# THE PRAGMATIC APPROACH TO APPEALABILITY IN THE FEDERAL COURTS

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Since its inception, the federal judicial system has maintained as one of its basic tenets the principle, currently embodied in section 1291 of the Judicial Code,[1] that in the overwhelming majority of cases,[2] appeal could be taken from a lower to a higher court only from final judgments or decrees. Although it has been contended that "[t]he reasons which prompted [the rule's] development are now somewhat murky and may have been largely conceptual,"[3] the courts have appeared reasonably certain of the rule's purposes. As Mr. Justice Frankfurter once declared, the finality rule "has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice."[4] If parties could take up on appeal each disputed ruling by a lower court as it was handed down, the case could drag on indefinitely. Courts and commentators felt that judicial time would be put to better use if the parties were required to raise all issues on appeal at a single point in the proceedings. Such a requirement could conceivably moot numerous potential issues for appeal as a result of favorable decisions on the merits in the trial court. It was felt that the only means by which such judicial economy could be accomplished was to prohibit all appeals until the case had been finally determined in the lower court.[5]

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1. The finality rule in the federal system, presently codified as 28 U.S.C. § 1291 (1970), provides in relevant part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

This finality requirement was originally imposed in section 22 of the first federal judiciary act of 1789. 1 Stat. 72 (1789). Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 178-79 (1955). *See* Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333, 335 (1959). For a discussion of the rule's historical development, *see* Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 541-51 (1932).

The finality requirement cannot be waived by the parties, and hence may be raised by the court on its own motion. *See, e.g.*, United States v. Florian, Executor, 312 U.S. 656 (1941); Clark v. Taylor, 163 F.2d 940 (2d Cir. 1947).

2. Under 28 U.S.C. § 1292(a) (1970), interlocutory appeals are permitted from orders refusing or granting requests for injunctive relief. The Supreme Court has construed the statute to authorize interlocutory appeals only from orders involving preliminary injunctive relief so as to avoid the dangers of piecemeal appeal. Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966). Analysis of this exception to the final judgment rule for equitable decrees, largely a result of the historical division between law and equity, is beyond the scope of this article. *See generally* Crick, *supra* note 1, at 545-48.

3. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 597, 609 (1969).

4. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945). *See also* Baker v. United States Steel Corp., 492 F.2d 1074, 1077 (2d Cir. 1974).

5. Another justification which is often given for the final judgment rule is that "[o]ne was not really aggrieved until the final judgment." M. GREEN, BASIC CIVIL PROCEDURE 232 (1972).

Adoption and application of the final judgment rule in the federal courts, however, has not been free from difficulty. The traditional definition of a "final" decision is one which ends the litigation on the merits and leaves nothing for the court to do but to execute the judgment.[6] Strict application of this definition, however, would make little sense in the numerous situations where an order effectively leaves nothing further for the litigants to do in a case, yet there has been no technically final "judgment" for the court to execute.[7] Furthermore, even if courts were in agreement as to when an order is or is not final, unbending application of the finality requirement in certain cases may result in severe hardship to the litigants.[8]

To mitigate the harshness and occasional absurdity of inflexible insistence on finality in all situations, Congress and the courts have developed certain exceptions to the finality requirement.[9] Moreover, because the final judgment rule and its preexisting exceptions have not always been sufficient to assure fairness to appellants, the courts have at times allowed appeals of orders that neither fit within the terms of any of the established exceptions nor meet the technical requirements of finality.[10] The courts have applied a pragmatic approach to appealability in these situations. In the words of the Supreme Court, among "the considerations that always compete in the question of

6. Catlin v. United States, 324 U.S. 229, 233 (1945). *See also* St. Louis, I. Mt. & So. R.R. v. Southern Express Co., 108 U.S. 24, 28 (1883). *Cf.* Collins v. Miller, 252 U.S. 364, 370 (1920).

7. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967); discussed at notes 30-43 and accompanying text *infra*.

8. *See, e.g.*, Parr v. United States, 351 U.S. 513 (1956), discussed at notes 64-66 and accompanying text *infra*. *See generally* Comment, *Collateral Orders and Extraordinary Writs as Exceptions to the Finality Rule*, 51 NW. U. L. REV. 746 (1957).

9. The judicially developed exceptions to the finality requirement stem from two landmark decisions. *See* Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848), discussed at notes 127-31 and accompanying text *infra*; Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), discussed at notes 36-40, 120-24 and accompanying text *infra*. *Forgay* provides for immediate appeal of cases, usually involving orders directing the delivery of property, where the substantive issues have been decided and to delay appeal will render the "right of appeal . . . of very little value . . . [for the appellant] may be ruined before he is permitted to avail himself of the right." 47 U.S. (6 How.) at 205. *Cohen* established the "collateral order" doctrine which allows appeal from the "small class" of orders 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 be deferred until the whole case is adjudicated." 337 U.S. at 546.

The most significant statutory exception to the finality requirement is the certification procedure of 28 U.S.C. § 1292(b) (1970), discussed at notes 100-19 and accompanying text *infra*. Section 1292(b) allows appeal from an order in a civil action upon certification by the district court that it "involves a controlling question of law 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." Once the order is certified by the district court, the appeals court may exercise its discretion either to hear or reject the appeal. Other statutory exceptions to the finality requirement include the mandamus power of appellate review provided for by the All Writs Act, 28 U.S.C. § 1651(a) (1970), discussed at notes 132-49 and accompanying text *infra*, and the provision in Rule 54(b) of the Federal Rules of Civil Procedure allowing appeal, upon certification by the district judge, of orders which are final with respect to only certain parties or issues in multiple party litigation.

10. *See* Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), discussed at notes 153-73 and accompanying text *infra*.

appealability, the most important . . . are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."[11] This balancing of the competing needs for judicial economy represents the Court's recognition that "[a] pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action.' "[12] or, as the Court has also phrased it, "the requirement of finality is to be given a 'practical rather than a technical construction.' "[13]

Use of such a pragmatic approach[14] in the federal courts has given rise to considerable confusion. On the one hand, the Supreme Court has on at least one occasion[15] so extended its application that some commentators have suggested that the Court may have jeopardized the whole finality requirement.[16] On the other hand, there are numerous lower court decisions which have continued to apply traditional criteria of finality without taking account of the possible application of the pragmatic approach.[17] There have been still other decisions which, while employing a pragmatic approach, evince a misunderstanding of the subtle differences in its varying forms and uses.[18]

Because of the enormous effect general adoption of the pragmatic approach would have on the federal system's criteria of appealability, and the tremendous state of confusion presently surrounding the approach in the courts, the need arises for a reexamination of the approach's development, current status and appropriate use.[19] The position taken here is not only that reports of the

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11. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950) (citations omitted).

12. Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 306 (1962).

13. Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964), *quoting* Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

14. The term "pragmatic approach" is used throughout this Article to denote a concept of appealability that requires an assessment by an appellate court of the practical factors weighing in favor of or against the desirability of direct appellate review of a particular order.

15. Gillespie v. United States Steel Corp., 379 U.S. 148 (1964).

16. D. CURRIE, FEDERAL COURTS, CASES AND MATERIALS 308 (2d ed. 1975). C. WRIGHT, LAW OF FEDERAL COURTS § 101, at 455-58 (2d ed. 1970).

17. *See, e.g.*, Bradley v. Milliken, 468 F.2d 902, 902-03 (6th Cir.), *rev'd on other grounds*, 94 S. Ct. 3112 (1974); Benton Harbor Malleable Industries v. UAW, 355 F.2d 70 (6th Cir. 1966). *Cf.* United Southern Companies, Inc. v. Cravey, 410 F.2d 377, 378 (5th Cir. 1969).

18. *See, e.g.*, Hackett v. General Host Corp., 455 F.2d 618 (3d Cir. 1972), *cert. denied*, 407 U.S. 925 (1972), discussed at notes 43-53 and accompanying text *infra*.

19. This Article deals only with the finality of appeals within the federal judicial system. Generally, the courts have cited interchangeably cases construing section 1257 of the Judicial Code, involving appeals from state courts to the Supreme Court, and section 1291, involving appeals within the federal system. *See* Frank, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292, 295 (1966); Note, *The Requirement of a Final Judgment or Decree for Supreme Court Review of State Courts*, 73 YALE L.J. 515 (1964). It has been suggested, however, that the term "final decision" should be more strictly construed under section 1257 than under section 1291, because of the added considerations of federalism which dictate federal restraint in interfering with state judicial actions. *See, e.g.*, Boskey, *Finality of State Court Judgments Under the Federal Judicial Code*, 43 COLUM. L. REV. 1002 (1943). *Cf.* Frank, *supra* at 320. On the other hand, it could be argued that the existence of certain alternative methods of appealing non-

demise of the finality rule[20] are mistaken but that existing exceptions to the rule, other than the pragmatic approach, do not adequately serve the interests of justice in many instances. Thus, there exists a need to relax the rule of finality still further by increased intelligent use of the pragmatic approach to the appealability of interlocutory orders.

## I. The Interpretative Form of the Pragmatic Approach: A Realistic View of a Litigation's Termination

There is a general misunderstanding of the two fundamentally different ways a pragmatic approach to appealability may be used. The first permits the courts to take a realistic view of finality and thus allow appeal of realistically final orders, even though technical finality has not been established. The second, and more controversial, application essentially constitutes a judicially created exception to the finality rule, permitting appeal from concededly interlocutory orders when a balance of competing interests so dictates.

The most logical and accepted[21] use of the pragmatic approach is in its "interpretive" sense, occasionally referred to as the "death knell" doctrine. The courts, working within the dictate of section 1291 that appeal may be taken only from final decisions, interpret "finality" pragmatically by delving beyond technical labels to determine whether the trial court's order has effectively terminated or sounded the "death knell" of the litigation.

*United States v. Wood*[22] illustrates this use of the pragmatic approach. In *Wood* the federal government had sought injunctive relief under the Civil Rights Act of 1957[23] to halt the prosecution of a black before a Mississippi Justice of the Peace for breach of the peace. The Government argued that "continued prosecution . . . was designed to, and would, intimidate the qualified Negroes of Walthall County from attempting to register to vote."[24] The federal government's suit was filed on September 20, 1961—two days before the scheduled breach of the peace trial. The next day, the Government's motion for a temporary restraining order pending a hearing for a preliminary injunction was denied, and it sought appeal in the Fifth Circuit.

The Fifth Circuit accepted the federal government's argument that "under the special circumstances of this case,"[25] the lower court's denial of the temporary restraining order was a final order for purposes of section 1291. The court reasoned:

> As a practical matter, the time between the arrest and prosecution of

final orders within the federal system in exceptional cases which do not apply to appeals from state systems arguably dictates a more relaxed standard of finality under section 1257.

20. *See, e.g.*, Frank, *supra* note 19, at 320.
21. *Id.* at 302-05.
22. 295 F.2d 772 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962).
23. 42 U.S.C. § 1971 (1970).
24. 295 F.2d at 774.
25. *Id.* at 777.

> a person for breach of the peace is usually very short . . . . If the Government states a claim entitling it to injunctive relief, then the effect of denying the temporary restraining order is to moot its case. The denial of the restraining order is thus equivalent to the dismissal of the First Claim of the complaint on the ground that it does not state a claim upon which the requested injunctive relief can be granted. To then call this de facto dismissal a nonappealable interlocutory order is to preclude review altogether. *As a practical matter, then, it is clear that the denial of the restraining order is a final disposition of the Government's claimed right to prevent the prosecution . . . .*[26]

Since the finality requirement of section 1291 is designed to assure that an appeal will not be taken until a case is truly complete, that objective was achieved when the district court's order effectively terminated the action. Although the denial of a temporary restraining order is not ordinarily considered final for purposes of appealability,[27] such an interpretation was proper under the unusual circumstances in *Wood*.[28]

Application of this interpretive method has been plagued with difficulty. The most problematic application has been with respect to the appealability of district court orders denying the existence of class actions.[29] The Second Circuit first employed the interpretive approach in such a situation in its well-known opinion in *Eisen v. Carlisle & Jacquelin* (*Eisen I*).[30] In *Eisen I* "[t]he sole question . . . [was] whether appellant may take an appeal from an order of the district court dismissing his class action, but permitting him to litigate his individual claims."[31] The theory against finality was that since appellant bad not been precluded from pursuing his individual claims against defendant, the court's order was merely interlocutory. Because plaintiff's individual claims amounted to $70, however, the court quite properly recognized that "[t]he alternatives are to appeal now or to end the lawsuit for all practical purposes . . . [for] [w]e can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen."[32] The court therefore concluded that "[i]f the appeal is dismissed, not only will Eisen's claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was proper . . . ."[33] The rule which derives from the case accurately states the thrust of the interpretive use of the pragmatic approach:

> Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed.[34]

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26. *Id.* (emphasis supplied).
27. *See, e.g.*, Pennsylvania Motor Truck Ass'n v. Port of Philadelphia Marine Terminal Ass'n, 276 F.2d 931 (3d Cir. 1960).
28. *Cf.* Peabody Coal Co. v. Local Unions Nos. 1734, 1508 & 1548, UMW, 484 F.2d 78 (6th Cir. 1973); McSurely v. McClellan, 426 F.2d 664 (D.C. Cir. 1970).
29. FED. R. CIV. P. 23.
30. 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).
31. *Id.* at 119.
32. *Id.* at 120.
33. *Id.*
34. *Id.* at 121. Although the death knell theory in class action cases has been ac-

Rather than simply rely upon the "death knell" or pragmatic approach in holding the denial of class action status a final decision, however, the Second Circuit explained its decision by referring to the "collateral order" doctrine[35] enunciated by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*[36] In *Cohen* plaintiff brought a stockholder's derivative action alleging that the corporation's officers and directors had wasted or diverted corporate assets. Under the applicable state law, plaintiffs in a derivative action holding less than five percent of the total stock outstanding had to file a security bond as a prerequisite to bringing suit. Even though plaintiff in *Cohen* came within the statutory requirement but did not file the bond, the lower court refused to apply the statute.[37] Although this order was neither technically nor pragmatically final, as the entire substance of the plaintiff's claim remained to be litigated, the Supreme Court held it appealable. It reasoned that since the order conclusively resolved a collateral issue—compliance with the bond requirement—but "did not make any step toward final disposition of the merits of the case and will not be merged in final judgment,"[38] and since review of the final judgment will come too late to preserve the rights adjudicated in the first order, appeal should be allowed. Though such 'internal' finality did not satisfy the concept of finality generally thought to be required by the final judgment rule, the Court in *Cohen* enunciated the "collateral order" doctrine as what amounted to a clear exception to the final judgment rule:

> 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.[39]

Under the "collateral order" doctrine, a court will allow orders which are collateral to the merits of the suit and clearly interlocutory to be appealed for reasons of fairness and judicial efficiency. The *Cohen* test is therefore significantly different from the determination of whether a particular order effectively terminates the litigation. It is clear that the litigation would have continued in the *Cohen* case had the court of appeals refused to review the trial court's denial of the defendant corporation's motion.

