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Richard L. Heppner Jr.

CONCEPTUALIZING APPEALABILITY: RESISTING THE SUPREME COURT'S CATEGORICAL IMPERATIVE

Richard L. Heppner Jr.*

* Assistant Professor, Duquesne University School of Law. J.D. 2008, Harvard Law School; Ph.D. (Literature) 2003, Tufts University; B.A. 1995, Kenyon College. Thanks to my colleagues at Duquesne for their support and guidance, including Wes Oliver, Jane Moriarty, and Seth Oranburg for their helpful comments and advice. Special thanks to Judge Thomas Hardiman for his guidance and comments on an earlier draft of this piece. Particular thanks to Bryan Lammon for generously sharing his time, comments, and insights on earlier drafts. Thanks to Dr. Aimee Knupsky for our fruitful discussion about cognitive psychology and concept theory. Thanks to my research assistants Oluwaseyi Odunaiya and Mark Stevens. Thank you to the participants in and organizers of the 2019 Junior Faculty Forum at the University of Richmond School of Law and the 2019 Junior Faculty Federal Courts Workshop at the University of Arkansas School of Law for their feedback and the opportunity to present earlier versions of this paper. And particular thanks to Soledad Caballero for her wisdom, support, and patience.

In federal court, various appealability doctrines govern whether a decision can be immediately appealed. Some doctrines apply to clearer categories of orders, like injunctions. Others apply to more amorphous categories of orders, like the different "final decisions" appealable under multiple interpretations of the final-judgment rule. The Supreme Court has directed courts to decide appealability based only on whole categories of orders, not on the facts of individual cases. But that categorical imperative has not stopped courts from creating varied new categories of orders to deem final-for-appeal.

This paper draws on insights from cognitive psychology to understand how courts conceive of categories of orders. Cognitive psychologists have shown that people understand the world using not only "classical categories" based on logical definitions, but also "conceptual categories" based on fuzzier, intuitive concepts of similarity and typicality. This paper approaches appealability as a two-step process—first, categorizing the order and, second, applying the appropriate doctrine. Previous interventions have focused on whether different doctrines use rules or standards at the second step. This paper focuses on the initial categorization step.

This paper makes two contributions to the study of federal appealability. First, it maps the appealability doctrines on both a rules–standards continuum and a classical–conceptual categorical continuum. It shows that different applications of the final-judgment rule employ different categorical approaches. Sometimes, when applied to formal final judgments and truly final orders, the final-judgment rule uses classical categories of finality. But in other applications, particularly the finality-for-appeal doctrines, it uses conceptual categories. Second, this paper argues that, despite the Supreme Court's categorical imperative, courts should employ a flexible conceptual approach to identify new categories of orders that are final-for-appeal. It posits some potential features of those new conceptual categories. Over time, intuitive, conceptual categories could produce more definite classical categories, but only if courts have the opportunity to implement and iterate on them. Shutting down the finality-for-appeal doctrines because of the Court's categorical imperative would frustrate that development.

INTRODUCTION

When it comes to federal appeals, every lawyer knows at least two things. We all know the final-judgment rule: you can appeal only from a district court's "final decision" at the end of the case.[1] And we all know that the final-judgment rule is not really true. There are exceptions that allow immediate appeals from non-final decisions. And there are judge-made doctrines that deem other decisions final-for-appeal, even though they do not end the case. It is probably safe to say that we also all know that the resulting system of federal appealability doctrines is complex and sometimes confusing.[2]

The doctrines governing appealability in federal court are numerous and varied. They are found not only in the Federal Rules of Civil Procedure,[3] but also in statutes,[4] and case law.[5] They can be bright-line rules that always allow immediate appeals or contextual standards that only sometimes allow them, or they can seem to combine both rules and standards. 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.

This is not to say that the appealability doctrines are broken. Indeed, for most cases they work well—determining whether an order is immediately appealable is just a matter of applying the appropriate rule or standard. For the cases that do not fit neatly within an existing doctrine, the Supreme Court has imposed a type of categorical imperative to direct how courts decide them.[6] First, the Court has held that judges may not create new appealability doctrines.[7] If a judge wants to permit an appeal from a decision that is not covered by an existing doctrine, the judge must explain why the decision should nonetheless be deemed final-for-appeal under the final-judgment rule.[8] Second, the Court has held that judges making that finality-for-appeal determination must do so based not on the "particular injustic[es]" of a specific case, but on "the entire category to which a claim belongs."[9]

Despite that categorical imperative, the Courts of Appeals continue to identify new,

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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 and internal footnotes 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 Indus. Loan Corp., 337 U.S. 541 (1949).
6. My use of the term "categorical imperative" is somewhat tongue-in-cheek. While the Supreme Court's directive does not have the moral implications of Kant's categorical imperative to "[a]ct 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., Hackett Publ'g Co. 3d ed. 1993) (1785).
7. 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).
8. *Id.* at 113–14.
9. *Id.* at 107 (quoting Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994)).

contested categories of potentially final-for-appeal orders—usually by applying an interpretation of the final-judgment rule known as the collateral-order doctrine. The Third and Ninth Circuits are split over whether interlocutory orders declining to enforce statutes of repose are final-for-appeal.[10] The Fifth and Tenth Circuits are split over whether interlocutory orders "bearing on First Amendment rights" are final-for-appeal.[11] The Second Circuit has split from the Fifth and Ninth over whether orders declining to dismiss cases under anti-SLAPP statutes are final-for-appeal.[12] Three Circuits have held that orders declining to appoint counsel in civil cases are final-for-appeal, but nine Circuits have held that they are not.[13] 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.[14] 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.[15]

This article treats making appealability determinations as a two-step process: categorizing the order and then applying the appropriate doctrine for that category. These circuit splits show that courts still disagree about which orders should be appealable at the second step. But they also show that courts can be endlessly creative in how they conceive of different categories of orders at the first step. Even when ostensibly constrained by applying the same collateral-order doctrine, courts categorize orders based on everything from the law they apply (statutes of repose, anti-SLAPP statutes), to their likely effects (affecting First Amendment rights, requiring expenditures of public funds), to whom they affect (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 circuit splits but rather to explain *how* courts keep recognizing different categories of potentially appealable decisions. While commentators have examined which doctrinal forms (rules or standards) work best at the second step,[16] less attention has been paid to how courts categorize decisions in the

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10. *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).

11. *Compare* Whole Woman's Health v. Smith, 896 F.3d 362, 368 (5th Cir. 2018) (citing Marceaux v. Lafayette City-Par. Consol. Gov't, 731 F.3d 488, 490 (5th Cir. 2013), and *In re* Hearst Newspapers, L.L.C., 641 F.3d 168 (5th Cir. 2011), *with In re* Motor Fuel Temperature Sales Practices, 641 F. 3d 470, 482 (10th Cir. 2011).

12. *Compare* Ernst v. Carrigan, 814 F.3d 116 (2d Cir. 2016), *with* DC Comics v. Pac. 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).

13. *See* Matthew R. Pikor, Note, *The Collateral Order Doctrine in Disorder: Redefining Finality*, 92 CHI.-KENT L. REV. 619, 638 (2017) (collecting cases).

14. Copeland v. Ryan, 852 F.3d 900, 904–05 (9th Cir. 2017).

15. Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n, 896 F.3d 520, 529 (D.C. Cir. 2018).

16. *See, e.g.*, Scott Dodson & Elizabeth McCuskey, *Structuring Jurisdictional Rules and Standards Response*, 65 VAND. L. REV. EN BANC 31 (2012); 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 (2017) [hereinafter Lammon, *Dizzying Gillespie*]; Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423 (2013) [hereinafter Lammon, *Rules, Standards*]; John C. Nagel, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review Notes*, 44 DUKE L.J. 200, 217 (1994); Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards*

first place. Understanding the initial 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 depends on "artificial[ly] ordering" the variety of human experience into categories.[17] And cognitive psychologists have shown that we rely on categories to understand the world in everyday life.[18] But experiments in cognitive psychology prove that our everyday mental categories work in surprising ways.[19] Categories resist clear definitions; some members seem to fit categories better than others; and categories' 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 logical definition to do so. And we tend to 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 logical rules and standards. While some of our mental categories are what psychologists call "classical categories," based on logical definitions with necessary-and-sufficient characteristics, many are not. Instead we use intuitive understandings based on perceived similarity. Cognitive psychologists call those understandings "concepts." These conceptual categories often have a particular, radial structure: at the center are prototypes and exemplars, quintessential category-members that we use to anchor the concept. Other category-members are recognized based on our sense of their similarity to the 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 prototypical examples of birds in our heads (something like a sparrow, or, more accurately, our mental idea of a sparrow-like bird).

Sometimes judges must 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 collateral-order doctrine and the other finality-for-appeal interpretations of the final-judgment rule, use radial conceptual thinking. The formal final judgment that ends a case is clearly defined by a classical definition and procedural markers. But the categories of orders that are deemed final-for-appeal remain more conceptual and amorphous. Recognizing the role of conceptual categories in the various appealability doctrines helps explain how judges have reshaped, and will continue to reshape, the categories of orders deemed final for appeal. And it also suggests that—even in light of the Supreme Court's categorical imperative—judges can identify categories of appealable orders using conceptual models of finality, rather than continuing to strive for an unobtainable classical, rule-like purity. Although that

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to Define Federal Jurisdiction, 65 VAND. L. REV. 507 (2012).

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

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

19. *See generally id.*; GREGORY MURPHY, THE BIG BOOK OF CONCEPTS (2004) [hereinafter MURPHY, BBOC]; Gregory Murphy, *What Are Categories and Concepts?*, *in* THE MAKING OF HUMAN CONCEPTS 11 (Denis Mareschal et al. eds., 2010) [hereinafter Murphy, *What Are Categories and Concepts?*]; Mark L. Johnson, *Mind, Metaphor, Law Symposium: Using Metaphor in Legal Analysis and Communication*, 58 MERCER L. REV. 845 (2007).

conceptual approach might not provide the immediate clarity of a bright-line rule, neither have the numerous existing appealability doctrines. Using a conceptual approach instead would build on the signature strength of common-law adjudication—evolution over time—to guide judicial development of new categories of appealable orders.

Part I, below, explains why appeals doctrines matter and the traditional rules-vs.-standards approach to describing their formal logic. *Part II* discusses some recurrent issues in appealability, including the confusing idea of finality, and the categorical nature of the appealability inquiry. *Part III* describes how concept theory and cognitive psychological concept models explain the different categories we use to understand the world—and the roles they play in law. *Part IV* applies concept theory to the major appealability doctrines (except the finality-for-appeals doctrines), mapping them by both the formal logic and the categorical models they employ. *Part V*, applies that same mapping approach to the finality-for-appeals doctrines and the article concludes that courts should explicitly use concept models to recognize new categories of orders that are final-for-appeal.

