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## Three Ideas for Discretionary Appeals

Bryan Lammon

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## THREE IDEAS FOR DISCRETIONARY APPEALS

*Bryan Lammon\**

I.	Introduction .....	639
II.	The Present and Future Role of Discretionary Appeals .....	641
III.	Two Alternative Forms of Discretionary Appeals ....	644
	A. The Limitless § 1292(b).....	644
	1. The Problem .....	645
	2. No Limits .....	649
	B. The One-Opportunity Appeal .....	651
IV.	Circuit Experimentation .....	655
V.	Conclusion .....	657

### I. INTRODUCTION

Discretionary appeals currently play a limited role in federal appellate jurisdiction. But reformers have long argued for a larger role.<sup>1</sup> And any wholesale reform of the current appellate-jurisdiction system will likely involve additional or expanded opportunities for discretionary appeals.<sup>2</sup> Some of these will be in the form of subject or category-specific discretion, like the current Civil Rule 23(f) (which permits discretionary appeals from class certification decisions). But the more general avenues

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\* Professor, University of Toledo College of Law. Thanks to Cassandra Burke Robertson, Michael Solimine, and Joan Steinman for comments on an earlier draft. And special thanks, as always, to Nicole Porter.

1. See generally Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, 47 L. & CONTEMP. PROBS. 157 (1984); Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules*, 1 J. APP. PRAC. & PROCESS 285 (1999); Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717 (1993); Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165 (1990) [hereinafter Solimine, *Revitalizing*].

2. See Bryan Lammon, *Dizzying Gillespie: The Exaggerated Death of the Balancing Approach and the Inescapable Allure of Flexibility in Appellate Jurisdiction*, 51 U. RICH. L. REV. 371, 415 (2017) [hereinafter Lammon, *Dizzying Gillespie*].

for discretionary appeals—which currently exist primarily in 28 U.S.C. § 1292(b)—might also expand.

In this essay, I offer some ideas for the future of discretionary appeals—what form they might take in a reformed system of federal appellate jurisdiction and how we might learn about their function. I have three (admittedly preliminary and undeveloped) ideas:

- First, eliminate all limits on certified appeals under 28 U.S.C. § 1292(b). That provision allows a district court to certify an interlocutory order for an immediate appeal in civil cases, which the courts of appeals then have discretion to review. But—due to the provision’s language and the way courts have interpreted that language—only some district court decisions are eligible for § 1292(b) certification. One possible reform would be to remove any limits on the types of decisions that could be certified under § 1292(b).
- Second, give each side in a civil action one opportunity to seek discretionary appellate review without first obtaining district court certification. That is, each side gets to try once. Regardless of whether that petition to appeal is granted or denied, no party from that side may try again without the district court first certifying the issue for immediate appeal (or without using another avenue for discretionary appeals, like Rule 23(f)).
- Third, experiment with these or other possible reforms in a limited number of circuits to see how they work. One of the main issues with expanding discretionary appeals is uncertainty about how they will function. How often will parties seek discretionary review? Can courts of appeals manage the increased caseload? Or will any increase in interlocutory discretionary appeals be offset by a reduction in appeals after a final judgment? We won’t know the answer to these and other questions without first trying these new rules. And rather than try nationwide, we might run pilot programs in smaller circuits (such as the First Circuit) to gain some useful data.

A wholesale switch to discretionary interlocutory appeals (for which some have argued) seems unlikely to me.<sup>3</sup> But less-radical reforms seem plausible.<sup>4</sup> We should accordingly start thinking about what discretionary

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3. See Bryan Lammon, *Perlman Appeals After Mohawk*, 84 U. CIN. L. REV. 1, 24–25 (2016).

4. See Lammon, *Dizzying Gillespie*, *supra* note 2, at 415.

appeals might look like in the future and how we might move towards that future.

## II. THE PRESENT AND FUTURE ROLE OF DISCRETIONARY APPEALS

As a general rule, appeals in federal court must wait until the end of district court proceedings, when all issues have been decided and all that remains is enforcing the judgment.<sup>5</sup> But lots of exceptions to that general rule exist. Some are found in statutes.<sup>6</sup> Others come from rules of procedure.<sup>7</sup> And still others—indeed, lots of others—come from judicial decisions.<sup>8</sup>

Discretionary appeals currently play a limited role in this system. Most federal appeals are as of right.<sup>9</sup> That is, the appellants do not need the appellate court's permission to take an appeal. Some appeals as of right come before the end of district court proceedings via one of the exceptions to the final-judgment rule. But most appeals as of right come at the end of district court proceedings.

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5. See 28 U.S.C. § 1291 (2018) (“The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.”); *Catlin v. United States*, 324 U.S. 229, 233 (1945) (defining a “final decision” as one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment”); *United States v. Williams*, 796 F.3d 815, 817 (7th Cir. 2015) (concluding that a judgment was appealable if it “end[ed] the litigation and [left] nothing but execution of the court’s decision, the standard definition of ‘final’ under § 1291.”).

6. See, e.g., 9 U.S.C. § 16(a)(1)–(2) (2018) (granting jurisdiction to review decisions refusing to order arbitration); 18 U.S.C. § 3731 (2018) (granting jurisdiction to review government appeals from orders suppressing or excluding evidence in a criminal proceeding); 28 U.S.C. § 1292(a)(1) (2018) (granting jurisdiction over appeals from “[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.”); *id.* § 1453(c) (giving the courts of appeals discretion to review orders remanding a case that was removed under the Class Action Fairness Act).