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cepted in principle by several other circuits, *see, e.g.*, Hartmann v. Scott, 488 F.2d 1215 (8th Cir. 1973), a fairly equal number have rejected the concept, *see* King v. Kansas City Southern Industries, Inc., 479 F.2d 1259 (7th Cir. 1973) (per curiam); Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

35. 370 F.2d at 120.

36. 337 U.S. 541 (1949).

37. Cohen v. Beneficial Industrial Loan Corp., 7 F.R.D. 352 (D.N.J.), *rev'd*, 170 F.2d 44 (3d Cir. 1948), *aff'd*, 337 U.S. 541 (1949).

38. 337 U.S. at 546.

39. *Id.* at 546-47. *See* note 7 *supra.*

The Second Circuit's reliance in *Eisen I* on the "collateral order" doctrine was misplaced, for the issue there was whether the order dismissing the class action effectively terminated the litigation, not whether it was an appealable interlocutory ruling within the *Cohen* exception. The *Eisen I* court further compounded the confusion by referring to the Supreme Court's statement in *Gillespie v. United States Steel Corp.*,[40] that in determining finality a balance was to be struck between "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."[41] Assuming the factual accuracy of the court's finding that Mr. Eisen's $70 claim would undoubtedly not be pursued individually, the issue was not whether justice would be denied by delaying appeal until after a final decision, but rather whether justice would be denied by refusing any appeal at all. For as the court correctly concluded, if Mr. Eisen were not permitted to appeal at that time, realistically he would *never* have an opportunity to appeal.[42]

The *Eisen I* court thus confused use of a pragmatic approach to ascertain the terminating effect of a particular order on the underlying litigation with its use as a balancing approach to determine whether appeal from clearly interlocutory orders should be taken under certain circumstances. In so doing, the court weakened the force of its opinion. By relying for its conclusion on decisions which have balanced competing interests to allow an appeal of what is really a nonfinal order, the court invited balancing in an area where logically there should be none. When it is concluded that a district court's decision is, for all practical purposes, final, the balance has already been struck by Congress in section 1291: the order is appealable.

Similar confusion pervades the Third Circuit's decision in *Hackett v. General Host Corp.*[43] Plaintiff there filed a complaint under section 4 of the Clayton Act,[44] seeking treble damages, costs and attorney's fees for alleged violations of the antitrust laws. The suit was brought as a class action and the plaintiff's individual claim was for $9.[45] After the district court invalidated the class action and refused to certify an interlocutory appeal,[46] plaintiff filed a notice of appeal, alleging that the district court's order refusing to recognize the existence of a class was final for purposes of section 1291.

The Third Circuit held that the order was not appealable.[47] It first rejected the "death knell" doctrine, but suggested that, in any event, the district court's order did not constitute the "death knell" of the action,[48] for

40. 379 U.S. 148 (1964), discussed at notes 153-73 and accompanying text *infra*.
41. *Id.* at 152-53.
42. 370 F.2d at 120.
43. 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).
44. 15 U.S.C. § 15 (1970).
45. 455 F.2d at 620.
46. 28 U.S.C. § 1292(b) (1970). *See* notes 100-19 and accompanying text *infra*.
47. 455 F.2d at 625-26.
48. *Id.*

the availability of an award of attorney's fees to a successful plaintiff would be sufficient to keep alive such small claims.[49]

While the court seemed to peg its decision on the absence of practical finality, the logical and factual unpersuasiveness of its argument that plaintiff's case would not in all likelihood have ended with the termination of her class action,[50] which the majority itself seemingly conceded,[51] suggests that the ruling was ultimately based on its view of the balance of competing interests. The court reasoned:

> The chief policy argument in favor of a hospitable attitude toward [securities and antitrust] class actions is that they tend to reinforce the regulatory scheme by providing an additional deterrent beyond that afforded either by public enforcement or by a single-party private enforcement . . . . Even assuming such a deterrent policy, however, *it must be balanced against the competing policies which have historically protected the federal appellate courts from being overwhelmed by interlocutory appeals.*[52]

Similar to the Second Circuit in *Eisen I*, the Third Circuit in *Hackett* balanced in an area where it simply had no authority to do so. For if the order of the district court truly ended plaintiff's action, then the order was, for all practical purposes, final. If the district court had, for example, dismissed the complaint in *Hackett* for failure to state a claim, resulting in a technically final order, the circuit court of appeals would certainly not refuse to hear plaintiff's appeal on the grounds that the need for encouraging antitrust actions is outbalanced by the need of the federal courts to reduce their burdens. Yet once it is accepted that the district court's order has in reality ended the action, refusal to hear an appeal because of a balancing of competing interests does just as much violence to the dictates of section 1291 as does denying an appeal from a technically final decision.

By effectively denying any appeal in such a situation, the court, moreover,

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49. There is no certain basis for the assumption that an interested holder of a small claim will be unable to prevail upon a private attorney to pursue that claim in the hope of being compensated by the award of "reasonable counsel fees" against a wrongdoer.
455 F.2d at 623.

50. In *Hackett* the attorney who handled plaintiff's individual claim could not reasonably expect to receive more than $27, for

> [t]he amount recovered by the plaintiff has been the single most significant factor used by courts in determining a reasonable fee . . . . It is a rare case in which a successful antitrust plaintiff recovers attorneys' fees in excess of the damages established, and even a rarer one in which the fees awarded exceed the treble damages.

86 HARV. L. REV. 438, 442 (1972) (citations omitted). *See* Judge Rosenn's dissent in *Hackett*. 455 F.2d at 631.

51. The majority argued that while the dissent might be correct in its view that no capable lawyer would pursue such a small claim absent class action treatment, "the conclusion that the judicial process must therefore provide a mechanism, by making class action determinations appealable, whereby the lawsuit will be more attractive to attorneys, does not follow." 455 F.2d at 625.

52. *Id.* at 623 (emphasis supplied) (citations omitted).

undermines what must be considered a fundamental aspect of our judicial system—the right of appellate review. Professor Carrington has articulately described the overriding importance of assuring a litigant the opportunity to obtain review of a trial judge's actions. Because "[t]he trial judge is in a unique position of authority over the day-to-day actions of individuals," Professor Carrington argues, "[m]egalomania is an occupational hazard of the judicial office."[53] Review by a court remote "from the firing line of a trial" provides the objective supervision "essential to the goal of law . . . ."[54] But even if trial judges are capable of maintaining necessary objectivity, and their decisions are usually correct (a conclusion which is far from clear[55]), preserving the appearance of justice in the eyes of the litigants who would otherwise view themselves as victims of arbitrary individuals is an equally important goal.[56] A viable appellate process legitimizes the decisions of the lower courts, and thereby preserves faith in the functioning of the legal system.

Thus, where there exists no doubt that an order of the district court has effectively terminated the litigation,[57] it seems reasonably clear that the order is a "final decision" and appeal must be allowed under section 1291.

## II. The Balancing Form of the Pragmatic Approach: Costs of Piecemeal Review Versus Denial of Justice by Delay

Whereas the "interpretative" aspect of the pragmatic approach provides a basis for permitting appeal of technically nonfinal orders because of their

53. 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 (1969). Professor Carrington elaborates:

> The judge responsible for making primary decisions must necessarily make a heavy investment of time and interest in particular disputes and individuals that come before him; his limited perspective and his limited opportunity for reflection make it impossible for him to coordinate successfully with his colleagues. Vanity and pride of opinion are additional obstacles; even very sensitive, intelligent, and self-disciplined judges must be troubled at times by their own involvments of ego.

*Id.* at 551.

54. *Id.* at 551.

55. *See* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

56. *See* ABA Code of Professional Responsibility, Canon 9 (1969); ABA Canons of Judicial Ethics, Canons 13, 26 (1969).

57. The "death knell" theory, however, has raised difficult line-drawing problems for courts in determining the certainty of an action's termination. *Compare* Green v. Wolf Corp., 406 F.2d 291, 295 n.6 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969) (denial of class action status held appealable where individual claim amounted to less than $1000), *with* City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 299 (2d Cir. 1969) (denial of class action status nonappealable since "the City . . . with adequate resources to continue the action and with substantial amounts at stake will undoubtedly carry on"). *See also* Caceres v. International Air Transport Association, 422 F.2d 141 (2d Cir. 1970) (denial of class action status nonappealable where individual claims were approximately $150,000). These difficulties have caused Judge Friendly to express doubts whether the "death knell" theory is workable and to suggest that the court "formulate a rule that will avoid the necessity of making such ad hoc judgments . . . ." Korn v. Franchard, 443 F.2d 1301, 1307 (2d Cir. 1971) (Friendly, J., concurring). Until such a test is devised, however, it appears that courts will be faced with the task of predicting, in each case, whether the order appealed from has truly terminated the action. *Cf.* Thomas v. Hefernnan, 473 F.2d 478 (2d Cir. 1973).

preclusive impact on continued litigation, the "balancing" aspect deals with the appealability of admittedly interlocutory orders. Under the latter, an order is held to be appealable because on balancing the interests of litigants in expeditious and fair consideration of their cases against the need for the efficient expenditure of judicial resources, the court finds that appeal should be heard at this point in the litigation, regardless of what remains for the trial court to do in the matter. As the Supreme Court has phrased the test, the judiciary, in determining appealability, will consider "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."[58]

Since the balancing approach has not yet received widespread recognition in the courts as an independent exception to the final judgment rule of section 1291, policy considerations, more than precedent, compel its adoption. If the policy arguments are found persuasive, the courts will be able to piece together enough case authority to support their position.[59]

### A. *The Need for a Flexible Approach to Interlocutory Appeals*

The primary justification for a flexible approach to the appealability of interlocutory orders is, perhaps, deceptively simple. In a significant number of cases not falling within any of the established exceptions to the final judgment rule (an assumption more fully examined below[60]), the danger of prejudicing the litigants as a result of delaying appeal will be so substantial as to outweigh any countervailing interest in avoiding the harms of piecemeal appeal. For example, a trial court's refusal to grant summary judgment, or to deny removal from a state court, may require the parties to expend substantial physical, financial and emotional effort in the preparation and conduct of a trial which may later prove to have been worthless. If the aggrieved party could have appealed the ruling prior to the holding of the trial, the trial court's error might have been recognized by the appellate court prior to the conduct of an unnecessary trial.

Aside from the "internal consequences" of delaying appeal—those relating to the litigation itself, such as the expenditure of time, effort and money in a litigation which may prove unnecessary if a particular order is ultimately reversed—delay often entails "external consequences." For example, although a trial court's denial of a motion for summary judgment may not portend an expensive or drawn-out trial, the delay before the case reaches trial may cause serious economic consequences to the moving party because of the cloud of uncertainty surrounding the financial soundness of his business or the legality

58. Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964), *quoting* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950). *See* notes 153-73 and accompanying text *infra*.

59. *See* notes 151-97 and accompanying text *infra*.

60. *See* notes 100-50 and accompanying text *infra*.

of his practices.[61] In drawing a balance between the harm of piecemeal review and the dangers of denying justice by delay, the appellate court would consider the "external" harm that might result from delaying an appeal—a consideration which is not taken into account under most of the other exceptions to the finality requirement.

Orders to produce evidence may also give rise to situations where serious harm will result from delayed appeal under this "external consequences" analysis.[62] The classic situation, one might suppose, is an order to produce information which the opposing party contends is a lawfully protected trade secret. Although the court could issue protective orders to guard the secret's value,[63] the party may rightfully claim that revealing the information might cause serious competitive harm, and that the opportunity to challenge the information's discoverability on appeal after a final judgment, and after compliance with the district court's order, may prove a rather worthless form of protection.

