Interlocutory Review by Agreement of the Parties: A Preliminary Analysis

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INTERLOCUTORY REVIEW BY AGREEMENT OF THE PARTIES: A PRELIMINARY ANALYSIS

By James E. Pfander* and David R. Pekarek Krohn**

ABSTRACT

Although the nineteenth century’s final judgment rule no longer represents an absolute barrier to interlocutory appellate review, scholars disagree about what should take its place. Some favor a regime of discretionary interlocutory review, with power conferred on appellate courts to select issues that warrant intervention. Others reject discretionary review as a waste of appellate resources and call upon the rule makers to identify specific categories of non-final orders that always warrant review. While the Supreme Court’s collateral order doctrine bears some similarity to this process of categorization, the Court may have called a halt to the judicial recognition of new categories in its 2009 decision in Mohawk Industries, Inc. v. Carpenter.

In this Article, we suggest a new approach to interlocutory review that combines elements of discretion and categorization. We argue that the district court should be empowered to certify a question for interlocutory review (categorically) whenever the parties to the litigation so agree (in the exercise of joint discretion). Drawing on the case-selection literature, we show that the parties will often share a financial interest in interlocutory review where they recognize that a decisive issue of law will survive any trial court disposition. Where the costs of preparing the case for trial are substantial and the risks of appellate invalidation significant, the parties have more to gain than lose through appellate review. What’s more, the orders chosen by agreement of the parties make good candidates for immediate appellate review. Agreed-upon review will occur only as to issues that the parties regard as presenting close questions that the jury cannot settle.

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TABLE OF CONTENTS

I. Introduction ..................................................................................................2
II. The Case for Party-Based Interlocutory Review........................................19
   A. The Intuitive Case for Party Autonomy .....................................................21
   B. The Formal Case for Party Autonomy .......................................................23
   C. The Empirical Case for Party Autonomy...................................................27
      1. Patent Litigation and Markman Hearings...............................................28
      2. Particularity to Facilitate Early Evaluation of Novel Claims.................34
      3. Settlement Agreements that Provide for Appellate Adjudication ..........37
      4. Judicialization: The Shift from Jury to Judicial Resolution ..................38
III. Predictable Concerns with Party-Driven Appellate Review......................46
   A. Erosion of the Final Judgment Rule.........................................................47
   B. Feigned Case Problems Under Article III.................................................50
   C. The Incidence Problem...............................................................................55
IV. Conclusion..................................................................................................59

I. INTRODUCTION

In the comparatively simple world of the nineteenth century, the final judgment rule worked reasonably well as a means of regulating access to appellate review.1 Much civil litigation involved two opposing parties and many cases went to trial, usually before a jury.2 The final judgment rule deferred

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1 The final judgment rule appeared in the Judiciary Act of 1789, both as a limitation on appellate review in the federal system and as a limit on Supreme Court review of state court decisions. See An Act to Establish Judicial Courts of the United States, ch. 23, 1 Stat. 73, §§ 22, 25 (1789) (allowing review of “final decrees and judgments” of the federal district courts and review by writ of error of a “final judgment or decree” of the state courts). The Judiciary Act applied the final judgment rule to both of the two most common modes of appellate review -- writ of error review for judgments at common law and review by way of appeal for decrees in equity and admiralty. On the origins of the writ of error and its limitation of the scope of review to legal errors apparent on the face of the record of the lower court, see J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 136-38 (4th ed. 2002). The appeal, by contrast, brought the whole case before the appellate court and did not limit the scope of review to issues of law. See id. at 138-41. See generally Carleton M. Crick, The Final Judgment as a Basis for Appeal, 41 YALE L.J. 539 (1932) (tracing the origins and operation of the final judgment rule in the early republic); ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES (2d ed. 1989) (describing modern practice).

2 See Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. EMPIRICAL LEGAL STUDIES 459, 462 Table 1 Civil Trials in U.S.
appellate oversight until the trial court entered judgment on the jury’s verdict (except in the rare cases that warranted supervisory review through mandamus or other common law writs). Parties focused their efforts on winning at trial in the district court and sought review only when errors appeared on the record. The common law writ of error, the preferred vehicle for securing appellate review of jury verdicts in the federal system, limited review to issues of law and preserved the jury’s role in the determination of factual questions.

Two centuries on, much has changed. Today, many questions that juries once decided have been transformed into issues of law. Such legal questions no
longer disappear into the black box of jury deliberations; instead, they persistently demand appellate review. In addition, modern litigation has grown a good deal more complex and variegated; complaints identify more parties and more theories of recovery, and often reach across borders to bring non-resident defendants before the court. With this growth in the size and complexity of litigation, modern procedural systems now provide managerial judges, extensive discovery, and forms of motions practice that substantially define the contours of the claims and the prospects for recovery. Rising settlement rates, either through negotiation or alternative forms of dispute resolution, mean that fewer cases go to trial today as a percentage of those filed in federal court.

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9 See Richard L. Marcus and Edward F. Sherman, Complex Litigation: Cases and Materials on Advanced Civil Procedure 2–7 (3d Ed. 1998) (discussing “The Metamorphosis of Litigation”); Daniel J. Meador, A Perspective on Change in the Litigation System, 49 Ala. L. Rev. 7 (1997) (discussing developments in the litigation system that have made litigation more complex); Mass Tort Working Group, Report on Mass Tort Litigation, 187 F.R.D. 293, 299 (1999) (“In the absence of reform, these problems are more likely to increase than to abate. Many believe that only the subtle exercise of discretion by knowledgeable and creative trial judges has protected the judicial process from more substantial problems resulting from mass tort litigation.”).


11 See Galanter, supra 2, at 515 (rise in settlement one reason for decline in trials); Marc Galanter and Mia Cahill, “Most Cases Settle”: Judicial Promotion and Regulation of Settlements, 46 Stan. L. Rev. 1339, 1340 (1994) (noting the ways that parties are encouraged to settle); but see Gillian K. Hadfield, Where Have All the Trials Gone? Settlements, Non-Trial Adjudications and Statistical Artifacts in the Changing Disposition Of Federal Civil Cases 1 J. Empirical Legal Studies 705, 711–12 (2004) (noting the possibility that settlement rate dropped between 1970 and
With the growing influence of managerial judges, the transformation of questions of fact into questions of law, and the rise of settlement, the final judgment rule no longer provides an entirely satisfactory trigger for the exercise of appellate oversight.\textsuperscript{12} While the requirement of a final order continues to control the timing of the review of most actions for damages, pressure for expanded interlocutory review has led to a variety of important changes.\textsuperscript{13} Thus, Congress has expanded interlocutory review directly, by creating the certification mechanism in 28 U.S.C. § 1292(b).\textsuperscript{14} Congress has also acted indirectly to


\textsuperscript{13} See Paul D. Carrington, \textit{Towards a Federal Civil Interlocutory Appeals Act}, 47 LAW & CONTEMP. PROBS. 164, 168–69 (1984) (proposing a statutory change similar to what was later adopted as 28 U.S.C. § 1292(c)); Redish, \textit{supra} note 12, at 91–92 (arguing that the current exceptions to the finality rule “do not adequately serve the interests of justice in many instances.”).

\textsuperscript{14} 28 U.S.C. § 1292(b) (2006). \textit{See also} 19 MOORE ET AL., \textit{supra} note 3, § 203.31. Section 1292(b) allows the district court to certify appeals to the Courts of Appeals when the “order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . .” § 1292(b). The appellate court, however, has the discretion to deny such appeals “for any reason, including docket congestion.” Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978). Section 1292(b) suffers, therefore, from the issue of double discretion, requiring the district court and appellate court to agree on the need for immediate review. Appellate courts have been reluctant to take appeals under § 1292(b). See Nystrom v. TREX, Inc., 339 F.3d 1347, 1351 (Fed. Cir. 2003) (declaring that review of claim construction orders under § 1292(b) will rarely be granted); Horwitz v. Alloy Automotive Co., 957 F.2d 1431, 1438 (7th Cir. 1992) (recounting a colloquy between the district judge and the parties where the judge lamented
authorize federal rule makers to craft new rules for expanded interlocutory review.\textsuperscript{15} Federal rule makers, for their part, have accepted this new delegation of authority with modest enthusiasm; amendments to Rule 23 of the Federal Rules of Civil Procedure empower the appellate courts to conduct discretionary review of class certification decisions.\textsuperscript{16}

that he “can never get the Seventh Circuit to take an interlocutory appeal” under § 1292(b) or Fed. R. Civ. P. 54(b) after trying “many, many times.”); Erin B. Kaheny, The nature of circuit court gatekeeping decisions, 44 LAW & SOC’Y REV. 129, 149 (2010) (circuit law regarding threshold gatekeeping appears to influence judges votes on threshold issues); Solimine, supra note 12, at 1201 (high refusal rate of courts of appeals to provide review “reflects a high level of reluctance to utilize section 1292(b) appeals). Noting that review of orders certified under § 1292(b) is “surprisingly low,” Timothy Glynn has suggested that § 1292(b) be amended to accept certified appeals unless certification constituted abuse of discretion by the district court. See Glynn, supra note 12, at 246, 259.

\textsuperscript{15} 28 U.S.C. § 1292(e) (2006) (“The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for . . . .”). See also 19 MOORE ET AL., supra note 3, § 203.34 (Section 1292(e) is constitutional because it allows rule makers to define “when appeals may be taken, which is an issue apart from the [congressional] power to confer original jurisdiction on the lower federal courts.”) (citing Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 973–974 (5th Cir. 2000)); Amy E. Sloan, Appellate Fruit Salad and Other Concepts: A Short Course in Appellate Process, 35 U. BALTIMORE L. REV. 43, 50 n. 28 (2005) (predicting that “[t]he number of exceptions [to the final order rule] may well increase in the future” due to § 1292(e)); Laura J. Hines, Mirroring or Muscling: An Examination of State Class Action Appellate Rulemaking, 58 KANSAS L. REV. 1027, 1033 (2010) (1292(e) “laid foundation for the only exercise of this new rulemaking authority thus far, Rule 23(f)); Adam N. Steinman, Reinventing Appellate Jurisdiction, 48 B.C. L. REV. 1237, 1246 (2007) (noting that “[t]his rulemaking authority has remained largely dormant . . . .”).

\textsuperscript{16} Fed. R. Civ. P. 23(f). See also 19 MOORE ET AL., supra note 3, § 203.34; 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1802.2 (3d ed.). Rule 23(f) provides that the court of appeals “may permit” interlocutory review of an order granting or denying class-action certification. Fed. R. Civ. P. 23(f). The courts of appeals have, however, been reluctant to exercise this authority. See In re Sumitomo Copper, 262 F.3d 134, 140 (2d Cir. 2001) (imposing requirements for the interlocutory review of class-certification rulings that “will rarely be met.”); Barry Sullivan & Amy Kobelski Trueblood, Rule 23(f): A Note on Law and Discretion in the Courts of Appeals, 246 F.R.D. 277 (2008) (empirical study that finds that “it does not appear that the courts are accepting most [Rule 23(f) petitions.”) The Second Circuit’s response to Rule 23(f) shows the problem with allowing unfettered discretionary review over a narrow area of concern. See Glynn, supra note 12, at 260 (discussing the problems with discretionary review). Even as the rule makers expressed a desire for increased supervision over a specific area of law, the courts of appeals hesitate to provide that supervision. For example, the rule makers specifically distinguished 23(f) from certified appeals under 28 U.S.C. § 1292(b) in that appeals under 23(f) do not need to involve a controlling question of unsettled law. Committee Notes to 1998 Amendments, Fed. R. Civ. P. 23(f); see also Hines, supra note 15, at 1030–35
The Supreme Court has played a role as well. The Court has broadened the collateral order doctrine to allow interlocutory review of a variety of matters that it has deemed both relatively important and relatively distinct from the merits-based questions that normally come to appellate courts after a final judgment. In addition, the Court has fashioned significant exceptions in statutory provisions that would otherwise foreclose interlocutory review of certain orders. For example, the Court has ruled that the flat ban on interlocutory review of remand orders in 28 U.S.C. § 1447(d) does not bar all such appellate review. As a result, the Court has frequently struggled in recent years to define access to appellate review of remand orders.

(summarizing history of 23(f)). The Second Circuit, however, restored such a requirement by requiring either “(1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution.” Sumitomo Copper, 262 F.3d at 139.

17 While the collateral order doctrine provides for review that appears to be interlocutory in nature, it “is not considered an exception to the final judgment rule, but rather a practical construction of the rule.” 19 MOORE ET AL., supra note 3, § 202.07 (citing Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994)), but see 15A WRIGHT, MILLER & KANE, supra note 16, at § 3911 (“The only finality required is that the district court have made its final determination of the matter in question.”); id. at § 3524.6 (describing collateral order doctrine as allowing “appeal of interlocutory issues under limited circumstances.”). The Court originally applied the collateral order doctrine in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) (finding decision final because it “finally determine claims of right separable from, and collateral to, rights asserted in the case itself to require that appellate consideration be deferred until the whole case is adjudicated”). The collateral order doctrine has since been applied to orders denying claims of sovereign immunity, Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993), and official immunity, Mitchell v. Forsyth, 472 U.S. 511 (1985) (qualified official immunity from Bivens liability). The Court has also embraced the collateral order doctrine as the proper vehicle for review of some remand orders. See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 713 (1996). Recently, however, the Court has begun applying the doctrine more narrowly. See Will v. Hallock, 546 U.S. 345 (2005) (doctrine does not apply to order denying motion to dismiss on judgment bar grounds); Digital Equipment Corp., 511 U.S. at 867 (doctrine does not apply to order denying relief to give effect to settlement agreement). In the most recent case on the issue, the Court indicates that it is unlikely to expand the collateral order doctrine further. See Mohawk Industries, Inc. v. Carpenter, 558 U.S. ___ (2009) (doctrine does not apply to disclosure order involving information protected by the attorney-client privilege).

18 See Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996) (Section 1447(d) only bars appellate review of remands based on § 1447(c)).

Noting the Court’s efforts to define its parameters, scholars have suggested a variety of competing approaches to the proper scope of interlocutory review.20 Taking a pragmatic approach to appellate review, Professor Martin Redish argues that courts should weigh the likely costs of deferring review against the benefits that immediate review can provide.21 Professor Redish rightly notes that interlocutory appellate review can sometimes correct serious mistakes at the trial level, and thus avoid the costs associated with an unnecessary trial.22 On the other hand, interlocutory review can result in appellate oversight that fails to address any serious errors and serves only to delay the ultimate resolution of the claim. Redish suggests that the appellate courts exercise discretion in weighing the costs and benefits associated with interlocutory review. Professor Ed Cooper, among others, has also expressed some support for a regime of discretionary review.23


20 See supra note 12.

21 Redish, supra note 12.

22 Id. at 98. See also Edward H. Cooper, Timing as Jurisdiction: Federal Civil Appeals in Context, 47 LAW & CONTEMP. PROBS. 156, 157 (1984) (“serious consequences” of postponing review of trial court ruling include that “an error may so taint subsequent proceedings as to require reversal and further proceedings[,] which may not only represent an expensive duplication of effort, but may themselves be distorted beyond repair by the events of the first trial.”). The effects of delay may, in fact, go beyond the particular dispute. See id. at 158 (noting that if an unreviewed incorrect trial court ruling may be dissipated by further trial court proceedings and the “appellate courts may be deprived of the opportunity to clarify and improve the law on matters that repeatedly evade review.”).

23 Cooper, supra note 22. Professor Cooper would accord greater discretion to the courts as they gain competence. He argues that without “mature” judicial institutions, especially at the district court level, rules that provide for as-of-right interlocutory review may be necessary, even if those rules are extremely complex. Id. at 159. But at some point these rules may become “so complex and so shifting that they cannot be contained in any set of elaborate rules” and that we should consider whether “our institutions have matured to the point at which discretion can be substituted for some part of the rules.” Id. at 158. Professor Cooper also argues that the level of the court exercising discretion should reflect the quality of the judiciary at each level. Id. at 159. If trial judges show themselves to be “much like appellate judges in ability and temperament,” they might view “appellate judges as a resource to be invoked whenever immediate review promises to facilitate the speediest, most just, and most efficient disposition of litigation.” Id. Professor Cooper’s view resembles Professor Redish’s in that both believe the goal should be to have simple rules that provide for discretionary review. Robert Martineau has argued against expanding the
Other scholars, by contrast, defend a categorical approach to interlocutory review. Rather than relying on the exercise of case-by-case discretion, these scholars argue that the system of interlocutory review should attempt to identify specific orders that warrant review in every case. Orders falling within the exceptions to the finality requirement by rule, and for wide-ranging discretion in the appellate courts to accept or reject interlocutory appeals. Martineau, supra note 12. He specifically endorsed the approach of the American Bar Association’s Standards Relating to Appellate Courts, codified in Wisconsin. Id. at 776. The ABA approach has been also been supported by others as the best approach to interlocutory review. See Eisenberg & Morrison, Discretionary Appellate Review of Non-Final Orders: It’s Time to Change the Rules, supra note 12; John C. Nagel, Note: Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review, 44 Duke L.J. 200 (1994). The ABA approach gives the appellate courts discretion to hear non-final orders if the appeal will “(a) Materially advance the termination of the litigation or clarify further proceedings in the litigation; (b) Protect the petitioner from substantial or irreparable injury; or (c) Clarify an issue of general importance in the administration of justice.” ABA Standards Relating to Appellate Courts (updated 1994). While the factors for interlocutory appeal are similar to §1292(b), there are three important differences. First, they are disjunctive requirements, so that interlocutory review can be granted if any individual factor is satisfied. Second, they include a broad factor relating to irreparable harm. Third, they do not require the district court to certify the appeal, placing all of the discretion in the hands of the appellate courts. The assignment of such wide-ranging discretion to the courts of appeals, however, poses two problems. First, it does not address the reluctance of appellate courts to provide interlocutory review. See supra note 14. Second, decisions rejecting immediate review may not give future litigants enough clarification about when interlocutory review will be allowed. See, e.g., K.W. v. Banas, 191 Wis.2d 354 (Wis. App. 1995) (rejecting interlocutory review without explanation except that “the court concludes that the petition does not meet the criteria for granting permissive appeal.”).

