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# REINVENTING APPELLATE JURISDICTION

ADAM N. STEINMAN\*

**Abstract:** Appellate jurisdiction in the federal system has been properly criticized for both its doctrinal incoherence and its procedural complexity. Although these critiques are well-founded, this Article reveals that, as applied in practice, federal courts have drawn sensible lines between interlocutory orders that are immediately appealable and those that are not. A limited category of interlocutory orders, primarily those rejecting immunities from suit, are immediately appealable as of right. All other interlocutory orders are potentially eligible for discretionary appellate review. The doctrinal morass of the present framework, however, has obscured this basically sensible structure and has led to inefficient procedures for seeking appellate review of interlocutory orders. This Article proposes two new theories of appellate jurisdiction that preserve the current regime's pragmatic structure without its procedural problems. First, this Article argues that the All Writs Act authorizes discretionary *appeals* (not just writs of mandamus), and that such appeals are a superior vehicle for discretionary review of interlocutory orders. Second, this Article argues that for the limited category of interlocutory orders over which appellate jurisdiction is mandatory, 28 U.S.C. § 1292(a) provides a more coherent doctrinal foundation than the collateral order doctrine's awkward interpretation of the term "final decision" under 28 U.S.C. § 1291.

## INTRODUCTION

Appellate jurisdiction over interlocutory trial court rulings is among the most troublesome issues in civil procedure. In a given case, a trial court may make dozens—if not hundreds<sup>1</sup>—of decisions before it enters a final judgment on the merits. The question that invariably arises is, may a litigant appeal a particular ruling immediately, or must

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<sup>1</sup> See, e.g., *In re Sch. Asbestos Litig.*, 977 F.2d 764, 771 (3d Cir. 1992) (noting that "the district court has issued hundreds of pretrial orders").

she wait until all trial court proceedings have concluded? The answer to this question is a function of the appellate court's jurisdiction. In the federal system, the jurisdictional starting point is the so-called final judgment rule, which ordinarily postpones any appellate review until the district court reaches a final judgment.<sup>2</sup> But this rule is more honored in the breach than in the observance.<sup>3</sup> The true scope of appellate jurisdiction is found in the exceptions to the final judgment rule.<sup>4</sup>

The prevailing doctrinal landscape is principally a product of two mid-twentieth-century judicial innovations: (1) the collateral order doctrine, which expands the meaning of the term "final decision" for purposes of 28 U.S.C. § 1291; and (2) appellate mandamus, which allows the federal courts of appeals to review interlocutory orders by issuing writs of mandamus under the All Writs Act.<sup>5</sup> The current system has been subject to much criticism: "hopelessly complicated,"<sup>6</sup> "legal gymnastics,"<sup>7</sup> "dazzling in its complexity,"<sup>8</sup> "unconscionable intricacy" with "overlapping exceptions, each less lucid than the next,"<sup>9</sup> "an unacceptable morass,"<sup>10</sup> "dizzying,"<sup>11</sup> "tortured,"<sup>12</sup> "a jurisprudence of unbelievable impenetrability,"<sup>13</sup> "helter-skelter,"<sup>14</sup> "a crazy quilt,"<sup>15</sup> "a near-chaotic

<sup>2</sup> See 28 U.S.C. § 1291 (2000) (providing the federal courts of appeals jurisdiction over "appeals from all final decisions of the district courts").

<sup>3</sup> See WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 1, sc. 4 ("[I]t is a custom [m]ore honour'd in the breach than the observance.").

<sup>4</sup> For an early discussion of the exceptions to the final judgment rule, see generally Theodore D. Frank, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292 (1966).

<sup>5</sup> See 28 U.S.C. § 1651 (2000) (All Writs Act); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949) (collateral order doctrine).

<sup>6</sup> 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, 555 (2002).

<sup>7</sup> Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 738 (1993).

<sup>8</sup> Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, 47 LAW & CONTEMP. PROBS. 157, 157 (1984).

<sup>9</sup> Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, 47 LAW & CONTEMP. PROBS. 165, 165-66 (1984).

<sup>10</sup> Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 LAW & CONTEMP. PROBS. 171, 172 (1984).

<sup>11</sup> Waters, *supra* note 6, at 556.

<sup>12</sup> Stephen Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 662.

<sup>13</sup> Waters, *supra* note 6, at 555 & n.110 (quoting Luther T. Munford, *Dangers, Toils, and Snares: Appeals Before Final Judgment*, 15 LITIGATION 18, 18, 19 (1989)).

<sup>14</sup> Rosenberg, *supra* note 10, at 174.

<sup>15</sup> *Id.* at 172; see also RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 345 (1996); John C. Nagel, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200, 200 (1994).

state of affairs,"<sup>16</sup> a "Serbonian Bog,"<sup>17</sup> and "sorely in need of limiting principles."<sup>18</sup>

In the face of such criticism, the prevailing doctrine on appellate jurisdiction has proven to be surprisingly immune from reform. In the early 1990s, Congress took the unprecedented step of giving the federal judiciary the authority to promulgate rules defining the scope of its own appellate jurisdiction.<sup>19</sup> This rulemaking authority has remained largely dormant, however.<sup>20</sup> Likewise, the U.S. Supreme Court has failed to use its case law to rectify its doctrinal creations, although this failure is not for lack of opportunity. Since the 1980s, the Supreme Court has issued more than forty decisions implicating the current doctrines for determining the jurisdiction of federal appellate courts.<sup>21</sup> This level of attention is considerably greater than that given to ostensibly higher profile civil procedure issues such as class actions,<sup>22</sup> personal jurisdiction,<sup>23</sup> pleading<sup>24</sup> and summary judgment<sup>25</sup> standards, and the *Erie* doctrine.<sup>26</sup>

There is reason for optimism, however. The Supreme Court has in the not-too-distant past shown a willingness to reconsider well-established but doctrinally-cumbersome principles of appellate jurisdiction. In its 1988 decision in *Gulfstream Aerospace Corp. v. Mayacamas*

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<sup>16</sup> Rosenberg, *supra* note 10, at 174.

<sup>17</sup> Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 *DRAKE L. REV.* 539, 539 (1998).

<sup>18</sup> *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 292 (1988) (Scalia, J., concurring).

<sup>19</sup> See 28 U.S.C. § 1292(e) (2000); 28 U.S.C. § 2072(c) (2000); see also *infra* notes 70–72 and accompanying text.

<sup>20</sup> The Supreme Court has used this authority only once. In 1998, it promulgated Federal Rule of Civil Procedure 23(f), which gave federal appellate courts discretionary review over district court orders granting or denying class action certification. *FED. R. CIV. P.* 23(f).

<sup>21</sup> See *infra* app. tbl.1.

<sup>22</sup> See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 838–41, 864 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619–22 (1997).

<sup>23</sup> See, e.g., *Burnham v. Superior Court of Ca.*, 495 U.S. 604, 619 (1990); *Asahi Metal Indus. Co. v. Superior Court of Ca.*, 480 U.S. 102, 113–15 (1987).

<sup>24</sup> See, e.g., *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964–69 (2007); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510–13 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 167–68 (1993).

<sup>25</sup> See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 576 (1986).

<sup>26</sup> See, e.g., *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 500–01, 504 (2001); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426–27 (1996); *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 3–6 (1987).

Corp., the Court overturned a doctrine known as the *Enelow-Ettelson* rule,<sup>27</sup> which since the early 1900s had governed appellate jurisdiction over orders staying (or refusing to stay) judicial proceedings.<sup>28</sup> The Court unanimously recognized the need for a more fundamental consideration of the precedents in this area and concluded that “the *Enelow-Ettelson* rule is deficient in utility and sense.”<sup>29</sup> “A half century’s experience” with the rule persuaded the Court to overturn a doctrinal framework that was “unsound,” “unworkable,” and “unnecessary to achieve any legitimate goals.”<sup>30</sup>

Like the *Enelow-Ettelson* rule, the collateral order doctrine and appellate mandamus are creatures of the Court’s own making, not mandates from Congress that the judiciary is obligated to respect. If the Court can invent them, the Court can reinvent them. And if *Gulfstream*’s treatment of the *Enelow-Ettelson* rule suggests a half-century limit on the Court’s patience with cumbersome doctrines of appellate jurisdiction, then the time is ripe to reconsider the collateral order doctrine<sup>31</sup> and appellate mandamus.<sup>32</sup>

The solution, however, cannot be simply to discard these mid-twentieth-century inventions and return to strict adherence to the final judgment rule. It is no accident that the collateral order doctrine and appellate mandamus flourished during the last half of the twentieth century. Countless commentators have noted the fundamental changes in civil litigation that occurred during this period.<sup>33</sup> In particular, there has been a steep decrease in trials resulting in appealable final judgments. Relatedly, there has been an increase in the

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<sup>27</sup> 485 U.S. at 287.

<sup>28</sup> *Id.* at 279–80 (describing *Enelow v. N.Y. Life Ins. Co.*, 293 U.S. 379 (1935) and *Ettelson v. Metro. Life Ins. Co.*, 317 U.S. 188 (1942)).

<sup>29</sup> *Id.* at 282.

<sup>30</sup> *Id.* at 283.

<sup>31</sup> See *infra* notes 79–90 and accompanying text (describing the Supreme Court’s initial endorsement of the collateral order doctrine in 1949, in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)).

<sup>32</sup> See *infra* notes 146–157 and accompanying text (describing the Supreme Court’s initial endorsement of appellate mandamus in 1957, in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957)).

<sup>33</sup> See Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1265–66 (2005) [hereinafter Galanter, *Hundred-Year Decline*]; Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 482–84 (2004) [hereinafter Galanter, *The Vanishing Trial*]; Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1332–35 (2005); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378–80 (1982); Yeazell, *supra* note 12, at 632–39; see also Adam Liptak, *Cases Keep Flowing In, but the Jury Pool Is Idle*, N.Y. TIMES, Apr. 30, 2007, at A14.

importance of pretrial judicial management—including interlocutory decisions relating to jurisdiction, alternative dispute resolution, pleadings, class actions, discovery, and summary judgment—through which the parties posture themselves for a hard-fought but unappealable settlement.<sup>34</sup> Under this new model of adjudication, strict adherence to the final judgment rule might not allow for meaningful appellate review of the trial court decisions that really matter.<sup>35</sup> Indeed, many of the most vocal critics of the current framework for appellate jurisdiction argue that, as a policy matter, it is important that appellate review of interlocutory orders remain available.<sup>36</sup> The real challenge, therefore, is to reinvent appellate jurisdiction in a way that recognizes the new reality of civil adjudication without the host of conceptual, doctrinal, and procedural problems that accompany the current jurisdictional framework.

An excellent starting point for this reinvention is to examine what appellate courts have actually done while operating within the current regime. Setting aside the doctrinal vehicles of interlocutory appellate

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<sup>34</sup> See Galanter, *Hundred-Year Decline*, *supra* note 33, at 1265–66; Galanter, *The Vanishing Trial*, *supra* note 33, at 482–84; Redish, *supra* note 33, at 1332–35; Resnik, *supra* note 33, at 378–80; Yeazell, *supra* note 12, at 632–39; *see also* Liptak, *supra* note 33.

<sup>35</sup> *See, e.g.*, Carrington, *supra* note 9, at 165–67; Cooper, *supra* note 8, at 160; Riyaz A. Kanji, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 YALE L.J. 511, 513 (1990); Waters, *supra* note 6, at 551–59; Yeazell, *supra* note 12, at 646–64. This problem is distinct from the more general concern about the costs of delaying appellate review of interlocutory orders in cases that ultimately will yield a final, appealable judgment. Edward Cooper provides excellent description of this more general concern:

If review of a trial court ruling is post ponied until the final judgment, serious consequences may ensue. As to matters that bear only on the conduct of the litigation, an error may so taint subsequent proceedings as to require reversal and further proceedings. The further proceedings may not only represent an expensive duplication of effort, but may themselves be distorted beyond repair by the events of the first trial. As to matters that have effects beyond the court proceedings, irreparable injury may occur.

Cooper, *supra* note 8, at 157–58. For an excellent description of the value of appellate review as a general matter, see Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 550–54 (1969). *But cf.* Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 778–82 (1957).

<sup>36</sup> *See, e.g.*, Carrington, *supra* note 9, at 167–68; Cooper, *supra* note 8, at 157; 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, 286–87 (1999); Martineau, *supra* note 7, at 767–87; Nagel, *supra* note 15, at 202–04; Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 126 (1975); Waters, *supra* note 6, at 530–31. *But see* Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 179–80 (2001) (arguing against expanded appellate jurisdiction over interlocutory orders).

review and focusing on what appellate courts actually do, the jurisdictional landscape looks far more rational. There is a limited category of identifiable orders over which appellate courts have immediate, mandatory jurisdiction.<sup>37</sup> These are primarily interlocutory orders rejecting claims of governmental and other immunities from suit.<sup>38</sup> Litigants may appeal such orders as a matter of right, and appellate courts lack discretion to decline review.<sup>39</sup> All other interlocutory rulings are potentially eligible for discretionary appellate review, and appellate courts have identified a number of factors relevant to when this discretionary authority should be exercised. Although appellate courts exercise this discretion quite sparingly (and justifiably so), it is fair to say that under the prevailing judicial doctrines, no interlocutory trial court order is categorically beyond an appellate court's jurisdiction.<sup>40</sup>

This may sound controversial. Federal appellate courts repeatedly invoke the prevailing doctrinal strictures to claim that their hands are tied by the narrow scope of their appellate jurisdiction.<sup>41</sup> The facts on the ground belie this conventional wisdom, however. Using either the collateral order doctrine or appellate mandamus, federal appellate courts have exercised review over every kind of interlocutory order imaginable.<sup>42</sup> But because of the cumbersome doctrinal framework created by the collateral order doctrine and appellate mandamus, courts and commentators have yet to see the jurisdictional metastructure that has developed.

This underlying structure—mandatory appellate jurisdiction over certain identifiable categories of interlocutory orders and discretionary appellate jurisdiction for all others—should be moved to the forefront of the jurisdictional regime. This Article proposes two doctrinal reforms that would reinvent our half-century-old framework for appellate jurisdiction. First, courts and commentators have overlooked the possibility that the All Writs Act authorizes discretionary *appeals*, not just

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<sup>37</sup> See *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

<sup>38</sup> See, e.g., *Osborn v. Haley*, 127 S. Ct. 881, 892–93 (2007); *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 (1993); *Mitchell*, 472 U.S. at 525–30; *Nixon v. Fitzgerald*, 457 U.S. 731, 733 (1982).

<sup>39</sup> See 28 U.S.C. § 1291 (2000); *Mitchell*, 472 U.S. at 530.

<sup>40</sup> See *infra* notes 242–277 and accompanying text. My point here does not apply to orders for which appellate review is explicitly barred by statute. See, e.g., 28 U.S.C. § 1447(d) (2000) (forbidding review “by appeal or otherwise” of an order “remanding a case to the State court from which it was removed”) (discussed *infra* note 270).

<sup>41</sup> See, e.g., *United States v. Victoria-21*, 3 F.3d 571, 575 (2d Cir. 1993) (refusing to review a non-final order “[i]n the face of Congress’ unquestionable intent to limit appellate jurisdiction over interlocutory orders”).

<sup>42</sup> See *infra* notes 248–269 and accompanying text.

writs of mandamus.<sup>43</sup> This approach has support from legislation enacted by Congress shortly before the Supreme Court began its invention of the current regime in the late 1940s and 1950s, and this Article is the first to recognize its relevance to the appellate jurisdiction debate.<sup>44</sup> All Writs Act appeals would be a superior method for engaging in discretionary appellate review of interlocutory orders than the current regime's awkward use of appellate mandamus and the collateral order doctrine.

Second, courts should recognize that for the limited category of interlocutory orders over which appellate jurisdiction is mandatory, 28 U.S.C. § 1292(a)'s provision of appellate jurisdiction over orders relating to injunctions<sup>45</sup> provides a more coherent doctrinal foundation than the collateral order doctrine's interpretation of "final decision" under § 1291.<sup>46</sup> These orders—typically orders rejecting governmental immunities from suit—are not in any sense more "final" than other interlocutory orders.<sup>47</sup> Rather, the immunities addressed in such orders are deemed to have an injunctive quality as a matter of substantive law; the holder of the immunity is entitled not just to win the case against it, but to enjoin the case from proceeding.<sup>48</sup> Situating such appeals under § 1292(a) would bring the jurisdictional theory into alignment with the policy judgments that actually determine whether immediate appellate review is available. Currently, these policy decisions are obscured by the cumbersome-yet-unhelpful framework of the collateral order doctrine.

Part I of this Article summarizes the statutory structure of appellate jurisdiction.<sup>49</sup> Part II describes and criticizes what are currently the two most important judicial inventions in the area of appellate jurisdiction—the collateral order doctrine and appellate mandamus.<sup>50</sup> Part III explains how the collateral order doctrine and appellate mandamus operate in practice and argues that appellate courts have implemented a fairly rational regime despite the troubling doctrinal

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<sup>43</sup> 28 U.S.C. § 1651 (2000).

<sup>44</sup> See *infra* notes 290–293 and accompanying text (discussing Act of June 25, 1948, ch. 646, § 23, 62 Stat. 869, 990).

<sup>45</sup> 28 U.S.C. § 1292(a)(1) (2000) (authorizing appeals from "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions").

<sup>46</sup> See *infra* notes 343–373 and accompanying text.

<sup>47</sup> See *infra* notes 111–137 and accompanying text.

<sup>48</sup> See *infra* notes 353–357 and accompanying text.

<sup>49</sup> See *infra* notes 53–75 and accompanying text.

<sup>50</sup> See *infra* notes 76–241 and accompanying text.



landscape.<sup>51</sup> Part IV proposes a reinvention of appellate jurisdiction that will provide a better foundation for interlocutory appellate review; it also responds to potential critiques of this reinvention.<sup>52</sup>

### I. THE STATUTORY FOUNDATION OF APPELLATE JURISDICTION

This Part summarizes the key statutes that govern the jurisdiction of the federal courts of appeals.<sup>53</sup> The core provision is 28 U.S.C. § 1291, which gives federal appellate courts jurisdiction over “appeals from all final decisions of the district courts.”<sup>54</sup> This statute is the source of what is known as the final judgment rule. In 1945, in *Catlin v. United States*, the Supreme Court defined § 1291 quite narrowly: “A ‘final decision’ generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”<sup>55</sup> Once such a “final decision” is reached, the appellate court has jurisdiction to review all previous district court orders that led to that final decision.<sup>56</sup>

The most longstanding statutory exception to the final judgment rule is 28 U.S.C. § 1292(a), which authorizes immediate appellate review of particular enumerated orders, most notably orders granting, modifying, refusing, or dissolving injunctions.<sup>57</sup> Section 1292(a) also provides exceptions for interlocutory orders involving the appointment of receivers and the winding up of receiverships,<sup>58</sup> as well as for interlocutory orders determining the rights and liabilities of parties to admiralty cases.<sup>59</sup>

During the last half century, the statutory exceptions to the final judgment rule have expanded somewhat. In 1958, Congress enacted 28 U.S.C. § 1292(b), which created a certification procedure for enabling

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<sup>51</sup> See *infra* notes 242–277 and accompanying text.

<sup>52</sup> See *infra* notes 278–389 and accompanying text.

<sup>53</sup> See *infra* notes 53–75 and accompanying text.

<sup>54</sup> 28 U.S.C. § 1291 (2000).

<sup>55</sup> 324 U.S. 229, 233 (1945).

<sup>56</sup> See, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 710 (1996) (“The general rule is that ‘a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.’” (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 866 (1994))); see also Joan Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After Swint*, 49 HASTINGS L.J. 1337, 1339 (1998) (citing 15A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3905.1 (2d ed. 1992 & Supp. 1996)).

<sup>57</sup> 28 U.S.C. § 1292(a)(1).

<sup>58</sup> *Id.* § 1292(a)(2).

<sup>59</sup> *Id.* § 1292(a)(3).

appellate review over some interlocutory orders.<sup>60</sup> Under § 1292(b), a district court may certify that a particular 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.”<sup>61</sup> If the district court so certifies, the appellate court may “in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.”<sup>62</sup> The district court has complete discretion over whether to certify such an order for an interlocutory appeal,<sup>63</sup> and the appellate court has complete discretion over whether to allow an appeal from the certified order.<sup>64</sup> Section 1292(b) has not been an effective method for obtaining appellate review over interlocutory orders for two reasons. First, the certification requirement gives district courts a veto over § 1292(b) appeals.<sup>65</sup> Second, the federal appellate courts have narrowly construed § 1292(b)’s requirements so that relatively few certified appeals are accepted.<sup>66</sup>

Congress has periodically created additional exceptions to the final judgment rule for particular kinds of orders in particular kinds of cases. Section 16 of the Federal Arbitration Act, for example, allows interlocutory appeals of certain orders relating to arbitration.<sup>67</sup> More recently, Congress has allowed discretionary appellate review of jurisdictional rulings in cases subject to the new forms of federal subject

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<sup>60</sup> *Id.* § 1292(b).

