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## Civil Rule 54(b): Seventy-Five and Ready for Retirement

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## CIVIL RULE 54(B): SEVENTY-FIVE AND READY FOR RETIREMENT

*Andrew S. Pollis\**

### Abstract

As we commemorate the diamond anniversary of the Federal Rules of Civil Procedure, this Article takes a critical look at one of the failed Rules: Rule 54(b). Although many commentators have noted difficulties with Rule 54(b), this is the first effort to describe those difficulties comprehensively, analyze their root causes, and offer a workable alternative.

When an order resolves a discrete claim in a multi-claim action, Rule 54(b) permits a district court to sever the order for immediate appeal by “expressly determin[ing] that there is no just reason for delay.” The rule was designed to ease the hardship on litigants who would otherwise have to await the conclusion of the entire case to appeal an adverse ruling.

But the Rule has spawned seventy-five years of chaos. Appellate courts, in examining their jurisdiction to review an order certified under Rule 54(b), struggle to evaluate whether the order fully adjudicates a discrete and severable claim. They struggle to evaluate what “no just reason for delay” really means. And they struggle to articulate consistent standards for district courts to follow in making the required “express determin[ation].” At the heart of the problem lies a power clash: Rule 54(b) puts the district court in charge of deciding when an appellate court is required to hear an appeal. Not surprisingly, appellate courts often resist. And the resistance often comes only after full briefing and oral argument.

It is time to end the struggle. And a better solution exists. This Article advocates the repeal of Rule 54(b) and, in its place, a resort to a discretionary-appeal system to permit trial courts to certify certain orders for immediate appeal and to permit appellate courts to decide whether to hear them.

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\* Assistant Professor, Case Western Reserve University School of Law. Thanks to my colleagues Jessie Hill, Sharona Hoffman, David Mills, and Cassandra Burke Robertson for their valuable comments on this Article and general support; to Glen Staszewski for excellent comments and for including me in the junior-faculty exchange at Michigan State University College of Law; and to Steve Sheppard and the faculty at the University of Arkansas School of Law for their generous hospitality and feedback. Deep gratitude to Kevin Clermont and Michael Solimine for providing comments and criticism that crystallized some of the important issues I address and inspired me to articulate them better.

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## INTRODUCTION

In August 2004, Planned Parenthood sued the State of Ohio, challenging the constitutionality of a statute limiting access to RU-486, the early-abortion pill.<sup>1</sup> Seven years later, the district court, on summary judgment, rejected all but one of Planned Parenthood's constitutional challenges.<sup>2</sup> The court then certified the decision for immediate appeal under Federal Rule of Civil Procedure 54(b),<sup>3</sup> which permits a district court to enter partial final judgment on fewer than all claims in a multi-claim action if the court finds "no just reason for delay."<sup>4</sup> Planned

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1. See *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 493–94 (6th Cir. 2012).

2. *Id.* at 499.

3. *Id.* This Article frequently uses the words "certify" and "certification" when referring to a partial final judgment entered under Rule 54(b). Some courts criticize the use of that nomenclature. See, e.g., *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002) (term "certification" is a "misnomer born of confusion between Rule 54(b) and 28 U.S.C. § 1292(b), only the latter of which requires a certification"). I disagree with that criticism for two reasons. First, the rule *does* contain a certification requirement, even if the language of the rule does not use that word. See *infra* text accompanying notes 99–101. Second, the Supreme Court itself has adopted that nomenclature. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956) (holding that district court had not "abused its discretion in certifying that there exists no just reason for delay" under Rule 54(b)). As this Article demonstrates, imprecise use of "certification" is trivial compared with the other problems with the Rule.

4. The current version of the rule, entitled "Judgment on Multiple Claims or Involving Multiple Parties," provides:

JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment

Parenthood appealed to the U.S. Court of Appeals for the Sixth Circuit, and in June 2012, the appellate court held oral argument. After eight years of litigation, the parties expected a decision on the important constitutional questions, never before decided by a federal appellate court, that would determine the extent of Ohio citizens' access to RU-486.

But two days before the oral argument, in a letter to counsel, the Sixth Circuit raised an entirely different concern: whether the district court had "properly certified" its decision as final under Rule 54(b).<sup>5</sup> If the certification was improper, then the Sixth Circuit had no jurisdiction and would dismiss the case. Jurisdiction played a dominant role in the oral argument, and the court requested additional post-argument briefing on the issue.<sup>6</sup>

Though recognizing that its decision was not "straightforward," the Sixth Circuit ultimately acquiesced to the Rule 54(b) certification and ruled on the merits of the appeal.<sup>7</sup> Nevertheless, the court's eleventh-hour concern about its jurisdiction under Rule 54(b) is symptomatic of a larger problem that has plagued courts since the first iteration of the Rule in 1938<sup>8</sup>: no one is entirely sure what it means. The Rule was designed to permit district courts to enter partial final judgment on discrete claims in multi-claim or multi-party litigation, even before the case is adjudicated in its entirety, if the district court concludes in its discretion that immediate appeal is warranted. But courts struggle to understand what constitutes a "claim" under the rule. They struggle to determine if a resolved claim is sufficiently distinct from those that remain for adjudication. And they struggle to articulate what, and how much, the Rule requires district judges to articulate in exercising their discretion to certify. The circuits disagree about the legal standards, and judges apply those standards unevenly.

To some extent the problem lies in the Rule's resort to an awkward blend of legal doctrine (what constitutes a discrete claim?) and trial-court discretion (what are the circumstances justifying a finding of "no just reason for delay"?). To make matters worse, the two inquiries

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adjudicating all the claims and all the parties' rights and liabilities.

FED. R. CIV. P. 54(b).

5. Letter from Leonard Green, Clerk of U.S. Court of Appeals for Sixth Circuit, to Counsel, *Planned Parenthood Cincinnati Region v. DeWine*, No. 11-4062 (6th Cir. June 5, 2012).

6. *Planned Parenthood*, 696 F.3d at 500.

7. *Id.*

8. "The Federal Rules of Civil Procedure were adopted by the Supreme Court on December 27, 1937, and became effective in September 1938." William V. Dorsaneo III & C. Paul Rogers III, *The Flawed Nexus Between Contract Law and the Rules of Procedure: Why Rules 8 And 9 Must Be Changed*, 31 REV. LITIG. 233, 239 n.18 (2012).

involve overlapping considerations. Not surprisingly, then, appellate courts often collapse the two inquiries when reviewing the propriety of a district court's Rule 54(b) certification, lending further uncertainty to the Rule 54(b) standards.

The Rule also has a feature unique in appellate jurisdiction—it permits district courts to use their discretion in determining whether appellate courts must hear a case. Some appellate courts resist that odd allocation of power. Conversely, some ignore the jurisdictional issue and defer entirely to the district court's decision to certify. Of course, neither approach is satisfactory; the uncertain standards and inconsistent treatment leave litigants confused about their appeal rights and burden appellate courts with jurisdictional clutter on their already-overcrowded dockets. And often, as in the *Planned Parenthood* case, these issues surface only after the parties have expended time and resources briefing the case and preparing for oral argument. Despite the best intentions, it is hardly the “simple, definite, workable rule” that its drafters hoped it would be.<sup>9</sup>

Perhaps what is most astonishing about this problem is that it has persisted for seventy-five years, creating decades of jurisdictional uncertainty. Courts and commentators have noted that the problem has existed since the outset.<sup>10</sup> And it continues. *Planned Parenthood* is but one example; a recent Third Circuit opinion observed that “numerous cases discuss[] the rule,” but it remains “not understood clearly and . . . sometimes misapplied.”<sup>11</sup> Despite the discontent, the Supreme Court has never adequately addressed the problem; it has decided only a handful of Rule 54(b) cases, all more than thirty years ago.<sup>12</sup> And rather than dispel the confusion, the few relevant Supreme Court cases have

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9. See ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 72 (1946) [hereinafter 1946 ADVISORY COMMITTEE REPORT], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-1946.pdf>.

10. E.g., Craig E. Stewart, Case Note, *Multiple Claims Under Rule 54(b): A Time for Reexamination?*, 1985 BYU L. REV. 327, 327 (“Since its adoption, [Rule] 54(b) has posed definitional problems.”).

11. *Elliott v. Archdiocese of N.Y.*, 682 F.3d 213, 228 (3d Cir. 2012).

12. See *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1 (1980); *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 583–84 (1980); *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1976); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445 (1956); *Reeves v. Beardall*, 316 U.S. 283 (1942). See also *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 556 (2005) (discussed *infra* at note 215).

actually exacerbated it.<sup>13</sup> In one case, the Court squarely refused to “attempt” to resolve some of the confusion.<sup>14</sup>

But the uncertainty and confusion are entirely unnecessary. As this Article explains, after seventy-five years it is now clear that we do not need the Rule. We have a mechanism for discretionary appellate review that is already well known to district and appellate courts—certification for appellate review under 28 U.S.C. § 1292(b). Resort to the well-understood statutory mechanism would remove all of the uncertainty and confusion surrounding the application of Rule 54(b), while still achieving the Rule’s ostensible purpose.

This Article begins by laying out that ostensible purpose. Part I explains the rationale behind the original adoption of Rule 54(b) in 1938, as well as the issues that have informed the occasional amendments to the rule over the years. The Rule sprang from a concern that the adoption of the Civil Rules in 1938 would increase the complexity of civil lawsuits and, as a result, delay the entry of final judgment and access to appellate review. Subsequent amendments helped clarify some areas of confusion, in particular confusion over the method for ensuring a district court’s intention to invoke the Rule and its applicability to cases involving not only multiple claims, but also multiple parties.

But, as Part II explains, the changes failed to clarify the most-fundamental problem with the Rule: how to determine whether a civil action actually involves multiple claims and, if so, whether a particular interlocutory order completely resolves at least one of them. The 1948 amendment to the Rule also added a discretionary step that the district court must take in order to apply the Rule, and that step has added a further layer of confusion.

Part III explains that we have no reason to cling to this broken system, because we simply do not need the Rule. Section 1292(b) already provides for discretionary appellate review, and its provisions can be adapted to situations that would warrant partial final judgment under Rule 54(b). Unlike the Rule, the statute poses few interpretive problems and largely turns on the trial and appellate courts’ exercise of discretion. The statutory approach is by no means perfect; as I have argued elsewhere, in certain circumstances it vests too much discretion in both trial and appellate courts and therefore fails to provide a meaningful antidote to serious trial-court error that occurs before final

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13. See, e.g., Douglas D. McFarland, *Seeing the Forest for the Trees: The Transaction or Occurrence and the Claim Interlock Civil Procedure*, 12 FLA. COASTAL L. REV. 247, 293 (2011) (arguing that *Sears* is “a bad decision, one of the worst in the history of the Court”).

14. See *Liberty Mut. Ins. Co.*, 424 U.S. at 743 n.4 (“We need not here attempt any definitive resolution of the meaning of what constitutes a claim for relief within the meaning of the Rules.”).

judgment.<sup>15</sup> It also imposes administrative burdens. But these and other drawbacks of the statute are a small price to pay to alleviate the uncertainty and confusion that afflict the finality inquiry under Rule 54(b) and the delay or even loss of substantive appellate review that can result. Thus, as we celebrate the diamond anniversary of the Federal Rules of Civil Procedure, it is time to excise from them the troublesome Rule 54(b).

Prior commentators have recognized that Rule 54(b) is problematic,<sup>16</sup> but none to date has provided a comprehensive explanation of its difficulties or proposed a viable alternative, as I do here.<sup>17</sup> If my solution were in place today, the Sixth Circuit's only concern in *Planned Parenthood* would have been the merits of the important constitutional issues in the case.

## I. THE PURPOSE OF RULE 54(B) AND ITS AMENDMENTS

An understanding of the problems with Rule 54(b) begins with an exploration of its origins, which in turn requires context. As this Part explains, the first iteration of the rule, in 1938, appeared in the midst of a century-long debate over the finality rule and its exceptions. Against that backdrop, it was hardly surprising that the original Federal Rules of Civil Procedure included Rule 54(b) in response to a concern about the ways in which the new Rules expanded civil litigation and potentially delayed finality. This Part also explains the two significant amendments to the Rule—amendments that reflected changing perceptions about the need for finality and that began to acknowledge some of the confusion engendered by the original Rule.

### A. *The Context for Rule 54(b): The Longstanding Debate over the Contours of the Finality Rule*

The story of Rule 54(b) is but one chapter in a long saga about the proper scope of appellate jurisdiction. That debate starts from a premise

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15. See Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 *FORDHAM L. REV.* 1643, 1662–63 (2011).

16. See, e.g., 10 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 54.22[2][b] (3d ed. 2012); 10 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2657 (3d ed. 1998); McFarland, *supra* note 13, at 288–301; Note, *Appealability in the Federal Courts*, 75 *HARV. L. REV.* 351, 357–63 (1961); John B. Rees, Jr., Note, *Federal Rule 54(b): The Multiple Claims Requirement*, 43 *VA. L. REV.* 229, 229 (1957); Jacqueline Gerson, Comment, *The Appealability of Partial Judgments in Consolidated Cases*, 57 *U. CHI. L. REV.* 169, 175 (1990); Stewart, *supra* note 10, at 327, 332.

17. Professor Kevin Clermont has advocated expanding Rule 54(b) to avoid its definitional problems, suggesting that trial judges should have wide discretion to determine when the balance of interests favors immediate appeal. See, e.g., KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* 148–49 (3d ed. 2012). As I explain below, I respectfully disagree with that proposal. See *infra* text accompanying notes 346–48.



that an appeal may not proceed “in fragments.”<sup>18</sup> Thus, the final-judgment rule, currently codified in 28 U.S.C. § 1291,<sup>19</sup> confers appellate jurisdiction over trial-court orders that “end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment.”<sup>20</sup> The final-judgment rule is “[o]ne of the bedrock principles of appellate court jurisdiction.”<sup>21</sup>

But courts have frequently chipped away at this bedrock principle. By 1892, finality was already the subject of “frequent discussion” in the case law.<sup>22</sup> In 1949, the Supreme Court expanded the definition of finality by announcing the infamous collateral-order doctrine.<sup>23</sup> And in 1964, the Court noted that “it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the ‘twilight zone’ of finality.”<sup>24</sup>

Congress and the Supreme Court have also eroded the finality rule through statutory or rule-based exceptions beginning in 1891, with a statutory right of limited interlocutory appeal.<sup>25</sup> In the 120 years since then, numerous exceptions, beyond Rule 54(b), have expanded the scope of appellate jurisdiction.<sup>26</sup> These exceptions include various interlocutory orders that are subject to appeal as of right<sup>27</sup> and others that are appealable in the discretion of the courts.<sup>28</sup> These various

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18. *Collins v. Miller*, 252 U.S. 364, 370 (1920).

19. “The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .” 28 U.S.C. § 1291 (2006).

20. *Catlin v. United States*, 324 U.S. 229, 233 (1945).

21. *Carolina Power & Light Co. v. U.S. Dep’t of Labor*, 43 F.3d 912, 918 (4th Cir. 1995).

22. *McGourkey v. Toledo & Ohio Cent. Ry. Co.*, 146 U.S. 536, 545 (1892).

23. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (holding that orders are final if they are “collateral to” the merits of an action and “too important to be denied [immediate] review”). Although some would argue that the collateral-order doctrine operates as an exception to the finality rule, the Court has taken pains to explain that it is “best understood not as an exception to the ‘final decision’ rule . . . , but as a ‘practical construction’ of it.” *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (referencing *Cohen*, 337 U.S. at 546).

24. *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964).

25. Circuit Court of Appeals (Evarts) Act of 1891, ch. 517, § 7, 26 Stat. 826, 828 (1891) (permitting appeal from an “interlocutory order or decree granting or continuing [an] injunction”) (current version found in 28 U.S.C. § 1292(a)(1) (2006)).

26. *E.g.*, Pollis, *supra* note 15, at 1652–59.

27. *See* 28 U.S.C. § 1292(a) (2006) (providing for appeals from certain orders involving preliminary injunctions, receiverships, and the parties’ rights in admiralty cases); *see also* 9 U.S.C. § 16(a) (2006) (providing for appeals from orders denying motions to enforce contractual arbitration clauses).

28. *See* FED. R. CIV. P. 23(f) (providing for discretionary appeals from orders granting or denying class certification); 28 U.S.C. § 1292(b) (2006) (establishing a mechanism for district courts to certify certain orders relating to dispositive issues of law for discretionary appeal); 28 U.S.C. § 1453(c) (2006) (permitting discretionary appeals of orders granting or denying remand of class actions removed from state to federal court).

avenues for appeal have inspired commentators to lament the resulting labyrinth of doctrine, rules, and statutes.<sup>29</sup>

The labyrinth is the product of a struggle to strike a proper balance in conferring the right of appeal.<sup>30</sup> On the one hand, we strive to provide adequate opportunities for appellate review from orders that are not final judgments if they have a “serious, perhaps irreparable, consequence” that demands immediate appellate review.<sup>31</sup> On the other hand, “[d]isfavoring piecemeal appeals is a long-standing policy of the federal courts”,<sup>32</sup> we want to withhold the right of appeal “when the competing considerations of judicial economy,” such as the burden on the appellate courts and the delay of proceedings in the trial courts, “outweigh the need for immediate review.”<sup>33</sup> That tension underlies any debate about expanding appellate jurisdiction beyond the final-judgment rule,<sup>34</sup> and it certainly has found its way into the debacle that is Rule 54(b).<sup>35</sup>

### B. *The Emergence and Evolution of Rule 54(b)*

There are three pivotal moments in the history of Rule 54(b): the initial promulgation of the Rule in 1938 and two substantive amendments, in 1948 and in 1961.<sup>36</sup> This Section discusses each in turn.

#### 1. The Original 1938 Rule: Antidote to the Expanded Civil Action

It is not difficult to understand the dynamics that led to the promulgation of Rule 54(b) in 1938. Rule 54(b) was the antidote to the expansion of the civil action occasioned by the adoption of the Federal Rules of Civil Procedure.<sup>37</sup>

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29. E.g., Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1238–39 (2007) (observing that “[t]he current system has been subject to much criticism” and collecting pejorative statements from other commentators).

30. See Pollis, *supra* note 15, at 1649–50; see also *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950).

31. See *Balt. Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955); see also Pollis, *supra* note 15, at 1647.

32. E.g., *Sussex Drug Prods. v. Kanasco, Ltd.*, 920 F.2d 1150, 1153 (3d Cir. 1990).

33. E.g., Pollis, *supra* note 15, at 1654; see also *Dickinson*, 338 U.S. at 511 (noting the “struggle of the courts; sometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declarations”).

