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The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After *Swint*

by
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Introduction

Federal courts of appeals usually review district court orders only after the entry of final judgment. There are, however, a number of statutory exceptions to the final judgment rule and judicially crafted doctrines that permit appellate review before final judgment. Whenever litigants take an authorized appeal (whether at or before final judgment), one of the questions the court of appeals has to confront is the scope of its jurisdiction. If an appeal is taken from a final judgment, it is well-established that the court's jurisdiction encompasses all of the lower court rulings that led up to and are "merged" in that judgment.[1] When an appeal is taken *before* final judgment, the scope of jurisdiction is more controversial. To varying degrees, in each of the several contexts of pre-final judgment appeals, all of the federal courts of appeals have exercised what they call "pendent appellate jurisdiction" to allow review of some trial court rulings that fall outside the narrowly construed literal terms of the statutory and common law authorizations of interlocutory appeals.[2] Nonetheless, in March, 1995, the United States Supreme Court sharply limited the use of pendent appellate jurisdiction (or so it appeared), at least in the context of "collateral order" appeals,[3] and potentially in the context of other interlocutory appeals as well.

Section I of this Article defines pendent appellate jurisdiction and discusses *Swint v. Chambers County Commission*,[4] the 1995 case in which the Court cast doubt upon the propriety of pendent appellate jurisdiction, although indicating in dicta a circumscribed version of the doctrine that might be acceptable. Section II evaluates *Swint*, comparing its approach to that which the Court has taken to the district courts' exercise of supplemental subject matter jurisdiction. It

1. *See generally* 15A WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3905.1 (1992 & Supp. 1996).

2. When I speak of "interlocutory appeals," I intend to include all appeals before final judgment, including appeals of orders that are considered "final decisions" within the meaning of 28 U.S.C. § 1291. This usage is consistent with the Black's Dictionary of Law definitions of "interlocutory" as "[s]omething intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy" and of "interlocutory appeal" as "[a]n appeal of a matter which is not determinable of the controversy, but which is necessary for a suitable adjudication of the merits." BLACK'S LAW DICTIONARY 815 (6th ed. 1990).

3. For a description of collateral order appeals, see *infra* Sections III.A, III.G.

4. 514 U.S. 35 (1995).

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explains why the Court's opinion in *Swint* casts doubt upon the exercise of pendent appellate jurisdiction, not only in the context of collateral order appeals, but also when appellate review is available in advance of final judgment under the statutory authority provided in 28 U.S.C. §§ 1292(a) and (b),[5] in § 1651 governing mandamus,[6] and elsewhere. Section II then explains the position in which the *Swint* approach leaves Congress, the Court as promulgator of Rules, and the federal appellate courts as potential elaborators of the doctrine of pendent appellate jurisdiction. In particular, Section II considers whether control of the pendent appellate jurisdiction doctrine properly is within the lower courts' interpretive and common law-making authority, or whether the existence and scope of pendent appellate jurisdiction are matters that properly lie exclusively with the legislature and with the Supreme Court, as Congress's delegated Rule maker. The Article takes issue with the Court's view that pendent appellate jurisdiction (or at least any but a narrowly limited form of such jurisdiction) may exist only if expressly authorized by Congress or by Rule. In doing so, the Article questions the Court's conclusion that the statutory scheme governing appeals precludes the federal courts from using adjudication to add to the occasions on which they may afford interlocutory review. More importantly and more conservatively, it argues that pendent appellate jurisdiction doctrine constitutes *interpretation*—of §§ 1291, 1292 and other authorizations of pre-judgment appeals—that establishes the scope of appellate jurisdiction when there is a statutorily authorized interlocutory appeal. The Article argues further that Congress, in conferring rule making authority to provide for appeal of new categories of interlocutory orders constituting new occasions for appeal, did not intend to curtail such interpretation of statutory jurisdictional grants. Thus, pendent appellate jurisdiction should not be threatened even if that rule making authority is construed to preclude pure common law creation of new occasions for immediate appeal of interlocutory orders.

Section III begins with an examination of the Supreme Court's decisions (other than *Swint*) concerning pendent appellate jurisdiction in the context of collateral order appeals. It then examines the doctrine of pendent appellate jurisdiction as it has been applied upon the occasion of statutorily authorized interlocutory appeals and when

5. *See infra* notes 16-17.
6. *See infra* note 327.

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mandamus is granted, either by the Supreme Court or by the federal courts of appeals. Section III includes discussion of the law of pendent appellate jurisdiction that has developed under 28 U.S.C. § 1292(a), and an evaluation of pendent appellate jurisdiction over subject matter jurisdiction issues, objections made pursuant to Federal Rule of Civil Procedure 12(b)(1-5, 7), and matters that constitute bases for the grant or denial of injunctive relief. Section III goes on to address the law of pendent appellate jurisdiction that has developed in connection with 28 U.S.C. § 1292(b), mandamus, Federal Rule of Civil Procedure 54(b), interlocutory orders entered *after* final judgment, and the jurisdiction of the United States Supreme Court. The Section then returns to the law of pendent appellate jurisdiction that has developed in collateral order appeals, with special emphasis on cases decided since *Swint* in which defendants' claims for immunity have been rejected.

This survey demonstrates that pendent appellate jurisdiction upon interlocutory appeal has an exceedingly long history, has long been synonymous with determining the scope of jurisdiction that is statutorily or otherwise authorized, has enjoyed widespread use—including use by the Supreme Court—and that the conditions of its exercise (established primarily by the courts of appeals) are highly consistent across statutory authorizations for interlocutory appeal, mandamus, and the appeal of "collateral orders." It also shows that both the utility and the pre-*Swint* acceptance of pendent appellate jurisdiction reached beyond "inextricably intertwined" issues, and beyond what is necessary to ensure meaningful review. The Article considers whether and how differences in the jurisdictional bases of interlocutory appeals bear upon the propriety and scope of exercises of pendent appellate jurisdiction. It argues however that, at a fundamental level, the use of pendent appellate jurisdiction in the context of collateral order appeals should not be distinguished from kindred determinations of the scope of appellate review in other appellate jurisdictional contexts.

Finally, Section IV explains why Rule promulgation would not be the best way to define the circumstances in which pendent appellate jurisdiction may be exercised. Consensus concerning the circumstances under which the courts have power to exercise pendent appellate jurisdiction, and concerning the factors that should guide their exercises of discretion to decide (or not to decide) particular issues on a pendent basis, would be useful, however. Part IV thus sets forth

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pertinent considerations and proposes both a test for power and a non-exhaustive list of guidelines, standards and factors to govern when federal courts of appeals should review orders pursuant to pendent appellate jurisdiction. The proposal may be viewed as a recommendation as to how the doctrine should be elaborated, to the extent that its contours are left to the courts to define in their adjudicatory capacity. In view of the Supreme Court's professed view that rule making is *the only* proper means to define when an interlocutory order is appealable,[7] it also may be viewed as a recommendation as to what the "rules" should be, to the extent that they are left to rule makers to determine.

I. *Swint v. Chambers County Commission*

After police repeatedly raided a nightclub, without a search warrant or an arrest warrant, owners of the club and others sued, alleging civil rights violations by the Chambers County Commission, the City of Wadley, Alabama, and three police officers. A time came when the Court of Appeals for the Eleventh Circuit reviewed the denial of the individual police officers' motions for summary judgment, predicated on their claim of qualified immunity from suit. This denial was immediately appealable as a collateral order.[8] The appeals court simultaneously reviewed the denial of the County Commission's motion for summary judgment, a motion based on the contention that the County Sheriff who authorized the raids was not a policy maker for the County. The Eleventh Circuit reviewed the denial of the County Commission's motion for summary judgment pursuant to what it regarded as a discretionary jurisdiction pendent to its jurisdiction to review the denial of the individual defendants' summary judgment motions. It exercised that discretion for reasons of judicial economy, to potentially put a quick end to the case against the County.[9] In *Swint v. Chambers County Commission*,[10] the Supreme

7. *See Swint*, 514 U.S. at 48.

8. *See* Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (a district court's denial of qualified immunity is an immediately appealable "final decision" within the meaning of 28 U.S.C. section 1291); *see also* Behrens v. Pelletier, 516 U.S. 299, 306 (1996) (a defendant's immediate appeal of the denial of his motion to dismiss, predicated on an asserted qualified immunity, does not deprive the appellate court of jurisdiction to hear a second appeal, also based on qualified immunity, immediately following the denial of summary judgment). The "collateral order" doctrine is discussed *infra* at note 20.

9. *See Swint*, 514 U.S. at 44; Swint v. City of Wadley, 5 F.3d 1435, 1450 (11th Cir.

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Court held that the Eleventh Circuit lacked jurisdiction to review the latter ruling: the ruling did not fit within the "collateral order" doctrine,[11] and was not reviewable pursuant to a pendent party appellate authority.[12]

The Supreme Court acknowledged that several federal courts of appeals had endorsed the doctrine of pendent appellate jurisdiction, which the Court described as the authority of "a court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are not themselves independently appealable."[13] However, it found that the arguments in support of such jurisdiction "drift away from the statutory instructions Congress has given to control the timing of appellate proceedings."[14] The Court noted the structure of the statutory scheme conferring appellate jurisdiction: The main rule conferring jurisdiction to review "final decisions" (28 U.S.C. § 1291)[15] is followed by statutory provisions (in 28 U.S.C. § 1292(a))[16] author-

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1993), *modified in other respects*, 11 F.3d 1030, 1031-32 (11th Cir. 1994), both *vacated*, 51 F.3d 988 (11th Cir. 1995) (following the Supreme Court decision).

10. 514 U.S. 35 (1995).

11. The *Swint* Court held that the denial of the County's summary judgment motion did not constitute an immediately appealable final judgment for two reasons: first, the district court's ruling was not conclusive on the matter, that court having clearly stated its intention to reconsider its ruling before the case went to the jury, when it would have more information on the basis of which to decide whether the County was entitled to judgment as a matter of law; second, effective review *would be* available to the County after final judgment. The grounds for its motion for summary judgment, if established, would provide the County with a defense to liability but not with an immunity from suit, denial of which would not be effectively reviewable after final judgment. *See id.* at 42.

12. *See id.* at 35-38.

13. *Id.* at 50-51.

14. *Id.* at 45.

15. 28 U.S.C. § 1291 (1994). Section 1291 provides in pertinent part:

> FINAL DECISIONS OF DISTRICT COURTS The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court ....

Id.

16. 28 U.S.C. § 1292(a) (1994). Section 1292(a) provides:

> Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to

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izing immediate appeal from specified categories of interlocutory decisions, and by 28 U.S.C. § 1292(b),[17] which accords the district courts authority to certify for immediate appeal a circumscribed set of interlocutory orders. Observing that "Congress thus chose to confer on the district courts first line discretion to allow interlocutory appeals,"[18] and that, when it passed § 1292(b), Congress "had before it [and implicitly rejected] a proposal by Jerome Frank of the Court of Appeals for the Second Circuit, to give the courts of appeals sole discretion to allow interlocutory appeals,"[19] the Court concluded that "[i]f courts of appeals had discretion to append to a *Cohen*-authorized appeal[20] from a collateral order further rulings of a kind neither independently appealable nor certified by the district court, then the two-tiered arrangement § 1292(b) mandates would be severely undermined."[21]

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dissolve or modify injunctions, expect where a direct review may be had in the Supreme Court;

(2) Interlocutory 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;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

Id.

17. 28 U.S.C. § 1292(b) (1994). Section 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Id.

18. Swint v. Chambers County Comm'n, 514 U.S. 35, 47 (1995).

19. *Id.* at 47 n.4.

20. The reference is to *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), where the Court first articulated the requirements for an order to be immediately appealable as a collateral order. To be a collateral order under the Court's precedents, an order must be conclusive on the matter it addresses, resolve questions that are too independent of the merits to need to be deferred, be too important to be denied review, and involve rights that will be lost if immediate review is not afforded.

21. *Swint*, 514 U.S. at 47; *see also* United States v. Bloom, 149 F.3d 649, 657 (7th Cir. 1998) (stating that "a discretionary appellate power to entertain additional issues would

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The Court further reasoned that section (c) of the Rules Enabling Act,[22] which authorizes the Court to prescribe rules defining when a district court ruling is "final" for purposes of the final judgment rule codified in 28 U.S.C. § 1291, and § 1292(e),[23] which allows the court, by rule, to authorize immediate appeal of interlocutory decisions not provided for under § 1292(a), (b), (c), or (d), "counsel resistance to expansion of appellate jurisdiction"[24] through a pendent appellate jurisdiction doctrine of the kind endorsed by the Eleventh Circuit. The Court pointed out various constraints on its rulemaking authority that have no role in adjudicatory decision making by courts.[25] It then declared that "Congress' designation of the rule making 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."[26]

In the ensuing paragraphs of its opinion, the Court discussed two prior Court decisions that it described as "securely support[ing] the conclusion that the Eleventh Circuit lacked jurisdiction to instantly review the denial of the County Commission's summary judgment motion."[27] The Court discussed *Abney v. United States*[28] and *United*

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go a long way toward treating a list as an open-ended invitation").

22. 28 U.S.C. § 2072 (1994). Section 2072 provides:

> Rules of procedure and evidence; power to prescribe
>
> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Id.

23. 28 U.S.C. § 1292(e) (1994). Section 1292(e) provides that "[t]he 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[sic] of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)." *Id.*

24. *Swint*, 514 U.S. at 48.

25. The Court pointed to the requirements that meetings of bench-bar committees established to recommend rules ordinarily be open to the public, *see* 28 U.S.C. § 2073(c)(1) (1994), and that any proposed rule be submitted to Congress before it can take effect. *See* 28 U.S.C. § 2074(a) (1994); *see Swint*, 514 U.S. at 48.

26. *Swint*, 514 U.S. at 48 (emphasis added).

27. *Id.* at 49.

28. 431 U.S. 651 (1977).

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States v. Stanley.[29] In *Abney*, the Court had held that there was no appellate jurisdiction to conduct an interlocutory review of a trial court's rejection of a criminal defendant's challenge to the sufficiency of his indictment.[30] Immediate appeal of that ruling could not piggyback on the immediate appeal, under the collateral order doctrine, of an order denying a motion to dismiss the indictment on double jeopardy grounds.[31] The Court in *Abney* had reasoned, in part, that "[a]ny other rule would encourage criminal defendants to seek review of ... frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the ... courts of appeals prior to conviction and sentence."[32] In *Swint*, the Court opined that "the concern ... that a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets—bears on civil cases as well."[33] In *Stanley*, the Court had refused to allow a noncertified order (permitting a plaintiff to amend his complaint to reinstate a Federal Tort Claims Act claim against the United States) to be heard along with an order certified for immediate appeal under § 1292(b).[34] The Court had found no merit in the argument that the appeals court had jurisdiction to review the reinstatement of the FTCA claim because the issues raised by the governmental immunity defense that was key to whether plaintiff had a viable FTCA claim closely paralleled the issues raised by the claim (and by the qualified immunity defense to the claim) that was the subject of the § 1292(b) certification.[35]

Swint's implication seemed to be that pendent appellate jurisdiction is illegitimate. However, in at least two respects, the Court backed away from that extreme position, or might be read to have done so. First, the Court noted that the Eleventh Circuit had asserted "not merely pendent appellate jurisdiction, but pendent *party* appellate jurisdiction,"[36] since the ruling it undertook to review as a pendent matter related to a defendant, the County Commission, dif-

29. 483 U.S. 669 (1987).
30. *Abney*, 431 U.S. at 663.
31. *See id.*
32. *Id.*
33. Swint v. Chambers County Comm'n, 514 U.S. 35, 49-50 (1995).
34. *Stanley*, 483 U.S. at 676-77.
35. *See id.* at 677.
36. *Swint*, 514 U.S. at 48 n.6 (emphasis added).

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ferent from the defendants (police officers) affected by the ruling that was properly before the appellate court.[37] It would be possible to interpret the *Swint* case to disapprove only pendent *party* appellate jurisdiction; the involvement of a new party in the appeal might constitute "the manner" of expanding appellate jurisdiction to which the Court objected.[38] Such a narrow reading would be inconsistent with the logic of the opinion, however. Pendent appellate jurisdiction not involving any additional parties would seem, in the Court's view, to be equally inconsistent with §§ 1292(b, e) and 2072(c).

The Court also expressly disavowed the thoroughgoing rejection of pendent appellate jurisdiction that its opinion otherwise might have implied. The Court acknowledged the existence of cases in which it had *not* confined its own or court of appeals review to the precise decisions independently subject to review.[39] Although it explicitly conceded nothing based on the existence of those cases, in its concluding paragraph on the general subject of pendent appellate jurisdiction, the Court stated:

> We need not definitively or preemptively settle here whether or when it may be proper for a court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are not themselves independently appealable. The parties do not contend that the District Court's decision to deny the Chambers County Commission's summary judgment motion was inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or that review of the former decision

37. That also was the situation in *Stanley*, where the FTCA defendant, the United States, was not a party to the § 1292(b) appeal, which involved only the plaintiff and individual defendants. *See Stanley*, 483 U.S. at 676-77.

38. *See Swint*, 514 U.S. at 48; *see, e.g.*, United States v. Lopez-Lukis, 102 F.3d 1164, 1167 n.10 (11th Cir. 1997) (describing *Swint* as dealing "only with the use of pendent jurisdiction over a nonappealable issue involving parties different from those involved in the appealable issue"); Kaluczky v. City of White Plains, 57 F.3d 202, 207 (2d Cir. 1995) (viewing *Swint* as "caution[ing] that, on an interlocutory appeal from an order rejecting a claim of qualified immunity, a claim involving a 'pendent party' is an 'unrelated question' that cannot be resolved," but not otherwise narrowing the scope of pendent appellate jurisdiction and contemplating such jurisdiction over independent but related questions that are inextricably intertwined with qualified immunity or necessary to ensure meaningful review of the latter). *Cf.* Rein v. Socialist People's Libyan Arab Jamahiriya, No. 98-7467, 1998 U.S. App. LEXIS 31223 (2d Cir. Dec. 15, 1998) (concluding that *Swint* is not limited to pendent parties, and that pendent issues are a greater threat to the final judgment rule because of the relative unlikelihood that parties will conspire for one to bring an interlocutory appeal so that another can appeal early).

39. *See Swint*, 514 U.S. at 50.

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> was necessary to ensure meaningful review of the latter. . . . Nor could the parties so argue.[40]

The Court thus left the door open, both to giving renewed life to those of its past decisions that are apparently contrary to the views expressed in *Swint*, and to possible approval of pendent appellate jurisdiction over rulings that are inextricably intertwined with independently appealable decisions, whose review is necessary to ensure meaningful review of independently appealable decisions, and perhaps even beyond those parameters.

II. Evaluating *Swint*

A. Drawing the Analogy to Supplemental Jurisdiction

The Court easily could have reversed the exercise of pendent appellate jurisdiction in *Swint* as an abuse of discretion, because the trial court had expressly indicated its intention to revisit, before jury deliberations, whether Sheriff Morgan was a policy maker for the County.[41] The appellate court's preemption of the district court, which denied it the opportunity to finally decide in the first instance whether the County had a defense to liability under *Monell v. New York City Department of Social Services*,[42] was an abuse of the discretion afforded by the pendent appellate jurisdiction doctrine.[43]

40. *Id.* at 50-51 (citations omitted). The Court cited and quoted from Riyaz A. Kanji, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 YALE L.J. 511, 530 (1990).

41. *Swint*, 514 U.S. at 39. The trial court planned either to decide the issue as a matter of law, after hearing more evidence, or at least to consider whether the evidence was such that it could decide the issue as a matter of law. *See id.* at 39-40.

42. 436 U.S. 658, 690-91 (1978) (allowing local governments to be sued under 42 U.S.C. section 1983 only when the action alleged to be unconstitutional either implements a policy statement, ordinance, regulation or decision officially adopted or promulgated by local government officers, or is imposed pursuant to governmental custom; disallowing respondeat superior liability).

43. *See* Gilda Marx, Inc. v. Wildwood Exercise, Inc., 85 F.3d 675, 679 (D.C. Cir. 1996) (stating that "the prohibition on advisory opinions counsel[ed] against reaching an issue that might be mooted or altered by subsequent district court proceedings"); Georgine v. Amchem Products, Inc., 83 F.3d 610, 624 (3d Cir. 1996) (indicating significance of there being no indication that district court might alter the determination over which the appellate court was deciding to exercise pendent appellate jurisdiction in the context of a section 1292(a)(1) appeal), *affirmed*, 117 S.Ct. 2231 (1997); Behrens v. Pelletier, 516 U.S. 299, 305 (1996) (stating that the concept of finality, in the collateral order

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Clearly, however, the Court had no interest in rendering such a narrow decision. It reached out to address the legitimacy of pendent appellate jurisdiction generally. In doing so, the Court took an approach reminiscent of the attack it made in the late 1980's on pendent party jurisdiction, and indirectly on other forms of pendent and ancillary jurisdiction, in the federal district courts. In both that context and this, a form of supplemental jurisdiction was involved, and *Swint* is a very *Finley*[44]-like opinion.

Since early in our history, the federal district courts had exercised various forms of what were called "ancillary" and "pendent" jurisdiction.[45] Ancillary jurisdiction allowed federal district courts to hear claims such as compulsory counterclaims, cross-claims, and defendants' claims against third-party defendants, although the claims lacked an independent basis of subject matter jurisdiction, so long as

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context and elsewhere, precludes consideration of decisions that are subject to revision); Singleton v. Wulff, 428 U.S. 106, 119-21 (1976) (holding that court of appeals' resolution of the merits was unacceptable where trial court had dismissed count because plaintiff lacked standing and defendant had not been heard in the trial court on the merits of the case). The *Singleton* court stated that "[i]t is the general rule . . . that a federal appellate court does not consider an issue not passed upon below . . . [T]his is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . .' [and] the opportunity to present whatever legal arguments [they] may have . . . . The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals . . . Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where 'injustice might otherwise result.' . . . [T]his is not such a case." *Id.* at 120-21 (citations omitted); *accord* Garzaro v. University of Puerto Rico, 575 F.2d 335, 338-39 (1st Cir. 1978) (declining to reach merits on interlocutory appeal of injunction, *inter alia*, because the hearing to be had on damages might shed further light on the constitutional issues in the case and because the trial court still could change the injunctive order); *see generally*, 15A WRIGHT, *supra* note 1, § 3907, at 276 (stating that "appellate review ordinarily should not occur before it is clear that the judge had no intention of further considering the challenged ruling").

44. Finley v. United States, 490 U.S. 545 (1989); *see* the discussion of *Finley, infra* text at notes 56-60.

45. For articles that trace the evolution of pendent, ancillary, or pendent party jurisdiction, see Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 868-90 (1992); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 228 nn.10 & 12, 236-45, 270-75, 304-08 (1990); Mary B. MacManamon, *Dispelling the Myths of Pendent and Ancillary Jurisdiction: The Ramifications of a Revised History*, 46 WASH. & LEE L. REV. 863 (1989); Richard A. Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103 (1983).

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the plaintiffs' claims were within either the federal question[46] or the diversity[47] jurisdiction of the federal courts.[48] Ancillary jurisdiction typically was recognized only as to claims that arose out of the same transaction or occurrence as claims for which there was an independent basis of subject matter jurisdiction.[49] Pendent jurisdiction paradigmatically allowed federal district courts to adjudicate state law claims, asserted by plaintiffs along with substantial federal question claims, so long as the state law claims arose out of a common nucleus of operative fact with a federal question claim and were such that, notwithstanding the claims' respective state and federal law natures, one normally would expect the plaintiff to try them together.[50] Some courts had recognized "pendent party jurisdiction," by which district courts could hear a plaintiff's state law claims bearing the requisite relation to a federal question, but asserted against a defendant other

46. *See* 28 U.S.C. § 1331 (1994).

47. *See* 28 U.S.C. § 1332 (1994).

48. *See, e.g.,* Moore v. New York Cotton Exch., 270 U.S. 593, 610 (1926) (permitting ancillary jurisdiction over compulsory counterclaims); Phelps v. Oaks, 117 U.S. 236, 241 (1886) (permitting ancillary jurisdiction over claims by intervenors of right); *In re* Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig., 15 F.3d 1230, 1236-37 (3d Cir. 1994) (holding district court to have ancillary jurisdiction over claims against additional defendants to a compulsory counterclaim and over claims against third party defendants); Cam-Ful Indus., Inc. v. Fidelity & Deposit Co. of Md., 922 F.2d 156, 160 (2d Cir. 1991) (holding that trial court erred in failing to exercise ancillary jurisdiction over claim by non-diverse third-party defendant against plaintiff). In general, ancillary jurisdiction allowed federal courts to hear claims asserted by parties other than plaintiffs and by plaintiffs against parties other than the original defendants, where the requirements of the doctrine were met. *But see* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 477 (1978) (ancillary jurisdiction over a plaintiff's claim against a non-diverse third-party defendant is inconsistent with 28 U.S.C. section 1332).

49. *See, e.g., Moore*, 270 U.S. at 609; Zurn Indus., Inc. v. Acton Constr. Co., 847 F.2d 234, 238 (5th Cir. 1988) (holding court to have ancillary jurisdiction over cross-claims and counterclaims that arose out of same transaction or occurrence as plaintiff's claim); Eagerton v. Valuations, Inc., 698 F.2d 1115, 1119 (11th Cir. 1983) (holding that ancillary jurisdiction may operate only over claims that have a tight subject matter nexus with claims properly in federal court); Amco Constr. Co. v. Mississippi State Bldg. Comm'n, 602 F.2d 730, 732-33 (5th Cir. 1979) (denying ancillary jurisdiction over proposed cross-claim that did not arise from transaction that gave rise to original claim). The Court also has recognized a form of ancillary jurisdiction to enable courts to manage their proceedings, vindicate their authority and effectuate their decrees by such actions as compelling payment of an opposing party's attorneys' fees as a sanction for misconduct and exercising contempt power to maintain order. *See* Peacock v. Thomas, 516 U.S. 349, 354 (1996); Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 379-80 (1994).

50. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

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than he against whom the federal question claim was asserted.[51] As was true with respect to pendent and ancillary jurisdiction generally, in the courts that recognized pendent party jurisdiction, whether to actually exercise such jurisdiction always was within the courts' discretion.[52]

The Supreme Court had held exercises of several of these permutations of jurisdiction to be constitutional under Article III[53] and, as to others, had in dicta indicated its belief in their constitutionality.[54] The lower courts either believed that constitutionality was the only prerequisite to their power to exercise pendent and ancillary jurisdiction, or they believed that Congress, in conferring original jurisdiction to hear "civil actions" arising under federal law or between the parties described in 28 U.S.C. §1332(a), had conferred jurisdiction over claims that the courts held to be within their pendent or ancillary jurisdiction.[55] In *Finley v. United States*,[56] the Supreme Court went beyond deciding the particular question before it[57] to make

51. *See, e.g.,* Hiram Walker & Sons, Inc. v. Kirk Line, 877 F.2d 1508, 1512 (11th Cir. 1989) (approving pendent party jurisdiction over maritime tort law claim against stevedore in conjunction with plaintiff's federal question claim against common carrier); Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511, 516 (7th Cir. 1985) (affirming district court's exercise of pendent party jurisdiction over retaliation claim against insurance company in conjunction with plaintiff's federal question claim against his employer); *see also* Rodriguez v. Comas, 888 F.2d 899, 905 (1st Cir. 1989) (court would exercise pendent party jurisdiction over state law claim for emotional distress asserted by federal civil rights plaintiff's wife).

52. *See, e.g., United Mine Workers*, 383 U.S. at 726; *see also* cases cited in note 51, *supra*.

53. *See supra* notes 48-50.

54. *See* Finley v. United States, 490 U.S. 545, 549 (1989) (assuming, without deciding, that the constitutional criterion for pendent party jurisdiction is analogous to that for pendent-claim jurisdiction); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 371 n.10 (1978) (assuming, without deciding, that the "common nucleus" test determines the outer boundaries of constitutionally permissible federal jurisdiction in diversity cases.)

55. *See Finley*, 490 U.S. at 553-54; *see generally* LARRY L. TEPLY AND RALPH U. WHITTEN, CIVIL PROCEDURE 118 (Foundation Press 1994) (citing *United Mine Workers*, 383 U.S. 715, for the proposition that, "The Court's earliest modern decisions seemed to stand for the proposition that federal jurisdictional statutes would be presumed to allow the assertion of pendent or ancillary jurisdiction."); VOL. I. FEDERAL COURTS STUDY COMMITTEE WORKING PAPERS AND SUBCOMMITTEE REPORTS 549 (1990) ("Precisely because the [*Gibbs*] Court simply *assumed* that § 1331 authorized supplemental jurisdiction, most courts inferred from *Gibbs* that jurisdictional statutes should be presumed to confer supplemental jurisdiction.")

56. 490 U.S. 545 (1989).

57. The question posed in *Finley* was whether the federal courts could exercise pen-

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clear, as a general proposition, that federal courts can hear claims as a function of ancillary or pendent jurisdiction *only* if Congress has conferred the power to do so.[58] The Court rejected the view that jurisdiction to hear "civil actions" suffices to confer such power.[59] The Court thus cast doubt on the propriety of virtually all the traditional exercises of pendent and ancillary jurisdiction.[60]

To fill the gap that the Court had either created or identified (depending on one's point of view), Congress responded by enacting a statute that expressly confers on the district courts "supplemental jurisdiction over all ... claims that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the ... Constitution,"[61] including claims that involve the joinder or intervention of additional parties, subject to exceptions legislated in § 1367(b) and in other federal statutes.