<sup>61</sup> *Id.*

<sup>62</sup> 28 U.S.C. § 1292(b).

<sup>63</sup> See 16 WRIGHT ET AL., *supra* note 56, § 3929.

<sup>64</sup> See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978) (“The appellate court may deny the appeal for any reason, including docket congestion.”); see also Martineau, *supra* note 7, at 733.

<sup>65</sup> See Redish, *supra* note 36, at 108–09 (“By providing trial courts with a veto over appeals, the certificate requirement has vastly reduced section 1292(b)’s potential effectiveness as a safety valve from the rigors of the final judgment rule.”).

<sup>66</sup> Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1167 (1990) (noting that “some federal courts have purported to limit the use of section 1292(b) to ‘big cases,’ and in fact, relatively few appeals are . . . accepted by the circuit courts”); see Redish, *supra* note 36, at 109 (arguing that “[t]he circuit courts have generally not been receptive to [§ 1292(b)] applications”).

<sup>67</sup> 9 U.S.C. § 16 (2000). In the criminal context, Congress has authorized immediate appeals of orders relating to detention and release in criminal cases. See 18 U.S.C. § 3145(c) (2000); 18 U.S.C. § 3731 (2000 & Supp. IV 2004).

matter jurisdiction created by the Class Action Fairness Act<sup>68</sup> and the Multiparty Multiforum Trial Jurisdiction Act.<sup>69</sup>

Also worth mentioning are two statutes that authorize judicial rulemaking about appellate jurisdiction through the procedures set forth in the Rules Enabling Act.<sup>70</sup> A 1990 statute, codified at 28 U.S.C. § 2072(c), allows rules that would “define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.”<sup>71</sup> A 1992 statute, codified at 28 U.S.C. § 1292(e), authorizes rules designating additional categories of interlocutory orders from which an immediate appeal may be had.<sup>72</sup> This rulemaking authority has remained largely dormant, however. The lone example of its exercise is the 1998 adoption of Federal Rule of Civil Procedure 23(f),<sup>73</sup> which gives the appellate courts discretion to hear immediate appeals from orders granting or denying motions to certify a class action.<sup>74</sup>

Although they have evolved and expanded in recent decades, the statutory- and rule-based exceptions to the final judgment rule are not

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<sup>68</sup> 28 U.S.C.A. § 1453(c)(1) (West 2006); see Adam N. Steinman, “Less” Is “More”? *Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act’s Appellate Deadline Riddle*, 92 IOWA L. REV. 1183, 1187 (2007).

<sup>69</sup> 28 U.S.C. § 1441(e)(3) (2000 & Supp. III 2003); see Thomas J. McLaughlin & Adam N. Steinman, *The Multiparty, Multiforum Trial Jurisdiction Act’s Impact on Major Accident Litigation*, 34 BRIEF 16, 16 (2004).

<sup>70</sup> 28 U.S.C. § 2072(c) (2000) (subsection (c) enacted in 1990); 28 U.S.C. § 1292(e) (2000) (subsection (e) enacted in 1992). For an excellent discussion of the legislative history behind the 1990 and 1992 acts giving the Supreme Court rulemaking authority in this area, see Martineau, *supra* note 7, at 720–26.

<sup>71</sup> 28 U.S.C. § 2072(c).

<sup>72</sup> 28 U.S.C. § 1292(e).

<sup>73</sup> FED. R. CIV. P. 23(f). Rule 23(f) provides: “A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order.” *Id.* No special certification needs to be sought from the district court, but the party seeking to appeal must obtain the appellate court’s permission. The appellate court has “unfettered discretion” whether to hear an immediate appeal. *In re Delta Air Lines, Inc.*, 310 F.3d 953, 957 (6th Cir. 2002) (quoting FED. R. CIV. P. 23(f) advisory committee notes (1998)). For an analysis of how federal appellate courts should exercise their discretion under Rule 23(f), see generally Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531 (2000).

<sup>74</sup> FED. R. CIV. P. 23(f). Rule 54(b) is another Federal Rule of Civil Procedure that might be characterized as an exception to the final judgment rule. See FED. R. CIV. P. 54(b). Rule 54(b) allows the district court to enter a final judgment as to certain claims and parties in a particular action, even if trial court proceedings are ongoing with respect to other claims or parties. *Id.* If the district court does so, an immediate appeal may be taken as to those claims or parties for which a Rule 54(b) final judgment has been entered. See, e.g., *Kelly v. Lee’s Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218, 1220 (5th Cir. 1990).

the final word on appellate jurisdiction. Today, the most significant aspect of appellate jurisdiction for courts and litigants are the judicially created bases for appellate jurisdiction, which are described in the next Part.<sup>75</sup>

## II. THE JUDICIAL INVENTIONS THAT DEFINE THE CURRENT APPROACH TO APPELLATE JURISDICTION

During the last half century, the U.S. Supreme Court has crafted a number of jurisdictional doctrines that expand appellate jurisdiction beyond the final judgment rule and its explicit statutory exceptions. The Court ostensibly gleans these doctrines from statutory authority, but they are more properly viewed as judicial inventions because a considerable amount of interpretive imagination is needed to deduce these doctrines from their purported statutory foundation. This Part describes and critiques the two most commonly used judicially crafted doctrines: the collateral order doctrine and appellate mandamus.<sup>76</sup>

### A. *The Collateral Order Doctrine: Precedent and Procedure*

One judicial invention that has expanded the scope of federal appellate jurisdiction is the collateral order doctrine. This Section summarizes the collateral order doctrine's invention in 1949 and its evolution over the last several decades.<sup>77</sup> It also summarizes the procedures by which litigants invoke the collateral order doctrine and through

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<sup>75</sup> See *infra* notes 76–241 and accompanying text.

<sup>76</sup> See *infra* notes 77–241 and accompanying text. Although the Supreme Court has at times suggested other judicially invented methods of appellate jurisdiction, these have failed to take root. For example, in *Gillespie v. U.S. Steel Corp.*, the Supreme Court suggested that an interlocutory order could be deemed a “final decision” for purposes of 28 U.S.C. § 1291 if the court of appeals determined that immediate review was justified after balancing “the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.” 379 U.S. 148, 152–53 (1964). The current viability of *Gillespie*'s balancing approach has been repeatedly questioned, however. See, e.g., *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 (1978) (“If *Gillespie* were extended beyond the unique facts of that case, § 1291 would be stripped of all significance.”); *Fultz v. Alternative Retail Concepts, Inc.*, 2 F. App'x 409, 412 (6th Cir. Jan. 16, 2001) (unpublished decision) (“[T]he continued validity of *Gillespie* has been called into question by the Supreme Court.”); *Stubblefield v. Windsor Capital Group*, 74 F.3d 990, 996 (10th Cir. 1996) (“[I]t is unclear whether the *Gillespie* doctrine is still viable.”); see also Redish, *supra* note 36, at 98 (noting in 1975 that *Gillespie*'s “balancing approach has not yet received widespread recognition”). It has been over thirty years since the U.S. Supreme Court cited *Gillespie*'s view of § 1291 with approval. Cf. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 478 n.7 (1975).

<sup>77</sup> See *infra* notes 79–105 and accompanying text.

which courts determine whether the doctrine allows immediate review of interlocutory orders.<sup>78</sup>

### 1. The Invention and Evolution of the Collateral Order Doctrine

The collateral order doctrine derives from the Supreme Court's 1949 decision in *Cohen v. Beneficial Industrial Loan Corp.*<sup>79</sup> The collateral order doctrine allows immediate appellate review if three criteria are satisfied. First, the order must resolve an important issue that is completely separate from the merits of the action.<sup>80</sup> Second, the order must be effectively unreviewable if the aggrieved party is forced to wait until the trial court proceedings are complete.<sup>81</sup> Third, the order must be final in the sense that it conclusively determines the particular issue.<sup>82</sup> Although the Court often enumerates these three factors,<sup>83</sup> the first factor in actuality comprises two requirements—the issue resolved by the order must be both “important” and “separate from the merits.”<sup>84</sup> Accordingly, it is not uncommon to see the collateral order doctrine described in terms of four factors rather than three.<sup>85</sup> Interlocutory orders that satisfy the collateral order doctrine's requirements are considered “final decisions” for purposes of 28 U.S.C. § 1291 and, therefore, are immediately within a court of appeals' jurisdiction.<sup>86</sup>

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<sup>78</sup> See *infra* notes 106–110 and accompanying text.

<sup>79</sup> 337 U.S. 541, 546–47 (1949).

<sup>80</sup> E.g., *Will v. Hallock*, 546 U.S. 345, 349 (2006); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988).

<sup>81</sup> E.g., *Will*, 546 U.S. at 349; *Gulfstream Aerospace*, 485 U.S. at 276.

<sup>82</sup> E.g., *Will*, 546 U.S. at 349; *Gulfstream Aerospace*, 485 U.S. at 276.

<sup>83</sup> See, e.g., *Will*, 546 U.S. at 349 (“The requirements for collateral order appeal have been distilled down to three conditions.”); *Gulfstream Aerospace*, 485 U.S. at 276 (“We have articulated a three-pronged test to determine whether an order that does not finally resolve a litigation is nonetheless appealable under § 1291.”).

<sup>84</sup> E.g., *Will*, 546 U.S. at 349; *Gulfstream Aerospace*, 485 U.S. at 276.

<sup>85</sup> See *Espinal-Dominguez v. Puerto Rico*, 352 F.3d 490, 496 (1st Cir. 2003) (describing the collateral order doctrine's four elements of “separability, finality, urgency, and importance”); *Persyn v. United States*, 935 F.2d 69, 73 (5th Cir. 1990) (“The collateral order doctrine has four requirements.”); 5A WRIGHT ET AL., *supra* note 56, § 1337.4 (1992) (describing *Cohen* as “setting forth four conditions that must be met for interlocutory appeals under collateral order doctrine”); Nagel, *supra* note 15, at 206 (quoting a restatement of the *Cohen* factors by the Supreme Court in *Coopers & Lybrand*, 437 U.S. at 468).

<sup>86</sup> Until fairly recently, the Supreme Court had given conflicting indications about whether the collateral order doctrine “is simply an interpretation of section 1291, or is a judicially created exception to that statute.” Solimine, *supra* note 66, at 1184 & n.99 (citing *Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the H. Comm. on the Judiciary*, 100th Cong., 1st & 2d Sess. 424, 430 (1987–88) (statement of Professor Judith Resnik) and Redish, *supra* note 36, at 124–26). The Court has since clarified that the collateral order doctrine “is best

In the seminal *Cohen* case, the district court concluded that under the *Erie* doctrine, a federal court was not bound by a state law requiring plaintiffs in shareholder derivative suits to post a substantial bond before being able to proceed.<sup>87</sup> Thus, the plaintiff in *Cohen* was allowed to proceed with his action without posting the bond that would have been required under the state law.<sup>88</sup> The Supreme Court ruled that immediate review of that ruling was available:

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.<sup>89</sup>

No decision prior to *Cohen* had ever identified this “small class” of immediately appealable orders.<sup>90</sup>

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understood not as an exception to the ‘final decision’ rule laid down by Congress in § 1291, but as a ‘practical construction’ of it.” *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *see also* *Johnson v. Fankell*, 520 U.S. 911, 916–17 (1997) (holding that *Cohen* was the source for an expanded “definition” of the term “final decision”).

<sup>87</sup> *Cohen*, 337 U.S. at 544–45 & n.1.

<sup>88</sup> *Id.* at 545.

<sup>89</sup> *Id.* at 546.

<sup>90</sup> *See id.* In this same paragraph of the *Cohen* opinion, the Court cites three of its prior cases for the proposition that 28 U.S.C. § 1291 should be given a “practical rather than a technical construction.” *Id.* (citing *Cobbledick v. United States*, 309 U.S. 323, 328 (1940); *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 414 (1926); *Bank of Columbia v. Sweeny*, 26 U.S. (1 Pet.) 567, 569, (1828)). *Cohen*’s reliance on these cases is rather puzzling. *Bank of Columbia v. Sweeny*, decided in 1828, decades before the federal courts of appeals even existed, concerned a petition for a writ of mandamus to the Supreme Court. 26 U.S. (1 Pet.) at 567. If anything, *Bank of Columbia* undermines *Cohen*’s exception to the final judgment rule—it refused to issue a writ of mandamus on the ground that to grant the writ “would be a plain evasion of the provision of the Act of Congress, that *final* judgments only should be brought before this Court for re-examination.” *Id.* at 569. The 1926 *United States v. River Rouge Improvement Co.* decision also did not concern the appellate jurisdiction of the federal courts of appeals, as the district court had clearly reached a final judgment on all of the claims before it. 269 U.S. at 413 (noting that “a jury trial . . . result[ed] in seventy-three awards of compensation to the property owners” and that “[j]udgments were entered confirming all these awards”). The court of appeals affirmed all but one of the claims, and the only question was whether the Supreme Court could review the affirmed claims given that the court of appeals had ordered a new trial with respect to the one nonaffirmed claim. *Id.* Lastly, the 1940 decision in *Cobbledick v. United States*, far from supporting *Cohen*’s exception to the final judgment rule, made clear that “the requirement of finality will be enforced not only against a party to the litigation but against a witness who is a stranger to the main proceeding.” 309 U.S. at 326.

Since *Cohen*, the Supreme Court has invoked the collateral order doctrine to permit review of interlocutory orders denying claims by governmental defendants for immunity from suit.<sup>91</sup> Examples of such claims include a president's claim of absolute immunity,<sup>92</sup> a government official's claim of qualified immunity,<sup>93</sup> a state's claim of immunity under the Eleventh Amendment,<sup>94</sup> and a federal employee's claim of immunity under the Westfall Act.<sup>95</sup> According to the Court, such orders are "effectively unreviewable" on appeal from a final judgment because the immunity creates not merely a defense to liability, but rather a right not to stand trial that includes a right to be free from trial-related burdens.<sup>96</sup>

In many other cases, the Supreme Court has rejected the use of the collateral order doctrine. Defendants, for example, have sought to extend the Court's treatment of interlocutory immunity rulings to other issues that might entitle a defendant to an early dismissal of a lawsuit. The Court, however, has held that the collateral order doctrine does not allow immediate appeals of orders refusing to dismiss a

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<sup>91</sup> See *infra* notes 92–96 and accompanying text. For an excellent discussion of the Supreme Court's past treatment of the collateral order doctrine in particular cases, see Solimine, *supra* note 66, at 1170–71.

<sup>92</sup> *Nixon v. Fitzgerald*, 457 U.S. 731, 733 (1982).

<sup>93</sup> *Mitchell v. Forsyth*, 472 U.S. 511, 525–30 (1985).

<sup>94</sup> *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 (1993).

<sup>95</sup> *Osborn v. Haley*, 127 S. Ct. 881, 892–93 (2007). Although the Supreme Court has yet to address the issue, the federal courts of appeals have unanimously held that the collateral order doctrine also allows immediate appeal of an order denying a foreign entity's claim of immunity from suit under the Foreign Sovereign Immunities Act. See, e.g., *Rux v. Republic of Sudan*, 461 F.3d 461, 467 (4th Cir. 2006); *FG Hemisphere Assocs., LLC v. Republique du Congo*, 455 F.3d 575, 584 (5th Cir. 2006); *Transatl. Schiffahrtsgesellschaft GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 387 (2d Cir. 2000).

<sup>96</sup> See, e.g., *Mitchell*, 472 U.S. at 526 ("The entitlement is an immunity from suit rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial."). The Supreme Court has applied a similar logic to immunities from criminal prosecution. It has allowed immediate appeals under the collateral order doctrine from orders denying a criminal defendant's claim that the Double Jeopardy Clause bars prosecution and a legislator's claim that the Speech and Debate Clause bars prosecution. See *Richardson v. United States*, 468 U.S. 317, 321–22 (1984) (Double Jeopardy Clause); *Helstoski v. Meanor*, 442 U.S. 500, 506–07 (1979) (Speech and Debate Clause); *Abney v. United States*, 431 U.S. 651, 659–61 (1977) (Double Jeopardy Clause). Also in the criminal context, the Supreme Court recently held that an order allowing the government to administer antipsychotic medication forcibly to a criminal defendant solely to render him competent to stand trial was appealable under the collateral order doctrine. *Sell v. United States*, 539 U.S. 166, 176–77 (2003). Such an interlocutory order was deemed to be effectively unreviewable on appeal from a final judgment because "[b]y the time of trial [the defendant] will have undergone forced medication—the very harm that he seeks to avoid. He cannot undo that harm even if he is acquitted." *Id.*

case based on a prior judgment or settlement,<sup>97</sup> forum non conveniens,<sup>98</sup> or a contractual forum selection clause.<sup>99</sup> According to the Court, such orders may be effectively reviewed on appeal from a final judgment because even after a trial on the merits, the appellate court can reverse the earlier denial and order the case dismissed.<sup>100</sup> In other words, such defenses merely entitle a defendant to have the case dismissed (eventually), not to avoid all of the burdens of trial. The Court has also rejected attempts to use the collateral order doctrine to appeal interlocutory rulings on class certification,<sup>101</sup> disqualification of counsel,<sup>102</sup> and sanctions for discovery violations.<sup>103</sup>

An order that satisfies the requirements of the collateral order doctrine is appealable as of right. Such an order is deemed to be a "final decision" over which the court of appeals "shall have jurisdiction" under 28 U.S.C. § 1291.<sup>104</sup> Thus, unlike other sources of interlocutory appellate jurisdiction, such as § 1292(b), neither the district court nor the appellate court has discretion to prevent or decline review of interlocutory rulings that qualify under the collateral order doctrine.<sup>105</sup>

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<sup>97</sup> *Will*, 546 U.S. at 349 (holding that the collateral order doctrine does not allow an immediate appeal from an order rejecting defendants' assertion of the Federal Tort Claims Act's judgment bar); *Digital Equip. Corp.*, 511 U.S. at 884 (holding that the collateral order doctrine does not allow an immediate appeal from an order rejecting defendants' assertion that the action was barred by a prior settlement).

<sup>98</sup> *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527 (1988).

<sup>99</sup> *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 496 (1989).

<sup>100</sup> *See, e.g., Digital Equip. Corp.*, 511 U.S. at 869 (noting that "rights under private settlement agreements can be adequately vindicated on appeal from final judgment").

<sup>101</sup> *Coopers & Lybrand*, 437 U.S. at 464–65.

<sup>102</sup> *Richardson-Merrell v. Koller*, 472 U.S. 424, 425–26 (1985); *see also* *Flanagan v. United States*, 465 U.S. 259, 260 (1984); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 370 (1981).

<sup>103</sup> *Cunningham v. Hamilton County*, 527 U.S. 198, 200 (1999).

<sup>104</sup> 28 U.S.C. § 1291 (2000) (emphasis added); *see Mitchell*, 472 U.S. at 530 ("[A] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."); *Mitchell v. Carlson*, 896 F.2d 128, 133 (5th Cir. 1990) (noting that the "right to appeal" as a collateral order extends to immunity rulings); *cf. In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995) (Posner, J.) (reading the Supreme Court's refusal to apply the collateral order doctrine to class certification orders as meaning that "class certification orders [are not] automatically appealable under 28 U.S.C. § 1291").

<sup>105</sup> *Cf.* 28 U.S.C. § 1292(b).



## 2. Procedures for Invoking the Collateral Order Doctrine

Because the collateral order doctrine provides an appeal as of right,<sup>106</sup> a litigant invoking it must simply file a notice of appeal.<sup>107</sup> The notice of appeal states only the parties who are appealing, the judgment or order being appealed, and the court to which the appeal is being taken.<sup>108</sup> The notice of appeal does not even need to specify that the collateral order doctrine is the basis for appellate jurisdiction. Unless the party opposing the appeal files a preliminary motion to dismiss the appeal for lack of jurisdiction,<sup>109</sup> the appeal will proceed to full briefing on the merits as well as on the appellate court's jurisdiction, and the jurisdictional issue will not be resolved until full briefing is complete. A notice of appeal must be filed within the time limits set by Federal Rule of Appellate Procedure 4, which, for civil appeals, is typically thirty days after the district court enters the order being appealed.<sup>110</sup>

### B. Problems with the Collateral Order Doctrine

The collateral order doctrine suffers from three principal problems. First, it is inconsistent with the statutory text on which it is purportedly based. Second, it fails to account for the policy concerns that actually motivate its use in particular cases. Third, the process for invoking it and determining whether it applies in particular situations is inefficient in a number of situations.

Although the collateral order doctrine purportedly defines a category of decisions that are "final decisions" under 28 U.S.C. § 1291, the elements of the collateral order doctrine are inconsistent with this tex-

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<sup>106</sup> See *supra* note 104 and accompanying text.

<sup>107</sup> FED. R. APP. P. 3; see, e.g., *Berrey v. Asarco Inc.*, 439 F.3d 636, 641-42 & n.2 (10th Cir. 2006); *Ussery v. Louisiana ex rel. La. Dep't of Health & Hosps.*, 150 F.3d 431, 434 (5th Cir. 1998).

