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## Using the Scientific Method in the Law: Examining State Interlocutory Appeals Procedures that Would Improve Uniformity, Efficiency, and Fairness in the Federal Appellate System

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**USING THE SCIENTIFIC METHOD IN THE LAW:  
EXAMINING STATE INTERLOCUTORY APPEALS  
PROCEDURES THAT WOULD IMPROVE  
UNIFORMITY, EFFICIENCY, AND FAIRNESS IN  
THE FEDERAL APPELLATE SYSTEM**

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\* J.D. expected 2013, Cleveland State University, Cleveland-Marshall College of Law; B.A. Yale University. Sincerest thanks to my beautiful parents for their love and support. Second, thank you to my brother Jim for his guidance as I follow in his footsteps. Lastly, this Note is dedicated to my brother Joe, as proof that I have a brain.

## I. INTRODUCTION

The United States Constitution never established the right to appeal.<sup>1</sup> The common law never recognized the appeal as an absolute right.<sup>2</sup> Any “right” to appeal is “purely a creature of statute”<sup>3</sup> that evolved to become a central component in the litigation process.<sup>4</sup>

Thus, imagine civil litigation without the appeal. A pretrial motion is filed, and the judge denies it. The case continues, and the parties endure litigation that culminates in a trial.<sup>5</sup> An unfavorable judgment is rendered. The client’s mid-size company just spent over two years<sup>6</sup> investing at least one million dollars in litigation.<sup>7</sup> Looking at the record, the court clearly erred in failing to grant the pretrial motion to dismiss. But, the case is over. One million dollars later, the attorney and client find no relief from legal community.

The imagined situation is often the reality even where the appeal process exists. For instance, the current use of the federal interlocutory appeal process operates much like an appeal-less system. A pretrial motion is filed, the interlocutory order is given, and the petition for interlocutory review is usually denied.<sup>8</sup> Thus, the case continues. It may continue into settlement negotiations or go to trial where the losing party files an appeal. That final appeal could find that the lower court erred,

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<sup>1</sup> Jones v. Barnes, 463 U.S. 745, 751 (1983); see also McKane v. Durston, 153 U.S. 684 (1894).

<sup>2</sup> McKane, 153 U.S. at 684.

<sup>3</sup> Abney v. United States, 431 U.S. 651, 656 (1977).

<sup>4</sup> Some form of an appeal always existed in the federal system. See *infra* Part II; see also *infra* note 19.

<sup>5</sup> Assuming the case occurred in 2009, it would be one of 5,360 cases that went to trial from 276,397 civil filings. Judicial Bus. 2010, *U.S. District Courts—Civil: Civil Cases Filed, by Origin, 2006 Through 2010*, U.S. COURTS tbl.S-7 (2010), available at <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2010.aspx>; see also Judicial Facts & Figures 2010, *U.S. District Courts—Combined Civil and Criminal: Civil and Criminal Trials Completed*, U.S. COURTS tbl.6.4 (2010), available at <http://www.uscourts.gov/Statistics/JudicialFactsAndFigures/JudicialFactsAndFigures2010.aspx>. In 2010, only one percent of cases reached trial. *Statistical Tables for the Federal Judiciary*, U.S. COURTS tbl.C-4 (2010) [hereinafter Table C-4], available at <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/dec10/C04Dec10.pdf>.

<sup>6</sup> In 2009, the average length of a civil suit before going to trial was 24.8 months. This statistic assumes the case did not fall within the 11.7 percent of cases over three years old, or 36,829 cases. Fed. Court Mgmt. Statistics, *U.S. District Court—Judicial Caseload Profile*, U.S. COURTS (2010), available at <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2010Sep.pl>.

<sup>7</sup> FULBRIGHT & JAWORSKI L.L.P., FULBRIGHT’S 6TH ANNUAL LITIGATION TRENDS SURVEY REPORT (2009). Approximately 38 percent of midsize companies spent at least one million dollars on civil litigation. The same study found that 13 percent of small companies spent at least \$1 million annually in litigation costs (the number was 4 percent in 2007). The largest companies had a much smaller increase in companies spending at least \$1 million annually as the percentage grew from 75 percent in 2007 to 78 percent in 2009. *Id.*

<sup>8</sup> See Hess, Parker & Toufanian, *infra* note 59.

rendering that trial meritless. In reaching any of those stages, the adversely affected party more than likely devoted unnecessary time, resources, and finances in the case. Additionally, the parties are often unable to predict success when making a petition or appeal. Under the current system, the court does not provide any explanation to the party regarding the reasons the petition was denied. Instead, the system relies upon a broad set of confusing criteria to qualify for a grant of an interlocutory appeal without requiring any explanation to accompany the decision.<sup>9</sup>

The unfairness and confusion created by the current interlocutory appeal system invites many suggestions for change, including eliminating all appeals.<sup>10</sup> While the above example briefly demonstrates that this elimination is too drastic,<sup>11</sup> it is also impractical because historically the appellate process prohibited such an extreme change.<sup>12</sup> More importantly, this measure is unnecessary. The state court systems offer demonstrative examples of successful techniques that decrease unfairness without sacrificing judicial efficiency. Thus, there is no reason to eliminate, or even create, a completely new appellate system. Rather, by adopting federalism's historical tenet of "states as laboratories,"<sup>13</sup> the interlocutory appeal system can be refined.

Within the paradigm of the scientific method, this Note explains the problems with the current interlocutory appellate system and offers accessible techniques utilized in the states for its improvement. In Part II, this Note briefly explains the research to outline the historical evolution of the final judgment rule. While this section highlights the benefits of the rule, it also details the rule's expansion as a response to concerns that the federal appellate framework was inefficient, unfair, and oftentimes confusing.

In Part III.A-B., this Note develops its thesis by examining the state court systems that are already in place. These state systems are the "experiments." The state experiments provide ample evidence of techniques that work and show possible problems that may arise before considering its adoption at the federal level. Then, this Note argues that combining the strongest techniques employed at the state level would improve efficiency and fairness<sup>14</sup> at the federal level, while maintaining the balance between the court and parties' interests.

Part III.C. extends the analysis to demonstrate the need to require written opinions to accompany decisions. Such a requirement would help to facilitate changes to the federal interlocutory appeal system. Not only do written opinions balance efficiency and fairness between the court and parties, but mandated opinions could also bring insight and clarity to a confusing process. Thus, like the state

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<sup>9</sup> See *infra* Part IV.

<sup>10</sup> See Carelton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L. J. 539, 560-63 (1932) (stating "the concept of the final judgment is wholly unsatisfactory as a method of" restricting appeals.").

<sup>11</sup> For an explanation on why appeals are beneficial, see Robertson, *infra* note 89.

<sup>12</sup> See *infra* Part III.

<sup>13</sup> See, e.g., *New State Ice, Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>14</sup> Fairness applies to both the judges and the parties.

experiments, written opinions would offer evidence of any problems and any trends within the courts that could guide future procedural changes.

## II. THE RESEARCH: THE INTERLOCUTORY APPEALS PROCESS WITHIN THE FEDERAL SYSTEM

### A. *The Evolution of the Final Judgment Rule*

The right to appeal has become a central tenet of American law. The right is “sacrosanct,”<sup>15</sup> and credited with improving the federal courts’ “ability to administer justice in a regular, evenhanded, and confidence-inspiring manner.”<sup>16</sup> Generally, the right to appeal may only be exercised *after* the trial court renders a final decision.<sup>17</sup> Such timing is a prerequisite for exercising the right to appeal. Some version of this finality requirement has existed in the United States since 1789.<sup>18</sup> The United States Congress adopted the English common law,<sup>19</sup> and later codified the requirement in 28 U.S.C. § 1291.<sup>20</sup>

The finality requirement is not unwarranted. Rather, the final judgment rule exists to serve at least four purposes for the various groups involved.<sup>21</sup> First, the rule guards against the interruption of court proceedings by allowing an organized court record to fully develop before review.<sup>22</sup>

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<sup>15</sup> Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L. J. 62, 64 (1985) (questioning the desirability of appeals and offers proposals that the appeals be limited to certain categories of cases).

<sup>16</sup> Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 712 (1999) (exploring the history of the federal courts and attempting to explain the growing interest in the structure and development of the lower courts).

<sup>17</sup> See Laura C. Baucus, *How Long Should Bad Attorneys Have to Wait? The Immediate Appeal of Attorney Sanctions Under the Collateral Order Doctrine*, 46 WAYNE L. REV. 289, 290 (2000).

<sup>18</sup> Specifically, the rule was embodied in the Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84.

<sup>19</sup> Presented in the Judiciary Act of 1789, the rule developed from English common law. The appellate court was required to take the entire record under consideration, thereby making appeals before a final decision problematic since the King’s Bench and the trial court could not review the record simultaneously. See Gerald T. Wetherington, *Appellate Review of Final and Non-Final Orders in Florida Civil Cases—An Overview*, 47 LAW & CONTEMP. PROBS. 3, Summer 1984, at 61-62.

<sup>20</sup> 28 U.S.C. § 1291 (1948) (declaring that the federal appellate courts only have jurisdiction “from all final decisions of the district courts”); see also *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (discussing the history of 28 U.S.C. § 1291).

