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The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation

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THE NEED FOR NON-DISCRETIONARY INTERLOCUTORY APPELLATE REVIEW IN MULTIDISTRICT LITIGATION

Andrew S. Pollis*

Multidistrict Litigation (MDL) is a tool for managing complex litigation by transferring cases with common questions of fact to a single judge for coordinated pretrial proceedings. The subject matter of the cases can run the gamut from airplane crashes to securities fraud to environmental disasters, such as the recent BP oil spill in the Gulf of Mexico. Today, about a third of all pending civil cases in federal court are part of the MDL system. A single judge renders all the important legal decisions in each MDL, exerting outsized impact on the parties and on the evolution of the law—and does so with virtually no scrutiny from other judges. This power centralization promotes efficient case management, but it can be an anathema to our conception of decentralized justice. One instance of unreviewable pretrial error can have immediate and sweeping impact on thousands of cases in one fell swoop.

It is time to restore the balance of judicial power. This Article argues for an expansion of non-discretionary interlocutory appellate jurisdiction over certain legal rulings rendered in MDL cases.

Any opportunity to appeal before the end of the case reflects an inherent value judgment that the immediate rights at stake outweigh the burdens that interlocutory review imposes on the courts. The discretionary approach to interlocutory appellate jurisdiction has proven generally adequate. But it is not adequate in the context of MDL proceedings, where the risks and consequences of legal error are heightened considerably. Ultimately, MDL cases tend to settle rather than proceed to final judgment, so the appellate courts rarely have an opportunity to clarify the law, and the settlements are often mispriced as a result of the uncertainty. The absence of appellate review also deprives our jurisprudence of one of its central features—the

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back-and-forth negotiation of legal principles that occurs when multiple jurists grapple with the same legal questions.

Certain interlocutory MDL orders, then, warrant mandatory appellate jurisdiction. To qualify, the order should involve a pure issue of law in an unsettled area or in contravention of established precedent, and immediate appellate review should potentially be dispositive of a significant number of cases in the MDL. The guaranteed availability of immediate review in these circumstances would not come without costs, but the benefits would far outweigh them. Indeed, the right of immediate appeal would ensure the integrity of the MDL process on which our legal system has come so heavily to depend.

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consolidated in an MDL proceeding can number in the thousands.⁵ A single judge, for example, will handle hundreds of federal actions arising out of the 2010 BP oil spill in the Gulf of Mexico.⁶

Consolidation of power in a single federal judge offers advantages in terms of uniformity, efficiency, and the facilitation of global settlement.⁷ But it also ratchets up considerably the risk and consequences of legal error, particularly when the MDL raises issues of first impression. A single judge's thinking exerts a disproportionate influence on the evolution of the law.⁸ New legal theories emerge, unrefined by the scrutiny of other trial-court judges wrestling with the same problems. And, because interlocutory rulings generally are not subject to immediate appeal, the trial judge presiding over an MDL lacks any meaningful appellate supervision.⁹ For the sake of gaining control over *case* management, the existing MDL format sacrifices a critical component of *law* management. The power consolidation also leaves litigants, unable to take an immediate appeal, with a Hobson's choice: (a) risk a highly unfavorable trial verdict that may result from the judge's mistaken view of the law, with the hope of securing relief on a post-trial appeal; or (b) avoid the risk by settling before trial—but at a price that reflects the erroneous legal rulings.¹⁰

It is unclear whether Congress lacked the foresight to anticipate these problems when it passed the Multidistrict Litigation Act¹¹ in 1968 or whether it consciously determined that the anticipated benefits of so structuring the MDL system outweighed these costs. Either way, it failed to appreciate the value of building into the MDL process a right, under limited circumstances, to appeal immediately from significant pretrial rulings in MDLs. Early appellate scrutiny would serve as a much-needed antidote to the excess power the current MDL system bestows on the individual presiding judge. And it would replace the Hobson's choice with an opportunity for real, systematic dispensation of justice while leaving the parties free to settle without appeal if that is their preference.

McCollam, *Slick on Slick*, N.Y. TIMES MAG., Nov. 7, 2010, at 44, 62 (noting that a multidistrict litigation (MDL) judge "customarily exercises a lot of sway").

5. See, e.g., *In re* Briscoe, 448 F.3d 201, 206 (3d Cir. 2006) (describing MDL involving "14,000 actions filed by some 30,000 to 35,000 plaintiffs").

6. See *In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179, 2010 U.S. Dist. LEXIS 83268 (J.P.M.L. Aug. 10, 2010); see also *In re* BP p.l.c. Sec. Litig., MDL No. 2185, 2010 U.S. Dist. LEXIS 83263, at *4 (J.P.M.L. Aug. 10, 2010) (consolidating under single judge all federal actions involving allegations that BP misled investors about its safety measures).

7. Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2223 (2008); see also Danielle Oakley, Note, *Is Multidistrict Litigation a Just and Efficient Consolidation Technique? Using Diet Drug Litigation As a Model To Answer This Question*, 6 NEV. L.J. 494, 506 (2005).

8. See Moller, *supra* note 4, at 857.

9. Cf. Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 530 (2002).

10. E.g., Michael J. Davidson, *A Modest Proposal: Permit Interlocutory Appeals of Summary Judgment Denials*, 147 MIL. L. REV. 145, 205 (1995).

11. See Multidistrict Litigation Act, Pub. L. No. 90-296, 82 Stat. 109 (1968) (codified as amended at 28 U.S.C. § 1407 (2006)).

As I explain in Part I, the hodgepodge avenues of interlocutory appellate jurisdiction fall into two basic categories: mandatory jurisdiction and discretionary jurisdiction. Every right of interlocutory appeal reflects a value judgment that the immediate vindication of a particular right justifies early involvement of an appellate court, at the expense of judicial economy and trial-court autonomy. The difference between mandatory and discretionary jurisdiction is in essence one of allocating the task of making that value judgment. Congress and the U.S. Supreme Court have sometimes made the judgments categorically, establishing mandatory appellate jurisdiction over certain kinds of interlocutory orders that always have a “serious, perhaps irreparable, consequence.”¹² But in large measure the opportunity for interlocutory review is left to the lower courts to provide or to decline, based on subjective case-by-case determinations. We can frame the distinction as one of rules (mandatory jurisdiction) *versus* standards (discretionary jurisdiction)¹³ or as another example of the debate over institutional choice (“deciding who decides”).¹⁴ However scrutinized, the end result is that our current system vests trial and appellate courts with broad and misplaced discretion to deny interlocutory review over important orders in MDLs. The existing scholarship has not offered an adequate solution; commentators have frequently criticized rules of appellate jurisdiction¹⁵ and have advocated for expanding the scope of *discretionary* interlocutory review.¹⁶ But tinkering with discretionary review is inadequate in the MDL context. Litigants in MDLs should enjoy a *right* of interlocutory appellate review when the trial court steps outside the parameters of settled law and when the decision in question has widespread impact on MDL litigants.¹⁷

Part II shows how the absence of guaranteed appellate review over MDL cases has increasingly significant consequences. The proportion of suits

12. *Balt. Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955).

13. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992) (“[A] rule may entail an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator A standard may entail leaving both specification of what conduct is permissible and factual issues for the adjudicator.”); *see also* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. (forthcoming Mar. 2011) (manuscript at 17–25), available at <http://ssrn.com/abstract=1673116> (discussing distinction between rules and standards and analogizing it to distinction between mandates and discretion).

14. *See, e.g.*, NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 3 (1994).

15. Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1294 (2007); *see also* Thomas E. Baker, *An Annotated Bibliography on Federal Appellate Practice and Procedure*, 10 J. APP. PRAC. & PROCESS 13 (2009) (listing numerous articles on appellate jurisdiction and related issues).

16. *See infra* notes 101–13 and accompanying text.

17. Only one prior commentator, Professor Timothy P. Glynn, has advocated the expansion of mandatory appellate jurisdiction over trial court decisions in what he characterizes as “problem areas.” Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 259 (2001). But Professor Glynn makes no mention of the MDL system and declines to identify any specific problem areas to which his analysis would apply. *Id.* at 261–62; *see also infra* text accompanying notes 115–22.

consolidated in MDLs has grown considerably since Congress first authorized MDLs in 1968. In recent years, up to one-third of all civil lawsuits pending in the federal courts have been consolidated in MDLs. A single trial-court decision can implicate hundreds, or even thousands, of individual lawsuits. As a result, MDL decisions can have an exaggerated influence both for the parties to MDL proceedings and for the evolution of the law. The existing rules of appellate jurisdiction rarely permit immediate appellate review of most significant MDL decisions; the decisions in question do not fit the traditional mold of orders reviewable as of right, and discretionary review in this context is unreliable. To illustrate the untenability of the status quo, I look closely at some of the more controversial decisions rendered in a high-profile product-liability MDL involving a gasoline additive—decisions that, to date, have evaded appellate review.¹⁸

Building on my analysis in Parts I and II, I propose in Part III a right of immediate appellate review in MDLs from interlocutory orders that raise important issues of unsettled law (or departures from settled law) and that are potentially dispositive of a significant number of the consolidated cases. My proposed test would essentially convert an existing discretionary right of appeal in the ordinary case into a mandatory right of appeal if the case is part of an MDL proceeding. The reform would provide a much-needed and meaningful check on MDL judges. It also would create a foundation for global settlement based not on the coercion of a single trial judge's potentially erroneous view of the law, but instead on carefully considered legal principles that have been forged in the course of full-scale appellate review. While the greater access to appellate review would not come without costs, the benefits for the litigants, for both the evolution of the law and the public's confidence in the judicial system would far outweigh them.

I. MANDATORY AND DISCRETIONARY APPELLATE JURISDICTION: DELINEATING WHO MAKES THE VALUE JUDGMENTS

A. *Access to the Appellate Courts As an Expression of Value Judgments*

The right to appeal in American jurisprudence is “sacrosanct,” and “we clutch it reverently to our collective breast.”¹⁹ In federal civil cases, the right, born with the Judiciary Act of 1789,²⁰ is credited with enhancing the federal courts’ “ability to administer justice in a regular, evenhanded, and confidence-inspiring manner.”²¹ That public confidence results from a

18. In the interest of full disclosure, I also note that I served as counsel for one of the principal defendants in the referenced MDL and attempted, unsuccessfully, to obtain interlocutory appellate review of some of the decisions I describe below.

19. Harlon Leigh Dalton, *Taking the Right To Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 62, 64 (1985). Professor Dalton questions the desirability of appeals of right generally and proposes that they be limited to certain categories of cases. *See id.* at 97–107.

20. Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84.

21. Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 712 (1999).

blend of what Professor Cassandra Burke Robertson identifies as “three of the basic goals of appellate review—(1) increasing the probability of a correct judgment; (2) providing uniformity of result; and (3) increasing litigants’ sense that their dispute has been fully and fairly heard.”²²

But the right is not, and cannot be, unrestricted. The opportunity for appellate review cannot be so broad that it imposes “unmanageable burdens on the judicial system” by permitting unlimited rights to appeal interlocutory orders.²³ Interlocutory appeals burden the appellate courts and slow down the resolution of cases in the trial courts.²⁴ The extreme example proves the point: “If parties could take up on appeal each disputed ruling by a lower court as it was handed down, the case could drag on indefinitely.”²⁵

Thus, every decision to allow an interlocutory appeal necessarily reflects a subjective value judgment that the interests of the aggrieved party in the prompt resolution of a particular claim of error outweigh the systemic interests that militate in favor of requiring that party to wait until the end of the case to seek appellate vindication. By definition, then, permitting interlocutory appellate review involves a balancing test of competing policy choices.²⁶ The struggle to strike the proper balance is evident in the application of the most fundamental rule of appellate jurisdiction, the final-judgment rule. Codified in 28 U.S.C. § 1291,²⁷ the final-judgment rule supposedly restricts appellate jurisdiction to “final” decisions that “end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment.”²⁸ But finality itself is in the eyes of the beholder; Justice Hugo Black observed that the Court’s decisions “dealing with the meaning of finality have provided no satisfactory definition of this term.”²⁹

22. Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 771 (2006); see also Dalton, *supra* note 19, at 69 (“[A]ppellate courts exist to correct errors; to develop legal principles; and to tie geographically dispersed lower courts into a unified, authoritative legal system.”).

23. Robertson, *supra* note 22, at 771.

24. See, e.g., *id.* at 738.

25. Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 89 (1975); see also Glynn, *supra* note 17, at 222 (appellate review normally “should wait until the end of the litigation in the district court”).

26. Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 767 (1993) (“[A]n appeal [should] be permitted from an admittedly interlocutory order, when the dangers of allowing an interlocutory appeal are outweighed by the advantages of allowing the appeal.”).

27. The statute provides, in pertinent part: “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) (emphasis added).

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

29. *Rederi A/B Disa v. Cunard S.S. Co.*, 389 U.S. 852, 854 (1967) (Black, J., dissenting), *denying cert.* to 376 F.2d 125 (2d Cir. 1967); see also *McGourkey v. Toledo & Ohio Cent. Ry. Co.*, 146 U.S. 536, 544–45 (1892) (“Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees.”); Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, LAW & CONTEMP. PROBS., Summer 1984, at 170, 171 (“The idea that an appeal to the second level of a court system should wait until a final decision has issued at the first level of the system is as sweet

The Court has also noted that “[n]o verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future.”³⁰ The guiding principle has nevertheless remained the same: to balance “the most important competing considerations,” which “are ‘the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.’”³¹

Grappling with these competing considerations, Congress and the Court have frequently “hedged the finality requirement with exceptions and qualifications necessitated by shared perceptions that there are times when forthright application of a simple rule against piecemeal appeals works injustice and diseconomy.”³² We recognize that an opportunity to appeal from a nonfinal order sometimes “would prevent irreparable harm to a party, advance the termination of the litigation, or serve some broader public interest, [so] there have been constant efforts to make exceptions to the finality requirement to allow early appeals in some cases.”³³

But every argument for expanding appellate rights is met with forceful opposition by those keen to limit the exceptions, on the theory that permitting “piecemeal, prejudgment appeals . . . undermines ‘efficient judicial administration’ and encroaches upon the prerogatives of district court judges, who play a ‘special role’ in managing ongoing litigation.”³⁴ Several Supreme Court Justices have thus expressed hostility toward the expansion of appellate rights; Justice Breyer has “cautioned against expanding the class of orders eligible for interlocutory appeal.”³⁵ Justice Scalia has observed that “finality jurisprudence is sorely in need of further limiting principles.”³⁶ And the Court has repeatedly emphasized that

and simple as a baby’s kiss. But as so often happens with legal affairs that are simple in theory the finality requirement in actual operation becomes ‘dazzling in its complexity’ . . .” (quoting Edward H. Cooper, *Timing As Jurisdiction: Federal Civil Appeals in Context*, LAW & CONTEMP. PROBS., Summer 1984, at 156, 156)).

30. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

31. *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152–53 (1964) (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)); see also *Eisen*, 417 U.S. at 171. Perhaps the Court’s most vexing application of the final-judgment rule is the collateral-order doctrine. See *infra* notes 44–50 and accompanying text.

32. Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, LAW & CONTEMP. PROBS., Summer 1984, at 165, 165; see also Redish, *supra* note 25, at 90 (“[T]he final judgment rule and its preexisting exceptions have not always been sufficient to assure fairness to appellants.”).

33. Martineau, *supra* note 26, at 788; see also Pierre H. Bergeron, *District Courts As Gatekeepers? A New Vision of Appellate Jurisdiction over Orders Compelling Arbitration*, 51 EMORY L.J. 1365, 1369 (2002) (“[I]nterlocutory review is largely unavailable in a significant number of cases in which it should be appropriate.”); Robertson, *supra* note 22, at 741 (“[T]he detriments [of the final-judgment rule] generally outweigh the benefits.”); Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1165 (1990) (“[I]nterlocutory appeals can and should play a greater role in the adjudicative process in the federal courts.”).

34. *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 605 (2009) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).

35. *Behrens v. Pelletier*, 516 U.S. 299, 320 (1996) (Breyer, J., dissenting).

36. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 292 (1988) (Scalia, J., concurring).

exceptions to the final-judgment rule are confined to those situations in which strict adherence to it “would practically defeat the right to any review at all.”³⁷

The back-and-forth debate has given rise to a vast body of literature, populated by both courts and commentators, striving “to determine how to strike the balance”³⁸ between “allowing meaningful interlocutory review when necessary” and avoiding “overburdening the federal appellate system with a cascade of interlocutory appeals.”³⁹ The debate is not new; more than sixty years ago, the Supreme Court noted that “the volume of judicial writing” on the subject was “formidable.”⁴⁰ And the struggle to construe and apply doctrines of appellate jurisdiction continues right up to the present day.⁴¹

Certainly, then, there is a fundamental question over where to draw the line. Congress, courts, and commentators have all struggled to strike the proper balance in conferring adequate opportunities to appeal without overburdening the judicial system or inhibiting the expeditious progression of cases through the trial courts. But there is just as fundamental a question about *who* should draw the line. And, as I explain below in Part I.B, Congress and the Supreme Court have ultimately answered that question in two different ways. The first way, expressed in routes of interlocutory appeal *of right*, reflects Congress’s or the Court’s own determination that a particular category of trial-court orders always justifies immediate review and therefore warrants a fixed rule. The second way, *discretionary* interlocutory appeal, reflects a decision to delegate to the lower courts the task, on a case-by-case basis, of making the value judgments and conducting the balancing tests according to flexible standards.

The dual system has spawned a labyrinthian conglomeration of jurisdictional rules—a “crazy quilt,” as one student commentator has described it⁴²—and commentators frequently criticize the resulting confusion. Confusion aside, I show below in Part I.C that the commentators who have advocated expanding appellate jurisdiction have

37. *Mohawk*, 130 S. Ct. at 610 (Thomas, J., concurring in part) (quoting *Cobbledick v. United States*, 309 U.S. 323, 324–25 (1940)).

38. See Redish, *supra* note 25, at 100.

39. Bergeron, *supra* note 33, at 1367; see also Glynn, *supra* note 17, at 176 (“The vexing question is how to distinguish those interlocutory orders that are worthy of immediate review from those that are not.”); Martineau, *supra* note 26, at 767 (“[T]he interests of the parties in a speedy, fair, just, and effective review of their cases should be weighed against the interest in preventing piecemeal appeals.”); Redish, *supra* note 25, at 100 (“The difficult issue is, of course, to determine how to strike the balance in each case.”).

40. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950); see also *id.* at 516–17 (Black, J., dissenting) (“Finality and appealability have provided judges, lawyers, and commentators with a perpetual subject for debate.”).

41. See *Ortiz v. Jordan*, No. 09-737, 2011 U.S. LEXIS 915, at *7 (Jan. 24, 2011) (recent decision holding that a party may not “appeal an order denying summary judgment after a full trial on the merits”).