24 See Glynn, supra note 12, at 259 (recommending that the rule makers provide for interlocutory review of “problem areas,” where the lack of interlocutory review (1) has left the law unclear or underdeveloped, and (2) inflicts severe irreparable harm on one of the parties.). Paul Carrington suggested a Federal Civil Interlocutory Appeals Act, which had a three-fold approach to revising interlocutory review that relies heavily on the categorical approach. Carrington, supra note 13, at 168–69. First, his proposed act would tighten the final judgment rule by making a final decision one “set forth on a separate document, manifesting the intent of the district court that proceedings in the case be thereby terminated save for the taxation of costs or enforcement proceedings, and entered on the docket of the district court.” Id. Second, he proposed a statutory revision similar to the eventually adopted § 1292(e) that would “make explicit that the rulemaking power does extend to the specification of appealable interlocutory decisions . . . .” Id. Third, the act would explicitly allow for interlocutory review where it was “essential to protect substantial rights which cannot be effectively enforced on review after final decision.” Id. at 167. The purpose of this last revision was to eliminate the “necessity for strained interpretations of finality . . . . and . . . use of extraordinary writs . . . as an alternative to appeal.” Id. at 168. Those supporting discretionary review raise the concern that rule based interlocutory review will not provide the needed flexibility in the courts of appeals to manage their own case load and that rules are likely to be either over- or under-inclusive. See Eisenberg & Morrison, supra note 12, at 301.

25 See Glynn, supra note 12, at 259.
scope of these previously defined categories would thus enjoy interlocutory
review as of right and would not require any extended case-by-case analysis at the
jurisdictional threshold. This categorical approach resembles the Supreme
Court’s collateral order doctrine, which provides as-of-right interlocutory review
over orders falling within the scope of the doctrine. The Court’s categorical
testing comes through quite clearly in its decisions: it has reminded us that
collateral order analysis should focus not on “individualized jurisdictional”
issues but on “the entire category to which a claim belongs.”29 Scholars who
support the categorical approach often propose to rely on rule makers to identify
relatively discrete orders for which the costs and benefits favor immediate review.
For example, both Professor Paul Carrington, and the American Law Institute’s
Federal Judicial Code Revision Project, would rely on the rule makers to identify
the categories of orders to which interlocutory review would apply.30 Similarly,
Professor Timothy Glynn has suggested that the rule makers should identify
“problem areas” and create rules to allow interlocutory review in those narrow
areas.31

Critics of the categorical approach have expressed deep skepticism about
the prospects for developing a set of criteria with which to identify proper

26 See Carrington, supra note 13, at 170 (the law treats ripeness and timeliness of appeals as
jurisdictional is “a fetish which serves no significant systematic interest.”); Glynn, supra note 12,
at 263 (proposing review of class certification orders that could only be dismissed under an abuse
of discretion standard).

27 See supra note 17 and accompanying text. Because the orders under the collateral order
doctrine are treated as final, litigants receive review as a matter of right. 28 U.S.C. § 1291 (2006).
See also Glynn, supra note 14 at 192–93 (discussing the collateral order doctrine).


30 See Carrington, supra note 13; AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT
465, 495 (2004) (recommending a revised 28 U.S.C. § 1447(d) that would give rule makers
control over when to allow appellate review over remand orders). The commentary for the
proposed removal statute explains that the rule makers are in the best position to provide the
needed “flexibility” by not requiring statutory amendment. FEDERAL JUDICIAL CODE REVISION
PROJECT at 495. The American Law Institute project retains, however, a measure of discretiona
review for extraordinary cases. See id. at 465, 495 (precluding as-of-right review but leaving
appellate courts to use extraordinary writs to review remand orders “free of any putative
restriction”).

31 See Glynn, supra note 12 at 259–60.
Review by Party Agreement

subjects for interlocutory review. Professors Eisenberg and Morrison doubt that the rule makers can identify orders by category that will always warrant interlocutory review. Experience with the collateral order doctrine tends to bear out this contention; the recognition of a right to interlocutory review can attract some relatively dubious appeals. Similarly, the Court’s approach to the interlocutory review of remand orders can sometimes result in the review of matters that many observers, including the Justices themselves, would not regard as worthy candidates for appellate intervention. This skepticism about the ability of rule makers to define deserving orders by category may tend to encourage reliance on discretionary modes of review as a way to weed out routine and undeserving appeals. Eisenberg and Morrison, and Professor Michael Solimine, join in the call for review based on the exercise of discretion.

Apart from questions about the proper balance between categorical rules and discretionary standards, debates over interlocutory review feature widespread disagreement about who should fashion and apply the rules. At various times, Congress, courts, and the rule makers have all taken responsibility for crafting rules of interlocutory review. The rules differ not only in their institutional origins but also in the level of the court system that takes the lead in determining the existence of appellate jurisdiction. In some cases, the district courts can exercise discretionary control over appellate review, perhaps by entering a partial

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32 See Eisenberg & Morrison, supra note 12, at 296–97 (expressing concern that criteria would be both broad and vague). Professors Eisenberg and Morrison make the additional point that appellate courts might construe jurisdictional grants narrowly, allowing, in effect, for discretionary denial of the appeal. Id.

33 See id. at 295 (identifying areas of disagreement about when to allow interlocutory review).

34 Pfander, supra note 19, at ___ (noting the growth in appeals from remand orders).

35 See Carlsbad Technology, Inc. v. HIF Bio, Inc., 129 S.Ct. 1862, 1869 (2009) (Breyer, J., concurring) (noting that “something is wrong” when, as appears to be the case in the context of remand orders under § 1447, review is permitted “in an instance where that decision is unlikely to be wrong and where a wrong decision is unlikely to work serious harm” but forbidden “in an instance where that decision may well be wrong and where a wrong decision could work considerable harm.”).

36 See Eisenberg & Morrison, supra note 12; Solimine, supra note 12.

37 See, e.g., supra note 14 and accompanying text (congressional implementation of § 1292(b)); supra note 17 and accompanying text (judicial creation of collateral order doctrine); supra note 16 (interlocutory review of class certification created by rule makers).
summary judgment under Rule 54 and finding no just cause for delay. In other cases, discretionary review requires combined action at both the district and circuit court levels; section 1292(b) certifications fall into this category. Finally, some forms of interlocutory review, such as class action certification review and mandamus review, require only that the appellate court agree to hear the matter; district courts have no role to play in facilitating appellate review.

38 See Fed. R. Civ. P. 54(b) (allowing the district court, when it determines that there is no just reason for delay, to enter “final judgment as to one or more, but fewer than all, claims or parties,” thereby triggering the opportunity for appellate review); 10 MOORE ET AL., supra note 3, § 54.23. For an argument favoring discretionary review of orders compelling arbitration, see Pierre H. Bergeron, District Courts as Gatekeepers? A New Vision of Appellate Jurisdiction Over Orders Compelling Arbitration, 51 EMORY L.J. 1365 (2002).

39 See 28 U.S.C. § 1292(b) (2006) (interlocutory order only appealable if district court finds that it “order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation” and the court of appeals “in its discretion, permit[s]” the appeal.). See also supra note 14 and accompanying text; AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO APPELLATE COURTS, Commentary to § 3.12 (1994 Ed.) (describing that § 1292(b) requires “concurrent permission” of trial and appellate court). Michael Solimine argues for an increased use of § 1292(b), especially in complex litigation such as mass torts. Solimine, supra note 12. Professor Solimine views § 1292(b) as an underused safety valve of interlocutory review, which the appellate courts have reserved for use in “big” cases. Id. at 1204. He believes that if the statute were “shorn of the . . . requirement [that it only applies to ‘big, exceptional cases,’]” it would provide for the needed flexibility without overly burdening the courts of appeals. Id. at 1168.

40 See Fed. R. Civ. P. 23(f) (“A court of appeals may permit an appeal from an order granting or denying class-action certification . . .”). See also supra note 16 and accompanying text.

41 See 28 U.S.C. § 1651 (2006) (federal courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions . . .”). See 19 MOORE ET AL., supra note 3, § 204.01 (mandamus is included within “all writs” and “is generally used to prevent district judges from exceeding their authority . . .”); Sloan, supra note 15, at 57–59 (mandamus directs district court “to act in a manner necessary to fulfill her duties . . .”); Federal Civil Appellate Jurisdiction: An Interlocutory Restatement, 47 LAW & CONTEMP. PROBS. 13, 84–85 (1984) (hereinafter Restatement) (describing the “supervisory” use of mandamus). Melissa Waters has argued for an expanded use of mandamus to supervise district courts that act more like courts of equity when dealing with mass torts. 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 (2002). While Professor Waters’ approach would allow greater discretionary oversight, it raises questions. First, mandamus originated as a tool for correction of jurisdictional and procedural issues, and has been thought less appropriate for a full consideration of the merits of a decision. Second, reliance on mandamus does not take advantage of the strength of the district court in evaluating the need for interlocutory review. See Glynn, supra note 12, at 263 (“[A] district court judge is in the best position to determine whether an order is worthy of appellate review.”). Professor Waters nicely
Recent developments at the Supreme Court suggest that the debate over how to structure interlocutory review may be coming to a head. In *Carlsbad Technology v. HIF Bio*, the Court approved yet another exception to section 1447(d)’s prohibition against review of remand orders. In a concurring opinion, Justice Breyer posed sharp questions about the Court’s handling of the doctrine. In particular, Justice Breyer questioned rules that seemingly authorized review of mundane problems yet foreclosed review of more serious issues. He ended his opinion with a call for help from “experts.” Similarly, in *Mohawk Industries*, the Court took an exceedingly narrow view of the propriety of fashioning new judge-made rules of interlocutory review through the expansion of the collateral order doctrine. The skeptical assessment in the majority opinion was echoed and underscored in Justice Thomas’s concurring opinion, which proclaimed a

captures the interesting connection between equity and interlocutory review, noting that the finality rule did not historically apply to courts of equity. See 28 U.S.C. § 1292(a)(1) (interlocutory review available as a matter of right for orders regarding injunctions); Restatement, at 82 (“the finality requirement was never well established in equity’’); Bergeron *supra* note 38, at 1371–72.

42 Adam Steinman has argued that the All Writs Act allows not just for discretionary writs of mandamus, but discretionary appeals as well. See Steinman, *supra* note 15, at 1257–58. He further suggests that interlocutory review under the All Writs Act would “situate all interlocutory appeals on a more solid textual and doctrinal footing . . . .” Id. at 1295.

43 556 U.S. ___, 129 S.Ct. 1862 (2009) (concluding that district court’s discretionary decision to remand after declining supplemental jurisdiction is not a dismissal for lack of subject matter jurisdiction and does not implicate the ban on review of remand orders in 28 U.S.C. § 1447(c)–(d)).

44 556 U.S. ___, 129 S.Ct. at 1869 (Breyer, J., concurring) (“We have held that § 1447 permits review of a district court decision in an instance where that decision is unlikely to be wrong and where a wrong decision is unlikely to work serious harm. And we have held that § 1447 forbids review of a district court decision in an instance where that decision may well be wrong and where a wrong decision could work considerable harm. Unless the circumstances I describe are unusual, something is wrong. And the fact that we have read other exceptions in the statute's absolute-sounding language suggests that such circumstances are not all that unusual.”).

45 *Id.*

46 *Id.*

47 *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. ___, 130 S. Ct. 599, 605 (2009) (stressing that collateral order doctrine is an exception that should not “swallow the general rule” that there should be a single appeal from a final judgment, and that “justification for immediate appeal must therefore be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes.”).
more absolutist opposition to judge-made interlocutory review. Together, the opinions suggest the emergence of a fairly strong preference for the development of rules through the rule-making process.

In this article, we propose the adoption of a rule of interlocutory review that combines features of discretion and categorization. In brief, we propose a rule that would empower the parties, by consent, to request the district court to certify a question for interlocutory review. If the district court approved the joint request, the party contesting the district court’s order could appeal the certified question without first having to secure leave from the appellate court. Such a consensual trigger for interlocutory review would rely on the self-interest of the parties to identify district court decisions that warrant immediate review. The requirement that the district court certify the appeal will allow the district judge to maintain some control of the litigation by rejecting potentially disruptive repetitive review and screening out cases in which she feels the decision might be modified as the proceedings continue. Not every district court order would attract the consent of the parties, needless to say. Indeed, we will explore a variety of situations in which the parties will predictably disagree about the wisdom of immediate appellate review. But the parties do have obvious financial incentives to weigh the costs of going to trial in light of the risk and expense associated with both pre- and post-trial appellate reversal. Self-interest would encourage the parties to identify situations where expected trial costs are high, and where the risks of post-trial appellate court invalidation of the trial court’s interlocutory disposition are significant. In such cases, both parties might well prefer appellate review sooner rather than later. Instead of trying to specify these deserving orders in advance, we propose to rely on the parties to cull them from the litigation process.

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48 Id. at 610 (Thomas, J., concurring in part and concurring in the judgment) (applying the collateral order doctrine, even to find that the order does not fall within it “needlessly perpetuates a judicial policy that we for many years have criticized and struggled to limit.”).

49 As explained below, we would recommend use of the rule-making process as the vehicle for implementing our proposal because it offers the possibility of ongoing evaluation. See infra Part III.

50 Such a rule would be authorized under 28 U.S.C. § 1292(e), which allows the creation of rule “to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for . . . .”). In other words, we are not proposing that parties be allowed to consent to finality, but instead to consent to the review of an interlocutory decision.

51 In addition, district court certification will ensure that “feigned cases” are weeded out. See infra Part III.
Our proposal, which has not previously appeared in the literature, would allow the parties to evaluate the economics of their case in deciding whether to agree to appellate review and would add something valuable to the modes of interlocutory review now available. For starters, our proposal would operate as a matter of right for orders that come within its terms, thus avoiding the expense associated with litigation at the appellate court level over the existence of appellate jurisdiction. In addition, our proposal would rely on the parties to identify situations in which immediate review can cost-effectively advance the resolution of the case. Happily, the parties’ incentives will often lead them to take account of the same factors that would presumably inform an attempt on the part of the rule makers to establish criteria for interlocutory review. But instead of a rigid system of categories, with inevitable problems of over- and under-inclusiveness, the system we envision would allow the parties to tailor the timing of appellate review to suit their own situation. We do not view party autonomy as a solution to every problem of appellate oversight and do not advocate its adoption to the exclusion of other forms. But we do think it would add something valuable to the tools of interlocutory review now available.

Our approach relies on two insights not currently reflected in the appellate review literature. First, our approach hypothesizes that appellate review can reduce the systemic costs of dispute resolution, even where the district court did not make a clear error in resolving a potentially decisive legal issue. In discussions of pragmatic review, scholars treat appellate review as cost-effective in cases where the district court made a clear mistake that would require trial of a case that should have been dismissed. But we suggest that even close cases may

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52 Professor Carrington has argued that the parties be allowed to waive a defect in jurisdiction, thus envisioning “appellate jurisdiction conferred by consent of the parties[.]” Carrington, supra note 13, at 170. We would treat consent not simply as overcoming defects in other modes of review but as providing an independent basis for interlocutory appellate review. Party agreement does inform some applications for interlocutory review today. District courts are more likely to certify questions when the parties agree that they meet the test in 28 U.S.C. § 1292(b). It is also “not uncommon for the parties to file a joint or stipulated motion seeking a Rule 54(b) judgment” that triggers immediate review. 10 MOORE ET AL., supra note 3, § 54.23. In addition, district courts may work to facilitate review by manufacturing finality (as the appellate court recognized in Nystrom v. TREX, 339 F.3d 1347 (Fed. Cir. 2003)) when the parties agree that such review would advance the resolution of the case. For more on the manufactured finality doctrine, see infra note 63. Finally, some settlement agreements contemplate appellate review and thus reflect the parties’ agreement that such review will help resolve the case. See infra Part III.