<sup>108</sup> *Id.* 3(c)(1).

<sup>109</sup> See, e.g., D.C. CIR. R. 27(g) (allowing dispositive motions to be filed within forty-five days of an appeal being docketed and deferring merits-briefing until motion is decided).

<sup>110</sup> See, e.g., *United States v. Moats*, 961 F.2d 1198, 1203 (5th Cir. 1992) ("An appeal taken under the collateral order doctrine is subject to all the usual appellate rules and time periods, including Rule 4 of the Federal Rules of Appellate Procedure."). Under Appellate Rule 4, the deadline in civil cases is thirty days after entry of the judgment or order, unless the United States is a party, in which case the deadline is sixty days. FED. R. APP. P. 4(a)(1). In criminal cases, the defendant has ten days to file a notice of appeal. *Id.* 4(b)(1). Where the government has a right to appeal in a criminal case, the deadline is thirty days. *Id.*

tual premise.<sup>111</sup> The collateral order doctrine allows immediate review of interlocutory orders where (1) the issue decided by the order is important, (2) the issue decided by the order is separate from the merits, (3) the order is effectively unreviewable if the aggrieved party is forced to wait until the trial court proceedings are complete, and (4) the order is final in the sense that it conclusively resolves the issue in question.<sup>112</sup>

Consider the collateral order doctrine's first factor: whether an interlocutory ruling concerns an "important" issue.<sup>113</sup> This is a perfectly reasonable factor to take into account when deciding whether to expend appellate resources on an interlocutory appeal and risk the delay that such an appeal might entail. But it has absolutely nothing to do with finality. Both an important ruling and an unimportant ruling can be equally "final."

The same may be said of the collateral order doctrine's requirement that the ruling must be "effectively unreviewable" absent an immediate appeal.<sup>114</sup> All other things being equal, there is less need to review an interlocutory decision that could effectively be reviewed at the end of the proceedings. But are such rulings really any less "final" than ones that cannot be effectively reviewed at the end of the proceedings? One might argue that an effectively unreviewable decision is "final" precisely because it cannot be corrected on appeal. By that logic, however, a truly final decision (e.g., a trial court's judgment for one side or the other) would not be considered "final" because it *can* be corrected on appeal.

The collateral order doctrine's requirement that the issue decided must be "separate from the merits" has some plausible connection to finality.<sup>115</sup> One could argue, as the Supreme Court suggested in *Cohen*, that an issue that is not separate from the merits is simply a "step toward final disposition of the merits of the case."<sup>116</sup> But all court rulings are, in some sense, steps toward the court's final disposition, even ones that have nothing to do with the merits of the case. The correctness of the interlocutory order at issue in *Cohen*—the district court's refusal to

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<sup>111</sup> See 28 U.S.C. § 1291 (2000).

<sup>112</sup> See *supra* notes 83–85 and accompanying text.

<sup>113</sup> See *Cohen*, 337 U.S. at 546–47; see also *Will*, 546 U.S. at 349; *Gulfstream Aerospace*, 485 U.S. at 276.

<sup>114</sup> See *Will*, 546 U.S. at 349; *Gulfstream Aerospace*, 485 U.S. at 276.

<sup>115</sup> See *Will*, 546 U.S. at 349; *Gulfstream Aerospace*, 485 U.S. at 276.

<sup>116</sup> *Cohen*, 337 U.S. at 546.

impose the state law bond requirement<sup>117</sup>—may not depend on the merits of the parties' substantive claims or defenses. But it is surely an important step toward the court's final disposition of the case.

In any event, the Supreme Court's treatment of the "separate from the merits" requirement belies any reliance on this kind of argument. The orders that are most frequently appealed under the collateral order doctrine are decisions rejecting a government official's claim of qualified immunity.<sup>118</sup> Typically, an official is entitled to immunity from damages for constitutional violations if she can demonstrate that her conduct was reasonable under the law as it existed at the time she acted.<sup>119</sup> Although the Court has held that this question is "conceptually distinct" from the question of whether a constitutional violation occurred,<sup>120</sup> it is hard to see how the qualified immunity inquiry—which will likely consider exactly the same legal sources as the inquiry into whether a violation occurred—is truly "separate from the merits." And it is nonsensical to say that such a ruling is not a critical "step toward final disposition of the merits."<sup>121</sup> If the defendant prevails on her immunity defense, the plaintiff's claim for damages fails *on the merits*.

The last element of the collateral order doctrine is that the order must "conclusively resolve" the particular issue before the court.<sup>122</sup> To be sure, a decision that conclusively resolves a given issue (such as the applicability of a state law bond requirement) is more "final" than a decision that is "tentative, informal or incomplete."<sup>123</sup> But this standard is easily met in connection with almost *all* interlocutory orders.<sup>124</sup> It is a far cry from the strict definition of "final decision" embodied in the final judgment rule.<sup>125</sup> The textual fallacy is that the collateral order

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<sup>117</sup> See *id.* at 544–45.

<sup>118</sup> See, e.g., *Mitchell*, 472 U.S. at 530.

<sup>119</sup> *Elder v. Holloway*, 510 U.S. 510, 512 (1994) ("The doctrine of qualified immunity shields public officials like respondents from damages actions unless their conduct was unreasonable in light of clearly established law.").

<sup>120</sup> *Mitchell*, 472 U.S. at 527.

<sup>121</sup> *Cohen*, 337 U.S. at 546.

<sup>122</sup> See *Will*, 546 U.S. at 349; *Gulfstream Aerospace*, 485 U.S. at 276.

<sup>123</sup> *Cohen*, 337 U.S. at 546 (noting that § 1291 "disallow[s] appeal from any decision which is tentative, informal or incomplete").

<sup>124</sup> See *Alexander v. United States*, 201 U.S. 117, 121 (1906) ("In a certain sense finality can be asserted of the orders under review; so, in a certain sense, finality can be asserted of any order of a court.").

<sup>125</sup> See *supra* notes 54–55 and accompanying text; see also Redish, *supra* note 36, at 94 (noting that the collateral order doctrine's notion of "internal" finality did not satisfy the concept of finality generally thought to be required by the final judgment rule).

doctrine's relaxed definition of finality applies only where the doctrine's other three elements are met. Thus, what makes so-called collateral orders immediately appealable is not their conclusiveness. Rather, it is the other three elements—separability, unreviewability, and importance—that are doing the legwork. And these are the three elements that are the hardest to square with the text of 28 U.S.C. § 1291.

Furthermore, the elements of the collateral order doctrine obscure, rather than illuminate, the policy concerns that actually motivate its use. Compare an order denying a police officer's qualified immunity defense with an order denying a defendant's motion to dismiss on the basis that a prior judgment or settlement bars the current lawsuit. The first order is categorically appealable under the collateral order doctrine, whereas the second is not. The justification for this distinction is that qualified immunity constitutes a right "not to stand trial."<sup>126</sup> This makes a denial of immunity effectively unreviewable on appeal from a final judgment because to get to such a final judgment, the defendant must endure the trial-related burdens that immunity is supposed to prohibit.<sup>127</sup> A *res judicata* defense based on a prior settlement or judgment, on the other hand, is a mere defense to liability, not a "right not to stand trial."<sup>128</sup> Such a defense only entitles the defendant to prevail on the merits at the end of the day, and that result can be accomplished by allowing the defendant to appeal after a final judgment.<sup>129</sup> If the trial court was incorrect, the appellate court can reverse the final judgment and order the case dismissed.

Why, exactly, does our system tolerate delayed appellate enforcement of a prior judgment or settlement, but not delayed appellate enforcement of qualified immunity? The purpose of allowing a *res judicata* defense based on a prior judgment or settlement is to avoid relitigation of claims that were or should have been raised in an earlier action.<sup>130</sup> If a defendant is forced to relitigate those issues despite the earlier judgment or settlement, he has in a very real sense lost the benefit of that judgment or settlement, just as the other hypothetical defendant has lost the benefit of qualified immunity. The only plausible

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<sup>126</sup> *Mitchell*, 472 U.S. at 526.

<sup>127</sup> *See id.* ("The entitlement is an *immunity from suit* rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial.").

<sup>128</sup> *Digital Equip. Corp.*, 511 U.S. at 873.

<sup>129</sup> *See, e.g., id.* at 869 (noting that "rights under private settlement agreements can be adequately vindicated on appeal from final judgment").

<sup>130</sup> *See* 18A WRIGHT ET AL., *supra* note 56, § 4436 ("The purpose of *res judicata* is to protect against the burden of relitigating the same issues.").

basis for distinguishing the two is a value judgment about which right is more deserving of immediate appellate correction. Reasonable people may disagree about how to rank these two rulings, but it is complete fiction to say that one is a "final decision" and the other is not. It is similarly meaningless to ask in the abstract whether either ruling is "effectively unreviewable" absent an immediate appeal. A ruling is "effectively unreviewable" if and only if a policy judgment has been made that the ruling requires vindication by immediate appeal.<sup>131</sup>

Another problem with the collateral order doctrine is the fact that in many situations it operates as a discretionary basis for appellate jurisdiction. Appeals from orders granting or denying security in civil actions provide a good example. Appellate courts have taken a flexible approach to determining whether the collateral order doctrine allows an immediate appeal of such orders, balancing a number of factors including the level of hardship imposed on the party who needs to post the security, the risk of nonpayment that would result if the security is denied, and whether the decision turns on a legal rather than a factual issue.<sup>132</sup> More generally, some appellate courts have explicitly incorporated a discretionary cost-benefit analysis into their collateral order doctrine analysis.<sup>133</sup>

Such discretionary inquiries are not necessarily bad policy. But such discretion is problematic in the context of the collateral order doctrine for two reasons. First, jurisdiction under the collateral order doctrine is based on 28 U.S.C. § 1291, which provides: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts."<sup>134</sup> If appellate jurisdiction under the collateral order doctrine has in practice become discretionary rather than manda-

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<sup>131</sup> See *Digital Equip. Corp.*, 511 U.S. at 864 ("[W]hether a right is 'adequately vindicable' or 'effectively reviewable,' simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.").

<sup>132</sup> See 15A WRIGHT ET AL., *supra* note 56, § 3914.2.

<sup>133</sup> See, e.g., *First Wis. Mortgage Trust v. First Wis. Corp.*, 571 F.2d 390, 393 (7th Cir. 1978) (stating that the collateral order doctrine applies only when "on balance, the danger of denying justice by delay outweighs the inconvenience and costs of piecemeal review"), *rev'd in part* by 584 F.2d 201 (7th Cir. 1978) (en banc); accord *Socialist Workers Party v. Grubisic*, 604 F.2d 1005, 1007 (7th Cir. 1979); see also *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892, 896-97 (D.C. Cir. 2006) (allowing the appeal of a discovery order under the collateral order doctrine because the cost of releasing certain information subject to the discovery order "outweighs the costs of piecemeal review that underlie the finality rule" and because "the privacy and competitive interests . . . that would potentially go unprotected overcome the interest in finality").

<sup>134</sup> 28 U.S.C. § 1291 (2000) (emphasis added).

tory (at least for some kinds of interlocutory orders), then it is awkward to base the collateral order doctrine on a statute using the word "shall."

Second, the process for invoking the collateral order doctrine (and determining whether it applies to a particular case) is ill-suited to these kinds of discretionary judgments. This too is a consequence of the collateral order doctrine's textual justification as a construction of 28 U.S.C. § 1291. Because § 1291 provides for an appeal as of right, a party relying on the collateral order doctrine needs to file only a notice of appeal under Federal Rule of Appellate Procedure 3.<sup>135</sup> A notice of appeal, however, is not required even to state the basis for appellate jurisdiction.<sup>136</sup> And it is certainly not a procedural vehicle for convincing the appellate court that it should exercise its discretion to hear a particular interlocutory appeal. Ordinarily, collateral order doctrine appeals proceed to full briefing, not only on the issue of appellate jurisdiction but also on the substantive merits of the appeal.<sup>137</sup> Thus, the applicability of the collateral order doctrine is usually not resolved until full briefing is complete. If, however, the applicability of the collateral order doctrine depends on the appellate court's discretionary (and hence unpredictable) balancing of concerns, this procedure creates a risk that substantial energy and expense will be incurred briefing, arguing, and considering the merits of an appeal that will ultimately be dismissed for lack of jurisdiction.

### C. *Appellate Mandamus: Precedent and Procedure*

Appellate mandamus is another mid-twentieth-century judicial invention that has allowed federal courts of appeals to circumvent the final judgment rule. The statutory source for appellate mandamus is the All Writs Act, codified at 28 U.S.C. § 1651.<sup>138</sup> This seemingly innocuous provision simply states that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their re-

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<sup>135</sup> See *supra* notes 106–108 and accompanying text.

<sup>136</sup> See FED. R. APP. P. 3(c)(1).

<sup>137</sup> See *id.* 28(a) (requiring the appellant to present in its brief a "jurisdictional statement" as well as a "statement of the issues," "statement of the case," "statement of facts," and "argument"); *id.* 28(b) (requiring the appellee to present the same in its brief, unless it is satisfied with the appellant's statements); see also, e.g., *Venus Lines Agency v. CVG Industria Venezolana De Aluminio*, 210 F.3d 1309, 1313 n.1 (11th Cir. 2000) ("Having reviewed the parties' briefs, the court is satisfied that Venalum adequately identified the orders from which it appeals in its notice of appeal, and the appeal is properly brought under the collateral order doctrine." (emphasis added)).

<sup>138</sup> 28 U.S.C. § 1651 (2000).

spective jurisdictions and agreeable to the usages and principles of law."<sup>139</sup> Although this language does not appear to expand appellate jurisdiction over interlocutory orders, the Supreme Court has construed it to authorize appellate courts to review interlocutory orders by way of a writ of mandamus.<sup>140</sup> This Section summarizes the invention of appellate mandamus in the 1950s and its evolution over the last several decades.<sup>141</sup> It also summarizes the procedures by which litigants invoke appellate mandamus and through which courts determine whether appellate mandamus is justified in a particular case.<sup>142</sup>

### 1. The Invention and Evolution of Appellate Mandamus

Appellate mandamus is based on the appellate court's authority under the All Writs Act to "issue all writs necessary or appropriate *in aid of* their respective jurisdictions."<sup>143</sup> To satisfy the All Writs Act's jurisdictional prerequisite, it is only necessary that the case may, at some future time, come within the court's appellate jurisdiction.<sup>144</sup> The textual justification for appellate mandamus is that the court may issue a writ of mandamus "in aid of" the jurisdiction that will exist in the future once a hypothetical final judgment is entered.<sup>145</sup>

As with the collateral order doctrine, the Supreme Court did not endorse this method of appellate court review until the mid-twentieth century. In the 1957 decision of *La Buy v. Howes Leather Co.*, the Court held that the U.S. Court of Appeals for the Seventh Circuit properly issued a writ of mandamus to prevent a district court judge from referring two antitrust cases to a special master for trial under Federal Rule of Civil Procedure 53(b).<sup>146</sup> The Supreme Court rejected the argument that the power of the courts of appeals does not extend to the issuance of writs of mandamus.<sup>147</sup> Instead, it reasoned that "[s]ince

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<sup>139</sup> *Id.* § 1651(a).

<sup>140</sup> See 16 WRIGHT ET AL., *supra* note 56, § 3932.

<sup>141</sup> See *infra* notes 143–198 and accompanying text.

<sup>142</sup> See *infra* notes 199–207 and accompanying text.

<sup>143</sup> 28 U.S.C. § 1651(a) (emphasis added).

<sup>144</sup> *In re Chambers Dev. Co.*, 148 F.3d 214, 223 n.6 (3d Cir. 1998).

<sup>145</sup> See *La Buy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957) ("Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them."). As explained at *supra* note 56 and accompanying text, when a "final decision" is reached for purposes of 28 U.S.C. § 1291, the court of appeals has jurisdiction to review all orders leading to that final decision.

<sup>146</sup> 352 U.S. at 250–51.

<sup>147</sup> *Id.* at 254–55.

the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them."<sup>148</sup> The Court noted both that the district court's orders concerned rules promulgated by the Supreme Court and that there had been a clear abuse of discretion under those rules.<sup>149</sup> It concluded that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system" and that, therefore, the All Writs Act conferred discretionary power on the courts of appeals to issue writs of mandamus in exceptional circumstances, such as those existing in that case.<sup>150</sup>

Until *La Buy*, the authority of federal courts of appeals to direct writs of mandamus to federal trial courts "in aid of" the appellate court's jurisdiction was very narrow.<sup>151</sup> Mandamus was proper only where future appellate jurisdiction "might otherwise be defeated by the unauthorized action of the court below."<sup>152</sup> For example, mandamus could issue if the federal trial court refused to adjudicate a case at all, thus preventing a reviewable final decision from ever being reached.<sup>153</sup> Similarly, mandamus could issue if a federal trial court stayed proceedings so that a state court could adjudicate an action. In that situation, res judicata or collateral estoppel could otherwise prevent either the federal trial court or the federal appellate court from addressing the merits.<sup>154</sup> But the Supreme Court had never endorsed

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<sup>148</sup> *Id.* at 255.

<sup>149</sup> *Id.* at 257.

<sup>150</sup> *Id.* at 259–60.

<sup>151</sup> See Robert S. Berger, *The Mandamus Power of the United States Courts of Appeals: A Complex and Confused Means of Appellate Control*, 31 BUFF. L. REV. 37, 50 (1982) (noting that *La Buy* "does represent a less restrictive attitude toward the use of the mandamus power"); Redish, *supra* note 36, at 114 ("In its 1957 decision in *La Buy* . . . the Supreme Court expanded considerably [mandamus's] potential scope."). In the decade or so prior to *La Buy*, the Supreme Court had on several occasions rejected attempts to seek interlocutory appellate review via writs of mandamus. In 1953, it affirmed the Fifth Circuit's refusal to issue a writ of mandamus directed at a district court order transferring a case to another federal district. *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 381–82 (1953). In 1943, the Supreme Court reversed the Ninth Circuit's use of mandamus to overturn a district court's refusal to quash an indictment. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 32 (1943).

<sup>152</sup> *McClellan v. Carland*, 217 U.S. 268, 280 (1910); see *Roche*, 319 U.S. at 25 (noting that the circuit court of appeals has authority to issue writs of mandamus in aid of its jurisdiction because "[o]therwise the appellate jurisdiction could be . . . thwarted by unauthorized action of the district court obstructing the appeal").

<sup>153</sup> See *McClellan*, 217 U.S. at 280 (recognizing that a writ of mandamus was appropriate to compel a trial court to proceed to final judgment).

<sup>154</sup> See *id.* In *McClellan* the Court stated:



appellate mandamus as a means of interlocutory review by the federal courts of appeals.<sup>155</sup> It was "elementary" that a court of appeals' authority to issue writs of mandamus was *not* to correct errors of law or fact or to otherwise compel adjudication in a particular way.<sup>156</sup> "Mandamus," the Court stated, "is an appropriate remedy to compel a judicial officer to act" but may not be used as a "substitute for an appeal or writ of error to dictate the manner of his action."<sup>157</sup>

Following *La Buy*'s lead, the Supreme Court endorsed appellate mandamus in a number of other situations. The Court's 1964 decision in *Schlagenhauf v. Holder* addressed the use of mandamus to review a district court's decision to order mental and physical examinations under Federal Rule of Civil Procedure 35.<sup>158</sup> The U.S. Court of Appeals for the Seventh Circuit had refused to issue a writ of mandamus, concluding that mandamus was not appropriate to consider whether Rule 35's "good cause" requirement was satisfied.<sup>159</sup> The Supreme Court reversed the Seventh Circuit, finding that the court of appeals should have determined the "good cause" issue on mandamus.<sup>160</sup> It noted that the application of Rule 35 to defendants (rather than plaintiffs) pre-

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Inasmuch as the order of the circuit court, staying the proceeding until after final judgment in the state court, might prevent the adjudication of the questions involved, and thereby prevent a review thereof in the circuit court of appeals, which had jurisdiction for that purpose, we think that court had power to issue the writ of mandamus to require the circuit court to proceed with and determine the action pending before it.

*Id.*

<sup>155</sup> See *La Buy*, 352 U.S. at 262 (Brennan, J., dissenting) (stating that *La Buy* was "a clear departure by the Court of Appeals from the settled principles governing the issuance of the extraordinary writs" and that the Court had "seriously undermined the long-standing statutory policy against piecemeal appeals"). Some of the pre-*La Buy* Supreme Court cases that are often cited to support robust mandamus authority involve issuance of writs of mandamus by the Supreme Court itself, not by the courts of appeals. See generally *Ex parte Republic of Peru*, 318 U.S. 578 (1943); *Colorado v. Symes*, 286 U.S. 510 (1932); *L.A. Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927); *Maryland v. Soper*, 270 U.S. 9 (1926); *In re Skinner & Eddy Corp.*, 265 U.S. 86 (1924); *In re Simons*, 247 U.S. 231 (1918). Reliance on such cases is "misplaced" because unlike the federal courts of appeals, the Supreme Court is not limited to "the strictly auxiliary power" provided under the All Writs Act. *La Buy*, 352 U.S. at 265 (Brennan, J., dissenting). Whether or not one agrees with the result in *La Buy*, its recognition of such mandamus authority in the federal courts of appeals was a significant development.