Pendent appellate jurisdiction also relates to a form of supplemental jurisdiction. The term has been used to denote a discretionary jurisdiction that courts of appeals can exercise over interlocutory orders that would not, by themselves, be immediately appealable pursuant to a statutory or common law doctrine authorizing immediate appeal of interlocutory orders, but that bear a relationship to an immediately appealable interlocutory order that makes contempora-

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dent party jurisdiction over a state law negligence claim against a city when hearing a Federal Tort Claims Act claim against the United States, pursuant to 28 U.S.C. section 1346. The state courts did not have concurrent jurisdiction over the FTCA claim. *See* 28 U.S.C. § 1346 (1994).

58. *See Finley*, 490 U.S. at 548, 551-54.

59. *Id.* at 554-55.

60. *See* Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 946 (1991) (discussing lower courts' interpretation of *Finley* to forbid supplemental jurisdiction in several contexts); John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 763 (1991) ("[*Finley*] was greeted by some as calling into question the future stability of the entire edifice of pendent and ancillary doctrines of jurisdiction"); Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 BYU L. REV. 247, 255-60 (noting that the Court's finding of an absence of statutory authorization for one kind of pendent or ancillary jurisdiction imperiled all types); Wendy Collins Perdue, *Finley v. United States: Unstringing Pendent Jurisdiction*, 76 VA. L. REV. 539, 540 (1990) (stating that the Court "used broad language that could potentially invalidate all pendent-party jurisdiction absent explicit statutory authority").

61. 28 U.S.C. § 1367(a) (1994).

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neous appellate review appropriate.[62] As supplemental jurisdiction allows district courts to adjudicate claims that lack an independent basis of subject matter jurisdiction if they bear a particular relationship to claims for which there is such jurisdiction, so pendent appellate jurisdiction allows appellate courts to review issues that lack an independent basis of appellate jurisdiction if they bear a particular relationship to issues for which there is such jurisdiction. Pendent *party* appellate jurisdiction allows (or allowed) appellate courts to review pendent issues that involve parties to the litigation who are not directly aggrieved or benefited by the decision for which an independent basis of appellate jurisdiction exists.

There are other similarities. Determining whether a particular claim is within original federal jurisdiction may be difficult,[63] and close questions may arise both as to whether particular claims comprise part of the same case or controversy under Article III,[64] and as

62. *See, e.g.,* Swint v. Chambers County Comm'n, 514 U.S. 35, 50-51 (1995) (referring to the question "whether or when it may be proper for a court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are not themselves independently appealable"); Gilda Marx, Inc. v. Wildwood Exercise, Inc., 85 F.3d 675, 678 (D.C. Cir. 1996) (stating that "a circuit court exercises pendent jurisdiction when, in the course of reviewing an order from which an appeal is within its jurisdiction, it hears an appeal from another order that, while part of the same case or controversy, would not otherwise be within its statutory jurisdiction"). In this context, when I speak of "interlocutory orders," I intend to include all orders issued prior to final judgment, including orders that are considered "final decisions" within the meaning of 28 U.S.C. § 1291, under the collateral order doctrine. *See supra* note 2.

This Article does *not* address extensions of appellate jurisdiction over questions of enforcement that may arise when a court of appeals has entered its own judgment, nor appellate determinations to retain jurisdiction over a case so that future trial court proceedings can be reviewed without a second appeal. With respect to those matters, *see generally* 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3937 (1977 & Supp. 1996).

63. *See, e.g.,* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986). "There is no 'single, precise definition' of the concept; rather, 'the phrase "arising under" masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.'" *Id.* (quoting Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8 (1983)). Moreover, the court explained that "in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." *Id.* at 810.

64. *See* Baer v. First Options of Chicago, Inc., 72 F.3d 1294, 1299 (7th Cir. 1995) (discussing what is meant by terms "case or controversy" in supplemental jurisdiction context); Ortiz v. United States, 595 F.2d 65, 68-69 (1st Cir. 1979) (discussing distinction between "case" and "controversy," but concluding that any such distinction should not be

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to whether a court, in its discretion, should hear a claim that it is empowered to hear under supplemental jurisdiction.[65] Similar issues arise in the context of pendent appellate jurisdiction. Determining whether an interlocutory order is within federal appellate jurisdiction may be difficult,[66] and close questions may arise both as to whether another particular interlocutory order is so related to the former that contemporaneous appellate review is appropriate, and as to whether, in light of additional considerations, a court should exercise discretion to hear an immediate appeal of that other interlocutory order as a matter of its pendent appellate jurisdiction.[67]

In *Swint*, the Court staked out the position that, despite its constitutionality, pendent appellate jurisdiction, like the supplemental jurisdiction of the district courts, is illegitimate unless it is rooted in Congress' statutory scheme or in the offspring of that scheme: Rules prescribed by the Court and promulgated pursuant to a congressional delegation of power. The Court did not find a statutory basis for the appellate courts' exercise of pendent appellate jurisdiction, nor did it find a basis in the current Rules. It is true that the case before the Court posed only the question of the propriety of pendent appellate jurisdiction when courts are hearing appeals pursuant to the collateral order doctrine, and the Court disavowed definitively or preemptively settling in *Swint* "whether or when it may be proper for a court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are not themselves independently appealable."[68]

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recognized for purposes of pendent jurisdiction analysis); McLaughlin, *supra* note 45, at 898 (noting that the Constitution "provides no definition of a 'case' or 'controversy' under Article III"); Richard A. Matasar, *Rediscovering 'One Constitutional Case': Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1401, 1403 (1983) (noting that the "case" and "controversy" concept is quite elusive in context of supplemental jurisdiction).

65. *See* United States v. Zima, 766 F.2d 1153, 1158 (7th Cir. 1985) (discussing factors that should affect discretion to exercise supplemental jurisdiction); United States *ex rel.* Hoover v. Franzen, 669 F.2d 433, 438 (7th Cir. 1982) (same).

66. *See, e.g.,* Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 877-78 (1994) (rejecting applicability of collateral order doctrine to order vacating a settlement and thereby denying petitioner a contractual right to be trial-free); Van Cauwenberghe v. Biard, 486 U.S. 517, 526-27 (1988) (rejecting applicability of collateral order doctrine to orders denying motions to dismiss based on an extradited person's claim that he is immune from civil service and based on forum non conveniens); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468-69 (1978) (rejecting applicability of collateral order doctrine to orders denying class certification or decertifying previously certified classes).

67. *See infra* Section III.

68. Swint v. Chambers County Comm'n, 514 U.S. 35, 50-51 (1995).

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Nonetheless, in invoking *United States v. Stanley*,[69] a case involving a § 1292(b) appeal, as supporting its conclusion that the appeals court lacked pendent appellate jurisdiction over the denial of the County Commission's summary judgment motion, and in acknowledging prior instances involving mandamus and appeals predicated on the grant or denial of injunctions in which the Court itself had failed to confine review to the precise ruling independently subject to review, the Court implied that, prior to final judgment, pendent appellate jurisdiction is suspect regardless of the jurisdictional basis of appeal. Consequently, *Swint* cast great doubt upon the legitimacy of the doctrine in any of these contexts. The Court may not really have intended to open a Pandora's Box of uncertainty with respect to the scope of jurisdiction available to appellate courts hearing cases under one of the statutory grants of power to entertain interlocutory appeals or exercising mandamus power—any more than it meant to undermine the basic kind of pendent jurisdiction established in *United Mine Workers v. Gibbs*[70] when it restrained the district courts' exercise of pendent *party* jurisdiction in *Finley*.[71] Nonetheless, the Court's language and reasoning do raise doubts about the proper scope of appellate jurisdiction in all of these contexts.

In purporting to leave the door open to the possibility of a narrowly defined doctrine of pendent appellate jurisdiction in the context of collateral order appeals, *Swint* also creates more questions than it resolved. For example, how wide is that opening, and how will it, and should it, compare with the size of the opening for pendent appellate jurisdiction in the context of other appeals in advance of final judgment? The *Swint* case thus leaves litigants and federal courts of appeals waiting to see whether Congress itself will react to the *Swint* decision by expressly legislating forms of pendent appellate jurisdiction, and whether the Court will accept the challenge of prescribing Rules providing for the appeal of additional interlocutory decisions or dictating when, if ever, orders may be appealed as a matter of pendent appellate jurisdiction. *Swint* also leaves it to the federal courts of appeals to grapple with how much leeway they have to continue to exercise pendent appellate jurisdiction.

Although the Court did not look very hard for a statutory basis

69. 483 U.S. 669 (1987).
70. 383 U.S. 715 (1966).
71. Finley v. United States, 490 U.S. 545 (1989).

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for pendent appellate jurisdiction,[72] this Article will consider whether there already might be such bases. Interpretation of the jurisdictional statutes governing appeals should be consistent with their language, but also may take into account the structure and purpose of the statutes, any pertinent legislative history, the history of their interpretation, related legal developments, and sound judicial policy.[73] To the extent that the Court could be persuaded to interpret existing statutes to authorize pendent appellate jurisdiction, new statutes and Rules would be unnecessary.

It should be noted that when Congress responded to the invitation implicitly issued in *Finley*, it responded with a statute that conferred very broad supplemental jurisdiction, to the limits of Article III, in federal question cases. Its policy judgment was that such broad discretionary power would serve the interests of justice and efficiency by enabling federal courts to hear claims arising from the same transaction or occurrence in one judicial proceeding, and would eliminate the undesirable incentive that litigants otherwise would have to file their federal law claims in state courts for efficiency reasons.[74] Con-

72. The parties did propose to the Court that it *interpret* 28 U.S.C. section 1291 to accommodate pendent appellate jurisdiction. *See Swint*, 514 U.S. at 45; Supplemental Brief for Petitioners at 11-14; Supplemental Brief for Respondents at 4-10. However, the *Swint* opinion did not seriously consider that proposal. Instead, the Court conclusorily declared that the parties' arguments for pendent appellate jurisdiction "drift away from the statutory instructions Congress has given." *Swint*, 514 U.S. at 45.

73. *See, e.g.*, Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 720-22 (1996). Gonzalez advocates a two-step approach to statutory interpretation; in step one the court "uses traditional tools of statutory interpretation such as text, legislative history, and canons and presumptions of construction, to determine the range of plausible meanings," and in step two the court undertakes a policy-oriented analysis of those interpretations, seeking the most "public-regarding." *Id.* Gonzalez also reviews various current normative theories of statutory construction, discussing what he characterizes as textual, intentional, and dynamic theories of statutory interpretation as well as "the honest agent conception" in the former two theories. *Id.* at 585. *See also*, Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988) (arguing that public choice theory warrants evaluation of legislative intent); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (urging courts to go beyond legislative history and intent to consider the current societal, political and legal context); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 386 (urging judges to use all available tools when interpreting statutes); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1073-96 (1993) (advocating consideration of legislative history and intent, purpose and policy, in addition to textual language, in the interpretation of the Federal Rules of Civil Procedure).

74. *See* H.R. Rep. No. 734, 101st Cong., 2d Sess. 28 (1990) (lauding supplemental

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gress was less generous with supplemental jurisdiction in diversity cases because it sought to respect Court decisions rendered in an effort to safeguard the "complete diversity" construction of 28 U.S.C. §1332.[75] If Congress, the Court, or the lower courts in the maneuvering room left to them by *Swint do* further elaborate pendent appellate jurisdiction, some of their concerns will differ from those that bear upon the desirable scope of original federal jurisdiction. Article III will not be a significant limiting factor. So long as a case or controversy was properly pending in the district court and remains justiciable, Article III will pose no obstacle to an appeal of any portion of the case at any time.[76] Any statute governing the timing of appeals will be arguably procedural, and hence constitutional.[77] In addition,

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jurisdiction for enabling federal courts and litigants to deal economically with related matters and for making federal courts available to resolve entire controversies so that plaintiffs will not be dissuaded from bringing federal law claims to the federal forum); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47 (1990) (urging Congress to expressly authorize federal courts to assert pendent jurisdiction, to enable federal courts to deal economically with related claims and to avoid the unfairness of putting plaintiffs to the choice of splitting claims, abandoning some claims, or leaving determination of their federal law claims to state courts).

75. 28 U.S.C. § 1367(b) (1994). Section 1367(b) provides that:

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

Id.

76. The pertinent portions of Article III merely state that:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. [Section 2 prescribes the cases and controversies to which the judicial power of the United States shall extend.] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make . . . .

U.S. CONST. art. III.

77. *See* Hanna v. Plumer, 380 U.S. 460, 472 (1965). In deciding that service of process in a diversity case should be governed by the Federal Rules of Civil Procedure rather than conflicting state law, the Court stated that "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in

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in view of the supersession clause of the Rules Enabling Act,[78] the drafter of Rules authorizing pendent appellate jurisdiction (like Congress itself) will not be constrained by pre-existing statutes governing the timing of appeals, with which their enactments might conflict.[79] All laws in conflict with properly promulgated Rules have no further force or effect. Neither will any statute governing the jurisdiction of a district court be a factor. District court jurisdictional statutes have a role in setting the parameters of pieces of litigation, but beyond that they are irrelevant to the proper scope of appellate jurisdiction and to the desirable time for appeals. Rather, in framing new statutes or Rules authorizing pendent appellate jurisdiction, the critical questions will be whether and when provision for such jurisdiction will be wise policy. In making policy judgments, concerns about justice and efficiency will have a role, as they do in framing policy as to district court jurisdiction, but several policy considerations will bear on appeals that have no relevance to matters of original jurisdiction.[80] Insofar as the elaboration of pendent appellate jurisdiction is done by the courts as adjudicators, however, the courts *will* have to consider

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turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Id.*

78. 28 U.S.C. § 2072(b) (1994) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").

79. *See, e.g.,* Henderson v. United States, 517 U.S. 652, 654 (1996) (because Rules made by Congress supersede conflicting laws, as do Rules prescribed by the Supreme Court, service "forthwith" provision of the Suits in Admiralty Act was superseded by FED. R. CIV. P. 4's provision of a minimum of 120 days for service of process); *see also* Penfield Co. of Cal. v. Securities & Exch. Comm'n, 330 U.S. 585, 589 n.5 (1947) (the abrogation clause trumps statutes passed before the effective date of the rule in question); Jackson v. Stinnett, 102 F.3d 132, 135 (5th Cir. 1996) (stating that "a statute passed after the effective date of a federal rule repeals the rule to the extent that it actually conflicts"), *dismissed*, 1997 U.S. App. LEXIS 13327 (5th Cir. Apr. 8, 1997). When 28 U.S.C. § 2072 was revised in 1988, the House of Representatives planned to eliminate the supersession clause, believing it unseemly, unwise and perhaps unconstitutional for a duly promulgated procedural rule to prevail over an act of Congress. However, the Senate version, which prevailed, preserved the clause. *See* 28 U.S.C.A. §§ 2071, 2072, David D. Siegel, Commentary on 1988 Revision, at 521, 534 (West Supp. 1994) (citing H.R. Rep. No. 889, 100th Cong., 2d Sess. 3 (1988)), H.R. Rep. No. 889, 100th Cong., 2d Sess. 27-28 (1988), 134 Cong. Rec., H-10440, (daily ed. Oct. 19, 1988) (statement of Rep. Kastenmeier). Thus, if some form of pendent appellate jurisdiction doctrine were to be legislated by Congress, its prescriptions would override earlier statutes, Rules, and decisions on the subject.

80. *See infra* Section IV. It is conversely true that some policy considerations relevant to the scope of federal subject matter jurisdiction—such as those that concern the relationship of the federal and state courts—have no bearing on matters of federal appellate jurisdiction.

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whether a particular formulation would conflict with congressional legislation or with Rules promulgated by the Court. They also will have to avoid disobedience to binding precedent.

B. Rebutting The Separation of Powers/Exclusively for Rule Making Argument

The Court in *Swint* appeared to view pendent appellate jurisdiction as a purely common law creation of the federal appellate courts, which provides for appeals of interlocutory decisions that do not constitute collateral orders and appeal of which is not provided for in § 1292(a) or (b). In taking this view, I believe that the Court conflated pure common law creation of new categories of immediately appealable interlocutory orders with court-made determinations of the scope of review that is available when an appeal preceding final judgment already is authorized by statute or by the interpretation of § 1291 that is the collateral order doctrine. Thus, the primary argument made against pendent appellate jurisdiction by the Court in *Swint* is that such jurisdiction is contrary to the statutory instructions Congress has given to control the timing of appellate proceedings: it is contrary to the structure that Congress established in 28 U.S.C. § 1291, 1292(a) and (b), and in §§ 1292(e) and 2072(c). It seems to me, however, that when §§ 1291, 1292(a) and (b) are read together with §§ 1292(e) and 2072(c), a different conclusion is justified, even on the Court's view of pendent appellate jurisdiction as pure common law, creating new categories of immediately appealable interlocutory orders. In addition, I believe that pendent appellate jurisdiction is reconcilable with the statutory scheme governing the timing of appeals because it constitutes interpretation of the *scope* of review available upon an appeal preceding final judgment which already has been authorized, either directly by statute or by the collateral order construction of § 1291.[81]

81. It has been said that "[i]n both the statutory and Rules arenas, there is a continuum between the interpretation of a text and the development of federal common law." Moore, *supra* note 73 at 1095 n. 267 (citing Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 889-96 (1986) (stating that "there is no significant difference between creation of federal common law and interpretation of federal statutes; the question in any case is whether a court has power to formulate law, under explicit or implicit provisions of the Constitution or federal statutes")). However, there are circumstances, such as those under consideration here, in which that which is viewed as statutory interpretation is viewed as permissible and that which is viewed as

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I address first the Court's view that new categories of immediately appealable interlocutory orders may be recognized, and new occasions for immediate appeal of interlocutory orders may be authorized, only by Congress or by the promulgation of formal Rules. Although the Court suggests that in exerting pendent appellate jurisdiction the judicial branch is intruding on legislative turf, Congress shows no signs of desiring to closely control when most interlocutory rulings will be immediately appealable or when decisions will be considered "final" for appeals purposes. Indeed, rather than legislating these matters any further than it already has done (in § 1291, 1292(a)-(d) and elsewhere[82]), Congress has, for now, chosen to leave most such questions primarily to the judicial branch.[83] In enacting §§ 1292(e) and 2072(c), Congress authorized the Court to add categories of interlocutory orders that should be immediately appealable and to further define finality, through Rules promulgated by the Court.[84] In view of these grants of rule making authority, it would be

"free standing" common law is not.

82. *See, e.g.*, 11 U.S.C. § 47a (1976) (concerning interlocutory appeals in bankruptcy proceedings).

83. The only Rules amendments (of which I am aware) that might be grounded in the authority conferred by either of these statutory provisions are (1) an amendment of Federal Rule of Civil Procedure 9(h), effective December 1, 1997, to clarify that an interlocutory appeal pursuant to 28 U.S.C. section 1292(a)(3) may be taken with respect to a non-admiralty claim joined with an admiralty claim, and (2) the addition of a section (f) to Federal Rule of Civil Procedure 23, effective December 1, 1998. With respect to the former, however, the Committee Note to the proposed amendment to Rule 9(h) explicitly stated that, "*No* attempt is made to invoke the authority conferred by 28 U.S.C. section 1292(e) to provide by rule for appeal of an interlocutory decision that is not otherwise provided for by other subsections of § 1292." (emphasis added) FED. R. CIV. P. 9 advisory committee's note (Judicial Conference Committee, Proposed Draft 1997). New Federal Rule of Civil Procedure 23(f) provides: "(F) APPEALS. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders." Also relevant in this connection is an amendment to Rule 5, FED.R. APP. P., governing "Appeal by Permission," effective December 1, 1998. According to the Advisory Committee Note, this amendment was "prompted by the possibility of new statutes or rules [promulgated under the authority of 28 U.S.C. section 1292(e)] authorizing additional interlocutory appeals," if the appeals require court of appeals permission. Fed. R. CIV. P. 5 advisory committee's note (Judicial Conference Committee, Proposed Draft 1997).

84. Of course, persons from outside the judicial branch have the opportunity to influence the Rules that the Court prescribes. Under 28 U.S.C. § 2073, the Judicial Conference is authorized to appoint committees, consisting of members of the bench and bar, to recommend rules, and the meetings of such committees ordinarily are open to the public. The meetings must be preceded by sufficient notice to enable all interested persons to

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untenable to say that judicial additions to the Congressionally authored list of immediately appealable interlocutory orders, or judicial definitions of finality, fly in the face of the Congressional scheme. The Court did not go quite so far as that, but it did indicate that any additions to the Congressionally authored list of immediately appealable interlocutory orders (and perhaps also further refinement of the concept of finality) must be made through the rule making process. Is that a proper interpretation of the statutes?

Sections 1292(e) and 2072(c) are a direct outgrowth of a recommendation by the Federal Courts Study Committee.[85] In its Report, issued in April 1990, that Committee specifically recommended that:

> To deal with difficulties arising from the definitions of an appealable order, Congress should consider delegating to the Supreme Court the authority under the Rules Enabling Act to define what constitutes a final decision for purposes of 28 U.S.C. § 1291, and to define circumstances in which orders and actions of district courts not otherwise subject to appeal under acts of Congress may be appealed to the courts of appeals.[86]

The Committee's commentary indicates concern with an unsatisfactory state of the law on appealability which has produced a great deal of procedural litigation, has caused appeals to be dismissed as premature, and has created risks of inadvertent waiver of the right to appeal due to a lack of clarity as to when a decision is "final," and "may in some circumstances [have] restrict[ed] too sharply the opportunity for interlocutory review."[87] The Committee proposed that "Congress consider permitting the rule making process to refine and supplement definitions of appellate jurisdiction . . . [because that area] might profit . . . from the specialized focus of those responsible for the Federal Rules of Appellate Procedure."[88] It contemplated

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attend, and must be memorialized in minutes that ordinarily will be available to the public. In addition, pursuant to 28 U.S.C. § 2074, Congress has the opportunity to reject or alter Rules proposed by the Court. Nonetheless, the judicial branch has primary responsibility for Rules promulgated pursuant to the Rules Enabling Act, 28 U.S.C. § 2072 (1994), in that the Court is the body with the rule-making power, subject to public and Congressional scrutiny.

85. *See* H.R. 5381, 101st Cong., 2d Sess, at 18 (1990) (noting that section 1292(e) implements a recommendation of the Federal Courts Study Committee).

86. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 95 (1990).

87. *Id.*

88. *Id.* at 95-96. There is, of course, a long history of judicial control of judicial process. In the eighteenth century, American courts controlled judicial process, and historical arguments have been made that, in the English tradition, procedural rule-making always

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that:

> The rulemaking authority under this proposal would include authority both to change (by broadening, narrowing, or systematizing) decisional results under the finality rule of 28 U.S.C. § 1291 and to add to—but not subtract from—the list of categories of interlocutory appeal permitted by Congress in 28 U.S.C. § 1292. Favorable experience under this limited rulemaking authority ... might later support a broader delegation of power to treat the entire area of appealability from federal district courts by rule rather than statute.[89]

Several aspects of this discussion are noteworthy. The Committee's primary concern appears to have been the problems created for

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has been a judicial function. *See* Roscoe Pound, *The Rule-making Power of the Courts*, 12 A.B.A. J. 599, 601 (1926). Some significant commentators have argued that the judiciary should be the sole source of procedural rule-making. *See, e.g.*, Henry A. Wigmore, *All Legislative Rules for Judicial Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 276-79 (1928); *see also* Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 382, 384 (1992) [herinafter Mullenix, *Counter-Reformation*] (arguing that the Civil Justice Reform Act "authorizes unconstitutional rulemaking, violates the separation of powers doctrine, and arrogates to Congress unprecedented authority over procedure ... [It] strips the judicial branch of its important function of procedural rulemaking," and "the separation of powers doctrine ... commits control over internal court housekeeping affairs, including the promulgation of procedural rules, to the judiciary"); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1297-98, 1314-22 (1993) [hereinafter Mullinex, *Unconstitutional*]. Congress has delegated rule-making power to the Supreme Court since 1789. Legislators frequently have recognized that the courts' greater experience with and greater interest in judicial procedure, and the dangers posed to beneficial reform by those with influence in the legislature, but not in the judiciary, militate in favor of vesting rule-making power in the courts. *See generally* Bruce L. Dean, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139, 146-48 (1988) and articles there cited.

> Mr. Dean writes that the reasons advanced in support of judicial rule-making include: ...(1) judicial immunity from political pressures; (2) judicial interest, expertise, and familiarity with procedural problems; (3) avoidance of legislative delay ...; (4) public expectation of judicial accountability for the efficient administration of justice; (5) willingness to constantly review procedural methods; (6) ability to make minor changes in individual rules without embarking on wholesale ... reform; (7) less cumbersome enactment process; (8) decreased litigation ... because of legislative inability to clarify ambiguity once rules are promulgated; and (9) consistent interpretation of rules by the same body who created them.
>
> In opposition, arguments advanced favoring legislative rule-making include: (1) judicial resistance to change; (2) judges' bias favoring their own preferences; (3) judges who are out of touch with the needs of litigants and members of the bar; (4) the perception that the legislature better reflects the public will; and (5) concern that judicial rule-making will restrict or create substantive rights.

Id. at 149-51 (citations omitted).

89. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 96 (1990).

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litigants and for the courts by the uncertainty surrounding "finality." Insofar as the Committee was concerned about interlocutory appeals, its concern was that current statutes and doctrine unduly restrict the opportunities for such review, and its mandate was that rule makers should add to (not subtract from) the categories of interlocutory appeals now permitted by Congress. There is no indication that the Committee was thinking about the *scope* of those interlocutory appeals that already are authorized or about the doctrine of pendent appellate jurisdiction in particular, but if the Committee *was* thinking about any change in scope, the Report shows that its desire was for expansion, not contraction, of such appeals. Also, the final sentence of its commentary makes clear that the Committee envisioned the rulemaking that it endorsed to be limited, and not to encompass the entire area of appealability. Thus, it certainly did not view the regime it proposed as one that would preempt the field and prevent other players—Congress and the courts—from having a continuing role in working out the law of appealability. Finally, the last words of the commentary make clear that the Committee was focusing on a shift of responsibility from Congress to rule makers; it was not focussing on the role of the courts as adjudicators—except to make clear that the entire area of appealability was *not* to be governed by the Rules that it urged Congress to authorize the Court to make.

While §§ 1292(e) and 2072(c) bespeak Congress' agreement with the Federal Court Study Committee's view of the preferred division of labor between itself and the Court on these questions, there is no reason to believe that, in delegating rulemaking power to the Court, Congress intended to alter the division of labor *within* the judicial branch or to preclude continued common law creation by the courts on the matters as to which it authorized rulemaking. Certainly, nothing in the legislative history indicates such an intention.[90] There is thus no reason to view the continuing elaboration of a doctrine of pendent appellate jurisdiction as necessarily contrary to, or undermining, the rulemaking authority that Congress conferred on the Court.

Beyond the legislative history, several additional factors make it

90. None of the legislative history of 28 U.S.C. §§ 1292(e) and 2072(c) that I reviewed indicated any such intention. *See* H.R. Rep. No. 1006, 102d Cong., 2d Sess. (1992), S. Rep. No. 416, 101st Cong., 2d Sess. (1990), H.R. Rep. No. 733, 101st Cong., 2d Sess. (1990), H.R. Rep. No. 734, 101st Cong., 2d Sess. (1990), H.R. Rep. No. 889, 100th Cong., 2d Sess. 3 (1988).

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unlikely that Congress, by its delegation of rulemaking power, intended for the first time to render the federal courts powerless to hold particular rulings to constitute final decisions or to afford immediate appeal to particular interlocutory rulings. Such a stance would be undesirable as a matter of policy, would be inconsistent with historical practice and with the language of §§ 1292(e) and 2072(c), and might itself violate separation of powers principles with respect to the interpretation of §§ 1291, 1292 and other jurisdictional statutes.

First, because the concept of finality is too subtle and complex to be well captured by a codification, it would be undesirable (and hence not likely Congress' intent) for a delegation of power to define finality by Rule to oust the courts of authority to make common law on the same subject. The Court itself has long and repeatedly recognized this, saying, for example, that:

> No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future. [Giving finality a practical rather than a technical construction] ... requires some evaluation of 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.'[91]

I submit that the same is true with respect to which interlocutory orders ought to be immediately appealable. That determination requires an evaluation of competing considerations concerning the best time for appellate review that is too subtle and complex to be well captured by a codification.[92] Indeed, the common law development of the "collateral order doctrine," although it may be viewed as a refinement of § 1291's finality requirement, also has been seen as an

91. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170-71 (1974) (footnote omitted) (quoting Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)); *accord* Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964) ("[W]hether a ruling is 'final' ... is frequently so close a question that decision ... either way can be supported with equally forceful arguments, and ... it is impossible to devise a formula to resolve all marginal cases coming within ... the 'twilight zone' of finality.").

92. *See* The American Bar Ass'n Commission on Standards of Judicial Administration, Standards Relating to Appellate Courts 26 (1977) ("In practice, however, it has proved very difficult to formulate satisfactory definitions of orders [that so affect a party's right to an orderly and correct resolution of the litigation that a right should be afforded to correct them by immediate appeal].") The attempted definitions inevitably are both over- and under-inclusive. *See id.*

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"exception" to the final judgment rule.[93] The collateral order doctrine, along with the judicially created exception to § 1291 that permits immediate appeal of orders directing the immediate delivery of property for sale (or of funds) thereby threatening irreparable loss,[94] the dubious "pragmatic finality" doctrine,[95] the use of mandamus, and 28 U.S.C. § 1292(b)[96] all evidence the need for the courts, in their adjudicatory capacities, to identify the orders that do not end litigation but that should be immediately appealable. The difficulties in adequately defining those orders that should be immediately appealable—as well as the difficulties of drafting Rules that successfully effectuate the drafters' intentions—might be taken as an argument against the conferral of rulemaking authority to define finality or to

93. *See, e.g.,* Behrens v. Pelletier, 516 U.S. 299, 314-15 (1996) (Breyer, J., dissenting) (stating that the collateral order doctrine is in effect a judge made exception to 28 U.S.C. § 1291); Midland Asphalt Corp. v. United States, 489 U.S. 794, 798-800 (1989) (referring to the collateral order exception to the final judgment rule); Abney v. United States, 431 U.S. 651, 663 (1977) (same); Michael E. Solomine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1167 n.10, 1168-71 (1990) (referring to the collateral order doctrine as an exception to the finality requirement).