53 See Redish at 13 (“For example, a trial court’s refusal to grant summary judgment, or to deny removal from a state court, may require the parties to expend substantial physical, financial and emotional effort in the preparation and conduct of a trial which may later prove to have been worthless.”). See also Cooper, supra note 22, at 157 (if an error is not immediately reviewed it
benefit from interlocutory review; clarifying a potentially controlling legal question can avoid trial costs no matter how the appellate court rules on the merits. Our approach also draws on the insight that we can rely on the parties to identify orders that meet the close-question test for interlocutory review. Party control, and district court review, can thus identify a **category** of interlocutory orders for which review makes sense.\(^{54}\) We would thus eliminate the common requirement that the appellate court independently agree to hear the appeal.\(^{55}\) By eliminating such threshold review, our proposal should further reduce the systemic cost of dispute resolution.\(^{56}\)

Despite its novelty, our suggested reliance on the parties to select orders for interlocutory review fits comfortably with two bodies of literature. One body of literature explores the factors that influence the way parties select cases for trial and settle cases in the shadow of the law. Drawing on this literature, we think the parties’ self-interest would lead them to identify orders with a substantial probability of appellate reversal. The classic article by Priest and Klein shows that the parties will tend to select cases for trial in which they perceive genuine uncertainty as to the outcome.\(^{57}\) Weak cases will be weeded out and strong cases may “so taint subsequent proceedings as to require reversal and further proceedings.”); Sloan, *supra* note 15, at 53–54 (noting how immediate review of a controlling question of law under § 1292(b) can be efficient because “an error in the application of a controlling question of law results in wasted resources.”); Solimine, *supra* note 36, at 1169 (noting that interlocutory review “can save cost and time by shortening, streamlining or terminating the litigation.”).

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54 This addresses the concern raised regarding the categorical approach to interlocutory review that “any [] criteria that could be devised [regarding interlocutory review] are, of necessity, both quite broad and quite vague.” Eisenberg & Morrison, *supra* note 12, at 297.

55 See 28 U.S.C. § 1292(b); FED. R. CIV. P. 23(f); see also *supra* notes 14, 16.

56 For an example of the costs of discretionary gatekeeping by appellate courts, see In re Sumitomo Copper, 262 F.3d 134 (2d Cir. 2001) (conducting a detailed review of a class certification decision only to find that it did not present issues pressing enough to warrant discretionary review). See also *supra* note 14. As noted above, Professor Glynn has suggested an amendment to § 1292(b) to require the courts of appeals to hear certified appeals absent abuse of discretion by the district court. In some ways, our proposal is more modest, in that with most § 1292(b) appeals, one party opposes the certification. We are suggesting only that the courts of appeals would be required to hear those appeals that neither party opposes and the district court certifies as appropriate for immediate review.

may well settle without any need for litigation. The same logic will, we believe, lead the parties to select cases for interlocutory appellate review in which the prospects for appellate reversal are significant. In other words, a model of party autonomy will tend to identify precisely those orders that pose a significant threat of appellate reversal and will most likely block resolution through settlement. A second body of literature recognizes and explores the implications of the parties' power to choose a forum for the resolution of their disputes. Courts today freely enforce forum-selection clauses, whether they call for the resolution of the dispute by the publicly-funded court system or by a privately-paid arbitral panel. Parties can exercise their choice of forum at any stage in the process, opting out of the civil justice system either before or after the dispute arises. Indeed, recent developments suggest that the parties can ask a private arbitration panel to

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58 See Priest & Klein, supra note 57, at 19 (as parties’ likelihood of being wrong about outcome of litigation goes down, likelihood of settlement increases).


61 See Redish & Larsen, supra note 59, at 1573 (“[T]he individual litigant's autonomy in deciding whether to pursue her claim and if so, how best to conduct that litigation” is “the theoretical foundation of the procedural due process guarantee . . . .”).
conductor the functional equivalent of appellate review of a judicial decision. The growing familiarity with party autonomy in the choice of forum suggests that its use to select cases for interlocutory review should not prove unduly disruptive or controversial.

We present our argument for a party-based approach to interlocutory review in four parts. Part II sets forth the basic elements of the argument. We begin with the intuitive case for party-based review, offering a simple hypothetical case to explain why the parties might agree on the need for appellate intervention. We next formalize the model of party-based review, drawing on the literature that has grown up around the selection of cases for trial. We find that the model predicts that the parties will agree to interlocutory review in cases where both parties anticipate relatively high costs associated with taking the case to trial, relatively low costs of appellate intervention, and a relatively substantial likelihood of appellate reversal. Appellate review of such orders makes sense to the parties because the prospect of post-verdict or final judgment review threatens to upset everything that has gone before. Party-based review makes systemic sense because it applies to one identifiable set of orders likely to produce net efficiencies for the system of litigation as a whole. Finally, we collect evidence to support our claim that modern litigation often displays the features that will tend to produce situations in which the parties (and the system) can profit from agreed upon appellate review.

Part III of the article considers a variety of objections to our proposal. We first consider objections based upon the policies underlying the final judgment rule. We show that our proposal does not run afoul of the sensible policies of avoiding unnecessary, fragmented, or repetitive review. We next consider an objection based on the limits that the case-or-controversy requirements of Article III impose on the power of appellate courts to hear feigned or contrived cases and to issue advisory opinions. We show that, with the exception of appellate review aimed at purchasing a favorable precedent, party-based review does not present an

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62 See Controlling Legal Costs – Law Firms Consider Appellate Arbitration and Consultation, The Metropolitan Corporate Counsel, http://www.metrocorpncounsel.com/current.php?artType=view&artMonth=February&artYear=2010&EntryNo=10605. See also Moffitt, supra note 59, at 475 (proposing customization of the appellate experience). While Professor Moffitt argues for allowing litigants to agree to customize the appellate process, the customization he envisions is more related to curtailing, and not expanding appellate review. See id. at 477–78. The courts of appeals also provide mediation programs that provide assistance to parties in settling as an alternative to appellate litigation. See Gilbert J. Ginsburg, Essay: The Case for a Mediation Program in the Federal Circuit, 50 AM. U.L. REV. 1379, 1382–87 (2001) (surveying various ADR programs of the courts of appeals).
Article III problem. Parties to a genuine dispute can agree between themselves on the need for a determination of their respective rights and obligations without depriving the court of its power to issue a declaratory judgment; party agreement on the need for judicial resolution does not mean that the dispute lacks the genuineness needed to support the exercise of federal judicial power. Finally, we address what we call the incidence problem: the concern that the proposal will produce either too much or too little interlocutory review. For a variety of reasons, we do not believe our proposal will give rise to unbridled interlocutory review. While it’s possible that plaintiffs will prefer to take their cases to trial in the face of a threat of appellate reversal, we explain why we doubt that plaintiffs will act irrationally and how the parties can structure side-deals that facilitate appellate review. Part IV briefly concludes.

II. The Case for Party-Based Interlocutory Review

In this part, we set forth our case for a rule that would allow the parties to agree to interlocutory appellate review. We begin with the most straightforward claim: when one takes account of the prospects for settlement and the costs associated with litigation at the district court level, the parties will often have a common financial interest in agreeing to interlocutory review of controlling questions of law. Early resolution of such controlling questions can obviate the necessity for a trial, can provide important information to shape the way the case proceeds to trial, and can eliminate the possibility of a post-trial appellate invalidation of the judgment. One can generalize by saying that review makes sense when the parties expect to gain more from legal clarification (and from avoiding the costs associated with a flawed or unnecessary trial) than they expect to expend in obtaining an appellate resolution. What’s more, the parties’ financial incentives will lead them to agree to interlocutory review in precisely those closely divided cases of legal uncertainty in which the systemic interest in the low-cost resolution of disputes will argue in favor of interlocutory review. By allowing the parties to identify cost-effective interlocutory review, our proposal should improve the overall operation of the dispute resolution system.

We develop three separate arguments in favor of a party-driven approach to interlocutory review. In the first section of this part, we offer a simple hypothetical to illustrate the intuitive case for party autonomy. We then attempt to formalize the intuitive case, drawing on the theoretical literature that has grown up around the economics of settlement negotiations. After setting forth the intuitive and theoretical cases for party autonomy, the third section develops empirical support for the proposal. For starters, we explore a number of cases in which it appears that something like party-based appellate review may already be
occurring in the federal courts. Indeed, in the field of patent litigation and elsewhere, federal courts have responded to the demand for interlocutory review by acting to facilitate review through “manufactured finality” doctrines that can be quite difficult to square with current law.\textsuperscript{63} In addition, we show that the federal courts have transformed issues of fact into questions of law that require judicial resolution. This trend toward shifting issues from jury to judge—or what

\textsuperscript{63} Manufactured finality involves the voluntary dismissal of “peripheral” claims in district court after pre-trial resolution of the “central or core” claim, thus rendering the dismissal “dispositive, final, and appealable.”. Rebecca A. Cochran, \textit{Gaining Appellate Review by “Manufacturing” A Final Judgment Through Voluntary Dismissal of Peripheral Claims}, 48 MERCER L. REV. 979, 982 (1997). Though apparently straightforward, the manufactured finality doctrine has divided the circuits over the use of a without-prejudice dismissal of the peripheral claims. \textit{See} Doe v. U.S., 513 F.3d 1348, 1352 (Fed. Cir. 2008) (discussing the split among circuits). The Second, Fifth, and Eleventh circuits do not allow a without-prejudice dismissal to manufacture the needed finality. \textit{See id.} (citing Rabbi Jacob Joseph Sch. v. Province of Mendoza, 425 F.3d 207, 210 (2d Cir. 2005); Marshall v. Kansas City S. Ry. Co., 378 F.3d 495, 499–500 (5th Cir. 2004); State Treasurer v. Barry, 168 F.3d 8, 11 (11th Cir. 1999)). The Sixth, Eighth, Ninth, and Federal circuits do allow, at least in some situations, a without-prejudice dismissal to create the necessary finality for immediate review. \textit{See id.} (citing James v. Price Stern Sloan, 283 F.3d 1064, 1069-70 (9th Cir. 2002); Chrysler Motors Corp. v. Thomas Auto Co., 939 F.2d 538 (8th Cir. 1991); Hicks v. NLO, Inc., 825 F.2d 118 (6th Cir. 1987)). The Sixth Circuit focuses on whether the parties and district court have “schemed to create jurisdiction over an essentially interlocutory appeal.” James v. Price Stern Sloan, 283 F.3d 1064, 1069 (9th Cir. 2002) (citing United States v. Kaufmann, 985 F.2d 884 (7th Cir. 1993) (refusing appeal); Horwitz v. Alloy Auto Co., 957 F.2d 1431 (7th Cir. 1992) (refusing appeal); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1266 & n.1 (7th Cir. 1976) (allowing appeal)). At the suggestion of Mark Levy, the Advisory Committee on Appellate Rules of the Judicial Conference of the United States has taken up the manufactured finality issue. \textit{See} Mark I. Levy, Manufactured Finality, National Law Journal (May 5, 2008); Agenda Book for April 16-17, 2009 Meeting of Advisory Committee on Appellate Rules, p. 19. While the manufactured finality doctrine is narrower than our proposal for interlocutory appeal by agreement, Judge Carl Stewart believes it may be necessary to address the issue that there are “cases in which everybody—the parties and the trial judge—wants to send a case up to the court of appeals quickly.” Agenda Book for April 16-17, 2009 Meeting of Advisory Committee on Appellate Rules, p. 38 (draft minutes from January 12-13, 2009 Meeting Committee on Rules of Practice and Procedure Standing Committee). Professor Bergeron’s proposal regarding orders compelling arbitration can also be seen as an implementation of the manufactured finality doctrine through without-prejudice dismissal. \textit{See} Bergeron, supra note 38 (proposing that a district court dismisses litigation simultaneously with ordering arbitration if it feels that immediate review would be important). Professor Bergeron notes, however, that under the Federal Arbitration Act there appears to be circuit uniformity regarding the finality of without-prejudice dismissals after compelling arbitration. \textit{See id.} at 1383. This is because a with-prejudice dismissal might have the effect of preventing the parties from re-entering court to secure and enforce a judgment on the arbitration award. \textit{See} Interactive Flight Technologies, Inc. v. Swissair Swiss Air Transport Co., Ltd., 249 F.3d 1177, 1179 (9th Cir. 2001) (dismissal of district court was only without-prejudice in the sense that it was not meant to preclude parties from enter judgment after completing arbitration).
we call judicialization—creates a growing demand for interlocutory review, as parties seek the resolution of decisive questions by the appellate court—the only institution that can settle the issue. Finally, we show that many fields of complex litigation display the financial characteristics (expensive trial costs relative to the costs of appellate review) that would tend to make party-based interlocutory review viable.

A. The Intuitive Case for Party Autonomy

To see the intuition behind our proposal, consider a garden variety motion to dismiss an action on statute-of-limitations grounds. Under current law, the district court’s rejection of such a threshold motion would constitute a non-final order and would not be subject to immediate appellate review. Such an application of the final judgment rule makes sense in most situations. Defendants almost always prefer interlocutory review: a successful appeal might secure the action’s dismissal and will often, in the meantime, delay the discovery and trial phases of the litigation. The defendants’ predictable desire for delay means that allowing routine or categorical review of such orders does not make sense; defendants could seek review even in cases where the only goal was to delay and where there was only the slightest prospect of appellate reversal. But despite the general rule, interlocutory review may be appropriate in cases where the defendant has a substantial prospect of success on appeal; interlocutory review could sustain the limitations defense, thus obviating the need for further

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64 The validity of a statute-of-limitations defense may turn on a preliminary question of law. See Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618, 629 (2007) (petitioner/plaintiff argued that each paycheck she received based on previous discriminatory pay discrimination was a fresh violation of equal employment laws for statute-of-limitations purposes); Walker v. Armco Steel Corp., 446 U.S. 740, 743 (1980) (petitioner/plaintiff unsuccessfully argued that, although state law would have foreclosed the case, the limitations clock was tolled by compliance with federal rules).

65 See Parmar v. Jeetish Imports, Inc., 180 F.3d 401, 402 (2d Cir. 1999) (noting that “the denial of a statute-of-limitations defense may effectively be reviewed on appeal from a final judgment” and awarding sanctions based on defendant’s attempt to receive immediate review of motion to dismiss based on the statute of limitations). See also Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994) (rejecting the view that a limitations defense should be regarded as a collateral order that would warrant interlocutory review); Mitchell v. Forsyth, 472 U.S. 511, 551 (1985) (Brennan, J., concurring in part and dissenting in part) (denial of motion to dismiss on statute-of-limitations grounds would only be immediately reviewable if such a defense conferred the right not to be sued.).

66 See Solimine, supra note 36, at 1168 (noting that the final judgment rule “discourages the delay of trial proceedings and harassment of party opponents . . . ”).
proceedings at the trial level. Even if the appellate court were to affirm the rejection of the defense and remand for trial, the decision may clear the way for a settlement that would have been difficult to reach so long as the limitations defense remained unresolved. Especially when appellate review costs less than the trials avoided or decisively re-shaped thereby (an assumption that often holds), review of substantial defenses could make the system more efficient.

The trick lies in identifying the cases in which the defendant has a sufficiently substantial claim to warrant interlocutory review, given the expected costs of trial and appellate review. Our proposal would rely on the parties to identify non-final orders for immediate review. It may not seem obvious at first blush why plaintiffs would ever agree to such review, having overcome a motion to dismiss at the district court level. But return to our hypothetical case and consider a situation in which the plaintiff predicts that the trial, though expensive, will result in a substantial plaintiff’s verdict that the defendant can attack, perhaps successfully, with the limitations defense. If the plaintiff views the limitations defense as substantial, the plaintiff might prefer to litigate that issue right away, before incurring the expense necessary to prepare the case for trial. After all, the plaintiff can predict that the defendant will renew the limitations defense on appeal from any verdict. If the plaintiff succeeds in clarifying in advance of trial that the limitations defense was properly rejected, the plaintiff will have removed an important legal barrier to liability. Plaintiffs thus have an incentive to agree to interlocutory review in precisely the cases where the threat of appellate reversal looms relatively large and the costs of seeking interlocutory review seem low in comparison to the cost of taking the case to trial. Indeed, in many cases like the one involving the hypothetical limitations defense, the parties may agree to settle

67 The American Intellectual Property Law Association reports that for patent litigation suits with between $1,000,000 and $25,000,000 at risk, the median cost of litigation is $1,500,000 through the end of discovery, and $2,500,000 inclusive of everything, including trials and appeals. AM. INTELLECTUAL PROP. LAW ASS’N, REPORT OF THE ECONOMY SURVEY 2009, at 29 (2009). Pre-trial litigation costs, including discovery are, therefore, the majority of the costs in patent litigation suits. Even if the $1,000,000 post-discovery expense is divided equally between trial and appeal, an appeal would still only represent 20% of the total cost of litigation. See David L. Schwartz, Practice Makes Perfect? An Empirical Study Of Claim Construction Reversal Rates In Patent Cases, 107 MICH. L. REV. 223, 243 (2008) (noting that the low cost of appeal and the high overall stakes in patent cases mean that most cases are appealed). See also SCOTT BARCLAY, AN APPEALING ACT: WHY PEOPLE APPEAL IN CIVIL CASES 48–49 (1999) (discussing the cost/benefit model for determining whether to appeal and the role of transaction costs—including “nominal” appellate court fees and somewhat higher lawyer’s fees—in making that determination); Theodore Eisenberg, Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes, 1 J. EMPIRICAL L. STUD. 659, 660 (2004) (appeal rates of judgments resulting from trial are twice that of nontribal judgments).
the case after the appellate court rules. Interlocutory review will thus facilitate settlement in the shadow of a (newly clarified) law and avoid the cost of trial even in cases where the appellate court affirms the district court’s rejection of the defense and remands for further proceedings.