<sup>21</sup> See, e.g., Robert Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717 (1993). Professor Martineau noted the rule “serves the purposes of some or most parties and prospective parties, their lawyers, the trial court, the appellate court, and ultimately the public.” *Id.* at 771.

<sup>22</sup> See *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985) (“[I]mmediate review of every trial court ruling, while permitting more prompt correction of erroneous decisions, would impose unreasonable disruption, delay, and expense.”).

Second, prohibiting non-final appeals prevents piecemeal adjudication,<sup>23</sup> thus reducing delays for the parties and courts.<sup>24</sup> Throughout early American history, courts sought to avoid piecemeal adjudication by imposing the finality requirement as a mechanism for preventing delays.<sup>25</sup> In 1830, Justice Story praised the restriction as a method for discouraging successive appeals, which could “occasion very great delays and oppressive expenses.”<sup>26</sup> Likewise, Chief Justice Marshall inferred that Congress intended the final judgment rule be used to avoid “all the delays and expense incident to a repeated revision” of successive appeals on a single issue.<sup>27</sup>

Third, the rule reduces “encroach[ment] upon the prerogatives of district court judges.”<sup>28</sup> District court judges can freely exercise their discretion when making a decision without repeated interruption by a second court. This approach thus preserves the respect and independence owed to trial judges as the initial adjudicators.<sup>29</sup> For instance, if a trial judge’s ruling could be challenged instantly on a whim, the judge’s authority and function could be significantly undermined.<sup>30</sup>

Fourth, the final judgment rule is believed to promote an efficient judicial system.<sup>31</sup> The rule prevents parties from using the appeals process to harass opponents, particularly wealthy parties filing separate appeals as a strategy to drain the opposition’s financial resources.<sup>32</sup> Further, lawyers are able to litigate cases economically, without needless appeals that serve no purpose but to appease the

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<sup>23</sup> *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

<sup>24</sup> See *Richardson-Merrell, Inc.*, 472 U.S. at 430 (stating that the final judgment rule avoids the delays that appellate interruptions would cause).

<sup>25</sup> See, e.g., *Rutherford v. Fisher*, 4 U.S. (4 Dall.) 22 (1800) (holding an order denying the statute of limitations defense is not appealable); see also *Canter v. Am. Ins. Co.*, 28 U.S. (3 Pet.) 307, 310 (1830) (holding that the question of whether damages may or may not be assessed at all was not appealable); Martineau, *supra* note 21.

<sup>26</sup> *Canter*, 28 U.S. (3 Pet.) at 430 (holding that damages for interlocutory appeals were interlocutory and thus not appealable).

<sup>27</sup> *United States v. Bailey*, 34 U.S. (9 Pet.) 267, 268-69 (1835).

<sup>28</sup> *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603 (2009) (quoting *Firestone Tire & Rubber Co.*, 449 U.S. at 374; see also *Richardson-Merrell, Inc.*, 472 U.S. at 430 (“It would also undermine the ability of district judges to supervise litigation.”)).

<sup>29</sup> *Firestone Tire & Rubber Co.*, 449 U.S. at 374 (“Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system.”); see also *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974) (the final judgment rule “prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy.”).

<sup>30</sup> *Richardson-Merrell, Inc.*, 472 U.S. at 430.

<sup>31</sup> CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3907 (1992).

<sup>32</sup> John C. Nagel, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L. J. 200, 203 (1994).

client.<sup>33</sup> The final judgment rule effectuates these policies by precluding appellate review of most interlocutory rulings.<sup>34</sup>

### B. Problems with the Final Judgment Rule

The final judgment rule effectively promotes the above policies, but the strict and limited application of the rule has significant drawbacks.<sup>35</sup> Chiefly, a trial court's decisions may have "serious and continuous effects"<sup>36</sup> on litigation that cannot be restored if the appeal is delayed, whereas an immediate appeal could shorten, streamline, or even end litigation. For instance, there has been greater emphasis on the importance of pretrial case management.<sup>37</sup> With increased pretrial rulings, strict adherence to the final judgment rule could advance what may turn out to be a potentially meritless trial.<sup>38</sup> This is especially problematic given the increased emphasis on pretrial activity. In a study conducted by the Federal Judicial Center, several attorneys reported that since *Bell Atlantic Corp. v. Twombly*<sup>39</sup> and *Ashcroft v. Iqbal*,<sup>40</sup> there has been an increase in the number of motions filed, without an increase in the likelihood that the motion would be granted.<sup>41</sup> Thus, attorneys face

<sup>33</sup> See also WRIGHT, MILLER & COOPER, *supra* note 31, at 279.

<sup>34</sup> See Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539, 542 ("[T]he general run of pretrial orders—denials of motions to dismiss, discovery orders, joinder decisions, denial of summary judgment, scheduling orders, and so on—cannot be appealed until the case is over.").

<sup>35</sup> Margaret L. Anderson, *The Immediate Appealability of Rule 11 Sanctions*, 59 GEO. WASH. L. REV. 683, 689 (1991) ("[A]lthough the final judgment rule has been an effective means of promoting these policies, courts also recognize that the rule can lead to harsh results.").

<sup>36</sup> S. Christian Mullgarat, *Settlement Agreements and the Collateral Order Doctrine: A Step in the Wrong Direction?*, 1995 J. DISP. RESOL. 155, 158 (1995) (citing R. STERN, APPELLATE PRACTICE IN THE UNITED STATES 79 (2d ed. 1989)).

<sup>37</sup> See Adam Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1241 (citing Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1265–66 (2005)).

<sup>38</sup> In 2010, 314,233 civil cases were filed with 229,448 terminated during the pretrial phase. Table C-4, *supra* note 5.

<sup>39</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>40</sup> *Ashcroft v. Iqbal*, 556 U.S. 622 (2009). It is this author's belief that the pleading standards arising out of *Twombly* and *Iqbal* are the most recent developments in civil litigation that would have an impact on the pretrial stage, and thus on the number of interlocutory orders.

<sup>41</sup> EMERY G. LEE III & THOMAS E. WILLIG, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 1–2 (Mar. 2010), available at [http://www.fjc.gov/public/pdf.nsf/%20lookup/costciv3.pdf/\\$file/costciv3.pdf](http://www.fjc.gov/public/pdf.nsf/%20lookup/costciv3.pdf/$file/costciv3.pdf) ("To supplement the multivariate analysis, . . . the Center . . . interview[ed] a number of the attorneys who responded to the case-based survey. . . . This report documents those interviews, organizing them where possible to track the results of the multivariate analyses."). The Advisory Committee on Civil Rules of the Judicial Conference of the United States asked the Federal Judicial Center to conduct a study on the costs of federal civil litigation. EMERY G. LEE III & THOMAS E. WILLIG, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES:

increased costs due to increased pretrial filings in addition to the rising costs incurred in litigation.

Even when the delay of appellate review is not a threat, strict adherence to the finality requirement can drain both the courts' and the parties' time and financial resources. In the same study mentioned above, the attorneys reported that the additional pretrial activity increased the costs of litigating their cases.<sup>42</sup> Thus, when an erroneous trial court ruling on a pretrial motion cannot be immediately corrected,<sup>43</sup> the parties may be forced to waste additional time and money on a meritless trial after investing such resources in increased pretrial activities.<sup>44</sup>

### C. Attempts to Reduce the Harshness of the Final Judgment Rule

#### 1. A Statutory Expansion: 28 U.S.C. § 1292(b)<sup>45</sup>

Recognition of these drawbacks led Congress and the Court to create exceptions to the finality requirement.<sup>46</sup> Both branches found that an opportunity to appeal from a non-final order may “prevent irreparable harm to a party, advance the termination of the litigation, or serve some broader public interest, [so] there have been constant efforts to make exceptions to the finality requirement.”<sup>47</sup>

The first significant change expanded 28 U.S.C. § 1292.<sup>48</sup> In expanding the statute, Congress sought to curtail inefficiency and injustice caused by a strict

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MULTIVARIATE ANALYSIS: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2-4 (Mar. 2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/\\$file/costciv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf). In 2009, the Center conducted a survey of a random sample of attorneys that were involved cases that were terminated in the last quarter of 2008. The Center supplemented this survey with interviews of some of the responding attorneys. “This report, prepared for the Committee’s March 2010 meeting, presents multivariate analysis of litigation costs in the closed cases.” *Id.*; see also JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* vii (Mar. 2011), available at [www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf) (finding that “[t]here was a general increase from 2006 to 2010 in the rate of filing of motions to dismiss for failure to state a claim . . . [but] no increase in the rate of grants of motions to dismiss”).

<sup>42</sup> LEE & WILLIG, *supra* note 41. While the study did not report costs, it is plausible that increased filings would increase the costs of litigation. This is an assumption by the author.

<sup>43</sup> See Anderson, *supra* note 35.

<sup>44</sup> Baucus, *supra* note 17, at 295.

<sup>45</sup> Interlocutory Appeals Act of 1958, 28 U.S.C.A. § 1292(b) (West 2012).