<sup>156</sup> *Interstate Commerce Comm'n v. United States ex rel. Campbell*, 289 U.S. 385, 393-94 (1933).

<sup>157</sup> *Id.* at 394.

<sup>158</sup> 379 U.S. 104, 109 (1964).

<sup>159</sup> *Id.* at 111 (citing *Schlagenhauf v. Holder*, 321 F.2d 43, 52 (7th Cir. 1964)).

<sup>160</sup> *Id.*

sented an issue of first impression, as did the meaning of Rule 35's "good cause" requirement.<sup>161</sup> Under these special circumstances, the Court concluded that mandamus was proper "to settle new and important problems."<sup>162</sup>

A decade later, the Supreme Court's 1976 opinion in *Thermtron Products, Inc. v. Hermansdorfer* stated that mandamus was appropriate to correct a district court's order remanding a case to state court because its crowded docket would severely impair plaintiffs' right of redress.<sup>163</sup> The Supreme Court concluded that the removal statutes did not allow the district court to remand a case simply because it considered itself too busy to try it.<sup>164</sup> It then held that mandamus was appropriate "to prevent nullification of the removal statutes by remand orders resting on grounds having no warrant in the law."<sup>165</sup> The Court also rejected the argument that appellate mandamus was barred by 28 U.S.C. § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."<sup>166</sup> The Court inferred that § 1447(d) barred appellate court scrutiny only for remand orders based on improper removal or lack of federal subject matter jurisdiction—it did not bar review of a remand order that, as in *Thermtron*, was based solely on the district court's crowded docket.<sup>167</sup>

The Supreme Court's next two mandamus decisions appeared to scale back the availability of appellate mandamus. In *Kerr v. U.S. District Court*, a case decided just five months after *Thermtron*, the Court affirmed the refusal of the U.S. Court of Appeals for the Ninth Circuit to review via mandamus a discovery order compelling California prison officials to provide personnel files and certain prisoner files.<sup>168</sup> The prison officials' mandamus petition argued that the documents should not be produced without the district court reviewing them *in camera* to determine whether plaintiffs' need for them outweighed

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

<sup>162</sup> *Id.*

<sup>163</sup> 423 U.S. 336, 340–41 (1976).

<sup>164</sup> *Id.* at 344–45.

<sup>165</sup> *Id.* at 353.

<sup>166</sup> 28 U.S.C. § 1447(d) (2000).

<sup>167</sup> *Thermtron*, 423 U.S. at 345–52 (allowing appellate review via a writ of mandamus for remand orders based on grounds other than improvident removal or lack of subject matter jurisdiction). See generally Michael E. Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 Mo. L. Rev. 287 (1993).

<sup>168</sup> *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 395–99 (1976).

their confidentiality.<sup>169</sup> The Supreme Court held that mandamus was improper because the prison officials were free to make a request for such *in camera* review in the district court as an initial matter.<sup>170</sup>

Two years later, in *Will v. Calvert Fire Insurance Co.*, the Supreme Court reversed the grant of a writ of mandamus by the U.S. Court of Appeals for the Seventh Circuit ordering the district court "to proceed immediately" to adjudicate a federal securities law claim, despite the pendency of a substantially identical proceeding between the same parties in the Illinois state courts.<sup>171</sup> In a plurality opinion written by Justice Rehnquist, the Court acknowledged that appellate mandamus may be available when "a district court obstinately refuses to adjudicate a matter properly before it," but concluded that the plaintiff had neither alleged nor proved such a refusal to proceed.<sup>172</sup> The plurality noted that the sparse record before it did not support an inference that the district court had simply "abated the [federal law] claim in deference to the state proceedings."<sup>173</sup> The plurality concluded that, so far as it appeared, "the delay in adjudicating the damages claim [was] simply a product of the normal excessive load of business in the District Court."<sup>174</sup>

In 1989, however, the Supreme Court in *Mallard v. U.S. District Court* once again endorsed appellate mandamus.<sup>175</sup> In that case, the Court held that appellate mandamus was proper to challenge a district court's refusal to grant an attorney's motion to withdraw as counsel for indigent inmates in a 42 U.S.C. § 1983 prison conditions lawsuit.<sup>176</sup> The attorney had been appointed involuntarily under 28 U.S.C. § 1915(d)'s provision that "[t]he court may request an attorney to represent" an indigent litigant.<sup>177</sup> The Court first found that the term "request" in § 1915(d) did not authorize a district court to *compel* an attorney to rep-

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<sup>169</sup> *Id.* at 404.

<sup>170</sup> *Id.* (noting "the opportunity for petitioners to return to the District Court, assert the privilege more specifically and through responsible officials, and then have their request for an *in camera* review of the materials by the District Court reconsidered in a different light").

<sup>171</sup> 437 U.S. 655, 657 (1978) (plurality opinion).

<sup>172</sup> *Id.* at 666-67. Justice Blackmun, who provided the fifth and deciding vote against granting the writ, did not join Justice Rehnquist's opinion. He reasoned that the court of appeals' issuance of the writ of mandamus was premature for other reasons. *Id.* at 656-67 (Blackmun, J.).

<sup>173</sup> *Id.* at 667.

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

<sup>175</sup> 490 U.S. 296, 309-10 (1989).

<sup>176</sup> *Id.* at 299-300.

<sup>177</sup> *Id.* at 301.

resent such a litigant.<sup>178</sup> The Court then concluded that appellate mandamus was appropriate because, given the correct interpretation of § 1915(d), the district court “plainly acted beyond its ‘jurisdiction’ . . . . In addition, [the appointed attorney] had no alternative remedy available to him.”<sup>179</sup>

The Supreme Court’s most recent endorsement of appellate mandamus was its 2004 decision in *Cheney v. U.S. District Court*.<sup>180</sup> The district court in *Cheney* had authorized the plaintiffs to seek “‘tightly-reined’ discovery” from Vice President Dick Cheney regarding the structure and membership of the National Energy Policy Development Group.<sup>181</sup> The U.S. Court of Appeals for the D.C. Circuit denied Cheney’s request for a writ of mandamus, concluding that it had “no authority to exercise the extraordinary remedy of mandamus”<sup>182</sup> in light of the fact that Cheney remained free to assert executive privilege in response to particular discovery requests.<sup>183</sup> The Supreme Court vacated the D.C. Circuit’s denial of the writ because the court of appeals had failed to give adequate consideration to separation of powers concerns, namely, whether judicial discovery directed at the Vice President “constituted an unwarranted impairment of another branch in the performance of its constitutional duties.”<sup>184</sup> The Supreme Court concluded that the D.C. Circuit had “prematurely terminated its inquiry” into Cheney’s separation of powers objections based on the mistaken assumption that he must first assert executive privilege in response to particular discovery requests.<sup>185</sup> The Court did not, however, require the D.C. Circuit to grant the writ of mandamus.<sup>186</sup> Rather, it remanded the case to the D.C. Circuit for further consideration, recognizing that “the issuance of the writ is a matter vested in the discretion of the court to which the petition is made.”<sup>187</sup>

Unlike the collateral order doctrine’s oft-cited multipart test, the Supreme Court has not provided a consistent set of requirements for appellate mandamus. Its most recent guidance came in *Cheney*, where

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<sup>178</sup> *Id.* at 301–07.

<sup>179</sup> *Id.* at 309.

<sup>180</sup> 542 U.S. 367, 379–80 (2004).

<sup>181</sup> *Id.* at 375 (quoting *Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 54 (D.D.C. 2002)).

<sup>182</sup> *Id.* at 377 (quoting *In re Cheney*, 334 F.3d 1096, 1105 (D.C. Cir. 2003)).

<sup>183</sup> *Id.* at 376 (citing *In re Cheney*, 334 F.3d at 1104).

<sup>184</sup> *Id.* at 390.

<sup>185</sup> *Cheney*, 542 U.S. at 391.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

the Court stressed that mandamus must not be used as a substitute for the regular appeals process.<sup>188</sup> It added:

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. Although courts have not confined themselves to an arbitrary and technical definition of "jurisdiction," only exceptional circumstances amounting to a judicial "usurpation of power" or a "clear abuse of discretion" will justify the invocation of this extraordinary remedy.<sup>189</sup>

The *Cheney* Court then articulated three conditions that must be satisfied for a writ of mandamus to issue.<sup>190</sup> First, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires.<sup>191</sup> Second, the petitioner must show that his right to issuance of the writ is "clear and indisputable."<sup>192</sup> Third, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances."<sup>193</sup> Other Supreme Court decisions, however, do not echo this three-part test. Neither *La Buy*, *Schlagenhauf*, nor *Thermtron*, for example, mentions *Cheney*'s requirements that there be no other adequate means of obtaining the relief sought or that the right to mandamus be clear and indisputable.<sup>194</sup>

Several federal courts of appeals have sought to crystallize the Supreme Court's inconsistent messages into their own frameworks for determining when mandamus is appropriate. Most prominent is the so-called *Bauman* test, which identifies five conditions that might justify appellate mandamus:

- (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires;
- (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal;
- (3) The district court's order is

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<sup>188</sup> *Id.* at 380-81.

<sup>189</sup> *Id.* at 380 (citations and internal quotation marks omitted).

<sup>190</sup> *Cheney*, 542 U.S. at 380-81.

<sup>191</sup> *Id.* (citing *Kerr*, 426 U.S. at 403).

<sup>192</sup> *Id.* (quoting *Kerr*, 426 U.S. at 403; *Bankers Life & Cas. Co.*, 346 U.S. at 384).

<sup>193</sup> *Id.* (quoting *Kerr*, 426 U.S. at 403; *Schlagenhauf*, 379 U.S. at 112 n.8).

<sup>194</sup> See generally *Thermtron*, 423 U.S. 336; *Schlagenhauf*, 379 U.S. 104; *La Buy*, 352 U.S. 249.

clearly erroneous as a matter of law; (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; or (5) The district court's order raises new and important problems, or issues of law of first impression.<sup>195</sup>

For courts that use this approach, it is not necessary that all five conditions be present to warrant mandamus.<sup>196</sup> Nor does the presence of one or more of these factors automatically trigger review via appellate mandamus—whether to grant the writ is always up to the appellate court's discretion.<sup>197</sup> Although the Supreme Court has yet to approve of this five-factor framework, several federal appellate courts have employed it.<sup>198</sup>

## 2. Procedures for Invoking Appellate Mandamus

A litigant who wishes to seek appellate mandamus must file a petition for a writ of mandamus in the court of appeals.<sup>199</sup> Such a petition is not formally an appeal, however. It actually initiates an entirely new action—an original action—in the court of appeals.<sup>200</sup> Formally, the petitioner is seeking a writ of mandamus ordering the district court judge to do whatever it is the aggrieved party believes should have been done initially. Thus, the petitioner must serve the petition on the judge *personally*, as well as on all the parties.<sup>201</sup> Up until 1996, the judge was formally the respondent in the mandamus proceed-

<sup>195</sup> *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654–55 (9th Cir. 1977).

<sup>196</sup> *See id.* at 655; *see also In re Chimenti*, 79 F.3d 534, 540 (6th Cir. 1996) (noting that the test does “not require that every element be met”).

<sup>197</sup> *E.g.*, *San Jose Mercury News, Inc., v. U.S. Dist. Court*, 187 F.3d 1096, 1099 (9th Cir. 1999) (“Mandamus review is at bottom discretionary—even where the *Bauman* factors are satisfied, the court may deny the petition.”); *see also Berger*, *supra* note 151, at 38 (noting that “mandamus . . . provides a means for discretionary interlocutory appellate review”).

<sup>198</sup> *E.g.*, *In re Bieter*, 16 F.3d 929, 932 (8th Cir. 1994) (noting that the *Bauman* factors are “instructive”); *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 303–04 (6th Cir. 1984); *see also Dew v. United States*, 48 M.J. 639, 648–49 (Army Ct. Crim. App. 1998); *Waters*, *supra* note 6, at 594 n.295 (noting that other circuits have adopted the *Bauman* factors or other similar factors). *But see Berger*, *supra* note 151, at 90 (noting that the *Bauman* factors “were simply drawn from cases without any evaluation of their propriety or the practical effects of using them”).

<sup>199</sup> *See* FED. R. APP. P. 21(a)(1) (“A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge.”).

<sup>200</sup> *See* 16 WRIGHT ET AL., *supra* note 56, § 3932.

<sup>201</sup> FED. R. APP. P. 21(a).

ings.<sup>202</sup> Although this is no longer the case, the appellate court may still authorize or order the trial court judge to respond.<sup>203</sup>

A petition for a writ of mandamus must state "(i) the relief sought; (ii) the issues presented; (iii) the facts necessary to understand the issue presented by the petition; and (iv) the reasons why the writ should issue."<sup>204</sup> To succeed, therefore, a party must convince the court of appeals both that appellate mandamus is an appropriate vehicle for interlocutory review and that the district court's ruling was incorrect. The mandamus petition must thus present argument on both appellate "jurisdiction" (i.e., whether the appellate court should exercise its discretion to review the order via mandamus) and the substantive merits of the appeal.

There is no formal deadline for filing a mandamus petition. The Supreme Court has held that the ordinary deadlines for filing notices of appeal do not apply to petitions for writs of mandamus.<sup>205</sup> Rather, the timeliness of a mandamus petition is measured by much murkier standards. Laches might bar a mandamus petition if the petitioner slept upon his rights, especially if that delay was prejudicial to the other party.<sup>206</sup> One court of appeals has explained the issue this way: "As with all remedies that are governed by equitable principles, mandamus must be sought with reasonable promptness. There is no inflexible rule on timeliness and we hesitate to create any."<sup>207</sup>

#### D. Problems with Appellate Mandamus

Appellate mandamus is problematic for several reasons. First, using the writ of mandamus as a method of appellate review does not comport with the historic understanding of the writ. Second, the Supreme Court's guidance on when appellate mandamus is appropriate is inconsistent and fails to reflect its actual use. Third, the process for invoking appellate mandamus is cumbersome and inefficient.

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<sup>202</sup> See *In re Chambers Dev. Co.*, 148 F.3d at 223 n.7 (citing the 1996 amendments to FED. R. APP. P. 21).

<sup>203</sup> FED. R. APP. P. 21(b)(4).

<sup>204</sup> *Id.* 21(a)(2)(B).

<sup>205</sup> *Cheney*, 542 U.S. at 378.

<sup>206</sup> *Id.* at 379 (citing *Chapman v. County of Douglas*, 107 U.S. 348, 355 (1883)).

<sup>207</sup> *United States v. Olds*, 426 F.2d 562, 565–66 (3d Cir. 1970); see *In re Rappaport*, 558 F.2d 87, 90 n.9 (2d Cir. 1977) ("[D]elay in seeking mandamus may itself prove fatal to the petition."); 20A JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 321.10(1) (3d ed. 2006) ("Although there is no express time limit on filing a petition, failure to seek prompt relief may result in denial of the relief sought.") (internal citation omitted).

The statutory foundation for appellate mandamus is fairly sensible. The All Writs Act provides: “The Supreme Court and all courts established by Acts of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”<sup>208</sup> Although a court of appeals’ jurisdiction under 28 U.S.C. § 1291 traditionally requires a final judgment by the district court, this jurisdiction has always included review of the interlocutory orders leading to that final judgment.<sup>209</sup> Any interlocutory order, therefore, may *eventually* be within the appellate court’s jurisdiction because it can be reviewed once the district court reaches a final judgment. Thus, it is plausible and textually sound to read appellate mandamus as “appropriate in aid of”<sup>210</sup> the jurisdiction that will exist once a “final decision”<sup>211</sup> is reached. The fact that appellate mandamus is a discretionary basis for review also fits nicely with the All Writs Act’s discretionary language: “[A]ll courts established by Acts of Congress *may* issue all writs . . . .”<sup>212</sup>

What is puzzling, however, is why—of “all” the “writs” available—the Supreme Court endorsed mandamus as the vehicle for obtaining what is essentially *appellate* review of interlocutory trial court orders. Mandamus has always been classified as an “extraordinary” writ, even when it is not used as a means of interlocutory appellate review.<sup>213</sup> In this sense, mandamus is an awkward fit for what is essentially discretionary appellate review of interlocutory orders. As Professor Rosenberg noted two decades ago, mandamus “has become an ordinary rather than an extraordinary route of appeal.”<sup>214</sup> Indeed, to fit the traditional elements of mandamus, a litigant must initiate an entirely new action in the appellate court seeking a writ commanding the trial court judge as an individual officer to correct what was done or not done in the trial court.<sup>215</sup>

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<sup>208</sup> 28 U.S.C. § 1651(a) (2000).

<sup>209</sup> See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (noting that on appeal from a final judgment “claims of district court error at any stage of the litigation may be ventilated”) (citations and internal quotation marks omitted).

<sup>210</sup> 28 U.S.C. § 1651(a).

<sup>211</sup> 28 U.S.C. § 1291 (2000).

<sup>212</sup> 28 U.S.C. § 1651(a) (emphasis added).

<sup>213</sup> E.g., *United States ex rel. Bernadin v. Seymour*, 10 App. D.C. 294, \*4 (D.C. Cir. 1897).

<sup>214</sup> Rosenberg, *supra* note 10, at 174.

<sup>215</sup> Accordingly, there is a perception that district court judges view appellate mandamus as a more personally hostile device than a conventional appeal. See Berger, *supra* note 151, at 87 (“The writ has been said to be extraordinary and is viewed that way by federal judges. . . . [T]o be ‘mandamus’ is a particularly strong rebuke that often will be taken



Historically, mandamus was not a vehicle for federal appellate courts to reverse or vacate lower court orders. In the decade following the creation of the circuit courts of appeals in 1891, their decisions were replete with language indicating that mandamus is not to be used to obtain appellate review of interlocutory orders. In 1900, the U.S. Court of Appeals for the Eighth Circuit explained it this way:

When a question has been decided by the officer or person to whose judgment or discretion the law has entrusted its determination, the writ of mandamus may not issue to review or reverse that decision, or to compel another. It may issue to command judicial officers to hear and to decide a question within their jurisdiction, but courts have no power by writ of mandamus to direct such officers how they shall decide such a question, or in whose favor they shall render their judgment.<sup>216</sup>

Indeed, a thorough review of the courts of appeals' first ten years of published decisions reveals not a single instance where a writ of mandamus was used as the sort of appellate vehicle that it has since become.<sup>217</sup> Although there are some examples during this time pe-

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more personally."); Charles Gardner Geyh, *Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act*, 41 CLEV. ST. L. REV. 511, 521 (1993) ("[A]s a regular litigator in the federal courts, it's hard enough to file a mandamus petition.") (quoting *Hearings of the National Commission on Judicial Discipline and Removal* 133 (1992) (Statement of Alan Morrison, Esq.)). This concern has been ameliorated somewhat by 1996 amendments to Federal Rule of Appellate Procedure 21. Under the new rule, a judge is no longer formally a party to the mandamus action, although she must be served copies of the mandamus petition, and the appellate court may authorize or order her to provide a personal response to the petition. See FED. R. APP. P. 21(a), (b); cf. Berger, *supra* note 151, at 86 (suggesting in 1982 that one "policy basis underlying the reluctance to employ mandamus" was "the fact that the district judge is a litigant"). The 1996 amendments were motivated by a desire to clarify that "[i]n most instances, a writ of mandamus . . . is not actually directed to a judge in any more personal way than is an order reversing a court's judgment." FED. R. APP. P. 21 advisory committee notes (note to the 1996 amendments).

<sup>216</sup> *Kimberlin v. Comm'n to Five Civilized Tribes*, 104 F. 653, 655 (8th Cir. 1900); see, e.g., *James v. Cent. Trust Co. of N.Y.*, 108 F. 929, 931 (4th Cir. 1901) (denying a writ of mandamus to challenge the trial court's compliance with the court of appeals' decree and noting that "if . . . a mistake in recital has been made, or an error of judgment committed, the writ of mandamus is not the remedy, but that an additional appeal must be sued out to correct the same" and that "if that court erred in disposing of the matters remanded to it by this court, not specified in the mandate, the remedy is by appeal, and not by mandamus"); *The New York*, 104 F. 561, 566 (6th Cir. 1900) ("[I]f the court erred in refusing to allow such recoupment, the remedy is by appeal, and not by mandamus.").

