

Concept Models of Appealability

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Introduction

When it comes to federal appeals, every lawyer knows at least two things. We all know the final-judgment rule: You can only appeal from a district court’s “final decision” at the end of the case.¹ And we all know that the final-judgment rule isn’t really true. Various exceptions allow immediate appeals from non-final decisions. And judge-made doctrines deem some decisions final-for-appeal, even though they don’t end the case. It is probably safe to say that we also all know that this system of federal appealability doctrines is a confusing mess.²

The doctrines governing appealability in federal court are numerous and varied. They can be found not only in the Federal Rules of Civil Procedure,³ but also in statutes,⁴ case law.⁵ They can be bright-line rules that apply to certain kinds of orders or standards that consider the specific circumstances of a case, or they can take forms that seem to combine both. They are all related to the venerable final-judgment rule, but the relationship is not always clear, and the contours of the final-judgment rule itself are murky.

To impose some order on the tangle of federal appealability doctrines, the Supreme Court has held that judges may not create new appealability doctrines.⁶ If

¹ 28 U.S.C. § 1291.

² The criticisms of the federal appealability system are legion. “The current system has been subject to much criticism: ‘hopelessly complicated,’ ‘legal gymnastics,’ ‘dazzling in its complexity,’ ‘unconscionable intricacy’ with ‘overlapping exceptions, each less lucid than the next,’ ‘an unacceptable morass,’ ‘dizzying,’ ‘tortured,’ ‘a jurisprudence of unbelievable impenetrability,’ ‘helter-skelter,’ ‘a crazy quilt,’ ‘a near-chaotic state of affairs,’ a ‘Serbonian Bog,’ and ‘sorely in need of limiting principles.’” Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1238–39 (2007) (citations to commentaries and judicial opinions omitted).

³ See, e.g., Fed. R. Civ. P. 23(f), 54(b).

⁴ See, e.g., 28 U.S.C. §§ 1291, 1292.

⁵ See, e.g., *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

⁶ The Supreme Court has directed that any new appealability doctrines must be developed only through legislation and rulemaking. See *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 112-14 (2009). But that does not prevent judges from applying the final-judgment rule to different categories of orders.

a judge wants to permit an appeal from a trial court decision that is not appealable under an existing doctrine, the judge must explain why it should nonetheless be deemed final-for-appeal under the final-judgment rule. But the Court has also held that judges must decide finality-for-appeal based not on the “particular injustices” of a specific case, but on “the entire category to which a claim belongs.”⁷ That ‘categorical imperative’⁸ means there are always two steps to deciding the appealability of a given order: categorizing it, and applying the appropriate doctrine for that category.

The courts have not been shy about identifying new categories of orders to deem final-for-appeal, though they do not always agree about them: The Third and Ninth Circuits are split over whether interlocutory orders declining to enforce a statute of repose are final-for-appeal.⁹ The Fifth and Tenth Circuits are split over whether interlocutory orders “bearing on First Amendment rights” are final-for-appeal.¹⁰ The Second Circuit has split from the Fifth and Ninth over whether orders declining to dismiss a case under an anti-SLAPP statute are final-for-appeal.¹¹

⁷ *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (*quoting* *Digital Equip. Corp. v. Desktop Direct Inc.*, 511 U.S. 863, 868, 876-877; *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473 (1978)) (cleaned up).

⁸ My use of the term “categorical imperative” is somewhat tongue-in-cheek. While the Supreme Court’s directive does not have the deontological moral implications of Kant’s categorical imperative to “act only according to that maxim whereby you can, at the same time, will that it should become a universal law,” it has essentially the same structure: only allow appeals according to a rule whereby you can, at the same time, will that it should be a universal rule to allow appeals from that entire category of decisions. *See* IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 30 (James Wesley Ellington trans., 3d ed. 1993).

⁹ *Compare* *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1111 (9th Cir. 2002) *with* *Robinson v. Hartzell Propeller, Inc.*, 454 F.3d 163, 172-74 (3d Cir. 2006).

¹⁰ *Compare* *Whole Woman’s Health v. Smith*, 896 F.3d 362, 368 (5th Cir. 2018) *with* *In re Motor Fuel Temperature Sales Practices*, 641 F.3d 470, 482 (10th Cir. 2011).

¹¹ *Compare* *Ernst v. Carrigan*, 814 F.3d 116 (2d Cir. 2016) *with* *DC Comics v. Pacific Pictures Corp.*, 706 F.3d 1009, 1013 (9th Cir. 2013) *and* *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 749 (5th Cir. 2014).

While three Circuits have held that orders declining to appoint counsel in civil cases are final-for-appeal, nine Circuits have held that they are not.¹² The Ninth Circuit, but no other, has held that orders “requiring the expenditure of public funds to reimburse an indigent habeas petitioner for certain litigation expenses” are final-for-appeal.¹³ The D.C. Circuit, but no other, has held that orders “that challenge (and will challenge) [the Nuclear Regulatory Commission’s] legal position that it may leave a license in full effect despite the agency’s failure to comply with [National Environmental Policy Act]” are final-for-appeal.¹⁴ In each of these disparate decisions, courts were applying the final-judgment rule—specifically, the interpretation of the final-judgment rule known as the collateral-order doctrine—to determine finality-for-appeal.

These disparate decisions obviously show that courts disagree about which orders should be appealable at the second step. But they also show that courts can be endlessly creative about conceiving of different kinds of categories at the first step. Even when ostensibly constrained by applying the collateral-order doctrine, courts categorize orders based on everything from the rule or law being applied (statutes of repose, anti-SLAPP statutes), to the likely effects (affecting First Amendment rights, requiring expenditures of public funds), to whom is affected (parties, nonparties, indigent parties), and to combinations of all of the above. There is no single set of features, traits, or aspects of an order that courts agree are relevant when categorizing orders.

In this article, I do not try to resolve these particular appealability debates but rather to explain *how* courts keep recognizing different categories of potentially appealable decisions. While commentators have examined which doctrinal forms

¹² See Matthew R. Pikor, *The Collateral Order Doctrine in Disorder: Redefining Finality*, 92 Chi.-Kent L. Rev. 619, 638 (2017) (collecting cases).

¹³ *Copeland v. Ryan*, 852 F.3d 900, 904–905 (9th Cir. 2017).

¹⁴ *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, 896 F.3d 520, 529 (D.C. Cir. 2018).

(rules or standards) work best for deciding appealability at the second step,¹⁵ less attention has been paid to how courts categorize decisions in the first place. Understanding the antecedent categorization question means building on the well-known rules-vs-standards dichotomy to theorize how judges conceptualize categories.

Legal scholars have long recognized that the law requires categories, an “artificial ordering” to deal with the variety of human experience.¹⁶ And cognitive psychologists have likewise shown that we rely on categories to understand the world.¹⁷ But experiments in cognitive psychology demonstrate that our everyday mental categories work in surprising ways. They resist clear definitions; they are graded, with some members fitting the category better than others; and their borders are fuzzy, with borderline cases. For example, we easily understand the category “Birds” and can usually decide quickly whether an animal is or is not a bird. But we don’t rely on a classical, logical definition to do so. And we tend feel intuitively that some birds (like robins) fit the category better than others (flamingoes, penguins, ostriches). And what about, say, feathered dinosaurs?

Our mental categories work this way because people—including judges—do not usually categorize things according to rules or standards. While some of our mental categories are what psychologists call “classical categories,” based on logical

¹⁵ See, e.g., Bryan Lammon, *Dizzying Gillespie: The Exaggerated Death of the Balancing Approach and the Inescapable Allure of Flexibility in Appellate Jurisdiction*, 51 U. RICH. L. REV. 371 (2016–2017); Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423 (2013); Scott Dodson & Elizabeth McCuskey, *Structuring Jurisdictional Rules and Standards Response*, 65 VAND. L. REV. EN BANC 31 (2012); Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 507 (2012); John C. Nagel, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review Notes*, 44 DUKE L.J. 200, 217 (1994).

¹⁶ Karl N. Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 COLUM. L. REV. 431, 453–54 (1930).

¹⁷ See STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 69 (2003).

definitions with necessary-and-sufficient characteristics, many are not. Instead we use intuitive understandings based on perceived similarity. Cognitive psychologists call those flexible-but-structured understandings “concepts.” They have modeled these mental concepts and shown that conceptual categories often have a radial structure. At the center are prototypes and exemplars, quintessential category-members that we use to anchor the concept. We identify other category-members based on their similarity to those prototypes and exemplars. We do not categorize animals as “Birds” based on a rule-like dictionary definition of “bird” or a standard-like sense of ‘birdness.’ We categorize them based on how similar they are to the typical examples of birds in our heads (something like a sparrow, or, more accurately, our mental idea of a sparrow-like bird).

Sometimes judges recognize categories of decisions for appeal the same way. Some appealability doctrines use clear, classical categories and bright-line rules to identify appealable decisions—but others, particularly the finality-for-appeal interpretations of the final-judgment rule like the collateral-order doctrine, use radial conceptual thinking. Thus, while formal final judgments that end cases are easily recognized using a classical definition and procedural markers, the categories of orders that are deemed final-for-appeal remain more conceptual and amorphous. Recognizing the conceptual categorical nature of appealability doctrines provides a clearer picture of the seemingly disjointed finality-for-appeal doctrines. It explains how judges have reshaped, and will keep reshaping, the categories of orders deemed final for appeal. And, I argue, it also suggests that—even in light of the Supreme Court’s categorical imperative—courts will implicitly, and should explicitly, embrace the structured flexibility of a conceptual approach, rather than continuing to strive for an unobtainable classical, rule-like purity.

In *Part I*, below, I explain the policy and theoretical approaches to the federal appealability doctrines. I begin by describing how different appealability doctrines serve the conflicting values of systemic efficiency and individual fairness by using bright-line rules and flexible standards. I then briefly canvas the history of the major appealability doctrines in those terms, ending with the Supreme Court’s

categorical imperative. I explain the traditional rules-vs.-standards approach to the appealability doctrines—and the limits of that framework.

In *Part II*, I describe the antecedent categorization question inherent in each appealability decision and the resulting two-step appealability decision process. I introduce cognitive psychology categorization theory, explaining the two basic types of categories (classical categories based on logical definitions, and conceptual categories based on concept models), and the two major concept models (prototypes and exemplars). I describe the roles of classical and conceptual categories in legal reasoning, address some potential critiques of using conceptual categories in law, and explain why they are nonetheless useful for understanding and shaping federal appealability doctrines.

In *Part III*, I apply concept theory and the traditional rules-vs.-standards approach to analyze the two-step decision process as it manifests in various federal appealability doctrines. First, I demonstrate how specific appealability doctrines combine classical and conceptual categories with rules and standards to govern appeals from certain categories of decisions. In that discussion, I highlight how courts recognize new conceptual categories of potentially appealable decisions, and how over time some of those conceptual categories evolve into classical definitions and new doctrines. Second, I turn to the idea of finality. I show that the idea of finality is conceptually structured, not classically defined, based on the prototype of a formal final judgment that ends a case. I show that, over time some finality doctrines have shifted from fuzzy concepts to become essentially clear, classical rules. But others, like the pragmatic finality-for-appeal doctrines, remain more conceptual and amorphous.

I argue that the Supreme Court's categorical imperative will not prevent courts from recognizing new categories of appealable decisions. And that is not a problem. Courts should explicitly recognize the categorization step in deciding appealability and use a concept model to recognize new categories of orders that are final-for-appeal. I propose that judges can identify categories of final-for-appeal orders by comparing them to existing positive and negative exemplars (immediately

appealable or not-immediately appealable orders). Such a concept model of finality based on assessing similarities among different kinds of appealable orders might not provide the immediate clarity of a bright-line rule, but neither have the various doctrines already adopted. Instead, using a concept model would build on the signature strength of common-law adjudication—evolution over time—to guide judicial development of new categories of appealable orders.

I. Understanding Appealability Doctrines

This section first describes why appealability questions matter by outlining the conflicting values they implicate, particularly the tension between systemic efficiency and individual fairness. Next, it examines the traditional rules-standards dichotomy used to understand how different forms of legal directives address that tension. It then describes how the major federal appealability doctrines have developed to address that tension, and how they fit along the traditional rules-standards continuum. Finally, it explains the judicial and scholarly criticisms of the federal appealability doctrines, and particularly of the central concept of finality.

A. Why Appealability Matters: Efficiency and Fairness

Justice Breyer recently described why questions of appealability matter: On the one hand, too “few interlocutory appeals will too often impose upon parties delay and expense that an interlocutory appeal, by quickly correcting a lower court error, might have spared them.”¹⁸ But, on the other hand, “too many interlocutory appeals will too often unnecessarily delay proceedings while a party appeals and loses. And delays can clog the appellate system, thereby slowing down the workings, and adding to the costs, of the judicial system seen as a whole.”¹⁹ In other words, the questions of whether and when district court orders should be immediately appealable necessarily implicate two conflicting values: the efficiency of the

¹⁸ *Lamps Plus v. Varela*, 587 U.S. ____, ____ (2019) (Breyer, J. dissenting).

¹⁹ *Lamps Plus v. Varela*, 587 U.S. ____, ____ (2019) (Breyer, J. dissenting).

adjudicative system and fairness to individual litigants.²⁰ That need to balance systemic efficiency and individual fairness manifests itself in every aspect of the design of an appellate system.

As Justice Breyer explains, that need influences *how many* interlocutory appeals to allow: allowing too many causes inefficiency in the “the judicial system seen as a whole,” while allowing too few is unfair to parties in that system.²¹ It is generally more efficient to allow fewer interlocutory appeals, which tends to speed up resolution of cases and lower litigation costs—but also to decrease fairness in individual cases because some errors are never corrected. It is generally fairer to allow more interlocutory appeals, which tends to correct more errors sooner—but also to cause delays and increase litigation costs. That being said, these are only general tendencies. In a particular case, allowing an appeal before the end of the case can prolong litigation, increasing litigation costs and delaying resolution of the dispute. But, in another case, postponing the appeal until the end of the trial-court portion of the case can cause parties to waste time and effort in trial-level litigation only to have it all undone by a reversal on appeal (or it can cause parties to settle, thereby preventing some issues from ever being resolved).

The tension between systemic efficiency and individual fairness also influences *what kinds* of appealability doctrines exist: On the one hand, the need for an efficient court system demands that appealability doctrines be clear and predictable. Easy, understandable rules about appealability save litigants the needless effort and expense of deciding whether to appeal, and also help courts by simplifying which appeals should be allowed. On the other hand, individual fairness demands that appealability doctrines be flexible. Flexible standards of appealability leave room for unusual situations where unexpected circumstances or an unusual

²⁰ See *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 171 (1974) (describing “the competing considerations underlying all questions of finality—the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.”) (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 [1950]).

²¹ *Lamps Plus v. Varela*, 587 U.S. ____, ____ (2019) (Breyer, J. dissenting).

order make it fair and just for a particular litigant to seek (and for the courts to allow) an immediate appeal in a particular case.²²

These two policy goals are well known, as is the conflict between them.²³ The Supreme Court has recognized “the considerations that always compete in the question of appealability the most important of which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.”²⁴ And it has described the history of appealability jurisprudence as a “struggle” by the courts “sometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declarations.”²⁵

A brief example illustrates the Court’s (and indeed, one Justice’s) struggle to choose between these two values. In 1940, the Court held in *Cobbledick v. United States* that an order enforcing a grand jury subpoena to appear and produce documents was not immediately appealable.²⁶ Justice Frankfurter invoked the efficiency concerns weighing in favor of strictly enforcing a clear rule that appeals were permitted only from final decisions in memorably metaphoric language:

Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration.

²² Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1818 (2018). To be sure, this dichotomy is not as polarized as this brief description suggests. Predictability also benefits individuals by giving individual litigants notice and decreasing their uncertainty when making litigation decisions. And flexibility also benefits the system by allowing for fairer outcomes in specific situations and improving public trust in the adjudicatory system. See Sunstein, Cass R. *Two Conceptions of Procedural Fairness*, 73 Social Research 2, 2006, pp. 619–646. JSTOR, www.jstor.org/stable/40971840.

²³ See *Microsoft v. Baker*, 582 U. S. ____ (2017) (noting that, although the “death-knell theory” of appealability likely enhanced “the quality of justice afforded a few litigants,” it imposed a “heavy cost to ... the judicial system’s overall capacity to administer justice”) (alterations, citations and internal quotation marks omitted).

²⁴ *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950).

²⁵ *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950).

²⁶ *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.²⁷

But Justice Frankfurter changed his tone five years later when the Court held in *Radio Station Wow v. Johnson* that a Nebraska court's interlocutory order directing a transfer of physical property *was* immediately appealable as a final decision. He admitted that “[c]onsiderations of English usage as well as those of judicial policy would readily justify an interpretation of ‘final judgment’ so as to preclude reviewability” in the case. But instead of applying a clear rule as he had in *Cobbledick*, he approached the issue more pragmatically, explaining that, because the case was, in “effect ... a multiple litigation,” the need for immediate review outweighed the benefits of restricting appeals to the final decision in “another litigation with which it happens to be entangled.”²⁸

B. Rules, Standards, and the Shifting Logical Forms of the Appealability Doctrines

As *Cobbledick* and *Radio Station WOW* illustrate, the tension between systemic efficiency and individual fairness is often understood to implicate the familiar choice between two different logical forms taken by legal doctrines: rules and standards. Rules are doctrines that dictate ahead of time all of the relevant elements and mandate the outcome of a decision based on the presence or absence of those elements.²⁹ Standards are doctrines that do not dictate elements or outcomes *ex ante*; they describe general goals and guidelines (*e.g.*, reasonableness) for the court to apply. The traditional illustration of these two logical forms is that

²⁷ *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

²⁸ *Radio Station WOW v. Johnson*, 326 U.S. 120, 124–26 (1945).

²⁹ See Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 961–62 (1995); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992–1993).

“speed limit: 55 miles per hour” is a rule, while “no excessive speeds” is a standard.³⁰ Broadly speaking, rules limit judicial discretion and decisionmaking, while standards expand judicial discretion and decisionmaking. Rules thus promote predictability and efficiency on a system-wide basis, while standards promote flexibility and fairness in individual cases.³¹

To facilitate comparisons, commentators often describe the two logical forms as if they were Platonic forms, as if they were contrasting pure rules with pure standards.³² But the labels “rules” and “standard” are usually understood as the opposite poles of a continuum, an unresolved and unresolvable dialectic.³³ In reality, most legal doctrines use both kinds of logic and mix rule-like and standard-like features.³⁴ A common hybrid example would be a standard that includes specific factors to be considered. There are good reasons that the law avoids pure rules and pure standards. Each logical form has its drawbacks. Pure rules are blunt instruments, often over- or under-inclusive, and unresponsive to unforeseen distinguishing features of particular cases.³⁵ Pure standards are mercurial creatures, often vague, and unpredictable in their application even to seemingly similar cases.³⁶

³⁰ See, e.g., Kaplow, *supra* note 29, at 560; Sunstein, *supra* note 29, at 964–65; Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 16 (2011).

³¹ See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1975–1976); Sunstein, *supra* note 29; Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985–1986); Richard Posner, *ECONOMIC ANALYSIS OF LAW* 805 (8th Ed. 2010).

³² Kaplow, *supra* note 29, at 561.

³³ Schlag, *supra* note 31, at 383 et seq.

³⁴ Kaplow, *supra* note 29, at 561; see also Sunstein, *supra* note 29, at 960–69 (describing other types of criteria, such as factors, guidelines, and principles, which share traits with both rules and standards).