B. The Formal Case for Party Autonomy

One can create a simple model to formalize the intuition underlying the exemplary case just described. Suppose a personal injury claimant has a solid case on liability; both the plaintiff and defendant predict that in 90% of cases with similar facts, the jury will return a plaintiff’s verdict. Suppose further that both sides reckon the likely jury verdict at a value of 100. Finally, suppose that both sides will face trial costs of 10 to take the case to the jury. In such a simplified world, we can sketch the likely settlement range. The plaintiff should accept any amount above 80, representing the expected value of the verdict less the cost of taking the case to trial (costs that the plaintiff will avoid by settling before trial) \[.9 \times 100 - 10 = 80\]. The defendant should be willing to pay any amount less than 100, representing the expected value of the verdict plus the defendant’s expected cost of taking the case to trial \[.9 \times 100 + 10 = 100\]. Such a case should settle between 80 and 100, a range scholars sometimes describe as the zone of potential agreement (ZOPA).^68

^68 See Donald R. Philbin, Jr., *The One Minute Manager Prepares for Mediation: A Multidisciplinary Approach to Negotiation Preparation*, 13 Harv. Negot. L. Rev. 249, 273 (2008) (discussing how valuation affects the ZOPA). Two general theoretical frameworks help analyze the interaction of factors bearing on settlement. See Gross & Syverud, *supra* note 57, at 321. The first, sometimes referred to as the “expectations framework,” posits that parties have independent expectations of the likelihood of success of a suit and the damages at issue. See Priest & Klein, *supra* note 57; George L. Priest, *Reexamining the Selection Hypothesis*, 14 J. Legal Stud. 215 (1985). Under this framework, settlement occurs if the expected judgments of each party are close enough to allow settlement. The theory assumes that the parties evaluate the cost of trial differently in determining what would be an acceptable settlement. The plaintiff’s minimum settlement demand subtracts the plaintiff’s litigation costs from the expected judgment. The defendant’s maximum settlement offer, on the other hand, represents the expected judgment plus the litigation costs. The second approach to determining when settlement is likely to occur considers the strategic behavior of the parties during negotiation. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979); see also Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. Legal Stud. 225 (1982). In the strategic approach, the behavior of the parties during negotiation can result in a failure to arrive at an agreement prior to trial, notwithstanding the fact that their expectations would produce a ZOPA.
The introduction of divergent views on a judicial question, such as the admissibility of an expert’s testimony under *Daubert*,\(^{69}\) can complicate the settlement calculus. Suppose, in the above case, that the claimant and defendant have different views of the viability of the claim. The plaintiff believes he has a 90% chance of a verdict in his favor, while the defendant believes there is only a 60% chance of a verdict in the plaintiff’s favor. These divergent views reflect the parties’ evaluation of the plaintiff’s medical expert. While the plaintiff believes the expert will sway the jury, the defendant does not believe the testimony meets the minimum threshold of reliability needed for admission of expert testimony.\(^{70}\) Unlike the situation where parties agree on the viability of a claim, the parties will no longer be able to settle. The plaintiff should still accept any amount above 80, since he still has the same belief in his success at trial. The defendant, however, will be unwilling to pay more than 70 \((.6 \times 100) + 10 = 70\). Because the lowest amount the plaintiff will accept exceeds the highest amount the defendant will offer, the parties confront a negative ZOPA and cannot reach a settlement.\(^{71}\)

Imagine the litigation proceeds and the defendant moves to have the medical expert disqualified. The judge, however, deals a blow to the defendant by allowing the expert’s testimony. The plaintiff and defendant both now agree that, if the ruling stands, the plaintiff has a 90% chance of succeeding at trial. If there was no chance of appellate reversal of that decision, the parties could now settle.\(^{72}\) Settlement, however, must still overcome the parties’ differing views of the likelihood that the trial court’s ruling on the expert’s testimony will withstand appellate review. Assume that the plaintiff assesses the likelihood of appellate affirmance at 80%, whereas the defendant sees only a 50% chance the higher court will uphold the ruling. To calculate the settlement prospects at this point, we consider both the likelihood of a favorable jury verdict as well as the likelihood of an order upholding that verdict on appeal. In addition, both sides must take account of the costs of appeal (which we will assume to be 2). The least the plaintiff should be willing to accept is now 60, which is the expected

\(^{69}\) See *Daubert v. Merrell Dow* [cite]

\(^{70}\) See *infra* notes 140–160 and accompanying text.


value of the verdict \([.9 \times 100 = 90]\) multiplied by the plaintiff’s belief that there is an 80% chance the verdict will stand after appeal, less the expected trial costs and appeal costs \([(0.8 \times 90) - 10 - 2 = 60]\).\(^73\) On the other hand, while the defendant evaluates the jury’s verdict at 90, the defendant will offer no more than 57 \[\{(0.5 \times 90) + 10 + 2 = 57\}\]. Again, no settlement is possible.\(^74\)

Assume that the case proceeds to trial, and the court allows the medical expert to testify. Assume further that (as both sides predicted) the jury finds the defendant liable and awards damages of 100. Even now, after a jury verdict, the parties will be unable to forgo the appeal and settle.\(^75\) The differing assessments of the likelihood of appellate court reversal continue to prevent settlement. The plaintiff’s settlement floor will now be 78, the value of the jury’s verdict multiplied by the plaintiff’s 80% expectation it will be upheld, less the costs of

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\(^73\) To keep the model simple, we have assumed that a reversal of the ruling would necessitate the reversal of any verdict for the plaintiff and would not occasion a new trial. If we take account of the possibility of a second trial based on an appellate decision, we can see how interlocutory review may encourage settlement and, therefore, why parties might consent to immediate review in certain situations. As a party’s expectation of a remand by the appellate court for a new trial goes up, so does her expected litigation costs, because she expects to pay for two trials instead of one. Taking this into account could significantly enlarge an existing ZOPA (or create a ZOPA where one had not existed previously), as it reduces the minimum amount a plaintiff would accept and, at the same time, raises the amount the defendant would offer. Interlocutory review would be especially helpful as the reversal and remand rate approaches 50%. As with expectations about close cases generally, expectations about the outcome of appeal in cases of imperfect foresight are more likely to be error prone. See Priest & Klein, supra note 57, at 14–15. Interlocutory review in this situation would significantly lower the likelihood of a new trial by removing concerns about reversal on the issue at hand.

\(^74\) Just as the mutual optimism of the parties about the chance for success at trial prevents settlement, so does the mutual optimism about the chance for success at the appellate level. See Prescott et al., supra note Error! Bookmark not defined., at 2.

\(^75\) In general, analyses under the Priest and Klein framework do not separate out trial from appeal, except to note that a case that is close enough to go to trial will also likely be close enough to be appealed. See Priest & Klein, supra note 57, at 51–52; Daniel Kessler, Thomas Meites, & Geoffrey Miller, Explaining Deviations From The Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation, 25 J. LEGAL STUD. 233, 240 (1996) (empirical analysis of the selection hypothesis in federal appellate cases). Priest & Klein also note that if the trial judge’s views of the law are clearly at odds with those of the appellate court, the parties will “reverse” the trial judge privately” by taking that into account in deriving their expectations of a successful suit. Priest & Klein, supra note 57, at 52. See also RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 119 (1996) (noting that the observed increase in appeal rates may result from growing legal uncertainty, making it more difficult for parties to “converge on the likely outcome of an appeal.”).
appeal \[(.8 * 100) – 2 = 78\].\(^{76}\) The defendant’s settlement ceiling will now be 52, based on the defendant’s view that the appellate court will reverse in 50% of such cases \[(.5 * 100) + 2 = 52\].

Now consider the settlement possibilities if, at the point where the district court allowed the medical expert’s testimony, interlocutory review were available. The interlocutory review would have the effect of reducing the uncertainty inherent in the question of law, and parties’ predictions of success would converge. If the appellate court rules in the plaintiff’s favor, upholding the trial court’s decision, both sides will now agree that there is a 90% chance of success at trial. This resembles the simple initial case, where both parties believe the expected judgment is 90 \([.9 *100 = 90]\) and there is a ZOPA between 80 and 100. If the appellate court rules in the defendant’s favor, overturning the trial court and rejecting the expert’s testimony, the plaintiff will likely reduce his estimate of success at trial to match the defendant’s initial belief that there is a 60% chance of success at trial. In this case, both sides will agree that the expected judgment is now 60 \[.6 * 100 = 60\]. This will create a ZOPA between 50 \[(.6 * 100) – 10 = 50\] and 70 \[(.6 * 100) + 10\]. Knowing that securing a resolution from the appellate court in either direction could open up a settlement window, the parties might agree to interlocutory review.\(^{77}\) In fact, the availability of interlocutory review by consent might encourage the parties to settle before the appeal for

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\(^{76}\) The costs of trial are now sunk costs and are therefore not considered. In addition, the jury’s actual judgment replaces both sides’ expected judgment.

\(^{77}\) Even in the situation where the ZOPA makes settlement possible without interlocutory review, there may still be reason for parties to agree on immediate review. Professor Robert Rhee has pointed out that “[c]ertainty obviates litigation, uncertainty begets dispute” and that that parties may be willing to spend money to “hedge” against the concern that they are not valuing settlement properly. Rhee, supra note 57, at 254. In other words, parties may consent to interlocutory review simply to better determine the risk of trial, and to make sure they know they are properly valuing settlement. Even if the parties’ initial estimates lead them to believe there is room for negotiation, each may still be willing to spend the relatively small cost of an appeal to remove the uncertainty and make sure they are not offering (or accepting) more (or less) than they should. The sequential nature of appellate decision-making has been noted as a barrier to settlement. See Posner, supra note 75, at 120. Allowing parties to consent to interlocutory review could reverse the standard sequence—appellate review of specific issue prior to full judgment by the district court—and therefore remove, at least partially, that barrier. Professor Steven Shavell has also proposed that allowing litigants the option for shaping their appellate experience—in his case by allowing the choice between direct appeal and discretionary review—can reduce uncertainty, and therefore promote settlement. Steven Shavell, On the Design of the Appeals Process: The Optimal Use of Discretionary Review versus Direct Appeal, 39 J. LEGAL STUD. 63, 90 (2010).
somewhere in the lower settlement range, with an additional 20 to be paid to the plaintiff if the appellate court upholds the trial court ruling.\textsuperscript{78}

Yet interlocutory review does not make sense in every case. If the parties’ views of the likelihood of success at trial are very different, regardless of the outcome of the appeal, interlocutory appeal may not create a ZOPA. We can illustrate that idea by modifying our example such that the allowance of the expert’s testimony has little impact on the defendant’s view that there is only a 60\% chance of success at trial. Then even if the ruling is upheld, the most the defendant would offer is 70 [(0.6 \times 100) + 10 = 70], while the plaintiff would still not settle for less than 80 [(0.9 \times 100) – 10 = 80]. The example illustrates the intuitive notion that, where the parties’ assessment of the strength of the defense varies widely, they’re unlikely to reach an agreement. For the same reason, the parties have little reason to agree on interlocutory appellate review of the issue: the plaintiff would tend to regard the defendant’s proposal for early review as aimed at obfuscation and delay.

This simple model predicts that the parties’ ability to secure interlocutory review to gain clarification of a legal question important to the litigation before incurring the cost of preparing the case for trial will yield settlement prospects that were otherwise unavailable. Interlocutory review may be especially attractive in cases where the parties predict a relatively expensive trial that might be negated or decisively re-shaped by appellate review. When the costs of appeal are relatively low in relation to the costs of trial, and appellate resolution of a legal question can shape (or re-shape) the trial, the parties will have incentives to secure the appellate court’s view before they present the case to the jury. In the next section, we contend that this basic intuition applies across a broad range of legal questions. We show further that the number of legal questions affecting the litigation has tended to grow over time; the assertion of greater judicial control over the resolution of civil disputes has created a corresponding increase in the demand for interlocutory oversight.

\textbf{C. The Empirical Case for Party Autonomy}

Moving from the intuitive and theoretical world to the somewhat messier world of the litigated case, we find evidence that the parties agree to seek early answers to decisive legal questions and that courts sometimes struggle to provide them. We focus on three situations that illustrate the way the parties and the district courts work to procure legal clarification from the appellate courts and the

\textsuperscript{78} See infra note 188.
somewhat inconsistent reception such efforts have received from the appellate bench.

1. Patent Litigation and Markman Hearings

Patent litigation displays many of the characteristics that produce joint requests for early appellate intervention. Patent cases often feature substantial claims for damages, expensive trial practice, and relatively inexpensive appellate review. Patent litigation also produces controlling questions of fact and law, such as the judicial “construction” of the patent “claim,” that can play a central role in resolving claims of patent infringement and patent invalidity. At one time, issues of patent claim construction were simply sent to the jury, along with the claims of infringement and invalidity. The jury sorted out the scope of the patent’s claims in the course of resolving the dispute and appellate review followed in due course. All that changed in 1996, when the Supreme Court affirmed the Federal Circuit’s decision in Markman v. Westview Instruments that claim construction issues should be treated as matters of law for the court (rather than the jury) to resolve. Now district courts routinely conduct “Markman hearings” at which the parties litigate claim construction issues in formats that “run the gamut from mid-trial sidebar conferences that undergird relevance rulings to virtual mini-trials extending over several days and generating extensive evidentiary records.” The result of such hearings can effectively determine the settlement value of the infringement claim.

The patent infringement case, Nystrom v. TREX, Inc. illustrates how the recognition of a judicial role in claim construction can shape the parties’ demand for appellate oversight. The district court conducted a Markman hearing and rendered a decision that was, as a practical matter, fatal to the plaintiff’s theory of

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79 See Schwartz, supra note 67, at 243.

80 Markman v. Westview Instruments, Inc., 517 U.S. 370, 384 (1996) (construing the patent claims is a mixed question of law and fact for the court to resolve).


82 See id., § 33.22 (“many patent cases are resolved once the claim construction is decided, either through summary judgment or settlement . . .”). To determine if a patent has been infringed, the tribunal must decide how broadly to construe the “claims” in the patent. A patent’s claims act as the metes and bounds of the monopoly grant. See Kimberly A. Moore, District Court Judges, supra note 8, at 5 (citing Dow Chem. Co. v. United States, 226 F.3d 1334, 1338 (Fed. Cir. 2000); KCJ Corp. v. Kinetic Concepts, Inc., 223 F.3d 1351, 1355 (Fed. Cir. 2000)).
infringement. Yet the decision did not satisfy the requirements for appellate review under the final judgment rule. The court did not formally reject plaintiff’s infringement claim and did not resolve the defendant’s counterclaim of patent invalidity. Lacking a final judgment “which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment,” the parties (and the district court) sought a mechanism with which to secure interlocutory review.

After requesting suggestions from the parties about how to proceed, the district court attempted to finalize its judgment by granting a partial summary judgment as to certain of the infringement claims and entering a stay pending appeal of the remaining allegations. The apparent goal of the district court’s stay order was to put everything else on hold and trigger review of the Markman decision. But the Federal Circuit refused to accept this mode of facilitating review. The stay order did not resolve the case on the merits, the Federal Circuit correctly observed, and thus did not operate as a final judgment. After all, the district court could simply lift the stay when the case was decided at the appellate level and the counterclaims would return to active litigation. Stays are generally not final and dispositions that fail to resolve pending counterclaims

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84 Apparently at the parties’ behest, the district court attempted to ripen the claim construction order for appellate review by staying the other claims in litigation. See Nystrom v. Trex Co., Inc. (Nystrom I), 339 F.3d 1347 (Fed. Cir. 2003). The litigation began with an action alleging that TREX had infringed Nystrom’s patent on a particular kind of curved exterior wood flooring. Nystrom v. Trex Co., Inc. (Nystrom III), 580 F.3d 1281, 1282 (Fed. Cir. 2009). The curving of the flooring was slight enough that it was still comfortable to walk on, but large enough to allow water to drain and for the boards to be easily stacked. Id. TREX countered with allegations of patent invalidity and non-infringement. Nystrom I, 339 F.3d at 1348.

85 Id. at 1349. While the district court had entered a partial summary judgment, it did not certify the finality of that judgment as required by Fed. R. Civ. P. 54(b). Nystrom I, 339 F.3d at 1351.

