

## INTERLOCUTORY REVIEW BY AGREEMENT OF THE PARTIES: A PRELIMINARY ANALYSIS

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### 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.<sup>1</sup> Much civil litigation involved two opposing parties and many cases went to trial, usually before a jury.<sup>2</sup> The final judgment rule de-

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<sup>1</sup> The final judgment rule appeared in the Judiciary Act of 1789 as a limitation both on appellate review in the federal system and on Supreme Court review of state court decisions. *See* Judiciary Act of 1789, ch. 20, §§ 22, 25, 1 Stat. 73, 84, 85 (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. *See generally* ROBERT L. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* (2d ed. 1989) (describing modern practice with respect to the final judgment rule); Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 *YALE L.J.* 539 (1932) (tracing the origins and operation of the rule in the early republic).

<sup>2</sup> *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *J. EMPIRICAL LEGAL STUD.* 459, 462–63 tbl.1 (2004) (finding that civil trials declined from 11.5% of dispositions in 1962 to 1.8% of dispositions in 2002 and that civil jury trials declined from 5.5% of dispositions in 1962 to 1.2% in 2002).

ferred appellate oversight until the trial court entered judgment on the jury's verdict<sup>3</sup> (except in the rare cases that warranted supervisory review through mandamus or other common law writs).<sup>4</sup> Parties focused their efforts on winning the trial in the district court and sought review only when errors appeared on the record.<sup>5</sup> 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.<sup>6</sup>

Two centuries on, much has changed. Today, many questions that juries once decided have been transformed into issues of law.<sup>7</sup> Such questions no longer disappear into the black box of jury deliberations; instead, they persistently reappear in petitions for appellate review.<sup>8</sup> 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 nonresident defendants before the court.<sup>9</sup>

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<sup>3</sup> The current statement of the rule continues to reflect this emphasis on finality. See 28 U.S.C. § 1291 (2006) ("The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."); *id.* § 1295 (stating that the Federal Circuit has jurisdiction over final decisions arising under certain subject matter, including patents, and final decisions of specific federal courts, such as the United States Court of Federal Claims); 19 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 202.02-.04 (3d ed. 1997).

<sup>4</sup> For an overview of the nature and origins of the supervisory writs, see James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433 (2000); see also 19 MOORE ET AL., *supra* note 3, § 204.06 (noting that such writs were available under "extraordinary circumstances" to review pretrial orders).

<sup>5</sup> See 8 MOORE ET AL., *supra* note 3, § 39App.100 (stating that, at common law, "a writ of error reviewed only questions of law appearing on the face of the record").

<sup>6</sup> See *id.* (explaining that a common law writ of error, absent legislation, was unavailable to secure review even of questions of fact raised in a bench trial).

<sup>7</sup> See *infra* Part I.C.4. In the 1980s, Professor Martin Louis noted a similar concern with the rise of decisions that combine questions of fact and law, or "ultimate facts." Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1002 (1986). Professor Louis noted that some ultimate facts have been designated questions of law because they are "regarded as too sensitive or too important to be entrusted to juries." *Id.* at 1004. Although Professor Louis considered the ability to reclassify questions of fact into questions of law as "a sword that appellate judges wear but seldom actually draw," *id.* at 1028-29, it seems that they have now begun to wield it with greater frequency.

<sup>8</sup> Two examples of what we call "judicialization" (the judicial transformation of factual questions into legal questions) are the construction of patent claims under *Markman v. Westview Instruments Inc.*, 517 U.S. 370 (1996), and the evaluation of expert witnesses under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 529 (1993). See, e.g., *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1451 (Fed. Cir. 1998) ("[C]laim construction, as a purely legal issue, is subject to *de novo* review on appeal."); *Bradley v. Brown*, 42 F.3d 434, 436 (7th Cir. 1994) (explaining that the *Daubert* framework for the admissibility of expert testimony is subject to *de novo* review in the courts of appeals).

<sup>9</sup> See RICHARD L. MARCUS, EDWARD F. SHERMAN & HOWARD M. ERICHSON, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 2-7 (5th ed. 2010) (discussing "The Metamorphosis of Litigation"); Daniel J. Meador, *A Perspective on Change in the Litigation Sys-*

With this growth in the size and complexity of litigation, modern procedural systems now provide managerial judges, extensive discovery, and opportunities for motion practice that substantially define the contours of the claims and the prospects for recovery.<sup>10</sup> Rising settlement rates, either through negotiation or alternative forms of dispute resolution, indicate that fewer cases go to trial today as a percentage of those filed in federal court.<sup>11</sup>

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 and its existing exceptions no longer provide an entirely satisfactory trigger for the exercise of appellate oversight.<sup>12</sup> 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.<sup>13</sup> Thus, Congress has expanded inter-

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tem, 49 ALA. L. REV. 7 (1997) (discussing developments in the litigation system that have made litigation more complex).

<sup>10</sup> See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77 (1982) (describing a growing judicial role in supervising case preparation and encouraging settlement); see also DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION 1 (4th ed. 2008) (noting the increased responsibilities placed on trial judges by, among other things, *Daubert* and *Markman*); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1285–1304 (1976) (discussing changes in the role of the judge since the nineteenth century).

<sup>11</sup> See Galanter, *supra* note 2, at 515–16 (suggesting the rise in settlements as one reason for the decline in trials); see also Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329 (2005) (exploring reasons why federal trials are decreasing as well as possible implications of the decrease). But see Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 711–12 (2004) (noting the possibility that the settlement rate dropped between 1970 and 2000). For reasons why parties might settle, rather than proceed to trial, see Federal Rule of Civil Procedure 68, which mandates that if an offer of judgment by a party is rejected by the opposing party, that opposing party will be liable for some court costs if the ultimate judgment obtained at trial is not more favorable than the unaccepted offer, and Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1994), which notes the ways in which parties are encouraged to settle. But see Robert G. Bone, “To Encourage Settlement”: *Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561, 1562 (2008) (challenging the “universally accepted [view] that Rule 68 is meant to encourage settlements”).

<sup>12</sup> See Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-final Orders: It’s Time to Change the Rules*, 1 J. APP. PRAC. & PROCESS 285 (1999); Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175 (2001); Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717 (1993); Craig Allen Nard, *Process Considerations in the Age of Markman and Mantras*, 2001 U. ILL. L. REV. 355, 357 (proposing that the Federal Circuit “be more receptive to adjudicating interlocutory orders arising from *Markman* hearings”); Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89 (1975); Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165 (1990); Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237 (2007).

<sup>13</sup> See, e.g., Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, LAW & CONTEMP. PROBS., Summer 1984, at 165, 168–69 (proposing a statutory change similar to what was later adopted as 28 U.S.C. § 1292(e) (2006)); see also, e.g., Redish, *supra* note 12, at 91–92 (arguing that

locutory review directly by authorizing district courts to certify “controlling question[s] of law” to the appellate courts for immediate review.<sup>14</sup> Congress has also acted indirectly to authorize federal rulemakers to craft new rules for expanded interlocutory review.<sup>15</sup> Federal rulemakers,<sup>16</sup> for their part, have been slow to embrace this new delegation of authority; appellate courts conduct discretionary review of class certification decisions under Federal Rule of Civil Procedure 23 but have not otherwise been given broader rule-based authority.<sup>17</sup>

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the current exceptions to the finality rule “do not adequately serve the interests of justice in many instances”).

<sup>14</sup> 28 U.S.C. § 1292(b); *see also* 19 MOORE ET AL., *supra* note 3, § 203.31 (laying out the requirements for discretionary appeal). 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, e.g., Nystrom v. TREX Co.*, 339 F.3d 1347, 1351 (Fed. Cir. 2003) (declaring that immediate appellate review under § 1292(b) is rarely granted); *Horwitz v. Alloy Auto. Co.*, 957 F.2d 1431, 1438 (7th Cir. 1992) (recounting a colloquy between the district judge and the parties where the judge lamented that he “can never get the Seventh Circuit to take an interlocutory appeal” under § 1292(b) or Federal Rule of Civil Procedure 54(b) after trying “many, many times”); *see also* Erin B. Kaheny, *The Nature of Circuit Court Gatekeeping Decisions*, 44 LAW & SOC’Y REV. 129, 149 (2010) (explaining that circuit court law regarding threshold gatekeeping appears to influence judges’ votes on threshold issues); Solimine, *supra* note 12, at 1201 (reporting that the 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,” Professor Timothy Glynn has suggested that § 1292(b) be amended to provide for appellate acceptance of certified appeals unless certification constitutes abuse of discretion by the district court. *See* Glynn, *supra* note 12, at 246, 259.

<sup>15</sup> 28 U.S.C. § 1292(e) (“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[1] & n.1 (noting that § 1292(e) is a constitutional delegation of rulemaking power because it allows the Supreme Court 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, 973–74 (5th Cir. 2000))); Laura J. Hines, *Mirroring or Muscling: An Examination of State Class Action Appellate Rulemaking*, 58 KAN. L. REV. 1027, 1033 (2010) (recognizing that § 1292(e) “laid the foundation for the only exercise of this new rulemaking authority thus far, Rule 23(f)”; Steinman, *supra* note 12, at 1246 (“This rulemaking authority has remained largely dormant . . . .”).

<sup>16</sup> The Rules Enabling Act empowers the Supreme Court to promulgate rules of procedure, subject to congressional review. *See* 28 U.S.C. § 2072. The statute further directs the Judicial Conference to assign rulemaking responsibility to a standing committee and to various subcommittees, comprised of members of the bench and bar. *Id.* § 2073. Pursuant to these statutes, federal rulemakers develop rules at the subcommittee level, subject to review by the standing committee and the Judicial Conference, and eventual review and promulgation by the Supreme Court.

<sup>17</sup> *See* FED. R. CIV. P. 23(f); *see also* 19 MOORE ET AL., *supra* note 3, § 203.34 (describing discretionary interlocutory appeals based on Supreme Court-prescribed rules); 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1802.2 (3d ed. 2005)

The Supreme Court has played a role in opening new avenues to interlocutory review as well. For a time, the Court broadened the collateral order doctrine,<sup>18</sup> which allows interlocutory review of issues that the Court deems both relatively important and relatively distinct from the merits-based questions that normally come to appellate courts after a final judgment, to include such issues as sovereign immunity,<sup>19</sup> official immunity,<sup>20</sup> and some remand orders.<sup>21</sup> In addition, the Court has fashioned significant exceptions to statutory provisions that would otherwise foreclose interlocu-

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(describing the appealability of class certification under Rule 23(f)). 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, however, have been reluctant to exercise this authority. See *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 137–40 (2d Cir. 2001) (describing requirements for the interlocutory review of class certification rulings and positing that they “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, 284 (2008) (noting, based on the findings of an empirical study, that “it does not appear that the courts are accepting most [Rule 23(f)] petitions”). The Second Circuit’s response to Rule 23(f) in *Sumitomo Copper* shows some problems with allowing unfettered discretionary review over a narrow area of concern. Accord Glynn, *supra* note 12, at 250–58 (discussing problems with discretionary review). Even as the rulemakers express a desire for increased supervision over a specific area of law, the courts of appeals hesitate to provide that supervision. For example, the rulemakers specifically distinguished Rule 23(f) from certified appeals under 28 U.S.C. § 1292(b) in that appeals under Rule 23(f) do *not need* to involve a controlling question of unsettled law. FED. R. CIV. P. 23(f) advisory committee’s note; see also Hines, *supra* note 15, at 1030–35 (summarizing the history of Rule 23(f)). The Second Circuit, however, in line with other circuits, 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.

<sup>18</sup> The Court originally applied the collateral order doctrine in *Cohen v. Beneficial Industrial Loan Corp.*, in which it found a decision was final because it fell into a class of decisions that “finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” 337 U.S. 541, 546 (1949). 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[1] (citing *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994), and *Cohen*, 337 U.S. 541).

<sup>19</sup> See *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 (1993).

<sup>20</sup> See *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (holding that a defendant can immediately appeal a district court’s denial of his qualified official immunity from *Bivens* liability).