<sup>46</sup> There are a number of other statutory exceptions to the finality requirement not discussed in this paper. The statutory exceptions to section 1291 include sections 1291(a)(2) and (3), which permit appeals from an interlocutory order “appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof” and allow non-final appeals in admiralty cases. 28 U.S.C.A. § 1291(a)(2)-3 (West 2012). The Federal Rules of Civil Procedure also provide an appeal through writs of mandamus and certification of partial final judgments under FED. R. CIV. P. 54(b). See generally FED. R. CIV. P. 54(b).

<sup>47</sup> Martineau, *supra* note 21, at 788; see also Pierre H. Bergeron, *A New Vision of Appellate Jurisdiction Over Orders Compelling Arbitration*, 51 EMORY L. J. 1365, 1369 (2002) (“[I]nterlocutory review is largely unavailable in a significant number of cases in which it should be appropriate.”).

<sup>48</sup> 28 U.S.C.A. § 1292(b) (West 2012).



adherence to the final judgment rule.<sup>49</sup> Initially, the Judicial Conference of the United States proposed a statute that would have granted interlocutory appeals by permission of the court of appeals that were “necessary or desirable to avoid substantial injustice.”<sup>50</sup> But, this language was strongly opposed.<sup>51</sup> Once Congress struck that language, the amendment immediately became codified as 28 U.S.C. § 1292(b).<sup>52</sup>

Congress and the courts viewed this addition as an effort to “improve and expedite the administration of justice in the courts.”<sup>53</sup> The new subsection permits an early appeal of limited types of interlocutory orders. Specifically, the district court may<sup>54</sup> certify an order “involv[ing] 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>55</sup> Once a district court certifies the order, the appellate court exercises its discretion

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<sup>49</sup> James P. Weygandt, *Motions for Appointment of Counsel and the Collateral Order Doctrine*, 86 MICH. L. REV. 1547, 1550 (1985); see also Martineau, *supra* note 21, at 788 (a non-final order sometimes “would prevent irreparable harm to a party, advance the termination of litigation, or serve some broader public interest, [so] there have been constant efforts to make exceptions to the finality requirement to allow early appeals in some cases.”).

<sup>50</sup> JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF SPECIAL SESSION FOR THE JUDICIAL CONFERENCE OF THE UNITED STATES 203 (Mar. 20-21, 1952).

<sup>51</sup> The grounds for the objections were not stated in the report; however, another author offers a compelling suggestion stating that it was “likely that objections were raised to the procedure for direct application to the courts of appeals and to the breadth of the standard controlling review.” Such objections were raised in the “debate” between Judge Frank and Chief Judge Charles E. Clark that was carried on in the Second Circuit for some fifteen years before the action of the Judicial Conference. Note, *Interlocutory Appeals in the Federal Courts Under 28 USC Section 1292(b)*, 88 HARV. L. REV. 607, 610 n.13 (1975) (referencing *Audi Vision, Inc. v. RCA Mfg. Co.*, 136 F.2d 621, 627 (2d Cir. 1943) (Frank, J.) and *Zalkind v. Scheinman*, 139 F.2d 895, 907-08; n.5 (2d Cir. 1943) (Clark, J., dissenting)).

<sup>52</sup> 28 U.S.C.A. § 1292(b) (West 2012).

<sup>53</sup> H.R. Res. 6238, 85th Cong. (1st Sess. 1957) (testimony of Chief Judge Parker of the Fourth Circuit at the House Committee on the Judiciary on February 26, 1958). The Judicial Conference of the United States viewed the bill as a compromise between those who did not want any expansion of interlocutory appeals and those who did. See CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* 713-16 (4th ed. 1983); see also H.R. REP. NO. 85-1667, at 1 (1958) (stating the purpose of section 1292(b) was “to expedite the ultimate termination of litigation and thereby save unnecessary expense and delay” by allowing appeal of certain non-final orders). *Id.*

<sup>54</sup> The judge uses her discretion whether to grant or deny the petition for an interlocutory appeal. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

<sup>55</sup> 28 U.S.C.A. § 1292(b) (West 2012). The “controlling question of law” standard has generally been held to “encompass at the very least every order which, if erroneous, would be reversible error on final appeal.” *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1975). But as this Note explains, even if a dispute satisfies the criteria, there is no guarantee the petition will be granted.

whether to permit the appeal.<sup>56</sup> Thus, for an appeal under section 1292(b) to be heard, both the district court *and* the appellate court must agree to the appeal.

By its terms, section 1292(b) is a limited exception to the final judgment rule. The plain language of section 1292(b) narrowly restricts its applications to a few limited circumstances, and the courts have refused to apply the statute broadly.<sup>57</sup> Particularly, courts interpreted section 1292(b) to be used “sparingly,” with most circuits restricting its application to “exceptional” or “big” cases.<sup>58</sup> Between 1995 and 2010, 117 petitions were filed pursuant to section 1292(b) in the Federal Circuit, but only thirty-four percent were granted.<sup>59</sup> Even more significant is that the Supreme Court has expressly stated that an appellate court may refuse to hear a section 1292(b) appeal “for any reason, including docket congestion,”<sup>60</sup> regardless of whether the petition met the criteria of section 1292(b). Hence, the consequences are that the statutory exception is (1) not often used and (2) when used, is not often successful.<sup>61</sup>

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<sup>56</sup> 28 U.S.C.A. § 1292(b) (West 2012). The Court of Appeals “may refuse to entertain such an appeal in much the same manner that the Supreme Court today refuses to entertain application for writs of certiorari.” S. REP. NO. 85-2434 (1958), *reprinted in* 1958 U.S.C.C.A.N. 5255, 5257.

<sup>57</sup> Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1171-74, 1193-96 (1990).

<sup>58</sup> *See, e.g.*, *Milbert v. Bison Labs., Inc.*, 260 F.2d 431, 435 (3d Cir. 1958) (declaring that “Congress intended that section 1292(b) should be sparingly applied. It is to be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals”); *Bobolakis v. Compania Panamena Maritima San Gerassimo*, 168 F. Supp. 236, 239 (S.D.N.Y. 1958) (stating “it is clear that this legislation was aimed at the ‘big’ and expensive case where an unusual amount of time and money may be expended in the pre-trial phases of the case or where the trial itself is likely to be long and costly.”); S. REP. NO. 85-2434, at 5259 (1958) (“[A]ppeals under this legislation should only be used in exceptional cases where an intermediate appeal may avoid protracted and expensive legislation and is not to be used or granted in ordinary litigation where the issues raised can otherwise be properly disposed of.”).

<sup>59</sup> Alexandra B. Hess, Stephanie L. Parker & Tala K. Toufanian, *Permissive Interlocutory Appeals at the Court of Appeals for the Federal Circuit: Fifteen Years in Review (1995-2010)*, 60 AM. U. L. REV. 757, 764 (2011).

<sup>60</sup> *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). Additionally, interlocutory appeals were only to be authorized to avoid “protracted and expensive litigation.” *Paschall v. Kan. City Star Co.*, 605 F.2d 403, 406 (8th Cir. 1979); *see also Kraus v. Bd. of Cnty. Road Comm’rs*, 364 F.2d 919, 922 (6th Cir. 1966) (Section 1292(b) “was not intended to authorize interlocutory appeals in ordinary suits for personal injuries or wrongful death that can be tried and disposed of on their merits in a few days.”). The same view dates back to the original codification of the final judgment rule in *Milbert*, 260 F.2d at 433.

<sup>61</sup> In the early years of section 1292(b), the Annual Reports of the Director of the Administrative Office of the United States Court suggested that applications to the court of appeals pursuant to section 1292(b) were made in approximately one-hundred cases per year. Roughly half of these applications were granted. *Interlocutory Appeals*, *supra* note 51, at 607 n.5. The statistics do not reveal the behavior of the district courts. *Id.* In the Seventh Circuit: “Since the beginning of 1999, this court has received 31 petitions for interlocutory appeal under . . . § 1292(b) and has granted only six of them.” *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000). A majority of the denials were “for jurisdictional

## 2. A Judicially Created Exception to the Final Judgment Rule: The Collateral Order Doctrine<sup>62</sup>

The judicial branch also created an exception to the final judgment rule known as the collateral order doctrine. The Court first developed the collateral order doctrine in 1949 in *Cohen v. Beneficial Industrial Loan Corporation*.<sup>63</sup> There, the Court identified the existence of a “small class” of interlocutory orders that could be immediately appealable.<sup>64</sup> Specifically, the Court explained that this “small class” regarded “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>65</sup> For nearly two decades the courts of appeals liberally applied the collateral order doctrine.<sup>66</sup>

Eventually, the Supreme Court limited the collateral order doctrine’s applicability. Consistent with 28 U.S.C § 1292’s limited application, the collateral order doctrine has also been applied in narrow circumstances.<sup>67</sup> To qualify within the “small class” of claims permitted by *Cohen’s* collateral order doctrine, the Court in *Coopers & Lybrand v. Livesay* established that an immediate appeal under *Cohen* must:

- (1) Conclusively determine the disputed question;
- (2) Resolve an important issue completely separate from the merits of the action; and

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reasons.” *Id.* Additionally in the Second Circuit: “§ 1292(b) has not caused a large problem in the federal appellate court. . . . The public record of the Second Circuit for the years 1994 and 1995 reveals a total for the two years of 35 motions for leave to appeal under § 1292(b), of which only eight were granted.” *Koehler v. Bank of Bermuda, Ltd.*, 101 F.3d 863, 866 (2d Cir. 1996).

