

Saying there is no right of appeal in a civil case may be more consonant with what now happens in our courts of appeals, but it will not reduce their workload or save the time and money of litigants that will be spent in equal measure however the issue is framed.

can facilitate review of all or even most interlocutory orders containing errors that cause irreparable harm. Irreparable harm is a typical—and severe irreparable harm is a common—byproduct of delayed review. Third, the circuit courts have limited resources and a burgeoning caseload; they, therefore, cannot handle significant increases in the number of appeals.

With these objectives and constraints in mind, I propose that the rulemakers utilize their authority under § 1292(e) to promulgate rules that provide for (1) mandatory appellate review of narrowly defined categories of orders addressing "problem areas" and (2) certification review for categories of orders addressing "problem areas" that cannot be narrowed sufficiently to prevent overburdening the circuit courts. Although such a reform is less likely, I also propose that Congress amend § 1292(b) to require circuit courts to accept review of orders certified under § 1292(b) unless certification constitutes an abuse of discretion. These reforms will enhance error correction, reduce severe irreparable harm, and support development of the law to the extent practicable, while avoiding the pitfalls of discretion.

A. Mandatory Review To Address Problem Areas

Expansion of interlocutory appellate review should be limited primarily to mandatory review of narrowly defined categories of orders within "problem areas." "Problem areas" are areas of the law that are unclear or underdeveloped, largely because they are usually addressed in interlocutory orders and tend to evade review. Also, I limit the definition of problem areas to those categories of orders that usually inflict some kind of severe irreparable harm on a party if erroneous and not immediately correctable. Class certification is a problem area because the standards governing certification are unclear and underdeveloped, and grants or denials of certification often create death knell or in terrorem effects. Other examples may include certain orders that deny protection for allegedly privileged or otherwise protected communications or information, and certain types of remand or abstention orders. Problem areas are easy to find; amidst the confusion in the law and complaints of severe irreparable harm, circuit courts will utilize—occasionally inappropriately—other exceptions such as mandamus or the collateral order doctrine to reach these kinds of controversies.300

300 Much of the controversy in the mandamus context stems from controversial uses of the writ in class action cases. See supra note 172 and accompanying text. Likewise, class actions gave rise to the death knell doctrine. See supra notes 67-68 and accompanying text. A significant number of recent decisions issuing writs of manda-
Such a rule might provide as follows: Within ten (10) days of a district court issuing in a civil action an order [describe category, such as “granting or denying class certification under Rule 23”], a party may appeal that order to the court of appeals. An appeal shall not stay proceedings in the district court unless the district court judge or the court of appeals so orders. If, for any reason, an appeal is not taken under this rule or the court of appeals dismisses the appeal as improper, this does not extinguish any right to appeal under § 1291 or any other statute.

This type of category-based rule offers the most efficient and reliable way to reduce the number of errors in interlocutory orders that inflict severe irreparable harm and to enhance development of the law. Indeed, mandatory review in problem areas ensures that error correction and development of the law work together. Error-inflicted severe irreparable harm occurs more frequently in problem areas since these areas, by definition, are governed by unclear legal standards and encompass orders that usually inflict severe irreparable harm. Mandatory review will immediately increase error correction and harm avoidance opportunities, and significant, even-handed appellate attention over time will make governing standards within the area clearer, thereby reducing the frequency of error.

Furthermore, mandatory review within particular categories avoids the waste and dangers associated with discretionary review. Although a mandatory rule will subject some respondents to the burdens of full appellate review who would not have faced such review in a discretionary regime, the petition process in a discretionary regime may impose almost as great a burden. Petitions are likely to contain full-scale battles over the merits, yet this added burden rarely will result in full appellate review. In addition, because clarity in the law is likely to emerge more quickly in a mandatory regime, attempted appeals may decline sooner. Moreover, mandatory review imposes appropriate and needed constraints absent in a discretionary regime.