Criminal cases provide an additional set of circumstances where the injustices flowing from the final judgment rule may be remedied by use of the balancing approach. A case in point is *Parr v. United States*.[64] Defendant had been indicted for tax evasion in the United States District Court for the Southern District of Texas, Corpus Christi Division. The court found that defendant could not obtain a fair trial in that division because of local prejudices, and transferred the case to the Laredo Division. The Government then obtained a new indictment for the same offenses in the Austin Division of the Western District of Texas and moved to dismiss the first indictment. The defendant appealed from the grant of the Government's dismissal motion. The Fifth Circuit found the order interlocutory and therefore unappealable, and the Supreme Court, in a five-to-four decision, affirmed. Despite the apparent inapplicability of the preexisting exceptions to the final judgment rule,[65] failure to allow appeal created serious prejudice for Parr. As Chief Justice Warren stated in dissent:

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61. For another illustration of "external consequences," *see* Kelly v. Metropolitan Cnty. Bd. of Educ., 436 F.2d 856, 862 (6th Cir. 1970), where the court held appealable a district court order effectively staying all desegregation proceedings until the Supreme Court decided the school cases under consideration at that time, noting:

> It is clear to us that the rights of school children to schooling under nondiscriminatory and constitutional conditions cannot be recaptured for any school semester lived under discrimination practices.

62. *See, e.g.*, United States v. Fried, 386 F.2d 691 (2d Cir. 1967) (non-party witness sought review of order requiring his presence for testimony, alleging that his attendance could seriously jeopardize his health). *See also* Gialde v. Time, Inc., 480 F.2d 1295 (8th Cir. 1973) (attempted interlocutory appeal from pre-trial discovery order in a libel and invasion of privacy suit requiring newsman to reveal secret sources), *discussed in* Note, *Assertion of a Journalist's Privilege in Conflict With the Final Judgment Rule in Civil Litigation: Gialde v. Time, Inc.*, 1973 DUKE L.J. 1063.

63. *See* FED. R. CIV. P. 26(c).

64. 351 U.S. 513 (1956). *See also* United States v. Fried, 386 F.2d 691 (2d Cir. 1967); *In re* Sylvania Electric Products, 220 F.2d 423, 425 (1st Cir. 1955).

65. 351 U.S. at 519-20. The Court specifically rejected the applicability of the "col-

> We countenance plain harassment if we require Parr to be tried under what may turn out to be an invalid indictment at Austin before he can obtain appellate review of dismissal of the Laredo case. Should this occur, Parr would have been required to undergo two trials, one at Austin and another at Laredo. Section 1291 should not be construed so as to bring about such a result.[66]

The only method available for construing section 1291 to avoid the kind of undue burden suffered by Parr is the balancing approach.

Although failure to allow interlocutory appeal may cause severe prejudice in certain situations, it would be absurd to suggest that every time a motion for summary judgment is denied or a burdensome discovery order is issued, an interlocutory appeal should be allowed. Rather, it is only where "the danger of denying justice by delay" outweighs the "inconvenience and costs of piecemeal review" that an appeal should be allowed prior to the issuance of a final judgment. The difficult issue is, of course, to determine how to strike the balance in each case.

Among the factors which a circuit court would consider in making its appealability decision under the balancing approach are (1) the delay which might result before the case would ultimately be heard on appeal after a final judgment, (2) the harm such delay would cause to the litigant's financial or personal situation, and (3) the length and expense of discovery and trial, in relation to the relative financial capabilities of the parties seeking appeal, that may prove unnecessary if the district court's order is ultimately reversed.[67]

But more must be involved in the appellate court's balancing process than the potential costs to the would-be appellant. Also relevant must be the likelihood that the order from which appeal is sought will be reversed. For if there were little doubt of the correctness of the district court's decision, the danger of wasted time, money and effort because of an ultimate reversal would be greatly decreased. As this danger of wasted effort in the trial court decreases, there is a corresponding increase in the danger of wasted effort in the appellate court. In other words, the less likely it is that the district court will be reversed, the smaller the danger of denying justice by delay and the greater the likelihood of causing harm by piecemeal review.

Of course, it would be illogical to ask an appellate court to make a complete examination of the merits of an attempted appeal so that it could decide

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lateral doctrine" of *Cohen*, *see* notes 35-40 and accompanying text *supra*, *and* notes 120-26 and accompanying text *infra*, *and* the mandamus provision of 28 U.S.C. § 1651(a) (1970), *see* notes 132-49 and accompanying text *infra*.

66. 351 U.S. at 523.

67. *Cf.* Norman v. McKee, 431 F.2d 769, 774 (9th Cir. 1970), where the court, in ruling appealable a district court disapproval of a settlement in a derivative action, noted:

> As a practical matter, stockholder's derivative suits and class actions generally present complex questions and involve large numbers of exhibits and witnesses. The present case is a good example. The trial would be lengthy and expensive. In this situation, therefore, we think that the cost and delay of piecemeal review, as balancing factors, are diminished in importance.

that the effort it had just expended was unnecessary. There would have to be a kind of "probable cause" examination of the issue, comparable in some ways to a shorthand certiorari process, by which the appellate court could satisfy itself without full study of the merits that the issue on appeal posed a legal question whose answer was either uncertain or likely to have been incorrectly determined by the district court.[68] Since appealability of a district court's order can be determined on a motion to dismiss the appeal—at a comparatively early stage in the appellate process and presumably before a full-blown analysis of the merits need be conducted by either the litigants or the court —such a preliminary determination could be made with relative flexibility.

B. *The Dangers of the Balancing Approach*

The arguments against widespread use of the balancing approach may be grouped into four basic categories: (1) it would add undue burdens to the already overworked appellate courts; (2) it could result in harassment of litigants who are forced to suffer the delays and expense of an interlocutory appeal; (3) it would dangerously undermine the power and authority of the district judge; and (4) in any event, the need for interlocutory review is generally illusory, since the would-be appellant will often win below, thus mooting the appeal, and district judges are usually correct in their decisions.[69]

1. *Undue Burdens on the Circuit Courts.* Traditionally, one of the major purposes of the final judgment rule was to prevent undue burdens on appellate courts. The final judgment rule "is said to be . . . the only way in which the appellate court can prevent itself from being swamped with appeals."[70] This traditional justification has taken on added significance in light of the drastic increase of the burdens on federal appellate courts in recent years.[71] In the early years courts of appeals entertained approximately 800 appeals. The number of appeals more than doubled by 1924, doubled again by 1960, and had almost doubled again by 1966.[72] The number of appeals docketed in 1972 per judgeship was 178 percent greater than that docketed in 1961.[73] The

68. Such a procedure is currently employed in attempting to obtain interlocutory review under 28 U.S.C. § 1292(b) (1970). *See* notes 100-07 and accompanying text *infra*. Thus, preliminary inquiry under the balancing approach need not result in what one court has called "[t]he judicial inefficiency inherent in reviewing an entire appeal and then deciding that the court of appeals cannot act because it does not have jurisdiction." Clark v. Kraftco Corp., 447 F.2d 933, 935 (2d Cir. 1971).

69. C. WRIGHT, *supra* note 16, § 101, at 453. *Cf.* Note, *Section 1292(b): Eight Years of Undefined Discretion*, 54 GEO. L.J. 940, 941 (1966).

Another objection to the balancing approach concerns the power of the judiciary to establish such an approach in light of the preexisting congressional statutes on appealability. *See* notes 198-209 and accompanying text *infra*.

70. Crick, *supra* note 1, at 539.

71. *See* Cramton, *Federal Appellate Justice in 1973*, 59 CORNELL L. REV. 571 (1974); Nathanson, *Proposals for an Administrative Appellate Court*, 25 AD. L. REV. 85, 86 (1973).

72. Carrington, *supra* note 53, at 543.

73. 1972 DIV. OF ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 90 [hereinafter cited as ANN. REP.].

crisis in the federal appellate courts is a very real one, prompting Congress to create a special commission for the purpose of reexamining the federal appellate structure.[74] In light of this enormous and ever-increasing burden, many would consider it utter folly to encourage adoption of a doctrine which probably cannot help but add to the already oppressive workload of the appellate courts.

Initially, it should be emphasized that "[i]f better justice can be obtained by broadening the scope of appellate review, then even congestion, delay and expense are not too high a price to pay."[75] If, as contended above, use of the pragmatic approach may save litigants the severe burdens of unnecessary pre-trial procedures or litigation, we should simply not accept as an adequate answer the contention that the burden such an approach would place on the federal courts is too great, any more than we should accept such an argument as a justification for restricting the availability of remedies for invasions of civil rights—a major cause of the appellate caseload crisis.[76] Certainly, there are limits to what we would or should accept to avoid overburdening the federal judicial system.[77]

The argument in support of the balancing approach, however, need not rest solely on this negative basis, for unlike an increase in the subject matter jurisdiction of the courts, such as the expansion of federal civil rights remedies, an increase in the use of the pragmatic balancing approach does not necessarily add to the sum total of the federal judicial system's workload. While it may increase the burden on the appellate courts, intelligent use of the pragmatic approach should remove some of the burden on the district courts by avoiding unnecessary proceedings at the trial level. If the balancing approach is employed to allow appeal only where it appears likely that immediate appeal will save more resources than it will expend, the total workload of the federal courts may, in fact, be ultimately reduced. In this context, it is significant to note that the workload of the district courts has also rapidly increased in recent years.[78]

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74. Commission on Revision of the Federal Court Appellate System, THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE (1973).

75. Wright, *supra* note 55, at 780. Professor Wright, however, is of the opinion that increased appellate review does not lead to "better justice." *See* notes 95-99 and accompanying text *infra*.

76. Carrington, *supra* note 53, at 544.

77. The needs of the appellate court must be considered, of course, but they are not the only parties interested in the appeal. Since courts are organized primarily to serve litigants, their needs cannot be ignored . . . .

Crick, *supra* note 1, at 561.

78. The total number of trials in district courts has increased from 10,048 in 1962 to 18,780 in 1970. 1972 ANN. REP. Table 45, at 159. While the percentage of "long trials" (four days and over) has remained between 12 and 14 percent, since 1966 the volume of these trials has risen by 51 percent. *Id.* at 158. In 1972 overall trial activity rose by 7 percent over the previous year, *id.*, and the backlog of civil cases pending in the district courts reached an all-time high, *see* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 26 (1973).

In any event, numerous means for reducing the burdens on the appellate courts have been suggested, some more extreme than others, which would hopefully allow the courts to employ a flexible pragmatic approach without worrying that they were adding to a preexisting oppressive burden. It has been suggested that more permanent reductions might be brought about by the establishment of specialized appellate courts for such fields as tax, environmental law, or administrative law,[79] by the reduction of time for oral argument, and by simply increasing the number of appellate judges. Each of these suggestions has been subjected to considerable question,[80] but other, less controversial proposals, such as widespread use of professional administrators,[81] have also been put forward. Perhaps the most significant suggestion for alleviating the workload of the appellate courts is the restructuring of the judicial circuits to allocate better the burdens among them.[82] Finally, the long-standing proposal for substantial reduction in the scope of federal diversity jurisdiction,[83] if adopted, might reduce the caseload of the circuit courts of appeals by as much as 5 percent.[84]

It would be unrealistic to argue that widespread adoption of the balancing approach would not add to the workload of the appellate courts. Although the total number of appeals actually allowed under the approach may be relatively small, the necessity of ruling upon the presumably larger number of attempted appeals[85] would most likely contribute a significant additional burden. But it must be recognized that (1) the goal of fairness to the litigants

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79. *Cf.* Nathanson, *supra* note 71, at 85-93.

80. As to the suggestion for reducing the time for oral argument, *see* Carrington, *supra* note 53, at 558. As to the dangers of increasing the number of judges, *see* H. FRIENDLY, *supra* note 78, at 44-46; Nathanson, *supra* note 71, at 91.

81. *Cf.* Carrington, *supra* note 53, at 557-58; Shafroth, *Survey of the United States Courts of Appeals*, 42 F.R.D. 243, 289 (1967).

82. The tremendous variation in the comparative burdens of the different circuits, with the Fifth, Ninth and Second Circuits the busiest by far, Nathanson, *supra* note 71, at 91, *citing* 1971 ANN. REP. Table 3, at 101, has prompted a congressional commission to suggest changes in the boundaries of the overworked circuits. *See* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE, *supra* note 74; Baar, *Reorganization of the Federal Judicial System*, 55 JUDICATURE 282 (1972).

83. *See* ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS §§ 1301-07 (1969).

84. Nathanson, *supra* note 71, at 92. Controversy still rages over the advisability of such a reduction in diversity jurisdiction. *Compare* Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963), *with* Burger, *Report on the Federal Judicial Branch*, 94 S. Ct. 1, 5 (1973), *and* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 234-40 (1948). *See generally* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1051-59 (2d ed. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler eds. 1973).