<sup>217</sup> The cases reviewed by the author are listed *infra*, app. tbl.2.

riod where a federal court of appeals directed a writ of mandamus to a lower court, they are qualitatively different from the sort of appellate review for which mandamus is used today. In 1898 in *Scaife v. Western North Carolina Land Co.*, for example, the lower court judge had refused to settle a bill of exceptions, which was a necessary prerequisite to reaching a final judgment.<sup>218</sup> The U.S. Court of Appeals for the Fourth Circuit granted a writ of mandamus: "In the case before us the writ will issue, commanding the judge to settle a bill of exceptions according to the facts as they took place before him on the trial of this action, as he may find them, and when so settled to sign it."<sup>219</sup> To require the judge merely to settle the bill of exceptions according to the facts as he may find them is not to second-guess or influence the ultimate content of the judge's factual findings; it is merely to require him to do what the taxpayers are paying him to do—to make *some* findings. Thus, the examples where courts of appeals issued writs of mandamus at federal trial courts are not situations where the lower court simply made a ruling that was incorrect in the eyes of the appellate court. Rather, the lower court utterly failed to decide an issue that it was required to decide.<sup>220</sup>

Another problem is that the Supreme Court's purported "requirements" for appellate mandamus obscure, rather than illuminate, how the writ is actually used. For example, the Court has stated recently that the mandamus petitioner must show that her right to the writ is "clear and indisputable."<sup>221</sup> In *Mallard*, however, the petitioner's right to the writ hinged on how the Court resolved a circuit split over whether 28 U.S.C. § 1915(d) authorized district court's to compel attorneys to represent indigent prisoners.<sup>222</sup> Can it really be said that the petitioner's right to reversal-by-mandamus is "clear and indisput-

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<sup>218</sup> 87 F. 308, 309 (4th Cir. 1898).

<sup>219</sup> *Id.* at 311.

<sup>220</sup> *Cf. Interstate Commerce Comm'n*, 289 U.S. at 394 ("Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action.").

<sup>221</sup> *Cheney*, 542 U.S. at 381 ("[T]he petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable.") (citations and internal quotation marks omitted); *Mallard*, 490 U.S. at 309 ("[P]etitioners must . . . carry the burden of showing that their right to issuance of the writ is clear and indisputable.") (citations and internal quotation marks omitted).

<sup>222</sup> *Mallard*, 490 U.S. at 300 & n.2, 309 (granting the writ of mandamus because "*as we decide today*, § 1915(d) does not authorize coercive appointments of counsel") (emphasis added).

able"<sup>223</sup> when the district court's action was permissible under the case law not only in its own circuit but in other circuits as well?

The same point could be made regarding other Supreme Court decisions on appellate mandamus. In *Schlagenhauf*, the Court found that appellate mandamus was proper even though the case involved an issue of first impression regarding Federal Rule of Civil Procedure 35 that had raised "new and important problems."<sup>224</sup> In *Thermtron*, the Supreme Court's use of appellate mandamus depended on a novel reading of 28 U.S.C. § 1447(d), the plain text of which precludes *all* appellate court review of district court remand orders.<sup>225</sup> Under either circumstance, it is a complete fiction to say that the petitioner's right to the writ was "clear and indisputable."<sup>226</sup> Perhaps *Schlagenhauf* and *Thermtron* can be justified on the basis that the petitioner's right to the writ in those cases was "clear and indisputable" in light of the legal interpretation provided during the court's consideration of the writ. But an appellate court is always capable of providing a legal interpretation that would make the proper result clear and indisputable. If that is all that the "clear and indisputable" requirement entails, then it provides no meaningful restriction on an appellate court's mandamus authority.

Other aspects of the Supreme Court's mandamus jurisprudence are also problematic. As recently as the *Cheney* decision, the Court observed that the purpose of appellate mandamus is solely to "confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction."<sup>227</sup> Although such language is meant to highlight that an appellate court's authority to review trial court rulings via mandamus is limited, if read closely it creates no limitation at all. Not even the most sweepingly intrusive appellate device can interfere with a district court decision that *lawfully* exercised its prescribed jurisdiction. So to state that mandamus is only permissible to confine a trial court to a lawful exercise of its jurisdiction provides no guidance at all for when, in fact, mandamus is appropriate—the purpose of *every* appeal is to confine a court to the "lawful" exercise of its jurisdiction.<sup>228</sup>

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<sup>223</sup> *Cheney*, 542 U.S. at 381; *Mallard*, 490 U.S. at 309.

<sup>224</sup> *Schlagenhauf*, 379 U.S. at 111.

<sup>225</sup> *Thermtron*, 423 U.S. at 345–52. See generally Solimine, *supra* note 167.

<sup>226</sup> *Cheney*, 542 U.S. at 381; *Mallard*, 490 U.S. at 309; see also Berger, *supra* note 151, at 46 ("How one establishes a clear and indisputable right to relief that is said to be discretionary with the appellate court is also open to serious question.").

<sup>227</sup> *Cheney*, 542 U.S. at 380.

<sup>228</sup> Cf. Berger, *supra* note 151, at 84–85 ("[A]lmost any order that is reversible error might be deemed a usurpation of power or excess of jurisdiction.").

Equally unsatisfying is the notion that mandamus relief is only appropriate when the petitioner has “no other adequate means to attain the relief he desires.”<sup>229</sup> The “relief” that is “desire[d]” by someone who petitions for mandamus is the *immediate* correction of the trial court’s interlocutory ruling. The fact that the petitioner has embraced mandamus as a method of appellate review confirms that no other method exists for obtaining immediate review. Thus, the “no other adequate means” requirement provides little concrete guidance and ultimately boils down to yet another circular policy judgment about whether forcing the aggrieved party to wait for an appeal from a final judgment is “adequate.”<sup>230</sup>

Finally, the procedural vehicle for invoking appellate mandamus fits poorly with its role as a means for discretionary appellate review. A party’s petition for a writ of mandamus must address not only the “jurisdictional” question of whether the order is suitable for review via appellate mandamus,<sup>231</sup> but also the merits of whether the order was correct.<sup>232</sup> This is a puzzling approach, as evidenced by the fact that every federal scheme that is explicitly designed to handle discretionary appeals *separates* the threshold question of whether the court should exercise its discretion to hear the appeal from the question of whether the order being reviewed was correct on the merits.<sup>233</sup> A litigant seeking discretionary review from the U.S. Supreme Court first files a petition for a writ of certiorari, which emphasizes why the case is worthy of Supreme Court review.<sup>234</sup> Only after that writ is granted does the case proceed to full briefing on the merits.<sup>235</sup>

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<sup>229</sup> *Cheney*, 542 U.S. at 380.

<sup>230</sup> *Cf. Berger*, *supra* note 151, at 89 (“There is almost always some harm that cannot be corrected on appeal. The question is what type of harm and what degree of harm should be sufficient to authorize an immediate review by mandamus.”).

<sup>231</sup> *Cf. id.* at 76 (stating that the propriety of mandamus involves “a somewhat different concept of appellate jurisdiction, that of an appellate screening device,” but acknowledging that “[j]urisdiction in the sense of the *power* to entertain the appeal is almost never the question in a mandamus proceeding”) (emphasis added).

<sup>232</sup> See *supra* notes 199–204 and accompanying text.

<sup>233</sup> See, e.g., FED. R. APP. P. 5(a)(1); SUP. CT. R. 14.1(h).

<sup>234</sup> See SUP. CT. R. 14.1(h) (requiring a petition for certiorari to contain “[a] direct and concise argument amplifying the reasons relied on for allowance of the writ”); *id.* 10 (“Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.”).

<sup>235</sup> See *id.* 16.2. Supreme Court Rule 16.2 states that:

Whenever the Court grants a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment is to be reviewed. The case then will be scheduled for briefing and oral argument.

A similar procedure is used for litigants pursuing discretionary appeals at the circuit level. Take for example a party who wishes to invoke the Class Action Fairness Act's provision allowing discretionary appeals of a district court's jurisdictional rulings.<sup>236</sup> The appellant must first file a petition for permission to appeal under Federal Rule of Appellate Procedure 5.<sup>237</sup> This petition need not fully brief the merits of the issue, but must simply persuade the appellate court to exercise its discretion to hear the appeal.<sup>238</sup> Only after that petition is granted does the case proceed to full briefing on the merits.<sup>239</sup> This bifurcated approach is far more efficient than Appellate Rule 21's procedure for writs of mandamus.<sup>240</sup> The fact that mandamus petitions are not subject to any explicit time requirements only compounds this inefficiency.<sup>241</sup>

### III. HOW THE CURRENT REGIME OPERATES IN PRACTICE

For all of the reasons explained above, the jurisdictional regime that today's appellate courts have inherited from their mid-twentieth-century ancestors is problematic on several levels. The federal courts, however, have worked within the cumbersome doctrinal and procedural framework to implement a system of interlocutory appellate review that, in practice, is fairly sensible. If one looks at the results on the ground—i.e., which interlocutory orders are immediately appealable and which are not—the jurisdictional landscape is commendable. This Part summarizes how the current regime actually operates in practice.<sup>242</sup>

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*Id.*

<sup>236</sup> See 28 U.S.C.A. § 1453(c)(1) (West 2006) (“[A] court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed.”).

<sup>237</sup> See FED. R. APP. P. 5(a)(1) (“To request permission to appeal when an appeal is within the court of appeals’ discretion, a party must file a petition for permission to appeal.”); see also, e.g., *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1162 (11th Cir. 2006) (holding that Rule 5 applies to Class Action Fairness Act appeals).

<sup>238</sup> See FED. R. APP. P. 5(b)(1) (requiring the petition to state “the reasons why the appeal should be allowed”).

<sup>239</sup> See *id.* 5(d)(1) (“Within 10 days after the entry of the order granting permission to appeal, the appellant must . . . pay the district clerk all required fees.”); *id.* 5(d)(3) (“The district clerk must notify the circuit clerk once the petitioner has paid the fees . . . . The record must be forwarded and filed in accordance with Rules 11 and 12(c).”); *id.* 31(a)(1) (“The appellant must serve and file a brief within 40 days after the record is filed.”).

<sup>240</sup> See *id.* 21.

<sup>241</sup> See *supra* notes 205–207 and accompanying text.

<sup>242</sup> See *infra* notes 243–277 and accompanying text.

There is a limited category of identifiable orders—primarily orders rejecting claims of governmental and other immunities from suit—over which appellate courts have immediate, mandatory jurisdiction.<sup>243</sup> Litigants may appeal such orders as a matter of right, and appellate courts lack discretion to decline review.<sup>244</sup> Orders rejecting a president's claim of absolute immunity, a government official's claim of qualified immunity, a state's claim of Eleventh Amendment immunity, or a federal employee's claim of immunity under the Westfall Act all fall within this category.<sup>245</sup>

Interlocutory orders that have not been blessed with categorical appealability under the collateral order doctrine may still be subject to immediate appellate review, but such review is left to the appellate court's discretion. Some appellate courts exercise such discretionary review through the collateral order doctrine, using the "importance" and "effectively unreviewable" requirements to identify particular rulings that warrant immediate appellate review without rendering all such orders appealable as of right.<sup>246</sup> Other appellate courts exercise this discretion via appellate mandamus.<sup>247</sup>

When viewed in the aggregate, appellate courts have exercised this sort of discretionary review over a very broad range of interlocutory orders, including:

1. Orders denying a motion to dismiss for lack of personal jurisdiction;<sup>248</sup>

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<sup>243</sup> See *supra* notes 79–96 and accompanying text.

<sup>244</sup> See *supra* note 104 and accompanying text.

<sup>245</sup> See *supra* notes 92–95 and accompanying text. The federal courts of appeals have also unanimously held that an interlocutory denial of a foreign entity's claim of immunity from suit under the Foreign Sovereign Immunities Act is also appealable as of right under the collateral order doctrine. See *supra* note 95. The Supreme Court may have watered down the appealability of immunity denials with its 1995 decision in *Johnson v. Jones*, which held that the collateral order doctrine did not allow an immediate appeal of an order denying three police officers' summary judgment motion where the order "determines only a question of 'evidence sufficiency.'" 515 U.S. 304, 313 (1995). This limitation arguably (although not necessarily) narrows the scope of immunity-related orders that are categorically appealable. The impact of *Johnson* is discussed in greater detail *infra* notes 361–373 and accompanying text.

<sup>246</sup> See, e.g., *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892, 895–98 (D.C. Cir. 2006) (reviewing discovery order via the collateral order doctrine); *Acosta v. Tenneco Oil Co.*, 913 F.2d 205, 207 (5th Cir. 1990) (same).

<sup>247</sup> See, e.g., *In re Atl. Pipe Corp.*, 304 F.3d 135, 140 (1st Cir. 2002) (reviewing via mandamus a district court order compelling participation in alternative dispute resolution).

<sup>248</sup> *In re Impact Absorbent Tech., Inc.*, No. 96–3496, slip op. at 1 (6th Cir. Dec. 18, 1996).

2. Orders denying a motion to dismiss or remand a case for lack of subject matter jurisdiction;<sup>249</sup>
3. Orders denying a motion to remand on the basis of unauthorized removal;<sup>250</sup>
4. Orders denying a motion to transfer venue;<sup>251</sup>
5. Orders granting a motion to transfer venue;<sup>252</sup>
6. Orders refusing to find a case barred by collateral estoppel;<sup>253</sup>
7. Orders refusing to dismiss a case for failure to effect timely service;<sup>254</sup>
8. Orders compelling discovery;<sup>255</sup>
9. Orders compelling discovery of information claimed to be protected by the attorney-client privilege or work product protection;<sup>256</sup>
10. Orders refusing to compel discovery;<sup>257</sup>
11. Orders refusing to impose a protective order limiting disclosure of certain discovery materials;<sup>258</sup>
12. Orders imposing a protective order limiting public disclosure of certain discovery materials;<sup>259</sup>
13. Orders compelling parties to participate in alternative dispute resolution;<sup>260</sup>
14. Orders disqualifying an attorney;<sup>261</sup>
15. Orders refusing to disqualify an attorney;<sup>262</sup>

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<sup>249</sup> *In re Hot-Hed, Inc.*, 477 F.3d 320, 322–23 (5th Cir. 2007).

<sup>250</sup> *In re Chimenti*, 79 F.3d 534, 540 (6th Cir. 1996).

<sup>251</sup> *In re Volkswagen AG*, 371 F.3d 201, 202–03 (5th Cir. 2004).

<sup>252</sup> *In re Warrick*, 70 F.3d 736, 740–41 (2d Cir. 1995); *Sunbelt Corp. v. Noble, Denton & Assocs., Inc.*, 5 F.3d 28, 30 (3d Cir. 1993); *Carteret Sav. Bank, F.A. v. Shushan*, 919 F.2d 225, 228 (3d Cir. 1990).

<sup>253</sup> *Miss. Chem. Corp. v. Swift Agric. Chem. Corp.*, 717 F.2d 1374, 1375 (Fed. Cir. 1983).

<sup>254</sup> *In re Cooper*, 971 F.2d 640, 641 (11th Cir. 1992).

<sup>255</sup> *Diamond Ventures*, 452 F.3d at 895–98; *In re Ford Motor Co.*, 345 F.3d 1315, 1316 (11th Cir. 2003); *SG Cowen Sec. Corp. v. U.S. Dist. Court*, 189 F.3d 909, 913 (9th Cir. 1999); *In re Remington Arms Co.*, 952 F.2d 1029, 1031 (8th Cir. 1991); *Acosta*, 913 F.2d at 207–08; *City of Las Vegas v. Foley*, 747 F.2d 1294, 1296–97 (9th Cir. 1984); *Hartley Pen Co. v. U.S. Dist. Court*, 287 F.2d 324, 331–32 (9th Cir. 1961).

<sup>256</sup> *In re Ford Motor Co.*, 110 F.3d 954, 956 (3d Cir. 1997); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 861 (3d Cir. 1994); *In re Bieter Co.*, 16 F.3d 929, 931–33 (8th Cir. 1994).

<sup>257</sup> *W. Elec. Co. v. Stern*, 544 F.2d 1196, 1198–99 (3d Cir. 1976).

<sup>258</sup> *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1111 (3d Cir. 1986).

<sup>259</sup> *In re San Juan Star Co.*, 662 F.2d 108, 112–13 (1st Cir. 1981).

<sup>260</sup> *In re Atl. Pipe Corp.*, 304 F.3d at 135.

<sup>261</sup> *In re Sandahl*, 980 F.2d 1118, 1120 (7th Cir. 1992).

<sup>262</sup> *In re Am. Airlines, Inc.*, 972 F.2d 605, 608–09 (5th Cir. 1992).

16. Orders imposing sanctions;<sup>263</sup>
17. Orders dismissing a single defendant from a case (without entry of partial judgment);<sup>264</sup>
18. Orders refusing to require a party to post a security bond;<sup>265</sup>
19. Orders requiring a party to post a security bond;<sup>266</sup>
20. Orders denying a motion to dismiss for failure to state a viable claim;<sup>267</sup>
21. Orders denying a motion for summary judgment for failure to raise a genuine issue of material fact;<sup>268</sup>
22. Orders refusing to allow a trial by jury.<sup>269</sup>

Although appellate courts exercise this discretionary review quite sparingly, it is fair to say that no interlocutory trial court order is categorically beyond an appellate court's jurisdiction.<sup>270</sup> And over the last quarter-century, the Supreme Court has (at least tacitly) encouraged appellate mandamus, which is the primary means by which appellate courts exercise this sort of discretionary review. It has been nearly three decades since the Court last reversed an appellate court's use of mandamus to review a district court's interlocutory ruling.<sup>271</sup> On sev-

<sup>263</sup> *In re Daimler-Chrysler*, 294 F.3d 697, 698–99 (5th Cir. 2002); *see also* *Cunningham v. Hamilton County*, 527 U.S. 198, 211 (1999) (Kennedy, J., concurring) (noting that mandamus could be available to challenge discovery sanctions).

<sup>264</sup> *Special Invs. Inc. v. Aero Air Inc.*, 360 F.3d 989, 991 (9th Cir. 2004).

<sup>265</sup> *Result Shipping Co. v. Ferruzzi Trading USA Inc.*, 56 F.3d 394, 398–99 (2d Cir. 1995); *see also* *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545–46 (1949).

<sup>266</sup> *Buckeye Union Ins. Co. v. Wilmoth*, 541 F.2d 463, 463–64 (4th Cir. 1976).

<sup>267</sup> *Mortgages, Inc. v. U.S. Dist. Court*, 934 F.2d 209, 211 (9th Cir. 1991); *In re Justices of Supreme Court of P.R.*, 695 F.2d 17, 25 (1st Cir. 1982) (Breyer, J.).

<sup>268</sup> *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1286 (3d Cir. 1994) (Alito, J.). In the mid-1990s, some federal appellate courts exercised discretionary review over class certification orders using appellate mandamus. *See, e.g., In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297–1304 (7th Cir. 1995). I have not included such orders in the preceding list because since 1998, Federal Rule of Civil Procedure 23(f) has explicitly authorized discretionary appeals from class certification orders, rendering the use of mandamus largely unnecessary. *See* FED. R. CIV. P. 23(f).

<sup>269</sup> *Beacon Theaters v. Westover*, 359 U.S. 500, 511 (1959); *In re Tech. Licensing Corp.*, 423 F.3d 1286, 1288 (Fed. Cir. 2005); *Hulsey v. West*, 966 F.2d 579, 582–83 (10th Cir. 1992); *Myers v. U.S. Dist. Court*, 620 F.2d 741, 742 (9th Cir. 1980).

<sup>270</sup> One caveat to this point is that some statutes explicitly forbid appellate review of particular orders. For example, 28 U.S.C. § 1447(d) forbids review “by appeal or otherwise” of an order “remanding a case to the State court from which it was removed.” 28 U.S.C. § 1447(d) (2000). The Supreme Court has created a narrow exception to this rule, *see Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345–52 (1976), but § 1447(d) prevents appellate review for the vast majority of remand orders. *See generally* *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145 (2006).

<sup>271</sup> *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 657 (1978).



eral occasions, however, the Court has corrected an appellate court's refusal to use appellate mandamus.<sup>272</sup>

Because of the cumbersome doctrinal framework created by the collateral order doctrine and appellate mandamus, courts and commentators have yet to see the jurisdictional metastructure that has developed. As a policy matter, this practical structure has pragmatic value, especially given how litigation has evolved in the decades since the Federal Rules of Civil Procedure were adopted. The widely-documented "vanishing trial"<sup>273</sup> has led to fewer contested final judgments.<sup>274</sup> In its place, pretrial judicial management has become increasingly important, especially interlocutory decisions relating to jurisdiction, alternative dispute resolution, pleadings, class actions, discovery, and summary judgment.<sup>275</sup> These pretrial matters are critical because they dictate what posture the case will be in when the parties reach (as they often do) a hard-fought, but unappealable, settlement.<sup>276</sup> Under this new model of adjudication, strict adherence to the final judgment rule might not allow for meaningful appellate review of the trial court decisions that really matter.<sup>277</sup>

#### IV. REINVENTING APPELLATE JURISDICTION

This Part proposes a reinvention of appellate jurisdiction that would maintain the current regime's pragmatic substantive structure but cure its conceptual, doctrinal, and procedural problems.<sup>278</sup> As applied in practice, the current regime draws sensible lines between interlocutory orders that are immediately subject to appellate review and those that are not.<sup>279</sup> Some identifiable categories of interlocutory orders are immediately appealable as of right. All other interlocutory orders are potentially appealable at the discretion of the ap-

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<sup>272</sup> See *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 392 (2004) (vacating the D.C. Circuit's refusal to grant a writ of mandamus for further consideration); *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309 (1989) (reversing the Eighth Circuit's refusal to grant a writ of mandamus).