34. Pollis, *supra* note 15, at 1649.

35. That tension also informs my proposed solution to the Rule 54(b) problem, addressed in Part III.

36. There also were style amendments to Rule 54(b) in 2007, as part of a comprehensive redrafting of the Rules, which did not purport to impact any of the substantive provisions. See *infra* note 77.

37. See Note, *Appealability in the Federal Courts*, *supra* note 16, at 357–58; see also *SEC v. Capital Consultants LLC*, 453 F.3d 1166, 1173 (9th Cir. 2006).

Before the Federal Rules, the final-judgment rule required that a judgment terminate a case “not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved.”<sup>38</sup> “[T]here was no authority for treating anything less than the whole case as a judicial unit for purposes of appeal.”<sup>39</sup> But there also was no need for a narrower characterization of the judicial unit; the common-law system that predated the Rules permitted only “single issue pleading,”<sup>40</sup> “reduc[ing] each lawsuit to a single issue of law or fact.”<sup>41</sup> Common-law rules also “severely restrict[ed] the joinder of plaintiffs and defendants.”<sup>42</sup> As a result, a case was typically concluded—and ripe for appeal—once the district court adjudicated the single issue raised in the pleadings.<sup>43</sup>

The 1938 Federal Rules of Civil Procedure eliminated that simplicity, replacing it with “a liberal pleading regime that provided for increased joinder of claims and parties.”<sup>44</sup> Plaintiffs could now bring all their claims against the same defendant in a single action, whether or not the claims were connected to each other,<sup>45</sup> and plaintiffs could also name multiple defendants in the same action.<sup>46</sup> Defendants could now assert both related and unrelated counterclaims against plaintiffs,<sup>47</sup> assert cross-claims against each other,<sup>48</sup> and even bring third parties into the lawsuit.<sup>49</sup> This new liberal regime “promised to increase greatly the length and complexity of many lawsuits.”<sup>50</sup>

It was precisely that increased length and complexity that prompted the perceived need for a tempering antidote.<sup>51</sup> The rule drafters worried

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38. *Collins v. Miller*, 252 U.S. 364, 370 (1920); see also *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 431 (1956) (before modern civil procedure rules, the presence of unresolved claims “was generally regarded as leaving the appellate court without jurisdiction of an attempted appeal”).

39. *Sears*, 351 U.S. at 432.

40. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914 (1987).

41. Gerson, *supra* note 16, at 174; see also John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 555–56 (2012) (footnote omitted) (“The pleading rules at common law, especially the single-issue requirement, greatly restricted multiparty and multi-issue litigation.”).

42. Subrin, *supra* note 40, at 916.

43. See, e.g., *Sears*, 351 U.S. at 431–32.

44. Gerson, *supra* note 16, at 174.

45. FED. R. CIV. P. 18.

46. FED. R. CIV. P. 20.

47. FED. R. CIV. P. 13(g).

48. *Id.*

49. FED. R. CIV. P. 14.

50. Note, *Appealability in the Federal Courts*, *supra* note 16, at 357–58; see also *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 860 F.2d 1441, 1443 (7th Cir. 1988) (“drafters recognized that the liberal joinder rules . . . would lead to more complex lawsuits”).

51. See *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 432 (1956) (“[I]ncreased

that the larger judicial unit, no longer involving just a single issue, had the potential to delay finality, at least under the traditional definition that required resolution of the entire action.<sup>52</sup> But “some claims within an action would become ripe for review before resolution of the entire action.”<sup>53</sup> The resulting delay had the potential to create “the danger of hardship and denial of justice.”<sup>54</sup> The amendments thus created a disparity between the contours of a civil lawsuit and boundaries of the traditional finality rule.<sup>55</sup>

Enter Rule 54(b). The Rule was designed to divide this new, large lawsuit back into smaller units of disposition, comprised of individual claims, once the trial court resolved one or more discrete claims.<sup>56</sup> In those cases, if the court adjudicated “the issues material to a particular claim” and all related counterclaims, it could “enter a judgment disposing of such claim,” which would “terminate the action with respect to the claim so disposed of.”<sup>57</sup> These smaller subunits would look more like the common-law action and, thus, would permit the appellate courts to continue to apply the familiar “standard of finality,” even under the expanded civil-litigation system.<sup>58</sup> Thus, “[R]ule 54(b) merely modified the ‘judicial unit’ to which the concept of finality applied”<sup>59</sup> while leaving “unimpaired the statutory concept of finality

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opportunity for the liberal joinder of claims in multiple claim actions . . . demonstrated a need for relaxing the restrictions upon what should be treated as a judicial unit for purposes of appellate jurisdiction.”).

52. *See Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511–12 (1950).

53. Gerson, *supra* note 16, at 174.

54. *Dickinson*, 338 U.S. at 511.

55. *See Note, Finality of Judgments in Appeals from Federal District Courts*, 49 YALE L.J. 1476, 1477–78 (1940) (traditional final-judgment rule was “ill adapted to a procedural system under which a suit may be a heterogeneous collection of claims, some of which are alternative, some closely connected and some quite unrelated”).

56. *See, e.g., SEC v. Capital Consultants LLC*, 453 F.3d 1166, 1173 (9th Cir. 2006); *see also* Gerson, *supra* note 16, at 174.

57. FED. R. CIV. P. 54(b) (1938 version). The entirety of the original rule provided:

JUDGMENT AT VARIOUS STAGES. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

58. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 432 (1956).

59. Note, *Appealability in the Federal Courts*, *supra* note 16, at 359.

prescribed by § 1291.”<sup>60</sup>

Like all constructions and exceptions to the traditional finality rule, Rule 54(b) “reflect[ed] a balancing of two policies: avoiding the ‘danger of hardship or injustice through delay which would be alleviated by immediate appeal’ and ‘avoid[ing] piecemeal appeals.’”<sup>61</sup> But the balancing was skewed by the novelty of the new Civil Rules. It was the “product” of the perceived danger of delay occasioned by the expansion of the civil action.<sup>62</sup> As a consequence, the original Rule erred on the side of immediate appeal in all circumstances in which a district court fully adjudicated a discrete claim in a multi-claim action.

## 2. The 1948 Amendment: A Quest for Greater Clarity and a Narrower Application

The judicial system quickly grew accustomed to the more-complex civil action,<sup>63</sup> and the success of the transition began to assuage earlier concerns about the frequency of hardship that would result from delayed appeals. There was no longer a perceived need for an antidote as strong as the original rule. And the Rule itself created confusion in its application, because it was not always clear when the district court had entered the now-permissible partial final judgment. Thus, within a decade, the Rule would undergo an important amendment designed both to limit and to clarify its use.

The confusion arose because it was not always clear when a district court had entered a judgment that met the definition of the Rule—one that constituted a “determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which [was] the subject matter of the claim.”<sup>64</sup> And the consequence of mistakenly concluding that the district court had not yet entered a Rule 54(b) judgment was severe given the time limit for appealing;<sup>65</sup> “a party who did not correctly divine that the court of appeals would regard a

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60. *Sears*, 351 U.S. at 434.

61. *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 740 (5th Cir. 2000) (alteration in original) (quoting *PYCA Indus. v. Harrison Cnty. Waste Water Mgmt. Dist.*, 81 F.3d 1412, 1421 (5th Cir. 1996)); see also Marianne Fogarty, Note, *The Finality of Partial Orders in Consolidated Cases Under Rule 54(b)*, 57 FORDHAM L. REV. 637, 647–48 (1989).

62. Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be Part I: Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. REV. 717, 807–08 (1995); see also 1946 ADVISORY COMMITTEE REPORT, *supra* note 9, at 70; Stewart, *supra* note 10, at 331.

63. Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 450 (2010) (“Most heralded the 1938 Federal Rules as a great success, and more than half of the states adopted rules modeled after them.”).

64. See FED. R. CIV. P. 54(b) (1938 version).

65. At the time, 28 U.S.C. § 340 (1940) generally provided a three-month period to appeal from final orders of district courts.

particular order as final under Rule 54(b) and who therefore waited until the entire litigation ended to challenge the order would find that he had forfeited his right to review.”<sup>66</sup> As an example, the Supreme Court dismissed an appeal in which the appellant waited until the conclusion of the entire action to seek appellate review, rather than appeal as soon as “its claims were dismissed.”<sup>67</sup> Naturally, then, prudent lawyers did what they tend to do—they appealed whenever the question of finality was uncertain.<sup>68</sup> Aggrieved litigants began to initiate appeals even where “a trial remained to be had on other claims similar or identical with those disposed of.”<sup>69</sup>

The Rule was therefore amended in 1948;<sup>70</sup> indeed, it was rewritten entirely and even given a new title: “Judgment upon Multiple Claims.”<sup>71</sup> To remove all ambiguity about the existence of a partial final judgment that triggered the running of the appeal clock, the amended Rule provided that a district court “may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.”<sup>72</sup> Judge John Minor Wisdom observed that “[t]he talismanic direction for the entry of judgment was

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66. Note, *Appealability in the Federal Courts*, *supra* note 16, at 358; *see also* Local P-171, *Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1072 (7th Cir. 1981) (“[L]itigants had no reliable way to determine whether a particular order which determined fewer than all pending claims was final and appealable, and so were forced either to file appeals from any order even arguably final or to risk losing the right to appeal it.”).

67. *See*, *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 513 (1950) (applying pre-amendment version of Rule 54(b) and holding that Petroleum had forfeited its right to appeal by not exercising that right at the time district court entered the relevant order). In that case, the court had dismissed Petroleum’s claims but reserved supervisory jurisdiction to supervise the distribution of stock shares and the allowance of further proceedings.

68. *See* Note, *Appealability in the Federal Courts*, *supra* note 16, at 358.

69. 1946 ADVISORY COMMITTEE REPORT, *supra* note 9, at 71.

70. The amendment was promulgated on December 27, 1946, and made effective as of March 19, 1948. *See* 329 U.S. 843, 861–62, 875 (1946).

71. FED. R. CIV. P. 54(b) (1948 version); *see also* 328 U.S. 843, 861 (1946). The full text of the amended rule provided:

JUDGMENT UPON MULTIPLE CLAIMS. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

72. FED. R. CIV. P. 54(b) (1948 version).

added to serve as an unambiguous signal” that the time for appeal had started to run.<sup>73</sup> By contrast, if the district court chose not to articulate either of the express requirements, the parties would know that the order was not final and that they would not need to appeal prophylactically.<sup>74</sup> The hope was that the amendment would, in Justice Hugo Black’s words, “chart[] a clear route through the jungle.”<sup>75</sup>

The requirement that district-court judges affirmatively express their intention to enter partial final judgment certainly avoided some of the ambiguity of the prior Rule (although, as discussed below, it was not the panacea the drafters hoped it would be).<sup>76</sup> But that change reflected two other important value judgments. First, the insertion of that requirement into the Rule<sup>77</sup>—and the accompanying requirement that the district court expressly determine that there is “no just reason for delay”—reflected an important change in the thinking about the urgency of appeal. No longer would parties automatically enjoy a right of appeal from the adjudication of a claim that would have fit the smaller-unit definition under the common law. Instead, the new Rule conferred on district courts “[t]he function of . . . a ‘dispatcher.’”<sup>78</sup> They were now charged with exercising their “discretionary power” to determine which adjudicated claims would qualify for partial final judgment and which would not,<sup>79</sup> with an admonition to confer that status sparingly—only in “the infrequent harsh case.”<sup>80</sup> Thus, within ten years of the original adoption of Rule 54(b), the drafters came to believe that the expanded civil-litigation system would not create “hardship and denial of justice through delay” in *every* case involving multiple claims, as the Court had

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73. Local P-171, *Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1072 (7th Cir. 1981) (Wisdom, J.).

74. *See, e.g., Dyer v. MacDougall*, 201 F.2d 265, 267 (2d Cir. 1952) (Hand, J.) (“[I]n a case of ‘multiple claims’ the period of limitation upon the right of appeal does not begin to run until the judge makes the required ‘determination’ . . .”).

75. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 517 (1950) (Black, J., dissenting).

76. *See infra* text accompanying notes 263–311.

77. The current version of the rule does not require “an express direction for the entry of judgment.” *See* FED. R. CIV. P. 54(b). That language was deleted as part the comprehensive style amendments promulgated in 2007. *See* 550 U.S. 1005, 1114–16 (2007); *see also* REPORT OF THE RULES ADVISORY COMMITTEE, SUBPART A, STYLE AMENDMENTS 147 (2006), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-2006.pdf>. The deletion of that language had no practical effect on the operation of the rule, which still requires the district court “expressly [to] determine that there is no just reason for delay.” *See* FED. R. CIV. P. 54(b).

78. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956)).

79. Stewart, *supra* note 10, at 344.

80. 1946 ADVISORY COMMITTEE REPORT, *supra* note 9, at 72.

initially anticipated.<sup>81</sup> Rather, the default appeared to be the opposite—that litigants should be required to wait for the completion of the litigation unless they demonstrated, to the district court’s satisfaction, the requisite unusual hardship. A decade of experience had tempered the initial concerns.

The second important value judgment reflected in the 1948 amendment involved allocation of judicial power and, in particular, the power to decide—and even to create—appellate jurisdiction. As the “dispatcher[s],”<sup>82</sup> district-court judges in multi-claim cases now held the keys to the appellate courthouse and enjoyed the discretion to decide when to use those keys. One student commentator observed at the time that this “grant of discretion” would be “the most controversial point in the new rule” but argued that “the district court is the logical court” to decide the wisdom of permitting an immediate appeal and lauded the “uniformity of judicial administration expected under the new rule.”<sup>83</sup> There was certainly logic in empowering the district court to serve as a dispatcher, but the historic decision to do so taps into a fundamental question in appellate jurisdiction: who should draw the line between what is appealable and what is not?<sup>84</sup> And, rather than categorically determine that adjudications of discrete claims in multi-claim actions were always appealable (as the original version of Rule 54(b) provided), the 1948 amendment vested in district-court judges the power to make that determination on a case-by-case basis.

Remarkably, the 1948 amendment conferred that power without permitting the appellate court to have any say in the matter; a properly certified Rule 54(b) judgment *requires* the appellate court to assume jurisdiction.<sup>85</sup> That allocation of power to the district court was unprecedented at the time and remains unique; no other avenue of discretionary appellate jurisdiction removes the appellate court from the process of deciding whether to accept an appeal.<sup>86</sup> The wisdom of that

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81. See *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950).

82. See *Sears*, 351 U.S. at 435.

83. Note, *Reformulation of the “Final Decision” Rule—Proposed Amendment to Rule 54(b)*, 56 YALE L.J. 141, 149 (1946) (footnotes omitted).

84. See Pollis, *supra* note 15, at 1651.

85. See 28 U.S.C. § 1291 (2006) (circuit courts “shall have jurisdiction” over final orders); *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 583–84 (1980) (partial final judgment under Rule 54(b) is “appealable” under § 1291).

86. See *supra* note 28 (listing sources of discretionary appellate jurisdiction). Of course, a district court also enjoys discretion to make certain substantive decisions that give rise to an appeal as of right. See, e.g., 28 U.S.C. § 1292(a)(1) (2006) (creating mandatory appellate jurisdiction over orders relating to injunctions). But in those circumstances, the district court exercises discretion in determining whether to grant the requested relief, not whether to permit an immediate appeal.



allocation of power is itself a topic of controversy.<sup>87</sup> Wise or not, I demonstrate below that appellate courts have responded inconsistently to it;<sup>88</sup> some appellate courts have gone to great lengths to interpret Rule 54(b) in ways that maximize their ability to second-guess the district courts' certification decisions.

### 3. The 1961 Amendment: Clarifying that the Rule Applies to Multi-Party Litigation

In 1961, Rule 54(b) was again amended to clarify another point of confusion over whether the rule applied to multi-party litigation—cases in which the plaintiff had asserted an identical claim against multiple defendants.<sup>89</sup> Beginning in 1955, courts began to hold that the Rule did apply in those circumstances.<sup>90</sup> The “serious difficulty” created by the disparate law on this point<sup>91</sup> led to a 1961 amendment clarifying that it applied to “one or more but fewer than all of the claims *or parties*.”<sup>92</sup>

In explaining its reasoning, the advisory committee noted that “[t]he danger of hardship through delay of appeal until the whole action is concluded may be at least as serious in the multiple-parties situations as in multiple-claims cases . . . .”<sup>93</sup> The reference back to that “hardship” language sounds at first blush like a retreat from the 1948 recognition that an appeal at the conclusion of the entire litigation was normally adequate and that certification under Rule 54(b) should be the exception.<sup>94</sup> But the 1961 amendment did not eliminate the district court's role as dispatcher—meaning that hardship still was not presumed in every case.

## II. SEVENTY-FIVE YEARS OF CONFUSION

The amendments in 1948 and 1961 focused on rectifying problems that courts and parties had encountered in applying earlier versions of

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87. See *infra* text accompanying notes 341–49.

88. See *infra* text accompanying notes 248–55, 273–77.

89. ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 55 (1955), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV10-1955.pdf>.

90. Benjamin Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961–63 (I)*, 77 HARV. L. REV. 601, 614 (1964).

91. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF PROPOSED AMENDMENTS TO CERTAIN RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 7 (1961) [hereinafter 1961 ADVISORY COMMITTEE REPORT].

92. FED. R. CIV. P. 54(b) (1961 version) (emphasis added). The amendment was promulgated on April 17, 1961, and made effective as of July 19, 1961. See 368 U.S. 1009 (1961).

93. 1961 ADVISORY COMMITTEE REPORT, *supra* note 91, at 6–7.

94. See *supra* text accompanying notes 80–81.

Rule 54(b). It is surprising, then, that neither amendment addressed the most-fundamental problem that has plagued the Rule since its earliest days: the difficulty in determining “whether a particular order disposed of a separate claim for relief.”<sup>95</sup> And none of the post-1948 amendments have addressed (or even recognized) the problems created by the requirement that a district court expressly determine that there is “no just reason for delay.”

This Part begins with a brief explanation of the ostensible mechanics for applying Rule 54(b), which is critical to understanding its limitations. I say “ostensible” because, as I go on to demonstrate, courts and commentators uniformly agree that application of the Rule is anything but mechanical. To the contrary, the Rule has created rampant confusion for courts and litigants in determining appellate jurisdiction. The last Section of this Part focuses specifically and thoroughly on the aspects of the Rule that give rise to the chaos.

#### A. *The Ostensible Mechanics of Rule 54(b)*

The current version of Rule 54(b) permits district courts to “direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.”<sup>96</sup> This deceptively simple language breaks down into two basic components.