<sup>21</sup> See, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 713 (1996) (holding that a stay order under the *Colorado River* abstention doctrine was appealable under the collateral order doctrine). Recently, however, the Court has begun to apply the doctrine more narrowly. See *Will v. Hallock*, 546 U.S. 345 (2006) (holding that the doctrine does not apply to an order denying a motion to dismiss on Federal Tort Claims Act judgment bar grounds); *Digital Equip. Corp.*, 511 U.S. at 865 (holding that the collateral order doctrine does not apply to the refusal to give effect to a settlement agreement). In the most recent case on the issue, the Court has indicated that it is unlikely to expand the collateral order doctrine further. See *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603 (2009) (stating that the doctrine does not apply to a disclosure order involving information protected by the attorney–client privilege).

tory 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.<sup>22</sup> As a result of the departure from this bright-line rule, the Court has frequently struggled to define access to appellate review of remand orders.<sup>23</sup>

Noting the Court's efforts to define its parameters, scholars have suggested a variety of competing approaches to delineate the proper scope of interlocutory review.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> 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. Professor Edward Cooper, among others, has expressed some support for a regime of measured discretionary review, in which courts would gain greater discretion as they gain competence.<sup>27</sup> Similarly, the approach of the American

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<sup>22</sup> See *Quackenbush*, 517 U.S. at 711–12 (noting that § 1447(d) only bars appellate review of remands based on § 1447(c)).

<sup>23</sup> Compare *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) (holding that a district court's remand for lack of subject matter jurisdiction is barred from appellate review by § 1447(d)), with *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862, 1865 (2009) (allowing appellate review of a remand order after a district court declined supplemental jurisdiction over a state law claim). For an assessment of developments and a suggested solution, see James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. PA. L. REV. 493 (2011).

<sup>24</sup> See *supra* note 12 (citing sources).

<sup>25</sup> Redish, *supra* note 12, at 98–101.

<sup>26</sup> *Id.* at 98; see also Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, LAW & CONTEMP. PROBS., Summer 1984, at 157, 157 (describing the potentially “serious consequences” of postponing review of a trial court ruling, including the possibility that “an error may so taint subsequent proceedings as to require reversal and further proceedings [that] 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 an unreviewed incorrect trial court ruling may be “dissipated” by further trial court proceedings and that the “appellate courts may be deprived of the opportunity to clarify and improve the law on matters that repeatedly evade review”).

<sup>27</sup> See Cooper, *supra* note 26. Cooper 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 157–58. But at some point these doctrines may become “so complex and so shifting that they cannot be contained in any set of elaborate rules,” so 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 courts’ discretion over interlocutory appealability should reflect the quality of the judiciary at each level. See *id.* at 158–59. 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.* at 159.

Bar Association (ABA), which has been codified in Wisconsin<sup>28</sup> and has gained support from scholars such as Professor Robert Martineau,<sup>29</sup> gives the appellate courts discretion to hear nonfinal orders if the appeal will “(i) [m]aterially advance the termination of the litigation or clarify further proceedings; (ii) [p]rotect a party from substantial and irreparable injury; or (iii) [c]larify an issue of general public importance in the administration of justice.”<sup>30</sup>

Other scholars, by contrast, have defended a categorical approach to interlocutory review.<sup>31</sup> 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.<sup>32</sup> Orders falling within the scope of these previously defined categories would thus trigger interlocutory review as of right and would not re-

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<sup>28</sup> WIS. STAT. ANN. § 808.03 (West Supp. 1992).

<sup>29</sup> Professor Martineau has argued against expanding the exceptions to the finality requirement by rule and in favor of wide-ranging discretion in the appellate courts to accept or reject interlocutory appeals. See Martineau, *supra* note 12, at 748–70. He has specifically endorsed the approach of the ABA’s *Standards Relating to Appellate Courts*. *Id.* at 776. The ABA approach has also been supported by others as the best approach to interlocutory review. See Eisenberg & Morrison, *supra* note 12, at 297–99; John C. Nagel, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200, 201 (1994).

<sup>30</sup> STANDARDS RELATING TO APP. CTS. § 3.12 (1994). Although the factors for interlocutory appeal are similar to those of § 1292(b), there are three important differences. First, they are disjunctive requirements, so 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 court. 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*, 529 N.W.2d 253, 254 (Wis. Ct. App. 1995) (rejecting interlocutory review without any explanation except that “the court concludes that the petition does not meet the criteria for granting permissive appeal”).

<sup>31</sup> Professor Glynn, for example, has recommended that the rulemakers provide for interlocutory review of “problem areas” where the lack of interlocutory review (1) has left the law “unclear or underdeveloped” and (2) “inflict[s] some kind of severe irreparable harm” on one of the parties. See Glynn, *supra* note 12, at 259. Professor Paul Carrington has suggested a Federal Civil Interlocutory Appeals Act, which takes a threefold approach to revising interlocutory review that relies heavily on the categorical approach. Carrington, *supra* note 13, at 166–69. 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.* at 167. Second, he proposed a statutory revision similar to that eventually adopted in § 1292(e) that “makes explicit that the rulemaking power does extend to the specification of appealable interlocutory decisions.” *Id.* at 168. Third, the act would explicitly allow for interlocutory review where it is “essential to protect substantial rights which cannot be effectively enforced on review after final decision.” *Id.* at 167. The purpose of this last revision is to eliminate the “necessity for strained interpretations of finality . . . and the use of extraordinary writs . . . as an alternative to appeal.” *Id.* at 168.

<sup>32</sup> See Glynn, *supra* note 12, at 259–61.

quire any extended case-by-case analysis at the jurisdictional threshold.<sup>33</sup> This categorical approach resembles the Supreme Court's collateral order doctrine, which provides as-of-right interlocutory review of orders falling within its scope.<sup>34</sup> The Court's categorical thinking comes through quite clearly in its decisions: it has reminded us that collateral order analysis should focus not on "individualized jurisdictional" issues<sup>35</sup> but on "the entire category to which a claim belongs."<sup>36</sup> Scholars who support the categorical approach often propose to rely on rulemakers 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 rulemakers to identify the categories of orders to which interlocutory review applies.<sup>37</sup> Similarly, Professor Timothy Glynn has suggested that the rulemakers should identify "problem areas" and create rules to allow interlocutory review in those narrow areas.<sup>38</sup>

Critics of the categorical approach have expressed deep skepticism about the prospects for developing a set of criteria with which to identify proper subjects for interlocutory review.<sup>39</sup> Professors Howard Eisenberg and Alan Morrison doubt that the rulemakers can identify orders by category that will always warrant interlocutory review.<sup>40</sup> Experience with the collateral order doctrine tends to bear out this contention; the recognition of a

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<sup>33</sup> For criticisms of threshold evaluation of the propriety of an appeal, see Carrington, *supra* note 13, at 170, which notes that the law treating ripeness and timeliness of appeals as jurisdictional precursors to appellate review is "a fetish which serves no significant systemic interest," and Glynn, *supra* note 12, at 262–63, which proposes an abuse of discretion standard for courts of appeals' determinations whether to grant review of or dismiss appeals from class certification orders.

<sup>34</sup> See Glynn, *supra* note 12, at 192–93 (describing the collateral order doctrine and the categories of cases to which it applies); *supra* note 21 and accompanying text. Because the orders considered appealable under the collateral order doctrine are treated as final, litigants receive review as a matter of right. See 28 U.S.C. § 1291 (2006).

<sup>35</sup> *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473 (1978).

<sup>36</sup> *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994).

<sup>37</sup> See AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT 463–65, 495 (2004) (recommending a revised 28 U.S.C. § 1447(d) that would give rulemakers control over when to allow appellate review over remand orders); Carrington, *supra* note 13. The American Law Institute's commentary on the proposed removal statute explains that the rulemakers are in the best position to provide the needed "flexibility" by not requiring statutory amendment. AM. LAW INST., *supra*, at 495. The American Law Institute project retains, however, a measure of discretionary review for extraordinary cases. *Id.* (precluding as-of-right review but leaving appellate courts to use extraordinary writs to review remand orders "free of any putative restriction").

<sup>38</sup> See Glynn, *supra* note 12, at 259–62.

<sup>39</sup> 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.*

<sup>40</sup> See *id.* at 295 (identifying areas of disagreement about when to allow interlocutory review).

right to interlocutory review can attract some relatively dubious appeals.<sup>41</sup> Similarly, the Court's categorical 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.<sup>42</sup> Their skepticism about the ability of rulemakers to define clear categories of deserving orders has prompted Professors Eisenberg and Morrison, along with other scholars such as Professor Michael Solimine, to join in the call for review based on the exercise of discretion.<sup>43</sup> Like Professors Redish and Cooper, these scholars turn to judicial discretion as the best means of weeding out routine and undeserving appeals.

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 rulemakers have all taken responsibility for crafting rules of interlocutory review.<sup>44</sup> 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 summary judgment under Rule 54 and finding no just cause for delay.<sup>45</sup> In other cases, discretionary review requires combined action at both the district and circuit court levels; section 1292(b) certifications fall into this category.<sup>46</sup> Finally, some forms of inter-

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<sup>41</sup> See Pfander, *supra* note 23, at 504–05 (noting the growth in appeals from remand orders); see also *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862, 1869 (2009) (Breyer, J., concurring) (noting that interlocutory review is available for district court decisions to retain cases that have no federal law issues even though such a decision “rarely involves major legal questions, and that (even if wrong) a district court decision of this kind will not often have major adverse consequences”).

<sup>42</sup> See *Carlsbad*, 129 S. Ct. at 1869 (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”).

<sup>43</sup> See Eisenberg & Morrison, *supra* note 12; Solimine, *supra* note 12.

<sup>44</sup> See, e.g., *supra* note 14 and accompanying text (describing the congressional implementation of § 1292(b)); *supra* note 17 and accompanying text (explaining the interlocutory review of class certification created by rulemakers); *supra* notes 21, 34 and accompanying text (describing the judicial creation of the collateral order doctrine).

<sup>45</sup> 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 district court discretion over appellate 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, 1392–94 (2002).

<sup>46</sup> See *supra* note 14 and accompanying text; see also AM. LAW INST., *supra* note 37, § 3.12 cmt. (explaining that § 1292(b) requires “concurrent permission” of the trial and appellate courts). Professor Solimine argues for an increased use of § 1292(b), especially in complex litigation such as mass torts.

locutory review, such as class action certification review<sup>47</sup> and mandamus review,<sup>48</sup> require only that the appellate court agree to hear the matter.<sup>49</sup>

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, Inc. v. HIF Bio, Inc.*, the Court approved yet another exception to § 1447(d)'s prohibition against review of remand orders.<sup>50</sup> In a concurring opinion, Justice Breyer posed sharp questions about the Court's handling of the doctrine.<sup>51</sup> In particular, he questioned rules that seemingly authorized review of mundane problems yet foreclosed review of more serious issues.<sup>52</sup> He ended his opinion with a call for help from "experts."<sup>53</sup>

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Solimine, *supra* note 12, at 1208–09. 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 1167, 1204. He believes that if the statute were "shorn of the 'big case' requirement" it could provide the needed flexibility without overly burdening the courts of appeals. *Id.* at 1168.

<sup>47</sup> 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 17 and accompanying text (describing the circuit courts' treatment of Rule 23(f)).

<sup>48</sup> See 28 U.S.C. § 1651 (2006) (stating that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions"); see also 19 MOORE ET AL., *supra* note 3, § 204.01[2][c] (stating that mandamus is included within "all writs" and "is generally used to prevent district judges from exceeding their authority"); *Federal Civil Appellate Jurisdiction: An Interlocutory Restatement*, LAW & CONTEMP. PROBS., Spring 1984, at 13, 84–85 (describing the "supervisory" use of mandamus). Professor 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, 591–602 (2002). Although Professor Waters's 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. See Pfander, *supra* note 4. 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 captures the interesting connection between equity and interlocutory review, noting that the finality rule did not historically apply to courts of equity. Waters, *supra*, at 533; see also *Federal Civil Appellate Jurisdiction: An Interlocutory Restatement*, *supra*, at 82 ("[T]he finality requirement was never well established in equity.").

<sup>49</sup> Professor Adam Steinman has argued that the All Writs Act, 28 U.S.C. § 1651, allows not only for discretionary writs of mandamus but for discretionary appeals as well. See Steinman, *supra* note 15, at 1267–68. 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.

<sup>50</sup> 129 S. Ct. 1862, 1865 (2009) (concluding that a 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)).

<sup>51</sup> *Id.* at 1869 (Breyer, J., concurring); see *supra* notes 41–42.

<sup>52</sup> 129 S. Ct. at 1869 (Breyer, J., concurring) (comparing *Carlsbad*, which allowed review of whether remand was proper after all federal law issues were dismissed from a case, a decision that "rarely involves major legal questions," with *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224 (2007), which refused to allow review of remand that "presented a difficult legal question involving the commercial activities of a foreign sovereign").

<sup>53</sup> *Id.* at 1869–70.

Similarly, in *Mohawk Industries, Inc. v. Carpenter*, 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.<sup>54</sup> The skeptical assessment in the majority opinion was echoed and underscored in Justice Thomas's concurring opinion, which proclaimed a more absolutist opposition to judge-made interlocutory review.<sup>55</sup> Together, the opinions suggest the emergence of a fairly strong preference for the development of rules through the rulemaking process.