I. Understanding Appealability

Deciding what orders should be appealable implicates the policy debate between the values of systemic efficiency and individual fairness. Clear rules usually promote efficiency, while flexible standards usually promote fairness. The history of the major federal appealability doctrines reflects the development of different rule-like or standard-like strategies to that policy debate.

A. Efficiency and Fairness

Justice Breyer recently reiterated why the doctrines governing appealability matter: On the one hand, "[t]oo 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."[20] But, on the other hand, "[t]oo 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."[21]

Deciding which orders should be immediately appealable implicates two conflicting values: the efficiency of the adjudicative system and fairness to individual litigants.[22] The need to balance systemic efficiency and individual fairness manifests itself in every aspect of the design of an appellate system. It 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.[23] It also influences *what kinds* of

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20. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1423 (2019) (Breyer, J., dissenting).

21. *Id.*

22. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171 (1974) (quoting Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)) (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.'"); *see also* Pikor, *supra* note 13, at 622.

23. *Lamps Plus*, 139 S. Ct. at 1423 (Breyer, J., dissenting). 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

appealability doctrines exist: On the one hand, the need for an efficient court system demands that appealability doctrines be clear and predictable, saving litigants the needless effort and expense of deciding whether to appeal, and simplifying judges' decisions about which appeals to allow. On the other hand, individual fairness demands that appealability doctrines be flexible and adaptable to unexpected circumstances where justice demands an immediate appeal in a particular case.[24]

These considerations are not new. The Supreme Court has long 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." [25] And the Court 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."[26]

B. Rules and Standards

The tension between systemic efficiency and individual fairness is often understood to implicate the familiar choice between 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.[27] 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. Broadly speaking, rules limit judicial discretion and decision making, while standards expand judicial discretion and decision making. Thus, "speed limit: 55 miles per hour" is a rule, while "no driving at excessive speeds" is a standard.[28]

The arguments in favor of each are familiar.[29] Rules promote stability, efficiency, and clarity; standards promote adaptability, fairness, and practicality.[30] The arguments

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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).

24. Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1818 (2018) [hereinafter Lammon, *Finality, Appealability*]. 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* Cass R. Sunstein, *Two Conceptions of Procedural Fairness*, 73 SOC. RES. 619 (2006).

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

26. *Id.*; *see also* Microsoft v. Baker, 137 S. Ct. 1702, 1707 (2017) (noting that, although the "death-knell theory" of appealability "likely 'enhance[d] the quality of justice afforded a few litigants,'" it imposed a "heavy cost to . . . 'the judicial system's overall capacity to administer justice'") (internal citations omitted).

27. *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).

28. *See, e.g.*, Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 16 (2011); Kaplow, *supra* note 27, at 560; Sunstein, *supra* note 27, at 964–65.

29. Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 400 (1985) (describing the traditional "vices" and "virtues" arguments for and against rules and standards).

30. *Id.* at 383–90; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV.

against them are also well known. Pure rules are blunt instruments, often over- or under-inclusive, and unresponsive to unforeseen distinguishing features of particular cases.[31] Pure standards are mercurial creatures, often vague, and unpredictable in their application even to seemingly similar cases.[32]

To facilitate comparisons, commentators often describe them as if they were Platonic forms, comparing pure rules with pure standards.[33] But the labels "rule" and "standard" are best understood as the opposite poles of a continuum, an unresolved and unresolvable dialectic.[34] Most legal doctrines use both doctrinal forms and mix rule-like and standard-like features.[35] Indeed, legal doctrines tend to shift from one to the other over time.[36] 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.[37] 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.[38]

C. The Rules-Standards Continuum of Appealability Doctrines

The history of the federal appealability doctrines illustrates this tension and unresolved dialectic. When it comes to appealability, neither formal approach has prevailed.[39] 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 doctrines discussed below[40] can be compared on the rules-standards continuum. And most innovations in appealability—and most proposed reforms—have involved moving particular doctrines

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1685, 1687–1701 (1976).

31. *See* Kaplow, *supra* note 27, at 561–62; Sunstein, *supra* note 27, at 957–58; Schlag, *supra* note 29, at 384–89 (describing the "stereotyped arguments" about rules and standards in various contexts).

32. *See* Kaplow, *supra* note 27, at 561–62; Sunstein, *supra* note 27, at 957–58.

33. Kaplow, *supra* note 27, at 561.

34. Schlag, *supra* note 29, at 383.

35. Kaplow, *supra* note 27, at 561; *see also* Sunstein, *supra* note 27, at 960–69 (describing other types of criteria, such as factors, guidelines, and principles, which share traits with both rules and standards). A common hybrid example would be a standard that includes specific factors to be considered.

36. Dodson, *supra* note 28, at 19–20; Schlag, *supra* note 29, at 429.

37. *See* Dodson, *supra* note 28, at 19; Schlag, *supra* note 29, at 429.

38. *See* Dodson, *supra* note 28, at 19; Schlag, *supra* note 29, at 429.

39. Lammon, *Rules, Standards*, *supra* note 16, at 424–25.

40. In addition to the trans-substantive appealability doctrines discussed here, there are subject-specific appealability doctrines. *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 decision[s] 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); 28 U.S.C. § 1292(a)(3) (authorizing immediate appeals from "[i]nterlocutory 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").

along the continuum, making them more rule-like or more standard-like. [41]

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 . . . complete discretionary power as to the cases which it will review."[42] Other scholars have also called for moving away from bright-line rules and using discretionary standards to decide appealability.[43] Still others have advocated for a clearer system using *more* bright-line rules.[44] Dissatisfaction and the push-pull of different proposals is apparent in the history of the federal appealability doctrines.

When legislators and rule-makers feel the need for greater predictability and efficiency, they enact more rule-like doctrines, such as § 1292(a)(1)–(2), which allow for appeals from injunctions and receiverships. When they feel the need for greater flexibility, they enact more standard-like doctrines, such as § 1292(b) which allows for appeals when a district court finds that an appeal is appropriate to resolve an important issue. And courts do the same thing. When courts feel the need for greater predictability or systemic efficiency, they interpret the final-judgment rule more formalistically as a strict rule, such as when the Supreme Court limited the reach of the death-knell doctrine.[45] But when courts feel the need for greater flexibility or individual fairness, they interpret the final-judgment rule more loosely, such as when the Supreme Court first recognized the collateral order doctrine.[46]

As a result, the various appealability doctrines are spread along the rules-standards continuum. Few doctrines are pure rules or pure standards. But each doctrine has more rule-like or more standard-like characteristics. 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 twentieth-century statutory and rulemaking innovations—§ 1292(b), Rule 54(b), and Rule 23(f)—tend to be more standard-like. Thus, the variable meanings of "final" and "final-for-appeal" when applying the final-judgment rule are all over the map.

Some of the different meanings of finality can be attributed to the different purposes to which the idea of finality is put in different legal contexts.[47] But even for the limited

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41. *See* Lammon, *Rules, Standards*, *supra* note 16, at 432–33.

42. Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 564 (1932).

43. *See, e.g.*, Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules*, 1 J. APP. PRAC. & PROCESS 285 (1999); Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717 (1993).

44. *See, e.g.*, Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539 (1997–1998) (proposing more rule-like *and* more standard-like versions of the collateral-order doctrine); Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175 (2001); Pikor, *supra* note 13 (arguing for a more rule-like collateral-order doctrine); Steinman, *supra* note 2 (arguing for a rule-like application of the collateral order doctrine to immunity-appeals, and discretionary appeals otherwise).

45. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 473 (1978).

46. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

47. 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(d)(1)(A). 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* 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4432 (3d ed. 2018). Finality under § 1291 is a consideration in determining the *scope* of review after an interlocutory appeal.

purpose of defining a "final decision" to apply the final-judgment rule, "finality" has multiple meanings: It 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 it can refer to "true finality"[48]: i.e., a decision made near the end of a case, that decides the merits of the case "and leaves nothing for the court to do but execute the judgment."[49] Or, in a third sense, it can describe "final-for-appeal": a decision that comes well before the end of trial, does not decide the merits of the case, and leaves more for the court to decide, but that is nonetheless considered appealable under one of the judge-made, finality-for-appeal doctrines.

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

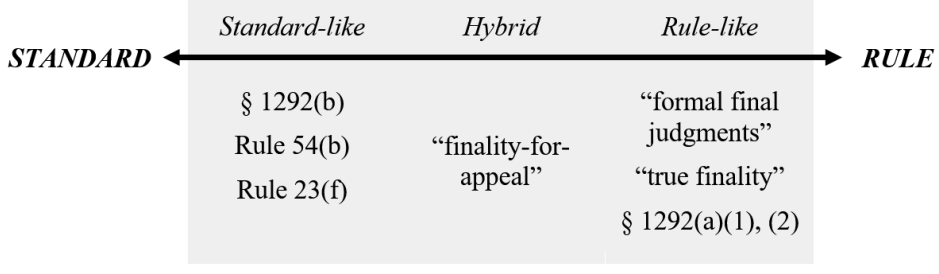

Figure 1. Rules-Standards Continuum of Appealability Doctrines

II. Recurrent Appealability Issues

The received wisdom among commentators and courts is that the system of federal appealability doctrines is a jumble of unsatisfactory solutions to the recurrent problem of when to permit immediate appeals. It has earned the epithet of, perhaps, one of the "most troublesome issues in civil procedure."[50] The patchwork of appealability doctrines has been called everything from a "crazy quilt"[51] to a "Serbonian Bog"[52] to a jurisprudence "sorely in need of limiting principles."[53] Many of the criticisms and proposals argue that some or all of the doctrines should be more rule-like—others argue they should be more standard-like. Many, including the Supreme Court's categorical imperative, find fault with the ambiguities around the concept of finality.

See Lammon, *Finality, Appealability*, *supra* note 24, at 1844–50.

48. Lammon, *Finality, Appealability*, *supra* note 24, at 1825.

49. Catlin v. United States, 324 U.S. 299, 233 (1945).

50. Steinman, *supra* note 2, at 1237.

51. Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 Law & Contemp. Probs. 171, 172 (1984).

52. Anderson, *supra* note 44, at 539.

53. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 292 (1988) (Scalia, J., concurring); *see also* Steinman, *supra* note 2, at 1238–39.

A. The Persistent Problem of Finality

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."[54] As explained above, § 1291's final-judgment rule makes "final decisions" appealable. The perceived harshness and inefficiency of that rule has led courts to adopt numerous interpretations of the term "final," spawning a host of fuzzy finality-for-appeal doctrines—including the nineteenth century's pragmatic hardship finality doctrine,[55] the collateral order doctrine,[56] and the defunct death-knell doctrine[57]—each of which treats as final certain orders that do not actually end the case. The core application of the final-judgment rule—to formal final judgments entered at the end of a case—is discussed below in Part IV.A.1. The various finality-for-appeal doctrines are discussed in Part V.