42. John C. Nagel, Note, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200, 200 (1994); see also Steinman, *supra* note 15, at 1238–39 (collecting numerous pejorative phrases commentators have used to describe the intricacies of federal appellate jurisdiction).

focused largely on the discretionary, case-by-case route, rather than recognizing a need for categorically expanding rights of mandatory review in appropriate circumstances.

*B. The Existing Avenues of Interlocutory Appellate Jurisdiction—
Mandatory and Discretionary*

1. Mandatory Interlocutory Appellate Jurisdiction, Whereby the Supreme Court or Congress Has Made Categorical Value Judgments

The Supreme Court and Congress have sometimes carved out exceptions to the final-judgment rule by providing mandatory appellate jurisdiction over certain types of interlocutory orders. In these circumstances, the Court or Congress itself has made the value judgment categorically, leaving no discretion to the lower courts to decline appellate jurisdiction if a trial court's order fits within particular parameters.

The Court's primary contribution was the 1949 creation of the collateral-order doctrine,⁴³ which permits appeals from orders that "are 'collateral to' the merits of an action and 'too important' to be denied immediate review."⁴⁴ The Court has actually avoided characterizing the collateral-order doctrine as a route of interlocutory appeal and instead has emphasized that the orders in question are deemed "final,"⁴⁵ but a collateral order does not actually end the action, as a final order normally does. As a result, the collateral-order rule has spawned criticism from both within the Court⁴⁶ and from commentators.⁴⁷ For present purposes, the important features of the collateral-order doctrine are the value judgments inherently reflected in its contours.

To illustrate: the Court has held that an order denying a defendant's motion to dismiss on the basis of immunity meets the collateral-order test, because immunity "is both a defense to liability and a limited 'entitlement

43. See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

44. E.g., *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603 (2009) (quoting *Cohen*, 337 U.S. at 546).

45. See, e.g., *Will v. Hallock*, 546 U.S. 345, 349 (2006) (collateral-order doctrine is "best understood not as an exception to the 'final decision' rule laid down by Congress in [28 U.S.C.] § 1291, but as a 'practical construction' of it" (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994))).

46. Justice Thomas, concurring in the 2009 decision that rejected application of the collateral-order doctrine to orders compelling the production of privileged information, suggested that mere consideration of the collateral-order doctrine in such circumstances "perpetuates a judicial policy that we for many years have criticized and struggled to limit." *Mohawk*, 130 S. Ct. at 610 (Thomas, J., concurring in part). Justice Scalia, joined by Justices Thomas and O'Connor, chastised the Court for having "invented" the collateral-order doctrine, for which "[t]he statutory text [of 28 U.S.C. § 1291] provides no basis." *Sell v. United States*, 539 U.S. 166, 189 n.4 (2003) (Scalia, J., dissenting).

47. See, e.g., H. Joon Chung, Comment, *Collateral Order—Knee-Deep in Confusion: Its Continuing Saga—Sell v. United States*, 123 S. Ct. 2174 (2003), 9 SUFFOLK J. TRIAL & APP. ADVOC. 153, 156 (2004) ("[T]he Court's application of the collateral order doctrine has a checkered history, replete with inconsistency and confusion."); Steinman, *supra* note 15, at 1247–57 (describing and critiquing the collateral order doctrine).

not to stand trial or face the other burdens of litigation.”⁴⁸ Arguably, any defendant with a strong defense has an interest in avoiding the burdens of litigation.⁴⁹ But only when the right derives from an immunity does the Supreme Court consider the right not to stand trial important enough to protect before the fact.⁵⁰ “[I]t is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is ‘effectively’ unreviewable if review is to be left until later.”⁵¹ Of course, the existence of a “substantial public interest” is a simple value judgment—a subjective assessment of substantiality.

Congress, for its part, began making such value judgments in 1891, when it first permitted an appeal of right from “an interlocutory order or decree granting or continuing [an] injunction.”⁵² Appeals of right from interlocutory orders “refusing” injunctions were authorized four years later,⁵³ and appeals of right from interlocutory decrees in admiralty cases were authorized in 1926.⁵⁴ In 1948, when reorganizing the Judicial Code, Congress also established the right of appeal from certain interlocutory

48. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1946 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

49. *See, e.g., Digital Equip.*, 511 U.S. at 873 (“We have, after all, acknowledged that virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a ‘right not to stand trial.’” (quoting *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989))); *see also Waters*, *supra* note 9, at 567 (“[C]ourts may not consider the added delay or expense of unnecessary litigation in determining whether a ruling qualifies for collateral order treatment.”). *But see Davidson*, *supra* note 10, at 206–11 (arguing that the right not to stand trial is a substantial right that justifies exercise of appellate jurisdiction, under the collateral-order doctrine, over orders denying summary judgment); *Redish*, *supra* note 25, at 118–19 (discussing *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148 (1964)) (the Supreme Court has occasionally, albeit only implicitly, recognized that the “expense of preparing and conducting a trial which might ultimately prove unnecessary” is harm enough to justify the right of immediate appeal).

50. *See Digital Equip.*, 511 U.S. at 873–81 (holding that a trial court’s disregard of the right to avoid trial under a settlement agreement is not important enough for immediate appellate review under the collateral-order doctrine); *see also Steinman*, *supra* note 15, at 1255–56 (“The only plausible basis for distinguishing” between immunity and settlement “is a value judgment about which right is more deserving of immediate appellate correction. Reasonable people may disagree about how to rank these two rulings, but it is complete fiction to say that one is a ‘final decision’ and the other is not.” (quoting *Digital Equip.*, 511 U.S. at 864)).

51. *Will v. Hallock*, 546 U.S. 345, 353 (2006) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

52. Circuit Court of Appeals (Evarts) Act, ch. 517, § 7, 26 Stat. 826, 828 (1891) (current version at 28 U.S.C. § 1292(a)(1) (2006)); *see also Balt. Contractors, Inc. v. Bodinger*, 348 U.S. 176, 180 (1955) (“The provision for interlocutory appeals was first introduced in 1891 when the circuit courts of appeals were established as intermediate appellate courts.”).

53. Act of Feb. 18, 1895, ch. 96, 28 Stat. 666, 666–67 (current version at 28 U.S.C. § 1292(a)(1)). Curiously, the right to appeal from orders *refusing* injunctions was effectively repealed in 1900, *see* Act of June 6, 1900, ch. 803, 31 Stat. 660, and then reinstated in 1911. *See All Writs Act*, Pub. L. No. 61-475, ch. 231, § 129, 36 Stat. 1087, 1134 (1911); *see also Balt. Contractors*, 348 U.S. at 180 n.6 (“This [1900] amendment had the effect of repealing the 1895 provision which was restored in § 129 of the Judicial Code of 1911.”).

54. Act of Apr. 3, 1926, Pub. L. No. 69-89, ch. 102, 44 Stat. 233, 233–34 (current version at 28 U.S.C. § 1292(a)(3)).

orders involving receiverships.⁵⁵ In an effort to glean meaning from these enactments, the Supreme Court in 1955 found “[n]o discussion of the underlying reasons for modifying the rule of finality . . . in the legislative history.”⁵⁶ The Court nevertheless inferred that “the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of *serious, perhaps irreparable, consequence*.”⁵⁷

Of course, that language—“serious, perhaps irreparable, consequence”—begs the question. As with the collateral-order doctrine, these statutorily created rights of appeal have hinged on a determination of importance. But the determination is inherently subjective; the words “serious” and “irreparable” identify the dividing line but offer no guidance on the value judgments that identify where to draw it and when the competing considerations of judicial economy outweigh the need for immediate review.⁵⁸ The value judgments are “based on preference, personal experience, or even bias, [and some] may have a greater distaste for certain types of irreparable harm than others.”⁵⁹ Those particular policy choices have ultimately been made each time Congress has expanded mandatory appellate jurisdiction by statute or the Supreme Court has recognized a category of collateral orders.

The most recent statutory expansion of interlocutory appeals of right illustrates the point. In 1988, Congress authorized appeals of right from interlocutory orders that refuse to enforce contractual arbitration clauses.⁶⁰ But the same legislation that created the immediate right to appeal from an order denying arbitration specified that interlocutory orders enforcing arbitration rights are *not* immediately appealable.⁶¹ Presumably, Congress drew a distinction between enforcing and refusing to enforce arbitration rights after concluding that an erroneous decision to refer a matter to

55. Judiciary and Judicial Procedure Rules of Decisions Act, Pub. L. No. 80-773, ch. 646, §§ 1291-94, 62 Stat. 869, 929-30 (1948) (codified as amended at 28 U.S.C. § 1292(a)(2)).

56. *Balt. Contractors*, 348 U.S. at 181. The Supreme Court seems to have ignored the legislative history that establishes a Congressional concern with outsized district court power, at least in the legislative history of the Evarts Act. See Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 592 (2009) (“At the time of the enactment [of the Evarts Act], Congress was concerned with the excesses of judicial discretion vested in federal trial judges that had resulted from the weakness of a system of appellate review that depended entirely on the Supreme Court.”).

57. *Balt. Contractors*, 348 U.S. at 181 (emphasis added).

58. Similarly, in 1984, Professor Paul D. Carrington proposed permitting a right of interlocutory appeal “when essential to protect substantial rights which cannot be effectively enforced on review after final decision.” Carrington, *supra* note 32, at 167. The difficulty, of course, is coming to agreement on defining those rights.

59. Glynn, *supra* note 17, at 245-46.

60. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1019(a), 102 Stat. 4642, 4671 (1988) (codified as amended at 9 U.S.C. § 16(a) (2006)). Under this statute, a defendant who loses a motion to compel arbitration “can take an immediate appeal of the district court’s order.” Bergeron, *supra* note 33, at 1366; see also Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896, 1900 (2009); Martineau, *supra* note 26, at 734-35.

61. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1019(b), 102 Stat. 4642, 4671 (1988) (codified as amended at 9 U.S.C. § 16(b)).

arbitration can effectively be corrected after the arbitration proceeding is concluded, so there is no immediate, perhaps irreparable, consequence (or important right lost) by proceeding unnecessarily with arbitration—or, if there is, the need for judicial economy outweighs the need for immediate vindication. By contrast, Congress implicitly concluded that an erroneous refusal to refer a matter to arbitration results in an immediate deprivation of rights that a later appeal cannot remedy. In effect, Congress made a subjective determination that the right to avoid trial is as significant in the arbitration context as the Supreme Court (subjectively) held it to be in the immunity context. That legislative value judgment was particularly important, because it essentially overrode judicial determinations that the refusal to enforce an arbitration clause did not give rise to mandatory appellate jurisdiction under the collateral-order doctrine.⁶²

Thus, the absolute right of appellate review under the collateral-order doctrine and the statutory-based exceptions to the final-judgment rule share a common trait. They reflect a decision by the Court (in the case of the collateral-order doctrine) and Congress (in the cases of statutory-based jurisdiction) to craft a rule permitting immediate access to appellate courts in every circumstance that comes within the rule. Their sweep is broad; if a particular type of order is a collateral order, for example, then it is always immediately appealable regardless of the specific facts that enhance or minimize the need for immediate review in a particular case.⁶³ In evaluating appellate jurisdiction, courts have the power to decide whether a particular order falls within the rule, but they have no discretion to deny appellate jurisdiction over orders that do.

Litigants and courts may struggle to determine whether a particular case comes within the rule, as we see from the numerous Supreme Court decisions construing and reshaping the collateral-order doctrine.⁶⁴ But these disputes are around the edges. The larger, subjective policy choices provide an overarching sense of predictability and uniformity, and they ensure that interlocutory orders fitting the established criteria will always enjoy the benefits of immediate review.⁶⁵

Over the last few decades, we have seen no expansion of mandatory appellate jurisdiction. Instead, we have seen Congress play hot potato over the issue by vesting in the Supreme Court the power, through its rulemaking authority, to expand mandatory appellate jurisdiction through new

62. See, e.g., *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1421 (9th Cir. 1984); *Langley v. Colonial Leasing Co.*, 707 F.2d 1, 3 (1st Cir. 1983).

63. *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 605 (2009) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473 (1978)).

64. See *Will v. Hallock*, 546 U.S. 345, 350–53 (2006) (discussing cases); see also *Chung*, *supra* note 47, at 158 (explaining that the Court at least on one occasion “abandoned strict adherence to its three-prong test for the collateral order exception” and instead “used a form of heightened constitutional scrutiny—weighing ‘the severity of [governmental] intrusion and corresponding importance of the constitutional issue’” (quoting *Sell v. United States*, 539 U.S. 166, 177 (2003))).

65. *But see* *Steinman*, *supra* note 15, at 1256–57 (inconsistent application of the collateral-order doctrine has rendered it “in practice . . . discretionary rather than mandatory”).

categories of appealable interlocutory orders⁶⁶ and through expanded definitions of “final” orders under § 1291.⁶⁷ The Supreme Court has never exercised these powers.⁶⁸

2. Discretionary Appellate Jurisdiction, Whereby the Supreme Court or Congress Has Delegated to the Lower Courts the Task of Making Case-by-Case Value Judgments

Some individual orders that are worthy of immediate appeal fall outside the broad categories that govern mandatory appellate jurisdiction. In navigating the delicate balance between meaningful appellate review and avoiding piecemeal appeals, Congress and the Supreme Court have created interlocutory appellate jurisdiction over certain interlocutory orders, but the lower courts hold the power to permit or deny review in a particular case. For these discretionary appeals, the value judgments and balancing tests are conducted on a case-by-case basis rather than in broad categories, and they are conducted by the lower courts, not by Congress or the Supreme Court. In these situations, appellate jurisdiction is governed by flexible standards rather than hard-and-fast rules.

There are five principal routes to discretionary appellate review over interlocutory orders, and they are a motley crew.⁶⁹ Perhaps the most commonly attempted route is certification under 28 U.S.C. § 1292(b). Enacted in 1958,⁷⁰ the statute permits appeals from interlocutory orders in civil cases if both the trial court and the court of appeals believe 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.”⁷¹ The would-be appellant must identify a discrete issue of law and persuade both the trial court and the appellate court that immediate review is warranted.

The Court has also promulgated a rule, Federal Rule of Civil Procedure 54(b), that permits a trial court to enter final judgment “as to one or more, but fewer than all, claims or parties” by “expressly determin[ing] that there is no just reason for delay.”⁷² While the entry of final judgment under Rule 54(b) creates an appeal of right, the threshold decision whether to invoke

66. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506, 4506 (codified at 28 U.S.C. § 1292(e) (2006)).

67. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 315, 104 Stat. 5089, 5115 (codified at 28 U.S.C. § 2072(c) (2006)).

68. The Supreme Court has used its delegated power to expand only *discretionary* appellate jurisdiction by rule and has done so only once. *See infra* text accompanying notes 80–85; *see also* Steinman, *supra* note 15, at 1239 (the Supreme Court’s “rulemaking authority has remained largely dormant”).

69. *See supra* note 42 and accompanying text.

70. Act of Sept. 2, 1958, Pub. L. No. 85-919, 72 Stat. 1770 (codified as amended at 28 U.S.C. § 1292(b)); *see also* Steinman, *supra* note 15, at 1244–45.

71. 28 U.S.C. § 1292(b). An analogous statute permits certification of interlocutory appeals in bankruptcy cases. *See id.* § 158(d)(2)(A).

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

the rule is left to the district court's discretion.⁷³ Because Rule 54(b) applies only to orders that resolve entire claims, it has no reliable application to the kinds of MDL orders described in this Article.

A court of appeals also has the power to issue a writ of mandamus commanding a trial court to confine itself to “a lawful exercise of its prescribed jurisdiction.”⁷⁴ This power springs from the language of 28 U.S.C. § 1651(a),⁷⁵ which authorizes federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”⁷⁶ The Supreme Court has cautioned that the writ of mandamus is “a ‘drastic and extraordinary’ remedy ‘reserved for really extraordinary causes.’”⁷⁷ “[W]hether to grant the writ is always up to the appellate court’s discretion,”⁷⁸ and the standards “defy precision.”⁷⁹

The fourth avenue of discretionary review over interlocutory orders is unique to a particular category—class-certification orders. The Supreme Court promulgated Federal Rule of Civil Procedure 23(f) in 1998, conferring on appellate courts discretionary jurisdiction over “an order granting or denying class-action certification.”⁸⁰ Twenty years earlier, the Court had refused to deem class-action orders categorically “final” under the collateral-order doctrine, even while recognizing that “[c]ertification of a large class may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.”⁸¹ While class-certification orders were sometimes reviewed under an appellate court’s mandamus power⁸² or under

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

74. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (quoting *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943)). The Court has also held that a writ of mandamus may be appropriate to resolve an “issue of first impression.” *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964). The *Cheney* decision cited *Schlagenhauf* and distinguished, but did not overrule, that aspect of its holding. *See Cheney*, 542 U.S. at 391. Commentators have observed that the Supreme Court’s mandamus jurisprudence has sent “inconsistent messages” as to the appropriate standard. *E.g.*, Steinman, *supra* note 15, at 1264.

75. *See* Judiciary and Judicial Procedure Rules of Decisions Act, Pub. L. No. 80-773, ch. 47, 62 Stat. 869, 944 (1948) (codified as amended at 28 U.S.C. § 1651 (2006)).

76. 28 U.S.C. § 1651(a).

77. *Cheney*, 542 U.S. at 380 (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)); *see also* MANUAL FOR COMPLEX LITIGATION § 15.11 (4th ed. 2004) (“Appellate courts grant these writs rarely, limiting them to situations where the trial court has clearly committed legal error, and a party is entitled to relief but cannot obtain it through other means.” (citing *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402–03 (1976))); *Davidson*, *supra* note 10, at 199 (“Although frequently sought, writs of mandamus rarely are issued.” (citing *Allied Chem. Corp. v. Daiiflon, Inc.*, 449 U.S. 33, 36 (1980); *Doughty v. Underwriters at Lloyd’s, London*, 6 F.3d 856, 865 (1st Cir. 1993); *In re United States*, 10 F.3d 931, 933 (2d Cir. 1993))).

78. Steinman, *supra* note 15, at 1265.

79. Glynn, *supra* note 17, at 200–01; *see also* Robertson, *supra* note 22, at 758 (“[T]he different standards applied by the circuits lead to different results.”).

80. FED. R. CIV. P. 23(f). The promulgation of Rule 23(f) was the first (and so far only) instance of Supreme Court rulemaking on interlocutory appellate jurisdiction, as authorized by the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506, 4506 (codified at 28 U.S.C. § 1292(e) (2006)); *see also supra* note 68.

81. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978).

82. *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995).