In this Article, we propose a rule of interlocutory review that secures the benefits of both discretion and categorization while eliminating many of their drawbacks.<sup>56</sup> 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.<sup>57</sup> 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. 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. Furthermore, the requirement that the district court certify the appeal would allow the district judge to maintain some control of the litigation by rejecting potentially disruptive repetitive review

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<sup>54</sup> 130 S. Ct. 599, 605 (2009) (stressing that the 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 the "justification for immediate appeal must therefore be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes" (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) in first quotation)).

<sup>55</sup> *Id.* at 610 (Thomas, J., concurring in part and concurring in the judgment) (stating that 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").

<sup>56</sup> As explained below, we recommend use of the rulemaking process as the vehicle for implementing our proposal because it offers the possibility of ongoing evaluation. See *infra* Part II.

<sup>57</sup> Such a rule would be authorized under 28 U.S.C. § 1292(e), which allows the creation of a rule "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for." 28 U.S.C. § 1292(e) (2006). In other words, we are not proposing that parties be allowed to consent to finality but instead that they be permitted to consent to the review of an interlocutory decision.

and screening out cases in which she feels the decision might be modified as the proceedings continue.<sup>58</sup>

Our proposal to provide a new, independent basis for interlocutory appellate review 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, 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 would often lead them to take account of the same factors that would presumably inform an attempt on the part of the rulemakers to establish categories for interlocutory review. But instead of a rigid system of categories, with inevitable problems of over- and underinclusiveness, 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 when the district court does 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 in which the district court has made a clear mistake that would require trial of a case that should have been dismissed.<sup>59</sup> But we suggest that even close cases may benefit from interlocutory review because clarifying a potentially controlling legal question can avoid trial costs no matter how the appellate court rules on the merits. Second, our approach draws on the insight that we can rely on the parties to identify orders that meet the close-question test for interlocutory review. The combination of party consent and district court review can thus identify a

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<sup>58</sup> In addition, district court certification would ensure that "feigned cases" are weeded out. *See infra* Part II.B.

<sup>59</sup> *See Cooper, supra* note 26, at 157 (recognizing that if an error is not immediately reviewed it may "so taint subsequent proceedings as to require reversal and further proceedings"); Redish, *supra* note 12, at 98 ("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."); Amy E. Sloan, *Appellate Fruit Salad and Other Concepts: A Short Course in Appellate Process*, 35 U. BALT. L. REV. 43, 53-54 (2005) (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 12, at 1169 (noting that interlocutory review "can save cost and time by shortening, streamlining or terminating the litigation").

category of interlocutory orders for which review makes sense.<sup>60</sup> We would thus eliminate the traditional requirement that the appellate court independently agree to hear the appeal.<sup>61</sup> By eliminating such threshold review, our proposal should further reduce the systemic cost of dispute resolution.<sup>62</sup>

Our proposal differs in important respects from those put forward by other scholars. Professor Carrington has argued that the parties should be allowed to waive a defect in jurisdiction, thus envisioning “appellate jurisdiction conferred by consent of the parties.”<sup>63</sup> Though this does involve the aspect of consent,<sup>64</sup> Carrington’s proposal, unlike ours, allows for consent to overcome defects in other modes of review and does not provide an independent basis for interlocutory appellate review. In a different vein, 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.<sup>65</sup> In some ways, our proposal is more modest in that with most § 1292(b) appeals one party opposes the certification. We are suggesting

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<sup>60</sup> This insight addresses the concern raised regarding the categorical approach to interlocutory review that “any . . . criteria that could be devised [for interlocutory review] are, of necessity, both quite broad and quite vague.” Eisenberg & Morrison, *supra* note 12, at 297.

<sup>61</sup> See 28 U.S.C. § 1292(b); FED. R. CIV. P. 23(f); see also *supra* notes 14, 17 (discussing the contours and practice of appellate court discretion under these rules).

<sup>62</sup> For an example of the costs of discretionary gatekeeping by appellate courts, see *Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134 (2d Cir. 2001), which conducts a detailed review of a class certification decision only to find that it did not present issues pressing enough to warrant discretionary review.

<sup>63</sup> Carrington, *supra* note 13, at 170.

<sup>64</sup> Party agreement does inform some applications for interlocutory review today. District courts may be more likely to certify questions when the parties agree that they meet the test in § 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[1][a]. In addition, district courts may work to facilitate review by manufacturing finality, as the appellate court recognized in *Nystrom v. TREX Co.*, 339 F.3d 1347 (Fed. Cir. 2003), when the parties agree that such review would advance the resolution of the case. See *infra* note 72. In the bankruptcy context, appeals from the bankruptcy judge to the court of appeals are authorized either upon certification by the bankruptcy judge or by “all the appellants and appellees (if any) acting jointly.” 28 U.S.C. § 158(d)(2)(A). The certification in question must specify one of three justifications for direct appellate review: the absence of controlling law, a division of authority, or the prospect of “materially advanc[ing] the progress of the case.” *Id.* § 158(d)(2)(A)(i)–(iii). In addition, the statute provides for the appellate court to exercise its discretion in deciding whether to accept the appeal. *Id.* § 158(d)(2)(A). The law has less to do with authorizing the parties to agree to an interlocutory appeal than it does with allowing the parties to agree that a particular question ought to be the subject of direct review by the federal appellate court (rather than of two levels of review, beginning with the bankruptcy appellate panel). According to published reports, the appellate courts have agreed to hear sixty-two such certified appeals and have declined on nineteen occasions. See Laura B. Bartell, *The Appeal of Direct Appeal—Use of the New 28 U.S.C. § 158(d)(2)*, 84 AM. BANKR. L.J. 145, 164–69 & n.132 (2010). In four cases, the certification leading to direct appellate review resulted from agreement of all the parties. *Id.* at 170–71. Finally, some settlement agreements contemplate appellate review and thus reflect the parties’ agreement that such review will help resolve the case. See *infra* Part I.C.3.

<sup>65</sup> See Glynn, *supra* note 12 at 246, 259.

only that the courts of appeals be required to hear those appeals that both parties support and that the district court certifies as appropriate for immediate review. By combining the notions that appellate review can make litigation more cost-effective and that parties are well positioned to assess when there are benefits to be derived from appellate review, our proposal reframes the way appellate review ought to be considered by the courts.

Though new within the field of appellate review, 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 Professors George Priest and Benjamin Klein shows that the parties will tend to select cases for trial in which they perceive genuine uncertainty as to the outcome.<sup>66</sup> Weak cases will be weeded out and strong cases may settle without any need for litigation.<sup>67</sup> The same logic would, 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 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.<sup>68</sup> Courts freely enforce forum selection clauses, whether they call for the resolution of the dispute by the publicly funded court system or by a privately

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<sup>66</sup> George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); see also Robert J. Rhee, *The Effect of Risk on Legal Valuation*, 78 U. COLO. L. REV. 193, 213 (2007) ("Uncertainty begets the lawsuit."). But see Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 333 (1991) (empirically testing Priest and Klein's selection hypothesis and finding that the hypothesis is inconsistent with the collected data).

<sup>67</sup> See Priest & Klein, *supra* note 66, at 19 (asserting that, as parties' likelihood of being wrong about the outcome of litigation decreases, their likelihood of reaching a settlement increases).

<sup>68</sup> See Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233 (2008); Okuma Kazutake, *Party Autonomy in International Commercial Arbitration: Consolidation of Multiparty and Classwide Arbitration*, 9 ANN. SURV. INT'L & COMP. L. 189 (2003); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461 (2007); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 52 (1992) ("The rise of forum-selection clauses is a manifestation of the increasing deference to party autonomy in jurisdictional and related matters."). In addition to forum selection and alternative dispute resolution (ADR), parties also have the option of consenting to a jury or bench trial conducted by a magistrate judge. See 28 U.S.C. § 636(c)(1). The importance of litigant autonomy grows out of the general individual autonomy valued in democratic society. See Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1574 (2007) ("[L]itigant autonomy should be acknowledged as a logical outgrowth of the nation's commitment to process-based liberal democratic thought, and therefore a foundational element of procedural due process analysis.").

paid arbitral panel.<sup>69</sup> 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.<sup>70</sup> Indeed, recent developments suggest that the parties can ask a private arbitration panel to conduct the functional equivalent of appellate review of a judicial decision.<sup>71</sup> The growing familiarity with party autonomy in the choice of forum suggests that its use to select cases for interlocutory review would not prove unduly disruptive or controversial.

We present our argument for a party-based approach to interlocutory review in two parts. Part I begins 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 developed 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 offer evidence to support our claim that modern litigation will often produce situations in which the parties (and the system) can profit from agreed-upon appellate review.

Part II 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 sensi-

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<sup>69</sup> See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (upholding a forum selection clause in fine print on the back of a cruise ticket); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (giving effect to an arbitration agreement notwithstanding the fact that it would result in piecemeal litigation); see also Solimine, *supra* note 12, at 1210–11 (discussing arbitration in the context of the collateral order doctrine). For a discussion of how party autonomy influences arbitration, see Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1201 (2000): “[C]ourts have largely accepted the party autonomy model, willingly adapting their own processes to meet the articulated needs of the litigants.”

<sup>70</sup> Cf. Redish & Larsen, *supra* note 68, at 1574 (“[T]he theoretical foundation of the procedural due process guarantee [is] the individual litigant’s autonomy in deciding whether to pursue her claim and if so, how best to conduct that litigation.”).

<sup>71</sup> See *Controlling Legal Costs—Law Firms: Consider Appellate Arbitration and Consultation*, METRO. CORP. COUNS., Feb. 1, 2010, at 12; see also Moffitt, *supra* note 68, at 475 (proposing customization of the appellate experience). Although Professor Moffitt argues for allowing litigants to agree to customize the appellate process, the customization he envisions is more related to curtailing rather than 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, *The Case for a Mediation Program in the Federal Circuit*, 50 AM. U. L. REV. 1379, 1382–89 (2001) (surveying various ADR programs of the courts of appeals).

ble 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 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 is 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.

#### I. 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 the interlocutory review of controlling questions of law. Early resolution of such controlling questions can obviate the necessity for a trial, provide important information to shape the way the case proceeds to trial, and 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 favor 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 in the second section to formalize the intuitive case, drawing on the theoretical literature that has developed 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.<sup>72</sup> 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 we call judicialization—creates a growing demand for interlocutory review as parties seek the resolution of decisive questions by the appellate court. 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.<sup>73</sup> Under current law, the district court's rejection of such a threshold motion would constitute a nonfinal order and would not be subject to immediate appellate re-

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<sup>72</sup> Manufactured finality involves the voluntary dismissal of “peripheral” claims in the district court following pretrial resolution of the “central or core” claim, thus rendering the core claim order “dispositive, final, and appealable.” Rebecca A. Cochran, *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. See *Doe v. United States*, 513 F.3d 1348, 1352–53 (Fed. Cir. 2008) (discussing the split among circuits). 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. See *ADVISORY COMM. ON APPELLATE RULES, AGENDA FOR SPRING 2009 MEETING OF ADVISORY COMMITTEE ON APPELLATE RULES 19–20* (1999), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/AgendaBooks/Appellate/AP2009-04.pdf>; Mark I. Levy, *Manufactured Finality*, *NAT'L L.J.*, May 5, 2008, at 13.

Professor Pierre Bergeron, on the other hand, notes circuit agreement regarding finality of without-prejudice dismissals after compelled arbitration. See Bergeron, *supra* note 45, at 1382–83 & n.111. 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. See *Interactive Flight Techs., Inc. v. Swissair Swiss Air Transp. Co.*, 249 F.3d 1177, 1179 (9th Cir. 2001) (finding that the lower court's without-prejudice dismissal was only without prejudice in the sense that it was not meant to preclude parties from bringing a new action to enter judgment after completing arbitration). Professor Bergeron's proposal regarding orders compelling arbitration can, in fact, be seen as an implementation of the manufactured finality doctrine through without-prejudice dismissal. See Bergeron, *supra* note 45, at 1392–94 (proposing that a district court dismiss litigation simultaneously with ordering arbitration if it feels that immediate review is important).