86 Id.

87 Id. at 1350.

88 Id. at 1351.

89 Cf. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 713 (1996) (stay order based on abstention doctrine was appealable as “final decision” because it effectively put the litigants out of court.); Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 10 (1983) (stay order appealable as “final decision” because only issue in federal forum was that which would be resolved in state court, therefore ending litigation in federal forum).
also fail the final judgment rule. To accept this mode of review, the Federal Circuit noted, would represent a departure from settled precedent and the ban on piecemeal litigation. The decision therefore might be considered as giving the requirement for a final order a “technical construction.”

The desire for appellate review was no doubt sharpened by the Federal Circuit’s practice of closely evaluating claim construction decisions. Empirical studies of the Federal Circuit suggest that the reversal rate on claim construction questions approaches 40%. This compares with an appellate reversal rate in all civil proceedings in the federal system that hovers at around 20%. While accounts differ as to why the Federal Circuit so frequently reverses on claim construction matters, one component may be that claim construction rulings, including fact-based questions related to them, are reviewed de novo by the Federal Circuit. Such a reversal rate could influence the parties’ willingness to settle on the basis of a trial court’s claim construction decision. If we assume that a party in the position of Nystrom has an infringement claim worth $10 million, and a 40% chance of overturning the district court’s claim construction decision, and the prospect of substantial trial expenses, the incentives to seek immediate review seem obvious. Even the defendant, TREX, might prefer immediate appellate review, knowing that the case cannot settle so long as Nystrom views

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90 Nystrom I, 339 F.3d at 1350.

91 See Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964) (the requirement of finality is to be given a ‘practical rather than a technical construction.’) (quoting Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949)).

92 See Schwartz, supra note 67, at 240 (Federal Circuit finds at least one wrongly construed term in 38.8% of cases).


94 Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1456 (Fed. Cir. 1998).

95 Damages for patent infringement are those “adequate to compensate for the infringement, but in no event less than a reasonable royalty . . . .” 35 U.S.C. § 284 (2006). The floor of “reasonable royalty” damages means that the plaintiff may be able to recover a large damage award even if he or she does not practice the invention to the same extent as the defendant (or at all). Although Nystrom was a working carpenter, Nystrom III, 580 F.3d at 1282, and likely did not intend to manufacture wood flooring on a large scale, if TREX was found to have infringed, Nystrom’s damages would have been calculated on TREX’s production, not Nystrom’s. The court can increase such damages “up to three times . . . .” Id.
itself as owning a patent infringement claim that it values at $4 million.96 For TREP, an appellate rejection of the plaintiff’s claim construction may provide a cheaper way to end the litigation than trial on the issues remaining after the district court’s disposition.

Despite the parties’ shared desire for immediate review of the Markman ruling, existing law provides few good options. One can hardly characterize the claim construction question as sufficiently divorced from the merits to bring the collateral order doctrine into play. Nor can one find the elements of a denial of injunctive relief in the decision (even though plaintiffs will occasionally include requests for injunctive relief in their infringement complaint and even though an adverse claim construction decision necessarily reduces the practical prospects for securing such relief). Mandamus does not seem appropriate as a way to review the merits of the claim construction order97 nor does it seem possible to characterize the decision as a partial summary judgment of the kind that would bring into play the district court’s power under Rule 54(b) to declare such a judgment final for purposes of permitting execution and appellate review.98 Perhaps the most promising approach would be for the district court to certify, under § 1292(b), that the decision involves a controlling question of law as to which there may be grounds for disagreement and as to which appellate review will speed the ultimate resolution of the dispute.99 In some ways, this seems especially appropriate; claim construction requires the district court to answer an unsettled question of law (as the claims at issue have not been previously construed), and its resolution will clearly move the litigation forward

96 See supra Part II.B10.

97 See Cheney v. U.S. Dist. Court for Dist. of Columbia 542 U.S. 367, 379 (2004) (Mandamus "is a drastic and extraordinary remedy reserved for really extraordinary causes. The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction.") (internal quotation marks, internal citations, and internal modifications omitted).

98 Fed R. Civ. P. 54(b); see also Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 8 (1980) (absent other important reason for granting certification, claim appealed under 54(b) should be separable from remaining claims in that appellate court would not have to decide the same issues more than once even if there were subsequent appeals); Oklahoma Turnpike Authority v. Bruner, 259 F.3d 1236, 1242–43 (10th Cir. 2001) (highlighting importance of separability for 54(b) certification).

99 28 U.S.C. § 1292(b) authorizes such review for the regional circuits, and § 1292(c)(1) authorizes review by the Federal Circuit of appeals authorized under §§1292(a)-(b) if it would ordinarily have jurisdiction over the appeal. See supra note 14.
significantly. The Federal Circuit, however, has discretion over whether or not to permit such an appeal, and “[s]uch appeals are rarely granted.”

Yet despite this lecture on the first principles of finality, the Federal Circuit’s *Nystrom* opinion confirms the viability of an alternative mode of procuring interlocutory review that appears functionally identical to the district court’s approach. In the course of describing how the district court could have taken steps to facilitate appellate review, the *Nystrom* court mentioned dismissal of the invalidity counterclaims. But the surprising feature of the opinion was its apparent suggestion that even a dismissal of the counterclaims *without prejudice* would suffice to create the sort of finality needed to support appellate review. What the appellate court appears to have contemplated was the following process: after the claim construction decision cut the heart out of the plaintiff’s infringement allegation, the district court would enter summary judgment as to those allegations. Instead of staying the pending invalidity counterclaims, the district court would instead dismiss them without prejudice. Such an approach would dispose of all pending matters and, at least in the view of the Federal Circuit, satisfy the final judgment rule. Indeed, following dismissal of the appeal in *Nystrom I*, the parties returned to district court. The court entered the suggested order, dismissing the counterclaims without prejudice, and the case returned to the Federal Circuit for appellate review of the merits of the claim construction issue and the associated grant of summary judgment. The Federal Circuit in *Nystrom II* had no difficulty in concluding that the final judgment rule was satisfied by the dismissal of the counterclaims.

Notwithstanding the Federal Circuit’s approval of this approach to appellate review, one can fairly ask if the without-prejudice dismissal of the counterclaims differs in substance from the stay order that the court treated as non-final in *Nystrom I*. After all, the without-prejudice designation assumes that

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100 *Nystrom I*, 339 F.3d at 1351.

101 *Nystrom I*, 339 F.3d at 1351.

102 For a discussion of the circuit split regarding whether a without-prejudice dismissal provides the finality necessary for immediate review, see *supra* note 63.

103 *See* Nystrom v. Trex Co., Inc. (*Nystrom II*), 424 F.3d 1136, 1141 (Fed. Cir. 2005).

104 *Id.*

105 *Id.*
the dismissal does not operate as an adjudication on the merits to which preclusive effect will attach.\textsuperscript{106} That means that the counterclaims of invalidity remain alive and subject to re-activation through the filing of claims or counterclaims. In particular, if the plaintiff were successful on appeal in \textit{Nystrom II} in securing a reversal of the district court’s adverse claim construction decision and the reinstatement of his infringement case, the defendants would apparently be free to reinstate their invalidity counterclaims. As a practical matter, then, the without-prejudice dismissal operates in much the same way as the stay order. The counterclaims go into hibernation, pending the resolution of the appeal on claim construction, but can return to active litigation depending on the outcome. Indeed, the defendants would apparently be free to re-assert their claims of invalidity even if the plaintiff failed to secure the reversal of the adverse claim construction ruling.\textsuperscript{107}

Despite its curious features, we think the \textit{Nystrom} decision may underscore the importance of party autonomy in determining when to make available interlocutory review. Rather than its analysis of technical finality, we think the key to the \textit{Nystrom} decision lies in the fact that the district court and the parties apparently agreed that it would ultimately advance the resolution of the dispute if they could secure an appellate resolution of the claim construction issue before taking the case to trial. Given the salience of claim construction, the comparatively high cost of patent trials in relation to the cost of patent appeals, and the Federal Circuit’s relatively high rate of appellate reversal, one can predict that parties will often have trouble settling their disputes on the basis of a trial court’s claim construction determination. Recognizing this, the district court judge in \textit{Nystrom} was attempting to work with the parties to resolve a matter he considered important to the ongoing case, but the court of appeals refused to hear the appeal. Our proposal would promote the district court judge's authority by


\textsuperscript{107} See Altvater v. Freeman, 319 U.S. 359, 363 (1943) (counterclaim for declaratory judgment of invalidity survives finding of non-infringement of the original claim). In addition, there would be no issue of the claim of invalidity being time-barred. The main purpose of declaratory relief regarding invalidity “is to allow [someone potentially liable for infringement] to know in advance whether he may legally pursue a particular course of conduct.” Hanes Corp. v. Millard, 531 F.2d 585, 592 (D.C. Cir 1976). Therefore, the ability to get declaratory relief lasts as long as there is the potential for infringement, generally until the patent expires. \textit{See} Erie Technological Products, Inc. v. JFD Electronics Corp., 198 U.S.P.Q. (BNA) 179 (E.D.N.Y. 1978).
allowing him to certify the parties’ request for interlocutory review on a matter that would benefit from immediate appellate review.108

2. Particularity to Facilitate Early Evaluation of Novel Claims

Litigation over novel theories of liability may also produce situations in which the parties jointly prefer an early appellate resolution of a question of law. One can see the logic of a joint desire for appellate review reflected in the Seventh Circuit’s decision in Mitchell v. A & K.109 There, the plaintiff suffered grievous personal injuries at the hands of armed robbers while he was waiting outside the defendant’s warehouse to unload his truck.110 Illinois law clearly imposed a duty on landowners to reasonably guard against known threats posed by the unlawful conduct of third parties.111 But Illinois law had not previously extended that duty to those, like the plaintiff, who were assaulted on a public street adjacent to a private warehouse.112 The case thus turned on whether the duty of the defendant extended to events taking place on public property over which the defendant’s employees exercised a degree of control as part of their warehouse operation.113 As matters developed, the district court granted a motion to dismiss the action for failure to state a claim, and the Seventh Circuit upheld that decision on appeal.114 One puzzle arises from the question why the plaintiff chose to set forth the nature of the truck’s relationship to the warehouse in such detail, detail that virtually invited a motion to dismiss.115 The plaintiff might have survived a round of motions’ practice (at least in those pre-Iqbal days) by simply

108 That district court judges might view appellate courts as a resource to resolve important issues resembles Professor Cooper’s conception that trial judges might come rely on appellate courts in a “mature” judicial system. See supra note 23.

109 573 F.2d 429 (7th Cir. 1978).

110 Id. at 431.

111 Id. at 433 (citing Neering v. Illinois Central R.R. Co., 50 N.E.2d 497 (Ill. 1943)).

112 Id. at 433.

113 Id. at 431, 437.

114 Id. at 431–32, 438.

115 See id. at 431 (complaint detailed “A & K’s practice, custom and habit over a period of several years” of using public thoroughfare as “an extension of the receiving dock area”).
alleging that the truck was parked on premises that the defendant used as a warehouse. Why did the plaintiff choose to plead in detail?

One answer to the puzzle of detailed allegations may lie in the nature of the legal issue that the case presented. To be sure, the parties might dispute the factual question of what amount should be awarded as compensation to the injured trucker. But those sorts of disputes often yield to effective settlement negotiations, particularly after discovery has been taken of treating physicians and other expert witnesses. As long as the legal issue remained open, however, the case would predictably defy ready settlement. If the district court and the defendants were right, and Illinois law recognized no duty, the case had no value at all.116 If the plaintiff was right, by contrast, the verdict might well reach into the millions of dollars; breach of duty and resulting injury seem perfectly straightforward. Initially, one might suppose that the plaintiff would prefer to plead generally with a hope of securing a nuisance settlement (even if the legal claim were unavailing). But the plaintiff might have also preferred to secure an early determination of the legal question, confident that the case would settle for a substantial sum if the court recognized the existence of a duty. Such a desire for a legal determination could explain the detailed allegations in the plaintiff’s complaint, allegations apparently framed to set the stage for an evaluation of the legal issues. The plaintiff (or his lawyers) may have sought to defer their investment in the discovery expenses needed to bring the case to trial until after the appellate court upheld the viability of the legal theory.

Mitchell suggests that a more subtle factor might lend support to the suggested model of agreed-upon appellate review. In a case like Mitchell, just as in the case of Nystrom, the district court judge may well recognize that the parties share an interest in securing interlocutory review at the appellate level. Under current law, the desire to facilitate such review may exert subtle pressure on the district court’s evaluation of the defendant’s motion to dismiss in a close case. Dismissal not only removes the action from the court’s docket, it also provides a final judgment suitable for appellate review by the court with essentially final

116 In such a case, the parties might agree to appellate review of a district court order denying the defendant’s motion to dismiss (despite the fact that the order would be considered a non-final decree). Both parties have an incentive to economize on the costs of litigation. Plaintiffs may not want to spend money to take a case to trial only to have the theory of liability overturned on appeal; better to know the legal viability of the action at an earlier stage. Defendants, similarly, might well prefer to settle the case and avoid the costs of litigation once the federal courts determine that the claim has legal merit. With their shared interest in avoiding litigation costs that might prove unnecessary either way the legal question comes out, both the parties and the federal system might well benefit from interlocutory review. See supra, Part II.B.
authority over the viability of a novel claim.\footnote{Of course, a denial of a motion to dismiss would not appealable until the final judgment has been entered. See Pediatrix Screening, Inc. v. Telechem Intern., Inc., 602 F.3d 541 (3d Cir. 2010).} Our suggested approach would allow the parties (and district courts) to agree to appellate review, thus making it clear that the district court need not dismiss in order to facilitate speedy appellate resolution of the legal question. With the prospect of agreed-upon appellate review, district courts might feel less inclined to ripen close cases through dismissal, thereby removing a possible source of subtle bias in the district court’s decisional process.

We believe that a desire to secure an appellate court evaluation of the merits of a novel legal claim can help to explain a part of the otherwise puzzling tendency of plaintiffs, in the pre-Twombly-Iqbal world, to set forth their claims with greater particularity than the rules would have then required. Many commentators have noted the puzzling persistence of fact-pleading in a setting where the rules required only that the complaint notify the defendant of the nature of the claim.\footnote{See Richard L. Marcus, The Puzzling Persistence of Pleading Practice, 76 Tex. L. Rev. 1749 (1998); see also Christopher M. Fairman, The Myth of Notice Pleading, 45 Ariz. L. Rev. 987 (2003); Thomas E. Willging & Emery G. Lee III, In Their Words: Attorney Views About Costs and Procedures in Federal Civil Litigation 28 (Federal Judicial Center 2010) (collecting quotes from practicing attorneys about their decision not to plead with more specificity than notice pleading would require).} Of course, Iqbal confirms that notice alone will no longer suffice; the plaintiff must plead enough non-conclusory factual information to satisfy a standard of plausibility.\footnote{Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); Richard A. Epstein, Bell Atlantic v. Twombly: How Motions To Dismiss Become (Disguised) Summary Judgments, 25 Wash. U. J. L. & Pol'y 61, 79 (2007) (Twombly applied the same rationale for applying the tend-to-exclude standard for a motion to dismiss that it had applied to summary judgment in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986): “the basic facts alleged in the complaint cannot amount to a credible case of the ultimate fact . . . ").} To the extent the plaintiff in Mitchell sought to hasten a definitive legal ruling, the case allows us to see why particularity may have made sense for plaintiffs even before the Supreme Court found a version of it lurking in Rule 8. If the parties’ joint desire for legal clarification explains a part of particularity phenomenon, it suggests that Twombly-Iqbal may not dramatically
alter the degree of particularity one can expect to find in the complaints of plaintiffs bringing novel claims. Rather, as others have suggested, the new and potentially disruptive feature of *Twombly-Iqbal* may be its introduction of a plausibility standard that goes beyond notice and particularity to require non-conclusory allegations that tend to show some support for the claims.\(^\text{120}\)

3. Settlement Agreements that Provide for Appellate Adjudication

Parties sometimes stipulate that their settlement of a dispute will depend in part on the way an appellate court resolves an issue that arose in the course of litigation. For example, in *John Doe 1 v. Abbott Laboratories, Inc.*,\(^\text{121}\) the defendants appealed from the denial of motions to dismiss and for summary judgment. Prior to seeking interlocutory review, the parties had structured a “high/low” settlement that involved: (1) an initial settlement payment of $10 million by the defendants; (2) an agreement to seek certification of interlocutory review; and (3) a possible additional payment of up to $17.5 million depending on the outcome of the appeal.\(^\text{122}\) Such an agreement helps to confirm that the parties will sometimes agree that the settlement of a dispute can best be facilitated by the appellate resolution of a legal issue on which the district court cannot decisively rule. Such agreements also suggest that the parties’ calculation of settlement ranges can depend on predictions about the likely outcome of appellate litigation.\(^\text{123}\)

High/low agreements have become an accepted feature of practice at the trial level; such agreements typically provide that the amount of the settlement


\(^{121}\) 571 F.3d 930 (9th Cir. 2009).

\(^{122}\) Id. at 932.

