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Bryan Lammon  
*University of Toledo College of Law*

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# DIZZYING *GILLESPIE*: THE EXAGGERATED DEATH OF THE BALANCING APPROACH AND THE INESCAPABLE ALLURE OF FLEXIBILITY IN APPELLATE JURISDICTION

*Bryan Lammon* \*

## INTRODUCTION

In *Gillespie v. U.S. Steel Corp.*, the Supreme Court emphasized that the final-judgment rule—the general rule delaying appellate review of a district court decision until the district court reaches a final judgment on the case—must be given a practical rather than technical construction.<sup>1</sup> *Gillespie* seemed to promise a new approach to federal appellate jurisdiction: a balancing approach that would allow courts of appeals to determine, case-by-case, whether to allow an appeal before a final judgment.<sup>2</sup> But it was not long before the Supreme Court retreated from *Gillespie*, cabining the decision to its facts,<sup>3</sup> and the Court nowadays adamantly rejects ad hoc balancing in appellate jurisdiction.<sup>4</sup> With the seeming death of *Gillespie* came the conventional wisdom that the balancing approach to appellate jurisdiction had died as well,<sup>5</sup>

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\* Assistant Professor, University of Toledo College of Law. My thanks to Pauline Kim, Ken Kilbert (who gets extra thanks and credit for the title), Liz McCuskey, James E. Pfander, and Michael Solimine, and to participants in the Ninth Annual Junior Faculty Federal Courts Workshop, the 2015 Central States Law Schools Scholarship Conference, and the University of Toledo College of Law faculty roundtable. Thanks also to the University of Toledo College of Law for providing summer funding for this project. And special thanks to Nicole Porter.

1. 379 U.S. 148, 152 (1964).

2. See generally Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89 (1975) (discussing the potential of a balancing approach to appellate jurisdiction).

3. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n.30 (1978).

4. See, e.g., *Johnson v. Jones*, 515 U.S. 304, 315 (1995) (“We of course decide appealability for categories of orders rather than individual orders. Thus, we do not now in each individual case engage in ad hoc balancing to decide issues of appealability.”).

5. See, e.g., 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3913 (2d ed. 1992).

modern accounts regard the case as essentially overruled and reject the balancing approach as a valid source of appellate jurisdiction.<sup>6</sup> The balancing approach accordingly receives little attention in the literature, primarily mentioned (if at all) as a historical aside.<sup>7</sup>

But the balancing approach is not quite dead. It instead persists in a variety of contexts addressed largely (and sometimes entirely) in the decisions of the courts of appeals. In these contexts, courts have followed and continue to follow *Gillespie*'s legacy of taking a practical and not technical approach to appellate jurisdiction. And in these contexts, decisions are rife with case-by-case decisions on whether to hear an interlocutory appeal, seemingly in defiance of the Supreme Court's rejection of such ad hoc balancing.

In this article, I survey five areas in which the balancing approach persists in the courts of appeals: administrative remands, post-judgment appeals, the ministerial/technical exception, cumulative finality, and pure pragmatic appeals. Each of these areas has received little academic attention, but each of these areas continue to bear the influence of *Gillespie* and the balancing approach. This survey thus reveals that the conventional wisdom about *Gillespie*—and the balancing approach to appellate jurisdiction more generally—is wrong.

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6. See 19 MOORE'S FEDERAL PRACTICE § 202.10 (3d ed. 2016); ERIC J. MAGNUSON & DAVID F. HERR, FEDERAL APPEALS § 2.3, at 53 (2015); 15A WRIGHT ET AL., *supra* note 5, at 479; Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 205–06 (2001); Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353, 371 (2010); Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1183 n.97 (1990); see also Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1247 n.76 (2007) ("The current viability of *Gillespie*'s balancing approach has been repeatedly questioned."); Thomas E. Baker, *Toward a Unified Theory of the Jurisdiction of the United States Courts of Appeals*, 39 DEPAUL L. REV. 235, 268 (1990) (describing the balancing approach as "moribund but susceptible to some future revitalization"). I have myself repeated the conventional wisdom that *Gillespie* and the balancing approach are no longer a valid basis for appellate jurisdiction. See Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 429 n.26 (2013) [hereinafter Lammon, *Rules, Standards, and Experimentation*]. But see Bryan Lammon, Perlman Appeals After Mohawk, 84 U. CIN. L. REV. 1, 33–34 (2016) [hereinafter Lammon, Perlman Appeals] (noting that appeals under the balancing approach still crop up).

7. See, e.g., Petty, *supra* note 6, at 371.

The persistence of the balancing approach raises difficult questions for interlocutory appeal reform, which is the focus of most appellate jurisdiction literature. The current system of interlocutory appeals is largely regarded as a mess,<sup>8</sup> and calls for reform have persisted for decades.<sup>9</sup> If reform is to happen, it will likely take the form of categorical rules.<sup>10</sup> But the balancing approach's persistence—in the face of the Supreme Court seemingly burying

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8. Lammon, *Rules, Standards, and Experimentation*, *supra* note 6, at 423; Steinman, *supra* note 6, at 1238–39.

9. See, e.g., Lloyd C. Anderson, *The Collateral Order Doctrine: A New “Serbonian Bog” and Four Proposals for Reform*, 46 DRAKE L. REV. 539, 606–14 (1998); Thomas J. André, Jr., *The Final Judgment Rule and Party Appeals of Civil Contempt Orders: Time for a Change*, 55 N.Y.U. L. REV. 1041, 1080–84, 1108 (1980); Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, 47 L. & CONTEMP. PROBS. 165, 166–70 (1984); Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, L. & CONTEMP. PROBS., 157, 163–64 (1984); Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 563–65 (1932); 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, 293–302 (1999); Kristin B. Gerdy, “Important” and “Irreversible” but Maybe Not “Unreviewable”: The Dilemma of Protecting Defendants’ Rights Through the Collateral Order Doctrine, 38 U.S.F. L. REV. 213, 256–60 (2004); Glynn, *supra* note 6, at 258–67; Kenneth K. Kilbert, *Instant Replay and Interlocutory Appeals* (July 31, 2016) (unpublished manuscript) (draft on file with author); Lawyers Conference Comm. on Fed. Courts & the Judiciary, *The Finality Rule: A Proposal for Change*, 19 JUDGES’ J., 33, 35–38 (1980); Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 748–87 (1993); Petty, *supra* note 6, at 393–405; James E. Pfander & David R. Pekarek Krohn, *Interlocutory Review by Agreement of the Parties: A Preliminary Analysis*, 105 NW. U. L. REV. 1043, 1058–81 (2011); Andrew S. Pollis, *Civil Rule 54(b): Seventy-Five and Ready for Retirement*, 65 FLA. L. REV. 711, 760 (2013) [hereinafter Pollis, *Rule 54(b)*]; Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1685–93 (2011) [hereinafter Pollis, *Multidistrict Litigation*]; Cedric W. Porter, *Appeals from Interlocutory and Final Decrees in the United States Circuit Courts of Appeal*, 19 B.U. L. REV. 377, 411–12 (1939); Redish, *supra* note 2, at 124–27; Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 777–85 (2006); Thomas D. Rowe, Jr., *Defining Finality and Appealability by Court Rule: A Comment on Martineau’s “Right Problem, Wrong Solution,”* 54 U. PITT. L. REV. 795, 797–803 (1993); 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, 1562–72 (2000); Solimine, *supra* note 6, at 1201–03; Steinman, *supra* note 6, at 1276–94; Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 584–602 (2002); Brad D. Feldman, Note, *An Appeal for Immediate Appealability: Applying the Collateral Order Doctrine to Orders Denying Appointed Counsel in Civil Rights Cases*, 99 GEO. L.J. 1717, 1739–44 (2011); Theodore D. Frank, Comment, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292, 320 (1966); Michael W. McConnell, Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. CHI. L. REV. 450, 481–82 (1978); John C. Nagel, Note, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200, 214–22 (1994).

10. See Lammon, *Perlman Appeals*, *supra* note 6, at 25.

it—suggests that appellate judges cannot resist approaching their jurisdiction with some flexibility. And this flexibility threatens to undermine the certainty, predictability, and ease of application of any categorical rules. To address this threat, I suggest an approach to interlocutory appeal reform modeled on the hearsay rules in the Federal Rules of Evidence: categorical rules coupled with a discretionary catchall. This proposal is, by necessity, preliminary and will be developed further in future scholarship. But this article provides the potential structure for reform and a starting point for adding content to that structure.

In Part I, I provide necessary background on the current regime of federal appellate jurisdiction before turning to the rise and fall of *Gillespie* and the balancing approach. Part I concludes by explaining how inconsistent *Gillespie* and the balancing approach are with the Supreme Court's current approach to appellate jurisdiction. Part II turns to five areas in which the balancing approach persists in the courts of appeals and demonstrates the influence of the balancing approach, and the often case-by-case nature of decision-making, in each of these areas. And in Part III, I explore the implications of the balancing approach's persistence for the major focus of the interlocutory appeals literature—reform. I explain how this persistence suggests that appellate judges cannot resist using some flexibility in defining their jurisdiction. I conclude with a preliminary suggestion of how to account for flexibility's allure: a jurisdictional regime that mixes categorical rules and discretion.

## I. THE FINAL-JUDGMENT RULE AND *GILLESPIE*

### A. *Appeals Before a Final Judgment*

District court judges often decide a number of issues in the course of litigation.<sup>11</sup> Nearly all of these decisions are “interlocutory”—they’re made at some point before a final judgment and leave other issues for later resolution. As a general rule, federal litigants must wait until the end of proceedings in the district court—when all issues have been decided and all that remains is

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11. I have adapted much of this section's introductory material from Lammon, *Rules, Standards, and Experimentation*, *supra* note 6, at 428–31.

enforcing the judgment—before appealing any one of those interlocutory orders.<sup>12</sup> This limit on federal appellate jurisdiction is codified at 28 U.S.C. § 1291 and commonly called the “final-judgment rule.”<sup>13</sup>

The final-judgment rule is thought to strike the general balance between the conflicting interests in appellate review—efficiency and error correction.<sup>14</sup> The efficiency benefits are obvious: district court proceedings are free from appellate interruption, appellate judges generally address a case only once, litigants are saved the cost and potential harassment of multiple appeals, and interlocutory appeals that might eventually become unnecessary—say, because the aggrieved party ultimately prevails at trial—are avoided.<sup>15</sup> But the final-judgment rule also has costs. Appellate decisions can develop unclear areas of the law and correct errors. Appellate intervention can speed along trial court proceedings and cut short what would later be deemed unnecessary litigation. And the delay between an erroneous district court decision and vindication on appeal can cause substantial, sometimes irreparable, harms.<sup>16</sup>

By generally postponing appeal until the end of district court proceedings, the final-judgment rule reflects a belief that in most cases the benefits of delaying appeal outweigh the costs.<sup>17</sup> But like most rules, the final-judgment rule strikes that balance only generally. Sometimes the balance shifts because the need for imme-

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12. See 28 U.S.C. § 1291 (2012) (“The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.”); *Catlin v. United States*, 324 U.S. 229, 233 (1945) (defining a “final decision” as one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment”).

13. See, e.g., *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *Mitchell v. Forsyth*, 472 U.S. 511, 543 (1985) (Brennan, J., concurring in part and dissenting in part); *Abney v. United States*, 431 U.S. 651, 657 (1977); see also *Petty*, *supra* note 6, at 356–60 (discussing the final-judgment rule’s history).

14. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 805 (8th ed. 2010).

15. E.g., *Will v. Hallock*, 546 U.S. 345, 350 (2006); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987).

16. For example, parties who cannot obtain immediate review of an interlocutory district court order might feel compelled to abandon or settle a case—even if they would have won on appeal—rather than bear the costs of discovery and trial.

17. See 15A WRIGHT ET AL., *supra* note 5, § 3911.2 (“The final judgment rule . . . rests on a rough calculation that ordinarily the balance between the values of immediate appeal and delayed appeal swings in favor of deferring appeal.”).

diate review outweighs (or is at least thought to outweigh) the loss in efficiency. Sometimes it can even be more efficient—systematically speaking—to allow interlocutory appeals.<sup>18</sup>

So the final-judgment rule has exceptions. In fact, it has many exceptions.<sup>19</sup> Some are found in statutes.<sup>20</sup> Others in rules.<sup>21</sup> And still others come from judicial decisions.<sup>22</sup>

The current regime of federal appellate jurisdiction—with a general final-judgment rule and a slew of exceptions—has been extensively discussed and critiqued elsewhere.<sup>23</sup> This topic will be

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18. Arguments for a system of discretionary appeals often make this point. See, e.g., Eisenberg & Morrison, *supra* note 9, at 301–02. I have argued elsewhere that this is an entirely plausible argument. See Lammon, *Rules, Standards, and Experimentation*, *supra* note 6, at 434. But it is one for which the opposite argument—that discretionary appeals would be overall less efficient—is similarly plausible. See *id.* The point is that we do not know (and likely cannot know) which argument is more accurate without trying a system of discretionary appeals out. The same goes for many arguments about the likely effects of any change to the system of interlocutory appeals. See *id.* at 432–36.

19. For a more in-depth discussion of the exceptions to the final-judgment rule, see Glynn, *supra* note 6, at 182–201; Martineau, *supra* note 9, at 729–47; Petty, *supra* note 6, at 360–93; Pollis, *Multidistrict Litigation*, *supra* note 9, at 1652–59; Steinman, *supra* note 6, at 1244–72.

20. 28 U.S.C. § 1292(a)(1), for example, gives the courts of appeals jurisdiction over appeals from “[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.” 28 U.S.C. § 1292(a)(1) (2012). The Federal Arbitration Act permits immediate appeals from interlocutory orders involving arbitration. See 9 U.S.C. § 16(a)(1)–(2) (2012). And a district court can certify an interlocutory order for immediate review under 28 U.S.C. § 1292(b) so long as the order involves “a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance . . . the litigation.” 28 U.S.C. § 1292(b) (2012).

21. Federal Rule of Civil Procedure 23(f) allows for immediate appeals from district court orders granting or denying class certification. FED. R. CIV. P. 23(f). And Federal Rule of Civil Procedure 54(b) authorizes a district court to enter a final judgment for some (but not all) of the claims or parties in a case “if the court expressly determines that there is no just reason for delay,” thereby allowing an immediate appeal from orders that would otherwise have to wait for a final judgment. FED. R. CIV. P. 54(b).

22. The major judge-made exception to the final-judgment rule is the collateral order doctrine. See Lammon, *Rules, Standards, and Experimentation*, *supra* note 6, at 431 (calling the collateral order doctrine “the most common and most maligned exception to the final judgment rule”). Although the exact requirements of that doctrine can vary from case to case, it generally allows immediate appeals from types of orders that are conclusively decided in the district court, separate from the merits of the trial court proceedings, and effectively unreviewable after a final judgment. See *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). For a discussion of whether these are properly considered “exceptions” to the final judgment rule (which I think they are), see Lammon, *Perlman Appeals*, *supra* note 6, at 27–28; Lammon, *Rules, Standards, and Experimentation*, *supra* note 6, at 447 n.118.