301 Any new mandatory rule will produce some collateral litigation on the issue of appealability. However, a carefully worded category-based rule is unlikely to spawn the quantum of collateral litigation that judicially crafted interpretive doctrines or exceptions governed by broadly defined standards have generated in the past.

302 The low rate of grants of review in a discretionary regime will deter some from seeking appeal. Yet in problem areas, where severe irreparable harm is common, many parties will seek review despite the low rate, if the law remains unclear. Greater certainty in the outcome on appeal—which will emerge sooner in a mandatory regime—is more likely to reduce the number of appeals.
Courts obligated to undertake review cannot so easily avoid addressing reversible errors or confronting difficult legal issues.

Finally, this approach to reform offers potential flexibility. For example, at some point, an area of the law may cease to be a problem area—or become less of a problem than other areas—and interlocutory review can be abandoned. Rulemaking in its current form is a long process. If, however, the rulemakers were to agree to the “problem area” approach, perhaps they could develop a limited “fast-track” process for adding or subtracting categories. The list should never be long, and categories should be limited to true problem areas as previously defined. The rulemakers should feel free to remove a category if it creates an unanticipated burden for the circuit courts or unforeseen hardships for litigants or district courts.

The greatest difficulty in promulgating these types of rules is defining the category broadly enough to capture the entire problem area, yet narrowly enough not to impose an unmanageable additional burden on circuit courts. However, close attention to the true nature of the doctrinal problems underlying the problem area often will allow the rulemakers to define the categories narrowly, perhaps even by specific issue. For example, if the rulemakers were to replace current Rule 23(f) with a rule providing for mandatory review, they could lessen the potential impact on circuit court dockets by limiting appeals to certain issues or classes. Perhaps they might determine that numerosity issues are not so problematic as to justify interlocutory review or that certification issues surrounding Rule 23(b)(1) and (2) classes have created far fewer problems than those surrounding (b)(3) class actions. Expressly excluding such issues and classes (and prohibiting pendent review) will limit the burden and focus the courts’ attention on those issues where error correction and legal development are most needed.

Although class certification orders are a strong candidate for this type of mandatory review, I make no proposals regarding particular problem areas. I simply contend that providing category-based

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303 Rule 23(f), for example, was promulgated after years of hearings and deliberation. See Solimine & Hines, supra note 69, at 1562–72 (discussing in detail the history of Rule 23(f)).

304 The rulemakers would have to decide if such detail is appropriate in the given circumstance. Finer distinctions may lead to more collateral litigation on appealability. Moreover, parsing categories would be inappropriate if the lines fail to draw meaningful distinctions between issues and classes. I am less concerned about the nontrans substantive nature of such rulemaking; although rulemakers have tended to avoid nontrans substantive rules, the category-based approach to interlocutory review has a long tradition and, as discussed previously, is not inherently problematic.
mandatory review for discrete problem areas is the best approach to reform.

B. Certification Rules for Categories That Cannot Be Narrowed

Although promulgating narrowly drawn mandatory rules is the best way to enhance error correction and development of the law given current docket constraints, there may be circumstances in which the rulemakers cannot narrow sufficiently the definition of a particular category to ensure that the additional burden on the circuit courts is acceptable. The rulemakers might conclude, for example, that the class certification and attorney-client privilege categories cannot be parsed in any meaningful way. Moreover, the exclusion of some internal issues or classes may not be sufficient to reduce appeals to a manageable level. While the number of appeals is likely to decline as outcomes become more certain, the resulting burden on the circuit courts and interference with district courts still may be too great.

If the rulemakers identify a category of orders addressing a problem area that cannot be narrowed meaningfully or sufficiently, I propose that they adopt a category-based certification rule. The rule might provide as follows:

Within ten (10) days of a district court issuing in a civil action an order [describe category, such as “granting or denying class certification under Rule 23” or “denying a motion for protection for allegedly privileged attorney-client communications”], a party may move the court to certify the order for immediate appellate review.