The first component is that the order in question must fully adjudicate at least one claim or the rights and liabilities of at least one party. As the Supreme Court has explained, there must be a “judgment,” meaning “a decision upon a cognizable claim for relief,” and that judgment “must be ‘final’ in the sense that it is ‘an ultimate disposition of an individual claim entered in the course of a multiple claims action.’”<sup>97</sup> Thus, for example, an order that determines liability but not damages does not qualify for Rule 54(b) certification, because it does not fully resolve a claim.<sup>98</sup>

The second component, added by the 1948 amendment, requires the exercise of the district court’s discretion. If the order fully resolves at least one claim, “the district court must go on to determine whether there is any just reason for delay.”<sup>99</sup> The Supreme Court, in keeping with the spirit of the 1948 amendment, has cautioned that “[n]ot all final judgments on individual claims should be immediately appealable.”<sup>100</sup>

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95. Note, *Appealability in the Federal Courts*, *supra* note 16, at 358.

96. FED. R. CIV. P. 54(b).

97. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)).

98. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 745–46 (1976).

99. *Curtiss-Wright*, 446 U.S. at 8.

100. *See id.* But, as explained further below, *see infra* text accompanying notes 271–72, the

Thus, the “no just reason for delay” finding is the basis for distinguishing between those orders that should be immediately appealable and those that should not be. Drawing that distinction is “[t]he function of the district court” in fulfilling its role as a “dispatcher.”<sup>101</sup>

The second component is, at least in theory, distinct from the first in an important respect. Determining whether an order fully resolves at least one claim is—again, in theory—an objective exercise, while deciding whether to certify an order for immediate appeal is a subjective one, requiring “weighing and balancing the contending factors.”<sup>102</sup> The appellate court thus reviews de novo the district court’s threshold objective determination that an adjudicated portion of an action constitutes a separate and distinct claim for purposes of Rule 54(b).<sup>103</sup> By contrast, as a consequence of the subjectivity of the second component, the district court enjoys “substantial deference” in determining whether there is no just reason for delay, and an appellate court should reverse that determination only if it finds an abuse of discretion.<sup>104</sup> That oddly blended standard of review—no deference as to the first component and wide deference as to the second—is one of the root causes of the confusion that surrounds Rule 54(b).

### B. *The Rampant Confusion and Its Consequences*

There is universal agreement that Rule 54(b) is problematic. Commentators have previously lamented the “definitional problems” that have plagued the Rule “[s]ince its adoption” seventy-five years ago.<sup>105</sup> But the confusion is not limited to definitional problems; courts and commentators also misunderstand the dual standards of review that appellate courts are required to use in reviewing a Rule 54(b) certification.<sup>106</sup> These and other problems have inspired courts to lament

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Court did not embrace the advisory committee’s attempt to limit Rule 54(b) appeals. *See Curtiss-Wright*, 446 U.S. at 10; *see also supra* text accompanying note 80.

101. *Curtiss-Wright*, 446 U.S. at 8 (quoting *Sears*, 351 U.S. at 435).

102. *Id.* at 12; *see also infra* text accompanying notes 264–84.

103. *Sears*, 351 U.S. at 437 (“The District Court cannot, in the exercise of its discretion, treat as ‘final’ that which is not ‘final’ within the meaning of § 1291.”); *see also, e.g.*, *Gen. Acquisition, Inc. v. GenCorp, Inc.*, 23 F.3d 1022, 1027 (6th Cir. 1994) (“The determination that a particular order ultimately disposes of a separable claim is a question of law reviewed de novo . . .”).

104. *E.g.*, *Curtiss-Wright*, 446 U.S. at 12.

105. *E.g.*, Stewart, *supra* note 10, at 327.

106. *See, e.g.*, *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 292 (7th Cir. 1992) (determining that the severability of claims falls within “the zone of shadings traditionally committed to a district judge’s discretion”); *Local P-171, Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1070 (7th Cir. 1981) (appellate courts must “rely on the sound discretion of district judges to” apply Rule 54(b) “on a case by case basis”); Fogarty, *supra* note 61, at 649 (mistakenly suggesting that the district court “has the sole

“that uncertainty is the rule”<sup>107</sup> and that Rule 54(b) is “not understood clearly.”<sup>108</sup> The Third Circuit has even imposed on lawyers a heightened obligation to assist courts in applying Rule 54(b).<sup>109</sup>

The difficulty with Rule 54(b) is particularly problematic because a proper certification creates mandatory appellate jurisdiction,<sup>110</sup> while (by contrast) an improper certification gives rise to no right of appeal and will result in dismissal of any appeal premised on it.<sup>111</sup> When litigants are uncertain about the propriety of a Rule 54(b) certification, they either err on the side of appealing (aggravating congestion on the appellate-court dockets), or they run the risk of losing the right to appeal altogether by “sleep[ing] on their appeal rights.”<sup>112</sup>

Thus, our tolerance for jurisdictional uncertainty should be low. Indeed, in a different context the Supreme Court has admonished courts to avoid “[u]ncertainty regarding the question of jurisdiction,” calling such uncertainty “particularly undesirable.”<sup>113</sup> In the appellate-jurisdiction context, the Court has recognized that it “has no authority to create equitable exceptions to jurisdictional requirements.”<sup>114</sup> The Second Circuit, applying the original version of Rule 54(b), likewise cautioned against loose standards and urged “a procedure uniform throughout the country.”<sup>115</sup> Commentators also agree on clarity in rules of appellate jurisdiction: “[I]t is essential that [exceptions to the final-judgment rule] be accurately mapped, that overlap among various exceptions to the rule be minimized, and that those exceptions be supported by strong principles so that their application to novel situations is as orderly and predictable as possible.”<sup>116</sup>

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discretion to determine the finality of the order”).

107. *Sussex Drug Prods. v. Kanasco, Ltd.*, 920 F.2d 1150, 1154 (3d Cir. 1990).

108. *Elliott v. Archdiocese of N.Y.*, 682 F.3d 213, 228 (3d Cir. 2012); *see also* *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 741 (5th Cir. 2000) (noting “this unsettled area of the law”).

109. *Fed. Home Loan Mortg. Corp. v. Scottsdale Ins. Co.*, 316 F.3d 431, 442 (3d Cir. 2003).

110. *E.g.*, *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 745–46 (1976).

111. *Id.*

112. Gerson, *supra* note 16, at 175; *see also supra* text accompanying notes 65–69.

113. *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 582 (2004).

114. *Bowles v. Russell*, 551 U.S. 205, 205–06 (2007).

115. *Libbey-Owens-Ford Glass Co. v. Sylvania Indus. Corp.*, 154 F.2d 814, 817 (2d Cir. 1946). The Second Circuit recognized that “there may be times when a quick appellate decision on a part of the case may be helpful . . . . But the policy [against piecemeal appeals] is the fruit of experience and embodies a general judgment which is not to be cast aside for an occasional aberrant case.” *Id.*

116. Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353, 354 (2010). *But see generally* Frederic M. Bloom, *Jurisdiction’s Noble Lie*, 61 STAN. L. REV. 971 (2009) (arguing that jurisdictional inflexibility is a falsehood).

But seventy-five years of confusion over Rule 54(b) have lulled some courts into embracing jurisdictional uncertainty. The Eleventh Circuit, for example, “has cautioned against an inflexible approach to jurisdictional questions” under Rule 54(b).<sup>117</sup> Commentators have also expressed support for “creating some flexibility.”<sup>118</sup> Some courts have taken the opposite view, continuing to insist on consistent jurisdictional principles “no matter how significantly the judicial equities may weigh in favor [of] hearing the appeal.”<sup>119</sup> Thus, the confusion engenders not only inconsistent results, but even inconsistent levels of tolerance for the inconsistent results. Worse yet, these problems frequently surface after the parties have devoted significant resources to briefing the appeal on the merits and preparing for oral argument.<sup>120</sup>

It would be tempting to blame the confusion entirely on a lack of guidance in the case law, and some courts and scholars have done so. One commentator has suggested that the Supreme Court’s few cases applying Rule 54(b) have complicated what he thinks should be a straightforward analysis.<sup>121</sup> The Fifth Circuit has criticized the Supreme Court for throwing out “judicial crumbs” that “have failed to lead the circuit courts to a consensus as to the handling of this confusing area of law.”<sup>122</sup>

While there is truth in that criticism, a call for clarity in applying Rule 54(b) is an overly simplistic suggestion. As the next Section explains, the various problems that have led to the confusion are not so easily resolved. They are fundamental to the rule and to some extent even deliberate. The only certain way to eliminate the problems is, as I later argue, to eliminate the Rule itself and to substitute in its place a system of discretionary review that dispenses with the pretense of uniformity.

### C. *Dissecting the Flaws*

So what are the sources of all this confusion? This Section explains that the two components of a Rule 54(b) certification—the resolution of at least one discrete claim and the express determination of no just reason for delay—both have given rise to difficulties. I first discuss the

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117. *Brandt v. Bassett (In re Se. Banking Corp.)*, 69 F.3d 1539, 1546 (11th Cir. 1995).

118. *E.g.*, Note, *Finality of Judgments in Appeals from Federal District Courts*, *supra* note 55, at 1482 n.35.

119. *Elliott v. Archdiocese of N.Y.*, 682 F.3d 213, 228 (3d Cir. 2012).

120. *See supra* text accompanying notes 1–5; *see also, e.g.*, *EJS Properties, LLC v. City of Toledo*, 689 F.3d 535, 537 (6th Cir. 2012); *Gen. Ins. Co. of Am. v. Clark Mall Corp.*, 644 F.3d 375, 378 (7th Cir. 2011); *Guippone v. Bay Harbor Mgmt. LC*, 434 F. App’x 4 & 7 n.2 (2d Cir. 2011); *Transport Workers Union of Am. v. N.Y. City Transit Auth., Local 100*, 505 F.3d 226, 230–31 (2d Cir. 2007); *Wood v. GCC Bend, LLC*, 422 F.3d 873, 877 (9th Cir. 2005).

121. *See generally* McFarland, *supra* note 13, at 286–301; *see also supra* note 12.

122. *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 741 (5th Cir. 2000).

confusion over what constitutes a claim for purposes of Rule 54(b). I then turn to the confusion over the discretionary aspect of the district court's determination.

1. Claim Confusion: What Constitutes a Discrete Claim Under Rule 54(b)?

a. The Genesis of the Problem and the Supreme Court's Unhelpful Contributions

The first component of a Rule 54(b) determination requires the district court to resolve at least one claim in a multi-claim action. The inquiry involves “delineat[ing] the point at which one claim parts company with another.”<sup>123</sup> This has been described as “[t]he most difficult problem in applying Rule 54(b).”<sup>124</sup>

The premise is simple enough—and easy enough to apply when a single lawsuit contains two or more indisputably distinct claims. Thus, a plaintiff who sues the same defendant on two entirely different bases—for example, for breaching a sales contract and for negligence resulting in an automobile collision—has clearly asserted two claims that can be the subject of separate adjudications under Rule 54(b). By contrast, the automobile collision itself is unlikely to give rise to more than a single claim (although there may be circumstances in which some courts would hold that it does). These cases fit nicely within the familiar definition of “claim” that we use in the res judicata context: “[A]ll rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.”<sup>125</sup>

But not all lawsuits involve such easy determinations. What if the plaintiff alleges several different, and arguably unrelated, breaches of the same contract?<sup>126</sup> What if the parties have multiple contracts that are all part of an ongoing business relationship that goes awry?<sup>127</sup> What if the plaintiff asserts common-law claims together with statutory claims that partially, but do not entirely, overlap?<sup>128</sup> What if a plaintiff alleges that she was fired because of some combination of age, gender, and

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123. *Brandt v. Bassett (In re Se. Banking Corp.)*, 69 F.3d 1539, 1547 (11th Cir. 1995).

124. Note, *Appealability in the Federal Courts*, *supra* note 16, at 359 (footnote omitted).

125. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982); *see also* Alexandra D. Lahav, *The Case for “Trial by Formula,”* 90 TEX. L. REV. 571, 601 (2012) (“Claim preclusion only applies to claims arising out of the same transaction or occurrence.”).

126. *E.g.*, *Local P-171, Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1067–68 (7th Cir. 1981).

127. *E.g.*, *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 430–31 (1956).

128. *E.g.*, *City of N.Y. v. Exxon Mobil Corp. (In re MTBE Prods. Liab. Litig.)*, Nos. 00 MDL 1898 (SAS), 04 CIV. 3417 (SAS), 2010 WL 1328249, at \*3 (S.D.N.Y. Apr. 5, 2010).

racial discrimination?<sup>129</sup> And what if—as in *Planned Parenthood*<sup>130</sup>—the plaintiff raises multiple arguments challenging the constitutionality of a single statute?

These and other problems underlie the confusion over the first component of a Rule 54(b) determination: “[I]t has never been clear when an action presents multiple claims”<sup>131</sup> or “whether a particular order disposed of a separate claim for relief.”<sup>132</sup> The problem is not unique to Rule 54(b); the Supreme Court, outside the Rule 54(b) context, has acknowledged that the word “claim” can “carry a variety of meanings.”<sup>133</sup> But in the case of Rule 54(b) it poses a jurisdictional problem that arises every time a litigant asks a district court to enter a partial final judgment and in every appeal where the district court has done so.

The problem existed at the outset. Some early cases adopted a view that the term referred to “a single set of facts or a single transaction.”<sup>134</sup> Under the original version of the Rule, the Supreme Court seemed to accept that definition; in a 1942 case, the Court noted that it was “clear that . . . differing occurrences or transactions . . . form[ed] the basis of separate units of judicial action.”<sup>135</sup> That was a fairly easy conclusion to draw based on the text of the original version of the Rule, which referred to “a determination of the issues material to a particular claim and all counterclaims *arising out of the transaction or occurrence* which is the subject matter of the claim.”<sup>136</sup>

But even in the Rule’s infancy, some courts applied a more-liberal definition of claim—one that favored a finding of finality—than they had applied when construing the same term in other civil-procedure contexts.<sup>137</sup> The discrepant usage created immediate “uncertainty”

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129. See, e.g., *Stearns v. Consol. Mgmt., Inc.*, 747 F.2d 1105, 1107 (7th Cir. 1984) (alleging age and gender discrimination).

130. See *supra* text accompanying notes 1–5.

131. Stewart, *supra* note 10, at 327.

132. Note, *Appealability in the Federal Courts*, *supra* note 16, at 358; see also *Minority Police Officers Ass’n v. City of S. Bend*, 721 F.2d 197, 199 (7th Cir. 1983) (“Unfortunately, it is sometimes unclear whether a complaint or other pleading presents ‘one claim for relief’ or multiple claims.”).

133. *Keene Corp. v. United States*, 508 U.S. 200, 210 (1993) (construing 28 U.S.C. § 1500 (2006)); see also *Torres v. Am. Employers Ins. Co.*, 151 F. App’x 402, 408 (6th Cir. 2005) (“Because ‘claim’ has multiple meanings, this Court must look to the context of the term’s usage to understand the drafter’s intent.”).

134. E.g., Note, *Finality of Judgments in Appeals from Federal District Courts*, *supra* note 55, at 1479 (discussing *Collins v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 83 (2d Cir. 1939)).

135. *Reeves v. Beardall*, 316 U.S. 283, 285 (1942) (quoting *Atwater v. N. Am. Coal Corp.*, 111 F.2d 125, 126 (2d Cir. 1940) (Clark, J., concurring)) (internal quotation marks omitted).

136. FED. R. CIV. P. 54(b) (1938 version) (emphasis added).

137. Note, *Finality of Judgments in Appeals from Federal District Courts*, *supra* note 55, at 1482.

borne of the appellate courts' desire to exercise jurisdictional "discretion in the interests of [their] own convenience."<sup>138</sup> As a result, "it was soon found to be inherently difficult to determine by any automatic standard of unity which of several multiple claims were sufficiently separable from others to qualify for this relaxation of the unitary principle in favor of their appealability."<sup>139</sup> Indeed, the uncertainty over finality—whether a district court had fully adjudicated a discrete claim—was one of the reasons the Rule was amended in 1948.<sup>140</sup>

Ironically, however, the 1948 amendment made it even harder to differentiate between claims or to determine if a single action consisted of multiple claims. True, the amendment forced district-court judges to express their intention to enter final judgment (rather than leave the litigants to sort out for themselves whether the court had done so). But that change had no bearing on the underlying question—whether the order in question actually resolved a distinct claim in the first place. Only if it did was the district court authorized to use its discretionary power to certify. In fact, the 1948 amendment actually removed the one bit of language in the Rule—the "arising out of the transaction or occurrence" language<sup>141</sup>—that had provided at least some measure of guidance on the claim-differentiation question.

That amendment led to a pair of Supreme Court cases decided in tandem in 1956: *Sears, Roebuck & Co. v. Mackey*<sup>142</sup> and *Cold Metal Process Co. v. United Engineering & Foundry Co.*<sup>143</sup> In *Sears*, the Court held that a district court had properly certified an order under Rule 54(b) in a business dispute, where the district court had resolved only two of four pleaded counts. The Court offered no explanation of how the counts constituted separate claims; instead it simply expressed "no doubt that each of the claims dismissed is a 'claim for relief' within the meaning of Rule 54(b)."<sup>144</sup> In *Cold Metal Process*, the Court went a step further. Citing the 1948 amendment, the Court concluded that a claim could be the subject of a partial final judgment, notwithstanding a pending counterclaim arising out of the same transaction or occurrence, if the district court chose to certify it under Rule 54(b).<sup>145</sup> The Court

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138. *Id.*

139. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 434 (1956).

140. *See supra* text accompanying notes 64–75.

141. *Compare* FED. R. CIV. P. 54(b) (1938 version), *with* FED. R. CIV. P. 54(b) (1948 version).

142. 351 U.S. 427 (1956).

143. 351 U.S. 445 (1956).

144. *Sears*, 351 U.S. at 436 (quoting FED. R. CIV. P. 54(b) (1948 version)).