For now, it suffices to note the two fundamental frustrations judges and scholars often express about the resulting concept of finality, both of which are captured in Justice Black's famous observation in *Gillespie*:

> 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.[58]

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

Finality is hard to define. As the Supreme Court has recognized, 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."[59] 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."[60]

Finality has fuzzy boundaries. The Supreme Court has also acknowledged (usually when relaxing the strict final-judgment rule) that, whatever the definition of finality, its borders are unclear. In *Gillespie*, Justice Black referred to the "twilight zone" of finality.[61] And Justice Frankfurter noted in *Radio Station WOW* that "even so circumscribed a legal concept as appealable finality has a penumbral area."[62]

In short, the category of orders that are considered final is not susceptible to a clear definition and borderline cases keep cropping up. Deciding whether an order is final is less

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54. McGourkey v. Toledo & Ohio Cent. R. Co., 146 U.S. 536, 544–45 (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).

55. *See* Forgay v. Conrad, 47 U.S. (6 How.) 201, 203 (1848); *see generally* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3910 (2d ed. 1991).

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

57. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 473 (1978).

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

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

60. United States v. 243.22 Acres of Land in Babylon, 129 F.2d 678, 680 (2d Cir. 1942).

61. *Gillespie*, 379 U.S. at 152.

62. Radio Station WOW v. Johnson, 326 U.S. 120, 124 (1945).

like asking, "is 7 a prime number?" than like asking, "is a hot dog a sandwich?"[63] It is a question of categorization.

B. The Question of Categorization

Although we normally think of "categorical rules" and "case-by-case standards," all of the appealability doctrines—whether they employ a rule, a standard, or something in-between—operate categorically in that they each apply only to a particular category of cases. For example, the final-judgment rule uses a rule permitting an immediate appeal, but it only applies to orders categorized as final decisions—while Rule 23(f) uses a discretionary standard for deciding appealability, but it only applies to class certification orders.

Every appealability doctrine, therefore, implicates not only the question of logical form (rule or standard?) but also an initial categorization question (what category of decisions is subject to the doctrine?). When crafting an appealability doctrine, rule-makers 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 initial categorization step. (It is easy to apply the rule that all final decisions are appealable; it is harder to identify 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.)

These initial categorization questions implicate the policy concerns of systemic efficiency and individual fairness. As a purely numerical matter, having fewer categories of appealable orders is more efficient because it tends to decrease the number of appeals, overall litigation costs, and judicial workload—but having more categories is fairer in individual cases because it tends to increase the opportunities for error correction.[64] 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

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63. Distinguished jurists disagree on this crucial categorization question. *Compare* Sophie Tatum & Caroline Kenny, *Ruth Bader Ginsburg Settles it for Stephen Colbert: Hot Dogs Are Sandwiches*, CNN (Mar. 22, 2018), 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, *A Hot Dog Is Not a Sandwich*, MAXIMUMFUN (Mar. 26, 2020), https://maximumfun.org/episodes/judge-john-hodgman/a-hot-dog-is-not-a-sandwich/ (Hodgman, J., opining that hot dogs are not sandwiches).

64. 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.

appealability question—but having flexibly described categories is fairer in individual cases because it allows for more particularized decision-making.[65]

The Supreme Court has long emphasized that the appealability doctrines operate categorically (without explicitly discussing the categorical inquiry as a separate step). The Court first recognized that statutes and rules must "necessarily" be drawn "in terms of categories"[66]—because they do not address the circumstances of individual cases, they set the rules by which different *kinds* of cases may proceed. And the Court more recently has issued a categorical imperative to judges: When applying the finality-for-appeal doctrines, judges also must "decide appealability for categories of orders rather than individual orders."[67] Judges must not "in each individual case engage in ad hoc balancing to decide issues of appealability"[68]—they "must . . . determine[it] at a higher level of generality."[69] Rather than making "an 'individualized [appellate] jurisdictional inquiry'" based on a "particular injustice" in a specific case, judges must "focus[] on 'the entire category to which a claim belongs.'"[70] That means that judges must not only decide whether the order before them is a "final decision," they must determine to which category of orders that order belongs, and then apply the appropriate finality-for-appeal doctrine to that whole category.[71]

Despite that effort to restrain judicial discretion, 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.[72] Given the Court's categorical imperative, that means they will conceive of new categories of orders to deem final for appeal.[73] But that is not to say that judicial discretion is entirely unhampered by the categorical imperative. Although the category of final decisions is fuzzy and resists definition, and although judges have some freedom to formulate new conceptions of categories to deem final-for-appeal, the idea of finality is not entirely amorphous and there are flexible-but-structured concepts that direct how judges conceive of categories.

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65. This seems to be the general presumption, but it is not necessarily always true and has not been empirically verified. *See*, Lammon, *Rules, Standards*, *supra* note 16, at 432 (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.

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

67. Johnson v. Jones, 515 U.S. 304, 315 (1995) (citing Digital Equip., Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994)).

68. *Id.*

69. *Digital Equip.*, 511 U.S. at 876–77 (1994).

70. Mohawk Indus., Inc. v. Carpenter, 588 U.S. 100, 101 (2009) (quoting Coopers & Lybrand v. Livesay*,* 437 U.S. 463, 473 (1978); *Digital Equip.*, 511 U.S. at 868)).

71. The Court has also declared a moratorium on courts creating new finality doctrines through case law. Swint v. Chambers Cty. 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."). Instead, the Court provided that any new appealability doctrines must be created through rulemaking. 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.").

72. Lammon, *Dizzying Gillespie*, *supra* note 16, at 410–15.

73. *See supra* notes 10–15 and accompanying text.

III. CATEGORY AND CONCEPT THEORY

A. Introducing Categories and Concepts

Cognitive psychology uses concept theory to explain how people understand categories.[74] Psychologists have shown experimentally that we rely on categorical thinking to organize and structure our lives,[75] and we do not understand most categories in everyday life by applying formal rules with necessary-and-sufficient elements.[76] 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.[77]

A *category*, according to cognitive psychologists, is a set of items (objects, ideas, people) that are "equivalent for some purpose," that we treat "equivalently in one or another respect."[78] 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 structure our interactions with the world. When we 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. Only by categorizing disparate items together are we able to treat them as "equivalent for some purpose." That is why 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.[79]

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74. *See* WINTER, *supra* note 18, at 69; MURPHY, BBOC, *supra* note 19, at 41–71; Murphy, *What Are Categories and Concepts?*, *supra* note 19.

75. WINTER, *supra* note 18, at 69.

76. Cognitive psychologists continue to debate and design experiments to uncover the origins of cognitive categories. Some see them as biological or evolutionary in origin. Olga F. Lazareva & Edward A. Wasserman, *Category Learning and Concept Learning in Birds*, *in* THE MAKING OF HUMAN CONCEPTS 151 (Denis Mareschal et al. eds., 2010); Michèle Fabre-Thorpe, *Concepts in Monkeys*, *in* THE MAKING OF HUMAN CONCEPTS 201 (Denis Mareschal et al. eds., 2010). Some see them as mental structures that metaphorically represent embodied realities. Johnson, *supra* note 19, at 852–56; *see generally* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (2003). But even without a single unifying explanation, cognitive psychologists have constructed models that illuminate how we form, understand, and manipulate conceptual categories. WINTER, *supra* note 18, at 77–84 (describing structural, neurological, and cross-cultural bases for concept models); MURPHY, BBOC, *supra* note 19, at 41–71; Murphy, *What Are Categories and Concepts?*, *supra* note 19, at 16–24 .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.

77. 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*, STAN. L. REV. 1371, 1389 (1988). For the reasons discussed below, prototype and exemplar models are the most useful for understanding appealability doctrines, and I do not discuss the other models here.

78. Murphy, *What Are Categories and Concepts?*, *supra* note 19, at 13.

79. H.L.A. HART, THE CONCEPT OF LAW 160 (2d 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

A *concept* is the internal, mental representation or understanding of a category—the idea in our heads by which we understand a category.[80] Concepts are *how* we identify categories and category members. Psychologists have studied how people form concepts and understand categories. They have identified common conceptual models that we use to understand categories.

B. Classical Categories Based on Logical Definitions

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."[81] A classical category is constituted by a formal definition (a rule) made up of a set of necessary and sufficient characteristics (elements).[82] "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."[83] 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.[84]

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.[85] 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.[86] *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.[87] None of these traits can be adequately explained

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used in determining when, for any given purpose, cases are alike or different.").

80. Murphy, *What Are Categories and Concepts?*, *supra* note 19, at 13.

81. Johnson, *supra* note 19, at 848.

82. Murphy, *What Are Categories and Concepts?*, *supra* note 19, at 13.

83. Johnson, *supra* note 19, at 848. 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."

84. *Id.*

85. MURPHY, BBOC, *supra* note 19, at 15.

86. *Id.* at 17–22.

87. 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

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 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.[88] 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.[89] 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."[90] Similarly, although we all know what counts as a vegetable, it turns out there is no set of necessary-and-sufficient characteristics to define the category of vegetables.[91] Indeed, biologically-speaking, there is no such thing as a "vegetable."[92]

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."[93] In the real world, boundaries between our conceptions of categories are much fuzzier than

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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.

88. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 66–77 (1951).

89. As discussed below, Wittgenstein's explanation for how categories work aligns with certain modern cognitive psychology theories. *Id.* at § 70.

90. MURPHY, BBOC, *supra* note 19, at 17.

91. 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.

92. Peskoe-Yang, *supra* note 91; Nicholls, *supra* note 91.

93. Peskoe-Yang, *supra* note 91; Nicholls, *supra* note 91.

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?[94] The boundaries of categories are not as clear as a set of necessary and sufficient conditions would make them.[95] 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.

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."[96] Similarly, for the category "Birds," people tend to recognize that "robin" fits very well, while "ostrich" and "penguin" fit poorly.[97] 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.[98] 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: categories depend on context and purpose. We do not conceptualize categories in a vacuum. We do so for a reason. Remember, a category is a set of items that are "equivalent for some purpose."[99] 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.[100]

C. Conceptual Categories Based on Similarity and Typicality

Based on experimental observation, cognitive psychologists have created conceptual models of how we conceptualize categories. Two such models are the prototype model

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94. Lawrence M. Solan, *Legislative Style and Judicial Discretion: The Case of Guardianship Law*, 35 INT'L J. L. & PSYCHIATRY 464, 467 (2012).

95. 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.

96. Solan, *supra* note 94, at 467 (citing Eleanor Rosch, *Cognitive Reference Points*, 7 COGNITIVE PSYCHOL. 532 (1975) [hereinafter Rosch, *Reference Points*]); MURPHY, BBOC, *supra* note 19, at 21–22 (citing Eleanor Rosch, *Cognitive Representations of Semantic Categories*, 104 J. EXPERIMENTAL PSYCHOL. 193 (1975)); WINTER, *supra* note 18, at 76–77.