\(^{123}\) *See supra* Part IIB.
will depend on the jury’s resolution of the case. The example of *Doe v. Abbott Labs* provides some evidence that these agreements now include appellate contingencies as well. But the use of high/low agreements on appeal has proven controversial; indeed, some appellate courts have refused to assert appellate jurisdiction on the ground that a dispute framed by a high/low agreement does not present a justiciable dispute. While we understand the appellate courts’ concern with the parties’ ability to purchase a judicial precedent, we view appellate high/low agreements as essentially benign and deserving of encouragement in most cases. (We explore the problems of justiciability in Part III below.) Such agreements certainly confirm our intuitive and theoretical perception that the parties consider the cost of appellate review and the likelihood of appellate reversal when evaluating the wisdom of settling the case or taking it to trial. As with the other evidence in this section, appellate high/low agreements tend to confirm our claim that parties often share an interest in interlocutory review and courts often, but not invariably, attempt to make such review available to them.

4. Judicialization: The Shift from Jury to Judicial Resolution

If a variety of real-world scenarios already display features of agreed-upon appellate review, we think that the number of situations in which the parties (and the system) can gain from party-based interlocutory review will likely continue to increase.

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124 In a high/low agreement, plaintiff and defendant agree to set a floor and a ceiling for damages. The jury hears the case, but the contract specifies that the amount changing hands will depend on whether the jury renders a verdict for the plaintiff or defendant. Such an agreement allows a plaintiff to ensure that she can recover at least something from the action, even if the jury returns a defense verdict. On the other hand, the agreement protects the defendant from an especially large damage award, especially one that might exceed liability insurance coverage. *See Malick v. Seaview Lincoln Mercury* 940 A.2d 1221, 1223 (N.J. Super. Ct. App. Div. 2008) (high/low agreement is a contract and subject, therefore, to traditional rules of contract interpretation); *Cunha v. Shapiro*, 837 N.Y.S.2d 160 (N.Y. App. Div. 2007) (treating high/low agreement as settlement); *Roxanne Barton Conlin & Gregory S. Cusimano, 3 Litigating Tort Cases § 33:26; Prescott et al., supra note Error! Bookmark not defined.. Another type of settlement agreement is the Mary Carter agreement, where the plaintiff settles with some of the defendants before trial, but remains in the suit. The agreement requires the plaintiff to reimburse the settling defendants up to a specific amount from plaintiff’s recovery from other (non-settling) defendants. *See Becker v. Tidewater, Inc.*, 586 F.3d 358, 365 n. 3 (5th Cir. 2009); *Booth v. Mary Carter Paint Co.*, 202 So.2d 8 (Fla. Dist. Ct. App. 1967).

125 *See e.g., Gator.com v. L.L. Bean*, 398 F.3d 1125 (9th Cir. 2005). The case is discussed *infra* Part III B.
grow over time. This section documents a trend toward what we call judicialization—the judicial transformation of fact questions (previously sent to the jury) into issues of law for the judge to resolve. We saw one example in the patent field, where the Supreme Court approved the switch to the judicial resolution of issues of claim construction. Others examples of judicialization abound, and with them have come new demands for interlocutory review. Following judicialization, the resolution of important issues often occurs before trial or on appeal rather than in connection with jury deliberations. Decisive resolution of important issues in the pre-trial stage of litigation virtually invites an application for interlocutory review. In addition, and more subtly, judicialization almost invariably alters the degree of deference accorded the district court decision by the appellate court. Rather than deferential review of a jury’s resolution of disputed fact questions, judicialization creates issues of law on which the appellate courts will provide the final word. We suspect the parties will continue to seek readier access to decisive rulings on these issues of law from appellate courts.

**Qualified Immunity**

The Court’s well-known decision in *Harlow v. Fitzgerald* represents a textbook case of judicialization. There, the Court altered the test for qualified immunity in constitutional tort litigation, ending the fact-bound inquiry into the official’s mental state and shifting to an assessment of whether the officer violated “clearly established” legal norms. Under the old approach, disputes over official immunity often necessitated a jury trial to resolve the subjective good faith of the officer as a matter of fact. The *Harlow* Court shifted from a subjective to an objective inquiry, transforming the issue of immunity into a matter of law to facilitate summary judgment. This change in immunity law

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126 See supra note 80 and accompanying text.


129 See id. at 818 (extending immunity to officials so long as they do not violate clearly established federal law). For a critique of the one-size-fits-all standard of qualified immunity, see John C. Jeffries, Jr., Disaggregating Constitutional Torts, 110 YALE L.J. 259 (2000).

130 See Harlow, 475 U.S. at 815–16 (emphasizing the need for an objective standard to facilitate summary adjudication of insubstantial claims).
worked a fundamental alteration in the litigation of constitutional torts. Shortly after *Harlow* came down, the lower federal courts began to insist that the plaintiff furnish allegations detailed enough to support a conclusion that the government official violated clearly established norms.131 Eventually, the Court would confirm this conclusion in *Ashcroft v. Iqbal*, concluding that its plausibility standard applied to all claims, including constitutional tort claims against high government officials.132 One can see the conclusion of this transformative series of decisions in the Court’s description of the issue in *Iqbal*: did the plaintiff plead sufficient factual matter that, if taken as true, “states a claim that [government officials] deprived him of his clearly established constitutional rights.”133 By casting the burden of pleading on the plaintiff, the Court facilitated the use of the Rule 12(b)(6) motion to secure an early determination of the viability of the plaintiff’s legal theory and the plausibility of the claim.

An interesting change in appellate practice accompanied *Harlow’s* judicialization of the qualified immunity standard. In 1985, the Court ruled that government officials could seek interlocutory appellate review of non-final decisions rejecting motions to dismiss on qualified immunity grounds.134 Although such orders were not technically final,135 the Court found in *Mitchell v. Forsyth* that they satisfied the terms of the collateral order doctrine.136 The decision was, to say the least, something of a departure from established doctrine. The collateral order doctrine applies when the district court conclusively resolves an important issue, separate from the merits, and that cannot be effectively

131 See Siegert v. Gilley, 500 U.S. 226 (1991) (collecting examples of lower court decisions that applied a heightened pleading standard to constitutional tort claims). In *Siegert* itself, the plaintiff’s allegations of malice apparently met the standard of Rule 9 of the Federal Rules of Civil Procedure, but the lower court found that a more demanding pleading standard applied to claims seeking to overcome qualified immunity. *Id.* at 232.

132 *Iqbal* therefore requires that the district court judge make the fact-bound decision of whether the plaintiff has “nudged his claims . . . across the line from conceivable to plausible.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007)).

133 *Id.* at 1943.


135 For the classic definition of technical finality, see Caitlin v. United States, 324 U.S. 229 (1945) (defining technical finality as an order that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment).

136 472 U.S. 511 at 530 (1985) (extending government officers a right to interlocutory appellate review of decisions that reject a qualified immunity defense).
reviewed after a final judgment.\textsuperscript{137} Decisions rejecting a qualified immunity defense may well satisfy the conclusive and importance prongs of the analysis, but they do not turn on questions separate from the merits and they do not evade review. After all, following the Court’s refinement of qualified immunity law in \textit{Harlow}, the existence of the immunity depends almost entirely on the merits of the plaintiff’s constitutional claim. Only claims to vindicate clearly established rights may proceed to judgment. Immunity issues thus overlap with the merits to a substantial degree. They also present questions of law that an appellate court can review after a final judgment. The Court worked around these doctrinal rough patches by re-conceptualizing qualified immunity for purposes of review in the federal system as a right not to stand trial;\textsuperscript{138} so viewed, the right was portrayed as one that could not be effectively vindicated without review of the immunity issue during the pre-trial phase of the litigation.\textsuperscript{139}

\textit{Mitchell}’s provision for interlocutory review provides an interesting window on our proposal. Resolution of the qualified immunity issue will play a central role in the prospects for settlement. In such cases, especially where anticipated trial costs are high, the plaintiff and the defendant might have a shared interest in securing an early determination of the legal sufficiency of the plaintiff’s claim; we can thus imagine agreed-upon interlocutory review had the Court not made such review available as of right for government officials. We might also predict that the routine availability of interlocutory review will lead to the assertion of some relatively frivolous appeals by government officials who wish to delay the trial. One might see some evidence of the Court’s impatience with such appeals in \textit{Johnson v. Jones}, where the Court unanimously cut back on the scope of collateral order review for relatively fact-bound qualified immunity

\textsuperscript{137} \textit{Id.} at 546.

\textsuperscript{138} One might assume, based on this conception of qualified immunity as an immunity from trial, that the state courts would owe a similar obligation to provide interlocutory review of rejected qualified immunity claims. But the Court did not agree. \textit{See} \textit{Johnson v. Frankell}, 520 U.S. 911, 916–17 (1997) (rejecting the argument that state courts must make available interlocutory review of rejected claims of qualified immunity in the context of a § 1983 claim against state officials). Because the federal government removes \textit{Bivens} actions to federal court as a matter of course, the state courts would predictably have little opportunity to evaluate the need for interlocutory review of a rejected qualified immunity defense by a federal officer. \textit{See} John F. Preis, \textit{Alternative State Remedies in Constitutional Torts}, 40 CONN. L. REV. 723, 762 n.199 (2008).

\textsuperscript{139} \textit{See} \textit{Mitchell}, 472 U.S. at 525–26 (qualified immunity doctrine is meant to protect government officials from the “costs of trial or the burdens of broad-reaching discovery in cases where the legal norms the officials are alleged to have violated were not clearly established at the time.”) (internal quotation marks omitted).
Finally, one might sensibly predict that the prospects for the settlement of *Bivens* actions will improve sharply following a decision definitively rejecting an officer’s immunity defense. A recent study suggests, in fact, that plaintiffs secure a higher settlement rate in *Bivens* litigation than has been previously supposed; even *Iqbal*’s claims were reportedly settled after the plaintiff amended his complaint on remand to satisfy the Court’s more demanding pleading standard.

**Reliability of Expert Testimony**

Two Supreme Court opinions shifted, at least partially, the responsibility for determining the credibility of testimony from the jury to the judge. The 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* held that the district court judge had a gatekeeping responsibility to determine whether scientific testimony of expert witnesses was reliable and relevant enough to be put in front of a jury. In doing so, the Court “recognize[d] that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations.” In *Kumho Tire Co., Ltd. v. Carmichael*, decided in 1999, the Court expanded this gatekeeping role to include not just scientific testimony, but also to any testimony requiring “technical” or “other specialized” knowledge. Of course, the prerequisite for

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140 See 515 U.S. 304 (1995). Justice Breyer wrote for a unanimous Court in concluding that an immediate appeal was not available from an order denying an official’s immunity-based summary judgment motion. *Id.* at 313. Unlike the order in *Mitchell*, which involved an interpretation of law and its application to an agreed-upon set of facts, the order in *Johnson* was based on a trial judge’s finding that there was sufficient factual matter in the summary judgment record to create a genuine issue for the jury to resolve. *Id.* To such an order, the Court found that the collateral review doctrine did not apply: it was too fact-bound (unlike the legal question addressed in *Mitchell v. Forsyth*); it was not really separate from the merits in the sense that the same sort of issues could well arise after the trial; and it presented issues of factual detail that the district court was better suited to address than the appellate court. *Id.* at 314–15.


142 E-mail from Alexander Reinert, Attorney for Javaid Iqbal to James Pfander (August 17, 2010) (on file with author).


144 *Id.* at 597.

the *Daubert/Kumho* evaluation—does the testimony involve scientific, technical, or other specialized knowledge—is itself necessarily a question for the judge. *Daubert* and *Kumho* created a new pre-trial battleground where litigants attempt to knock out each other’s experts, not through the traditional tools of cross-examination, but before they appear before a jury.146

As with other instances of judicialization, the *Daubert* test for expert witnesses creates situations in which the parties might sensibly demand interlocutory review, as the Seventh Circuit decision in *Fuesting v. Zimmer* illustrates.147 In suing for personal injuries, the plaintiff (Fuesting) contended that the manufacturer of his prosthetic knee (Zimmer)148 had defectively designed the sterilization process of the implant.149 The key witness in support of Fuesting was Dr. Pugh, an expert who testified that Zimmer’s faulty sterilization procedures caused the implant to fail.150 Before trial, Zimmer attempted to have Dr. Pugh excluded as an expert witness under Federal Rule of Evidence 702 and *Daubert*.151 The district court denied the motion in limine and the trial then began, resulting in a jury finding for Fuesting.152

The Seventh Circuit reversed the *Daubert* ruling of the district court.153 Conducting a de novo review of the district court’s determination, the court found that the *Daubert* inquiry was inadequate because although Dr. Pugh had the requisite credentials, his methodology did not have the necessary indicia of


147 421 F.3d 528 (7th Cir. 2005) (*Fuesting I*); 2010 WL 271728 (7th Cir. 2010) (*Fuesting III*). Like *Nystrom*, the case appeared more than once in the court of appeals. *Id.* Even prior to *Daubert*, commentators noted that using tools such as ADR to resolve scientific issues might facilitate settlement. See Deborah R. Hensler, *Science in the Court: Is There a Role for Alternative Dispute Resolution*, 54 LAW & CONTEMP. PROBS. 171, 193 (1991) (finding there may be a role for judges obtaining agreement to innovate regarding ADR solutions to scientific issues).

148 *Fuesting I*, 421 F.3d at 530.

149 *Id.*

150 *Id.*

151 *Id.* at 532.

152 *Id.*

153 *Id.* at 537.
reliability. The court therefore remanded for a new trial. At the second trial, Fuesting put forth a new expert, Dr. Rose. This time, the district court excluded the testimony of Dr. Rose. Without the testimony of Dr. Rose, Fuesting was unable to show causation, and the district court granted summary judgment in favor of the defendant. On appeal, the Seventh Circuit agreed that Dr. Rose’s testimony was properly excluded and affirmed the decision of the district court. Reflecting its perception that the admissibility of expert testimony was now a matter for the court to resolve, the Seventh Circuit conducted its own independent analysis of whether Dr. Rose’s testimony met the Daubert test.

The Seventh Circuit’s handling of Fuesting nicely illustrates the way judicialization can increase the demand for interlocutory review. Like the novel legal theory in Mitchell v. A & K, novel expert theories of causation may be decisive in complex products liability and medical malpractice cases. If the case goes to the jury, acceptance of the expert’s testimony provides a sound basis for liability. If Daubert forecloses admission of the expert’s testimony, by contrast, and no other expert can be identified, then the plaintiff cannot get to the jury. Immediate review of the initial (non-final) decision to allow Dr. Pugh to testify could have saved the parties the cost of an expensive trial and could have highlighted the need for the plaintiff to identify another expert. Depending on the prospects for locating an expert to fill Dr. Pugh’s shoes, the parties might have consented to such interlocutory review, knowing that the Daubert issue would

154 Id. at 535.

155 The court initially remanded with instructions to direct a verdict for the defendant. Id. at 537–38. On rehearing, the court vacated the part of the opinion directing the district court to enter judgment for the defendant, finding that the proper remedy, based on Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 546 U.S. 394 (2006), was to grant a new trial. Fuesting v. Zimmer, Inc., 448 F.3d 936, 937 (7th Cir. 2006) (Fuesting II).

156 Fuesting III, 2010 WL 271728 at *2.

157 Id.

158 Id.

159 Id. at *5.

160 Id. at *3–4.
remain a threat to any plaintiff’s jury verdict.\textsuperscript{161} We cannot say that the parties would have agreed to such review in this case, given our uncertainty about the parties’ actual valuations of the case and their perception of the likelihood of appellate reversal. But we can easily imagine that \textit{Daubert} issues, like those in \textit{Fuesting}, could give rise to situations in which agreed upon appellate review would make sense to both parties.

Other examples of judicialization abound. We can see evidence of similar trends in such far-flung fields of law as antitrust law,\textsuperscript{162} patent litigation,\textsuperscript{163} and elsewhere.\textsuperscript{164} Even where the federal courts have made no change in the balance

\textsuperscript{161} Of course, one might argue that interlocutory review could present problems of piecemeal review to the extent it allowed the plaintiff to put forth a succession of witnesses (or methodologies) until it found one the appellate court would accept. For a variety of reasons, we do not envision a problem of serial appeals. Neither the plaintiff nor the defendant has any incentive to lead with weak witnesses; rather, they will tend to offer their strongest witness first. (To the extent that a party has several equally strong witnesses, they will often present them as a group, thus enabling the district court to evaluate all the witnesses in a single proceeding.) That may well have been the case in \textit{Fuesting}; the plaintiff apparently hoped that Dr. Pugh, alone, could carry the plaintiff’s burden on causation and only proffered the testimony of Dr. Rose after Pugh was rejected. In any case, the parade-of-witness problem arises only if the plaintiff perceives the defendant’s challenge to any particular witness as posing a serious risk of appellate reversal. As with other examples of agreed-upon appellate review, such review of \textit{Daubert} issues will likely target those that most clearly warrant review. In any case, the requirement that both the parties and the district court agree should limit the ability of one party (or even both parties) to game the system.

\textsuperscript{162} Because antitrust law limits what inferences can be drawn from ambiguous evidence, the determination of summary judgment motions can be very fact bound. The judge must, therefore, compare the reasonableness of the alleged conduct to that of independent action by the defendants. See Matsushita Electrical Industrial Co. v. Zenith Radio Corporation, 475 U.S. 574, 587 (1986) (requiring the Court, in determining whether there was a genuine issue of material fact “to consider the nature of the alleged conspiracy and the practical obstacles to its implementation.”).