<sup>73</sup> The validity of a statute of limitations defense may turn on a preliminary question of law. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628–29 (2007) (rejecting the argument that each paycheck was a fresh violation of equal employment laws for statute of limitations purposes); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 743 (1980) (concluding that state tolling rules determine the timeliness of a claim governed by state law).

view.<sup>74</sup> 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.<sup>75</sup> 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 in which the only goal was to delay and there was only the slightest prospect of appellate reversal. But despite the general rule, interlocutory review may be appropriate in cases in which the defendant has a substantial prospect of success on appeal. Interlocutory review could sustain the limitations defense, thus obviating the need for further proceedings at the trial level. Even if the appellate court were to affirm the rejection of the defense and remand for trial, the decision might 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 reshaped thereby (an assumption that often holds),<sup>76</sup> 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. It may not seem obvious at first blush why plaintiffs would ever agree to such review, having overcome a

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<sup>74</sup> See *Parmar v. Jeetish Imps., 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 its motion to dismiss based on the statute of limitations); see also *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873, 876 (1994) (suggesting that a limitations defense should not 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) (concluding that denial of a motion to dismiss on statute of limitations grounds would only be immediately reviewable if such a defense conferred the right not to be sued).

<sup>75</sup> See Solimine, *supra* note 12, at 1168 (noting that the final judgment rule “discourages the delay of trial proceedings and harassment of party opponents”).

<sup>76</sup> The American Intellectual Property Law Association reports that, for patent litigation suits with \$1,000,000 to \$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). Pretrial 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 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); 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 generally Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 660 (2004) (finding that judgments resulting from trial are appealed at twice the rate of nontrial judgments).

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 those cases in which the threat of appellate reversal looms relatively large and the costs of seeking interlocutory review seem low in comparison to the cost of trial. Indeed, in many cases like the one involving the hypothetical limitations defense, the parties may agree to settle 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)  $[(0.9 \times 100) - 10 = 80]$ . 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  $[(0.9 \times 100) + 10 = 100]$ . Such a case should settle between \$80 and \$100, a range scholars sometimes describe as the zone of potential agreement (ZOPA).<sup>77</sup>

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<sup>77</sup> 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 66, 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 George L. Priest, *Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes*, 14 J. LEGAL STUD. 215, 219 (1985); Priest & Klein, *supra* note 66, at 9. 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 determin-

The introduction of divergent views on a judicial question, such as the admissibility of an expert's testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>78</sup> can complicate the settlement calculus. Suppose that in the above case 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' evaluations 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.<sup>79</sup> 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 [(0.6 × 100) + 10 = 70]. Because the lowest amount the plaintiff will accept exceeds the highest amount the defendant will offer, the parties will have no ZOPA and cannot reach a settlement.<sup>80</sup>

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 were no chance of appellate reversal of that decision, the parties could now settle.<sup>81</sup> 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%,

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ing 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. See Gross & Syverud, *supra* note 66, at 323–24. The second approach to determining when settlement is likely to occur considers the strategic behavior of the parties during negotiation. See Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 972–73 (1979). 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.

<sup>78</sup> 509 U.S. 579 (1993).

<sup>79</sup> See *infra* notes 160–77 and accompanying text.

<sup>80</sup> This is a typical situation where the parties are mutually optimistic about their chances of success at trial and therefore cannot reach a settlement. See JJ Prescott, Kathryn E. Spier & Albert Yoon, *Trial and Settlement: A Study of High-Low Agreements 2* (Harvard John M. Olin Ctr. for Law, Econ. & Bus., Discussion Paper No. 678, 2010), available at [http://www.law.harvard.edu/programs/olin\\_center/papers/678\\_Spier.php](http://www.law.harvard.edu/programs/olin_center/papers/678_Spier.php).

<sup>81</sup> In fact, motion practice in general appears to accelerate parties' ability to settle. See Christina L. Boyd & David A. Hoffman, *Litigating Toward Settlement 19* (Temple Univ. Legal Studies Research, Paper No. 2011-8, 2010), available at <http://ssrn.com/=1649643>.

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 value of the verdict [ $0.9 \times 100 = 90$ ] 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 [ $(0.8 \times 90) - 10 - 2 = 60$ ].<sup>82</sup> 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.

Assume that the case proceeds to trial and that 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.<sup>83</sup> 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 appeal [ $(0.8 \times 100) - 2 = 78$ ].<sup>84</sup> The defendant's settlement ceiling will now be \$52, based on the defendant's

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<sup>82</sup> 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 do 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) because 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 66, 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.

<sup>83</sup> 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 66, at 51–52; see also 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, 249–50 & tbl.3 (1996) (conducting an empirical analysis of the selection hypothesis in federal appellate cases). Priest and 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 appeal and deciding whether and on what terms to settle at that time. Priest & Klein, *supra* note 66, 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”).

<sup>84</sup> The costs of trial are now sunk costs and are therefore not considered. In addition, the jury's actual judgment replaces both sides' expected judgments.

view that the appellate court will reverse in 50% of such cases  $[(0.5 \times 100) + 2 = 52]$ .

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 the 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 believed the expected judgment was \$90  $[0.9 \times 100 = 90]$  and there was a ZOPA between \$80 and \$100. If the appellate court rules in the defendant's favor, overruling 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  $[0.6 \times 100 = 60]$ . This will create a ZOPA between \$50  $[(0.6 \times 100) - 10 = 50]$  and \$70  $[(0.6 \times 100) + 10 = 70]$ . 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.<sup>85</sup> In fact, the availability of interlocutory review by consent might encourage the parties to settle before the appeal for somewhere in the lower settlement range, with an additional \$20 to be paid to the plaintiff if the appellate court upholds the trial court's ruling.<sup>86</sup>

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

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<sup>85</sup> 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. See Rhee, *supra* note 66, at 229–39, 254 (noting that “[c]ertainty obviates litigation [and] uncertainty begets dispute” and that parties may be willing to spend money to hedge against uncertainty). Parties may consent to interlocutory review simply to better determine the risk of trial and to make sure they know that 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 pay the relatively small cost of an appeal to remove the uncertainty and make sure he or she is not offering (or accepting) more (or less) than he or she should.

The sequential nature of appellate decisionmaking has been noted as a barrier to settlement. See POSNER, *supra* note 83, at 120. Allowing parties to consent to interlocutory review could reverse the standard sequence—full judgment by the district court prior to appellate review of specific issues—and therefore remove, at least partially, that barrier. Professor Steven Shavell has also proposed that allowing litigants the option to shape 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, 86–93 (2010).

<sup>86</sup> For additional discussion of contingent appellate settlement agreements, see *infra* note 206.

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' assessments of the strength of the defense vary widely, they are unlikely to reach an agreement. For the same reason, the parties have little incentive 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 are otherwise unavailable. Interlocutory review may be especially attractive in cases in which the parties predict a relatively expensive trial that might be negated or decisively reshaped 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 reshape) 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 broadly in light of the continuing growth of decisive legal questions. We show that the assertion of greater judicial control over the resolution of civil disputes has created a corresponding increase in the demand for interlocutory oversight.

### C. *The Empirical Case for Party Autonomy*

Moving from the intuitive and theoretical worlds 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 ways in which the parties and the district courts work to procure legal clarification from the appellate courts and the somewhat inconsistent reception such efforts have encountered 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 trials, and relatively inexpensive appellate review.<sup>87</sup> Patent litigation also produces controlling questions of fact and law, such as the judicial construction of patent claims, that can play a central role in resolving suits for patent infringement and patent invalidity.<sup>88</sup> At one time, issues of patent

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<sup>87</sup> See Schwartz, *supra* note 76, at 243.

<sup>88</sup> A patent's claims "define the invention which an applicant believes is patentable." *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993). Claim construction is the process of interpreting and elaborating on the normally terse claim language in order to explain the scope of the claims. *Scripps Clinic & Research Found. v. Genentech, Inc.*, 927 F.2d 1565, 1580 (Fed. Cir. 1991).

claim construction were simply sent to the jury along with the litigants' assertions of infringement and invalidity.<sup>89</sup> 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.<sup>90</sup> All that changed in 1996 with the Supreme Court's decision in *Markman v. Westview Instruments, Inc.*, which held that construction issues should be treated as matters of law for the court (rather than as issues of fact for the jury) to resolve.<sup>91</sup> 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."<sup>92</sup> The result of such hearings can effectively determine the settlement value of the infringement suit.<sup>93</sup>

The patent infringement case *Nystrom v. TREX Co.*<sup>94</sup> 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 on the scope of the patent that was, as a practical matter, fatal to the plaintiff's theory of infringement.<sup>95</sup> Yet the decision did not satisfy the requirements for appellate review under the final judgment rule.<sup>96</sup> The court did not formally reject plaintiff's infringement claim and did not resolve the defendant's counterclaim of patent invalidity.<sup>97</sup> Lacking a final judgment, "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment,"<sup>98</sup> the parties

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<sup>89</sup> See, e.g., Brian Michael Martin, *Federal Circuit Limits Jury's Role in Patent Trials*, 77 J. PAT. & TRADEMARK OFF. SOC'Y 641 (1995).

<sup>90</sup> See, e.g., *id.*

<sup>91</sup> 517 U.S. 370, 372 (1996) (construing the patent claims as presenting a mixed question of law and fact for the court to resolve).

<sup>92</sup> *MediaCom Corp. v. Rates Tech., Inc.*, 4 F. Supp. 2d 17, 21 (D. Mass. 1998). See also *Phillips v. AWH Corp.*, 415 F.3d 1303, 1317–18 (Fed. Cir. 2005) (en banc) (describing the relative value of intrinsic and extrinsic evidence in claim construction).

<sup>93</sup> See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 33.22 (2004) ("[M]any 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. Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?*, 15 HARV. J.L. & TECH. 1, 5 (2001) (citing *Dow Chem. Co. v. United States*, 226 F.3d 1334, 1338 (Fed. Cir. 2000), and *KCJ Corp. v. Kinetic Concepts, Inc.*, 223 F.3d 1351, 1355 (Fed. Cir. 2000)).

<sup>94</sup> *Nystrom v. TREX Co.* (*Nystrom I*), 339 F.3d 1347 (Fed. Cir. 2003).

<sup>95</sup> See *id.* at 1348–49.

<sup>96</sup> *Id.* at 1349.

<sup>97</sup> *Id.*

<sup>98</sup> *Catlin v. United States*, 324 U.S. 229, 233 (1945).

(and the district court) sought a mechanism with which to secure interlocutory review.<sup>99</sup>

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.<sup>100</sup> The apparent goal of the district court's stay order was to accept the parties' request to put everything else on hold and trigger review of the *Markman* decision.<sup>101</sup> The Federal Circuit, however, refused to accept this mode of facilitating review.<sup>102</sup> 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.<sup>103</sup> 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,<sup>104</sup> and dispositions that fail to resolve pending counterclaims also fail the final judgment rule.<sup>105</sup> To accept this mode of

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<sup>99</sup> 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 I*, 339 F.3d at 1349. 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. (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 substantial enough to allow water to drain and for the boards to be easily stacked. *Id.* TREX countered with allegations of patent invalidity and noninfringement. *Nystrom I*, 339 F.3d at 1348.

<sup>100</sup> *Nystrom I*, 339 F.3d at 1349. Although the district court had entered a partial summary judgment, it did not certify the finality of that judgment as required by Federal Rule of Civil Procedure 54(b). *Id.* at 1351.

<sup>101</sup> See *id.* at 1349–50 (noting that the parties' suggestions to the district court were “three possible avenues of appeal as a matter of right”).

<sup>102</sup> See *id.* at 1350.

<sup>103</sup> *Id.* at 1351.

<sup>104</sup> But see *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 713 (1996) (concluding that a stay order based on abstention doctrine was appealable as a final decision because it effectively put the litigants out of court); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 (1983) (concluding that a stay order was appealable as a final decision because the only issue in the federal forum was one that would be resolved in state court, therefore ending litigation in the federal forum).

<sup>105</sup> Rule 54(b) permits a district court to enter a judgment as to certain separable claims and ripen the case for appeal upon a finding that there is no just cause for delay. FED. R. CIV. P. 54(b). But to the extent that counterclaims present issues factually connected to the claims on which judgment was entered, the connection may defeat Rule 54's separable claims requirement and foreclose the assertion of appellate jurisdiction. See, e.g., *Jordan v. Pugh*, 425 F.3d 820, 826–29 (10th Cir. 2005) (reviewing a district court order to ensure that the adjudicated claims and unadjudicated counterclaims were truly separate for purposes of Rule 54). To the extent that counterclaims have been dismissed without prejudice and remain subject to revival, their presence in the litigation defeats the final judgment rule. See, e.g., *India Breweries, Inc. v. Miller Brewing Co.*, 612 F.3d 651, 657–58 (7th Cir. 2010) (recognizing the general rule that without-prejudice dismissals of counterclaims do not ripen a case for appellate review but concluding that a last-second, with-prejudice dismissal of the counterclaim in question sufficed to create finality).

review, the Federal Circuit noted, would represent a departure from settled precedent and the ban on piecemeal litigation.<sup>106</sup>

The *Nystrom* parties' 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%.<sup>107</sup> This compares with an appellate reversal rate in all civil proceedings in the federal system that hovers around 20%.<sup>108</sup> 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,<sup>109</sup> 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 as long as *Nystrom* views itself as owning a patent infringement claim that it values at \$4 million.<sup>110</sup> For TREX, 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 in-

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<sup>106</sup> *Nystrom I*, 339 F.3d at 1350.