<sup>273</sup> E.g., Galanter, *The Vanishing Trial*, *supra* note 33, at 459; Redish, *supra* note 33, at 1329.

<sup>274</sup> See, e.g., Yeazell, *supra* note 12, at 646–64.

<sup>275</sup> See, e.g., Galanter, *supra* note 33, at 1264–65; Kanji, *supra* note 35, at 513; Resnik, *supra* note 33, at 378–79; Yeazell, *supra* note 12, at 646–64.

<sup>276</sup> See, e.g., Yeazell, *supra* note 12, at 656–60.

<sup>277</sup> See, e.g., Kanji, *supra* note 35, at 513; Waters, *supra* note 6, at 551–59; Yeazell, *supra* note 12, at 646–64.

<sup>278</sup> See *infra* notes 279–389 and accompanying text.

<sup>279</sup> See *supra* notes 242–277 and accompanying text.

pellate court, although appellate courts have invoked this discretion quite sparingly. The confusion and incoherence inherent in the collateral order doctrine and appellate mandamus have obscured this basic structure. This Part argues that appellate jurisdiction can be reinvented in a way that would simplify the current approach and permit candid consideration of the concerns that affect whether appellate jurisdiction should be exercised.<sup>280</sup> And it can be reinvented in a way that fits better with the statutory foundations for federal appellate jurisdiction and optimizes the procedural mechanisms for pursuing appellate review of interlocutory orders.

This reinvention would recognize that the most important distinction for purposes of appellate jurisdiction is *not* the distinction between the collateral order doctrine and appellate mandamus. Rather, it is the distinction between interlocutory orders for which appellate jurisdiction is mandatory (limited to certain identifiable categories of orders) and interlocutory orders for which appellate jurisdiction is discretionary (all other interlocutory orders). This Part proposes two new theories of appellate jurisdiction that will accomplish this goal.<sup>281</sup> First, courts should recognize that the All Writs Act authorizes discretionary *appeals* of interlocutory orders, and that such appeals are a superior method for conducting discretionary appellate review than either the collateral order doctrine or appellate mandamus.<sup>282</sup> Second, courts should recognize that for the limited category of interlocutory orders over which appellate jurisdiction is mandatory, 28 U.S.C. § 1292(a) provides a more coherent doctrinal foundation than the collateral order doctrine.<sup>283</sup>

Although this solution would change quite drastically the doctrinal and procedural vehicles for invoking an appellate court's jurisdiction over interlocutory rulings, it could leave the underlying substantive structure in place. Some identifiable categories of interlocutory orders would be immediately appealable as of right, whereas all other interlocutory orders would be potentially appealable at the discretion of the appellate court.<sup>284</sup> Preservation of this general substan-

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<sup>280</sup> See *infra* notes 281–389 and accompanying text.

<sup>281</sup> See *infra* notes 284–373 and accompanying text.

<sup>282</sup> See *infra* notes 286–342 and accompanying text.

<sup>283</sup> See *infra* notes 343–373 and accompanying text.

<sup>284</sup> See *supra* notes 242–277 and accompanying text.

tive approach mitigates stare decisis concerns that might otherwise counsel against such a reinvention of prevailing doctrine.<sup>285</sup>

A. *Reinventing Discretionary Appellate Jurisdiction over Interlocutory Orders: Appeals Under the All Writs Act*

This Section argues that, although the current system is correct in seeing the All Writs Act as a source of authority for interlocutory appellate review, courts have seized on the wrong “writ” for engaging in such review.<sup>286</sup> Courts and commentators have thus far overlooked the possibility that the All Writs Act authorizes *appeals* (not just writs of mandamus), and that such appeals would be a better, more coherent way for appellate courts to engage in discretionary review of interlocutory orders. This Section also responds to potential critiques of this approach.<sup>287</sup>

1. The Availability and Advantages of All Writs Act Appeals

Under the prevailing approach to appellate jurisdiction, writs of mandamus are the only vehicles for obtaining appellate review of interlocutory orders under the All Writs Act. As explained above, appellate mandamus is historically, doctrinally, and procedurally problematic.<sup>288</sup> A superior reinvention of appellate jurisdiction should recognize that the All Writs Act authorizes not only writs of mandamus but also appeals.<sup>289</sup> The kind of discretionary appeals currently handled by either appellate mandamus and the collateral order doctrine should instead be handled by discretionary, interlocutory appeals under the All Writs Act.

The textual argument for All Writs Act appeals is based on the interplay between the All Writs Act and twentieth-century legislation that aimed to make appeals (rather than writs of error) the principal

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<sup>285</sup> Such a “reconceptualization” or a “rerationalization” of an existing framework is not inconsistent with stare decisis, but rather is a core part of the common law process. See Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2035 (1994) (noting that “as Oliver Wendell Holmes discerned, the common law evolves through a process of rerationalization”); *id.* at 2037–38 (“[T]he common law enterprise of reconceptualization proceeds at the level of theory supporting legal rules, not legal rules themselves.”). My argument, essentially, is that what federal appellate courts are currently doing may be rerationalized to stand on more solid doctrinal footing.

<sup>286</sup> See *infra* notes 287–308 and accompanying text.

<sup>287</sup> See *infra* notes 309–342 and accompanying text.

<sup>288</sup> See *supra* notes 208–241 and accompanying text.

<sup>289</sup> See 28 U.S.C. § 1651(a) (2000).

method of appellate review in the federal system. In 1948, Congress enacted a statute providing that “[a]ll Acts of Congress referring to writs of error shall be construed as amended to the extent necessary to substitute appeal for writ of error.”<sup>290</sup> The All Writs Act authorizes “all courts established by Act of Congress” (including the courts of appeals) to issue “all writs” (including writs of error) that are “necessary or appropriate in aid of their respective jurisdictions.”<sup>291</sup> Because the All Writs Act authorizes federal appellate courts to issue writs of error, the 1948 statute requires the All Writs Act to be “construed as amended to the extent necessary to substitute appeal for writ of error.”<sup>292</sup> Accordingly, the All Writs Act authorizes “appeal[s]” that are “in aid of” a federal appellate court’s jurisdiction.<sup>293</sup>

Based on this logic, courts could justify current forms of discretionary appellate review—whether via the collateral order doctrine or mandamus—as simply “appeals” under the All Writs Act. Recognizing interlocutory All Writs Act appeals would not necessarily require any change to the substantive principles governing what is currently appellate mandamus. Courts could continue to apply the *Bauman* factors, for example.<sup>294</sup> But instead of guiding a court’s discretion to is-

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<sup>290</sup> Act of June 25, 1948, ch. 646, § 23, 62 Stat. 869, 990.

<sup>291</sup> 28 U.S.C. § 1651(a).

<sup>292</sup> § 23, 62 Stat. at 990.

<sup>293</sup> See 28 U.S.C. § 1651(a); § 23, 62 Stat. at 990.

<sup>294</sup> See *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654–55 (9th Cir. 1977). Factors to be considered are whether: (1) the party has no other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) the party will be damaged or prejudiced in a way not correctable on appeal; (3) the district court’s order is clearly erroneous as a matter of law; (4) the district court’s order is an oft-repeated error, or manifests a persistent disregard of the federal rules; or (5) the district court’s order raises new and important problems, or issues of law of first impression. *Id.* The *Bauman* factors are not perfect, of course. Indeed, they reflect some of the same conceptual problems inherent in the Supreme Court’s mandamus jurisprudence. As discussed *supra* notes 229–230 and accompanying text, inquiring whether a party seeking mandamus has “no other adequate means” to attain the relief desired provides little meaningful guidance on when mandamus is appropriate; nor would it provide meaningful guidance on when an All Writs Act appeal would be appropriate. That said, the *Bauman* factors do highlight legitimate considerations that should inform whether a discretionary interlocutory appeal would be proper under my view of the All Writs Act. Appellate courts should certainly consider the extent to which “the party will be damaged or prejudiced in a way not correctable on appeal.” Inquiring whether the district court’s order “raises new and important problems or issues of law of first impression” correctly recognizes the value of providing appellate court guidance on new legal issues, particularly issues that might otherwise evade appellate scrutiny altogether. And all other things being equal, a district court’s order that is “clearly erroneous” is probably more deserving of immediate correction than one which is merely erroneous. It is beyond the scope of this Article to provide a complete list of the factors that ought to inform an appellate court’s decision whether to hear a discretionary All Writs Act

sue writs of mandamus, these factors would guide the court's discretion to hear appeals. The All Writs Act is discretionary (a court "may" act in aid of its jurisdiction), and it is just as proper for courts to develop principles to guide their discretion to hear appeals, as it is for them to develop such principles to guide their discretion to issue a writ of mandamus.<sup>295</sup>

There are several benefits that would flow from this approach. First, it would solve the problem that mandamus's modern-day use as a device for obtaining interlocutory appellate review chafes against its historical understanding.<sup>296</sup> Instead, the vehicle for invoking appellate review under the All Writs Act would be an *appeal*—a procedural device explicitly designed for this purpose.

Second, this solution would simplify the procedures currently required for obtaining appellate review under the All Writs Act. No longer would parties be required to file a separate action in the court of appeals seeking a writ of mandamus. Rather, parties would employ the same means by which they would pursue any other permissive appeals in a federal appellate court—a petition for permission to appeal under Federal Rule of Appellate Procedure 5.<sup>297</sup> In a Rule 5 petition, the required briefing is limited to the threshold question of whether an interlocutory appeal is appropriate.<sup>298</sup> Thus, using Rule 5 would allow the court to decide whether it wants to hear the discretionary appeal *before* full briefing on the merits.<sup>299</sup> This is more efficient than

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appeal. Cf. Solimine & Hines, *supra* note 73, at 1577 ("It is neither necessary nor desirable to formulate an exclusive list of factors informing the courts of appeals' decisions whether to permit, under Rule 23(f), a challenge to a class certification order."). An excellent starting point, however, would be the factors identified in RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1561–62 (5th ed. 2003) (describing "a number of factors that may favor earlier appeals in particular cases," including (1) "the avoidance of hardship" that would result from postponing an appeal, (2) "the need to oversee the work of the lower courts on matters that seldom if ever arise on appeal from a final judgment," and (3) "the conservation of the time and energy of courts and litigants by correction of error at an early stage").

<sup>295</sup> Appeals under the All Writs Act would also be "in aid of" the appellate jurisdiction that would exist when a "final decision" occurs in the future. See *supra* notes 208–211 and accompanying text. This theory would be similar to the one that the federal courts have already accepted with respect to appellate mandamus under the All Writs Act. See *supra* notes 143–145 and accompanying text.

<sup>296</sup> See *supra* notes 213–220 and accompanying text.

<sup>297</sup> FED. R. APP. P. 5.

<sup>298</sup> *Id.* 5(b) (1); see *supra* note 237–239 and accompanying text.

<sup>299</sup> See *supra* notes 237–239 and accompanying text. To be sure, a party seeking to convince a court to employ a discretionary means of interlocutory review would want to make a compelling argument that he should also prevail on the merits. But this is no different

current mandamus practice, which requires the party seeking review to present *both* the reasons why mandamus is an appropriate means of review *and* the reasons why the petition should be granted.<sup>300</sup>

Finally, allowing interlocutory All Writs Act review to occur via appeal rather than mandamus would do away with the procedural oddity that mandamus petitions are not subject to any formal deadlines. By channeling what is now mandamus practice into Appellate Rule 5, such appeals would now be subject to the predictable time periods set forth in that rule.<sup>301</sup>

This same approach would apply to interlocutory appeals that are currently justified under the collateral order doctrine but that are, in practice, a form of discretionary appellate review.<sup>302</sup> Using an All Writs Act appeal would ameliorate the problems that arise when “discretionary” collateral order review is based on 28 U.S.C. § 1291.<sup>303</sup> For an All Writs Act appeal, it would not matter that the elements of the collateral order doctrine test cannot be reconciled with the term “final decision” because the basis for an All Writs Act appeal is 28 U.S.C. § 1651, not § 1291.<sup>304</sup> Section 1651 is a more solid foundation for such discretionary appeals because it provides that the court of appeals “may,”<sup>305</sup> not “shall,”<sup>306</sup> invoke its authority. Treating “discretionary” collateral order appeals as All Writs Act appeals would also enable a more suitable procedural device to be used, namely, a petition for permission under Appellate Rule 5.<sup>307</sup> As described above, this allows the appellate court to decide early on whether immediate appellate

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than a party seeking certiorari review from the U.S. Supreme Court. There is an important distinction between arguing that an issue is worthy of review and arguing that one should prevail on the merits. By allowing what is now mandamus review to proceed under Rule 5, the parties can concentrate their efforts more effectively on the first question and address the second question if the appellate court agrees to hear the appeal.

<sup>300</sup> See *supra* note 204 and accompanying text.

<sup>301</sup> See FED. R. APP. P. 5(a)(2) (requiring that a Rule 5 petition be filed “within the time provided by Rule 4(a) for filing a notice of appeal”); *id.* 4(a)(1)(A) (requiring that a notice of appeal in civil cases must be filed within thirty days).

<sup>302</sup> See *supra* notes 132–133 and accompanying text.

<sup>303</sup> See 28 U.S.C. § 1291 (2000).

<sup>304</sup> See *id.*; 28 U.S.C. § 1651 (2000).

<sup>305</sup> 28 U.S.C. § 1651(a) (“[A]ll courts established by Act of Congress *may* issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”) (emphasis added).

<sup>306</sup> 28 U.S.C. § 1291 (“The courts of appeals . . . *shall* have jurisdiction of appeals from all final decisions of the district courts.”) (emphasis added).

<sup>307</sup> See FED. R. APP. P. 5.

review is appropriate.<sup>308</sup> That issue can and should be resolved *before* the parties have done extensive briefing on the merits of the appeal.

## 2. Responses to Potential Critiques of All Writs Act Appeals

This Section responds to two potential objections to allowing appeals under the All Writs Act.<sup>309</sup> The first such objection could be that under traditional common law, writs of error could not be sought to review interlocutory trial court decisions.<sup>310</sup> The All Writs Act allows writs only where use of the writ is "agreeable to the usages and principles of law."<sup>311</sup> Thus, one might argue, the All Writs Act should not be construed to allow appeals over interlocutory orders that would not have been subject to writs of error at common law.

This objection is contrary to the settled understanding of the All Writs Act. The phrase "agreeable to the usages and principles of law" has never been construed to require strict compliance with common law requirements for particular writs.<sup>312</sup> Especially telling is the Supreme Court's decision in *Price v. Johnston*, decided in 1948<sup>313</sup>—just one year before the *Cohen v. Beneficial Industrial Loan Corp.* decision that marked the beginning of our present framework for appellate jurisdiction.<sup>314</sup> *Price* held that the All Writs Act authorized a writ of habeas corpus even under circumstances that were not authorized under common law.<sup>315</sup> The Court reasoned:

[W]e do not conceive that a circuit court of appeals, in issuing a writ of habeas corpus under [the All Writs Act], is necessarily confined to the precise forms of that writ in vogue at the common law or in the English judicial system. [The All Writs Act] says that the writ must be agreeable to the usages and principles of "law," a term which is unlimited by the common law or the English law. And . . . "law" is not a static concept, but expands and develops as new problems arise.<sup>316</sup>

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<sup>308</sup> See *supra* notes 297–300 and accompanying text.

<sup>309</sup> See *infra* notes 310–342 and accompanying text.

<sup>310</sup> See generally Carleton M. Crick, *The Final Judgment Rule as a Basis for Appeal*, 41 YALE L.J. 539 (1932).

<sup>311</sup> 28 U.S.C. § 1651(a).

<sup>312</sup> See *id.*

<sup>313</sup> See generally 334 U.S. 266 (1948).

<sup>314</sup> See 337 U.S. 541, 546–47 (1949).

<sup>315</sup> *Price*, 344 U.S. at 282.

<sup>316</sup> *Id.*

Accordingly, the Court refused to read the All Writs Act “as an ossification of the practice and procedure of more than a century and a half ago” but rather as a “legislatively approved source of procedural instruments designed to achieve ‘the rational ends of law.’”<sup>317</sup> Giving appellate courts discretion to hear appeals (qua writs of error) under the All Writs Act would surely comport with the rational ends of law.<sup>318</sup> This would be a sensible “develop[ment]”<sup>319</sup> to respond to the “new problems”<sup>320</sup> that rigid adherence to the final judgment rule would pose in the current era of civil litigation.<sup>321</sup>

A second potential objection to All Writs Act appeals might be that allowing such appeals would conflict with dicta in two more recent Supreme Court decisions. In the 1985 decision *Pennsylvania Bureau of Correction v. U.S. Marshals Service*, the Court held that in the absence of exceptional circumstances, the All Writs Act did not authorize a federal district court to order federal marshals to transport state prisoners to a federal courthouse to testify in a 42 U.S.C. § 1983 action.<sup>322</sup> In 2002, in *Syngenta Crop Protection, Inc. v. Henson*, the Court refused to read the All Writs Act to allow removal of a state court action to federal court.<sup>323</sup> In both opinions, the Court stated that “[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.”<sup>324</sup> Based on this dicta, one might argue that 28 U.S.C. § 1291 and § 1292 “specifically address[]” jurisdiction over appeals and, therefore, preclude reliance on the All Writs Act to authorize appeals not covered by those sections.<sup>325</sup>

This potential response represents too simplistic a reading of *Syngenta* and *Pennsylvania Bureau*, and it contravenes the settled un-

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<sup>317</sup> *Id.* *Price*’s holding with respect to the scope of the All Writs Act remains good law. Another aspect of the *Price* decision, however, was abrogated by *McCleskey v. Zant*, 499 U.S. 467, 483 (1991) (abrogating *Price* with respect to the “abuse of the writ” standard that applies to frequent filers of habeas corpus petitions).

<sup>318</sup> *Price*, 334 U.S. at 282.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> See *supra* notes 273–277 and accompanying text (explaining how the increased importance of pretrial procedure justifies expanded appellate review of interlocutory rulings).

<sup>322</sup> 474 U.S. 34, 43 (1985).

<sup>323</sup> 537 U.S. 28, 31 (2002). For a pre-*Syngenta* analysis of whether the All Writs Act authorizes removal, see generally Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. REV. 773 (2000).

<sup>324</sup> *Id.* at 32 (quoting *Pa. Bureau of Corr.*, 474 U.S. at 43).

<sup>325</sup> See 28 U.S.C. §§ 1291, 1292 (2000).



derstanding of the All Writs Act. Interestingly, the notion that All Writs Act relief is unavailable where a statute specifically addresses the particular issue at hand stems from statutory language that was removed from the All Writs Act in the 1940s.<sup>326</sup> An earlier version of the All Writs Act had been limited to "all writs *not specifically provided for by statute*."<sup>327</sup> This qualification no longer exists, however.<sup>328</sup> Furthermore, the dicta in *Syngenta* and *Pennsylvania Bureau* are contrary to the settled understanding of the All Writs Act that existed when that language *was* in the statute.<sup>329</sup> Again, the Supreme Court's 1948 decision in *Price* is instructive.<sup>330</sup> There, the Court held that federal courts had authority under the All Writs Act to command that a prisoner be brought before the court to argue his case.<sup>331</sup> The Court acknowledged that the All Writs Act authorized only "writs not specifically provided for by statute" and that the order at issue was "in the nature of a writ of habeas corpus."<sup>332</sup> Obviously, there were statutes on the books in 1948 that "specifically address[ed]" when a writ of habeas corpus may be issued.<sup>333</sup> Nonetheless, the Court concluded that the All Writs Act authorized such an order.<sup>334</sup>

Thus, it is not the case that a statutory reference to a particular writ prevents the All Writs Act from justifying the same writ in other circumstances. Naturally, a court need not rely on the All Writs Act if the particular use of the writ is "specifically provided for" by some other statute. But contrary to the dicta in *Syngenta* and *Pennsylvania Bureau*, the All Writs Act is not rendered impotent simply because a statute authorizes the writ in situations other than the particular one

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<sup>326</sup> See *Pa. Bureau of Corr.*, 474 U.S. at 42 (noting that "Congress dropped the phrase 'not specifically provided for by statute' in its 1948 consolidation").

<sup>327</sup> 28 U.S.C. § 377 (1940) (current version at 28 U.S.C. § 1651 (2000)) (emphasis added) (providing that federal courts "shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law"); see also Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (providing that federal courts "shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law").

<sup>328</sup> See 28 U.S.C. § 1651.

<sup>329</sup> See *Syngenta*, 295 U.S. at 32; *Pa. Bureau of Corr.*, 474 U.S. at 43.

<sup>330</sup> *Price*, 334 U.S. at 278–79.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 279.

<sup>333</sup> See, e.g., 28 U.S.C. §§ 451–452 (1940).