\textsuperscript{163} While it is not yet clear, the Supreme Court’s holding in \textit{KSR Int'l, Co. v. Teleflex, Inc.}, may be an indication that the question of obviousness, including perhaps the factual underpinnings, is one for the judge, and not the jury. See 550 U.S. 398, 427 (2007) (reiterating that “[t]he ultimate judgment of obviousness is a legal determination”); see also Meng Ouyang, Note: \textit{The Procedural Impact of KSR on Patent Litigation}, 6 Buff. Intell. Prop. L.J. 158, 159–62 (2009) (citing John F. Duffy, KSR v. Teleflex: Predictable Reform of Patent Substance and Procedure in the Judiciary, 106 MICH. L. REV. FIRST IMPRESSIONS 34, 37 (2007), http://www.michiganlawreview.org/firstimpressions/vol106/duffy.pdf as believing that KSR moved the question of obviousness from a jury to a judge question, and Judge Matthew Kennelly as believing that it had not).

\textsuperscript{164} For example, the Seventh Circuit found that because the controlling Illinois state law treated the question of piercing the corporate veil as one of equity, it was to be determined by a judge and
between judge and jury, the growth of federal statutory law has tended to provide a more detailed legal framework within which fact-finders must operate in resolving issues of federal liability.165 With the growth of statutes and the legal questions they inevitably pose comes a corresponding demand for appellate review, as parties seek the answers from the only body that can finally resolve the issue. Our proposal attempts to address this demand for review by empowering the parties and the district court to make it available when they all agree that it would help resolve the case.

III. PREDICTABLE CONCERNS WITH PARTY-DRIVEN APPELLATE REVIEW

Despite our perception that both the parties and the system have much to gain from agreed-upon interlocutory review, we can imagine objections to making such review more readily available. We address those objections in this part of the article. We first tackle a set of concerns that may attend any proposed expansion of interlocutory review, concerns driven by the policies underlying the final judgment rule. We next consider the justiciability concerns that might appear to arise from the fact that both parties have agreed to seek review. We show that the fact of agreement alone does not create a feigned case problem under Article III. Finally, we consider two possible concerns that might arise from what we will call the likely incidence of such agreed-upon review. Some may oppose the proposal on the ground that it will burden the appellate courts with too many cases; others on the ground that the proposal has no practical value because the parties will too rarely agree to interlocutory review. We say to both groups: let’s give the proposal a trial run and see what happens. The possible need for ongoing evaluation suggests that there might be an advantage in adopting the proposed rule through the rules advisory process. The Judicial Conference Committee on Civil Rules—or the newly formed joint Civil/Appellate Subcommittee166—can provide ongoing review and oversight of new rules of interlocutory review, adjusting course in light of experience.

not a jury. See International Financial Services Corp. v. Chromas Technologies Canada, Inc., 356 F.3d 731 (7th Cir. 2004).


166 See Report of Advisory Committee on Appellate Rules, May 9, 2009, at 7 (noting formation of the subcommittee, and including on its list of topics to consider the manufactured finality doctrine).


A. Erosion of the Final Judgment Rule

One can question our suggested reliance on party agreement to identify issues for interlocutory review on the familiar basis that it would undermine the final judgment rule. Although this argument applies to any proposed expansion of interlocutory review, it deserves serious consideration. In evaluating the possible concern with erosion, we note that scholars have long taken the view that the final judgment rule should operate less as an absolute prohibition and more as a presumptive guidepost. Thus, a leading casebook explains that the goal has been to “identify those trial rulings that should be eligible for an immediate appeal rather than have their appeal postponed until a final judgment disposes of the entire dispute.”167 In this section, we will briefly sketch the elements of the final judgment rule and explain why our proposal will yield appeals that do not offend the rule.

The classic justifications for the final judgment rule have been to avoid the premature, fragmentary, and repetitive appeal of matters first resolved at the trial court level.168 If we break down these elements, we can see a number of considerations at work. As for the concern with prematurity, appellate courts rightly expect that some appeals might be avoided or obviated if the final judgment rule were applied.169 Thus, to return to our example of the non-final district court rejection of a proffered statute of limitations defense, some defendants might win on the merits at trial, thus avoiding liability and obviating the need for appellate resolution of the limitations issue. As for the concern with fragmentation, appellate courts often feel that they can better address the fundamental issues in a case if they see the issues against the backdrop of a full


168 See id. at 49.

169 The possibility that an issue might be obviated by further proceedings at the trial court level has played a somewhat inconsistent role in Supreme Court decisions cutting back on the final judgment rule. Compare Radio Station WOW, Inc. et al. v. Johnson, 326 U.S. 120, 127 (1945) (allowing review of a non-final state court decision on the ground that further proceedings could not obviate the federal question) with North Dakota State Board v. Snyder’s Drug Stores, Inc., 414 U.S. 156, 163–64 (1973) (emphasizing that further proceedings might obviate the federal question as a factor supporting a finding of finality) and Construction Laborers’ Union v. Curry, 371 U.S. 542, 549–551 (1963) (noting that the union might, in theory, prevail in a state court trial but concluding that this prospect of obviation should not prevent immediate review of the state court’s rejection of the union’s claim that federal labor law foreclosed state court authority to adjudicate a labor disputes).
record; fragmentary appeals may not bring into view all of the issues that might properly influence an appellate decision. As for the concern with repetition, appellate courts rightly resist interlocutory review of issues that could return to the appellate docket later in the form of an appeal from a final judgment. The Supreme Court’s decision to curtail interlocutory review of fact-bound issues of qualified immunity was based in good measure on concerns with the prospect of repetitive review.

We do not believe that agreed-upon interlocutory review will offend these elemental features of the final judgment rule. Consider first the problem of obviation. One can certainly imagine situations in which defendants will succeed at trial, thus obviating any need for appellate resolution of legal defenses to liability. But such defense verdicts on liability will likely occur in situations in which both parties view the case on liability as something of a toss-up. In such cases, the prospect of interlocutory appellate review does not create prospects for settlement where they did not previously exist; indeed, interlocutory review may reduce the expected settlement value of the case from the plaintiff’s perspective. This comports with our intuition that plaintiffs in doubtful cases

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170 For examples of the somewhat formulaic invocation of the importance of a full record, see In re Lorillard Tobacco Co., 370 F.3d 982, 988 (9th Cir. 2004) (“Without a full record and without the benefit of an adversarial proceeding, the appellate court would be in a particularly poor position to pass on the propriety of the district court’s exercise of discretion.”); Gerardi v. Pelullo, 16 F.3d 1363, 1372 (3d Cir. 1994) (“Even though the district court decided the matter on a motion for summary judgment, we cannot say that the development of a full factual record at a trial on the action on the notes might not be of assistance to us in deciding the issues raised on this appeal.”).

171 The Court’s collateral order doctrine was framed with this problem in mind. Thus, in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949), the Court emphasized that the question at issue—the plaintiff’s obligation under state law to post a bond before pursuing a shareholder’s derivative action—was separate from the merits and could not be effectively reviewed after the entry of judgment at trial. The requirement that collateral orders must remain separate from the merits and evade review after final judgment has remained part of the doctrine. See, e.g., Van Cauwenberghe v. Baird, 486 U.S. 517, 527 (1988) (denial of motion to dismiss on grounds of forum non conveniens was not sufficiently separate from the merits to warrant immediate review under collateral order doctrine).

172 See Johnson v. Jones, 515 U.S. 304, 316–17 (1995) (refusing to allow collateral order review of a district court decision denying the defendant’s motion for summary judgment on qualified immunity grounds; reasoning that the fact-bound nature of the summary judgment motion would mean that the same issue and facts could well arise in the wake of a final judgment).

173 In Part II.B, we considered the settlement prospects in a case where the plaintiff and defendant both assessed the likelihood of a plaintiff’s verdict at 90% if a pre-trial ruling stood, but assigned different values (80% and 50% respectively) to whether the ruling would be upheld on appeal. Under those assumptions, we found that the parties would likely agree to interlocutory review to
on liability will tend to press forward to a jury verdict in an effort to secure a settlement offer from risk averse defendants who might agree to settle to cap their potential liability and reduce the threat of a runaway jury. Thus, both our intuition and our simple model predict that the parties would be unlikely to agree to interlocutory appellate review when they anticipate a strong likelihood of a defense verdict that would obviate the need for appellate review.

Just as we do not anticipate that the parties will agree to interlocutory review when the case affords a realistic prospect that further proceedings will obviate the need for review, we do not view fragmentation and repetition as likely stumbling blocks to our proposal. Parties will tend to agree on the need for interlocutory review only where the case turns on a relatively clear-cut issue on which the appellate court has the final say. The more clear-cut the legal question, the less it will likely benefit from a more fully developed record. Moreover, clear-cut legal questions do not pose a threat of repetition; once settled, the legal disposition will control the remainder of the litigation. In assessing an expert’s qualifications (as in our hypothetical case) or a novel claim for relief (as in the case of Mitchell v. A& K), the appellate court will resolve the matter once and for all (subject to the possibility of Supreme Court review). Whatever conclusion the jury reaches as to liability (assuming the case returns there for trial disposition), we would not ordinarily expect the appellate court to revisit legal conclusions reached in the course of interlocutory review.

enable them to settle the case without proceeding to trial. When we assume, by contrast, that both parties reckon the plaintiff’s success at trial at only 50% if the ruling stands and 20% if it is reversed, the introduction of interlocutory review has a different effect. Under the final judgment rule there would be a settlement range as plaintiff will accept anything over $28 \[(.8 \times .5 \times 100) - 10 - 2 = 28\]$ and defendant will pay up to $37 \[(.5 \times .5 \times 100) + 10 + 2 = 37\]$. Immediate review of the ruling might put the plaintiff in a worse bargaining position. While the settlement range would go up if the court of appeals upholds the ruling (plaintiff would accept anything over $40 \[(.5 \times 100) - 10 = 38\]$ and defendant will pay up to $60 \[(.5 \times 100) + 10 = 60\]$), it would go down if the ruling is reversed. The settlement range after a reversal would be between $10 \[(.2 \times 100) - 10 = 10\]$ and $30 \[(.2 \times 100) + 10 = 30\]$. A well advised plaintiff would either reject interlocutory review in this situation, or consent to interlocutory review only as a part of a pre-appeal settlement to hedge against the risk of losing the appeal.

174 See supra Part II.B.

175 573 F.2d 429 (7th Cir. 1978). See supra Part II.C.2.

176 To be sure, the Nystrom case illustrates the possibility that appellate court resolution of some fact-bound questions, such as the claim construction decision on which the parties sought appellate review, may produce some fragmentation and repetition. That case has made at least
B. Feigned Case Problems Under Article III

Among the many other limits it imposes on the exercise of judicial power, Article III forbids the federal courts from hearing feigned or collusive cases. As a consequence, the federal courts may not proclaim the law except in cases of “honest and actual antagonistic assertion of rights.” The requirement of adversariness might appear to pose an Article III barrier to our proposal. After all, we propose to allow the parties to procure an appellate court’s resolution of a legal question by agreeing with one another that such review would be mutually beneficial. Some courts might take the view that the parties’ agreement as to the need for appellate review violates the prohibition against feigned or collusive cases and thus presents a jurisdictional bar to the exercise of appellate review. In cases where the parties enter into settlement agreements, conditionally resolving their dispute subject to the appellate court’s resolution of an outstanding issue, justiciability issues might appear especially acute.

The Ninth Circuit’s decision in *Gator.com v. L.L. Bean* illustrates the concern. In a cease-and-desist letter, clothing manufacturer L.L. Bean three trips to the Federal Circuit already. But these extra trips are likely due to the unavailability of interlocutory review on the claim construction. The first appeal was dismissed because it improperly attempted to get interlocutory review of the initial claim construction. *Nystrom I*, 339 F.3d 1347 (Fed. Cir. 2003). The second, addressing the claim construction on the merits, reversed on the construction of one of the claim terms. *Nystrom II*, 424 F.3d 1136, 1146–48 (Fed. Cir. 2005). While this construction made clear that Nystrom could not win under a theory that TREX had literally infringed, he still attempted to pursue the case under the theory that TREX had infringed under the “doctrine of equivalents.” The district court ruled, however, that because Nystrom’s had stipulated to non-infringement, he had waived his doctrine of equivalents argument. *Nystrom III*, 580 F.3d 1281, 1284 (Fed. Cir. 2009). This led to the third appeal, where the Federal Circuit affirmed the district court’s ruling that the doctrine of equivalents argument had been waived. Had Nystrom been working under our rule, however, that because Nystrom’s had stipulated to non-infringement, he had waived his doctrine of equivalents argument.


398 F.3d 1125 (9th Cir. 2005).
demanded that Gator.com stop interfering with Bean’s website by opening pop-up advertisements for competitor Eddie Bauer.\textsuperscript{180} In response to Gator’s action for declaratory relief, Bean moved to dismiss on the ground that the federal district court in northern California lacked personal jurisdiction over it.\textsuperscript{181} After the district court granted the motion, Gator sought review.\textsuperscript{182} A panel of the Ninth Circuit reversed, concluding that Bean was subject to both general and specific jurisdiction in California.\textsuperscript{183} After en banc review was granted and the case was fully briefed and argued, the parties informed the court that they had reached a settlement of the underlying litigation.\textsuperscript{184} Instead of asking the court to dismiss the appeal, the parties specifically requested that the court provide a ruling on the personal jurisdiction issue.\textsuperscript{185} The settlement provided for a winding down of Gator’s practices and a payment to compensate Bean; it also provided for Gator to pay an additional $10,000 if the appellate court found that the district court lacked personal jurisdiction over Bean.\textsuperscript{186} The Ninth Circuit found that the settlement mooted the controversy, and therefore dismissed the appeal for lack of jurisdiction.\textsuperscript{187} The ruling might appear to cast some doubt on the viability of high/low settlement agreements that turn on the appellate court’s resolution of a disputed legal issue.\textsuperscript{188}

\textsuperscript{180} Id. at 1127.

\textsuperscript{181} Id. at 1127–28.

\textsuperscript{182} Id.

\textsuperscript{183} Id. at 1134 (W. Fletcher, J. dissenting).

\textsuperscript{184} Id. at 1128 (majority opinion).

\textsuperscript{185} Id.

\textsuperscript{186} Id.

\textsuperscript{187} Id. at 1132.

\textsuperscript{188} Subsequent decisions treat the Gator.com dismissal as reflecting the Ninth Circuit’s conclusion that the personal jurisdiction issue did not involve the merits of the case but was merely a side issue. See John Doe 1 v. Abbott Laboratories, Inc., 571 F.3d 930, 933 (9th Cir. 2009) (describing Gator.com as a case in which a settlement of the merits of the declaratory judgment action mooted the case, leaving only the “side issue” of personal jurisdiction). While this gloss helps narrow the reach of the doctrine, the Gator.com decision nonetheless threatens the viability of contingent appellate settlement agreements, at least to the extent that the issue the parties wish to press on appeal can be described as collateral to the merits. Many threshold procedural motions, such as motions to transfer or dismiss for improper venue or jurisdiction, as well as many dispositive legal
While the Ninth Circuit decision may appear to draw some support from recent developments in vacatur practice following a finding of mootness, we do not believe the analogy holds and we question the mootness conclusion in *Gator.com*. Findings of mootness on appeal in the federal system have long given rise to the practice of remanding the action with a directive that the lower court vacate its prior judgment. Relying on this practice, institutional litigants began to settle cases on appeal in an effort to moot them and procure the vacatur of an opinion below that the litigant viewed as antithetical to its institutional interests. The Court rejected this practice of erasing judgments through settlement, ruling in *United States Bancorp v. Bonner Mall* that mootness by way of settlement does not typically “justify vacatur of a judgment under review.” Underlying the Court’s decision was the perception that parties should not be allowed to purchase the negation of precedents they dislike through the settlement process. To the extent that the Ninth Circuit regarded Bean as attempting to purchase a favorable precedent, one can understand the court as having attempted to prevent gamesmanship comparable to that involved in *United States Bancorp*.

Ultimately, however, we believe that the settlement practice criticized in *United States Bancorp* differs fundamentally from that at issue in *Gator.com*. To see the difference, consider the position of the parties at the time they negotiate their settlements. In the *United States Bancorp* setting, the parties negotiate a settlement for the purpose of procuring the vacatur of a decision rendered in the context of an adversary proceeding. They act, in short, to undo the binding quality of a judicial decision that they have come to regard as inconvenient. In the *Gator.com* setting, by contrast, the parties act not to undo an existing precedent but to secure the appellate court’s resolution of a disputed issue of law defenses, such as a limitations defense, might be characterized as a side issue to the merits. As a result, the *Gator.com* restriction poses a threat to the effective implementation of agreed-upon interlocutory review, at least when it occurs in the context of a contingent appellate settlement agreement.