23. See generally 15A WRIGHT ET AL., *supra* note 5, §§ 3901–44; Glynn, *supra* note 6; Martineau, *supra* note 9; Petty, *supra* note 6; Steinman, *supra* note 6.

addressed later. The immediate discussion focuses on one of the less studied judge-made exceptions to the final-judgment rule—the balancing approach.

### B. *The Balancing Approach to Appealability*

The balancing approach has gone by a variety of names in the caselaw and literature—e.g., practical finality, pragmatic finality, marginal finality, even “the twilight zone doctrine.”<sup>24</sup> And although its exact contours are not defined, the balancing approach essentially entails a case-by-case approach to appellate jurisdiction, with courts engaging in ad hoc, pragmatic balancing of the costs and benefits of an immediate appeal in each case.<sup>25</sup>

As a preliminary note, singling out one judge-made exception to the final-judgment rule as *the* balancing approach is a bit misleading. As just mentioned, the final-judgment rule itself strikes a balance of the interests between immediate review and delaying appeals. And many of the exceptions to the final-judgment rule involve similar balancing.<sup>26</sup> Consider, for example, the most common judge-made exception: the collateral order doctrine. Simplifying a bit, that doctrine allows for appeals from orders that are (1) conclusive, (2) separate from the merits, and (3) effectively unreviewable on appeal.<sup>27</sup> Each of these requirements addresses some of the interests that must be balanced when determining the timing of appeals. A district court decision that is not conclusive, for example, could be revisited—and reversed—as litigation proceeds, and any revisiting could obviate the need for an appeal. Appeal of an order that is separate from the merits is less likely to interfere with (and thus slow down) proceedings in the district

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24. See, e.g., *Stubblefield v. Windsor Capital Grp.*, 74 F.3d 990, 996 (10th Cir. 1996) (“marginal finality”); *Albright v. UNUM Life Ins. Co. of Am.*, 59 F.3d 1089, 1094 (10th Cir. 1995) (“practical finality”); *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 401 (5th Cir. 1984) (“pragmatic finality”); 19 MOORE’S FEDERAL PRACTICE, *supra* note 6, § 202.10 (“pragmatic finality doctrine”); 15A WRIGHT ET AL., *supra* note 5, § 3913 (“pragmatic finality”); *Petty*, *supra* note 6, at 368 (“practical finality”); *Baker*, *supra* note 6, at 268 (“the twilight zone doctrine”); see also *New Mexico v. Trujillo*, 813 F.3d 1308, 1317 (10th Cir. 2016) (“The pragmatic finality doctrine—also referred to as the practical finality doctrine, the Gillespie doctrine, and the twilight zone doctrine—is an exception to the formal finality requirement of § 1291.”).

25. See 15A WRIGHT ET AL., *supra* note 5, § 3913; *Petty*, *supra* note 6, at 371.

26. See *Pollis, Multidistrict Litigation*, *supra* note 9, at 1649–51.

27. See *Coopers & Lybrand*, 437 U.S. at 468.



court. And if an order is “effectively unreviewable” on appeal from a final judgment, the need for immediate appellate review is much stronger; otherwise the order might never be reviewed by an appellate court.

Other, non-judge-created exceptions to the final-judgment rule also entail balancing. Federal Rule of Civil Procedure 23(f), for example, gives the courts of appeals discretion to immediately review district court orders granting or denying class certification.<sup>28</sup> This is a context in which the benefits of an immediate appeal are especially great. The district court’s decision on class certification is often the main event in class litigation—if the class is certified, the risk of an immense adverse money judgment often forces defendants to settle; if class certification is denied, the stakes are often too low to make the non-class suit financially viable and the claims are often abandoned.<sup>29</sup> In either of these two situations—settlement or abandonment—there is no chance for appellate review. If class certification decisions are ever going to be reviewed, they generally must be reviewed immediately.<sup>30</sup> Since the benefits of an immediate appeal are especially great in this context, Rule 23(f) gives the courts of appeals discretion to review interlocutory orders on class certification.

Similarly, 28 U.S.C. § 1292(b) allows district courts to certify an interlocutory order for immediate review. If the district court does so, the court of appeals then has discretion to immediately hear the appeal.<sup>31</sup> Section 1292(b) directs district courts to certify an order when there exist substantial grounds for disagreement and an immediate appeal would accelerate resolution of district court proceedings.<sup>32</sup> These two criteria capture situations in which the balance of costs and benefits in appeal timing have shifted. If

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28. FED. R. CIV. P. 23(f). For an in-depth discussion of Rule 23(f), see generally Solimine & Hines, *supra* note 9.

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

30. See *id.* at 834–35.

31. See 28 U.S.C. § 1292(b) (2012). For more on section 1292(b), see generally Alexandra B. Hess, Stephanie L. Parker & Tala K. Toufanian, *Permissive Interlocutory Appeals at the Court of Appeals for the Federal Circuit: Fifteen Years in Review (1995–2010)*, 60 AM. U. L. REV. 757 (2011); Solimine, *supra* note 6; Tory Weigand, *Discretionary Interlocutory Appeals Under 28 U.S.C. § 1292(b): A First Circuit Survey and Review*, 19 ROGER WILLIAMS U. L. REV. 183 (2014); Mackenzie M. Horton, Note, *Mandamus, Stop in the Name of Discretion: The Judicial “Myth” of the District Court’s Absolute and Unreviewable Discretion in Section 1292(b) Certification*, 64 BAYLOR L. REV. 976 (2012).

32. 28 U.S.C. § 1292(b) (2012).

substantial grounds for disagreement exist, there is a better chance that the district court's order will be reversed and thus a greater need for mid-course correction. Immediate review can stave off what would turn out to be wasteful litigation that proceeded under the district court's erroneous ruling. And if immediate review would facilitate earlier resolution of district court proceedings (often through dismissal or settlement), the benefits of immediate review are greater than normal. Similarly, the costs of an immediate appeal are less in the section 1292(b) context; the district court has certified the order for appeal and thus lessened concerns about the appeal interfering with the district court's management of the case.

These exceptions to the final-judgment rule (and others) reflect a balancing of interests in appellate jurisdiction. But the distinct "balancing approach" to appellate jurisdiction is something different. Most exceptions to the final-judgment rule are categorical rules or have some clear basis in the statutes and rules governing appellate jurisdiction. By categorical, I mean that the exceptions define classes or types of orders that are immediately appealable. Most of those that are not categorical—such as Rule 54(b) and the just-discussed section 1292(b)—come from congressionally approved statutes or rules. Rule 23(f) meets both of these criteria.

The balancing approach, in contrast, meets neither. It encompasses case-by-case determinations of appellate jurisdiction, made by balancing the costs and benefits of an immediate appeal in the individual case. Few rules or doctrines for later cases are laid down. Instead, the balancing approach essentially gives the courts of appeals discretion over whether to hear an immediate appeal in any case. And there is little statutory basis for the balancing approach; nowadays most courts and commentators deem this approach antithetical to section 1291 and the final-judgment rule.

The balancing approach stems primarily from a Supreme Court decision in which the Court came as close as it ever has to endorsing an ad hoc balancing approach to appellate jurisdiction: *Gillespie v. U.S. Steel Corp.*<sup>33</sup>

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33. 379 U.S. 148 (1964).

### C. Gillespie and the Balancing Approach

Daniel Gillespie drowned while working aboard a ship owned by U.S. Steel.<sup>34</sup> His mother Mabel sued U.S. Steel, claiming damages under the Jones Act (the federal law under which the survivors of seamen can seek recovery), an Ohio wrongful death statute, and the common law.<sup>35</sup> The district court dismissed all but the Jones Act claim, concluding that the Act provided the sole remedy in this situation and preempted the other claims.<sup>36</sup> Although the mother's Jones Act claim remained pending in the district court, she immediately appealed the dismissal of her other claims.<sup>37</sup> The court of appeals avoided answering the question of appellate jurisdiction and decided the case on its merits.<sup>38</sup> The Supreme Court, however, squarely addressed the jurisdiction issue.

The Court began by noting that its cases "long have recognized that whether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that decision of the issue either way can be supported with equally forceful arguments."<sup>39</sup> It was thus "impossible to devise a formula to resolve all marginal cases coming within what might be called the 'twilight zone' of finality," and the Court had accordingly "held that the requirement of finality is to be given a 'practical rather than a technical construction.'"<sup>40</sup> And "in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'"<sup>41</sup>

Turning to the facts of *Gillespie*, the Supreme Court recognized that the case posed some risk of multiple appeals—one addressing whether the Jones Act was the exclusive remedy and another

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34. *Id.* at 149–50.

35. *Id.*

36. *Id.* at 150.

37. *Id.* at 151.

38. *Id.* at 151–52; *see also* *Gillespie v. U.S. Steel Corp.*, 321 F.2d 518, 522 (6th Cir. 1963).

39. 379 U.S. at 152.

40. *Id.* (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

41. *Id.* at 152–53 (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)).

on the merits after a final judgment.<sup>42</sup> But the Court thought the cost of multiple appeals in this case would not be great (though it did not explain why),<sup>43</sup> and deciding the question immediately would avoid wasting all the time and effort put into appealing the case all the way to the Supreme Court.<sup>44</sup> Perhaps more importantly, the Court deemed the questions presented in the appeal “fundamental to the further conduct of the case.”<sup>45</sup> And although there had been no section 1292(b) certification, the Court concluded that “treating this obviously marginal case as final and appealable” would “implement[] the same policy Congress sought to promote in § 1292(b).”<sup>46</sup>

*Gillespie*—in both its broad statements and its specific application—is pretty unique among the Court’s finality decisions. The order was not separate from or collateral to the merits; whether *Gillespie*’s mother could bring her state and common-law claims were instead part of the merits. The order involved was not effectively unreviewable after a final judgment; an appellate court could have waited for decision on the Jones Act claim and then decided all issues in a single appeal. (Granted, a reversal might have required an additional trial, which would impose some costs on the district court and the parties. But those costs are little different from the types of costs that courts have routinely deemed insufficient to merit an immediate appeal).

The Court was left only with the costs and benefits of an immediate appeal in the case before it. And that is all it relied on in finding jurisdiction. The Court weighed the costs of allowing immediate review (primarily the chance of multiple appeals) versus the benefits (primarily answering a question “fundamental” to the case). It concluded that the benefits outweighed the costs. Notably, the Supreme Court did not make any sort of categorical judgment and did not suggest that some (or all) partial dismissals

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42. See *id.* at 152–53, 156 (“It is true that the review of this case by the Court of Appeals could be called ‘piecemeal.’”).

43. See *id.* at 153 (“[I]t does not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered.”).

44. See *id.* (“And it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided.”).

45. *Id.* at 154.

46. *Id.*

were henceforth immediately appealable. It instead looked only to the present circumstances, without any evident regard to the systematic effects of allowing the appeal.

*Gillespie* crystalized the balancing approach to appellate jurisdiction in the Supreme Court.<sup>47</sup> And it appeared to open the door to a more widespread balancing approach to defining appellate jurisdiction.<sup>48</sup> In the years immediately following *Gillespie*, courts of appeals often invoked the Court's instruction to take a practical, not technical, approach to appellate jurisdiction.<sup>49</sup> Indeed, the *Gillespie* decision came to embody the balancing approach; courts and commentators often regarded them as one in the same, with *Gillespie* providing the balancing approach's source, definition, and limitations.<sup>50</sup>

But *Gillespie* did not live a long life. In *Coopers & Lybrand v. Livesay*, the Court held that denials of class certification were not immediately appealable orders.<sup>51</sup> And in so doing, the Supreme Court appeared to sharply limit *Gillespie*'s reach. In response to the argument that *Gillespie* supported jurisdiction over denials of class certification, the Court emphasized *Gillespie*'s "unique facts": the order in *Gillespie* was "marginally final" and "disposed of an unsettled issue of national significance"; immediate review "implemented the same policy Congress sought to promote in § 1292(b)"; and the question of appellate jurisdiction "had not been presented to [the] Court until argument on the merits," meaning that a dismissal of the appeal for lack of jurisdiction would have meant all the time and effort spent appealing the case were wasted.<sup>52</sup> The Supreme Court concluded that any extension

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47. See Redish, *supra* note 2, at 116 ("[I]t was not until *Gillespie v. United States Steel Corp.* . . . that the pragmatic balancing approach can arguably be said to have received the [Supreme] Court's endorsement.").

48. *Id.* at 119.

49. See, e.g., *Joseph F. Hughes & Co. v. United Plumbing & Heating, Inc.*, 390 F.2d 629, 630 (6th Cir. 1968) (per curiam); *Plymouth Mut. Life Ins. Co. v. Ill. Mid-Continent Life Ins. Co.*, 378 F.2d 389, 391 (3d Cir. 1967); *United States v. McWhirter*, 376 F.2d 102, 105 (5th Cir. 1967); *Kelly v. Greer*, 354 F.2d 209, 210 (5th Cir. 1965).

50. See, e.g., *New Mexico v. Trujillo*, 813 F.3d 1308, 1317 (10th Cir. 2016) (calling the balancing approach the "*Gillespie* doctrine" (among other things)); 15A WRIGHT ET AL., *supra* note 5, § 3913; Steinman, *supra* note 6, at 1247 n.76.

51. 437 U.S. 463, 465 (1978).

52. *Id.* at 477 n.30.

of *Gillespie* beyond its “unique facts” would effectively nullify the final-judgment rule.<sup>53</sup>

Conventional wisdom soon became that *Coopers & Lybrand* closed the door on the balancing approach. *Federal Practice and Procedure* (a leading authority on federal appellate jurisdiction) reads *Coopers & Lybrand* as distinguishing *Gillespie* “on grounds that seem to bury it quietly.”<sup>54</sup> *Moore’s Federal Practice* similarly states that the Court “has severely restricted [*Gillespie*’s] scope, limiting its application to the unique facts that gave rise to the doctrine.”<sup>55</sup> Modern discussions of appellate jurisdiction (mine included) repeat the accepted belief of *Gillespie*’s death.<sup>56</sup> The Supreme Court has not cited *Gillespie* for twenty years (and then it was only for *Gillespie*’s Jones Act holding).<sup>57</sup>

With *Gillespie*’s death came the apparent death of the balancing approach. By most accounts, little ever became of it. *Federal Practice and Procedure* suggests that the approach has had little influence, as many of the decisions that rely on it “could be justified on other grounds.”<sup>58</sup> And the “benign neglect” that the decision has received in the caselaw and literature is, according to that treatise, “fully warranted.”<sup>59</sup> Along these lines, several judicial decisions have stated that *Gillespie* and the balancing approach are no longer a sound basis for appellate jurisdiction.<sup>60</sup> The

53. *Id.*

54. 15A WRIGHT ET AL., *supra* note 5, § 3913.