§ 1292(b),⁸³ the promulgation of Rule 23(f) reflected the prevailing view that these avenues were often inadequate.⁸⁴ Under Rule 23(f), the court of appeals examines each petition to determine whether, in its sole discretion, the benefits of interlocutory review in a particular case outweigh the costs. The appellate courts have not articulated uniform standards for conducting that cost-benefit analysis; there are “disparate Rule 23(f) standards among circuits.”⁸⁵

The final category of discretionary jurisdiction, like Rule 23(f), is unique to class actions. With the Class Action Fairness Act of 2005,⁸⁶ Congress conferred discretionary appellate jurisdiction over orders remanding or refusing to remand class actions from federal court back to state court if the case was originally filed in state court and subsequently removed.⁸⁷ Once again, the decision whether to accept an appeal implicates the appellate court’s subjective assessment of the “balance of relevant harms.”⁸⁸

All of these routes of discretionary appellate jurisdiction can open the appellate courthouse doors to litigants who successfully tug at the heartstrings of the court of appeals or the district court (or sometimes both) with a plea for immediate review. But the jurisdictional pleas often fall on deaf ears. Trial judges who eschew appellate review can consistently refuse to certify legal questions for discretionary review under § 1292(b), rendering that avenue “useless.”⁸⁹ Even when trial courts certify, the

83. See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 737 (5th Cir. 1996).

84. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1778 n.4 (2010) (Ginsburg, J., dissenting) (Rule 23(f), “adopted in response to *Coopers & Lybrand*, gives Courts of Appeals discretion to permit an appeal from an order granting or denying class-action certification.”).

85. Charles R. Florest, *Appealing Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f)*, 4 SETON HALL CIRCUIT REV. 27, 57 (2007); see also Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 284–85 (2008) (explaining that most decisions on Rule 23(f) petitions fail to explain the courts’ reasons for accepting or rejecting the interlocutory appeals).

86. Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

87. See *id.* § 5, 119 Stat. at 12 (codified at 28 U.S.C. § 1453(c) (2006)); see also Steinman, *supra* note 15, at 1245–46.

88. E.g., *Coll. of Dental Surgeons v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 39 (1st Cir. 2009).

89. *Waters*, *supra* note 9, at 558 (Section 1292(b)’s “usefulness in the mass tort context is undermined by the fact that it permits interlocutory review only if the trial judge agrees to certify the order to the court of appeals.”); see RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 1567 (10th ed. 2010) (“District court certificates under § 1292(b) are rare”); Bergeron, *supra* note 33, at 1368 (“Permissive interlocutory review continues to be rarely invoked by district judges”); Davidson, *supra* note 10, at 197 (“[I]n practice, district and circuit courts permit few section 1292(b) appeals.”); Glynn, *supra* note 17, at 266 (“District court certification is rare. . . . Indeed, the district court judge has strong incentives to refuse certification . . . [and] circuit courts inexplicably refuse to hear many certified questions.”); Martineau, *supra* note 26, at 766 (“[C]onditioning an interlocutory appeal on a trial judge certifying an order for appeal is inadequate because the judge may lack sufficient objectivity.”); Redish, *supra* note 25, at 97 (“Because ‘[t]he trial judge is in a unique position of authority over the day-to-day actions of individuals,’ . . . ‘[m]egalomania is an occupational hazard of the judicial office.’” (quoting Paul D. Carrington, *Crowded Dockets*

appellate courts typically refuse to accept the appeals;⁹⁰ as a result, appeals under § 1292(b) “comprise well fewer than one percent of all appeals.”⁹¹ And the law provides no meaningful standard for knowing when a court will permit discretionary interlocutory review; the Supreme Court candidly has acknowledged that a discretionary standard permits “[t]he appellate court [to] deny the appeal for any reason, including docket congestion.”⁹² Thus, “[d]espite the Court’s frequent reference to section 1292(b), commentators generally discount its effectiveness as a safety valve for interlocutory appeals, since it has been historically utilized infrequently.”⁹³ Appellate courts are even more grudging in their willingness to entertain a petition for a writ of mandamus;⁹⁴ in fiscal year 2000, for example, only 2.3% of mandamus petitions succeeded, translating to about 1.33 successful mandamus petitions per circuit per year.⁹⁵

Ultimately the standard in discretionary appeals boils down to whether the court wants to hear the case. For the most part, we can live with that. We want courts to accept appeals from interlocutory orders that raise a “serious, perhaps irreparable, consequence,” but we do not want to burden them by requiring them to hear appeals from orders that do not. Many cases defy easy categorization, so the discretionary standard, while imperfect, provides needed flexibility. But when we can identify categories of cases in which the infrequency and unpredictability of discretionary review are unacceptable, the discretionary standard is inadequate. In those cases, any meaningful right of appellate jurisdiction must be in the form of a mandatory rule, leaving the courts no discretion to keep the door closed.

and the Courts of Appeals: The Threat to the Function of Review and the National Law, 82 HARV. L. REV. 542, 550 (1969)); Robertson, *supra* note 22, at 762 (“From the district court’s perspective, there is little incentive to certify orders for appeal; an interlocutory appeal increases the opportunities for reversal . . .”).

90. See, e.g., Bergeron, *supra* note 33, at 1368 (district court judge certifications are “rarely accepted by their appellate colleagues”); Glynn, *supra* note 17, at 246 (“[T]he rate at which circuit courts grant review of orders certified under § 1292(b) . . . is surprising[ly] low.”); Martineau, *supra* note 26, at 734 (“[I]n a substantial percentage of cases the courts of appeals exercise their discretion to refuse to hear appeals certified by a district court under section 1292(b).”); Nagel, *supra* note 42, at 219 (“Section 1292(b) is seldom a successful route to an interlocutory appeal.”); Solimine, *supra* note 33, at 1174 (“Perhaps the most telling characteristic of section 1292(b) appeals, however, is how few certified appeals are accepted by the circuit courts.”).

91. FIELD, KAPLAN & CLERMONT, *supra* note 89, at 1567.

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

93. Solimine, *supra* note 33, at 1193; see also Martineau, *supra* note 26, at 768 (“[Section 1292] grants the district court and the court of appeals too much discretion to deny certification and applications for review.” (citing Redish, *supra* note 25, at 108–09)); Waters, *supra* note 9, at 559 (Section 1292(b) “may be inadequate in many modern complex cases.”). The discretion to deny review is particularly ironic given the *de novo* standard of review that applies to issues of law that an appellate court reviews if it accepts an appeal under § 1292(b). In effect, the discretionary standard for getting in the door undermines the rigorous standard of substantive review.

94. See *supra* note 77 and accompanying text.

95. FIELD, KAPLAN & CLERMONT, *supra* note 89, at 1579.

C. The Commentators' and Reformers' Primary Focus: Expanding Discretionary, Rather Than Mandatory, Appellate Jurisdiction

There is certainly no shortage of commentators willing to criticize the existing rules of appellate jurisdiction.⁹⁶ Professor Adam N. Steinman posits that “[a]ppellate jurisdiction over interlocutory trial-court rulings is among the most troublesome issues in civil procedure.”⁹⁷ Many commentators focus on the inconsistent application of, and the labyrinthian exceptions to, the defined rules.⁹⁸ Professor Paul D. Carrington has criticized “the reluctance of courts of appeals to be candid in acknowledging the nature and regularity of the exceptions being made” to the final-judgment rule.⁹⁹ A major focus of these commentators is “to inquire whether all this complexity can be simplified.”¹⁰⁰

Commentators who look beyond the complexity and focus on the scope of available appellate review almost uniformly agree that existing avenues for interlocutory appeal are inadequate.¹⁰¹ By and large, however, those who would expand appellate jurisdiction advocate expanding avenues of discretionary appeal.¹⁰² Some scholars would even replace the current blend of mandatory and discretionary jurisdiction with an all-discretionary system.¹⁰³ Most believe that the dual-discretion system of § 1292(b) should be replaced by a system that vests sole discretion in the court of appeals—as the drafters of § 1292(b) originally proposed in 1958.¹⁰⁴ These

96. See Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time To Change the Rules*, 1 J. APP. PRAC. & PROCESS 285, 291 (1999) (“There is widespread dissatisfaction with the present state of the law regarding appeals from non-final orders.”); see also Martineau, *supra* note 26, at 748–70 (describing various proposals for change).

97. Steinman, *supra* note 15, at 1237; see also *id.* at 1241 (lamenting the “host of conceptual, doctrinal, and procedural problems” in the current system).

98. See, e.g., Carrington, *supra* note 32, at 165–66 (lamenting “the unconscionable intricacy of the existing law”); Nagel, *supra* note 42, at 200 (describing “widespread” dissatisfaction with the “patchwork of exceptions to the final judgment rule”); Redish, *supra* note 25, at 91 (the federal courts’ “pragmatic approach” to appellate jurisdiction “has given rise to considerable confusion”); Robertson, *supra* note 22, at 736 (“[I]t is not surprising that some courts, frustrated with the current scheme, have expressed a desire for greater uniformity.”); Steinman, *supra* note 15, at 1238–39 (collecting other authorities). *But see* Glynn, *supra* note 17, at 201 (“Today, contrary to common belief, the existing exceptions are relatively clear and easy for federal courts and litigants to understand and apply. They therefore produce little controversy or collateral litigation in the circuit courts.”).

99. Carrington, *supra* note 32, at 166.

100. E.g., Cooper, *supra* note 29, at 157.

101. See, e.g., Redish, *supra* note 25, at 92 (“[E]xisting exceptions to the [finality] rule . . . do not adequately serve the interests of justice in many instances.”).

102. See, e.g., Cooper, *supra* note 29, at 161; Eisenberg & Morrison, *supra* note 96, at 287; Martineau, *supra* note 26, at 788; Nagel, *supra* note 42, at 201.

103. See, e.g., Carleton M. Crick, *The Final Judgment As a Basis for Appeal*, 41 YALE L.J. 539, 564 (1932); Dalton, *supra* note 19, at 97–107 (reserving mandatory appeal, even after final judgment, for limited categories of cases); see also Martineau, *supra* note 26, at 775 (describing proposals “to eliminate completely the right to appeal, and to make all judgments and orders, both final and interlocutory, appealable only in the discretion of the court of appeals”).

104. See Solimine, *supra* note 33, at 1171–72. The discretionary-appeal movement resulting in § 1292(b) began in earnest in 1951, when “Judge Jerome Frank . . . presented a

reformers believe that trial judges can never serve as adequate gate-keepers of appellate review when they have a vested interest in preventing reversal, but they retain confidence in the ability of the appellate courts to exercise discretion when appropriate.¹⁰⁵

The American Bar Association (ABA) has twice advanced proposals for vesting sole discretion in the court of appeals. The first proposal, in 1977, would have replaced § 1292(b) with a standard directed exclusively to the appellate courts' discretion;¹⁰⁶ Wisconsin adopted this standard in 1978, but no other jurisdiction has done so.¹⁰⁷ And in 1989, the ABA contemplated, and then withdrew, a proposal for discretionary appellate review of interlocutory orders in mass-tort cases as part of a larger, unsuccessful proposal to nationalize mass-tort litigation.¹⁰⁸ The American Law Institute made a similar suggestion for discretionary review in connection with its 1993 recommendations for managing complex litigation.¹⁰⁹

Some commentators have advocated a greater resort to the writ of mandamus as a means of securing discretionary interlocutory review.¹¹⁰ Professor Melissa A. Waters, for example, advocates the application of various factors—irreparable harm, errors by the district court, and novelty of the legal issues involved—to test whether an interlocutory trial-court order in a mass-tort case is worthy of mandamus review.¹¹¹ Professor

proposal to the United States Judicial Conference that a court of appeals be granted discretion to review an interlocutory order if it finds that review is necessary to avoid substantial injustice." Martineau, *supra* note 26, at 751 (citing Judicial Conference of the U.S., Report of the Judicial Conference of the United States 32 (1951)); *see also* Nagel, *supra* note 42, at 215 n.116.

105. *See, e.g.*, Cooper, *supra* note 29, at 159; Eisenberg & Morrison, *supra* note 96, at 301–02; Robertson, *supra* note 22, at 773.

106. ABA COMM'N ON STANDARDS OF JUDICIAL ADMIN., STANDARDS RELATING TO APPELLATE COURTS § 3.12(b), at 25 (1977). The ABA's 1977 proposal permitted discretionary appeals for any interlocutory order if the appeal would "(1) Materially advance the termination of the litigation or clarify further proceedings therein; (2) Protect a party from substantial and irreparable injury; or (3) Clarify an issue of general importance in the administration of justice." *Id.*; *see also* Robertson, *supra* note 22, at 773–74.

107. Martineau, *supra* note 26, at 777 (citing WIS. STAT. ANN. § 808.03 (West Supp. 1992)); *see also* Eisenberg & Morrison, *supra* note 96, at 297–302 (lauding the Wisconsin system). Wisconsin's experience is of limited utility in fashioning an appropriate system of interlocutory review for significant MDL orders. *See infra* note 322.

108. The ABA's recommendation would have authorized "[a] Court of Appeals [to] permit an appeal to be taken from an interlocutory order of a transferee court entered [in an MDL case] if application therefor is made within ten days after entry of such order." ABA COMM'N ON MASS TORTS, REPORT TO THE HOUSE OF DELEGATES app. D at 7d (1989). But the overall proposal was met with numerous concerns surrounding state sovereignty, so the ABA House of Delegates initially voted to "defer consideration of the package until the commission addresses some of these concerns." *See* 58 U.S.L.W. 2109 (Aug. 22, 1989). The proposal was later withdrawn. *See* 58 U.S.L.W. 2477 (Feb. 20, 1990).

109. AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 3.07(C), at 130 (1994); *id.* § 3.07(C) cmt. D at 138–41.

110. *See, e.g.*, Waters, *supra* note 9, at 591.

111. *See id.* at 594 (quoting *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654–55 (9th Cir. 1977)); *see also id.* at 596–98 (elaborating on factors). But Professor Waters cautions that mandamus should not "expand[] into a method of permissive interlocutory appeal." *Id.* at 593 (quoting 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3933, at 527 (2d ed. 1996)).

Robertson has advocated the use of mandamus in cases involving discovery of privileged matter if the trial court refuses to certify a discretionary appeal under § 1292(b).¹¹² And Professor Steinman believes that appellate courts already possess, and need to begin to use, the full power to exercise discretionary appellate review under § 1651.¹¹³

These suggested routes of discretionary appellate jurisdiction are sufficient in certain circumstances, particularly when the trial-court order has minimal impact or reflects the exercise of the trial court's own discretion. But when a trial court commits an error of law that has an outsized impact, the availability of immediate appellate review should not depend on the subjective value judgments of a single appellate panel deciding a petition for discretionary review or for a writ of mandamus.

While the occasional scholar has expressed skepticism of the all-discretionary solution,¹¹⁴ only one commentator, Professor Timothy P. Glynn, has offered a comprehensive explanation for why "discretionary review is the wrong approach" and urged the adoption of a system of mandatory appellate jurisdiction for certain types of interlocutory orders.¹¹⁵ As Professor Glynn demonstrates, it is not only the trial courts, but also the appellate courts, that inhibit access to discretionary review.¹¹⁶ A discretionary system is too vulnerable to the whims and prejudices of individual judges who deny discretionary appeals in cases they wish to avoid¹¹⁷ and have no obligation to justify or explain why they do so.¹¹⁸ At the very least, it leaves important value judgments—judgments that should be made on a global level in certain cases—in the hands of the random panel of judges assigned to accept or reject discretionary review in a particular case.

The dangers of a discretionary system are not limited to the injustices that can occur in an individual case. The detriment to the judicial system is far more insidious. A discretionary standard ensures that access to interlocutory review will depend on the luck of the judicial draw. Two cases may present identical facts, issues, and arguments for immediate review, but only one may succeed. That inconsistency undermines the

112. See Robertson, *supra* note 22, at 778–79.

113. See Steinman, *supra* note 15, at 1242–43; see also *id.* at 1278–86. Professor Steinman believes that his construction of § 1651 could supplant the courts' resort to the collateral-order doctrine and writs of mandamus.

114. See, e.g., Rosenberg, *supra* note 29, at 175 ("I do not see the transformation of rules into discretion as a positive or promising movement in this context.").

115. Glynn, *supra* note 17, at 229, 259–62.

116. *Id.* at 241 ("[T]he circuit courts' surprisingly low rate of review of orders certified under § 1292(b) suggests that the circuit courts resist giving themselves more work, even when the total impact on their caseloads would be minimal."); see also *supra* note 89 and accompanying text.

117. Glynn, *supra* note 17, at 252–53 ("In addition to being largely ineffective in serving the lawmaking function, discretionary review is dangerous" because "circuit judges easily can avoid articulating, reiterating, or enforcing legal principles or conclusions they dislike by denying review."); *id.* at 245 ("[J]udges may allow personal preferences . . . to creep into their decision whether to grant review.").

118. *Id.* at 249 ("A circuit panel armed with such discretion can ignore reversible error for any reason, without comment, and without downstream consequences.").

integrity of our process and our conception of justice. “The power to decide what to decide . . . weakens the influence of precedent and allows personal views and preferences to have a greater impact on the application and substance of the law.”¹¹⁹ In the end, a discretionary regime leads to the twin evils—“procedural unpredictability and substantive uncertainty”—that threaten our confidence in legal rules built on *stare decisis*,¹²⁰ particularly when the absence of interlocutory review can have devastating consequences.

Professor Glynn thus shares my view that the courts should have no discretion to deny appellate jurisdiction over some categories of interlocutory orders, which he calls “problem areas.”¹²¹ But Professor Glynn has not identified any particular problem areas,¹²² and other commentators have suggested that doing so is “virtually impossible.”¹²³ I disagree. As I demonstrate below, certain kinds of interlocutory orders in MDL cases qualify as “problem areas” that courts of appeals should have no discretion to refuse to review.

II. THE MASSIVE IMPACT OF INTERLOCUTORY LEGAL RULINGS IN MDL CASES

The need to expand the right of appeal in MDL proceedings stems from the exaggerated impact of interlocutory legal decisions in MDL cases. One legal ruling by one judge can reallocate liability risks in thousands of individual lawsuits. That outsized impact is not surprising; the MDL system was designed to centralize power for the sake of efficiency, and its use has grown spectacularly since its inception. As I describe in this part, the increasing consolidation ratchets up the risk and consequences of legal error, rendering both settlement and trial untenable options. To illustrate the point, I examine three questionable interlocutory legal decisions in a pending MDL proceeding, *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*,¹²⁴ and the unsuccessful efforts to appeal from them.

A. *The Purpose, Scope, and Spectacular Growth of MDL Proceedings*

The MDL statute, 28 U.S.C. § 1407, was enacted in 1968 “[t]o provide for the temporary transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which

119. *Id.* at 253.

120. See Robertson, *supra* note 22, at 759, 770; see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 20.4, at 591 (7th ed. 2007) (“[D]ecision in accordance with precedent reduces uncertainty about one’s legal rights and obligations.”); THE FEDERALIST NO. 78 (Alexander Hamilton) (purpose of *stare decisis* is “[t]o avoid an arbitrary discretion in the courts”).

121. Glynn, *supra* note 17, at 259.

122. *Id.* at 261–62.

123. *E.g.*, Martineau, *supra* note 26, at 775.