7. See FED. R. CIV. P. 23(f) (giving the courts of appeals discretion to review orders granting or denying class certification); FED. R. CIV. P. 54(b) (authorizing a district court to enter a final judgment for some (but not all) of the claims or parties in a case “if the court expressly determines that there is no just reason for delay,” thereby allowing an immediate appeal from orders that would otherwise have to wait for a final judgment).

8. For overviews of the judge-made exceptions to the final-judgment rule, see generally, e.g., THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 42–49 (2d ed. 2009); Martineau, *supra* note 1, at 737–46; Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353, 360–86 (2010).

9. See Bryan Lammon, *Finality, Appealability, the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1811 (2018) (noting that most of the law of federal appellate jurisdiction is built atop § 1291) [hereinafter Lammon, *Finality*].

Discretionary appeals come before the end of district court proceedings and are thus interlocutory.<sup>10</sup> And unlike an appeal as of right, a discretionary appeal requires that the would-be appellant get permission to appeal. That permission might come from the district court, the court of appeals, or both. And the court has some amount of discretion as to whether to grant that permission.

Discretionary appeals come primarily via 28 U.S.C. § 1292(b), which creates a system of dual certification for appeals in civil actions. When the district court determines “that [an otherwise non-appealable] 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,” it can certify that order for an immediate appeal.<sup>11</sup> The would-be appellant can then petition the court of appeals for permission to appeal. That court in turn has more-or-less complete discretion over whether to then hear the appeal. If the appellate court grants the petition, the case then proceeds like any other appeal.

A few other avenues for discretionary appellate review exist. Mandamus is probably the most well-known. Though not technically an appeal, mandamus allows the courts of appeals to review district court decisions in extraordinary circumstances.<sup>12</sup> The remaining avenues apply only to certain kinds of decisions or in certain proceedings. For example, Federal Rule of Civil Procedure 23(f) gives the courts of appeals discretion to hear appeals from class-certification decisions. A provision in the Class Action Fairness Act—28 U.S.C. § 1453(c)—gives the courts of appeals discretion to review remand orders made under that Act. And in a provision similar to § 1292(b), bankruptcy courts can certify an order for immediate appeal that the courts of appeals then have discretion to hear.<sup>13</sup>

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10. Perhaps the only discretionary appeals that come after the end of district court proceedings are discretionary appeals of remand orders under the Class Action Fairness Act. *See* 28 U.S.C. § 1453(c) (2018). Thanks to Michael Solimine for pointing this out.

11. 28 U.S.C. § 1292(b) (2018).

12. *See* 28 U.S.C. § 1651 (2018). For overviews of appellate mandamus, see Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 351–61 (2012); Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1257–66 (2007).

13. *See* 28 U.S.C. § 158(d)(2) (2018). *See also* 28 U.S.C. § 1292(d)(1) (2018) (governing certified appeals from the Court of International Trade); *id.* § 1292(d)(2) (governing certified appeals from the Court of Federal Claims); 48 U.S.C. § 2166(e)(3) (2018) (governing certified appeals in suits related to the Puerto Rico Oversight, Management, and Economic Security Act).

By nearly all accounts, the current system of federal appellate jurisdiction is broken and sorely in need of fixing.<sup>14</sup> The system's problems have been extensively covered elsewhere, and I don't need to repeat them here.<sup>15</sup> Suffice it to say that the current regime of federal appeals is complicated and unpredictable, and it doesn't meet the needs of modern litigation.<sup>16</sup>

Reform has accordingly long been a focus of the appellate-jurisdiction literature. When it comes to discretionary appeals, proposed reforms have taken a few different forms. Some propose discretionary appellate jurisdiction over particular kinds of district court decisions or in particular contexts.<sup>17</sup> Others argue for expanding or reinvigorating existing avenues for discretionary appeals.<sup>18</sup> And still others argue for a wholesale switch to discretionary interlocutory appeals.<sup>19</sup>

I have focused largely on wholesale reform in my work, proposing a system that combines discretion and categorical rules for appealability.<sup>20</sup>

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14. Lammon, *Finality*, *supra* note 9, at 1821–22; Martineau, *supra* note 1, at 729 (“[T]he unanimous view of commentators is that the rule has either too many or too few exceptions, but in any event requires revision.”).

15. *See, e.g.*, Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 432–36 (2013) [hereinafter Lammon, *Rules*]; Steinman, *supra* note 12, at 1252–57, 1266–72.

16. *See, e.g.*, Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, 47 L. & CONTEMP. PROBS. 165, 165–66 (1984) (noting “the unconscionable intricacy of the existing law, depending as it does on overlapping exceptions, each less lucid than the next.”); Cooper, *supra* note 1, at 157 (“The final judgment requirement has been supplemented by a list of elaborations, expansions, evasions, and outright exceptions that is dazzling in its complexity.”); Eisenberg & Morrison, *supra* note 1, at 291 (calling the current system “arcane and confusing”); Lammon, *Finality*, *supra* note 9, at 1815–25; Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 L. & CONTEMP. PROBS. 171, 172 (1984) (“The existing federal finality-appealability situation is an unacceptable morass.”); Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Torts Era*, 80 N.C. L. REV. 527, 556 (2002) (noting the “dizzying array of statutory and judicially-created [finality] exceptions”).

17. *See, e.g.*, Bryan Lammon, *Assumed Facts and Blatant Contradictions in Qualified-Immunity Appeals*, 55 GA. L. REV. (forthcoming 2020) (draft at 68–69) (suggesting discretionary appeals for denials of qualified immunity); Andrew S. Pollis, *Civil Rule 54(b): Seventy-Five and Ready for Retirement*, 65 FLA. L. REV. 711, 757–60 (2013) (arguing for discretionary appeals over decisions that resolve some (but not all) claims in a multi-claim or multi-party action) [hereinafter Pollis, *Rule 54(b)*]; Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful?*, 94 NOTRE DAME L. REV. ONLINE 169, 183 (2019) (suggesting discretionary appeals for denials of qualified immunity).