³⁵ See Kaplow, *supra* note 29, at 561–62; Sunstein, *supra* note 29, at 957–58; Schlag, *supra* note 31, at 384–89 (describing the “stereotyped arguments” about rules and standards in various contexts).

³⁶ See Kaplow, *supra* note 29, at 561–62; Sunstein, *supra* note 29, at 957–58.

Given those limits, and the inevitable difficulty of applying established logical forms in new contexts, even established legal rules and standards can be unstable. Over-and-over again, commentators, lawyers, and judges marshal familiar arguments in favor of each.³⁷ Typically, those favoring rules argue for stability, efficiency, and clarity; those favoring standards argue for adaptability, fairness, and practicality.³⁸ Over time—through the interpretive, adjudicative process—legal doctrines tend to shift between logical forms, depending on the context and the values at issue, from rule-like to standard-like, or vice versa.³⁹ Rules become more standard-like: when courts adopt unexpected interpretations to avoid seemingly undesirable outcomes; when multiple rules are subsumed under a broader standard in the name of restating the doctrine; and when specific rules are re-interpreted or restated as general standard-like goals and principles.⁴⁰ And standards become more rule-like: when courts learn to apply them and establish precedential landmarks; when multiple standards are rationalized or restated under a broad rule; and when standard-like descriptive terms become rule-like terms of art.⁴¹

The history of the federal appealability doctrines illustrates this tension and unresolved dialectic. When it comes to appealability, neither formal approach has prevailed.⁴² The competing goals of efficiency and fairness have given rise to a patchwork landscape of doctrines using both forms, with some doctrines appearing to embody both approaches at once. The major trans-substantive appealability

³⁷ Schlag, *supra* note 31, at 400 (describing the traditional “vices” and “virtues” arguments for and against rules and standards).

³⁸ *Id.* at 383–390; Kennedy, *supra* note 31, at 1687–1701.

³⁹ Dodson, *supra* note 30, at 19; Schlag, *supra* note 31, at 429.

⁴⁰ See Dodson, *supra* note 30, at 19; Schlag, *supra* note 31, at 429.

⁴¹ See Dodson, *supra* note 30, at 19; Schlag, *supra* note 31, at 429.

⁴² Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, *supra* note 15, at 424–25.

doctrines discussed below⁴³ can be compared on the rules-standards continuum. And most innovations in appealability—and most proposed reforms—have involved moving particular doctrines along the continuum, making them more rule-like or more standard-like.⁴⁴

1. *28 U.S.C. § 1291: the final-judgment rule*

Most accounts⁴⁵ of the federal appealability doctrines begin with the so-called “final-judgment rule” in 28 U.S.C. § 1291 which gives federal appeals courts jurisdiction to hear “appeals from all final decisions of the district courts.”⁴⁶ This foundational rule can be traced back to the Judiciary Act of 1789, which provided for appeals from federal trial courts’ “final decrees” and “final judgments”⁴⁷ (and which, itself, derived from the practice of English common law courts).⁴⁸ When

⁴³ In addition to the trans-substantive appealability doctrines discussed here, various subject-specific appealability doctrines apply in particular legal areas based on concerns particular to those kinds of cases. *See, e.g.*, 9 U.S.C. § 16(a)(1)-(3) (provisions of the Federal Arbitration Act (FAA) authorizing appeals from district court orders refusing arbitration, from “final decisions with respect to an arbitration,” and from orders “confirming,” “denying confirmation of,” or “modifying, correcting, or vacating an [arbitration] award”); 28 U.S.C. § 1453(c)(1) (authorizing discretionary appeals from rulings permitting removal under the Class Action Fairness Act); 28 U.S.C. § 1441(e)(3) (authorizing immediate appeals from district courts’ liability rulings in cases governed by the Multiparty, Multiforum Trial Jurisdiction Act (MMTJA) before the actions are remanded to state courts to determine damages); and 28 U.S.C. § 1292(a)(3) (authorizing immediate appeals from “interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.”).

⁴⁴ *See* Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, *supra* note 15, at 432–33.

⁴⁵ *See, e.g.*, §§ 3905–3914 Final-judgment rule, 15A Fed. Prac. & Proc. Juris. §§ 3905–3914 (2d ed.); Gregory A. Castanias, Robert H. Klonoff, *Federal Appellate Practice and Procedure in a Nutshell*, 71 (2d ed. 2017) (Ch. 4 “The Final-Judgment Rule”).

⁴⁶ 28 U.S.C. § 1291. Section 1291 also provides for particular cases where “direct review may be had in the Supreme Court.” *Id.*

⁴⁷ Act of Sept. 24, 1789, 1 Stat. 73, c.20, §§ 21, 22, 26.

⁴⁸ Wright & Miller § 3906 Finality—History, 15A Fed. Prac. & Proc. Juris. § 3906 (2d ed.). For unclear reasons, the first Judiciary Act applied this final decision

Congress created the circuit courts of appeals in 1891, it granted them appellate jurisdiction over those same final decrees, now called “final decision[s].”⁴⁹ Over time, what constitutes a “final decision” has become a complex question, giving rise to a number of other finality doctrines and quasi-doctrines. But the *idea* of the final-judgment rule—and its application to orders that end cases—is quintessentially rule-like: If an order is a final decision ending a case, then it is immediately appealable.

2. *True finality*

The most rule-like application of the final-judgment rule, sometimes called “true finality,”⁵⁰ is captured by the oft-cited formulation from *Catlin v. United States*: A final decision is “generally one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”⁵¹ Such “truly” final decisions are considered final under §1291, give rise to the right to appeal, and start the clock on the deadline for filing a notice of appeal under Appellate Rule 4(a).⁵² Subsequent cases have blurred the meaning of “nothing ... to do but execute the judgment,” so that a decision can be considered truly final even if some issues (like entitlement to attorney fees) remain to be decided.⁵³ But the application of the final-

requirement to case in both law and equity, even though English practice allowed for interlocutory appeals in equity courts. *Id.* See also Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L. J. 539, 540–544 (1931–1932).

⁴⁹ The Judiciary Act of 1891 (“Evarts Act”), Act of March 3, 1891, 26 Stat. 826m c. 517, § 6.

⁵⁰ Lammon, *supra* note 22.

⁵¹ *Catlin v. United States*, 324 U.S. 229, 233 (1945).

⁵² There are still open questions regarding whether certain other kinds of decisions should be considered are “truly final.” See Lammon *Finality* 30-36.

⁵³ Subsequent cases have held that decisions on the merits can be considered truly final even if they leave to be decided: attorneys’ fees claims (*Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988); *Ray Haluch Gravel v. Central Pension Fund*, 134 S. Ct. 773 (2014)); ministerial or technical damages calculations (Lammon, *Finality* 26-27); or the claims of other parties in an MDL case (*Gelboim v. Bank of America Corp.*, 135 S. Ct. 897 (2015)).

judgment rule to truly final orders operates with fairly rule-like clarity and predictability.

In the nineteenth century, the Court began to experiment with flexible interpretations of the final-judgment rule, giving rise to more standard-like doctrines allowing appeals from orders that—even though they do not come near the end of the case and do not resolve the merits of the case—could nonetheless be considered final-for-appeal under § 1291.⁵⁴

3. *Finality for appeal: hardship doctrine*

One of the earliest finality-for-appeal doctrines was developed to address the situation where a trial court order threatened an irreparable hardship by immediately conveying one party's property to another party.⁵⁵ The 1848 case *Forgay v. Conrad* held that an immediate appeal was permitted from a trial court order conveying property to an opposing party—even though the case was continuing for an accounting of the property so the order “[u]ndoubtedly [was] not final, in the strict, technical sense of that term.”⁵⁶ *Forgay* and the few later cases recognizing a similar finality-for-appeal doctrine based on irreparable hardship reasoned that an order compelling the immediate transfer of real property to an opposing party was final for appeal because it risked an immediate harm—the opposing party could execute immediately and quickly sell the property—that could not be remedied on appeal.⁵⁷

⁵⁴ See Lammon, *supra* note 22, at 1825.

⁵⁵ See generally § 3910 Finality—Hardship: Orders Transferring Property, 15A Fed. Prac. & Proc. Juris. § 3910 (2d ed.).

⁵⁶ *Forgay v. Conrad*, 47 U.S. 201, 203 (1848).

⁵⁷ *Id.* at __ (“[W]hen the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed”); *Thomson v. Dean*, 74 U.S. 342 (1869);

But the Court was decidedly wary of relaxing the rigidity of the final-judgment rule. In *Forgay* itself, the Court disapproved of the way the trial court had handled the question and expressed a preference for non-appealable interlocutory orders where “money is directed to be paid into court, or property to be delivered to a receiver, or property held in trust to be delivered to a new trustee appointed by the court, or to cases of a like description.”⁵⁸ And in two other cases decided the same day, the Court found seemingly similar orders nonfinal and unappealable. In *Perkins v. Fourniquet*, the Court held that an order declaring the parties’ rights to disputed property and referring the case to a special master for accounting was not final for appeal because the property was not actually transferred to the opposing party.⁵⁹ In *Pulliam v. Christian*—where the trial court had found that a deed transferring property to Pulliam as a trustee was a fraudulent conveyance, and had ordered Pulliam to deliver the property to the opposing party (an assignee in the bankruptcy) pending an accounting—the Supreme Court held the order was not final for appeal because there was “no sale or change of the property ordered which [could] operate injuriously to the parties.”⁶⁰ Subsequent cases have applied *Forgay*,⁶¹ or applied similar principles,⁶² depending on the specific circumstances. While *Forgay*’s irreparable-hardship finality-for-appeal doctrine remains alive in

Carondelet Canal & Nav. Co. v. Louisiana, 233 U.S. 362 (1914); *Radio Station Wow, Inc. v. Johnson*, 326 U.S. 120 (1945).

⁵⁸ *Forgay*, 47 U.S. at 204.

⁵⁹ *Perkins v. Fourniquet*, 47 U.S. 206 (1848).

⁶⁰ *Pulliam v. Christian*, 47 U.S. 209, 212 (1848).

⁶¹ See, e.g., *Radio Station Wow, Inc. v. Johnson*, 326 U.S. 120; Wright & Miller 15A Fed. Prac. & Proc. Juris. § 3910 (2d ed.) n.31 (collecting cases relying on *Forgay*).

⁶² See, e.g., *Carondelet Canal & Nav. Co. v. Louisiana*, 233 U.S. at 372–73 (finding “distinct and explicit finality” where a State court interlocutory order decided the federal rights of a canal company and required it to immediately transfer property, the canal, to the State). See, e.g., *Radio Station Wow, Inc. v. Johnson*, 326 U.S. 120; Wright & Miller 15A Fed. Prac. & Proc. Juris. § 3910 (2d ed.) n.32-34 (collecting cases that “reinvent” the *Forgay* doctrine or adapt other doctrines to accomplish the same ends, without relying on *Forgay* itself).

theory, its application has partially been overtaken by more specific doctrines.⁶³ As an ostensible application of § 1291's final-judgment rule, the *Forgay* hardship doctrine resembles a rule—but its case-specific contours exemplify how judge-created finality-for-appeal doctrines can operate as more standard-like relaxation of the final-judgment rule's clarity.

4. 28 U.S.C. § 1292(a)(1) and (2)

Toward the end of the nineteenth century, Congress stepped in with a novel approach⁶⁴ to correcting the perceived harshness of the final-judgment rule, drafting new rule-like appealability doctrines, which are often described as exceptions to the final-judgment rule. When creating the circuit courts of appeal in 1891,⁶⁵ Congress passed the first version of 28 U.S.C. § 1292, granting the circuit courts appellate jurisdiction over immediate appeals from a trial court “order or decree granting or continuing [an] injunction.”⁶⁶ This new rule for injunctions was motivated by the same recognition motivating the courts' experimentation with finality-for-appeal standards, that “rigid application” of the final-judgment rule “create[d] undue hardship in some cases” when injunctions would have immediate effects.⁶⁷ Over time, the rule was modified for similar reasons, and the current incarnation, 28 U.S.C. § 1292(a)(1), covers orders “granting, continuing, modifying,

⁶³ The irreparable hardship doctrine has largely been supplanted by the collateral order doctrine, along with Rule 54(b) and the statutory exceptions in 28 U.S.C. § 1292(a), but it may still have some continued vitality. *See generally* Wright & Miller 15A Fed. Prac. & Proc. Juris. § 3910 (2d ed.).

⁶⁴ *See Dreutzer v. Frankfort Land Co*, 65 F. 642, 644 (6th Cir. 1895) (noting that § 7 of the Act of 1891, the predecessor to § 1292[a][1], “introduced into federal appellate procedure a novelty”).

⁶⁵ The Judiciary Act of 1891 (“Evarts Act”), Act of March 3, 1891, 26 Stat. 826, § 6.

⁶⁶ The Judiciary Act of 1891 (“Evarts Act”), Act of March 3, 1891, 26 Stat. 826, § 7.

⁶⁷ *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 (1981); *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181 (1955) (“No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence.”).

refusing or dissolving injunctions.”⁶⁸ A similar process⁶⁹ and similar reasons⁷⁰ led Congress in 1900 to pass the precursor⁷¹ to 28 U.S.C. § 1292(a)(2), which now grants appellate jurisdiction over interlocutory decisions orders “appointing *receivers*, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property.”⁷² As with the final-judgment rule itself, the specific categories of orders to which § 1292(a) applies (which orders sufficiently involve injunctions and receiverships) can be difficult to ascertain; but in that 1292(a)(1) and (2) define specific kinds of orders that are immediately appealable, without any discretion left to the courts, they are more rule-like doctrines.

5. *Rule 54(b)*

In 1932, Carleton M. Crick wrote an influential article calling into question the utility and efficiency of the final-judgment rule and arguing for giving “the appellate court” “completely discretionary power as to the cases it will review.”⁷³ Without going quite so far, the adoption of the Federal Rules of Civil Procedure in

⁶⁸ 28 U.S.C. § 1292(a)(1). For more detailed history of the revisions to § 1292(a)(1), see *Carson v. American Brands, Inc.*, 450 U.S. at 83 n.8; *Stewart-Warner Corp. v. Westinghouse Elec. Corp.*, 325 F.2d 822, 829–30 (2d Cir. 1963) (Friendly, J. dissenting).

⁶⁹ For legislative history, see Wright & Miller § 3925 Receivership Appeals, 16 Fed. Prac. & Proc. Juris. § 3925, n.1 (3d ed.).

⁷⁰ Wright & Miller § 3925 Receivership Appeals, 16 Fed. Prac. & Proc. Juris. § 3925 (3d ed.) (“The purpose of allowing interlocutory appeals from [receivership] orders is similar to the purpose underlying injunction appeals.”)

⁷¹ Act of June 6, 1900, c. 620, 31 Stat. 660. Before it was codified as part of § 1292, the precursor rule appeared in Section 129 of the Judicial Code of 1911, which provided: “Where, upon a hearing in a district court, or by a judge thereof, in vacation..., an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals.”

⁷² 28 U.S.C. § 1292(a)(2) (emphasis added).

⁷³ Crick, *supra* note 48, at 564.

1938 marked a new approach to appealability, a trend toward proceduralizing appealability questions and developing new doctrines aimed not only at *what* would be appealable but at *how* courts decided appealability questions.

The new Rules included liberal joinder provisions allowing federal courts to hear more complex, multi-claim cases.⁷⁴ Because more complex cases would take longer and involve more parties and more interlocutory decisions, the rulemakers felt that a more liberal appealability doctrine was needed.⁷⁵ The solution was Rule 54(b).⁷⁶ In its first incarnation, Rule 54(b) authorized district courts to enter appealable partial final judgments, if they found that an interlocutory ruling decided “the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim.”⁷⁷ This, for the first time, gave the district courts explicit authority to determine whether a given interlocutory order should be considered final and appealable.

That original version of Rule 54(b) proved unworkable because it was hard to tell which issues were sufficiently “material to a particular [decided] claim”—and sufficiently separate from other undecided issues and claims—to warrant immediate appeal.⁷⁸ It was too fuzzy a standard for easy adjudication. But a strict bright-line rule would not achieve the flexibility that was the original impetus for the Rule. Therefore, in 1946, the rulemakers amended the Rule to clarify that district courts could enter appealable partial final judgments only when an interlocutory ruling decided “one or more but less than all of the claims,” and only if

⁷⁴ Fed. R. Civ. P. 54, advisory committee’s note (1946).

⁷⁵ Fed. R. Civ. P. 54, advisory committee’s note (1946) (“Rule 54(b) was originally adopted in view of the wide scope and possible content of the newly created “civil action” in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case.”).

⁷⁶ *Id.* Rule 54(b) was actually promulgated and amended pursuant to the Supreme Court’s general rulemaking authority, before the 1990 enactment of 28 U.S.C. § 2072(c) which would seem to specifically authorize it. *See* Fed. R. Civ. P. 54(b), Advisory Committee Notes 1946, 1961.

⁷⁷ Sears, Roebuck at 432-33 (quoting Fed. R. Civ. P. 54(b) (1939)).

⁷⁸ Fed. R. Civ. P. 54, advisory committee’s note (1946).

the district court made a separate, explicit determination that there was “no just reason for delay” in entering judgment.⁷⁹ The new version broke the appealability inquiry into two steps, providing initial rule-like clarity (was a claim decided?) while preserving room for case-by-case standard (is there a just reason for delay?) answerable to the needs of justice.

6. *Finality for Appeal: collateral order doctrine*

Around the same time, the Supreme Court developed a new finality-for-appeal doctrine, the collateral order doctrine, which applies to a supposedly “small class” of orders that qualify as “final decisions” under § 1291, even though they do not end (or even come near the end of) the litigation.⁸⁰ The Court first recognized the collateral order doctrine in 1949 in *Cohen v. Beneficial Industrial Loan Corp.*, where it held that § 1291’s finality requirement must be given a “practical rather than a technical construction.”⁸¹ There the Court described collateral orders as: “that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.”⁸²

Since *Cohen*, the Court has applied the doctrine many times, most often in cases allowing a government defendant to appeal immediately from an order denying the defendant’s claim of immunity.⁸³ The original formulation of the

⁷⁹ *Id.* (quoting Fed. R. Civ. P. 54(b)). Rule 54(b) was amended again in 1961 to clarify that it applies when a court disposes of a *party* in a multi-party case, just as it applies when a court disposes of a *claim* in a multi-claim case. Fed. R. Civ. P. 54 Notes of Advisory Committee on Rules—1961 Amendment.

⁸⁰ *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

⁸¹ *Id.* at 546–547.

⁸² *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)

⁸³ *See Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (absolute immunity); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144–45 (1993) (state sovereign immunity); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity). The Court has reasoned that immune government defendants are immune from *suit*, not just from liability, and that immunity cannot be effectively

collateral-order doctrine in *Cohen* resembled a standard, a “practical” release valve from the strict application of the final-judgment rule, asking whether a given order was “too important” and “too independent” from the rest of the case to defer review.⁸⁴ And that is how it was first applied.⁸⁵ Over time, the doctrine was “distilled” into something more like a bright-line rule with required elements.⁸⁶ As articulated by the Court in *Coopers & Lybrand* in 1978, to be appealable under the collateral order doctrine, “the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.”⁸⁷ And it remains difficult to classify the collateral-order doctrine as either a rule or a standard.⁸⁸

protected by an appeal after the defendant has already been compelled to defend the litigation. *Id.* For that same reason, the Court has applied the collateral order doctrine to orders denying a criminal defendant’s double-jeopardy defense. *Abney v. United States*, 431 U.S. 651, 660 (1977).