124. *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, MDL No. 1358, 2000 U.S. Dist. LEXIS 14901 (J.P.M.L. Oct. 10, 2000).

involve one or more common questions of fact, and for other purposes.”¹²⁵ The legislation vested in the U.S. Judicial Panel on Multidistrict Litigation (JPML) the “authority to transfer all cases relating to similar litigation to a single judge for pretrial proceedings.”¹²⁶

An MDL proceeding is authorized “[w]hen civil actions involving one or more common questions of fact are pending in different districts,” when “transfers for such proceedings will be for the convenience of parties and witnesses,” and when transfers “will promote the just and efficient conduct of such actions.”¹²⁷ A party or the JPML itself may initiate MDL proceedings.¹²⁸ The JPML bases its decision to consolidate cases into an MDL “on the number and nature of similar cases pending and likely to be filed, with importance given to whether it will further the ultimate resolution of the litigation.”¹²⁹ Parties and counsel involved in potential “tag-along actions”—that is, subsequently filed actions involving the same “common questions of fact”¹³⁰—are required to notify the JPML of the new actions,¹³¹ which are then conditionally transferred into the MDL through a summary process.¹³² Though consolidated for pretrial purposes, each action aggregated within the MDL proceeding remains a separate action, “theoretically independent” from the others.¹³³ A judge in an MDL proceeding may choose to accelerate some of these actions by denominating them “‘focus actions’ for early discovery and trial within the MDL.”¹³⁴

MDL consolidation inevitably centralizes in the transferee judge the power to render the important legal decisions. While the consolidation standard under § 1407(a) is the existence of “common questions of fact,” and while “greater complexity of factual issues” increases the likelihood of

125. Multidistrict Litigation Act, Pub. L. No. 90-296, 82 Stat. 109 (1968) (codified as amended at 28 U.S.C. § 1407 (2006)).

126. Sherman, *supra* note 7, at 2209 (citing 28 U.S.C. § 1407 (2000)); *see also* Courtney E. Silver, Note, *Procedural Hassles in Multidistrict Litigation: A Call for Reform of 28 U.S.C. § 1407 and the Lexecon Result*, 70 OHIO ST. L.J. 455, 455 (2009). The MDL statute tracked a consolidation trend that simultaneously took place *within* the judicial districts; while cases are now assigned immediately to a single judge from the moment of filing, cases before the late 1960s “were not assigned to any particular judge until they were ready for trial,” so “judges shared responsibility for resolving pretrial matters.” Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 674–75 (2010).

127. 28 U.S.C. § 1407(a); *see also* Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 51–56 (2007); Silver, *supra* note 126, at 456.

128. 28 U.S.C. § 1407(c).

129. Sherman, *supra* note 7, at 2210.

130. Rules of Procedure of the Judicial Panel on Multidistrict Litigation [hereinafter J.P.M.L. R.P.] 1.1.

131. J.P.M.L. R.P. 7.1(a), 7.2(a).

132. J.P.M.L. R.P. 7.1(b); *see also* Oakley, *supra* note 7, at 499.

133. *See* Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 281–82.

134. *See* Orange Cnty. Water Dist. v. Unocal (*In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.), 522 F. Supp. 2d 557, 558 (S.D.N.Y. 2007). Note that an action may be tried by the MDL court only if that action was originally filed in that court. *See infra* note 175.

MDL consolidation,¹³⁵ the MDL system is “flexible” and allows for “transfer and consolidation based on pragmatic considerations.”¹³⁶ Thus, the JPML’s decisions suggest that the presence of “complex *legal* . . . questions” also weighs in favor of initiating an MDL proceeding.¹³⁷ Indeed, when the JPML declines MDL consolidation, it often bases its decision on the failure of the “proponents of centralization . . . to persuade [it] that any common questions of fact *and law* are sufficiently complex and/or numerous to justify Section 1407 transfer.”¹³⁸

The magnitude of the MDL system is reflected both in the broad categories of cases consolidated into MDL proceedings¹³⁹ and in the explosive growth in the number of MDLs in the last decade alone. As to breadth, the statute places no limits on the categories of cases that are candidates for consolidation, so long as the cases share common facts (and law) and meet the other pragmatic considerations. The JPML has thus centralized litigation involving a single disaster, such as an airplane crash¹⁴⁰ or an industrial accident,¹⁴¹ as well as claims resulting from allegations of widespread injury from, *inter alia*, unreasonably dangerous products¹⁴² and from violations of antitrust,¹⁴³ securities,¹⁴⁴ and consumer-protection laws.¹⁴⁵ The claims arising out of the BP oil spill in the Gulf of Mexico were centralized in MDLs in 2010.¹⁴⁶

135. See *In re* Clark Oil & Refining Corp. Antitrust Litig., 364 F. Supp. 458, 459 (J.P.M.L. 1973).

136. Sherman, *supra* note 7, at 2209.

137. See, e.g., *In re* Terrorist Attacks on Sept. 11, 2001, 295 F. Supp. 2d 1377, 1378 (J.P.M.L. 2003) (emphasis added); *In re* Wireless Tel. Fed. Cost Recovery Fees Litig., 293 F. Supp. 2d 1378, 1379 (J.P.M.L. 2003) (denying transfer on same grounds).

138. *In re* New Century Mortg. Corp. Prescreening Litig., 473 F. Supp. 2d 1383, 1384 (J.P.M.L. 2007) (emphasis added); see also *In re* Ins. Indus. Discriminatory Sales Practices Litig., 460 F. Supp. 2d 1376, 1377 (J.P.M.L. 2006) (same).

139. For a comprehensive list of all MDL proceedings pending in 2009 or 2010, see U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION 2010, SUMMARY BY DOCKET OF MULTIDISTRICT LITIGATION PENDING AS OF SEPT. 30, 2010, OR CLOSED SINCE OCT. 1, 2009 (2010) [hereinafter 2010 MDL STATISTICAL ANALYSIS], available at http://www.jpml.uscourts.gov/Statistics/JPML_Statistical_Analysis_of_Multidistrict_Litigation_2010.pdf.

140. See, e.g., *In re* Air Crash over Makassar Strait, Sulawesi, Indonesia, 626 F. Supp. 2d 1354 (J.P.M.L. 2009).

141. See, e.g., *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 601 F. Supp. 1035 (J.P.M.L. 1985).

142. See, e.g., *In re* RC2 Corp. Toy Lead Paint Prods. Liab. Litig., 528 F. Supp. 2d 1374 (J.P.M.L. 2007).

143. See, e.g., *In re* Nat’l Arbitration Forum Antitrust Litig., 682 F. Supp. 2d 1343 (J.P.M.L. 2010).

144. See, e.g., *In re* Fairfield Greenwich Group Sec. Litig., 655 F. Supp. 2d 1352 (J.P.M.L. 2009).

145. See, e.g., *In re* Zicam Cold Remedy Mktg. & Sales Practices Litig., 655 F. Supp. 2d 1371 (J.P.M.L. 2009).

146. *In re* Oil Spill by the Oil Rig “Deepwater Horizon,” MDL No. 2179, 2010 U.S. Dist. LEXIS 83268 (J.P.M.L. Aug. 10, 2010) (personal-injury and property-damage claims); *In re* BP p.l.c. Sec. Litig., MDL No. 2185, 2010 U.S. Dist. LEXIS 83263 (J.P.M.L. Aug. 10, 2010) (securities-fraud claims).

As to growth, the raw numbers illustrate how integral MDL proceedings have become to our federal court system. Between its inception in 1968 and September 30, 2009, the JPML consolidated 323,258 individual actions into MDL proceedings.¹⁴⁷ The number of separate actions pending in MDLs consistently rose from 39,799 in 2000 to 102,545 in 2008.¹⁴⁸ That increase of more than 250% between 2000 and 2008 is almost fifteen times higher than the seven-percent increase in total civil cases filed in that same period (259,517 new cases in 2000 compared with 267,257 in 2008).¹⁴⁹ The growth in the total number of pending (as opposed to new) civil cases also pales in comparison to the growth in the number of cases pending in MDL proceedings; the total number of all pending civil cases rose only 17.6% between 2000 (250,202 pending cases) and 2008 (294,122 pending

147. JAMES C. DUFF, JUDICIAL BUS. OF U.S. COURTS, 2009 ANNUAL REPORT OF DIRECTOR, at tbl.S-20 (2009) [hereinafter 2009 ANNUAL REPORT], available at <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/tables/S20Sep09.pdf>.

148. *Id.*; JAMES C. DUFF, JUDICIAL BUS. OF U.S. COURTS, 2008 ANNUAL REPORT OF DIRECTOR, at tbl.S-20 (2008), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2008/tables/S20Sep08.pdf>; JAMES C. DUFF, JUDICIAL BUS. OF U.S. COURTS, 2007 ANNUAL REPORT OF DIRECTOR, at tbl.S-20 (2007), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2007/tables/S20Sep07.pdf>; JAMES C. DUFF, JUDICIAL BUS. OF U.S. COURTS, 2006 ANNUAL REPORT OF DIRECTOR, at tbl.S-20 (2006), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/tables/s20.pdf>; LEONIDAS RALPH MECHAM, JUDICIAL BUS. OF U.S. COURTS, 2005 ANNUAL REPORT OF DIRECTOR, at tbl.S-20 (2005), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2005/tables/s20.pdf>; LEONIDAS RALPH MECHAM, JUDICIAL BUS. OF U.S. COURTS, 2004 ANNUAL REPORT OF DIRECTOR, at tbl.S-20 (2004), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2004/tables/s20.pdf>; LEONIDAS RALPH MECHAM, JUDICIAL BUS. OF U.S. COURTS, 2003 ANNUAL REPORT OF DIRECTOR, at tbl.S-20 (2003), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2003/tables/s20.pdf>; LEONIDAS RALPH MECHAM, JUDICIAL BUS. OF U.S. COURTS, 2002 ANNUAL REPORT OF DIRECTOR, at tbl.S-20 (2002), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2002/tables/s20sep02.pdf>; LEONIDAS RALPH MECHAM, JUDICIAL BUS. OF U.S. COURTS, 2001 ANNUAL REPORT OF DIRECTOR, at tbl.S-20 (2001) [hereinafter 2001 ANNUAL REPORT], available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2001/tables/s20sep01.pdf>. In 2009 and 2010, the number of pending actions in the MDL system dropped significantly; the reductions appear largely attributable to an unusually high number of terminations in those years, as well as a slight drop in the number of actions transferred into MDLs in 2009. See 2009 ANNUAL REPORT, *supra* note 147, at tbl.S-20; 2010 MDL STATISTICAL ANALYSIS, *supra* note 139, at 2 (at section entitled “Cumulative Summary of Multidistrict Litigation”); U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION 2009, SUMMARY BY DOCKET OF MULTIDISTRICT LITIGATION PENDING AS OF SEPT. 30, 2009, OR CLOSED SINCE OCT. 1, 2008, at 2 (2009) [hereinafter 2009 MDL STATISTICAL ANALYSIS], available at http://www.jpml.uscourts.gov/Statistics/JPML_Statistical_Analysis_of_Multidistrict_Litigation_2009.pdf (at section entitled “Cumulative Summary of Multidistrict Litigation”). The number of actions transferred into MDLs rose again in 2010. See 2010 MDL STATISTICAL ANALYSIS, *supra* note 139, at 2 (at section entitled “Cumulative Summary of Multidistrict Litigation”).

149. Compare 2009 ANNUAL REPORT, *supra* note 147, at tbl.S-7, available at <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/tables/S07Sep09.pdf>, with 2001 ANNUAL REPORT, *supra* note 148, at tbl.S-7, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2001/tables/s07sep01.pdf>.

cases).¹⁵⁰ Thus, by 2008, the 102,545 actions pending in MDLs constituted more than a third of all federal civil cases pending in that year—resulting in what Professor Waters calls an “unprecedented reallocation of power in favor of mass tort trial judges.”¹⁵¹ MDL litigation “is emerging as the primary vehicle for the resolution of complex civil cases.”¹⁵²

B. The “Serious, Perhaps Irreparable, Consequence” of Legal Error in MDL Proceedings

1. The Untenable Choice Between Settling and Going to Trial in the Face of Questionable Legal Rulings

This increased use of MDL proceedings has “obvious benefits.”¹⁵³ MDL consolidation can reduce legal fees that common defendants would otherwise incur in defending claims scattered throughout various federal and state courts across the country.¹⁵⁴ Discovery, often the most expensive phase of litigation,¹⁵⁵ can be coordinated to avoid duplication.¹⁵⁶ There are also obvious efficiencies in having a single judge become an expert on the complex factual and legal issues in a particular MDL proceeding, rather than requiring multiple judges to learn the facts and the law.¹⁵⁷ Coordinating every action in one place, before one judge, all but eliminates the risk of inconsistent rulings.¹⁵⁸ And that judge, as an expert in the relevant facts and law and with all the parties before her, is perhaps in the best position to foster global settlement.¹⁵⁹

But MDL consolidation comes at significant cost. Legal error in pretrial rulings has “effects that go far beyond the mere conduct of litigation.”¹⁶⁰ A

150. Compare 2009 ANNUAL REPORT, *supra* note 147, at tbl.C, available at <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/C00Sep09.pdf>, with 2001 ANNUAL REPORT, *supra* note 148, at tbl.C, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2001/appendices/c00sep01.pdf>.

151. See Waters, *supra* note 9, at 531.

152. Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2324 (2008).

153. Orange Cnty. Water Dist. v. Unocal (*In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*), 522 F. Supp. 2d 557, 558 (S.D.N.Y. 2007).

154. Oakley, *supra* note 7, at 506.

155. See, e.g., *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 588 (5th Cir. 1992).

156. Oakley, *supra* note 7, at 506.

157. See *In re MTBE*, 522 F. Supp. 2d at 558; Oakley, *supra* note 7, at 513 (“[T]he process becomes more efficient because of the judge’s expertise.”).

158. Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245, 2270 (2008); see also, e.g., *In re Preferential Drug Prods. Pricing Antitrust Litig.*, 429 F. Supp. 1027, 1029 (J.P.M.L. 1977) (consolidating litigation “under the supervision of a single court will eliminate the possibilities of . . . inconsistency”); Oakley, *supra* note 7, at 507 (suggesting expectation that single judge would “rule uniformly on all discovery and pretrial matters” in cases within an MDL).

159. See Sherman, *supra* note 7, at 2223.

160. See Cooper, *supra* note 29, at 162.

trial judge, in ruling on a motion to dismiss¹⁶¹ or a motion for summary judgment,¹⁶² is often required to articulate the law that will govern various substantive aspects of the parties' dispute. When the trial judge misstates the governing law, the parties are forced to choose between two untenable alternatives: (1) an expensive and risky trial conducted under the wrong legal standard, with the hope of vindication on appeal after final judgment; or (2) an unfavorable settlement, the value of which is artificially increased (for defendants) or decreased (for plaintiffs) by the erroneous rulings. To be sure, that particular dilemma always exists, even outside MDL proceedings, when a trial court misstates the governing law or "exert[s] activist or ideological pressures in ways that would elude appellate oversight."¹⁶³ But the complexity of MDLs heightens the risk of serious error,¹⁶⁴ and the number of affected litigants increases the impact of that error. The product of the heightened risk and the heightened impact results from the "kingly power" of district court judges, which inspired Congress to expand the jurisdiction of the appellate courts in the first place.¹⁶⁵ And that product is precisely the sort of "serious, perhaps irreparable, consequence" that justifies a categorical right to immediate appellate review.¹⁶⁶ There are a number of reasons why.

First, and perhaps most obviously, aggregation of the cases also means aggregation of the amount at stake.¹⁶⁷ While an erroneous legal ruling in a single lawsuit can render it particularly difficult for a plaintiff to prove liability or for a defendant to escape it, the financial impact of the legal ruling is confined to that single dispute. The parties can make rational, if imperfect, choices about whether to settle, and no one else will be directly affected. By contrast, pretrial legal rulings in aggregated MDL cases have a dramatically larger impact.¹⁶⁸ For example, the diabetes drug Rezulin was

161. See FED. R. CIV. P. 12(b)(6) & 12(c).

162. See FED. R. CIV. P. 56.

163. Gensler, *supra* note 126, at 678 (citing Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424–31 (1982)).

164. See Cooper, *supra* note 29, at 160 (MDL cases "involve difficult law" and "pose multiple opportunities for error").

165. 21 CONG. REC. 3404 (1889) (statement of Rep. David Culberson); see also *supra* note 56.

166. See *supra* notes 56–58 and accompanying text.

167. ABA COMM'N ON MASS TORTS, *supra* note 108, at 74.

168. See *id.* At first blush, this dynamic can appear to be more relevant to defendants than to plaintiffs. Actions consolidated into MDL proceedings typically have different plaintiffs but common defendants, so the defendants have more at stake as a result of the aggregated decision-making. The reality, though, is that most plaintiffs in MDL lawsuits are represented by common law firms that are compensated based on the results of the case. See, e.g., Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 530 (1994) ("The plaintiffs' attorneys often will receive a fee based upon a percentage of the total [settlement] fund . . ."); Katherine Dirks, Note, *Ethical Rules of Conduct in the Settlement of Mass Torts: A Proposal to Revise Rule 1.8(g)*, 83 N.Y.U. L. REV. 501, 502 (2008) ("Settlement . . . requires that a limited number of plaintiffs' law firms each represent a large number of clients and coordinate the settlement on their behalf."); see also McCollam, *supra* note 4, at 48–49 (describing efforts by plaintiffs' bar to secure "mass" representations of clients with claims arising out of 2010 BP oil spill in Gulf of Mexico). So the lawyers, if not the individual plaintiffs, stand to gain or lose significantly from pretrial

the subject of over 1800 individual product-liability and fraud lawsuits, alleging severe injury and death, that were consolidated within an MDL proceeding,¹⁶⁹ and every legal ruling that limited or expanded the right of recovery had an immediate impact of more than 1800 times what it would have had in a single lawsuit.¹⁷⁰ Simple mathematics reveal the enormous financial impact—into the billions of dollars for compensatory damages alone—of a single legal ruling that effectively establishes or precludes liability.¹⁷¹

The exaggerated influence of legal rulings works in tandem with the MDL judge's power to effectuate global settlement. "[T]here is every reason to believe that multidistrict centralization increases pressure on transferee judges to promote an early settlement (since the MDL process creates incentives for judges to treat settlement as the ultimate goal of consolidation)."¹⁷² The emphasis on settlement within an MDL proceeding is unavoidable given the general preference for settlement over trial.¹⁷³ There is an obvious additional allure in the prospect of resolving multiple cases simultaneously and avoiding an unmanageable number of trials.¹⁷⁴ An MDL judge also knows that if the cases do not settle, they must return

legal rulings affecting the strength of their cases. *See* McCollam, *supra* note 4, at 65 (lawyer for prospective settling BP oil-spill plaintiffs "sounded almost giddy at the prospect of once again extracting a sizeable settlement from the oil giant"). Rightly or wrongly, the lawyers have significant influence over settlement decisions. Thus, the consequences of aggregation are effectively the same for plaintiffs as for defendants.