<sup>62</sup> Besides the collateral order doctrine, the other judicially created exceptions pertain to property. *See Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848). These exceptions are rarely used, but are discussed in 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3929 (2d ed.) (West 2011).

<sup>63</sup> *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 543 (1949). In *Cohen*, a plaintiff brought a stockholder’s derivative action under diversity jurisdiction. *Id.* The district court judge refused to apply a state law that required the plaintiff to first file a security bond where the plaintiff held less than five percent of the total stock outstanding. The order was not final, thus the plaintiff’s case could proceed. *Id.* at 545. But, the Court found the order appealable, resolving an issue collateral to the merits of the case. *Id.* at 546-47.

<sup>64</sup> *Cohen*, 337 U.S. at 546.

<sup>65</sup> *Id.*

<sup>66</sup> Martineau, *supra* note 21, at 740. During the twenty year period, few orders did not qualify as appealable under the *Cohen* opinion. *Id.*

<sup>67</sup> The Court held that the collateral order doctrine “is best understood not as an exception to the ‘final decision’ rule laid down by Congress in § 1291, but as a ‘practical construction’ of it.” *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”).

(3) Be effectively unreviewable on appeal from a final judgment.<sup>68</sup>

Over the years, the doctrine's application to a "small class" of decisions eroded.<sup>69</sup> The collateral order doctrine now permits an immediate appeal of a wide-array of non-final orders.<sup>70</sup> Broadening the doctrine's application may have improved a party's situation, but it resulted in inconsistencies among the circuit courts. The circuits differ on defining and determining the types of interlocutory orders that qualify within the doctrine's scope. For instance, courts differ upon the role of "importance" in the application of the collateral order doctrine. The D.C. Circuit and Third Circuit define *Cohen* "separability" as imposing a requirement that the appeal must be "important."<sup>71</sup> In contrast, the Fourth Circuit does not even reference "importance" in its analysis of collateral order decisions.<sup>72</sup> Additionally, courts are split on the application of "unreviewability." The First and Seventh circuits require the presence of "irreparable harm" as the basis for jurisdiction,<sup>73</sup> whereas the Sixth, Tenth, and sometimes the First and Seventh Circuits require that rights be irretrievably lost before an order can qualify as collateral.<sup>74</sup> Such ambiguity in the

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<sup>68</sup> *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

<sup>69</sup> The Supreme Court still uses language of the "small class" to define the appealability of an interlocutory order. See *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995) (stating "[t]hat small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action."). It is my opinion that the "small class" is merely a term of art because the "class" has since enlarged. Moreover, the phrase serves to sustain the Court's support of the final judgment rule and its belief that the collateral order doctrine "never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 605 (2009) (citing *Digital Equip. Corp.*, 511 U.S. at 868 (citation omitted); see also *Will v. Hallock*, 546 U.S. 345, 350 (2006) ("emphasizing [the doctrine's] modest scope").

<sup>70</sup> See *Mitchell v. Forsyth*, 472 U.S. 511, 512 (1985) (holding that the doctrine permits the immediate appeal of pretrial orders denying the qualified immunity defense advanced by a defendant in a civil rights action); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974) (finding that the doctrine applies to orders in a class action dispute where the defendant assumes the costs of notice). Although this Note is limited to civil cases, the same narrow application of the *Cohen* doctrine is true in criminal cases. See, e.g., *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (stating that the *Cohen* doctrine is to be interpreted "with the utmost strictness") (quoting *Flanagan v. United States*, 465 U.S. 259, 265 (1984)).

<sup>71</sup> Separability is defined where "an issue is important if the interests that would potentially go unprotected without immediate appellate review of that issue are significant relative to efficiency interests sought to be advanced by adherence to the final judgment rule." *United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003) (citing *In re Ford Motor Co.*, 110 F.3d 954, 959 (3d Cir. 1997)).

<sup>72</sup> See *Under Seal v. Under Seal*, 326 F.3d 479, 481 (4th Cir. 2003).

<sup>73</sup> See Kristin B. Gerdy, "Important" and "Irreversible" but Maybe Not "Unreviewable": The Dilemma of Protecting Defendants' Rights Through the Collateral Order Doctrine, 38 U.S.F. L. REV. 213, 236-37 (2004).

<sup>74</sup> *Id.*

manner the doctrine is applied results in confusion. Unfortunately, the Supreme Court has resolved and clarified only a handful of these circuit splits.<sup>75</sup>

### 3. Other Exceptions to the Final Judgment Rule<sup>76</sup>

The Supreme Court also recognizes two exceptions to the final judgment rule within the Federal Rules of Civil Procedure. The first, codified in Rule 54(b), is invoked in cases involving multiple claims or parties.<sup>77</sup> Under this rule, a district court judge may directly enter a judgment for one or more, but less than all, of the claims or parties if the judge makes an express determination that there is no just reason to delay entry.<sup>78</sup> This judgment may be immediately appealed.<sup>79</sup>

On its face, Rule 54(b) appears to violate the definition of “final decision” because it permits early judgment on any claim. The Court explained that the Federal Rules of Civil Procedure allow joinder of claims and parties, which “in turn, demonstrate[s] a need for relaxing the restriction upon what should be treated as a judicial unit for purposes of appellate jurisdiction.”<sup>80</sup> This judicial unit concept “was developed from the common law which had dealt with litigation generally less complicated than much of that today.”<sup>81</sup> Accordingly, Rule 54(b)’s relaxation on finality is limited to cases involving multiple claims and thus does not directly contradict the final judgment rule.

The second exception is embodied in Federal Rule of Civil Procedure 23(f).<sup>82</sup> Before its amendment in 1998, interlocutory review of class certification was subject to the same stringent requirements and restraints of the final judgment rule.<sup>83</sup> Today, 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. An

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<sup>75</sup> See, e.g., *Mohawk Indus., Inc.*, 130 S. Ct. at 603 (holding that disclosure orders adverse to attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 624 (2009) (allowing interlocutory appeal to a non-signatory seeking to enforce an arbitration agreement).

<sup>76</sup> While this Note only discusses the statutory exception to the final judgment rule in the Federal Rules of Civil Procedure, another statutory exception is the writ of mandamus as defined by federal statute. 28 U.S.C. § 1651 (2006). The statute permits interlocutory review only in “extraordinary” circumstances. See *Will v. United States*, 389 U.S. 90, 95-97 (1967) (explaining the statute’s restrictive application).

<sup>77</sup> FED. R. CIV. P. 54(b).

<sup>78</sup> *Id.*

<sup>79</sup> *Sears, Roebuck, & Co. v. Mackey*, 351 U.S. 427, 437-38 (1956). If the party does not immediately appeal this judgment, then it may not be appealed when the judgment disposing of all remaining claims is entered. See, e.g., *Martineau*, *supra* note 21, at 737.

<sup>80</sup> *Sears, Roebuck, & Co.*, 351 U.S. at 432.

<sup>81</sup> *Id.*

<sup>82</sup> FED. R. CIV. P. 23(f).

<sup>83</sup> *Solimine*, *supra* note 57, at 1535-36.

appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders it.<sup>84</sup>

Under this rule, the authority to allow an immediate appeal shifts from the district court to the appellate court. The rule differs from section 1292(b), which requires a party to seek permission to appeal from the district court.<sup>85</sup> The Advisory Committee viewed this departure as a way to “make appeals more readily available.”<sup>86</sup> But like the other exceptions, permission for an interlocutory appeal under Rule 23(f) will “rarely be given,”<sup>87</sup> thus perpetuating inefficiency and unfairness under the current federal system.

### III. DISCUSSION

The ultimate goal of the appellate system is to “expedite the disposition of interlocutory rulings in which timeliness is essential.”<sup>88</sup> In theory, appellate review provides: (1) uniform results; (2) higher probabilities of correct judgment; and (3) increased belief that a party’s dispute has been fully and fairly heard.<sup>89</sup> In practice, the result is the opposite.<sup>90</sup>

Commentators suggest solutions to the problems of the federal interlocutory system, including: expanding the statutory list of exceptions;<sup>91</sup> permitting more interlocutory appeals;<sup>92</sup> and making individual exceptions to the final judgment rule that permit the immediate appeal of a particular class of orders that the specific interlocutory order falls.<sup>93</sup> These suggestions are not in practice,<sup>94</sup> and thus there is

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<sup>84</sup> FED. R. CIV. P. 23(f).

<sup>85</sup> JUDICIAL CONFERENCE OF THE U.S., ADVISORY COMMITTEE ON CIVIL RULES, MINUTES OF NOVEMBER 9-10, 1995 3 (1995), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/min-cv11.htm>.

<sup>86</sup> *Id.* at 2.

<sup>87</sup> *Id.* at 1.