⁸⁴ See Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, *supra* note 15, at 449. Lloyd C. Anderson, *The Collateral Order Doctrine: A New Serbonian Bog and Four Proposals for Reform*, 46 *DRAKE L. REV.* 539 (1997–1998).

⁸⁵ Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, *supra* note 15, at 449.

⁸⁶ *Will v. Hallock*, 546 U.S. 345, 349 (2006) (“The requirements for collateral order appeal have been distilled down to three conditions...”)

⁸⁷ *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978); See *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). See also *Johnson v. Jones*, 515 U.S. 304, 310–311 (1995) (observing that *Coopers & Lybrand* “restated *Cohen*” to include three distinct “requirements”); *Mohawk Indus.*, 558 U.S. at ___ (describing the “narrowing” of the collateral order doctrine) (Thomas, J., concurring); Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, *supra* note 15, n. 125 (quoting cases).

⁸⁸ 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, 1572 (2000) (“The collateral order doctrine is something of a hybrid: it is standardlike in determining whether the criteria of the doctrine have been met, but it yields a rule, as a certain class of orders thereafter always becomes appealable.”)

7. *28 U.S.C. § 1292(b)*

Section 1292(b)—first enacted in The Interlocutory Appeals Act of 1958—is another Congressional enactment that, like Rule 54(b), takes a two-step proceduralizing approach to allow discretionary appeals of certain interlocutory orders. Once again, Congress tried to ameliorate judicial concerns about the need for flexibility to alleviate the strict application of the final-judgment rule.⁸⁹ Under § 1292(b), a district court can permit the immediate appeal of an interlocutory order by certifying that it is “of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.”⁹⁰ Because the appellate court can review and reverse that certification decision, 1292(b) appeals are actually doubly discretionary—both the district court and the appellate court have the discretion to decide whether the order meets the standard.⁹¹

Section 1292(b) is very standard-like, requiring courts to consider fuzzy factors including whether the question of law is “controlling,” whether there are “substantial” grounds for disagreement on it, and whether an immediate appeal will

⁸⁹ “This statute, 28 U.S.C.A. § 1292(b), was recommended by the Judicial Conference of the United States as a compromise between those who opposed any broadening of interlocutory review and those who favored giving the appellate courts discretion to entertain any interlocutory appeal they wished regardless of certification by the trial judge.” § 109 Review of Interlocutory Orders, 20 Fed. Prac. & Proc. Deskbook § 109 (2d ed.). See *Hadjipateras v. Pacifica, Sa*, 290 F.2d 697, 702–703, n.12 (Court of Appeals, 5th Circuit 1961) (noting that § 1292[b] “was a judge-sought, judge-made, judge-sponsored enactment,” and describing the legislative history).

⁹⁰ 28 U.S.C. § 1292(b).

⁹¹ *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475, 98 S. Ct. 2454, 2461, 57 L. Ed. 2d 351 (1978) (superseded by rule on other grounds) (“[E]ven if the district judge certifies the order under § 1292(b), the appellant still has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.”) (quotation marks and citation omitted).

“materially” advance the end of the litigation.⁹² The appellate court then applies its own discretionary standard when deciding whether to hear an order the district court has certified.⁹³ The appellate court can both review the district court’s certification decision and decide *de novo* whether the issue should be immediately appealable.⁹⁴ When doing the former, the appellate court re-applies the standard applied by the district court. When doing the latter, the court applies an even more discretionary standard of whether “exceptional circumstances” warrant an immediate appeal, and it can decide not to allow the appeal for any reason including concerns about its own docket congestion.⁹⁵ Perhaps to mitigate against the highly discretionary, standard-like nature of § 1292(b), the doctrine does incorporate some bright-line rules and procedural hurdles: the district court’s certification is absolutely required; the time for filing the petition for appeal after receiving the certification is short (10 days); and the district court order declining to certify a decision for appeal is not, itself, appealable.⁹⁶ And various courts have held that certain kinds of discretionary orders are categorically not appealable under § 1292(b).⁹⁷

8. *Finality for Appeal: Gillespie Doctrine*

In 1964, in the case of *Gillespie v. U.S. Steel Corp.*, the Court took another swing at finality-for-appeal, a big swing.⁹⁸ The case involved tort claims by the mother of a deceased sailor under state law and the federal Jones Act (which

⁹² 28 U.S.C. § 1292(b).

⁹³ *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 883, n.9 (1994).

⁹⁴ *Id.*

⁹⁵ *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (“[E]ven if the district judge certifies the order under § 1292(b), the appellant still has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.”) (quotation marks and citation omitted). *Id.*

⁹⁶ See § 109 Review of Interlocutory Orders, 20 Fed. Prac. & Proc. Deskbook § 109 n. 56 (2d ed.).

⁹⁷ See *id.*

⁹⁸ *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).

permits seamen and their survivors to recover in federal court).⁹⁹ When the trial court dismissed all but the Jones Act claim, she immediately appealed, even though the case was not over.¹⁰⁰ The appellate court did not answer whether the decision was final and appealable, but the Supreme Court held that it was.¹⁰¹ The Court reiterated that “‘final’ within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case,”¹⁰² that “whether a ruling is ‘final’ within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the ‘twilight zone’ of finality.”¹⁰³ Emphasizing again that “the requirement of finality is to be given a ‘practical rather than a technical construction,’”¹⁰⁴ the Court held the decision was immediately appealable. The decision was not appealable under Rule 54(b) (the claims were not severable), the collateral order doctrine (the issue was not separate from the merits), or § 1292(b) (the trial court had not certified it for appeal).¹⁰⁵ But the Court relied on the practical justifications motivating those three doctrines because, under the circumstances (including the sunk costs of already having appealed all the way to the Supreme Court), the benefits of an immediate appeal (answering a “fundamental” question in the case) outweighed the costs (the chance of a second appeal after final judgment).¹⁰⁶ *Gillespie’s* practical, context-specific, cost-benefit balancing approach was the high-water mark for case-by-case standard-like

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 151–152 (quoting *Cohen*, 337 U.S. at 545).

¹⁰³ *Id.* at 152.

¹⁰⁴ *Id.* at 151–152 (quoting *Cohen*, 337 U.S. at 546).

¹⁰⁵ *Id.* at 152–154.

¹⁰⁶ *Id.*

appealability doctrines.¹⁰⁷ But the Court backed away from it later, apparently limiting its holding to its specific facts.¹⁰⁸

9. *Rule 23(f)*

Also starting in the 1960s, courts of appeal began to try out a new finality-for-appeal doctrine: the “death-knell doctrine” allowing immediate appeals from orders granting or denying class certification in class action cases.¹⁰⁹ After the 1966 amendment to Rule 23 established procedures for class certification, courts began to recognize that certification grants and denials often led to the end of the entire case—because grants tended to spur settlement and denials prompted plaintiffs to drop their cases.¹¹⁰ Either way, the certification decision often sounded the “death knell” for the case, but did not result in an appealable judgment.¹¹¹ So the courts developed a “death knell doctrine,” allowing for discretionary immediate appeals when a class-certification order would likely induce a party to give up before final judgment.

In a now familiar pattern, the Supreme Court put a stop to this alteration of the final-judgment rule. Emphasizing that the costs to systemic efficiency (“the impact of such an individualized jurisdictional inquiry on the judicial system’s overall capacity to administer justice”) “outweighed” the benefits of individual fairness (“enhanc[ing] the quality of justice afforded a few litigants”), the Court held such orders unappealable.¹¹² Instead, the Court urged courts to use their discretion under § 1292(b) to permit interlocutory appeals of class certification orders.¹¹³

¹⁰⁷ Lammon, *Dizzying Gillespie*, *supra* note 15, at 382.

¹⁰⁸ *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n.30 (1978).

¹⁰⁹ 15A Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Juris.* § 3912 (3d ed.)

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Coopers & Lybrand*, 437 U.S. at 473.

¹¹³ *Id.* at 473–475.

Using § 1292(b), however, proved ineffective (perhaps because of the requirement to obtain trial court certification before the appeal). And the Court used its rulemaking power¹¹⁴ in 1998 to create Rule 23(f) allowing parties to petition for immediate appeal from class certification orders.¹¹⁵ Rule 23(f) is not a rule that class certification orders are immediately appealable. It merely permits a party to ask the appellate court to apply a discretionary standard to allow an appeal. The rules committee emphasized that Rule 23(f) gives the courts of appeals “sole,” “unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari.”¹¹⁶ In deliberate contrast to § 1292(b), the committee chose not to require district court approval of the appeal or that the decision involve an “involve 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.”¹¹⁷ Although the committee expected the courts of appeals to develop appealability standards to guide their discretion, it did not impose any.¹¹⁸

¹¹⁴ In the 1990s, Congress granted the Supreme Court explicit rulemaking authority to make previously unappealable orders appealable. First, in 1990, Congress amended the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, to authorize the Court to adopt rules “defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291.” § 2072(c). Then, in 1992, Congress further authorized the Court to prescribe rules allowing appeals from “interlocutory decision[s]” under § 1292. 28 U.S.C. § 1292(e) (“The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).”); Federal Courts Administration Act of 1992, PL 102–572, October 29, 1992, 106 Stat 4506.

¹¹⁵ Fed. R. Civ. P. 23(f).

¹¹⁶ Fed. R. Civ. P. 23 committee note to 1998 amendment.

¹¹⁷ Fed. R. Civ. P. 23 committee note to 1998 amendment.

¹¹⁸ Fed. R. Civ. P. 23 committee note to 1998 amendment. The committee suggested some considerations (whether a certification order would end a particular case and whether the case presented novel questions). *Id.* The courts have largely followed those suggestions, while developing their own variations on the standard to apply. See 116 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Juris. § 3931.1 (2d ed.) at n. 9, 14.

Since adopting Rule 23(f) in 1998, the Court has not exercised its rulemaking power either to “define when a ruling of a district court is final for the purposes of appeal under section 1291”¹¹⁹ or to allow appeals from new types of “interlocutory decisions” under § 1292.¹²⁰ But it has relied on that rulemaking authority to regularize the finality doctrines in two ways. First, it has declared a moratorium on courts creating new finality doctrines through case law.¹²¹ Instead, the Court has provided that any new finality or appealability doctrines must be created through rulemaking.¹²² Second, it has issued a categorical imperative, forbidding judges from applying existing finality-for-appeal doctrines, like the collateral order doctrine, on a case-by-case basis. Judges must not make an “individualized [appellate] jurisdictional inquiry” based on the “particular injustices” in a specific case.¹²³ Instead, the Court has declared, judges “must ... determine[]” finality-for-appeal “at a higher level of generality” based on “the entire category to which a claim belongs.”¹²⁴

C. The Rules-Standards Continuum and the Persistent Problem of Finality

This brief history suggests that over time appealability doctrines shift back-and-forth between rule-like and standard-like doctrines. When legislators and rulemakers feel the need for greater predictability and efficiency, they enact more

¹¹⁹ 28 U.S.C. § 2072(c).

¹²⁰ 28 U.S.C. § 1292(e).

¹²¹ *Swint v. Chambers County Com’n*, 514 U.S. 35, 48 (1995) (“Congress’ designation of the rulemaking process as the way to define or refine when a district court ruling is ‘final’ and when an interlocutory order is appealable warrants the Judiciary’s full respect.”).

¹²² *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1714 (2017) (“These changes are to come from rulemaking, however, not judicial decisions in particular controversies or inventive litigation ploys.”).

¹²³ *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009); *Digital Equip. Corp. v. Desktop Direct Inc.*, 511 U.S. 863, 876-77 (1994); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988).

¹²⁴ *Id.*

rule-like doctrines, like 28 U.S.C. § 1292(a)(1)-(2). When they feel the need for greater flexibility, they enact more standard-like doctrines, like 28 U.S.C. § 1292(b). And courts do the same thing. When they feel the need for greater predictability and efficiency, courts interpret doctrines more formalistically as strict rules, as when the Supreme Court limited the reach of the hardship doctrine.¹²⁵ But when they feel the need for greater flexibility or individual fairness, courts interpret doctrines more loosely, as when the Supreme Court first recognized the collateral order doctrine.¹²⁶

The consensus among commentators and courts is that the resulting system of federal appealability doctrines is a jumble of unsatisfactory solutions to the recurrent problems of how many, and which, appeals to allow. The criticisms, complaints, and pejorative descriptions of the system are well-documented and too numerous to repeat here.¹²⁷ But one result of all this shifting between rules and standards is that the various appealability doctrines seem to exist along a continuum. Few of the appealability doctrines are either pure rules or pure standards. But different doctrines have more-rule-like or more standard-like characters. Very broadly speaking: The earlier statutes and rules—the original, strict version of the final-judgment rule, and § 1292(a)—tend to be more rule-like. The 20th century statutory and rulemaking innovations—§ 1292(b), Rule 54(b), and Rule 23(f)—tend to be more standard-like. And the judicially created finality-for-appeal doctrines interpreting § 1291 tend to be somewhere in-between.

The variable nature of the idea of finality under § 1291 has caused much judicial dissatisfaction. Ironically, that dissatisfaction leads to more innovative judicial interpretations, because crafting novel interpretations of § 1291 is one of the only tools available for judges to alter appealability standards.¹²⁸ As early as the

¹²⁵ *Perkins v. Fourniquet*, 47 U.S. 206 (1848); *Pulliam v. Christian*, 47 U.S. 209 (1848).

¹²⁶ *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

¹²⁷ *See Steinman, supra* note 2, at 1238–39.

¹²⁸ *Lammon, supra* note 22, at 1818.

mid-nineteenth century, courts were already reinterpreting the final-judgment rule to make it more standard-like when they found it too constraining.¹²⁹ Over time, courts have (sometimes aggressively) reshaped the idea of finality, moving it along the rule-standard continuum to respond to perceived needs of the time. Sometimes they sought to create more standard-like flexibility; sometimes they aimed for more rule-like clarity; and sometimes they just needed more than the vague phrase “final decisions” to decide novel appealability questions. The confusion this caused was apparent. Over a century ago, the Court lamented that “[p]robably no question ... has been the subject of more frequent discussion in this court than the finality of decrees.”¹³⁰

Some of the variation in the meanings of “finality” and “final decision” is due to the different purposes to which those terms are put in different legal contexts.¹³¹ Even for the limited purpose of deciding appealability under § 1291, finality has multiple meanings: “Final decision” can refer to the formal final judgment, a separate document entered at the end of a case, by which the district court separates itself from the case, based on the traditional meaning, inherited it from English common law. Or “final decision” can refer to the “true finality”¹³² decisions:

¹²⁹ See *Forgay v. Conrad*, 47 U.S. 201 (1848).

¹³⁰ *McGourkey v. Toledo & Ohio Central R. Co.*, 146 U.S. 536, 544-545 (1892). In 1892, the Court referred to the question of finality as a “question of equity practice,” *id.*, but it repeated the lament well after the adoption of the Federal Rules of Civil Procedure abolished separate courts of equity and tried to impose some order on the question of appealability. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950).

¹³¹ The idea of finality has different meanings in contexts other than appealability. In the *habeas* context, a decision is not “final” until “the conclusion of direct [appellate] review or the expiration of the time for seeking such review. 28 U.S. C. § 2244. Finality under § 1291 is a consideration in determining the *scope* of review after an interlocutory appeal. See Lammon, *supra* note 22, at 1844–50. The “final judgment” necessary for a decision to have preclusive effect is related to, but not identical with, the “final judgment” necessary for an appeal. See Wright & Miller § 4432 Finality—Traditional Requirement, 18A Fed. Prac. & Proc. Juris. § 4432 (3d ed.).

¹³² Lammon, *supra* note 22.

decisions made near the end of a case, that decide the merits of the case “and leave[] nothing for the court to do but execute the judgment” (and decide ancillary issues like attorney fees).¹³³ Or, in a third sense, “final decision” can describe decisions that are final-for-appeal: decisions that come well before the end of trial, do not decide the merits of the case, and leave more for the court to decide, but that are nonetheless considered appealable under one of the judge-made doctrines interpreting § 1291.

Incorporating those different ideas of finality, the rule-standards continuum looks something like Figure 1.



Figure 1. Rules-Standards Continuum of Appealability Doctrines

Dividing the idea of finality into separate context-specific meanings has not achieved rule-like clarity. Even within a given context, it is hard to know what, exactly, is meant by “final.” Two recurrent complaints arise, both captured in Justice Black’s famous observation in *Gillespie v. U.S. Steel Corp.*:

whether a ruling is ‘final’ within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and . . . it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the ‘twilight zone’ of finality.¹³⁴

In other words, finality is hard to define, and its boundaries are fuzzy.

¹³³ *Catlin v. United States*, 324 U.S. 229, 233 (1945).

¹³⁴ *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964) (quoted in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 n.9 [1974]).

Finality resists definition. The Supreme Court has recognized that its finality decisions do not give rise to a coherent, usable definition: “No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future.”¹³⁵ In another famous complaint, Judge Jerome Frank observed that “‘Final’ is not a clear one-purpose word; it is slithery, tricky. It does not have a meaning constant in all contexts.”¹³⁶

Finality has fuzzy boundaries. The Supreme Court has also acknowledged (usually when relaxing the strict final-judgment rule in favor of a more practical standard) that, whatever the definition of finality, its borders are unclear. Justice Black pointed out in *Gillespie* the recurring “marginal cases coming within what might well be called the ‘twilight zone’ of finality.”¹³⁷ And Justice Frankfurter noted in *Radio Station WOW* that “even so circumscribed a legal concept as appealable finality has a penumbral area.”¹³⁸

As explained above, the Supreme Court has recently moved to cabin the indeterminacy and the spread of the finality doctrines in two ways: barring judges from creating new finality doctrines through case law;¹³⁹ and requiring judges to apply existing finality-for-appeal doctrines on a categorical basis.¹⁴⁰ Despite the Court’s efforts to restrain further judicial innovation, history has shown that parties and judges cannot resist the allure of flexibility and will find ways to push at the boundaries of any definition.¹⁴¹ And what counts as final is difficult to reduce to a

¹³⁵ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974)

¹³⁶ *United States v. 243.22 Acres of Land in Town of Babylon, Suffolk Cty., N.Y.*, 129 F.2d 678, 680 (2d Cir. 1942) (citations omitted).

¹³⁷ *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964)

¹³⁸ *Radio Station WOW v. Johnson*, 326 U.S. 120, 124–26 (1945).

¹³⁹ *Swint v. Chambers County Com’n*, 514 U.S. 35, 48 (1995); *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1714 (2017).

¹⁴⁰ *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009)

¹⁴¹ Lammon, *Dizzying Gillespie*, *supra* note 15.

clearly defined category. Deciding whether an order is final is less like asking, “is 7 a prime number?” than like asking “is a hot dog a sandwich?”¹⁴²

The category of final decisions is undefined and fuzzy—but that does not mean that it is entirely amorphous. Unlike Justice Potter Stewart who—when confronted with a category that he “perhaps could never succeed in intelligibly” defining—famously declared “I know it when I see it,”¹⁴³ we can begin to sketch out some models that give shape to the concept of finality.

II. Conceptual Categories and Legal Thought

This section begins by explaining the importance of categorization and category-formation to the question of appealability. It then introduces category and concept theory from cognitive psychology and places it in the context of legal thought as a way of understanding the particular categorization concerns underlying appealability.