169. *See, e.g., In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 63–65 (S.D.N.Y. 2002) (describing factual allegations and legal theories); 2009 MDL STATISTICAL ANALYSIS, *supra* note 148, at 7 (noting, at section entitled "Summary by Docket of Multidistrict Litigation Pending As of Sept. 30, 2009, or Closed Since Oct. 1, 2008," that 1868 cases have been consolidated within Rezulin MDL proceedings).

170. *See, e.g., In re Rezulin Prods. Liab. Litig.*, 369 F. Supp. 2d 398, 438 (S.D.N.Y. 2005) (granting defendants' motion "to exclude proposed testimony of plaintiffs' experts that Rezulin can cause liver injury, or exacerbate a pre-existing liver condition, in the absence of marked elevations of liver enzymes while the patient was taking the medication").

171. *See* Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 548 (2005) (describing mean tort awards of around \$3,000,000 and median tort awards of around \$1,000,000 for loss of life); *see also In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1015–16 (7th Cir. 2002) ("Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims.").

172. Moller, *supra* note 4, at 883; *see also id.* at 877 ("Put in economic terms, the MDL process turns the transferee judge into a kind of central planner, tasked with setting a single price (the pay-out that defendants will be forced to pay) for all claims in a one-shot proceeding . . ."); Waters, *supra* note 9, at 530 (MDL judges decide cases primarily "through pretrial rulings and settlement rather than trial").

173. *See, e.g., Samuel R. Gross & Kent D. Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991) ("A trial is a failure. . . . With some notable exceptions, lawyers, judges, and commentators agree that pretrial settlement is almost always cheaper, faster, and better than trial.").

174. MANUAL FOR COMPLEX LITIGATION, *supra* note 77, § 20.132 (MDLs "afford a unique opportunity for the negotiation of a global settlement").

to the transferor courts for trial.¹⁷⁵ The potential remand creates a further incentive to be perceived as the hero who resolved the disputes rather than the ineffectual colleague whose inability to achieve a settlement left her fellow trial judges with the task of trying each case individually. This “pressure to compel a settlement . . . exists independently of the value of the claims at issue.”¹⁷⁶ And the numbers bear out the dynamic: of the 235,258 cases that have exited the MDL system since 1968, 223,126 were terminated by the transferee court and only 12,132, or about five percent, were remanded to the transferor court for trial.¹⁷⁷

The legal rulings in that pro-settlement environment can thus become tools for exerting settlement pressure on the parties. And therein lies the danger. “Many [MDL] judges view their role as ‘getting the parties to a claims process’—a settlement—as quickly as possible. Confronted with such a judge, the client can no longer hope to prevail simply because it has done nothing wrong.”¹⁷⁸ An MDL judge holds the power, with a single decision, to dramatically recast the risk of liability in tens, hundreds, or even thousands of cases at a time,¹⁷⁹ sometimes using “fuzzy normative assumptions”¹⁸⁰ that leave the parties with “the painful choice of bearing the risk and expense of trial or succumbing to [the] pressures to settle.”¹⁸¹ And to insulate these rulings from appellate scrutiny, the judge may deliberately refuse to certify an interlocutory appeal under § 1292(b), which leaves intact the uncertainty and creates additional pressure to settle.¹⁸²

Centralization in an MDL proceeding also tends to insulate the legal rulings from the scrutiny of other trial judges handling similar cases. Outside the MDL system, “[f]requent disagreements are inevitable when

175. Silver, *supra* note 126, at 456 (“Each transferred action is to be remanded to its originating district by the [JPML] at or before the conclusion of pretrial proceedings unless it is previously terminated.” (citing 28 U.S.C. § 1407(a) (2006))). In 1998, the Supreme Court blocked “the use of MDL for trial consolidation of all the cases.” Sherman, *supra* note 7, at 2206 (citing *Lexecon Inc. v. Milberg Weiss Bershad & Lerach*, 523 U.S. 26 (1998)). That ruling has been widely criticized and has inspired reform efforts that would confer on transferee courts the power to try cases transferred to them as part of an MDL. *See generally* Silver, *supra* note 126, at 479–85.

176. Moller, *supra* note 4, at 878.

177. *See* 2009 ANNUAL REPORT, *supra* note 147, at tbl.S-20; *see also* Waters, *supra* note 9, at 545 (“[T]he MDL device . . . most often results in settlement or other disposition of the transferred cases before the transferee judge.”).

178. Marcus, *supra* note 158, at 2288 (quoting Mark Herrmann, *To MDL or Not To MDL? A Defense Perspective*, LITIG., Summer 1998, at 43, 45) (internal quotation marks omitted); *see also* AM. LAW INST., *supra* note 109, at 22 (“Since most cases settle before trial, the[] pretrial decisions [in MDL cases] often effectively dispose of the actions.”).

179. *See, e.g.*, 2010 MDL STATISTICAL ANALYSIS, *supra* note 139 (identifying numbers of actions consolidated within each MDL proceeding).

180. Moller, *supra* note 4, at 862.

181. Davidson, *supra* note 10, at 150 (citations omitted).

182. Waters, *supra* note 9, at 558. Professor Michael E. Solimine describes the “cautionary tale” that “emerges from the . . . *Agent Orange* litigation, where a lack of interlocutory appeals certified by the district court judge appeared to play a significant role.” Solimine, *supra* note 33, at 1205–06. “Judge [Jack] Weinstein used the uncertainty of the appellate court’s disposal of the case as an incentive to settle.” *Id.* at 1206; *see also* Waters, *supra* note 9, at 550 (“Rather than merely acting as a settlement facilitator, Judge Weinstein exerted tremendous pressure on the parties to settle the case.”).

649 district judges, reviewed by twelve separate courts of appeals, are all independently empowered” to interpret the law.¹⁸³ Each judge contributes to the development of legal thinking and is subjected to the horizontal scrutiny of other trial judges grappling with identical issues, leading to majority and minority viewpoints and ultimate resolution on appeal.¹⁸⁴ But the MDL system’s delegation of all pretrial decisionmaking to a single judge eliminates the horizontal scrutiny. Indeed, even when a case returns for trial to the court in which it was originally filed,¹⁸⁵ that court is unlikely to reexamine the MDL judge’s pretrial legal rulings.¹⁸⁶ That insulation defies the normal expectations we have for our legal system and the evolution of the law.¹⁸⁷ The consistent application of erroneous law propagates error and undermines the cherished practice of negotiating the law among multiple jurists rather than allowing one judge to dictate it for everyone. The JPML implicitly recognizes the importance of selecting the right judge¹⁸⁸ and often “transfers complex cases to judges experienced in handling complex and multidistrict litigation.”¹⁸⁹ But the fact remains that a single judge makes all of the important pretrial decisions for all the

183. See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 495 (1996) (expressing the concept in the context of “ambiguous criminal statutes”).

184. See, e.g., Samuel Estreicher & John Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984). As Professors Estreicher and Sexton explained:

Disagreement in the lower courts facilitates percolation—the independent evaluation of a legal issue by different courts. The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of those lower courts.

Id., quoted in *California v. Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting); see also Moller, *supra* note 4, at 882 (“The [Supreme] Court has emphasized that decentralized decision-making is an important component of our system of checks and balances.”).

185. See *supra* note 175 and accompanying text.

186. See MANUAL FOR COMPLEX LITIGATION, *supra* note 77, § 20.133 (“Although the transferor judge has the power to vacate or modify rulings made by the transferee judge, subject to comity and ‘law of the case’ considerations, doing so in the absence of a significant change of circumstances would frustrate the purposes of centralized pretrial proceedings.”); *Bellevue Drug Co. v. CaremarksPCS, Inc. (In re Pharm. Benefit Managers Antitrust Litig.)*, 582 F.3d 432, 441 (3d Cir. 2009) (“[W]e do not believe that Congress intended that a ‘Return to Go’ card would be dealt to parties involved in MDL transfers.”); see also, e.g., *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 273–74 (E.D.N.Y. 2006) (court “to which an MDL case is transferred or remanded may revisit a transferee court’s decision” in “exceptional cases”).

187. See, e.g., Moller, *supra* note 4, at 881 (“[T]he centralized framework of the MDL process dampens the proposed due process scrutiny, creating incentives that run against the grain of judicial review, if not defusing it altogether in many cases.”).

188. Sherman, *supra* note 7, at 2211 (“Perhaps the most critical decision the Panel has to make is the selection of the judge to whom an MDL case is transferred.”).

189. Ostolaza & Hartmann, *supra* note 127, at 60 (citing *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 990 F. Supp. 834, 836 (J.P.M.L. 1998)); see also, e.g., *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098, 1101 (J.P.M.L. 1992).

consolidated cases. The rulings may be consistent across all the cases,¹⁹⁰ but the virtue of consistency has its limits (as Ralph Waldo Emerson's famous words remind us).¹⁹¹

Of course, the consolidated judicial power does not require the parties to settle. But the alternative to settlement—taking a case to trial and getting an appealable final judgment—is typically not viable.¹⁹² By definition, trials always involve significant expense of money and time.¹⁹³ These are costs we impose on litigants who choose not to settle, and they are rarely perceived as a basis for immediate appeal.¹⁹⁴ But a trial in an MDL proceeding—even of just one of the consolidated cases—can have consequences far more devastating than the litigation expenses, especially if conducted according to an erroneous construction of the applicable law. One trial result often serves as a bellwether for all of the aggregated cases.¹⁹⁵ A defense verdict or an award of trivial damages can doom all of the plaintiffs' claims, and the extrapolated results of a large plaintiff's verdict, like a plaintiff's verdict in a class action, can be ruinous to the defendants.¹⁹⁶ That extraordinary impact of a single trial result is

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

191. See Ralph Waldo Emerson, *Self-Reliance* (1841), in, e.g., THE SELECTED WRITINGS OF RALPH WALDO EMERSON 132, 138 (Brooks Atkinson ed., 1992) (“A foolish consistency is the hobgoblin of little minds . . .”). The danger of consistency in the legal context is that it can lull us into a sense of complacency. For example, one student commentator has suggested that the uniformity of rulings in an MDL proceeding has the effect of “reducing [the] need to pursue certain interlocutory appeals or motions to reconsider.” Oakley, *supra* note 7, at 507. My thesis, of course, is the opposite—that the centralization of power in a single judge makes it all the more prudent to facilitate interlocutory appellate review. See also KOMESAR, *supra* note 14, at 145 (“[S]pecialization increases the potential for the bias associated with substituting ‘expert’ judges for ‘general’ judges.”).

192. See Steinman, *supra* note 15, at 1240 (“[T]here has been a steep decrease in trials resulting in appealable final judgments.”).

193. See *id.*; see also Davidson, *supra* note 10, at 195 (lamenting “the cost and unnecessary waste of resources associated with bringing the case to trial when the district court should have terminated the litigation at the summary judgment stage”); Redish, *supra* note 25, at 98 (erroneous pretrial ruling “may require the parties to expend substantial physical, financial and emotional effort in the preparation and conduct of a trial which may later prove to have been worthless”); Solimine, *supra* note 33, at 1176 (“[A]n incorrect decision may prolong a case and cause the litigants unnecessary cost and delay in resolving their dispute” and “may cause a party considerable economic or legal uncertainty while a case proceeds to trial or otherwise terminates in a final judgment.”).

194. See, e.g., *Federal Civil Appellate Jurisdiction: An Interlocutory Restatement*, LAW & CONTEMP. PROBS., Spring 1984, at 13, 190 (“Even though . . . a reversal of the order on immediate appeal would dispense with a time-consuming and costly trial, the policy against piecemeal litigation prevails.”); Martineau, *supra* note 26, at 742 (“[T]he trouble and expense of litigation, even if the litigation is held to be ultimately unnecessary, are not to be taken into consideration in deciding whether an order qualifies as collateral and thus appealable.”); Waters, *supra* note 9, at 567 (“[C]ourts may not consider the added delay or expense of unnecessary litigation in determining whether a ruling qualifies for collateral order treatment.”); see also *supra* notes 49–51 and accompanying text.

195. See, e.g., Fallon, Grabill & Wynne, *supra* note 152, at 2340–41 (“bellwether trial process” provides “a ‘once-in-a-lifetime’ opportunity for the resolution of mass disputes”); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 581 (2008) (“[T]he results of the bellwether trials will be extrapolated to the remaining plaintiffs.”).

196. See FED. R. CIV. P. 23(f), advisory committee's note (1998 amendment) (“An order granting certification . . . may force a defendant to settle rather than incur the costs of

particularly troubling when the underlying legal rulings are questionable and have never been reviewed by anyone other than the judge who rendered them.

Even a party that can bear the risk of trial and musters up the fortitude to try a case to final judgment loses the full value of an appeal by having to wait. For one thing, the fortitude may dissolve once an adverse verdict occurs.¹⁹⁷ But even a stalwart verdict-loser, undeterred by the trial loss and game for the appellate process, would find the appellate court less receptive to overturning the erroneous legal ruling precisely to avoid expending additional judicial resources on a retrial.¹⁹⁸ “[E]ven very doubtful trial-court rulings that would not have survived interlocutory review are much more likely to be upheld at this late stage.”¹⁹⁹ The dynamic is more pronounced in the MDL context, because appellate courts tend to regard the trial judge as the expert.²⁰⁰ In short, the very same policy that the Supreme Court has lauded in describing the final-judgment rule—the desire to avoid the “oppressive expenses” of “successive appeals”²⁰¹—becomes an obstacle in securing fair appellate review *after* final judgment.²⁰²

The likely result is a settlement at a price that reflects a trial court’s mistaken articulation of the governing law, perhaps adjusted slightly to reflect the potential for reversal on appeal that will never come. So a defendant, aggrieved by an erroneous legal ruling, will pay more to settle, because the prospect of trial is even worse. A similarly aggrieved plaintiff will take less. And the implications of this mispriced settlement go beyond the immediate financial impact to the parties; the mispricing remains a lingering anathema to the legal system’s role in encouraging or discouraging certain behaviors through economic models.²⁰³ Although

defending a class action and run the risk of potentially ruinous liability.”); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (recognizing that “[c]ertification of a large class may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense”); see also Michael E. Solimine & Christine Oliver Hines, *Deciding To Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1567 (2000) (citing Proposed Amendments to the Federal Rules of Civil Procedure, 167 F.R.D. 559, 565 (1996)).

197. See *In re Chevron USA, Inc.*, 109 F.3d 1016, 1022 (5th Cir. 1997) (Jones, J., concurring).

198. See Cooper, *supra* note 29, at 160 (“[T]here are great risks . . . that affirmance will blink at serious error in order to avoid” the cost of a retrial.).

199. Waters, *supra* note 9, at 552; see also *id.* at 565 (courts of appeals have “every incentive to affirm all but the grossest trial court errors” when a mass-tort case gets to final judgment); Dalton, *supra* note 19, at 80 (“[R]eversals are more likely . . . where retrial would be easy, inexpensive, or unnecessary.”).

200. See, e.g., Moller, *supra* note 4, at 879.

201. E.g., *Canter v. Am. Ins. Co.*, 28 U.S. (3 Pet.) 307, 318 (1830) (Story, J.).

202. This is not to say that appellate courts will never reverse a judgment rendered after trial in an MDL case. Indeed, the Sixth Circuit recently ordered a new trial in an MDL case that the trial judge had selected as a bellwether. See *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665 (6th Cir. 2010). But such reversals appear rare. And the *Tamraz* case illustrates the tremendous waste of resources that could have been avoided—and the true purpose of a bellwether case enhanced—if appellate review had been available before trial.

203. See generally POSNER, *supra* note 120, § 21.2, at 594–95.

they may be willing to resolve a particular dispute on unfavorable terms, the parties are left unsure of their legal obligations going forward,²⁰⁴ and their “freedom to plan . . . future conduct” is diminished as a result.²⁰⁵ To the extent we rely on the allocation of legal liabilities to influence behavior, we either lose that benefit or skew the analysis by failing to offer MDL litigants a means of correcting a trial judge’s error of law before settlement.

2. The Unavailability of Interlocutory Review from Important Legal Rulings in MDL Proceedings

The dynamic in the similar context of class actions has led a number of judges and commentators to use the pejorative term “blackmail” in describing a trial judge’s power in consolidated cases to force a settlement through adverse pretrial rulings. Perhaps the most famous example is Judge Richard Posner’s opinion in *In re Rhone-Poulenc Rorer, Inc.*,²⁰⁶ in which he observed that “Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action ‘blackmail settlements.’”²⁰⁷ The “blackmail charge” was influential in the promulgation of a rule authorizing interlocutory appellate review of certification orders under Federal Rule of Civil Procedure 23(f).²⁰⁸

But the “blackmail charge” had no impact on the right of appellate review under § 1407.²⁰⁹ Despite the growth in MDL cases and the resulting

204. See Moller, *supra* note 4, at 857.

205. *Id.* at 871; see also Redish, *supra* note 25, at 98–99 (An actor is left in a “cloud of uncertainty surrounding the financial soundness of his business or the legality of his practices.”); Solimine, *supra* note 33, at 1181 (“[C]ertainty as to the procedural or substantive law will lead to more settlements than not. . . . [P]arties probably go into most litigation expecting the law to be fairly certain or to be made more certain by the judiciary.”).

206. 51 F.3d 1293 (7th Cir. 1995).

207. *Id.* at 1298 (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)); see also Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681, 682 (2005) (“[A] number of federal courts have held that aggregating numerous claims into one class action suit puts excessive settlement pressure on defendants, and renders class certification tantamount to blackmail.”); Waters, *supra* note 9, at 582 (“[T]he court [in *Rhone-Poulenc*] addressed the ‘economic blackmail’ problem that often confronts defendants in mass tort class actions.”).

208. Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1358 (2003); see also *supra* notes 80–85 and accompanying text.

209. The “blackmail charge” also has not resulted in an expansion of the right of interlocutory review from the substantive legal decisions rendered in class actions. One could thus argue that my proposal to expand mandatory interlocutory appellate jurisdiction in the MDL context should also apply to similar kinds of orders entered in certified class actions, where there is a similar aggregation concern. I do not necessarily quarrel with that suggestion, but I do not believe the need is as compelling, for several reasons. First, a substantial number of class actions would benefit from my proposed expansion of MDL appellate jurisdiction, because they are already part of MDL proceedings. See, e.g., Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 929 (1995). That should come as no surprise, considering that competing class actions by definition raise identical claims that are obvious candidates for MDL consolidation. Second, to the extent that competing class actions are not part of an MDL, the legal rulings are not centralized in a single judge, so there remains some measure of horizontal scrutiny that we do not see in the MDL setting. See *supra* notes 183–91 and accompanying text. Finally, Rule 23(f), though

increase in the power consolidated in individual district court judges, the MDL system has no built-in mechanism for scrutiny of any kind—even of rulings that are fairly debatable, novel, or outright wrong—until after a case reaches final judgment. A party seeking to obtain review of an interlocutory MDL decision must rely on the categories of interlocutory appellate jurisdiction that exist for all other cases. As a result, and as Professor Waters has observed, “appellate courts never effectively review many of the most controversial rulings and innovations of mass tort trial judges.”²¹⁰ I now provide a palpable example of an MDL in which the trial court has made several such controversial rulings and innovations that have evaded appellate review.