85. Of course, even without adoption of the balancing approach, any litigant is theoretically able to seek an appeal, thus requiring the circuit court of appeals to invest time and effort in ruling upon the appropriateness of the appeal, regardless of how frivolous it is. With increased use of the pragmatic approach, however, it is highly likely that litigants who lose iuterlocutory motions in the district court will consider an attempted appeal a more reasonable risk. Additionally, under the balancing approach the appellate court will be called upon to make a more substantial effort in balancing competing factors than it would in merely determining whether the lower court's order was a final decision.

and the avoidance of wasted effort by the trial court call for increased use of the balancing approach; (2) the generally acknowledged crisis in the appellate courts is centered primarily in only a few of the eleven circuits; and (3) there exist numerous methods of reducing burdens in those circuits in particular as well as in the appellate courts in general. And if it is ultimately found that the appellate courts are inundated with frivolous attempts to appeal under the balancing approach,[86] increased deterrence might be developed in the form of imposition of appellate costs on would-be appellants in such situations.[87]

2. *Increased Delay and Expense.* To the extent interlocutory appeal is allowed, proceedings in the district court may well be delayed while the parties bear the potentially severe financial burden imposed by the appellate process.[88] Delay in and of itself can be a serious consequence. As the Second Circuit has recognized:

> In a large and complicated lawsuit or series of lawsuits closely related, interlocutory review of such housekeeping matters as discovery would practically preclude termination of the litigation by settlement or trial within the normal lifespan of any of the parties, attorneys or judges.[89]

The desire to avoid such delay has long been recognized as a major purpose behind the final judgment rule in the federal system.[90] In addition to the delay, the expense of appeal presents an equally critical problem.[91] A defendant with

86. Although it is likely that widespread use of the balancing approach will result in an increase in the burdens on the circuit courts, it does not follow that a flood of frivolous attempts to appeal under the balancing approach will similarly obtain. It may well be that currently numerous frivolous appeals are sought from final judgments. But fundamental differences between appeals after a final judgment and those under the balancing approach suggest that there will be a difference in the number of frivolous appeals under each. When a party appeals from a negative final judgment he has something to lose—the cost of appeal—and everything to gain, since if he fails to appeal he has lost the case. The situation is very different with regard to attempted appeals under the balancing approach, where the party has something to lose—again, the cost of appeal—but by no means everything to gain. Unlike the litigant who is on the short end of a final order, the litigant who has lost his motion for summary judgment has not lost all. He may win at trial, he may settle the case prior to trial, and he can ultimately appeal after the final order if all else fails. Thus, it is likely that many litigants, presumably operating from considerations of rational self-interest, will "balance" themselves out of an attempted interlocutory appeal, by concluding that the harm endured while waiting for a final judgment simply does not warrant the costs and trouble of an attempted interlocutory appeal.

87. Under 28 U.S.C. § 1912 (1970), when a judgment is affirmed, a circuit court of appeals may in its discretion "adjudge to the prevailing party just damages for his delay, and single or double costs." Such costs may, in the court's discretion, include the award of attorney's fees, *see, e.g.*, Furbee v. Vantage Press, Inc., 464 F.2d 835 (D.C. Cir. 1972), making the deterrence power of section 1912 potentially substantial.

88. *Cf.* Wright, *supra* note 55, at 780.

89. American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 284 (2d Cir. 1967).

90. Catlin v. United States, 324 U.S. 229, 233-34 (1945); Canter v. American Ins. Co., 28 U.S. (3 Pet.) 307, 318 (1830) (Story, J.). The problems of delay which have affected states which are liberal in their allowance of interlocutory appeals, *see, e.g.*, N.Y. CPLR § 5701(a) (McKinney 1963), have long been noted by commentators. *See, e.g.*, Korn, *Civil Jurisdiction of the New York Court of Appeals and Appellate Division*, 16 BUFF. L. REV. 307, 330 (1967).

91. *See* J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE: CASES AND MATERIALS, 858 (1968) (lawyer's time in preparation of briefs and records, and costs

substantial financial resources could conceivably employ the increased availability of interlocutory appeals under the balancing approach as a means of harassment to "wear out" a plaintiff with inferior economic backing.

If the balancing approach is employed, however, to allow appeal only in those cases where it appears likely that appeal will in the long run save costs, time, or both, by preventing an unnecessary trial and avoiding substantial delay in the district court prior to that trial, the approach cannot help but ultimately prove beneficial to the litigants. Thus, the fact that appellate review is an expensive process cannot be determinative, if it is assumed that the approach will be employed only when it appears reasonably likely that immediate appeal will prevent even greater expense at trial. As expensive as appeals may be, it cannot be doubted that detailed discovery, trial preparation and trial conduct require at least as much of a lawyer's time—and probably a good deal more supplemental costs—than does appellate preparation. Moreover, it is not clear that use of the balancing approach will result in increased delay or become a potential weapon of harassment in most cases. As Professor Carrington has stated:

> Delay is not a universal consequence of interlocutory review; often the appeal can be disposed of before the trial calendar makes its turn. And the motive of delay can often be taken into account on the issue of a requested stay of trial court proceedings.[92]

Since the propriety of appeal under the pragmatic approach may be determined on a motion to dismiss—at a comparatively early stage of the appellate process and with a comparatively minimal expense—the danger of undue harassment should be substantially reduced.

3. *Undermining the Authority of the District Judge.* Professor Wright has argued that any increase in the scope or amount of appellate review necessarily results in the reduction of the power and authority of the district judge. In his view,

> increased review is likely to lead to quite tangible public dissatisfaction. Every time a trial judge is reversed, every time the belief is reiterated that appellate courts are better qualified than trial judges to decide what justice requires, the confidence of litigants and the public in the trial courts will be further impaired.[93]

It cannot be denied that increased allowance of interlocutory appeal—especially

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of duplication and travelling). It should be noted, however, that under Rule 32 of the Federal Rules of Appellate Procedure, briefs and appendices need not be printed, but "may be produced by any duplicating or copying process which produces a clear black image on white paper." If court permission is obtained, carbon copies may be submitted.

92. Carrington, *supra* note 3, at 517. *Cf.* FED. R. APP. P. 8. It has been generally held that an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other phases of the case. Phelan v. Taitano, 233 F.2d 117, 119 (9th Cir. 1956). *See Ex parte* National Enameling and Stamping Co., 201 U.S. 156 (1906); De Pinto v. Provident Security Life Ins. Co., 374 F.2d 50, 51 n.2 (9th Cir.), *cert. denied*, 389 U.S. 822 (1967).

93. Wright, *supra* note 55, at 781.

in areas such as discovery—will permit the appellate courts to interfere more readily with the day-to-day operations of the district judge. Given Professor Wright's assumptions, then, it is arguable that such increased appellate review is neither necessary nor desirable.

Contrary to Professor Wright's contentions, however, the increased availability of appellate review might well tend to increase respect for, and thus the authority of, the district judge. To the extent increased appellate review results in affirmance of the district court's decision, the district court's legitimacy in the eyes of the litigants will undoubtedly be increased. On the other hand, to the extent increased appellate review results in a significant increase in the reversal rate of district judges, the legitimacy and authority which have been undermined was apparently undeserved in the first place.[94]

4. *Illusory Need for Interlocutory Review.* In addition to the arguments that increased interlocutory review is damaging to the proper functioning of the judicial system, it has been contended that there exists no real need for such review in any event. Again, in the words of Professor Wright:

> In most cases . . . the interlocutory issue that seems crucial at the time may fade into insignificance as the case progresses, and in any event the district courts are right in their resolution of most such issues.[95]

Thus, according to Professor Wright, an increase in the availability of interlocutory review is wholly unnecessary, since most issues which would be the subject of an interlocutory appeal will ultimately either be recognized by the parties as having little significance or will become mooted because the would-be appellant is victorious at the trial level or the case is settled. In any case, it probably makes little difference that interlocutory review is not allowed, since district judges are generally correct in their decisions, or at least as correct as the appellate judges, even if the latter would have reached a different conclusion had appeal been allowed.

Perhaps the simplest answer to the argument that district judges are usually correct is that even if it is valid, it is unresponsive to the question of increased use of the balancing approach.[96] It seems to concern, rather, the fundamental justification for any appellate review, final or interlocutory. Once it is accepted that a party is entitled to some form of appellate review, the goal

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94. Certainly no one would dispute Professor Wright's conclusion that "appellate judges are not always omniscient." *Id.*, *quoting* Orvis v. Higgins, 180 F.2d 537, 542 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950). Appellate judges, however, were placed in their positions for the very purpose of hearing appeals. When individuals are appointed to judgeships, it is known by all involved in the selection process that individuals placed on the appellate bench will review the decisions of those selected for the district court. Critical to the appellate process is the assumption that the decision of the appellate court is the "correct" one, subject to review by the Supreme Court.

95. C. WRIGHT, *supra* note 16, at 452.

96. It should be emphasized that in making his arguments Professor Wright was not directly addressing the issue of the advisability of a balancing approach. Rather, he was concerned with the increase in the scope and amount of appellate review in general.

of the balancing approach is to assure that litigants will be afforded review at a time when it may be effective and before substantial financial and emotional burden is incurred in proceedings at the trial court level which, rightly or wrongly, may ultimately be reversed on appeal.

Moreover, it is by no means clear that Professor Wright's arguments are valid even in the broader sense. It is difficult to determine factually whether he is correct in his assertion that district judges are generally right in their resolution of issues which might form the basis for interlocutory appeal. To the extent the issues concern consolidation, discovery, admissibility of evidence, or change of venue, he is probably accurate, though not so much because the district judges are necessarily "right" as because appellate courts feel such issues should generally be left to the sound exercise of the district court's discretion. An interlocutory appeal may also be sought, however, from orders regarding matters which are not committed to district court discretion, such as those denying motions for summary judgment or those granting class action status. As to such orders, any theory that the district judges are generally correct may largely be a self-fulfilling prophecy. It may be that because appellate courts generally assume the district judge's decision is correct, they tend to affirm, and then any one attempting to establish the correctness of district court decisions may point to the high affirmance rate. In any event, the contention that district court decisions are generally accurate is not firmly established.[97]

Furthermore, if it is acknowledged that public faith in the fair operation of the judicial system is an important factor, as Professor Wright seems to recognize,[98] whether district judges are actually "correct" is of comparatively limited importance in determining the need for effective appellate review. If the appearance of fairness is virtually as important as fairness itself, the litigant's perception that he is at the mercy of a single individual without any viable opportunity for review by a judicial body detached from the immediacy of the issue may do a great deal to undermine public confidence in the judicial system.[99]

In conclusion, the benefits of the balancing approach—in avoiding the harm of delayed appeal and in affording courts flexibility in their appealability determinations—outweigh any of the countervailing considerations, and argne for widespread but sensible application of this approach. Nonetheless, unless the balancing approach expands significantly on the remedies provided by the established statutory and judicial exceptions to the final judgment rule, a discussion of its availability would be wholly academic. Analysis of these

97. It is relevant to note that "[t]he reversal rate of those cases [in the federal courts] disposed of after hearing or submission excluding original proceedings increased from 18.1 percent [in 1971] to 19.4 percent in 1972." 1972 ANN. REP. 90.

98. Wright, *supra* note 55, at 780-81.

99. *See* notes 53-56 and accompanying text *supra*.

alternatives as they are currently interpreted and applied, however, reveals their insufficiency in achieving the flexibility and other benefits of the balancing approach.

C. *Inadequacy of Preexisting Alternatives to the Final Judgment Rule*

1. *Certification Requirement of 28 U.S.C. § 1292(b).* The exception to the finality requirement most similar to the balancing approach in terms of the factors considered in allowing appeal is the Interlocutory Appeals Act of 1958, presently codified as 28 U.S.C. § 1292(b), which states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such 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, he shall so state in writing in such order. The Court of Appeals may thereupon, 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: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

The purpose of section 1292(b), according to its legislative history, was to "expedite the ultimate termination of litigation and thereby save unnecessary expense and delay" through appeal of certain nonfinal orders.[100]

Like section 1292(b), the balancing approach authorizes the court to inquire whether allowing appeal will "materially advance" a litigation's termination and whether the issue in question is in real doubt. Despite this similarity, however, comparison of these two alternatives to the final judgment rule reveals substantial procedural and substantive differences.

The most obvious differences relate to matters of procedure. Unlike traditional appeals under section 1291, appeals under section 1292(b) require the exercise of discretionary power resulting in certification by both the district and circuit courts. Congress apparently determined that by means of the dual certificate requirement

> the district court, better able to gauge both the time saving from a reversal and the presence of dilatory motives in the request for appeal, can protect the appellate courts from an inundation of applications for appeal, while the appellate court, free of the temptations and pressures which face the district court, can better estimate the likelihood of error and the burden upon its own docket.[101]

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

100. H.R. REP. No. 1667, 85th Cong., 2d Sess. 1 (1958).
101. Note, *Appealability in the Federal Courts,* 75 HARV. L. REV. 351, 379 (1961).

from the rigors of the final judgment rule. As might be expected, "[d]istrict courts . . . have not been overly sympathetic to claims of error. Neither have they been easily persuaded that the order involves a 'controlling question of law' or that immediate appeal will speed the final determination."[102] The district courts enjoy generally absolute discretion to deny a section 1292(b) certificate,[103] and the procedures for obtaining appellate court certification once the district court certificate has been issued are comparatively cursory.[104] Furthermore, section 1292(b) has been held to provide the circuit courts of appeals with absolute discretion to reject applications for appeal even though an initial certificate has been issued by the district court.[105] The circuit courts have generally not been receptive to such applications[106] and are not required to provide reasons for their decision on section 1292(b) petitions.[107]

The pragmatic balancing approach, by contrast, avoids a substantial part of the dual certification barrier, since it does not require the trial court's consent for an appeal to lie. While it is true that appeals under the balancing approach are not likely to receive better treatment than section 1292(b) petitions at the hands of circuit courts already burdened by overloaded dockets, the appellate courts may treat filings under the balancing approach as they have traditionally received section 1291 appeals. They may be more likely to give such applications serious consideration, afford oral argument on motions to dismiss, and provide a statement of reasons for their decisions.

A comparison of the substantive aspects of section 1292(b) on the one hand, and the balancing approach on the other, also indicates that the latter is

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102. Gellhorn & Larsen, *Interlocutory Appeal Procedures in Administrative Hearings*, 70 MICH. L. REV. 109, 137 (1971) (citations omitted). Professor Carrington has noted that section 1292(b) has had "only negligible impact" in contributing to the increase in the hurdens of the appellate courts. Carrington, *supra* note 53, at 546-47.