A. The Appealability Categorization Question

Although we normally think of “categorical rules” and “case-by-case standards,” that nomenclature can be misleading. Appealability doctrines, both rules and standards, operate categorically in that they each apply only to a particular category of cases.¹⁴⁴ For example, the final-judgment rule consists of a rule permitting an immediate appeal, but it only applies to orders categorized as

¹⁴² Distinguished jurists disagree on this crucial categorization question. *Compare Ruth Bader Ginsburg tells Stephen Colbert that hot dogs are sandwiches – CNNPolitics*, <https://www.cnn.com/2018/03/22/politics/ruth-bader-ginsburg-stephen-colbert-workout/index.html> (Ginsburg, J. opining that hot dogs are sandwiches); *with Judge John Hodgman Ep. 182: Clearing the Docket | Maximum Fun*, <https://www.maximumfun.org/judge-john-hodgman/judge-john-hodgman-ep-182-clearing-docket> (“Hodgman, J.” opining that hot dogs are not sandwiches).

¹⁴³ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”)

¹⁴⁴ See *Mark L. Johnson, Mind, Metaphor, Law Symposium: Using Metaphor in Legal Analysis and Communication*, 58 *MERCER L. REV.* 845 (2006–2007).

final decisions. And Rule 23(f) use a discretionary standard for deciding appealability, but it only applies to class certification orders.

In other words, appealability doctrines implicate not only the question of logical form (rule or standard?) but also an antecedent categorization question (what category of decisions is subject to the doctrine?). When formulating an appealability doctrine, rulemakers and courts must consider both questions: First, which *kinds* of orders should be eligible for immediate appeal? Second, *how* should courts decide whether a decision is appealable? Likewise, when judges apply an existing appealability doctrine, they must make two separate inquiries: First, to what category of decisions does the doctrine apply? And, second, under the appropriate rule or standard, is it appealable?

The two questions are not always explicit. Courts often seem to skip one or to conflate them, usually because the outcome is obvious or presumed. For doctrines employing bright line rules, the rule itself is easily applied, and the difficult analysis actually happens at the preliminary categorization step. (It is easy to apply the rule that all final decisions are appealable; it is harder to know what counts as a final decision.) For doctrines employing malleable standards, the categorization step can be simple, while the case-by-case decision-making can be more difficult. (It is easy to identify a class certification order; it is harder to apply a discretionary standard to decide if it's appealable.) When it comes to analyzing the nature of appealability doctrines, the choice between rules and standards discussed above has received more attention from commentators than the antecedent categorization question, despite its importance to the appealability process and policy.

The Court has long emphasized that appealability decisions require applying doctrines that apply to categories of cases. And with the categorical imperative, it has deprecated the exercise of case-by-case discretion to decide finality for appeal. The Court first observed that statutes written by Congress must “necessarily” be drawn “in terms of categories.”¹⁴⁵ That makes sense since most Congressional

¹⁴⁵ Carroll v. United States, 354 U.S. 394, 405 (1957).

enactments are not directed at the circumstances of individual cases but rather set the rules by which certain kinds of cases may proceed.

But the Court has further decreed that even judges applying a finality-for-appeal doctrine must “of course decide appealability for categories of orders rather than individual orders.”¹⁴⁶ Judges must not “in each individual case engage in ad hoc balancing to decide issues of appealability”¹⁴⁷—they “must ... determine[it] at a higher level of generality.”¹⁴⁸ Rather than making an “individualized [appellate] jurisdictional inquiry” based on “particular injustices” in a specific case, judges must focus on “the entire category to which a claim belongs.”¹⁴⁹ That is to say, a judge must not only decide whether an order fits into the Congressionally-drawn category of “final decisions,” she must first consider the entire category to which that order belongs, and then decide whether that category of orders fits into the final-decision category.

The antecedent categorization question implicates the same policy concerns as the logical form question about the choice between rules and standards. As discussed above, bright-line appealability rules tend to be systemically more efficient, but flexible appealability standards tend to be fairer in individual cases. The same can be said of the categorization inquiry, in at least two ways. To begin with, as a purely numerical matter: having fewer categories of immediately appealable orders tends to be more efficient because it tends to decrease the number of appeals and thus decrease overall litigation costs and judicial workload—but

¹⁴⁶ *Johnson v. Jones*, 115 S.Ct. 2151, 2157 (1995).

¹⁴⁷ *Johnson v. Jones*, 1995, 115 S.Ct. 2151, 2157 (1995).

¹⁴⁸ *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (*quoting* *Digital Equip. Corp. v. Desktop Direct Inc.*, 511 U.S., at 868, 876-77 *and* *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988)).

¹⁴⁹ *Id.* (*quoting* *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473 (1978) *and* *Digital Equipment*, 511 U.S., at 868).

having more categories tends to be fairer in individual cases because it tends to increase the opportunities for error correction.¹⁵⁰

More interestingly, it also makes a difference *how* the categories are determined or constituted. Categories are not fixed or stable things. Having clearly defined categories of immediately appealable orders is systemically more efficient because it tends to decrease the costs of litigating each appealability question—but having flexibly described categories is fairer in individual cases because it allows for more particularized decision-making.¹⁵¹

Recognizing a preliminary categorization step in the appealability process sheds some light on the rule-standards taxonomy. Instead of trying to classify all the doctrines as either bright-line rules or fuzzy standards, we can direct our attention to the kind of analysis at each step. Understanding the antecedent categorization question means building on the rules-standards continuum to theorize how judges conceptualize categories.

The next section (B) provides a framework for theorizing legal categorization questions by describing modern cognitive psychology theory about mental category-creation and concept modelling. And Section C then describes how such category-formation figures into legal reasoning. Those discussions pave the way to return to a discussion of appealability doctrines in Section III, where I propose that, by considering both their formal (rules-standards) and their categorical dimensions, we

¹⁵⁰ As with the rules-vs-standards debate, these tendencies are not absolute. Experience has shown, for example, that limiting appeals only to a single category of decisions (final judgments) would probably give rise to so many reversals that it would be less efficient than allowing at least some other categories of orders to be immediately appealed.

¹⁵¹ This seems to be the general presumption, but it is not necessarily always true and has not been empirically verified. *See*, Lammon, *supra* note 40, at 433 (noting that commentators proposing solutions disagree about the effects of various reforms on appellate workloads). Whether it holds true likely depends on context and different kinds of decisions may be more amenable to more classically-defined categories or more conceptually constituted categories, as discussed below.

can classify and understand the appealability doctrines and the question of finality better.

B. Cognitive Category Theory and Concept Models

Cognitive psychology uses concept theory to explain how people understand categories.¹⁵² Psychologists have shown experimentally that (1) we rely on categorical thinking to organize and structure our lives,¹⁵³ and (2) we do not understand most categories in everyday life by applying formal rules with necessary-and-sufficient elements.¹⁵⁴ Nor, for the most part, do we use standard-like general principles or lists of abstract factors. Instead, we use mental models to conceptualize categories. Using quintessential members of a category as central anchors, we create conceptual models with radial structures. And we use those radial models to identify other category members based on their similarity to (or difference from) those prototypes and exemplars.¹⁵⁵

¹⁵² See WINTER, *supra* note 17, at 69; GREGORY MURPHY, THE BIG BOOK OF CONCEPTS (2004); Gregory Murphy, *What Are Categories and Concepts?*, in THE MAKING OF HUMAN CONCEPTS 11 (Denis Mareschal et al. eds., 2010).

¹⁵³ WINTER, *supra* note 17, at 69.

¹⁵⁴ Cognitive psychologists continue to debate and design experiments to uncover the origins of cognitive categories. Some see them as biological or evolutionary in origin. Some see them as mental structures that metaphorically represent embodied realities. But even without a single unifying explanation, cognitive psychologists have constructed models that illuminate how we form, understand, and manipulate conceptual categories. *Id.* at 77–84 (describing structural, neurological, and cross-cultural bases for concept models); MURPHY, BBOC, *supra* note 152, at ___; Murphy, *What Are Categories and Concepts?*, *supra* note 152 [TK - other essays in the same volume]. Whatever their origins, conceptual categories seem fundamental to human thought, and the concept models psychologists use to describe them are useful in understanding legal categorization, as well.

¹⁵⁵ The two radial models discussed below (the prototype and exemplar models) are based on similarity. These are not the only concept models cognitive psychologists have identified. We also use concept models based on, for example, metaphoric, metonymic, and gestalt relationships—and we combine those models into more complex structures and chains of categorization Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, STANFORD LAW REVIEW 1371, 89 (1988). For the reasons discussed below, prototype and exemplar models are the

To lay the groundwork, let us define some terms. What do cognitive psychologists mean when they talk about “categories” and “concepts?” A *category* is a set of items (objects, ideas, people) that are “equivalent for some purpose,” that we treat “equivalently in one or another respect.”¹⁵⁶ Categories are sets of things in the world. For example, “Dogs” is a category. We treat all of the items (animals) in the category “Dogs” equivalently in that we: use the word “dog” to refer to them; consider them suitable pets in Western society; require them to be registered with the city; etc.

Psychological categories are crucial to how people interact with the world. Whenever we say or think “X is a Y” (“Fido is a dog”), we are making a categorical observation that “X is in the category of Ys” (“Fido is in the category of Dogs”). That categorical observation dictates how we treat Fido. And similar categorical observations dictate how we treat everything and everyone in the world. Only by categorizing disparate items together are we able to treat them as “equivalent for some purpose.” For that reason, as discussed below, working with categories is central to the operation of law. Treating disparate things as equivalent for some purpose—treating “like cases alike”—is one of the fundamental principles of a just legal system.¹⁵⁷

In theory, there is no limit on the number or nature of categories and any group of items can be a category: birds, animals; things I own; things my brother likes; prime numbers; words that start with the letter G; the seven deadly sins; foreign cars; the students in a class; the items on a to-do list; etc. And, depending on the context and purpose for categorizing, any category might be useful and interesting. But not all categories are equally meaningful or useful (to psychology or

most useful for understanding appealability doctrines, and I do not discuss the other models here.

¹⁵⁶ Murphy, *What Are Categories and Concepts?*, *supra* note 152, at 11–14.

¹⁵⁷ H.L.A. HART, *THE CONCEPT OF LAW* 160 (2nd ed. 1994) (The “idea of justice ... consists of two parts: a uniform or constant feature, summarized in the precept ‘Treat like cases alike’ and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different.”).

law). The interesting categories are those that we share, those that seem intuitive—categories based on shared mental concepts.

A *concept* is the internal, mental representation or understanding of a category—the idea in our heads by which we understand a category.¹⁵⁸ While categories are real-world phenomena (the sets of items or ideas), concepts are mental phenomena that represent or constitute different categories in our conscious and unconscious minds. Concepts are *how* we identify categories, and how we decide whether a given item is in the category or not. Psychologists have studied how people form concepts and understand categories. They have identified common conceptual models that we use to understand categories. And, as discussed below, those concept models appear in legal doctrines like appealability.

1. *Classical categories are defined by logical definitions and necessary-and-sufficient elements.*

What cognitive psychologists call the “classical view” of categories is similar to the “rules” side of the rules-standards dichotomy. The classical view of categories is that every category has “a fixed, stable, and objective structure.”¹⁵⁹ A classical category is constituted by a formal definition (a rule) made up of a set of necessary and sufficient characteristics (elements).¹⁶⁰ “In this view, a category like ‘dog’ is believed to be defined by a set of [characteristics] an object must possess to be that particular type of thing we call a dog.”¹⁶¹ If an object has those characteristics, then it meets the definition and it is a dog—if it does not have those characteristics, then it does not meet the definition and it is not a dog.¹⁶²

¹⁵⁸ Murphy, *What Are Categories and Concepts?*, *supra* note 152, at 11–14.

¹⁵⁹ MURPHY, BBOC, *supra* note 152, at 15.

¹⁶⁰ *Id.*

¹⁶¹ Mark L. Johnson, *Mind, Metaphor, Law Symposium: Using Metaphor in Legal Analysis and Communication*, 58 MERCER L. REV. 845, 848 (2006–2007). Different cognitive theories use different terminology. For this article, I have regularized it and refer to the classical view as using “definitions” made up of “characteristics” and to concept models as using “concepts” made up of “features.”

¹⁶² *Id.*

In the classical view, the membership of categories is definite, not fuzzy. Because classical categories are made up of necessary-and-sufficient definitions, every item either does or does not fit within the categorical definition. There are no borderline cases that are “sort of” in a classical category.¹⁶³ Every item either is a dog, because it has all of the characteristics necessary and sufficient to define a dog—or it isn’t, because it lacks one or more of those necessary and sufficient characteristics. This is not to say that the classical view does not allow for unknowns. It is quite possible, in the classical view, not to know whether a given item is in a category, but it is not possible for the item to be both in and outside the category. The answer to “is that a dog?” can be “yes,” “no,” or “I don’t know”—but it cannot be “sort of.”

Cognitive psychologists have identified at least three shortcomings of the classical view, three ways that it fails to capture how we understand categories.¹⁶⁴ *First*, categories are often indefinable—we recognize categories even when we cannot formulate a definition composed of necessary-and-sufficient characteristics. *Second*, categories are often fuzzy—we recognize borderline items that are both inside and outside some categories. *Third*, categories are often graded—even within a given category, we recognize that some items “fit” better than others.¹⁶⁵ None of these traits can be adequately explained by the classical view of categories.

Categories are often indefinable. The classical view of categories is based on logical definitions consisting of necessary and sufficient characteristics. But in real life our concepts of categories often do not work that way. The canonical

¹⁶³ MURPHY, BBOC, *supra* note 152, at 15.

¹⁶⁴ *Id.* at ____.

¹⁶⁵ These are not the only shortcomings that psychologists have identified with the classical view. Another phenomenon that cannot be explained by the classical view is that categories can be “intransitive.” Categories display intransitivity when: A is in category B; B is in category C; but A is not in category C. For example: Big Ben is a clock; clocks are furniture; but Big Ben is not furniture. *Id.* at 45. Or: car seats are chairs; chairs are furniture; but car seats are not furniture. *Id.* at 38. This phenomenon is not possible under the classical view, which allows only for sets and subsets of categories.

example of this phenomenon is Wittgenstein's observation that the idea of a "Game" cannot be pinned down to a set of necessary and sufficient characteristics.¹⁶⁶ No set of characteristics—competition, amusement, winning and losing, an element of luck, an element of skill, etc.—is necessary and sufficient to define a category consisting of everything from chess to poker to tennis to ring-around-the-rosy to double Dutch to Dungeons & Dragons. And yet, even though we cannot formulate a definition made up of necessary and sufficient characteristics that accurately encompass every kind of game, we know what a game is and what items fit in the category "Game." Although the category "Game" is, in Wittgenstein's terms, "uncircumscribed" we still use it and understand it.¹⁶⁷ Wittgenstein's insight was to recognize this phenomenon is not just a shortcoming of classical categorical reasoning, but a strength of human conceptual thought. We can conceptualize logical, classical categories—but we can also conceptualize other kinds of categories.

On reflection, many intuitive categorical understandings work this way. For the category "Dog," one might try to identify various defining characteristics: has fur, has four legs, is domesticated, etc. And, each of those characteristics probably does go into our understanding of the category "Dog." But there are dogs without four legs, dogs without fur, and dogs who are wild. We, of course, know what a dog is—but we do not do so because we have a single set of necessary and sufficient characteristics for the category "Dog."¹⁶⁸ Similarly, although we all know what counts as a vegetable, it turns out there is no set of necessary-and-sufficient

¹⁶⁶ Philosophical Investigations § 66-77.

¹⁶⁷ As discussed below, Wittgenstein's explanation for how categories work aligns with certain modern cognitive psychology theories.

¹⁶⁸ MURPHY, BBOC, *supra* note 152, at ____.

characteristics to define the category of vegetables.¹⁶⁹ Indeed, biologically-speaking, there is no such thing as a “vegetable.”¹⁷⁰

Categories are often fuzzy. A necessary feature of the classical view is that, because classical categories rely on the either/or logic of necessary and sufficient characteristics, classical categories have strict boundaries and no borderline cases. Although there are rigorously logical categories with clear boundaries made up of necessary and sufficient characteristics—categories like “odd numbers” or “words that start with the letter R”—most of our useful categories do not work that way. Indeed, when you read in the previous paragraph that “we all know what counts as a vegetable,” you might have thought “what about tomatoes? People are always arguing about whether tomatoes are vegetables.”¹⁷¹ In the real world, boundaries between our conceptions of categories are much fuzzier than the classical view suggests. A chair is different from a loveseat, which is different from a sofa—but where exactly is the line between them?¹⁷² The boundaries of categories are not as clear as a set of necessary and sufficient conditions would make them.¹⁷³ And borderline cases (like tomatoes and loveseats) often arise that cannot be accounted for by the either/or logic of the classical view’s necessary and sufficient characteristics.

¹⁶⁹ Lynne Peskoe-Yang, *Vegetables Don’t Exist*, Popula (Feb. 20, 2019), <https://popula.com/2019/02/20/vegetables-dont-exist/>; Henry Nicholls, *Do vegetables really exist?*, BBC (Oct. 17, 2015), <http://www.bbc.com/earth/story/20150917-do-vegetables-really-exist>.

¹⁷⁰ Peskoe-Yang, *supra* note 169; Nicholls, *supra* note 169.

¹⁷¹ Peskoe-Yang, *supra* note 169; Nicholls, *supra* note 169.

¹⁷² Lawrence M. Solan, *Legislative Style and Judicial Discretion: The Case of Guardianship Law*, 35 INTERNATIONAL JOURNAL OF LAW AND PSYCHIATRY 464, § 3.2 (2012).

¹⁷³ A traditional example of this problem is the “sorites paradox” attributed to the ancient philosopher Eubulides: Although we know what a “heap” is (it is a pile of objects), there is no clear dividing line where a few objects become a heap and, indeed, the very idea that adding or removing one object from the pile could make the difference is nonsensical. TK

Categories are often “graded.” Cognitive psychologists have also observed that people share an intuitive sense that not all members of a category are equally part of the category, some “fit” the category better than others. For the category “Furniture,” people tend to think that “chair” and “bed” fit better than “piano” and “telephone.”¹⁷⁴ Or, for the category “Birds,” people tend to recognize that “robin” fits very well, while “ostrich” and “penguin” fit poorly.¹⁷⁵ This is a different phenomenon from categorical fuzziness. It is not that some items’ category membership is ambiguous. Ostriches and penguins definitely are birds, and people recognize that.¹⁷⁶ And yet we mostly agree that some birds “fit” the category better than others. This intuitive understanding that category membership is graded cannot be explained by the either/or logic of the classical view. Under the classical view, there is no differentiating among the items within a given category—all the items that exhibit all the necessary and sufficient characteristics for a category are equally in that category.

Those three shortcomings of the classical view (that categories are indefinable, fuzzy, and graded) also suggest another trait of categories for which the classical view, at least implicitly, fails to account. Remember, a category is a set of items that are “equivalent for some purpose.”¹⁷⁷ Categories depend on context and purpose. We do not conceptualize categories in a vacuum. We do so for a reason. One answer to whether a tomato is a vegetable or a fruit might be that it depends on whether you are preparing a salad (where it’s considered a vegetable) or classifying parts of a plant in biology class (where it is the fruit). *Why* you are making the category matters to your conception of the category itself.¹⁷⁸

¹⁷⁴ Solan, *supra* note 172, sec. 3.2 (Rosch); MURPHY, BBOC, *supra* note 152, at _____ (Rosch 1975, Prinz 2004); WINTER, *supra* note 17, at 76–77.

¹⁷⁵ WINTER, *supra* note 17, at 76 citing Eleanor Rosch, Cognitive Reference Points, 7 *Cognitive Psychol.* 532 (1975)]. Solan, *supra* note 172, sec. 3.2 (Armstrong, Gleitman, and Gleitman 1983].

¹⁷⁶ Solan, *supra* note 172, sec. 3.2.

¹⁷⁷ ”Murphy, *What Are Categories and Concepts?*, *supra* note 152, at 11–14.