94. *See* Forgay v. Conrad, 47 U.S. (6 How.) 201, 204-05 (1848) (allowing appeal from an order that provided for immediate execution of a command that property be delivered for sale to an assignee in bankruptcy where all matters in controversy, except for an accounting, had been completed); United States v. Davenport, 106 F.3d 1333, 1335 (7th Cir. 1997) (holding foreclosure and sale order concerning appellants' marital residence to be a final decision subject to immediate review because it posed a risk of irreparable harm). *Davenport* also cites other cases in which the Seventh Circuit recognized the vitality of the *Forgay* finality doctrine. *See also* Cleveland Hair Clinic, Inc. v. Puig, 104 F.3d 123, 126 (7th Cir. 1997) (holding immediate appeal to be proper if there is reason to be concerned that payment would be irreversible because the prevailing party will be unable or unwilling to pay if the award ultimately is altered); *see* 15A WRIGHT ET AL., *supra* note 1, at § 3910 (discussing the continuing vitality, although infrequent applicability, of this hardship doctrine, and the ways in which it is distinct from the collateral order doctrine and from Federal Rule of Civil Procedure 54(b) appeals).

95. *See generally* 15A WRIGHT ET AL., *supra* note 1, at § 3913. Generally speaking, this "doctrine" invited a case-by-case weighing of the costs and benefits of allowing an immediate appeal of orders fundamental to the further conduct of litigation, where there was reasonable uncertainty as to the finality of an order, *i.e.*, a marginally final order, which disposed of an unsettled issue of national significance, where review would implement the same policy that Congress sought to promote in section 1292(b), and where the finality issue was not presented to the appellate court until argument on the merits, thereby assuring that judicial economy would not be served by remanding without resolving the important issue presented. *See* Service Employees Int'l Union v. San Diego, 60 F.3d 1346, 1350 (9th Cir. 1995).

96. *See supra* note 17; *infra* text at notes 315-18.

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specify immediately appealable interlocutory orders.[97] However, these difficulties are raised here in support of the narrower proposition that such rulemaking power, once conferred, should not be construed to exclude a role for adjudicating courts.

Second, for a delegation of rulemaking power to oust the federal courts of all authority in an area would be inconsistent with historical practice. It generally has not been the case that delegation of rulemaking authority to the Supreme Court has excluded participation by the courts, as adjudicators, in addressing matters within the rulemaking authority. Thus, for example, the Court's power to prescribe "general rules of practice and procedure" for cases in the United States courts[98] has never been construed to deprive the district courts of their inherent power to govern various aspects of federal practice and procedure. The inherent powers of the federal courts have been held to include the power to sanction bad-faith conduct of parties when the conduct sanctionable under Rule or statute is intertwined with conduct that only the inherent power can address,[99] power to bar from the courtroom a criminal defendant who disrupts a trial,[100] power to dismiss sua sponte a suit for failure to prosecute,[101] power to dismiss an action on grounds of forum non conveniens,[102] power to vacate a judgment upon proof of fraud on the court,[103] power to punish for contempt,[104] and power to control admission to a bar and to discipline attorneys who appear before a court.[105] Since even the ac-

97. *See also* Solomine, *supra* note 93, at 1212 (observing that a rule promulgated under 28 U.S.C. § 1292(e) might suffer from poor draftsmanship, and that such a rule or its legislative history would need to make clear whether it purported to preempt any or all of the appeals now permitted under the collateral order doctrine, and arguing that such rulemaking is unnecessary in light of 28 U.S.C. section 1292(b)). For a recent example of the difficulties of drafting jurisdictional legislation that is well-conceived as a matter of policy and operates as intended, see the extended exchange of articles concerning the supplemental jurisdiction statute, 28 U.S.C. § 1367 (1994), in 40 EMORY L.J. 943-1014 (1991) and 41 EMORY L.J. 1-113 (1992).

98. 28 U.S.C. § 2072(a) (1994).

99. *See* Chambers v. Nasco, Inc., 501 U.S. 32, 46-51 (1991).

100. *See* Illinois v. Allen, 397 U.S. 337, 343-46 (1970).

101. *See* Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962).

102. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-08 (1947).

103. *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244-45, 248-50 (1944).

104. *See Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1874).

105. *See Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824); *see generally* Mullenix, *Unconstitutional*, *supra* note 88, at 1320-21 ("The theory [of inherent power] posits that once Congress creates federal courts and vests them with jurisdiction, it must also vest

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tual promulgation of Rules need not deprive the district courts of their inherent power to govern matters similar to, or even the same as, those governed by Rule,[106] for a mere delegation of rulemaking power to oust the federal courts of all authority in an area would be manifestly inconsistent with historical practice. As Professor Redish has written, "Absent preemptive congressional legislation, it is not only appropriate but essential for federal courts, as a matter of common law development, to fashion procedural principles to govern their internal operation."[107] While special constraints apply when jurisdiction is at issue, the courts have common law making authority which includes authority to interpret the scope of their jurisdiction, as well as authority to impose prudential restraints on themselves.[108]

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them with those powers necessary for them to administer justice and to preserve their status as part of an independent branch.") (citations omitted); Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into Federal Rules of Evidence*, 57 TEX. L. REV. 167, 181 (1979) ("[F]ederal courts are supreme over Congress regarding at least some rules of evidence, so that a court may on some occasions disregard explicit directives in the Federal Rules of Evidence. This argument is grounded on the constitutional grant of judicial power to the courts and a determination that some evidence rules are 'inherent' in that power."). *But see* Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 699, 707, 724-25 (1995) (arguing that lawmaking independence, "the ability of the federal courts to create ... substantive legal principles or governing general rules of procedure in the course of individual adjudications, free from interference by other branches of the federal government," is not central to performance of the judicial function and sometimes would undermine democratic theory; rejecting the idea that judicial power to promulgate rules of procedure is exclusive of legislative power).

106. *See, e.g.,* Chambers v. Nasco, Inc., 501 U.S. 32, 46-51, 70-72 (1991) (Kennedy, J., dissenting) (upholding inherent power to sanction bad-faith conduct of parties, some of which was within the reach of Federal Rule of Civil Procedure 11, 28 U.S.C. § 1927, and perhaps other statutes); *Link*, 370 U.S. at 630-31 (upholding inherent power to dismiss a suit sua sponte for failure to prosecute where neither the permissive language of Federal Rule of Civil Procedure 41(b), permitting a defendant to move for such a dismissal, nor its policy abrogated the inherent power of a federal court to dismiss sua sponte). The promulgation of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure also has not precluded individual courts from promulgating their own local rules, not in conflict with the Federal Rules. *See* FED. R. CIV. P. 83 (authorizing district courts to make and amend rules governing their practice in any manner not inconsistent with, or duplicative of, Acts of Congress and Court promulgated Rules). Approximately 87 district courts and 13 United States courts of appeals have created such local rules. Federal Local Court Rules (Lawyers Coop. 1995 & Feb. 1996 Supp.).

107. Redish, *supra* note 105, at 727-28.

108. *Compare, e.g.,* U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 20-22 (1994) (concluding that even when the requirements of Article III are no longer met by a piece of litigation, federal appellate courts may take some actions regarding the litigation, including vacating the judgment rendered by a lower court or deciding to let the

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That Congress did not intend its grant of rulemaking power to preempt the federal courts is also suggested by the permissive language of §§ 1292(e) and 2072(c): the former says that the Supreme Court "*may* prescribe rules ... 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) [of § 1292],"[109] while the latter states that the rules of practice and procedure that the Supreme Court has power to prescribe "*may* define when a ruling of a district court is final for the purposes of appeal under § 1291."[110] As unlikely as it is that Congress would intend a *command* to promulgate Rules to terminate the courts' power to address "covered" issues in the decision of cases, it is still less likely that Congress intended the passage of these merely *permissive* statutes to abrogate the power of the federal courts to decide issues of finality in the course of interpreting § 1291 or to afford immediate appeal to particular interlocutory rulings. Indeed, it is noteworthy that the Supreme Court has not, outside of *Swint*, suggested that § 2072(c) has terminated the courts' power to determine that particular rulings are immediately appealable "collateral orders" or otherwise to interpret the finality requirement of § 1291. To the contrary, the Court has continued to interpret the finality requirement of § 1291, to determine whether particular rulings were immediately appealable "collateral orders," and to indicate that the intermediate appellate courts should do the same. The court engaged in such analysis in cases including *Quackenbush v. Allstate Insurance Co.*,[111] *Johnson v. Jones*,[112] *Swint v.*

lower court judgment stand), American Nat'l Red Cross v. S.G., 505 U.S. 247, 264-65 (1992) (broadly construing Article III's "arising under" language to authorize congressional conferral of jurisdiction over actions involving federally chartered corporations), Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (same), Bowsher v. Synar, 478 U.S. 714, 721 (1986) (holding it unnecessary to consider whether the sole plaintiffs in a certain civil action had standing once it had been determined that plaintiffs in another civil action, consolidated with the first, had standing), State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967) (interpreting Article III to permit legislation conferring jurisdiction over controversies in which any two adverse parties are not co-citizens), *and* United Mine Workers v. Gibbs, 383 U.S. 715, 725-27 (1966) (formulating the test for pendent jurisdiction permissible under Article III) *with* the case law, such as *Warth v. Selden*, 422 U.S. 490, 499-502 (1975), establishing prudential limitations on standing, and the case law, such as *Railroad Commission v. Pullman*, 312 U.S. 496 (1941), and *Younger v. Harris*, 401 U.S. 37 (1971), establishing abstention doctrines.

109. 28 U.S.C. § 1292(e) (1994) (emphasis added).

110. 28 U.S.C. § 2072(c) (1994) (emphasis added).

111. 517 U.S. 706 (1996) (holding that remand order predicated on abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), is immediately appealable collateral order,

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Chambers County Commission,[113] and *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*[114] The Court also reaffirmed the collateral order doctrine in *Behrens v. Pelletier*.[115] It is only § 1292(e) that the Court has held to preclude common law development concerning the interlocutory decisions that may be immediately appealed.[116] Although the Court did not describe its decision in *Swint* in those terms, that is what it appears to have done, since nothing in the reasoning of *Swint* would distinguish from the Court's view of pendent appellate jurisdiction other bases for newly holding categories of interlocutory decisions to be immediately appealable. However, as argued above, the language of § 1292(e)—permitting but not requiring the Court to prescribe rules providing for appeals of interlocutory decisions—indicates that Congress did not intend, by its rulemaking authorization, to prohibit common law that determines which interlocutory decisions may be immediately appealed.

Finally, for a delegation of rulemaking power to define "final"ity to render the federal courts powerless to hold particular rulings to constitute final decisions, also might violate separation of powers principles. It is the responsibility of courts, in deciding cases, to interpret and apply federal statutory law. Interpreting congressional

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"final" under 28 U.S.C. § 1291).

112. 515 U.S. 304, 314-16 (1995) (holding district court's determination that summary judgment record in qualified immunity case raised genuine issue of fact [concerning officers' involvement in alleged beating] not to be a 'final decision' within the meaning of 28 U.S.C. section 1291 and thus not to be immediately appealable).

113. 514 U.S. 35, 37-38 (1995) (holding that denial of summary judgment based on contention that County Sheriff who authorized raids was not a County policy maker did not fit within the collateral order doctrine); *see also* discussion at note 11, *supra*.

114. 506 U.S. 139, 144 (1993) (holding that, under the collateral order doctrine, states and entities that claim to be arms of the state may immediately appeal a district court order denying their claim to 11th Amendment immunity).

115. 516 U.S. 834 (1996) (holding denial of summary judgment sought on grounds of qualified immunity to be appealable final judgment despite prior appeal from unfavorable ruling on defendant's motion to dismiss, which also had been based on qualified immunity grounds).

116. There is a parallel here with the law respecting supplemental jurisdiction. That is, the federal courts may continue to interpret 28 U.S.C. sections 1331 and 1332, but *Finley* precludes judicial invention of supplemental jurisdiction unsupported by a statute. Similarly, the *Swint* Court arguably left intact the lower courts' ability to construe sections 1291 and 1292, but moved in the direction of precluding judicial creation of pendent appellate jurisdiction unsupported by a statute. However, as elaborated below, there is good reason to accept pendent appellate jurisdiction *as interpretation* of sections 1291, 1292 and other grants of authority to hear interlocutory appeals. *See infra* text at Sections II.C, III.

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statutes is among the core functions of the judiciary.[117] One might even say that statutory interpretation is an inherent power of the courts. Thus, Congress' mere conferral of authority to promulgate Rules that define when a ruling is final for purposes of appeal under § 1291 should not be held to displace the courts' authority to interpret § 1291: to determine, in adjudication, whether particular rulings are final within the meaning of that section, and to determine the scope of the review available upon a § 1291 appeal.

Similarly, Congress' conferral of authority to promulgate Rules that provide for an appeal of an interlocutory decision that is not otherwise provided for under §§ 1292(a),(b),(c), or (d) should not be held to displace the courts' authority to interpret § 1292 or § 1291: to determine, in adjudication, whether particular rulings are subject to appeal under the sub-sections of those statutes, and to determine the scope of the review available upon a § 1292 or a pre-final judgment § 1291 appeal.[118] If federal courts have continuing law making power as to matters governed by Rules, *a fortiori* they should have such power while a rulemaking power lies dormant, as the rulemaking

117. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (holding that section 27A(b) of the Securities Exchange Act of 1934 violates the constitutional separation of powers principle to the extent that it requires federal court to reopen final judgments in private civil actions under section 10(b) of the Act). The Court stated that "Article III establishes a 'judicial department' with the 'province and duty . . . to say what the law is' in particular cases and controversies." *Id.* at 218 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). The Court went on to say that "[t]he legislature would be possessed of power to 'prescribe the rules by which the duties and rights of every citizen are to be regulated,' but the power of 'the interpretation of the laws' would be 'the proper and peculiar province of the courts.'" *Id.* at 222 (quoting The Federalist No. 78, p.523, 525 (J. Cooke ed. 1961)). The Court also refused to give effect to a congressional statute that it found to prescribe rules of decision in cases pending in federal court, *see United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1871) (holding that an act of Congress intended to deny to Presidential pardons the effect that the Court had adjudged them to have sought to prescribe a rule of decision, and consequently violated separation of powers), although it recognizes that Congress may amend applicable law, altering the outcome of pending cases. *See, e.g.*, Robertson v. Seattle Audobon Soc'y, 503 U.S. 429, 437-41 (1992) (upholding legislation that the Court found to modify a statutory regime, against a challenge that under *Klein* the legislation unconstitutionally directed a particular decision in pending cases without amending any law).

118. A delegation of rulemaking power to provide for appeal of an interlocutory decision that is not otherwise provided for under section 1292 (a),(b),(c), or (d) also should not preclude the courts from interpreting *other* statutes to afford immediate appeal of interlocutory orders. Otherwise Congress would be interfering with the courts' exercise of their responsibility to construe those other statutes.

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power conferred in §§ 1292(e) and 2072(c) largely does.[119] Only if and when the Court promulgates Rules pursuant to the powers conferred in §§ 2072(e) and 1292(c) will the occasion arise for courts to interpret those Rules to determine whether and to what degree those Rules displace or limit the courts' role in interpreting §§ 1291 and 1292.[120]

A reader might believe that, for all of the foregoing reasons, Congress probably did not intend to preclude the courts from further interpreting and refining the concept of finality, but that, notwithstanding all of the foregoing arguments, Congress might have intended to preclude the courts from adding to the occasions for interlocutory appeal. At the root of that argument, however, is the idea that the courts *must* interpret statutory language, such as "final"ity, but that there is no comparable compulsion or duty to add to the occasions for interlocutory appeal. But if, as proposed above and argued below, pendent appellate jurisdiction can fairly be viewed as a matter of *interpreting* the scope of review appropriate when an established occasion for interlocutory appeal is presented, then the proposed distinction is weakened, if not felled.

In theory, it also might be argued against the positions asserted above that the failure of the Court to promulgate Rules pursuant to §§ 2072(e) and 1292(c) signals its satisfaction with the law as it stands; that is, signals a desire that finality (within the meaning of § 1291) not

119. For a discussion of recent changes to the Federal Rules of Civil Procedure, see note 83, *supra.*

120. Analysis done by the Court and dissenting Justices in *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991), is very pertinent here. The Court there acknowledged that "the exercise of the inherent power of lower federal courts can be limited by statute and rule, for 'these courts were created by act of Congress.' Nevertheless, ... [the Court would] 'not lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power." *Id.* at 47 (citations omitted). The Court then closely examined the language of the codified mechanisms that defendant contended should have been the predicate for any sanctions imposed on him, the Advisory Committee Notes to the 1983 Amendments to Rule 11 and to other Rules, and case law, to determine that they did not warrant the conclusion that other sanctioning mechanisms displaced inherent federal court power. *See id.* at 48-50. In dissent, Justice Kennedy too focused on the manner and extent to which the Rules and statutes that provide for sanctions limit the exercise of inherent authority. *See id.* at 60-67 (Kennedy, J., dissenting). He noted that "as the number and scope of Rules and statutes governing litigation misconduct increase, the necessity to resort to inherent authority—a predicate to its proper application—lessens." *Id.* at 70. *See also* Link v. Wabash R. Co., 370 U.S. 626, 630-31 (1962); Redish, *supra* note 105, at 699, 707, 724-25.

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be further defined by anyone, and that the statutory list of immediately appealable interlocutory orders be maintained exactly as it is, and not be augmented by the Court (or anyone else).[121] However, such an understanding of the silence of the Court as rule maker would deprive the courts of authority to refine finality or to recognize additional immediately appealable interlocutory orders only if the Court has exclusive power over these matters—a proposition that this Article has rejected. Moreover, the explanation offered above is a highly *improbable* interpretation of the failure, thus far, to promulgate many Rules pursuant to §§ 2072(e) and 1292(c). This explanation is circumstantially rebutted by the expressed opinion of the Federal Courts Study Committee that further refinement of the meaning of finality and recognition of additional immediately appealable interlocutory orders is desirable.[122]

Moreover, at least until the spring of 1995, when *Swint* made clear the Court's views, the failure to adopt Rules in these areas could instead have reflected a belief by the members of the Judicial Conference that rulemaking is not the best way to attack these issues,[123] or that continuing case law development was desirable as a predicate for Rules to be adopted in the future. As Professor Sunstein has written, speaking in general rather than in connection with this particular context, "The Supreme Court [or one might substitute "the Judicial Conference"] ... can see that rules will bind its members, perhaps unfortunately, in subsequent cases, and therefore might avoid rule-making in the interest of maintaining flexibility for the fu-

121. One might analogize to the occasional judicial interpretation of legislative inaction to signify a legislative intent. Several years ago, however, Professor Eskridge found that, "Generally, when the Court finds meaning in Congress' inaction, it points to specific legislative consideration of the issue and, either implicitly or explicitly, indicates that Congress' failure to act bespeaks a probable intent to reject the alternative(s)." William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69 (1988). I am aware of no evidence that the Court has considered and rejected the option of promulgating rules pursuant to the authority conferred in sections 1292(e) or 2072(c). The task of interpreting the inaction of a collective body that must operate through multi-step processes also is complicated by the variety of reasons, unrelated to the merits, for the failure of an idea. *See id.* at 98-99.

122. See *supra* text at notes 86-89.

123. Proposed rules originate in a committee of the Judicial Conference. Once its Standing Committee on Rules of Practice and Procedure is satisfied with proposed rules, it reports them to the Judicial Conference which then makes recommendations to the Supreme Court.

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ture."[124] Further:

> [I]t can be very hard to design good [rules]. In many areas, people lack enough information to produce rules that will yield sufficiently accurate results. ... Production of rules entails high *ex ante* investment of political and informational costs. Sometimes those costs are too high for lawmakers, who do not know enough to produce good rules, and for affected persons, who would be faced with excessive rigidity.[125]

Professor Sunstein theorizes that, broadly speaking:

> [R]ules will likely be avoided (1) when the lawmaker lacks information and expertise, so that the information costs are too high to produce rules; (2) when it is difficult to decide on rules because of political disagreement within the relevant institution ...; (3) when people in the position to decide whether to have rules do not fear the bias, interest, or corruption of those who decide cases; (4) when those who make the law do not disagree much with those who will interpret the law, and hence when the law-makers do not need rules to discipline ... judges, or others; and (5) when the applications of the legal provision are few in number or relevantly different from one another.[126]

All but the last of these factors could be operating in the failure, thus far, of those empowered to draft Rules governing finality and interlocutory appeals to do so (with a few minor exceptions).[127] Alternatively, perhaps those who draft the Rules simply have been too busy with other matters to get to this task.[128] These factors seem more likely to explain the near absence of Rule promulgation to date than is a desire by the Court to freeze the law in its tracks.

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124. Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 973 (1995).

125. *Id.* at 992 (footnote omitted).

126. *Id.* at 1003.

127. The possible exceptions to date are described in note 83, *supra*. Even the last factor might be operating if the drafters believe, however erroneously, that there are relatively few occasions on which the doctrine of pendent appellate jurisdiction is relevant.

128. Since 1990, the Judicial Conference has, among its other activities and studies concerning federal jurisdiction, proposed amendments to the Federal Rules of Appellate Procedure, The Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the Rules of Bankruptcy Procedure. *See* Reports of the Proceedings of the Judicial Conference of the United States at 101-03 (September 12, 1990); at 31-32 (March 12, 1991); at 57-58 (September 20, 1993); at 66-67 (September 20, 1994); at 29-30 (March 14, 1995); at 95-96 (September 19, 1995); *see also* Report of the Proceedings of the Judicial Conference of the United States at 34-35 (March 12, 1996) making recommendations concerning periodic amendment of Official Bankruptcy Forms and adopting a numbering system for local rules of court.

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Finally, the reasoning of *Swint* can be criticized for internal inconsistency. That is, the reasoning that the jurisdictional statutes and the rulemaking power that they confer negate common law making power to recognize new categories of immediately appealable interlocutory orders (or new varieties of final decisions) arguably does not leave room for any exceptions. Yet the Court recognizes that it may be wise to permit pendent appellate jurisdiction when necessary to assure meaningful review of rulings that *are* supported by an independent basis of appellate jurisdiction and over rulings that are inextricably intertwined with such properly presented rulings. The Court nowhere articulates why the negation of common law making power that it insists upon through much of its opinion is inoperative in the described situations. More importantly perhaps, no analysis explains why those particular word formulas capture the terrain within which pendent appellate jurisdiction should continue to be exercised. It may well be that there are occasions, not captured by those tests, in which there is good reason to permit pendent appellate jurisdiction. This question will be explored later in the Article.

The foregoing discussion sought to establish that §§ 1292(e) and 2072(c)'s conferral of rulemaking power should not be construed to prohibit courts, acting in their adjudicatory capacity, from continuing to develop the law concerning finality or concerning the immediate appealability of interlocutory orders. Accepting, for the sake of argument, the Court's view of pendent appellate jurisdiction as involving pure common law creation of new occasions for immediate appeal of interlocutory orders, the previous discussion sought to rebut the Court's view that §§ 1292(e) and 2072(c) so strongly "counsel resistance to expansion of appellate jurisdiction"[129] as to largely deny federal courts the power to exercise pendent appellate jurisdiction. It also sought to lay some groundwork for questioning the Court's view that "[i]f courts of appeals had discretion to append to a *Cohen*-authorized appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court, then the two-tiered arrangement [that] § 1292(b) mandates would be severely undermined."[130] This Article further rebuts the latter position in the following sections.

The next subsection elaborates the argument that pendent ap-

129. Swint v. Chambers County Comm'n, 514 U.S. 35, 48 (1995).

130. *Id.* at 47.

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pellate jurisdiction doctrine constitutes *interpretation* of sections 1291, 1292 (and other authorizations of pre-judgment appeals) which establishes the scope of appellate jurisdiction when there is a statutorily authorized pre-final judgment appeal. It further argues that Congress, in conferring rulemaking authority to provide for appeal of new categories of interlocutory orders, did not intend to curtail such interpretation. Rather, if Congress intended to preclude any activity of the courts, it intended to preclude only judicial creation of new categories of interlocutory orders that would constitute new occasions for interlocutory appeal. Thus, pendent appellate jurisdiction should not be threatened even if that now-latent rulemaking authority *is* construed to preclude pure common law creation of new occasions for immediate appeal of interlocutory orders.

C. Demonstrating the Error of the View that Pendent Appellate Jurisdiction Is Inconsistent with § 1291 and Would Severely Undermine the Two-Tiered Arrangement that § 1292(b) Mandates

Section 1291 states that, "The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States ..., except where a direct review may be had in the Supreme Court."[131] Generally speaking, when a litigant appeals after final judgment, all interlocutory orders and decrees that led up to the final judgment (and from which no appeal has yet been taken) become immediately appealable; the court is not limited to reviewing the final decision, narrowly construed.[132] This generous reading of

131. 28 U.S.C. § 1291 (1994).

132. *See supra* text at note 1. However, orders that could not have affected the outcome and which consequently are not material to the judgment are not appealable upon final judgment. *See, e.g.*, Foy v. Schantz, Schatzman & Aaronson, P.A., 108 F.3d 1347, 1350 & n.4 (11th Cir. 1997) (holding that court lacked jurisdiction to review the denial of a motion to dismiss for failure to state a claim which had not led to the dismissal for lack of subject matter jurisdiction, here reversed; pendent appellate jurisdiction would not be exercised because the facts underlying the two motions were unrelated); National American Ins. Co. v. Certain Underwriters at Lloyd's London, 93 F.3d 529, 540 (9th Cir. 1996) (holding that the court lacked jurisdiction to review discovery order compelling production of documents when that order was immaterial to the summary judgment entered against defendants). Moreover, there are a few exceptions to the general principle stated in the text. For example, special rules govern appeals from denials of motions to intervene, *see* 15A WRIGHT, *supra* note 1, at 253-55, and some failures to take an interlocutory appeal waive the right to appeal an order after final judgment. *See, e.g.*, Sellers v. United States, 709 F.2d 1469, 1471-72 (11th Cir. 1983) (holding that failure to immediately appeal

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§ 1291 allows the appellate courts to review rulings that are not themselves "final decisions" in conjunction with the courts' review of the "true" final decision: the final judgment. It is itself a form of pendent appellate jurisdiction, which lacks any specific textual justification.[133]

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order denying intervention of right waived right to later appeal that order); California v. Block, 690 F.2d 753, 776 (9th Cir. 1982) (same). In addition, some rulings (including recusal by a trial judge and denial of a motion for summary judgment) are held not to warrant reversal after trial, even if they were erroneous. *See, e.g.*, Lum v. City & County of Honolulu, 963 F.2d 1167, 1169-70 (9th Cir. 1992) (refusing after trial to review denial of summary judgment), *amended*, No. 90-16452, 1992 U.S. App. LEXIS 13486 (June 15, 1992); Bottineau Farmers Elevator v. Woodward-Clyde Consultants, 963 F.2d 1064, 1068 n.5 (8th Cir. 1992) (same); Hampton v. City of Chicago, 643 F.2d 478, 479 (7th Cir. 1981) (holding recusal of the trial judge not to be appealable even after final judgment since plaintiff had no protectable interest in the identity of the judge).

133. *See* Hoechst Celanese Corp. v. BP Chemicals Ltd., 78 F.3d 1575, 1584 (Fed. Cir. 1996). After final judgment, the trial court having denied plaintiff's motion for summary judgment on a claim of patent invalidity, but having granted its motion for summary judgment based on non-infringement, and having dismissed the counterclaim and all other pending claims, the appeals court assumed jurisdiction over plaintiff's cross-appeal as a matter of pendent appellate jurisdiction, citing the extent to which review of the appealable orders would involve consideration of factors relevant to the otherwise nonappealable order. *See id. See also* Hart Environmental Management Corp. v. Sanshoe Worldwide Corp., 993 F.2d 300, 304 (2d Cir. 1993) (exercising pendent appellate jurisdiction over a grant of partial summary judgment in a consolidated proceeding after final judgment in bankruptcy proceeding where the relevant questions were identical, no additional parties had been brought in, and the exercise of jurisdiction would avoid a remand for proceedings with a foreordained outcome); Akin v. Pafec, Ltd., 991 F.2d 1550, 1563-64 (11th Cir. 1993) (declining to exercise pendent appellate jurisdiction over denial of motion to make an untimely jury demand, upon partial reversal of summary judgment against plaintiffs, where the court would not be able to assess whether the denial was prejudicial until after trial); Pedraza v. Shell Oil Co., 942 F.2d 48, 54-55 (1st Cir. 1991) (declining to exercise pendent appellate jurisdiction over cross-appeals by defendant of the denial of its motion for summary judgment after final judgment via dismissal on preemption grounds); American Motorists Insurance Co v. United Furnace Co., 876 F.2d 293, 302 (2d Cir. 1989) (exercising pendent appellate jurisdiction, in the interests of judicial economy, over denial of plaintiff's motion for summary judgment after reversing grant of motion to dismiss for failure to state a claim).