<sup>334</sup> Indeed, the *Price* Court reasoned that the fact that the writ was "in the nature of a writ of habeas corpus" meant that it "clearly falls *within* the scope of [the All Writs Act]." 334 U.S. at 278 (emphasis added).

for which All Writs Act relief is sought.<sup>335</sup> Rather, the All Writs Act is precisely designed for circumstances where more specific statutes do *not* provide for the necessary remedy.

To criticize the dicta in *Syngenta* and *Pennsylvania Bureau* is not to say that those cases were wrongly decided. *Syngenta* was right to hold that the All Writs Act does not authorize removal.<sup>336</sup> As the Supreme Court recognized, “The right of removal is entirely a creature of statute.”<sup>337</sup> Removal bears no resemblance to any common law writ, and, therefore, is not properly authorized by the All Writs Act. Likewise, *Pennsylvania Bureau* was correct to hold that the district court could not fashion an “ad-hoc writ” simply because other procedures were inconvenient.<sup>338</sup> A writ of error, on the other hand, is designed for the specific purpose of enabling a superior court to review a lower court decision. It is a writ that federal law recognized and that Congress explicitly sought to preserve (albeit in a different procedural form) when it commanded in 1948 that all federal statutes be “construed as amended to the extent necessary to substitute appeal for writ of error.”<sup>339</sup>

Indeed, to take the dicta in *Syngenta* and *Pennsylvania Bureau* literally would contradict the Supreme Court’s ongoing endorsement of appellate mandamus under the All Writs Act.<sup>340</sup> There are dozens of statutes that “specifically address” a court’s jurisdiction to issue writs of mandamus.<sup>341</sup> None of these statutes, other than the All Writs Act it-

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<sup>335</sup> See *Syngenta*, 537 U.S. at 32; *Pa. Bureau of Corr.*, 474 U.S. at 43.

<sup>336</sup> *Syngenta*, 537 U.S. at 31.

<sup>337</sup> *Id.* at 32.

<sup>338</sup> *Pa. Bureau of Corr.*, 474 U.S. at 43.

<sup>339</sup> Act of June 25, 1948, ch. 646, § 23, 62 Stat. 869, 990.

<sup>340</sup> See, e.g., *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 392 (2004); *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 308–09 (1989).

<sup>341</sup> See, e.g., 7 U.S.C. § 13a-1(c) (2000) (providing federal courts “jurisdiction to issue writs of mandamus, or orders affording like relief, commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the [Commodity Futures Trading] Commission thereunder”); 15 U.S.C. § 49 (2000) (providing federal courts “jurisdiction to issue writs of mandamus commanding any person, partnership, or corporation to comply with the provisions of this subchapter or any order of the [Federal Trade] Commission made in pursuance thereof”); 15 U.S.C. § 77t (2000 & Supp. IV 2004) (providing federal courts “jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this subchapter or any order of the [Securities and Exchange] Commission made in pursuance thereof”); 15 U.S.C. § 717s(b) (2000) (providing federal courts “jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the [Federal Power] Commission thereunder”); 18 U.S.C. § 3626 (2000) (“Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion [to modify or terminate an injunction relating to prison conditions].”); 18 U.S.C. § 3771(d)(3) (Supp. IV 2004) (providing that if the district court denies a crime victim’s request for statutorily provided rights, “the

self, authorize the sort of appellate mandamus that is now a staple of federal appellate jurisdiction. By endorsing the writ of mandamus as a method of interlocutory appellate review,<sup>342</sup> the Court has implicitly rejected any *Syngenta*-based critique of allowing interlocutory appeals under the All Writs Act.

*B. Reinventing Mandatory Appellate Jurisdiction over Interlocutory Orders:  
The Role of 28 U.S.C. § 1292(a)*

This Section addresses the narrow category of interlocutory orders for which immediate appeals are currently available as a matter of right.<sup>343</sup> These orders, again, are principally those that refuse to enforce a governmental defendant's claim that he is immune from civil suit.<sup>344</sup> The Supreme Court has rationalized the right to an immediate appeal of such orders under the collateral order doctrine.<sup>345</sup> As a policy matter, allowing appeals as of right in such circumstances is not unreasonable.

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movant may petition the court of appeals for a writ of mandamus"); 19 U.S.C. § 1333(c) (2000) (providing federal courts "jurisdiction to issue writs of mandamus commanding compliance with" efforts by the International Trade Commission to compel the attendance of witnesses and the production of documents); 19 U.S.C. § 1677f(f)(7)(C) (2000) (providing federal courts "jurisdiction to issue writs of mandamus commanding compliance with the provisions of this subsection or any order of the [Secretary of Commerce] or the [International Trade] Commission made in pursuance thereof"); 28 U.S.C. § 1361 (2000) (providing federal district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff"); 28 U.S.C. § 2266(b)(4)(B) (2000) ("The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals."); 42 U.S.C. § 300j-9(i)(5) (2000) (authorizing mandamus to enforce federal statute pertaining to public water systems); 42 U.S.C. § 5851(f) (2000) (authorizing mandamus to enforce federal statute protecting employees who provide information about nuclear energy); 42 U.S.C. § 7622(f) (2000) (authorizing mandamus to enforce federal statute protecting employees who provide information about air pollution); 45 U.S.C. § 153(p) (2000) (authorizing federal courts to enforce via mandamus orders of the National Railroad Adjustment Board); 47 U.S.C. § 401(a) (2000) (providing federal courts jurisdiction to issue writs of mandamus ordering compliance with federal communications law); 47 U.S.C. § 406 (2000) (providing federal courts jurisdiction to issue writs of mandamus ordering carriers to furnish communications facilities); 48 U.S.C. § 872 (2000) (authorizing the district court of Puerto Rico to issue writs of mandamus "in all proper cases"); 49 U.S.C. § 42121(c) (2000) (authorizing mandamus to enforce federal statute protecting employees who provide information about aviation safety); 49 U.S.C. § 60129(c) (2000 & Supp. III 2003) (authorizing mandamus to enforce federal statute protecting employees who provide information about pipeline safety).

<sup>342</sup> See *supra* notes 146–187 and accompanying text (detailing the Supreme Court's use of mandamus as a vehicle for the courts of appeals to review district court decisions).

<sup>343</sup> See *infra* notes 344–373 and accompanying text.

<sup>344</sup> See *supra* notes 91–96 and accompanying text.

<sup>345</sup> See *supra* notes 91–96 and accompanying text.

If particular interlocutory orders warrant immediate appellate review in all cases, it is sensible to identify those orders and remove any uncertainty about the appellate court's jurisdiction. The challenge, however, is to develop a coherent reading of the relevant statutes that would justify such appeals. This Section argues that 28 U.S.C. § 1292(a) is a superior source of appellate court jurisdiction over such appeals.<sup>346</sup> It also responds to potential critiques of this approach.<sup>347</sup>

### 1. The Availability and Advantages of 28 U.S.C. § 1292(a) as a Basis for Interlocutory Appeals as of Right

The Supreme Court's special treatment of orders that deny a government official's or government entity's claim of immunity is based on a distinction between an "immunity from suit" and a mere "defense to liability."<sup>348</sup> An immunity constitutes a right not to stand trial.<sup>349</sup> In the parlance of the collateral order doctrine, this makes a denial of immunity effectively unreviewable on appeal from a final judgment because the defendant, in order to get to a final judgment, must endure the trial-related burdens that the immunity is supposed to prohibit.<sup>350</sup> On the other hand, a mere defense to liability (e.g., that a lawsuit is barred by a previous settlement agreement between the parties) is not a "right not to stand trial."<sup>351</sup> Such a defense simply entitles the defendant to prevail on the merits at the end of the day, and that result can be accomplished by allowing the defendant to appeal once a final judgment is reached.<sup>352</sup>

As explained above, this distinction between an immunity and a defense does not flow from any plausible definition of the term "final decision" under 28 U.S.C. § 1291.<sup>353</sup> A better fit would be § 1292(a), which allows appeals of right from "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions."<sup>354</sup> What makes immunities unique is not their "final[ity]"<sup>355</sup> but rather their injunctive quality. As a matter of substantive law, an immunity creates not

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<sup>346</sup> See *infra* notes 348–360 and accompanying text.

<sup>347</sup> See *infra* notes 361–373 and accompanying text.

<sup>348</sup> E.g., *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

<sup>349</sup> *Id.* at 527.

<sup>350</sup> See *supra* notes 96–100 and accompanying text.

<sup>351</sup> *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994).

<sup>352</sup> See *id.* at 881.

<sup>353</sup> See *supra* notes 112–129 and accompanying text.

<sup>354</sup> 28 U.S.C. § 1292(a) (1) (2000).

<sup>355</sup> *Id.* § 1291.

merely a defense to liability but a right to halt the proceedings against the immunity-holder.<sup>356</sup> It essentially entitles the defendant to *enjoin* the action against her.

The Supreme Court's discussion of 28 U.S.C. § 1292(a) in other contexts supports this approach. It has recognized that § 1292(a) can create appellate jurisdiction over orders that do not literally "refuse" an "injunction" but that have "the practical effect of doing so."<sup>357</sup> Precisely because federal courts have interpreted this narrow category of governmental immunities as creating a right to be free not only from liability but also from trial-related burdens, a district court's denial of such an immunity has the "practical effect" of refusing a defendant's request for an injunction.

The principal benefit of this approach as compared to the collateral order doctrine is textual coherence. Whatever the policy benefits are for allowing immediate appeals from denials of governmental immunities, the Supreme Court has yet to articulate a plausible textual theory for why such orders are any more "final" than orders rejecting other defenses to liability.<sup>358</sup> What the Court has made clear is that, as a matter of substantive law, these governmental immunities entitle the holder to what is, in essence, an injunction against having to suffer the burdens of trial.<sup>359</sup> Accordingly, a theory of appellate jurisdiction that situates such appeals under 28 U.S.C. § 1292(a) avoids the interpretive gymnastics needed to label them "final decisions" for purposes of § 1291.<sup>360</sup>

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<sup>356</sup> See *supra* notes 126–131 and accompanying text.

<sup>357</sup> *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981) (quoting 28 U.S.C. § 1292(a)(1)). Admittedly, the *Carson* decision limited such appeals to interlocutory orders that "might have a 'serious, perhaps irreparable, consequence'" and that "can be 'effectually challenged' only by immediate appeal." *Id.* at 84 (quoting *Balt. Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955)). But the Supreme Court has already determined that the narrow class of orders that currently qualify under the collateral order doctrine would satisfy this standard. According to the Supreme Court, a government official's right to be free from trial-related burdens "is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526. It follows that such orders have irreparable consequences and are "effectively unreviewable" absent an immediate appeal. *Will v. Hallock*, 546 U.S. 345, 349 (2006).

<sup>358</sup> See *supra* notes 111–137 and accompanying text.

<sup>359</sup> See *supra* notes 126–131 and accompanying text.

<sup>360</sup> See 28 U.S.C. §§ 1291, 1292.

## 2. Responses to Potential Critiques of an Expanded Role for 28 U.S.C. § 1292(a)

One possible critique of the 28 U.S.C. § 1292(a) solution is that it is circular. The interlocutory rejection of a governmental immunity qualifies as an immediately appealable “order . . . refusing . . . an injunction”<sup>361</sup> because such an immunity entitles its holder to halt the proceedings against her; the interlocutory rejection of some other defense (e.g., *res judicata*) is *not* immediately appealable because it does *not* entitle its holder to halt the proceedings against her. This logic is circular, admittedly, in the sense that the language of § 1292(a) *itself* does not dictate which orders are immediately appealable; rather, it would be the fact that courts, as a matter of judicial policy, have determined that the order at issue involves a right that has an injunctive quality.

But this critique applies with equal force to the approach courts currently use. As explained above, the Supreme Court’s treatment of such orders ultimately boils down to a naked policy judgment that such orders should be immediately appealable.<sup>362</sup> The difference—and the reason why § 1292(a) is a better solution—is that this policy judgment is currently obscured by the complex-yet-uninformative strictures of the collateral order doctrine.<sup>363</sup> A jurisdictional theory based on § 1292(a), on the other hand, makes this substantive policy decision the central inquiry. By bringing the jurisdictional theory into alignment with the policy judgments that actually determine whether immediate appellate review is available, future courts faced with the decision of whether to expand or contract the universe of immediately appealable orders will at least be asking (and answering) the right question.<sup>364</sup>

One might also argue that the 28 U.S.C. § 1292(a) solution fails to account for recent Supreme Court case law that potentially cuts

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<sup>361</sup> 28 U.S.C. § 1292(a)(1).

<sup>362</sup> See *supra* notes 126–131 and accompanying text.

<sup>363</sup> See *supra* notes 111–131 and accompanying text.

<sup>364</sup> Another possible critique is that the § 1292(a) solution proves too much. Imagine that a party with a mere defense to liability (such as a *res judicata* defense based on a prior judgment or settlement) asserted this defense as a “motion to enjoin the plaintiff’s action.” If the trial court denied that motion, there would indeed be an order “refusing” an injunction that would plainly be covered by § 1292(a). The answer to this hypothetical is that such an appeal would be incredibly easy to decide because as a matter of substantive law the prior judgment or settlement—even if valid—does not entitle a defendant to an injunction. By contrast, an immunity (a “right not to stand trial”) entitles the defendant to stop the proceedings against her.

back on the categorical availability of immediate appeals from orders denying governmental immunity. In *Johnson v. Jones*, a civil rights case decided by the Court in 1995, the plaintiff alleged that he had suffered an unconstitutional beating at the hands of five police officers.<sup>365</sup> Three of the defendants moved for summary judgment on the basis that there was no evidence of their involvement in the beating.<sup>366</sup> The district court denied the motion because sufficient circumstantial evidence existed to support the plaintiff's claims against these officers.<sup>367</sup> The Supreme Court held that the collateral order doctrine did not allow an immediate appeal of this order because it had "determine[d] only a question of 'evidence sufficiency.'"<sup>368</sup>

As an initial matter, it is not clear that the *Johnson* decision involved a trial court's denial of a governmental immunity as such. The basis for the *Johnson* defendants' summary judgment motion was not that a governmental immunity insulated them from liability, but rather that they were not involved in the alleged beating at all.<sup>369</sup> But even if *Johnson* is read to preclude appeals as of right from immunity denials based on the district court's assessment of evidentiary sufficiency, such an "exception" is fully consistent with my proposed role for 28 U.S.C. § 1292(a). Indeed, the Supreme Court has long applied precisely such an exception for injunction-related orders that are clearly governed by § 1292(a). In *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, the plaintiffs sought a permanent injunction and moved

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<sup>365</sup> 515 U.S. 304, 307 (1995).

<sup>366</sup> *Id.* at 307-08.

<sup>367</sup> *Id.* at 308.

<sup>368</sup> *Id.* at 313.

<sup>369</sup> *Id.* at 316 (describing *Johnson* as a "simple 'we didn't do it' case"). Indeed, the Court in *Johnson* was careful not to describe the defendants' summary judgment motion itself as being based on a governmental immunity, even though *Johnson* might generally be called a "qualified immunity" case or one where government officials would be "entitled to assert a qualified immunity defense." 515 U.S. at 307 (stating that although the defendants were "entitled to assert a qualified immunity defense, . . . [t]he order in question resolved a fact-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial"). Only two years before *Johnson*—in a case where a governmental immunity was clearly at issue—the Court rejected an attempt to avoid an immediate appeal on the ground that the applicability of the immunity involved "factual questions." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (allowing an immediate appeal of an order denying a motion to dismiss a case on Eleventh Amendment grounds despite an argument that the availability of Eleventh Amendment immunity in that case was "bound up with factual complexities" and "present[ed] difficult factual questions"). *But see Anderson, supra* note 17, at 592-94 (stating the view that *Johnson* "limited the availability of qualified immunity appeals" and attempted to draw "a clear distinction between pure questions of law and questions of fact").

for summary judgment granting such an injunction.<sup>370</sup> Reasoning that genuine issues of material fact remained for trial, the district court denied the motion.<sup>371</sup> Although such an order arguably “refuse[d] . . . [an] injunction” within the meaning of § 1292(a), the Supreme Court held that § 1292(a) did not allow immediate appeals of a district court’s determination that “unresolved issues of fact” surrounding the propriety of an injunction required that “the case should go to trial.”<sup>372</sup> Thus, the recognition of an exception from the general rule that immunity denials are categorically appealable where such denials are based on questions of evidentiary sufficiency actually bolsters my argument that § 1292(a) is a solid statutory foundation for immunity appeals. The *Johnson* exception essentially incorporates an identical exception that has long existed for “pure” injunction orders whose appealability is more explicitly governed by § 1292(a).<sup>373</sup>

### C. Appellate Jurisdiction Reinvented: Revisiting the Crazy Quilt

This Section reflects on a few matters that would arise if appellate jurisdiction were indeed reinvented as I propose in this Article. Because I propose solely a *judicial* reinvention of *judicially-created* methods for interlocutory appellate review, statutes and court rules providing for interlocutory appellate review would remain on the books. One concern, then, is how my proposed reinvention would interact with such provisions. What, for example, would be the role of the certification procedure set forth in 28 U.S.C. § 1292(b),<sup>374</sup> or the provision in Federal Rule of Civil Procedure 23(f)<sup>375</sup> for discretionary appellate review of class certification orders?

My proposal that 28 U.S.C. § 1292(a) is the proper basis for review of categorically appealable interlocutory orders would not be problematic in this regard. As explained above, the current approach treats such orders as appealable under the collateral order doctrine,<sup>376</sup> a judicially-created basis for appellate jurisdiction that I propose to eliminate entirely. Because the collateral order doctrine lacks a sound basis in

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<sup>370</sup> 385 U.S. 23, 23 (1966).

<sup>371</sup> *Id.* at 23–24.

<sup>372</sup> *Id.* at 25 (explaining that such orders “are not in our view ‘interlocutory’ within the meaning of § 1292(a)(1)”).

<sup>373</sup> See *Johnson*, 515 U.S. at 313; *Switzerland Cheese*, 385 U.S. at 25.

<sup>374</sup> See *supra* notes 60–62 and accompanying text.

<sup>375</sup> See *supra* notes 73–74 and accompanying text.

<sup>376</sup> See *supra* notes 348–352 and accompanying text.



positive law,<sup>377</sup> my proposal to situate such appeals on more solid textual footing would create no new problems. Essentially, I am suggesting that we eliminate one cumbersome, statutorily-questionable square of the "crazy quilt"<sup>378</sup> and replace it with a more coherent one.

A somewhat thornier issue is the relationship between my proposal for discretionary All Writs Act appeals and existing statutory and rule-based sources of discretionary appellate review. The scope of discretionary appellate review under the All Writs Act would be broader than both § 1292(b) and Rule 23(f), and therefore could fully encompass appeals that are currently brought under those provisions. Under my proposal, therefore, neither § 1292(b) nor Rule 23(f) would be formally necessary for obtaining interlocutory appellate review.

The arguable superfluity of § 1292(b) and Rule 23(f) under my proposal would not necessarily make them irrelevant, however. Even under my approach, parties might still ask the district court to certify interlocutory appeals under § 1292(b), because if certification is granted it would signal to the court of appeals that the district court believes an immediate appeal is appropriate (even though the appellate court would still have discretion whether or not to hear the appeal). If § 1292(b) certification is denied, parties would still be able to seek discretionary appellate review via the All Writs Act. In this regard, the role of § 1292(b) under my proposal would not be all that different from how it is currently used. Even today, certification by the district court is no guarantee that the court of appeals will hear the case.<sup>379</sup> And the availability of appellate mandamus and the collateral order doctrine means that a lack of § 1292(b) certification does not automatically foreclose immediate appellate review.<sup>380</sup> Thus, under both my proposal and the current framework, § 1292(b) is a device that is potentially advantageous but not strictly necessary for obtaining interlocutory appellate review. My proposal has an unquestionable advantage, however, in terms of procedural simplicity.<sup>381</sup> The procedures are fur-

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<sup>377</sup> See *supra* notes 112–129 and accompanying text.

<sup>378</sup> See *supra* note 15 and accompanying text.

<sup>379</sup> See *supra* notes 63–66 and accompanying text.

<sup>380</sup> See, e.g., *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892, 895–98 (D.C. Cir. 2006) (allowing appeal of discovery order under the collateral order doctrine); *In re Chimenti*, 79 F.3d 534, 538–40 (6th Cir. 1996) (allowing mandamus review of a refusal to grant a motion to remand).

<sup>381</sup> See *supra* notes 297–308 and accompanying text. Suppose, for example, that a district court certifies an order for immediate appeal under § 1292(b). A party seeking to maximize its chances under the current regime would file: (1) a permission to appeal under Federal Rule of Appellate Procedure 5, which would ask the court of appeals to exer-

ther simplified, of course, if parties opt to bypass § 1292(b) altogether, knowing that under either the All Writs Act or § 1292(b), the court of appeals retains complete discretion whether or not to hear the appeal.