145. *Cold Metal Process*, 351 U.S. at 452 ("The amended rule, in contrast to the rule in its original form, treats counterclaims, whether compulsory or permissive, like other multiple claims.").



concluded its discussion by announcing broadly that Rule 54(b) could be used to “certif[y] a final order on a claim which arises out of the same transaction and occurrence as pending claims . . . .”<sup>146</sup>

That single sentence from *Cold Metal Process* necessarily suggested that a claim for purposes of Rule 54(b) is something different from a claim in the res judicata context, in which, by definition, the same transaction and occurrence gives rise to only one claim.<sup>147</sup> That sentence also marked a stark departure from the Supreme Court’s interpretation of the original Rule; in 1942 the Court had found it “clear that it is ‘differing occurrences or transactions, which form the basis of separate units of judicial action.’”<sup>148</sup> Professor Benjamin Kaplan, reacting to the 1955 decisions, explained that “[w]ith ‘transaction or occurrence’ excised from the rule, the Court has narrowed still further the dimensions of the unit of judicial action upon which appeal can be had.”<sup>149</sup>

Before examining the fallout from these cases, I pause to note that the language of the Rule and the amendment history did not lead inexorably to the conclusions the Court reached. Certainly the change made clear that a district court can enter partial final judgment on a counterclaim, cross-claim, or third-party claim, just as it may do so on a claim—something that the original rule did not explicitly authorize and that the Supreme Court explicitly forbade.<sup>150</sup> But the 1948 amendment did not redefine “claim” as something other than a “transaction or occurrence.” The deleted “transaction or occurrence” language that had appeared in the original Rule did not modify the word “claim”; it modified “counterclaims.” Under the original Rule, a partial judgment was final only if it determined “a particular claim” and “all counterclaims” arising out of the same “transaction or occurrence” as that claim.<sup>151</sup> There is also evidence that the advisory committee to the 1948 amendment intended no significant change by virtue of the decision to excise the “transaction or occurrence” language. To the contrary, it expressed a goal of reaffirming “an ancient policy with clarity and precision,”<sup>152</sup> presumably meaning to preclude piecemeal appeals over the same basic dispute. As it turns out, the revised wording was neither clear nor precise, and *Sears* and *Cold Metal Process* are the

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146. *Id.*

147. See *supra* text accompanying note 125.

148. See *Reeves v. Beardall*, 316 U.S. 283, 285 (1942) (quoting *Atwater v. N. Am. Coal Corp.*, 111 F.2d 125, 126 (2d Cir. 1940) (Clark, J., concurring)).

149. Kaplan, *supra* note 90, at 612; see also Note, *Appealability in the Federal Courts*, *supra* note 16, at 359.

150. See *Reeves*, 316 U.S. at 286 (holding that Rule 54(b) properly applied only to “wholly separate and distinct transactions”).

151. Stewart, *supra* note 10, at 332 n.23.

152. 1946 ADVISORY COMMITTEE REPORT, *supra* note 9, at 72.

unfortunate results.<sup>153</sup> Those cases suggested that claims over the same basic dispute were, in fact, severable for Rule 54(b) purposes.<sup>154</sup>

Justice Felix Frankfurter, joined by Justice John Marshall Harlan, dissented from the Court's decision in *Cold Metal Process* and concurred in the result in *Sears*. In so doing, he expressed concern over the Court's departure from the ancient policy that the advisory committee had sought to reaffirm:

[W]hat has been the core of the doctrine of finality as applied to multiple claims litigation—that only that part of a litigation which is separate from, and independent of, the remainder of the litigation can be appealed before the completion of the entire litigation—is no longer to be applied as a standard, or at least as an exclusive standard, for deciding what is final for purposes of § 1291.<sup>155</sup>

He also anticipated the decades of problems that the *Sears* and *Cold Metal Process* decisions would engender, particularly in failing to articulate a definitive replacement for the now-abandoned ancient policy: “The Court does not, however, indicate what standards the district courts and the courts of appeals are now to apply in determining when a decision is final.”<sup>156</sup> Indeed, the decisions provided no such indication. Although the Court in *Sears* described what appeared to be discrete transaction-based harms that formed the basis of the plaintiffs' complaint, all of them were tied together with “allegations that Sears [had] used its great size to monopolize commerce and restrain competition.”<sup>157</sup> The Court nowhere explained by what standard these overarching common allegations were not fatal to the propriety of the Rule 54(b) certification it endorsed. Nor did it address the likelihood that the claims could not have been brought in separate lawsuits without running afoul of claim-preclusion rules.<sup>158</sup>

In the half-century since the two decisions, the Court has never retreated from the suggestion that a single transaction and occurrence can give rise to multiple claims under Rule 54(b). But it also has never articulated a concrete test that would embrace that suggestion, despite at

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153. See McFarland, *supra* note 13, at 293 (arguing that *Sears* “is just wrong”).

154. See *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445, 452–53 (1956); see also Stewart, *supra* note 10, at 334.

155. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 439 (1956) (Frankfurter, J., concurring). Justice Frankfurter's concurrence in *Sears* also served as his dissent from the decision in *Cold Metal Process*.

156. *Id.*; see also *supra* text accompanying note 144 (noting the absence of explanation for the Court's conclusion that claims in *Sears* were sufficiently distinct for Rule 54(b) purposes).

157. *Sears*, 351 U.S. at 430.

158. See *supra* note 125 and accompanying text.

least two clear opportunities to do so. The first missed opportunity came in 1976, when the Court shied away from “attempt[ing] any definitive resolution of the meaning of what constitutes a claim for relief within the meaning of the Rules.”<sup>159</sup>

The second missed opportunity came in 1980, when the Court decided *Curtiss-Wright Corp. v. General Electric Co.*<sup>160</sup> In *Curtiss-Wright*, the Court held that the severability of resolved claims and pending counterclaims “turns on their interrelationship.”<sup>161</sup> That sounds at first blush like a retreat from the *Sears–Cold Metal Process* holding. But the same paragraph of *Curtiss-Wright* also says “that counterclaims, whether compulsory or permissive, present no special problems for Rule 54(b) determinations,”<sup>162</sup> even though compulsory counterclaims, by definition, involve the same “transaction or occurrence” as the opposing party’s claims.<sup>163</sup> In the end, then, *Curtiss-Wright* perpetuated the *Sears–Cold Metal Process* confusion and, again, provided no definitive test for lower courts to apply in scrutinizing whether an order fully adjudicated a discrete claim in a multi-claim action.

To the contrary, *Curtiss-Wright* only added to the confusion. The focus of the Court’s decision in that case was the second component of the Rule 54(b) certification process—the district court’s discretionary determination that there is no just reason for delay. In conjunction with that component, the Court held that a district court properly “consider[s] such factors as whether the claims under review were separable from the others remaining to be adjudicated.”<sup>164</sup> But presumably the separability analysis should already have taken place in connection with the threshold determination—whether the adjudicated part of the case constitutes a separate claim. The *Curtiss-Wright* decision has thus led one commentator to urge that separability “is a question relating primarily to the district court’s discretion” and that making it “a prerequisite to finding multiple claims usurps” that discretion.<sup>165</sup> Of course, if the separateness of the claims is a discretionary determination for the district courts in conjunction with the second component of the Rule 54(b) test, what is left for the first component?

Predictably, the result of these Supreme Court cases has been chaotic.<sup>166</sup> “[C]ourts have been completely unable to settle on a single

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159. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 743 n.4 (1976); see also *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 741 (5th Cir. 2000); Stewart, *supra* note 10, at 335.

160. 446 U.S. 1 (1980).

161. *Id.* at 9.

162. *Id.* (emphasis added).

163. See FED. R. CIV. P. 13(a)(1)(A) (a counterclaim is compulsory if it “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim”).

164. *Curtiss-Wright*, 446 U.S. at 8.

165. Stewart, *supra* note 10, at 339; see also *Sears*, 351 U.S. at 441.

166. The federal judicial system’s annual statistical reports do not capture the number of

test for determining when claims are ‘separate.’”<sup>167</sup> Courts call the claim-differentiation analysis “very obscure” and lament that judges “on too few occasions articulate[] the basis for their decisions in this area.”<sup>168</sup> Some courts cite *Sears* for the proposition that “the rule for determining multiple claims” does not “mandate[] . . . rigidity”<sup>169</sup>—a fairly astounding proposition considering the jurisdictional nature of the inquiry.<sup>170</sup> Some courts are simply “reluctant . . . to rush in where other courts fear to tread.”<sup>171</sup>

Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit has been openly critical of the *Sears* and *Cold Metal Process* holdings. In a 1983 decision, he expressed a preference for a rule providing that claims are “never separate for Rule 54(b) purposes if they arose out of the same factual setting,” but he acknowledged that “the Supreme Court rejected this approach.”<sup>172</sup> He suggested that the Supreme Court’s holdings were a function of “a time when the caseload of the federal courts of appeals was much lighter than it is today” and that these 1956 holdings “may be ripe for reexamination.”<sup>173</sup> Instead, thirty years after Judge Posner’s critique, the Court has shown no sign of reexamining *Sears* or *Cold Metal Process*, and confusion has continued to reign. And Judge Posner has apparently resigned himself to the exercise of appellate jurisdiction under Rule 54(b) even when “the question is close.”<sup>174</sup>

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district court certifications under Rule 54(b) or the disposition of such certified cases on appeal. See, e.g., THOMAS F. HOGAN, JUDICIAL BUSINESS OF U.S. COURTS, 2012 ANNUAL REPORT OF DIRECTOR (2012), available at <http://www.uscourts.gov/Statistics/JudicialBusiness/2012.aspx>. Nevertheless, the number of reported decisions in this area, only a fraction of which are cited in this Article, establishes that the problem is large, even if we do not know the precise magnitude.

167. Local P-171, *Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1070 (7th Cir. 1981); see also *Okla. Turnpike Auth. v. Bruner*, 259 F.3d 1236, 1242–43 (10th Cir. 2001); *Allegheny Cnty. Sanitary Auth. v. EPA*, 732 F.2d 1167, 1172 (3d Cir. 1984).

168. *Brandt v. Bassett (In re Se. Banking Corp.)*, 69 F.3d 1539, 1547 (11th Cir. 1995); see also 19 JAMES WM. MOORE ET AL., *supra* note 16, ¶ 202.06[2] (noting that courts find separability under Rule 54(b) to be “an elusive term” for which there is “no reliable litmus test”).

169. E.g., *Gas-A-Car, Inc. v. Am. Petrofina, Inc.*, 484 F.2d 1102, 1104 (10th Cir. 1973).

170. See *supra* text accompanying notes 113–16.

171. *Samaad v. City of Dallas*, 940 F.2d 925, 932 (5th Cir. 1991).

172. *Minority Police Officers Ass’n v. City of S. Bend*, 721 F.2d 197, 200 (7th Cir. 1983) (Posner, J.) (citing *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956), and *Cold Metal Process Co. v. United Eng’g & Foundry Co.*, 351 U.S. 445, 451–52 (1956)).

173. *Id.* at 200–01.

174. See *On Command Video Corp. v. Roti*, 705 F.3d 267, 270–71 (7th Cir. 2013) (Posner, J.).

## b. The Disparate Claim-Differentiation Tests That Have Emerged

While Justice Black hoped in 1950 that the 1948 amendment would “chart[] a clear route through the jungle,”<sup>175</sup> courts instead have been left to wander in the jungle and forge their own paths.<sup>176</sup> No test for claim differentiation has emerged as entirely satisfactory,<sup>177</sup> so “circuit courts of appeals have drawn the line of ‘finality’ with an unsteady hand.”<sup>178</sup> Some courts “have invoked claim-preclusion rules,” some “have looked to the possibility of separate recoveries,” and some “have concentrated on the underlying facts.”<sup>179</sup> None of these tests has emerged as the prevailing one; even within individual circuits, courts have not “resolve[d] which amongst these methods is the preferable method” and have explicitly “decline[d] to do so.”<sup>180</sup> This Subsection discusses each of the tests that courts have variously applied and explains their respective shortcomings.<sup>181</sup>

### i. One Point of (Supposed) Agreement: Different Legal Theories Do Not Constitute Different Claims

I start by identifying one concept on which many courts agree: a claim is defined by something other than the legal theory conferring the right to relief. “[M]ere variations of legal theory do not constitute separate claims.”<sup>182</sup> Even when “a claimant . . . presents a number of

175. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 517 (1950) (Black, J., dissenting).

176. *E.g.*, *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 741 (5th Cir. 2000) (“[V]arious methods to determine what constitutes a ‘claim for relief’ for purposes of Rule 54(b) have percolated amongst the circuits.”).

177. *Stewart*, *supra* note 10, at 344 n.84.

178. Note, *Reformulation of the “Final Decision” Rule—Proposed Amendment to Rule 54(b)*, *supra* note 83, at 143.

179. *Tubos de Acero de Mexico, S.A. v. Am. Int’l Inv. Corp.*, 292 F.3d 471, 485 (5th Cir. 2002).

180. *See, e.g.*, *Eldredge*, 207 F.3d at 741; *see also* *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 500 (6th Cir. 2012) (“[W]e have previously recognized that there is no ‘generally accepted test’ for determining what constitutes a separate claim” (quoting *Gen. Acquisition, Inc. v. GenCorp, Inc.*, 23 F.3d 1022, 1028 (6th Cir. 1994) (some internal quotation marks omitted))).

181. The Seventh Circuit has eschewed a bright-line test and instead has articulated “rules of thumb to identify certain types of claims that clearly cannot be ‘separate,’ and otherwise rel[ies] on the sound discretion of district judges to make that determination on a [case-by-case] basis.” *Local P-171, Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1070 (7th Cir. 1981). “The court’s suggested rules of thumb are simply an amalgamation of various approaches taken by appellate courts over the years,” as explained further below. *See Stewart*, *supra* note 10, at 343. Also note that reliance on “the sound discretion of district judges” ignores the de novo standard of review the Supreme Court requires for the first component of Rule 54(b) certification. *See infra* text accompanying notes 248–52.

182. *Amalgamated Meat Cutters*, 642 F.2d at 1071; *see also* *Marseilles Hydro Power, LLC*

alternative legal theories,” that claimant may have “only a single claim of relief for purposes of Rule 54(b).”<sup>183</sup>

The need to articulate that principle—that multiple legal theories do not in and of themselves give rise to multiple claims—springs in part from pleading conventions, in which a lawyer will typically “organize her complaint into separate ‘counts’ or ‘statements of claim.’”<sup>184</sup> That organization, in turn, is a carryover from the common-law system in which each pleading was framed by a single legal issue.<sup>185</sup> Some courts have suggested that pleading legal theories is unnecessary and confuses the Rule 54(b) analysis.<sup>186</sup> The confusion is all the greater when the legal theories themselves are identified in the pleadings as separate claims.<sup>187</sup> From a Rule 54(b) perspective, certainly, the organization “make[s] no real difference.”<sup>188</sup>

But even if most courts agree that the organization of pleadings does not make a real difference, *Sears* and *Cold Metal Process* left room for doubt on that point.<sup>189</sup> And some courts have undermined the utility of

v. Marseilles Land & Water Co., 518 F.3d 459, 464 (7th Cir. 2008) (quoting *Amalgamated Meat Cutters*); *Sussex Drug Prods. v. Kanasco, Ltd.*, 920 F.2d 1150, 1154 (3d Cir. 1990) (“Alternative theories of recovery based on the same factual situation are but a single claim, not multiple ones.”).

183. *Page v. Preisser*, 585 F.2d 336, 339 (8th Cir. 1978); see also *Samaad v. City of Dallas*, 940 F.2d 925, 931 (5th Cir. 1991) (quoting *Page*, 585 F.2d at 339); *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 860 F.2d 1441, 1445 (7th Cir. 1988).

184. See, e.g., *Spiegel v. Trs. of Tufts College*, 843 F.2d 38, 44 n.6 (1st Cir. 1988).

185. See *supra* text accompanying notes 40–41.

186. See, e.g., *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 292 (7th Cir. 1992) (“A complaint should limn the grievance and demand relief. It need not identify the law on which the claim rests, and different legal theories therefore do not multiply the number of claims for relief.”). Indeed, the Supreme Court has recently emphasized that facts, rather than elements of legal causes of action, are the key components of pleadings. See *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”).

187. See *NAACP*, 978 F.2d at 292 (“Perhaps the judge was led astray by the structure of the complaint. Identifying legal theories may assist defendants and the court in seeing how the plaintiff hopes to prevail, but this organization does not track the idea of ‘claim for relief’ in the federal rules.”). Lawyers organize their legal theories by variously referring to them in pleadings as “claims,” “causes of action,” and “counts,” and this inconsistent nomenclature also contributes to the problem, because these terms enjoy no consistent usage in the law. Sometimes, for example, courts construe “claim” as synonymous with “cause of action.” See, e.g., *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 554 (6th Cir. 2006) (“A ‘claim’ is defined simply as a ‘cause of action.’” (quoting *BLACK’S LAW DICTIONARY* 247 (6th ed. 1990))). And sometimes they distinguish between the two terms—either explicitly, e.g., *Nunley v. Kloehn*, 158 F.R.D. 614, 617 (E.D. Wis. 1994) (“While often times used interchangeably, the terms ‘cause of action’ and ‘claim’ or ‘count’ are more accurately understood to mean two different things.”), or implicitly. E.g., *United States v. Ripa*, 323 F.3d 73, 82 (2d Cir. 2003) (“[‘C]laim’ and ‘cause of action’ have overlapping meanings.”).

188. *Spiegel*, 843 F.2d at 44 n.6.

189. One student commentator, writing six years after the Court’s 1955 decisions in *Sears*

that point by suggesting that differences in proof necessary to prevail on different “legal theories” may be enough to treat the different legal theories as separate claims under Rule 54(b).<sup>190</sup> The civil-rights context, in which many of these cases arise,<sup>191</sup> illustrates the limitations of the legal-theories analysis. In many of these cases, the plaintiff asserts multiple legal theories to redress the same alleged wrong (for example, employment discrimination or the unconstitutionality of a statute).<sup>192</sup> In some instances, courts have held that the differing legal theories are immaterial to the claim-differentiation test,<sup>193</sup> while in others courts have held the legal theories to be different enough to constitute separate claims.<sup>194</sup> Thus, even on this basic point, courts have struggled to reach consistent results.

The legal-theories test, though largely rejected, has a distinct advantage that no other test can boast: it is easy to apply. A district court’s decision accepting or rejecting liability on a particular legal theory enjoys a level of certainty that is absent from the more-accepted claim-differentiation tests. It is for that reason that my solution to the

and *Cold Metal Process*, believed that the Court had adopted a definition of claim that turned on the legal cause of action: “In all probability the Justices implicitly were accepting the cause-of-action theory, since this narrower concept of claims affords greater flexibility for trial judges to certify an appeal upon finding ‘no just reason for delay.’” Note, *Appealability in the Federal Courts*, *supra* note 16, at 360.

190. *E.g.*, *NAACP*, 978 F.2d at 292 (“Two legal theories sufficiently distinct that they call for proof of substantially different facts may be separate ‘claims.’”); *see also* *Hudson River Sloop Clearwater, Inc. v. Dep’t of the Navy*, 891 F.2d 414, 418 (2d Cir. 1989) (holding that different “legal questions” can inform the determination of whether “the certified claims may be considered separate claims under Rule 54(b)”).