<sup>107</sup> See Schwartz, *supra* note 76, at 240 tbl.1 (finding that 38.8% of cases adjudicated by the Federal Circuit contain at least one wrongly construed term); see also Moore, *supra* note 93, at 11–12 & fig.1 (“[A]ccording to the Federal Circuit, the district court claim constructions were wrong 28% of the time.”); Kimberly A. Moore, *Markman Eight Years Later: Is Claim Construction More Predictable?*, 9 LEWIS & CLARK L. REV. 231, 245–47 (2005) (noting that the reversal rate of claim construction is getting higher).

<sup>108</sup> See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 150 (2002) (finding an 80% affirmance rate). While accounts differ as to why the Federal Circuit so frequently reverses on claim construction matters, we note that claim construction rulings, including resolutions of related factual questions, are reviewed de novo by the Federal Circuit. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1456 (Fed. Cir. 1998).

<sup>109</sup> 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 damages 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 1281, 1282 (Fed. Cir. 2009), 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 as a royalty on TREX's production, as it would likely be more than *Nystrom*'s actual damages. The court can increase such damages “up to three times” for willful infringement. 35 U.S.C. § 284.

<sup>110</sup> See *supra* Part I.B.

fringement 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 order,<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup> 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 significantly. The Federal Circuit, however, has discretion to allow or reject such appeals and takes the view that “[s]uch appeals are rarely granted.”<sup>114</sup>

Notwithstanding its 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.<sup>115</sup> 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.<sup>116</sup> Such an approach would dispose of all pending matters and, at least in the view of the Federal Circuit, satisfy

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<sup>111</sup> See *Cheney v. U.S. District Court*, 542 U.S. 367, 380 (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.” (second alteration in original) (internal citations omitted) (internal quotation marks omitted)).

<sup>112</sup> See FED. R. CIV. P. 54(b); see also *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980) (noting that, absent another important reason for granting certification, a claim appealed under Rule 54(b) should be separable from remaining claims in that the appellate court would not have to decide the same issues more than once even if there were subsequent appeals); *Okla. Tpk. Auth. v. Bruner*, 259 F.3d 1236, 1242–43 (10th Cir. 2001) (highlighting the importance of separability for Rule 54(b) certification).

<sup>113</sup> 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 the court would ordinarily have jurisdiction over the appeal. 28 U.S.C. §§ 1292(b)–(c)(1) (2006); see also *supra* note 14.

<sup>114</sup> *Nystrom I*, 339 F.3d 1347, 1351 (Fed. Cir. 2003).

<sup>115</sup> See *id.*

<sup>116</sup> For a discussion of the circuit split regarding whether a without-prejudice dismissal provides the finality necessary for immediate review, see *supra* note 72.

the final judgment rule.<sup>117</sup> Notwithstanding the Federal Circuit's approval of this approach to appellate review, one can fairly question whether the without-prejudice dismissal of the counterclaims differs in substance from the stay order that the court treated as nonfinal in *Nystrom*. After all, the without-prejudice designation assumes that the dismissal does not operate as an adjudication on the merits to which preclusive effect will attach.<sup>118</sup> That means that the counterclaims of invalidity remain alive and subject to reactivation through the filing of claims or 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 reassert their claims of invalidity even if the plaintiff failed to secure the reversal of the adverse claim construction ruling.<sup>119</sup>

Despite its curious features, we believe that the Federal Circuit's *Nystrom* decision underscores the importance of party autonomy in determining when to make interlocutory review available. In contrast to *Nystrom*'s emphasis on technical finality, we stress that the district court and the parties apparently agreed that securing an appellate resolution of the claim construction issue before taking the case to trial would ultimately advance the resolution of the dispute. The district court judge in the *Nystrom* saga 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 allowing him to certify the parties' request for interlocutory review on a matter that would benefit from immediate appellate review.<sup>120</sup>

2. *Particularity to Facilitate Early Evaluation of Novel Claims.*— Litigation over novel theories of liability may also produce situations in

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<sup>117</sup> Indeed, following dismissal of the appeal in *Nystrom I*, the parties returned to district court. *See Nystrom v. TREN Co. (Nystrom II)*, 424 F.3d 1136, 1141 (Fed. Cir. 2005). The court entered the suggested order, dismissing the counterclaims without prejudice, and the case returned to the Federal Circuit for appellate review of the claim construction issue and the associated grant of summary judgment. *See id.* The Federal Circuit in *Nystrom II* had no difficulty in concluding that the final judgment rule was satisfied by the dismissal of the counterclaims. *See id.*

<sup>118</sup> *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (distinguishing between adjudication on the merits, to which preclusive effect attaches, and without-prejudice dismissal). Regarding the meaning of "on the merits," see Jay Tidmarsh, *Resolving Cases "On the Merits,"* 87 DENV. U. L. REV. 407, 410–11 (2010), which notes two distinct meanings of "on the merits": (1) "deciding cases accurately" and (2) "deciding cases under procedures that give the parties the full opportunity to present evidence and arguments."

<sup>119</sup> *See Erie Technological Prods., Inc. v. JFD Elecs. Components Corp.*, 198 U.S.P.Q. 179, 186–87 (E.D.N.Y. 1978) (noting that declaratory judgment relief for claims of invalidity can be granted at the discretion of the court).

<sup>120</sup> The idea 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 to rely on appellate courts in a "mature[]" judicial system. *See supra* note 27.

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. Archibald & Kendall, Inc.*<sup>121</sup> 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.<sup>122</sup> Illinois law clearly imposed a duty on landowners to reasonably guard against known threats posed by the unlawful conduct of third parties.<sup>123</sup> But Illinois law had not previously extended that duty to those who, like the plaintiff, were assaulted on a public street adjacent to a private warehouse.<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup> But why did the plaintiff choose to set forth the nature of the truck's relationship to the warehouse in such detail, detail that virtually invited a motion to dismiss?<sup>127</sup> The plaintiff might have survived a round of motion practice (at least in those pre-*Iqbal* days)<sup>128</sup> by simply alleging that the truck was parked on premises that the defendant used as a warehouse. Why did the plaintiff choose to plead in such detail?

One answer to the puzzle of the 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 conducted and depositions have 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 defendant were right, and Illinois law recognized no duty, the case had no value at all.<sup>129</sup> If the plaintiff was right, by contrast, the verdict might well reach

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<sup>121</sup> 573 F.2d 429 (7th Cir. 1978).

<sup>122</sup> *Id.* at 431.

<sup>123</sup> *Id.* at 433 (citing *Neering v. Ill. Cent. R.R. Co.*, 50 N.E.2d 497 (Ill. 1943)).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 431, 437.

<sup>126</sup> *Id.* at 431–32, 438.

<sup>127</sup> *See id.* at 431 (noting that the complaint detailed “A & K’s practice, custom and habit over a period of several years” of using the public thoroughfare as “an extension of the receiving dock area”).

<sup>128</sup> *See infra* notes 158–59 and accompanying text.

<sup>129</sup> 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 nonfinal 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; it is 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.

into the millions of dollars with breach of duty and resulting injury seeming perfectly straightforward.<sup>130</sup> 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 investment in the discovery expenses needed to bring the case to trial until after the appellate court upheld the viability of the legal theory.

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,<sup>131</sup> to set forth their claims with greater particularity than the rules would have then required. Many commentators have noted the confusing persistence of fact pleading in a setting where the rules required only that the complaint notify the defendant of the nature of the claim.<sup>132</sup> Of course, *Ashcroft v. Iqbal* confirms that notice alone will no longer suffice: the plaintiff must plead enough nonconclusory factual information to satisfy a standard of plausibility.<sup>133</sup> To the extent that the *Mitchell* plaintiff sought to hasten a definitive

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With their shared interest in avoiding litigation costs that might prove unnecessary whichever way the legal question comes out, both the parties and the federal system might well benefit from interlocutory review. See *supra* Part I.B.

<sup>130</sup> *Mitchell*, 573 F.2d at 433 (noting that the defendant conceded that owners of land owe a duty to invitees to guard against criminal acts of third parties when the owner knows of previous incidents).

<sup>131</sup> The Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), confirms that the new pleading regime announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), applies generally to all claims brought in federal court. Known by their telescoped name, *Twiqbal*, the two cases have spawned an enormous amount of scholarly commentary and nearly as much disputation in the lower federal courts. For a modest sampling of the voluminous literature, see Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010); Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010); and A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009).

<sup>132</sup> See, e.g., Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998); Thomas E. Willging & Emery G. Lee III, *In Their Words: Attorney Views About Costs and Procedures in Federal Civil Litigation* 28 (Mar. 2010) (unpublished manuscript), [http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/\\$file/costciv3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/$file/costciv3.pdf) (documenting a tendency among practicing attorneys to plead with more specificity than notice pleading would require); see also Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003) (noting that courts often expect more than mere notice pleading and that current pleading practices are often "a far cry" from notice pleading).

<sup>133</sup> 129 S. Ct. at 1949 ("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." (citing *Twombly*, 550 U.S. at 556)); see also Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 889 (2009) ("The major impact of *Twombly* . . . is

legal ruling, the *Mitchell* case allows us to see why particularity may have made sense for plaintiffs even before the Supreme Court found a version of it in Federal Rule of Civil Procedure 8. If the parties' joint desire for legal clarification explains a part of the particularity phenomenon, it suggests that the *Twombly–Iqbal* framework 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 nonconclusory allegations that tend to show some support for the claims.<sup>134</sup> The same motivations that drove plaintiffs to plead specific facts under a notice-pleading scheme would make our proposal viable: plaintiffs often wish to secure earlier determinations of the law.

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 parties' 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 but also provides a final judgment suitable for appellate review by the court with essentially final authority over the viability of a novel claim.<sup>135</sup> 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 from the district court's decisional process.

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 I v. Abbott Laboratories*, the de-

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not so much what it says about the pleading standard, but rather what it says about discovery costs and settlement leverage as well as the ineffectiveness of case management more generally.”); 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) (suggesting that the Court employed the same rationale for applying the tend-to-exclude standard that it had applied to summary judgment in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), to a motion to dismiss in *Twombly*: “the basic facts alleged in the complaint cannot amount to a credible case of the ultimate fact”).

<sup>134</sup> Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (arguing that the decisions in *Twombly* and *Iqbal* “invent[ed] a new and foggy test for the threshold stage of every lawsuit [and therefore] have destabilized the entire system of civil litigation”); Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 852, 857 (2008) (arguing that “no one quite understands what [*Twombly*] holds” because the opinion “replaced the ‘no set of facts’ language [from *Conley v. Gibson*, 355 U.S. 41 (1957)] with a new standard grounded in . . . ‘plausibility’” while eschewing “any notion that it was imposing a heightened pleading requirement”).

<sup>135</sup> Of course, a denial of a motion to dismiss would not be appealable until the final judgment had been entered. *See, e.g.,* *Pediatrix Screening, Inc. v. Telechem Int'l, Inc.*, 602 F.3d 541, 547 (3d Cir. 2010).

endants appealed from the denial of motions to dismiss and for summary judgment.<sup>136</sup> 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.<sup>137</sup> The existence of these types of settlements confirms that parties will sometimes agree that an appellate resolution of a legal issue on which the district court cannot decisively rule will best facilitate settlement. Such agreements also suggest that the parties’ calculations of settlement ranges depend on predictions about the likely outcome of appellate litigation.<sup>138</sup>

High–low agreements have become an accepted feature of practice at the trial level; such agreements typically provide that the amount of the settlement will depend on the jury’s resolution of the case.<sup>139</sup> The example of *Abbott Laboratories* 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 on justiciability grounds to assert appellate jurisdiction over a dispute framed by a high–low agreement.<sup>140</sup> 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.<sup>141</sup> 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.

4. *Judicialization: The Shift from Jury to Judicial Resolution.*—This section documents a trend toward what we call judicialization—the trans-

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<sup>136</sup> 571 F.3d 930, 932 (9th Cir. 2009).

<sup>137</sup> *Id.*

<sup>138</sup> See *supra* Part I.B.