3. A Case Study: The Effects of MDL Power Centralization in the *MTBE* Litigation

In 2000, the JPML created a new MDL proceeding for product-liability claims involving MTBE, a gasoline oxygenate.²¹¹ The cases were consolidated before Judge Shira A. Scheindlin²¹² in the U.S. District Court for the Southern District New York.²¹³ The plaintiffs are private landowners and public and private water providers.²¹⁴ They allege that MTBE, found in gasoline that has leaked or spilled, has contaminated or threatens to contaminate the groundwater in their water wells.²¹⁵ The defendants include over fifty gasoline refiners, distributors, and retailers from fifteen different states.²¹⁶ As of January 2011, a total of 178 MTBE

not a vehicle for a direct attack on a district court’s substantive legal rulings in class actions, at least provides an established mechanism for some degree of immediate appellate review (albeit discretionary) from interlocutory orders rendered in class actions and has often served as a successful tool for pretrial appellate guidance. *See, e.g.,* *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 628 (9th Cir. 2010) (affirming class certification), *cert. granted in part*, 79 U.S.L.W. 3342 (U.S. Dec. 7, 2010) (No. 10-277). The decision to transfer a case to an MDL, by contrast, is reviewable only if a party can convince an appellate court to entertain the extraordinary remedy of mandamus. *See* 28 U.S.C. § 1407(e) (2006); *see also supra* notes 94–95 and accompanying text.

210. Waters, *supra* note 9, at 530–31.

211. *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, MDL No. 1358, 2000 U.S. Dist. LEXIS 14901 (J.P.M.L. Oct. 10, 2000).

212. Judge Shira A. Scheindlin is perhaps best known for her groundbreaking decisions governing the allocation of costs to conduct discovery of electronically stored information. *See, e.g.,* *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003). Before becoming a district judge, she served as a magistrate judge in the U.S. District Court for the Eastern District of New York, where she worked closely with Judge Weinstein on the *Agent Orange* MDL. *See, e.g., In re “Agent Orange” Prods. Liab. Litig.*, 597 F. Supp. 740, 752 (E.D.N.Y. 1984).

213. *In re MTBE*, 2000 U.S. Dist. LEXIS 14901, at *4.

214. *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 379 F. Supp. 2d 348, 364 (S.D.N.Y. 2005).

215. *See id.*

216. *See id.* at 362, 364, 382.

cases, originally filed in nineteen different states,²¹⁷ had been consolidated before Judge Scheindlin.²¹⁸

The underlying factual allegations of the lawsuits relate to MTBE's use as a gasoline oxygenate. In the 1990s, in response to legislation amending the Clean Air Act,²¹⁹ gasoline refiners began widely using MTBE to meet federal regulatory standards for minimizing air pollution from automobile emissions.²²⁰ The U.S. Environmental Protection Agency (EPA) had approved MTBE as one of several oxygenates that refiners could use to meet the new standards; ethanol was another.²²¹

The plaintiffs allege that MTBE has reached or will reach their water sources because gasoline containing MTBE has leaked or spilled into the ground. They claim that MTBE in the water supply has caused taste and odor problems and raised health concerns.²²² The alleged damages range in amounts, depending on the number and size of the plaintiffs' water wells and the extent of alleged contamination. Several of the plaintiffs have sought tens or hundreds of millions of dollars in compensatory damages.²²³ Simple math establishes the astronomical size of the aggregate potential liability when the alleged damages are multiplied by the number of consolidated cases. And the plaintiffs also seek to recover punitive damages based on allegations that the defendants misled the public about MTBE's properties.²²⁴

Both the facts and the law in MTBE cases are complex.²²⁵ And all of the complex legal questions—"virtually every substantive and procedural

217. *Cnty. of Suffolk v. Amerada Hess Corp. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, 510 F. Supp. 2d 299, 302 (S.D.N.Y. 2007).

218. *See* U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., DISTRIBUTION OF PENDING MDL DOCKETS (As of Jan. 11, 2011) 9, *available at* http://www.jpml.uscourts.gov/Pending_MDL_Dockets-January-2011.pdf. (Note that as the JPML updates its statistics, it replaces prior versions of its pending distribution summaries with updated versions.)

219. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 219, 104 Stat. 2399, 2492-2500 (codified as amended at 42 U.S.C. § 7545 (2006)). The statute was subsequently amended again in 2005. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1504, 119 Stat. 594, 1076-80 (codified as amended in scattered sections of 42 U.S.C.).

220. *California v. Atl. Richfield Co. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, 488 F.3d 112, 114 (2d Cir. 2007).

221. *See id.* ("Pursuant to regulations promulgated by the [EPA] in 1991, MTBE is one of several different oxygenates that may be used to certify gasoline as reformulated.")

222. *Id.* at 114-15.

223. *See, e.g., City of New York v. Exxon Mobil Corp. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, Nos. 00 Civ. 1898 (SAS), 04 Civ. 3417 (SAS), 2010 U.S. Dist. LEXIS 47135, at *1 (S.D.N.Y. May 12, 2010) (describing single plaintiff's \$104 million verdict against single defendant for subset of allegedly contaminated wells); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 578 F. Supp. 2d 519, 520 (S.D.N.Y. 2008) (describing \$422 million cash portion of partial settlement of fifty-nine plaintiffs' claims).

224. *See, e.g., City of New York v. Exxon Mobil Corp. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, Nos. 00 Civ. 1898 (SAS), 04 Civ. 3417 (SAS), 2009 U.S. Dist. LEXIS 96469 (S.D.N.Y. Oct. 19, 2009) (holding evidence in one particular case insufficient to warrant jury consideration of punitive damages).

225. *Cnty. of Suffolk v. Amerada Hess Corp. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, 510 F. Supp. 2d 299, 328 (S.D.N.Y. 2007) (noting that MTBE cases raise "complex issues of state law").

issue” that has come up in the focus cases—have been decided by a single district court judge.²²⁶ By 2007 that single judge had “issued thirty-six substantive opinions and orders, comprising more than one thousand pages of text”²²⁷ Many of the court’s interlocutory decisions “resolved disputed issues of state law.”²²⁸

The absence of immediate appellate review has been particularly significant for three of the district court’s decisions. All three decisions left significant room for debate about what the law is (or should be). And the decisions had “serious, perhaps irreparable, consequence[s]” for the litigants, the course of the litigation, and the choice between settling and proceeding to trial. I explain each of them in turn.

a. Three Questionable Rulings in the MTBE MDL Proceedings

i. The Holding That Plaintiffs’ State-Law Claims Were Not Barred by Conflict Preemption

Conflict preemption is a defense that applies “where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”²²⁹ In the MTBE context, the defense springs from the federal requirement to reduce gasoline air emissions through a choice of approved oxygenates, including MTBE. The Supreme Court has held that when federal law permits a range of choices, states may not regulate or impose tort liability in a way that restricts those federally approved choices.²³⁰

The defendants have argued that tort liability for using MTBE would interfere with the EPA regulations permitting them to use a choice of oxygenates, including MTBE.²³¹ The *MTBE* court has repeatedly rejected this argument.²³² In doing so, the court ignored Congress’s express delegation to the EPA the responsibility of approving oxygenates to meet the statutory emission-reduction standards, “taking into consideration the cost of achieving such emission reductions, any nonair-quality and other air-quality related health and environmental impacts and energy

226. *Id.* at 330.

227. *Id.* at 301.

228. *Id.* at 301 n.8 (citations omitted); *see also In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 457 F. Supp. 2d 324, 326 n.3 (S.D.N.Y. 2006) (listing numerous opinions).

229. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

230. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (tort liability); *Fid. Fed. Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141 (1982) (regulatory restrictions).

231. *See supra* notes 219–20 and accompanying text.

232. *See City of New York v. Exxon Mobil Corp.* (*In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*), Nos. 00 Civ. 1898 (SAS), 04 Civ. 3417 (SAS), 2010 U.S. Dist. LEXIS 92744, at *52–53 (S.D.N.Y. Sept. 7, 2010) (denying post-trial motion for judgment as a matter of law); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 457 F. Supp. 2d 324 (S.D.N.Y. 2006) (denying motion for summary judgment); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 614–16 (S.D.N.Y. 2001) (denying motion to dismiss under FED. R. CIV. P. 12(b)(6)).

requirements.”²³³ And the court dismissed as speculative the defendants’ argument that imposition of tort liability against any of the various approved oxygenates (MTBE in this case, ethanol in the next) could leave the defendants with no viable options for meeting federal clean-air requirements²³⁴—even while acknowledging that “[p]ermitting the City’s state tort claims to proceed [under these circumstances] may seem unfair.”²³⁵

Conflict preemption, by its nature, is dispositive of state-law claims. But the district court refused to certify its pretrial preemption decisions for immediate review under § 1292(b). The court noted its “unfettered discretion to deny certification”²³⁶ and found no “substantial ground for difference of opinion.”²³⁷ The latter holding is particularly startling—not only because of the potential flaws in the court’s reasoning, but also because “courts are split” on “the preemption of claims to remedy MTBE contamination.”²³⁸

ii. The Creation of a New Causation Theory: Commingled-Product Market Share

Perhaps the most vigorously contested state-law question in the *MTBE* litigation has been causation, which stems from “the problem of product identification.”²³⁹ In response to the plaintiffs’ difficulties in establishing causation, the court “fashion[ed] a new collective liability” theory,²⁴⁰ which the court named the “commingled product theory” of market share liability.²⁴¹ No state had ever recognized or endorsed this theory; it was the court’s own creation, and it has evolved considerably over time even within the *MTBE* litigation. Despite its novelty, its malleability, and the reasonable possibility that states would not extend their laws to recognize it, no other court—state or federal, trial or appellate—has had occasion to review it. Yet it remains the law governing the vast majority of the actions consolidated in the *MTBE* MDL.

The genesis of the theory is the proposition that plaintiffs would be unable to establish liability without a relaxation of traditional causation

233. 42 U.S.C. § 7545(k)(1) (2006).

234. *In re MTBE*, 457 F. Supp. 2d at 343.

235. *In re MTBE*, 2010 U.S. Dist. LEXIS 92744, at *52–53.

236. *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 174 F. Supp. 2d 4, 7 (S.D.N.Y. 2001) (quoting *Nat’l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139, 162 (E.D.N.Y. 1999)).

237. *Id.* at 8.

238. See Carrie L. Williamson, “*But You Said We Could Do It!*”: *Oil Companies’ Liability for the Unintended Consequence of MTBE Water Contamination*, 29 *ECOLOGY L.Q.* 315, 326 (2002).

239. *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 379 F. Supp. 2d 348, 362 (S.D.N.Y. 2005).

240. M. Stuart Madden & Jamie Holian, *Defendant Indeterminacy: New Wine into Old Skins*, 67 *LA. L. REV.* 785, 816 (2007).

241. *In re MTBE*, 379 F. Supp. 2d at 377.

principles.²⁴² The physical properties of MTBE and the nature of the gasoline distribution system make it impossible to identify the manufacturer of the gasoline that may have reached to a particular contamination site.²⁴³ But the court gleaned from the case law that “from time to time *courts have fashioned new approaches* in order to permit plaintiffs to pursue a recovery when the facts and circumstances of their actions raised unforeseen barriers to relief.”²⁴⁴

After identifying “the need for one more theory,” and using first-person language emphasizing its role in developing new law,²⁴⁵ the court held:

When a plaintiff can prove that certain gaseous or liquid products (*e.g.*, gasoline, liquid propane, alcohol) of many suppliers were present in a completely commingled or blended state at the time and place that the risk of harm occurred, and the commingled product caused a single indivisible injury, then each of the products should be deemed to have caused the harm.²⁴⁶

To determine each defendant’s several share of liability, the court would look to its “share of the market at the time of the injury.”²⁴⁷

The commingled-product theory departs from existing law, in which “identification of the exact defendant whose product injured the plaintiff is . . . generally required.”²⁴⁸ Judge Jack Weinstein had rejected a similar commingled-product theory in an earlier MDL.²⁴⁹ And the *MTBE* court acknowledged that the recognition of the new theory of state tort law was “a policy decision” that raised important federalism concerns.²⁵⁰

242. *E.g.*, Cesar Pereira, Comment, *Protecting the “Underground Seas”: A Case for Protecting and Creating Claims Against Oil Companies for Methyl Tertiary Butyl Ether (MTBE) Groundwater Contamination*, 12 U. BALT. J. ENVTL. L. 1, 15 (2004) (“[P]laintiffs suing MTBE manufacturers under a claim of negligence may have a hard time establishing causation.”).

243. *In re MTBE*, 379 F. Supp. 2d at 362.

244. *Id.* at 377 (emphasis added); *see also* Cnty. of Suffolk v. Amerada Hess Corp. (*In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*), 447 F. Supp. 2d 289, 301 (S.D.N.Y. 2006) (same).

245. *In re MTBE*, 379 F. Supp. 2d at 377 (“I shall now describe what I call the ‘commingled product theory’ of market share liability.”); *see also* City of New York v. Exxon Mobil Corp. (*In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*), Nos. 00 Civ. 1898 (SAS), 04 Civ. 3417 (SAS), 2010 U.S. Dist. LEXIS 92744, at *40 (S.D.N.Y. Sept. 7, 2010) (“[I]n order to protect the interests of plaintiffs in this MDL while fairly apportioning liability, I have developed the commingled product theory of liability.” (emphasis added)).

246. *In re MTBE*, 379 F. Supp. 2d at 377–78; *see also In re MTBE*, 447 F. Supp. 2d at 301 (same); Cnty. of Suffolk v. Amerada Hess Corp. (*In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*), 591 F. Supp. 2d 249, 274 (S.D.N.Y. 2008) (same); Madden & Holian, *supra* note 240, at 816–21 (summarizing commingled-product theory).

247. *In re MTBE*, 447 F. Supp. 2d at 301.

248. *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1073 (N.Y. 1989).

249. *See In re “Agent Orange” Prod. Liab. Litig.*, 611 F. Supp. 1223, 1263 (E.D.N.Y. 1985) (dismissing claims in part because plaintiffs failed to prove “that any particular defendant produced the Agent Orange to which he may have been exposed” and noting that “[n]o case has ever permitted recovery in such a situation”), *aff’d*, 818 F.2d 187 (2d Cir. 1987).

250. *In re MTBE*, 447 F. Supp. 2d at 301; *In re MTBE*, 379 F. Supp. 2d at 369–70; *see also* *Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1153 (2d Cir. 1989)

The *MTBE* court has also acknowledged that the new theory has engendered “much confusion,”²⁵¹ that it “has been difficult to describe,”²⁵² and that the court “has described the commingled theory in different ways over the years.”²⁵³ The inconsistencies have involved both the reasonable inferences that a jury could draw from the plaintiffs’ evidence of a commingled gasoline distribution system²⁵⁴ and the predicate showing that a plaintiff would have to make in order to resort to the commingled-product theory in the first place.²⁵⁵ The court has dismissed the inconsistencies as “not important.”²⁵⁶

Given the novelty of the theory and the court’s own difficulty in articulating it consistently, one might expect that the court would have appreciated and encouraged the participation of other judges before imposing the theory on hundreds of parties in an MDL proceeding involving the laws of multiple states.²⁵⁷ But that is not what happened. Instead, the district court twice rejected the defendants’ request for certification under § 1292(b).²⁵⁸ It did so even though the focus cases have been New York cases,²⁵⁹ and certification under § 1292(b) would have

(admonishing federal courts “not to adopt innovative theories that may distort established state law”); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1239 (2004) (noting “general preference for resolving novel state law questions in state court”).

251. *In re MTBE*, 591 F. Supp. 2d at 267.

252. *City of New York v. Amerada Hess Corp. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, 644 F. Supp. 2d 310, 314 (S.D.N.Y. 2009).

253. *Id.* at 318.

254. *Compare In re MTBE*, 591 F. Supp. 2d at 273 (“[N]o reasonable jury could find, by a preponderance of the evidence, that each defendant’s gasoline caused the contamination of each well.”), with *id.* at 275 (“A reasonable jury could conclude that each defendant’s gasoline was present within the well’s capture zone even if the jury concludes that it cannot identify the source of the spill that caused the well’s contamination.”).

255. *Compare Cnty. of Suffolk v. Amerada Hess Corp. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, 447 F. Supp. 2d 289, 304–05 (S.D.N.Y. 2006) (“If there is an identifiable defendant (or defendants) and plaintiffs can obtain a make-whole remedy from those parties, then there is no need to turn to an alternative theory of liability to pursue other possible tortfeasors.”), with *In re MTBE*, 591 F. Supp. 2d at 276 (“I have previously stated that alternative liability theories . . . should not be applied unless plaintiffs have no other remedy. . . . I now conclude that plaintiffs may pursue product liability or negligence claims against manufacturers . . . regardless of whether plaintiffs can identify a retailer whose leaking tank spilled gasoline into a well’s capture zone.”).

256. *See In re MTBE*, 644 F. Supp. 2d at 318.

257. *See Waters, supra* note 9, at 553 (“If dramatic innovations in procedural and substantive law are to take place as a result of the mass tort regime, mass tort trial judges, specialists though they may be, must be able to look to the appellate courts for guidance as to the appropriate limits of such innovation.”).

258. *See Cnty. of Suffolk v. Amerada Hess Corp. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, Nos. 1:00-1898, MDL 1358, M 21-88, 2008 U.S. Dist. LEXIS 47222, at *16 (S.D.N.Y. June 18, 2008); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 399 F. Supp. 2d 320, 324 (S.D.N.Y. 2005).

259. *See City of New York v. Exxon Mobil Corp. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, Nos. 00 MDL 1898 (SAS), 04 Civ. 3417 (SAS), 2010 U.S. Dist. LEXIS 34471, at *4 n.7 (S.D.N.Y. Apr. 5, 2010); *Cnty. of Suffolk v. Amerada Hess Corp. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, 510 F. Supp. 2d 299, 301 (S.D.N.Y. 2007).

enabled the Second Circuit to certify the novel state-law issue to New York's highest court.²⁶⁰ Remarkably, the court concluded that there was no "substantial ground for difference of opinion."²⁶¹

iii. The Retention of Jurisdiction After the Supreme Court Rejected Federal-Officer Removal

The *MTBE* court's debatable rulings on issues of substantive law warrant even greater scrutiny in light of the court's questionable jurisdiction over some of the cases consolidated within the MDL proceedings.