191. *See, e.g.*, *Wood v. GCC Bend, LLC*, 422 F.3d 873, 875 (9th Cir. 2005) (age discrimination); *Jordan v. Pugh*, 425 F.3d 820, 826–27 (10th Cir. 2005) (prisoner’s constitutional rights); *Gross v. Pirtle*, 116 F. App’x 189, 195 (10th Cir. 2004) (wrongful arrest and excessive force); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 291 (7th Cir. 1992) (race discrimination); *Samaad v. City of Dallas*, 940 F.2d 925, 928 (5th Cir. 1991) (race discrimination); *Spiegel*, 843 F.2d at 42 (retaliation in employment based on exercise of civil rights); *Stearns v. Consol. Mgmt., Inc.*, 747 F.2d 1105, 1108 (7th Cir. 1984) (age and gender discrimination); *Minority Police Officers Ass’n v. City of S. Bend*, 721 F.2d 197, 199 (7th Cir. 1983) (race discrimination); *Page v. Preisser*, 585 F.2d 336, 339 (8th Cir. 1978) (unconstitutional state regulations governing entitlement to public benefits).

192. *E.g.*, *Stearns*, 747 F.2d at 1109 (“Plaintiff is entitled to be free from discrimination on account of sex and on account of age.”); *NAACP*, 978 F.2d at 293 (“[The fact that the resolution of one legal theory would moot or bar remaining theories] is enough, if barely, to justify treating a legal theory as a ‘claim’ for purposes of Rule 54(b).”); *Page*, 585 F.2d at 337 (describing plaintiff’s two constitutional theories for challenging constitutionality of Iowa public-benefit regulations); *see also supra* text accompanying notes 1–5 (describing Planned Parenthood’s challenge to constitutionality of Ohio statute restricting access to abortion-inducing medication).

193. *E.g.*, *Page*, 585 F.2d at 339 (finding that “alternative constitutional theories” constituted only one claim).

194. *E.g.*, *Stearns*, 747 F.2d at 1109 (concluding that age- and gender-discrimination allegations “rest on separate legal rights and on separate operative facts”).

Rule 54(b) problem, discussed below,<sup>195</sup> embraces it.

ii. The Res Judicata Test: Dead or Alive?

The courts that focus on claim-preclusion rules present a good example of the long-running confusion over the significance of the 1948 amendment and the legacy of *Sears* and *Cold Metal Process*. Early articulations of this test refer to it as “the ‘pragmatic’ theory,”<sup>196</sup> presumably because it presented the pragmatic advantage of synchronizing the usage of “claim” among various civil-procedure contexts.<sup>197</sup> These cases hold that claims “cannot be separate” under Rule 54(b) “if together they constitute a single cause of action for res judicata purposes.”<sup>198</sup> As noted above, res judicata depends on the right to relief stemming from the same transaction or occurrence.<sup>199</sup>

But most courts have rejected the bright-line res judicata approach.<sup>200</sup> One commentator has suggested that the test “is dangerously close to a test rejected by the Supreme Court” in *Sears*.<sup>201</sup> I would go further; although the language in *Sears* and *Cold Metal Process* may be imprecise, the res judicata test *is* the rejected test. As one court has explained, if res judicata were a permissible test, then “a judgment could never be entered in a case in which a compulsory counterclaim remained pending in the district court, and yet we know it can be.”<sup>202</sup>

One would think, then, that the res judicata test is no longer on the table. But, surprisingly, it remains one of the tests that courts continue to articulate when conducting a Rule 54(b) claim-differentiation

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195. See *infra* Section III.A.

196. Note, *Appealability in the Federal Courts*, *supra* note 16, at 359.

197. The term “pragmatic” has also been used in conjunction with a Rule 54(b) test that focuses on “severability and efficient judicial administration” rather than on the transaction-and-occurrence theory. See *Cont’l Airlines v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987); see also *Wood v. GCC Bend, LLC*, 422 F.3d 873, 880 (9th Cir. 2005).

198. *Minority Police Officers Ass’n v. City of S. Bend*, 721 F.2d 197, 200 (7th Cir. 1983); see also *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 518 F.3d 459, 464 (7th Cir. 2008); *GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433, 442 (6th Cir. 2004); *Sussex Drug Prods. v. Kanasco, Ltd.*, 920 F.2d 1150, 1155 (3d Cir. 1990); *Tolson v. United States*, 732 F.2d 998, 1001–02 (D.C. Cir. 1984); *Backus Plywood Corp. v. Commercial Decal, Inc.*, 317 F.2d 339, 341 (2d Cir. 1963).

199. See *supra* text accompanying note 125.

200. *E.g.*, *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1367 (7th Cir. 1990) (“[T]he res judicata status of the two claims is not conclusive under Rule 54(b), and is probably a diversion from the main issue.”).

201. Stewart, *supra* note 10, at 327–28, 344–45 n.84.

202. *Olympia Hotels*, 908 F.2d at 1367; see also *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 292 (7th Cir. 1992) (“Language in some of our cases equates ‘claim’ in Rule 54(b) with ‘claim’ for purposes of res judicata, but . . . this equivalence cannot accommodate the many cases that permit separate appeals of claims and compulsory counterclaims.”).



analysis.<sup>203</sup> It is, indeed, tempting to seek a definition that fits consistently with the use of the word “claim” in other civil-procedure contexts, as one commentator has recently advocated.<sup>204</sup> But, as another commentator has recognized, the Supreme Court, construing the 1948 amendment, “effectively eliminated ‘separate and independent’ as an absolute requirement.”<sup>205</sup> As a result, Rule 54(b) certification is now proper “even when adjudicated and unadjudicated claims share a substantial factual base.”<sup>206</sup> Beyond the state of existing law, application of a *res judicata* test as a basis for conferring mandatory appellate jurisdiction is fraught with difficulty, because *res judicata* itself is not always easy to evaluate.<sup>207</sup> Thus, advocating a rule change or persuading the Supreme Court to revisit *Sears* and *Cold Metal Process* is not an adequate solution.

### iii. The Separate-Recoveries Test: Begging the Question

Some courts and commentators have sought a tidy solution to the problem by circumscribing claims based on the number of potential recoveries. “[I]f the possible recoveries under various portions of the complaint are mutually exclusive, or substantially overlap, then they are not separable claims.”<sup>208</sup> The Eleventh Circuit has characterized the separate-recoveries test as “the touchstone for determining whether an entire ‘claim’ has been adjudicated for the purposes of Rule 54(b).”<sup>209</sup> The separate-recoveries test focuses on the number of wrongs to be redressed rather than on the potential causes.<sup>210</sup>

The Supreme Court has decided only one case after *Sears* and *Cold Metal Process* in which it explicitly differentiated claims under Rule 54(b). In that case, *Seatrail Shipbuilding Corp. v. Shell Oil Co.*,<sup>211</sup> the Court seems to have applied the separate-recoveries test. The plaintiffs in *Seatrail* challenged a decision of the Secretary of

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203. E.g., *Marseilles Hydro Power*, 518 F.3d at 464; *GenCorp*, 390 F.3d at 442.

204. McFarland, *supra* note 13, at 295–96 (“One way of recognizing one claim” under Rule 54(b) “is by recognizing a single transaction or occurrence,” as we do for joinder, cross-claims, and relation back of amendments.).

205. Steinman, *supra* note 62, at 810.

206. *Id.* at 812.

207. See, e.g., Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 NOTRE DAME L. REV. 1085, 1107 (1999) (“[R]es judicata law, despite its apparent simplicity, can be very difficult to apply.”); see also *supra* text accompanying note 110; *infra* text accompanying notes 260–62.

208. *Brandt v. Bassett (In re Se. Banking Corp.)*, 69 F.3d 1539, 1547 (11th Cir. 1995); see also *Marseilles Hydro Power*, 518 F.3d at 464; *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 741 (5th Cir. 2000); Rees, *supra* note 16, at 236.

209. *Lloyd Noland Found., Inc. v. Tenet Health Care Corp.*, 483 F.3d 773, 780 (11th Cir. 2007).

210. Rees, *supra* note 16, at 237–38.

211. 444 U.S. 572 (1980).

Commerce that lifted restrictions on the use in domestic trade of their competitor's supertanker, the *Stuyvesant*, constructed under a federal subsidy program.<sup>212</sup> The plaintiffs also challenged, more generally, the Secretary's authority to lift those restrictions on any ship constructed under the program.<sup>213</sup> The Court held that the specific challenge directed to the use of the *Stuyvesant* and the general challenge to the Secretary's authority were separable claims with "two quite different sorts of relief sought."<sup>214</sup> But the Court's discussion of Rule 54(b) in *Seatrain* is so brief that it reads as an afterthought, as if added to the opinion only to justify appellate jurisdiction once the Court had already addressed the case on its merits. It does little to end the confusion created by *Sears*, *Cold Metal Process*, and *Curtiss-Wright*, and it certainly cannot be fairly said to have embraced the separate-recoveries test and rejected all others.<sup>215</sup>

In any event, the separate-recoveries test is unworkable in many situations. It fails to accommodate cases involving multiple constitutional challenges, which tend to "seek the same declaratory and injunctive relief"<sup>216</sup> but can involve different facts that inform "distinct constitutional rights."<sup>217</sup> It similarly appears inapposite when a habeas-corpus petitioner raises multiple challenges to a criminal conviction, because success on any theory results in the same relief.<sup>218</sup> It presents problems for appellate courts that sometimes have to guess about recovery rights in the absence of a fully developed record.<sup>219</sup> It also

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212. *Id.* at 574, 578.

213. *Id.* at 580.

214. *Id.* at 581.

215. Indeed, the Court arguably relied on something other than the separate-recoveries test in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). There, the plaintiffs challenged an agricultural regulation on "a number of constitutional and statutory grounds." *Id.* at 535, 555. The Court noted that the district court ruled only on the First Amendment challenge and "certified its resolution of the First Amendment claim as final" under Rule 54(b). *Id.* at 556. The Court could not have applied the separate-recoveries test because all of the plaintiffs' challenges sought the same relief: a finding that the regulation was unconstitutional. *See* *Livestock Mktg. Ass'n v. U.S. Dept. of Agric.*, 335 F.3d 711, 714–15 (8th Cir. 2003), *vacated*, 544 U.S. 550. Nevertheless, *Johanns* is of questionable assistance as a predictor of the Supreme Court's views on the subject, for two reasons. First, the district court had entered an injunction, so jurisdiction was independently proper under 28 U.S.C. § 1292(a)(1) (2006). Second, the district court in *Johanns* actually had ruled on the other constitutional grounds—finding them moot in light of its decision on the First Amendment challenge. *See* *Livestock Mktg. Ass'n v. U.S. Dept. of Agric.*, 207 F. Supp. 2d 992, 1008 (D.S.D. 2002), *aff'd*, 335 F.3d 711, *vacated*, 544 U.S. 550.

216. *See* *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 502 (6th Cir. 2012).

217. *See id.*

218. *See, e.g., Walker v. Martel*, 709 F.3d 925, 937 (9th Cir. 2013) (exercising appellate jurisdiction over district court's Rule 54(b) judgment granting writ of *habeas corpus* on two of petitioner's several challenges to state conviction).

219. *See, e.g., Samaad v. City of Dallas*, 940 F.2d 925, 932 (5th Cir. 1991). In *Samaad*, the

tends to work only in one direction; it identifies a non-severable claim by virtue of a unitary right of recovery,<sup>220</sup> but that does not necessarily mean that multiple rights of recovery justify a finding of multiple claims. Consider, for example, a case involving an unfair-competition business dispute in which the plaintiff relies on both state law, which provides only for compensatory damages, and the federal Lanham Act, which permits trebled damages and attorney fees.<sup>221</sup> There is no logic in construing that dispute as presenting more than one claim merely because the federal claim happens to give rise to enhanced damages unavailable under state law.<sup>222</sup> Admittedly, the damages in that scenario would partially overlap,<sup>223</sup> but if we factor overlap into the equation, where do we draw the line?

And what about a case in which one legal theory gives rise to damages and another gives rise to injunctive relief, even though the dispute arises out of the same basic events? Consider, for example, an employment dispute where a former employee moves to a competitor in breach of a noncompete agreement and begins to use trade secrets. If the period of noncompetition has expired, a breach-of-contract claim often can remedy the harm only through damages.<sup>224</sup> But the court can also issue an injunction to protect against future use of the misappropriated trade secrets.<sup>225</sup> Does that case present one claim or two?

In short, while the separate-recoveries test is sometimes helpful in identifying single-claim disputes, it is not a reliable test for determining whether a case presents multiple claims. Its imperfections therefore limit its utility as a workable rule.

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court had to “assum[e] that there [would be] no duplicate recovery for the same injury” before concluding that two different constitutional theories for challenging the city’s decision to hold races near plaintiffs’ residence were “separate violations,” and thus separate claims. *Id.* at 941.

220. See, e.g., *Lloyd Noland Found., Inc. v. Tenet Health Care Corp.*, 483 F.3d 773, 781 (11th Cir. 2007) (explaining that a common-law theory of indemnification “represented merely an alternate legal theory for a recovery identical to” a contractual theory, so the two theories were part of one claim); *Brandt v. Bassett (In re Se. Banking Corp.)*, 69 F.3d 1539, 1549 (11th Cir. 1995). In *Brandt*, the Eleventh Circuit held that allegations that bank directors engaged in wrongful lending practices and failed to consider potential mergers appeared “at first glance to be distinct” from each other but were in fact a single claim where success on one would “foreclose at least some—if not all—of the relief sought for” the other. 69 F.3d at 1549.

221. See, e.g., *Knit With v. Knitting Fever, Inc.*, Nos. 08–4221, 08–4775, 2009 WL 1459565, at \*5 (E.D. Pa. May 21, 2009).

222. See *id.*

223. See *id.* (“[T]he same basic compensatory damages are only recoverable one time under either the state court claims or the Lanham Act count.”).

224. E.g., *EMC Corp. v. Arturi*, 655 F.3d 75, 77 (1st Cir. 2011).

225. E.g., *Minn. Mining & Mfg. Co. v. Pribyl*, 259 F.3d 587, 607 (7th Cir. 2001).

#### iv. The Factual-Overlap Test: Riddled with Problems

Perhaps the most vexing test courts have articulated to differentiate claims under Rule 54(b) “concentrate[s] on the facts underlying the putatively separate claims.”<sup>226</sup> Under this approach, “[i]f the facts underlying those claims are different, [they] may be deemed separate for Rule 54(b) purposes.”<sup>227</sup> On the other hand, “if there is a great deal of factual overlap between the decided and the retained claims, they are not separate, and appeal must be deferred till the latter are resolved.”<sup>228</sup> This test has logical appeal from these superficial descriptions, but there are numerous problems with it.

The most immediate problem is that the test offers no clear boundaries; how much factual overlap is enough to constitute a single claim? Certainly “if the overlap is complete the claims are the same, the only possible difference being the legal theory in which they have been wrapped.”<sup>229</sup> But some courts have suggested that the overlap must be complete for the case to present only a single claim under Rule 54(b)—that the need to prove different facts to prevail under a different theory necessarily means that the case involves more than one claim.<sup>230</sup> Other courts suggest that a case presents only a single claim if there is a “significant factual overlap.”<sup>231</sup> At the same time, courts hold that “claims with overlapping facts are [not] foreclosed from being separate for purposes of Rule 54(b).”<sup>232</sup> The back-and-forth articulations defy a workable rule, so determining the extent of overlap that fuses two disputes into a single claim “may sometimes be difficult,”<sup>233</sup> to say the

226. *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 741 (5th Cir. 2000) (alteration in original) (quoting *Samaad v. City of Dallas*, 940 F.2d 925, 931 (5th Cir. 1991)) (internal quotation marks omitted).

227. *Id.*; see also *Minority Police Officers Ass’n v. City of S. Bend*, 721 F.2d 197, 201 (7th Cir. 1983); *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1316 (9th Cir. 1979).

228. *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 702 (7th Cir. 1984); see also *Samaad*, 940 F.2d at 931 (outlining the various approaches to determining what qualifies as a separate “claim for relief,” and explaining but ultimately declining to apply the factual-overlap test).

229. *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1367 (7th Cir. 1990).

230. See *Purdy*, 594 F.2d at 1316 (finding that plaintiff’s two claims were separate for Rule 54(b) purposes where statutory cause of action required proof of “an element not necessary to the proof of a breach of the franchise agreement”); cf. *Gas-A-Car, Inc. v. Am. Petrofina, Inc.*, 484 F.2d 1102, 1105 (10th Cir. 1973) (upholding certification after concluding that relevant facts were not “totally identical”).

231. *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 860 F.2d 1441, 1444 (7th Cir. 1988) (quoting *Automatic Liquid Packaging, Inc. v. Dominik*, 852 F.2d 1036, 1037 (7th Cir. 1988)) (internal quotation marks omitted).

232. *E.g.*, *Wood v. GCC Bend, LLC*, 422 F.3d 873, 881–82 (9th Cir. 2005).

233. *Ind. Harbor Belt*, 860 F.2d at 1445.

least.

The illogical results are the proof in the pudding. The factual-overlap test has led one court to hold that alleged systematic discrimination against minorities constituted two claims (one related to hiring decisions, one related to promotion decisions).<sup>234</sup> It has led another court to differentiate between discrimination theories when only one of them included an element of intentional misconduct.<sup>235</sup> And constitutional challenges to a city's decision to hold automobile races near plaintiffs' residences were considered different claims "even though they [arose] out of the same general set of facts."<sup>236</sup> These holdings are not only questionable; they are also inconsistent with other factual-overlap decisions that found only one claim even though the adjudicated and unadjudicated legal theories required proof of different facts, including lack of ordinary care<sup>237</sup> and intent.<sup>238</sup>

The factual-overlap test is also problematic because it is difficult to differentiate it from the same-transaction-and-occurrence test that the Supreme Court rejected in *Sears* and *Cold Metal Process*.<sup>239</sup> Indeed, the Seventh Circuit has recognized the inherent problem in relying on the factual-overlap test: "[O]nly a definition of 'separate claims' as claims resting on entirely different facts could be applied systematically," but the "Supreme Court rejected such a mechanical definition."<sup>240</sup> And, because of *Sears*, the Sixth Circuit has cautioned against "apply[ing] the 'operative facts' test too broadly."<sup>241</sup>

The factual-overlap test also provides questionable guidance in cases that challenge the constitutionality of statutes and regulations. The *Planned Parenthood* case, for example, turns on constitutional doctrine as applied to a state restriction on an abortion-inducing medication.<sup>242</sup> The only "factual" event that spawned the dispute was the legislature's enactment of the Ohio statute.<sup>243</sup> That posture is common in

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234. *Minority Police Officers Ass'n v. City of S. Bend*, 721 F.2d 197, 201 (7th Cir. 1983).

235. *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 292–93 (7th Cir. 1992).

236. *Samaad v. City of Dallas*, 940 F.2d 925, 927–28, 932 (5th Cir. 1991).