55. 19 MOORE’S FEDERAL PRACTICE, *supra* note 6, § 202.10.

56. See MAGNUSON & HERR, *supra* note 6, § 2:3, at 53; Glynn, *supra* note 6, at 205–06; Lammon, *Rules, Standards, and Experimentation*, *supra* note 6, at 429 n.26; Petty, *supra* note 6, at 371; Solimine, *supra* note 6, at 1183 n.97; see also Baker, *supra* note 6, at 268 (describing the balancing approach as “moribund but susceptible to some future revitalization”); Steinman, *supra* note 6, at 1247 n.76 (“The current viability of *Gillespie*’s balancing approach has been repeatedly questioned.”).

57. See *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 212 (1996). A few post-*Coopers & Lybrand* citations for *Gillespie*’s jurisdictional holding have concerned the Supreme Court’s jurisdiction to review state court decisions. See *Am. Export Lines, Inc. v. Alvez*, 446 U.S. 274, 277, 279 (1980). And a few dissents from the denial of certiorari have cited *Gillespie*’s jurisdictional holding to support an argument for hearing a case of questionable finality. See *Randolph Cent. Sch. Dist. v. Aldrich*, 506 U.S. 965, 966–67 (1992) (White, J., dissenting from the denial of certiorari); *Michael v. United States*, 454 U.S. 950, 951–52 (1981) (White, J., dissenting from the denial of certiorari).

58. 15A WRIGHT ET AL., *supra* note 5, § 3913.

59. *Id.*

60. See, e.g., *In re Chateaugay Corp.*, 922 F.2d 86, 91 (2d Cir. 1990) (noting that the Supreme Court had “rejected the view that *Gillespie* permits the court to decide close cases of finality by an ad hoc balancing”); *Newpark Shipbuilding & Repair, Inc. v. Roundtree*,

balancing approach has accordingly received little in-depth attention over the past several decades.

Indeed, *Gillespie* and the balancing approach run contrary to the Supreme Court's current views on judge-made exceptions to the final-judgment rule. The Supreme Court has now squarely disavowed any ad hoc, case-by-case approaches to appellate jurisdiction.<sup>61</sup> In the context of the collateral order doctrine, for example, the Court has repeatedly stated that decisions are to be made categorically—a particular type of order is either always appealable or never is.<sup>62</sup> And in one recent decision on the final-judgment rule—*Mohawk Industries, Inc. v. Carpenter*—the Court suggested that judge-made exceptions are out and rulemaking is in.<sup>63</sup> Rulemaking, the *Mohawk* Court noted, “draws on the collective experience of bench and bar, and it facilitates the adoption of measured, practical solutions.”<sup>64</sup> Most have read *Mohawk* as discouraging any more judge-made exceptions to the final-judgment rule, if not foreclosing them altogether.<sup>65</sup> And so rulemaking—“not expansion by court decision”—is now “the preferred means for determining whether and when prejudgment orders should be immediately appealable.”<sup>66</sup>

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723 F.2d 399, 405 (5th Cir. 1984) (en banc) (calling the balancing approach “in fundamental conflict with the values and purposes of the finality rule to avoid the delay and system-costs of piecemeal and multiple appeals, and to provide a relatively clear test of appealability so that needless precautionary appeals not be taken”).

61. See *Johnson v. Jones*, 515 U.S. 304, 315 (1995).

62. See *Cunningham v. Hamilton Cty.*, 527 U.S. 198, 206 (1999); *Johnson*, 515 U.S. at 315; *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994).

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

64. *Id.* at 114 (internal citation omitted).

65. See Erwin Chemerinsky, *Court Keeps Tight Limits on Interlocutory Review*, 46 TRIAL 52, 54 (2010) (“[*Mohawk*] shows that little, if anything, will be found to fit within the collateral order exception that the Court recognized in *Cohen*.”); James E. Pfander, Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Litigation, 114 PENN. ST. L. REV. 1387, 1404 (2010) (“[T]he Court [in *Mohawk*] . . . suggested that it would no longer adopt judge-made expansions of the collateral order doctrine.”); Pfander & Krohn, *supra* note 9, at 1053; Rory Ryan, Luke Meier & Jeremy Counsellor, *Interlocutory Review of Orders Denying Remand Motions*, 63 BAYLOR L. REV. 734, 776 (2011) (suggesting that after *Mohawk*, “little room exists for the [collateral order] doctrine’s expansion”). But see Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 42 (2011) (“[T]he Court [in *Mohawk*] has left open the possibility that other nonfinal decisions might be deemed to be final.”).

66. *Mohawk*, 558 U.S. at 113 (quoting *Swint v. Chambers Cty. Comm’n*, 514 U.S. 35, 48 (1995)).

The conventional wisdom is thus that *Gillespie* and the balancing approach—with their ad hoc, judge-crafted exceptions to the final-judgment rule—are no longer relevant to modern appellate jurisdiction. The balancing approach to appellate jurisdiction, in other words, is dead.

## II. PRAGMATIC APPEALS AND PRACTICAL FINALITY

But the balancing approach is not dead yet. It instead persists in several doctrines that exist primarily—often entirely—in the courts of appeals. These doctrines were built atop *Gillespie* and the balancing approach. Their early decisions invoked the hallmarks of balancing—the need to take a practical, not technical, approach to appellate jurisdiction. They regularly involve a case-specific balancing of the costs and benefits of immediate review. And despite *Gillespie*—the foundation on which these doctrines were built—having been seemingly limited to its facts, courts continue to apply them. The reports of the balancing approach's death have accordingly been exaggerated.

With most everyone thinking that the balancing approach is a thing of the past, its persistence has been given short shrift in the literature. Even courts are not always obvious in their use of the balancing approach. But a bit of unpacking reveals courts wielding the balancing approach in one of two ways.

The first is what I call “pragmatic appeals.” Pragmatic appeals occur when a court of appeals reviews an indisputably non-final order because the benefits of doing so are especially great. These are appeals from orders that are nowhere near a traditional final judgment; important issues remain pending, and the litigation is far from over. Unlike the more established exceptions to the final-judgment rule, these appeals often involve issues central to—rather than collateral to—the litigation. In cases of pragmatic appeals the costs of allowing an immediate review are often largely the same. But what distinguishes these cases is that the benefits of allowing immediate review are substantially greater than normal. Pragmatic appeals thus present a situation in which the court finds an especially good reason to hear an immediate appeal.

Second is “practical finality.” Practical finality, like pragmatic appeals, involve what are technically non-final orders. But in instances of practical finality, district court proceedings are *essen-*



tially done. That is, the district court has not entered a traditional final order, but it has more-or-less finished with the case, and there is nothing left for the district court to do that is of much significance. The key characteristic of practical finality is that the normal costs of allowing an immediate appeal are minimized while the benefits remain the same. In cases of practical finality, then, the court finds no good reason to wait for a traditional final judgment.

The line between pragmatic appeals and practical finality is not always a bright one; it is a matter of judgment to say that a case is close enough to the finish line to be an instance of practical finality rather than a pragmatic appeal. And in some instances, both costs and benefits shift; post-judgment appeals (as discussed below) are one context in which the benefits of an immediate appeal are often greater than normal and the costs are often lower. The important point, however, is the visible influence of the balancing approach.

In this part, I survey five instances in which the balancing approach survives in the courts of appeals: administrative remands, post-judgment appeals, the ministerial/technical exception, cumulative finality, and pure pragmatic appeals. *Gillespie* and the balancing approach influenced the law's development in each of these areas, and that influence can still be seen in modern cases. This survey reveals that the balancing approach persists in the courts of appeals despite its seeming death and burial in the Supreme Court. I turn to the implications of this discovery in Part III.

#### A. *Administrative Remands*

First is the administrative-remand rule. This doctrine addresses a problem that sometimes arises in district court review of administrative agency adjudication. Many administrative adjudications can be reviewed in federal district courts.<sup>67</sup> And it is not uncommon for district courts to remand cases back to the agency for further proceedings.

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67. See 5 U.S.C. § 702 (2012).

These remand orders are not final in the traditional sense of the word; more remains to be done in the agency. And in many cases, immediate review of the remand order could both disrupt administrative proceedings (they might be stayed during the appeal) and lead to piecemeal review (the court of appeals might hear a case twice—once after the administrative remand and again after any further administrative proceedings). Delaying review, in contrast, would consolidate all issues—issues from both the earlier agency action and the later agency action—into one appeal. Therefore, the general rule is that a district court order remanding a case to an agency for further proceedings is not a final, appealable order.<sup>68</sup>

Sometimes courts have held that a particular case requires an exception to this general rule. Courts have developed the administrative-remand exception to the final-judgment rule.<sup>69</sup> This exception applies primarily when the lack of an immediate appeal from an administrative remand might leave a party (most commonly the government) without any chance for appellate review. The administrative-remand exception allows parties to immediately appeal an administrative-remand when the benefits of doing so are especially great. Less commonly, courts have allowed an immediate appeal from an administrative remand when the costs of doing so were especially low. And the balancing approach has played a central role in this exception's development.<sup>70</sup>

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68. See *N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 550 F.3d 16, 19 (D.C. Cir. 2008) ("It is black letter law that a district court's remand order is not normally 'final' for purposes of appeal under 28 U.S.C. § 1291."); see also, e.g., *Papotto v. Hartford Life & Accident Ins. Corp.*, 731 F.3d 265, 270 (3d Cir. 2013) (quoting *Bhd. of Maint. Way Emps. v. Consol. Rail Corp.*, 864 F.2d 283, 285 (3d Cir. 1988)); *Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 656 (D.C. Cir. 2013); *W. Energy All. v. Salazar*, 709 F.3d 1040, 1048–49 (10th Cir. 2013); *Hanauer v. Reich*, 82 F.2d 1304, 1306 (4th Cir. 1996); *Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991); *Crowder v. Sullivan*, 897 F.2d 252, 252 (7th Cir. 1990) (per curiam); *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990); *Mall Prop., Inc. v. Marsh*, 841 F.2d 440, 441 (1st Cir. 1988); *Bender v. Clark*, 744 F.2d 1424, 1426–27 (10th Cir. 1984); 15B WRIGHT ET AL., *supra* note 5, § 3914.32 ("The general rule is that a remand [to an administrative agency] is not appealable as a final decision."). Cf. *Graham v. Hartford Life & Accident Ins. Corp.*, 501 F.3d 1153, 1159 (10th Cir. 2007) (applying a similar rule to an order remanding a benefits determination to an ERISA plan administrator).

69. *Federal Practice and Procedure* briefly discusses this aspect of appeals in administrative-review cases, though it does not note the balancing approach's influence. See 15B WRIGHT ET AL., *supra* note 5, § 3914.32.

70. See *Graham*, 501 F.3d at 1158 (questioning whether *Gillespie's* pragmatic balancing approach to appeals—which the court calls "practical finality"—is still a proper source of appellate jurisdiction but noting that it "is more robust in the context of agency re-

On a somewhat superficial level, several of the early decisions developing the rule invoked the hallmarks of the balancing approach. They often quoted *Gillespie's* instruction to give finality "a practical rather than technical construction."<sup>71</sup> And they described their task as "requir[ing] some evaluation of the competing considerations underlying all finality—the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."<sup>72</sup> Their task required, in other words, case-by-case balancing.<sup>73</sup>

More importantly, the rule itself reflects pragmatic balancing. As just mentioned, the costs and benefits of an immediate appeal in a run-of-the-mill administrative-remand case are little different than those in a normal case. The administrative-remand exception addresses some situations in which the balance of costs and benefits has shifted.

Consider the scenario in which the administrative-remand exception most commonly applies: cases in which an administrative-remand might leave the government with no opportunity to obtain appellate review. Assume that someone makes a claim of benefits to a government agency, but the agency rejects the claim. When the claimant seeks review in the district court, that court determines that the agency used the wrong legal standard and remands for further proceedings. If, in applying the new legal standard, the agency awards the claimant benefits, the government generally will not be able to appeal; agencies normally cannot appeal their own determination. So the remand risks making the district court's holding on the proper legal standard unreviewable by a court of appeals.

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view").

71. See *Stone v. Heckler*, 722 F.2d 464, 467 (9th Cir. 1983) (quoting *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964)); *Gueory v. Hampton*, 510 F.2d 1222, 1225 (D.C. Cir. 1974) (quoting *Gillespie*, 379 U.S. at 152).

72. *Stone*, 722 F.2d at 467 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974)).

73. Some courts have suggested that the administrative-remand rule is an application of the collateral order doctrine. See, e.g., *Borntrager v. Cent. States, Se. & Sw. Areas Pension Fund*, 425 F.3d 1087, 1092 (8th Cir. 2005). I disagree. As mentioned above, the collateral order doctrine applies only to orders that are separate from the merits. In administrative-remand cases, the issue being appealed is often the legal standard the agency should apply, which is central to the merits. See *Bender*, 744 F.2d at 1427 (concluding that the issues addressed in an appeal from an administrative remand were central—not collateral—to the merits; the collateral order doctrine was thus inapplicable).

Faced with this situation, courts in most of the circuits have concluded that the government can immediately appeal the district court's order, even though that order is not final.<sup>74</sup> In this situation, the costs of allowing an immediate appeal are little different than they normally are; an immediate appeal could interfere with the efficient adjudication of the administrative proceedings and could result in multiple appeals involving the same dispute. But the benefits of an immediate review are much greater than normal. The main benefit of appellate review is error correction. Because delaying review in these cases could preclude any review, the only opportunity to correct errors is through an immediate appeal. Since the benefits of immediate review can be especially great in these cases, the administrative-remand rule allows for an immediate appeal.<sup>75</sup>

Although the rule is sometimes stated categorically (e.g., the government can immediately appeal "when the agency to which the case is remanded seeks to appeal, and that agency would be unable to appeal after the proceedings on remand"),<sup>76</sup> the actual decisions are often more nuanced. In *Davies v. Johanns*, for example, the Eighth Circuit held that it had jurisdiction to review a district court order remanding a dispute to the Secretary of Agriculture for a reappraisal of the plaintiffs' land.<sup>77</sup> Like many administrative-remand cases, the court noted the possibility that the Secretary would not be able to appeal the district court's order if the plaintiffs prevailed before the agency.<sup>78</sup> But the court also emphasized judicial economy—the court thought it wasteful to dismiss the case for lack of appellate jurisdiction because the potentially dispositive issue had been fully briefed and argued.<sup>79</sup>

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74. See, e.g., *Davies v. Johanns*, 477 F.3d 968, 971 (8th Cir. 2007); *Travis v. Sullivan*, 985 F.2d 919, 923 (7th Cir. 1993); *Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 329–30 (D.C. Cir. 1989); *Bender*, 744 F.2d at 1427–28.