¹⁷⁸ WINTER, *supra* note 17, at 188–89.

2. *Conceptual categories are constituted by fuzzier principles of similarity and resemblance.*

Based on experimental observation, cognitive psychologists have created conceptual models of how we conceptualize categories. Two such models are the prototype model and the exemplar model, both of which rely on a fundamental insight: we do not conceptualize category membership based on logical binary choices, we think of categories based on our senses of similarity and typicality.

Similarity and Typicality. To explain how human conceptual categories can be indefinable, fuzzy, and graded, modern concept theory replaces the necessary and sufficient characteristics of classical definitions with the principles of similarity and typicality. Instead of classical categories defined by their members' essential characteristics, we have conceptual categories shaped by how similar items are to the typical member(s) of the category.

One again, Wittgenstein provides the canonical example and explanation. To explain his observation that the concept "Game" eludes classical definition, he posited that all games nonetheless share "a complicated network of similarities overlapping and criss-crossing[,] sometimes overall similarities, sometimes similarities of detail."¹⁷⁹ He likened that network of similarities to "family resemblances." Imagine a simple nuclear family. Imagine that: the father, son, and daughter (but not the mother) have similar eye colors; the mother, son, and daughter (but not the father) have similar hair colors; the mother, father, and daughter (but not the son) have similar nose shapes; the daughter and father (but not the son and mother) are similar heights; the mother and son (but not the father and daughter) are similarly athletic; etc.. Although there is no identifiable characteristic or set of characteristics that they *all* share (no necessary and sufficient element by which to identify members of the family), the family members do have shared features. They resemble each other and can be recognized as part of the same family because they share that "complicated network of similarities

¹⁷⁹ Philosophical Investigations § 66-77.

overlapping and criss-crossing.”¹⁸⁰ Wittgenstein likened these similarities to the individual strands that make up a length of rope.¹⁸¹ Although no single strand runs the entire length of the rope, they overlap enough that they form a unified object.

Just as shared features mark different people as a single family, and as overlapping strands make up a rope, overlapping shared features among items can mark them as part of the same category, even when no single characteristic is shared by *all* the category members. Unlike the members of a classical category, which each exhibit every defining characteristic—the members of a conceptual category can share some, but not necessarily all, of the same features. They are not identical, but they are similar.

From this principle of similarity, cognitive psychologists have derived the principle of typicality, which refers to *how similar* an item is to the category member(s).¹⁸² The principle of typicality—essentially a measure of the strength of similarity—allows modern concept theory to explain how categories can be graded. Items with more, or more significant, similar features are more typical, while items with fewer similar features are less typical. The former “fit” the category better, and the latter fit less well. A robin is a more typical examples of a bird than an ostrich. But similar to what, exactly? What anchors a conceptual category to give some structure to it? Why is a robin more typical than an ostrich? That is where the prototype and exemplar models come in.

The prototype model posits that our concept of a category is based on a conceptual prototype, an ideal member of the category.¹⁸³ The prototype is the most typical member of a category, the member that, in our heads, represents and

¹⁸⁰ Philosophical Investigations § 66-77.

¹⁸¹ Philosophical Investigations § 66-77.

¹⁸² MURPHY, BBOC, *supra* note 152, at ____.

¹⁸³ Rosch & Mervis (1975).

thereby constitutes the category.¹⁸⁴ Prototypical concepts are structured radially around a single prototype that we think of as the quintessential category-member.

¹⁸⁵ A prototypical concept can also be based on a negative prototype—an item that is definitely *not* part of the category, that we think of as the opposite. We decide whether an item is in a prototypically structured category based on similarity, by asking how its salient features resemble the prototype and differ from the negative prototype.¹⁸⁶

The prototype model explains the traits of categories discussed above that the classical view of categories cannot. By replacing the classical view's strict necessary-and-sufficient definitions with similarity to positive and negative prototypes, the prototype model explains how conceptual categories are indefinable. When items share enough features with the positive prototype and do not share many features with the negative prototype, we “just know” they are members of a prototypical category. And we know that even though the category members do not all share the same necessary and sufficient elements, and we cannot reduce that knowledge to a logical or verbal definition.

By focusing on similarity to and typicality with regard to a prototype, this model also explains how conceptual categories can be fuzzy and graded. Items that are equally similar to a positive and a negative prototype (or that are similar to both, but in different respects) are borderline category members in fuzzy categories.¹⁸⁷ And typicality explains graded categories. The more typical an item is—the more it resembles the prototype (and the more differs from the negative

¹⁸⁴ Johnson, *supra* note 161, at 851 (“[P]eople often build their categories around prototypical members, and they understand less prototypical members by virtue of their relations to the prototypes.”).

¹⁸⁵ *Id.* at ____.

¹⁸⁶ Rosch & Mervis (1975)

¹⁸⁷ MURPHY, BBOC, *supra* note 152, at 31.

prototype), *i.e.*, the more features it shares with the prototype (and the fewer it shares with the negative prototype)—the better it fits the category.¹⁸⁸

The exemplar model. Although the prototype model provides a better explanation of human concept-making than the classical view by accounting for indefinability, fuzziness, and gradation, it may still be too simplistic to explain complex conceptual categories. Like the classical view, the prototype model is still based on a single summary representation. Like a classical definition, a prototype is a single summary idea that we imagine constituting the entire category. Just as the classical view categorizes an item by comparing it to the definition, prototype theory categorizes an item by comparing it to the positive and negative prototypes. And just as we sometimes cannot formulate a definition for a category, sometimes we cannot identify a single item that serves as a prototype for a category, even though we can conceptualize the category.

A potentially more powerful concept model is provided by the exemplar model. The exemplar model rejects the idea that people have a single, summary representation that encompasses an entire concept.¹⁸⁹ Where the prototype model posits “that people learn a summary representation of the whole category and use that to decide category membership,” the exemplar model proposes that “people’s category knowledge is represented by specific exemplars, and categorization

¹⁸⁸ *Id.* (Typicality “is a graded phenomenon, in which items can be extremely typical (close to the prototype), moderately typical (fairly close), atypical (not close) and finally borderline category members (things that are about equally distant from two different prototypes).”). The prototype model does not completely explain gradedness. Even concepts that are not structured prototypically can be graded. For example, the category of Odd Numbers is constituted by a classical definition, but experiments have shown that we think of some odd numbers as more quintessentially Odd Numbers than others. “In sum, graded categories will produce prototype effects, but not all categories with prototype effects are graded.” WINTER, *supra* note 17, at 84.

¹⁸⁹ MURPHY, BBOC, *supra* note 152, at 49. “In the exemplar view, the idea that people have a [single] representation that somehow encompasses an entire concept is rejected.”

involves comparing an item to all (or many) such exemplars.”¹⁹⁰ To determine if a given animal is a bird, we don’t just compare it to a single idealized idea of a bird in our heads, we compare it to many examples of birds. The exemplar model, thus, accounts for the possibility that we can conceptualize a category even if we cannot conceive of a single prototypical member of it. But it also retains the explanatory potency of similarity and typicality (applied not through comparison to a single prototype but to multiple exemplars) and thus accounts for categorical fuzziness and gradation just as the prototype model does.

In sum, we conceptualize categories both classically and conceptually. Classical categories are composed of definitions made up of necessary-and-sufficient characteristics. Conceptual categories are composed of radial structures made up of prototype and exemplar models based on similarity and typicality. Classical categories draw on the formal logic and either/or structure of elemental rules to definitively determine category membership. Conceptual categories employ a standard-like weighing of various factors to determine category membership in fuzzier, less definitive terms. Accordingly, classical categories are (like rules) more predictable, while conceptual categories are (like standards) more flexible.

C. Concept Models of Categories in Law

Categories appear throughout the law. As Karl Llewellyn observed nearly 100 years ago, “[b]ehavior is too heterogeneous to be dealt with except after some artificial ordering. The sense impressions which make up what we call observation are useless unless gathered into some arrangement. Nor can thought go on without

¹⁹⁰ *Id.* at 95 (“[T]here is clearly an enormous difference between prototype and exemplar models. One says that people learn a summary representation of the whole category and use that to decide category membership. Category learning involves the formation of that prototype, and categorization involves comparing an item to the prototype representation. The other view says that people’s category knowledge is represented by specific exemplars, and categorization involves comparing an item to all (or many) such exemplars.”) (“Nonetheless, it is not that easy to tell the models apart. The reason for this is that under many circumstances, the models make similar predictions.”)

categories.”¹⁹¹ In short, for law to govern human activities, it must categorize them, and in order to categorize them, we need mental concepts of those categories. “Like rules, concepts are not to be eliminated; it cannot be done.”¹⁹² Only by dividing the multitude of worldly phenomena (people, organizations, political entities, actions, statements, beliefs, etc.) into separate categories can the law then act on them. Lawyers argue over whether their clients’ conduct fits into legal categories that give rise to liability, like negligence or fraud. Judges and juries rule on whether the conduct fits in those categories. Legislators pass laws that set the categories (the edges of which lawyers and judges then test and reshape through creative interpretation and precedent).

Both the classical view of categories and the conceptual model of categories have their places in law and legal practice. The classical view has an intuitive appeal, especially for lawyers.¹⁹³ Classical rules and definitions appear throughout the law.¹⁹⁴ They have the same advantages as rules: predictability and clarity. Every first-year student learns that the common law tort of negligence has four elements: duty, breach, causation, and damages. That is a classical definition of negligence consisting of four necessary and sufficient characteristics. That definition determines which conduct falls within the classical category of negligent

¹⁹¹ Karl N. Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 COLUM. L. REV. 431, 453–54 (1930).

¹⁹² *Id.*

¹⁹³ Why the classical view is intuitively attractive is the subject of debate. The formality of the logic that it enables is particularly useful and attractive to philosophers because it creates a bounded and manipulatable object, the *concept*, for philosophical examination. Margolis, Eric and Laurence, Stephen, “Concepts”, *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), Edward N. Zalta (ed.), available at <https://plato.stanford.edu/archives/spr2014/entries/concepts/>. Some psychologists attribute the appeal of the classical view to its metaphorical similarity to the real-world the phenomenon of sorting real objects into containers—an embodied experience that enables a metaphoric understanding of otherwise abstract analytical thought. See [TK Lakoff & Johnson, Rosch, Winter.] Others question whether concepts and categories are embodied in this manner. See [TK]

¹⁹⁴ See Solan, *supra* note 172, sec. 3.2.

conduct. If a certain course of conduct exhibits those four definitional elements, then that conduct is negligent. If it does not, then it is not.

This is not to say the classical view is simplistic. The necessary and sufficient characteristics that define a classical category can be related to one another with formal logical rules, giving rise to more complex definitions and rules.¹⁹⁵ By adding IF – THEN rules, BUT IF – THEN exceptions, and Boolean AND/OR connectors to the classical four-element definition of negligence, we can create a system of logical rules to determine liability for negligence: IF the defendant’s conduct was negligent (as defined above), THEN the defendant is liable; BUT IF the plaintiff assumed the risk, THEN the defendant is not liable; BUT IF the plaintiff is a minor AND the plaintiff’s injury was caused by the defendant’s attractive nuisance, THEN the defendant is liable; etc. In short, the classical view of categorization is capable of significant complexity and nuance.

But, because any system of classical definitional categories is necessarily built on nested, binary true / false determinations, it cannot describe all legal doctrines. Just as law students learn the basic definition of negligence, they also learn (often to their frustration) that classical categorical definitions often fail to fully capture the complexity of the common law. As in H.L.A. Hart’s famous “no vehicles in the park” example, it turns out that what fits in the category “vehicle” is a slippery, context-dependent, and fuzzy question.¹⁹⁶ The classical view of categories cannot accommodate that fuzziness and ambiguity. A system of legal directives made up only of classical definitions and strict rules risks arbitrariness and inflexibility to the needs of real-world legal problems.

¹⁹⁵ Think of “the following (incomplete) definition of a strike in baseball: ‘the ball must be swung at and missed OR it must pass above the knees and below the armpits and over home plate without being hit OR the ball must be hit foul (IF there are not two strikes)’.” MURPHY, BBOC, *supra* note 152, at 16.

¹⁹⁶ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1957); HART, *supra* note 157, at 125–27. See also Frederick Schauer, *A Critical Guide to Vehicles in the Park Symposium: The Hart-Fuller Debate at Fifty*, 83 N.Y.U. L. REV. 1109 (2008).

Fortunately, just as legal doctrines use standards to provide the flexibility lacking in strict rules, they use conceptual categories when classical definitions prove too rigid. Prototypical thinking and prototypically structured categories are fundamental parts of the common law. The category of legal harm, for example, is intuitively structured around a prototype of physical bodily harm. We conceive of other kinds of legal harm (emotional, financial, dignitary, etc.) based on their (degrees of) resemblance to the prototypical physical harms.¹⁹⁷ The concept of “property” is another prototypically structured category, with land (“real” property) as the prototype for understanding other kinds of property (chattel, stocks and bonds, intellectual property, etc.) based on their varying degrees of resemblance to the central prototype.¹⁹⁸

Exemplar-based categories are also a key component of the common law tradition. Many common-law doctrines exhibit greater structure and predictability than pure standards but have not been reduced to clear definitions or rules. Those doctrines are developed and elucidated through the accumulation of precedent. Such doctrines essentially provide that a particular category of cases should be treated similarly, with the category constituted by a constellation of exemplary precedents. To treat “like cases alike,”¹⁹⁹ judges look first at the exemplary precedents and then,

¹⁹⁷ Johnson, *supra* note 161, at 851. See Samuel D. Warren & Louis D. Brandeis, *Right to Privacy*, HARV. L. REV. 193, 193–95 (1890–1891) (describing the development of legal protections for dignitary and other intangible harms, and for intellectual and other intangible property, from concrete physical harms and real property).

¹⁹⁸ Johnson, *supra* note 161, at 867. The familiar “bundle of sticks” understanding of property is a metaphorical way to describe the salient features of the “property” category. It is reminiscent of Wittgenstein’s rope example and the sorites paradox. The “bundle of sticks” metaphor illustrates that the idea of property need not consist of any single, particular right, and emphasizes that there is no definite set of “sticks” (rights) that are necessary and sufficient characteristics to define the concept of “property.” See, e.g., Mossoff, Adam, *Trademark as a Property Right* (March 25, 2017). George Mason Law & Economics Research Paper No. 17-15.

¹⁹⁹ HART, *supra* note 157, at 160 (The “idea of justice ... consists of two parts: a uniform or constant feature, summarized in the precept ‘Treat like cases alike’ and

even if those precedents do not provide a clear definition for the category, assess whether the case at hand fits that category by gauging its meaningful similarity to the existing precedents.

The doctrine for determining personal jurisdiction over corporations provides a familiar example from the first year of law school. The requirement from *International Shoe v. Washington*—that “a defendant ... have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’”—is a vague, general standard.²⁰⁰ The *International Shoe* opinion provides some guidance as to how the standard should be applied (paying attention to both the nature and degree of contacts, for example), but it does not provide a clear rule or definition describing the category of defendants that it subjects to personal jurisdiction.²⁰¹ Subsequent cases provided more clarity, sometimes in the form of definitive rules, but more often because each case serves as an exemplar of the kind of corporate defendant that is or is not subject to personal jurisdiction. When deciding if there is personal jurisdiction over a corporate defendant, a judge looks at the defendant’s conduct and its contacts with the state and asks whether they are more like the positive exemplars where there was personal jurisdiction (*International Shoe’s* salesmen in Washington²⁰² and *Burger King’s* franchise contract governed by Florida law²⁰³) or more like the negative exemplars where there was no personal jurisdiction (*WorldWide Volkswagen’s* car in Oklahoma,²⁰⁴ *Asahi Metal Industry’s* tire valve in California,²⁰⁵ and *J. McIntyre Machinery v. Nicastro’s* metal-shearing machine in

a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different.”).

²⁰⁰ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

²⁰¹ *Id.* at ____.

²⁰² *International Shoe Co. v. Washington*, 326 U.S. 310.

²⁰³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

²⁰⁴ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

²⁰⁵ *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102 (1987).

New Jersey²⁰⁶). In doing so, a judge will identify the salient features of each case and note how similar or dissimilar they are to the case at hand.²⁰⁷

These uses of prototype and exemplar concept models in law owe something to the prevalence of analogical reasoning in legal thinking. Arguments for the use of concept models in the law will, therefore, find support in arguments for analogical reasoning in the law. Legal scholars have long recognized the centrality of analogies to legal thought and the development of the common-law.²⁰⁸ By drawing analogies to prior cases, lawyers argue for, and judges provide, similar treatment in current cases. Analogical reasoning depends on recognizing similarity between different cases, as do the prototype and exemplar models. Commentators disagree about how legal analogical reasoning works. Some argue that analogies necessarily require an intervening rule that makes two different cases similar, but others argue that lawyers and judges can and should reason from analogies without articulating, or consciously recognizing, an intervening rule.²⁰⁹ Those who believe analogies always require articulable intervening rules typically decry analogical reasoning, seeing analogies as essentially incomplete syllogisms. Those who believe analogies do not

²⁰⁶ J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

²⁰⁷ This is essentially what Justice Thomas did when writing for a unanimous court finding no jurisdiction in *Walden v. Fiore* 571 U.S. ____ (2014).

²⁰⁸ See generally Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1995–1996); Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience Symposium: Developing Best Practices for Legal Analysis*, 84 U. CHI. L. REV. 249 (2017); Brian N. Larson, *Law's Enterprise: Argumentation Schemes & Legal Analogy*, 87 U. CIN. L. REV. 663 (2018–2019).

²⁰⁹ Schauer & Spellman, *supra* note 208, pt. I–II; Larson, *supra* note 208. Among the detractors of the analogical reasoning in the law are: FREDERICK SCHAUER, *THINKING LIKE A LAWYER* (2009); Brewer, *supra* note 208 (expressing serious doubts about the independent utility of analogical reasoning and a preference for rules, although he also describes the split in the two camps without identifying with either).. Among the champions of analogical reasoning are: LLOYD L. WEINREB, *LEGAL REASON* (2016); Sunstein, *supra* note 208..

require articulable rules typically celebrate analogical reasoning because it reveals underlying connections between cases that are not, or not yet, apparent.²¹⁰

Cass Sunstein, for example, argues that analogies are useful precisely because they allow legal practitioners to draw connections that are incompletely theorized (not fixed in a given rule).²¹¹ Using incompletely theorized connections to decide cases can have certain advantages. It (1) helps efficiently decide cases without having to formulate rules beyond the needs of the case itself, (2) provides precedential guideposts for subsequent cases, but (3) does not fix legal doctrines in stone before they are fully developed, leaving room for subsequent cases to expand or contract them.²¹² Analogies based on incompletely theorized reasoning provide a kind of bounded flexibility, while leaving open the possibility of eventually coalescing into more bounded rules as the doctrine develops.

That feature of analogical reasoning—that it enables intuitive connections and parallels between cases—is also present in conceptual category-making. As we have seen, for cognitive psychologists the strength of concept models is they can describe categories that are not amenable to classical definitions or articulable rules. Similarly, conceptual categories are useful for deciding cases flexibly, without committing to a classical definition. But they also leave room for the doctrine to evolve in the future, and for loosely described conceptual categories to develop into classically defined categories and rules.

There are some arguments against using conceptual categories in law, but they do not mean we should, or can, do away with conceptual categories entirely. They mean we need to think carefully about when and how we use them.

One potential critique asks whether a categorical approach is anything new: Doesn't it just repeat the formal rules-vs.-standards dialectic? Aren't classical categories just categories defined by rules and conceptual categories just categories

²¹⁰ See Schauer & Spellman, *supra* note 208, and Larson, *supra* note 208 (both describing the two camps).