Because of the existence of a final judgment and because the appellate jurisdiction is regarded as non-discretionary, this is not pendent appellate jurisdiction in the sense that I defined it earlier, however: denoting a *discretionary* jurisdiction that courts of appeals can exercise over interlocutory orders that are not themselves immediately appealable pursuant to a statutory or common law doctrine authorizing immediate appeal of interlocutory orders, but that bear a relationship to an immediately appealable *interlocutory* order that makes contemporaneous appellate review appropriate. Nonetheless, it is a jurisdiction that courts of appeals exercise over non-final decisions that are not themselves immediately appealable, but that bear a relationship to an immediately appealable order (the final judgment) that makes contemporaneous appellate review appropriate. In this context, simply being an interlocutory order that aggrieves a party with standing to ap-

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If § 1291 is so construed when final judgments constitute the final decisions that are immediately appealable as of right, one may well ask why it would violate § 1291 to similarly construe it when orders other than final judgments are held to be "final decisions" within the meaning of the statute.[134] It might be argued that, after final judgment, review of allegedly erroneous rulings by the trial court typically is "now or never," that the "now or never" quality need not and typically does not characterize the review of rulings that are not themselves eligible for a freestanding interlocutory appeal, and that this difference justifies a broader scope of review after final judgment than before final judgment. This justification does not withstand scrutiny, however. It is true that if an alleged error were not reviewed after final judgment and the judgment were affirmed, no later opportunity would arise, within that particular litigation, to review the alleged error (hence "now or never"). However, an appellate court *could* reverse a judgment and remand for re-trial because of a single error and not decide whether other alleged errors were truly errors; and the same alleged errors could be repeated in the re-trial and appealed again, after final judgment. Review after the first final judgment, in such a situation, would not have been "now or never." Thus, the practice of considering multiple alleged errors after final judgment is not so much a function of a "now or never" principle as a reflection of the recognition that a failure to review all alleged errors and yet to remand a case for further proceedings in which those errors might be repeated would be enormously inefficient and wasteful.[135] However, considerations of waste and efficiency are relevant

peal, in a case that has reached final judgment, generally furnishes the requisite relationship to the immediately appealable decision.

134. When I say "similarly construe" § 1291, I mean construe it to allow the appellate courts to review rulings theretofore made that are not themselves "final decisions," but which an aggrieved litigant seeks to have the court review in conjunction with its review of the order that constitutes a "final decision" within the meaning of § 1291, and that would be appealable if the final decision were a final judgment.

135. *See, e.g.*, Keller v. Orix Credit Alliance, Inc., 105 F.3d 1508 (3d Cir. 1997) (reversing summary judgment because of multiple material issues of fact identified by the appeals court), *aff'd en banc*, 130 F.3d 1101 (3rd Cir. 1997); Bultmeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996) (same); Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061 (3d Cir. 1996) (en banc) (addressing evidentiary issues expected to arise on retrial before remanding for trial court to determine whether to grant a new trial in light of legal principles articulated by appeals court), *cert. denied*, 117 S.Ct. 2532 (1997); Freislinger v. Emro Propane Co., 99 F.3d 1412 (7th Cir. 1996) (addressing indemnification claim after finding new trial necessary on main claim); Miller v.

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when considering the scope of interlocutory appeals as well.

One also might seek to justify the broad reading of § 1291 post-final judgment by arguing that a court can review a final judgment only by reviewing the rulings that led up to it, for their correctness will determine whether the final judgment is erroneous. However, the practice under § 1291 is for courts of appeals to review more assignments of error than necessary to provide grounds to reverse, where the court believes that review would serve useful purposes such as avoiding error on remand.[136] Thus, one cannot persuasively defend a broad scope of review after final judgment as based in necessity; helping lower courts to conduct error-free proceedings that will lead to enduring judgments is very much a factor underlying the broad scope of post-judgment review. Consequently, it would be more consistent with the post-judgment interpretation of § 1291 and with appeals policy generally to construe § 1291 to authorize review of interlocutory rulings in conjunction with the review of "final decisions" of whatever kind, when such expanded appellate review would be efficient and would help trial courts to adjudicate cases after remand. This conclusion is further supported by the following considerations.

In general, the final judgment rule postpones appeals until the district court decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[137] The final judgment rule accomplishes a number of objectives: it guards against repeated interruption of district court proceedings and thereby promotes efficient litigation at the trial level and enhances the importance of the trial court; it simultaneously permits full development of the record for ultimate review, protecting the appellate courts from immediate consideration of rulings that the parties might

Chater, 99 F.3d 972, 976-78 (10th Cir. 1996) (after reversing decision below, addressing several alleged errors that had to be corrected when evidence was reweighed within correct legal framework).

136. *See* cases cited *supra* note 135; Kennedy v. Blankenship, 100 F.3d 640, 643 (8th Cir. 1996) (holding the interest asserted by plaintiff not to be a liberty interest and that, even if it were, defendant's action did not violate that interest); DXS, Inc. v. Siemens Medical Sys., Inc., 100 F.3d 462, 473 (6th Cir. 1996) (identifying multiple respects in which trial court erred in granting judgment as a matter of law on tortious interference claim); Advance Watch Co., Ltd. v. Kemper Nat'l Ins. Co., 99 F.3d 795, 806-07 (6th Cir. 1996) (providing alternate grounds for granting summary judgment).

137. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 497 (1989) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)); *accord* Van Cauwenberghe v. Biard, 486 U.S. 517, 521-22 (1988).

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be unable to appeal or uninterested in appealing after final judgment; and it blocks purposeful delay or harassment.[138]

> The final judgment rule ... serves to maintain the appropriate relationship between the district and appellate courts ... by ensuring that [trial judges'] every determination is not subject to the immediate review of an appellate tribunal ... The consolidation of all contested rulings into a single appeal provides the circuit courts with an opportunity, furthermore, to consider a trial judge's actions in light of the entire proceedings below, thereby enhancing the likelihood of sound appellate review ....[139]

However, the delayed review of determinations can have serious, even irreparable, effects on parties and can lead to a substantial waste of time, energy and money in unnecessary litigation or in error-tainted litigation that is later reversed and may have to be re-done.[140]

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138. *See* Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987) (holding that a district court order granting permissive intervention but denying intervention as of right was not immediately appealable because party could obtain effective review on appeal from final judgment). The court went on to say that "[t]he judge's ability to conduct efficient and orderly trials would be frustrated, rather than furthered, by piecemeal review," and that pretrial appeals also may cause disruption, delay and expense, and burden appellate courts with issues that may become moot or irrelevant. *Id.* *See also* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 436 (1985) (holding that order disqualifying counsel in civil case was not a collateral order subject to immediate appeal because order was reviewable after final judgment, after impact of disqualification could be assessed in context of entire litigation, and stating that the final judgment rule enhances authority of the trial judge and promotes efficient judicial administration); Flanagan v. United States, 465 U.S. 259, 264 (1984) (stating that the final judgment rule reduces litigants' ability to harass opponents and to clog the courts); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (opining that permitting piecemeal appeals would undermine the independence of the district judge; prohibiting them avoids harassment and cost); Cobbledick v. United States, 309 U.S. 323, 325-26 (1940) (stating that grand jury proceeding should not be interrupted by appeals because a court's "momentum would be arrested by permitting separate reviews of the component elements in a unified cause"); Kanji, *supra* note 40, at 512-513; 15A WRIGHT ET AL., *supra* note 1, at § 3907.

A ruling would become unappealable if rendered against the prevailing party and the losing party filed no appeal; a ruling might be futile to appeal if it would not warrant reversal even if erroneous. *See supra* note 132.

139. Kanji, *supra* note 40, at 512-13.

140. The collateral order doctrine is predicated on the existence of determinations that have an irreparable effect on the rights of parties. *See, e.g.,* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); *see also* Kanji, *supra* note 40, at 513 (referring to rulings that may be irremediable after final judgment and to errors that may require reversal and new trial or that allow an unnecessary trial); Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 98-100 (1975) (arguing that the delayed review of denials of summary judgment has adverse economic and emotional consequences, that

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Recognition of these drawbacks of the final judgment rule has prompted the enactment of statutes such as 28 U.S.C. § 1292, authorizing both interlocutory appeals and rulemaking to permit interlocutory appeals in still additional circumstances. The potential drawbacks also have prompted "practical construction"[141] of § 1291 to permit immediate appeal of decisions falling within the "collateral order" doctrine and within other distinct doctrines that, although less frequently used and less well known, also expansively read § 1291,[142] as well as the use of mandamus to allow immediate appellate decision in other compelling circumstances.[143]

To permit pendent appellate jurisdiction—of some as yet undetermined scope[144]—in conjunction with the immediate appeal of orders under the collateral order doctrine would not substantially undermine the final judgment rule, in part because only a very small percentage of cases present immediately appealable collateral orders.[145] Parties cannot inject collateral orders into a case at will. The Court has so narrowly limited the universe of orders that fall within the collateral order doctrine that litigants in only a few kinds of cases will even have the opportunity to ask the courts to exercise pendent appellate jurisdiction over rulings in their cases.[146] In addition, pen-

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erroneous orders to produce trade secrets may cause serious competitive harm, and that delayed review in criminal cases may permit harassment of accused parties).

141. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

142. *See supra* note 20; text at notes 94-95.

143. *See infra* text at notes 315-18.

144. The appropriate scope of such jurisdiction is discussed in text at notes 466-79, *infra*.

145. The Administrative Office of the United States Courts does not compile statistics on the number of collateral order appeals. A few scholars have done some sampling from which one can derive an impression, however. *See* R. POSNER, FEDERAL COURTS: CRISIS AND REFORM 72-73 (1985). Posner found through a review of a sample of published appellate court opinions issued in 1983 that only 12% were not appeals after a final judgment. *See id.* Of course, only a subset of these appeals would be pursuant to the collateral order doctrine. In addition, Professor Solomine reviewed all published circuit court opinions from 1987-89 that reviewed an interlocutory denial of a qualified immunity defense in a civil rights action. Such cases represent a substantial proportion of collateral order appeals and Solomine found only 134 cases that were decided on the basis of qualified immunity (another 66 were generated by his computer search but were decided on other grounds). *See* Solomine, *supra* note 93, at 1189-90 & n. 136.

146. Under the collateral order doctrine, the Court has upheld immediate appeal of: an order denying the posting of a bond, required by state law, in a shareholders' derivative action, *see* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); an order vacating the attachment of a vessel, when that attachment apparently would have afforded

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dent appellate jurisdiction ordinarily would not entail any interruption of the district court proceedings; it would simply expand the scope of review when an interruption would occur in any event to accommodate review of a collateral order. In theory, trial court pro-

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the only effective means to implement a decree, *see* Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684 (1950); an order denying leave to proceed in forma pauperis, *see* Roberts v. United States Dist. Court, 339 U.S. 844 (1950); an order challenging the amount set as bail as violating statutory and constitutional standards, *see* Stack v. Boyle, 342 U.S. 1 (1951); an order imposing on defendants 90% of the costs of notifying a plaintiff class of the certification of a Rule 23(b)(3) class action, *see* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); an order denying a pretrial motion to dismiss on double jeopardy grounds, *see* Abney v. United States, 431 U.S. 651 (1977); and an order denying a claim of absolute or qualified immunity, *see* Nixon v. Fitzgerald, 457 U.S. 731 (1982) (regarding absolute immunity); Mitchell v. Forsyth, 472 U.S. 511 (1985) (regarding qualified immunity)). *But see* Johnson v. Jones, 115 S. Ct. 2151 (1995) (holding denials of summary judgment predicated on conclusion that there are genuine issues of material fact regarding defendant's entitlement to immunity not to be immediately appealable as collateral orders).

On the other hand, the Court has held immediate appeal *un*available under the collateral order doctrine when such appeal was sought of: an order dismissing appeal from dismissal of an indictment, *see* Parr v. United States, 351 U.S. 513 (1956); an order denying a motion to dismiss a prosecution on speedy trial grounds, *see* United States v. MacDonald, 435 U.S. 850 (1978); an order decertifying a plaintiff class, *see* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); an order denying a motion to disqualify counsel, *see* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981); an order granting a motion to disqualify counsel, *see* Flanagan v. United States, 465 U.S. 259 (1984); Richardson-Merrell Inc. v. Koller, 472 U.S. 424 (1985); an order denying intervention of right and allowing permissive intervention but limiting the intervenor's participation, *see* Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987); an order denying a stay of federal court proceedings pursuant to the Colorado River abstention doctrine pending completion of parallel state court proceedings, *see* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988); an order denying a motion to dismiss on forum non conveniens grounds or because the defendant claims immunity from service of process, *see* Van Cauwenberghe v. Biard, 486 U.S. 517 (1988); an order refusing to give effect to a forum selection clause, *see* Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989); and an order vacating a settlement agreement and a dismissal, thereby subjecting the parties to trial, *see* Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994)); *see also* 15A WRIGHT ET AL., *supra* note 1, at § 3911-12.

Writing in 1990, Professor Solomine concluded that in the nine civil cases decided since *Coopers & Lybrand*:

> [T]he Court denied appealability in six due to the failure to meet one or more of the *Cohen* criteria. . . . Three cases have held that orders were appealable under the *Cohen* doctrine. Two concern issues that arise infrequently: the granting of a stay of a federal court lawsuit while a parallel state court suit proceeds, and the denial of the defense of absolute immunity in a civil rights action. The third, [*Mitchell v. Forsyth*], in contrast, has generated many appeals . . . . *[I]t is fair to say that collateral orders will not be a rich source of interlocutory appeals.*

Solomine, *supra* note 93, at 1170-71 (citations omitted) (emphasis added).

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ceedings that would *not* be stayed pending the appeal of a collateral order *might* be stayed for review of orders to be heard under pendent appellate jurisdiction, but such an effect on the trial court proceedings would be permitted only with the blessing of the trial judge, the court of appeals, or a judge thereof,[147] and would be a factor in the appeals court's decision whether, in its discretion, to exercise pendent appellate jurisdiction over a non-collateral order.

The Supreme Court in *Swint* expressed the concern that "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets."[148] This view, it seems to me, gives insufficient weight to the discretion that courts of appeals would have to refuse to hear pendent issues. Under the doctrine (as elaborated by *any* of the courts of appeals that had adopted a version of it) a court of appeals that believed that pendent issues could not efficiently be immediately heard,[149] could not soundly be decided on the record available upon the interlocutory appeal, or were likely to be mooted by subsequent developments, and a court of appeals that had other sound reasons, including a belief that a litigant was abusing a collateral order appeal by using it to bring other issues to the appellate court,[150] could simply reject a party's effort to impose pendent issues upon it. Indeed, the Court itself, in *Johnson v. Jones*,[151] a post-*Swint* opinion, made the argument that "assuming . . . it may sometimes be appropriate to exer-

147. *See* FED. R. CIV. P. 62(d), (g); FED. R. APP. P. 8(a) (regarding stays sought in a civil case which is in the intermediate court of appeals); Supreme Court Rule 23 (regarding stays sought from the U.S. Supreme Court); FED. R. CRIM. P. 38(a) (regarding stays in criminal cases). Federal Rule of Civil Procedure 62 states:

> (d) STAY UPON APPEAL. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule . . . (g) POWER OF APPELLATE COURT NOT LIMITED. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal . . . .

See FED. R. CIV. P. 62(d),(g).

148. Swint v. Chambers County Comm'n, 514 U.S. 35, 49-50 (1995).

149. That inefficiency might be from the perspective of the appellate court considering its own workload or might be based on effects in the trial court, including costs and delays for parties, attorneys and trial judges, that might be entailed by an interlocutory appeal on the pendent matters.

150. These reasons might relate to the proper allocation of authority between the trial and appellate court in the particular case, to concerns about harassment of the appellee, or to other factors.

151. 515 U.S. 304 (1995).

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cise 'pendent appellate jurisdiction' . . . it seems unlikely that Courts of Appeals would do so in a case where the appealable issue appears simply a means to lead the court to review the underlying factual matter . . . ."[152]

Moreover, given the nature of collateral orders, it seems highly unlikely that litigants would take an immediate appeal of a collateral order solely, or even primarily, for the purpose of seeking discretionary review of *other* orders. To be a collateral order under the Court's precedents, an order must be conclusive on the matter it addresses, resolve questions that are too independent of the merits to need to be deferred, be too important to be denied review, and (most important for present purposes) involve rights that will be lost if immediate review is not afforded.[153] These requirements are such that a litigant who is adversely affected by an order that falls within the collateral order doctrine will have enormous incentives to immediately appeal that order. In light of these incentives, the idea that litigants would use collateral order appeals merely to bootstrap some other issues into the appellate courts' sights seems unrealistic. Thus, the bootstrapping argument is not a persuasive reason to deny appellate courts the power to exercise pendent appellate jurisdiction—that response is overkill. The concern about bootstrapping is instead an argument to place exercise of the power within the sound discretion of the appeals courts. In view of the low probability that those litigants to whom a collateral order appeal is available would abuse the decision whether to immediately appeal the collateral order, and the nearly absolute control that the appellate courts would have over whether to hear issues under pendent appellate jurisdiction,[154] the Court's fear that recognition of pendent appellate jurisdiction would permit parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets seems clearly exaggerated.[155]

152. *Id.* at 318 (citations omitted).

153. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949); Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994). For a thoughtful exegesis of the prongs of *Cohen*, see *Kelly v. Ford Motor Co.*, 110 F.3d 954, 958-64 (3d Cir. 1997).

154. If the Court approved the doctrine, it seems very likely that it would afford the courts of appeals a high degree of deference with respect to their decisions whether to hear issues on pendent appellate jurisdiction. Such deference would be manifested both in the abuse of discretion standard used when the Court did review a case and in the Court's decisions not to accept writs of certiorari to hear such cases.

155. Even if recognition of the doctrine might encourage parties to do as the Court feared, the appellate courts' control would be sufficient to prevent successful abuse of the

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It already has been noted that review of interlocutory rulings in conjunction with the review of "final decisions" under the collateral order doctrines would not violate the objective of guarding against repeated interruption of district court proceedings.[156] The recognition of power to exercise pendent appellate jurisdiction also need not diminish the importance of the trial court or reflect disrespect of district courts. The key lies in sound exercises of discretion. Appeals courts that understand that it would be an abuse of discretion for them to exercise jurisdiction over issues which the district court has not finally and definitively decided or as to which the record is not fully developed, or when for other reasons postponement of appellate review is preferable, will afford the appropriate deference to trial judges and trial proceedings, and will protect litigants. One commentator has opined that "[t]he pendent appellate jurisdiction doctrine should . . . be defined to preclude premature circuit court consideration of factual issues, lest the essential role of the trial judge . . . be undermined."[157] However, I believe this emphasis on the factual nature of issues is misplaced. The standard of review governing factual issues properly protects the role of the trial judge.[158] So long as the record is fully developed and the trial judge has definitely decided a factual issue, there is no apparent reason why pendent appellate review should not encompass factual issues, if other requirements of the doctrine are satisfied.

The argument in the past several pages has been that it would be consistent with the post-judgment interpretation of § 1291 to construe it to authorize review of interlocutory rulings in conjunction with the review of "final decisions" under the collateral order (or other § 1291) doctrines, and that doing so would not seriously threaten the final judgment rule. One can go further and argue that prudent use of pendent appellate jurisdiction would be *more* consistent with the purposes of § 1291 and with appeals policy generally than is its rejection. It is difficult to make this argument without delving into the proper contours of pendent appellate jurisdiction (a matter directly confronted below), but some preliminary points can

appellate process.

156. *See supra* text at notes 146-47.

157. Kanji, *supra* note 40, at 524.

158. Under Federal Rule of Civil Procedure 52(a), "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." FED R. CIV. P. 52(a).

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be made now that are based upon alternative formulations of pendent appellate jurisdiction.

First, at least on the occasions when such jurisdiction is *necessary* to ensure meaningful review of independently appealable rulings, pendent appellate jurisdiction seems to be necessarily implied by the grant of jurisdiction, and is indisputably more consistent with the purposes of § 1291 and with appeals policy generally than is its rejection. Indeed, one might even question whether use of the term "pendent appellate jurisdiction" is appropriate in these circumstances, though that is common usage.

Second, on the occasions when a ruling that is not independently appealable *is* "inextricably intertwined" with one that is, inability to exercise jurisdiction over the former ruling will preclude the judicial economies to be gained by simultaneous review. It would require a kind of piecemeal litigation that appeals policy abhors.

When a ruling that is not independently appealable is not "inextricably intertwined" with one that is, it nonetheless might bear a factual, logical, or legal relationship with the latter that would make simultaneous review desirable from the perspective of judicial economy. Such situations present less strong, but perhaps strong enough, arguments that pendent appellate power should be held to exist. Such exercises of pendent appellate jurisdiction might provide guidance that narrows or otherwise expedites future trial court proceedings and sets them on a course that cures or avoids what otherwise would be reversible error requiring a re-trial after a great deal more money and effort have been expended and more time has elapsed. Moreover, if one defines "necessary to ensure meaningful review of independently appealable rulings" and "inextricably intertwined" to *exclude* logically prior rulings such as those upholding pleadings as stating a claim on which relief can be granted, then in some contexts pendent appellate jurisdiction of the variety now under discussion (for which the argument is weakest) sometimes would enable courts to dispose of litigation entirely. Examples and consideration of these situations will be presented below.[159]

An additional argument for viewing pendent appellate jurisdiction in the collateral order context as a matter of the construed scope of review lies in the fact that, in the contexts of § 1292(a) and (b) appeals, in mandamus, and, indeed, pervasively through the authoriza-

159. *See infra* text at notes 209-25.

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tions of appeals, pendent appellate jurisdiction has long been regarded as *interpretation* of the permissible scope of review. This is demonstrated in Section III, below.

Of course, if some version of pendent appellate jurisdiction is authorized by § 1291, as argued above, then by definition it cannot be inconsistent with the statutory scheme composed of §§ 1291-92. The Court in *Swint* nonetheless feared that pendent appellate jurisdiction would severely undermine the two-tiered arrangement established in § 1292(b),[160] under which a district court may certify questions for appeal if the questions meet that section's requirements and a court of appeals may hear those questions if but only if the district court has properly certified them.[161] It seems to me, however, equally reasonable to view § 1292(b) as operating only when, without its invocation, there would be *no* immediate appeal, and *not* to control the *scope* of appeals that may be taken without regard to § 1292(b). On that reading, § 1292(b) would not be relevant, and would not be undermined by a pendent appellate jurisdiction doctrine made available when an immediate appeal was taken of a collateral order under § 1291.

This view of § 1292(b) is in accordance with the courts' practice of determining the scope of interlocutory appeals under § 1292(a) without regard to § 1292(b). As described below, when appeals are brought pursuant to § 1292(a), the courts review matters *other than* the specific decisions enumerated in § 1292(a)(1),(2) and (3).[162] They do not take the position that because those non-injunctive matters have not been certified under § 1292(b) they may not be heard. I concede that the rationale for reaching such other matters *sometimes* is that they are (explicitly or implicitly) contained within the interlocutory orders or decrees that grant, continue, modify, refuse or dissolve injunctions, or that do any of the other things specifically enumerated in § 1292(a)(1),(2) and (3), and that it is the "orders" and decrees that the statute makes appealable.[163] Thus, one might view

160. Swint v. Chambers County Comm'n, 514 U.S. 35, 46-49 (1995); *see supra* text accompanying notes 14-21.

161. The text of § 1292(b) can be found at note 17, *supra*.

162. *See infra* text accompanying notes 182-208, 224-83.

163. *See* Smith v. Vulcan Iron Works, 165 U.S. 518, 524-25 (1897) (interpreting a predecessor of 1292(a)(1), permitting an appeal from an interlocutory order granting or continuing an injunction, to authorize an appeal "from the whole of such interlocutory order or decree, and not from that part of it only which grants or continues an injunc-

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the appellate jurisdiction conferred by § 1292(a) as including a statutorily conferred, limited, pendent appellate jurisdiction. However, it is a matter of statutory interpretation—judicial gloss—that additional subjects of those same orders may be heard on the interlocutory appeal. Section 1292(a) could have been interpreted to authorize the appeal of only the decisions specifically enumerated in it, but reasons of policy dictated a more generous reading.[164] More importantly, as shown in the subsequent section of this Article that focuses on the courts' interpretation and application of § 1292(a)(1), the courts have not limited their exercises of jurisdiction, on the occasion of a § 1292(a)(1) appeal, to additional subjects of those same orders. They also entertain other district court decisions whose factual, legal or logical nexus with the grant or denial of injunctive relief renders them appropriate for simultaneous appellate review. If one regards the practices that have developed in applying § 1292(a) as reflecting common law interpretation of the statute, then (again) we have a judicially-crafted pendent appellate jurisdiction which most courts and commentators have viewed as consistent with § 1292(b).

Can one view § 1291 as comparable to § 1292(a) in this regard, as similarly embodying a statutory pendent appellate jurisdiction or as similarly subject to interpretation that permits pendent appellate jurisdiction? One can make the analogy only by viewing the "final decision" as to which it confers appellate jurisdiction implicitly to embrace the matters theretofore decided. But that *is* the interpretation of "final decision" post-judgment, and (as previously discussed) there is no reason why "final decisions" rendered prior to judgment also could not be understood implicitly to embrace some matters theretofore decided, so that those matters could be simultaneously reviewed by appellate courts, in the exercise of sound discretion.[165] The ab-

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tion"); Seabulk Offshore, Ltd. v. Honora, 158 F.3d 897, 899 (5th Cir. 1998) (same interpretation of § 1292(a)(1)); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1067 (2d Cir. 1972) (same).

164. A very few decisions have construed section 1292(a)(1) jurisdiction very narrowly to confer jurisdiction to review only that portion of an order granting, or refusing or grant, an injunction. *See, e.g.*, Concerned Citizens of Bushkill Township v. Costle, 592 F.2d 164, 168 (3d Cir. 1979). However, such decisions are a minuscule minority. *See Smith*, 165 U.S. at 524-25 (citing the purpose of saving parties from the expense of further litigation in support of reading the interlocutory appeals statute to permit the appellate court to decide a case on its merits and dismiss a complaint that has no equity to support it); *Smith* is discussed at notes 187-88, *infra*.

165. *Cf.* Asset Allocation & Management Co. v. Western Employers Ins. Co., 892 F.2d 566, 569 (7th Cir. 1989). Judge Posner, discussing the scope of pendent appellate

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sence of a § 1292(b) certification need not be a bar, any more than it is in the context of § 1292(a) interlocutory appeals.

Thus, construction of § 1291 to entail power to permit interlocutory review of rulings that are not themselves "final decisions" would be more consistent with the post-judgment interpretation of the statute than is a denial of such power. In view of the stringent requirements of the collateral order doctrine and the courts' retention of discretion to decline to hear pendent issues, recognition of the power to exercise pendent appellate jurisdiction would not empower parties to parley *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets, thereby significantly undermining the final judgment rule. Recognition of power to exercise pendent appellate jurisdiction and prudent exercise of that power would further, rather than violate, the policies of sound judicial administration, judicial economy and avoidance of piecemeal appeals. Such jurisdiction also would not be inconsistent with the statutory scheme composed of §§ 1291-92—particularly, if § 1292(b) is held to operate only when, without its invocation, there would be *no* immediate appeal. There is no reason to believe that Congress, in conferring rulemaking authority to provide for appeal of new categories of interlocutory orders, intended to curtail such interpretation. If the legislative history evidences any intent to constrain the courts' role, it supports only an intention that Rules govern new occasions for interlocutory appeal, where there otherwise would be no appeal.

III. Case Law Concerning Pendent Appellate Jurisdiction

A. Collateral Order Cases in the Supreme Court

Prior to *Swint*, no Supreme Court decisions prohibited the exercise of pendent appellate jurisdiction in conjunction with the appeal of orders, in civil cases, that are immediately appealable under the "collateral order doctrine." One of the two cases that the *Swint* Court cited as "securely support[ing] the conclusion that the Elev-

jurisdiction under 28 U.S.C. § 1292(a)(1), explained the doctrine that any ruling on which the validity of the injunction turns is reviewable, saying:

> The principle is no different from that governing appeals from final decisions: the appeal brings up not only the final decision but also all prior rulings that affect the validity of that decision. Otherwise the decision would not be fully reviewable, and we would have piecemeal appealability with a vengeance.

Id. (citations omitted).

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enth Circuit lacked jurisdiction instantly to review the denial of the County Commission's summary judgment motion" did not arise under § 1291,[166] and the other cited case is distinguishable because it was a criminal proceeding. *Abney v. United States*[167] did involve the appeal of a collateral order, an order denying a motion to dismiss an indictment on double jeopardy grounds, and did reject pendent appellate jurisdiction (over the rejection of the defendant's challenge to the sufficiency of the indictment). However, *Abney* could be easily distinguished from, and held not to govern, civil litigation. The Court repeatedly has emphasized the special need to strictly apply the final decision rule in the context of criminal cases because "the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law."[168] These policies simply do not carry the same weight in the context of civil litigation, where the policies of punishing swiftly, protecting the public and deterring potential criminals are inapplicable. Moreover, for the reasons elaborated above, the fear, first mentioned in *Abney*, that a rule allowing pendent appellate jurisdiction would turn the collateral order doctrine into a multi-issue interlocutory appeal ticket is grossly overstated.

If one looks beyond these two cases, what one finds is a bit of support for pendent appellate jurisdiction in the collateral order context in at least one pre-*Swint* Supreme Court decision and at least one post-*Swint* Supreme Court decision, and considerable support in the jurisprudence developed by the courts of appeals. In *Eisen v. Carlisle & Jacquelin*,[169] the Court of Appeals for the Second Circuit, when reviewing a collateral district court order that allocated between the litigants the cost of providing notice to a plaintiff class, also reviewed the district court's decision on the methods to be used to effect notice. The Supreme Court approved the appellate court's exercise of jurisdiction. It concluded that the district court order imposing 90%

166. *See supra* text at notes 34-35.

167. 431 U.S. 651 (1977).

168. DiBella v. United States, 369 U.S. 121, 126 (1962), quoted in *Abney*, 431 U.S. 651, 657; *accord* United States v. Hollywood Motor Co., Inc., 458 U.S. 263, 265 (1982) (stating that the policy against piecemeal appellate review "is at its strongest in the field of criminal law"); United States v. MacDonald, 435 U.S. 850, 853-54 (1978) ("The rule of finality has particular force in criminal prosecutions because 'encouragement of delay is fatal to the vindication of the criminal law.'") (quoting Cobbledick v. United States, 309 U.S. 323, 325 (1940)).