<sup>139</sup> In a high–low agreement, the plaintiff and the 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. See *Malick v. Seaview Lincoln Mercury*, 940 A.2d 1221, 1223 (N.J. Super. Ct. App. Div. 2008) (stating that a high–low agreement is a contract and subject, therefore, to traditional rules of contract interpretation); *Cunha v. Shapiro*, 837 N.Y.S.2d 160, 162–64 (App. Div. 2007) (treating a high–low agreement as a settlement); 3 ATLA’S LITIGATING TORT CASES § 33:26 (Roxanne Barton Conlin & Gregory S. Cusimano eds., West & ATLA 2003) (describing high–low agreements); see also Prescott, Spier & Yoon, *supra* note 80 (empirically studying high–low agreements). 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. At the same time, the agreement protects the defendant from an excessively large damage award, especially one that might exceed its liability insurance coverage.

<sup>140</sup> See, e.g., *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1132 (9th Cir. 2005). This case is discussed *infra* Part II.B.

<sup>141</sup> We explore the problems of justiciability *infra* Part II.B.

formation of fact questions (previously sent to the jury) into issues of law for the judge to resolve. We have already seen one example in the patent field where the Supreme Court shifted to judicial resolution of claim construction issues that juries had previously resolved.<sup>142</sup> We have also seen that judicialization increases the demand for early appellate resolution of crucial issues; claim construction questions led the parties in *Nystrom* to agree on the need for interlocutory review. We think we can generalize from the lesson of *Nystrom*: as courts control more issues, parties will tend to demand greater access to the appellate courts for a definitive resolution. Juries still have a role to play, but appellate courts conduct *de novo* review of matters of law and owe no deference to the trial court's determination.<sup>143</sup> We suspect that, with the growth in judicialization, parties will continue to seek readier access to decisive rulings on issues of law from appellate courts.

*a. Qualified immunity.*—The Court's well-known decision in *Harlow v. Fitzgerald*<sup>144</sup> provides 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.<sup>145</sup> 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.<sup>146</sup> 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.<sup>147</sup>

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 or for summary judgment on qualified immunity grounds.<sup>148</sup> Although such orders were not technically

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<sup>142</sup> See *supra* note 89–91 and accompanying text.

<sup>143</sup> See, e.g., *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1451 (Fed. Cir. 1998) (“[C]laim construction, as a purely legal issue, is subject to *de novo* review on appeal.”); *Bradley v. Brown*, 42 F.3d 434, 436 (7th Cir. 1994) (noting that the application of the *Daubert* framework is subject to *de novo* review in the court of appeals).

<sup>144</sup> 457 U.S. 800 (1982).

<sup>145</sup> See *id.* at 818 (extending immunity to officials so long as they do not violate clearly established federal law). For a critique of this one-size-fits-all standard of qualified immunity and constitutional remedies, see John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259 (2000).

<sup>146</sup> See *Harlow*, 457 U.S. at 816.

<sup>147</sup> See *id.* at 815–18 (emphasizing the need for an objective standard to facilitate summary adjudication of insubstantial claims).

<sup>148</sup> *Mitchell v. Forsyth*, 472 U.S. 511, 527–30 (1985).

final,<sup>149</sup> the Court found in *Mitchell v. Forsyth* that they satisfied the terms of the collateral order doctrine.<sup>150</sup> The decision was, to say the least, a departure from established doctrine. The collateral order doctrine applies when the district court conclusively resolves an important issue that is separate from the merits and that cannot be effectively reviewed after a final judgment.<sup>151</sup> Decisions rejecting a qualified immunity defense may well satisfy the conclusiveness and importance prongs of the analysis, but they do not turn on questions separate from the merits and do not evade review. After all, following the Court's refinement of qualified immunity law in *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 reconceptualizing qualified immunity for purposes of review in the federal system as a right not to stand trial;<sup>152</sup> so viewed, the right was portrayed as one that could not be effectively vindicated without interlocutory review of the immunity issue during the pretrial phase of the litigation.<sup>153</sup>

*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. Thus, had the Court not made such review available to government officials as of right, one can easily imagine plain-

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<sup>149</sup> For the classic definition of technical finality, see *Catlin v. United States*, 324 U.S. 229, 233 (1945), which defines technical finality as an order that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."

<sup>150</sup> 472 U.S. at 525–30 (extending to government officers a right to interlocutory appellate review of decisions that reject a qualified immunity defense because, as a purported immunity from suit, it would otherwise be permanently lost).

<sup>151</sup> *Id.* at 544–45 (Brennan, J., dissenting).

<sup>152</sup> See *id.* at 526 (majority opinion). One might assume, based on this conception of qualified immunity as immunity from trial, that the state courts would owe a similar obligation to provide interlocutory review of rejected qualified immunity claims. But the Court does not agree. See *Johnson v. Fankell*, 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 *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. See John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 762 n.199 (2008).

<sup>153</sup> See *Mitchell*, 472 U.S. at 526 (holding that the 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" (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982))).

tiffs and officers agreeing to pursue interlocutory review before incurring the costs of trial. One might also expect that the categorical approach providing for the routine availability of interlocutory review leads 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 *Johnson v. Jones*, where the Court unanimously cut back on the scope of collateral order review for relatively fact-bound qualified immunity issues.<sup>154</sup> Finally, one might sensibly predict that the prospects for the settlement of *Bivens* actions will sharply improve following a decision definitively rejecting an officer's immunity defense. A recent study suggests, in fact, that plaintiffs secure higher settlement rates in *Bivens* litigation than has been previously supposed;<sup>155</sup> even Iqbal's claims were reportedly settled after he amended his complaint on remand to satisfy the Court's more demanding pleading standard.<sup>156</sup>

This change in immunity law also 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.<sup>157</sup> Eventually, the Court confirmed this conclusion in *Ashcroft v. Iqbal*, concluding that its plausibility standard applied to all claims, including constitutional tort claims against high government officials.<sup>158</sup> One can see the conclusion of this transformative series of deci-

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<sup>154</sup> 515 U.S. 304, 313–17 (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 undisputed set of facts, see *Mitchell*, 472 U.S. at 515, 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. *Johnson*, 515 U.S. at 313–17. The Court found that the collateral order doctrine did not apply to such an order: the issue was too fact-bound (unlike the legal question addressed in *Mitchell*), 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.

<sup>155</sup> See Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 841–42 & fig.4 (2010) (reporting a success rate in *Bivens* litigation of approximately 30%).

<sup>156</sup> E-mail from Alexander Reinert, Attorney for Javaid Iqbal, to James Pfander, Professor of Law, Nw. Univ. Sch. of Law (Aug. 17, 2010, 3:52 PM) (on file with author).

<sup>157</sup> See *Siegert v. Gilley*, 895 F.2d 797, 800–02 (D.C. Cir. 1990) (collecting examples of lower court decisions that applied a heightened pleading standard for constitutional tort claims). In *Siegert*, the plaintiff's allegations of malice apparently met the standard of Rule 9(b) 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. See *Siegert v. Gilley*, 500 U.S. 226, 231–32 (1991) (noting that the allegations were based on "malice," which under Rule 9(b) of the Federal Rules of Civil Procedure "may be alleged generally").

<sup>158</sup> 129 S. Ct. 1937, 1953 (2009). *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

sions in the Court's description of the issue in *Iqbal*: whether the plaintiff pleaded sufficient factual matter that, "if taken as true, state[d] a claim that [government officials] deprived him of his clearly established constitutional rights."<sup>159</sup> By incorporating the qualified immunity standard into the plaintiff's burden of pleading, 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.

*b. Reliability of expert testimony.*—Two Supreme Court opinions shifted, at least partially, the responsibility for determining the credibility of expert testimony from the jury to the judge. The 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* held that the district court judge has a gatekeeping responsibility to determine whether the scientific testimony of expert witnesses is reliable and relevant enough to reach the jury.<sup>160</sup> 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."<sup>161</sup> In *Kumho Tire Co. v. Carmichael*, decided in 1999, the Court expanded this gatekeeping role to include not only scientific testimony but also any testimony requiring "technical" or "other specialized" knowledge.<sup>162</sup> Of course, the prerequisite inquiry for the *Daubert*–*Kumho* evaluation—whether the testimony involves scientific, technical, or other specialized knowledge—is itself necessarily a question for the judge. *Daubert* and *Kumho* created a new pretrial battleground where litigants attempt to knock out each other's experts, not through the traditional tools of cross-examination but before they appear in front of the jury.<sup>163</sup>

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, Inc.* illustrates.<sup>164</sup> In suing for personal injuries, the plaintiff contended that the manufacturer of his prosthetic knee had defectively designed the sterili-

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plausible." *Id.* at 1951 (alteration in original) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (internal quotation marks omitted)).

<sup>159</sup> *Id.* at 1943.

<sup>160</sup> 509 U.S. 579, 592–93 (1993).

<sup>161</sup> *Id.* at 597.

<sup>162</sup> 526 U.S. 137, 141 (1999).

<sup>163</sup> See Sandra F. Gavin, *Managerial Justice in a Post-Daubert World: A Reliability Paradigm*, 234 F.R.D. 196, 197 (2006).

<sup>164</sup> See *Fuesting v. Zimmer, Inc. (Fuesting III)*, 362 F. App'x 560 (7th Cir. 2010); *Fuesting v. Zimmer, Inc. (Fuesting I)*, 421 F.3d 528 (7th Cir. 2005). Like *Nystrom*, see *supra* notes 94–120 and accompanying text, the *Fuesting* case appeared more than once in the court of appeals. 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?*, LAW & CONTEMP. PROBS., Summer 1991, at 171, 193 (finding there may be a role for judges in obtaining agreement from parties to develop ADR solutions to scientific disputes).

zation process of the implant.<sup>165</sup> 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.<sup>166</sup> Before trial, Zimmer attempted to have Dr. Pugh excluded as an expert witness under Federal Rule of Evidence 702 and *Daubert*.<sup>167</sup> The district court denied the motion in limine and the trial began, resulting in a jury verdict for Fuesting.<sup>168</sup>

The Seventh Circuit reversed the *Daubert* ruling of the district court.<sup>169</sup> Conducting de novo review of the district court's determination, the circuit 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 reliability.<sup>170</sup> The court therefore remanded for a new trial.<sup>171</sup> At the second trial, Fuesting put forth a new expert, Dr. Rose.<sup>172</sup> This time, the district court excluded the testimony of Dr. Rose.<sup>173</sup> Without the testimony of Dr. Rose, Fuesting was unable to show causation, and the district court granted summary judgment in favor of the defendant.<sup>174</sup> On appeal, the Seventh Circuit, reflecting the perception that the admissibility of expert testimony was a matter for courts to resolve, conducted its own independent analysis of whether Dr. Rose's testimony met the *Daubert* test and affirmed the decision of the district court.<sup>175</sup>

The Seventh Circuit's handling of *Fuesting* nicely illustrates the way that judicialization can increase the demand for interlocutory review. Like the novel legal theory in *Mitchell v. Archibald & Kendall, Inc.*,<sup>176</sup> novel theories of causation presented by experts 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 (nonfinal) decision to allow Dr. Pugh to testify could have saved the parties the cost of an expensive trial and

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<sup>165</sup> *Fuesting I*, 421 F.3d at 530.

<sup>166</sup> *Id.* at 531–32.

<sup>167</sup> *Id.* at 532.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 537.

<sup>170</sup> *Id.* at 535.

<sup>171</sup> 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. (Fuesting II)*, 448 F.3d 936, 937 (7th Cir. 2006).

<sup>172</sup> *Fuesting III*, 362 F. App'x 560, 562 (7th Cir. 2010).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 562–64.

<sup>176</sup> See *supra* notes 121–30 and accompanying text.

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 remain a threat to any plaintiff's jury verdict.<sup>177</sup> 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 *Daubert* issues, like those in *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 as patent litigation,<sup>178</sup> corporate law,<sup>179</sup> antitrust law.<sup>180</sup> Even in situations in which the federal courts have made no change in the balance between judge and jury, the growth of federal statutory law has tended to provide a more detailed legal framework within which

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<sup>177</sup> Of course, one might argue that interlocutory review could present problems of piecemeal review to the extent that it would have allowed the plaintiff to put forth a succession of witnesses (or methodologies) until he found one that 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 put forth a weak witness; rather, they will tend to offer their strongest witness in the first proceeding. To the extent that a party has several equally strong witnesses, the party will often present them as a group, thus enabling the district court to evaluate all the witnesses in a single proceeding. See, e.g., *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 779 (10th Cir. 1999) (recounting plaintiff's proposal to have four physicians testify at trial). 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, review of *Daubert* issues will likely target those that most clearly warrant review. 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.

<sup>178</sup> While it is not yet clear, the Supreme Court's holding in *KSR International 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) ("The ultimate judgment of obviousness is a legal determination."); see also Meng Ouyang, Note, *The Procedural Impact of KSR on Patent Litigation*, 6 BUFF. INTELL. PROP. L.J. 158, 159–62 (2009) (explaining that some believe that *KSR* moved the question of obviousness from the jury to the judge and that Judge Matthew Kennelly believes that it has not).