237. *Ind. Harbor Belt*, 860 F.2d at 1445–46 (7th Cir. 1988) (negligence and strict-liability theories emanating from chemical leak).

238. *Sussex Drug Prods. v. Kanasco, Ltd.*, 920 F.2d 1150, 1155 (3d Cir. 1990) ("The only additional evidence that would be required for proof of [the unadjudicated count] is intent to misrepresent.").

239. *Stewart*, *supra* note 10, at 335 (noting the Supreme Court's implicit holdings that "multiple claims can exist even when such claims arise out of the same transaction and involve considerable factual overlap"); *see also* *McFarland*, *supra* note 13, at 293.

240. *Local P-171, Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1070 (7th Cir. 1981).

241. *See Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 501 (6th Cir. 2012).

242. *See supra* text accompanying notes 1–5.

243. *See Planned Parenthood*, 696 F.3d at 501 (acknowledging that "the passage of the

constitutionality cases certified under Rule 54(b).<sup>244</sup> The Sixth Circuit nevertheless looked beyond the statute's enactment; it examined whether "the facts attendant to each [allegedly infringed constitutional] right were . . . sufficiently distinct" and found that they were.<sup>245</sup> But focusing on the relatedness of facts beyond enactment of the statute seems analytically artificial, at least when reviewing a facial (as opposed to an as-applied) constitutional challenge. Even in cases where the challenge springs from an enforcement of the offending statute or regulation—thus providing some factual event beyond the actual enactment or promulgation—the event often serves more as a backdrop for the litigation (conferring standing on the plaintiff) than as a substantive factual basis for the dispute.<sup>246</sup> Thus, in the constitutionality context, applying the factual-overlap test seems more like a method to justify appellate jurisdiction than a true inquiry into the propriety of that jurisdiction.

Finally, the factual-overlap test exposes two of the worst problems with Rule 54(b)—problems that actually reflect opposite tensions. The first is that the test blurs the distinction between the ostensibly objective determination of claim differentiation (as to which district courts supposedly enjoy no deference) and the subjective determination that there is no just reason for delay (as to which district courts supposedly enjoy wide deference).<sup>247</sup> One appellate case actually holds that a case involving factual overlap "should invite an exercise of discretion by the district court rather than a determination by us that the retained and appealed claims are or are not separate."<sup>248</sup> The Seventh Circuit has

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challenged law" is a common fact underlying all bases for a constitutional challenge").

244. See, e.g., *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 595 (6th Cir. 2013) ("[T]he passage of the individual mandate as part of the [Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010)] is simply one of the common operative facts before us . . ."); *Geary v. Renne*, 708 F. Supp. 278, 279 (N.D. Cal. 1988) (granting partial final judgment on one of several pleaded federal constitutional grounds in case challenging state-law ban on political parties from endorsing judicial candidates), *aff'd*, 911 F.2d 280 (9th Cir. 1990), *vacated*, 501 U.S. 312 (1991).

245. *Planned Parenthood*, 696 F.3d at 501 (court "must also consider the facts relating to the law's impact on similar or distinct constitutional rights"); see also *U.S. Citizens*, 705 F.3d at 595 ("Review of the counts alleged in *Planned Parenthood* reveals how the facts attendant to each right were found to be sufficiently distinct.").

246. See, e.g., *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 556 (2005) (reviewing order certified under Rule 54(b) on fewer than all constitutional challenges to the fee assessed against plaintiffs and paid by them); *Jordan v. Pugh*, 425 F.3d 820, 822 (10th Cir. 2005) (rejecting Rule 54(b) certification of order adjudicating some but not all constitutional challenges to a regulation prohibiting prison inmates from acting as journalists); *Page v. Preisser*, 585 F.2d 336, 337, 339 (8th Cir. 1978) (rejecting Rule 54(b) certification of order adjudicating some of plaintiffs' constitutional challenges to Iowa public-benefits regulations).

247. See *supra* Section II.A.

248. *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1367 (7th Cir.

held that resolving whether a case presented “substantially different facts” is within “the zone of shadings traditionally committed to a district judge’s discretion.”<sup>249</sup> These holdings ignore the Supreme Court’s directive that claim differentiation is a legal question that appellate courts must review de novo.<sup>250</sup> And ultimately, an inquiry into factual overlap involves a balancing test—whether the “differences” between two pleaded legal theories “sufficiently outweigh what they have in common.”<sup>251</sup> But a lower court’s conclusion under a balancing test is by definition a poor candidate for de novo appellate review and instead is typically accorded discretion on appeal.<sup>252</sup>

Paradoxically, the second significant problem is the converse of the first. Rather than focus on the true purpose of the claim-differentiation test—to ensure early finality in cases that would have qualified for it before 1938<sup>253</sup>—appellate courts frequently focus on policy considerations designed to accommodate their own workloads. In the absence of a “bright-line rule,” courts resort to “practical concerns, particularly the question whether a subsequent appeal of the claims before the district court will require the court of appeals to revisit the same issues decided in the first appeal.”<sup>254</sup> These practical concerns encroach on the discretion that Rule 54(b) accords the district court to weigh the factors that inform the finding of “no just reason for delay.”<sup>255</sup>

A recent case illustrates the conflict. In that case, “many of the claims on appeal and some still pending in the district court stem[med] from the same occurrence—the collapse of [a] retaining wall in April 2000.”<sup>256</sup> But “the issues raised in each part of the case [were] legally

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1990).

249. *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 292 (7th Cir. 1992); *see also* *Local P-171, Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1070 (7th Cir. 1981) (“[S]ince the exercise of the district court’s discretion in granting Rule 54(b) certification already involves a balancing [in connection with the second component], . . . it is hard to see what additional function the formal characterization of claims as ‘separate’ or ‘identical’ serves.”).

250. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956) (“The District Court *cannot*, in the exercise of its discretion, treat as ‘final’ that which is not ‘final’ within the meaning of [28 U.S.C.] § 1291.”).

251. *See Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 502 (6th Cir. 2012).

252. *See, e.g.,* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 423–24 (2007).

253. *See supra* text accompanying notes 44–60.

254. *E.g.,* *Jordan v. Pugh*, 425 F.3d 820, 827 (10th Cir. 2005); *see also* *Hudson River Sloop Clearwater, Inc. v. Dep’t of the Navy*, 891 F.2d 414, 418 (2d Cir. 1989); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 702 (7th Cir. 1984).

255. *See supra* text accompanying note 102; *infra* text accompanying notes 264–84.

256. *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 518 F.3d 459, 464

distinct and involve[d] different facts.”<sup>257</sup> Some claims turned on deed construction, some on the applicable statute of limitations, and some on questions of causation.<sup>258</sup> Mass torts also lend themselves to these kinds of issues—do we focus on the overarching allegations of the defendants’ misconduct or the individual accumulations and theories of damage?<sup>259</sup>

When we see these kinds of perspective problems in other contexts (such as insurance-coverage disputes), we recognize that the fact issues are appropriate for juries to resolve.<sup>260</sup> But Rule 54(b) goes to an appellate court’s mandatory jurisdiction, which should not rest on the vagaries of individual judges’ perspectives. We should not permit individual judges to adjudicate these issues “on a case-by-case basis.”<sup>261</sup> If a “single definition of claim cannot resolve the variables presented by each case,”<sup>262</sup> then we should not continue to live with a rule that depends on that definition.

## 2. No Just Reason for Delay—Or No Just Reason for the Rule?

As shown above, none the varied tests for claim differentiation is adequate. One court has metaphorically thrown up its hands, acceding to a low threshold for distinguishing between claims (so long as they are “legally distinct and involve at least some separate facts”). It held that the ultimate “*power* to enter a Rule 54(b) judgment” is “a matter of the district judge’s *discretion*.”<sup>263</sup> But as this Subsection shows, the district court’s discretionary determination on the second component of a Rule

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(7th Cir. 2008).

257. *Id.*

258. *Id.* at 465.

259. *See, e.g.,* Cont’l Airlines v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1525 (9th Cir. 1987) (concluding that airline’s claims against airplane manufacturer for property damage arising from negligence and strict liability arising out of airline disaster were severable from claims for breach of warranty, fraud for property damage and all claims of passenger indemnification); City of N.Y. v. Exxon Mobil Corp. (*In re* MTBE Prods. Liab. Litig.), Nos. 00 MDL 1898(SAS), 04 CIV. 3417(SAS), 2010 WL 1328249, at \*3 (S.D.N.Y. Apr. 5, 2010) (holding that each municipal water well allegedly contaminated by defendant’s gasoline gave rise to distinct claim, even though liability was premised on single decision to manufacture product, not individual instances of environmental release).

260. *See* SR Int’l Bus. Ins. Co. v. World Trade Ctr. Props., LLC, 467 F.3d 107, 138 (2d Cir. 2006) (discussing whether 2001 terrorist attacks on World Trade Center were single or multiple occurrences for insurance-coverage purposes and concluding that “the word ‘event’ is susceptible to more than one reasonable interpretation. As a result, the insurers are not entitled to judgment as a matter of law”).

261. *See* Local P-171, Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co., 642 F.2d 1065, 1070 (7th Cir. 1981).

262. *Sussex Drug Prods. v. Kanasco, Ltd.*, 920 F.2d 1150, 1154 (3d Cir. 1990).

263. *Olympia Hotels Corp. v. Johnson Wax Dev’t Corp.*, 908 F.2d 1363, 1368 (7th Cir. 1990).



54(b) certification—whether there is “no just reason for delay”—presents its own significant problems.

a. What Does “No Just Reason for Delay” Mean?

To begin with, the phrase itself is ambiguous—no just reason for delay of *what*? We know only from the history and application of Rule 54(b) that the *what* is entry of final judgment, but the rule itself does not say so clearly. Nor does the rule offer any explanation about how district courts are expected to go about making that determination. The Supreme Court has refrained from setting guidelines<sup>264</sup> and has instead vaguely referred to “judicial administrative interests” and “the equities involved.”<sup>265</sup> Courts are thus left to resolve for themselves a fundamental policy question prompted by the 1948 amendment: how parsimonious must they be in entering partial final judgment?<sup>266</sup>

The 1948 advisory committee wanted to limit the use of Rule 54(b) to the “infrequent harsh case.”<sup>267</sup> But, oddly, that is not how they drafted the Rule. Instead, from a linguistic standpoint, the rule provides that a Rule 54(b) certification is appropriate *unless* the district court finds “just reason for delay,”<sup>268</sup> suggesting a presumption of finality. And in *Curtiss-Wright*, the Supreme Court rejected “infrequent harsh case” as an appropriate qualifier. Even while reiterating that courts must “assure that application of the Rule effectively ‘preserves the historic federal policy against piecemeal appeals’”<sup>269</sup> and warning that certification should not “be granted routinely,”<sup>270</sup> the Court explained that “the phrase ‘infrequent harsh case’ in isolation is neither workable nor entirely reliable as a benchmark for appellate review.”<sup>271</sup> Courts thus recognize that the “myopic approach” of confining Rule 54(b) appeals to the infrequent harsh case “was rejected by the Supreme Court.”<sup>272</sup>

But even after *Curtiss-Wright*, some appellate courts continue to use the “infrequent harsh case” language (or words to that effect) as a basis for evaluating Rule 54(b) certifications.<sup>273</sup> They focus on their “already

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264. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 10–11 (1980).

265. *Id.* at 8.

266. *See supra* text accompanying notes 76–79.

267. 1946 ADVISORY COMMITTEE REPORT, *supra* note 9, at 72.

268. FED. R. CIV. P. 54(b).

269. *Curtiss-Wright*, 446 U.S. at 7–8 (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 438 (1956)).

270. *Id.* at 10.

271. *Id.*

272. *Fed. Sav. & Loan Ins. Corp. v. Cribbs*, 918 F.2d 557, 559 (5th Cir. 1990); *see also*, e.g., *Hess v. A.I. DuPont Hosp. for Children*, No. 08–0229, 2009 WL 2776606, at \*5 n.2 (E.D. Pa. Aug. 28, 2009).

273. E.g., *Williams v. Cnty. of Dakota*, 687 F.3d 1064, 1067 (8th Cir. 2012); *O’Bert ex rel.*

huge” dockets and characterize Rule 54(b) certification as a “luxury.”<sup>274</sup> This sort of limiting admonition appears time and again in the case law.<sup>275</sup> At the same time, some courts also continue to accept Rule 54(b) appeals with virtually no scrutiny<sup>276</sup> and reiterate the desire “to avoid the possible injustice of a delay in entering judgment . . . by making an immediate appeal available.”<sup>277</sup>

The duality should not come as a surprise. The struggle “to strike a balance” between early appellate review and conservation of judicial resources<sup>278</sup> predates Rule 54(b) and informed its promulgation.<sup>279</sup> What makes Rule 54(b) unique is that appellate courts technically have limited power to prevent an appeal from going forward if the case satisfies the claim-differentiation test; at that point, the discretion whether to permit appellate jurisdiction resides with district-court judges. The tension between that normative standard and the appellate judges’ resistance to it manifests itself in incompatible expressions of the policies underlying Rule 54(b). One district court has captured the essence of that conflict by describing the holdings of two Second Circuit cases “decided two weeks apart”:

In some instances, the Second Circuit has . . . instruct[ed] district courts only to direct partial final judgment in “exceptional” cases where failure to enter judgment would

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Estate of O’Bert v. Vargo, 331 F.3d 29, 41 (2d Cir. 2003); Citizens Accord, Inc. v. Town of Rochester, 235 F.3d 126, 128–29 (2d Cir. 2000); Gen. Acquisition, Inc. v. GenCorp, Inc. 23 F.3d 1022, 1027 (6th Cir. 1994); Anthuis v. Colt Indus. Operating Corp., 971 F.2d 999, 1004 (3d Cir. 1992); Morrison-Knudsen Co. v. Archer, 655 F.2d 962, 965 (9th Cir. 1981) (Kennedy, J.).

274. *E.g.*, Wood v. GCC Bend, LLC, 422 F.3d 873, 882 (9th Cir. 2005).

275. *E.g.*, Taco John’s of Huron, Inc. v. Bix Produce Co., 569 F.3d 401, 402 (8th Cir. 2009); Ebrahimi v. City of Huntsville Bd. of Educ., 114 F.3d 162, 167 (11th Cir. 1997); Nichols v. Cadle Co., 101 F.3d 1448, 1449 (1st Cir. 1996); Brandt v. Bassett (*In re Se. Banking Corp.*), 69 F.3d 1539, 1550 (11th Cir. 1995); Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 860 F.2d 1441, 1444 (7th Cir. 1988); Spiegel v. Trs. of Tufts College, 843 F.2d 38, 44–46 (1st Cir. 1988); FDIC v. Elefant, 790 F.2d 661, 664–65 (7th Cir. 1986); Minority Police Officers Ass’n v. City of S. Bend, 721 F.2d 197, 200 (7th Cir. 1983).

276. *See, e.g.*, Order Re Plaintiff’s Motion for Entry of Final Judgment and Certification to Appeal Pursuant to Federal Rule of Civil Procedures 54(b) at 2, Mahon v. Chi. Title Ins. Co., No. 3:09CV00690(AWT) (D. Conn. June 22, 2010), ECF No. 62 (granting partial final judgment, with no mention of hardship, because adjudicated claim was “separate and apart from” unadjudicated claims, would “not arise a second time on appeal,” and reversal “might avoid a . . . duplicative . . . trial”), *aff’d sub nom.* Mahon v. Ticor Title Ins. Co., 683 F.3d 59, 62 (2d Cir. 2012) (accepting district court’s Rule 54(b) finding with no discussion); *see also* cases cited *infra* note 307 and accompanying text.

277. *E.g.*, Okla. Turnpike Auth. v. Bruner, 259 F.3d 1236, 1241 (10th Cir. 2001) (quoting 10 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2654 (2d. 1983)).

278. WRIGHT ET AL., *supra* note 16, § 2654, at 35.

279. *See supra* Section I.A.

work an “unusual hardship” on the litigants. In other instances, however, it has directly contradicted this suggestion—asserting that the increasingly complex nature of litigation “cr[ies] out for flexibility in granting partial final judgments,” and that courts cannot rely on “comparative adjectives like ‘unusual’, ‘exceptional’, or ‘extraordinary’ if we wish to chart a sound course for future panels of this court[.]”<sup>280</sup>

Clearly these holdings are “at loggerheads,” but “the Second Circuit has never expressly adopted the rationale of one decision over the other, and both continue to be cited at the district and the appellate level.”<sup>281</sup>

Despite the tug and pull of policy considerations, courts do not review Rule 54(b) certifications in a standardless vacuum. In 1975, the Third Circuit identified a laundry list of factors for courts to consider when deciding whether there is no just reason for delay:

(1) the relationship between the adjudicated and the unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.<sup>282</sup>

Several other circuits have used the same list.<sup>283</sup>

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280. *City of N.Y. v. Exxon Mobil Corp. (In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.)*, Nos. 00 MDL 1898 (SAS), 04 CIV. 3417 (SAS), 2010 WL 1328249, at \*3 (S.D.N.Y. Apr. 5, 2010) (alterations in original) (footnotes omitted) (quoting *Hogan v. Consol. Rail Corp.*, 961 F.2d 1021, 1025 (2d Cir. 1992), and *Ginett v. Computer Task Grp., Inc.*, 962 F.2d 1085, 1095 (2d Cir. 1992)).

281. *Id.* (footnotes omitted).

282. *Allis-Chalmers Corp. v. Phila. Elec. Co.*, 521 F.2d 360, 364 (3d Cir. 1975) (footnotes omitted). The Supreme Court’s decision in *Curtiss-Wright* rejected the *Allis-Chalmers* requirement that Rule 54(b) certification be limited to cases involving “unusual or harsh circumstances.” *See, e.g., Hess v. A.I. DuPont Hosp. for Children*, No. 08–0229, 2009 WL 2776606, at \*5 n.2 (E.D. Pa. Aug. 28, 2009); *see also supra* text accompanying notes 270–71. But the *Allis-Chalmers* discretionary factors nevertheless appear to have survived the *Curtiss-Wright* decision. *See, e.g., MCI Contractors, LLC v. City of Greensboro*, 610 F.3d 849, 855 (4th Cir. 2010); *Berkeley Inv. Grp., Ltd. v. Colkitt*, 259 F.3d 135, 141 (3d Cir. 2001); *Corrosioneering, Inc. v. Thyssen Env’tl. Sys., Inc.*, 807 F.2d 1279, 1283 (6th Cir. 1986).

283. *See supra* note 282.