75. See *Stone*, 722 F.2d at 467 ("In deciding whether district court remand orders are appealable, other courts have especially considered whether a holding of nonappealability would effectively deprive the litigants of an opportunity to obtain review.").

76. *Perales*, 948 F.2d at 1353.

77. 477 F.3d at 971.

78. *Id.*

79. *Id.* ("[W]e observe that judicial economy would be ill-served by postponing consideration of the potentially dispositive and fully briefed and argued issue raised in this appeal.").

The nuanced approach to administrative remands is most apparent in the Tenth Circuit, which allows appeals from an administrative remand only if the issue is important, the issue is urgent, and the benefits of an immediate appeal outweigh the costs.<sup>80</sup> Applying this approach, the Tenth Circuit held in *Bender v. Clark* that the Bureau of Land Management could appeal from a remand that ordered the agency to apply a preponderance-of-the-evidence standard to determine whether land contained a particular geologic structure.<sup>81</sup> The Bureau had rejected a lease application after the applicant failed to prove by "clear and definite" evidence that the land in question did not contain the structure.<sup>82</sup> In the lease applicant's appeal, the court determined that the case required a "balancing" approach that asked "whether the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review."<sup>83</sup> The potential injustice of delay in *Bender* was especially great. The court thought that the issue presented was especially important.<sup>84</sup> And if the lease applicant prevailed on remand, the Bureau would have no way to seek review of the district court's decision; it could not appeal its own administrative decisions.<sup>85</sup> Immediate appellate review was necessary to ensure any review, so the court held that it had jurisdiction.<sup>86</sup>

In contrast, the Tenth Circuit held in *Western Energy Alliance v. Salazar* that it lacked jurisdiction to review a district court order remanding a dispute to the Bureau of Land Management for

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80. See *W. Energy All. v. Salazar*, 709 F.3d 1040,1049–50 (10th Cir. 2013) (quoting *Bender v. Clark*, 744 F.2d 1424, 1427 (10th Cir. 1984) (concluding that an appeal from an administrative remand required "the application of a balancing test")). The Tenth Circuit employs a similar case-by-case approach to appeals from orders remanding a benefits determination to a plan administrator. See *Graham v. Hartford Life & Accident Ins. Corp.*, 501 F.3d 1153, 1057 (10th Cir. 2007) ("The Tenth Circuit has declined to adopt a hard-and-fast rule regarding whether a district court's order remanding a benefits determination to a plan administrator is final, and therefore appealable, under 28 U.S.C. § 1291. 'The decision should be made on a case-by-case basis applying well-settled principles governing final decisions.'") (quoting *Rekstad v. First Bank Sys.*, 238 F.3d 1259, 1263 (10th Cir. 2001)).

81. 744 F.2d at 1425–28.

82. *Id.* at 1425–26.

83. *Id.* at 1427.

84. See *id.* at 1428 ("As admitted by both parties, the standard-of-proof issue is a serious and unsettled one in the federal oil and gas leasing area.").

85. *Id.*

86. *Id.*

the Bureau to take action on the plaintiffs' lease applications.<sup>87</sup> Unlike *Bender*, the appeal in *Western Energy Alliance* was brought by the lease applicants, not the Bureau.<sup>88</sup> The court reasoned that the applicants, if dissatisfied with the Bureau's subsequent actions, could seek additional judicial review in the district court and on appeal.<sup>89</sup> There was accordingly no urgency—that is, no special benefit—for immediate review.<sup>90</sup>

Decisions involving immediate appeals by private litigants especially illustrate the administrative-remand exception's case-by-case nature. Unlike the government—which normally can appeal an administrative-remand order due to the risk of otherwise never obtaining appellate review<sup>91</sup>—private litigants generally cannot appeal an administrative remand.<sup>92</sup> Private litigants (like those in *Western Energy Alliance*) who are still aggrieved after further proceedings can seek appellate review after those proceedings have finished, so there is rarely any need for an immediate appeal.<sup>93</sup>

Courts have sometimes found that the particularities of a case require a different rule. *In re Long-Distance Telephone Service Federal Excise Tax Refund Litigation* is one example.<sup>94</sup> Several plaintiffs in that case challenged an IRS notice that established a procedure for refunding illegally collected taxes.<sup>95</sup> The district court eventually vacated the notice and remanded the case to the agency, but it did not direct the agency to establish a new refund policy.<sup>96</sup> The plaintiffs appealed, and the D.C. Circuit held that it had jurisdiction under the administrative-remand rule.<sup>97</sup> Although the case was not final, the court noted that the IRS had

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87. 709 F.3d 1040, 1042, 1051 (10th Cir. 2013).

88. *Id.* at 1042.

89. *Id.* at 1050.

90. *Id.*

91. *See, e.g., Bender*, 744 F.2d at 1428.

92. *See, e.g., W. Energy All.*, 709 F.3d at 1050.

93. *See Alsea Valley All. v. Dep't of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004) (while noting that "there may be circumstances that would afford a non-agency litigant the ability to appeal a remand order," suggesting that the administrative-remand exception applied only to appeals by the government because only the government "face[s] the unique prospect of being deprived of review altogether").

94. 751 F.3d 629 (D.C. Cir. 2014).

95. *Id.* at 631–32.

96. *Id.* at 632.

97. *Id.* at 633.

“not taken any reviewable action in the two years since the district court’s remand order.”<sup>98</sup> Were the IRS to sit on its hands (as it had some incentive to do), the dispute would never produce a final, appealable order and review would be forever delayed.<sup>99</sup> Invoking *Gillespie*’s endorsement of a “practical approach” to finality, the court deemed the order appealable.<sup>100</sup>

Another example is *Sierra Forest Legacy v. Sherman*, in which the Ninth Circuit permitted private litigants to immediately appeal an administrative remand.<sup>101</sup> In *Sierra Forest Legacy*, several environmental groups and the state of California challenged some federal foresting guidelines on several grounds but had been largely unsuccessful; the district court held that the government had failed only to adequately consider alternative actions in violation of the National Environmental Policy Act.<sup>102</sup> The district court thus remanded the case to the Forest Service for a supplemental environmental impact study.<sup>103</sup> The Ninth Circuit nevertheless determined that it had jurisdiction over the environmental groups’ appeal.<sup>104</sup> The district court’s order had left much of the foresting guidelines in place, and the Forest Service had issued a draft impact study while the appeal was pending.<sup>105</sup> The Ninth Circuit determined that both the district court’s and the agency’s work was complete, even though the case was—procedurally speaking—not over.<sup>106</sup>

*Sierra Forest Legacy* also illustrates the other side of the appellate-jurisdiction balance. In that case, the costs of an immediate appeal were especially low—the work that would normally be done before a final, appealable order was already complete, and there was little left for the agency or the district court to do. Another example is *Chang v. United States*, in which the Ninth Circuit held that it had jurisdiction to review an order remanding a dispute to the Immigration and Naturalization Service when re-

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98. *Id.*

99. *Id.*

100. *Id.* at 633–34.

101. 646 F.3d 1161, 1175–76 (9th Cir. 2011).

102. *Id.* at 1172–74.

103. *Id.* at 1174.

104. *Id.* at 1176.

105. *Id.* at 1175–76.

106. *Id.* at 1176 (“As a practical matter, the work of both the district court and the agency is complete.”).

mand would result in a “totally wasted proceeding.”<sup>107</sup> The district court had remanded a lawful-permanent-residency petition to the Service with directions to conduct an analysis that (according to the Service) the Service was legally incapable of performing.<sup>108</sup> Immediate review was not necessary to ensure any review, as the government could later appeal the Service’s decision. But the Ninth Circuit determined that this “irrational” remand would simply waste judicial resources and concluded that it had jurisdiction.<sup>109</sup>

The administrative-remand rule is thus one area in which the influence of the balancing approach survives. And the doctrine exists entirely in the courts of appeals; the Supreme Court has decided only one marginally relevant case and has not squarely addressed the matter.<sup>110</sup> The balancing approach’s influence has accordingly gone largely unnoticed.

### B. *Post-Judgment Appeals*

Post-judgment proceedings sometimes follow the main event of litigation—that is, follow the determination of parties’ rights. These proceedings can take several forms. They can involve, for example, a plaintiff’s efforts to recover a judgment from a defendant by locating the defendant’s assets.<sup>111</sup> Post-judgment proceedings can also involve a district court’s ongoing supervision of an injunction or consent decree. This is particularly common in institutional reform litigation, which often includes a protracted remedial phase during which the district court interprets and enforces an earlier order.<sup>112</sup>

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107. 327 F.3d 911, 925 (9th Cir. 2003).

108. *Id.*

109. *Id.*; see also *Stone v. Heckler*, 722 F.2d 464, 467 (9th Cir. 1983) (“The district court’s decision is adverse to the Secretary and, if wrong, would result in a totally wasted proceeding below . . . . Deciding this legal issue now will promote the least possible waste of judicial resources.”).

110. See *Sullivan v. Finkelstein*, 496 U.S. 617, 625 (1990) (interpreting 42 U.S.C. § 405(g) to permit an immediate appeal from some district court orders remanding a dispute to the Social Security Administration).

111. FED. R. CIV. P. 69; see, e.g., *Resolution Trust Corp. v. Ruggiero*, 994 F.2d 1221, 1223 (7th Cir. 1993) (allowing a plaintiff-creditor to initiate a post-judgment proceeding in district court to collect judgments against defendant-debtor).

112. See, e.g., *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1063 (9th Cir. 2010); *Gautreaux v. Chi. Hous. Auth.*, 178 F.3d 951, 953 (7th Cir. 1999); *United States v. Washing-*



Like normal, pre-judgment litigation, appellate jurisdiction in post-judgment proceedings comes primarily from section 1291.<sup>113</sup> So section 1291's normal finality principles apply—an appeal generally cannot be taken until the end of post-judgment proceedings, when the district court has resolved all issues raised in those proceedings.<sup>114</sup> But determining when those proceedings have actually ended can prove troublesome.

In some cases, to be sure, the question is simple. Consider, for example, an independent post-judgment proceeding brought to collect a judgment; if the district court declines to enforce the judgment, the post-judgment proceedings are over and the litigants can appeal.<sup>115</sup> Similarly, in a post-judgment proceeding to enforce a consent decree regarding the distribution of a retirement plan's assets, the proceedings were final—and the district court's orders appealable—once the district court had determined how much each beneficiary of the plan would receive.<sup>116</sup>

Other cases are more difficult. Consider an order denying discovery of a debtor's assets in a post-judgment proceeding to collect a judgment. Discovery orders are normally not immediately appealable. But the denial of discovery about a debtor's property can spell the effective end of the pursuit of the debtor's property—without discovery, the creditor does not know what assets to attach.<sup>117</sup> And once this discovery is denied, there is often little prospect that the district court will enter an additional order that more resembles a final judgment. It is unclear, then, when that discovery order could be appealed.

District courts' ongoing supervision of an injunction or consent decree pose particular problems. These orders sometimes require protracted efforts by one or more of the parties to comply with the order. The injunction in *Armstrong v. Schwarzenegger*, for example, required the state of California to reform prison practices and

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ton, 761 F.2d 1404, 1405 (9th Cir. 1985).

113. See, e.g., *Jones-El v. Berge*, 374 F.3d 541, 543 (7th Cir. 2004).

114. 15B WRIGHT ET AL., *supra* note 5, § 3916.

115. See, e.g., *TDK Elec. Corp. v. Draiman*, 321 F.3d 677, 678 (7th Cir. 2003) (holding that a district court's refusal to revive an old judgment "end[ed] the Rule 69 proceeding, the only matter on the docket, and thus finally disposes of the parties' dispute").

116. See, e.g., *Solis v. Current Dev. Corp.*, 557 F.3d 772, 776 (7th Cir. 2009).

117. See, e.g., *Ohntrup v. Makina Ve Kimya Endustrisi Kurumu*, 760 F.3d 290, 294 (3d Cir. 2014).

policies that violated the Americans With Disabilities Act, the Rehabilitation Act, and the Due Process Clause.<sup>118</sup> The district court issued the pertinent injunctions between 1999 and 2002,<sup>119</sup> compliance efforts continue to this day.<sup>120</sup> Similarly, compliance with the consent decree desegregating Chicago's public housing has spanned decades.<sup>121</sup>

Identifying an end to these remedial proceedings can be impossible.<sup>122</sup> Granted, full compliance with an injunction or decree could create a close analogue to a final judgment; this can occur, for example, in post-judgment proceedings overseeing the parties' efforts to clean pollution from a contaminated site.<sup>123</sup> But an injunction or decree might have no expiration date, and even if post-judgment proceedings will eventually end at some point, that point might be so far in the future as to be unidentifiable at any one point in the proceedings. In the meantime, district court's often issue a variety of orders—the parties often monitor each other's compliance with the injunction or consent decree, and when the other side's efforts are lacking they turn to the district court for enforcement.<sup>124</sup> The lack of a foreseeable final judgment raises questions as to whether these interim orders can be appealed.

When a post-judgment appeal raises questions of appealability, most courts of appeals have answered those questions by weighing the costs and benefits of an immediate appeal. The *ad hoc* balancing approach that *Gillespie* epitomized has played a central role in these cases.

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118. 622 F.3d 1058, 1063 (9th Cir. 2010).

119. *Id.*

120. See *Armstrong v. Brown*, No. C942307CW (N.D. Cal. filed Nov. 13, 2015).

121. See *Gautreaux v. Chi. Hous. Auth.*, 178 F.3d 951, 952 (7th Cir. 1999).

122. *E.g.*, *Jones-El v. Berge*, 374 F.3d 541, 543 (7th Cir. 2004) (“[W]here a consent decree serves as the ‘first’ order of the postjudgment controversy, the postjudgment proceedings may not bear sufficient similarities to a freestanding lawsuit to enable easy identification of a plausible counterpart to a final judgment as required under § 1291.”); *Bogard v. Wright*, 159 F.3d 1060, 1062–63 (7th Cir. 1998) (presupposing “that the postjudgment proceeding is enough like a free-standing lawsuit to enable a plausible counterpart to the conventional final judgment . . . fails when the decree is dealing with a consent decree that . . . has no termination date”).

123. See, *e.g.*, *JMS Dev. Co. v. Bulk Petroleum Corp.*, 337 F.3d 822, 827 (7th Cir. 2003) (holding that, in post-judgment proceedings overseeing the cleanup of polluted property, the proceedings would not be final and appealable until the property was actually cleaned and the costs of that cleanup were determined).