18. *See generally, e.g.*, Solimine, *Revitalizing*, *supra* note 1, at 1201–05; Steinman, *supra* note 12, at 1276–82.

19. *See* Cooper, *supra* note 1, at 163–64; Eisenberg & Morrison, *supra* note 1, at 293–302; Martineau, *supra* note 1, at 748–87; John C. Nagel, Note, *Replacing the Crazy Quilt of Interlocutory Appeals with Discretionary Review*, 44 DUKE L.J. 200, 214–22. *See also* Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 124–27 (1975).

20. *See* Lammon, *Dizzying Gillespie*, *supra* note 2, at 415–16.

Categorical rules would describe what is (and perhaps what isn't) appealable before the end of district court proceedings.<sup>21</sup> Some of those categorical rules might be discretionary appeals. And all of those rules would be capped with a discretionary catchall that would cover appeals that did not fall into any categorical rule.<sup>22</sup> I have argued that this system (inspired by the hearsay rules in the Federal Rules of Evidence) could clear up the existing system of federal appellate jurisdiction and make the system transparent and accessible.<sup>23</sup> And the discretionary catchall would inject overt flexibility into the system—something that the complexity of modern federal litigation requires.<sup>24</sup>

### III. TWO ALTERNATIVE FORMS OF DISCRETIONARY APPEALS

What would the discretionary catchall look like? It could be a blanket grant of discretion, much like the system proposed by advocates of a wholesale switch to discretionary interlocutory appeals. Or it could simply be something similar to what already exists: § 1292(b) and mandamus.

Or it could be something else. And it's worth thinking about what that something else might look like. I offer two ideas, both of them admittedly preliminary and undeveloped. The first is the more modest one: remove most (or even all) of the limits that currently exist (or seem to exist) on the use of § 1292(b). The second is more radical: give parties one opportunity in every action to seek discretionary appellate review from any district court decision. I'm not saying that we should adopt these particular rules. I am, however, saying that we need to start thinking about rules like them. This is accordingly only the start of the discussion.

#### A. *The Limitless § 1292(b)*

Let's start with § 1292(b). Again, § 1292(b) applies only in civil cases. And it authorizes the district court to certify a decision for an immediate appeal. Specifically, it says that district courts "shall" certify their orders for an immediate appeal when they are "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

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21. *Id.*

22. *Id.*

23. *Id.* at 416–17.

24. *Id.* at 417; see also Bryan Lammon, Hall v. Hall: A Lose-Lose Case for Appellate Jurisdiction, 68 EMORY L.J. ONLINE 1001, 1011 (2018) [hereinafter Lammon, *A Lose-Lose Case*].

litigation.”<sup>25</sup> When a district court certifies its decision under this statute, the would-be appellant then has 10 days to petition the court of appeals for permission to appeal.<sup>26</sup>

Section 1292(b) could be an excellent appellate rule. In theory, it provides a valuable source of flexibility, allowing immediate appeals when the district and appellate courts agree that an appeal is warranted.<sup>27</sup> The district court’s gatekeeper role—requiring that it first certify an appeal—limits the provision’s impact on appellate work; there can be only as many appeals as there are certified decisions. And § 1292(b) avoids wasteful procedural litigation on jurisdiction. Unlike clunkier avenues for appeal like the collateral-order doctrine, the court of appeals decides whether to hear an appeal before any time is spent addressing the issues that the appeal raises. Michael Solimine, as well as the authors of *Federal Practice and Procedure*, have accordingly called for a broad reading and use of § 1292(b).<sup>28</sup>

### 1. The Problem

At least that’s the theory. In practice, § 1292(b) has proved unsatisfactory.<sup>29</sup> It is severely underused; district courts are too reluctant to certify their decisions, and even when they do, courts of appeals are too stingy with their own discretion.<sup>30</sup> The reasons for this are unclear. It might be that courts simply disagree with their critics on the appropriateness of appeals. But there are at least some signs that § 1292(b) isn’t working as intended. For example, a recent spate of appellate decisions has used mandamus to reverse—actually or effectively—a district court’s refusal to certify an order for appeal.<sup>31</sup>

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25. 28 U.S.C. § 1292(b) (2018).

26. *Id.*

27. 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD C. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 3930 (3d ed. 1998) (“Ideally, § 1292(b) could be used to allow interlocutory appeals whenever the district court and court of appeals agree that immediate review is a good gamble.”).

28. *See id.*; Solimine, *Revitalizing*, *supra* note 1, at 1204–05.

29. *See* Solimine, *Revitalizing*, *supra* note 1, at 1165.

30. *See* 16 WRIGHT ET AL., *supra* note 27, § 3929 (“[I]t is clear that § 1292(b) has not made serious inroads on the final-judgment rule.”); Solimine, *Revitalizing*, *supra* note 1, at 1165.