<sup>88</sup> Memorandum from Richard Van Duiezend, Principle Court Mgmt. Consultant, Nat’l Ctr. for State Courts, Introductory Overview of Massachusetts Single Justice Practice (July 2008) (on file with author) (summarizing Massachusetts’s single justice procedure), *available at* <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/appellate/id/129>.

<sup>89</sup> Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 771 (2006); *see also* Dalton, *supra* note 15, at 62 (“[A]ppellate courts exist to correct errors; to develop legal principles; and to tie geographically dispersed lower courts into a unified, authoritative legal system.”).

<sup>90</sup> *See supra* Part II.B.

<sup>91</sup> Crick, *supra* note 10, at 563-65. Crick is an early commentator on the final judgment. He suggests that to expand the statutory scheme, the system must abolish the right to appeal and the final judgment rule completely. His ideas are still considered amidst the commentary on the federal appellate system, even though this publication is dated before the creation of section 1292(b) and the collateral order doctrine.

<sup>92</sup> Solimine, *supra* note 57, at 1171-74, 1193-96.

<sup>93</sup> Martineau, *supra* note 21, at 729.

minimal evidence that such theories would adequately improve the federal appellate system.

### A. *The Hypothesis*

This Note does not offer yet another, theoretical proposal; there are plenty of valuable ideas that have been tested and implemented at the state level that should be examined for federal use. While most states follow the federal model, some states<sup>95</sup> have developed their own systems in an attempt to reduce the confusion and unfairness created under the federal approach. These state systems often provide the necessary supporting evidence of what works and what does not. For instance, in Texas, a petition for an interlocutory appeal could only be made if all the parties *and* the trial court judge agreed.<sup>96</sup> Agreement was rare, and within the year of enactment, the Texas legislature removed this hurdle.<sup>97</sup>

The actual implementation of a method, like in Texas, provides the necessary proof that can aid a decision of whether to continue with such an approach or possibly adopt another state's approach. Every effort may not work, but its implementation and adoption from the state level embodies federalism's classic, central tenet: "states as laboratories"<sup>98</sup> in which hypotheses are tested and results evaluated. It is from these results at the state level that a federal system can effectively and efficiently develop.

### B. *The Experiments*

#### 1. New York: The All-Appeal System

Making appeals more accessible lessens the resulting unfairness caused by the federal interlocutory appeals system. This result is evidenced by the approach taken in New York. On the spectrum of what is appealable, New York is the most generous.<sup>99</sup> New York procedural law permits a petition for interlocutory appeal of *any* non-final order regarding legal disputes.<sup>100</sup> The rationale behind this liberal approach helps a party avoid irreparable damage, such as unnecessary costs in

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<sup>94</sup> While New York and Massachusetts permit all interlocutory appeals, there is little commentary that references the two states to support this theory.

<sup>95</sup> These states include Delaware, Georgia, Maine, Massachusetts, New Jersey, New York, Texas, Washington, and Wisconsin. See David Scheffel, *Interlocutory Appeals in New York—Time has Come for a More Efficient Approach*, 16 PACE L. REV. 607 (1996).

<sup>96</sup> Ryan Brannan, *Returning Justice to the Judicial System: Procedural Protections from Frivolous Litigation*, TEX. PUB. POL'Y FOUND. POLICY PERSPECTIVE, Apr. 14, 2011, at 1, available at <http://www.texaspolicy.com/pdf/2011-04-PP03-LosersPays-rb.pdf>.

<sup>97</sup> The change occurred on September 1, 2011. See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (West 2011).

<sup>98</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280-81 (1932) (Brandeis, J., dissenting).

<sup>99</sup> Scheffel, *supra* note 95, at 613-19 ("New York [is] one of the most liberal jurisdictions in the United States," allowing a party to appeal, "by right, almost any civil interlocutory order."); see also *La Buy v. Howes Leather Co.*, 352 U.S. 249, 268 (1957) (citing New York as an extreme example for allowing review by right of almost any order).

<sup>100</sup> N.Y. C.P.L.R. § 5701 (McKinney 2011).

continuing with meritless litigation.<sup>101</sup> Additionally, New York's reasons for adopting this system attempt to avoid some of the federal system's most common critiques.<sup>102</sup>

According to the New York State Bar Association (NYSBA), the rigid federal model "was not . . . a promising one for New York to follow."<sup>103</sup> Primarily, the NYSBA argued that the federal model allowed too few certifications for appeal.<sup>104</sup> This limitation imposed a risk of irreparable harm because the adversely affected party could face an unnecessary trial.<sup>105</sup> Instead, the New York approach increases fairness for a party seeking an appeal. This is because all interlocutory issues are appealable.<sup>106</sup>

Another benefit of the all-appeal approach is improved efficiency within the courts. The opportunity to immediately appeal increases efficiency because it reduces both the risk of a useless trial by providing a quick avenue for error correction and the amount of time, resources, and money a party would spend in continuing litigation.<sup>107</sup>

While the New York approach is advantageous to the parties,<sup>108</sup> a main concern is that it risks unduly burdening the courts. More opportunities to appeal increase a

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<sup>101</sup> See *supra* Part II.

<sup>102</sup> See *supra* Part II.B; see also *infra* notes 103-105.

<sup>103</sup> Ellen B. Fishman, *State Bar Recognizes Importance of Interlocutory Appeals*, 2 LEAVEWORTHY 2, 3 (Summer 2011) [hereinafter *NYSBA Report*] (New York State Bar Association (NYSBA) Committee on Courts of Appellate Jurisdiction) (newsletter describing a study by the NYSBA and Civil Practice Law and Rules' Committees on New York's system of interlocutory appeals); see also N.Y. STATE BAR ASS'N (NYSBA) COMM. ON CIVIL PRACTICE LAW & RULES & COMM. ON COURTS OF APPELLATE JURISDICTION, REPORT ON INTERLOCUTORY CIVIL APPEALS IN NEW YORK STATE COURTS (Oct. 2010) (report on Interlocutory Civil Appeals in New York State Courts opining that "a broad right to take interlocutory appeals, should be maintained.").

<sup>104</sup> *NYSBA Report*, *supra* note 103.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

"For instance, summary judgment is not infrequently granted on appeal in whole or part, thus saving the parties and the court system from a wholly unnecessary trial on some or all of the issues in the case. Likewise, if an order compelling disclosure of a key piece of evidence is upheld on appeal, that may well encourage the parties to reach a settlement disposing of the matter entirely."

*Id.* (emphasis added).

<sup>107</sup> See *id.*

<sup>108</sup> Granted, it is more advantageous for the party seeking an appeal; however, the other party would still benefit in the cost-reduction and the time saved with the interlocutory appeal, especially when litigation costs are on the rise. LAWYERS FOR CIVIL JUSTICE, CIVIL JUSTICE REFORM GRP. & U.S. CHAMBER INST. FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES 3-4 (2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf>.



burgeoning caseload docket, which critics<sup>109</sup> argue imposes an additional burden upon the court. Along with docket congestion, the ability to immediately appeal *any* matter may interrupt, and thus interfere, with the trial court process. As a result, delays may occur that could also burden the court.<sup>110</sup>

Those burdens, however, are slight. First, according to NYSBA the current caseload congestion in New York is not the product of interlocutory appeals.<sup>111</sup> The largest portion of the appellate docket consists of non-interlocutory appeals.<sup>112</sup> Second, when a party makes a petition for an interlocutory appeal, the court's decision is based upon a minimally developed record. These decisions concern few questions of law and leave the factual disputes undisturbed.<sup>113</sup> Limiting decisions to fewer legal issues requires shorter appellate opinions, reducing the burden on the court.<sup>114</sup> Thus, adopting an all-appeal system grants parties a fair opportunity to avoid unnecessary litigation without reducing the efficiency of the courts.

Critics have also argued that the New York approach "may lead to excessive appellate intrusion, demoralizing the trial judge."<sup>115</sup> Allowing every order to be appealable without a valid reason is potentially disrespectful to the trial judge. This "encroach[ment] upon the prerogatives of district court judges" is one reason why Congress and the Court sought to prohibit non-final appeals.<sup>116</sup>

This argument is flawed for two reasons. First, the court has a purpose to administer justice. This purpose supersedes any "encroachment." Judges are sworn, under oath, "to do right to all manner of people" whose administrative purpose is to maintain right, to uphold justice, to protect rights, and "to redress wrongs."<sup>117</sup> Often, these judges sit on courts that will in some instances function as error-correcting

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<sup>109</sup> See Scheffel, *supra* note 95, at 608 (arguing that because New York is facing a caseload crisis, the all-appeal process must be reevaluated to improve the situation).

<sup>110</sup> ROBERT MACCRATE ET AL., APPELLATE JUSTICE IN NEW YORK 87 (1982) (stating interlocutory appeals take up a significant amount of the appellate courts' caseload and they are often used as a delay tactic disrupting the trial process).

<sup>111</sup> NYSBA Report, *supra* note 103.

<sup>112</sup> *Id.* at 2-3.