169. 417 U.S. 156 (1974).

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of the costs on defendants fell within the collateral order doctrine and that, "the Court of Appeals therefore had jurisdiction to review fully the District Court's resolution of the class action notice problem*s* in this case, for that court's allocation . . . of the notice costs . . . was but one aspect of its effort to construe the requirements of Rule 23(c)(2) . . . ."[170] The Supreme Court itself went on to review both prongs of the lower courts' decisions, and disapproved both the district court's conclusions.[171]

It should be observed that the exercise of pendent appellate jurisdiction in *Eisen* was not *necessary* to ensure meaningful review of the independently appealable ruling, and it would be a stretch to argue that the ruling that was not independently appealable (concerning the method of giving notice) was "inextricably intertwined" with the cost allocation issue, which was independently appealable. Indeed, in the Court's view at the time, the two legal issues were not dependent on the same facts or the same principles of law and were logically independent of one another: the holding that the plaintiffs should be required to pay for notice to the class did not rest in any degree on the methods by which that notice was held to have to be given. While the method by which notice is given has practical implications for the cost of giving notice, the law had not made "who pays" depend upon how much must be paid or on how notice will be afforded.[172] The only "legal" relationship between the two issues was that both were aspects of the courts' effort to construe the requirements of Rule 23(c)(2) of the Federal Rules of Civil Procedure. As a practical matter, both the trial court's ruling allocating to defendants most of the cost of notifying the plaintiff class and its ruling that individual notice had to be provided to only a limited number of class members, with notice by publication to the remainder, were important to Eisen's ability to pursue the suit as a class action.

170. *Id.* at 172.

171. *Id.* at 172-79.

172. This remains true today, except insofar as courts have held that if a defendant makes regular mailings to the certified class, the court may require the defendant to include notice to the class in those mailings, as a cost-saving measure. *See, e.g.*, Mountain States Tel. & Tel. Co. v. District Court, 778 P.2d 667 (Colo. 1989); *see also* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) (holding that Fed. R. Civ. P. 23(d) authorizes courts to order a defendant to prepare a list of class members only if the burden of doing so would be substantially less than the burden on plaintiffs to compile such a list, and then the defendant is entitled to reimbursement of the expense entailed unless the expense was trivial).

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Nonetheless, the Supreme Court in *Swint* disapproved pendent appellate jurisdiction, subject to the two possible exceptions described above. Perhaps, if pressed today, the Court would disavow the aspect of *Eisen* discussed above, although it did not do so in *Swint*. Or perhaps it would defend *Eisen* on the ground that the issues *were* inextricably intertwined; but these issues are no more intertwined than most issues heard before *Swint* by even the appellate courts with the most liberal pendent appellate jurisdiction doctrines.[173] If this degree of relationship suffices, there is considerable life left in pendent appellate jurisdiction after *Swint*, and the opinion's bark will prove far worse than its bite.

The Court also had held pre-*Swint* that when a court of appeals has statutory jurisdiction to consider a shipper's direct appeal from a Federal Maritime Commission reparation order granting only part of the relief requested, the appeals court also may consider a cross-appeal by the defendant common carrier who seeks to have the reparation order set aside or reduced, although there is no independent basis of jurisdiction over that appeal.[174] In so holding, the Court emphasized that many of the arguments a carrier might make in defending against the shipper's appeal also could be advanced to show that the award should be reduced or set aside entirely.[175] For reasons that will be elaborated later, I note here that a later hearing of the cross-appeal might have undermined the judgment on the interlocutory appeal and that, in a general sense, the reparation order (in all its aspects) was the subject matter of the appeal.

More recently, the Court both approved and engaged in an exercise of pendent appellate jurisdiction in *Clinton v. Jones*.[176] A former Arkansas state employee, Paula Jones, sued the President of the United States under 28 U.S.C. §§ 1983 and 1985 and Arkansas law alleging that, while Governor of Arkansas, defendant made abhorrent sexual advances to her and that her rejection of his advances led to retaliatory punishment by her state supervisors. The district court

173. *See infra* Section III.G.

174. *See* Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 613-17 (1966).

175. *Id.* at 616; *see also* United States v. Swift & Co., 318 U.S. 442 (1943) (holding that when an indictment is dismissed, circuit courts of appeals have authority to review not only the holding that the allegations of an indictment are inadequate but also the dismissal insofar as it rests on a construction of a federal statute, even though if the latter were the only basis for the dismissal, appeal would lie exclusively to the Supreme Court).

176. 117 S. Ct. 1636 (1997).

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denied defendant's motion to dismiss predicated on a claimed Presidential immunity and ruled that discovery could go forward, but ordered that trial be stayed until defendant's presidency ended. The Eighth Circuit affirmed the denial of the motion to dismiss but, on Jones' cross-appeal, reversed the postponement of trial.[177] The Supreme Court declared that the Eighth Circuit correctly found that pendent appellate jurisdiction over the latter issue was proper. It elaborated:

> The District Court's legal ruling that the President was protected by a temporary immunity from trial—but not discovery—was 'inextricably intertwined' ... with its suggestion that a discretionary stay having the same effect might be proper; indeed, 'review of the [latter] decision [is] necessary to ensure meaningful review of the [former].'[178]

The Court thus rejected defendant's contention that the Court lacked jurisdiction over plaintiff's cross-appeal from the trial court's alternative holding that its decision was also permitted under equity powers,[179] and proceeded to review (and disapprove) the discretionary decision to stay the trial.[180] Again, note that the stay was part of the subject matter of the appeal, conceived as whether a President is subject to being actively "prosecuted" in a civil suit arising out of events that occurred before he took office. Also, it was important for the Court to address and reverse the stay because, had it not done so, the stay could, as a practical matter although not as a technical legal matter, have undermined its holding that the President was subject to suit.

Before addressing the development of § 1291 pendent appellate jurisdiction by the federal courts of appeals and exploring what the contours of the doctrine should be—whether defined by the courts, by Congress, or through the rulemaking process—it is worthwhile to survey the pendent appellate jurisdiction that is being exercised in *other* interlocutory appeal contexts, with some pre- and some post-

177. *Id.* at 1640-41.

178. *Id.* at 1651 n.41. The reasoning of the Eighth Circuit was perhaps clearer. It stated that these two challenges (and the appeal of the order allowing discovery to proceed) were inextricably intertwined because all would be resolved by answering whether, for the duration of his presidency, a sitting President is entitled to immunity from civil suit for his unofficial acts. Clinton v. Jones, 72 F.3d 1354, 1357 n.4 (8th Cir. 1996), *aff'd*, 117 S. Ct. 1636 (1997).

179. *Clinton*, 117 S. Ct. at 1651 n.41.

180. *See id.* at 1650-51.

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Swint Supreme Court approval. At a minimum, doing so will demonstrate that pendent appellate jurisdiction has long been synonymous with determining the scope of jurisdiction that is statutorily authorized. This survey also will provide the groundwork for examining whether the § 1291-based doctrine that the courts of appeals applied prior to *Swint* fits comfortably within the fabric of interlocutory appeals law.[181]

B. § 1292(a)

As observed above, pendent appellate jurisdiction is firmly established in the jurisprudence of § 1292(a).[182] Consideration of the law that has developed under the most frequently invoked subsection of § 1292(a), § 1292(a)(1), conferring jurisdiction over appeals from interlocutory orders granting, modifying, refusing, or dissolving injunctions, demonstrates this.[183]

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181. Of course, to the extent that the § 1291-based pendent appellate jurisdiction doctrine applied by the courts of appeals prior to *Swint* fits comfortably within the fabric of interlocutory appeals law, the undermining of pendent appellate jurisdiction in the collateral order context also could undermine it in these other contexts. In some applications, however, pendent appellate jurisdiction under § 1292(a) and (b) may be distinguished by their statutory language (which renders whole orders appealable), and/or one might seek to distinguish these situations by reference to the fact that they entail "direct" statutory interpretation, while pendent appellate jurisdiction in connection with collateral orders involves building interpretation upon interpretation of § 1291.

182. *See supra* text at note 163.

183. For ease of reference, I repeat the text of this statute. Section 1292(a) provides:

> Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, expect where a direct review may be had in the Supreme Court;
>
> (2) Interlocutory 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;
>
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

28 U.S.C. 1292(a).

Although I did not seek to closely study the relatively small body of case law arising under sections 1292(a)(2) and (3), the cases I saw indicate that the analysis of pendent appellate jurisdiction undertaken by courts hearing interlocutory appeals predicated on those subsections of the statute is essentially the same as the analysis they undertake when hearing section 1292(a)(1) appeals. *See, e.g.*, National Gypsum Co. v. City of Mil-

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Although the purpose of the provision is to permit litigants to effectively challenge interlocutory orders "of serious, perhaps irreparable consequence,"[184] and despite an ostensible policy to construe the statute strictly so as to confine its application to the needs that inspired it,[185] the law that has developed under § 1292(a)(1) allows far broader appellate review.

Professors Wright and Miller describe, and comment upon that law, as follows:

> Review quite properly extends to all matters inextricably bound up with the remedial decision. In addition, the scope of review may extend further to allow disposition of all matters appropriately raised by the record, including entry of final judgment. Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development. Any other rule frequently would require wasted litigation without any off-setting advantage in economy of appellate effort or uninterrupted trial court proceedings.
>
> Some matters are plainly reviewable because they establish the immediate bases for granting or denying injunctive relief. [Discussing specific case examples.] . . .
>
> The same principle justifies appellate determination of the question whether the action should be dismissed for failure to state a claim, even though that question may not formally have entered into the injunctive determination and indeed may not have been considered by the trial court at all . . .
>
> Another category of cases in which interlocutory review is appropriately extended to the merits of the case involves appeals from interlocutory orders that grant permanent injunctive relief.[186]

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waukee, 915 F.2d 1154 (7th Cir. 1990) (relying on a section 1292(a)(1) decision to decline pendent appellate jurisdiction where an order disqualifying counsel was not inextricably intertwined with the immediately appealable ruling under section 1292(a)(3) and there were no compelling reasons to allow immediate appeal of the disqualification order); Illinois *ex rel.* Hartigan v. Peters, 861 F.2d 164 (7th Cir. 1988) (relying on a section 1292(a)(1) decision to exercise pendent appellate jurisdiction where an order refusing to dissolve appointment of receiver was inextricably intertwined with an order immediately appealable under section 1292(a)(2)); *see also* 16 WRIGHT ET AL., *supra* note 62, § 3925, at 216-27, and cases cited therein.

184. Garner v. Westinghouse Broad. Co., 437 U.S. 478, 480 (1978) (quoting Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955)); *see also* Carson v. American Brands, Inc., 450 U.S. 79, 84 (1981) (same).

185. *See* 16 WRIGHT ET AL., *supra* note 62, § 3921, at 13-25.

186. *Id.* at § 3921 (citations omitted).

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The treatise then discusses the Supreme Court decision in *Smith v. Vulcan Iron Works*,[187] where the Court rejected the contention that the validity of a patent and whether the patent had been infringed were not reviewable until after final judgment, despite the interlocutory appeal of an injunction against further infringement. The Court there found the statute intended to authorize "an appeal to be taken from the whole of such interlocutory order or decree, and not from that part of it only which grants or continues the injunction ... and not only to permit the defendant to obtain immediate relief from an injunction ... but also to save both parties from the expense of further litigation, should the appellate court be of [the] opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it."[188] The treatise writers opine that a similar scope of review should be available upon interlocutory appeal of orders that *deny* permanent injunctive relief:[189]

> Beyond these easily justified expansions of the scope of appeal, a few cases have reviewed matters that were not directly involved with the decision to grant or deny injunctive relief, but that seemed plainly important to further conduct of the case. ... Such extensions of appellate review are not inevitable, but they represent a wise use of judicial resources that should be encouraged whenever it is plain that the record before the court is as complete as required for final determination in light of the legal principles involved.[190]

187. 165 U.S. 518 (1897).

188. *Id.* at 525.

189. *See* 16 WRIGHT ET AL., *supra* note 62, § 3921, at 23; *see also* San Filippo v. U.S. Trust Co. of New York, 737 F.2d 246 (2d Cir. 1984) (exercising pendent appellate jurisdiction over a denial of a motion to dismiss a complaint for failure to state a claim, in conjunction with the appeal from a denial of preliminary injunction).

190. 16 WRIGHT ET AL., *supra* note 62, § 3921 (citations omitted). Moore's Federal Practice sees the law somewhat differently. This treatise finds that:

> When an interlocutory appeal is taken, the circuit court generally goes no further in exploring the merits of the action than is necessary to decide the matter before it. The court considers the order appealed from as well as any other orders and any other questions, although themselves interlocutory and not otherwise appealable, that underlie and that are inextricably involved with the order being appealed.

JAMES MOORE ET AL., 19 MOORE'S FEDERAL PRACTICE § 203.32[3][a] (3d ed. 1997). Although the second edition of Moore's recognized a "relatively broad *power* to review matters that are intertwined with orders properly before the court on interlocutory appeal," JAMES MOORE ET AL., 9 MOORE'S FEDERAL PRACTICE para. 110.25[1] (2d ed. 1994) (emphasis added) [9 MOORE hereinafter], and viewed the principles governing the scope of interlocutory appeals generally to be rules of orderly judicial administration, *see id.* at 297, I perceive the *practice* of the appellate courts to be more liberal than the trea-

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The treatise and its supplement describe numerous cases to illustrate the generalizations quoted above.

The Supreme Court itself has exercised pendent jurisdiction under § 1292(a) on several occasions. Most recently, in *Amchem Products, Inc. v. Windsor*,[191] without any mention of *Swint* or even of pendent appellate jurisdiction, the Court reviewed class certification issues that underlied an injunction that was appealed and that the Eighth Circuit had reviewed as a matter of pendent appellate jurisdiction.[192] In 1986, when hearing an appeal authorized because of the grant in part and denial in part of a motion for preliminary injunction in an action challenging the constitutionality of a state abortion control act, the Court in *Thornburgh v. American College of Obstetricians and Gynecologists*[193] held that the court of appeals was justified in reviewing the constitutional issues and was not limited to determining whether the district court had abused its discretion in denying a preliminary injunction sought by plaintiffs, since only questions of law were at issue.[194] The Court observed that the courts of appeals' ordinary limitation of their review, in a case of this kind, to whether the trial judge abused his discretion "is a rule of orderly judicial administration, not a limit on judicial power."[195] The Court then proceeded to address the constitutional issues itself.[196]

Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee[197] indicates (but only implicitly) that courts legitimately can interpret § 1292(a) to allow pendent appellate jurisdiction even over matters *outside* the scope of an order that does what § 1292(a) describes. In that case, the Court of Appeals for the Third

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tise writers of Moore's Federal Practice do.

191. 117 S. Ct. 2231 (1997).

192. *See id.* *Amchem* and other cases concerning review of class certification are discussed at notes 242-48, *infra*.

193. 476 U.S. 747 (1986), *overruled on other grounds by* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

194. *Id.* at 756-57.

195. *Id.* at 757.

196. *See id.* at 758-771. The Court had taken a similar approach in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (on appeal from a preliminary injunction restraining the Secretary of Commerce from executing an executive order to seize and operate most U.S. steel mills, determining the constitutionality of the executive order although there arguably were non-constitutional grounds on which the preliminary injunction could have been denied), and in *Smith v. Vulcan Iron Works*, 165 U.S. 518 (1897).

197. 456 U.S. 694 (1982).

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Circuit was presented with the question whether, under 28 U.S.C. § 1292(a)(1), the district court had erred in enjoining the defendant excess insurers from pursuing an action against the principal insurer in England to rescind certain insurance contracts. As a "threshold" matter, the court reviewed the trial court's determination, made in a separate order, that it had personal jurisdiction over various defendants.[198] In 1982, the Supreme Court reviewed the latter aspect of the case only, and affirmed.[199] It did not however expressly address the propriety of the appellate court's having reached the personal jurisdiction issue, or of the Supreme Court's doing so.

Deckert v. Independence Shares Corporation[200] represents one of the Court's early forays into this field. In some respects, it went beyond *Thornburgh* and *Bauxite*, but it also implied some limits on pendent appellate jurisdiction. Where appeals were taken pursuant to a predecessor of § 1292(a)(1),[201] the Court stated that appellate power "is not limited to mere consideration of, and action upon, the order appealed from. 'If insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated.'"[202] Thus, denials of motions to dismiss (here, predicated on failure to state a claim on which relief could be granted and lack of subject matter jurisdiction), were immediately reviewable in conjunction with review of an injunction, although ordinarily appealable only after final judgment.[203] The Court must have viewed such an exercise of

198. *See* Compagnie des Bauxites de Guinea v. Insurance Company of North America, 651 F.2d 877, 879, 880 (3d Cir. 1981) (treating the issue of personal jurisdiction as properly raised when defendants appealed the order that enjoined prosecution of the excess insurers' suit against the principal insurer, in England, seeking to cancel the policies), *aff'd sub nom* Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

199. Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

200. 311 U.S. 282 (1940).

201. *See* 28 U.S.C. § 227 (1946), which stated in part "[w]here, upon a hearing in a district court ... an injunction is granted ... by an interlocutory order or decree ... an appeal may be taken from such interlocutory order or decree to the circuit court of appeals...." *See Deckert*, 311 U.S. at 286-87.

202. *Deckert*, 311 U.S. at 287 (quoting Meccano Ltd. v. Wanamaker, 253 U.S. 136, 141 (1920), and citing several earlier Supreme Court and courts of appeals decisions, including Metropolitan Water Co. v. Kaw Valley Drainage Dist., 223 U.S. 519 (1912) (same); Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485 (1900) (same); and Smith v. Vulcan Iron Works, 165 U.S. 518 (1897), the seminal case).

203. *See* Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant, 760 F.2d 312, 314 n.4, 315 (D.C. Cir. 1985) (holding, by extrapolation from *Deckert*, that on appeal from

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pendent appellate jurisdiction as appropriate even by the high standards it had set in *Baltimore Contractors, Inc. v. Bodinger*,[204] where the Court left it to Congress to determine when interlocutory appeals should be afforded, saying "[t]his Court . . . is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction . . . occurs in the federal system."[205] Perhaps guided by the spirit of those conclusions, however, the Court also held in *Deckert* that the court of appeals had acted properly in refusing to consider the merits of orders allowing the addition of plaintiffs and referring certain matters to a master. These orders were not immediately appealable and would properly have been reversed only if plaintiffs were not entitled to any equitable relief.[206]

The Court made no effort in *Deckert* to explain why certain orders (denying motions to dismiss) that ordinarily could be appealed only after final judgment could be heard pendent to the injunctive appeal while other interlocutory orders could not. The rationale for reviewing the denial of a motion to dismiss is generally understood to lie in saving the parties the expense of further litigation.[207] However, some such savings may result from the immediate review of other orders as well. For example, in *Deckert*, the court could have saved all

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denial of preliminary injunction, court would hear cross-appeal of denial of motion to dismiss for improper venue, and would direct dismissal for improper venue and vacate, rather than review, denial of preliminary injunction); Lee v. Ply*Gem Industries, Inc., 593 F.2d 1266, 1270 (D.C. Cir. 1979) (reviewing denial of motion to dismiss for lack of personal jurisdiction and for improper venue on appeal from order refusing stay, pending arbitration); Montano v. Lefkowitz, 575 F.2d 378 (2d Cir. 1978) (deciding whether complaint stated a claim, in conjunction with appeal from denial of temporary injunctive relief); Codex Corp. v. Milgo Electronic Corp., 553 F.2d 735 (1st Cir. 1977) (reviewing venue as ancillary to the appeal from denial of an injunction against another suit).

204. 348 U.S. 176 (1955), *overruled by* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988).

205. *Id.* at 181.

206. *See Deckert*, 311 U.S. at 290-01; *see also Ex Parte* National Enameling & Stamping Co., 201 U.S. 156 (1906) (on petition for mandamus, denying pendent appellate jurisdiction over a plaintiff's cross-appeal seeking review of the dismissal of patent claims held invalid or found not to be infringed, on the occasion of an interlocutory appeal of an injunction against defendant's further infringement of other patent claims).

207. *See* Smith v. Vulcan Iron Works, 165 U.S. 518, 525 (1897); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 756 (1986) (noting that *Smith* had approved decision on the merits, upon the appeal of injunctions, since review of interlocutory appeals was designed in part to save the parties the expense of further litigation), *overruled on other grounds by* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

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the parties from the duplicative litigation that would be necessary if the matters referred to a master were erroneously so dispatched. Thus, the critical factor must be whether review of an order may terminate a litigation entirely. If that is not the key, one needs more than the above stated rationale to justify the combination of results concerning pendent appellate jurisdiction reached in *Deckert.*

For reasons elaborated below, I do not quarrel with the conclusion that denials of motions to dismiss should be appealable in conjunction with an interlocutory appeal under §1292(a). Rather, I emphasize that, notwithstanding the language in *Bodinger*, the line of cases of which *Deckert* is an early member demonstrates that the Court has long viewed the judiciary as having power to exercise pendent appellate jurisdiction—even over matters that arguably are not fairly considered to be within the scope of the order made appealable by §1292(a) and its predecessors—when the policy reasons for so concluding are sufficiently strong. The Court's more recent cases (*Thornburgh* and *Bauxite*) indicate, if anything, a reconsideration that expands the occasions when policy considerations warrant the exercise of such jurisdiction.[208]

Let us evaluate pendent appellate jurisdiction over the issues raised in the aforementioned Supreme Court cases and over other selected issues.

(1) Subject matter jurisdiction

First, I submit that when there is a § 1292(a)(1) appeal, indeed, when there is any interlocutory appeal, the court of appeals may con-

208. *Thornburgh*, 476 U.S. 747; *Compagnie des Bauxites*, 456 U.S. 694; *see also* La Chemise Lacoste v. Alligator Co., 506 F.2d 339 (3d Cir. 1974) (White, J., dissenting) (criticizing the court of appeals for holding that refusal to remand a removed case could not be raised on an appeal from a denial of a preliminary injunction, and consequently that the removal issues had not been waived). Justice White argued that the opposite position was supported by *Deckert*, that the Third Circuit's view conflicted with its own and other circuits' decisions, and that jurisdictional questions should be reviewed at the first available opportunity to save unnecessary trial time and decisions and to avoid giving losing parties an additional "bite at the apple." *Id.* at 938-39. Some cases hold that denial of a motion to remand *is* reviewable upon an interlocutory appeal proper under 28 U.S.C. § 1292(a)(1). *See* O'Halloran v. University of Washington, 856 F.2d 1375, 1378 (9th Cir. 1988) (citing policy to prevent waste of judicial resources); Beech-Nut, Inc. v. Warner-Lambert Co., 480 F.2d 801, 803 (2d Cir. 1973); Kysor Indus. Corp. v. Pet, Inc., 459 F.2d 1010, 1011 (6th Cir. 1972) (per curiam); Mayflower Indus. v. Thor Corp., 184 F.2d 537, 538 (3d Cir. 1950).

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sider, and should consider, whether the district court had subject matter jurisdiction over the case[209]—and it should do so regardless of whether any of the parties moved in the district court (or on appeal) to have the case dismissed for lack of subject matter jurisdiction,[210] *and* regardless of whether there is any factual overlap (or any overlap of legal issues) between this issue and the issues raised by the grant or denial of the injunction that is the occasion for the appeal. It is the appellate court's duty to raise the issue of subject matter jurisdiction, even sua sponte—whatever the occasion for a case being before the appellate court—because judicial action beyond the subject matter jurisdiction of a federal district court, as established by Congress, violates separation of powers, affronts federalism (the relationship between federal and state courts), and may violate Article III of the Constitution.[211] However, because the issue is before the appeals

209. *See* Deckert v. Independence Shares Corp., 311 U.S. 282 (1940); United States v. Corrick, 298 U.S. 435, 437-38, 440 (1936). Upon appeal of an interlocutory injunction, the *Corrick* court remanded with directions to dismiss the bill for lack of jurisdiction in the district court, while pronouncing that the question on appeal was limited to whether the lower court had abused its discretion in granting the injunction. *Id. Deckert* is discussed in text at notes 200-06, *supra*.

210. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (federal courts have a duty to determine whether they have subject matter jurisdiction and should address the issue sua sponte if the parties have not raised it); Torres v. Southern Peru Copper Corp., 113 F.3d 540, 542 (5th Cir. 1997) ("[B]efore proceeding with a case, federal trial and appellate courts have the duty to examine the basis for their subject matter jurisdiction, doing so on their own motion if necessary."); Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., 109 F.3d 105, 108 (2d Cir. 1997) (holding that even if defendant challenged only sufficiency of the complaint, court was entitled at any time sua sponte to delve into factual basis for subject matter jurisdiction); Cvelbar v. CBI Illinois Inc., 106 F.3d 1368, 1373 (7th Cir. 1997) (same as *Mottley*), *cert. denied*, 118 S. Ct. 56 (1997).

211. *See, e.g.*, Finley v. United States, 490 U.S. 545, 552-56 (1989) (finding an unconstitutional usurpation of power where a lower federal court exercised supplemental jurisdiction which had not been explicitly authorized by Congress); Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809) (striking down as violative of Article III a statute that purported to confer federal jurisdiction over all suits involving aliens since the Constitution extends the judicial power of the United States only to cases between aliens and U.S. citizens); *see generally* 13 WRIGHT, ET AL., Federal Practice and Procedure: Jurisdiction 2d § 3522, at 60-62, 66, 68-69 (1984 & 1997 Supp.).

The position taken in the text is reinforced by the Supreme Court's recent decision in *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), where the majority opinion of the Court, attacking the doctrine of "hypothetical jurisdiction," excoriated some appeals courts for purporting to resolve contested questions of law presented by the merits without first deciding whether they had subject matter jurisdiction, where the merits question was more readily resolved and the party prevailing on the merits was the one

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court whether or not the parties raise it, and because the issue is properly addressed *before* the issues directly raised by the grant or denial of injunctive relief[212] and without regard to whether the jurisdictional and merits issues share any factual nexus or overlapping legal issues, it may well be that, as a matter of linguistic usage, the jurisdictional issue should not be regarded as being within the court's "pendent" appellate jurisdiction. If the issue is raised by the appeals court sua sponte, lawyers probably do not consider it a matter of pendent appellate jurisdiction. We might so regard it if a party seeks to have the appellate court review the district court's denial of a motion to dismiss for lack of subject matter jurisdiction in conjunction with the § 1292(a)(1) (or other interlocutory) appeal. However, for the reasons stated above, it seems more accurate to regard the court's jurisdiction to determine its own and the district court's subject matter jurisdiction as independent (rather than pendent), although admittedly the *occasion* for immediate appellate consideration of the issue is created by the §1292(a)(1) appeal: but-for that appeal (or some other exception to the final judgment rule), the jurisdictional ruling would be reviewable only after final judgment.

(2) Objections Pursuant to Rule 12(b)(2-5, and 7)

Even though personal jurisdiction over the parties also is a prerequisite to the proper entry of judicial orders against them,[213] appel-

who challenged the court's jurisdiction. The majority argued that jurisdiction is a threshold matter, without which a court acts ultra vires and can issue only advisory opinions, and that the "hypothetical jurisdiction" approach offends separation of powers. *See id.* at 1012-16.

212. *See Mottley*, 211 U.S. at 152 (raising the issue of subject matter jurisdiction sua sponte and noting the courts' responsibility to do so; not reaching the merits once the Court concluded that the federal courts lacked jurisdiction over the case); Avitts v. Amoco Prod. Co., 53 F.3d 690 (5th Cir. 1995) (determining only that the district court did not have subject matter jurisdiction over the action upon appeal of the grant of a preliminary injunction; remanding with instructions to remand the removed action to state court); Gilder v. PGA Tour, Inc., 936 F.2d 417, 421 (9th Cir. 1991) (reviewing district court's subject matter jurisdiction before reviewing the district court's grant of a preliminary injunction).

213. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945) (establishing a test for determining whether, consistently with the due process clause of the Fourteenth Amendment to the Constitution, a defendant has by its activities rendered itself amenable to proceedings in a particular court so as to permit that court to render a binding judgment); Pennoyer v. Neff, 95 U.S. (95 Otto) 714 (1878) (elaborating the theory that the authority of every tribunal is necessarily restricted by the territorial limits of the sovereign by which it is established and that any attempt to exercise authority beyond those

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late consideration of the propriety of a district court's exercise of personal jurisdiction over defendants, on the occasion of a § 1292(a)(1) appeal,[214] *would be* a matter of pendent appellate jurisdiction, if it is permissible at all, *if the decision to exercise personal jurisdiction is decided in an order separate from that of which the appealable injunction (or denial thereof) is part.*[215] The jurisdiction would be pendent because appellate courts do not consider issues of personal jurisdiction sua sponte, and could not consider such issues unless the defendants had timely objected to, or moved to dismiss for, lack of personal jurisdiction in the district court and then appealed the denial of their motion in conjunction with a § 1292(a)(1) appeal. Had the defendants failed to make timely objection in the trial court, they would have waived their objections under the Federal Rules of Civil Procedure.[216] Moreover, judicial action in the absence of personal jurisdiction over defendants violates only the due process liberty interests of the individuals involved; it is no longer viewed as an affront to another sovereign.[217] Consequently, no interests equivalent to those that support appellate consideration of subject matter jurisdiction at the first opportunity dictate similarly prompt appellate consideration of personal jurisdiction. Thus, if the issue of personal jurisdiction over defendants can be heard on the occasion of a § 1292(a)(1) appeal, it can be heard only as pendent to the § 1292(a)(1) appeal.

I submit that it should be so heard only if the issues raised by the § 1292(a)(1) appeal and by the controversy over personal jurisdiction share a common nucleus of operative fact or overlapping legal issues, or at the very least only if the personal jurisdiction issue is part of the

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limits is illegitimate and results in a judgment that is voidable).