These guidelines assist district courts in assessing whether the inefficiencies of an immediate appeal, including the possibility of multiple appeals in the same case, are “offset” by the benefits of an immediate appeal, such as an appellate decision that would “facilitate a settlement of the remainder of the claims.”<sup>284</sup> But the guidelines are invented by judges applying the nondescript text of the Rule. And, as explained further below, the guidelines are troublesome for several reasons.

b. The Confusing Overlap Between Claim Differentiation and “No Just Reason for Delay”

The district court’s discretionary role to evaluate the pros and cons of permitting immediate appeal is logical when it comes to several of the relevant factors, such as the particular harm to the parties of a delayed judgment and the potential that an early appeal may promote settlement. But the discretionary decision suffers from an insurmountable problem: it calls upon district courts to exercise their discretion in evaluating factors that also bear on the legal analysis of claim differentiation, which is not supposed to be a discretionary analysis.<sup>285</sup>

This problem is in part a result of the Supreme Court’s decision in *Curtiss-Wright*.<sup>286</sup> The Seventh Circuit has criticized the Supreme Court for including separability as one of “the factors for the district court to consider when exercising its discretion.”<sup>287</sup> And the overlap leaves courts confused about the extent to which the first and second components collapse into each other,<sup>288</sup> which in turn creates “haziness” in determining the appropriate “standard an appellate court should apply when reviewing a Rule 54(b) certification.”<sup>289</sup>

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284. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 n.2 (1980).

285. *See supra* notes 103–07 and accompanying text.

286. *See supra* text accompanying notes 164–65.

287. *See Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 860 F.2d 1441, 1444 n.3 (7th Cir. 1988).

288. *Samaad v. City of Dallas*, 940 F.2d 925, 930 (5th Cir. 1991) (“One commentator has suggested that some courts have conflated the two inquiries.” (citing 6 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 54.33[2] (2d ed. 1991))).

289. *Ind. Harbor Belt*, 860 F.2d at 1444 n.3; *see also* *Brandt v. Bassett (In re Se. Banking Corp.)*, 69 F.3d 1539, 1546 (11th Cir. 1995) (explaining that the standard of review for the first determination “approaches” de novo review but allows “some room for deference[,] particularly where the district court has made its reasoning clear”); *Braswell Shipyards, Inc. v. Beazer E., Inc.*, 2 F.3d 1331, 1336 (4th Cir. 1993) (ignoring de novo component: “[O]ur conventional review of the district court’s Rule 54(b) certification is for an abuse of discretion”).

c. Conflicts in the Case Law over the Precise Words a District Court Must Use

The discretionary component has also resulted in a circuit split over the precise words a district court must use when finding no just reason for delay. Some courts, including the Third Circuit in a recent decision, have focused on the requirement of the word “express” in Rule 54(b) and have dismissed appeals that fail to use the actual words “no just reason for delay” or something akin to them. These courts have held that “Rule 54(b)’s ‘express’ determination is a jurisdictional prerequisite.”<sup>290</sup> So “even in a case . . . in which a district court clearly intends to enter judgment pursuant to Rule 54(b),” the order is not final if the right combination of words is missing.<sup>291</sup> The district court need not “use the talismanic phrase ‘there is no just reason for delay’”; it may “paraphrase or use language ‘of an indisputably similar effect.’”<sup>292</sup> But “even if the record indicates no just reason for delay, an order is not final under Rule 54(b) unless it contains the ‘express determination’ thereof.”<sup>293</sup>

The Fifth Circuit, in an en banc decision, took the opposite view, permitting the appeal to go forward if “the language in the order appealed from, either independently or together with related portions of the record referred to in the order, reflects the district court’s unmistakable intent to enter a partial final judgment under Rule 54(b).”<sup>294</sup> The court rejected a requirement that a district court “mechanically recite the words ‘no just reason for delay.’”<sup>295</sup> It reasoned that a reference to Rule 54(b), without the actual certification,

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290. *E.g.*, *Elliott v. Archdiocese of N.Y.*, 682 F.3d 213, 221 (3d Cir. 2012); *see also* *EJS Props., LLC v. City of Toledo*, 689 F.3d 535, 537–38 (6th Cir. 2012); *Stockman’s Water Co. v. Vaca Partners*, 425 F.3d 1263, 1266 (10th Cir. 2005); *Granack v. Cont’l Cas. Co.*, 977 F.2d 1143, 1145 (7th Cir. 1992); *LTV Steel Co. v. United Mine Workers (In re Chateaugay Corp.)*, 928 F.2d 63, 64 (2d Cir. 1991); *Mooney v. Frierdich*, 784 F.2d 875, 876 (8th Cir. 1986).

291. *Elliott*, 682 F.3d at 224–25; *see also* *Nat’l Ass’n of Home Builders v. Norton*, 325 F.3d 1165, 1168 (9th Cir. 2003) (remanding case where district court *had* expressly determined that there was no just reason for delay in an amended Rule 54(b) certification but had done so after adequacy of original certification was already the subject of appellate scrutiny, thus depriving the district court of jurisdiction to amend the Rule 54(b) certification).

292. *Elliott*, 682 F.3d at 225 (quoting *Berkeley Inv. Grp. Ltd. v. Colkitt*, 259 F.3d 135, 141 (3d Cir. 2001)).

293. *Blackman v. Dist. of Columbia*, 456 F.3d 167, 176 (D.C. Cir. 2006).

294. *Kelly v. Lee’s Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218, 1220 (5th Cir. 1990) (en banc) (per curiam) (10–7 decision); *see also* *St. Paul Fire & Marine Ins. Co. v. PepsiCo*, 884 F.2d 688, 693–94 (2d Cir. 1989) (finding appellate jurisdiction where district court “merely wrote the words ‘Motion granted So ordered’ and signed the cover of the notice of motion” because hearing the appeal would “make possible a more expeditious and just result for all parties” (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 875 F.2d 1008, 1014 (2d Cir. 1989))).

295. *Kelly*, 908 F.2d at 1220.

“expressly incorporates the entire rule by reference and signals its conclusion that the requirements of the rule have been met and entry of partial final judgment is proper.”<sup>296</sup> The dissent lamented the lack of clarity in the court’s decision, preferring instead “a bright-line test that will warn litigants when the thirty-day clock begins ticking for purposes of appealing a partial final judgment entered under [R]ule 54(b).”<sup>297</sup>

The Fifth Circuit acknowledged that its decision was “obviously not the only possible interpretation of this rule” and that the “circuits are also sharply divided on this issue.”<sup>298</sup> The division is another anathema to the goal of jurisdictional clarity that plagues Rule 54(b).

d. Conflicts in the Case Law over the Level of Required Detail and the Consequences of Failing to Provide It

Apart from the ambiguity of the phrase “no just reason for delay” and the question whether a court must mechanically recite it verbatim, there is disagreement about the extent to which a district court must explain its rationale in certifying a partial final judgment. Rule 54(b) on its face provides no guidance. But some appellate courts have imposed a requirement that district courts provide a rationale,<sup>299</sup> leading to a mishmash of approaches.<sup>300</sup>

In some circuits, the explanation is jurisdictional; these courts “have frequently dismissed appeals where no reasoned explanation for the Rule 54(b) judgment was given.”<sup>301</sup> Other courts have held that “the absence of such specific findings is not fatal”,<sup>302</sup> instead, it simply converts the standard of review from abuse of discretion to de novo or

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296. *Id.* at 1220–21.

297. *Id.* at 1227–28 (Smith, J., dissenting). The dissent’s reasoning hearkens back to the reason for adding the certification requirement in the first place, in 1948. *See supra* text accompanying notes 64–69.

298. *Kelly*, 908 F.2d at 1221 n.2; *see also id.* at 1229 (Smith, J., dissenting) (“[T]here is a clean split among the circuits on this discrete issue of appellate jurisdiction.”).

299. *E.g.*, *O’Bert ex rel. Estate of O’Bert v. Vargo*, 331 F.3d 29, 41 (2d Cir. 2003); *Akers v. Alvey*, 338 F.3d 491, 495 (6th Cir. 2003).

300. *See Gross v. Pirtle*, 116 F. App’x 189, 194 n.9 (10th Cir. 2004) (noting varying approaches among the circuits).

301. *O’Bert*, 331 F.3d at 41; *see also Sua Sponte Order Dismissing Appeal for Lack of a Final Appealable Judgment* at 3, *Crouch v. Honeywell Int’l, Inc.*, No. 11-06109 (6th Cir. Jan. 19, 2012) (dismissing appeal for “lack of a final appealable judgment” where district court “did not address any of the[] factors” underlying a finding of “no just reason for delay” (quoting in part *Solomon v. Aetna Life Ins. Co.*, 782 F.2d 58, 61 (6th Cir. 1986))); *Stockman’s Water Co. v. Vaca Partners, L.P.*, 425 F.3d 1263, 1266 (10th Cir. 2005); *Bldg. Indus. Ass’n v. Babbitt*, 161 F.3d 740, 745 (D.C. Cir. 1998).

302. *E.g.*, *Gross*, 116 F. App’x at 194; *see also Noel v. Hall*, 341 F.3d 1148, 1154 n.2 (9th Cir. 2003) (holding that lack of explanation for certification “is not a jurisdictional defect” (quoting *Alcan Aluminum Corp. v. Carlsberg Fin. Corp.*, 689 F.2d 815, 817 (9th Cir. 1982))).

heightened scrutiny.<sup>303</sup> Some have held that the failure to articulate the reasons for the discretionary determination is not a jurisdictional defect “when the propriety of the appeal may be discerned from the record.”<sup>304</sup> The Sixth Circuit has suggested that it is more inclined to overlook a bald assertion of “no just reason for delay” if the error is caught after the case is “briefed and argued,” since “the scales of judicial economy are now tipped in favor of disposing of the appeal on the merits.”<sup>305</sup> The Fifth Circuit—which does not require mechanical recitation of the language of the Rule<sup>306</sup>—also appears to require no explanation.<sup>307</sup>

These applications of Rule 54(b) are all over the map (literally and figuratively). Even circuits that consider the explanation jurisdictional are inconsistent in enforcing that requirement.<sup>308</sup> And courts that require precise use of the “no just reason for delay” language or detailed reasoning for certification have sometimes resorted to jurisdictional acrobatics to overcome deficiencies—either dismissing the appeal but promising “reinstatement” if the district court fixes the problem<sup>309</sup> or remanding the case with instructions that the district court “supply its reasons.”<sup>310</sup> The Rule’s confusing requirements and the draconian consequences that can result from misapplying it have prompted one court to place extra “responsibility” on lawyers to help district courts certify their orders properly.<sup>311</sup> But the Rule is not worth all this trouble. There is a better solution.

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303. *E.g.*, *Spiegel v. Trs. of Tufts College*, 843 F.2d 38, 44 (1st Cir. 1988); *see also Williams v. Cnty. of Dakota*, 687 F.3d 1064, 1068 (8th Cir. 2012); *cf.* *U.S. Citizens Ass’n v. Sebelius*, 705 F.3d 588, 596 (6th Cir. 2013) (“The district court’s reasoned analysis of the factors, although thin, offered more than a simple recitation of the Rule 54(b) formula; therefore, the court’s decision is entitled to substantial deference.”).

304. *Carter v. City of Phila.*, 181 F.3d 339, 346 (3d Cir. 1999).

305. *Akers v. Alvey*, 338 F.3d 491, 495–96 (6th Cir. 2003).

306. *See supra* text accompanying notes 294–97.

307. *See Ill. Cent. R.R. Co. v. Cryogenic Transp., Inc.*, 686 F.3d 314, 316 (5th Cir. 2012), *aff’g* Order on Counter-Claimant’s Motion for the Entry of a Rule 54(b) Final Judgment, No. 3:09-CV-473-HTW-LRA (S.D. Miss. May 4, 2011), ECF No. 237 (entering Rule 54(b) judgment with no elaboration of factors underlying finding of “no just reason” for delay); *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 740 n.2 (5th Cir. 2000); *Ackerman v. FDIC*, 973 F.2d 1221, 1225 (5th Cir. 1992).

308. *See, e.g.*, *ACLU v. Dep’t of Justice*, 681 F.3d 61, 68 (2d Cir. 2012), *aff’g in part and rev’g in part* Order on Final Judgment on Fourth and Fifth Motions for Partial Summary Judgment at 3, No. 1:04-cv-4151-AKH (S.D.N.Y. Oct. 1, 2010), ECF No. 427 (entering partial final judgment under Rule 54(b) with minimal explanation).

309. *E.g.*, *EJS Properties, LLC v. City of Toledo*, 689 F.3d 535, 538 (6th Cir. 2012).

310. *E.g.*, *Feliz v. MacNeill*, 493 F. App’x 128, 2012 WL 3590807, at \*2 n.3 (1st Cir. 2012).

311. *Fed. Home Loan Mortg. Corp. v. Scottsdale Ins. Co.*, 316 F.3d 431, 442 (3d Cir. 2003).

### III. THE SOLUTION: REPLACE RULE 54(B) WITH A PROCEDURE FOR DISCRETIONARY APPELLATE REVIEW

#### A. *The Preferable, All-Discretionary Approach of § 1292(b)*

The solution to the Rule 54(b) problems is surprisingly simple, yet no commentator has previously proposed it. We do not need a rule that requires courts to engage in the tortuous process of claim differentiation. And we do not need a rule that requires appellate courts to exercise jurisdiction against their will (or to twist the rule in order to justify withholding jurisdiction). What we need is a system of discretionary appellate review that permits district courts to continue to certify some of their interlocutory orders for early appeal while explicitly conferring on appellate courts the discretion to refuse them. We not only need such a system; we already have it. That is precisely the scheme that 28 U.S.C. § 1292(b) already offers.

That statute, enacted in 1958,<sup>312</sup> permits appeals from interlocutory orders in civil cases if both the trial court and the court of appeals believe that the order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.”<sup>313</sup> Once the trial court issues a certification order under § 1292(b), a party seeking to appeal files a petition for discretionary review in the appellate court.<sup>314</sup> The appellate court is then free to accept or reject the appeal “for any reason, including docket congestion.”<sup>315</sup>

Application of the § 1292(b) procedure would solve all of the difficulties with Rule 54(b) identified above. With the right language,<sup>316</sup> the statute would permit district courts to certify orders for immediate appeal without tripping over the analysis of whether the order completely resolved a single “claim.” Instead, the statute could permit certification whenever a district court issued an order that adjudicated a party’s rights under an asserted legal theory. All of the debate over the various tests for claim differentiation (and reconciling those tests with *Sears* and *Cold Metal Process*) would end. Identifying whether a legal theory is discrete or fully resolved presents none of the challenges of claim differentiation; it is simple and mechanical.

Likewise, vesting discretion in both trial and appellate courts would eliminate all of the debate over the meaning and application of the “no

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312. Act of Sept. 2, 1958, Pub. L. No. 85-919, 72 Stat. 1770 (codified at 28 U.S.C. § 1292(b) (2006)).

313. 28 U.S.C. § 1292(b) (2006).

314. *See* FED. R. APP. P. 5(a).

315. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

316. *See infra* text accompanying notes 329–31.



just reason for delay” requirement. There would be no need to evaluate whether the district court’s certification was sufficiently explicit or whether the explication of the district court’s reasoning was sufficiently complete. There would be no confusing overlap, as there is now with the first and second components of the Rule 54(b) certification process.

Perhaps most importantly, a § 1292(b)-type procedure would dismantle the existing standard-of-review problem. The district court would retain its role as “dispatcher,”<sup>317</sup> but appellate courts could overtly form their own value judgments about the pros and cons of permitting immediate appeal in individual cases without fear of treading on the district court’s discretion. In short, if the district court is the dispatcher, the appellate court would serve as its own gatekeeper. This structure would be, to use Professor Martin Redish’s nomenclature, an “intelligent use of the pragmatic approach to the appealability of interlocutory orders.”<sup>318</sup>

An all-discretionary system would also eliminate any confusion about loss of appellate rights. The uncertain application of Rule 54(b) leaves reasonable litigants with no choice but to appeal immediately to ensure that they preserve those rights, even when they harbor doubts about the propriety of certification.<sup>319</sup> Indeed, some courts have held that “[a] Rule 54(b) determination, right or wrong, starts the time for appeal running.”<sup>320</sup> All of that uncertainty and risk fall away in an all-discretionary system. There is still the possibility that the appellate court will reject the petition for discretionary appeal, but that rejection has no adverse impact on the right to appeal at the conclusion of the entire case.

Finally, elimination of Rule 54(b) would put to rest a persistent confusion about whether a trial court, wishing to facilitate immediate review, should invoke the Rule or the statute.<sup>321</sup> Appellate courts

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317. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956).

318. Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 92, 109 (1975) (suggesting, however, that the appellate court alone should determine whether to hear the appeal and that it should not depend on a trial court’s discretion).

319. See Gerson, *supra* note 16, at 175–76. For example, in *Gross v. Pirtle*, 116 F. App’x 189 (10th Cir. 2004), the plaintiff failed to take an immediate appeal from an order that he later argued the district court improperly certified under Rule 54(b). *Id.* at 193. The Tenth Circuit held that the “Rule 54(b) certification was proper” and that the plaintiff’s “failure to timely appeal”—within 30 days of the order, rather than within 30 days of the conclusion of the rest of the case—“deprives us of jurisdiction.” *Id.* at 195.

320. *E.g.*, *In re Lindsay*, 59 F.3d 942, 951 (9th Cir. 1995); see also *A-1 Amusement Co. v. United States*, 15 F. App’x 777, 781 (Fed. Cir. 2001). But see *Page v. Preisser*, 585 F.2d 336, 338 (8th Cir. 1978) (“[W]hen a district court erroneously certifies a claim as appropriate for immediate appeal under Rule 54(b), a party may raise that claim in a timely appeal from an adverse decision on the remaining claims in the lawsuit.”).

321. See *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 291 (7th Cir. 1992) (suggesting that the trial judge “confused Rule 54(b) with 28 U.S.C. § 1292(b)”; see also *Local*

periodically admonish district courts that they have misused Rule 54(b) and that “§ 1292 represents the more appropriate course.”<sup>322</sup> By contrast, “several cases have treated Rule 54(b) certifications as § 1292(b) certifications.”<sup>323</sup> The inconsistency is especially troubling because resort to Rule 54(b) rather than § 1292 confers mandatory appellate jurisdiction, “evade[s]” the appellate court’s discretion not to hear the appeal,<sup>324</sup> and requires the aggrieved party to appeal immediately or risk losing appellate rights. The Seventh Circuit has recognized a need to “keep Rule 54(b) distinct from § 1292(b)”;<sup>325</sup> to do so it scrutinizes Rule 54(b) certifications to ensure no “overlap” between the issues on appeal and those that remain with the district court.<sup>325</sup> But the scrutiny for overlap is one of the problems that leads to all the confusion and uncertainty in applying Rule 54(b). Converting to an overtly discretionary system rids us of these problems.