31. *See In re Gee*, 941 F.3d 153, 172–73 (5th Cir. 2019) (denying mandamus to decide the plaintiff’s standing to sue but suggesting that the district court certify the merits of the plaintiff’s claim for a § 1292(b) appeal); *In re Trump*, 781 F. App’x 1, 2 (D.C. Cir. 2019) (denying mandamus to reverse the denial of a § 1292(b) certification but also remanding the matter for “immediate reconsideration”); *In re Trump*, 928 F.3d 360, 372 (4th Cir. 2019) (directing a district court—via a writ of mandamus—to certify an issue for immediate appeal under 28 U.S.C. § 1292(b)), *rehearing en banc granted*, 780 F. App’x 36 (4th Cir. 2019). *See also* Michael E. Solimine, *The Renaissance of*

So what's wrong with § 1292(b)? Commentators have ventured a few guesses. First and primarily are the ways in which courts have treated the criteria specified in § 1292(b): a substantial ground for difference of opinion, a controlling question of law, and material advancement of the litigation. These criteria might be read as guidelines for the district court to consider when deciding whether to certify an order. But courts sometimes speak of these criteria as prerequisites to or requirements for a § 1292(b) certification.<sup>32</sup> That is, the district court cannot certify an order unless all three of these criteria are satisfied. Several courts have added an extra-textual “big case” requirement to § 1292(b), holding that certified appeals are appropriate only in “big” or “exceptional” cases.<sup>33</sup>

This practice—reading § 1292(b)'s criteria as prerequisites to certification—poses several problems. For one thing, it unwisely restricts the category of orders to which § 1292(b) could apply.<sup>34</sup> The three statutory criteria, and even the extra-textual “big case” requirement, are all relevant to determining whether an interlocutory appeal is appropriate. But they're underinclusive. Lots of district court decisions that fail to meet one or more of those criteria might merit an immediate appeal. When applied strictly and cumulatively, these criteria impede the use of § 1292(b).<sup>35</sup> When an order doesn't seem to satisfy one or more of the criteria, courts must either deny the certification or fudge the criteria.

For another thing, as far as requirements go, § 1292(b)'s are fuzzy and vague. That's not a good look for an appellate rule. To see why, it's worth considering the components of appellate rules. All appellate rules

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*Permissive Interlocutory Appeals and the Demise of the Collateral Order Doctrine*, 53 AKRON L. REV. (forthcoming 2020) (draft at 7–13).

32. 16 WRIGHT ET AL., *supra* note 27, § 3930 (“Opinions that elaborate on the reasons for permitting or refusing to permit appeal, however, tend to reflect a less relaxed attitude that may interfere with full realization of the statutory purposes. No insuperable barriers have been raised, but there is a risk that flexible application may be discouraged by opinions that imply restrictive views of the statutory criteria in expressing the conclusion that interlocutory appeal is not desirable in a particular case.”).

33. *See id.*; Solimine, *Revitalizing*, *supra* note 1, at 1173, 1193–95.

34. 16 WRIGHT ET AL., *supra* note 27, § 3929 (“The flexible approach to § 1292(b) is far superior to blind adherence to a supposed need to construe strictly any permission to depart from the final-judgment rule.”); Solimine, *Revitalizing*, *supra* note 1, at 1193 (“The limitation of the statute to ‘big cases,’ and the narrow definitions of the three criteria by which district judges must review certification motions, have limited use of the statute, at least in some quarters.”).

35. 16 WRIGHT ET AL., *supra* note 27, § 3929 (“So long as the district court has made an order, the three factors that justify interlocutory appeal should be treated as guiding criteria rather than jurisdictional requisites . . . . The three factors should be viewed together as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal.”).

have two components: the conditions under which an appeal is allowed, and the category of orders to which the rule applies.<sup>36</sup>

The conditions under which an appeal are allowed implicate the familiar rules-versus-standards debate.<sup>37</sup> The conditions of appeal fall somewhere on a spectrum between a hard-and-fast rule and a flexible, case-by-case standard.<sup>38</sup> Rule-like requirements for an appeal can be seen in the final-judgment rule itself: an appeal is proper when the district court has decided all outstanding issues (though there is still some nuance to that rule, along with a few exceptions).<sup>39</sup> Standard-like conditions would be the exercise of discretion over the propriety of an appeal, like Rule 23(f).<sup>40</sup>

Separate from the conditions for an appeal is the category of orders to which an appellate rule applies; that is, the orders that are eligible to be considered under the relevant conditions for appeal.<sup>41</sup> Categories have at least two dimensions. First, they fall somewhere on a spectrum between narrow and broad categories. Narrow categories encompass only specific kinds of orders or circumstances; again, Rule 23(f) (which applies to class-certification decisions) provides a nice example. Broader categories apply to all orders in a particular kind of case (*e.g.*, multidistrict litigation, civil cases) or even *all* district court decisions (*e.g.*, mandamus).

Categories also fall somewhere on a spectrum, this one between clear categories and fuzzy ones.<sup>42</sup> A clear category leaves little ambiguity over whether a particular district court order is eligible for the appellate rule. The law being the law, some ambiguity is inevitable at the margins.<sup>43</sup> But for the most part, there is little dispute over whether an order fits within—and can be evaluated under—a particular appellate rule. A fuzzy category

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36. See Richard L. Heppner Jr., *Conceptualizing Appealability: Resisting the Supreme Court's Categorical Imperative*, 55 TULSA L. REV. (forthcoming 2020) (draft at 27–29).

37. See *id.* at 23–25; Lammon, *Rules*, *supra* note 15, at 448–52.

38. See Heppner, *supra* note 36, at 23–25.

39. 28 U.S.C. § 1291 (2018).

40. This does not mean that Rule 23(f) has “standards” for when appeals are proper; it doesn’t, and the courts of appeals have had to develop criteria for evaluating the propriety of a Rule 23(f) appeal. I simply mean that the conditions under which an appeal is proper are not defined by hard-and-fast rules but instead by considerations that guide the court in its decisionmaking.