214. Just such consideration was undertaken in Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877 (3d Cir. 1981), *aff'd sub nom* Insurance Co. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 456 U.S. 694 (1982).

215. As previously noted, §1292(a)(1) directly confers jurisdiction over the entire such order; or, at least, this is how the statute has long been construed. *See* text at note 163, *supra.*

216. *See* FED. R. CIV. P. Rule 12(h)(1).

217. *Compare* Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites des Guinee, 456 U.S. 694, 703 n.10 (1982) ("The restriction on state sovereign power ... must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause") *with* Pennoyer v. Neff, 95 U.S. 714 (1878), *and* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (stating that the concept of minimum contacts "acts to ensure that the States[,] through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"). *Pennoyer* is discussed *supra* note 213.

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subject matter of the appeal. Only then may the economies gained by simultaneous decision outweigh the policies that normally would postpone review of personal jurisdiction rulings until after final judgment. The system should work in this way even though personal jurisdiction is a threshold issue that may be dispositive while the § 1292(a)(1) appeal may not have the potential to dispose of the case, because if it were otherwise the mere fortuity of a § 1292(a)(1) appeal would overturn the policies that led Congress to conclude that there ordinarily should be no immediate appeal of denials of motions to dismiss for lack of personal jurisdiction.[218] So limiting the exercise of pendent appellate jurisdiction over personal jurisdiction issues also has the virtue of sharply reducing the occasions on which litigants might be tempted to appeal an order appealable under § 1292(a)(1) primarily as a vehicle to get an early appellate ruling on personal jurisdiction issues.

If this analysis is correct, the Court of Appeals for the Third Circuit should not have decided the personal jurisdiction issues raised by defendants who appealed the order enjoining them from prosecuting a rescission action in *Compagnie des Bauxites de Guinea v. Insurance Company of North America*,[219] and the Supreme Court ought to have vacated the Third Circuit decision in pertinent part, *unless* a factual or legal overlap with the issues decided in reviewing the injunction justified simultaneous review. The opinion of the Third Circuit does not indicate that the issues overlapped either factually or legally. That court addressed the personal jurisdiction issues first, held such jurisdiction to be present as to some of the excess insurers, and held the injunction to be an abuse of discretion for the distinct reason that duplication of issues in the domestic and the foreign action and delay in filing the latter did not justify the breach of comity that the injunction represented.[220] Moreover, pendent appellate jurisdiction was not

218. *See supra* text at notes 137-39 regarding the policies that underlie the final judgment rule.

219. 651 F.2d 877, 880-86 (3d Cir. 1981), *aff'd sub nom.* Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

220. *See id.* at 880-87. The analysis proposed here is consistent with the Second Circuit's reconciliation of *Rein v. Socialist People's Libyan Arab Jamahiriya*, No. 98-7467, 1998 U.S. App. LEXIS 31223 (2d Cir. Dec. 15, 1998), and *Hanil Bank v. PT. Bank Negara Indonesia, (Persero)*, 148 F.3d 127 (2d Cir. 1998). In *Rein*, the court refused to exercise pendent appellate jurisdiction over a personal jurisdiction issue that was not inextricably intertwined with the claim to sovereign immunity, while in *Hanil Bank*, the court did exercise pendent appellate jurisdiction over a personal jurisdiction issue where the finding

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defensible by reference to the subject matter of the appeal because personal jurisdiction was not any part of the subject. Rather, the subject of the appeal was which of two duplicative actions should proceed.

Appellate consideration of district court rulings on motions to dismiss for improper venue, insufficient process, insufficient service, and failure to join an indispensable party (which are similarly waivable[221] and are non-jurisdictional), on the occasion of a § 1292(a)(1) appeal, also would be a matter of pendent appellate jurisdiction, if it is permissible at all, *assuming that the aforementioned decisions were rendered in an order or orders separate from that of which the appealable injunction (or denial thereof) is part.* Consequently, such matters should be heard on interlocutory appeal only if the issues raised by the § 1292(a)(1) appeal and by the Rule 12(b)(3-5) and (7) motions share a common nucleus of operative fact or overlapping legal issues or if the Rule 12 motions otherwise are part of the subject matter of the appeal.

The Court's approval in *Deckert* of the appellate court's refusal to afford interlocutory review of orders allowing the addition of plaintiffs is consistent with this analysis. Although not a Rule 12 matter, the joinder of parties is, at least in part, a matter of pleading, and in that sense is similar to Rule 12 issues. In all likelihood the question whether additional plaintiffs properly could be joined (which at least today turns on whether their claims arise out of the same transaction, occurrence or series as the claims of other plaintiffs and whether the claims share a common question of law or fact)[222] would not have significantly overlapped with the questions raised in reviewing the temporary injunction against the defendant's transfer or disposal of monies received from purchasers of securities, where the defendant was an allegedly insolvent company whose assets were in danger of dissipation, and certainly was not the subject matter of the immediately appealable order.[223] If the above analysis is correct, then appellate court cases which, purporting to extrapolate from *Deckert*, entertained interlocutory appeals from separately ordered denials of

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of subject matter jurisdiction, being based upon a "commercial activity" exception to sovereign immunity, entailed a finding of minimum contacts that was conclusive on personal jurisdiction as well.

221. *See* FED. R. CIV. P. 12(h)(1),(2).

222. *See* FED. R. CIV. P. 20.

223. *See* Deckert v. Independence Shares Corp., 311 U.S. 282, 284-85 (1940).

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motions to dismiss for improper venue on a pendent basis were incorrect in so doing, *unless* simultaneous review was justified by a factual or legal overlap with the issues raised by the grant or denial of injunctive relief, or if venue was somehow the subject of the immediately appealable order.[224]

One could disagree with the foregoing analysis and argue that whenever an appeal is properly filed pursuant to § 1292(a)(1), the court of appeals ought to be able to exercise pendent jurisdiction over at least those prior district court decisions that are potentially case-dispositive and logically prior to any questions on the merits, as are rulings on all motions to dismiss pursuant to Rule 12, even if they have been rendered in an order or orders separate from that of which the appealable injunction (or denial thereof) is part, and without regard to whether overlapping factual or legal issues are presented. Thus, one might say that whenever a court lacks personal jurisdiction over the parties, for example, it has grounds to reverse any injunctive relief that has been afforded. The presence of personal jurisdiction is a logical predicate for any relief; hence that issue properly may be entertained as a matter of pendent appellate jurisdiction. Moreover, there arguably is support for this position in the willingness of the Court to decide interlocutorily appealable matters *on grounds* that it need not have reached.[225] A wider breadth of pendent appellate ju-

224. *Compare* Codex Corp. v. Milgo Elec. Corp., 553 F.2d 735, 737 (1st Cir. 1977) (reviewing "the entire venue question" when addressing whether district court properly stayed the proceeding before it, pending termination of litigation elsewhere, as ancillary to the appeal from denial of a request to enjoin suit in another district), Barber-Greene Co. v. Blaw-Know Co., 239 F.2d 774 (6th Cir. 1957) (addressing propriety of venue below when party argued that court should overturn district court's decision to enjoin action elsewhere), *and* American Chem. Paint Co. v. Dow Chem. Co., 161 F.2d 956 (6th Cir. 1947) (reviewing lower court's refusal to dismiss for improper venue, along with decision to stay a foreign suit), *with* Lee v. Ply*Gem Ind., Inc., 593 F.2d 1266 (D.C. Cir. 1979) (concluding that court may review denial of motion to dismiss for lack of venue although the venue issue did not overlap with the immediately appealable order denying a stay pending arbitration).

225. *See, e.g.,* Thornburgh v. American Collage of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (approving review of the constitutionality of aspects of a statute, on appeal from denial of a preliminary injunction, although the case might have been decided on non-constitutional grounds); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (determining the constitutionality of executive order although there arguably were non-constitutional grounds on which the preliminary injunction restraining execution of the executive order could have been denied); Smith v. Vulcan Iron Works, 165 U.S. 518 (1897) (approving review of the validity of a patent and whether the patent had been infringed, upon interlocutory appeal of an injunction against further infringement,

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risdiction might be justified over the various grounds that support an independently appealable order than over issues arising from different claims, defenses, or other sources.

This position is attractive if one considers only the immediate judicial economy to be gained, but I believe that this position would excessively undermine the final judgment rule. In such a regime the mere serendipity of a § 1292(a)(1) appeal would overturn the policies that led Congress to conclude that there ordinarily should be no immediate appeal of denials of motions to dismiss pursuant to Rule 12 and of other cognate orders. Although such pendent appeals would not interrupt otherwise uninterrupted trial court proceedings, district courts would have lessened control and authority and might be less careful in making rulings they foresaw would soon be reviewed; some forever-avoidable appeals would consume the time and energy of appellate courts; resolution of interlocutory appeals would be somewhat delayed by the appellate courts' consideration of issues that overlap little or not at all; and parties would have every incentive to make § 1292(a)(1) appeals a vehicle for immediate appeal of several other orders. From a broad perspective, this would create a less efficient system.

The analysis presented above is equally applicable, by analogy, when litigants seek to raise threshold objections concerning personal jurisdiction, venue, service, process, or absence of parties, on the occasion of other interlocutory appeals, such as those authorized by the collateral order doctrine, § 1292(b), or the principles governing mandamus.

(3) Matters that Are and Should be Reviewable on a § 1292(a)(1) Appeal because they Directly Underlie (i.e., Constitute Bases for) the Grant or Denial of Injunctive Relief—including Rule 12(b)(6) Objections

To be distinguished from the kinds of issues discussed above are matters that are and should be reviewable on a § 1292(a)(1) appeal because they directly underlie (*i.e.*, constitute bases for) the grant or denial of injunctive relief. Where injunctive relief has been granted to a claimant, the question whether the complaint states a claim on which relief can be granted should be reviewable on a § 1292(a)(1) appeal because the injunction can properly have issued *only* if the

although there might have been grounds to reverse without regard to the aforementioned issues).

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complaint states a claim—without such a claim, the claimant cannot establish a likelihood of success on the merits;[226] hence, a court ought not to affirm without concluding, implicitly or explicitly, that the complaint states a claim. The two questions are inextricably intertwined in the sense that having a cause of action is legally and logically a prerequisite to being entitled to equitable relief. Consideration of whether the complaint states a claim would be appropriate—although not always necessary—when reversal of an injunction is the ultimate outcome[227] both because a failure to state a claim would be a proper ground to reverse an injunction, although it may not be the only ground,[228] and because the court's jurisdiction to decide a pendent issue should not turn on its ultimate view of the propriety of the injunction.[229]

Similarly, where injunctive relief has been denied to a claimant, the question whether the complaint states a claim on which relief can be granted should be reviewable on a § 1292(a)(1) appeal because the failure to state a claim would be a proper ground to affirm the denial of an injunction, although it may not be the only ground. The two questions also are inextricably intertwined in the sense that denial cannot be overturned without a determination that the complaint does state a claim. For the foregoing reasons, whether the complaint states a claim should be reviewable on appeal of the denial of an in-

226. Likelihood of success on the merits is a prerequisite for a preliminary injunction. *See, e.g.,* Schenck v. City of Hudson, 114 F.3d 590, 593 (6th Cir. 1997) (stating the general principle with which this footnoted begins); Starlight Sugar, Inc. v. Soto, 114 F.3d 330, 331 (1st Cir. 1997) (same); Artist M. v. Johnson, 917 F.2d 980, 986 (7th Cir. 1990) (reviewing the denial of a motion to dismiss for failure to state a claim under Section 1983 and under the Adoption Assistance and Child Welfare Act of 1980 along with review of the grant of a preliminary injunction, because the likelihood of success on the merits initially depends on whether the plaintiffs could maintain a cause of action), *rev'd on other grounds sub nom.* Suter v. Artist M., 503 U.S. 347 (1992).

227. An appellate court might have other grounds to reverse an injunction.

228. *See, e.g.,* NLRB v. Interstate Dress Carriers, Inc., 610 F.2d 99, 104 (3d Cir. 1979) (in an appeal from a preliminary injunction predicated on a counterclaim and an affirmative defense, holding that the lower court erred in not dismissing the counterclaim for failure to state a claim upon which relief may be granted).

229. *See* Underwood v. Hilliard, 98 F.3d 956, 964 (7th Cir. 1996) (adhering to the doctrine that appeals courts have jurisdiction of an immediate appeal from an order finding a party in civil contempt where the underlying order, enforced by the contempt, is immediately appealable, relying in part on a policy to avoid multiplication of appeals; in the latter connection, the court concluded that its view of the validity of the underlying injunction ought not to affect its jurisdiction to consider issues concerning compliance with the injunction).

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junction, even though review of the complaint's sufficiency *may* not be necessary to assure meaningful review, depending upon whether there are other grounds to affirm.

In view of the pervasive propriety and the frequent necessity of addressing whether a complaint stated a claim when reviewing the grant or denial of an injunction, courts should recognize that they always have jurisdiction to address that question on a § 1292(a)(1) appeal. Cases such as *Deckert v. Independence Shares Corporation*[230] thus properly addressed whether the plaintiff had stated a claim. Because the question is properly presented regardless of whether a defending party actually moved to dismiss under Rule 12(b)(6) in the trial court[231] and regardless of whether a party to the § 1292(a)(1) appeal urges the appeals court to consider whether the trial court erred in its ruling on any such motion, I question whether consideration of the issue should even be regarded as a matter of "pendent" appellate jurisdiction.

Certain decisions that go to the merits, beyond whether a claim has been stated, fall in the same category. For example, the decision in *Smith v. Vulcan Iron Works*[232] to address the validity of a patent and whether it had been infringed, as part of the interlocutory appeal of an injunction against further infringement, was proper because defendant's infringement of a valid patent would have been necessary, although not sufficient, to affirm the injunction. Similarly, the decision in *Thornburgh* to address the constitutionality of various provisions of a challenged abortion statute, as part of the interlocutory appeal of the denial of most of the injunctive relief sought by the plaintiffs, was proper. It is true that the denial of injunctive relief against enforcement of a law might be proper even if the law is unconstitutional; hence, the constitutional question may not be a logically necessary predicate to the denial of injunctive relief or the affirmance thereof.[233] The appellate courts were not limited to

230. 311 U.S. 282 (1940).

231. The objection of failure to state a claim will not have been waived by virtue of opposing parties' failure to raise it in the trial court in advance of the interlocutory appeal; the objection remains available through trial on the merits. *See* FED. R. CIV. P. 12(h)(2). Moreover, as a matter that directly underlies the grant or denial of injunctive relief, the issue cannot sensibly be ignored in reviewing the grant or denial of an injunction.

232. 165 U.S. 518 (1897). *Smith* is discussed in text at notes 187-88, *supra*.

233. For example, one would be unable to get an injunction against enforcement of a statute that had not been enforced for many years, or where one has an adequate remedy

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addressing a narrowly understood question of whether the district court had abused its discretion however because the unconstitutionality of the challenged statute would provide a proper ground for affirming. The fact that the Supreme Court approved review of the constitutional questions demonstrates that the scope of review available upon a § 1292(a)(1) appeal is not (and I agree that it should not be) narrowly limited to questions that inevitably must be addressed in order for the court to reach its conclusion.[234] Because the *grant* of injunctive relief against enforcement of an allegedly unconstitutional law can be proper only if the law is unconstitutional (or, at least, only if the plaintiff has shown that she probably will succeed in persuading the court of its unconstitutionality), an appeals court properly can reach the constitutional question on interlocutory appeal from grant of an injunction, even on a more narrowly circumscribed scope of review.

(4) Decisions of the Courts of Appeals

While the existence of these Supreme Court precedents interpreting and applying § 1292(a)(1) are notable because of their stature, one can get a better sense of the power that federal courts of appeals commonly exercise under § 1292(a)(1) by examining their decisions, which are far greater in number. Although my review of these cases was not exhaustive, it did confirm that the courts of appeals exercise a broad scope of review, of the sort described by Wright & Miller.[235] I will describe a number of these decisions in the margin and a few in the text to provide a sense of how the courts apply the general principles on which they rely, and to gauge whether, in general, they confine their exercises of pendent appellate jurisdiction to situations in which it is proper, under the guidelines indicated

at law. *See* Younger v. Harris, 401 U.S. 37 (1971) (holding that federal courts should not enjoin previously begun state criminal prosecutions except where necessary to prevent irreparable harm, and that such harm is lacking if the threat to plaintiff's federal rights can be eliminated by the defense of the prosecution). The *Younger* Court stated that "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate [plaintiffs]." *Id.* at 42.

234. Cases following *Thornburgh* include Doe v. Sundquist, 106 F.3d 702, 707-08 (6th Cir. 1997) (reaching the constitutionality of a statute that allowed disclosure of previously confidential adoption records, in support of affirmance of denial of preliminary injunction, where the issue was clearly presented, the factual record did not need expansion, and immediate resolution would materially advance the litigation).

235. *See supra* text at note 186.

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above. In light of the great number of these decisions, however, the text here will emphasize the general principles that the courts of appeals invoke to guide their determinations of what issues to hear in connection with § 1292(a)(1) appeals. There is a great deal of consistency among the circuits, although there is some variation in the liberality with which they exercise pendent appellate jurisdiction and there have been a very few appellate voices strongly opposed to pendent appellate jurisdiction.

The Court of Appeals for the Federal Circuit states as a general principle that:

> An interlocutory order that ordinarily would not be appealable may be given discretionary appellate review when it is *ancillary* to other matters that are appealable. . . . Consideration is given to the extent to which the appealable order *involves factors pertinent* to the otherwise nonappealable order, such that *judicial efficiency and the interest of justice* are served . . . ."[236]

In making that determination, the court focuses on whether the two issues are logically interdependent and factually closely interrelated.[237] Purporting to apply these principles, the Federal Circuit in *Katz v. Lear Siegler, Inc.*, reviewed the joinder of a counter-defendant (involuntary plaintiff) on the ground that the propriety of that joinder was intertwined with the merits of the injunction against continuation of a separate action by the plaintiff against that same entity, which was the occasion for the immediate appeal.[238] The Fed-

236. Katz v. Lear Siegler, Inc., 909 F.2d 1459, 1461 (Fed. Cir. 1990) (emphasis added).

237. *See id.* at 1461. *See also* Broyhill Furniture Ind. v. Craftmaster Furniture Corp., 12 F.3d 1080 (Fed. Cir. 1993) (declining to exercise pendent appellate jurisdiction where the two orders in question, one under Federal Rule of Civil Procedure 60(b), and the other allowing the assertion of counterclaims, were not sufficiently factually interrelated); Intermedics Infusaid, Inc. v. Regents of Univ. of Minnesota, 804 F.2d 129, 134 (Fed. Cir. 1986) (exercising pendent appellate jurisdiction over an order dismissing a declaratory judgment action without prejudice, in conjunction with review of a refusal to enjoin another lawsuit, where the court found the two motions closely related factually and interdependent.)

238. *Katz*, 909 F.2d at 1461-62. It is not clear however that the two issues were so related. The court found that the record did not show any potential for resolution of the issues posed in Katz's case against ASP in the instant case in which ASP had been joined as an involuntary plaintiff, and nothing in the opinion indicates how the above consideration, which rendered the injunctive improper, bore on the propriety of ASP's joinder as an involuntary plaintiff. *Id.* at 1462-64. The primary link between the issues seemed to lie in the district court's intention to determine who owned the beneficial interests in the patents involved, an issue that was important to Katz' capacity to sue for infringement (as it did in the instant case) and that might have been influenced by the issues between Katz and ASP. It is unclear from the opinion whether there was one district court order or

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eral Circuit recognizes this as an exercise of pendent appellate jurisdiction.[239]

The Court of Appeals for the District of Columbia has approvingly cited the very broad language quoted above from Wright & Miller,[240] while cautioning that matters so reviewed must be *closely related to the subject* of the interlocutory appeal itself.[241] Predicated on those principles, the court held, for example, in *Hartman v. Duffey* that the scope of a trial court's class certification order, as well as the merits of the class's hiring discrimination claim, were *inextricably bound up* with the injunctive decision that a certain number of foreign service positions be reserved for the plaintiff class.[242] It found that "closure on these fundamental issues . . . [wa]s *necessary to provide a proper groundwork* for the . . . order being appealed."[243] It therefore reviewed the class certification decision as pendent to the challenged injunctive relief,[244] but because further trial court consid-

more addressing the joinder and injunction issues.

239. *See, e.g., Broyhill*, 12 F.3d at 1087 (discussing the question presented as whether to exercise pendent appellate jurisdiction); *Katz*, 909 F.2d at 1461 (Fed. Cir. 1990) (discussing the question presented as whether an order that ordinarily would not be appealable may be given discretionary review when it is ancillary to matters that are appealable); *Intermedics Infusaid*, 804 F.2d at 134 (so describing review of an interlocutory order that would be nonappealable standing alone, in conjunction with review of the refusal of an injunction).

240. *See* Hartman v. Duffey, 19 F.3d 1459, 1464 (D.C. Cir. 1994) (quoting 16 WRIGHT ET AL, *supra* note 62, § 3921, at 17 (1977)); Wagner v. Taylor, 836 F.2d 578 (D.C. Cir. 1987) (same).

241. *See Hartman*, 19 F.3d at 1464.

242. *See id.*

243. *Id.*

244. Other decisions holding that a grant of class certification may be reviewed on appeal from a ruling on a motion for preliminary injunction include Paige v. California, 102 F.3d 1035, 1039-40 (9th Cir. 1996) (stating that, after *Swint*, it no longer suffices that matters are related to an injunction and that judicial economy would best be served by reaching them on a § 1292(a)(1) appeal, but holding that the class certification order was inextricably bound up with the grant of the interim injunction and that effective review of the injunction required review of the class certification, and hence that the class certification was reviewable on the interlocutory appeal); Georgine v. Amchem Products, Inc., 83 F.3d 610, 624 (3d Cir. 1996) (reviewing class certification as a matter of pendent appellate jurisdiction where the certification directly controlled the propriety of the appealed preliminary injunction which prohibited class members from pursuing claims for asbestos-related personal injury in any other court), *aff'd sub nom.* Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231 (1997). The Supreme Court agreed that the class certification issues were properly decided, and it too addressed them. Indeed, because the class certification issues were logically antecedent to Article III issues concerning the existence of a justiciable case or controversy and concerning some claimants' standing to sue and their

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eration and findings on class certification were necessary—and liability was inevitably bound up with the class determination—it postponed its review of liability and the propriety of the remedial order "until the next round."[245] These three matters (class certification, liability and remedy) had been decided in separate orders entered over a period of years.

Decisions such as *Hartman* are clearly correct under the analysis presented above and adumbrated in the opinions. Because injunctions providing class-wide relief typically cannot be proper absent proper class certification, review of the latter may be essential to proper review of the former. Of course, the fact that the appellate court has power to review the grant of class certification does not mean that it always would be an abuse of discretion to fail or refuse to do so. Although the court typically could not properly affirm classwide injunctive relief without reaching the grant of class certification, the court might be able to reverse such relief on other grounds that render it unnecessary to reach the grant of class certification.[246]

Another frequent fact pattern involves denial of an injunction, which rests on a prior or simultaneous denial of class certification. In the view of a number of courts, the latter is appealable as a matter of pendent appellate jurisdiction.[247] I agree with this conclusion be-

satisfaction of the amount in controversy requirement, the Court addressed the class certification issues first, and its disposition of them made it unnecessary to reach the Article III issues. *See Windsor*, 117 S. Ct. at 2244.

245. *Hartman*, 19 F.3d at 1464.

246. *See* Webb v. Missouri Pac. R.R. Co., 98 F.3d 1067 (8th Cir. 1996) (declining to consider whether the district court had improperly certified a plaintiff class, as not necessarily intertwined with the validity of an injunction, where the court had held the injunction to have been an abuse of discretion because predicated on a stale record).

247. *See* Wagner v. Taylor, 836 F.2d 578, 586 (D.C. Cir. 1987); Zepeda v. INS, 753 F.2d 719, 728 n.1 (9th Cir. 1983); Port Auth. Police Benevolent Ass'n v. Port Auth. of New York & New Jersey, 698 F.2d 150, 152-53 (2d Cir. 1983); Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 807-09 (5th Cir. 1982); Kershner v. Mazurkiewicz, 670 F.2d 440, 446-50 (3d Cir. 1982); Adashunas v. Negley, 626 F.2d 600, 602-03 (7th Cir. 1980) (dicta); Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 522 F.2d 1235, 1237-38 (7th Cir. 1975).

The exercise of appellate jurisdiction over the class certification issue in this context is quite different from, and its propriety is not undermined by, the holding by the Supreme Court that an order denying class certification does not itself constitute a denial of an injunction within the meaning of § 1292(a)(1), even if its effect is to refuse a substantial portion of the injunctive relief requested in the complaint, when the order is effectively reviewable after final judgment, has no irreparable consequences, and was not "on the merits" of the plaintiff's claim. Gardner v. Westinghouse Broad. Co., 437 U.S. 478, 480-81 (1978); *cf.* Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d 902, 906 (9th Cir. 1995) (explaining that the inquiry whether a can-

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cause—although there might be other reasons to deny the injunction—if the denial truly rests on the denial of class certification and on that alone, then review of the latter is essential to proper review of the denial of injunctive relief. Of course, the fact that the appellate court has power to review the denial of class certification does not mean that it always would be an abuse of discretion to fail or refuse to do so. The court may be able to affirm on other grounds that render it unnecessary to reach the denial of class certification.[248]

Numerous other § 1292(a)(1) cases in which the D.C. Circuit has exercised pendent appellate jurisdiction indicate that that court is inclined to exercise pendent appellate jurisdiction when the normally unappealable issue is "*[inextricably] bound up*" with the immediately appealable issue, is "*basic to and underlie[s]*" the order supporting the appeal, or is "*substantially interdependent*" with the appealable interlocutory order.[249]

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cellation order is an injunction is distinct from whether a cancellation order is appealable as an order inextricably bound up with an injunction, and that one of these determinations does not control, and is not even persuasive with respect to, the other).

248. In that situation, denial of the injunction would not rest solely on the denial of class certification, at least in the view of the appellate court. *Cf.* Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 209 (3d Cir. 1990) (finding that court of appeals lacked jurisdiction to review the denial of class certification because the preliminary injunction could not stand for other reasons).

249. *See* Association of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 911 (D.C. Cir. 1993). The district court in this case had granted a preliminary injunction requiring the President's Task Force on National Health Care Reform to comply with the Federal Advisory Committee Act ("FACA") except in specified circumstances, and the government appealed that injunctive order. The Court of Appeals entertained plaintiffs' cross-appeal challenging the dismissal, for failure to state a claim, of the claim that the Task Force's working group was covered by FACA, and further challenging the district court's corollary refusal to permit discovery into the status and operations of the working group. The circuit court found disposition of the claim against the working group to be bound up with the reasons for the grant of the injunction: "Once it is determined that the Task Force is not covered by FACA, the implicit analytical premises of the . . . decision as to the working group are removed. Moreover, had the district court determined, as have we, that the claim against the Task Force was invalid and then also dismissed the claim against the working group, the latter unquestionably would be appealable as well. Under these circumstances, we think it appropriate to consider the cross-appeal." *Id.*

In *Wagner v. Taylor*, 836 F.2d 578, 585-86 & nn. 42-53 (D.C. Cir. 1987), the court exercised jurisdiction over a denial of class certification held to be inextricably bound up with the denial of a preliminary injunction that, *inter alia*, would have restrained the Interstate Commerce Commission from discriminating against certain categories of black employees. The two trial court decisions were reflected in simultaneous but separate orders. While mindful of the Supreme Court's admonition that section 1292(a)(1) must be "approach[ed] . . . somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders," the D.C. Circuit found that "when the availability of provi-

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The Court of Appeals for the First Circuit likewise exercises pendent appellate jurisdiction when hearing § 1292(a)(1) appeals, citing with approval the commentators' view that review properly may extend to all matters *inextricably bound up* with the remedial decision, and invoking tests that look to *interdependence* of the issues and whether the normally non-appealable order is *basic to and underlies* the immediately appealable decision.[250]

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sional relief is as tightly interwoven into the fabric of class certification as it is in the case at bar, a narrower construction of Section 1292(a)(1) would impinge upon the congressionally conferred right to an interlocutory appeal from the refusal of the injunction." *Id.* at 586 (citing Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23 (1966)). Since the trial court had denied injunctive relief in light of its denial of class certification, effective review of the former would be seriously impaired by inability to review the latter. The court cited numerous cases of its own and of other circuits exercising pendent appellate jurisdiction under § 1292(a)(1), as well as the broad statements by commentators including Wright & Miller and Moore, whose treatises recognize appellate jurisdiction over interlocutory, in-themselves non-appealable, orders that are basic to and underlie the order supporting the appeal. *See* 9 MOORE, *supra* note 190, para. 110.25[1], at 289-90; Energy Action Educational Foundation v. Andrus, 654 F.2d 735, 745-46 (D.C. Cir. 1980) (reviewing denial of a motion for summary judgment and deciding the question of law on which it hinged, in conjunction with appeal from denial of preliminary injunction, where latter denial was predicated in substantial part on the same views that led to the denial of summary judgment), *rev'd on other grounds sub nom.* Watt v. Energy Action Educational Foundation, 454 U.S. 151 (1981); Blake Constr. Co. v. Laborers' International Union, 511 F.2d 324, 326 n.8 (D.C. Cir. 1975) (reviewing denial of a motion for partial summary judgment, in conjunction with appeal from denial of stay, pending arbitration, where decision of the former entailed identifying the parties bound by a collective bargaining agreement and consequently those affected by the arbitration agreement and thus by the proposed stay); E. P. Hinkel & Co. v. Manhattan Co., 506 F.2d 201 (D.C. Cir. 1974) (although challenge to injunction had become moot, retaining jurisdiction to decide issues concerning summary judgment); *cf.* Wyatt *ex rel.* Rawlins v. Fetner, 92 F.3d 1074, 1081 (11th Cir. 1996) (holding that court lacked pendent jurisdiction to consider denial of motion seeking disqualification of judge and refusal to certify plaintiff class because appeal from grant of preliminary injunction had been rendered moot); Neal v. Brown, 980 F.2d 747, 748 (D.C. Cir. 1992) (rejecting pendent appellate jurisdiction under § 1292(a)(1) over denial of motion to remand to state court, where motion for injunctive relief had become moot even before appeal was filed).