103. *See* D'Ippolito v. Cities Service Co., 374 F.2d 643, 649 (2d Cir. 1967).

104. By its terms, section 1292(b) requires that application to the circuit court of appeals be made within ten days. *See* FED. R. APP. P. 3(a), 5. The ten-day period is considerably less than the thirty days allowed for filing a notice of appeal (which requires substantially less preparation than the detailed petition to the circuit court under section 1292(b)). *See* FED. R. APP. P. 4(a). In addition, rarely, if ever, will section 1292(b) petitions receive oral argument, *see, e.g.*, 2d CIR. R. 10(d), whereas a party moving to dismiss an appeal for want of a final decision is usually afforded some time for oral argument.

105. *See, e.g.*, A. Olinick & Sons v. Dempster Brothers, Inc., 365 F.2d 439 (2d Cir. 1966). *See generally* Note, *Section 1292(b): Eight Years of Undefined Discretion*, 54 GEO. L.J. 940 (1966).

106. The courts of appeals have not been markedly hospitable to interlocutory appeals under section 1292(b). Decisions during the 1950's placing strong emphasis on the exceptional nature of the relief have not lost their precedential force. As a result, the procedure is not resorted to frequently. In the fiscal year 1966, the courts of appeals considered 68 applications and allowed only 36; for 1967 the figures were 80 applications and 41 allowed.

J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE: CASES AND MATERIALS 872 (1968) (citations omitted). In 1968, 58 appeals were allowed out of a total of 128 certifications by the district courts. 1968 ANN. REP. 185.

107. S. REP. No. 2434, 85th Cong., 2d Sess. 3 (1958): "[T]he court of appeals may deny such an application without specifying the grounds upon which such denial is based." Although not required to do so, the circuit courts occasionally provide reasons for their decisions on section 1292(b) petitions.

likely to allow appeal in certain instances where application of the former would lead to dismissal. The clearest substantive difference is that by its terms, section 1292(b) has no application to criminal cases,[108] while section 1291, whether applied in the traditional manner or pursuant to the balancing approach, reaches both civil and criminal cases. Since "[t]he final judgment rule applies with peculiar force in criminal cases,"[109] and application of the final judgment rule may cause severe prejudice in criminal as well as civil cases,[110] the balancing approach may serve a "safety valve" function in an area left wholly unaffected by section 1292(b).

Another area apparently covered by the balancing approach but not section 1292(b) consists of the group of cases involving "external consequences."[111] One of 1292(b)'s fundamental requirements is that allowing appeal "may materially advance the ultimate termination of the litigation." Hence, on its face, section 1292(b) seems concerned solely with alleviating the harmful "internal consequences" of the final judgment rule. The economic or personal hardship that may result from an adverse interlocutory order is irrelevant for section 1292(b) purposes; if allowing appeal does not increase the chances of an earlier termination of the case, the statutory exception offers no relief.[112] The balancing approach would enable the court to take account of "external consequences," regardless of whether allowing appeal may materially advance termination of the litigation.

Even in the area of "internal consequences," the balancing approach would provide greater flexibility than section 1292(b) inquiry. Section 1292(b) asks three distinct questions: (1) Is the question of law "controlling"? (2) Is there "substantial ground for difference of opinion" in regard to that question? (3) Might an immediate appeal "materially advance the ultimate termination of the litigation"? These three criteria, in the words of one commentator, "are not to be read so broadly that the district court can allow appeal whenever it would promote the 'efficient administration of justice,' since the Judicial Conference draftsmen deliberately rejected this phraseology in favor of a more restricted wording."[113] For appeal to be permitted under section

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108. *See* Continental Grain Co. v. Federal Barge Lines, Inc., 268 F.2d 240, 242 (5th Cir. 1959), *aff'd*, 364 U.S. 19 (1960).

109. 9 J. MOORE, FEDERAL PRACTICE AND PROCEDURE ¶ 110.07, at 110 (1973). *Cf.* DiBella v. United States, 369 U.S. 121 (1962).

110. *See, e.g.*, Parr v. United States, 351 U.S. 513 (1956), discussed at notes 64-66 and accompanying text *supra*.

111. *See* notes 61-63 and accompanying text *supra*.

112. Compliance with a discovery order, for example, could cause serious hardship, while allowing appeal of such an order may not expedite the termination of the litigation and may, in fact, prolong it. *Cf.* Covey Oil Co. v. Continental Oil Co., 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965). *See* notes 62-63 and accompanying text *supra*. Some courts seem to have mistakenly read section 1292(b) to allow appeal in such cases. *See, e.g.*, Carey v. Hume, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480 (4th Cir. 1973).

113. Note, *supra* note 1, at 341.

1292(b), each criterion must be examined separately, and each must be fulfilled.[114] The balancing approach, on the other hand, would provide a much more flexible approach to appealability. By painting with a broader brush, it allows the court to focus on the unique circumstances of individual cases, to weigh the likelihood of reversal of an interlocutory order against the burdens the litigants might face if appeal were rejected. The greater the likelihood of reversal, the less burden must be shown, and vice versa. Such a case-by-case approach enjoys the advantage of being more likely to assure a just result, and should not result in greater unpredictability if clear standards for appealability are enunciated.

One final possibly significant difference between appeal under the balancing approach and under section 1292(b) is the widely held view that section 1292(b) certificates are to be issued "only under most unusual circumstances."[115] This doctrine, known as the "big case" requirement, was established by the Third Circuit in *Milbert v. Bisons Laboratories, Inc.*[116] and has been followed extensively.[117] The doctrine limits application of section 1292(b) to "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."[118] It may well be that the large majority of cases where the balancing approach will allow appeal will be "big cases." There may be a significant number of cases, however, which on balance call for an interlocutory appeal but which do not meet the requirements of the "big case" doctrine.[119]

2. *The "Collateral Order" Doctrine.* The primary judicially created exception to the finality requirement is the "collateral order" doctrine enunciated in *Cohen v. Beneficial Industrial Loan Corp.*[120] While the scope of this

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114. *Id. See* Leighton v. N.Y., Susquehanna & Western R. Co., 306 F. Supp. 513, 514 (S.D.N.Y. 1969).

115. Leighton v. N.Y., Susquehanna & Western R. Co., 306 F. Supp. 513, 515 (S.D.N.Y. 1969).

116. 260 F.2d 431 (3d Cir. 1958).

117. *See* C. WRIGHT, *supra* note 16, at 463. *See, e.g.*, Gottesman v. General Motors Corp., 268 F.2d 194, 196 (2d Cir. 1959); Seidenberg v. McSorleys' Old Ale House, Inc., 308 F. Supp. 1253, 1261 (S.D.N.Y. 1969); Bobolakis v. Compania Panamena Maritima San Gerassimo, 168 F. Supp. 236, 239 (S.D.N.Y. 1958). The Fifth Circuit, which had previously expressly rejected statements of other courts restricting section 1292(b) to big cases, *see* Hadjipateras v. Pacifica, S.A., 290 F.2d 697, 702-03 (5th Cir. 1961), has retreated somewhat from its firm resistance to the "big case" requirement, *see* Garner v. Wolfinbarger, 433 F.2d 117 (5th Cir. 1970).

118. Bobolakis v. Compania Panamena Maritima San Gerassimo, 168 F. Supp. 236, 239 (S.D.N.Y. 1958).

119. *See, e.g.*, Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); notes 153-73 and accompanying text *infra*. What may not appear, on an objective basis, to be a "big case" may, in fact, cause serious prejudice to litigants who are not in a strong financial position. The balancing approach, because of the flexibility it affords, would permit consideration of such factors.

120. 337 U.S. 541 (1949). *See* notes 35-39 and accompanying text *supra*. This doctrine has been characterized as an "interpretation" of section 1291, rather than an exception to it. United States v. Lansdown, 460 F.2d 164, 170 (4th Cir. 1972). Since it serves to permit appeal of admittedly interlocutory orders which do not terminate the litigation

exception has not been fully delineated,[121] it is clear that the order from which appeal is sought must be "collateral" to the issues still pending before the trial court.[122] The requirement that the order be "collateral" to the merits has been criticized, since the appellant's injury and the need for immediate review may be just as great where the order deals with the merits.[123] This limitation is justified on the grounds that a non-collateral order might well be altered by subsequent action in the district court, while the order collateral to the merits will presumably not change below. Of course, any interlocutory order, whether collateral or not, may be mooted by subsequent action in the district court, in that a final decision favorable to the party losing the collateral issue will render any ultimate appeal of that collateral issue unnecessary. Notwithstanding its arguably tenuous logical basis, the doctrine has retained its vitality as an independent exception to the final judgment rule.[124]

Although the "collateral order" doctrine is not subject to the strict procedural requirements of section 1292(b), substantive limitations upon its use clearly distinguish it from the more expansive practical balancing approach. The latter permits the court to deal with the substantive reasons for and against permitting appeal, to balance the dangers of delay against the costs of piecemeal review, rather than focus on the difficult and somewhat specious determination of "collateralness." A second limitation on the doctrine's utility is the requirement that the harm resulting from the delay of appeal be of a possibly irreparable nature.[125] While the Court in *Cohen* did not explain why refusing to allow immediate appeal in that case would result in irreparable

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for all practical purposes, however, the better view is to regard it as an exception to the final judgment rule. *See* text following note 52 *supra*.

A somewhat different judicial exception was established in Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848), discussed at notes 127-31 and accompanying text *infra*.

121. *See* C. WRIGHT, *supra* note 16, at 455. Several interpretations of the term "collateral order" are discussed in Note, *supra* note 101, at 365-66.

122. 337 U.S. at 546. *See also* Swift & Co. Packers v. Compania Colombiana del Caribe, 339 U.S. 684 (1950); Roberts v. United States District Court, 339 U.S. 844 (1950).

123. Comment, *supra* note 8, at 757:

> It would seem that the only real function of this requirement is to limit the number of interlocutory appeals, since the question of whether an order is collateral is capable of fairly accurate determination and but few orders fall within the definition. However, from the standpoint of the litigant this is hardly a justification for the requirement. Whether or not an order is collateral has no relation to the potential injury he may be forced to suffer.

*See also* Note, *supra* note 101, at 365.

124. In the past few years, the doctrine had fallen into disfavor in some of the circuits. *See, e.g.*, Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972); Borden Co. v. Sylk, 410 F.2d 843 (3d Cir. 1969). *Accord*, 9 J. MOORE, *supra* note 109, ¶ 110.10, at 135-36. But the Supreme Court has recently breathed new life into the doctrine in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171-72 (1974). *See also* American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280 (2d Cir. 1967).

125. 337 U.S. at 546. *Accord*, 9 J. MOORE, *supra* note 109, ¶ 110.10, at 131. In its most recent application of the "collateral order" doctrine, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Supreme Court made no reference to the irreparable injury requirement suggested in *Cohen*. *See* note 186 and accompanying text *infra*.

loss, the pragmatic halancing approach would presumably require a lesser showing of harm from delay.[126]

3. *Appealability of Orders Directing Immediate Delivery of Possession of Subject Matter*: Forgay v. Conrad. A second important judicial exception to the final judgment rule, one preceding the *Cohen* decision by a century but bearing greater similarities to the balancing approach, was established in *Forgay v. Conrad*.[127] The lower court there set aside a conveyance of land and slaves and ordered both immediate delivery of the property to the complainant, an assignee in bankruptcy for the original transferor of the property, and an accounting of the rents and profits. Chief Justice Taney held that a judgment directing immediate delivery of physical property to the opposing party is appealable, even though the lower court had also ordered an accounting that had not yet taken place. Unless the order were deemed appealable, Taney reasoned, the "right of appeal is of very little value to him and he may be ruined before he is permitted to avail himself of the right."[128] He emphasized that "the bill is retained merely for the purpose of adjusting the accounts referred to the master. In all other respects, the whole of the matters brought into controversy by the bill are finally disposed of as to all of the defendants . . . ."[129]

The rule of *Forgay* is not limited to orders "collateral" to the merits as is the *Cohen* doctrine,[130] and therefore its analogy to the balancing approach, which may also reach the merits of a case, appears stronger than that of the *Cohen* rule. The Court's emphasis on the final determination of the substantive issues in the case,[131] however, demonstrates a key distinction between the *Forgay* rule and the balancing approach, for the latter contemplates allowance of appeal in certain instances well before many of the major substantive issues have been decided.

4. *Mandamus Under 28 U.S.C. § 1651(a)*. The All Writs Act authorizes federal courts "to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[132]

126. [Irreparable injury] must be distinguished from mere inconvenience. Irreparable injury results from a ruling which operates to deny a substantive right and which cannot be corrected on appeal from a final judgment.
Comment, *supra* note 8, at 750.

127. 47 U.S. (6 How.) 201 (1848).

128. *Id.* at 205. Taney based his finding of irreparable injury on the ground that "the lands and slaves . . . will be taken out of [appellants'] possession and sold, and the proceeds distributed among the creditors of the bankrupt, before they can have an opportunity of being heard in this court in defense of their rights." *Id.* at 204.

129. *Id.* at 204. *See also* Gulf Refining Co. v. United States, 269 U.S. 125 (1925).

130. *See* Note, *supra* note 101, at 364.

131. As the Supreme Court has described the *Forgay* line of decisions:
[A]ll of these cases rely on the fact that there had been a conclusive adjudication of the rights and liabilities of the parties with immediate delivery of possession of the subject matter of the suit.
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 125 n.2 (1945).