Why, then, have we not already moved to an all-discretionary system? For one thing, it has its own imperfections, as noted below.<sup>326</sup> But it appears that the primary reasons for not revisiting the structure of Rule 54(b) have been oversight and inertia. Congress had not yet enacted § 1292(b) in 1938, when the original Rule 54(b) was promulgated, or in 1948, when the Rule was amended to add the discretionary-certification step. Curiously, the advisory committee in 1961 recognized that § 1292(b) “may now be available for the multiple-parties cases” that were added to Rule 54(b) that year.<sup>327</sup> But the advisory committee concluded, without explanation, that the rule was a better mechanism for those cases.<sup>328</sup> Even so, the 1961 committee made

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P-171, *Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1068 (7th Cir. 1981) (noting that the parties proceeded under Rule 54(b) even though the district court order “purported to certify the orders for permissive interlocutory appeal under 28 U.S.C. § 1292(b)”).

322. *E.g.*, *Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 168 (11th Cir. 1997); *see also* *Braswell Shipyards, Inc. v. Beazer E., Inc.*, 2 F.3d 1331, 1336 n.4 (4th Cir. 1993); *Spiegel v. Trs. of Tufts College*, 843 F.2d 38, 46 n.7 (1st Cir. 1988); *Morrison-Knudsen Co., v. Archer*, 655 F.2d 962, 966 (9th Cir. 1981) (Kennedy, J.).

323. *Amalgamated Meat Cutters*, 642 F.2d at 1071 (7th Cir. 1981) (Wisdom, J.); *see also* *Tolson v. United States*, 732 F.2d 998, 1002 (D.C. Cir. 1984) (declining to convert improper Rule 54(b) certification to § 1292(b) certification but noting that in “an appropriate case, the requested conversion . . . might well be in order at the appellate court level”); *Bergstrom v. Sears, Roebuck & Co.*, 599 F.2d 62, 64 (8th Cir. 1979). *But see* *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 745–46 (1976) (refusing to construe improper Rule 54(b) certification as proper certification under § 1292(b) given the different mechanisms for seeking interlocutory appeal under the latter).

324. *Morrison-Knudsen*, 655 F.2d at 966.

325. *See* *Factory Mut. Ins. Co. v. Bobst Grp. USA, Inc.*, 392 F.3d 922, 924 (7th Cir. 2004).

326. *See infra* Section III.B.

327. 1961 ADVISORY COMMITTEE REPORT, *supra* note 91, at 7.

328. *Id.*; *see also* Kaplan, *supra* note 90, at 616–17.

no mention of the fact that the statute, enacted after the 1948 amendment, could also have served as a basis for appealing in multi-claim cases.

### B. *Responses to the Shortcomings of § 1292(b)*

The mechanism of § 1292(b) is not without its problems. But as this final Section shows, the problems are not insurmountable, and the benefits outweigh them.

#### 1. Fixing the Text

As a textual matter, § 1292(b) in its present form is not perfectly suited to the purposes of Rule 54(b). Section 1292(b) addresses itself to the resolution of dispositive legal issues, and, to be sure, early resolution of unsettled legal issues arguably can fall within the discretionary factors that courts consider when certifying under the Rule.<sup>329</sup> But the resolution of a discrete claim under Rule 54(b) does not necessarily involve a legal question “as to which there is substantial ground for difference of opinion.”<sup>330</sup> Indeed, the resolution of a discrete claim can turn on entirely on the facts and involve no legal controversy at all.

To address this concern, § 1292(b) would have to be amended, and the language of the amendment would have to avoid the problems that plague Rule 54(b). Primarily, we need to steer clear of having to determine what constitutes a “claim.” I propose the following amendment to § 1292(b) (proposed new language in italics):

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 *either*:

(i) involves a controlling question of law as to which there is substantial ground for difference of opinion *or*

(ii) *adjudicates entitlement to relief under particular legal theories,*

and *also concludes* that an immediate appeal from the order may materially advance the ultimate termination of the litigation *or that the benefits of an immediate appeal outweigh the costs*, he *or she* 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,

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329. See *supra* text accompanying notes 282–84.

330. Cf. 28 U.S.C. § 1292(b) (2006).

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 first added phrase—“adjudicates entitlement to relief under particular legal theories”—would permit discretionary appeals from determinations of liability or non-liability under any of the legal theories presented in the case. This language is perhaps coextensive with the view of “claim” under Rule 54(b) that most cases have rejected.<sup>331</sup> But that broad view is no longer problematic, because it would not require review in every case in which a district court adjudicates liability under a given legal theory, or even every case in which a district court then certifies that adjudication for immediate appeal. Instead, appellate courts would enjoy the discretion to decline to hear interlocutory appeals in such cases.

To guide district courts in determining when certification is appropriate, the second added phrase—“or that the benefits of an immediate appeal outweigh the costs”—embraces the balancing test that underlies all forms of early appellate review.<sup>332</sup> Instead of the confusing “no just reason for delay” language, I propose instructing district courts that certification of an order resolving liability under a particular legal theory is warranted when, on balance, the value of immediate appeal outweighs any delay in trial-court proceedings and any potential inefficiencies at the appellate level (captured simply with the single word *costs*). This test would require district courts to determine whether an immediate appeal would delay the resolution of the rest of the case and whether it would likely lead to multiple appeals on duplicative issues—two of the major barriers to certification under Rule 54(b).<sup>333</sup> If an immediate appeal would lead to delay, duplication, or both, the district court would have to determine whether the benefits of the appeal outweigh these drawbacks. Importantly, if the district court finds that an appeal is warranted, the appellate court would then have the final say in the matter.

An amendment to § 1292(b) is not the only way to accomplish this change. Another solution might be to amend Rule 54(b) itself.<sup>334</sup> The

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331. *See supra* text accompanying notes 182–94.

332. *See supra* text accompanying notes 31–34.

333. *See supra* text accompanying note 282.

334. To the extent such an amendment would amount to an additional avenue of interlocutory appellate review (rather than a modification of an existing one), Congress has vested the Supreme Court with the power to promulgate rules creating that avenue. *See* 28 U.S.C. § 1292(e) (2006). The Court has used that power only once, in creating a discretionary right of appeal from orders that grant or deny class-action status. *See* FED. R. CIV. P. 23(f); *see*

statutory approach is probably better for two reasons. First, amending the statute would aggregate two of the most important provisions for interlocutory appellate jurisdiction and would thus help reduce the balkanization of jurisdictional rules that scholars have criticized.<sup>335</sup> Second, Rule 54(b) is part of a larger civil rule governing *judgments*;<sup>336</sup> under my proposal, orders certified for discretionary review would no longer carry with them the status of a final judgment, so the amended provision would not seem to fit.<sup>337</sup> But the precise location of the provision is ultimately less important than its substance. So long as we eliminate the existing text of Rule 54(b) and replace it with a system of dual discretion along the lines described above, we will go a long way toward stabilizing appellate jurisdiction over orders that resolve less than an entire action.

## 2. Obtaining Meaningful Early Review

Another problem of replacing Rule 54(b) with a purely discretionary system—and of giving both trial and appellate courts full discretion to permit or refuse interlocutory review—is that it could curtail meaningful opportunities for such review. I have previously criticized the § 1292(b) mechanism for precisely that reason: it permits courts to evade prejudgment appellate review in certain situations where it is warranted.<sup>338</sup>

The important question, then, is when is it warranted? I have argued that legal error in multidistrict litigation (MDL) can be devastating for the litigants and the public and that deferring appellate review of certain interlocutory MDL orders is unacceptable.<sup>339</sup> High-impact legal decisions in MDLs are an example of what Professor Timothy Glynn calls “problem areas,” where appellate courts should have no discretion to reject interlocutory appellate jurisdiction.<sup>340</sup> In those categorical circumstances, § 1292(b) is ineffectual, because it confers on both trial and appellate courts unbridled power to prevent immediate appeal.

But the need for interlocutory appeal in multi-claim litigation is not categorical. It arises on a case-by-case basis and focuses on the discrete hardship that litigants will suffer if final judgment is delayed, balanced against the cost of permitting an immediate appeal. That is precisely why Rule 54(b) already vests discretion in district courts. My proposal

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also Pollis, *supra* note 15, at 1657, 1694 n.80.

335. See Steinman, *supra* note 29, at 1238–39.

336. See generally FED. R. CIV. P. 54.

337. See *infra* text accompanying notes 350–54.

338. See Pollis, *supra* note 15, at 1658–59.

339. See *id.* at 1663, 1667–84.

340. See *id.* at 1663 (quoting Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 259 (2001)).

does not remove that discretion, but it does permit the appellate court to have a say in the matter, eliminating the anomalous Rule 54(b) dynamic of permitting district courts to control the appellate-court docket.

Conferring discretion on appellate courts is already familiar. All other bases for discretionary appeal<sup>341</sup> depend on the appellate courts' willingness to hear a case, and many commentators have suggested that district courts should never have a say.<sup>342</sup> Under my proposal, district courts would continue to exercise their superior vantage points to dispatch only those interlocutory orders appropriate for immediate appeal, thus retaining control over their own dockets and limiting the cases that appellate courts would have discretion to consider. At the same time, the more-liberal standards for certification run the risk of flooding appellate courts with interlocutory appeals and thus require a counterbalance in the form of overt appellate-court jurisdictional discretion.

I say "overt" because appellate-court discretion under Rule 54(b) already lurks in the background<sup>343</sup> even if courts are loath to acknowledge it openly. Many appellate courts find an abuse of discretion to certify simply because they disagree with the district court's decision.<sup>344</sup> The abuse-of-discretion standard can also provoke disagreements on an appellate panel about the extent to which appellate courts should substitute their judgments for those of the district court that issued the certification.<sup>345</sup> My proposal embraces that discretion, giving rise to more-honest decision making and fewer inconsistent applications of the abuse-of-discretion standard.

Of course, trial and appellate courts would have different incentives for granting or refusing certification. These differences would matter only when the trial court certifies a case, because only then does the appellate court have to weigh in. The trial court may prefer early guidance on a disputed legal question in order to resolve the remainder of the case more efficiently, while the appellate court may prefer to avoid the possibility of hearing multiple appeals in the same case. This is precisely the sort of balancing test that both courts should be permitted to conduct. Both should have veto power. But bear in mind

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341. *See supra* note 28.

342. *See Pollis, supra* note 15, at 1660–62; *see also supra* note 347 and accompanying text.

343. *See supra* text accompanying notes 273–77.

344. *E.g., Novick v. AXA Network, LLC*, 642 F.3d 304, 314 (2d Cir. 2011); *Taco John's of Huron, Inc. v. Bix Produce Co.*, 569 F.3d 401, 402 (8th Cir. 2009); *Huggins v. FedEx Ground Package Sys., Inc.*, 566 F.3d 771, 775 (8th Cir. 2009).

345. *Compare Braswell Shipyards, Inc. v. Beazer E., Inc.*, 2 F.3d 1331, 1336 (4th Cir. 1993) ("[T]he Rule 54(b) certification . . . was not within the proper bounds of the district court's discretion"), *with id.* at 1342 (Luttig, J., dissenting) (" . . . I would not disturb the district court's exercise of discretion in entering judgment. That decision—amply supported—was not only well within the court's discretion, it was an appropriate exercise of its discretion.").

that a veto does not undermine the *right* of appeal; all it affects is the *timing*.

The addition of appellate-court discretion would displease commentators who favor expanding Rule 54(b) to avoid its definitional problems but leaving intact the district court's sole discretion to determine orders suitable for immediate appeal.<sup>346</sup> That suggestion is appealing, because at first blush it seems simpler and less likely to lead to jurisdictional battles in the appellate court. It also dovetails with the views of scholars who are skeptical of vesting discretion in appellate courts because of their institutional bias in favor of limiting appeals.<sup>347</sup> But it suffers from two major problems. First, the political opposition to such a suggestion dooms it from the start, as appellate judges would likely rally against any proposal to expand a district court's discretion to determine mandatory appellate jurisdiction. Second, that proposal would still permit appellate courts to review certification orders to ensure that district courts had not abused their discretion,<sup>348</sup> so the jurisdictional battles would still occur. Indeed, those battles would perpetuate the existing confusion over the extent of deference appellate courts would be required to accord to district courts' certification orders.

In the end, explicitly authorizing appellate courts to exercise discretion will permit more-honest debate at the appellate level about the need for immediate appeal. We cannot know in advance whether my proposal would meaningfully reduce the number of merit decisions in worthy cases. But it is more likely we would reduce merit decisions only in those cases in which the need for immediate review is questionable. And if some cases worthy of early appellate intervention do not receive it, that is a price worth paying in exchange for the clarity we would gain in avoiding the uncertainties associated with Rule 54(b).<sup>349</sup>

### 3. Executing on the Judgment

Perhaps lost in all the debate about appealability of partial final judgments is the practical consideration that a Rule 54(b) judgment

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346. See, e.g., CLERMONT, *supra* note 17, § 2.6, at 148–49.

347. See, e.g., Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 LAW & CONTEMP. PROBS., Summer 1984, at 171, 175–77; see also Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1201–03 (1990) (suggesting that appellate courts should defer to district courts' decisions to certify under § 1292(b) or at least should explain why they reject certifications).

348. See CLERMONT, *supra* note 17, § 2.6, at 149.

349. But see *id.*, § 2.6, at 149 (noting that “whoever determines appealability might be wrong occasionally” but that exercising appellate jurisdiction is more efficient than “expend[ing] energy on second-guessing decisions granting appeals”).

becomes enforceable upon its entry<sup>350</sup> unless execution is stayed. Eliminating Rule 54(b), and relying instead on a procedure akin to § 1292(b), would mean that the orders in question would no longer be final at the time they are dispatched for appeal.

As a practical matter, the elimination of Rule 54(b) would have an adverse impact only on the execution of money judgments. District courts are empowered already to issue injunctive relief before final judgment,<sup>351</sup> and my proposal would not affect that power. So the real concern is that the delay in entering final judgment might compromise a prevailing party's ability to obtain monetary satisfaction.<sup>352</sup>

But that concern is not enough to overcome the steep problems that Rule 54(b) poses. Litigation against financially unstable defendants always involves the risk of insolvency, and even under Rule 54(b) there is a risk of asset dissipation before the district court adjudicates a claim.<sup>353</sup> More importantly, these concerns are better addressed in appropriate cases—both before and after liability is established—by prejudgment attachment procedures to ensure that wrongdoers do not dissipate their assets.<sup>354</sup>

Ultimately, the uncertainty that plagues Rule 54(b) certifications calls into question the propriety of permitting a victor to execute on a Rule 54(b) money judgment. After all, if the Rule 54(b) certification turns out to be improper, then the judgment is not final for purposes of execution any more than it is final for purposes of appeal. But litigants would have no way to know about the defective judgment until the appellate court rejects the appeal. Meanwhile, execution proceedings may have begun.<sup>355</sup> Eliminating the risk of premature execution is itself a reason to embrace a proposal that eliminates Rule 54(b).

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350. *E.g.*, *Elliott v. Archdiocese of N.Y.*, 682 F.3d 213, 220 n.3 (3d Cir. 2012).

351. *See* FED. R. CIV. P. 65.

352. *See* *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 11–12 (1980) (finding that concerns about the ability to execute on a delayed judgment are appropriate considerations in entering immediate judgment under Rule 54(b)).

353. *See, e.g.*, Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 WASH. L. REV. 257, 267–68 (1992).

354. *See, e.g., id.* Unfortunately, the Supreme Court has limited the use of preliminary injunctions to prevent asset dissipation. *See* *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999). But the decision in *Grupo Mexicano* recognizes that Congress has the power to override the Court's holding in that case. *See id.* at 322. And the holding does not apply to assets on which the plaintiff can assert an equitable lien. *See, e.g., Iantosca v. Step Plan Servs., Inc.*, 604 F.3d 24, 33–34 (1st Cir. 2010).

355. *See* FED. R. CIV. P. 62(a) (execution proceedings on a judgment may begin when “14 days have passed after its entry”).



#### 4. Administrative Burdens

Finally, my proposal will add an additional step to the appeal process—the petition to the appellate court to appeal from a certified order.<sup>356</sup> Under the current system, an appellant simply files a notice of appeal, as she would do from any other final order. But the discretionary process involves briefing on the question whether to permit immediate review.

This is not troubling. We already accommodate discretionary-appeal petitions under § 1292(b) and in connection with other rights of discretionary review.<sup>357</sup> And Rule 54(b) already requires appellate courts to grapple with jurisdictional issues. The petition procedure simply requires them to do so earlier in the process, before the parties expend time and resources briefing and preparing the case for oral argument. Hastening the jurisdictional skirmish will lead to greater efficiency, not less.<sup>358</sup>

#### CONCLUSION

For seventy-five years, we have struggled to apply a rule that was designed for a purpose no currently practicing lawyer can even remember: to soften the impact of the 1938 expansion of civil litigation. The various iterations of the rule have never managed to solve its fundamental problems, and the Supreme Court's occasional foray into the Rule 54(b) dialog has succeeded only in aggravating the confusion.

A close examination of Rule 54(b) and its problems reveals that it is not worth all the trouble—not when a simpler, all-discretionary vehicle for early appeals is already functioning. Converting to a § 1292(b)-style discretionary review avoids all the interpretive problems and procedural traps that plague Rule 54(b) while still affording opportunities for early review in cases that warrant it. The benefits of an all-discretionary system far outweigh its burdens.

It is true that eliminating Rule 54(b) would reallocate power. It would vest appellate courts with ultimate authority to decide whether to hear the kinds of early appeals that now qualify for partial final judgment, rather than leave those decisions to trial judges. But trial judges would still enjoy the power to withhold certification. In the end, then, the shared discretion would supplant a system in which the power dynamics have led to inconsistent and confusing results.

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356. See FED. R. APP. P. 5(a).

357. See *supra* note 28.

358. See *Akers v. Alvey*, 338 F.3d 491, 495–96 (6th Cir. 2003) (concluding that inadequate Rule 54(b) findings that came to light after full briefing weighed in favor of disposing of the appeal on the merits, and “if the jurisdictional issue had been spotted sooner, [the court] would likely have remanded the case”).

My proposal, for example, would have entirely avoided the jurisdictional harangue that popped up at the last minute in Planned Parenthood's appeal to the Sixth Circuit.<sup>359</sup> The parties would have known, before briefing the appeal and certainly before oral argument, whether the court would rule on the merits. Given the important constitutional issues at stake, the court would quite likely have taken the case. And instead of arguing about appellate jurisdiction at the last minute, the parties to that appeal could have devoted all of their resources to those important constitutional issues.

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359. *See supra* text accompanying notes 1–5.