(a) The district court shall grant the motion for certification if the district judge finds that such an order involves a question of law regarding [e.g., “class certification under Rule 23” or “the attorney-client privilege”] (1) unsettled within the circuit in which the district is located and (2) the resolution of which is necessary to the disposition of the order. The district judge shall state in writing the reasons for granting or denying certification.

(b) If the district court denies the motion for certification, the party seeking certification may, within ten (10) days of such denial, appeal the denial. The court of appeals shall affirm the denial only

305 Section 1292(e) alone would provide the authority to promulgate such rules except for categories that might contain orders appealable as a matter of right. For example, the circuits are split on whether orders denying protection for alleged attorney-client privileged communications are immediately appealable final decisions under the collateral order doctrine. See supra note 165 and accompanying text. For such a category, the rulemakers also would have to determine, pursuant to their § 2072(c) authority that the orders are not, in fact, appealable as of right, and then promulgate a rule pursuant to § 1292(e) allowing for a certified appeal.
upon the express determination that the denial does not constitute an abuse of discretion.

(c) If the district court grants the motion for certification, the party seeking certification shall have ten (10) days to file a notice of appeal of the underlying order. The court of appeals shall permit an appeal to be taken from such an order unless the appellee moves to dismiss the appeal and the court of appeals determines that the certification constitutes an abuse of discretion, in which case, the court of appeals shall dismiss the appeal. The court of appeals shall state in writing the reasons why the grant constitutes an abuse of discretion.

(d) The application for certification, an appeal from the denial of certification, and an appeal following certification shall not stay proceedings in the district court unless the district judge or the court of appeals or a judge thereof shall so order.

(e) If, for any reason, an appeal is not taken under this rule or the circuit court dismisses an appeal under subsection (c) of this rule, this does not extinguish any right to appeal under § 1291 or any other statute.

Explanatory commentary might also provide that, for purposes of this rule, a question of law is “unsettled within the circuit” only if (1) the Supreme Court and circuit court have not addressed the question, (2) the Supreme Court and circuit court have not clearly resolved the question, or (3) circuit panels have split on the question. If the circuit court has resolved the question, contrary authority in other circuits does not make the law “unsettled.” The resolution of a question of law is not “necessary to the disposition of the order” if it is merely an alternative or supplemental basis for the disposition.306

Such a category-based certification rule offers several advantages over the type of certification rule contained in § 1292(b) and over category-based discretionary rules such as Rule 23(f). First, as discussed previously, a district court judge is in the best position to determine whether an order is worthy of appellate review.307 The district court judge is familiar with the issues in the case and the state of the relevant law and, unlike circuit judges, has no disincentives tied to appellate workload.

Section 1292(b) certification is relatively ineffective in part because a district court judge usually has a strong disincentive to certify an order for appeal, and the judge’s refusal to certify is unreview-

306 Parties also would be barred from seeking pendent review of other matters addressed in the underlying order.
307 See supra note 257 and accompanying text.
able. Under the proposed category-based certification rule, unlike under § 1292(b), the district court judge’s determination is subject to abuse of discretion review, which provides some check against this disincentive. Moreover, the two factors the district court judge must consider are narrower and arguably clearer than the factors set forth in § 1292(b).

Furthermore, the proposed certification rule is preferable to § 1292(b) and discretionary review because it does not grant circuit courts discretion to accept or deny review. Under the proposed rule, a circuit court is limited to reviewing a district court’s decision to certify an appeal for abuse of discretion. This standard of review, along with the requirement that any decision on reviewability be in writing and the possibility of en banc or Supreme Court reversal, restrains—both formally and informally—circuit decisionmaking on whether to take review far more than the ultimately unenforceable standards for exercising discretion articulated by the ABA and the circuit courts addressing Rule 23(f). These constraints substantially limit the influence of undesirable considerations, such as the tendency to avoid difficult questions, biases toward various parties or outcomes, and strategic review choices that may color the law. Yet, the proposed rule does so while achieving one of the primary goals of discretion—weeding out determinations not worthy of immediate appellate attention.