132. 28 U.S.C. § 1651(a) (1970). *See generally* Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973).

Pursuant to this provision, the circuit courts of appeals may issue, *inter alia*, writs of mandamus to the district courts, requiring those courts to take certain actions. Traditionally, such writs were reserved for "extraordinary situations or matters affecting the court's jurisdiction."[133] Mandamus did not give federal appellate courts power to review "any unappealable order which [the court] believe[s] should be immediately reviewable in the interest of justice."[134]

In its 1957 decision in *La Buy v. Howes Leather Co.*,[135] however, the Supreme Court expanded considerably the doctrine's potential scope.[136] *La Buy* concerned an attempt by Judge La Buy of the District Court for the Northern District of Illinois to refer certain antitrust cases to a master pursuant to Rule 53(b) of the Federal Rules of Civil Procedure. Judge La Buy claimed that since the court was "confronted with an extremely congested calendar,"[137] he was justified in referring the complex matters before him to a master. All parties objected to the references. When their motions to vacate the reference were refused, they sought a writ of mandamus in the Seventh Circuit, which granted the motion. The Supreme Court affirmed. Mr. Justice Clark, speaking for a five-man majority, stated:

> We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here.[138]

The Court's reference to a "supervisory" power of mandamus has been taken to establish the existence of a new, broad mandamus power lodged in appellate courts to review district court action.[139]

Although the exact limits of the supervisory mandamus power have never been thoroughly established by the courts, one commentator has sensibly suggested that "[t]he circumstances in which 'supervisory' mandamus is proper may be defined as circumstances where the order attacked represents one instance of a significant erroneous practice the appellate court finds is likely to recur."[140] Support for this view derives from Justice Clark's observation that Judge La Buy had made eleven references in six years, and his conclusion that "even 'a little cloud may bring a flood's downpour' if we approve the practice here indulged."[141] Under such a theory, which has received support from subsequent Supreme Court interpretation,[142] the expanded theory of

133. Note, *supra* note 101, at 377 (citations omitted). *See Ex parte* Fahey, 332 U.S. 258, 260 (1947); Note, *supra* note 1, at 338.
134. *In re* Josephson, 218 F.2d 174, 177 (1st Cir. 1954).
135. 352 U.S. 249 (1957).
136. *See* Wright, *The Interlocutory Appeals Act of 1958*, 23 F.R.D. 199, 201 (1959).
137. 352 U.S. at 252-53.
138. *Id.* at 259-60.
139. *See* Carrington, *supra* note 3, at 512-17.
140. Note, *supra* note 132, at 610.
141. 352 U.S. at 258. *See* Note, *supra* note 132, at 609.
142. *See* Will v. United States, 389 U.S. 90 (1967).

mandamus developed in *La Buy* falls far short of providing the flexibility for interlocutory appellate review provided by the balancing approach.

In any event, subsequent developments have established that *La Buy* was not meant to signal a truly drastic expansion of the mandamus power. Although undoubtedly some expansion has taken place,[143] appellate courts continue to reject summarily "transparent attempt[s] to substitute a writ of mandamus for an appeal . . . ."[144] Ten years after *La Buy*, the Supreme Court in *Will v. United States*[145] narrowed *La Buy*'s applicability to cases "where a district judge displayed a persistent disregard of the Rules of Civil Procedure . . . ."[146] The Court emphasized that:

> The peremptory writ of mandamus has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." While the courts have never confined themselves to an arbitrary and technical definition of "jurisdiction," it is clear that only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.[147]

Summarizing the situations where mandamus is available, the First Circuit has stated that the "extraordinary circumstances" where mandamus may apply include: (1) clear abuses of discretion by the district court; (2) situations where there is a need to confine an inferior court to the lawful exercise of its jurisdiction or to compel it to act when it is under a duty to do so; and (3) situations "raising important issues of first impression."[148] Whether or not the First Circuit's formulation will be followed, there can be little doubt that the power to review interlocutory orders in the federal system through the writ of mandamus is substantially more limited than a balancing approach under section 1291.[149]

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143. *See, e.g.*, Schlagenhauf v. Holder, 379 U.S. 104 (1964); Atlass v. Miner, 265 F.2d 312 (7th Cir. 1959), *aff'd on other grounds*, 363 U.S. 641 (1960).

144. Firestone Tire & Rubber Co. v. General Tire & Rubber Co., 431 F.2d 1199, 1200 (6th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971). It should be noted that

> the nature of the review in [mandamus] is markedly different [from review on direct appeal] since it subjects the appellate court to the rigid peremptory standard of 'abuse of discretion' in contrast to the broader review by appeal where our function is to determine whether the District Court's decision is right on its intrinsic merits.

Auerbach v. United States, 347 F.2d 742, 743-44 n.2 (5th Cir. 1965) (Brown, J., dissenting). *See also* Parr v. United States, 351 U.S. 513, 520 (1956) (mandamus is not used when "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.") *Cf.* Note, *supra* note 101, at 377; Note, *supra* note 132, at 600.

145. 389 U.S. 90 (1967).

146. *Id.* at 96.

147. *Id.* at 95.

148. *In re* Ellsberg, 446 F.2d 954, 956 (1st Cir. 1971).

149. The quantity of applications to the courts of appeals for extraordinary writs has not been great. In fiscal 1970, of 11,662 cases filed in the eleven courts of appeals, only 241 were original proceedings.

H. HART & H. WECHSLER, *supra* note 84, at 1572.

5. *The Certification Requirement of Federal Rule of Civil Procedure 54(b)*. Rule 54(b) of the Federal Rules of Civil Procedure provides in relevant part:

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The rule's limitations as a means of obtaining interlocutory review are obvious. As with appeals under section 1292(b), appeal under Rule 54(b) requires an initial certification by the district judge, which will presumably be no easier to obtain than it is under section 1292(b).[150] Additionally, Rule 54(b) applies only in specified circumstances involving appeal in multi-party or multi-claim cases. Like section 1292(b), the "collateral order" doctrine, the *Forgay* exception, and the writ of mandamus, Rule 54(b) is severely limited in comparison to the potentially freewheeling power of review authorized by the pragmatic balancing approach.

D. *The Balancing Approach in the Courts*

It has been demonstrated to this point that on balance the interests of justice and efficiency dictate the need for a more flexible approach to appealability than is currently afforded either by strict application of the final judgment rule of section 1291 or any of the established exceptions to it. In light of this, it is necessary to determine to what extent there is adequate precedent in the case law for the development of such an approach.

1. *The Origin of the Balancing Approach*: Gillespie v. United States Steel Corp. Although the Supreme Court had earlier, in *Dickinson v. Petroleum Conversion Corp.*,[151] given verbal approval to an approach to appealability which included a balancing of competing considerations,[152] it was not until *Gillespie v. United States Steel Corp.*,[153] a decision which has been called by one authority "[t]he sharpest departure from traditional notions of finality,"[154] that the pragmatic balancing approach can arguably be said to have received the Court's endorsement. Plaintiff was the mother of a seaman who drowned while working on defendant's ship. She brought suit in federal court under the Jones Act[155] and the Ohio Wrongful Death Statute[156] on behalf of

150. *See* notes 102-103 and accompanying text *supra*.
151. 338 U.S. 507 (1950).
152. In a statement which can be viewed as the foundation for development of a balancing approach, the Court noted that among
> the considerations that always compete in the question of appealability, the most important . . . are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.

*Id.* at 511.
153. 379 U.S. 148 (1964).
154. C. WRIGHT, *supra* note 16, § 101, at 457. *Accord*, D. CURRIE, *supra* note 16, at 308.
155. 46 U.S.C. § 688 (1970).
156. Ohio Rev. Code Ann. §§ 2125.01-2125.03 (Baldwin 1971).

the decedent's brother and sisters as well as herself. The district court held the Jones Act to be plaintiff's exclusive remedy, striking all references to Ohio law and dismissing the claims of the decedent's brother and sisters asserted by the plaintiff mother. The district court refused to certify the issue for appeal pursuant to section 1292(b).

On appeal, the Sixth Circuit,[157] noting at the outset that no section 1292(b) certificate had been issued, stated that "[i]t appears that, on its face, the order of the District Court, striking the allegations from the complaint is not a final order, but an interlocutory order, and not appealable . . . ."[158] Nonetheless, persuaded by the appellant's argument that immediate appeal would save considerable time, expense and effort without creating any additional stress upon the judicial machinery,[159] the court decided the merits of the appeal.[160]

The Supreme Court affirmed.[161] Mr. Justice Black, speaking for the Court, stated:

> [O]ur cases long have recognized that whether a ruling is "final" within the meaning of §1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a "practical rather than a technical construction."[162]

After referring to the Court's statement in *Dickinson*[163] concerning the need to balance competing considerations, Mr. Justice Black declared:

> Such competing considerations are shown by the record in the case before us. It is true that the review of this case by the Court of Appeals could be called "piecemeal"; but it does not appear that the inconvenience and cost of this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered. We cannot say that the Court of Appeals chose wrongly under the circumstances. And it seems clear now that the case is before us that the eventual costs will certainly be

157. 321 F.2d 518 (6th Cir. 1963), *aff'd*, 379 U.S. 148 (1964).
158. 321 F.2d at 521.
159. The unnecessary expense in time and money, the duplication of effort, the frustration of being required to await the verdict in a trial in which one is not a participant [i.e., the brother and sisters] and the piecemeal litigation compelled in the trial court, all as a result of appellate inaction now, are self-evident . . . . It is readily apparent that appellate intervention at this stage is vital to the parties and will involve less stress upon the judicial machinery than appellate inertia at this stage of the proceedings.
*Id.* at 520-21 n.1.
160. The question whether the order of the District Court is an appealable or non-appealable order is a close one. We would, at this time, in the interest of the due and proper administration of justice, prefer to decide the appeal on the merits, if that be possible; and we think it is.
*Id.* at 522.
161. 379 U.S. 148 (1964).
162. *Id.* at 152.
163. *See* note 152 *supra*.

> less if we now pass on the questions presented here rather than send the case back with those issues undecided. Moreover, delay of perhaps a number of years in having the brother's and sisters' rights determined might work a great injustice on them.[164]

The Court noted that in *United States v. General Motors Corp.*[165] it had reviewed a trial court's refusal to permit proof of certain damage items in a case not fully tried because the ruling was "fundamental to the further conduct of the case."[166] Finally, Mr. Justice Black found that although the district court had refused to issue a section 1292(b) certificate, "the Court of Appeals properly implemented the same policy Congress sought to promote in §1292(b) by treating this obviously marginal case as final and appealable under 28 U.S.C. §1291 . . . ."[167]

The Court's opinion in *Gillespie* is astounding for its clouded reasoning and enigmatic conclusions. It is unfortunate that a decision which may represent a truly significant adjustment of the entire philosophy of appealability is so devoid of any persuasive analysis.

The Court's characterization of the case as one which is "marginal" on the issue of appealability and which falls within the "twilight zone" of finality is puzzling. Under traditional standards, the order in *Gillespie* could in no sense be considered marginally final. There was no question that much remained to be done at the trial level. Moreover, the order certainly failed to meet the requirements of the "collateral order" doctrine of *Cohen*. The district court's order went to the very heart of the merits. Furthermore, delay would not result in "irreparable injury" either to the decedent's mother or brother and sisters; the Ohio law cause of action and the siblings' claims could have been readily revived on a successful appeal after trial. Although the case was effectively terminated for the decedent's brother and sisters, the order was not therefore final for purposes of appeal, for they were only ultimate beneficiaries of recovery whose interests were clearly not separate from those of their mother, rather than parties to the original action.[168] The only real harm

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164. 379 U.S. at 153.

165. 323 U.S. 373 (1945).

166. *Id.* at 377, *quoted in* Gillespie v. United States Steel Corp., 379 U.S. 148, 153 (1964).

167. 379 U.S. at 154.

168. The presence of the brothers and sisters cannot serve to make the District Court order final. They were parties only to the mandamus proceeding [seeking to compel the district court to issue a certificate under § 1292(b)], [and] their claims were not severable from petitioner's . . . .

*Id.* at 169 n.5 (Harlan, J., dissenting) (citations omitted). *See* J. COUND, J. FRIEDENTHAL & A. MILLER, TEACHER'S MANUAL FOR CIVIL PROCEDURE: CASES AND MATERIALS 207 (1970):

> The ultimate beneficiaries of any recovery might include [decedent's] brothers [sic] and sisters as well. But the statutory claims in each instance were vested in decedent's personal representative, plaintiff, his mother. Under traditional concepts of pleading and *res judicata*, plaintiff had one claim for the death of the decedent. Even if the trial judge had made the requisite express determination under Rule 54(b), that rule would seem to have been inapplicable to the case.

suggested was the mother's expense of preparing and conducting a trial which might ultimately prove unnecessary. Thus, the Court's conclusion that the order was in the "twilight zone" of finality is a dubious one. In light of this confusion, it remains unclear whether *Gillespie's* balancing approach was intended to be applied only to situations in which the issue of actual finality is truly in doubt, which is what the Supreme Court said, or to any situation in which on balancing the competing practical factors a court feels it is in the interests of justice to allow an interlocutory appeal, which is what the Supreme Court appears to have done.