124. See, *e.g.*, *Armstrong v. Schwarzenegger*, 622 F.3d at 1058, 1063 (9th Cir. 2010).

Like administrative-remand appeals, the early cases in this area invoked the hallmarks of the balancing approach. These decisions regularly remarked that finality was to be decided practically. In *United States v. McWhirter*, for example, the Fifth Circuit held that it had jurisdiction to review a district court's order denying the government's request to issue interrogatories in post-judgment proceedings to recover on a default judgment.<sup>125</sup> Citing *Gillespie*, the court noted that "[r]ecent decisions of the Supreme Court have expanded the scope of final judgments beyond the limited class encompassed by the traditional rule, and have stressed that the definition of a final judgment is a pragmatic one."<sup>126</sup> Similarly, in *Plymouth Mutual Life Insurance Co. v. Illinois Mid-Continent Life Insurance Co.*, the Third Circuit held that it had jurisdiction to review a district court's order interpreting a settlement agreement.<sup>127</sup> In the course of reaching that conclusion, the court noted *Gillespie*'s teaching that "it is sometimes appropriate that the requirement of finality be given a practical rather than a technical construction."<sup>128</sup> The Sixth Circuit quoted the same line from *Gillespie* in *Joseph F. Hughes & Co. v. United Plumbing & Heating, Inc.*, in which it held that it had jurisdiction to review a district court's order garnishing a judgment-debtor's tax refunds.<sup>129</sup>

The modern cases also reflect the case-by-case balancing of *Gillespie*. Two aspects of that balancing merit mention. First, the courts of appeals often are less concerned with the risks of piecemeal review in post-judgment appeals; the main event of litigation is complete and so any appeals will not interfere with it.<sup>130</sup> Second, the courts often look to whether the appellant would have any chance at review were immediate review denied; because of the uncertainty as to when post-judgment proceedings will end,

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125. 376 F.2d 102, 105 (5th Cir. 1967).

126. *Id.*

127. 378 F.2d 389, 391 (3d Cir. 1967).

128. *Id.* (quoting *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964)).

129. 390 F.2d 629, 630 (6th Cir. 1968).

130. See, e.g., *Miller v. Alamo*, 975 F.2d 547, 550 (8th Cir. 1992) ("One reason [courts are less concerned about piecemeal appeals in post-judgment proceedings] is that the underlying dispute has already been settled, and there is little danger that prompt appeal of post-judgment matters will cause confusion, duplicative effort, or otherwise interfere with the trial court's disposition of the underlying merits."); *Morales-Feliciano v. Parole Bd. of Commonwealth of P.R.*, 887 F.2d 1, 3-4 (1st Cir. 1989); *Joseph F. Hughes & Co.*, 390 F.2d at 630.

courts are often concerned with providing some opportunity for appellate review.<sup>131</sup>

So several courts have, for example, allowed immediate appeals from interlocutory orders denying discovery in post-judgment collection proceedings.<sup>132</sup> The denial of discovery can leave a judgment creditor with no means of attaching a judgment debtor's property.<sup>133</sup> And so there is little prospect in these cases of a future order that more resembles a traditional final judgment and from which an appeal could normally be taken.<sup>134</sup> If there is to be any review, it must be immediate.<sup>135</sup> In contrast, interlocutory orders *granting* discovery in post-judgment proceedings have generally not been deemed immediately appealable. A party wishing to immediately appeal such an order can obtain review by disobeying the order and appealing from a subsequent finding of contempt.<sup>136</sup>

Courts have been similarly generous with appellate jurisdiction over orders issued during a district court's ongoing supervision of an injunction or consent decree.<sup>137</sup> In some of these cases, the protracted nature of the proceedings requires an immediate appeal for there to be any appeal at all; with no end to the proceedings in

131. See, e.g., *Miller*, 975 F.2d at 550 ("Another reason for downplaying the courts' traditional concern over piecemeal appeals is that further proceedings are not likely to produce an order that is any more final than the one at issue."); *Morales-Feliciano*, 887 F.2d at 4.

132. See, e.g., *Ohntrup v. Makina Ve Kimya Endustrisi Kurumu*, 760 F.3d 290, 294 (3d Cir. 2014); *Wilkinson v. FBI*, 922 F.2d 555, 558 (9th Cir. 1991); *Fehlhaber v. Fehlhaber*, 664 F.2d 260, 262 (11th Cir. 1981); *United States v. McWhirter*, 376 F.2d 102, 105 (5th Cir. 1967).

133. See, e.g., *Ohntrup*, 760 F.3d at 294.

134. E.g., *Wilkinson*, 922 F.2d at 558; *McWhirter*, 376 F.2d at 105.

135. See, e.g., *McWhirter*, 376 F.2d at 105.

136. See, e.g., *Cent. States, Se. & Sw. Areas Pension Fund v. Express Freight Lines, Inc.*, 971 F.2d 5, 6 (7th Cir. 1992); *Rouse Constr. Int'l, Inc. v. Rouse Constr. Corp.*, 680 F.2d 743, 746 (11th Cir. 1982). But see *Rodriguez v. IBP, Inc.*, 243 F.3d 1221, 1228 (10th Cir. 2001). The *Rodriguez* court's holding that it had jurisdiction over an order compelling discovery in post-judgment proceedings might be better explained as a contempt appeal, since the target of the discovery order had been held in contempt. See *id.* at 1226.

137. See, e.g., *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1065 (9th Cir. 2010); *United States v. Knot*, 29 F.3d 1297, 1299 (8th Cir. 1994); *United States v. Int'l Bhd. of Teamsters*, 12 F.3d 360, 364 (2d Cir. 1993); *United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2d Cir. 1991); *United States v. Washington*, 761 F.2d 1404, 1407 (9th Cir. 1985). The Seventh Circuit, in contrast, has rejected the balancing approach in this context; it has deemed mandamus to be the more appropriate avenue for review. See *Gautreaux v. Chi. Hous. Auth.*, 178 F.3d 951, 956 (7th Cir. 1999); *Bogard v. Wright*, 159 F.3d 1060, 1062–63 (7th Cir. 1998).

sight, courts will not force the litigants to wait indefinitely. In *Armstrong v. Schwarzenegger*, the Ninth Circuit held that it had jurisdiction to review a district court order issued during the remedial phase of prison-reform litigation.<sup>138</sup> As part of its ongoing supervision of an order requiring California to bring its prisons into compliance with the Americans with Disabilities Act and other laws, the district court had ordered the state to develop a plan for implementing certain practices at county jails.<sup>139</sup> The Ninth Circuit held that it had jurisdiction over California's appeal.<sup>140</sup> After noting that finality was to be given a practical rather than a technical construction, the court stated that in post-judgment proceedings it was "less concerned with piecemeal review . . . and more concerned with allowing some opportunity for review, because 'unless such [post-judgment] orders are found final, there is often little prospect that further proceedings will occur to make them final.'"<sup>141</sup> In *Armstrong*, the district court contemplated no further orders regarding the county jails, and if the state complied with the district court's order, "it [was] unclear that there would be any future opportunity for [it] to appeal."<sup>142</sup>

In other cases involving injunctions or consent decrees, immediate review is necessary not because there is no end to the proceedings in sight, but because the order would be effectively unreviewable were review delayed. In *United States v. International Brotherhood of Teamsters*, for example, the Second Circuit held that it had jurisdiction to review a district court order entered as part of the court's ongoing supervision of the United States' consent decree with the Teamsters.<sup>143</sup> The district court had issued rules regarding the election of the union's officers, and the union appealed.<sup>144</sup> The Second Circuit noted that administering a complex consent decree "often require[s] intermediate acts by parties that may be unreviewable if appeals are delayed until compliance

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138. 622 F.3d at 1065.

139. *Id.* at 1064.

140. *Id.* at 1065.

141. *Id.* at 1064 (quoting *United States v. One 1986 Ford Pickup*, 56 F.3d 1181, 1185 (9th Cir. 1995)).

142. *Id.* at 1065; *see also, e.g.*, *United States v. Washington*, 761 F.2d 1404, 1407 (9th Cir. 1985) (reviewing immediately a district court order apportioning fishing rights as part of enforcing an earlier judgment; this was "the only opportunity for meaningful review").

143. 931 F.2d 177, 183 (2d Cir. 1991).

144. *Id.* at 182.

is final.”<sup>145</sup> Appealability in this context accordingly requires “a flexible approach.”<sup>146</sup> In the case of the officer elections, immediate review was necessary for there to be any review.<sup>147</sup> If the appeal came after the elections, those challenging the district court’s order would face the immense burden of proving that any error in interpreting the consent decree was harmful—that is, that the election outcome would have been different.<sup>148</sup> And even were the court to order a new election, immense amounts of time and money would have been wasted in conducting the initial election.<sup>149</sup> Because the need for immediate review was so great, the court held that it had jurisdiction.<sup>150</sup>

Many other decisions from the courts of appeals reflect a balancing approach to post-judgment appeals. In *Tweedle v. State Farm Fire & Casualty Co.*, for example, the Eighth Circuit held that it had jurisdiction to review several post-judgment orders even though other (and somewhat related) motions remained pending in the district court.<sup>151</sup> In *Tweedle*, the plaintiff’s ex-husband intervened in post-judgment proceedings to collect on a damages award, claiming an entitlement to some of the award.<sup>152</sup> The court determined that, under the particular facts of *Tweedle*, the grant of the motion to intervene—which normally cannot be immediately appealed—was a final, appealable order even though the husband’s entitlement to any of the award had not yet been determined.<sup>153</sup> The court recognized that another appeal might be required after the ex-husband’s rights were determined, but it thought this consideration insufficient to defeat the appeal.<sup>154</sup> Indeed, the court thought its “disposition of the orders on appeal [would] actually advance resolution of the litigation, at least as to

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145. *Id.* at 183.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*; see also, e.g., *Diaz v. San Jose Unified Sch. Dist.*, 861 F.2d 591, 594 (9th Cir. 1988) (reviewing immediately a desegregation plan for a particular school year; were review delayed, the plan would be implemented for that school year and the issues thus moot).

151. 527 F.3d 664, 670 (8th Cir. 2008).

152. *Id.* at 667.

153. *Id.* at 669.

154. *Id.* at 670.

the disputes between the original parties.”<sup>155</sup> Although unresolved and related outstanding issues remained outstanding, the court—“relying on ‘practical instead of technical considerations’”—held that those motions did not preclude an appeal.<sup>156</sup>

The balancing approach can also be seen in decisions declining to find appellate jurisdiction. In *United States v. Michigan*, the Sixth Circuit held that it lacked jurisdiction to review an order granting a party “litigating amicus curiae” status in post-judgment proceedings regarding prison conditions.<sup>157</sup> The court invoked *Gillespie*’s instruction to weigh the costs and benefits of an immediate appeal.<sup>158</sup> In following that instruction, the court determined that the order was not sufficiently important to merit immediate review; it simply let some of the inmates covered by the consent decree to participate in the case.<sup>159</sup>

### C. Ministerial/Technical Remnants

A district court decision is generally not final if it determines liability but leaves open other matters, such as the amount of damages.<sup>160</sup> (The one major exception to this rule is attorney’s fees—a district court judgment that leaves open issues of attorney’s fees is considered a final, appealable order.)<sup>161</sup> And rightfully so. Were the liability and damages determinations separately appealable, they could result in two separate appeals: one on liability and another on the amount of damages. It is generally more efficient to wait and address questions of liability and damages in a single appeal.

Courts have eased this requirement when the remaining matters before the district court involve what courts characterize as merely “ministerial” or “technical” matters. For example, courts

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155. *Id.* (noting also that “disposition of the other issues on appeal [would] facilitate final resolution”).

156. *Id.* at 668 (quoting *Giove v. Stanko*, 49 F.3d 1338, 1341 (8th Cir. 1995)).

157. 901 F.2d 503, 504 (6th Cir. 1990) (withdrawn opinion).

158. *Id.* at 506.

159. *Id.* at 507.

160. *See, e.g.*, *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976); *HSBC Bank USA, N.A. v. Townsend*, 793 F.3d 771, 776 (7th Cir. 2015) (“Damages are part of the judgment and essential to finality; lack of quantified damages prevents an appeal.”).

161. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988); *Ray Haluch Gravel Co. v. Cent. Pension Fund*, 134 S. Ct. 773, 780 (2014).

have deemed district court findings of liability appealable when the determination of damages will be mechanical and uncontroversial.<sup>162</sup> Courts have reached a similar conclusion on orders remanding disputes to administrative agencies or other bodies that require only ministerial, straightforward action by those bodies.<sup>163</sup>

In these cases, the order appealed from does not satisfy the traditional definition of finality.<sup>164</sup> But because the remaining issues are uncontroversial and straightforward, the parties are unlikely to dispute them. The appeal on liability is thus likely to be the only appeal, and the normal concern over piecemeal review diminishes.<sup>165</sup>

The balancing inherent in the ministerial/technical exception is obvious. These cases minimize the normal costs of allowing an appeal from a non-final order; there is little chance of another ap-

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162. See, e.g., *Goodwin v. United States*, 67 F.3d 149, 151 (8th Cir. 1995) (holding in a tax-refund suit that a district court order granting a refund but not calculating the amount was appealable, as “the calculation of this refund [was] merely a ministerial task”); *Prod. & Maint. Emps. Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1401–02 (7th Cir. 1992) (holding that a district court order concluding that an employer had wrongfully amended a retirement plan was appealable even though the court had not calculated the proper amount of accrued benefits because “[d]etermining that amount [was] just a matter of plugging information into the formula”); *Woosley v. Avco Corp.*, 944 F.2d 313, 317 (6th Cir. 1991).

163. See, e.g., *Verizon Wash. v. Comm’n Workers of Am.*, AFL-CIO, 571 F.3d 1296, 1301 (D.C. Cir. 2009) (holding in a dispute over the interpretation of a collective-bargaining agreement, the district court’s order remanding the dispute to the arbitrator was immediately appealable because the arbitrator’s only task on remand was to modify the amount of an award in a manner consistent with the district court’s opinion); *Vitale v. Latrobe Area Hosp.*, 420 F.3d 278, 281 (3d Cir. 2005) (holding an order remanding a dispute to an ERISA plan administrator was immediately appealable when all the district court required of the administrator was a “mechanical” calculation of benefits; “the Plan contain[ed] a precise mathematical formula for calculating the monthly retirement benefit, and the inputs to the formula [were] all undisputed facts”); *Pauly v. U.S. Dep’t of Agric.*, 348 F.3d 1143, 1148 (9th Cir. 2003) (holding an order remanding a dispute to the Department of Agriculture was final because “the district court’s partial remand [was] extremely narrow and merely require[d] a mechanical recalculation of the recapture amount under current agency regulations”).

164. See *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902 (2015); *Catlin v. United States*, 324 U.S. 229, 233 (1945); see, e.g., *United States v. Williams*, 796 F.3d 815, 817 (7th Cir. 2015) (“We conclude, therefore, that a judgment foreclosing a federal tax lien and specifying how the proceeds are to be applied is appealable because it ends the litigation and leaves nothing but execution of the court’s decision, the standard definition of ‘final’ under § 1291.”).