97. WINTER, *supra* note 18, at 76 (citing Rosch, *Reference Points*, *supra* note 96); Solan, *supra* note 94, at 467 (discussing S.L. Armstrong, L.R. Gleitman & H. Gleitman, *What Some Concepts Might Not Be*, 13 COGNITION 263 (1983)).

98. Solan, *supra* note 94, at 467.

99. Murphy, *What Are Categories and Concepts?*, *supra* note 19, at 12.

100. WINTER, *supra* note 18, at 188–89.

and the exemplar model. Both models 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 embraces the principles of similarity and typicality. Where classical categories are defined by the necessary and sufficient characteristics of classical definitions, conceptual categories are shaped by how similar items are to the typical member(s) of the category.

Once 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 crisscrossing[,] sometimes overall similarities, sometimes similarities of detail."[101] 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 all share that "complicated network of similarities overlapping and crisscrossing."[102] Wittgenstein likened these similarities to the individual strands that make up a length of rope.[103] 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 prototypical category member(s).[104] 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.

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101. WITTGENSTEIN, *supra* note 88, at § 66.
102. *Id.*
103. *Id.* at § 67.
104. MURPHY, BBOC, *supra* note 19, at 31.

1. The Prototype Concept Model

The prototype model of concept-formation posits that our concept of a category is based on a conceptual prototype, an ideal member of the category.[105] The prototype is the most typical member of a category, the member that, in our heads, represents and thereby constitutes the category.[106] Prototypical concepts are structured radially around a single prototype that we think of as the quintessential category-member.[107] 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. Thus, 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.[108]

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 and typicality, this model also explains how conceptual categories can be fuzzy and graded. Categories are fuzzy because 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, giving rise to fuzzy categories.[109] Categories are graded because the more typical an item is—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.[110]

2. The Exemplar Concept 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

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105. Eleanor Rosch & Carolyn B. Mervis, *Family Resemblances: Studies in the Internal Structure of Categories*, 7 COGNITIVE PSYCHOL. 573, 574 (1975).

106. Johnson, *supra* note 19, 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.").

107. *Id.* at 867.

108. Rosch & Mervis, *supra* note 105, at 586.

109. MURPHY, BBOC, *supra* note 19, at 31.

110. *Id.* ("[T]ypicality 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 graded-ness. 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 18, at 84.

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.[111] 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 involves comparing an item to all (or many) such exemplars."[112] 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. 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.

D. Legal Conceptual Categories

Categories appear throughout the law. As Karl Llewellyn observed nearly 100 years ago, "Behavior 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 categories."[113] In short, for law to govern human activities, it must categorize them, and in order to categorize activities, we need mental concepts of those categories. "Like rules, concepts are not to be eliminated;

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111. MURPHY, BBOC, *supra* note 19, at 49 ("In the exemplar view, the idea that people have a [single] representation that somehow encompasses an entire concept is rejected.").

112. *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."); *id.* ("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.").

113. Llewellyn, *supra* note 17, at 453.

it cannot be done."[114] 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 giving 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.[115] Classical rules and definitions appear throughout the law.[116] 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 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.[117] Adding IF–THEN rules, BUT IF–THEN exceptions, and Boolean AND/OR connectors to the classical four-element definition of negligence creates 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 frequently 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

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114. *Id.*

115. *See* WINTER, *supra* note 18, at 8–10 (describing the "ideology" and "hegemony" of the the "rationalist," i.e., classical, view). 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. Eric Margolis & Stephen Laurence, *Concepts*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE (Edwad N. Zalta ed., Spring 2014), https://plato.stanford.edu/archives/spr2014/entries/concepts/. Some cognitive scientists attribute the appeal of the classical view to its metaphorical similarity to the real-world experience of sorting real objects into containers—an embodied experience that enables a metaphoric understanding of otherwise abstract analytical thought. *See* Johnson, *supra* note 19, at 858–59; WINTER, *supra* note 18, at 62–64; *see generally* LAKOFF & JOHNSON, *supra* note 76.

116. *See* Solan, *supra* note 94, at 466.

117. 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 19, at 16.

question.[118] 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.

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.[119] 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.[120]

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 "[t]reat like cases alike,"[121] judges look first at the exemplary precedents and then, 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.[122] 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.[123]

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118. HART, *supra* note 79, at 125–27; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1957); *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).

119. Johnson, *supra* note 19, at 851; *see* Samuel D. Warren & Louis D. Brandeis, *Right to Privacy*, HARV. L. REV. 193, 193–95 (1890) (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).

120. Johnson, *supra* note 19, 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.*, Adam Mossoff, *Trademark as a Property Right*, 107 KY. L. REV. 3 (2017).

121. HART, *supra* note 79, at 160 (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").

122. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

123. *Id.* at 317.

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 Washington[124] and *Burger King's* franchise contract governed by Florida law[125]) or more like the negative exemplars where there was no personal jurisdiction (*World-Wide Volkswagen's* car in Oklahoma,[126] *Asahi Metal Industry's* tire valve in California,[127] and *J. McIntyre Machinery v. Nicastro's* metal-shearing machine in New Jersey[128]). 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.[129]

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.[130] 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.[131] 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 require articulable rules typically celebrate analogical reasoning because it reveals underlying connections between cases that are not, or not yet, apparent.[132]

Cass Sunstein, for example, argues that analogies are useful precisely because they

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124. *See generally id.*

125. *See generally* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

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

127. Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102 (1987).

128. J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873 (2011).

129. This is essentially what Justice Thomas did when writing for a unanimous court finding no personal jurisdiction in *Walden v. Fiore*, 571 U.S. 277 (2014).

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

131. Schauer & Spellman, *supra* note 130, at 251–57; Larson, *supra* note 130, at 681–83. Among the detractors of the analogical reasoning in the law are: FREDERICK SCHAUER, THINKING LIKE A LAWYER 96–100 (2009); Brewer, *supra* note 130, at 962–77 (expressing doubts about the independent utility of analogical reasoning and arguing that they always depend on inherent, unspoken rules). Among the champions of analogical reasoning are: LLOYD L. WEINREB, LEGAL REASON 11–13 (2016); Sunstein, *supra* note 130, at 290–91.

132. *See* Schauer & Spellman, *supra* note 130, at 251–58, *and* Larson, *supra* note 130, at 674–75 (both describing the two camps).

allow legal practitioners to draw connections that are incompletely theorized (not fixed in a given rule).[133] 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.[134] 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 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.[135] 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.[136] As Sunstein explains in defense of analogical thinking, this openness to untheorized recognition of similarity makes conceptual categories powerfully adaptable.[137]

Which brings us to a second potential critique: Shouldn't legal doctrines eschew the

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133. Sunstein, *supra* note 130, at 754.

134. *Id.*

135. 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.

136. 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.

137. Sunstein, *supra* note 130, at 751–54.

fuzziness and adaptability of conceptual categories for the determinacy and predictability of rules and classical definitions?[138] 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 give them too much power.[139] 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.

As these last two critiques demonstrate, 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, 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 decision making and doctrinal form that, well deployed, can capture the strengths of both rules and standards. [140]

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138. *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).

139. *See, e.g.*, *id.*

140. *See* WINTER, *supra* note 18, 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.") (emphasis omitted). Further,

> 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

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 initial categorical step. The categorical approach accounts for the initial categorization question and the two-step process for deciding appealability. It also supplements and clarifies the one-dimensional rules-standards continuum. Additionally, the categorical approach 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. These criticisms echo the shortcomings of the classical categorical view (or, put another way, they reflect the mismatch between the idea of finality and the classical categorical form). The complaint that there is "[n]o verbal formula" for finality[141] 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"[142] or a "twilight zone"[143] 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, the 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 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

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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.

Id. at 11; *see also* Solan, *supra* note 94, at 468–71.

141. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974).
142. Radio Station WOW v. Johnson, 326 U.S. 120, 124–26 (1945).
143. Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152 (1964).

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.

IV. Mapping Appealability Doctrines by Category Type

The traditional rules-standards continuum in Figure 1 can be expanded by adding a categorical dimension. As explained, each appealability doctrine has two steps: a categorization step and an application step. The rules-standard continuum focuses on the second step, arranging the appealability doctrines horizontally by the extent to which they resemble rules or standards. Figure 2, below, adds a second dimension, arranging each doctrine vertically by the extent to which it employs a classical or conceptual category at the first step.

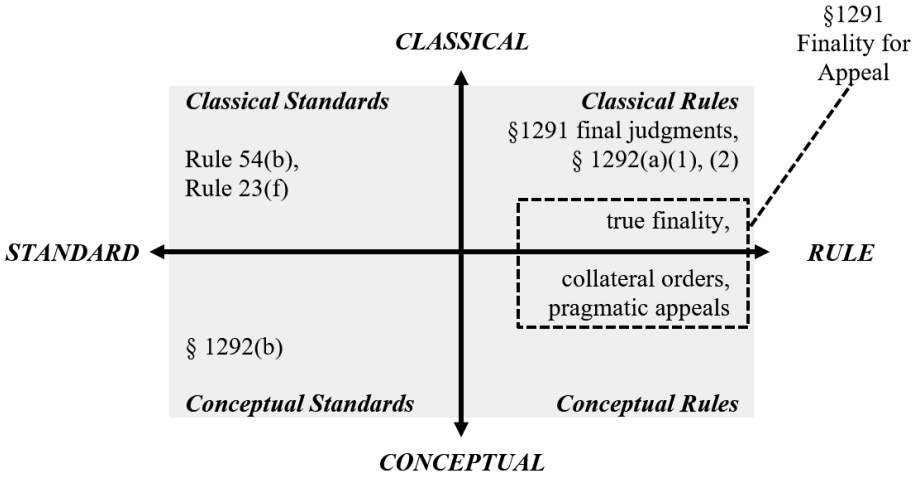

Figure 2: Categorical Map of Appealability Doctrines

This Part (IV) examines the exemplary doctrines in each quadrant, beginning with the Classical Rules in the upper right quadrant and proceeding counterclockwise around the matrix to discuss Classical Standards and Conceptual Standards. The next Part (V) discusses the finality-for-appeal doctrines that developed as interpretations of § 1291's final-judgment rule and how they use concept models of finality.

A. Doctrines Using Classical Categories

1. Classical Rules: Final Judgments, Injunctions, and Receiverships

Classical appealability rules use bright-line rules to *always* permit immediate

appeals, but only from *classically defined* categories of orders. For a court 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.

a. 28 U.S.C. § 1291: final judgments

When it comes to appealability, the quintessential classical rule is § 1291's so-called "final-judgment rule," which gives federal appeals courts jurisdiction to hear "appeals from all final decisions of the district courts."[144] Formally, the final-judgment rule is a simple if-then rule: if a decision is final, then it is immediately appealable. When applied to the formal final judgments discussed in this section, it is a *classical* rule, using a classical categorical definition (reinforced by procedural requirements) of finality. In practice, when applied in the finality-for-appeal doctrines discussed below in Part V, it is a conceptual rule, using conceptual categories to determine finality.