Justice Black's opinion further beclouded analysis and weakened the precedential force of the decision by its heavy reliance on its earlier opinion in *General Motors*, where, it claimed, appeal had been allowed from a nonfinal order "because the ruling was 'fundamental to the further conduct of the case.' " There is serious question whether the Court properly applied the *General Motors* holding to the facts of *Gillespie*.[169] Even if *General Motors* supplied an appropriate analogy, however, the meaning of the phrase chosen by the Court to provide guidance in determining whether an order is to be held appealable is anything but clear. To claim that an issue is "fundamental to the further conduct of the case" might reasonably be taken to imply that without its final resolution the case could not proceed. Was the Court saying, then, that the interlocutory appeal in *Gillespie* was necessary before the case could proceed in the district court? If this was the Court's meaning, it clearly defies reality, for regardless of what burdens or waste a delay in appeal might ultimately cause, the case could undoubtedly have proceeded to trial without an appellate ruling on the district court's preliminary determination.[170] Indeed, it is difficult, if at

169. *See* 379 U.S. at 168 n.2 (Harlan, J., dissenting) (*General Motors* involved appeal from a nonfinal order of the circuit court, not an interlocutory order of the district court).

170. The confusion engendered by the *Gillespie* Court's use of the phrase "fundamental to the further conduct of the case" can be seen in a recent decision of the Second Circuit, General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974). The court there held that an order *granting* class action status could be reviewed as an interlocutory order only if, had the lower court *denied* class action status, the case would effectively have been terminated. *See* notes 184-186 and accompanying text *infra*. In reaching this conclusion the court noted that the Supreme Court in *Gillespie*, in applying the "fundamentality" requirement to allow appeal,

> viewed [the order] as vital to the life of the action with respect, at least, to certain parties, for whose benefit, in part, the suit was brought, since the district court's order to strike the claims for relief on their behalf amounted to termination of the action as to them.

501 F.2d at 645 n.13. The court was apparently referring to the decedent's brother and sisters. Judge Mansfield, in a concurring opinion, disputed the court's analysis of the fundamentality requirement:

> In concluding that the order was "fundamental to the further conduct of the case" the Court did not suggest that the plaintiff-Administratrix might otherwise be unable to pursue her remaining Jones Act claims and then appeal from the judgment striking her claims under the Ohio survivor statute and those for the benefit of the decedent's brother and sisters.

501 F.2d at 657 n.2 (Mansfield, J., concurring). Judge Mansfield clearly has the better of the argument. Even if the brother and sisters had been parties to the case, *but see* note 168 *supra*, their interests clearly were not separate from their mother's, and they

all possible, to discover an interlocutory order to which an appeal really is essential to the case's progression in the district court. Even under the facts of *General Motors*, as the Court viewed them, the order in question would not fall into such a category, for a trial could certainly have continued despite the court's rejection of proof of certain damage items.

The Court may have meant simply that the issue is significant to the legal world in general. Although the importance of the legal issues involved in an interlocutory appeal may be relevant to a determination of appealability,[171] certainly "the danger of denying justice by delay," apparently so important to the Court in *Gillespie*, may arise regardless of the importance of the question involved.

The Court's reliance on phrases such as "marginal" finality, "twilight zone" of finality, and "fundamental to the further conduct of the case" seriously endangers the development of any viable principle of appealability out of the *Gillespie* decision. If the focus is shifted from what the Court said to what it did, *Gillespie*'s potential effect on the rules of finality and appealability is enormous. The Court, applying the balancing-of-interests test first enunciated in *Dickinson*, held appealable under section 1291 an order which dealt directly with the merits of the action in a situation in which the harm to the appellant because of delay would have been nothing more than the typical inconvenience suffered by many litigants—the physical, financial and emotional investment involved in a trial which might ultimately have proven unnecessary if the district court's preliminary decision were rejected on appeal. Although many litigants suffer such prejudice from delay in obtaining appellate review, it is no less real. Reversal of the district court's order[172] dismissing plaintiff's wrongful death claims *after* trial would necessarily result in a double investment in trial time and expense on the part of the litigants and of the courts.

2. *The Balancing Approach—Post*-Gillespie. The first point to note about the effect of *Gillespie* on subsequent determinations of appealability is that it seems to have been overestimated by a number of commentators.[173] Many lower court decisions which purport to apply the balancing approach of *Gillespie* are nothing more than common sense applications of traditional rules of finality most of which probably would have been decided the same way even

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ultimately could have appealed after the conclusion of their mother's suit in the district court. In no sense can it be accurately said that allowance of interlocutory appeal was necessary to the continued conduct of the case in the trial court.

171. *Cf. In re* Ellsberg, 446 F.2d 954, 956 (1st Cir. 1971).

172. The Court in *Gillespie* ultimately affirmed the lower court's decision on the merits. 379 U.S. at 158. The mere fact that the district court's decision ultimately proves to be correct does not necessarily mean that it was wrong to provide immediate appellate review. As long as the issue remains in some doubt, the Court apparently felt it should weigh the likelihood of avoiding unnecessary trial by providing interlocutory appeal.

173. *See, e.g.*, H. HART & H. WECHSLER, *supra* note 84, at 1553 ("In the years since *Gillespie*, the courts of appeals have shown considerable willingness to give the requirement of finality the 'practical' construction in that case"). *Cf.* C. WRIGHT, *supra* note 16, § 101, at 458 ("Though the requirement has been much diluted, it has not been abolished").

if *Gillespie* had never been handed down.[174] On the other hand, there are numerous decisions where consideration of the *Gillespie* balancing approach would have been logically appropriate, yet no mention of *Gillespie* was made.[175] There are still other decisions which, while recognizing the existence of the *Gillespie* rule, have construed it quite narrowly in order to preserve the fundamentals of the final judgment rule.[176]

*Gillespie* has had some effect in relaxing the rules of finality, however, for there are decisions which attempt to balance competing interests in determining whether an otherwise interlocutory order should be held appealable. Most of these cases concerned the "internal consequences" of delaying appeal,[177] the appellate court determining that the costs to litigants of a possibly unnecessary trial justified early review.[178] But these decisions are of only speculative precedential value, for virtually all of them relied, in part, on one of the established exceptions to the finality requirement as well as the balancing approach of *Gillespie*.[179] Moreover, other courts which have recognized the balancing approach have not found the expense of what may ultimately prove to be unnecessary litigation a persuasive consideration.[180]

The most recent installment of the Second Circuit's decision in *Eisen v. Carlisle & Jacquelin* (*Eisen III*)[181] may be a harbinger of a more receptive attitude in the lower courts towards use of the balancing approach in the "internal consequences" context. In *Eisen II*, on remand from the Second

174. *See, e.g.*, Staggers v. Otto Gerdau Co., Inc., 359 F.2d 292, 295 (2d Cir. 1966) (appeal from contingent denial of motion to substitute new plaintiffs). *See also* Jetco Electronic Industries, Inc. v. Gardiner, 473 F.2d 1228, 1231 (5th Cir. 1973) (appeal from dismissal of action against one of several defendants).

175. *See, e.g.*, Bradley v. Milliken, 468 F.2d 902 (6th Cir. 1972), *rev'd on other grounds*, 94 S. Ct. 3112 (1974); Benton Harbor Malleable Ind. v. UAW, 355 F.2d 70 (6th Cir. 1966). *Cf. In re* United States Southern Companies, Inc. v. Crawey, 410 U.S. 377, 378 (5th Cir. 1969).

176. *See, e.g.*, New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183 (1st Cir. 1972); Clark v. Kraftco Corp., 447 F.2d 933 (2d Cir. 1971).

177. *See* notes 60-61 and accompanying text *supra*.

178. *See, e.g.*, Thoms v. Hefernan, 473 F.2d 478 (2d Cir. 1973); United States v. 58.16 Acres of Land, 478 F.2d 1055 (7th Cir. 1973); Norman v. McKee, 431 F.2d 769 (9th Cir. 1970); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

179. One possible exception is the Seventh Circuit's decision in United States v. 58.16 Acres of Land, 478 F.2d 1055 (7th Cir. 1973) (appeal permitted from district court's denial of motion to vacate or modify decree requiring owners of condemned land to surrender possession, even though the issue of determining compensation remained undecided; but appellate court's opinion on the merits strongly influenced appealability decision).

180. *See, e.g.*, New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183 (1st Cir. 1972); Clark v. Kraftco Corp., 447 F.2d 933 (2d Cir. 1971). In *New England Power*, the First Circuit, in dismissing an appeal for lack of finality, stated:

> The only really adverse consequences of an erroneous decision not to stay the impending arbitration until a decision can be rendered on the issues raised in New England's complaint are the expense and irritation of securing what may be an unenforceable arbitration award. While we agree that these consequences, were they to occur, would indeed be unfortunate, they are not sufficiently serious to justify our departing from the longstanding federal rule against piecemeal review.

456 F.2d at 185 (citations omitted).

181. 479 F.2d 1005 (2d Cir. 1973), *rev'd on other grounds*, 417 U.S. 156 (1974).

Circuit for an evidentiary hearing on the maintainability of the action as a class action,[182] the district court held the action was maintainable as a class action and required defendants to bear 90 percent of the cost of notice to the class.[183]

The appealability of the lower court order allowing the class action to proceed and imposing the cost of notice on the defendants presented a more difficult problem than *Eisen I*, for the order did not sound a "death knell" as did the earlier ruling denying class action status. Troubled by the inequity of permitting immediate appeal of orders rejecting class action treatment while finding nonappealable orders holding class actions maintainable,[184] the Second Circuit decided that the order was appealable under the "collateral order" doctrine. Notwithstanding its reliance on *Cohen*, and its finding that the order was separable from the merits,[185] the appellate court significantly liberalized the "irreparable harm" requirement of the doctrine, and gave some recognition to the balancing approach of *Gillespie*. The court found the requisite "irreparable harm" to be the "time and money spent in defending a huge class action when an appellate court may years later decide such an action does not conform to the requirements of Rule 23."[186] The court concluded:

> [W]e would avoid a possible denial of justice caused by delaying review by permitting an interlocutory appeal of rulings either sustaining or striking class action allegations.[187]

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182. 391 F.2d 555 (2d Cir. 1968).

183. 52 F.R.D. 253 (S.D.N.Y. 1971); 54 F.R.D. 565 (S.D.N.Y. 1972); *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *aff'd*, 417 U.S. 156 (1974).

184. The same considerations which led this Circuit to apply the rule of Cohen v. Beneficial Industrial Loan Corp. . . . in *Eisen I*, also would seem to require a rule allowing a defendant to appeal from an interlocutory order permitting the representative plaintiff to continue the suit as a class action.

479 F.2d at 1007 n.1. Although the court may have been correct in recognizing the hardships which may be caused by a long trial which might be avoided by an early appeal, its concern about possible inequality of treatment between plaintiffs and defendants evinces continued failure to accept the principles of the interpretive form of the practical approach. *See* notes 21-57 and accompanying text *supra*. For if the court's sole goal is to interpret and apply the finality requirement of section 1291, as it is in the "interpretive" approach, then it should recognize that because of the peculiarities of the situation orders denying class action status may be appealable because they often terminate the litigation as effectively as any technically final judgment under section 1291; orders granting class action status, on the other hand, have no such effect. By way of analogy, it is clear that denial of a party's motion for summary judgment because of disputed issues of fact is a nonappealable interlocutory order. Yet if the party's motion is granted, the opposing party has an obvious right of appeal because an order granting summary judgment is a final decision. As in the class action situation, there is a form of "inequality" in this treatment, but it is an inequality which follows logically from the precepts of the final judgment rule.

185. 479 F.2d at 1007 n.1.

186. *Id.*

187. *Id.* The Second Circuit followed its *Eisen III* decision in Herbst v. International Tel. & Tel. Corp., 495 F.2d 1308 (2d Cir. 1974), where the court held an order granting class action status appealable, noting that "it is desirable for us to review orders authorizing class actions before the parties and the district courts expend large amounts of time and money in managing them." *Id.* at 1313. *But see* Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974); Thill Securities Corp. v. New York Stock Exchange, 469 F.2d 14 (7th Cir. 1972); Walsh v. City of Detroit, 412 F.2d 226 (6th Cir. 1969) (per curiam). The *Kohn* decision underscores the fact that *Eisen III* relied on the "collateral order" doctrine as well as the balancing approach, since it denied appeal from an

On certiorari, the Supreme Court affirmed on the "collateral order" rationale, without adverting to the other strands of the Second Circuit's reasoning.[188]

In cases involving "external consequences,"[189] the courts, with a few exceptions,[190] have been unreceptive to use of the balancing approach. Their reluctance to use a balancing approach in such situations appears to be based on the overwhelming practical difficulties which might result from its widespread adoption.

An area where this reluctance can be most clearly seen is in the field of attempted appeals from discovery orders.[191] The generally accepted route for review of such orders is to refuse to comply with the order, be held in contempt, and appeal from that contempt order.[192] Such a Draconian practice exacts a high price from a party or non-party witness wishing to challenge a discovery order. Moreover, it is by no means clear that a party to an action, as opposed to a non-party witness, may take an interlocutory appeal from a civil contempt order.[193] Thus, a party may effectively be left remediless. The Tenth Circuit departed from this traditional approach in *Covey Oil Co. v. Continental Oil Co.*,[194] allowing on the basis of the "collateral order" doctrine, a non-party to appeal an order requiring it to disclose what it contended were trade secrets. Other courts have specifically rejected the holding in *Covey Oil*,[195] primarily

order granting class action status, partially on the grounds that unlike *Eisen*, the class action order was not separable from the merits. *Id.* at 1099-1100.

188. 417 U.S. 156, 169-72 (1974).