165. See *Martin v. Brown*, 63 F.3d 1252, 1260 (3d Cir. 1995) (noting that an outstanding calculation of expenses was “unlikely to result in a later appeal”); *Morgan v. United States*, 968 F.2d 200, 204 (2d Cir. 1992) (“The rationale is that when what remains to be done is merely routine, that routine decision will not spark an appeal; hence permitting the earlier review will not thwart the policy against piecemeal appeals.”).



peal and thus little risk of piecemeal review. There is also some benefit to hearing the appeal immediately: dismissing for lack of a final order often seems wasteful. The parties have already spent time and money addressing the merits. Making them start over after the district court enters what is likely an uncontroversial and inevitable order would waste all that effort.

The true influence of the balancing approach, however, is evident in the case-by-case determinations that this exception requires. Courts must assess the outstanding tasks to determine on which side of the ministerial/technical line a district court's decision falls. In each case, the court must determine the likelihood of a dispute over the remaining issues and balance that against the potential waste of dismissing the appeal. And courts have spent much time (or at least much ink) explaining why a particular order does not satisfy this exception.<sup>166</sup>

#### D. *Cumulative Finality*

The doctrine of cumulative finality is another example of practical finality. Cumulative finality comes into play when parties file a notice of appeal before the district court enters a final judgment. (Notices of appeal must generally be filed within thirty days of the final judgment.<sup>167</sup>) The doctrine "cures" these prematurely (and improperly) filed notices when the district court proceedings have terminated by the time the case reaches the appellate court.<sup>168</sup>

Cumulative finality applies to a standard—and surprisingly common—set of circumstances. The district court enters a non-

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166. See, e.g., *Marshak v. Treadwell*, 240 F.3d 184, 190–92 (3d Cir. 2001); *Apex Fountain Sales, Inc. v. Kleinfeld*, 27 F.3d 931, 934–37 (3d Cir. 1994).

167. See FED. R. APP. P. 4(a)(1).

168. The cumulative finality doctrine's relation to the Federal Rule of Appellate Procedure 4(a)(2) is unclear. Rule 4(a)(2) states that "[a] notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." FED. R. APP. P. 4(a)(2). The Supreme Court interpreted this to mean that Rule 4(a)(2) saved a premature notice of appeal when it is filed from a decision a litigant "reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment." *FirsTier Mort. Co. v. Inv'rs Mort. Ins. Co.*, 498 U.S. 269, 276 (1991). It is unclear whether the cumulative finality doctrine is part of Rule 4(a)(2) or separate from it. See, e.g., *In re Bryson*, 406 F.3d 284, 289 (4th Cir. 2005) (describing the cumulative finality doctrine as "the confluence of Rule 4(a)(2), as interpreted in *FirsTier*, and Rule 54(b)").

final order (for example, one dismissing some but not all claims,<sup>169</sup> or one determining liability but leaving open a substantial issue regarding damages),<sup>170</sup> and a party files a notice of appeal. Since the district court proceedings are not finished and there is no final judgment, the notice is ineffective. The district court later addresses the remaining issues in the case and enters a final judgment. But the party does not file a new notice of appeal after that final judgment.

The appellate court is faced with a jurisdictional quandary. The party seeking review filed a notice of appeal before there was ever a final judgment, and such a notice is technically ineffective. That party has accordingly never filed a proper notice of appeal from the final judgment. The court arguably lacks appellate jurisdiction in this scenario.

Cumulative finality solves this problem. The courts have generally held that so long as district court proceedings have terminated and a final judgment has been entered by the time the appeal is heard, the court will treat the notice of appeal as having been filed after the final judgment.<sup>171</sup> The notice of appeal is thus deemed timely and the court exercises jurisdiction.

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169. See, e.g., *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 478–79 (4th Cir. 2015).

170. See, e.g., *Harbert v. Healthcare Servs. Grp., Inc.*, 391 F.3d 1140, 1146 (10th Cir. 2004).

171. The Courts of Appeals have developed different rules regarding cumulative finality, particularly after the Supreme Court's decision in *FirstTier*. See *supra* note 164. Some have incorporated cumulative finality into Rule 4(a)(2) and require that the district court's initial non-final decision—the one from which the premature notice of appeal was filed—be one that would have been appealable if immediately followed by a Civil Rule 54(b) or Criminal Rule 32.2(c)(3) certification. See, e.g., *Miller v. Gorski Wladyslaw Estate*, 547 F.3d 273, 277 n.1 (5th Cir. 2008); *In re Bryson*, 406 F.3d at 288; *Clausen v. Sea-3, Inc.*, 21 F.3d 1181, 1186 (1st Cir. 1994). Others hold simply that district court proceedings must terminate by the time the appellate court hears the merits; there is no express requirement that the initial non-final order could have been immediately appealed if certified, although the initial orders are often of that type. See, e.g., *Schippers v. United States*, 715 F.3d 879, 885 (11th Cir. 2013); *Cnty. Bank, N.A. v. Riffle*, 617 F.3d 171, 174 (2d Cir. 2010); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 691 (9th Cir. 2010); *Harbert v. Healthcare Servs. Grp., Inc.*, 391 F.3d 1140, 1146 (10th Cir. 2004); *General Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 311 n.3 (3d Cir. 2001). The Eighth Circuit currently claims to not recognize the cumulative finality doctrine, though its earlier decisions did. See *Kramer v. Cash Link Sys.*, 652 F.3d 840, 842 (8th Cir. 2011); *Miller v. Special Weapons, L.L.C.*, 369 F.3d 1033, 1035 (8th Cir. 2004). *But see* *Merchs. & Planters Bank of Newport v. Smith*, 516 F.2d 355, 356 n.3 (8th Cir. 1975) (*per curiam*) (holding that the court had jurisdiction despite a prematurely filed notice of appeal because the district court disposed of the remaining claims after oral argument before the court of appeals but before it issued its decision). The Federal Circuit appears to have rejected the doctrine, albeit in an unpublished decision. *Meade Instruments Corp. v. Reddwarf Starware, LLC*, No. 99-1517, 2000 WL 987268, at \*3 (Fed. Cir. 2000).

The cumulative finality doctrine was built atop the balancing approach.<sup>172</sup> Again, and on a potentially superficial level, several of the early cases developing or adopting the doctrine invoke *Gillespie*'s instruction to take a practical rather than technical approach to appellate jurisdiction.<sup>173</sup> But the cumulative finality cases also reflect a balancing of the costs and benefits of appeals before a final judgment—in cases of cumulative finality, the reasons for delaying appeal until after a final judgment are minimized in two ways.

First, most courts require that district court proceedings end by the time the court of appeals reached the merits before applying the doctrine. This requirement eliminates the risk of additional appeals. The normal reason for delaying appellate review—avoiding piecemeal appeals—is not a factor in these cases.<sup>174</sup>

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172. Wright, Miller & Cooper recognize that *Gillespie*'s balancing approach was the basis for the cumulative finality doctrine. See 15A WRIGHT ET AL., *supra* note 5, § 3913 ("The *Gillespie* decision was put to good use in establishing the principle that an appeal taken before complete disposition of a case could be salvaged by subsequent entry of an order accomplishing complete disposition.").

173. *Jetco Elecs. Indus., Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973), is probably one of the first cases to articulate the cumulative finality doctrine. *Jetco* was a multi-defendant suit, and the plaintiffs filed their only notice of appeal after the district court had dismissed the claims against only one of the defendants. *Id.* at 1231. The Fifth Circuit recognized that the plaintiffs had appealed from a non-final order, and there was no Rule 54(b) certification that would have permitted the appeal. *Id.* (Rule 54(b) allows a district court to certify for immediate appeal an order that dismisses some (but not all) of the claims or defendants in a suit. For more on Rule 54(b), see generally Pollis, *Rule 54(b)*, *supra* note 9). But the court refused to "exalt form over substance" and held that the premature notice of appeal—"under the circumstances of [that] case"—was sufficient to grant appellate jurisdiction. *Id.* And the court did so "[m]indful of the Supreme Court's command that practical, not technical, considerations are to govern the application of principles of finality." *Id.* (citing *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964)). Later courts similarly invoked *Gillespie*. See *Equip. Fin. Grp. Inc. v. Traverse Comput. Brokers*, 973 F.2d 345, 347 (4th Cir. 1992) (adopting the cumulative finality doctrine and noting that "the procedural circumstances . . . warrant a practical approach to finality" (citing *Gillespie*, 379 U.S. at 152)); *Sacks v. Rothberg*, 845 F.2d 1098, 1099 (D.C. Cir. 1988) (adopting the cumulative finality doctrine while noting that doing so "comport[ed] with the Supreme Court's admonition that 'the requirement of finality is to be given a practical rather than technical construction'" (quoting *Gillespie*, 379 U.S. at 152)); *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 681 (9th Cir. 1980) (adopting the cumulative finality doctrine and noting that the cumulative finality cases "provide clear examples of giving a practical rather than a technical construction to the finality rule"). Wright, Miller, and Cooper suggest that the cumulative finality doctrine "is so well established that there is no remaining need to rely on the *Gillespie* decision." 15A WRIGHT ET AL., *supra* note 5, § 3913. That's probably true, but the balancing approach still provided the doctrine's foundation.

174. See *Sacks*, 845 F.2d at 1099–1100; *Anderson*, 630 F.2d at 681.

Second, several cumulative finality cases have required that there be no prejudice to the appellees.<sup>175</sup> This, too, minimizes the cost of appeals from non-final orders. There is no risk of surprise or harassment, nor is there a risk of imposing the costs of duplicative appeals on the appellee.

Cases of cumulative finality thus present no real reason to delay an appeal except for adhering to technical requirements. So faced with the decision of dismissing the case for lack of appellate jurisdiction or overlooking the technical error in filing the notice of appeal, courts have largely gone with the latter. And that's because the normal cost of piecemeal review is minimized.

### E. *Pure Pragmatic Appeals*

Finally, some cases still engage in *Gillespie*-like ad hoc pragmatic balancing, despite the Supreme Court's seeming burial of that case.

Pragmatic balancing survives most prominently in the Ninth Circuit, although its cases are something of a mixed bag. Several years after *Coopers & Lybrand*, the Ninth Circuit continued to treat *Gillespie* as a viable source of appellate jurisdiction and even laid out a four-part test for determining jurisdiction under *Gillespie*.<sup>176</sup> While appeals under this approach are not common, the Ninth Circuit did use it to find appellate jurisdiction over non-final orders. In *Service Employees International Union, Local 102 v. County of San Diego*, the Ninth Circuit held that it had jurisdiction to review a series of partial summary judgment orders.<sup>177</sup> These orders, even taken together, did not yet result in a final decision of the case—there was no calculation of damages,

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175. This requirement is often part of the Third and Ninth Circuit's rules for cumulative finality. See, e.g., *DL Res., Inc. v. FirstEnergy Sols. Corp.*, 506 F.3d 209, 215 (3d Cir. 2007); *Fadem v. United States*, 42 F.3d 533, 535 (9th Cir. 1994).

176. See *In re Cal. Pub. Utils. Comm'n*, 813 F.2d 1473, 1479–80 (9th Cir. 1987) (“The exercise of appellate jurisdiction in *Gillespie* was based upon the unique circumstances of the case: (1) the case was a “marginally final order,” (2) “disposed of an unsettled issue of national significance,” (3) review “implemented the same policy Congress sought to promote in § 1292(b),” and (4) the finality issue was not presented to the Supreme Court until argument on the merits, thereby ensuring that policies of judicial economy would not be served by remanding the case with an important unresolved issue.”).

(quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n.30 (1978)); see also *SEIU, Local 102 v. City of San Diego*, 60 F.3d 1346, 1350 (9th Cir. 1994).

177. *SEIU, Local 102*, 60 F.3d at 1349–50.

which is normally required for an order to be final.<sup>178</sup> The court nevertheless deemed the orders appealable under *Gillespie*: the orders were “marginally final” and separate from the damages issue; the orders presented “an unsettled issue of national significance” (whether county employees were exempt from Fair Labor Standards Act coverage); and the merits were fully briefed and argued, meaning that dismissing the appeal would have rendered useless all the time already put into it.<sup>179</sup>

The Ninth Circuit recently appears to have pulled back on pragmatic appeals, adding a requirement that a case must not extend the balancing approach beyond the truly unique facts of *Gillespie*.<sup>180</sup> A case that satisfies this new requirement is likely rare; the court characterized such a case as an “albino black bear.”<sup>181</sup> (It is unclear if the court realized that such creatures do, in fact, exist.)<sup>182</sup> But the court has not expressly foreclosed—and continues to entertain the possibility of—pragmatic appeals.<sup>183</sup>

The Tenth Circuit similarly appears to still recognize the possibility of purely pragmatic appeals. Although that court initially deemed the balancing approach dead in light of *Coopers & Lybrand*,<sup>184</sup> it resuscitated the doctrine in the mid-1980s.<sup>185</sup> Under the Tenth Circuit’s approach, if “the issue under consideration [is] ‘important,’ ‘serious,’ ‘unsettled,’ and ‘not within the trial court’s discretion,’” the court should take jurisdiction “if injustice from delay would outweigh the expense and inconvenience of piecemeal review.”<sup>186</sup> That being said, the Tenth Circuit has also suggested that the balancing approach should only be used in “truly

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178. See *id.* at 1349; see also *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742 (1976).

179. *SEIU, Local 102*, 60 F.3d at 1350; see also *Nehmer v. U.S. Dep’t of Veterans Affairs*, 494 F.3d 846, 856 n.5 (9th Cir. 2007).

180. See *Comm’r of Int’l Revenue v. JT USA, LP*, 630 F.3d 1167, 1171 (9th Cir. 2011); see also *Solis v. Jasmine Hall Care Homes, Inc.*, 610 F.3d 541, 545–46 (9th Cir. 2010).

181. *Jasmine Hall Care Homes, Inc.*, 610 F.3d at 545.

182. See Andrew McKean, *Albino Bear*, OUTDOOR LIFE, <http://www.outdoorlife.com/photos/gallery/hunting/2009/11/albino-bear/?image=0>.

183. See *J.L. v. Downey Unified Sch. Dist.*, No. 12-57053, 2014 U.S. App. LEXIS 13476, at \*2 (9th Cir. July 10, 2014).

184. See *Daiflon, Inc. v. Bohanon*, 612 F.2d 1249, 1253 (10th Cir. 1979), *rev’d on other grounds, sub nom.*, *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980).