²¹¹ Sunstein, *supra* note 208.

²¹² *Id.*

defined by standards? Although this critique has some force when it comes to classical categories and rules (a classical definition with necessary and sufficient characteristics is essentially a rule with required elements), it misses two points when it comes to conceptual categories. One, it oversimplifies how conceptual categories work. They are not abstract principles like reasonableness, fairness, or justice; they are radial models that explain how we *use* a particular abstract principle to build categories based on concrete anchors of specific prototypes and exemplars.²¹³ Two, psychologically speaking, recognizing similarity comes before either rules or standards. We recognize similarity and assess typicality in an intuitive and incompletely theorized way, even when we cannot formulate rules and standards. Often, when we do formulate rules or standards to explain our categorical understandings, they are retroactive back-formations or justifications for a similarity we recognize intuitively.²¹⁴ As Sunstein explains in defense of analogical thinking, this openness to untheorized recognition of similarity makes conceptual categories powerfully adaptable.²¹⁵

Which brings us to a second potential critique: Shouldn't legal doctrines eschew the fuzziness and adaptability of conceptual categories for the determinacy and predictability of rules and classical definitions?²¹⁶ This argument asserts that law needs greater essentialism (reliance on necessary and sufficient conditions) to protect individual rights, and that doctrines that give judges too much discretion

²¹³ One might argue that reasonableness, fairness and justice are not just vague standards, but rather are informed by experience and familiarity with prior cases and the law. Quite so. But that amounts to arguing that they are conceptual categories, based on exemplars of prior cases.

²¹⁴ Indeed, the categories of "rules" and "standards" are, themselves, conceptual categories for different doctrinal forms. As discussed above, they resist specific definitions, but we know intuitively what we mean by each, based on prototypical examples like speed limits and driving safely.

²¹⁵ Sunstein, *supra* note 208.

²¹⁶ See, e.g., Joseph D'Agostino, *Against Imperialism in Legal Concepts*, 17 U.N.H. L. Rev. 67 (2018) (arguing that legal doctrines should be constituted only based only on essential elements).

give them too much power.²¹⁷ But it goes too far when it calls for doing away with conceptual categories entirely in favor of purely essentialist definitions. First, even if it were normatively preferable for laws to use only bright-line rules and classical definitions, that does not describe the history of the law as we know it. As we have seen, even the brightest lines get blurred by unanticipated new developments and motivated parties and judges. Second, this normative argument essentially echoes the traditional arguments for rules and against standards, and thus it repeats the rules-standards dialectic. There are, to be sure, areas of law where bright lines and classically defined categories work better than conceptual categories. But that does not mean that they are universally superior—just as law needs both rules and standards, it needs both classical and conceptual categories.

What about a potential third critique (the mirror image of the second): If legal doctrines inevitably shift over time, why require even the flexible structure of concept models? Why not use pure standards and unfettered discretion? The same descriptive and normative responses apply to this critique as to the previous one. Once again, descriptively, that is not how the law has evolved. Lawmakers and judges inevitably and necessarily have developed more and less rigorously structured categories over time. And normatively, this is another turn in the rules-standards dialectic and all the traditional responses in favor of bright-line rules apply. There are areas of law where open-ended standards are more desirable than even the loosely-structured concept models. But that does not mean unfettered discretion is always better.

One thing that these last two critiques demonstrate is that the concept-model approach can be placed in opposition to both rules and standards. That not only underscores the response to the first critique, that conceptual categories are not just standards in another guise. It also suggests that an understanding of conceptual categories adds something new to the rules-standards dialectic. As we have seen,

²¹⁷ Joseph D'Agostino, *Against Imperialism in Legal Concepts*, 17 UNIVERSITY OF NEW HAMPSHIRE LAW REVIEW 67, ____ (2018).

the rules-standards continuum illustrates that law need not consist only of determinate logical rules or freewheeling discretionary standards; many legal doctrines combine aspects of both. Concept models using prototypes and exemplars help explain how those doctrines do so, how they can be flexible but not unbounded, structured but not rigid. While concept models do not resolve the rules-standards dialectic, they do identify patterns of decisionmaking and doctrinal form that, well deployed, can capture the strengths of both rules and standards.²¹⁸

Very well, one might say, concept models and categories have their place in the law, and they can be useful for understanding some legal doctrines. But why *this* place? How do they help us understand appealability? I believe they are both descriptively and normatively helpful. They add an important dimension to our description of the federal appealability doctrines. And they can provide normative guidance for future doctrinal development where the current appealability doctrines are in flux.

An understanding of categories and concepts helps describe the present state and the history of the federal appealability doctrines. A description of the appealability doctrines should also be able to describe how they change over time and how judges actually decide cases. As explained further below, those doctrinal changes—and many of the unspoken judicial decisions—happen at the antecedent categorical step. The categorical approach accounts for the antecedent

²¹⁸ See WINTER, *supra* note 17, at 7 (“The recognition that human rationality is grounded in experience requires rejection of both the determinacy aspired to by analytic logic and the arbitrariness assumed by most social coherence theories.”); *See id.* at 11 (““Developments in cognitive theory make it possible to talk about innovation and constraint free from the distorting grip of these objectivist assumptions. True, legal materials do not produce patterns that conform to the rationalist expectations of precision, hierarchy, and determinacy. But it does not follow that law is indeterminate; we may just be looking for the wrong patterns. Propositional legal rules promise determinate answers, but the largely imaginative structure of thought yields, instead, a different pattern of decisionmaking. As I argue in chapter 6, much of the perceived indeterminacy of law results from the superimposition of a rationalist model for law upon a much more complex process of human reasoning.”); Solan, *supra* note 172.

categorization question and the two-step process for deciding appealability. The categorical approach supplements and clarifies the one-dimensional rules-standards continuum. And it explains the judicial and scholarly dissatisfaction with the doctrine of finality.

Take, for example, the typical complaints about the final-judgment rule and the idea of finality: that it is hard to define, that it is fuzzy with borderline cases. They echo the shortcomings of the classical categorical view (or, put another way, they express reflect the mismatch between the idea of finality and the classical categorical form). The complaint that there is “[n]o verbal formula” for finality²¹⁹ reflects the fact that radial categories elude definition and are graded (with more typical members more strongly resembling the central prototypes and exemplars). The observation that “appealable finality has a penumbral area”²²⁰ or a “twilight zone”²²¹ echoes the way radial categories are fuzzy with marginal members that are equally similar to negative prototypes and exemplars. As explained further below, that is because finality is not a purely rational idea defined by a classical category, it is a radial concept. For a description to capture the contours of a concept like finality-for-appeal, not to mention describing what courts have actually been doing, it needs to consider the categorical dimension.

The conceptual approach can also provide normative guidance when it comes to appealability, suggesting potential directions for doctrinal reform, particularly about finality-for-appeal. First, conceptual approach calls into question the efficacy and desirability of the Supreme Court’s current efforts to cabin judicial innovation. The inevitability of a categorical step in any appealability decision, along with the historical evidence that judges and parties will reshape categories to meet perceived needs, means that an edict directing judges to decide finality-for-appeal issues categorically (without further guidance as to how to formulate categories) will not

²¹⁹ Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974).

²²⁰ Radio Station WOW v. Johnson, 326 U.S. 120, 124–26 (1945).

²²¹ Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964).

meaningfully limit the innovations around the idea of finality. It will only lead to more circumlocutory interpretations and innovations, and more costly litigation to try to fix the fuzzy boundaries of various categories. Second, a conceptual approach that acknowledged the inevitability of categorical flexibility but channeled judicial innovation through conceptual categories would be superior to an ineffective ban on judicial reinterpretation of the finality-for-appeal doctrines. If the Court provided more conceptual guidance, without trying to shut down innovation entirely, it would encourage the continued development of the finality-for-appeal doctrines, including eventually enabling their solidification into classically defined categories and clear rules.

III. Concepts and Categories in the Appealability Doctrines

This section takes the traditional rules-standards continuum described in Part I above and adds a categorical dimension. As explained, each appealability doctrine has two steps: a categorization step and then an application step. The rules-standard continuum in Figure 1 arranges the appealability doctrines by the extent to which the second step applies a rule or a standard. Figure 2 adds a second dimension, arranging them by the extent to which the first step employs a classical or conceptual category. Each appealability doctrine can be placed into a quadrant based on what kind of categorization it requires at the first step (classical or conceptual) and what kind of formal logic (rule or standard) it applies at the second.

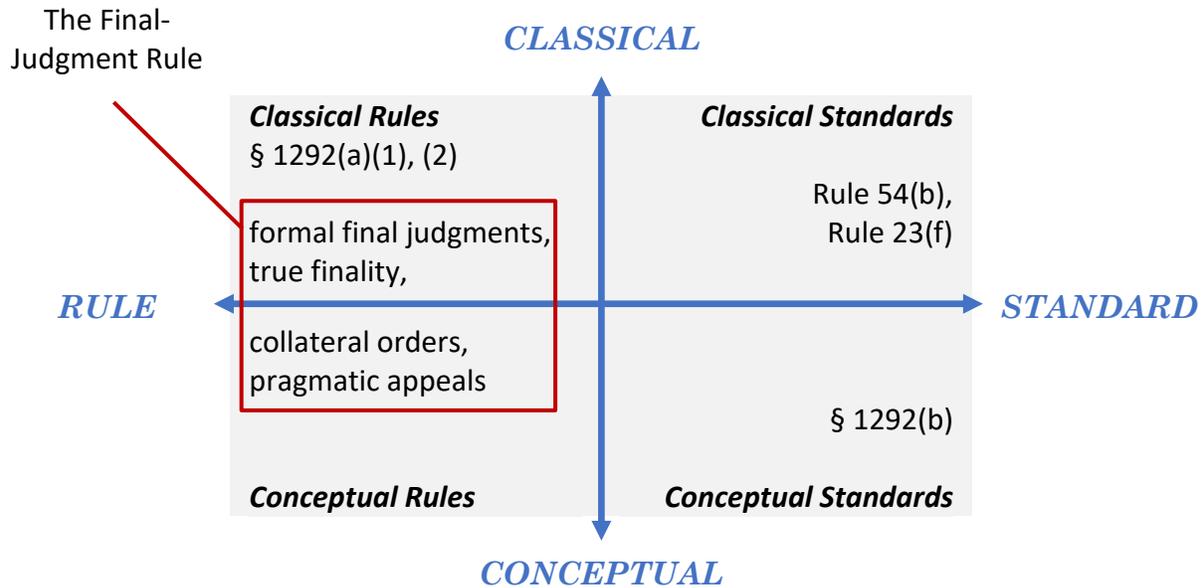


Figure 2: Categorical Matrix of Appealability Doctrines

The first half of this section explains how the matrix works and examines the exemplary doctrines in each quadrant, beginning with the Classical Rules in the upper left quadrant and proceeding clockwise around the matrix. The second half uses a concept model of finality to describe how the different interpretations the final-judgment rule fit into the matrix. And it concludes by making proposing a conceptual method for courts to approach finality, particularly the pragmatic finality-for-appeal doctrines, in the future.

A. Classical and Conceptual Appealability Doctrines

1. Orders involving injunctions and receiverships – classical rules

Title 28, sections 1292(a)(1) and (2) make particular kinds of orders (orders affecting injunctions and receiverships) immediately appealable. They are quintessential classical categorical appealability rules.²²²

A classical appealability rule uses a bright-line rule to *always* permit an immediate appeal, but only from a *classically defined* category of orders. For a court

²²² Other classical categorical rules include the subject-specific appealability doctrines found in specific statutes like the FAA and CAFA.

to find an order appealable under a classical categorical rule, the court need only ask “does this order fit into a defined category?”—if it does, then the rule provides that the order is immediately appealable.

Sections 1292(a)(1) and (2) are classical categorical rules, because each uses a classical definition to establish a specific category of orders that is immediately appealable. The original 1891 version of § 1292 granted the new Circuit Courts of Appeal appellate jurisdiction over, and allowed immediate appeals from, trial court orders “granting or continuing [an] injunction.”²²³ The Supreme Court has carefully policed the reach of §1292, approaching it “somewhat gingerly lest a floodgate be opened” that allows too many appeals.²²⁴

Over time, the joint efforts of the courts and rulemakers have established the specific contours of the categories that § 1292(a) make immediately appealable. It has been amended repeatedly to, among other things, clarify what kinds of orders it covered, and to add a new category of orders: orders involving receivers. In its modern incarnation, § 1292(a) now allows immediate appeals from specific categories of interlocutory district court decisions, including: (1) orders “granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions”²²⁵; and (2) orders “appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property.”²²⁶ The end result is that, for both of these categories of orders, § 1292(a) operates as a rule allowing an immediate appeal, with no provision for the exercise of judicial discretion based on the specific facts or circumstances of the given case.

Section 1292(a) highlights a few things about the categorical nature of the appealability doctrines in general, and about classical rules specifically. First, it illustrates that classical and conceptual categories are relative, not absolute—they

²²³ The Judiciary Act of 1891 (“Evarts Act”), Act of March 3, 1891, 26 Stat. 826, § 7.

²²⁴ *Switzerland Cheese Ass’n, Inc. v. E. Horne’s Market, Inc.*, 385 U.S. 23, 24 (1966).

²²⁵ 28 U.S.C. § 1292(a)(1).

²²⁶ 28 U.S.C. § 1292(a)(2).

mark the ends of a continuum. Second, it shows that they are mutable, not fixed—doctrines can move along that continuum over time. Centuries of attorneys and judges motivated to allow or disallow various appeals have teased out ambiguities to blur the definitions of “injunction,” and “receiver,” pushing classical categories more toward the conceptual end of the continuum. In response, rulemakers have revised and added rules, and the Court has cabined interpretations to move them more toward classical categorical clarity. Indeed, the trace of a similarity-based conceptual category can be found in § 1292(a)(2)’s description of “orders... to take steps to accomplish the purposes [of receiverships], *such as* directing sales or other disposals of property.” Rather than identifying every necessary and sufficient characteristic of an order that serves the purpose of a receivership, the definition identifies two exemplars and trusts judges to recognize which orders are similar to those.

Section 1292(a) also demonstrates a trait of all classical categorical rules: they create a right to appeal. (As we will see below, this is also true of conceptual categorical rules.) That is to say, when an appealability doctrine employs a rule, that rule is always “if the decision is in the category, then an immediate appeal is permitted.” But there are no categorical rules *barring* appeals. Although there are categories of orders, like discovery orders, that are only rarely immediately appealable, there is no rule that they are *never* immediately appealable.²²⁷ Even a discovery order could be appealable if it also fit into a category from which another doctrine permits an appeal. While there are categories of orders that are *always* immediately appealable, there are no categories of orders that are *never* immediately appealable.

²²⁷ See Steinman, *supra* note 2, at __ (“[U]nder the prevailing judicial doctrines, no interlocutory trial court order is categorically beyond an appellate court’s jurisdiction.”).

2. *Partial final judgments and class certification orders – classical standards*

Federal Rule of Civil Procedure 54(b) permits immediate appeals from partial final judgments, and Rule 23(f) permits applications for permission to appeal from class certification orders. These two rules most explicitly demonstrate the two-step appealability decision-making process. They are both classical categorical appealability standards.

A classical appealability standard uses a discretionary standard to *sometimes* (on a case-by-case basis) permit an immediate appeal, but only from a *classically defined* category of orders. For a court to find an order appealable under a classical categorical standard, the court must first ask, “does this order fit into a defined category?”—and, if it does, must then ask, “should this specific order be appealable under the applicable standard?”

Rule 54(b) allows for an immediate appeal from a partial final judgment—an interlocutory ruling that resolves the merits of “one or more, but fewer than all, claims or parties” in a multi-claim case—but only if the district court “expressly determines that there is no just reason for delay” in entering judgment.²²⁸ Thus, Rule 54(b) explicitly requires a two-step process. First, the district court must determine whether a given order falls into the category of orders eligible to be partial final judgments: orders in a multiclaim case that resolve all of a claim or all of a party’s claims. Second, the district court must decide whether there is “no just reason for delay” in entering the judgment. The first step employs a classical

²²⁸ *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511–12 (1950) (quoting Fed. R. Civ. P. 54(b)). Fed. R. Civ. P. 54(b). Rule 54(b) was actually promulgated and amended pursuant to the Supreme Court’s general rulemaking authority, before the 1990 enactment of 28 U.S.C. § 2072(c) which would seem to specifically authorize it. See Fed. R. Civ. P. 54(b), Advisory Committee Notes 1946, 1961. Rule 54(b) was amended again in 1961 to clarify that it applies when a court disposes of a *party* in a multi-party case, just as it applies when a court disposes of a *claim* in a multi-claim case. Fed. R. Civ. P. 54 Notes of Advisory Committee on Rules—1961 Amendment.

categorical definition, the second a standard. And that is no accident—it was a deliberate innovation when Rule 54(b) was amended in 1946.

The original 1939 version of Rule 54(b) authorized district courts to enter appealable partial final judgments if they made a single determination: that an interlocutory ruling decided “the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim.”²²⁹ But the confusing fuzziness of that determination led to the amended version employing the two-step process.

A pair of cases decided together in 1956, *Sears, Roebuck & Co. v. Mackey* and *Cold Metal Process Co. v. United Engineering & Foundry Co.*, illustrate how Rule 54(b) crystallized into a classical categorical standard.²³⁰ They also illustrate the Court’s persistent struggles with the nature of finality. The question before the Court in both cases was whether the amended Rule was consistent with § 1291’s final-judgment rule. If it were not, the Rule would be impermissible, because Congress had not yet granted the Court authority to write rules declaring categories of orders final under § 1291.

Justice Burton, writing for a seven Justice majority, held that the amended 1946 version of Rule 54(b) did not “relax” § 1291’s final-decision requirement.²³¹ That was so, the majority held, because a decision resolving an entire claim was final *as to that claim*.²³² Pointing to the history of the Rule and the 1946 amendment, the majority opinion treated the decides-a-claim requirement as a

²²⁹ Fed. R. Civ. P. 54(b) (1939).

²³⁰ *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445 (1956).

²³¹ *Sears, Roebuck & Co. v. Mackey*, 351 U.S. at 435; *id.* at 437 (noting in passing that the validity of the original version of the Rule was “no longer questioned”).

²³² *Sears, Roebuck*, 351 U.S. at 436; see *Curtiss-Wright Corp. v. General Elc. Co.*, 446 U.S. 1, 7 (1980) (“A district court must first determine that it is dealing with a ‘final judgment.’ It must be. ‘judgment’ in the sense that it is a decision upon a cognizable claim for relief, and it must be ‘final’ in the sense that it is ‘an ultimate disposition of an individual claim entered in the course of a multiple claims action.’”) (quoting *Sears, Roebuck*, 351 U.S. at 436).

necessary and sufficient feature to both define the category of decisions subject to Rule 54(b) and deem them “final.” The opinion’s declaration that a decision resolving an individual claim could be considered “final” rested on, without acknowledging, a prototype model of finality, finding that such decisions were enough *like* prototypical final decisions that they should be categorized as final.²³³ But the majority did not state that it was using a prototype approach. Instead, by relying on the decides-a-claim requirement, it framed its interpretation in terms of the classical view of categorization. And so, the first step of the analysis—categorizing a decision as a final judgment—became the application of a classical definition, while the second step—determining whether there was. Just reason for delay in the case—remained a case-by-case standard. And 54(b) became a classical categorical standard.