189. *See* notes 61-63 and accompanying text *supra.*

190. *See* cases cited in note 175 *supra.*

191. *See, e.g.*, United States v. Fried, 386 F.2d 691 (2d Cir. 1967) (nonparty witness sought review of order requiring his presence for testimony, alleging that his attendance could seriously jeopardize his health). *See also* Gialde v. Time, Inc., 480 F.2d 1295 (8th Cir. 1973) (attempted interlocutory appeal from pre-trial discovery order in a libel and invasion of privacy suit requiring newsman to reveal secret sources). *Gialde* is discussed in Note, *supra* note 62.

192. Alexander v. United States, 201 U.S. 117, 121 (1906). *But cf.* United States v. Nixon, 94 S. Ct. 3090 (1974), where the Supreme Court allowed an interlocutory appeal to the D.C. Circuit from a district court denial of the President's motion to quash a subpoena duces tecum for the production of tapes and documents, without requiring the President to be first held in contempt and then appeal from the contempt order. The Court noted that

> the traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and present an unnecessary occasion for constitutional confrontation between two branches of the Government.

*Id.* at 3099. The Court's conclusion that appeal should have been allowed without the complications ensuing from a contempt order seems clearly correct. It is unclear, however, why the federal courts should not make a similar examination in cases which do not involve a clash between the branches of government to determine if use of the contempt process would be unduly burdensome or unlikely to result in appeal.

193. Fox v. Capital Co., 299 U.S. 105 (1936). *See* 9 J. MOORE, *supra* note 109, ¶ 110.13[4], at 167. If contempt of the order is considered criminal, rather than civil, it is immediately appealable, even though the citation is directed against a party. *See, e.g.*, Hanley v. James McHugh Construction Co., 419 F.2d 955 (7th Cir. 1969).

194. 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965). *See also* Sanders v. Great W. Sugar Co., 396 F.2d 794 (10th Cir. 1968).

195. Borden Co. v. Sylk, 410 F.2d 843 (3d Cir. 1969); United States v. Fried, 386 F.2d 691 (2d Cir. 1967).

because of the inordinate number of appeals which might result from its widespread adoption.[196] In the comparatively limited number of instances where a claim of truly severe prejudice is established, however, it would seem to be appropriate to employ the balancing approach to determine if the dangers of denial of justice by delay outweigh the harm of piecemeal review. But the courts have seemed unwilling to apply the balancing approach, or even the "collateral order" doctrine,[197] to the area of discovery orders.

3. *The Balancing Approach: Current Status.* The preceding discussion demonstrates that although the dramatic shift in judicial attitudes towards appealability widely expected after *Gillespie* has failed to materialize, a number of lower courts have seized upon the Court's broad "balancing" language to suggest a new judicial exception to the rigid dictates of section 1291. Thus, it seems that if a federal court were convinced of the need for increased flexibility in the allowance of appeals, it would have sufficient precedent to employ the balancing approach without feeling it had ignored the weight of prior case law.

### E. *The Balancing Approach and the Proper Role of the Judiciary*

One significant obstacle to further judicial development of the balancing approach is the potential conflict between this approach and Congress' concept of appealability. It may be argued that the adoption of section 1291, with the provision of certain specified exceptions, establishes a congressional "scheme" of appealability, implicitly rejecting any route to appeal other than those specified. If this argument is accepted, judicial recognition and expansion of the pragmatic balancing approach would seem to be an improper judicial invasion of legislative prerogative,[198] foreclosing adoption of this approach irrespective of its desirability on the merits.

It is significant to note, however, that the "collateral order" doctrine of *Cohen* and the limited exception to the final judgment rule established in the *Forgay* decision are fundamentally no less in conflict with section 1291 than is the balancing approach.[199] Thus, any court which has employed either of

196. *See* United States v. Fried, 386 F.2d 691, 693 (2d Cir. 1967). *Cf.* Borden Co. v. Sylk, 410 F.2d 843, 846 (3d Cir. 1969).

197. In American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277 (2d Cir. 1967), the court held that the "collateral order" doctrine did not apply to discovery orders, since the Supreme Court in *Cohen* had, in describing the doctrine, referred to that "small class of orders." The Second Circuit reasoned that the doctrine could not apply to such a large category as discovery orders. *See also* Borden Co. v. Sylk, 410 F.2d 843 (3d Cir. 1969).

198. Judges have only a limited power to amend the law; when the subject has been confided to a Legislature, they must stand aside, even though there be an hiatus in completed justice.

Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 281 (2d Cir. 1929), *cert. denied*, 281 U.S. 728 (1930) (L. Hand, J.).

199. In Craighead v. Wilson, 59 U.S. (18 How.) 199, 202 (1855), the Supreme Court candidly acknowledged that the *Forgay* rule allowed an interlocutory appeal, and thus was not merely an interpretation of the final judgment rule. Although the Court

these doctrines would seem to be inconsistent if it were to reject the balancing approach on the ground that it is in conflict with congressional intent contained in section 1291.

A valid argument can be framed to justify the judicial establishment of these exceptions to section 1291. First, it should be emphasized that at least on its face the language of section 1291 does not exclude the creation by the courts of equitable rules permitting appeal of certain nonfinal orders. It provides in relevant part that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." No limiting language is used. It might be replied that the entire history of the final judgment rule indicates that it is to be the exclusive form of appeal. Yet the *Cohen* and *Forgay* exceptions have been in existence for a long time (as has the broad language of the balancing approach first enunciated in *Dickinson*), and Congress has made no explicit effort to abrogate those doctrines, even though it substantially revised the system of appealability in 1958 with passage of what has become section 1292(b).[200] Although generally legislative failure to overturn a judicial decision should not be interpreted as constituting approval of that decision's interpretation of a statute,[201] perhaps congressional failure to overrule the judicially created exceptions in this instance reflects a sound policy of deference to the courts in an area in which they possess a unique competence to balance competing concerns—the control of the flow of business from lower to higher courts.

To promote judicial economy and convenience, the courts have created similar exceptions to congressional dictates in other areas as well. The doctrine of pendent jurisdiction, for example, now provides that when federal subject matter jurisdiction exists over a particular claim, the court may also assert jurisdiction over claims for which there is no independent basis of jurisdiction, provided that both claims "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding."[202] In a sense, use of this doctrine to assert jurisdiction over a claim for which Congress has not provided jurisdiction clearly circum-

attempted in *Cohen* to construe the order as "final," such an understanding of finality is quite different from the "total" finality generally thought to be required by the final judgment rule. *See* note 6 and accompanying text *supra*.

200. *See* Wright, *supra* note 136, at 202:

> The procedure set out in the 1958 statute is in addition to prior methods of securing interlocutory review; it does not replace them.

201. *See* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1393-1401 (Tent. ed. 1958). *But cf.* Flood v. Kuhn, 407 U.S. 258, 283-85 (1972).

202. United Mineworkers v. Gibbs, 383 U.S. 715, 725 (1966). *See* Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1968). It may be that assertion of jurisdiction over pendent claims might be justified on the basis of a broad reading of the phrase "civil actions" in 28 U.S.C. § 1331 (1970). Pendent jurisdiction over a party who was in no way part of the original action, however, may be more difficult to justify than the assertion of jurisdiction over pendent claims. *Compare* cases cited in Moor v. County of Alameda, 411 U.S. 693, 713 n.29 (1973), *with* Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974).

vents congressional intent. Yet the judiciary has long accepted some form of this doctrine, because the interests of judicial economy are served by it.

Judicial recognition of a pragmatic balancing approach to appealability may thus be justified as an exercise of the courts' inherent equitable power to deal with matters uniquely within their expertise, to promulgate rules regulating the flow of business from one federal court to another in a manner consistent with the interests of justice and practicality. Moreover, the balancing approach is consistent with the fundamental purposes of the final judgment rule. If one of Congress' goals in enacting the final judgment rule was to achieve judicial economy and avoid undue waste and harassment, intelligent use of the pragmatic balancing approach will accomplish these very same ends. For if the approach is used to avoid the unnecessary expenditure of time, effort and money at the trial level, the result will be increased judicial economy.[203]

Although it is possible to fashion an argument which might reconcile the balancing approach with the dictates of section 1291, it is considerably harder to harmonize the approach with the more detailed scheme of appealability promulgated by Congress in section 1292(b). The balancing approach, when employed in situations to which section 1292(b) was intended to apply, effectively repeals the legislative compromise, which established the dual certification requirement of section 1292(b).[204]

Acceptance of the theory that a judicially established balancing approach is inconsistent with congressional intent in section 1292(b), however, does not necessarily mean that the approach can have no applicability. It is at least arguable that section 1292(b) does not preclude use of the balancing approach in cases to which section 1292(b) has no application. These cases include such areas as criminal cases and those involving "external consequences." In any case, the "collateral order" doctrine presents many of the same conflicts with section 1292(b) as does the balancing approach, although only with respect to collateral rulings. They are both judicially created doctrines allowing

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203. It might be thought that the position taken here is inconsistent with the previously expressed view that courts which reject the interpretive aspect of the practical approach are improperly subverting congressional intent in section 1291. *See* text following note 52 *supra*. If the courts cannot balance to *reject* an appeal *authorized* by Congress, can they balance to *allow* an appeal which Congress itself has, in section 1291, not authorized? This apparent inconsistency, however, is capable of rational explanation. Courts which feel they can balance away an appeal from an order which is pragmatically final are emphasizing form over substance, for an order which ends a litigation for all practical purposes is no different in any meaningful way from an order which technically terminates a case. Probably at the heart of the distinction is the fact that a refusal to allow appeal from an order which for all practical purposes terminates a litigation will effectively deny the aggrieved party *any* opportunity for appeal. To bend somewhat the congressional intent of section 1291 in the opposite direction, as has been suggested here, would not bring about that most harmful result.

204. *See* Wright, *supra* note 136, at 202. *But see* Gillespie v. United States Steel Corp., 379 U.S. 148, 154 (1964), where Mr. Justice Black noted without explanation that allowance of an interlocutory appeal in that case would implement "the same policy Congress sought to promote in § 1292(b)," notwithstanding the district court's unequivocal denial of a section 1292(b) certificate.

what is effectively an interlocutory appeal, even though the congressionally imposed dual certificate requirement has not been met. Yet the Supreme Court last term reaffirmed the vitality of the "collateral order" doctrine in *Eisen v. Carlisle & Jacquelin*,[205] although without specifically addressing itself to the apparent conflict with section 1292(b).

If courts, though convinced of the soundness of the balancing aspect of the pragmatic approach, nevertheless feel compelled to avoid its use because of these considerations, there remain several options open to them. One possibility would be to expand the concept of "irreparable injury" under the collateral order doctrine to include the significant expenditure of time and money at the trial level.[206] Of course, the collateral order doctrine still presents substantial obstacles, chief among which is the requirement that the order from which appeal is sought be collateral to the merits. Another option is the continued expansion of mandamus as the vehicle which courts repeatedly insist it is not: a substitute for appeal. Here, too, the inherent limits on the use of mandamus prevent it from accomplishing the complete goals of the pragmatic approach. But again, its expanded use might alleviate some of the problems of the final judgment rule. A third alternative, which ultimately might prove the most effective, is a more flexible use of section 1292(b).[207]

Though these efforts would undoubtedly improve the situation, they are only make-shift substitutes for the establishment of a rational, flexible and predictable balancing approach. If the judiciary were to conclude that it is beyond its power to implement the balancing approach, perhaps the answer would have to come in the form of new congressional action. At this time, Congress is in the process of reviewing the entire scope and structure of federal appellate jurisdiction.[208] Though it appears unlikely that Congress would do anything at this point to expand the scope of appellate jurisdiction, it is submitted that the policy considerations outlined above, coupled with the relative inadequacy of section 1292(b) and the other avenues of interlocutory appeal, dictate a need for Congress to reassess present rules of appealability. A statute which allowed the appellate court to authorize appeal where, in the court's opinion, the dangers of denying justice by delay outweighed the harm of piecemeal appeal would add the needed flexibility to assure swift and fair appellate justice.[209]

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205. 417 U.S. 156, 169-72 (1974).

206. The Second Circuit may have done this in Eisen v. Carlisle & Jacquelin (Eisen III), 479 F.2d 1005 (2d Cir. 1973), *aff'd*, 417 U.S. 156 (1974). *See* notes 186-87 and accompanying text *supra*.

207. The courts could, for example, do away with the "big case" requirement, which is of specious origin in any event. Appellate courts could also review a district court's refusal to grant a section 1292(b) certificate for abuse of discretion. Additionally, they could establish a consistent practice of providing reasons for their decisions on 1292(b) certificates. Such a practice would go a long way towards preventing 1292(b) petitions from receiving short shrift traditionally accorded to them.

208. *See* note 74 *supra*.

209. It should be emphasized, however, that because it is an interpretation of, rather

## CONCLUSION

The development of a pragmatic approach to appealability has suffered from fundamental confusion as to its basic purposes, inadequate judicial analysis of its components and failure of the courts to recognize the logical implications of its use. The future of the balancing aspect of the approach is clouded by serious obstacles posed by the tremendous burdens currently faced by the federal appellate courts as well as by legitimate fears that the approach could be abused as a weapon of harassment of one litigant by another. Despite these difficulties, however, effective use of the approach would most likely prevent the undue hardship to litigants that often results from the final judgment rule but is not alleviated by the established exceptions to that rule, and would probably not result in an increase in the sum total of burdens on the federal courts.

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than an exception to, section 1291, the interpretative use of the pragmatic approach creates none of the problems of contravening legislative will which plague use of the balancing aspect of the approach.