185. See *Bender v. Clark*, 744 F.2d 1424, 1247 (10th Cir. 1984).

186. *Boughton v. Cotter Corp.*, 10 F.3d 746, 752 (10th Cir. 1993) (quoting *Bender*, 744 F.2d at 1247).

unique instances.”<sup>187</sup> In practice, the Tenth Circuit largely confines any allowance of pragmatic appeals to the administrative-remand context.<sup>188</sup>

For some years after *Cooper & Lybrand*, the Federal Circuit continued to allow pragmatic appeals. Relying on *Gillespie*, the Federal Circuit allowed appeals when “the effect of the [lower court’s interlocutory] order was ‘fundamental to the further conduct of the case.’”<sup>189</sup> So in *Tenneco Resins, Inc. v. Reeves Bros., Inc.*, the Federal Circuit permitted an appeal from a district court order denying the plaintiff leave to amend its pleadings.<sup>190</sup> But the court later seemed to reject the use of pragmatic appeals.<sup>191</sup> In an interlocutory appeal from the Trademark Trial and Appeal Board, the Federal Circuit read *Coopers & Lybrand* to limit *Gillespie* to its “unique facts.”<sup>192</sup> Because similar facts “could not possibly arise” before the Board, the Federal Circuit held that “*Gillespie* no longer provide[d] a viable basis upon which [it] may entertain appeals from interlocutory . . . orders of that tribunal.”<sup>193</sup> Later Federal Circuit decisions extended this holding to interlocutory appeals from district courts.<sup>194</sup> But even after this seeming rejec-

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187. *Id.* So, for example, the Tenth Circuit has refused to hear a pragmatic appeal from discovery orders adverse to a claim of attorney-client privilege; the issues presented in these orders (which were then “unsettled questions about the application of privileges in the context of state and federal licensing proceedings”) were “not of the magnitude that justify an exception to the traditional ‘final order’ requirement.” *Id.*

188. See, e.g., *W. Energy All. v. Salazar*, 709 F.3d 1040, 1049 (10th Cir. 2013).

189. *Tenneco Resins, Inc. v. Reeves Bros., Inc.*, 736 F.2d 1508, 1510 (Fed. Cir. 1984) (quoting *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 154 (1964)).

190. *Id.* at 1509, 1512. The proposed amendment involved issues that were factually related to those already presented in the pleadings. See *id.* at 1512. The court thought it would be more efficient to hear an immediate appeal; were the order later reversed after a final judgment and the case remanded for a trial of the new issues, the parties would need “to resubmit evidence previously presented, argued, and weighed by the district court.” *Id.* “The potential costs and wasted judicial resources of an additional trial on substantially the same evidence demand[ed] the application of *Gillespie*.” *Id.*

191. See *Copelands’ Enters., Inc. v. CNV, Inc.*, 887 F.2d 1065, 1068 (Fed. Cir. 1989) (en banc).

192. *Id.*

193. *Id.*

194. See *Spread Spectrum Screening, LLC v. Eastman Kodak Co.*, 657 F.3d 1349, 1356–57 (Fed. Cir. 2011); see also *Steri-Lube Int’l, Ltd. v. W. Phase Change, Inc.*, No. 00-1471, 2000 WL 1643785, at \*1 (Fed. Cir. Oct. 19, 2000) (unpublished table decision); *Minn. Mining & Mfg. Co. v. N. Am. Sci. Assocs., Inc.*, No. 99-1409, 1999 WL 669502, at \*1 (Fed. Cir. Aug. 16, 1999) (unpublished table decision); *Giese v. Vector Labs., Inc.*, No. 574, 1999 WL 50674, at \*1 (Fed. Cir. Jan. 21, 1999) (unpublished table decision) (noting that “the Supreme Court has curtailed the doctrine set forth in *Gillespie* as a basis for accepting an appeal from an interlocutory order”); *Kerr Mfg. Co. v. Centrix, Inc.*, No. 94-1132, 1994 WL

tion of pragmatic appeals, the Federal Circuit has not overruled *Tenneco Resins*, and it has allowed at least one pragmatic appeal (albeit in an unpublished decision).<sup>195</sup>

A few other circuits continue to treat pragmatic appeals as a potential source of appellate jurisdiction. The Eleventh Circuit has repeatedly stated that there exists an exception to the final-judgment rule for marginally final orders that present issues fundamental to the case.<sup>196</sup> The Seventh Circuit continues to recognize the balancing approach under what it calls "practical finality."<sup>197</sup> But neither of these circuits appears to have allowed a purely pragmatic appeal in several years. The D.C. Circuit, in contrast, does not expressly endorse pragmatic appeals but recently allowed one without saying as much.<sup>198</sup>

That all being said, some circuits have squarely refused to use the balancing approach for interlocutory orders since *Coopers & Lybrand*.<sup>199</sup> Others have been more coy with their rejection, refus-

371645, at \*1 (Fed. Cir. Feb. 24, 1994) (unpublished table decision); *Elan Transdermal Ltd. v. Cygnus Therapeutic Sys.*, No. 92-1068, 1992 WL 55576, at \*1 (Fed. Cir. Feb. 21, 1992) (unpublished table decision).

195. In *Swede Indus., Inc. v. Zebco Corp.*, the Federal Circuit allowed an appeal from a partial grant of summary judgment. No. 93-1403, 1994 WL 124024, at \*2 (Fed. Cir. Apr. 12, 1994) (unpublished table decision). The case involved alleged infringement of a utility patent and a design patent. *Id.* at \*1. The district court's order apparently determined only that the design patent had not been infringed—leaving the utility patent claim undecided—and the plaintiff immediately appealed that order. *Id.* The court held that it had jurisdiction over the appeal under what it called "the Gillespie rule." *Id.* at \*2.

196. See *United States v. ADT Sec. Servs., Inc.*, 2013 U.S. App. LEXIS 12114, at \*12 (11th Cir. June 13, 2013) (per curiam); *Atl. Fed. Sav. & Loan Ass'n of Fort Lauderdale v. Blythe Eastman Paine Webber, Inc.*, 890 F.2d 371, 376 (11th Cir. 1989); see also *In re Martin Bros. Toolmakers, Inc.*, 796 F.2d 1435, 1437 (11th Cir. 1986).

197. See *United States v. Bokhari*, 757 F.3d 664, 668 (7th Cir. 2014); *Edalatdju v. Laz-er*, 2011 U.S. App. LEXIS 24003, at \*6 (7th Cir. Dec. 1, 2011); *Travis v. Sullivan*, 985 F.2d 919, 922 (7th Cir. 1993); *Richardson v. Penfold*, 900 F.2d 116, 118 (7th Cir. 1990); *Crowder v. Sullivan*, 897 F.2d 252, 253 (7th Cir. 1990) (per curiam). But see *Bogard v. Wright*, 159 F.3d 1060, 1063 (7th Cir. 1998) (rejecting "the concept of 'pragmatic finality' in the context of post-judgment appeals as 'formless'").

198. In *Murthy v. Vilsack*, 609 F.3d 460, 464 (D.C. Cir. 2010), the D.C. Circuit held that it had jurisdiction to review a district court order dismissing a Title VII claim after breach of contract claims were transferred to the Court of Federal Claims. Normally a dismissal followed by a transfer of remaining claims requires the dismissed claim to tag along with the transferred claims; appeal from the transferred claims then includes review of the initially dismissed claim. But here, the transferee court (the Court of Federal Claims) lacked jurisdiction over the Title VII claim. While a Rule 54(b) certification would have been the proper avenue for an appeal, the D.C. Circuit held that the lack of one did not preclude appellate jurisdiction.

199. The Second Circuit appears to have rejected the continued use of pragmatic appeals. In *LTU Steel Co., Inc. v. United Mine Workers of Am. (In re Chateaugay Corp.)*, 922

ing to deem pragmatic appeals foreclosed and still appear to entertain the possibility of allowing one. But these courts have essentially cabined the doctrine; they deem such appeals proper only in truly unique circumstances, which are never present.<sup>200</sup>

The balancing approach survives in other contexts. Courts have sometimes invoked the balancing approach in appeals from partial grants of summary judgment. A partial grant of summary judgment is normally not a final order, as the order leaves other claims or issues unresolved. But courts have sometimes looked behind partial grants of summary judgment to conclude that a district court was essentially done with a case, even though it had not disposed of all outstanding issues.<sup>201</sup>

The balancing approach has also been used to find appellate jurisdiction from dismissals without prejudice. A dismissal without prejudice is normally not a final order; the dismissal leaves the plaintiff with an opportunity to amend the complaint to cure any defects. Plaintiffs wishing to stand on a complaint dismissed without prejudice normally must announce their intention to do so for the dismissal to become a final, appealable order. But

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F.2d 86, 91 (2d Cir. 1990), that court refused to read *Gillespie* to “permit[] an appeal from an interlocutory order based on a balancing of the inconvenience and cost of piecemeal review against the danger of denying justice by delay.” The Supreme Court had, according to the Second Circuit, “rejected the view that *Gillespie* permits the court to decide close cases of finality by an ad hoc balancing.” *Id.* The Second Circuit does not appear to have allowed a pragmatic appeal since.

The Fifth Circuit continued to allow pragmatic appeals for several years after *Coopers & Lybrand*. But it eventually rejected their continued use. See *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 405 (5th Cir. 1984) (en banc) (calling the balancing approach “in fundamental conflict with the values and purposes of the finality rule to avoid the delay and system-costs of piecemeal and multiple appeals, and to provide a relatively clear test of appealability so that needless precautionary appeals not be taken”); see also *Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 382 (5th Cir. 1998) (Dennis, J., dissenting) (“This court no longer recognizes the pragmatic finality exception.”); *Kmart Corp. v. Aronds*, 123 F.3d 297, 300 (5th Cir. 1997).

200. The First Circuit has not squarely rejected pragmatic appeals. It has, however, noted the Supreme Court’s rejection of “a broad balancing approach to questions of finality,” *Anderson v. City of Boston*, 244 F.3d 236, 241 (1st Cir. 2001) (citing *Johnson v. Jones*, 515 U.S. 304, 315 (1995)), and expressed doubt about whether pragmatic appeals (which it calls “the pragmatic finality doctrine”) are still allowed. See *Anderson*, 236 F.3d at 241 (stating “the pragmatic finality doctrine, if it still survives, does not apply [to the facts of this case]”); see also *Petralia v. AT&T Glob. Info. Sols. Co.*, 114 F.3d 352, 354–55 (1st Cir. 1997) (treating an appellant’s invocation of *Gillespie* as a petition for a writ of mandamus).

201. See *Acton v. City of Columbia*, 436 F.3d 969, 974–75 (8th Cir. 2006). But see *Solis v. Hooglands Nursery LLC*, 2009 U.S. App. LEXIS 9890, at \*4 (5th Cir. May 5, 2009) (per curiam) (refusing to review where the district court has not formally finished with the case).



courts have sometimes looked behind a dismissal without prejudice to determine that, while not technically final, the order was the district court's last word on the matter.<sup>202</sup>

The balancing approach thus persists in the courts of appeals, despite its seeming burial by the Supreme Court and the widespread consensus on its death.

### III. THE BALANCING APPROACH, FLEXIBILITY, AND INTERLOCUTORY APPEAL REFORM

This persistence—and the literature's failure to notice this persistence—raises several questions for the study and practice of appellate jurisdiction. I address two of those questions in this part: (1) Why have the courts persisted in using the balancing approach? (2) What are the implications of this persistence for interlocutory appeal reform?

#### A. *The Inescapable Allure of Flexibility in Appellate Jurisdiction*

First, why? Why have courts persisted in invoking the balancing approach—seemingly in defiance of the Supreme Court's directions on matters of appellate jurisdiction—to hear appeals? I suspect that the answer lies in the inescapable allure of flexibility in defining appellate jurisdiction.

Congress and the Supreme Court have—in theory—created a system of appellate jurisdiction that largely relies on categorical rules and eschews discretion. This system starts with Congress, which defines the courts of appeals' jurisdiction. Congress has generally limited that jurisdiction to appeals from final judgments.<sup>203</sup> When it allows discretion—such as section 1292(b) and Rule 23(f), discussed previously—Congress does so through express grants of power. The Supreme Court has—especially recently—tried to adhere to these bright lines in appellate jurisdiction.

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202. See, e.g., *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 845–46 (9th Cir. 2009) (concluding that the district court's order dismissing plaintiff's claim without prejudice was intended to be the final action in the case); *Moya v. Schollenbarger*, 465 F.3d 444, 454 (10th Cir. 2006) (deciding that the district court's intent was to dismiss the plaintiff's entire claim, not just her complaint, and the appellate court thus had jurisdiction).

203. See 28 U.S.C. § 1291 (2012).

It has largely narrowed judge-made exceptions to the final-judgment rule. The Court's rejection of *Gillespie* is one example. Its conclusion in *Mohawk* that further exceptions to the final-judgment rule should come through rulemaking, not judicial decisions, is another.<sup>204</sup> And the Court has repeatedly attempted to narrow the most common judge-made exception, the collateral order doctrine, leading some to conclude that any future expansion of the doctrine is unlikely.<sup>205</sup> Even when judge-made exceptions apply, the Court has squarely rejected case-by-case analysis; exceptions are to be made over entire categories of orders or not at all. The takeaway of all this is that—again, in theory—the rules of appellate jurisdiction should be clear, predictable, and leave courts with little room for case-by-case assessments of whether to hear an appeal.

But the practice of appellate jurisdiction is different. There are, to be sure, some clear rules that give parties a right to appeal. But there is also discretion.<sup>206</sup> Judges will sometimes run into appeals that the most straightforward application of the final-judgment rule (and its exceptions) would require dismissing. In some of these instances, the court thinks that it should hear the case now rather than wait until later. Courts in this latter situation are not always great at letting go. Rather than let go, they find some source of appellate jurisdiction. Sometimes, as catalogued above, that source is the balancing approach. Sometimes it is some other nuance of appellate jurisdiction, such as the collateral order doctrine or writs of mandamus.<sup>207</sup>

In practice, this amounts to discretionary appellate jurisdiction: judges are determining for themselves which appeals to immediately hear and which to save for later.

The fact that judges use final-judgment rule's exceptions to exercise discretion is not news; others have described this practice elsewhere, and the cases discussed above add to the evidence.<sup>208</sup>

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204. See *supra* notes 69–72 and accompanying text.

205. See *supra* note 71 and accompanying text.

206. See Pollis, *Multidistrict Litigation*, *supra* note 9, at 1651; Steinman, *supra* note 6, at 1256, 1273.

207. See Steinman, *supra* note 6, at 1256, 1273 (describing courts' use of the collateral order doctrine and writs of mandamus as a basis for discretionary appeals).

208. See Pollis, *Multidistrict Litigation*, *supra* note 9, at 1651; Steinman, *supra* note 6, at 1256, 1273.

But what is unique about the balancing approach is the level of defiance in which the courts of appeals have engaged. When judges invoke the balancing approach to find jurisdiction over an appeal, they are doing precisely what *Gillespie* seemed to promise—and they are doing precisely what the Supreme Court said they should not.

The persistence of the balancing approach thus suggests not only that appellate judges like to exercise some flexibility in defining their jurisdiction, but also that they cannot help but use flexibility to reach what they believe to be sensible outcomes. Appellate judges were more or less told to stop using the balancing approach. They did not. They instead found that *Gillespie* and the balancing approach provide a useful tool for trying to reach what these judges deem reasonable results. This suggests that they simply cannot give up having some flexibility in defining their jurisdiction.