This type of rule also is better tailored to facilitate the error correction and lawmaking functions. Errors are most likely when the governing law is unclear. Given the “unsettled question within the circuit” standard, the test for appealability is the lack of clarity in the applicable law. Also, given that review will occur even when the circuit court would not perceive error as probable (much less intolerable), treatment of the area of the law will be more consistent and evenhanded—in terms of affirmances and reversals. Moreover, even the circuit court’s review of the district court judge’s certification decision facilitates development of the law; the circuit court must state why it is affirming a district court’s certification denial or reversing a district court’s certification grant. This review alone may illuminate or clarify the law on the particular question.

The rule also contains substantial limitations on review. It restricts review to unsettled law within the circuit and, therefore, is not a vehicle to test possible inter-circuit conflicts. It also ensures that review will only occur when necessary; nondispositive unsettled ques-

308 District courts are hesitant to certify because an immediate appeal invites delay and circuit interference, and subjects the order to reversal. See supra note 75 and accompanying text.
tions are not a basis for review. Although the rule will burden the circuit courts initially with more appeals than a discretionary rule, the area will become less unsettled over time, and hence, produce fewer appeals.

Moreover, the proposed certification process is more efficient than a petition process. The district would make the initial and usually determinative decision on whether appeal is appropriate. Because the judge is already familiar with the underlying issues, this process would not be onerous. Likewise, because the parties would be appearing before the same court at the time, they would not have to put forth the kind of effort that a petition for review to the circuit court might entail. Once the district judge makes a determination on certification, whether a grant or denial, many parties may opt not to seek appellate review of the certification decision, given that it will be reversed only for abuse of discretion. The circuit courts need not address the appropriateness of the district judge's certification decision unless one of the parties pursues further review. Given that the district judge will have provided his or her reasons for granting or denying certification, and the factors to consider—unsettled law and necessary to the disposition—are limited and do not require scouring the record for probable error, any such circuit review usually will not be burdensome.

Thus, to the extent mandatory review of all orders in a category is not feasible, a certification rule like the one proposed above is the best way to limit review within the category. It strikes the proper balance by facilitating error correction and development of the law, weeding out orders unworthy of appellate attention, and imposing constraints that minimize the dangers associated with discretion.

C. Amending § 1292(b)

Finally, the circuit courts should not have the power to reject certified appeals under § 1292(b) unless the district court abused its discretion in certifying the order. Unlike the core components of my other proposals, this proposal likely would require congressional action.

309 For example, if such a rule were adopted to replace Rule 23(f), I am confident that there would be more appeals certified under this standard in the next few years than accepted under the current rule.

310 I suspect such motions will accompany motions for reconsideration, which often would be forthcoming anyway, given that the orders we are concerned with impose some type of significant irreparable harm.
Under the current version of § 1292(b), a district court may, in its discretion, certify an order not otherwise appealable when it determines that such an order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that appellate review would materially advance the ultimate termination of the litigation.311 Once an order is certified by the district court, the circuit court has discretion to decide whether to hear the appeal.312

This discretion offers little or no benefit. District court certification is rare. Likewise, there is little danger of inappropriate certification. The decision of a district court judge to subject his or her own order to immediate appeal, and the possibility of reversal is inherently trustworthy.313 Indeed, the district court judge has strong incentives to refuse certification; when the judge chooses to certify, the judge is conceding that the question is a troubling one, and thus, worthy of appellate attention and possible reversal. Yet circuit courts inexplicably refuse to hear many certified questions.314 The district court’s decision deserves more deference.315