<sup>113</sup> Another supporting argument by NYSBA is that an interlocutory appeal is also taken without an oral argument, decreasing the potential for a burdened court. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Scheffel, *supra* note 95, at 608; see also Jill Paradise Botler et al., *The Appellate Division of the Supreme Court of New York: An Empirical Study of its Powers and Functions as an Intermediate State Court*, 47 FORDHAM L. REV. 929, 954 (1979) (stating "free appealability affords the Appellate Division substantial opportunity to supervise the trial court and to ensure that its actions are within permissible legal and discretionary bounds.").

<sup>116</sup> *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603 (2009) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)); see also *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985) ("It would also undermine the ability of district judges to supervise litigation.").

<sup>117</sup> SIR JOHN WILLIAM SALMOND, JURISPRUDENCE: OR THE THEORY OF THE LAW 13 (1907). For further discussion of the error-correcting function of the appellate courts, see Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUDIES 379 (1995).

bodies.<sup>118</sup> For instance, the NYSBA found several “incidence[s] of modification or reversal of orders by the Appellate Division”<sup>119</sup> demonstrating this error-correcting function within its state system. Given the court’s purpose and judge’s oath, this error-correcting component should not be avoided for fear of treading upon the judge’s feelings. Second, the district court judge maintains authority over the merits of case even when a party makes a petition. While an appeal pends, the party must seek permission to stay the underlying case.<sup>120</sup> Such stays are rarely granted, thus the case continues under that judge minimizing any “encroachment” or interruption of adjudication.<sup>121</sup>

## 2. Massachusetts: The All-Appeal System Under a Single Justice

By making interlocutory appeals more accessible, we must make efforts to reduce the potential burden from increased litigation on the courts. One example of such effort is in Massachusetts. Massachusetts adopts the same generous standard as New York in permitting petitions to appeal for all non-final orders.<sup>122</sup> Yet, Massachusetts has a unique approach to the interlocutory appeal procedure. Appeals are permitted through the discretion of a separate, designated justice at the state appellate level.<sup>123</sup> The justice considers all petitions for review.<sup>124</sup> This system gives the single justice the same power as a full bench, but the interlocutory appeals exist entirely on a separate docket. The separate bench and docket conserves the appellate division’s resources because plenary appellate review is avoided and a judge’s docket is not inundated with interlocutory appeal petitions.<sup>125</sup>

The sole justice has broad discretion to decide whether to grant the petition for an appeal, which invokes criticism.<sup>126</sup> Under this system, no other justice provides a

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<sup>118</sup> *Pennsylvania v. Bruder*, 488 U.S. 9, 13 (1988) (Marshall J., dissenting) (acknowledging the error-correcting function of the Supreme Court); *Irving v. United States*, 162 F. 3d 154, 161 (1st Cir. 1998) (explaining that the en banc court authority “to overrule the decision of a prior panel in the same case flows logically from the error-correcting function of the full court.”).

<sup>119</sup> Memorandum from Ellen B. Fishman to Hon. Stephen Crane, Chair, Civil Practice Law & Rules Comm., New York State Bar Association (NYSBA) 4 (Sept. 13, 2010) (on file with author) [hereinafter NYSBA Memorandum] (citing Bentley Kassal, *Update: Did the Appellate Odds Change in 2008? Appellate Statistics in State and Federal Courts*, N.Y. STATE BAR ASS’N J., Nov./Dec. 2009, at 36).

<sup>120</sup> N.Y. C.P.L.R. § 5519 (McKinney 2011).

<sup>121</sup> NYSBA Memorandum, *supra* note 119, at 2-3.

<sup>122</sup> MASS. GEN. LAWS ch. 231, § 118 (2011).

<sup>123</sup> *Id.*

<sup>124</sup> Scheffel, *supra* note 95, at 644.

<sup>125</sup> *See id.* The justices take turns sitting as the sole justice for one month at a time serving on a docket separate from full court proceedings. *See* MASS. GEN. LAWS ch. 221, §§ 13, 15 (2011).

<sup>126</sup> John H. Henn, *Civil Interlocutory Appellate Review Under G.L.M. C. 231, § 118 and G.L.M. C. 211, § 3*, 81 MASS. L. REV. 24, 25 (1996) (“the single justice is given broad discretion in deciding whether to grant it. A single justice has extensive power to grant relief; whether he or she will do so is an entirely different matter.”).

check on a potentially “dangerous”<sup>127</sup> power as generally follows in a plenary appellate system. Additionally, relief from the higher court is rare and invoked only “to correct and prevent errors and abuses . . . where no other remedy is expressly provided.”<sup>128</sup> The decision requires no accompanying rationale, leaving a party in the dark as to the reasons for a denial. Thus, a party faces an extremely unfair system—a system that is highly discretionary, with little guidance of what is required to achieve an interlocutory appeal, and little relief from the decision.<sup>129</sup>

To increase fairness under this model, the solution is simple—require written opinions to accompany the decision.<sup>130</sup> The “dangerous power” is thereby diminished, because the justice could be held responsible for his decision by providing reasons for it.<sup>131</sup> Such accountability may force the justice to craft a thoughtful opinion.

The simple addition of a written opinion would not burden the single justice system, because the system exists on a separate docket where judges rotate terms over the docket. Also, like New York, interlocutory appeals do not make up the majority of the Massachusetts appellate docket.<sup>132</sup> With limited data as to the filing

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<sup>127</sup> Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 252-53 (2001).

<sup>128</sup> Memorandum from Richard Van Duizend, *supra* note 88 (describing the purpose of MASS. GEN. LAWS ch. 211, § 3); *see also* Elizabeth McElaney, *A Unique Tool for the Massachusetts Practitioner—Single Justice Review of Interlocutory Orders*, 15 SUFFOLK J. TRIAL & APP. ADVOC. 233, 234 (2010); *see also* Thibbitts v. Crowley, 539 N.E.2d 1035, 1037 n.5 (1989) (stating that interlocutory appeals are not favored).

<sup>129</sup> The party cannot appeal the justice’s decision to deny a petition for an interlocutory appeal. *Thibbitts*, 539 N.E.2d at 1037.

<sup>130</sup> Currently, Massachusetts does not require the justice to write an opinion. *Id.* For further discussion as to the benefits of a mandated written opinion, see Part III.C.

<sup>131</sup> Furthermore, justices for the Supreme Judicial Court and the Appeals Court, each with jurisdiction over interlocutory appeals with a single justice docket, are appointed by the Governor of Massachusetts with the consent of the Governor’s Executive Council. *See* MASS. CONST. ch. II, sec. I, art. IX (describing the justice selection in Massachusetts). Both the Governor and the Executive Council are elected, and thus there is a political check over the justices and the threat of a “dangerous” power is further diminished. *See* MASS. CONST. ch. II, sec. I, art. II (explaining the process of gubernatorial elections); MASS. CONST. ch. II sec. I amend. XVI (amended by MASS. CONST. ch. II, sec. I, art. XVI) (stating the council election proceedings).

<sup>132</sup> In 2007, a total of 1,984 cases were entered in the Appeals Court, and an additional 647 cases were entered in the single justice docket. The number of entries on the single justice docket represented a decrease of 7.2 percent from 2006. *Report of the Appeals Court: FY2007*, MASS. JUDICIAL BRANCH: MASS. APPEALS COURT, <http://www.mass.gov/courts/appealscourt/2007-report.html> (last visited Dec. 15, 2011). In 2008, 2,083 entered the Appeals Court, with an additional 597 cases presented to the single justice docket, a decrease of 7.7 percent from 2007. *Report of the Appeals Court: FY2008*, MASS. JUDICIAL BRANCH: MASS. APPEALS COURT, <http://www.mass.gov/courts/appealscourt/2008-report.html> (last visited Dec. 15, 2011); *see also* NAT’L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS 2008 (e-mail on file with author) (the National Center has not published the statistics for 2009, but they are believed to be forthcoming). Not all reported entries concern interlocutory appeals, demonstrating that the interlocutory appeal, in an all-appeal system, is not unduly burdening a court with an exorbitant amount of additional appeals. *See About the*

rates of interlocutory appeals taken in the federal system, state data offers the necessary proof that interlocutory appeals, in an all-appeal system, do not automatically burden the court with an influx of cases.<sup>133</sup>

Concerns arise that, given the complexity of many federal civil suits, the all-appeals system would be ineffective.<sup>134</sup> However, the federal circuit has significant leeway before an all-appeal system would make any impact. In 2009, the United States Court of Appeals concluded a mere 334 applications for interlocutory appeals, whereas the termination rate of *all* appeals reached upwards of 60,508 cases.<sup>135</sup> With over two hundred times the interlocutory appeal rate, it is likely that increasing access to appeals would have a minimal effect on appellate dockets. However, to prepare for the caseload increase, employing a single justice with authority over a separate docket would help conserve resources without sacrificing efficiency, as demonstrated by Massachusetts.

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*Court*, MASS. JUDICIAL BRANCH: MASS. APPEALS COURT, <http://www.mass.gov/courts/appealscourt/about-the-court.html> (last visited Dec. 15, 2011) (the single justice reviews orders for injunctive relief, “requests for review of summary process appeal bonds, certain attorney’s fee awards, motions for stays of civil proceedings or criminal sentences pending appeal, and motions to review impoundment orders.”).