The jurisdictional defect stemmed from developments in the law under the federal-officer removal statute.²⁶² The defendants in the *MTBE* cases removed several actions to federal court, alleging that they had added MTBE to gasoline "at the direction of the EPA" and that the federal court had jurisdiction over any related civil claims.²⁶³ The court denied the plaintiffs' motion to remand, finding that the defendants' removal allegations were sufficient to establish federal-officer jurisdiction.²⁶⁴ It then denied the plaintiffs' request for interlocutory-appeal certification under § 1292(b), finding, among other things, "no substantial ground for a difference of opinion with respect to the Court's jurisdictional analysis."²⁶⁵

Later developments confirmed that there *was* substantial ground. In 2007, the Second Circuit held that federal-officer removal was not appropriate in the *MTBE* cases.²⁶⁶ That holding ostensibly required the district court to remand the cases removed on the basis of federal-officer jurisdiction.²⁶⁷ But the district court refused to remand. It retained jurisdiction on the strength of a federal claim, under the citizen-suit

260. See N.Y. COMP. CODES R. & REGS. tit. 22, § 500.27(a) (2008) (New York Court of Appeals accepts certified questions only from "the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state"); see also *Cnty. of Westchester v. Comm'r of Transp.*, 9 F.3d 242, 245 (2d Cir. 1993) (suggesting that a district court confronted with a novel issue of state law should certify an appeal under § 1292(b) so that the state-law issue can "in turn be certified" to the Connecticut Supreme Court).

261. See *In re MTBE*, 2008 U.S. Dist. LEXIS 47222, at *10–15.

262. 28 U.S.C. § 1442(a)(1) (2006) (providing for removal to federal court of any case against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office . . .").

263. *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 342 F. Supp. 2d 147, 156 (S.D.N.Y. 2004).

264. *Id.* at 159.

265. *Orange Cnty. Water Dist. v. Unocal Corp. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, Nos. 1:00-1898, MDL 1358 (SAS), M 21-88, 2005 U.S. Dist. LEXIS 225, at *7 (S.D.N.Y. Jan. 6, 2005).

266. *California v. Atl. Richfield Co. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, 488 F.3d 112, 124–32 (2d Cir. 2007); see also *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007) ("[A] highly regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone.").

267. See 28 U.S.C. § 1447(c) (2006) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

provision of the Toxic Substances Control Act (TSCA),²⁶⁸ that the plaintiffs had added by way of amendment after removal.²⁶⁹

Pinning jurisdiction on that post-removal event ran counter to established law holding that subject-matter jurisdiction “depends upon the state of things at the time of the action brought.”²⁷⁰ The district court nevertheless concluded that it could exercise jurisdiction because it “believed that [it] had jurisdiction” when it permitted the plaintiffs to add the TSCA claim²⁷¹ and because the TSCA amendment was “intended to solidify the court’s jurisdiction” rather than destroy jurisdiction.²⁷² Neither justification for refusing to remand was supported by the case law; the Supreme Court had recently reemphasized a bright-line “time-of-filing rule” whether “destruction or perfection of jurisdiction is at issue.”²⁷³

Ultimately, the court’s refusal to remand seemed most influenced by its concerns with “finality, efficiency and economy”²⁷⁴ and its distaste for a result that “would ignore the years of effort by the Court and the parties.”²⁷⁵ But this exception ignored the Supreme Court’s express rejection of “an approach to jurisdiction that focuses on efficiency and judicial economy”²⁷⁶ and its reaffirmation of “the time-of-filing rule regardless of the costs it imposes.”²⁷⁷

Given the district court’s unsupported bases for retaining jurisdiction in a case that it acknowledged was “*sui generis*,”²⁷⁸ one might have expected (or hoped) that the Second Circuit would entertain a request for mandamus relief.²⁷⁹ But the Second Circuit refused the defendant’s request for mandamus, finding no “exceptional circumstances.”²⁸⁰ As a result, the improperly removed cases remained (and those that did not settle²⁸¹ still remain) in the same district court that has rendered debatable substantive decisions on both federal and state law. Ironically, had the case returned to New York state court, the substantive rulings may themselves have been subject to interlocutory appeal²⁸²—and we would know with certainty, for

268. 15 U.S.C. § 2619 (2006).

269. See *Cnty. of Suffolk v. Amerada Hess Corp. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, 510 F. Supp. 2d 299, 319 (S.D.N.Y. 2007).

270. *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 570 (2004) (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat) 537, 539 (1824)).

271. See *In re MTBE*, 510 F. Supp. 2d at 306 n.31 (emphasis added).

272. *Id.* at 307 (citing *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1046 n.3 (9th Cir. 2000)).

273. *Grupo Dataflux*, 541 U.S. at 580–81.

274. *In re MTBE*, 510 F. Supp. 2d at 307.

275. *Id.* at 319.

276. See *Grupo Dataflux*, 541 U.S. at 577.

277. *Id.* at 571.

278. *In re MTBE*, 510 F. Supp. 2d at 305–06.

279. See, e.g., *Waters*, *supra* note 9, at 591–93 (advocating expansion of resort to writs of mandamus).

280. Order, *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, Nos. 07-4290, 07-4308, at 2 (2d Cir. Nov. 16, 2007).

281. See *infra* notes 283–84 and accompanying text.

282. See ROBERT J. MARTINEAU, MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS § 4.12 (1983) (“New York places virtually no restrictions on the right to

example, whether the New York cases are to be governed by the federal district court's newly fashioned commingled-product theory.

b. The Impact of Insulating the MTBE Rulings from Interlocutory Review

The denial of interlocutory appellate review in the *MTBE* cases has insulated the trial court from any meaningful scrutiny of decisions that have the potential to redistribute billions of dollars. The right to appeal would potentially have tempered the court's inclination to depart from or to extend existing law. But the unsuccessful attempts to appeal seem to have had the opposite effect. In denying a request for § 1292(b) certification from one of its decisions relating to its commingled-product theory, the court chastised the defendants for "seeking interlocutory appeal . . . three times in less than one year."²⁸³

Measuring the precise economic impact of the district court's unbridled power is difficult, because we do not know what would have occurred if the appellate court had been willing to review even one of these rulings. We know, though, that shortly after the failed attempts to appeal, all of the defendants ultimately settled for hundreds of millions of dollars with one group of plaintiffs, including the plaintiffs in one of the early New York focus cases.²⁸⁴ Another group of plaintiffs also settled with most of the defendants, leaving only one defendant willing to go to trial.²⁸⁵ It stands to reason that the cost of these settlements was higher as a result of the district court's rulings and the inability to obtain immediate appellate review. Indeed, appellate review might have established that the defendants had no liability at all. But the option of going to trial and seeking to correct the legal error after final judgment was obviously even more unpalatable.²⁸⁶ In the lone case that so far has proceeded to trial against the only non-settling defendant, a single plaintiff pursued only a portion of its alleged damages²⁸⁷ and won a compensatory verdict of over a hundred million dollars.²⁸⁸ Most defendants would be unwilling or unable to withstand that

appeal."); *see also* N.Y. C.P.L.R. 5701(a) & (a)(2)(iv) (McKinney Supp. 2010) (listing broad categories of appeals available "as of right" in New York state courts, including orders that "involve[] some part of the merits").

283. *Cnty. of Suffolk v. Amerada Hess Corp. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, Nos. 1:00-1898, MDL 1358 (SAS), M 21-88, 2008 U.S. Dist. LEXIS 47222, at *6 (S.D.N.Y. June 18, 2008).

284. *See In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 578 F. Supp. 2d 519, 520 (S.D.N.Y. 2008).

285. *See City of New York v. Exxon Mobil Corp. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, Nos. 00 Civ. 1898 (SAS), 04 Civ. 3417 (SAS), 2010 U.S. Dist. LEXIS 47135, at *1 (S.D.N.Y. May 12, 2010) (noting that trial proceeded against Exxon Mobil entities, as they were "the only remaining defendants in this case").

286. *See supra* notes 192-96 and accompanying text.

287. *See City of New York v. Exxon Mobil Corp. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, Nos. 00 MDL 1898 (SAS), 04 Civ. 3417 (SAS), 2010 U.S. Dist. LEXIS 34471, at *4 (S.D.N.Y. Apr. 5, 2010) ("In preparation for trial, five focus wells, among the dozens at issue in this case, were selected.").

288. *See In re MTBE*, 2010 U.S. Dist. LEXIS 47135, at *3.

kind of verdict. Yet it has become the purchase price for the right of appeal.

Is the *MTBE* example sufficiently representative? To answer that question would require a detailed analysis of the important legal rulings rendered in a statistically significant number of MDL cases, and I have not undertaken that examination. Certainly, however, there is other anecdotal evidence, both in the recent case law²⁸⁹ and in commentary,²⁹⁰ to suggest that the appellate courthouse doors are frequently closed in the face of MDL litigants trying mightily to break them down. And, at bottom, the more infrequently an MDL gives rise to the need for immediate appeal, the smaller the burden an expanded pathway to appeal would impose on the courts. In other words, a new avenue for mandatory appeal is justified regardless of how frequently a litigant may legitimately invoke it.

For those who view any settlement as the highest and best objective, then perhaps the *MTBE* cases show that the existing system is satisfactory. But if we want parties to settle only if the settlement reflects the true value of the claims; if we want tort liability to serve its utilitarian purpose in adjusting parties' behaviors in the marketplace;²⁹¹ and if we want to ensure that any evolution of our common law takes place with the benefit of consideration by multiple judges (and not just one),²⁹² then the existing MDL system is inadequate. As Professor Waters writes, "the appellate courts will have very little influence" over the evolution of substantive law in mass-tort cases "unless they change their approach to interlocutory appellate review."²⁹³

289. See *In re Briscoe*, 448 F.3d 201, 226 (3d Cir. 2006) (rejecting petition for writ of mandamus in case involving federal court's refusal to remand cases to state court); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 401 F.3d 143, 145 (3d Cir. 2005) (dismissing appeal from interim attorney-fee award); *Adelphia Recovery Trust v. Bank of Am., N.A.*, Nos. 05 Civ. 9050, 03 MDL 1529, 2010 U.S. Dist. LEXIS 50209, at *72–76 (S.D.N.Y. May 14, 2010) (denying § 1292(b) certification over order dismissing claims for lack of standing); *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, MDL No. 1967, No. 08-1967-MD-W-ODS, 2010 U.S. Dist. LEXIS 3904, at *30–32 (W.D. Mo. Jan. 19, 2010) (denying § 1292(b) certification over order specifying which categories of defendants had alleged cognizable damages related to use of plastic baby bottles); *Ntsebeza v. Daimler AG (In re S. Afr. Apartheid Litig.)*, No. 02 MDL 1499 (SAS), 2009 U.S. Dist. LEXIS 121559, at *10–11 (S.D.N.Y. Dec. 31, 2009) (denying § 1292(b) certification over holding that Alien Tort Statute, 28 U.S.C. § 1350 (2006), applies to corporations); *Hood ex rel. Mississippi v. Eli Lilly & Co. (In re Zyprexa Prods. Liab. Litig.)*, 671 F. Supp. 2d 397, 464 (E.D.N.Y. 2009) (denying § 1292(b) certification over order dismissing claims based on plaintiff's attempted use of aggregate proof); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2009 U.S. Dist. LEXIS 56557, at *4–5 (D. Minn. July 1, 2009) (summarizing third-party plaintiffs' several unsuccessful attempts at interlocutory appeal over order dismissing claims for lack of standing).

290. See *supra* note 182 (commentators discussing Judge Weinstein's refusal to permit interlocutory review of orders rendered in *Agent Orange* MDL).

291. See, e.g., *supra* notes 203–05 and accompanying text.

292. See *supra* notes 183–91 and accompanying text.

293. Waters, *supra* note 9, at 566; see also *id.* at 530 ("[M]ass tort trial judges are creating, systematizing, and refining the [mass-tort] genre alone, without the guidance of appellate courts."); *id.* at 531 ("[A]ppellate courts lack the necessary tools to exercise their proper role in supervising the development of the mass tort regime.").

III. THE SOLUTION: A LIMITED RIGHT OF APPEAL FROM INTERLOCUTORY LEGAL RULINGS IN MDL CASES

To solve the problem, I propose a new category of mandatory appellate jurisdiction over certain interlocutory orders entered in MDL proceedings. Identifying the criteria is admittedly challenging, because they must be articulated “broadly enough to capture the entire problem area, yet narrowly enough not to impose an unmanageable additional burden on circuit courts.”²⁹⁴ But I believe these three criteria, similar in large measure to the criteria of § 1292(b), strike the right balance: (1) the order must raise an issue of law; (2) there must be no controlling law on point, or the district court must have elected not to follow it; and (3) appellate review must be potentially dispositive of a significant number of the cases consolidated in the MDL proceeding. I elaborate below on each of the three criteria.²⁹⁵

A. Section 1292(b) Criteria Invigorated: Appeals of Right in MDL Proceedings

1. An Issue of Pure Law

The first criterion under my proposal is the simplest and most familiar: the interlocutory order in question must raise a question of pure law. This criterion echoes the first criterion of § 1292(b) and one of the more salient functions of Rule 23(f)—to permit appellate review of “important legal issues that otherwise might prove elusive.”²⁹⁶ These arise most commonly from rulings on motions to dismiss and for summary judgment and involve “a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine.”²⁹⁷

There are several reasons for requiring that the issue involve a legal question. First, that limitation eliminates large categories of orders on nonlegal questions that typically involve trial-court discretion, such as those affecting docket management, discovery disputes, or trial procedure. While legal rulings are reviewed *de novo*, discretionary rulings are reviewed under the more deferential abuse-of-discretion standard and are therefore less likely to be reversed.²⁹⁸ Limiting interlocutory appeal to issues of law

294. Glynn, *supra* note 17, at 261.

295. There are certainly other possible vehicles for expanding the review currently available from interlocutory trial court orders in MDL cases. One alternative approach, for example, would be to bolster the MDL system with MDL appellate panels comprised of other district court judges, similar to the bankruptcy appellate panels that Congress has authorized. See 28 U.S.C. § 158(b) (2006). But the proposal I offer has the advantage of operating within an existing judicial structure and avoiding the administrative burdens that accompany new institutions.

296. *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1016 (7th Cir. 2002).

297. *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000).

298. See Paul R. Michel, *Foreword: The Court of Appeals for the Federal Circuit Must Evolve To Meet the Challenges Ahead*, 48 AM. U. L. REV. 1177, 1192 (1999) (“In general, the chances of reversal are much higher on an issue subject to *de novo* review than under any

helps ensure that the court of appeals is called upon to examine only those orders that require its exacting review.

That is not to say that some orders that are ultimately exercises of trial-court discretion would categorically fail to qualify for immediate review. If the trial court resolves a legal question in the course of ruling on a discretionary matter, then the order in question may potentially fit the bill. For example, a trial court may be required to articulate the governing law to resolve a discovery dispute, and an appellate court would review *de novo* the legal analysis underlying that decision.²⁹⁹ In general, however, the issue-of-law requirement would protect against an onslaught of questionable appeals from the numerous instances in which trial courts are called upon to exercise their discretion.³⁰⁰

Limiting interlocutory review to legal issues also ensures that interlocutory appeals will have the most direct impact on the parties' assessments of potential litigation outcomes. Such review would assist the parties in evaluating and accurately pricing settlement, thus stabilizing the economic impact of the mass tort and better reflecting the costs that a tortfeasor should bear for having caused the alleged injuries. By contrast, most nonlegal rulings are unlikely to influence the parties' assessments of their overall risks.

Beyond the parties, requiring appellate courts to participate more actively in articulating the governing law would temper the outsized influence that MDL judges have over the evolution of legal theories. In the current system, the pressure to settle before trial all but ensures that a case never reaches final judgment—and, thus, rarely reaches the court of appeals. A single MDL judge's articulation of the law in essence *becomes* the law, with no review or input from other judges. But an immediate appeal before settlement would decentralize that power and ensure that difficult legal questions enjoy a full measure of judicial consideration.

It also bears mention that my proposal would supplement the existing avenues of immediate discretionary jurisdiction, so litigants would lose no existing rights of appeal from trial-court decisions that do not raise issues of pure law. For example, the discretionary decision whether to certify a class³⁰¹—even in an MDL proceeding—would still qualify for

of the other deferential standards of review . . ."); *see also* Dalton, *supra* note 19, at 80 (“[R]eversals are more likely when the question is one of law . . .”).

299. *See, e.g.*, *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 607 (2009) (recognizing propriety of certifying discovery-privilege order for immediate appeal under § 1292(b) when it “involves a new legal question”).

300. Perhaps with the benefit of experience under my current proposal, there would be a case for expanding the availability of mandatory appellate jurisdiction in MDL cases to include appeals from certain discretionary rulings. There certainly is extensive criticism in the literature of the extent to which trial judges enjoy discretion in case management, even outside the MDL context. *See, e.g.*, Gensler, *supra* note 126, at 720–26 (discussing academic critiques of trial-court discretion).

301. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 630 (1997) (Breyer, J., concurring in part and dissenting in part) (district courts have “broad power and discretion . . . with respect to matters involving the certification’ of class actions” (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979))).

discretionary appellate review under Rule 23(f). Mandamus would also remain an option for other orders on matters committed to the district court's discretion, such as discovery orders involving privileged material.³⁰²

Limiting review to legal issues would insulate both the trial and appellate courts from excessive appeals, while still providing a right of appellate review on the questions that make the most difference for the parties and, ultimately, the evolution of the law. And because there is no room for serious disagreement about whether an issue is or is not a legal issue, this element of my proposed test serves as a rule, rather than a standard, and will presumably enjoy consistent application from court to court and from case to case.

2. An Unsettled Area of Law or an Order That Disregards Settled Law

The second criterion of my proposal is that the issue of law be novel or unsettled, or that the district court has declined to follow settled law. This requirement, similar to the § 1292(b) requirement that there be “substantial ground for difference of opinion”³⁰³ (and perhaps even more similar to its analog in bankruptcy³⁰⁴), ensures that the interlocutory appeal actually merits an appellate court's immediate attention. But unlike the second prong under § 1292(b), a mere basis for disagreement is not enough to trigger appellate jurisdiction; this second criterion would instead require a would-be appellant to demonstrate that the district court has unilaterally undertaken to define the law in a new area or has disregarded controlling precedent. The three decisions in the *MTBE* litigation described above³⁰⁵ would all fit the bill. This avenue for immediate appeal would be particularly helpful for federal court pronouncements of state law, where the comity considerations demand even greater scrutiny³⁰⁶ and where immediate appellate review would, in some cases, facilitate certification to the state's highest court.³⁰⁷

Admittedly, this criterion overlaps to some extent with the merits of the appeal. But that is not a novel problem in appellate jurisdiction. The analogous provision of § 1292(b) shares that quality, and the likelihood of

302. See *Mohawk*, 130 S. Ct. at 607 (“[I]n extraordinary circumstances—*i.e.*, when a disclosure order . . . works a manifest injustice—a party may petition the court of appeals for a writ of mandamus.”); see also Robertson, *supra* note 22, at 779–85 (advocating mandamus when trial court refuses to certify interlocutory appeal from order compelling disclosure of privileged material).

303. 28 U.S.C. § 1292(b) (2006).