250. *See* Xerox Fin. Servs. Life Ins. Co. v. High Plains Ltd. Partnership, 44 F.3d 1033 (1st Cir. 1995) (entertaining appeal of denials of motions for relief from consent judgments that did not end proceedings, because of their relationship to preliminary injunction entered in aid of enforcement of consent judgments); Avery v. Secretary of Health & Human Services, 762 F.2d 158 (1st Cir. 1985) (having decided to treat orders to issue certain notices and ordering procedures for determining class membership as injunctive relief for purposes of §1292(a)(1), the court also reviewed the class definition, the trial court's decision not to dismiss the case, and the trial court's power to issue those orders, because the injunctive orders could be legally proper only if the aforementioned decisions also were correct); James v. Bellotti, 733 F.2d 989, 992 (1st Cir. 1984) (stating that refusal to remand was reviewable in conjunction with appeal from denial of injunction); Alloyd General Corp. v. Building Leasing Corp., 361 F.2d 359, 363 (1st Cir. 1966) (claiming juris-

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The Second Circuit similarly looks for *inextricable intertwining*,[251] *substantial overlap* in the issues,[252] or the *dependence* of the appealable issue on the non-appealable;[253] and it considers whether review

diction over questions basic to and underlying the order supporting appeal, and reviewing conclusion that trust mortgage was in effect assignment for the benefit of creditors as the basis for immediately appealable dissolution of temporary restraining order); Loew's Drive-In Theatres, Inc. v. Park-In Theatres, Inc., 174 F.2d 547 (1st Cir.) (after initially stating in dicta that § 1292 confers jurisdiction to review only that part of a judgment that has to do with the injunctive relief afforded, declining to decide its appellate jurisdiction over a claim for unpaid royalties where the parties had not argued that such jurisdiction was ancillary to appeal of the interlocutory injunction against patent infringement and the appellate court's decision that the patent claims were invalid rendered the jurisdictional question of no practical moment).

251. *See* New York v. Exxon Corp., 932 F.2d 1020 (2d Cir. 1991) (refusing to exercise pendent jurisdiction over a ruling on liability in the absence of inextricable intertwining with the grants and denials of injunctive orders); United States v. Ianniello, 824 F.2d 203, 209 (2d Cir. 1987) (addressing whether the costs of a receiver should have been imposed on the government pending trial, in connection with reviewing the receiver's appointment, because the issues were sufficiently intertwined); Port Authority Police Benevolent Ass'n v. Port Authority of New York & New Jersey, 698 F.2d 150 (2d Cir. 1983) (exercising pendent appellate jurisdiction over denial of class certification that was inextricably related to an appealable denial of preliminary injunction contained in the same order; the denial of the injunction was based solely on a finding of lack of probability of success on the merits which itself was based solely on the denial of class certification); New York v. Nuclear Regulatory Comm'n, 550 F.2d 745 (2d Cir. 1977) (refusing to exercise pendent appellate jurisdiction over a denial of summary judgment and dismissal of certain defendants, in conjunction with the appeal of a preliminary injunction denial, where significant connections between the appealable and non-appealable issues were lacking).

252. *See* McCowan v. Sears, Roebuck & Co., 908 F.2d 1099, 1104-05 (2d Cir. 1990) (exercising pendent jurisdiction over the denial of a stay pending arbitration where, *inter alia*, the issues presented overlapped substantially with issues presented by a properly brought appeal); *cf.* Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 839 F.2d 69, 76 (2d Cir. 1988) (declining to exercise pendent jurisdiction over claims it found to be disparate from those as to which injunctive relief was denied in practical effect); SEC v. American Bd. of Trade, Inc., 830 F.2d 431, 443 (2d Cir. 1987) (declining to exercise pendent jurisdiction over appeal from denial of leave to amend answer and to assert counterclaim and affirmative defenses due to lack of sufficient relationship to rulings properly appealed; indicating that at least some of the proposed amendments were untenable); General Motors Corp. v. Gibson Chemical & Oil Corp., 786 F.2d 105 (2d Cir. 1986) (declining to exercise pendent jurisdiction over appeal from order confirming writ of seizure, in conjunction with appeal from preliminary injunction, where the legal arguments on appeal were "markedly diverse," had not been argued and ruled upon below, an appellate ruling would not terminate the litigation, and delay would not leave the appellant's interests unprotected).

253. *See* United States v. Allen, 155 F.3d 35, 39-40 (2d Cir. 1998) (reviewing determination that the government was entitled to summary judgment on defendant's RICO liability where this determination was the basis for issuance of injunctive relief); HBE Leasing Corp. v. Frank, 48 F.3d 623, 633 (2d Cir. 1995) (relying on the dependence of the

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of the appealable order will involve *consideration of factors relevant* to the otherwise nonappealable order.[254] The court also considers whether the non-appealable order proffered as a candidate for pendent appellate jurisdiction is part of the order granting the injunction (although this is not determinative)[255] and other matters that bear on how its discretion should be exercised. These matters include such considerations as whether the proffered issue is "more appropriately considered after a complete airing of all aspects of the dispute between the parties,"[256] whether the non-appealable interlocutory order

appealable issue on the non-appealable); Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 482 (2d Cir. 1995) (asserting pendent appellate jurisdiction over the certification of a defendant class said to be related to the appeal of a preliminary injunction against defendants).

254. *See McCowan*, 908 F.2d at 1104; New York v. Shore Realty Corp., 763 F.2d 49, 51 (2d Cir. 1985). The *Shore Realty* court asserted pendent appellate jurisdiction over a discovery order requiring defendants to answer interrogatories and produce documents concerning their financial condition, as sufficiently related to the merits of the adjudication for violation of earlier injunctive orders requiring defendants to remove hazardous chemicals. The latter orders were part of the same appeal. The exercise of pendent appellate jurisdiction was an alternative holding, the court also holding that, in light of the previous entry of permanent injunctions, the contempt adjudication was a post-judgment proceeding from which an appeal might be taken. *See id*; *see also* San Filippo v. U.S. Trust Co., 737 F.2d 246, 255 (2d Cir. 1984) (expressing willingness to consider otherwise nonappealable issues where there is sufficient overlap in the factors relevant to the appealable and nonappealable issues to warrant exercising plenary authority over the appeal); Marcera v. Chinlund, 595 F.2d 1231, 1236-37 n.8 (2d Cir.), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979) (in conjunction with review of ruling on motion for preliminary injunction, reviewing denials of plaintiff and defendant classes because the rulings reflected the same issues and the same fundamental legal error, such jurisdiction was appropriate to protect the appellate court's earlier mandate in the case, and review would be a wise and time-saving exercise of discretion).

255. The court sometimes exercises pendent appellate jurisdiction over distinct orders, and sometimes declines to exercise pendent appellate jurisdiction over aspects of the same order. *See, e.g.*, Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 692 n.1 (2d Cir. 1980) (declining to exercise jurisdiction over a denial of a motion to dismiss counterclaims in conjunction with the appeal from a preliminary injunction); Drittel v. Friedman, 154 F.2d 653 (2d Cir. 1946) (declining to review denials of defendants' motion for summary judgment in conjunction with review of dismissal of counterclaim that sought an injunction).

256. Sterling Drug v. Bayer AG, 14 F.3d 733, 751 (2d Cir. 1994) (declining to exercise pendent appellate jurisdiction over a denial of attorneys' fees, in conjunction with review of an injunction, where the two matters were not disposed of in the same order and where defendant's bad faith, a factor in the attorneys' fee determination, was more appropriately considered at the end of the litigation). Other circuits consider the same kinds of factors. *See, e.g..*, Fogie v. THORN Americas, Inc., 95 F.3d 645 (8th Cir. 1996) (reviewing summary judgment that formed the basis of an injunction and the rejection of defenses

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"might infect the entire proceeding with error and thus require reversal after large expenditure of judicial and professional time,"[257] whether but for a procedural default the court would have had jurisdiction, whether the issue has been fully briefed and argued, and whether hearing the issue will be a wise and time-saving exercise of discretion.[258] When the requirements of the doctrine are satisfied, the court will exercise even pendent *party* appellate jurisdiction.[259]

The remaining circuits fall into the same general pattern, with slight variations. One pervasively sees the decision to exercise pendent appellate jurisdiction in connection with § 1292(a)(1) appeals when the appealable and non-appealable issues are found to be *inextricably bound*, so that the court must address both to properly resolve the § 1292(a)(1) appeal.[260] Some circuits, such as the Third, at

that were a necessary predicate to entry of the injunction but declining to review findings under RICO or a formula for calculating damages where the district court, on remand, would be making determinations on remaining elements of the RICO claim and determining damages, and immediate review of these matters was not necessary to effective review of the injunction), *cert. denied*, 117 S. Ct. 1427 (1997).

257. McCowan v. Sears, Roebuck & Co., 908 F.2d 1099, 1104 (2d Cir. 1990) (quoting Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1201 (2d Cir. 1970)).

258. *See id.* at 1105; *see also* Rosen v. Siegel, 106 F.3d 28, 33 (2d Cir. 1997) (upon the interlocutory appeal of an injunction barring plaintiff minority shareholder from interfering with corporate management, exercising pendent appellate jurisdiction over the denial of appointment of a receiver for the corporation "to eliminate any doubt as to the propriety of the district court's ruling"). Sometimes the court addresses issues proffered for appeal while disclaiming, or not making entirely clear whether it accepts, jurisdiction. *See, e.g.*, Ferguson v. FBI, 957 F.2d 1059, 1063, 1065, 1069-70 (2d Cir. 1992) (addressing an issue presented by one of the unappealable orders in order to guide the district court on remand, although purporting to exercise its discretion against exercising pendent appellate jurisdiction); Holt v. Continental Group, Inc., 708 F.2d 87, 92 n.4 (2d Cir. 1983) (commenting that review of an order denying a motion for disqualification of counsel is available once the appeal from denial of preliminary injunction has invoked the court's appellate jurisdiction, and rejecting the appeal on the ground that the motion was patently frivolous).

259. *See, e.g.*, McCowan, 908 F.2d at 1104-05.

260. *See, e.g.*, Third Circuit: Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996) (exercising jurisdiction over a class certification as the basis for the grant of a preliminary injunction prohibiting class members from pursuing claims for asbestos-related personal injury in any other court), *aff'd sub nom.* Amchem Prods., Inc., v. Windsor, 117 S. Ct. 2231 (1997) ; Yi v. Maugans, 24 F.3d 500 (3d Cir. 1994) (exercising jurisdiction over denial of class certification as inextricably bound up with denial of preliminary injunction forbidding the INS from deporting any member of the proposed class); Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 189, 208 (3d Cir. 1990) (refusing jurisdiction over class certification where preliminary injunction had to be vacated regardless of whether the class was correctly certified; where there is no need, there is no power, to review a class certification decision); Cohen v. Board of Trustees, 867 F.2d 1455, 1468 (3d Cir.

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one time purported to apply the "inextricably bound" test narrowly, on the ground that § 1292(a)(1) is an exception to the fundamental policy against piecemeal appeals which an appellate court is not authorized to enlarge, and for fear of opening the floodgates.[261] In what generally was regarded as its seminal case, the Third Circuit in *Kershner v. Mazurkiewicz*[262] further argued, as a policy matter, that:

> [E]xtending appellate jurisdiction over interlocutory orders *not* explicitly covered by section 1292(a)(1) could ... prematurely tak[e]

1989) (exercising jurisdiction over a Rule 56(d) liability determination that was inextricably bound up with the immediately appealable grant of injunctive relief); Ortiz v. Eichler, 794 F.2d 889 (3d Cir. 1986) (exercising jurisdiction over grants of partial declaratory relief closely intertwined with the grant, in part, of plaintiffs' requests for injunctive relief); Tustin v. Heckler, 749 F.2d 1055 (3d Cir. 1984) (same as *Hoxworth, supra*); Weiss v. York Hosp., 745 F.2d 786, 803-04 (3d Cir. 1984) (refusing to review federal and state law issues that differed from and were not inextricably bound up with the appeal from an injunction but agreeing to review Rule 54(b) certified final judgments that—in a strange turn of events—favored defendants and certification of which had occurred over plaintiffs' objection, but which were based on the same factual circumstances as the injunction); Allegheny County Sanitary Auth. v. United States Envtl. Protection Agency, 732 F.2d 1167, 1173 (3d Cir. 1984) (where propriety of denial of preliminary injunction rested in part on correctness of dismissal of a count of the complaint, reviewing the latter); Kershner v. Mazurkiewicz, 670 F.2d 440, 449-50 (3d Cir. 1982) (refusing review of denial of class certification contained in same order as a refusal of preliminary injunctive relief where the two issues were separate and distinct).

Seventh Circuit: Elliott v. Hinds, 786 F.2d 298, 301 (7th Cir. 1986) (stating that orders or issues may be reviewed to the extent they bear upon and are central to the grant or denial of injunction); Eighth Circuit: Midwest Motor Express v. Central States Southeast & Southwest Areas Pension Fund, 70 F.3d 1014, 1016 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1704 (1996) (exercising pendent appellate jurisdiction over transfer order that had the effect of refusing an injunction where the motion for injunction and the transfer order were inextricably bound up with one another); Ninth Circuit: Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d 902, 905-06 (9th Cir. 1995) (stating that where summary judgment provided the legal authority to issue or dissolve injunction, it was a necessary predicate to complete review of the injunction or its dissolution and inextricably bound up with the injunction or its dissolution so as to fall within the jurisdiction conferred by § 1292(a)(1); where cancellation of registrations and the dissolution order both rested on summary judgment rulings, the former was appealable as a merits order inextricably bound up with the injunctive ruling); Tracer Research Corp. v. National Envtl. Servs. Co., 42 F.3d 1292, 1294 (9th Cir. 1994) (relying on extension of jurisdiction to all issues that underlie an injunctive order, asserting jurisdiction over order compelling arbitration where trial court relied solely on arbitrator's findings in dissolving injunction and order referring case to arbitration was therefore inextricably bound up with the injunctive order); EEOC v. Recruit U.S.A., Inc., 939 F.2d 746, 757 (9th Cir. 1991) (finding that the court lacked jurisdiction to review a failure to assess sanctions that was not inextricably bound up with the propriety of injunction).

261. *See* Kershner v. Mazurkiewicz, 670 F.2d 440, 446-47 (3d Cir. 1982).

262. 670 F.2d 440 (3d Cir. 1982).

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> matters out of the district judge's hands . . . [and] usurp[] the district court's role [particularly with respect to decisions that the district court might alter before final judgment, such as a class certification decision]. In addition, any rule that encourages a broad range of appeals under section 1292(a)(1) invites abuse. Litigants desiring immediate appellate review could simply encumber their complaints or counterclaims with prayers for injunctive relief. Finally, and most importantly, the [broad view of 1292(a)(1) jurisdiction that allows review of the entire order] could effectively undermine the final decision rule. Once we begin reviewing a broad range of interlocutory orders, we defeat the narrow scope of section 1292(a) that was clearly intended by Congress.[263]

Judge Seitz, concurring, advocated abandoning pendent appellate jurisdiction altogether and holding that § 1292(a)(1) confers jurisdiction to review only the grant or denial of injunctive relief, not other matters within the same order, not ancillary orders, not orders that directly control the grant or denial, and not orders that are inextricably bound-up with such an order. He attempted to distinguish Supreme Court cases such as *Deckert* as establishing an independent exception to § 1291,[264] and viewed his restrictive approach as desirable in light of the Court's restrictive construction of § 1292(a)(1) generally.[265] On the other hand, Judge Higginbotham, Jr., concurring in part and dissenting in part in *Kershner*, argued that the *Kershner* version of pendent appellate jurisdiction is too narrow. He advocated the Second Circuit's approach, interpreted to allow jurisdiction where, because of the intertwining of facts or law, it is useful to reach the non-appealable issue and economical to do so because very little extra work would be required.[266] The Third Circuit has more broadly

263. *Id.* at 449. The court pointed out, however, that its decision in no way impaired the vitality of holdings that an appellate court may consider civil contempt in connection with an appeal from the underlying preliminary injunction and that an appeals court should consider rulings on motions to dismiss for failure to state a claim on which relief can be granted, in conjunction with 1292(a)(1) appeals. *See id.* at 447 & n.8, 449 n.12. *See also* Gould v. Control Laser Corp., 650 F.2d 617, 621 n.7 (5th Cir. 1981) (observing that the court "should not encourage the practice of appending perfunctory requests for injunctive relief to complaints as a device to secure immediate appeal of all orders"); Parks v. Pavkovic, 753 F.2d 1397 (7th Cir. 1985) (noting that this doctrine is subject to "abuse of the tail-wagging-dog variety" which has led to its being given circumscribed application).

264. *Kershner*, 670 F.2d at 451 n.2.

265. *Id.* at 450-52.

266. *Id.* at 452-53. On that reasoning, Judge Higginbotham would have reached the class certification question because both it and the denial of an injunction rested on the

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construed pendent appellate jurisdiction since *Kershner* and has limited *Kershner*'s restrictive holding to the preliminary injunction context.[267]

Just as some circuits have said that the mere fact that two orders arise out of the same factual matrix is not sufficient to confer pendent appellate jurisdiction,[268] some decisions have held a single order not appealable in its entirety merely because a portion of the order was appealable under § 1292(a)(1).[269] The latter decisions may well reflect what the deciding courts regarded as the proper exercise of discretion, however, rather than a view that they lacked *power* to reach unrelated issues;[270] in these same circuits, other decisions take a

difficulty of defining indigence, both issues had been fully briefed, there was an overlap in the relevant factors, and very little extra appellate effort would have been required. *See id.* at 453. *See also* Jackson v. Fort Stanton Hosp. & Training Sch., 964 F.2d 980, 989 (10th Cir. 1992) (recognizing jurisdiction over rulings related but not essential to the validity of an injunction, with discretion turning on whether the issue is sufficiently developed for review, whether review will involve consideration of factors relevant to the appealable issue, and whether judicial economy will be better served by resolving the otherwise nonappealable issue); Colorado v. Idarado Mining Co., 916 F.2d 1486, 1491 (10th Cir. 1990) (same as *Jackson*).

267. *See* United States v. Spears, 859 F.2d 284, 288 (3d Cir. 1988) (so limiting *Kershner*); *see also* National Union Fire Ins. Co. of Pittsburgh v. City Sav., F.S.B., 28 F.3d 376, 382-83 n.4 (3d Cir. 1994) (noting that the court seemed to have broadened the availability of pendent appellate jurisdiction in *Spears*). For Third Circuit decisions upholding pendent appellate jurisdiction in conjunction with § 1292(a)(1) appeals, see *supra* note 260.

268. *See, e.g.*, Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 209 (3d Cir. 1990); Patterson v. Portch, 853 F.2d 1399, 1403 (7th Cir. 1988) ("We can review an unappealable order only if it is so entwined with an appealable one that separate consideration would involve sheer duplication of effort by the parties and this court.").

269. *See, e.g.*, Association of Co-operative Members, Inc. v. Farmland Indus., Inc., 684 F.2d 1134, 1138 (5th Cir. 1982) (declining pendent appellate jurisdiction over issues of trademark infringement and monetary relief, following the principle that jurisdiction under § 1292(a)(1) ordinarily extends only to those parts of an order that relate to the grant of an injunction).

270. *See, e.g.*, Asset Allocation & Management Co. v. Western Employers Ins. Co., 892 F.2d 566, 569 (7th Cir. 1989) (noting the tension between cases indicating that the appellate court can, in its discretion and in the interest of judicial economy, review rulings related, but not essential, to the validity of an injunction and cases implying a lack of power to review rulings not dispositive of an injunction's validity); Liskey v. Oppenheimer & Co., 717 F.2d 314 (6th Cir. 1983) (as matter of discretion and not for lack of power, declining to review dismissal of counts of plaintiff's complaint where dismissal was not inextricably bound up with the § 1292(a)(1) appeal). As described above, the Supreme Court has long found power to review all aspects of the orders appealable under § 1292(a)(1). *See supra* note 163.

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broader view than that described just above.[271] Other circuits (or judges within circuits)[272] approve language from both judicial decisions and commentators that broadly frames the scope of pendent appellate jurisdiction under § 1292(a)(1).[273] They apply the doctrine liberally in circumstances where that seems appropriate to them, and view narrower exercises of jurisdiction as reflecting self-restraint

271. *See, e.g.*, *Hoxworth*, 903 F.2d at 209 (citing *Kershner*, described next); Kershner v. Mazurkiewicz, 670 F.2d 440, 445-46 (3d Cir. 1982) (citing several earlier decisions of the Third Circuit that adopted a broad view of appellate jurisdiction under § 1292); Myers v. Gilman Paper Corp., 544 F.2d 837, 847 (5th Cir. 1977) (reviewing rulings concerning liability and back pay, in conjunction with appeal from consent decree, based on jurisdiction to reach other aspects of an injunctive order).

272. One sees a difference in liberality when one compares some opinions by Judge Posner with some opinions by Judge Flaum, both of the Court of Appeals for the Seventh Circuit, for example. *Compare* Asset Allocation & Management Co. v. Western Employers Ins. Co., 892 F.2d 566, 569 (7th Cir. 1990) (Posner, J.) (stating in dicta that "in the interest of judicial economy, the appellate court can in its discretion review rulings that are related but not essential to the validity of the injunction"), *and* Parks v. Pavkovic, 753 F.2d 1397 (7th Cir.) (Posner, J.) (as an alternative ground, exercising jurisdiction over order directing state to reimburse plaintiffs in conjunction with closely related appeal of permanent injunction against state, where considering them together was more economical than postponing consideration) *with* Qad Inc. v. ALN Assoc., Inc., 974 F.2d 834, 837 (7th Cir. 1992) (Flaum, J.) (declining pendent appellate jurisdiction despite an overlap in the evidence supporting two rulings where the two were not so entwined that separate consideration would involve sheer duplication of effort).

273. *See, e.g.*, Magnolia Marine Transport Co. v. Laplace Towing Corp., 964 F.2d 1571 (5th Cir. 1992) (stating that jurisdiction is not limited to the specific order appealed from and encompasses matters that establish the immediate basis for injunctive relief, and noting, with apparent approval, that federal appellate courts have invoked the doctrine to consider nonappealable issues where sufficient overlap in the relevant factors warrants); Maybelline Co. v. Noxell Corp., 813 F.2d 901, 903 & n.1 (8th Cir. 1987) (stating that court was free to review denial of motion to dismiss for improper venue and to reverse for error in that regard because § 1292(a)(1) appeal presents for review the entire order, not merely the propriety of injunctive relief); *In re* Federal Skywalk Cases, 680 F.2d 1175, 1180-81 (8th Cir. 1982) (asserting jurisdiction over all matters interdependent with injunction against pending state actions, including judge's refusal to disqualify himself); Gaines v. Sunray Oil Co., 539 F.2d 1136, 1140 (8th Cir. 1976) (noting that "although the denial of injunctive relief provides the vehicle for appellate review, our scope of review is not limited to the propriety thereof" but encompasses the entire order); McNally v. Pulitzer Pub. Co., 532 F.2d 69 (8th Cir. 1986) (same, adding that the court may decide the merits of the case and may order dismissal, citing C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 102, at 708 (4th ed. 1983)); Mercury Motor Express, Inc. v. Brinke, 475 F.2d 1086, 1091 (5th Cir. 1973) (exercising pendent appellate jurisdiction over a stay of proceedings, opining that reluctance to consider issues beyond those necessary to decide the matter which supplies appellate jurisdiction is a rule of orderly judicial administration, not a limit on jurisdiction); Allstate Ins. Co. v. McNeill, 382 F.2d 84, 87-88 (4th Cir. 1967).

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which normally is highly desirable, but nonetheless is a matter of wise judicial administration, not of power.[274]

In general, most federal courts of appeals will review aspects of the order granting or denying injunctive relief (and will review separate orders) that involve matters that underpin the decision as to injunctive relief or have a factual, logical, or legal relation to the injunction decision that, in the court's view, renders simultaneous decision judicially economical.[275] They tend to decline the exercise of

274. *See* United States v. Michigan, 940 F.2d 143, 151-52 (6th Cir. 1991). In conjunction with injunctive orders modifying a consent decree, the court entertained a contempt citation and an order mandating the disclosure of privileged peer audits because of their common genesis in the consent decree and because they were inextricably entangled with the injunctive orders. The court approved the broad scope of review described in Wright & Miller, *see supra* text at note 186, and opined that an appeal involving injunctive relief brings the whole record before the appellate court, which may review all matters appropriately raised by the record, including all issues having a common nexus with the injunctive issues. *See Michigan*, 940 F.2d at 151-52. *See also* Showtime/Movie Channel v. Covered Bridge Condominium Ass'n, 881 F.2d 983, 987-88 (11th Cir. 1989), *vacated on other grounds*, 895 F.2d 711 (11th Cir. 1990) (finding broad power to review a case on appeal under § 1292(a)(1), but declining to exercise jurisdiction over a grant of partial summary judgment where the propriety of the injunction could be determined by addressing only one issue going to the merits of the summary judgment and did not depend on a finding of liability as to all of plaintiffs' federal claims); *cf.* Cable Holdings of Battlefield, Inc. v. Cooke, 764 F.2d 1466, 1472 & n.15 (11th Cir. 1985) (exercising jurisdiction over partial summary judgment that was the basis for denial of preliminary injunction, where such served judicial economy); Callaway v. Block, 763 F.2d 1283, 1287-88 n.6 (11th Cir. 1985) (stating that the general rule that reviewing court will go no further into the merits than necessary to decide the interlocutory appeal is a rule of orderly judicial administration, and that § 1292(a)(1) grants jurisdiction to reach the merits, at least where no relevant facts are at issue and the matters to be decided are closely related to the injunctive order so that judicial economy will be served); Parks v. Pavkovic, 753 F.2d 1397 (7th Cir. 1985) (stating that the court of appeals can consider a closely related order if considering them together is more economical than postponing consideration); Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 230 n.17 (6th Cir. 1980) (relying on the broad view of § 1292(a)(1) jurisdiction to decide whether the federal district court had jurisdiction to entertain different claims than those involved in the appeal, and viewing more restrictive practices as matters of judicial administration rather than limits on jurisdictional power), *aff'd*, 456 U.S. 353 (1982); Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1370 (6th Cir. 1977) (same as *Curran*).

275. *See, e.g.*, Chambers v. Ohio Dep't of Human Servs., No. 96-3046, 1998 U.S. App. LEXIS 10456, at *6, 8-14 (6th Cir. May 27, 1998) (reviewing the content of a notice, the order of which was the appealable injunction, because the court could not determine the propriety of the notice order without considering the issues that dictated the content of the notice); Law v. NCAA, 134 F.3d 1010, 1015-16 (10th Cir. 1998) (addressing the summary judgment order that was the principal legal basis for granting the injunction on which the appeal was predicated); Law v. NCAA, 134 F.3d 1025, 1027-28 (10th Cir. 1998)

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pendent appellate jurisdiction where, although there is some overlap in the evidence supporting the two rulings, there is an independent basis on which the immediately appealable order can be decided and the rulings are not so entwined that separate consideration would in-

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(hearing appeal from imposition of interim attorney's fees as inextricably linked with appeal from permanent injunction where only issue was whether plaintiffs were prevailing parties); Quakenbush v. Allstate Ins. Co., 121 F.3d 1372, 1379-80 (9th Cir. 1997) (reviewing the propriety of an arbitration order, where a principal argument on appeal was that an injunction was necessary to protect or effectuate the court's order compelling arbitration); Hook v. Arizona, 120 F.3d 921, 925-26 (9th Cir. 1997) (holding appointment of a special master inextricably bound up with an order modifying a consent decree, against the backdrop of the special master's recommendations concerning such proposed modifications); F.D.I.C. v. Bell, 106 F.3d 258, 262-63 (8th Cir. 1997) (asserting jurisdiction over partial summary judgment for plaintiffs which was basis of interim injunctive relief); Paige v. California, 102 F.3d 1035, 1039 (9th Cir. 1996) (asserting jurisdiction over partial summary judgment for plaintiffs which was basis of interim injunctive relief); Fogie v. THORN Americas, Inc., 95 F.3d 645, 649 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1427 (1997) (asserting jurisdiction over summary judgment for plaintiffs and rejection of defenses, as inextricably bound up with injunctive order, but declining to exercise jurisdiction over issues not necessary to effective review of the injunction and more appropriately reviewed after further action by the trial court); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 278 (8th Cir. 1993) (reviewing order denying motions for summary judgment because of its "interdependence" with denial of preliminary injunction); Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, 970 F.2d 273, 276 (7th Cir. 1992) (exercising pendent jurisdiction over "mirror image" motions for preliminary injunction); Artist M. v. Johnson, 917 F.2d 980 (7th Cir. 1990) (reviewing order denying the bulk of a motion to dismiss, in conjunction with review of preliminary injunction, because evaluation of the likelihood of success on the merits turned, as an initial matter, on whether plaintiffs had stated a claim), *rev'd on other grounds sub nom.* Suter v. Artist M., 503 U.S. 347 (1992); Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc., 874 F.2d 1346, 1352-53 (10th Cir. 1989) (extending appellate jurisdiction to district court's determination on summary judgment that defendant did not have an implied obligation to maintain requirements because the latter was a basis of the district court's holding that the injunctive relief sought was overly broad, and holding that the court could properly reach this issue even though it had an independent basis to affirm denial of plaintiffs' request for a permanent injunction); Asset Allocation & Management Co. v. Western Employers Ins. Co., 892 F.2d 566, 569 (7th Cir. 1989) (reviewing holding of personal jurisdiction as essential to validity of injunction); Union Nat'l Bank v. Federal Nat'l Mortg. Ass'n, 860 F.2d 847, 852 (8th Cir. 1988) (reviewing dismissal of claims found to depend on resolution of the issues necessarily resolved in reviewing the denial of injunctive relief); Payne v. Travenol Lab., Inc., 673 F.2d 798, 808-09 (5th Cir. 1982) (reviewing class definition that underlied the partial denial of an injunction); Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1023 (6th Cir. 1979) (reviewing order dismissing securities law claims where appealable stay order depended on that prior ruling); Devex Corp. v. Houdaille Indus., Inc., 382 F.2d 17, 20 (7th Cir. 1967) (stating that authority to consider propriety of injunction carries with it authority to consider the infringement issue upon which the injunction issued).