Most descriptions of the federal appealability doctrines start with the final-judgment rule.[145] And it has been called the "cornerstone" of all the federal appealability doctrines.[146] Its origins can be traced to the Judiciary Act of 1789's provision for appeals from federal trial courts' "final decrees" and "final judgments."[147] When Congress created the circuit courts of appeals in 1891, it granted them appellate jurisdiction over those same final decrees, now called "final decision[s]."[148]

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.[149] For formal final judgments, the boundary defining a final judgment is marked by a procedural requirement: only entry of the judgment on the docket triggers the thirty-day deadline for filing a notice of appeal.[150] Indeed, as the idea of finality has grown fuzzier, the procedural requirement for formal final judgments has become clearer: 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.[151] Later, Rule 58(c) was added to

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144. 28 U.S.C. § 1291. Section 1291 also provides for particular cases where "direct review may be had in the Supreme Court." *Id.*

145. *See, e.g.*, 15A WRIGHT, MILLER & COOPER, *supra* note 55, at §§ 3905–14; GREGORY A. CASTANIAS & ROBERT H. KLONOFF, FEDERAL APPELLATE PRACTICE AND PROCEDURE IN A NUTSHELL 71 (2d ed. 2017).

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

147. Act of Sept. 24, 1789, 1 Stat. 73, c.20, §§ 21, 22, 26. The Judiciary Act's finality provision derived from the practice of English common law courts. 15A WRIGHT, MILLER & COOPER, *supra* note 55, at § 3906. For unclear reasons, the first Judiciary Act applied this final decision requirement to case in both law and equity, even though English practice allowed for interlocutory appeals in equity courts. *Id.*; *see also* Crick, *supra* note 42, at 540–44.

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

149. *Judgment*, BLACK'S LAW DICTIONARY (Bryan Garner ed., 11th ed. 2019) ("A court's final determination of the rights and obligations of the parties in a case." Final judgment is "[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).

150. FED. R. APP. P. 4(a).

151. 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.

direct that, if the court has not entered a separate document, the judgment is deemed entered 150 days after the final order was entered.[152] These procedural requirements definitively establish what counts as a formal final judgment. That certainty allows for the final-judgment rule to operate as a classical categorical rule, at least in that specific instance: if a decision meets those procedural requirements, then it is immediately appealable, regardless of the specific facts or circumstances of the given case.

b. 28 U.S.C. § 1292(a)(1) and (2)

Sections 1292(a)(1) and (2) are also classical categorical rules; each uses a classical definition to establish a specific category of orders (orders affecting injunctions and receiverships) that is immediately appealable.[153]

Section 1292 owes its origin to perception that strict enforcement of the final-judgment rule was sometimes unjust or inefficient. In the mid-nineteenth century, the Court began to experiment with more flexible interpretations of the rule, giving rise to some of the fuzzier finality-for-appeal doctrines discussed below.[154] Toward the end of the century, Congress stepped in, drafting new rule-like exceptions to the final-judgment rule.[155] In 1891, Congress passed the first version of § 1292, granting the newly created circuit courts appellate jurisdiction over immediate appeals from trial court "interlocutory order[s] or decree[s] granting or continuing . . . injunction[s]."[156] Congress was motivated by the recognition that "rigid application" of the final-judgment rule "create[d] undue hardship in some cases" when injunctions would have immediate effects.[157] 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, refusing or dissolving injunctions."[158]

Section 1292(a)(2) originated through a similar process,[159] for similar reasons.[160] In 1900, Congress passed the precursor[161] to § 1292(a)(2), which now grants appellate

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152. FED. R. CIV. P. 58(c).

153. Other classical categorical rules include the subject-specific appealability doctrines found in specific statutes like the Federal Arbitration Act (FAA) and Class Action Fairness Act (CAFA).

154. *See* Forgay v. Conrad, 47 U.S. (6 How.) 201, 203 (1848); *see generally* 15A WRIGHT, MILLER & COOPER, *supra* note 55, at § 3910.

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

156. The Judiciary Act of 1891 ("Evarts Act"), Act of March 3, 1891, 26 Stat. 826, § 7.

157. Carson v. Am. Brands, Inc., 450 U.S. 79, 83 (1981) (citing Balt. Contractors v. Bodinger, 348 U.S. 176, 180–81 (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." *Balt. Contractors*, 348 U.S. at 181.

158. 28 U.S.C. § 1292(a)(1). For more detailed history of the revisions to § 1292(a)(1), see *Carson*, 450 U.S. at 83–84 n.8; Stewart-Warner Corp. v. Westinghouse Elec. Corp., 325 F.2d 822, 829–30 (2d Cir. 1963) (Friendly, J., dissenting).

159. For legislative history, see 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3925 (3d ed. 2008).

160. *Id.* ("The purpose of allowing interlocutory appeals from [receivership] orders is similar to the purpose underlying injunction appeals.").

161. Act of June 6, 1900, c. 620, 31 Stat. 660. Before it was codified as part of § 1292, the precursor rule appeared in § 129 of the Judicial Code of 1911, which provided:

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."[162]

As with the final-judgment rule itself, there remains some ambiguity about which orders §§ 1292(a)(1) and (2) cover (which orders sufficiently involve injunctions and receiverships). The Supreme Court has carefully policed the reach of § 1292, approaching it "somewhat gingerly lest a floodgate be opened" that allows too many appeals.[163] 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.

These classical categorical rules have certain traits in common. First, they illustrate something that is true of all the appealability rules (including, as shown below, conceptual categorical rules): they create a right to appeal. That is to say, when an appealability doctrine employs a rule, that rule is always "if the decision is in the category, then an appeal is permitted." There are no categorical rules *barring* appeals. Although some categories of orders, like discovery orders, rarely give rise to immediate appeals, there is no rule that they are *never* immediately appealable.[164] Even a discovery order could be appealable if it also fit into a category from which another doctrine permits an appeal.

Second, the classical rules illustrate that classical and conceptual categories are relative, not absolute—they mark the ends of a continuum. And their history shows that the positions of doctrines along that continuum are not fixed—they change over time. Centuries of attorneys and judges motivated to allow or disallow particular appeals have teased out ambiguities to blur the definitions of "final," "injunction," and "receiver," pushing classical categories more toward the conceptual end of the continuum. In response, rule-makers 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."[165] 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).

Third, the classical rules illustrate two ways that rule-makers and courts try to create classical categorical clarity. The evolution of § 1292 demonstrates a definition-writing technique: adding words and clarifications to a category description to better describe the

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> 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.

162. 28 U.S.C. § 1292(a)(2) (emphasis added).

163. Switz. Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc., 385 U.S. 23, 24 (1966).

164. *See* Steinman, *supra* note 2, at 1242 ("[U]nder the prevailing judicial doctrines, no interlocutory trial court order is categorically beyond an appellate court's jurisdiction.").

165. 28 U.S.C. § 1292(a)(2).

category it defines. The development of Rule 58 demonstrates a proceduralizing technique: rather than revising the § 1291's definition of "final," it imposes an artificial, procedural requirement and uses that as a bright-line.

2. Classical Standards: Partial Final Judgments and Class Certification Orders

Classical appealability standards use discretionary standards to *sometimes* (on a case-by-case basis) permit immediate appeals, but only from *classically defined* categories 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?"

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. They both explicitly employ the two-step appealability decision-making process, and they are both classical categorical appealability standards.

a. Rule 54(b)

Rule 54(b) allows 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.[166] 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.[167] The first step employs a classical categorical definition, the second a standard. And that is no accident—it was a deliberate innovation when Rule 54(b) was amended in 1946.[168]

Because the Federal Rules of Civil Procedure include liberal joinder provisions allowing federal courts to hear complex cases, the original drafters of the Rules felt that a more liberal appealability doctrine was needed.[169] The solution was Rule 54(b).[170] The first version of 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

166. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511–13 (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's notes to 1946 and 1961 amendments. 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 advisory committee's notes to 1961 amendments.

167. FED. R. CIV. P. 54.

168. FED. R. CIV. P. 54 advisory committee's notes to 1946 amendment.

169. *Id.* ("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.").

170. *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's notes to 1946 and 1961 amendments.

particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim."[171] For the first time district courts had explicit authority to determine whether a given order should be considered final and appealable.

That version proved unwieldy 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.[172] It was too fuzzy a standard for consistent adjudication. But a strict bright-line rule would not achieve the flexibility that was the original impetus for the Rule. Therefore, in 1946, the Rule was amended to clarify that district courts could enter appealable partial final judgments only when an interlocutory order decided "one or more but less than all of the claims," and only if the district court made a separate, explicit determination that there was "no just reason for delay" in entering judgment.[173] 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.

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 two-step, classical categorical standard.[174] The question before the Court in both cases was whether the amended Rule 54 was consistent with § 1291's final-judgment rule. If it were not, the Rule amendment would be impermissible, because Congress had not yet granted the Court authority to write rules declaring non-final orders appealable.

In *Sears, Roebuck*, 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.[175] The majority held that a decision resolving an entire claim was final *as to that claim*.[176] Accordingly, the Court held in *Sears, Roebuck* that a partial judgment on two of six claims was immediately appealable, and it held in *Cold Metal Process* that a partial judgment on a counterclaim was immediately appealable.[177] Pointing to the history of the Rule and the 1946 amendment, the majority opinion treated the decides-a-claim requirement as a necessary and sufficient feature to both define the category of decisions subject to Rule 54(b) and deem them "final." That decision could be understood as a prototype model of finality, reasoning that decisions deciding entire claims were enough

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171. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 432–34 (quoting FED. R. CIV. P. 54(b)).

172. FED. R. CIV. P. 54 advisory committee's note to 1946 amendment.

173. FED. R. CIV. P. 54(b) (1946); FED. R. CIV. P. 54 advisory committee's note to 1946 amendment. 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 advisory committee's note to 1961 amendment.

174. *Sears, Roebuck*, 351 U.S. at 434–36; Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S. 445, 449–53 (1956).

175. *Sears, Roebuck*, 351 U.S. at 435, 437 (noting in passing that the validity of the original version of the Rule was "no longer questioned").

176. *Id.* at 436; *see* Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 7 (1980) ("A district court must first determine that it is dealing with a 'final judgment.' It must be a '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).

177. *Sears, Roebuck*, 351 U.S. at 435; *Cold Metal Process*, 351 U.S. at 452–53.

like prototypical final decisions that they should be categorized as final.[178] But the majority did not adopt a prototype model. Instead, using the decides-a-claim requirement as a necessary-and-sufficient condition, the Court created a category with a classical definition. 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. Thus, 54(b) became a classical categorical standard.