But, as Justice Frankfurter explained in his dissenting and concurring opinions, that holding could not really be squared with the prior understanding of finality. Frankfurter would have held instead that a decision was final only if it comported with the “deeply rooted” and “widely sanctioned principle” at the “core” of § 1291 “that there should be no premature intermediate appeal,” no “piecemeal appeals,”—meaning that even a fully decided claim had to be separable from the remainder of the case before it could be considered final.²³⁴ Frankfurter protested that the majority’s insistence that § 1291’s finality requirement “remain[ed]

²³³ In order to make this declaration, the Court recharacterized the prior understanding of finality as merely a “former, *general practice* that, in multiple claim actions, all the claims had to be finally decided before an appeal could be entertained from a final decision upon any of them.” *Sears, Roebuck* 351 U.S. at 434 (emphasis added). Then the Court explained that Rule 54(b) had relaxed this “general practice,” not the final-decision requirement itself. *Id.*

²³⁴ 351 U.S. at 441 For Frankfurter, courts making that determination had to apply a “separate-and-independent test” to determine whether a given ruling decided a truly separable issue or whether it was truly the nonappealable part “of an organic whole.” 443–444. Years later, in *Curtiss Wright*, the Court reintroduced the separability concerns that motivated Frankfurter, holding that separability was a permissible consideration in the second part of the Rule 54(b) certification process, when determining that there was no just reason for delay. 446 U.S. 1, 8 (1980).

unimpaired” rang hollow.²³⁵ He correctly observed that finality under § 1291 was no longer “what it was before these opinions were written.”²³⁶

The majority’s and Frankfurter’s opinions reflected two different views of the final judgment rule. The majority opinions tried to treat finality under § 1291 like a classically defined category while Frankfurter would have treated it as a conceptual category, conceptualized for a particular purpose, and structured around a prototypical “deeply rooted,” “core” principle. In effect, what Frankfurter would have done explicitly—treated § 1291 as a prototypical category and asked whether rulings under 54(b) were enough *like* the prototype at the center of § 1291 to be considered final—the majority did implicitly. Instead of acknowledging that it was treating orders subject to Rule 54(b) *like* final decisions, the majority insisted that they actually *are* final decisions. As discussed below, the flexible “final decision” category survived the transformation that Frankfurter was protesting because that category was never a strictly defined classical category, and it continued to be understood in an essentially prototypical manner.

Rule 23(f) employs a similar two-step classical categorical standard. Unlike Rule 54(b), Rule 23(f) was enacted pursuant to explicit statutory authority allowing the Court to define “finality” through rulemaking, so it did not raise the same questions about compatibility with § 1291. But, like rule 54(b), Rule 23(f) applies a standard only to a specific category of orders, namely orders granting or denying

²³⁵ Frankfurter listed various ways the Court could have acknowledged and explained the contradiction between Rule 54(b) and the prior conception of finality. 351 U.S. at 439 (“The Court could have said that Rule 54(b), promulgated under congressional authority and having the force of statute, has qualified 28 U.S.C. § 1291. It does not say so. The Court could have said that it rejects the reasoning of the decisions in which this Court, for over a century, has interpreted § 1291 as expressing a hostility toward piecemeal appeals. It does not say so. The Court could have said that Rule 54(b)'s requirement of a certificate from a district judge means that the district judges alone determine the content of finality. The Court does not say that, either.”).

²³⁶ 351 U.S. at 439.

class certification.²³⁷ Faced with such an order, a party may file a “petition for permission to appeal,” and the appellate court “may permit” the appeal. The Rule provides no criteria for when the appellate court should grant an appeal (although courts have identified non-exclusive some factors to consider).²³⁸ The upshot is that class certification orders are eligible for appeal, but only if the appellate court determines, on a discretionary, case-by-case basis, that an appeal is warranted.

Both of these Rules using classical categorical standards reflect the judicial understanding, developed through years of institutional experience, that we can identify categories of decisions that are sometimes, but not always, worth immediately appealing. Rules 54(b) and 23(f) employ the benefits of clear classical categories: the either/or certainty as to whether an order fits a category, and they embody them in bright-line procedural mechanisms. But they also enjoy the flexibility of standards, which can be applied on a case-by-case basis. The strict classical categories corral the more discretionary standards. By limiting the application of the standards to only certain categories of orders, classical categorical standards limit the risk of freewheeling judicial caprice posed by pure discretionary standards. They also allow for specialized standards. The specific standard applicable to each category can be different, and over time the standards can be tailored to the particular kinds of orders to which they apply.

There is no reason that a classical categorical standard must appear as rule of procedure (rather than as a statute or case law), but it is also not surprising that these two are found in the Federal Rules. The rulemaking process can leverage judicial institutional knowledge to identify categories of decisions that could benefit

²³⁷ Fed. R. Civ. P. 23(f).

²³⁸ An influential early Rule 23(f) case by Judge Easterbrook identified three non-exclusive considerations: whether the denial of class certification would be the effective “death knell” of the case; whether a grant of class certification would exert undue pressure to settle; and whether permitting an appeal would advance the development of the law. *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999). . Other courts have largely followed suit. *See Wright & Miller*, 16 Fed. Prac. & Proc. Juris. § 3931.1 n. 14 (3d ed.).

from applying an appealability standard, it and can then fix those categories with classical definitions and procedural markers setting their limits.²³⁹ In addition, placing the requirement in the Federal Rules creates a procedural bright line—either the district court has entered a partial final judgment or it hasn’t, either it has entered a class certification order or it hasn’t. That procedural clarity reinforces the definitional boundaries of the classical categories.

3. *Interlocutory orders – a conceptual standard?*

But not all categories of orders that should sometimes be appealable are so fixed or easily defined. That is where 28 U.S.C. § 1292(b) comes into play. Aside from the appellate mandamus doctrine—which is best considered an exception to or safety valve from the appealability doctrines²⁴⁰—the most flexible of the appealability doctrines is § 1292(b), and it employs something like a conceptual standard.

A conceptual appealability standard uses a discretionary standard to *sometimes* (on a case-by-case basis) permit an immediate appeal, but only from a *conceptually constituted* category of orders. For a court to find an order appealable under a conceptual categorical standard, the court must first ask, “does this order

²³⁹ See *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, ___ (2017).

²⁴⁰ The appellate mandamus doctrine permits a discretionary appeal—via petition for a writ of mandamus—when a court of appeals determines that the vaguely defined, but quite limited, extraordinary-circumstances standard has been met. *Microsoft Corp. v. Baker* 582 U.S. ___, ___ (*5) (2017) (“[In] extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means ‘final’ and thus appealable under federal statutes.”) (cleaned up). Somewhat tautologically, the doctrine permits an appellate court to grant a writ of mandamus, and thus hear an appeal from an interlocutory order, when the petitioner shows that: it has no other adequate means of obtaining relief; the right to issuance of the writ is “clear and indisputable”; and issuing the writ is “appropriate under the circumstances.” *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 380-81 (2004). This vague, discretionary standard can be applied to any kind of order, unlike the appealability doctrines, which apply only to certain categories of orders.

fit into a conceptual category?”—and, if it does, must then ask, “should this specific order be appealable under the applicable standard?”

Because conceptual standards are so amorphous—combining the fuzziness of conceptual categories with the flexibility of standards—it is a little surprising that there is such an appealability doctrine. But the appealability doctrine that most resembles a conceptual categorical standard is 28 U.S.C. § 1292(b).

Section 1292(b) authorizes a party to file an application to appeal in the appellate court, if the district court certifies that an interlocutory 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.”²⁴¹ The appellate court then has the discretion to permit the appeal, which it exercises both by reapplying the same standard as the district court and by making an independent discretionary determination.

The 1292(b) inquiry employs the familiar two step categorization-then-application approach, using a conceptual categorical question at the first step, and case-specific standards at the second. Because the appellate court re-applies the same standard as the district court, the steps are not split between the trial and appellate courts. The first-step categorization question is whether there is a “substantial ground for difference of opinion” on a question of law, which requires the requiring the courts to identify a category of contestable legal questions. The second-step standards ask whether the question of law is “controlling” and whether an immediate appeal “may materially advance the ultimate termination of the litigation,” which are case-specific determinations, dependent on the nature and procedural posture of the particular case.²⁴²

The categorical inquiry at the first step is more conceptual than classical. There is no classical definition for what constitutes a contestable question of law.

²⁴¹ 28 U.S.C. § 1292(b).

²⁴² See Wright & Miller, 16 Fed. Prac. & Proc. Juris. § 3930, at nn. 24-25, 38-42 (3d ed.).

Instead, courts use both a prototype and an exemplar concept model. The obvious prototype for a contestable decision is one that could be reversed, an incorrect decision.²⁴³ But the category of contestable decisions must consist of more than just incorrect decisions because “a substantial ground for difference of opinion” is a broader descriptor than “incorrect.” (Indeed, truly incorrect decisions that are contrary to controlling precedent are not certifiable under § 1292(b) because there is no grounds for disagreement on them.)²⁴⁴ Still, there is an intuitive prototype concept-model centered on the *idea* of an incorrect decision—a graded category, where decisions that are likely to be reversed fit the category better those with little chance of reversal. That prototype model raises some implementation difficulties: it is hard to require trial judges to assess their own likelihood of error, and even if they believe an error is possible, they may be loath declare it.²⁴⁵

It is not surprising, therefore, that an exemplar model has evolved to describe the category of contestable decisions. The exemplars are other types of decisions with high likelihoods of reversal. Because this is a graded category, some of the exemplars are more typical than others. Most courts recognize some combination of the following exemplars (in roughly descending order of typicality): decisions contrary to holdings in other circuits; decisions where there is a circuit split on the

²⁴³ By “incorrect,” I mean “likely to be reversed.” Judges may very well make decisions which they believe are required by binding precedent, even if they believe they are incorrect on some other grounds. *See, e.g., Berger v. US*, 170 F. Supp. 795, 796 (S.D.N.Y. 1959).

²⁴⁴ *See, e.g., In re Miedzianowski*, 735 F.3d 383, 384 (2013) (“Where our circuit has answered the question, the district court is bound by our published authority. And so are we. Because there is governing precedent in this circuit that settles the issue at hand, Defendants cannot show the extraordinary circumstances such that an interlocutory appeal should be granted.”).

²⁴⁵ It would be a rare judge, indeed, who would happily opine that there is even a 50% chance that her decision is wrong. And no judge would opine that it is more than 50% likely to be wrong—she would simply decide the other way.

question; decisions where there is an intracircuit split at the district court level; and decisions on novel questions of law.²⁴⁶

When an interlocutory decision resembles one of the more typical exemplars (say, decisions where there is a circuit split), courts often find it is a member of the category based on that similarity alone.²⁴⁷ But when an interlocutory decision resembles only one of the less-typical exemplars (say, decisions on novel questions of law), courts are more cautious, often noting that something more is needed to fit the category.²⁴⁸

Section 1292(b) demonstrates something interesting about the development of categorical appealability doctrines: the more substantively open-ended a doctrine, the more courts and rulemakers rely on procedural strictures to bound it. Because 1292(b) is vague and discretionary at both the categorization and the standard-application steps, the procedural requirements are correspondingly higher: both the trial court and the appellate court have to agree that the doctrine applies, *and* the appellate court has to agree to take the case. These procedural requirements serve as a backstop to the open-endedness of the doctrine itself.

Similarly, most of the exemplars of contestable decisions are defined by particular procedural outcomes—prior contrary holdings, circuit splits, etc. all depend on how other courts have ruled in the past. Courts rely on the clear procedural signs of past contested decisions to recognize the vague substantive category of contestable decisions. Put another way, each of the exemplars is itself a category of decisions—but, like orders on injunctions or partial final judgments,

²⁴⁶ *See, e.g.*, *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010); *In re Suntrust Banks, Inc. ERISA Litig.*, No. 08-CV-3384, 2011 WL 13824, at *2 (N.D. Ga. Jan. 3, 2011); *City of Dearborn v. Comcast of Michigan III, Inc.*, No. 08-10156, 2008 WL 5084203, at *3 (E.D. Mich. Nov. 24, 2008); *Wright & Miller*, 2 Fed. Proc., L. Ed. § 3:218.

²⁴⁷ *See, e.g.*, *Tanasi v. New All. Bank*, 786 F.3d 195, 198 (2d Cir. 2015), as amended (May 21, 2015); *Muniz v. Sabol*, 517 F.3d 29, 32 (1st Cir. 2008); *Fasano v. Fed. Reserve Bank of New York*, 457 F.3d 274, 279 (3d Cir. 2006); *In re Baker & Getty Fin. Servs., Inc.*, 954 F.2d 1169, 1172 (6th Cir. 1992)

²⁴⁸ *See, e.g.*, *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010).

they are relatively clear, classical categories, constituted by definitive procedural boundaries.

Thinking of the contestability prong of § 1292(b) as a conceptual inquiry also illustrates another trait of conceptual categories. Recall that we began by using a prototype model to describe contestability, using the incorrect decision as the prototype. Notably, even though an incorrect decision is *not actually* contestable and thus not part of the category, it can still serve as the prototype because the category involves decision that are *similar* but not *identical* to the prototype. As we will see below, this relationship of similarity to a prototype that is not itself part of the category is crucial to understanding finality-for-appeal.

B. The Final-Judgment Rule as a Classical and Conceptual Categorical Rule

The final-judgment rule is both the “cornerstone” of all the federal appealability doctrines²⁴⁹ and a perpetual source of confusion. As explained above, some of that confusion is because “final” means different things in different contexts: from formal final judgments, to true finality, to finality-for appeal.²⁵⁰ And, even more confusing, “final” sometimes means different things even in the same context.

The idea of finality resists clear definition (it has “[n]o verbal formula”)²⁵¹ and has fuzzy boundaries (a “penumbral area”²⁵² or a “twilight zone”).²⁵³ That is because the idea of finality is not classically defined, it is a concept, a radial concept that we can model with positive and negative prototypes and exemplars. And, using that concept model, we can identify how the different meanings of “final” relate to one another.

²⁴⁹ *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 306 (1962).

²⁵⁰ *See supra* at I.C.

²⁵¹ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

²⁵² *Radio Station WOW v. Johnson*, 326 U.S. 120, 124–26 (1945).

²⁵³ *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964).

The central prototype anchoring the concept of finality is the idea of the end of the case. All of the conceptions of finality are arranged radially around that intuitive central idea. Some of those conceptions have developed and crystallized into relatively clear classical categories; “finality” in the context of formal final judgments and true finality is essentially classically defined, with clear borders and procedural markers. In other contexts, the finality-for-appeal doctrines, the meaning of “finality” remains more conceptual.

Thus, while the final-judgment rule *is* a rule (if a decision is final, then it is immediately appealable), it functions as a classical rule or a conceptual rule, depending on the type of category used to give meaning to the term “final.” Sometimes, it is a classical appealability rule that, as described above, uses a bright-line rule to always permit an immediate appeal from a classically defined category of orders. But other times it is a conceptual appealability rule that uses a bright-line rule to always permit an immediate appeal, but only from a *conceptually constituted* category of orders. For a court to find an order appealable under a conceptual categorical rule, it must ask “does this order fit into a conceptual category?”— if it does, then the rule provides that the order is immediately appealable.

Let’s start with the relatively clear classical rules: the final-judgment rule as applied to formal final judgments and to “true finality” decisions. We can then proceed to the more conceptual rules of the finality-for-appeal doctrines.

1. *Classical categories of finality – true finality and formal final judgments*

The final-judgment rule operates like a classical categorical rule when applied to formal final judgments and truly final decisions. The final-judgment rule is most like a classical categorical rule in these two core applications because the two categories ‘formal final judgment’ and ‘truly final decision’ can be clearly defined. A formal final judgment is the traditional end of the trial-court stage of a case, when the district court enters its definitive ruling on the parties’ rights and

obligations and dispenses with the entire case.²⁵⁴ A truly final decision—as opposed to a one that is interlocutory or is deemed final for appeal—is, as the Court defined it in *Catlin v. United States*, “generally... one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”²⁵⁵ Both of these definitions also reflect an intuitive, conceptual understanding that “final” means “similar to the end of the case.”

Let us first consider **formal final judgments**. In the discussions of §1292(b) and Rules 54(b) and 23(f) above, we saw that those doctrines use procedural requirements to clarify the conceptual indeterminacy. A similar phenomenon is evident in the application of the final-judgment rule to formal final judgments. Under § 1291, entry of a truly final decision triggers the right to appeal under, but it is entry of the formal judgment on the docket that triggers the 30-day deadline for filing a notice of appeal.²⁵⁶ Accordingly, knowing whether a judgment has been entered on the docket is at least as important as knowing whether an order is final. For that reason, the Rules now require a definitive procedural act to mark formal entry of the judgment: in 1958, Rule 58(a) was amended to require the district court or clerk to enter a judgment on the docket as a separate document.²⁵⁷ And Rule 58(c) was added later to direct that, if the court has not entered a separate document, the judgment is deemed entered 150 days after the final order was entered.²⁵⁸ These procedural requirements definitively establish what counts as a

²⁵⁴ JUDGMENT, Black’s Law Dictionary (11th ed. 2019) (“A court’s final determination of the rights and obligations of the parties in a case.”) (“final judgment. (18c) A court’s last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney’s fees) and enforcement of the judgment.”). The Federal rules of Civil Procedure define “judgment” somewhat unhelpfully for these purposes, as “a decree and any order from which an appeal lies.” Fed. R. Civ. P. 54(a).

²⁵⁵ *Catlin v. United States*, 324 U.S 229, 233 (1945).

²⁵⁶ Fed. R. App. 4(a).

²⁵⁷ Fed. R. Civ. P. 58(a). Rule 58(a) also provides that certain other orders function as judgments but do not require a separate document.

²⁵⁸ Fed. R. Civ. P. 58(c).

formal final judgment. That certainty allows for the final-judgment rule to operate as a categorical rule, declaring definitively that if a decision meets those procedural requirements, then it is immediately appealable, regardless of the specific facts or circumstances of the given case.

Let us next consider the *truly final decisions*. Unquestionably, the most famous definition of a truly final decision is the one from *Catlin v. United States*, “generally... one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”²⁵⁹ This famous definition operates largely as a classical categorical rule. It sets the necessary and sufficient characteristics for a truly final decision: it must decide the merits of the case, and the only thing that remains must be executing the judgment. If a decision has both of those characteristics, it is a truly final decision, and it is appealable under § 1291.

²⁵⁹ *Catlin v. United States*, 324 U.S. 229, 233 (1945). The Supreme Court alone has cited the *Catlin* formulation 23 times. *Microsoft Corp. v. Baker*, 137 S.Ct. 1702, 1716 (2017); *Gelboim v. Bank of America Corp.*, 135 S.Ct. 897, 902 (2015); *Ray Haluch Gravel Co. v. Central Pension Fund of Intern. Union of Operating Engineers and Participating Employers*, 134 S.Ct. 773, 779 (2014); *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S.Ct. 1758, 1778 (2010); *Mohawk Industries, Inc. v. Carpenter*, 130 S.Ct. 599, 610 (2009); *Riley v. Kennedy*, 128 S.Ct. 1970, 1974+ (2008); *Green Tree Financial Corp.-Alabama v. Randolph*, 121 S.Ct. 513, 519+ (2000); *Cunningham v. Hamilton County, Ohio*, 119 S.Ct. 1915, 1920 (1999); *Quackenbush v. Allstate Ins. Co.*, 116 S.Ct. 1712, 1718+ (1996); *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S.Ct. 1992, 1995 (1994); *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 111 S.Ct. 648, 651 (1991); *Midland Asphalt Corp. v. U.S.*, 109 S.Ct. 1494, 1497 (1989); *Van Cauwenberghe v. Biard*, 108 S.Ct. 1945, 1949+ (1988); *Budinich v. Becton Dickinson and Co.*, 108 S.Ct. 1717, 1720 (1988); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S.Ct. 1133, 1136 (1988); *Stringfellow v. Concerned Neighbors in Action*, 107 S.Ct. 1177, 1181 (1987); *Firestone Tire & Rubber Co. v. Risjord*, 101 S.Ct. 669, 673 (1981); *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 100 S.Ct. 800, 805 (1980); *Coopers & Lybrand v. Livesay*, 98 S.Ct. 2454, 2457 (1978); *Reeder A/B Disa v. Cunard Steamship Co.*, 88 S.Ct. 78, 79 (1967); *Brown Shoe Co. v. U.S.*, 82 S.Ct. 1502, 1515+ (1962); *Baltimore Contractors v. Bodinger*, 75 S.Ct. 249, 251 (1955); *Radio Station WOW v. Johnson*, 65 S.Ct. 1475, 1478 (June 18, 1945). The courts of appeal have cited it hundreds more. *See Wright & Miller* § 3910.