41. See Heppner, *supra* note 36, at 27.

42. See *id.* at 50–51.

43. See, *e.g.*, *Matz v. Household Int’l Tax Reduction Investment Plan*, 687 F.3d 824, 826 (7th Cir. 2012) (addressing whether an order modifying the scope of a previously certified class is appealable under Rule 23(f)); *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) (*per curiam*) (addressing whether an order denying a motion to amend a class-certification order revives the time for taking a Rule 23(f) appeal).

is the opposite, creating uncertainty about whether an appellate rule applies to a particular district court order.

I think that clear categories are appropriate for most (if not all) appellate rules. Clear categories minimize uncertainty and—importantly—litigation over whether an appellate rule applies to a particular district court order. They focus attention instead on the conditions for appeal. That determination can be easy with rule-like conditions for appeal. Or it can require the exercise of judgment and discretion with standard-like conditions for appeal. In either case, attention is focused on whether an appeal is appropriate.

Back to § 1292(b). The appellate court's role can be easily described: once the district court has certified a decision, the court of appeals exercises complete discretion over whether an appeal is appropriate. So the conditions for appeal are just about as standard-like as they get. And the category of orders eligible for the appellate court's discretion is narrow and clear: any order the district court has certified under § 1292(b).

At the district court level, § 1292(b) seems to couple a fuzzy category with a standard-like exercise of discretion. Reading § 1292(b)'s criteria as requirements—*i.e.*, the district court cannot certify an order unless those requirements are met—creates uncertainty and litigation over whether an order is eligible for certification. It's not clear from the get-go whether these criteria are satisfied. Opinions can differ on whether a question is controlling or whether a substantial ground for disagreement exists or whether an appeal would advance the litigation or even whether a question is one of law.<sup>44</sup> This means uncertainty and litigation over eligibility, which can distract from the more important issue of whether the order in question should be immediately appealed.

The situation is even worse when you couple this vague category with an arguably discretionary determination. It's not clear whether district courts are supposed to make a discretionary (as opposed to mandatory) decision on certification.<sup>45</sup> But if their decision is

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44. See generally 16 WRIGHT ET AL., *supra* note 27, § 3930; Solimine, *Revitalizing*, *supra* note 1, at 1172–74.

45. The legislative history says that the district court's decision is discretionary. See 16 WRIGHT ET AL., *supra* note 27, § 3929 (“[T]he appeal is discretionary rather than a matter of right. It is discretionary in the first instance with the district judge . . .”). See also *id.* (“The initial determination that appeal is desirable is confided to the discretion of the district judge, relying on the criteria specified in the statute.”); BAKER, *supra* note 8, at 59. But the statute's use of the term “shall” has led some to argue that the district court has only limited discretion in certifying an order under § 1292(b). See Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 779–81 (2006).

discretionary, all the worse. There is little use in coupling uncertainty over eligibility with uncertainty over appealability. That simply invites two disputes instead of one. And given the vagueness of the eligibility determination, the two will almost inevitably overlap. A lot of time and effort could be saved by instead focusing directly on the latter question of whether the order should be appealed.

In practice, it might be the case that district courts are marking flexible, pragmatic decisions about the appropriateness of an appeal under the auspices of § 1292(b)'s criteria. That is, even if they speak in terms of requirements, district courts might actually be exercising the discretion that I think is appropriate in this circumstance. But then we have covert flexibility. This is good insofar as it allows for discretion. But I'm no fan of covert flexibility; flexibility should be overt so that the parties know what to argue about and the district court can candidly explain the basis for its decision.<sup>46</sup>

Or it might be the case that courts are not, in practice, applying § 1292(b) flexibly. That means rigid, formalistic decisionmaking that is anathema to our current regime of federal appellate jurisdiction. And that's even worse. Flexibility is necessary for a working system of appeals, and § 1292(b) is currently the best (and perhaps the only appropriate) outlet for that flexibility.<sup>47</sup>

## 2. No Limits

We cannot know for certain how much the textual (and non-textual) limits and uncertainties in § 1292(b) are impeding its use. But these limits and uncertainties don't serve much of a purpose. The rule accordingly might improve were we to remove them as strict preconditions to an appeal. That is, a limitless § 1292(b) might finally accomplish the sound use of discretionary appeals that both Michael Solimine and Wright, Miller & Cooper have separately advocated. This does not mean that courts would be completely at sea when deciding the propriety of an appeal; the statute could include guidance, or the courts could develop their own. But the analysis would no longer rigidly require satisfying certain underinclusive, cumulative requirements.

What would this rule look like? Section 1292(b) currently reads:

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

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46. See Lammon, *Dizzying Gillespie*, *supra* note 2, at 417.

47. See Lammon, *A Lose-Lose Case*, *supra* note 24, at 1011.

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 which would have jurisdiction of an appeal of such action 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.<sup>48</sup>

A reformed—and limitless—§ 1292(b) might say:

In a civil action, a district court may certify an order for an immediate appeal. The court of appeals that would have jurisdiction over an appeal in that action may then permit an appeal to be taken from that order. Application to the court of appeals must be made within 10 days. And application for an appeal under this section does not stay district court proceedings unless the district court or the court of appeals so orders.

Let's break this down a bit. First, the limit to civil cases is retained (I'll return to this in a moment). Second, by saying "a district court may certify," the revised rule removes any doubt that the district court has discretion to certify; no more "shalls." Third, there is no suggestion of any prerequisites to the district court's certification; the court can exercise its judgment to determine whether it thinks a decision warrants an immediate appeal. The rest is more or less the same; the court of appeals has discretion to accept the appeal, the petition must be filed within 10 days, and district court proceedings are not stayed without an appropriate order.