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191 See United States Bancorp, 340 U.S. at 26 (“Petitioner's voluntary forfeiture of review constitutes a failure of equity that makes the burden [to show entitlement to the extraordinary remedy of vacatur] decisive, whatever respondent's share in the mooting of the case might have been.”).
about which they have long disagreed. They can argue to the court but they
cannot control the contours of the ultimate decision. The threat underlying the
United States Bancorp decision, that parties might settle their way out from under
the precedential effect of federal decrees, thus seems entirely absent from the
Gator.com setting where the parties continue to press for a binding appellate
resolution that will control both the resolution of their own dispute and provide a
possible precedent for future disputes.

Instead of drawing an analogy to the United States Bancorp setting, we
think that the justiciability issues in Gator.com can be more aptly analogized to
the declaratory judgment action. In many declaratory judgment proceedings,
the parties recognize that they have a genuine dispute about a question of law that
will require judicial intervention. For example, an insurance company might
refuse to honor its contractual duty to defend and indemnify after concluding that
its insurance contract has lapsed. Both the company and the insured might
recognize the existence of an open question under the terms of the particular
insurance contract. They might further recognize that they cannot resolve the
issue without the intervention of a neutral decision maker. They might agree to
arbitrate their dispute or to initiate a declaratory judgment action to clarify the
contract’s applicability. Both parties might recognize the need for judicial
intervention, and might agree to secure it, but that joint interest in settlement of
the dispute would not make the case a feigned proceeding. So long as they
genuinely contest the contractual issue, and have adequate incentives to do so,

192 The Federal Declaratory Judgment Act allows the federal courts to issue declaratory judgments
in cases of “actual controversy.” 28 U.S.C. § 2201. At one time, the federal courts appeared
reluctant to entertain declaratory judgment proceedings as a result of concerns with their
justiciability under Article III. For an account, see FALLON ET AL., supra note 177, at 56. But the
Court promptly upheld the act’s constitutionality as applied to a fairly concrete dispute over the

193 See 14 STEVEN PLITT, JOSHUA D ROGERS, DANIEL MALDONADO, LEE R RUSS & THOMAS F
SEGALLA, COUCH ON INSURANCE § 202:3 (3d ed. 1997) (“In case of doubt or dispute as to whether
there is a duty to defend, based on dispute over whether an insurance policy affords coverage for
the conduct alleged in the complaint against the insured, a declaratory judgment action or motion
may be brought to make the determination.”); cf. Travelers Indem. Co. v. Bowling Green
Professional Associates, PLC, 495 F.3d 266, 268 (6th Cir. 2007) (declaratory judgment action by
general liability insurance provider against out-patient drug treatment facility contesting duty to
defend claim by estates of patient and another third-party who perished in car accident caused by
patient after he left treatment center after receiving methadone treatment).

194 See Travelers, 495 F.3d at 268.
their agreement as to the need for a legal resolution should not bar the federal courts from intervening.\textsuperscript{195}

Parties who agree on the need for appellate review occupy much the same position toward one another as litigants who agree on the need for a declaratory judgment proceeding. That is, the parties continue to dispute the issue of law they wish to present to the appellate court, but agree on the need for its resolution. Our proposal would, in effect, authorize the parties to seek a declaratory judgment from the appellate court upon agreement that the appellate resolution would advance the resolution of their dispute. So long as the parties have an adequate financial incentive to pursue their opposing views of the issue on appeal, continued litigation at the appellate court level does not appear to threaten the requirement of adversary presentation. Indeed, the Supreme Court has twice upheld the justiciability of disputes in the wake of the parties’ adoption of contingent appellate settlement agreements.\textsuperscript{196} The entry into such settlements did not moot the cases on appeal, in the Court’s view, because the amount of money changing hands between the parties was structured to turn on the Court’s resolution of a disputed legal question.\textsuperscript{197} District courts, under our proposal, would have authority to evaluate the terms of any contingent appellate settlement agreement and satisfy themselves as to the existence of that degree of adversity

\textsuperscript{195} Cf. id. at 271 (although neither party raised jurisdictional issues, the court raised the issue sua sponte and found that the exercise of jurisdiction over the declaratory judgment action was an abuse of discretion). While the court found that the resolution of this declaratory judgment action would not settle the controversy or help to clarify the legal relationships between the parties, this may be a dubious determination. See id. Once the insurance provider clarified its duty to defend the insured, it could then enter into settlement negotiations with the third-party estates. Until it was clear, however, that the insurance company had any duty to defend, those settlement negotiations would be impossible.

\textsuperscript{196} See Nixon v. Fitzgerald, 457 U.S. 731 (1982) (confirming justiciability of immunity issue on appeal, notwithstanding settlement agreement under which Nixon would pay $142,000 if absolutely immune from suit and $170,000 if only qualifiedly immune); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) (upholding the justiciability of a class action appeal, despite a settlement agreement that provided that the plaintiffs would receive either $400 apiece, or nothing at all, depending on the outcome of the appeal).

\textsuperscript{197} In Nixon, the former President paid Fitzgerald $142,000, in exchange for which, Fitzgerald agreed to accept liquidated damages of another $28,000 if the Supreme Court found that President Nixon was not entitled to absolute immunity. See Nixon, 457 U.S. at 743–44. The Court found that both parties still had “a considerable financial stake in the resolution of the question presented in [the] Court” and therefore the case was not moot. Id. at 744. Similarly, in Havens, the Court found that an agreement liquidating damages in case of success on appeal did not moot the claims. See Havens Realty, 455 U.S. at 371.
needed for further litigation under Article III. Appellate courts could also inquire into the situation if doubts arose as to the existence of adversity sufficient to sustain their appellate jurisdiction.

C. The Incidence Problem

We expect that uncertainty about the incidence of agreed-upon interlocutory review will lead to questions about our proposal. (By incidence, we mean to refer to the frequency with which the parties and district courts will approve interlocutory appellate review.) Without concrete data on the expected incidence of party-driven review, we can offer only our best guess that our proposal will do more good than harm. Some might point to the lack of incidence data in arguing that party-agreements will inundate the appellate courts with a new collection of appeals, perhaps on mundane or routine questions, and will siphon away scarce appellate resources from more pressing matters. Others might use the lack of incidence data to express the opposite concern: that the parties will all too rarely agree to appellate review, thus making the proposal more of an academic exercise than a practical tool for the resolution of disputes. We acknowledge the concern; one of the reasons we labeled this Article a preliminary analysis was to capture a measure of our own uncertainty and to invite more scholarship.

We can nonetheless offer some (preliminary) comments on the incidence problem, focusing first on the threat to appellate dockets. Both our model and our assessment of such interlocutory appeals as that in \textit{Nystrom} give us some confidence that the parties will not burden the appellate courts with a flood of appeals on matters that would otherwise work themselves out at the trial stage of the process. Economic interests will tend to encourage the parties to agree on interlocutory review of those dispositive legal issues that they expect to survive (and potentially threaten) the lower court’s resolution of liability issues in the case. Precisely because the parties anticipate that those dispositive issues will survive for appellate adjudication, they will occasionally have incentives to get them addressed sooner rather than later. As a consequence, we would expect substantial overlap between the issues that the parties identify for interlocutory review and those that they view as likely candidates for review in the wake of a final judgment.\textsuperscript{198} It thus seems likely that our proposal will not alter the mix of issues brought to the appellate courts so much as the timing of appellate court review. In \textit{Nystrom}, we observe, the appellate court agreed to make interlocutory

\textsuperscript{198}As discussed above, in high-stakes litigation, the likelihood of appeal is great, and therefore the question is not about whether to appeal, but when. \textit{See supra} note 67 and accompanying text.
review available of claim construction issues that were likely to have survived any disposition of the case at the trial level.\textsuperscript{199}

If we can rely on the parties’ self-interest to identify serious issues for interlocutory appellate review that are likely to require appellate resolution in any case, can we also predict that they will agree with sufficient frequency to justify the adoption of a new rule? Here, we point first to the fact of increasing judicialization, a trend that suggests that the number of dispositive legal issues will continue to grow and produce greater need for interlocutory review. We also observe that the relative costs of trial and appellate litigation tend to create conditions favorable to growing demand for interlocutory review. At the trial level, the growing cost of e-discovery, increased reliance on expert witnesses, and other factors have tended to drive up the cost of obtaining a jury’s resolution on liability.\textsuperscript{200} At the appellate level, by contrast, the trend runs in the opposite direction; such technological innovations as computerized legal research and word processing have reduced the relative cost of appellate practice over the past generation.\textsuperscript{201} Not surprisingly, then, we find a strong demand for interlocutory review in precisely those fields of litigation that are characterized by relatively high trial practice costs and relatively inexpensive appellate review. Patent holders and other intellectual property litigants, in particular, have pressed

\textsuperscript{199} If there are many claims at issue, and even one construction appears to disfavor the eventual loser at trial, an appeal seems likely. As seen anecdotally, through the case of \textit{Fuesting III}, 2010 WL 271728 (7th Cir. 2010), similar issues may arise in the area of qualification of expert testimony. \textit{See supra} notes 157170 and accompanying text.

\textsuperscript{200} On e-discovery, see John Bace, Cost of E-Discovery Threatens to Skew the Justice System, Gartner RAS Core Research Note G00148170, at 2 (Apr. 20, 2007) (Justice Breyer noting that the large cost of e-discovery could “limit use of courts to only those who have the tools and money” and “drive out of the litigation system a lot of people who ought to be there.”), \textit{available at} www.h5technologies.com/pdf/gartner0607.pdf. On expert witness fees, see Anthony v. Abbott Laboratories, 106 F.R.D. 461, 465 (D.R.I. 1985) (“Our citizens' access to justice, which is at the core of our constitutional system of government, is under serious siege. Obtaining justice in this modern era costs too much. The courts are among our most treasured institutions. And, if they are to remain strong and viable, they cannot sit idly by in the face of attempts to loot the system. To be sure, expert witness fees are but the tip of an immense iceberg. But, the skyrocketing costs of litigation have not sprung full-blown from nowhere. Those costs are made up of bits and pieces, and relaxation of standards of fairness in one instance threatens further escalation across the board. The effective administration of justice depends, in significant part, on the maintenance and enforcement of a reasoned cost/benefit vigil by the judiciary.”).

Congress in recent years for legislation that would ease their access to the appellate courts for interlocutory review of dispositive legal issues.202

In addition, some decisions, such as claim construction and the admission of expert testimony may be the subject of cross-motions. The resulting decisions may leave both sides unhappy about some portion of the ruling. In such cases, the parties might agree to interlocutory review if both believe the result will both provide clarity and strengthen their position. Finally, even in situations where one party clearly prevails on a particular ruling, the losing party might be willing to put enough money on the settlement table to convince the winner to agree to interlocutory review. For example, consider a defendant that loses a motion for summary judgment. The defendant would like to immediately appeal this decision, and will likely not settle without such an appeal. But the plaintiff would likely not agree to interlocutory review, having just won at an important stage of the litigation. The defendant could, however, offer to settle, with the full amount of the settlement being determined by the result of the interlocutory appeal.203

We recognize that the greater the likely incidence of agreed-upon review, the more likely appellate courts will oppose our proposal. As a general matter, appellate courts have experienced greater growth in their dockets in recent years than have the district courts.204 To cope, appellate courts have adopted a variety of measures: they have increased their reliance on per curiam dispositions,205

202 See Patent Reform Act of 2009, H.R. 1260, 111th Cong. § 10(b) (2009) (allowing interlocutory appeals of claim construction rulings); Patent Reform Act of 2009, S. 515, 111th Cong. § 8(b) (2009) (allowing interlocutory appeals of claim construction rulings “if the district court finds that there is a sufficient evidentiary record and an immediate appeal from the order (A) may materially advance the ultimate termination of the litigation, or (B) will likely control the outcome of the case, unless such certification is clearly erroneous.”).

203 Parties to such agreements may seek review by joint motion for interlocutory review under 28 U.S.C. § 1292(b). See, e.g., John Doe 1 v. Abbott Laboratories, Inc., 571 F.3d 930, 933 (9th Cir. 2009). As discussed previously, however, the appellate court has the discretion to refuse to take such appeals. See supra note 14.

204 See POSNER, supra note 75, 100–01, Table 4.2 (cases filed in district courts grew 372% between 1960 and 1983, while cases filed in courts of appeals grew 823%; cases filed in district courts dropped 1% between 1983 and 1995, while cases filed in courts of appeals grew 67%).

205 The Administrative Office of the United States Courts reports that for the twelve-month period ending September 30, 2009, 64.1% of decisions of the courts of appeals were unsigned. Judicial Business of the United States, 2009 Annual Report of the Director, table S-3.
granted fewer oral arguments, released fewer opinions for publication as fully precedential, and made greater efforts to resolve matters through alternative dispute resolution. The perception that appellate courts have experienced greater docket growth in recent years surely helps to explain their reluctance to accept certified questions for interlocutory review under section 1292(b). We can predict that our proposal, in omitting any provision for the appellate court to screen appeals, will prove somewhat controversial among appellate judges.

Yet we worry that the introduction of a screening mechanism would undermine a central purpose of our proposal. As we explained at the outset, our proposal to rely on the parties to identify issues for interlocutory appellate review offers the advantages of both categorical and discretionary review. Categorical review avoids the necessity for appellate screening, a practice that can often consume scarce appellate resources without producing any decision on the merits of a divisive legal issue. Discretionary review tends to target issues that deserve appellate attention, but imposes a screening burden on either the trial or appellate court. By relying on the parties to identify issues deserving of interlocutory review and the district court to ensure that systemic interests receive due attention, our proposal offers some of the advantages of both approaches. Introduction of a layer of appellate screening would complicate the process of

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206 The Administrative Office of the United States Courts reports that for the twelve-month period ending September 30, 2009, 71.5% of cases were terminated on the merits without oral argument. Judicial Business of the United States, 2009 Annual Report of the Director, table S-1. This is compared with 59.9% of cases for the same period in 1997. Judicial Business of the United States, 1997 Annual Report of the Director, table S-1. See also POSNER, supra note 75, at 161–62 (discussing “the curtailment of both the length and frequency of oral argument.”).


208 See supra note 59.

209 See supra note 14.

210 See supra notes 24–31 and accompanying text.

211 See supra notes 32–36 and accompanying text.

212 See supra notes 54, 56 and accompanying text.
docketing an appeal and raise the cost of appellate review to the parties by requiring them to brief both the discretionary issue and the merits. It would, moreover, enable the appellate courts to narrow access to their dockets, thus duplicating the disappointing results that have obtained under section 1292(b)’s provision for certified review.

IV. CONCLUSION

Apart from the relaxation of the final judgment rule, much has changed since the nineteenth century, and much was foreseen by Justice Oliver Wendell Holmes. While Holmes denied that “general principles” can decide “concrete cases,” he also observed that judges work by induction reasoning from the bottom up. By this, Holmes meant that judges draw their general principles from the consensus reflected in prior decisions. Holmes thus described a process of generalization that bears some resemblance to what we observe today as courts and legislatures insistently go about the business of transforming issues of fact into matters of law. With this modern shift towards judicialization, we observe an accompanying demand for judicial dispositions; juries can no longer provide a decisive answer to many of the questions that divide litigating parties.

With the rise of general principles, the growing cost of trial practice, and the preference for settlement in the shadow of the law, parties increasingly demand access to appellate review at all stages of the litigation process. We can see this growing demand reflected in the many tools of interlocutory review that courts and rule makers have already made available to the parties. These tools represent a significant departure from the nineteenth century’s final judgment rule, which rather inflexibly barred any pre-judgment appellate oversight of actions for money damages. Rather than a world of inflexible finality, we now inhabit a world of presumptive but episodic finality, where arguments for exceptions to the final judgment rule receive respectful attention.


214 In perhaps his best known aphorism, Holmes proclaimed that “experience,” not logic, was the life of the law. O.W. Holmes, The Path of the Law, 10 HARV. L. REV. 457, 465 (1879). In rejecting deductive logic, Holmes was arguing for induction, or bottom up reasoning, as the key to the development of general principles. He found merit in the common law because “it decides the case first, and determines the principle afterward.” Thomas C. Grey, Langdell’s Orthodoxy, 45 PITT. L. REV. 1 (1983) (quoting O.W. Holmes, Codes, and the Arrangement of the Law, 44 HARV. L. REV. 725 (1931)). For all his skepticism about logic, Holmes remained quite keen on the importance of identifying general principles; he simply rejected the syllogism as the basis for their derivation.
In this Article, we have argued that the parties should be given a measure of control over their own access to interlocutory review. Parties will, needless to say, refuse to agree on such review in the great majority of cases; plaintiffs will likely reject interlocutory appeals that they regard as more likely to delay than to edify. But in cases where a question of law strikes the parties as one that could go either way, when the question of law can invalidate or reconfigure much of what lies ahead in the trial court, and when the cost of appellate review seems modest in relation to the cost of preparing the case for submission to the jury, parties will have good reason to seek an early appellate court answer to the question. We have argued that, for systemic reasons, such questions will almost always warrant interlocutory review. We thus suggest a rule that would authorize a district court to certify an issue for interlocutory review upon agreement of the parties.