We can perhaps sense the traces of a more conceptual view of finality in the background of this classical definition—one based on the intuitive sense that truly final decisions are decisions that look a lot like the end of a case (or a lot like a formal final judgment). Indeed, early cases, before the definition obtained its present fixed form, sometimes suggests this conceptual view. In the 1855 case *Craighead v. Wilson*, for example, the Court describes a prior case as holding that a decision was final because it had “an effect similar to that of an execution on a judgment.”²⁶⁰ And that case (*Whiting v. Bank of the United States*) examines an even earlier case (*Ray vs. Law*²⁶¹) and imagines that it must have been comparing the decree at issue to a final judgment (despite never saying so): “This decision must have been made upon the general ground, that a decree, final upon the merits of the controversy between the parties, is a decree upon which a bill of review would lie, without and independent of any ulterior proceedings. Indeed, the ulterior proceedings are but a mode of executing the original decree, like the award of an execution at law.”²⁶²

Today, the language used to discuss true finality still bears traces of this conceptual thinking. Perhaps most obviously, although § 1291 grants appellate jurisdiction over “final *decisions* of the district courts,”²⁶³ it is commonly referred to as the “final-*judgment* rule,” a reminder that its “core application” is to formal final judgments that end cases.²⁶⁴ Many cases use metaphors that describe finality based on the centrality of final judgments. The Court has called the requirement of a final judgment the “*cornerstone* of the structure of appeals in the federal courts.”²⁶⁵ When deciding whether an order is final, judges wonder how metaphorically close it is to

²⁶⁰ *Craighead v. Wilson*, 59 U.S. 199, 201 (1855).

²⁶¹ 3 Cranch R. 179

²⁶² *Whiting v. Bank of U.S.*, 38 U.S. 6, 15 (1839).

²⁶³ 28 U.S.C. § 1291 (emphasis added)

²⁶⁴ *Gelboim v. Bank of America Corp.*, 135 S.Ct. 897, 902 (2015) (noting that § 1291’s “*core application* is to rulings that terminate an action”) (quoting and citing *Mohawk Indus.*, *Cohen*, and *Catlin*) (emphasis added).

²⁶⁵ *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 306 (1962).

an formal final judgment: “A ‘final decision’ is not necessarily the ultimate judgment or decree completely closing up a proceeding.’ But it is not easy to determine what decisions *short of that point* are final.”²⁶⁶

The *Catlin* definition itself uses the word “generally” to indicate that it is describing a *typical* final decision, thus suggesting both that the category could be graded and that its outer boundaries could be blurred.²⁶⁷ Likewise, when the Court cites *Catlin*, it usually qualifies the definition by stating, for example, that it describes a final decision in “the ordinary course,”²⁶⁸ or that “‘final decisions’ *typically* are ones that trigger the entry of judgment”²⁶⁹—a formulation that Chief Justice Roberts doubled-down on in *Hall v. Hall*, stating that “the *archetypal* final decision is one that triggers the entry of judgment.”²⁷⁰

When it comes to true finality, these various turns of phrase are the vestiges of an earlier mode of thought. The true-finality category is now essentially classically defined. The definition’s necessary and sufficient elements—deciding the merits and leaving nothing to do but enter judgment—have more-or-less crystallized into an either/or question, as illustrated by two more modern cases. In *Budinich v. Becton Dickinson* and *Ray Haluch Gravel v. Central Pension Fund*, the Court held that an order can be truly final and appealable even if it leaves the amount of attorney’s fees to be decided later.²⁷¹ A literal application of the *Catlin* definition would seem to require the opposite outcome, because something else remains for the trial court to do besides executing the judgment. But the Court had

²⁶⁶ *United States v. 243.22 Acres of Land in Town of Babylon, Suffolk Cty., N.Y.*, 129 F.2d 678, 680 (2d Cir. 1942) (*quoting* *Rubert Hermanos, Inc., v. People of Puerto Rico*, 1 Cir., 118 F.2d 752, 757) (emphasis added).

²⁶⁷ *Catlin v. United States*, 324 U.S. 229, 233 (1945).

²⁶⁸ *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int’l Union of Operating Engineers & Participating Employers*, 571 U.S. 177, 183 (2014).

²⁶⁹ *Mohawk Indus. v. Carpenter*, 558 U. S. 100, 103 (2009) (emphasis added)

²⁷⁰ *Hall v. Hall*, 584 U.S. ____ (2018) (emphasis added) (*quoting* *Mohawk Industries, Inc. v. Carpenter*, 558 U. S. 100, 103 (2009)) (cleaned up).

²⁷¹ *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988); *Ray Haluch Gravel v. Central Pension Fund*, 134 S. Ct. 773 (2014).

already held that a “question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order.”²⁷² In *Budinich*, the Court recognized that the definition was “ultimately question-begging” because whether a decision “ends the litigation on the merits” depends on what is considered a merits issue in the first place.²⁷³

Therefore, the Court opted for a classical categorical holding that resolving attorney’s fees claims is not part of deciding the merits, in order to preserve the “operational consistency and predictability in the overall application § 1291.”²⁷⁴ When the question arose again in *Ray Haluch*, the Court quickly rejected the new twist on the argument from *Budinich*—that attorney’s fees should be considered part of the merits when the fee claim was based on a contract, rather than a statute.²⁷⁵ It did so by first repeating the policy reasons identified in *Budinich* (operational consistency and predictability) and then relying on the “uniform rule” that *Budinich* established.²⁷⁶ In the interests of clarity, the Court drew an admittedly arbitrary line. Even when a statute or contract provides that attorney’s fees are part of the merits (as many do), the Court was imposing its own bright-line definition for purposes of defining true finality under § 1291.

2. *Conceptual categories of finality – finality-for-appeal*

The finality-for-appeal doctrines are interpretations of the final-judgment rule that deem certain categories of decisions final-for-appeal, even though they are neither formal final judgments nor truly final decisions; finality-for-appeal doctrines

²⁷² *Budinich v. Becton Dickinson & Co.*, 486 U.S. at 199 (citing *Brown Show Co. v. United States*, 370 U.S. 294, 308–309 [1962]; *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 513–516 [1950]).

²⁷³ *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) (holding that a decision on attorney’s fees is not part of the merits, and thus is not necessary before a decision is final and appealable).

²⁷⁴ *Budinich v. Becton Dickinson & Co.*, 486 U.S. at 202.

²⁷⁵ *Ray Haluch Gravel v. Central Pension Fund*, 134 S. Ct. 773.

²⁷⁶ *Id.*

are conceptual categorical rules. They deem a decision to be in the category “final-for-appeal” if it is similar enough to a final judgment—and if it is final-for-appeal, then it is appealable. The most well-developed finality-for-appeal doctrine is the collateral order doctrine. It has gone through a process of refinement and evolution so that it now almost resembles a classical rule. The other finality-for-appeal doctrines, the pragmatic appeals doctrines, remain more conceptual and have not crystallized into classical rules. Examining how the collateral-order doctrine evolved can help us explain and predict the evolution of the pragmatic appeals doctrines.

The collateral order doctrine began as an undertheorized conceptual rule, based essentially on the intuition that some trial-court decisions should be considered final because they share features making them similar to final judgments. As the Court first described them in *Cohen v. Beneficial Industrial Loan Corp.*, collateral orders were:

that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.²⁷⁷

Over time, the doctrine has been “distilled”²⁷⁸ almost into a classical category, with the necessary-and-sufficient elements of a classical definition:

the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.²⁷⁹

Still, from its origins, we can deduce that the collateral order doctrine describes a radial category structured around positive and negative prototypes. The positive prototype is the formal final judgment. The negative prototype is a tentative order that is just a step toward final judgment.

²⁷⁷ *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)

²⁷⁸ *Will v. Hallock*, 546 U.S. 345, 349 (2006).

²⁷⁹ *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978); *See Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106 (2009).

In *Cohen*, the issue was whether the district court order—declining to apply a state-law expense-shifting statute to a stockholder derivative suit—was an appealable final decision.²⁸⁰ To answer that question, the Court made some necessary rhetorical moves before arriving at the original collateral-order description above. First, the Court had to blur the boundaries of finality, to stretch them beyond a pure classical definition that encompassed only formal final judgments. It did so by invoking the purpose of § 1292 “to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties.”²⁸¹ The Court used this quick foray into the legislative intent of a different section to extend the category of final decisions under § 1291 beyond final judgments, while maintaining the centrality of the final judgment to the category.

Next, the Court had to limit the category somehow. It did so by using a negative prototype: “any decision which is tentative, informal or incomplete,” which is only a “step[] towards the final judgment.”²⁸² That negative prototype stands for the outside of the reconfigured final-decisions category. *Cohen* thus recast the “final decisions” category in prototypical terms, first centering the category on (without limiting it to) the positive prototype of the final judgment, and then limiting the reach of the category by pointing to the negative prototype of the unappealable tentative decision.

The positive and negative prototypes are still apparent in the more classical definition used to identify collateral orders today. Understood in terms of those two prototypes, the collateral order doctrine covers decisions that: *like a final judgment*, “conclusively determine the disputed question” and “resolve an important issue”; but *unlike a tentative step toward final judgment*, are “completely separate from the

²⁸⁰ *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545 (1949).

²⁸¹ *Id.*

²⁸² *Cohen*, 337 U.S. at ____.

merits of the action” and “effectively unreviewable on appeal from a final judgment.”²⁸³

The pragmatic appeals doctrines are conceptual categorical rules that, unlike the collateral order doctrine, have resisted distillation into classical categorical rules.²⁸⁴ These doctrines include the hardship-finality doctrine from *Forgay* and the balancing approach from *Gillespie*.²⁸⁵ The continued vitality of these doctrines is unclear, largely because they remain incompletely theorized conceptual categorical rules.

The *Forgay* hardship doctrine and the *Gillespie* balancing doctrine seem more like case-by-case balancing standards, like appellate mandamus or certiorari, than like the final-judgment rule they are supposedly interpreting.²⁸⁶ And there are cases in the courts of appeal, and even occasionally (although not recently) in the Supreme Court, applying them on a case-by-case basis.²⁸⁷

The problem is that, if they are to survive, the pragmatic appeals doctrines cannot be case-by-case standards. The Supreme Court’s categorical imperative requires that finality-for-appeal be decided categorically, at the first step of the court’s analysis, not on a case-by-case basis. And, as judicial interpretations of the final-judgment rule, they must use a bright-line rule creating a right to appeal, at the second step, not a standard. That means that, for the pragmatic appeal doctrines to survive, they must have an identifiable categorical basis and must enable courts to identify clear categories of decisions.

²⁸³ *Coopers & Lybrand*, 437 U.S. at 467; *See Mohawk Indus.*, 558 U.S. at 106.

²⁸⁴ *See Lammon, Dizzying Gillespie*, *supra* note 15, at ____.

²⁸⁵ I use the term “pragmatic appeals doctrines” broadly to include both the *Forgay* hardship doctrine and *Gillespie*’s balancing approach; others treat them as more separate. *See, Wright & Miller*, §§ 3910, 3911, Had it not been for the Supreme Court’s ruling in *Coopers & Lybrand*, they would also have included the “death-knell” doctrine for certain class certification orders. *Coopers & Lybrand*, 437 U.S. 463.

²⁸⁶ *See Lammon, Dizzying Gillespie*, *supra* note 15.

²⁸⁷ *Id.*

In their current formulations, the *Forgay* hardship doctrine and the *Gillespie* balancing doctrine do not seem to enable such categorization. The *Forgay* hardship doctrine seems to authorize an immediate appeal from an order that immediately transfers property from one party to the other and thereby risks irreparable harm if an appeal is delayed until the case is concluded.²⁸⁸ But the boundaries of the doctrine are unclear: perhaps it applies only to decisions posing “some special danger to the appellant”; perhaps it does not apply to decisions like sanctions which require an immediate payment to the opposing party but are “designed to control continuing proceedings rather than grant relief”; perhaps it does not apply when another doctrine, like the collateral order doctrine or Rule 54(b), could apply.²⁸⁹

The contours of the *Gillespie* balancing approach are, if anything, less clearly delineated than the *Forgay* hardship doctrine’s. The Court in *Gillespie* stated that the “most important competing considerations” in deciding finality were “the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other,”²⁹⁰—suggesting that weighing cost against the risk of injustice could be sufficient to determine appealability. But such untrammelled balancing is of little help when trying to define a category of orders. The Court suggested a few other considerations: whether “there is reason to view [the decided] claims as severable;” and, somewhat contradictorily, whether the decision was “fundamental to the further conduct of the case.”²⁹¹ But they, too, do not add up to a classical categorical definition.

Nonetheless, it is imperative that the pragmatic appeals doctrines—or some other conceptual categorical appealability doctrines—survive. Courts face, on the one hand, the Supreme Court’s categorical imperative and the increasing classical categorical nature of the collateral order doctrine. And they face, on the one hand,

²⁸⁸ See *Forgay v. Conrad*, 47 U.S. 201 (1848); Wright & Miller § 3910 at n.30-31.

²⁸⁹ See Wright & Miller § 3910 at nn. 38-63.

²⁹⁰ *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964) (quoting *Dickinson* 338 U.S. 507, 511).

²⁹¹ *Id.* at 154 (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377).

the need for the law to continue evolving and the inevitable pressure for innovation in deciding appealability. They need some flexible, but not entirely unbounded, appealability doctrines.

An explicitly conceptual approach to the pragmatic appeals doctrines could fill that need. A conceptual approach will allow courts to continue using pragmatic appeals doctrines and perhaps to eventually identify new categories of decisions to be considered final-for-appeal. As we have seen, fuzzy and undefined conceptual categories can, over time, give rise to more definite classical categories—but only if the courts have the opportunity to implement and iterate on them. Shutting down the pragmatic appealability doctrines because they do not conform to the Court’s categorical imperative would frustrate that development.

The conceptual development of the pragmatic appealability doctrines through future cases will take time. The other appealability doctrines have evolved sufficiently to address most appealability issues. The pragmatic appealability doctrines only come into play occasionally.

But we can begin to sketch a concept of model of finality-for-appeal to be used by courts trying to apply the pragmatic appealability doctrines. As explained above, conceptual categories are radially constructed based on the similarity to positive and negative prototypes or exemplars, and that similarity depends on shared family resemblances, an overlap of some, but not necessarily all, features.²⁹² Each pragmatic appeals doctrine identifies a few salient features, as described above. But for them to survive and be used for new categories of orders, courts will have to identify other features that new categories of orders share with the appropriate prototypes and exemplars.

The positive and negative prototypes for the concept of finality-for-appeal have already identified in the discussion above about the collateral order doctrine: the idea of the final judgment that ends the case and the idea of the tentative order that is just a step in the case. Based on the collateral order doctrine and the other

²⁹² *See supra* at II.B.2.

finality doctrines, we can compile a non-exhaustive list of features of those prototypes.

Features of Final Judgments (the positive prototype):

- Ends the proceedings;²⁹³
- Conclusive;²⁹⁴
- Distinct;²⁹⁵
- Decides a merits question;²⁹⁶
- Important to a party's rights;²⁹⁷
- Immediately transfers property;²⁹⁸
- Important to resolving the case;²⁹⁹
- Only reparable if reviewed now;³⁰⁰
- Procedurally distinct;³⁰¹
- Efficient to review now;³⁰²

Features of Tentative-Step Orders (the negative prototype):

- Provisional;³⁰³

²⁹³ *Catlin v. United States*, 324 U.S. 229, 233 (1945) (“generally one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment”).

²⁹⁴ *Coopers & Lybrand v. Livesay*, 437 U.S. 463, __ (1978). (“*conclusively* determine the disputed question”) *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

²⁹⁵ *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (“separable from, and collateral to, rights asserted in the action”) (“independent of the cause itself”).

²⁹⁶ *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (“finally determine claims of right”).

²⁹⁷ *Coopers & Lybrand*, 437 U.S. at __. (“resolve an important issue”); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (“finally determine *claims of right*”).

²⁹⁸ *Forgay v. Conrad*, 47 U.S. 201 (1848).

²⁹⁹ *Coopers & Lybrand*, 437 U.S. at __. (“resolve an important issue”);

³⁰⁰ *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (“too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.”)

³⁰¹ Fed. R. Civ. P. 58(a), (c); Fed. R. Civ. P. 54(b); 28 U.S.C. § 1292(b).

³⁰² Fed. R. Civ. P. 54(b) (“no just reason for delay”); 28 U.S.C. § 1292(b) (“immediate appeal ... may materially advance the ultimate termination of the litigation”).

³⁰³ *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, __ (1949). (“any decision which is tentative, informal or incomplete,” which is only a “step[] towards the final judgment”)

- Purely procedural;³⁰⁴
- Merges into a final merits appeal;³⁰⁵
- Inefficient to review now;³⁰⁶

These are some of the features of the positive and negative prototypes that the other finality doctrines identify as potentially salient to the concept of finality. (In their efforts to identify necessary-and-sufficient elements of finality, courts and rulemakers have identified more features of the positive prototype than the negative.) The lists of features are necessarily impressionistic and non-exhaustive—they are trying to capture intuitive understandings that are often not explicitly stated. Future cases could recognize new features of either prototype, or new combinations of already recognized features, to delineate new categories of appealable decisions.

Conclusion

The Supreme Court’s categorical imperative directing that finality-for-appeal must be decided only for categories of orders seeks to curtail the proliferation of new case-by-case appealability rulings. But it must not be read to shut down the possibility of judicial innovation in appealability. Parties and judges have always used conceptual thinking—similarity and typicality, prototypes and exemplars, and shared features—to identify new categories for immediate appeals. They should continue to do so. And they should explicitly describe the conceptual models guiding their thinking, identifying features that each proposed new category of orders shares with existing prototypes and exemplars of appealability. Perhaps further

³⁰⁴ See, e.g., *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) (“Mohawk does not dispute that ‘we have generally denied review of pretrial discovery orders.’”) (citations omitted).

³⁰⁵ *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (not “completely separate from the merits of the action” or “effectively unreviewable on appeal from a final judgment”).

³⁰⁶ See the many warnings against the dangers of “piecemeal” appeals. *Dickinson*, 338 U.S. at 511; *Cobbledick*, 309 U.S. at 325; *Sears, Roebuck & Co. v. Mackey*, 351 U.S. at 439, 441 (Frankfurter, J. concurring).

common-law percolation will reveal a new classical category of appealable orders defined by a set of is necessary and sufficient characteristics. But to get there, judges need to retain the freedom and flexibility of a conceptual approach.