These revisions focus both the district court and the court of appeals on the central question: would this decision benefit from immediate appellate review? Courts would likely develop standards governing both exercises of discretion. But those standards would be just that—standards, which would guide the parties in making their arguments and the courts in making their decisions. And perhaps most importantly, courts would make those decisions in procedurally appropriate circumstances—directly tackling the appropriateness of an appeal before any time is wasted on the merits of that appeal (unlike they currently do in, for example, the collateral-order doctrine context).

A revised § 1292(b) could also eliminate the need for Federal Rule of Civil Procedure 54(b). Rule 54(b) allows the district court to certify for an immediate appeal an order that resolves some (but not all) of the claims

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48. 28 U.S.C. § 1292(b) (2018).

in a multi-party or multi-claim suit. If the district court so certifies—finding that there is “no just reason for delay”—the parties then have a right to appeal. While Rule 54(b) might at first seem useful and even pragmatic, Andrew Pollis has revealed its problems.<sup>49</sup> Rule 54(b)’s terms create uncertainty and disputes over whether a decision is eligible for a certification. And the rule gives the district court power to control appellate jurisdiction, occasionally creating a power struggle between the district and appellate courts. Pollis accordingly suggested reforming § 1292(b) to add a provision for double-certified discretionary appeals from orders that resolve a party’s entitlement to relief on a particular legal theory.<sup>50</sup> A limitless § 1292(b) would make Pollis’s suggested change unnecessary, as it could handle the orders that Rule 54(b) normally would. And like Pollis’s suggestion, a limitless § 1292(b) would appropriately direct those matters to the discretion of *both* the district court and appellate court.

One last note. Section 1292(b) currently applies only in civil cases. Arguments have been made to expand it to criminal cases.<sup>51</sup> As of now, I have no opinion on whether doing so is wise; it’s an issue to which I have not given enough thought. I will note that pushes for increased appeals are less common (though hardly nonexistent) in the criminal context. And courts regularly emphasize the need to limit interlocutory appeals in criminal proceedings.<sup>52</sup> But I leave this issue for another day.

### B. *The One-Opportunity Appeal*

Even this revised § 1292(b) still requires double certification. What about appeals solely at the discretion of the courts of appeals? Again, a move to this has long been advocated, fueled in part by dissatisfaction with the district court’s gatekeeper role under § 1292(b). And absolute discretion has some benefits. It would place a check on district courts trying to force a settlement with decisions that are insulated from appeals. And there are likely occasions in which appellate courts think an

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49. See generally Pollis, *Rule 54(b)*, *supra* note 17.

50. *Id.* at 760.

51. See generally Daniel J. Adelman, Comment, *Time Is of the Essence: The Case for Amending 28 U.S.C. § 1292(b) to Permit Interlocutory Appeals in Criminal Cases*, 1986 ARIZ. ST. L.J. 727 (1986); Raymond A. Hayward, Note, *Amending 28 U.S.C. § 1292(b) to Permit Interlocutory Appeals in Federal Criminal Proceedings—An Economic Analysis*, 67 IOWA L. REV. 1037 (1982).

52. See, e.g., *United States v. Sueiro*, 946 F.3d 637, 640 (4th Cir. 2020).

immediate appeal is warranted regardless of what the district court thinks.<sup>53</sup>

But one persistent concern with a wholesale switch to discretion is impact on appellate caseloads.<sup>54</sup> Reform efforts are sensitive to increasing appellate caseloads.<sup>55</sup> And it's at least plausible that a wholesale switch to discretion would increase appellate workloads. Even if appellate courts were chary of granting permission to appeal—and thus actual appeals did not increase beyond the courts' capabilities—the courts of appeals would still have to deal with an increased number of petitions to appeal.<sup>56</sup> Petitions to appeal are almost certainly less work than full-blown appeals. But they're not nothing. And allowing litigants to seek discretionary appeals from any district court decision creates at least a realistic chance that the courts of appeals will be inundated with petitions to appeal. This increased workload might be temporary—litigants might adjust to the new reality. Multiple appeals in a single case, however, could very well become common.

Balancing the costs and benefits of discretionary appeals thus likely requires limiting their number. Section 1292(b) did that by requiring that litigants first obtain permission from the district court.<sup>57</sup> Other forms of discretionary appeals (such as Rule 23(f) and § 1453(c)) limit the number of petitions to appeal by limiting those petitions to a specific kind of order; there can only be as many petitions to appeal as there are orders of that type. But there might be other ways.

One possibility comes from Kenneth Kilbert's recent proposal for "challenge appeals." Inspired by instant-replay review in sports, Kilbert offered a rule whereby "plaintiff and defendant each has the right to appeal one interlocutory order in the case immediately to the court of appeals, without the need for any permission by a judge."<sup>58</sup> As Kilbert saw it, challenge appeals would open interlocutory appeals to a wide variety of orders, provide certainty over appealability, reduce procedural

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53. See the mandamus/§ 1292(b) cases cited *supra* note 31.

54. See Lammon, *Rules*, *supra* note 15, at 433–34; Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 236–40 (2001).

55. See Lammon, *Rules*, *supra* note 15, at 433–34.

56. See Bryan Lammon, *Appellate Jurisdiction in Sanchez-Gomez: A Hard Case that Should Be Easy*, 96 WASH. U. L. REV. ONLINE 1, 7 (2018).

57. 28 U.S.C. § 1292(b) (2018).