Rule 23(f)'s provision for discretionary appeals of class certification rulings might also retain some significance under my proposal. While the general availability of discretionary appeals under the All Writs Act would render Rule 23(f)'s specific authorization of discretionary appeals unnecessary, Rule 23(f) might still be valuable evidence that, according to the Supreme Court (which promulgated the Rule) and Congress (which refrained from vetoing the Rule),<sup>382</sup> appellate review of class certification orders is particularly worthwhile. In any event, the overlap creates no additional procedural complexity because a party could invoke both Rule 23(f) and the All Writs Act as bases for discretionary appellate review in a single document—a petition for permission to appeal under Federal Rule of Appellate Procedure 5.<sup>383</sup>

I should stress that this Article is certainly not the first to argue that federal appellate courts should have discretion to review interlocutory trial court orders.<sup>384</sup> This Article adds significant new strength to that argument, however. In the past, the scholarly debate has largely presumed that such discretion would be inconsistent with current statutes governing federal appellate court jurisdiction.<sup>385</sup>

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cise discretion to hear the § 1292(b) appeal, *see* FED. R. APP. P. 5(a)(1) ("To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal."); *see also, e.g.*, *Braden v. Univ. of Pittsburgh*, 552 F.2d 948, 950 (3d Cir. 1977) (noting petitioner's use of Rule 5 to seek permission to appeal under § 1292(b)); (2) a petition for a writ of mandamus, which could permit the court of appeals to review the issue even if it determines that § 1292(b)'s prerequisites for immediate appeal were not satisfied, *see, e.g.*, *In re City of Memphis*, 293 F.3d 345, 350–51 (6th Cir. 2002) (refusing to hear § 1292(b) appeal because the statutory factors were not present); and (3) a notice of appeal, which could permit the court of appeals to review the issue under a discretionary form of the collateral order doctrine. *See supra* notes 106–107 and accompanying text (noting that a notice of appeal is the proper vehicle for invoking the collateral order doctrine). Under my proposal, a party in this situation would file a single petition for permission to appeal under Appellate Rule 5, which would seek to convince the court of appeals to hear the case based on both its authority under § 1292(b) and its authority under the All Writs Act.

<sup>382</sup> *See* 28 U.S.C. § 2072(a) (2000) (noting the Supreme Court's "power to prescribe general rules of practice and procedure"); 28 U.S.C. § 2074(a) (2000) (describing the process by which the Supreme Court transmits such rules to Congress).

<sup>383</sup> *See* Steinman, *supra* note 68, at 1234 & nn.305–06 (describing the consensus view that Appellate Rule 5 is the method for pursuing Rule 23(f) appeals of class certification orders).

<sup>384</sup> *See supra* note 36.

<sup>385</sup> *See, e.g.*, Martineau, *supra* note 7, at 788–89 (arguing that Congress should enact a statute proposed by the American Bar Association that would allow discretionary appeals

Others questioned "whether our institutions have matured" to the point where broad discretionary review is appropriate.<sup>386</sup> This Article reveals that neither of these concerns should delay a judicial reinvention of appellate jurisdiction. First, this Article offers a new approach that is consistent with what appellate courts are currently doing within the cumbersome jurisdictional framework they have inherited.<sup>387</sup> The fact that the federal courts of appeals have already instituted a de facto system of discretionary appellate review indicates that we are indeed ready to discard the cumbersome framework within which such review is now undertaken.<sup>388</sup> Second, the framework proposed in this Article fits with existing sources of appellate jurisdiction as well if not better than the current approach.<sup>389</sup> It thus paves the way for a reinvention of appellate jurisdiction that can occur in the same manner that the bulk of the current framework came to be—not through legislation or judicial rulemaking, but rather through good, old-fashioned case law. Trading the collateral order doctrine and appellate mandamus for the doctrinal framework I propose would be a vast improvement.

#### CONCLUSION

Few areas of civil procedure have received more critique and scrutiny than the various doctrines governing appellate jurisdiction in the federal system. The current regime has been criticized as much for its doctrinal incoherence as for its procedural complexity. And it has continued to vex the Supreme Court, which has failed to improve the situation despite a consistent diet of cases raising issues of appellate jurisdiction. The current problems stem from the Court's attempt in the mid-twentieth century to invent new sources of appellate jurisdiction. Although this expansion may have been necessary in light of

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where one of three criteria is satisfied); Redish, *supra* note 36, at 126–27 (recognizing that his proposed "pragmatic balancing approach" to appealability was in conflict with the prevailing statutory scheme and arguing for the enactment of a statute "which allowed the appellate court to authorize an appeal where, in the court's opinion, the dangers of denying justice by delay outweighed the harm of piecemeal appeal").

<sup>386</sup> Cooper, *supra* note 8, at 158; *see also id.* at 164 (questioning whether "our institutions are ready for a more openly discretionary system of interlocutory appeal").

<sup>387</sup> *See supra* notes 246–272 and accompanying text.

<sup>388</sup> *Cf.* Cooper, *supra* note 8, at 157 (arguing in 1984 that "[t]he best answer may be to adopt the framework for discretionary interlocutory appeals without yet abolishing the present rules. As the discretionary system becomes more familiar, it should prove possible to discard many of the present rules").

<sup>389</sup> *See supra* notes 290–293, 354–360 and accompanying text.

the increasing importance of interlocutory rulings in modern litigation, the doctrinal methods by which the Court accomplished that expansion were misguided. A reinvention of appellate jurisdiction is now very much in order.

The solution proposed in this Article would bring the doctrinal framework into alignment with the actual practice of appellate courts. It would retain the authority of the federal courts of appeals to engage in discretionary review of interlocutory orders in those rare circumstances where such review is deemed appropriate. And it would retain the appellate courts' obligation to hear interlocutory appeals for that very small category of orders that are immediately appealable as of right. But unlike the current approach, this proposed reinvention would situate all interlocutory appeals on a more solid textual and doctrinal footing, while optimizing the procedural mechanisms for invoking appellate jurisdiction.

## APPENDIX

Table 1: Supreme Court Appellate Jurisdiction Cases Since 1980		
No.	Case Citation	Interlocutory Order at Issue
1.	Osborn v. Haley, 127 S. Ct. 881 (2007)	Order refusing to immunize a federal employee under the Westfall Act.
2.	Will v. Hallock, 546 U.S. 345 (2006)	Order refusing to dismiss a case based on the judgment bar of the Federal Tort Claims Act.
3.	Cheney v. U.S. Dist. Court, 542 U.S. 367 (2004)	Order allowing discovery against the Vice President.
4.	Sell v. United States, 539 U.S. 166 (2003)	Order requiring criminal defendant to involuntarily receive medication to render him competent to stand trial.
5.	Cunningham v. Hamilton County, 527 U.S. 198 (1999)	Order imposing sanctions on an attorney for discovery violations.
6.	Clinton v. Jones, 520 U.S. 681 (1997)	Order refusing to stay discovery.
7.	Behrens v. Pelletier, 516 U.S. 299 (1996)	Order refusing to grant summary judgment based on qualified immunity.
8.	Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996)	Order remanding a case on the basis of <i>Burford</i> abstention.
9.	Yamaha Motor Corp. U.S.A. v. Calhoun, 516 U.S. 199 (1996)	Order granting a defendant partial summary judgment on the ground that remedies provided by federal maritime law were exclusive.
10.	United States v. Jose, 519 U.S. 54 (1996)	Order enforcing a summons by the Internal Revenue Service.
11.	Johnson v. Jones, 515 U.S. 304 (1995)	Order refusing to grant summary judgment based on qualified immunity.
12.	Swint v. Chambers County Comm'n, 514 U.S. 35 (1995)	Order refusing to grant summary judgment based on municipality's <i>Monell</i> defense.
13.	Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994)	Order refusing to dismiss a case based on a prior settlement agreement.
14.	P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993)	Order denying a claim of immunity under the Eleventh Amendment.
15.	Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992)	Order denying motion to strike a jury trial demand.
16.	Sullivan v. Finkelstein, 496 U.S. 617 (1990)	Order remanding case to agency for reconsideration.
17.	Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989)	Order denying motion to dismiss based on a contractual forum-selection clause.
18.	Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989)	Order denying motion to dismiss a grand jury indictment.
19.	Mallard v. U.S. Dist. Court, 490 U.S. 296 (1989)	Order requiring an attorney to represent indigent inmates in a § 1983 lawsuit against prison officials.
20.	Van Cauwenberghe v. Biard, 486 U.S. 517 (1988)	Order denying forum non conveniens motion.
21.	Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988)	Order denying motion to stay or dismiss action.
22.	Kamen v. Nordberg, 485 U.S. 939 (1988)	Order denying a jury trial.
23.	Budinich v. Becton Dickson & Co., 486 U.S. 196 (1988)	Final judgment on the merits where request for attorneys fees had not yet been decided.

**Table 1: Supreme Court Appellate Jurisdiction Cases Since 1980**

No.	Case Citation	Interlocutory Order at Issue
24.	Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987)	Order granting permissive intervention but denying intervention as of right.
25.	United States v. Stanley, 483 U.S. 669 (1987)	Order dismissing one claim in a complaint.
26.	Mitchell v. Forsyth, 472 U.S. 511 (1985)	Order denying claim of qualified immunity.
27.	Richardson-Merrell v. Koller, 472 U.S. 424 (1985)	Order disqualifying counsel.
28.	Talamini v. Allstate Ins. Co., 470 U.S. 1067 (1985)	Order dismissing one count in a complaint.
29.	Marrese v. Am. Acad. of Orthopedic Surgeons, 470 U.S. 373 (1985)	Order refusing to dismiss a case on claim preclusion grounds.
30.	Claiborne v. United States, 465 U.S. 1305 (1984)	Order denying claim of judicial immunity.
31.	Richardson v. United States, 468 U.S. 317 (1984)	Order denying motion to bar a retrial on Double Jeopardy grounds.
32.	Flanagan v. United States, 465 U.S. 259 (1984)	Order disqualifying counsel.
33.	Rohrer Hibler & Replogle v. Perkins, 469 U.S. 890 (1984)	Order remanding a case to state court based on a forum selection clause.
34.	Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)	Order staying federal court action pursuant to <i>Pullman</i> abstention doctrine.
35.	Nixon v. Fitzgerald, 457 U.S. 731 (1982)	Order denying claim of absolute presidential immunity.
36.	Harlow v. Fitzgerald, 457 U.S. 800 (1982)	Order denying claim of absolute immunity for presidential aides.
37.	United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982)	Order denying motion to dismiss based on vindictive prosecution.
38.	Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981)	Order denying motion to disqualify counsel.
39.	Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. Carter, 450 U.S. 949 (1981)	Order remanding case to state court for lack of subject matter jurisdiction.
40.	Carson v. Am. Brands, Inc., 450 U.S. 79 (1981)	Order denying motion to enter a consent decree.
41.	Boeing Co. v. Van Gemert, 444 U.S. 472 (1980)	Order allowing class counsel fees to be paid from class action judgment.
42.	Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980)	Order granting defendants' motion for a new trial.

**Table 2: Early Circuit Court of Appeals Mandamus Cases (1891-1901) \***

No.	Case Citation
1.	Macfarland v. United States <i>ex rel.</i> Miller, 18 App. D.C. 554 (D.C. Cir. 1901)
2.	Washington County v. Williams, 111 F. 801 (8th Cir. 1901)
3.	City of Cleveland v. United States, 111 F. 341 (6th Cir. 1901)
4.	Graham v. Swayne, 109 F. 366 (5th Cir. 1901)
5.	White v. Bruce, 109 F. 355 (5th Cir. 1901)
6.	United States <i>ex rel.</i> Paine v. Philips, 109 F. 1063 (8th Cir. 1901)
7.	United States <i>ex rel.</i> Brown v. Root, 18 App. D.C. 239 (D.C. Cir. 1901)
8.	James v. Cent. Trust Co. of N.Y., 108 F. 929 (4th Cir. 1901)
9.	Nichols v. McGhee, 108 F. 989 (5th Cir. 1901)
10.	United States <i>ex rel.</i> Bride v. MacFarland, 18 App. D.C. 120 (D.C. Cir. 1901)
11.	Rowan v. Ide, 107 F. 161 (5th Cir. 1901)
12.	United States <i>ex rel.</i> Stapleton v. Duell, 17 App. D.C. 575 (D.C. Cir. 1901)
13.	United States <i>ex rel.</i> Bronson Co. v. Duell, 17 App. D.C. 471 (D.C. Cir. 1901)
14.	United States v. Hammond, 104 F. 862 (6th Cir. 1900)
15.	Kimberlin v. Comm'n to Five Civilized Tribes, 104 F. 653 (8th Cir. 1900)
16.	The New York, 104 F. 561 (6th Cir. 1900)
17.	City of Helena v. United States, 104 F. 113 (9th Cir. 1900)
18.	City of Little Rock v. United States, 103 F. 418 (8th Cir. 1900)
19.	Ransom v. City of Pierre, 101 F. 665 (8th Cir. 1900)
20.	New England R.R. Co. v. Hyde, 101 F. 397 (1st Cir. 1900)
21.	United States <i>ex rel.</i> Mut. Dist. Messenger Co. v. Wight, 15 App. D.C. 463 (D.C. Cir. 1899)
22.	<i>Ex parte</i> Breese, 97 F. 980 (4th Cir. 1899)
23.	C. & A. Potts & Co. v. Creager, 97 F. 78 (6th Cir. 1899)
24.	United States <i>ex rel.</i> Hufty v. Trimble, 14 App. D.C. 414 (D.C. Cir. 1899)
25.	United States <i>ex rel.</i> Beal v. Cox, 14 App. D.C. 368 (D.C. Cir. 1899)
26.	<i>Ex parte</i> Franklin Mining Co., 90 F. 830 (6th Cir. 1899)
27.	Church v. United States <i>ex rel.</i> Fid. & Deposit Co. of Md., 13 App. D.C. 264 (D.C. Cir. 1898)
28.	United States <i>ex rel.</i> Bernardin v. Duell, 13 App. D.C. 379 (D.C. Cir. 1898)
29.	<i>In re</i> Put-In-Bay Waterworks, Light & Ry. Co., 90 F. 831 (6th Cir. 1898)
30.	Roberts v. United States <i>ex rel.</i> Valentine, 13 App. D.C. 38 (D.C. Cir. 1898)
31.	Scaife v. W. N.C. Land Co., 87 F. 308 (4th Cir. 1898)
32.	United States <i>ex rel.</i> Washington v. Johnson, 12 App. D.C. 545 (D.C. Cir. 1898)
33.	United States <i>ex rel.</i> Wedderburn v. Bliss, 12 App. D.C. 485 (D.C. Cir. 1898)
34.	Deuel County v. First Nat'l Bank of Buchanan County, 86 F. 264 (8th Cir. 1898)
35.	United States v. Indian Grave Drainage Dist., 85 F. 928 (7th Cir. 1898)
36.	Fleming v. Trowsdale, 85 F. 189 (6th Cir. 1898)
37.	United States v. Judges of U.S. Court of Appeals, 85 F. 177 (8th Cir. 1898)
38.	United States <i>ex rel.</i> Sheehy v. Johnson, 12 App. D.C. 92 (D.C. Cir. 1898)
39.	<i>Ex parte</i> Mansfield, 11 App. D.C. 558 (D.C. Cir. 1897)
40.	United States <i>ex rel.</i> De Yurbide v. Metro. Club of Wash., 11 App. D.C. 180 (D.C. Cir. 1897)
41.	Wagner v. Morris, 82 F. 1006 (4th Cir. 1897)
42.	United States <i>ex rel.</i> Bernardin v. Seymour, 11 App. D.C. 91 (D.C. Cir. 1897)
43.	Seymour v. Nelson, 11 App. D.C. 58 (D.C. Cir. 1897)
44.	Holt County v. Nat'l Life Ins. Co., 80 F. 686 (8th Cir. 1897)
45.	Seymour v. United States <i>ex rel.</i> Brodie, 10 App. D.C. 567 (D.C. Cir. 1897)
46.	United States <i>ex rel.</i> Bernardin v. Seymour, 10 App. D.C. 294 (D.C. Cir. 1897)
47.	United States <i>ex rel.</i> Brightwood Ry. Co. v. O'Neal, 10 App. D.C. 205 (D.C. Cir. 1897)
48.	<i>Ex parte</i> Hunt, 10 App. D.C. 275 (D.C. Cir. 1897)

**Table 2: Early Circuit Court of Appeals Mandamus Cases (1891-1901) \***

No.	Case Citation
49.	Brazoria County v. Youngstown Bridge Co., 80 F. 10 (5th Cir. 1897)
50.	Town of Darlington v. Atl. Trust Co., 78 F. 596 (4th Cir. 1897)
51.	<i>Ex parte</i> Citizens' Nat'l Bank, of Des Moines, Iowa, 79 F. 991 (8th Cir. 1896)
52.	<i>Ex parte</i> Nat'l Masonic Acc. Ass'n, of Des Moines, Iowa, 79 F. 999 (8th Cir. 1896)
53.	Stryker v. Bd. of Comm'rs, 77 F. 567 (8th Cir. 1896)
54.	Lant v. Manley, 75 F. 627 (6th Cir. 1896)
55.	Fuller v. Aylesworth, 75 F. 694 (6th Cir. 1896)
56.	<i>Ex parte</i> Stirling Co., 76 F. 1006 (6th Cir. 1896)
57.	<i>In re</i> Woerishoffer, 75 F. 335 (5th Cir. 1896)
58.	<i>In re</i> Ricks, 79 F. 1001 (5th Cir. 1896)
59.	United States <i>ex rel.</i> Bissell Carpet-Sweeper Co. v. Severens, 76 F. 1006 (6th Cir. 1896)
60.	Ross v. United States <i>ex rel.</i> Prospect Hill Cemetery, 8 App. D.C. 32 (D.C. Cir. 1896)
61.	N. Ala. Dev. Co. v. Orman, 71 F. 764 (5th Cir. 1896)
62.	Carlisle v. United States <i>ex rel.</i> Waters, 7 App. D.C. 517 (D.C. Cir. 1896)
63.	Ross v. United States <i>ex rel.</i> Goodfellow, 7 App. D.C. 1 (D.C. Cir. 1895)
64.	Lochren v. United States <i>ex rel.</i> Long, 6 App. D.C. 486 (D.C. Cir. 1895)
65.	Brown v. Bradley, 6 App. D.C. 207 (D.C. Cir. 1895)
66.	Bd. of Comm'rs v. King, 67 F. 945 (8th Cir. 1895)
67.	Bd. of Comm'rs v. King, 67 F. 202 (8th Cir. 1895)
68.	Moore v. Miller, 5 App. D.C. 413 (D.C. Cir. 1895)
69.	United States v. Swan, 65 F. 647 (6th Cir. 1895)
70.	Leonard v. Rodda, 5 App. D.C. 256 (D.C. Cir. 1895)
71.	United States <i>ex rel.</i> Kerr v. Ross, 5 App. D.C. 241 (D.C. Cir. 1895)
72.	United States <i>ex rel.</i> Miles Planting & Mfg. Co. v. Carlisle, 5 App. D.C. 138 (D.C. Cir. 1895)
73.	Lewis v. Balt. & Lehigh R.R. Co., 62 F. 218 (4th Cir. 1894)
74.	<i>Ex parte</i> Redmond, 3 App. D.C. 317 (D.C. Cir. 1894)
75.	Bd. of Supervisors v. Thompson, 61 F. 914 (6th Cir. 1894)
76.	Breckinridge County v. McCracken, 61 F. 191 (6th Cir. 1894)
77.	United States <i>ex rel.</i> Int'l Contracting Co. v. Lamont, 2 App. D.C. 532 (D.C. Cir. 1894)
78.	Seymour v. United States <i>ex rel.</i> South Carolina, 2 App. D.C. 240 (D.C. Cir. 1894)
79.	Union Pac. Ry. Co. v. United States, 59 F. 813 (8th Cir. 1894)
80.	United States v. Bd. of Liquidation of City Debt, 60 F. 387 (5th Cir. 1894)
81.	Police Jury, v. United States (5th Cir. 1894)
82.	Ashley v. Bd. of Supervisors, 60 F. 55 (6th Cir. 1893)
83.	Starcke v. Klein, 62 F. 502 (5th Cir. 1893)
84.	Wineman v. Gastrell, 53 F. 697 (5th Cir. 1892)
85.	Blanks v. Klein, 53 F. 436 (5th Cir. 1892)
86.	Dempsey v. Twp. of Oswego, 51 F. 97 (8th Cir. 1892)
87.	Del. & Atl. Tel. & Tel. Co. v. Delaware <i>ex rel.</i> Postal Tel.-Cable Co., 50 F. 677 (3d Cir. 1892)
88.	<i>In re</i> Coe, 49 F. 481 (1st Cir. 1892)
89.	United States v. Town of Cicero, 50 F. 147 (7th Cir. 1892)
90.	The Lurline, 57 F. 398 (2d Cir. 1892)
91.	Blanks v. Klein, 49 F. 1 (5th Cir. 1891)

\* These cases were obtained by searching the "CTA-OLD" database on Westlaw for all cases between 1891 and 1901 that contain the word "mandamus" in the synopsis.