#### B. *Interlocutory Appeal Reform and the Allure of Flexibility*

The answer to the first question—why have the courts of appeals persisted in using the balancing approach—lies at least partially in judges' inability to give up flexibility in defining their jurisdiction. Putting aside whether this is a good or legitimate practice, I'm concerned about the challenge it poses to appellate jurisdiction reform.

Reform has long been a focus of the appellate jurisdiction literature. By nearly every account, the current system of federal appellate jurisdiction—a general final-judgment rule mixed with a variety of statutory, rule-based, and judge-made exceptions—is a mess.<sup>209</sup> The criticisms have been covered extensively elsewhere

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209. See, e.g., Martineau, *supra* note 9, at 729 (“[T]he unanimous view of commentators is that the rule has either too many or too few exceptions, but in any event requires revision.”). Some suggest that the system is functioning relatively well. See, e.g., Glynn, *supra* note 6, at 179 (“[T]he current regime is in far better shape than commonly appreciated.”); Steinman, *supra* note 6, at 1272 (“The federal courts . . . have worked within the cumbersome doctrinal and procedural framework to implement a system of interlocutory appellate review that, in practice, is fairly sensible. If one looks at the results on the ground—i.e., which interlocutory orders are immediately appealable and which are not—the jurisdictional landscape is commendable.”). But they, too, note that there is still room for reform. See Glynn, *supra* note 6, at 181; Steinman, *supra* note 6, at 1277.

and need not be repeated here.<sup>210</sup> Suffice it to say that most everyone views the system as overly complex and insufficiently predictable,<sup>211</sup> such that judges and litigants spend far too much time figuring out appellate jurisdiction.<sup>212</sup>

With all this criticism have come calls for reform, both narrow (that is, focusing on a particular type of order) and wholesale.<sup>213</sup> The wholesale reformers generally fall into one of two camps. The first camp proposes a system of rules.<sup>214</sup> Reformers in this camp would keep the traditional final-judgment rule (so litigants would still have a right to appeal at the end of district court proceedings), but they would replace the current judge-made exceptions with rules defining the types of orders that are appealable before a final judgment.<sup>215</sup> The other camp of reformers proposes a system of discretion. Like rule advocates, discretion advocates would retain the final-judgment rule. But they would give the courts of

210. See Lammon, *Rules, Standards, and Experimentation*, *supra* note 6; Steinman, *supra* note 6.

211. See Carrington, *supra* note 9, at 165–66 (noting “the unconscionable intricacy of the existing law, depending as it does on overlapping exceptions, each less lucid than the next”); Cooper, *supra* note 9, at 157 (“The final judgment requirement has been supplemented by a list of elaborations, expansions, evasions, and outright exceptions that is dazzling in its complexity.”); Eisenberg & Morrison, *supra* note 9, at 291 (calling the current system “arcane and confusing”); Lammon, *Perlman Appeals*, *supra* note 6; Pollis, *Multidistrict Litigation*, *supra* note 9, at 1651 (noting the “labyrinthian conglomeration of jurisdictional rules”); Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 L. & CONTEMP. PROBS. 171, 172 (1984) (“The existing federal finality-appealability situation is an unacceptable morass.”); Waters, *supra* note 9, at 556 (noting the “dizzying array of statutory and judicially-created [finality] exceptions”).

212. Lammon, *Rules, Standards, and Experimentation*, *supra* note 6, at 431 (“The broader exceptions are much less predictable. They are plagued by vague terms and inconsistent treatment in the courts, such that both litigants and judges spend far too much time trying to determine what can be appealed and when.”); see also Cooper, *supra* note 9, at 157 (arguing that even “[l]awyers and judges who are experts in working with the system . . . often encounter elusive uncertainty in seeking clear answers to many problems”); Luther T. Munford, *Dangers, Toils, and Snares: Appeals Before Final Judgment*, 15 LITIG. 18, 18 (1989) (noting that the appealability regime “provides the kind of excursions into legal history and abstract analysis that can drive practical litigators crazy”); Rosenberg, *supra* note 211, at 172 (“Entirely too much of the appellate courts’ energy is absorbed in deciding whether they are entitled under the finality principle and in its exceptions to hear cases brought before them—and in explaining why or why not.”).

213. See *supra* note 9.

214. See Carrington, *supra* note 9, at 167–68; Glynn, *supra* note 6, at 259; Rosenberg, *supra* note 211, at 179.

215. Timothy P. Glynn, for example, has argued for clear rules that permit an immediate appeal in specific categories of “problem areas.” See Glynn, *supra* note 6, at 259 (“Expansion of interlocutory appellate review should be limited primarily to mandatory review of narrowly defined categories of orders within ‘problem areas.’”).

appeals discretion to hear a case any time before a final judgment. Discretion—not rules—would replace the current judge-made exceptions.<sup>216</sup>

Whatever the merits of these two approaches, I have argued elsewhere (and continue to believe) that rule-based reform is far more likely than a wholesale switch to discretion.<sup>217</sup> But if judges will inevitably find a way to inject some flexibility into appellate jurisdiction—as the persistence of the balancing approach suggests—there is a threat to successful reform.

The likely (though not certain) benefits of rule-based reform would be certainty, predictability, and ease of application; clear rules are more likely to attain these than discretionary appeals.<sup>218</sup> But a system of wholly categorical rules would—like any system of rules—be over- and under-inclusive; it would sometimes produce results that judges perceive as unreasonable or unjust.<sup>219</sup> More specifically, a system of only categorical rules would likely deny immediate appeals in some situations that judges think merit an immediate appeal.

Judges faced with this situation would need to either forego exercising some flexibility or find some way to inject flexibility into the categorical rules. Given the allure and usefulness of flexibility illustrated above, the latter seems likely. Flexibility would likely work its way into the rules through interpretation and application. And this injection of flexibility into a system of categorical rules could then undermine the certainty, predictability, and ease of application that those rules aimed to achieve.

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216. See Cooper, *supra* note 9, at 163–64; Eisenberg & Morrison, *supra* note 9, at 293–302; Martineau, *supra* note 9, at 748–87; Nagel, *supra* note 9, at 214–22; see also Redish, *supra* note 2, at 124–27; Steinman, *supra* note 6, at 1278–82.

217. See Lammon, Perlman *Appeals*, *supra* note 6, at 24–25.

218. These are the *likely* benefits; whether or not categorical rules would achieve them (and whether discretion would achieve them better) is a point of contention in the literature. I have argued elsewhere that this disagreement—and many of the other disagreements about the likely costs and benefits of any type of interlocutory appeal reform—is abstract and not grounded in experience. See Lammon, *Rules, Standards, and Experimentation*, *supra* note 6, at 433–36. The arguments are based on perfectly reasonable assumptions about how people would react to different rules. *Id.* But those arguments are inconsistent with one another, and there is no theoretical way to resolve the difference. *Id.*

219. For more in-depth discussions of the over- and under-inclusiveness of rules, see Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 268 (1974).

One solution would be to follow the other camp of reformers, switching entirely to a system of discretionary jurisdiction over interlocutory appeals. Again, I think that is unlikely: the Supreme Court does not seem to favor discretion, the limited work that the Rules Committee has done on interlocutory appeal reform has focused on categorical rules, and a wholesale switch to discretion is probably too radical a change in the short term.<sup>220</sup>

So if appellate judges truly cannot entirely give up flexibility in determining their jurisdiction, the allure of flexibility poses a threat to successful reform. Categorical rules would likely be undermined by judges finding a way to reach what they think to be sensible outcomes. And discretionary appeals, though embracing judges' need to wield discretion, seem unlikely.

I propose a potential third way for reform: rather than rely solely on categorical rules or solely on discretion, combine them—categorical rules coupled with a discretionary catch-all.<sup>221</sup> Categorical rules could define what is (and what is not) appealable before a final judgment. These rules would be capped with a rule giving courts discretion to hear appeals that do not fall under a categorical rule. And unlike a wholesale switch to discretion, this catch-all could (or at least could try to) guide the courts in their exercise of discretion.

The Federal Rules of Evidence on hearsay illustrate this structure. The hearsay rules begin with a general definition of hearsay and a prohibition on its admission.<sup>222</sup> Dozens of categorical exceptions to this general prohibition then follow.<sup>223</sup> These are all capped with Rule 807, the catch-all provision, which gives courts

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220. See Lammon, *Perlman Appeals*, *supra* note 6, at 24–25.

221. This proposal bears some similarity to Paul Carrington's proposed reform. He suggested coupling a grant of authority to hear appeals "when essential to protect substantial rights that cannot be effectively enforced on review after final decision" with several rules defining appealable interlocutory orders. Carrington, *supra* note 9, at 167–68. Among those several rules is one authorizing courts to promulgate rules defining appealable interlocutory orders (Carrington offered this proposal before Congress gave the Supreme Court power to promulgate these rules). See *id.* at 168. To the extent that Carrington's proposal to allow appeals necessary to protect substantial rights can be characterized as discretion, I am building on his approach. But it is unclear how extensive a role Carrington envisioned for rulemaking under his proposal; I suggest that rulemaking sit front and center. Cf. Glynn, *supra* note 9, at 261–62 (proposing that the number of categorical rules permitting appeals be kept few).

222. FED. R. EVID. 801(c), 802.

223. *Id.* 801(d), 803, 804.

discretion to deem hearsay admissible even if it does not meet one of the categorical definitions.<sup>224</sup> And Rule 807 guides this exercise of discretion by telling courts what to consider in applying the rule—particularly the reliability of the hearsay and whether the hearsay is necessary given other potential evidence.<sup>225</sup>

Granted, codifying the law of interlocutory appeals via a mix of categorical rules and a discretionary catch-all would in some ways merely formalize the current system. As the system currently stands, some interlocutory district court orders are appealable as a matter of right via a statutory, rule-based, or judge-made exception to the final judgment rule.<sup>226</sup> Most others can, at least in theory, be reviewed as a matter of discretion via express grants of authority (such as section 1292(b) or writs of mandamus) or applications of judge-made exceptions (such as the collateral order doctrine or the balancing approach).<sup>227</sup> So the current system, in practice, is already a mix of categories and discretion.

But codifying this system could have several benefits.<sup>228</sup> First, it could provide clarity. Clearly articulated rules on what can and cannot be appealed before a final judgment would save courts and litigants the time of determining jurisdiction under the current system. Rather than search for previous cases allowing (or disal-

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224. *See id.* 807.

225. *See id.* Both the general categorical approach to hearsay and the individual categories have their supporters and critics. *See, e.g.,* Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA. L. REV. 1861, 1862 (2015) (rejecting the purely discretionary model for evaluating hearsay); Richard A. Posner, *On Hearsay*, 84 FORDHAM L. REV. 1465, 1471 (2016) (concluding that the hearsay rule should be retained overall, but the open-ended exception should be simplified and some of the hearsay exceptions should be eliminated). I leave for later study how these debates could or should influence the development of interlocutory appeal reform.

226. 28 U.S.C. § 1292(a)(1), for example, gives litigants the right to appeal orders “granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.” 28 U.S.C. § 1292(a)(1) (2012). Under the collateral order doctrine, government officials have a right to appeal the denial of qualified immunity to the extent the denial turns on an issue of law. *See Behrens v. Pelletier*, 516 U.S. 299, 311 (1996); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). That doctrine also gives a right to appeal in several other situations, including the denials of Eleventh Amendment immunity, immunity under the Double Jeopardy Clause, and immunity under the Constitution’s Speech or Debate Clause. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (Eleventh Amendment Immunity); *Helstoski v. Meanor*, 442 U.S. 500, 506–07 (1979) (Speech or Debate Clause Immunity); *Abney v. United States*, 431 U.S. 651, 659–60 (1977) (Double Jeopardy immunity).

227. *See Steinman, supra* note 6, at 1276–77.

228. Again, I present these as potential benefits. Whether categorical rules will actually attain them can be learned only through experience. *See supra* note 225.

lowing) a similar appeal or determine if an exception to the final-judgment rule applies, courts and litigants could look to the rules.<sup>229</sup>

Along these same lines, codification could provide transparency that the current system lacks. Some of the intricacies of interlocutory appeals are known only to the experienced appellate practitioner. In the current regime, where the rules of federal appellate jurisdiction are spread across statutes, rules of procedure, and an immense body of caselaw, litigants without that experience and the luxury of time to acquire this expertise might fail to take appeals that they could have. Codification, even if it ends up resembling the current system, could thus democratize interlocutory appeals.

And perhaps most importantly, codification—especially codification that includes an express avenue for judges to exercise discretion—could bring some much-needed candor to interlocutory appeals. The current system requires judges to often channel exercises of discretion through stretched interpretation of the term “final.” The courts of appeals, after all, generally have jurisdiction over only “final decisions.” Since “final” equals “appealable,” courts determined to hear an interlocutory appeal must find some way to call the case final. And the reasons a court might want to hear an appeal before a final judgment rarely has anything to do with finality.<sup>230</sup> Channeling discretion through an explicit rule, particularly one that requires courts to justify their exercise of discretion, could transform these instances of stretched interpretation into candid discussions of whether or not a case could be heard before a final judgment.

Codifying the current system could have several other benefits, including resolving some of the outstanding circuit splits on matters of appellate jurisdiction. Even if codification resembled the current system’s practice of mixing largely categorical rules and

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229. This is not to say that categorical rules would provide perfect clarity; there would of course still be disputes in cases on the margins. We can see as much in the relatively clear Rule 23(f), which contains some ambiguity at the margins. *See, e.g., Matz v. Household Int’l Tax Reduction Inv. Plan*, 687 F.3d 824, 826 (7th Cir. 2012) (addressing whether an order modifying the scope of a previously certified class is appealable under Rule 23(f)); *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) (*per curiam*) (addressing whether an order denying a motion to amend a class certification order revives the time for taking a Rule 23(f) appeal).

230. *See Steinman, supra* note 6, at 1253.



exercises of discretion, the actual rules themselves would not need to be the same; categorical rules could address troublesome issues like attorney-client privilege appeals and immunity appeals.<sup>231</sup>

This is an extremely preliminary proposal absent any particulars. But it is a third way to approach appellate jurisdiction reform that accounts for the inevitability of discretion without fully embracing it as the only basis for jurisdiction over interlocutory appeals.

### CONCLUSION

The decisions of the courts of appeals reveal that the balancing approach to finality is alive and perhaps even well. It continues to play an important role in determining when an appeal can be taken in a variety of contexts. Its persistence suggests that interlocutory appeal reform must account for appellate judges' inability to completely forego a flexible approach to their jurisdiction with an eye toward achieving what they think to be just and reasonable results. This article has taken the first step of suggesting an approach to reform that would account for flexibility while not embracing it wholesale. The devil will ultimately be in the details, but those details are for another day and another article.

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231. See Lammon, *Perlman Appeals*, *supra* note 6, at 30–33.