<sup>133</sup> See Robertson, *supra* note 89, at 773 (Robertson argues that the courts’ workload would dramatically increase because she believes all cases involving privilege claims would be petitioned for review; however, Robertson fails to offer evidence that those claims would spur such an increase).

<sup>134</sup> Martineau, *supra* note 21, at 777.

<sup>135</sup> ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES: MULTI-YEAR STATISTICAL COMPILATIONS ON THE FEDERAL JUDICIARY’S CASELOAD THROUGH FISCAL YEAR 2009 tbl.2.1 and 2.7 (May 2010), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2009/alljudicialfactsandfigures.pdf>. Even though there is no report on the success of such appeals, it is likely safe to presume that the courts continued their historical support of the final judgment rule and thus, doubtful many applications were even granted.

### 3. Wisconsin: The Discretionary System<sup>136</sup>

Another model emphasizes the discretion of the judge in making the decision to grant a petition for review. This approach is the most commonly offered theory on expanding appellate jurisdiction.<sup>137</sup> The American Bar Association (ABA) promulgated this approach, which Wisconsin adopted and has continued to use for the past thirty years.<sup>138</sup>

Like the federal system, the Wisconsin method permits appeals of disputes after the judgment is formally final.<sup>139</sup> However, the Wisconsin system also permits petitions for interlocutory appeals if the case qualifies for review under the “whenever justice requires” exception in the Wisconsin statute.<sup>140</sup> This provision authorizes a judge to use broad discretion when reviewing and determining if an appeal is warranted.<sup>141</sup> The exception effectively eliminates the judicially created

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<sup>136</sup> Other states adopt discretionary approaches in their state statutes, but their methods are not discussed in this Note. These include Delaware, DEL. SUP. CT. R. 42 (d)(v) (“[T]his Court shall . . . determine in its discretion whether to accept or refuse the interlocutory appeal . . . . In exercising that discretion, this Court may consider all relevant factors, including the decision of the trial court, whether to certify interlocutory appeal.”); Georgia, GA. SUP. CT. R. 31 (granting permission to appeal interlocutory order in three instances: “(1) [t]he issue to be decided appears to be dispositive of the case; (2) [t]he order appears erroneous and will probably cause a substantial error at trial; or (3) [t]he establishment of a precedent is desirable.”); Maine, ME. R. RAP. 24(c) (“If the trial court is of the opinion that a question of law involved in an interlocutory order or ruling made by it ought to be determined by the Law Court before any further proceedings are taken, it may on motion of the aggrieved party report the case to the Law Court for that purpose and stay all further proceedings except such as are necessary to preserve the rights of the parties without making any decision therein.”); New Jersey, N.J. R. 2:2-4 (declaring “the Appellate Division may grant leave to appeal, in the interest of justice, from any interlocutory order . . . if the final judgment, decision or action thereof is appealable as of right pursuant to R. 2:2-3(a).”); and Washington, WA. RAP. 2.3(b)(1)-(4) (stating that review will be granted if the lower court: “has committed an obvious error which would render further proceedings useless; . . . [or] has committed probable error and the decision . . . substantially alters the status quo or substantially limits the freedom of a party to act; . . . [or] has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure . . . as to call for review by the appellate court; . . . [or] superior court has certified, or that all parties to the litigation have stipulated.”).

<sup>137</sup> See, e.g., Martineau, *supra* note 21, at 788; Nagel, *supra* note 32, at 201.

<sup>138</sup> Andrew Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1661 (2011).

<sup>139</sup> WIS. STAT. ANN. § 808.03(1) (West 2011) (providing that “[a] final judgment or final order is a judgment or order entered in accordance with sections 806.06(1)(b) or 807.11(2) [when it is filed with the office of the clerk of the court]. . . .”).

<sup>140</sup> Nagel, *supra* note 32, at 216.

<sup>141</sup> Wisconsin granted appeals in cases involving double jeopardy (*State v. Fischer*, No. 90-2855-CR, 1991 Wis. App. LEXIS 220 (Wis. Ct. App. Mar. 12, 1991)), appointment of counsel in a civil contempt action (*Brotzman v. Brotzman*, 283 N.W.2d 600 (Wis. Ct. App. 1979)), jurisdiction over a minor by a juvenile court (*G.B.K. v. State*, 376 N.W.2d 385 (Wis. Ct. App. 1985) (minor accused of murder)), a claim that a delinquency petition was untimely (*C.A.K. v. State*, 433 N.W.2d 298 (Wis. Ct. App. 1988)), *aff’d*, 453 N.W.2d 897 (Wis. 1990)), subject-matter jurisdiction in an insurance dispute (*Sipl v. Sentry Indem. Co.*, 431 N.W.2d 685 (Wis. Ct. App. 1988)), choice of law (*Gavers v. Fed. Life Ins. Co.*, 345 N.W.2d 900 (Wis. Ct. App.

exceptions to the final judgment rule, because all decisions lie within the discretion of the judge as opposed to the generic, confusing list of criteria used in the federal system.<sup>142</sup>

The criteria for discretionary review are whether (1) the termination of the proceedings will be materially advanced, (2) the proceedings will be clarified, (3) the litigant will suffer substantial or irreparable harm absent appeal, or (4) appeal will clarify an issue of general importance.<sup>143</sup> This language provides that discretion apply on a case-by-case basis. Although this approach may promote fairness,<sup>144</sup> the broad language has its drawbacks. Specifically, relying on four, general criteria could lead to the same confusion as the circuits' application of the collateral order doctrine criteria. Additionally, judges are not required to give a reason for a denial, and yet they have the discretion to deny for an unrelated matter.<sup>145</sup> The combination of the powerful discretion and the lack of an explanation create an unpredictable and unfair environment for the parties.

Despite this drawback, the Wisconsin discretionary approach is a technique that can be readily adopted in the federal model and is highly beneficial for purposes of judicial efficiency. First, relying on the discretion of judges eliminates the need to create more exceptions where much of the confusion between the circuits lies. Second, imposing a discretionary model improves judicial efficiency because it reduces judges' decision-making time.<sup>146</sup> Lastly, invoking judicial discretion causes

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1984)), refusal to submit to a blood test as civil contempt (*State v. A.W.O.*, 344 N.W.2d 200 (Wis. Ct. App. 1983)), an order compelling testimony of a minor in a child abuse prosecution (*State v. Gilbert*, 326 N.W.2d 744 (Wis. 1982)), constitutionality of judicial substitution statutes postponement of hearing on a petition to vacate a street (*Selk v. Twp. of Minocqua*, 422 N.W.2d 889 (Wis. Ct. App. 1988) (court of appeals granted petition to appeal and in turn certified case to supreme court)), statutory construction (*State v. Holmes*, 315 N.W.2d 703 (Wis. 1982)), disqualification of a party's attorney, change of venue (*Irby v. Young*, 407 N.W.2d 314 (Wis. Ct. App. 1987)), and discovery (*Vincent & Vincent, Inc. v. Spacek*, 306 N.W.2d 85 (Wis. Ct. App. 1981) (appeal from order denying a protective order and directing party to answer series of written interrogatories)).

<sup>142</sup> See Part II.C.2.

<sup>143</sup> See WIS. STAT. ANN. § 808.03(2) (West 2011).

<sup>144</sup> Martineau, *supra* note 21, at 782.

<sup>145</sup> *Id.* at 777.

<sup>146</sup> See *supra* note 60. The judge would avoid the multi-step criteria often required when analyzing a petition for interlocutory review. In an early case, the Fifth Circuit made an astute observation on the need for a judge's discretion:

[Section 1292(b)] was a judge-sought, judge-made, judge-sponsored enactment. Federal Judges from their prior professional practice, and more so from experience gained in the adjudication of today's complex litigation, were acutely aware of two principal things. First, certainty and dispatch in the completion of judicial business makes piecemeal appeal as permitted in some states undesirable. But second, there are occasions which defy precise delineation or description in which as a practical matter orderly administration is frustrated by the necessity of a waste of precious judicial time while the case grinds through to a final judgment as the sole medium through which to test the correctness of some isolated identifiable point of fact, of law, of substance or procedure, upon which in a realistic way the whole case or defense will turn. The amendment was to give to the appellate machinery of [28 U.S.C.] §

little change to the federal system, because the federal system already applies a highly discretionary standard for certification of interlocutory appeals.<sup>147</sup>

### C. *A Long-Term Solution: Mandating Written Opinions*

Adopting the states' methods will improve fairness and efficiency without unduly burdening courts.<sup>148</sup> A requirement of a written opinion could shed light on any inconsistencies or trends between the circuits.<sup>149</sup> For instance, if an exorbitant number of judges decide to deny an interlocutory appeal for reasons of case congestion, the legislature could seek steps to alleviate this trend. Additionally, the opinions would aid in predicting a party's chance to prevail while providing the information necessary to make an educated decision to petition for an interlocutory appeal. Moreover, if a party decides to petition, an explanation accompanying the decision provides a helpful check on the justice as to whether he fairly considered the petition without wasting the party's time and finances.<sup>150</sup>

#### 1. Quantitative Data

Currently, there is no way to know the exact rationale of the courts, because there is no mandatory requirement to draft opinions for decisions involving either section 1292(b) or the collateral order doctrine.<sup>151</sup> All that is required is for the district court to provide a minimal statement as to whether the statutory criteria has been satisfied.<sup>152</sup> The statement need not include the grounds for the judge's certification, and therefore even "cryptic orders have proved effective, even to the point of supporting appeal without expressly stating the controlling question."<sup>153</sup> Parties are

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1291. . . a considerable flexibility operating under the immediate, sole and broad control of Judges so that within reasonable limits disadvantages of piecemeal and final judgment appeals might both be avoided.

*Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 702-03 (5th Cir. 1961).

<sup>147</sup> See Part II.

<sup>148</sup> See Parts III.A-C.

<sup>149</sup> Assuming the Wisconsin method is not adopted, the opinions would also give information on the manner in which the current federal standards, such as the *Cohen* criteria, are defined.

<sup>150</sup> The single justice process is also informal, requiring that the aggrieved party file his or her petition within thirty days of the issuance of the order. See Scheffel, *supra* note 95, at 624.

<sup>151</sup> The majority of the state statutes simply mirror the federal model. Thus, the states impose a duty on the district court, when certifying an appeal, to explain their reasonings for the appeal. See, e.g., *Town of Fitchburg v. City of Madison*, 299 N.W.2d 199, 210 n.4 (Wis. 1980) (explaining that the Supreme Court of Wisconsin would not review the appellate court's decision to refuse to hear an interlocutory appeal).

<sup>152</sup> See generally 16 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3930 (2d ed. 1996).

<sup>153</sup> *Id.*

thus left in the dark as to the reasons for denials and potentially unable to predict the petition's success.<sup>154</sup>

Withholding an explanation for a denial diminishes a prime opportunity to see the inner workings of the courts, explain judiciary behavior, and collect evidence of problems or trends in decisions. Judge Posner adequately described the difficulty in assessing the judiciary's behavior as "a mystery that is also an embarrassment."<sup>155</sup> Still, we are dealt with a system where Congress authorized courts to deny an application for an interlocutory appeal when,

[B]ased upon a view that the question involved was not a controlling issue. It could be denied on the basis that the docket of the circuit court of appeals was such that the appeal could not be entertained for too long a period of time. But, whatever the reason, the ultimate determination concerning the right of appeal is within the discretion of the judges of the appropriate circuit court of appeals.<sup>156</sup>

Such authority may result in a variety of reasons for a denial, or the petition may be denied solely because of case congestion. Unfortunately, there is no way to know for certain which it may be. Absent an explanation, a court of appeals may even conclude that the district judge failed to consider the relevant statutory criteria, when in fact the judge properly did so.

Additionally, the federal courts allow judicial discretion on interlocutory appeal decisions. Judges are best suited to make an educated decision, because they know their docket and their cases.<sup>157</sup> Without a rationale, we are excluded from some of the purest data on the court systems.

## 2. Qualitative Data

Lack of an opinion is just as harmful when a decision to "grant" the petition is made. Currently, the federal model is an "unacceptable morass,"<sup>158</sup> "manag[ing] to be at once redundant, incomplete, and unclear."<sup>159</sup> The inability to clearly define the

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<sup>154</sup> An argument can be raised that a petitioner could assess the success rate because most petitions for interlocutory appeal are denied. See Part II. However, as circuit splits go unresolved, the rising confusion regarding the differing criteria could cause difficulty in predicting outcomes or potentially force a party to change strategy in selecting the forum. This is an assumption by the author.

<sup>155</sup> Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 10 (1993).

<sup>156</sup> S. REP NO 85-2434 (1958), reprinted in 1958 U.S.C.C.A.N. 5255, 5257.

<sup>157</sup> These judges are the most knowledgeable on the issue because they were the authority over the record. See *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985) ("[T]he district judge can better exercise [his or her] responsibility [to police the prejudgment tactics of litigants] if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings.").

<sup>158</sup> Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 LAW & CONTEMP. PROBS. 171, 172 (1984).

<sup>159</sup> *Palmer v. City of Chicago*, 806 F.2d 1316, 1318 (7th Cir. 1986).



exceptions has produced widespread dissatisfaction.<sup>160</sup> The need for clarification is extremely important given the current state of litigation.<sup>161</sup> Specifically, written opinions would offer insight into circuit splits or specific cases that are often granted for interlocutory review. Such information could aid the legislature in enacting new guidelines for interlocutory review, or help both the legislature and the Court to definitively permit interlocutory review for a specific issue.<sup>162</sup> By providing clarity to interlocutory appeal criteria, steps can be taken towards developing a more expansive interlocutory appeal practice.<sup>163</sup>

#### IV. CONCLUSION

Changes are slow and arguably ineffective in improving fairness and efficiency. The Court and Congress skewed the rules in such a manner to continue adhering to the final judgment rule. First, Congress appeared to have answered the discontent in the finality requirement by introducing section 1292(b). On its face, this doctrine appears to ameliorate the litigant's concern for fairness and efficiency. However, its application to few interlocutory orders did not come close to improving fairness and efficiency or even addressing the litigant's concerns.

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<sup>160</sup> See, e.g., FED. COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 95 (1990). The Committee explained,

The state of the law on when a district court ruling is appealable because it is “final,” or is an appealable interlocutory action, strikes many observers as unsatisfactory in several respects. The area has produced much purely procedural litigation. Courts of appeals often dismiss appeals as premature. Litigants sometimes face the possibility of waiving their right to appeal when they fail to seek timely review because it is unclear when a decision is “final” and the time for appeal begins to run. Decisional doctrines—such as “practical finality” and especially the “collateral order” rule—blur the edges of the finality principle, require repeated attention from the Supreme Court, and may in some circumstances restrict too sharply the opportunity for interlocutory review.

*Id.*; see also Martineau, *supra* note 21, at 747.

<sup>161</sup> *Federal Judicial Caseload Statistics*, U.S. COURTS tbl.B (2011), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/B00Mar11.pdf>. Even in state courts, where, over the past nine years, civil caseloads increased twenty-eight percent. Nat'l Ctr. for State Courts, *Civil Caseloads Level Off After Three Years of Growth*, COURT STATISTICS PROJECT (2010) [hereinafter Nat'l Ctr. for State Courts], <http://www.courtstatistics.org/Civil/CivilGrowth.aspx>.

<sup>162</sup> Nat'l Ctr. for State Courts, *supra* note 161. Currently, a common trend is expanding interlocutory review in cases involving class actions and patents. See Thomas D. Nevins, *Interlocutory Appeal from Denial of Twombly Motion to Dismiss in Text Messaging Antitrust Litigation*, NAT'L L. REV. (2010), available at <http://www.natlawreview.com/article/interlocutory-appeal-denial-twombly-motion-to-dismiss-text-messaging-antitrust-litigation>. Thus, information on decision-making could help the legislature and the Court clarify criteria regarding interlocutory appeals.

<sup>163</sup> The main benefactor from this clarity will likely be the Supreme Court. Recent circuit splits have been resolved on the issues of interlocutory appeal by the Court. See *supra* note 28. More information on judicial decisions and rationales would likely shed light on the existence of other splits and potential issues that need to be resolved.

Second, the Court employed a similar tactic by judicially creating the collateral order doctrine. The doctrine allows petitions for interlocutory appeals, but the ultimate authority to grant such an appeal lies within the judiciary—the original proponent of the final judgment rule.

Third, circuits apply various definitions to explain the collateral order doctrine's factors. For such an important rule, the doctrine does not aptly specify the conditions, nor has the Supreme Court sought to define the factors that would grant immediate appeals of non-final orders. Granted, the courts share the goal of finality, resulting in consistent decisions; however, there is no uniformity in decisions that aid a party in preparing for court, because there is no way to predict what the court may decide.

Commentators offer several suggestions<sup>164</sup> that lack evidentiary support, leading to more criticisms. The state court models provide legitimate examples that give credence to an argument for change. They provide concrete evidence of what works and what does not. The method is simple:

- (1) Permit petitions of all interlocutory appeals;
- (2) A single justice at the appellate level renders a decision based upon that judge's discretion; and
- (3) Mandate written opinions explaining the decision to grant or deny a petition for interlocutory appeal.

Allowing all appeals would promote fairness without inundating the court, because the single justice's discretionary power and separate docket would conserve resources and promote judicial efficiency. Additionally, the written opinions would provide clarity and predictability to aid litigation strategies. This combination would enhance the original goal<sup>165</sup> of expediting the dispute through the appellate system, with the added benefit of improving efficiency and maintaining fairness.

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<sup>164</sup> See *supra* notes 91-93.

<sup>165</sup> See Memorandum from Richard Van Duizend, *supra* note 88. Appellate review also provides: (1) uniform results; (2) higher probabilities of correct judgment; and (3) increased belief that a party's dispute has been fully and fairly heard, which my approach would continue to uphold; see also Robertson, *supra* note 89.