304. See *id.* § 158(d)(2)(A)(i) (“[Q]uestion of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance . . .”).

305. See *supra* Part II.B.3.a.

306. See *supra* note 250 and accompanying text.

307. See *supra* note 260 and accompanying text.

error has also been suggested as an appropriate factor in determining whether to hear discretionary appeals under Rule 23(f).³⁰⁸

Of course, reasonable jurists can disagree about the extent to which a district court's articulation of the law has truly departed from established precedent. In that respect, this element of my proposed test has the potential to dissolve into a discretionary standard,³⁰⁹ as opposed to a mandatory rule. Such disagreements are not ideal, but they are also inevitable in any test for mandatory appellate jurisdiction.³¹⁰ They are no more troubling at the jurisdictional stage than they would be on the merits in an appeal after a final judgment. Our legal system often grapples with legal tests that combine fixed rules with flexible standards,³¹¹ and the imperfection of that blend is less troubling than the absence of appellate review altogether. And, at bottom, an appellate court that rejects jurisdiction based on this criterion would implicitly suggest agreement with the district court's decision, which alone would provide some measure of guidance to the litigants.

3. An Issue That Is Potentially Dispositive of a Significant Number of Cases in the MDL

The third criterion of my proposal is that an immediate appeal have a potentially dispositive impact on a significant number of the cases consolidated within the MDL—analogous to the § 1292(b) requirement that an interlocutory appeal “may materially advance the ultimate termination of the litigation.”³¹² This requirement ensures that the leap from discretionary to mandatory jurisdiction is justified under the circumstances. Thus, if the MDL setting is the factor that creates the “serious, perhaps irreparable, consequence” of deferring appellate review until final judgment, then there

308. See Christopher A. Kitchen, Note, *Interlocutory Appeal of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal for a New Guideline*, 2004 COLUM. BUS. L. REV. 231, 233 (“[T]he courts of appeals should each adopt a guideline” for discretionary review of class-certification orders under Federal Rule of Civil Procedure 23(f) “that allows for appeal when it can be shown that the district court’s decision is ‘likely erroneous.’”).

309. See Redish, *supra* note 25, at 101 (suggesting, for discretionary appeals, “a kind of ‘probable cause’ examination of the issue, comparable in some ways to a shorthand certiorari process, by which the appellate court could satisfy itself without full study of the merits that the issue on appeal posed a legal question whose answer was either uncertain or likely to have been incorrectly determined by the district court”).

310. See *supra* notes 27–30 and accompanying text (discussing difficulties in defining contours of final-judgment rule).

311. See, e.g., Kaplow, *supra* note 13, at 561 (“[L]egal commands mix [rules and standards] in varying degrees.”).

312. 28 U.S.C. § 1292(b) (2006). The Supreme Court recently held that “district courts should not hesitate to certify” a discovery-privilege ruling for interlocutory appeal if it “involves a new legal question or is of special consequence.” *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 607 (2009). Since discovery rulings will rarely advance the termination of the litigation, we are left to conclude that the Court does not necessarily require a would-be appellant to meet that prong of the test. My proposed reform, by contrast, absolutely requires that the order in question have the potential to be dispositive of a substantial number of cases consolidated within an MDL.

must be a corresponding requirement that the interlocutory appeal will itself have MDL-sized impact.³¹³ It makes no sense to depart from the strictures of the final-judgment rule unless the departure actually addresses the problem we are trying to solve.

Implementing this criterion presents no special challenges, but it is admittedly the prong of my test that retains the sort of case-by-case subjectivity normally seen in discretionary review and more akin to a standard than a rule. To some extent the case-by-case evaluation is unavoidable; a requirement in terms of absolute numbers of affected cases or even the affected percentage of consolidated cases seems too rigid. At the same time, there must be a check against the appellate courts' institutional inclination to decline review too frequently. The presumption, then, should be in favor of interlocutory review. A court should decline review only when the order in question clearly appears to have a limited impact on a very small number of the consolidated cases.

As an illustration, this prong of the test would not have deprived the appellate court of jurisdiction over the district court's conflict-preemption decision in the *MTBE* litigation, because that issue has affected every case in the MDL. It also would have required appellate review of the district court's creation of the commingled-product theory, because that theory has affected every case governed by the law of the states that the court held would adopt it. The district court's questionable jurisdiction over the cases originally removed to federal court solely on the basis of § 1442(a)(1) is a closer call, because the issue has affected a smaller subset of the MDL cases, and reversal would have returned them to state court rather than aiding in their substantive resolution.³¹⁴ But even a denial of interlocutory review over the jurisdictional question would have been a tolerable result, because the affected cases would still have benefited from the immediate appeals that would have gone forward on the other two issues.

B. The Benefits of Mandatory Appeal from Important Interlocutory MDL Orders Outweigh the Costs

Like all policy choices, creating a new category of mandatory appellate jurisdiction—and the specific proposal I offer here for doing so—comes with costs. Policymakers and commentators have debated the trade-offs between the final-judgment rule and its exceptions for over a century. But the disadvantages always inherent in expanding appellate jurisdiction are worth the price in the MDL context. At bottom, the reform I propose would foster the integrity of the MDL system, which is designed, after all, to promote judicial efficiency.

313. Cf. Solimine & Hines, *supra* note 196, at 1582 (noting, in Rule 23(f) context, that “the presence or absence of simultaneous litigation in other courts” would weigh in favor of interlocutory review).

314. *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, Nos. 1:00-1898, MDL 1358 (SAS), M 21-88, 2005 U.S. Dist. LEXIS 225, at *9 (S.D.N.Y. Jan. 6, 2005).

Expanding mandatory appellate jurisdiction is not an insignificant reform, but it is certainly not without precedent in our relatively recent history. The Supreme Court, though it struggles to limit the collateral-order doctrine, created the category in 1949³¹⁵ and has frequently expanded its reach.³¹⁶ And Congress, to protect arbitration clauses, added a new category of mandatory appellate jurisdiction in 1988 from orders refusing to enforce them.³¹⁷

There are obviously several costs to my proposal, beginning with the increased appellate workload that will naturally result.³¹⁸ The added resources required to staff the appellate courts adequately will require capital outlay. But Congress, in enacting the MDL statute, has already established a policy that the benefits of coordinated MDL proceedings justify the costs of staffing the JPML and administering the MDL system; it is unlikely that the added appellate costs would skew that analysis. And there will be an offset in the workload of the district courts, in some instances by resolving cases entirely and in others by preventing district courts from wasting their resources on activities premised on a misconception of the law.³¹⁹

Several commentators have also pointed out that a new category of appellate jurisdiction would create “satellite procedural litigation” over appellate jurisdiction in each case.³²⁰ While litigation over appellate jurisdiction is not ideal, it is nothing new. For example, in the collateral-order context, courts must grapple with such amorphous factors as whether the “interlocutory ruling” in question “concerns an ‘important’ issue.”³²¹ Most avenues of discretionary jurisdiction requires briefing on the threshold

315. See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

316. See, e.g., Lloyd C. Anderson, *The Collateral Order Doctrine: A New “Serbian Bog” and Four Proposals for Reform*, 46 *DRAKE L. REV.* 539, 575–76 (1998) (“[T]he Court’s periodic willingness to expand the [collateral-order] doctrine . . . created a long list of new candidates for collateral order appeal.”).

317. See *supra* note 60 and accompanying text; see also Bergeron, *supra* note 33, at 1366.

318. See Waters, *supra* note 9, at 586 (frequent appellate review in mass-tort cases “is simply not practicable in light of the much-lamented (and much-debated) caseload crisis already facing the courts of appeals”).

319. See Solimine, *supra* note 33, at 1178 (“A modest increase in interlocutory appeals, however, may decrease the overall federal court caseload by expediting and possibly shortening the resolution of trial court cases and by leading to more settlements at the district court level.”).

320. See Glynn, *supra* note 17, at 254 (“[T]he category-based approach has the potential to produce some collateral litigation over the issue of appealability, specifically, whether the order in question falls within the category covered by the rule.”); Nagel, *supra* note 42, at 220 (“Broad categories in mandatory terms would likely lead to substantial amounts of satellite procedural litigation construing the boundaries of these categories.”); Rosenberg, *supra* note 29, at 172 (“Entirely too much of the appellate courts’ energy is absorbed in deciding whether they are entitled under the finality principle and its exceptions to hear cases brought before them—and explaining why or why not.”). One commentator dismisses this concern. See Redish, *supra* note 25, at 101 (“Since appealability of a district court’s order can be determined on a motion to dismiss the appeal—at a comparatively early stage in the appellate process and presumably before a full-blown analysis of the merits need be conducted by either the litigants or the court—such a preliminary determination could be made with relative flexibility.”).

321. Steinman, *supra* note 15, at 1253.

question whether the appellate courts should accept the case³²²—and, in the cases of § 1292(b) and Rule 54(b), whether the trial court should permit it.³²³ Often these petitions for appellate review hinge on amorphous criteria that vary from court to court.³²⁴ By contrast, the proposed criteria for interlocutory appellate jurisdiction in MDL cases are fairly straightforward.

Another concern is that “any increase in the scope or amount of appellate review necessarily results in the reduction of the power and authority of the district judge.”³²⁵ This dynamic is especially keen when an appeal is successful, leaving “the reversed trial judge [to] feel that her time and energy have been wasted, her work unappreciated, and her judgment called into question.”³²⁶ But this concern merits minimal attention, at least in the context of my proposed reform. By definition, only those orders reflecting a district judge’s unilateral conception of what the law is (or should be) will satisfy the second criterion. We should hope that our district court judges would appreciate and encourage an opportunity to ensure that these decisions are correct—especially given the sweeping impact that legal rulings can have in MDL cases. An MDL judge can even control the timing by issuing legal decisions at convenient moments in the litigation when an interlocutory appeal would be least disruptive. Any judge who would take offense at appellate review in these circumstances needs a check on his own *hubris*.³²⁷

Some commentators have also warned that opportunities to appeal disproportionately benefit the mass-tort defendants, who tend to have

322. See FED. R. APP. P. 5 (governing procedure for petitioning court of appeals for permission to appeal); see also Nagel, *supra* note 42, at 219 (“The courts of appeals would have to review each petition filed, which would require some effort.”); Robertson, *supra* note 22, at 774 (“In practice, . . . discretionary review is likely to create nearly as large a burden on appellate courts as mandatory review; the courts would need to review every request for review, even those that are subsequently denied.”). But see Martineau, *supra* note 26, at 777 (noting, but disagreeing with, criticism that discretionary-review system would “inundate[]” the courts of appeals “with applications for leave to appeal interlocutory orders, thus increasing rather than decreasing their workloads.”). Professor Martineau suggests that the adoption of broad discretionary appellate jurisdiction has not overwhelmed Wisconsin’s appellate courts, but “the data from that system may not predict accurately how many petitions would be filed if the federal courts adopted a similar regime.” Glynn, *supra* note 17, at 237; see also Nagel, *supra* note 42, at 220 (“[T]he [Wisconsin] numbers tell little of what impact this discretionary scheme would have on the federal system.”).

323. See, e.g., *Cnty. of Suffolk v. Amerada Hess Corp. (In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.)*, Nos. 1:00-1898, MDL 1358 (SAS), M 21-88, 2008 U.S. Dist. LEXIS 47222, at *6 (S.D.N.Y. June 18, 2008).

324. See, e.g., *supra* note 85 (inconsistent criteria in evaluating discretionary appeals under Rule 23(f)).

325. Redish, *supra* note 25, at 105 (citing Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 780–81 (1957)); see also Nagel, *supra* note 42, at 203 (“[P]iecemeal appeals threaten the independence of trial judges.”); Waters, *supra* note 9, at 586 (“[E]xcessive appellate oversight of mass tort trial judges would hinder . . . the ingenuity and creativity of enterprising trial judges.”).

326. Dalton, *supra* note 19, at 68.

327. See Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2033 (1997) (“Being a great judge requires the hubris to do what seems necessary, and perhaps surprisingly, the humility to admit the limitations of oneself and the materials at hand.”).

greater financial resources and will use that wherewithal to manipulate the litigation process³²⁸ and “wear out” a plaintiff with inferior economic backing.”³²⁹ That concern is mitigated by the growing strength and resources of the plaintiffs’ bar.³³⁰ And, while any expansion of appellate jurisdiction runs the risk of facilitating gamesmanship and inviting delay, there are ways to prevent that problem; blocking access to the appellate courts is not the best of them. If the appellant files a frivolous appeal, the appellee already has a remedy in the form of “just damages and single or double costs,”³³¹ including attorneys’ fees.³³² Additional sanction provisions could also be added, to level the playing field, if experience suggests a need to curb abuse. A specific sanction (such as a higher level of prejudgment interest) could be authorized for frivolous appeals that serve no purpose other than to engender delay or to exploit a poorer litigant’s lack of resources.

Finally, there is a valid procedural concern: if a party has a right to an interlocutory appeal under this MDL proposal but fails to exercise it, does the right revive when the case reaches final judgment? The Supreme Court has recently suggested that it does not revive in the collateral-order context.³³³ While collateral orders are final orders that arguably must be appealed immediately, the MDL orders that would become appealable under my proposal are, by definition, interlocutory. Once those interlocutory orders merge into a final judgment, the right to appeal should merge with them if it has not already been exercised.³³⁴

In sum, there are clearly costs to my proposal, as there are with any expansion of appellate jurisdiction. But these costs are worth the price of admission considering the numerous benefits for the parties, for the tort system, for the evolution of the law, and ultimately for the public’s confidence in our multi-tiered justice system.

328. Dalton, *supra* note 19, at 70 (“Party initiative [of appeals] is . . . commonly viewed as a means of allocating scarce judicial resources on the basis of intensity of felt need as expressed by willingness to pay to play.”).

329. Redish, *supra* note 25, at 105.

330. See, e.g., Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 198 (2001) (“[A] well-capitalized and specialized plaintiffs’ lawyer may have deeper resources than does the defense.”).

331. FED. R. APP. P. 38.

332. See, e.g., *St. Germain v. Howard*, 556 F.3d 261, 264 (5th Cir. 2009) (“The Court may assess sanctions and single or double costs and attorney’s fees against a party if their appeal is deemed frivolous.”).

333. See *Ortiz v. Jordan*, No. 09-737, 2011 U.S. LEXIS 915, at *16 (Jan. 24, 2011) (noting that time to file an appeal from a collateral order had “expired” by the time of trial, more than 30 days later).

334. See, e.g., *Long v. St. Paul Fire & Marine Ins. Co.*, 589 F.3d 1075, 1078 & n.2 (10th Cir. 2009) (“[O]nce the district court enters a final order, its earlier interlocutory orders merge into the final judgment and are reviewable on appeal.”); *United States v. 191.07 Acres of Land*, 482 F.3d 1132, 1135 (9th Cir. 2007) (“Failure to pursue an opportunity for interlocutory appeal normally does not constitute a waiver.”).

C. The Best Way To Implement the New Jurisdictional Provision

Until recently, expanding appellate jurisdiction required an act of Congress.³³⁵ But in the 1990s, Congress vested the Supreme Court with authority to promulgate rules identifying new categories of both final judgments³³⁶ and appealable interlocutory orders.³³⁷ It is now within the province of both Congress, through legislation, and the Supreme Court, through rulemaking, to expand appellate jurisdiction.

The Court itself has touted the “important virtues” of the rulemaking process: “It draws on the collective experience of bench and bar, and it facilitates the adoption of measured, practical solutions.”³³⁸ The Court has also recognized Congress’s role to “weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants.”³³⁹

The precise vehicle for implementing my proposal is ultimately immaterial to the substance; the provisions would operate the same way, whether codified in a statute or promulgated as a rule. I would nevertheless suggest that the better approach is to amend the MDL statute, § 1407, to add within it the right of appellate review from orders that meet the three criteria I have articulated. That location will undoubtedly offend the commentators who lament the disorganization of our patchwork of appellate rules.³⁴⁰ But it will highlight an important undercurrent: the MDL system cries out for a new route of appeal, and it belongs, part and parcel, with the other MDL statutory provisions. By amending the statute, we ensure, perhaps poetically, that the law governing MDL procedure would be consolidated in one place.

CONCLUSION

Our tolerance for the final-judgment rule is limited by our desire to ameliorate the “substantial, perhaps irreparable, consequence” that it sometimes creates. Congress and the Supreme Court have extended mandatory appellate jurisdiction over several categories of interlocutory

335. See *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 610 (2009) (Thomas, J., concurring in part).

336. See 28 U.S.C. § 2072(c) (2006).

337. See *id.* § 1292(e); see also *supra* note 67 and accompanying text; *Mohawk*, 130 S. Ct. at 609 (describing statutory amendments); Thomas D. Rowe, Jr., *Defining Finality and Appealability by Court Rule: A Comment on Martineau’s “Right Problem, Wrong Solution”*, 54 U. PITT. L. REV. 795, 796 (1993) (same); Solimine & Hines, *supra* note 196, at 1563–64 (same).

338. *Mohawk*, 130 S. Ct. at 609 (citing 28 U.S.C. § 2073 (2006)); see also Rowe, *supra* note 337, at 802 (“The rulemakers, in particular the Advisory Committee on Appellate Rules, can think about policy and what may be the best ways to define finality and the circumstances in which interlocutory appeals shall be allowed, and then draft rules to achieve those ends.”).

339. *Balt. Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955); see also Martineau, *supra* note 26, at 775 (suggesting legislative process may be more efficient).

340. See *supra* note 98 and accompanying text.

orders. The time has come to make another categorical value judgment, adding certain MDL orders to that list.

The MDL system has become so integral to federal civil litigation that it seems hard to imagine a time that we lived without it. Consolidating cases with common factual and legal questions provides a tremendous savings to our courts and to the parties. It also facilitates global settlement.

But the bewitching virtues of the MDL system should not blind us to the ways in which it undermines some of the basic principles of American jurisprudence—that everyone deserves a day in court, that federal courts respect the limits of the state laws they interpret, and that no one judge should hold outsized power. Eventually, the virtues of efficiency reach their limit. Our quest for efficiency runs up against our disdain for centralized power.

We can solve the problem. Through mandatory appellate jurisdiction, we can permit appellate courts to review interlocutory MDL orders, and momentarily decentralize MDL proceedings, when MDL judges make legal rulings that potentially overstep the law. Doing so restores balance to the proceedings, enables the parties to make informed choices about settlement and business practices, and results in a more fully developed body of emerging law. We need mandatory jurisdiction, rather than discretionary jurisdiction, because the orders in question—like the other routes to mandatory appellate review—fall into a definable category, and because experience teaches that courts are parsimonious in permitting discretionary review. In the end, the importance of legal rulings in MDL cases demands that appellate review be a component of the system; it should not depend on the acquiescence of the MDL judge or the whims of a random three-judge panel.

To be sure, it is costly to interrupt an MDL proceeding while a case proceeds to appeal. But on balance, the costs are more palatable than the existing infirmities of an MDL system in which appellate review is largely unavailable. A right of interlocutory appeal would ensure the integrity of the MDL system. And we need to protect that integrity, because the mass tort shows no signs of an imminent demise.