Limiting the circuit courts’ power of refusal to abuse of discretion is consistent with such deference while providing circuit courts with more than enough authority to weed out improper certifications. Moreover, given the sparse number of certifications each year, the increased burden on circuit courts will be insignificant.316 The number of certifications is not likely to increase as a result of such an amendment, given that the change would have no effect on the district court judge’s strong incentives to deny certification.317 The increased circuit review of troubling and unsettled issues would facilitate error cor-

311 See supra note 72 and accompanying text.
312 See supra note 73 and accompanying text.
313 See supra note 257 and accompanying text.
314 See id.
315 Over ten years ago, Professor Solimine advocated that circuit courts should take a more benign view of interlocutory appeals under § 1292(b) and afford district court certifications more deference. See Solimine, supra note 4, at 1201–02, 1213. Indeed, he suggested that circuit courts limit their own discretion by limiting their decision whether to take review to the criteria set forth for granting certification. See id. at 1202. For reasons similar to those given by Professor Solimine, I offer the proposal here, except that I would mandate such deference—circuit courts must take review unless the district court abused its discretion in certifying the order.
316 See Solimine, supra note 4, at 1203–04 (contending that more broad acceptance of certified appeals will neither lead to significantly more certifications nor unmanageable docket congestion).
317 See id. (stating that district court judges err on the side of reluctance in granting certification and concluding that greater acceptance rates would not compel judges to certify more decisions for immediate review).
rection and lawmaking, without imposing significant costs on the circuit courts.

As a practical matter, § 1292(b) often provides the only opportunity for interlocutory review of orders not falling within category-based or other exceptions to the final judgment rule. While this opportunity should be subject to a district court judge's determination about how to manage the litigation, it should not fall prey to the unarticulated preferences of circuit panels once the district court judge reluctantly concedes that circuit guidance is needed.

**Conclusion**

The rules governing interlocutory appeals are too important to be free of controversy. Yet, much of the discontent with the current regime is unwarranted. The final judgment rule and the current exceptions generally draw clear and sensible distinctions between interlocutory orders that are immediately appealable and those that are not. Indeed, the exceptions with the most troubled history—the collateral order doctrine and mandamus review—no longer create significant application problems or corresponding litigation. Reform efforts therefore should focus on expanding opportunities for interlocutory review rather than seek to fix that which is not broken.

Any modification of the current regime should have two primary aims: (1) facilitating correction of errors that cannot otherwise be corrected or would cause severe irreparable harm; and (2) clarifying the law in areas that often evade appellate review. Fulfillment of these goals is significantly constrained, however, by the sheer volume of probable errors and the limited resources of the circuit courts. Under any viable regime, many errors that inflict irreparable harm will go uncorrected. The real question then, is how to enhance error correction and development of the law to the greatest extent practicable, without intolerably burdening the circuit courts or litigants, or otherwise harming the judicial function.

The most popular approach to reform is to grant to circuit courts the power to decide which interlocutory orders to review. Yet, as I have demonstrated, the discretionary approach—generally or in category-based rules like Rule 23(f)—is flawed; it will not significantly increase error correction or facilitate clarification in the law and, in fact, is likely to lead to even less interlocutory review. Moreover, unfettered discretion at the circuit level will impose significant, additional costs on litigants and the courts, and creates risks to the integrity of both the error correction and lawmaking functions.
Category-based mandatory review offers a feasible and superior alternative to discretion. This approach utilizes scarce appellate resources efficiently by requiring and concentrating review in discrete areas where probable errors are most likely and greater certainty in the law is most needed. When a category cannot be narrowed sufficiently to avoid excessively burdening the system, a district court certification procedure—checked by abuse of discretion review—is the most appropriate means of distinguishing those orders worthy of immediate review from those that are not. This principle should be extended to §1292(b) appeals as well; there is little to be gained from allowing circuit courts to reject certified appeals for any reason. These proposed changes will serve the dual aims of reform while avoiding the introduction of unacceptable additional costs and risks into the appellate system.