58. Kenneth K. Kilbert, *Instant Replay and Interlocutory Appeals*, 69 BAYLOR L. REV. 267, 269 (2017).

litigation over what can be appealed, and keep the number of interlocutory appeals manageable.<sup>59</sup>

Kilbert's proposal is fascinating. But I'm concerned about its impact on appellate workloads. The rule would allow for two interlocutory appeals *as of right* in every case. If those challenge appeals are coupled with an appeal from a final judgment, we then have three full trips to the court of appeals in a single case. To be sure, we don't know how frequently that would occur. But it's a risk.

I offer a variation on Kilbert's idea. Rather than give both sides the *right* to one appeal, give them each one *opportunity* to seek a discretionary appeal. That is, each side could have one chance to ask the court of appeals for permission to appeal any district court decision. They would have a short window in which to petition—say, 14 days from the order. And at some point before trial, they would lose this opportunity had they not used it—say, after the final pretrial order or when jury selection begins. Regardless of whether a side's petition to appeal is granted or denied, that side cannot ask again. Or, at least, they couldn't ask again under this rule; other discretionary options like § 1292(b) and Rule 23(f) would still exist.

Rather than risk two interlocutory appeals as of right, giving each side only the opportunity to seek appellate review would mean a maximum of two petitions for interlocutory appeal. A cap thus exists on the number of requests for discretionary review. Granted, the number is somewhat arbitrary. There could be cases in which several interlocutory appeals were warranted (but that a district court, for whatever reason, would refuse to certify under § 1292(b)). And there certainly will be cases in which no interlocutory appeals are needed. The rule would thus be both under- and overinclusive. But at least there's a cap.

Further, the use-it-and-lose-it nature of the appeal might make some litigants never use it. Some litigants might want to save their chance at an interlocutory appeal in case a particularly important district court decision doesn't go their way. Those litigants might pass on several orders from which they could have sought review. And the important order that they were waiting for might never come; once the final pretrial order is issued (or jury selection begins, or whatever), they can no longer seek permission to appeal. The rule thus mixes incentives and uncertainty to further discourage the use of this procedure.

Limits would need to exist when one side comprises multiple parties. And I think Kilbert handled this issue well in his recommendation for

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59. *Id.* at 299–302.

challenge appeals.<sup>60</sup> One option would be to give each individual party its own one-opportunity appeal. But that would be too much. Keeping the number of petitions to appeal low is a key feature of this proposal. Giving each individual party a shot at an interlocutory appeal could mean dozens of attempts in larger suits.

The better option is to give each side one opportunity to seek discretionary review. This makes especially good sense for plaintiffs, who generally are the masters of their claims and choose who's on their side.<sup>61</sup> It's different for defendants, who have little say in who their co-parties are and might even be adverse to them. But they, too, should ultimately be limited to one appeal. Defendants often have much in common and sometimes even work jointly.<sup>62</sup> They do not have to become adverse in litigation, since cross-claims are permissive.<sup>63</sup> And allowing one side multiple attempts at appeal loses one of the key limits for one-opportunity appeals: the limit on the number of petitions that could be filed in a single case. So in cases of multiple defendants, as with multiple plaintiffs, the first mover gets the chance at an appeal.<sup>64</sup> That being said, nothing is stopping the parties on one side from agreeing among themselves that they unanimously agree about the propriety of taking their side's appeal.<sup>65</sup>

Another option for dealing with multiple parties is to make them share the one opportunity to seek a discretionary appeal. That is, there would be only one opportunity per case for anybody to seek appellate review. Whichever party took the opportunity first would get it. That would mean only one potential petition to appeal in each action, further reducing appellate workloads. How parties would use these appeals is not entirely clear. Parties might swiftly take their first opportunity to appeal to deprive their opponent of that chance. Or the rule might result in a standoff—each waiting nervously for an order they want to appeal—with neither party taking an appeal until a crucial decision.

One final variation on these kinds of appeals—particularly if they're limited to only one appeal in each action rather than one per side—is to require that parties agree to the use of the procedure. That is, neither party would be able to unilaterally seek a discretionary appeal. The parties would instead have to agree on what to try and appeal. This is similar to a

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60. *See id.* at 309–12.

61. *Id.* at 309.

62. *Id.* at 310.

63. *Id.* at 310. *See also* FED. R. CIV. P. 13(g).

64. Kilbert, *supra* note 58, at 311.

65. *Id.* at 311–12.

procedure proposed by James Pfander and David Krohn.<sup>66</sup> They suggested that parties be allowed to agree to ask the district court to certify an issue for immediate appeal.<sup>67</sup> This final variation on the one-opportunity appeal would similarly operate by the agreement of the parties, though they would go straight to the court of appeals with their request.

There is also (and again) the question of whether this rule would apply in criminal cases. Again, and for much the same reasons as a limitless § 1292(b), I have no position on that matter at this time.

#### IV. CIRCUIT EXPERIMENTATION

Just proposing new discretionary-appeal rules won't be enough. Debate persists over how any appellate-jurisdiction reform—discretionary or otherwise—would work in practice.<sup>68</sup> And that debate sometimes seems interminable and irreconcilable.<sup>69</sup>

Part of the difficulty stems from defining “work”; that's a value-laden judgment, and reasonable minds can disagree over the merits of particular appellate rules. But another problem comes from a lack of information on which those judgments should be based. The consequences of most proposed appellate reforms are uncertain.<sup>70</sup> We can predict a rule's effects—such as the frequency with which district court proceedings would be interrupted and appellate workloads would be increased—based on reasonable assumptions about litigant and court behavior.<sup>71</sup> And we can even be fairly confident in some of those predictions. But those predictions might very well be wrong. We can sometimes look to similar state practices for data. But efforts to look to the states have been criticized, as unique aspects of federal litigation (greater complexity, well-resourced parties) can render state experience unhelpful.<sup>72</sup> In short, we don't really know what any discretionary system would look like in practice. And uncertainty over the consequences of any particular appellate reform can stand in the way of adopting that reform.