<sup>179</sup> 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 not a jury. See *Int'l Fin. Servs. Corp. v. Chromas Techs. Can., Inc.*, 356 F.3d 731, 739 (7th Cir. 2004).

<sup>180</sup> Because antitrust law limits what inferences can be drawn from ambiguous evidence, see *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986), the determination of summary judgment motions can be very fact-bound. The judge must compare the reasonableness of the alleged conduct to that of independent action by the defendants. See *id.* (requiring a court, in determining whether summary judgment is proper, to consider whether "the inference of conspiracy is reasonable" and the facts of "the nature of the alleged conspiracy and the practical obstacles to its implementation"); see also *id.* at 599 (White, J., dissenting) ("[T]he Court makes a number of assumptions that invade the factfinder's province.").

factfinders must operate in resolving issues of federal liability.<sup>181</sup> With the growth of statutes and the legal questions they inevitably pose comes a corresponding demand for appellate review as parties seek answers from the only body that can finally resolve the issue. Our proposal addresses this demand for review by empowering the parties and the district court to make review available when they all agree that it would help resolve the case.

## II. PREDICTABLE CONCERNS WITH PARTY-AUTONOMOUS 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 may oppose it 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 us test the proposal in a trial run and evaluate the results. The need for ongoing evaluation suggests that there might be an advantage to adopting the proposed rule through the rules advisory process. The Judicial Conference Committee on Civil Rules—or its newly formed joint Civil/Appellate Subcommittee<sup>182</sup>—can provide ongoing review and oversight of new rules of interlocutory review, making necessary adjustments in light of the practical experience that emerges.

### *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

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<sup>181</sup> On the rise of statutes, see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982), which describes an “orgy of statute making” and a resulting “statutorification” of American law, and Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

<sup>182</sup> See Memorandum from Judge Carl E. Stewart, Chair, Advisory Comm. on Appellate Rules, Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., to Judge Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure, Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S. 7 (May 8, 2009), available at <http://host4.uscourts.gov/rules/Reports/AP05-2009.pdf> (noting the formation of the subcommittee and including the manufactured finality doctrine on its list of topics to consider).

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.<sup>183</sup> Today, 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.”<sup>184</sup> 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 justification for the final judgment rule has been to avoid the premature, fragmentary, and repetitive appeal of matters first resolved at the trial court level.<sup>185</sup> 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.<sup>186</sup> Thus, to return to our example of the nonfinal 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 record; fragmentary appeals may not bring in to view all of the issues that might properly influence an appellate decision.<sup>187</sup> As for the concern with repetition, appellate courts rightly resist interlocutory review of issues that could return to the appellate docket later

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<sup>183</sup> See Redish, *supra* note 12, at 90 (noting how Congress and the courts have “mitigate[d] the harshness and occasional absurdity of inflexible insistence on finality in all situations”).

<sup>184</sup> DANIEL J. MEADOR, THOMAS E. BAKER & JOAN E. STEINMAN, *APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL* 49 (2d ed. 2006).

<sup>185</sup> *Id.*

<sup>186</sup> 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. v. Johnson*, 326 U.S. 120, 127 (1945) (allowing review of a nonfinal state court decision on the ground that further proceedings could not obviate the federal question), with *N.D. State Bd. of Pharmacy 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 *Local No. 438 Constr. & Gen. Laborers’ Union v. Curry*, 371 U.S. 542, 549–51 (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 dispute).

<sup>187</sup> There are numerous examples of the somewhat formulaic invocation of the importance of a full record. See, e.g., *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.”).

in the form of an appeal from a final judgment.<sup>188</sup> 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.<sup>189</sup>

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 a settlement range where one did not previously exist; indeed, interlocutory review may reduce the expected settlement value of the case from the plaintiff's perspective.<sup>190</sup> This comports with our intuition that plaintiffs in doubtful cases on liability will tend to press forward to a

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<sup>188</sup> For an expression of general concern with duplicative appeals, see *India Breweries, Inc. v. Miller Brewing Co.*, which notes the general rule that an order that disposes of less than all of the claims does not satisfy the requirement of finality because the "remaining elements are apt to come back on a second appeal." 612 F.3d 651, 657 (7th Cir. 2010) (quoting *First Health Grp. Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 801 (7th Cir. 2001) (internal quotation marks omitted)). The Court's collateral order doctrine was framed with this problem in mind. Thus, in *Cohen v. Beneficial Industrial Loan Corp.*, 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. 337 U.S. 541, 544–46 (1949). The requirement that collateral orders remain separate from the merits and evade review after final judgment has remained part of the doctrine. See, e.g., *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527 (1988) (holding that the denial of a motion to dismiss on grounds of forum non conveniens was not sufficiently separate from the merits to warrant immediate review under the collateral order doctrine).

<sup>189</sup> 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 meant that the same issue and facts could well arise in the wake of a final judgment).

<sup>190</sup> In Part I.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 pretrial 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 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. As we did previously, consider \$100 to be the anticipated jury award, \$10 to be the cost of trial, and \$2 to be the cost of appeal. Under the final judgment rule there would be a settlement range because the plaintiff would accept anything over \$28  $[(0.8 \times 0.5 \times 100) - 10 - 2 = 28]$  and the defendant would pay up to \$37  $[(0.5 \times 0.5 \times 100) + 10 + 2 = 37]$ . 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 upheld the ruling (the plaintiff would accept anything over \$40  $[(0.5 \times 100) - 10 = 40]$  and the defendant will pay up to \$60  $[(0.5 \times 100) + 10 = 60]$ ), it would go down if the ruling were reversed. The settlement range after a reversal would be between \$10  $[(0.2 \times 100) - 10 = 10]$  and \$30  $[(0.2 \times 100) + 10 = 30]$ . 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.

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 will 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 tend to agree on the need for interlocutory review only where the case turns on a relatively clear-cut issue about which the appellate court has the final say. The more clear-cut the legal question, the less likely it is to 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)<sup>191</sup> or a novel claim for relief (as in the case of *Mitchell v. Archibald & Kendall, Inc.*),<sup>192</sup> the appellate court will resolve the matter once and for all (subject to the possibility of Supreme Court review).<sup>193</sup> 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 already reached in the course of interlocutory review.<sup>194</sup>

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<sup>191</sup> See *supra* Part I.B, I.C.4.

<sup>192</sup> 573 F.2d 429 (7th Cir. 1978); see *supra* Part I.C.2.

<sup>193</sup> Federal law empowers the Court to review “[c]ases in the courts of appeals” by writ of certiorari “before or after rendition of judgment.” 28 U.S.C. § 1254 (2006). For an account of the requirement that the case be “in” the court of appeals, see EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 79, 83–84 (9th ed. 2007), which observes that “a case is considered ‘in’ the court of appeals at and from the moment it is docketed in that court.” As long as the circuit courts have jurisdiction of the issue on interlocutory review, the Supreme Court may exercise review by way of certiorari.

<sup>194</sup> 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 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 obtain interlocutory review of the initial claim construction. See *Nystrom I*, 339 F.3d 1347 (Fed. Cir. 2003). The second, addressing the claim construction on the merits, was reversed on the construction of one of the claim terms. See *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. *Nystrom III*, 580 F.3d 1281, 1284 (Fed. Cir. 2009). The district court ruled, however, that because *Nystrom* had stipulated to noninfringement, he had waived his doctrine of equivalents argument. *Id.* This led to the third appeal, in which the Federal Circuit affirmed the district court’s ruling that the doctrine of equivalents argument had been waived. *Id.* at 1285. Had *Nystrom* been working under our rule, however, two of these appeals would have been avoided. First, it would only have taken one trip to the Federal Circuit to get a definitive ruling on the claim construction. Second, because getting that ruling would not have

### B. Feigned-Case Problems Under Article III

Among the many other limits Article III imposes on the exercise of judicial power, it forbids the federal courts from hearing feigned or collusive cases.<sup>195</sup> As a consequence, the federal courts may not proclaim the law except in cases of “honest and actual antagonistic assertion of rights.”<sup>196</sup> 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 in which 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 Corp. v. L.L. Bean, Inc.* illustrates the concern.<sup>197</sup> In a cease-and-desist letter, clothing manufacturer L.L. Bean demanded that Gator stop interfering with L.L. Bean’s website by opening pop-up advertisements for competitor Eddie Bauer.<sup>198</sup> In response to Gator’s action for declaratory relief, L.L. Bean moved to dismiss on the ground that the federal district court in northern California lacked personal jurisdiction over it.<sup>199</sup> After the district court granted the motion, Gator sought review.<sup>200</sup> A panel of the Ninth Circuit reversed, concluding that L.L. Bean was subject to both general and specific jurisdiction in California.<sup>201</sup> 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.<sup>202</sup> Instead of asking the court to dismiss the appeal, the parties specifically requested that the court provide a ruling on the personal jurisdiction issue.<sup>203</sup> The settlement provided for a winding

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required Nystrom to stipulate to noninfringement, there would have been no issue as to whether he had waived his doctrine of equivalents argument.

<sup>195</sup> On the feigned-case prohibition, see RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 94–100 (6th ed. 2009), and ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 50–51 (4th ed. 2003), the latter of which discusses examples of cases dismissed by the Supreme Court where the parties colluded to obtain federal judicial resolution of their dispute.

<sup>196</sup> *United States v. Johnson*, 319 U.S. 302, 305 (1943) (quoting *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)) (internal quotation marks omitted).

<sup>197</sup> 398 F.3d 1125 (9th Cir. 2005).

<sup>198</sup> *Id.* at 1127.

<sup>199</sup> *Id.* at 1127–28.

<sup>200</sup> *Id.* at 1128.

<sup>201</sup> *Id.* at 1134 (W. Fletcher, J., dissenting).

<sup>202</sup> *Id.* at 1128 (majority opinion).

<sup>203</sup> *Id.*

down of Gator's practices and a payment to compensate L.L. Bean; it also required Gator to pay an additional \$10,000 if the appellate court found that the district court lacked personal jurisdiction over L.L. Bean.<sup>204</sup> The Ninth Circuit found that the settlement mooted the controversy and therefore dismissed the appeal for lack of jurisdiction.<sup>205</sup> 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.<sup>206</sup>

While the Ninth Circuit decision may appear to draw some support from recent developments in vacatur practice following a finding of mootness,<sup>207</sup> 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 and dismiss the case.<sup>208</sup> 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 *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership* that mootness by way of settlement does not typically “justify vacatur of a judgment under review.”<sup>209</sup> 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.<sup>210</sup> To the extent that the Ninth Circuit regarded L.L. Bean as attempting to purchase a favorable precedent, one can understand the court as having attempted to prevent gamesmanship comparable to that involved in *U.S. Bancorp*.

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 1132.

<sup>206</sup> 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 Labs.*, 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 to narrow the reach of the manufactured finality 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 defenses, such as a statute of limitations defense, might be characterized as side issues. 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.

<sup>207</sup> See, e.g., *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994).

<sup>208</sup> See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

<sup>209</sup> *U.S. Bancorp*, 513 U.S. at 29. For a critical evaluation of the practice that anticipated the Supreme Court's conclusion, see Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991).

<sup>210</sup> See *U.S. Bancorp*, 513 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.”).

Ultimately, however, we believe that the settlement practice criticized in *U.S. 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 *U.S. 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 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 *U.S. 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 both control the resolution of their own dispute and provide a possible precedent for future disputes.

Instead of drawing an analogy to the *U.S. Bancorp* setting, we think that the justiciability issues in *Gator.com* can be more aptly analogized to the declaratory judgment action.<sup>211</sup> 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.<sup>212</sup> 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 decisionmaker. They might agree to arbitrate their dispute or to initiate a declaratory judgment action to clarify the contract's applicability.<sup>213</sup> 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. As long as they genuinely contest the contrac-

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<sup>211</sup> The Federal Declaratory Judgment Act allows the federal courts to issue declaratory judgments in cases of "actual controversy." 28 U.S.C. § 2201 (2006). At one time, the federal courts appeared reluctant to entertain declaratory judgment proceedings as a result of concerns with their justiciability under Article III. See FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 195, at 56. But the Court promptly upheld the Act's constitutionality as applied to a fairly concrete dispute over the interpretation of an insurance contract. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

<sup>212</sup> See LEE R. RUSS & THOMAS F. SEGALLA, *COUCH ON INSURANCE* § 202:3 (3d ed. 2005) ("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., e.g., Travelers Indem. Co. v. Bowling Green Prof'l Assocs.*, 495 F.3d 266, 272 (6th Cir. 2007) (recounting that the insurance company argued that a car accident was the result of "medical" negligence and not ordinary negligence and that therefore there was no duty to defend under a general liability policy).