In his dissenting and concurring opinions, Justice Frankfurter objected that the majority's holding could not 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.[179] Frankfurter protested that the majority's insistence that § 1291's finality requirement "remain[ed] unimpaired" rang hollow, and that finality under § 1291 was no longer "what it was before these opinions were written."[180]

The majority's and Frankfurter's opinions reflected different views of the categorical nature of the final-judgment rule. While Frankfurter would have treated finality under § 1291 as a conceptual category, based on a particular purpose and a prototypical "deeply rooted," "core" principle, the majority treated it like a classically defined category with ascertainable boundaries.[181]

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178. 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). The Court then explained that Rule 54(b) had relaxed this "general practice," not the final-decision requirement itself. *Id.* at 436.

179. *Id.* at 441 (Frankfurter, J., dissenting). 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." *Id.* at 443–44. 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. at 8.

180. *Sears, Roebuck*, 351 U.S. at 439 (Frankfurter, J., dissenting). Frankfurter listed various ways the Court could have acknowledged and explained the contradiction between Rule 54(b) and the prior conception of finality:

> 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.

Id.

181. *Id.* at 441. Arguably, 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.

b. Rule 23(f)

Like Rule 54(b), Rule 23(f) uses a two-step, classical categorical standard, applying a standard to a defined category of orders, namely orders granting or denying class certification.[182] Faced with such an order, a party may file a "petition for permission to appeal," and the appellate court "may permit" the appeal.[183] Rule 23(f) provides no criteria for when the appellate court should grant an appeal (although courts have identified some non-exclusive factors to consider).[184] 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.

Because Rule 23(f) was enacted pursuant to explicit statutory authority allowing the Court to define "finality" through rulemaking, it does not raise the same questions about compatibility with § 1291 as Rule 54(b).[185] But its origins illustrate that same tension. In the 1960s, appellate courts began to experiment with a new finality-for-appeal doctrine in class actions: the "death-knell doctrine" which allowed immediate appeals from orders granting or denying class certification in class action cases.[186] The courts reasoned that, because class-certification grants often spurred settlement and class-certification denials often prompted plaintiffs to drop their cases,[187] the certification decision often sounded the "death knell" for the case, but it did not result in an appealable judgment.[188] 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 1978, the Supreme Court put a stop to this relaxation of the final-judgment rule in *Coopers & Lybrand v. Livesay*. 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.[189] Instead, the Court urged courts to use their discretion under § 1292(b) to permit interlocutory appeals of class certification orders.[190]

Using § 1292(b), however, proved ineffective, and the Court used its rulemaking power[191] in 1998 to adopt Rule 23(f) allowing parties to petition for immediate appeal

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182. FED. R. CIV. P. 23(f).

183. *Id.*

184. 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 Servs., Inc., 181 F.3d 832 (7th Cir. 1999). Other courts have largely followed suit. *See* 16 WRIGHT, MILLER & COOPER, *supra* 159, at § 3931.1 n.14.

185. FED. R. CIV. P 23(f) advisory committee's note to 1998 amendment; *see* 28 U.S.C. § 1292.

186. 15A WRIGHT, MILLER & COOPER, *supra* note 55, at § 3912.

187. *Id.*

188. *Id.*

189. Coopers & Lybrand v. Livesay, 437 U.S. 463, 473 (1978).

190. *Id.* at 473–75. For a discussion of discretionary interlocutory appeals under § 1292(b), see *infra* Part IV.B.1.

191. 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

from class certification orders.[192] Rule 23(f) does not create a right to appeal from a class certification decision. It merely permits a party to ask the appellate court for permission to 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."[193] Although the committee expected the courts of appeals to develop appealability standards to guide their discretion, it did not impose any.[194]

Both Rule 54(b) and Rule 23(f)—the Rules using classical categorical standards—reflect the judicial understanding, developed through years of institutional experience, that purely categorical rules fail to meet the efficiency and fairness goals of the appealability doctrines: there are categories of decisions that are sometimes, but not always, worth immediately appealing. Therefore, these Rules use bright-line procedural mechanisms to obtain the either/or certainty as to whether an order fits a category. But they also enjoy the flexibility of standards, which can be applied on a discretionary, case-by-case basis. The strict classical categories clear a (limited) space for the courts to employ the discretionary standards. By limiting the categories of orders to which the standards apply, these classical categorical standards limit the risk of freewheeling judicial caprice posed by pure discretionary standards. They also allow for courts to develop more specialized standards. The standard for deciding appealability within each category can be different, and over time the standards can be tailored to the particular kinds of orders to which judges think they should apply.

Classical categorical standards do not have to be rules of procedure (rather than statutes or case law), but it is 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 from applying an appealability standard, and it can then fix those categories with classical definitions and procedural markers setting their limits.[195] Placing the requirement in the Federal Rules creates a procedural bright line: either the district court has entered a partial final judgment or it has not; either it has entered a class certification order or it has not. That procedural clarity reinforces the definitional boundaries of the classical categories.

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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.

192. FED. R. CIV. P. 23(f).

193. FED. R. CIV. P. 23 advisory committee's notes to 1998 amendment.

194. *Id.* 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* 16 WRIGHT, MILLER & COOPER, *supra* 159, at § 3931.1 nn.9, 14.

195. *See* Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1714–15 (2017).

B. Doctrines Using Conceptual Categories

1. Conceptual Standards: Interlocutory Orders

Not all categories of orders that should sometimes be appealable are 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 doctrines[196]—the most flexible of the appealability doctrines is § 1292(b), and it employs something like a conceptual standard. Conceptual standards are the most amorphous of the appealability doctrines, combining the fuzziness of conceptual categories with the flexibility of standards.

Conceptual appealability standards use discretionary standards to *sometimes* (on a case-by-case basis) permit immediate appeal, but only from *conceptually constituted* categories of orders. For a court to find an order appealable under a conceptual categorical standard, the court must first ask, "does this order fit into a conceptual category?"—and, if it does, must then ask, "should this specific order be appealable under the applicable standard?"

a. 28 U.S.C. § 1292(b): Interlocutory Orders

In 1958, Congress created § 1292(b)[197] in response to judicial desire for flexibility to alleviate the strict final-judgment rule.[198] It permits a party to seek permission in the appellate court to appeal from an interlocutory order, but only if the district court first certifies that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[199]

If the district court makes that certification, then the appellate court decides whether to permit the appeal. That court both reviews the district court's certification decision and decides *de novo* whether the issue should be immediately appealable.[200] 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

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196. 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. *Id.* at 1708 (quoting Will v. United States, 389 U.S. 90, 108 (1967) (Black, J., concurring)) ("[In] extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means 'final' and thus appealable under federal statutes."). 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: (1) it has no other adequate means of obtaining relief; (2) the right to issuance of the writ is "clear and indisputable"; and (3) issuing the writ is "appropriate under the circumstances." Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367, 380–81 (2004) (quoting Kerr v. U.S. Dist. Ct. for N. Dist. of Cal., 426 U.S. 394, 403 (1976)). This vague, discretionary standard can be applied to any kind of order, unlike the appealability doctrines, which apply only to certain categories of orders.

197. Interlocutory Appeals Act of 1948, ch. 646, 62 Stat. 929 (amended 1958); 28 U.S.C. § 1292(b).

198. 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 109 n.56 (2d ed. 2011); *see* Hadjipateras v. Pacifica, 290 F. 2d 697, 702–03, n.12 (5th Cir. 1961) (noting that § 1292(b) "was a judge-sought, judge-made, judge-sponsored enactment," and describing the legislative history).

199. 28 U.S.C. § 1292(b).

200. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 883 n.9 (1994).

for any reason including concerns about its own docket congestion.[201] Unlike the *classical* categorical rules and standards discussed above, § 1292(b) employs a *conceptual* categorical question at the first step, before applying a standard 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 the contestability inquiry: whether there is a "substantial ground for difference of opinion" on a question of law, which requires courts to identify a category of contestable legal questions.[202] The second-step standard asks 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.[203]

At the first step, there is no classical definition for what constitutes a contestable question of law. Instead, courts use prototype- and exemplar-based reasoning to identify contestable questions. The obvious prototype for a contestable decision is one that could be reversed, an incorrect decision.[204] But the category of contestable decisions must be broader than just incorrect decisions because "a substantial ground for difference of opinion" is a broader descriptor than "incorrect."[205] Still, one could imagine an intuitive prototype-model centered on the *idea* of an incorrect decision—a graded category, where decisions that are likely to be reversed fit the category better than those with little chance of reversal. The problem with that prototype model lies in its implementation: 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 to declare it.[206]

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. Courts have developed a rough graded category, where some of the exemplars are considered more typical than others. Most courts recognize some combination of the following exemplars (in roughly descending order of typicality): (1) decisions contrary to holdings in other circuits; (2) decisions where there is a circuit split on the question; (3) decisions where there is an intracircuit split at the district court

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201. Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978) (quoting Fisons, Ltd. v. United States, 458 F.2d 1241, 1248 (7th Cir. 1972)) ("[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.'").

202. 28 U.S.C. § 1292(b).

203. *Id.*; *see* 16 WRIGHT, MILLER & COOPER, *supra* 159, at § 3930 nn.24–25, 38–42.

204. 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. United States, 170 F. Supp. 795, 796 (S.D.N.Y. 1959).

205. 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. *See, e.g.*, *In re* Miedzianowski, 735 F.3d 383, 384 (6th Cir. 2013) (citing Kraus v. Bd. of Cnty. Rd. Comm'rs for Kent Cty., 364 F.2d 919, 922 (6th Cir. 1966)) ("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.").

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

level; (4) and decisions on novel questions of law.[207]

When an interlocutory decision resembles a more-typical exemplar (say, decisions where there is a circuit split), courts often find it is a member of the category based on that similarity alone.[208] 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.[209]

Section 1292(b) demonstrates something interesting about the development of categorical appealability doctrines: The more substantively open-ended a doctrine, the more courts and rule-makers rely on procedural strictures to bound it. Section 1292(b) is vague and discretionary at both the categorization and the standard-application steps. Therefore, the procedural requirements are heightened. 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.[210]

That is why most of the exemplars of contestable decisions are defined by procedural postures or 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, they are relatively clear, classical categories, constituted by definitive procedural boundaries.

V. FINALITY-FOR-APPEAL: A QUASI-CLASSICAL AND A CONCEPTUAL CATEGORY

When litigants seek (or appellate judges want to hear) an appeal that does not fit into one of the established categories, either classical or categorical, they are left arguing (or holding) that it should be considered final-for-appeal under § 1291. The finality-for-appeal doctrines are different 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.

The finality-for-appeal doctrines each owe their origins to creative re-

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207. *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, Inc., No. 08-10156, 2008 WL 5084203, at *3 (E.D. Mich. Nov. 24, 2008); 2 BARBARA J. VAN ARSDALE ET AL., FEDERAL PROCEDURE, LAWYERS EDITION § 3:218 (2019).