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66. See generally James E. Pfander & David R. Pekarek Krohn, *Interlocutory Review by Agreement of the Parties: A Preliminary Analysis*, 105 NW. U. L. REV. 1043 (2011).

67. See *id.* at 1053.

68. See Lammon, *Rules*, *supra* note 15, at 432–36.

69. See *id.*

70. See *id.* at 434.

71. See *id.* at 436.

72. Compare Eisenberg & Morrison, *supra* note 1, at 297–301 (relying on Wisconsin's experience with discretionary appeals to argue for a move to discretionary appeals in the federal system), and Martineau, *supra* note 1, at 777–87 (same), with Glynn, *supra* note 54, at 236–37 (doubting the relevance of the Wisconsin experience to federal appeals).

Some information on the consequences of particular appellate rules might help. And one way to learn about the consequences of an appellate rule is to try it. I once proposed judicial experimentation as a means for learning about different appellate rules.<sup>73</sup> I suggested that courts could use the collateral-order doctrine to craft rules allowing particular orders to be appealed.<sup>74</sup> Courts could then apply that rule for a period of years and learn how it operates. If need be, courts could eventually revise or abandon the rule.

I now doubt the feasibility (not to mention likelihood) of this kind of judicial experimentation. The collateral-order doctrine is an awkward tool for crafting appellate rules. And courts don't seem to have much interest in experimenting with these rules.

But experimentation is still possible. Rulemakers (with a little help from Congress) can craft appellate rules, too.<sup>75</sup> We could thus try appellate rules via rulemaking—those I've proposed or others, such as Kilbert's or Pfander and Krohn's—to see how they work. And doing so does not require adopting a rule nationwide. Congress could instead authorize one or more circuits to experiment with appellate rules. The Supreme Court (via the rulemaking process) could then create those rules, and the Federal Judicial Center could monitor their operation. Eventually rulemakers could better assess a proposed appellate rule and predict how it would function nationwide.

This would likely require congressional action. Although the Supreme Court has the authority to create procedural rules on appealability, the Rules Enabling Act requires that those rules be "general."<sup>76</sup> Creating special procedural rules for one or more circuits thus seems problematic under the existing statutes. But Congressional action could fix this. Indeed, circuit experimentation is not entirely novel. In 1998, the Commission on Structural Alternatives for the Federal Courts of Appeals (commonly called the "White Commission" after its chair, Justice Byron White) suggested empowering the courts of appeals to create intra-circuit divisions as they grow.<sup>77</sup> The Commission suggested legislation that would create these divisions in the Ninth Circuit, with the Federal Judicial Center monitoring that circuit's experience for eight

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73. See Lammon, *Rules*, *supra* note 15, at 445–59.

74. See *id.*

75. See 28 U.S.C. § 2072.

76. See 28 U.S.C. § 2072 (2018).

77. COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 61 (1998).

years.<sup>78</sup> After the eight-year experiment, the Judicial Conference would have made recommendations to Congress on the further use of divisions.<sup>79</sup>

As for where any experimentation might take place, circuits with lower caseloads are probably the best candidates. One major (if not the major) concern with increased discretionary appeals is appellate caseloads. It thus makes sense to experiment with new avenues for appeals where caseloads are already low. That way, if the experiment goes horribly wrong and caseloads increase substantially, the court will hopefully still be able to manage its business through the course of the experiment.

That probably means the First, Tenth, or D.C. Circuits.<sup>80</sup> They each have a relatively low absolute number of appeals and a relatively low number of decisions-per-judge.<sup>81</sup> So they are probably best positioned to absorb any increase in appellate workloads. These lower workloads also suggest that the First, Tenth, or D.C. Circuits would be good barometers for the workability of an appellate rule; if something cannot work in the Tenth Circuit, it probably won't work in the Ninth. This isn't to say that success in any of these circuits means that a rule would function well nationwide. Circuit differences in caseloads as well as staffing, internal procedures, and even cultures might affect the consequences of a new appellate rule. But trying new appellate rules where they are most likely to function is at least a start.

## V. CONCLUSION

The next several decades will hopefully see some reform of federal appellate jurisdiction. Granted, the literature has pushed reform for years. But sustained efforts—with new visions for appellate timing and information on how new structures might function—might make reform more likely. It's accordingly worth considering what a reformed system of appellate jurisdiction might look like. I've offered three ideas for

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78. *Id.* at 95.

79. *Id.* at 43.

80. The Federal Court Management Statistics Summary includes the number of cases terminated on the merits per active judge for the past 12 months. In the 12-month period ending September 30, 2019, the First, Tenth, and D.C. Circuits each terminated 447, 228, and 210 cases per judge. The Tenth and D.C. Circuit numbers are the two lowest. Four circuits have a lower number of merits terminations per judge than the First Circuit: the Second (389), Third (424), Sixth (292), and Seventh (366). But each of those four circuits has a much greater total caseload than the First does. See U.S. COURT OF APPEALS SUMMARY—12-MONTH PERIOD ENDING SEPTEMBER 30, 2019, [https://www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_appsummary0930.2019.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsummary0930.2019.pdf) [<https://perma.cc/PD6S-CJST>].

81. *See id.*

discretionary appeals, but there are many more possibilities. And we should start finding ways to break the empirical impasse that hinders serious consideration of new appellate rules.