<sup>213</sup> See, *e.g., Travelers*, 495 F.3d at 268.

tual issue and have adequate incentives to do so, their agreement as to the need for a legal resolution should not bar the federal courts from hearing the case.<sup>214</sup>

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 decision would advance the resolution of their dispute.<sup>215</sup> As 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.<sup>216</sup> 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. District courts, under our proposal, would have the authority to evaluate the terms of any contingent appellate settlement agreement and satisfy themselves as to the existence of that degree of adversariness needed for further litigation under Article III. Appellate courts could also inquire into the situation if doubts arose as to the existence of adversariness sufficient to sustain their appellate jurisdiction.

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<sup>214</sup> In *Travelers*, 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. *Id.* at 271. 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, *see id.* at 272, this may be a dubious determination. 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.

<sup>215</sup> Something similar underlies the Supreme Court's decision to allow officials to appeal from a qualified immunity decision even though they prevailed in the lower court. *See Camreta v. Greene*, 131 S. Ct. 2020 (2011). *See generally* James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1630 (2011) (describing *Camreta* as approving applications for declaratory review of lower court decisions).

<sup>216</sup> *See Nixon v. Fitzgerald*, 457 U.S. 731, 743–44 (1982) (confirming the justiciability of the immunity issue on appeal, notwithstanding a settlement agreement under which Nixon paid \$142,000 and would pay only an additional \$28,000 if the Court found he was not absolutely immune); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 371 (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).

*C. Certification by the District Court*

Our proposal calls for the district court to certify an issue for interlocutory review upon agreement of the parties. We do not envision a terribly complex process of district court oversight. The district court should simply examine the terms of the parties' agreement (and any related side deals) to confirm that it provides for interlocutory review. If the requisite meeting of the minds can be shown, the district court will ordinarily grant the requested certification and authorize an appeal to the circuit court. In the typical case, the parties will have identified a potentially controlling issue of law on which appellate guidance may play an important role in either the trial or settlement of the case. Often, the district court will simply confirm the existence of such an issue and grant the requested certification.

Our proposal differs from current law in two respects. The current certification statute requires certification both by the district court and by the appellate court. We would dispense with the appellate court's role. In addition, the current statute specifies a standard for certification, requiring that the order satisfy three separate criteria: it must involve a "controlling question of law," there must be "substantial ground for difference of opinion" about that question, and immediate review of the question must "materially advance the ultimate termination of the litigation."<sup>217</sup> Our proposal does not attempt to describe the issues or interlocutory orders that we regard as fit subjects for interlocutory review. Instead, we rely on the parties to identify such matters. Ordinarily, the parties will identify matters for which interlocutory review makes sense; the district court need not determine that the issues meet a particular standard.

Despite our perception of the district court's role as relatively narrow, we do not believe that the district court would owe an obligation to certify in every instance in which the parties have so agreed. (If the parties' agreement were obligatory, there would be no reason to provide for district court review at all.) Rather, we would expect the district court to perform two functions in addition to confirming the existence of an agreement by the parties. First, the district court should examine the parties' agreement to ensure that the disputed issue on appeal satisfies the Article III case-or-controversy requirement. Second, the district court should consider whether immediate review would threaten to undermine the effective case management of the pending litigation. We can imagine situations in which both parties might wish to escape from a scheduling order or other case management decision by agreeing to appellate review (and the delay it would necessarily entail). We can also imagine situations in which two parties to a dispute involving a wider array of litigants might wish to opt out of a scheduled trial or other proceeding by agreeing to appellate review. If fewer than all of the parties agree, we would expect the district court to consid-

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<sup>217</sup> See 28 U.S.C. § 1292(b) (2006).

er the threat of piecemeal litigation that the proposal for review would present.

In the end, though, we do not think it wise to specify all of the situations in which the district court might plausibly decline a requested certification. We think it enough to provide the district court with discretion to act in the interests of justice and in the spirit of deference to good-faith agreements to interlocutory review negotiated by the parties. We doubt that we can anticipate all of the considerations that might inform the district court's exercise of discretion and worry that a specification would result in an unnecessarily restrictive conception of district court authority.<sup>218</sup> Some may worry that district courts would use the broad discretion we envision irresponsibly, perhaps by denying review of orders out of a self-interested desire to avoid reversal or in a wrongheaded belief that the order was indisputably correct or beyond reproach. But our experience suggests that district courts recognize the possibility of reversal as an inherent feature of appellate oversight and will take appropriate steps to facilitate review when the parties believe it would make sense. It was precisely that spirit of good-faith cooperation that motivated the district court in *Nystrom* and the same spirit of cooperation that today leads district judges to rely on the certification power.

#### *D. The Incidence Question*

We expect that uncertainty about the incidence of agreed-upon interlocutory review will lead to questions about our proposal. (By "incidence," we refer to the frequency with which the parties will agree to and district courts will approve interlocutory appellate review.) Without concrete data on the expected incidence of party-driven review, we can only 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 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 label this Article a "preliminary analysis" is 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 like the ones in *Ny-*

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<sup>218</sup> For an insightful account of the challenges of law reform, see Geoffrey C. Hazard, Jr., *Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems*, 66 CORNELL L. REV. 564, 565 (1981), which notes the limits of the "collective mind."

*strom* 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 only of those dispositive legal issues that they expect to survive (and potentially threaten) the lower court's resolution of 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.<sup>219</sup> 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 *Nystrom*, we observe, the appellate court agreed to make interlocutory review available for claim construction issues that were likely to have survived any disposition of the case at the trial level.<sup>220</sup>

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? 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,<sup>221</sup> increased reliance on expert witnesses,<sup>222</sup> and other factors have tended to

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<sup>219</sup> 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. See *supra* note 76 and accompanying text.

<sup>220</sup> See *supra* note 117. In general, 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 *Fuesting III*, 362 F. App'x 560 (7th Cir. 2010), similar issues may arise in the area of qualification of expert testimony. See *supra* notes 172–77 and accompanying text.

<sup>221</sup> For an account of the rise in e-discovery costs and the 2006 amendments to the civil rules that seek to address and apportion those costs, see Vlad Vainberg, Comment, *When Should Discovery Come with a Bill? Assessing Cost Shifting for Electronic Discovery*, 158 U. PA. L. REV. 1523 (2010)

<sup>222</sup> The expenses associated with discovery of expert witnesses have produced ongoing rule changes, most recently in 2010. See Damon Wright, *Expert Discovery Returns to the Past*, FED. LAW., Jan. 2011, at 32; see also *Anthony v. Abbott Labs.*, 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.”).

drive up the cost of obtaining a jury's resolution on liability, especially in the types of cases that would be prime candidates for the exercise of interlocutory review as contemplated in our proposal.<sup>223</sup> 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.<sup>224</sup> 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 Congress in recent years for legislation that would ease their access to the appellate courts for the interlocutory review of dispositive legal issues.<sup>225</sup>

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 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 may wish to immediately appeal this decision and would 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.<sup>226</sup>

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.<sup>227</sup> To cope, appellate

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<sup>223</sup> See *Anthony*, 106 F.R.D. 461.

<sup>224</sup> See Thomas E. Baker, *Proposed Intramural Reforms: What the U.S. Courts of Appeals Might Do to Help Themselves*, 25 ST. MARY'S L.J. 1321, 1322–26 (1994) (noting the impact of technology on reducing costs to the courts of appeals and to litigants themselves).

<sup>225</sup> See, e.g., Patent Reform Act of 2009, H.R. Res. 1260, 111th Cong. § 10(b) (2009) (allowing interlocutory appeals of claim construction rulings); Patent Reform Act of 2009, S. Res. 515, 111th Cong. § 8(b)(3) (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”). As finally enacted, the patent reform legislation did not include these or similar provisions. See Leahy-Smith America Invents Act, Pub. L. No. 112-29 (2011).

<sup>226</sup> Parties to such agreements may agree to seek interlocutory review under 28 U.S.C. § 1292(b). See, e.g., *John Doe 1 v. Abbott Labs.*, 571 F.3d 930, 932 (9th Cir. 2009). As discussed previously, however, the appellate court has the discretion to refuse to take such appeals. See *supra* note 14.

<sup>227</sup> See POSNER, *supra* note 83, at 100–01 tbl.4.2 (reporting that civil cases filed in district courts grew 372% between 1960 and 1983 whereas civil cases filed in courts of appeals grew 823% and that

courts have adopted a variety of measures: they have increased their reliance on per curiam dispositions,<sup>228</sup> granted fewer oral arguments,<sup>229</sup> released fewer opinions for publication as fully precedential,<sup>230</sup> and made greater efforts to resolve matters through alternative dispute resolution.<sup>231</sup> The fact 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 § 1292(b).<sup>232</sup> 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 another screening mechanism would undermine a central purpose of our proposal.<sup>233</sup> 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,<sup>234</sup> a practice that can often consume scarce appellate resources

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cases filed in district courts dropped 1% between 1983 and 1995 whereas cases filed in courts of appeals grew another 67%).

<sup>228</sup> The Administrative Office of the United States Courts reported that for the twelve-month period ending September 30, 2009, 64.1% of decisions of the courts of appeals were unsigned. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 42 tbl.S-3 (2010), available at <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/JudicialBusiness.pdf> [hereinafter 2009 ANNUAL REPORT].

<sup>229</sup> The Administrative Office of the United States Courts reported that for the twelve-month period ending September 30, 2009, 71.5% of cases were terminated on the merits without oral argument. *Id.* at 40 tbl.S-1. This is compared with 59.9% of cases for the same period in 1997. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS, 1997 REPORT OF THE DIRECTOR tbl.S-1 (1998), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/1997/tables/s01sep97.pdf>; see also POSNER, *supra* note 83, at 161–62 (discussing “the curtailment of both the length and the frequency of oral argument”).

<sup>230</sup> The Administrative Office of the United States Courts reported that for the twelve-month period ending September 30, 2009, 83.2% of decisions of the courts of appeals were unpublished. See 2009 ANNUAL REPORT, *supra* note 228, at 42 tbl.S-3; see also POSNER, *supra* note 83, at 162–75 (discussing the increasing use of unpublished opinions as a means for reducing appellate workloads); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1373–74 (1995) (noting that many unpublished decisions “would have been the subject of full-fledged opinions a few decades ago”).

<sup>231</sup> See, e.g., FED. R. APP. P. 33 (“The court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement.”); ROBERT J. NIEMIC, FED. JUDICIAL CTR., MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS 3 (2006) (“All thirteen federal courts of appeals have implemented appellate mediation or settlement programs, under Federal Rule of Appellate Procedure 33.”); cf. *supra* note 68 and accompanying text.

<sup>232</sup> See *supra* note 14.

<sup>233</sup> With the rise of unpublished opinions and the decline of oral argument, see *supra* notes 228, 229, appellate courts have ample power to manage their dockets.

<sup>234</sup> See *supra* notes 31–38 and accompanying text.

without producing any decision on the merits of a divisive legal issue. Discretionary review tends to target issues that deserve appellate attention,<sup>235</sup> but it also imposes a screening burden on either the trial or appellate court. By relying on the parties to identify issues deserving of interlocutory review and on the district court to ensure that systemic interests receive due attention, our proposal offers some of the advantages of both approaches.<sup>236</sup> Introduction of a layer of appellate screening would complicate the process of 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 § 1292(b)'s provision for certified review.

#### CONCLUSION

In addition to the relaxation of the final judgment rule, much else has changed since the nineteenth century, and much of this change was foreseen by Justice Oliver Wendell Holmes. While Justice Holmes denied that “[g]eneral propositions” could decide “concrete cases,”<sup>237</sup> he also observed that judges work by induction, reasoning from the bottom up. By this, Justice Holmes meant that judges draw their general principles from the consensus reflected in prior decisions.<sup>238</sup> Justice 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 decisive answers 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. We can see this growing demand reflected in the many tools of interlocutory review that courts and rulemakers 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 prejudgment

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<sup>235</sup> See *supra* notes 39–43 and accompanying text.

<sup>236</sup> See *supra* notes 60–62 and accompanying text.

<sup>237</sup> *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

<sup>238</sup> In perhaps his best known aphorism, Justice Holmes proclaimed, “The life of the law has not been logic: it has been experience.” OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Am. Bar Ass'n 2009) (1881). 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 afterwards.” Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870). For all his skepticism about logic, Justice Holmes remained quite keen on the importance of identifying general principles; he simply rejected the syllogism as the basis for their derivation.

appellate oversight of actions for monetary damages. Rather than inhabit 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.

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 the case than to contribute to its resolution. 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, this precise category of 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.