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

209. *See, e.g.*, *Couch*, 611 F.3d at 633.

210. As a counterbalance to the open-ended, 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 (ten days); and the district court order declining to certify a decision for appeal is not, itself, appealable. *See* 20 WRIGHT & KANE, *supra* note 198, at § 109 n.56; *cf. In re* Donald Trump, 928 F.3d 360 (4th Cir. 2019) (using mandamus to direct the district court to certify an immediate appeal under 1292(b)); *see also* Bryan Lammon, *Appellate Jurisdiction in the Fourth Circuit's Emoluments Appeals*, FINAL DECISIONS (July 10, 2019), https://finaldecisions.org/appellate-jurisdiction-in-the-fourth-circuits-emoluments-appeals/ (arguing this is possibly an improper use of mandamus).

conceptualizing of the final-judgment rule—although some of them have now evolved into quasi-classical categorical rules.

As explained above, the idea of finality-for-appeal is flexible: it resists clear definition (it has "[n]o verbal formula")[211] and has fuzzy boundaries (a "penumbral area"[212] or a "twilight zone").[213] That is because finality-for-appeal is, at least originally, a conceptual category. It can be modeled as a radial structure with positive and negative prototypes and exemplars. As explained below, the central prototype anchoring the concept of finality-for-appeal is the idea of the end the case.

While the final-judgment rule *is* a rule (if a decision is final, then it is immediately appealable), the finality-for-appeal doctrines use that bright-line rule to always permit an immediate appeal only from *conceptually constituted* categories of orders. For a court to find an order appealable under these conceptual appealability rules, it must ask "does this order fit into a conceptual category?"—if it does, then the final-judgment rule provides that the order is immediately appealable.

A. Quasi-Classical Categorical Rules: True Finality and the Collateral Order Doctrine

1. True Finality

Based on the prototype of formal final judgments, courts have long recognized another category of orders—those that essentially end the case on the merits—that is also considered final.[214] That category of orders, those with so-called "true finality"[215] began as a conceptual category and evolved into a quasi-classical one. It is now usually defined using the famous 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."[216] 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).[217] Thus, the final-judgment rule operates on truly-final

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

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

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

214. Catlin v. United States, 324 U.S. 299, 233 (1945).

215. *See* Lammon, *Finality, Appealability*, *supra* note 24, at 1825–26.

216. *Catlin*, 324 U.S at 233. The Supreme Court alone has cited the *Catlin* formulation twenty-three times. Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1716 (2017); Gelboim v. Bank of Am. Corp., 574 U.S. 405, 408 (2015); Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs, 571 U.S. 177 (2014); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 690 (2010); Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 116 (2009); Riley v. Kennedy, 553 U.S. 79, 86 (2008); Green Tree Fin. Corp.-Ala. v. Randolph, 539 U.S. 79, 86 (2000); Cunningham v. Hamilton Cnty., Ohio, 527 U.S. 198, 204 (1999); Quackenbush v. Allstate Ins., 517 U.S. 706, 712 (1996); Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994); FirsTier Mortg. Co. v. Invr's Mortg. Ins., 498 U.S. 269, 273 (1991); Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989); Van Cauwenberghe v. Biard, 486 U.S. 517, 522, 527 (1988); Budinich v. Becton Dickinson and Co., 485 U.S. 271, 275 (1988); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 275 (1988); Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 374 (1987); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373–74 (1981); Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 580 (1980); Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978); Rederi A/B Disa v. Cunard S.S. Co., 389 U.S. 852, 854 (1967); Brown Shoe Co. v. United States, 370 U.S. 294, 361 (1962); Balt. Contractors v. Bodinger, 348 U.S. 176 n.4 (1955); *Radio Station WOW*, 326 U.S. at 123–24 . The Courts of Appeals have cited it hundreds more. *See* 15A WRIGHT, MILLER & COOPER, *supra* note 55, at § 3910.

217. There are still open questions regarding whether certain other kinds of decisions should be considered are

decisions with nearly[218] classical-categorical, rule-like clarity and predictability: If an order decides the merits of the case, and the only thing that remains is executing the judgment, then it is a truly final decision, and it is appealable under § 1291.

The classical *Catlin* definition of true finality evolved over time from a more conceptual view of finality, based on the intuitive sense that some decisions that do not end a case nonetheless look a lot like the end of a case (or a lot like a formal final judgment) and should give rise to a right to appeal. Earlier cases sometimes express this looser conceptual view. In the 1855 case *Craighead v. Wilson*, for example, the Court describes a prior case, *Whiting v. Bank of the United States*, as holding that a decision was final because it had "an effect similar to that of an execution on a judgment."[219] And the Court in *Whiting* imagined that an even earlier case finding an interlocutory decree appealable "must have been" comparing the decree to a final judgment (despite never saying so).[220]

Today, the language used to describe finality still bears traces of this earlier conceptual final-judgment-as-prototype thinking. Perhaps most obviously, although § 1291 grants appellate jurisdiction over "final *decisions* of the district courts,"[221] it is commonly referred to as the "final-*judgment* rule," which functions as a reminder that its "core application" is to formal final judgments that end cases.[222] Courts often use metaphors to describe finality that highlight the centrality of final judgments to the concept. The Court has called the requirement of a final judgment the "*cornerstone* of the structure of appeals in the federal courts."[223] When deciding whether an order is final, judges wonder how metaphorically close it is to a 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."[224]

The *Catlin* definition itself uses the word "generally" to indicate that it is describing a *typical* final decision, thus suggesting both that the category of finality described could be graded and its outer boundaries blurred.[225] 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,"[226] or that "'final decisions' *typically* are ones that trigger the entry

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"truly final." *See* Lammon, *Finality, Appealability*, *supra* note 24, at 30–36.

218. Subsequent cases have blurred the meaning of "nothing . . . to do but execute the judgment," *Catlin*, 324 U.S. at 233, so that a decision can be considered truly final even if some issues (in addition to assessment of costs) have yet to be decided, including: attorneys' fee claims (*Budinich*, 486 U.S. at 198; *Ray Haluch Gravel*, 571 U.S. at 188–90); ministerial or technical damages calculations (Lammon, *Finality, Appealability*, *supra* note 24, at 26–27); or the claims of other parties in an MDL case (*Gelboim*, 574 U.S. at 415–17).

219. Craighead v. Wilson, 59 U.S. (18 How.) 199, 201 (1855).

220. Whiting v. Bank of U.S., 38 U.S. (13 Pet.) 6, 15 (1839) ("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.") (discussing Ray v. Law, 7 U.S. (3 Cranch) 179 (1805)).

221. 28 U.S.C. § 1291 (emphasis added).

222. *Gelboim*, 574 U.S. at 408 (emphasis added) (quoting *Catlin*, 324 U.S. at 233) (noting that § 1291's "*core application* is to rulings that terminate an action").

223. Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962) (emphasis added).

224. United States v. 243.22 Acres of Land in Town of Babylon, 129 F.2d 678, 680 (2d Cir. 1942) (emphasis added) (quoting Rubert Hermanos, Inc., v. People of P.R., 118 F.2d 752, 757 (1st Cir. 1941)).

225. *Catlin*, 324 U.S at 233.

226. Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'lrs,

of judgment."[227] Last year, in *Hall v. Hall*, Chief Justice Roberts stated that "the *archetypal* final decision is one[] that trigger[s] the entry of judgment."[228]

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 modern cases exploring its boundaries. 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.[229] A literal application of the *Catlin* definition would have required the opposite outcome, because something else undeniably remained for the trial court to do besides executing the judgment. But, in *Budinich*, the Court recognized that the *Catlin* 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.[230]

Therefore, the Court opted for a classical categorical holding and a new bright-line rule 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 of § 1291."[231] When the question arose again in *Ray Haluch*, the Court quickly rejected a variation 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.[232] 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.[233] 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. The Collateral Order Doctrine

Aside from the "true finality" category which has essentially become a classical category, the most well-developed finality-for-appeal doctrine is the collateral order doctrine. It has been refined and evolved over time so that it also now *almost* resembles a classical rule.

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571 U.S. 177, 183 (2014).

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

228. Hall v. Hall, 138 S. Ct. 1118 (2018) (alteration in the original) (emphasis added) (quoting *Mohawk Indus., Inc.*, 558 U.S. at 103).

229. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199 (1988); *Ray Haluch Gravel*, 571 U.S. at 183 (2014).

230. *Budinich*, 486 U.S. at 199 (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). The Court relied on its earlier holding 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" to blur the ostensible bright-line of the *Catlin* decision. *Id.* (citing Brown Shoe Co. v. United States, 370 U.S. 294, 308–09 (1962); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 513–16 (1950)).

231. *Id.* at 202.

232. *Ray Haluch Gravel*, 571 U.S. at 184.

233. *Id.* at 185.

In the mid-twentieth century, the Supreme Court recognized a new finality-for-appeal doctrine, the collateral order doctrine.[234] In *Cohen v. Beneficial Industrial Loan Corp.*, the Court held that § 1291's finality requirement must be given a "practical rather than a technical construction,"[235] and it recognized a new "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."[236]

That original formulation of the collateral-order doctrine was an undertheorized conceptual rule, a "practical" release valve from the strict application of the final-judgment rule, applicable if a given order was "too important" and "too independent" from the rest of the case to defer review.[237]

Since then, the doctrine has been "distilled"[238] by subsequent cases into a nearly 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.[239]

Still, the boundaries of the collateral-order doctrine can be difficult to pin down, hence the numerous cases described above where the Courts of Appeals have disagreed on its application.[240] And close attention to its origins in *Cohen* shows how the collateral order doctrine works as a conceptual category structured radially around positive and negative prototypes. The positive prototype is the end of the case and the formal final judgment. The negative prototype is a tentative order that is just a step toward final judgment.

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.[241] To answer that question, the Court made some necessary rhetorical moves before arriving at the original collateral-order formulation quoted 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."[242] 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

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234. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

235. *Id.* at 546–47.

236. *Id.* at 546.

237. *See* Lammon, *Rules, Standards*, *supra* note 16, at 449; Anderson, *supra* note 44, at 559.

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

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

240. *See supra* notes 10–15 and accompanying text; *see also* Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 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.").

241. *Cohen*, 337 U.S. at 545.

242. *Id.* at 545.

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."[243] That negative prototype marks the outer limit 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.

Those positive and negative prototypes are still detectable 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 merits of the action" and "effectively unreviewable on appeal from a final judgment."[244]

B. Conceptual Categorical Rules: The Pragmatic Appeals Doctrines

The pragmatic appeals doctrines are conceptual categorical rules that, unlike the collateral order doctrine, have resisted distillation into classical categorical rules.[245] These doctrines include the hardship-finality doctrine from *Forgay* and the balancing approach from *Gillespie*.[246] Whether they can survive the Supreme Court's categorical imperative is unclear, largely because they remain incompletely theorized conceptual categorical rules.

1. The Hardship Appeals Doctrine

In the mid-nineteenth century, when the Court first began to experiment with flexible interpretations of the final-judgment rule (before many of the appealability innovations discussed above), it developed the first finality-for-appeal doctrines.[247] In 1848, the Court held in *Forgay v. Conrad* 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."[248]

Forgay reasoned that such an order was final for appeal because it risked an immediate harm—the opposing party could execute immediately and quickly sell the

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243. *Id.* at 546.

244. *Coopers & Lybrand*, 437 U.S. at 468; *see Mohawk Indus.*, 558 U.S. at 106.

245. *See* Lammon, *Dizzying Gillespie*, *supra* note 16, at 405–10.

246. 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* 15A WRIGHT, MILLER & COOPER, *supra* note 55, at §§ 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. at 463.

247. *See* Lammon, *Finality, Appealability*, *supra* note 24, at 1825.

248. Forgay v. Conrad, 47 U.S. (6 How.) 201, 203 (1848); *see generally* 15A WRIGHT, MILLER & COOPER, *supra* note 55, at § 3910.

property—that could not be remedied on appeal.[249] Since then, the *Forgay* hardship doctrine has rarely been invoked, but it has not disappeared entirely, and there are later cases recognizing a similar finality-for-appeal doctrine based on irreparable hardship.[250]

2. The Balancing Approach

Over a century later, the Court took another swing at a pragmatic, flexible finality-for-appeal doctrine in the 1964 case of *Gillespie v. U.S. Steel*.[251] The case involved state and federal tort claims.[252] When the trial court dismissed all the state claims, the plaintiff immediately appealed, even though the federal claim remained and the case was not over.[253] The appellate court did not answer whether the decision was final and appealable, but the Supreme Court held that it was.[254] The Court reiterated that "'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case"[255] and opined 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."[256]

Emphasizing again that "the requirement of finality is to be given a 'practical rather than a technical construction,'" the Court held the decision was immediately appealable.[257] The decision did not fit into any existing categories of appealable orders: it 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).[258] But the Court relied on the practical justifications motivating those three doctrines because, under the circumstances, 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).[259] *Gillespie*'s practical, context-specific, cost-benefit balancing approach was the high-water mark for case-by-case appealability doctrines.[260] But the Court backed away from it later, apparently limiting its holding to its

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249. *Forgay*, 47 U.S. at 204 ("[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"); Radio Station Wow, Inc. v. Johnson, 326 U.S. 120 (1945); Carondelet Canal & Nav. Co. v. Louisiana, 233 U.S. 362 (1914); Thomson v. Dean, 74 U.S. (9 Wall.) 342 (1869).

250. *Radio Station Wow*, 326 U.S. at 120; *Carondelet Canal & Nav. Co.*, 233 U.S. at 362; *Thomson*, 74 U.S. at 342.

251. Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964).

252. *Id.* at 149–50.

253. *Id.* at 150.

254. *Id.* 151–52.

255. *Id.* (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545 (1949)).

256. *Gillespie*, 379 U.S. at 152.

257. *Id.* at 151–52 (quoting *Cohen*, 337 U.S. at 546).

258. *Id.* at 152–54.

259. *Id.*

260. Lammon, *Dizzying Gillespie*, *supra* note 16, at 382.

specific facts.[261]

At first glance, both the *Forgay* hardship doctrine and the *Gillespie* balancing doctrine seem more like case-by-case standards (like appellate mandamus or certiorari) than like the final-judgment rule they are supposedly implementing. And there are cases in the Courts of Appeals, and even occasionally (although not recently) in the Supreme Court, applying them on a case-by-case basis.[262] But, if these pragmatic appeals doctrines are to survive, they cannot be case-by-case standards. The Supreme Court's categorical imperative requires courts to decide finality-for-appeal categorically, not on a case-by-case basis. And, the final-judgment rule which these doctrines are implementing is a bright-line rule permitting an appeal, not a standard. Thus, for the pragmatic appeal doctrines to survive, they must have an identifiable categorical basis and must enable courts to identify clear categories of decisions.

In their current formulations, the *Forgay* hardship doctrine and the *Gillespie* balancing doctrine do not seem to enable such categorization. It is tempting to try to turn the *Forgay* hardship doctrine into a categorical rule allowing an immediate appeal from any 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.[263] But that cannot be true, and 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.[264]

The contours of the *Gillespie* balancing approach are, if anything, less clear 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,"[265]—suggesting that weighing cost against the risk of injustice could be sufficient to determine appealability. But, once again, that cannot be true, particularly after the Court's categorical imperative. In *Gillespie*, 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."[266] But they, too, do not add up to a classical categorical definition.

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

262. *See* cases cited *supra* note 249 (post-*Forgay* cases applying versions of the hardship doctrine); Lammon, *Dizzying Gillespie*, *supra* note 16, at 386–410 (describing areas where courts continue to apply versions of the *Gillespie* balancing approach).

263. *See* Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848); 15A WRIGHT, MILLER & COOPER, *supra* note 55, at § 3910 nn.30–31.

264. *See* 15A WRIGHT, MILLER & COOPER, *supra* note 55, at § 3910 nn.38–63.

265. Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152–53 (1964) (quoting Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)).

266. *Id.* at 153, 154 (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 377 (1945)).

It is imperative, and perhaps inevitable, that the pragmatic appeals doctrines—or other similarly conceptual categorical finality-for-appeal doctrines—survive. The inevitable pressure for innovation in deciding appealability is an unstoppable force; and the Supreme Court's categorical imperative is an immovable object. Although the various appealability doctrines help avoid many collisions, courts and litigants keep finding new cases where they require greater flexibility than the existing doctrines provide. Courts need the freedom to develop new, flexible, but not entirely unbounded, appealability doctrines.

An explicitly conceptual approach could address appeals that do not fit within existing categories. A conceptual approach will eventually allow courts to identify new categories of decisions to be considered final-for-appeal. 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 emerging finality-for-appeal 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. Most appealability issues are already addressed by the more developed appealability doctrines, so the conceptual approach to finality-for-appeal will only come into play occasionally. But we can begin to sketch a concept model of finality-for-appeal to be used by courts. As explained above, conceptual categories are radially constructed based on similarity to positive and negative prototypes and exemplars, and that similarity depends on shared family resemblances, an overlap of some, but not necessarily all, features.[267] The pragmatic appeals doctrines each identify a few salient features. But for those doctrines to evolve, or for courts to develop new finality-for-appeal categories, courts must be allowed to create new categories of appealable orders, described by new sets of shared features.

The evolution of the collateral order doctrine demonstrates how this would work. That doctrine shows the appropriate positive and negative prototypes for conceptualizing new finality-for-appeal categories. The positive prototype is the idea of a final judgment that ends the case; the negative prototype is the idea of a tentative order that is just a step in the case. Drawing on all of the appealability doctrines, we can compile a non-exhaustive list of those prototypes' relevant features. Any new conceptual finality-for-appeal doctrine will draw on some combination of these features:

Features of Final Judgments (the positive prototype):

- Ends the proceedings[268];
- Conclusively decides a question[269];
- Decides a merits question[270];

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267. *See supra* Part II.B.2.

268. Catlin v. United States, 324 U.S. 229, 233 ("[G]enerally one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.").

269. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (emphasis added) ("*conclusively* determine the disputed question"); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

270. *Cohen*, 337 U.S. at 546 ("finally determine claims of right").

- Is important to a party's rights[271];
- Immediately transfers property[272];
- Is important to resolving the case[273];
- Is, if erroneous, only reparable if reviewed now[274];
- Is distinct from the rest of the case[275];
- Is procedurally distinct or identifiable[276];
- Is more efficient to review now[277];

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

- Is provisional[278];
- Is purely procedural[279];
- Is mooted by a final merits appeal[280];
- Is inefficient to review now[281];

These lists reflect some of the features of the positive and negative prototypes that the existing finality doctrines identify as potentially salient to the concept of finality. These lists are necessarily impressionistic and non-exhaustive—they are trying to capture intuitive understandings that are often not explicitly stated. Importantly, these features are not necessary-and-sufficient conditions; they need not all be present to mark an order as falling into a category (just as not all birds must fly to fall in the category "Birds"). Indeed, some of them are contradictory and could not both be features of the same order. New conceptual categories of appealable orders could be described by family resemblances among orders that each share some, but not all, of a relevant set of features. Although courts and rule-makers have identified more features of the positive prototype than the negative one (likely because they have focused on identifying the elements of finality), future cases could recognize new features of either prototype, or new combinations of already recognized features, to delineate new categories of final-for-appeal decisions.

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The Supreme Court's categorical imperative directing that finality-for-appeal must

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271. *Coopers & Lybrand*, 437 U.S. at 468. ("resolve an important issue"); *Cohen*, 337 U.S. at 546 (emphasis added) ("finally determine *claims of right*").

272. Forgay v. Conrad, 47 U.S. (6 How.) 201, 204 (1848).

273. *Coopers & Lybrand*, 437 U.S. at 468. ("resolve an important issue").

274. *Cohen*, 337 U.S. at 546 ("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.").

275. *Id.* ("separable from, and collateral to, rights asserted in the action"; "independent of the cause itself").

276. FED. R. CIV. P. 58(a), (c); FED. R. CIV. P. 54(b); 28 U.S.C. § 1292(b).

277. 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").

278. *Cohen*, 337 U.S. at 546 ("any decision which is tentative, informal or incomplete," which is only a "step[] towards [the] final judgment").

279. *See, e.g.*, Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 108 (2009) (quoting Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 377 (1981)) ("Mohawk does not dispute that 'we have generally denied review of pretrial discovery orders.'").

280. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (not "completely separate from the merits of the action" or "effectively unreviewable on appeal from a final judgment").

281. See the many warnings against the dangers of "piecemeal" appeals. Dickinson Petroleum Conversion Corp., 338 U.S. 507, 511 (1950); Cobbledick v. United States, 309 U.S. 325, 325 (1940); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 439, 441 (1956) (Frankfurter, J., concurring).

be decided only for categories of orders aims to curtail the proliferation of new case-by-case appealability rulings. But it must not be read to shut down the possibility of judicial innovations in appealability. Parties and judges have always used conceptual thinking—analogies and metaphors, similarity and typicality, prototypes and exemplars, family resemblances and shared features—to identify new categories for immediate appeals. They should continue to do so. Indeed, they should explicitly describe the conceptual models guiding their thinking, identifying features that each proposed new category of orders shares with existing positive and negative prototypes of appealability. Perhaps further common-law percolation will reveal new classical categories of orders that should be considered final-for-appeal. But to get there, judges need to retain the freedom and flexibility of a conceptual approach.