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volve largely duplicative effort.[276] Often, particularly pre-*Swint*, courts did not closely distinguish the articulated tests for pendent appellate jurisdiction; they cited a number of formulations and collectively found them to be satisfied or not satisfied. Consequently, it is difficult to determine and describe precise circuit alignments.

* * *

This discussion illustrates that pendent appellate jurisdiction has long been synonymous with determining the scope of jurisdiction that is statutorily authorized by § 1292(a)(1). It provides the basis for showing that the § 1291-based doctrine is a parallel development that used the same reasoning and the same legal tests, at least until the Court's decision in *Swint*, and is not at all an aberration from interlocutory appeals law generally. The discussion of pendent appellate jurisdiction in the context of § 1292(a)(1) appeals also shows both the utility and acceptance of pendent appellate jurisdiction that reaches beyond "inextricably intertwined" issues and beyond what is necessary to ensure meaningful review.

Taken to their extreme, the views expressed by the Court in *Finley*[277] and in *Swint*[278] indicate that if pendent appellate jurisdiction is legislatively conferred, it is legitimate, whereas if it is a product of common law, it is worse than suspect.[279] I submit that, being the

276. *See, e.g.*, California *ex rel.* California Dep't of Toxic Substance Control v. Campbell, 138 F.3d 772, 778-79 (9th Cir. 1998) (stating that despite overlap in facts, order holding defendants liable under federal "CERCLA" was not inextricably intertwined with injunction issued based upon finding of liability on state law nuisance claim); Kaimowitz v. Orlando, 122 F.3d 41 (11th Cir. 1997) (holding that court lacked jurisdiction to review the denial of motion to amend the complaint), *cert. denied*, 118 S. Ct 1842 (1998); Innovative Health Systems v. City of White Plains, 117 F.3d 37, 49 (2d Cir. 1997) (declining pendent appellate jurisdiction over partial denial of motion to dismiss); Qad, Inc. v. ALN Assoc., Inc., 974 F.2d 834, 836-37 (7th Cir. 1992) (so characterizing the relationship between a summary judgment ruling and the dissolution of a preliminary injunction); Shaffer v. Globe Protection, Inc., 721 F.2d 1121, 1124-25 (7th Cir. 1983) (finding denial of injunction independent of, and not so inextricably tied to, dismissal of conspiracy allegations and denial of class certification as to warrant review of the latter two rulings); *see also* Silver Star Enterprises, Inc. v. M/V Saramacca, 19 F.3d 1008, 1014 (5th Cir. 1994) (declining pendent appellate jurisdiction under 28 U.S.C. § 1292(a)(3), where ruling that defendant's owner had to post a bond was not inextricably entwined with the immediately appealable order to sell a ship).

277. Finley v. United States, 490 U.S. 545 (1989).

278. Swint v. Chambers County Comm'n, 514 U.S. 35 (1995).

279. *See supra* text at notes 13-35, 56-60.

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product of statutory interpretation, the pendent appellate jurisdiction exercised under § 1292(a)(1) is a little of each, and its legitimacy should remain untarnished. Despite the broad implications one might draw from *Finley* and *Swint*, it is unclear whether the Court intended to draw into question the scope of jurisdiction (the pendent appellate jurisdiction) that it and the intermediate appellate courts have exercised under § 1292(a)(1). Since *Swint*, the Supreme Court has decided few cases concerning § 1292(a). Although not explicitly admitting it, the Court exercised pendent appellate jurisdiction over class certification issues in *Amchem* in the context of a § 1292(a)(1) appeal.[280] The federal appeals courts hearing these cases appear, for the most part, to be operating just as they did before *Swint*, and not to view *Swint* as governing the scope of their § 1292(a)(1) jurisdiction.[281] However, often the issues over which courts of appeals exercise jurisdiction and the articulation of the tests that they use in determining whether they can exercise jurisdiction "comply" with *Swint*, and it is merely the courts' failure to cite *Swint* from which one can infer that they do not view *Swint* as governing the scope of their § 1292(a)(1) jurisdiction.[282] A few of the courts of appeals have ex-

280. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997). *Amchem* is discussed in text at notes 191-96, *supra*.

281. Thus, making no reference to *Swint*, the First Circuit reviewed the denial of Rule 60(b) motions to vacate certain consent judgments although this did not end the proceedings, where an immediately appealable preliminary injunction entered in aid of enforcement was "colorably dependent" on the denial. *See* Xerox Fin. Servs. Life Ins. Co. v. High Plains Ltd. Partnership, 44 F.3d 1033, 1038 (1st Cir. 1995); *see also* Midwest Motor Express v. Central States Southeast & Southwest Areas Pension Fund, 70 F.3d 1014 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1704 (1996) (making no mention of *Swint*); Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d 902 (9th Cir. 1995) (making no mention of *Swint*).

282. *See, e.g.*, F.D.I.C. v. Bell, 106 F.3d 258 (8th Cir. 1997) (reviewing grant of partial summary judgment that defendants were liable for fraudulently transferring assets, as a necessary predicate for reviewing for abuse of discretion the decision enjoining defendants from encumbering or transferring assets, not citing *Swint*); Webb v. Missouri Pac. R.R. Co., 98 F.3d 1067 (8th Cir. 1996) (declining to consider whether the district court had improperly certified a plaintiff class, as not necessarily intertwined with the validity of an injunction, where the court had held the injunction to have been an abuse of discretion because predicated on a stale record; not citing *Swint*); Fogie v. THORN Americas, Inc., 95 F.3d 645, 649 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1427 (1997) (exercising jurisdiction over the propriety of summary judgment in favor of plaintiffs because that liability determination and the rejection of certain defenses were the basis of the injunction on appeal; declining, in the court's discretion, to exercise jurisdiction over other issues resolution of which was not necessary to effective review of the injunctive relief granted be-

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pressly acknowledged that *Swint* casts doubt on their practice of exercising pendent appellate jurisdiction in the context of § 1292(a)(1) appeals except when the requirements for such jurisdiction suggested in *Swint* are met.[283]

In my view, because of the shadow of doubt cast by *Swint*, it would be desirable for the Court to re-affirm the courts' power to entertain simultaneous appeals of all aspects of the orders made appealable by the statute *and* of additional orders that are the predicate for or are otherwise inextricably entwined with injunctive orders *or* whose simultaneous review serves sound judicial administration by virtue of other factual, legal or logical relationships between those orders and the grant or denial of injunctive relief. After the discussion of the pendent appellate jurisdiction law developed under § 1291, in conjunction with the collateral order doctrine, I will propose more specifically what the contours of the jurisdiction should be. I can say the following now, however.

The appealability of all aspects of the orders appealable under § 1292(a)(1) follows from the language of the statute.[284] The appealability of related orders is not precluded by the statutory language or anything in its legislative history, is part of the history of § 1292(a)(1)'s interpretation, and often is consistent with sound judicial policy, for the courts of appeals generally review separate orders only when effective review of the injunctive aspects of a case depends upon an enlarged reviewing power *or* when strong arguments for judicial economy, grounded in overlapping questions of law or fact, dictate expanded review. The decisions of the courts of appeals recognizing pendent appellate jurisdiction under 28 U.S.C. § 1292(a)(1), and judiciously exercising the discretion to exercise that power, thus make good sense as a matter of judicial administration. In their own

low; not citing *Swint*.)

283. *See, e.g.*, United States v. City of Hialeah, 140 F.3d 968, 992 (11th Cir. 1998) (Kravitch, J., dissenting) (noting that although the Court in *Swint* addressed the scope of appellate jurisdiction in connection with collateral orders, the language of its opinion was broad enough to encompass appeals brought pursuant to § 1292(a)(1)); Underwood v. Hilliard, 98 F.3d 956, 964 (7th Cir. 1996) (in the context of a § 1292(a)(1) appeal, observing that, after *Swint*, the doctrine of pendent appellate jurisdiction hangs by a thread, and that under the usual formulations the doctrine would not permit jurisdiction over the civil contempt here sought to be appealed together with the underlying injunctive order that the contempt sought to enforce); Paige v. California, 102 F.3d 1035, 1039 (9th Cir. 1996); *see also* Wyatt *ex rel.* Rawlins v. Fetner, 92 F.3d 1074, 1081 (11th Cir. 1996) (citing *Swint*, prefaced by "*see also*," as a case discussing the doctrine of pendent appellate jurisdiction).

284. For the language of the statute, *see* note 16, *supra*.

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way, they further the policy of avoiding piecemeal appeals, for they keep together the appeal of issues that because of their factual, legal or logical relationship should be heard simultaneously.[285] When the requirements of the doctrine are met, it is antithetical to, rather than in furtherance of, the policies behind the final judgment rule to require the courts to postpone review of such related issues until after final judgment.

It is also significant that the interpretation of § 1292(a)(1) to empower the appellate courts to hear issues outside the literal scope of the injunctive matters described there has a very long pedigree, going back to the 1890's, and that Congress has shown no signs of dissatisfaction with this construction of the statute. By analogy to the reasoning of the Court in *Ankenbrandt v. Richards*,[286] more than a century has elapsed since some of the Supreme Court precedents broadly construing the scope of appellate jurisdiction available under § 1292(a)(1) (and decades have passed since still more liberal construction by the Court and the courts of appeals) without any intimation of Congressional dissatisfaction. Had Congress been dissatisfied with the courts' interpretation, it could have expressed that dissatisfaction when it was amending the statute in other respects. Instead, it was silent with respect to the scope of review being exercised under § 1292(a)(1) and, within the past few years, conferred rulemaking power to *increase* the kinds of orders interlocutorily appealable.[287] "Considerations of *stare decisis* have particular strength in this context, where 'the legislative power is implicated, and Congress remains free to alter what we have done.'"[288] The Court should therefore accept the broad interpretation of § 1292(a)(1) as a correct interpretation of Congressional intent.

Certainly, the extreme view that there should be no pendent appellate jurisdiction of any dimension in conjunction with § 1292(a)(1) appeals seems impracticable and to undercut a grant of appellate review that is as central to our system as is the final judgment rule. In its minimalist form, the pendent appellate jurisdiction doctrine exists to ensure that *effective* review will given to those grants and denials

285. *Cf. infra* text at note 321.

286. 504 U.S. 689 (1992) (where the Court reaffirmed the "domestic relations exception" to diversity jurisdiction).

287. *See supra* text at notes 85-89.

288. *Ankenbrandt*, 504 U.S. at 700 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989)).

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of injunctions of which the statute speaks. If one cannot review the orders that are the predicate for such injunctive rulings, how can one meaningfully review the injunctive orders themselves? More liberal applications of pendent appellate jurisdiction are justifiable so long as factual or legal overlap in issues generates substantial judicial economies in simultaneous review, while the requirement of such overlap prevents undue erosion of the final judgment rule.

Other concerns that some courts and individual judges have expressed can adequately be handled through the discretion of the appellate court. For example, when an exercise of pendent appellate jurisdiction would prematurely take a matter out of the district judge's hands and usurp her role, particularly as to a matter on which she might alter her decision, the court can decline to hear the pendent matter.[289] And when the court suspects abuse of the appellate process through injection of a request for injunctive relief as a vehicle to obtain interlocutory review of other issues, the court can decline to hear the pendent matter.[290]

289. *See, e.g.*, Paige v. California, 102 F.3d 1036, 1039 (9th Cir. 1996) (declining jurisdiction over denial of partial summary judgment to defendants where facts were not sufficiently developed to allow resolution); Jackson v. Fort Stanton Hosp. & Training Sch., 964 F.2d 980, 990 (10th Cir. 1992) (declining to review remedial issues that would be further developed before the district court, having noted that among the factors that enter into whether to exercise pendent appellate jurisdiction is whether the otherwise nonappealable issue is sufficiently developed for review, factually and legally); *cf.* Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc., 874 F.2d 1346, 1352 (10th Cir. 1989) (exercising pendent appellate jurisdiction over determination on summary judgment, in conjunction with review of denial of permanent injunctive relief, where issues could be decided without further development of the record and it would waste judicial resources not to review the ruling at that time).

290. *See, e.g.*, Shaffer v. Globe Protection, Inc., 721 F.2d 1121, 1123 (7th Cir. 1983) (declining to review dismissal of conspiracy claim and denial of class certification because of the "perfunctory nature of [the] request for preliminary injunctive relief"); Gould v. Control Laser Corp., 650 F.2d 617, 621 n.1 (5th Cir. 1981) (where the lower court granted summary judgment on two of three counts of a complaint, only superficially addressing the summary judgment orders to the extent that they denied the requested injunctive relief because it did not want to "encourage the practice of appending perfunctory requests for injunctive relief to complaints as a device to secure immediate appeal of all orders"). For dicta to this effect, see Gilda Marx, Inc. v. Wildwood Exercise, Inc., 85 F.3d 675, 679 (D.C. Cir. 1996) ("[P]arties should not be encouraged to bring insignificant, but final, matters before this court as mere vehicles for pendent review of numerous or complex orders that are not independently appealable."); Volvo N. Am. Corp. v. Mens Int'l Prof'l Tennis Council, 839 F.2d 69, 76 n.6 (2d Cir. 1988) (explaining decision not to review contractual issues not related to appealable antitrust claim as based on concern that a floodgate be opened that would bring many pretrial orders into the exception provided by sec-

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C. § 1292(b)

The law of § 1292(b), as developed by the courts, permits courts of appeals to exercise jurisdiction, before final judgment, over *any* question that happens to be within the scope of the order that contains the question(s) certified for immediate appeal by a district court, regardless of whether those questions bear any logical, legal or factual relation to the certified question(s). Indeed, the Supreme Court recently reaffirmed this principle in *Yamaha Motor Corporation v. Calhoun*.[291] It there stated that:

> As the text of § 1292(b) indicates, appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court. ... [T]he appellate court may address any issue fairly included within the certified order because "it is the *order* that is appealable, and not the controlling question identified by the district court."[292]

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tion 1292(a)(1)); Parks v. Pavkovic, 753 F.2d 1397, 1402 (7th Cir. 1985) (stating the pendent appellate jurisdiction doctrine "is subject to abuse of the tail-wagging-the-dog variety, which has led to its being given a circumscribed application").

291. 516 U.S. 199 (1996).

292. *Id.* at 205 (quoting 9 MOORE, *supra* note 190, para. 110.25[1], at 300). Pursuant to that conclusion, the Court in *Yamaha* approved the action of the Court of Appeals for the Third Circuit which, rather than address the certified questions concerning recovery of damages in a maritime cause of action, determined "an anterior issue [that] was pivotal": whether federal maritime law or state wrongful death and survival statutes supplied the rule of decision and the remedial prescriptions. *Id.* at 204. The Court itself then addressed that latter question. *See id.* at 204-16; *see also* Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1365 (11th Cir. 1997) (stating that court lacked power to limit its jurisdiction to certain aspects of sanction order that was certified under § 1292(b)); Kemp v. International Bus. Mach. Corp., 109 F.3d 708, 711 (11th Cir. 1997) (addressing subject matter jurisdiction, decided by the district court in the same order as the decision concerning the preemptive effect of ERISA, which was certified for appeal); Armstrong v. Executive Office of the President, 1 F.3d 1274, 1290 (D.C. Cir. 1993) (finding jurisdiction to hear cross-appeal because it challenged aspects of the same order that was the subject of the main § 1292(b) appeal); *In re* School Asbestos Litig., 789 F.2d 996, 1002 (3d Cir. 1986) (quoting the oft-invoked principle that on a § 1292(b) appeal, the courts consider all grounds that might require a reversal).

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Section 1292(b) does not even require the district court judge to precisely frame the certified question.[293]

This is another example of legislated pendent appellate jurisdiction, or, more accurately I believe, another example of pendent appellate jurisdiction that is a product of judicial interpretation of legislative language. Section 1292(b) provides in pertinent part:

> *When* a district judge, in making in a civil action *an order* not otherwise appealable under this section, shall be of the opinion that such order *involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation*, he shall so state in writing in such order. *The Court of Appeals* which would have jurisdiction of an appeal of such action *may* thereupon, in its discretion, *permit an appeal to be taken from such order*, if application is made to it within ten days after the entry of the order . . . .[294]

This language could reasonably be interpreted to allow an immediate appeal from an order only insofar as it involves controlling questions of law that have been certified by the district court. I need not (and would not) take the position that that would be a preferable understanding of the statute; the fact that it is a plausible reading brings home that judicial interpretation is at play when the statute is interpreted as it has been. More than legislative action is involved. I emphasize this for two reasons: first, to make the point that if such

293. *See, e.g.*, *In re* Oil Spill by the "Amoco Cadiz," 659 F.2d 789, 793 n.5 (7th Cir. 1981) (stating that because nature and scope of appellate review are not determined by the district court's certification, it was not essential to identify the precise questions certified); SCM Corp. v. Xerox Corp., 474 F. Supp. 589 (D. Conn. 1979), *aff'd*, 645 F.2d 1195 (2d Cir. 1981) (very broadly certifying the question to be whether plaintiff was entitled to judgment for $111.3 million; the court of appeals accepted the appeal); 16 WRIGHT ET AL., *supra* note 62, § 144, at 3929 ("[I]t has been ruled that the court of appeals may review the entire order, either to consider a question different than the one certified as controlling or to decide the case despite the lack of any identified controlling question.") (citations omitted). Even when interlocutory appeal statutes do require specific questions of law to be certified, *see, e.g.*, 28 U.S.C. § 1254(2) (conferring jurisdiction on the Supreme Court when a court of appeals certifies a question of law as to which it desires instructions), the statutes may authorize review of matters beyond the certified questions. Section 1254(2), for example, gives the Court jurisdiction to hear "cases in the court of appeals" when an appeals court certifies a question as described above. Upon such certification, the statute expressly authorizes the Court to require the entire record to be sent up for decision of the entire matter in controversy. 28 U.S.C. § 1254(2); *see also* SUP. CT. R. 19.2 (to the same effect).

294. 28 U.S.C. § 1292(b) (1994) (emphasis added).

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judicial complicity in the creation of pendent appellate jurisdiction is proper in the contexts of § 1292(a-b), then judicial interpretation that allows pendent appellate jurisdiction in the context of § 1291 interlocutory appeals should not be beyond the pale; second, to ask whether the pendent appellate jurisdiction permissible on a § 1292(b) appeal must stop at the boundaries of the order in which the certified questions may be found. According to dicta in the *Yamaha* case, "court[s] of appeals may not reach beyond the certified order to address other orders made in the case."[295] Yet, in that very case, the court of appeals and the Supreme Court did, in a sense, reach beyond the certified order. As explained in the Brief for the United States as Amicus Curiae Supporting Petitioners, the certified order dismissing various damage claims as inconsistent with federal law[296] was separate from the order that declared that plaintiffs' right to recover would be determined under federal admiralty law.[297] But it was the correctness of the latter conclusion that the court of appeals and the U.S. Supreme Court reviewed on the § 1292(b) appeal. Presumably, in the Court's view, this was defensible because the certified order was necessarily based on the antecedent holding that state remedies were inapplicable,[298] but the Court did not explain its action. Even if the rationale suggested above accurately reflects the Court's thinking, the Court's actions demonstrate that the review permissible pursuant to § 1292(b) *does* extend beyond the certified order, at least to other orders that provide the underpinnings of the certified order.[299]

295. *Yamaha*, 316 U.S. at 205; *accord* 16 WRIGHT ET AL., *supra* note 62, § 3929, at 143 ("[T]he scope of the issues open to the court of appeals is closely limited to the order appealed from. The court of appeals will not consider matters that were ruled upon in other orders, and even more clearly will not consider matters not yet ruled upon by the district court.") (citations omitted).

296. The district court had held that general maritime law prohibited recovery for lost future wages and punitive damages, but permitted damages for loss of society and loss of support and services. Brief of Respondents at 7, *Yamaha* (No. 94-1387).

297. Brief for the United States as Amicus Curiae Supporting Petitioners at n.16, *Yamaha* (No. 94-1387).

298. *See id.*

299. *See generally* Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996); *see also* Ivy Club v. Edwards, 943 F.2d 270, 275 (3d Cir. 1991) (deciding whether case was moot as necessary to decide the appeal where certified question was whether plaintiff had waived its right to litigate in federal court); *In re* Cinematronics, Inc., 916 F.2d 1444, 1448 (9th Cir. 1990) (stating that where certified order permitted jury trial in what lower court viewed as "core" bankruptcy proceeding, appeals court properly could consider whether proceeding was "core"); Simon v. G.D. Searle & Co., 816 F.2d 397, 400 (8th Cir. 1987)

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Certainly, it would go beyond any supportable reading of the statute to interpret § 1292(b) to permit a court of appeals to hear any and all matters theretofore decided, when a § 1292(b) certification has been made. Such a regime would fly in the face of the legislative history of § 1292(b), which includes rejection of a proposal to vest discretion to hear an interlocutory appeal solely in the courts of appeals,[300] but no one now proposes such a scheme. What of rulings that are inextricably intertwined with the independently appealable decisions, or whose review is necessary to ensure meaningful review of the independently appealable decisions?[301] Can they be heard in conjunction with a § 1292(b) appeal? Might they be "issue[s] fairly included within the certified order," within the meaning of that phrase as used by the Court in *Yamaha*,[302] even though not literally included within the certified order? It certainly seems they are.[303] For the rea-

(stating in dicta, on § 1292(b) appeal, that court is free to consider questions that are basic to and underlie the questions certified); 9 MOORE, *supra* note 190, para. 110.25[1], at 300-01 (stating that on § 1292(b) appeal, appeals court may address any issue necessary to decide the case).

300. The original proposal studied by the Judicial Conference would have allowed a court of appeals to authorize an appeal when it alone determined the appeal to be "necessary or desirable to avoid substantial injustice." Judicial Conference of the United States, Report of the Proceedings of a Special Session, March 20-21, 1952, at 203 (published with Judicial Conference of the United States, [1952] Annual Report); *see also* Swint v. Chambers County Comm'n, 514 U.S. 35, 47 n.4 (1995). *But see* Katz v. Carte Blanche Corp., 496 F.2d 747, 755 (3d Cir. 1974) (en banc) (stating that in a § 1292(b) appeal, a court of appeals can review every order which, if erroneous, would be reversible error on final judgment, because one of § 1292(b)'s purposes is to avoid unnecessary trials).

301. That language describes the forms of pendent appellate jurisdiction on which the Court in *Swint* did not firmly slam the door. Petitioners in the *Yamaha* case took the position in their brief that the court of appeals properly addressed the question whether admiralty jurisdiction attached to several counts of the complaint because that question "was both included within the district court's order certified for appeal and so inextricably intertwined with the district court's certified question as to be necessary to ensure meaningful review of the latter." Brief for the Petitioners at 27, *Yamaha* (1996) (No. 94-1387). I am suggesting that those tests properly may be alternative rather than cumulative. The courts generally, and the Supreme Court in particular, have not required inextricable intertwining in addition to presence in the certified order. *See, e.g.*, Mills v. Electric Auto-Lite Co., 396 U.S. 375, 390 n.13 (1970) (in reviewing what constituted a cause of action under § 14 of the Securities Exchange Act of 1934, the Court also addressed the plaintiff's entitlement to an award of attorney's fees finding that it was "sufficiently close" to the appealable issue).

302. *Yamaha*, 516 U.S. at 205.

303. *Yamaha* cited *United States v. Stanley*, 483 U.S. 669 (1987), discussed in text at notes 34-35, *supra*, for the proposition that a court of appeals may not reach beyond the certified order to address other orders made in a case. *Yamaha*, 516 U.S. at 205. The

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sons elaborated above, the Supreme Court's decision in *Yamaha Motors* itself supports that proposition.[304] Many decisions of the federal courts of appeals agree.[305]

Moreover, the appellate courts have long taken the position that they may address any issue necessary to decide, or even "material to," the appeal from a certified order.[306] Thus, issues related to any of

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Court could find, however, that neither of the two descriptions of exceptional circumstances was present in *Stanley*, since the order containing the certified question related to plaintiff's *Bivens* claim, and the other orders that plaintiff sought to have the court review related to long-dismissed FTCA claims that were asserted against a party, the United States, that was not party to the claims at issue in the certified order. *See Stanley*, 483 U.S. at 678. The rejection of pendent appellate jurisdiction in *Stanley* therefore would not be inconsistent with the view that § 1292(b) authorizes pendent appellate jurisdiction over rulings that a) are inextricably intertwined with the question certified for review under § 1292(b) (or even with independent questions appealed as part of the same order), or b) whose review is necessary to ensure meaningful review of the question certified for review under § 1292(b) (or even of independent questions appealed as part of the same order).

304. *See supra* text at 292. The second edition of Moore's treatise opined that "the permissible scope of review may vary to some extent with the statute under which the appeal is taken," 9 MOORE, *supra* note 190, para. 110.25[1], at 291, and found that the Supreme Court has taken a somewhat more restrictive position in delineating the scope of review when appeals are taken pursuant to 28 U.S.C. § 1292(b) than when taken under 28 U.S.C. § 1292(a)(1). *See id.* at 298. While this is a reasonable inference from the decided cases, the Court has not chosen to decide cases that would test the outer limits of the scope of review upon a § 1292(b) appeal.

305. *See, e.g.*, Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1365 (11th Cir. 1997) (exercising pendent appellate jurisdiction over order compelling discovery because it was inextricably intertwined with certified sanctions order and meaningful review of the latter required review of the former); Hillman v. Resolution Trust Corp., 66 F.3d 141, 144 (7th Cir. 1995) (in reviewing whether a statute or a Supreme Court decision precluded a claim of fraud based on a memorandum, the court also decided the substance of the fraud claim as a "pertinent issue[] reflected in the district court's order" since the only evidence of fraud was the memorandum); Kline v. First Western Gov't Sec., Inc., 24 F.3d 480, 485, 488 (3d Cir. 1994) (when reviewing two certified questions concerning attorney liability for opinion letters, the court also reviewed the reasonableness of plaintiff's reliance on the opinion letters as "necessary to decide the appeal"); Dailey v. National Hockey League, 987 F.2d 172, 175 (3d Cir. 1993) (stating that where certified question was whether ERISA claim precluded dismissal of action under *Princess Lida* doctrine, court was entitled to determine whether that doctrine applied); Walsh v. Ford Motor Co., 807 F.2d 1000, 1002 n.2 (D.C. Cir. 1986) (stating that on § 1292(b) appeal, all questions of law necessary to proper disposition of the appeal are decided; in reviewing class certification, addressing on appeal a number of legal issues other than the one certified as controlling).

306. *See, e.g.*, *In re* Cinematronics, Inc., 916 F.2d 1444, 1449 (9th Cir. 1990) ("[w]e may address those issues material to the order from which appeal has been taken"); United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.2 (11th Cir. 1990) (reviewing decision that creditor was not owner/operator of facility at relevant time, although per-

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the issues decided in a § 1292(b) order, but not inextricably intertwined with or essential to ensure meaningful review of the independently appealable (*i.e.*, certified) questions may be reviewed, at least in the opinion of several circuit courts of appeals.[307] Consequently, appeals courts do exercise a form of pendent appellate jurisdiction when they hear appeals from orders certified under 28 U.S.C. § 1292(b), and they do so with Supreme Court approval on at least some occasions. Notwithstanding intimations from the Court in *Swint* that such jurisdiction is illegitimate,[308] the Court's own jurispru-

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mission had not been sought to raise that point on § 1292(b) appeal, where the issue was material to the certified order); *cf.* Adkinson v. International Harvester Co., 975 F.2d 208, 211 n.4 (5th Cir. 1992) (in reviewing the certified question whether a general rule of contribution and indemnity applied to a claim of breach of the implied warranty of merchantability, holding that the court could not review whether the defendant timely notified the plaintiff of breach of the implied warranty and whether any such breach proximately caused the judgment against the defendant because it had "jurisdiction to hear only questions that [were] material to the lower court's certified order"); Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 629 (1975) (stating that allowing courts to review issues material to certified questions serves efficiency while limiting the scope of review to only such material issues helps to prevent frivolous appeals).

307. *See, e.g.*, Hillman v. Resolution Trust Corp., 66 F.3d 141, 143-44 (7th Cir. 1995) (without addressing the certified question whether a statute and a case precluded the plaintiff's fraud claim, reviewing the substance of the fraud claim as a "pertinent [issue] reflected in the district court's order" that provided a basis for dismissal of the action); Morse/Diesel, Inc. v. Trinity Indus., Inc., 859 F.2d 242, 249 (2d Cir. 1988) (in finding § 1292(b) jurisdiction over a portion of a certified order, the court stated that the close relationship between the certified portion of the order, dealing with liability, and the question of liability for contribution, reinforced its view that it should exercise its discretion to hear both issues); *In re* School Asbestos Litig., 789 F.2d 996, 1002 (3d Cir. 1986) (in exercising jurisdiction over all aspects of an order certifying classes under various subsections of FED. R. CIV. P. 23, where the certified question focused on the applicability of the Anti-Injunction Act to Rule 23(b)(1)(b) mandatory classes, observing that because so many of the factors relevant to the (b)(1)(b) class also were crucial to the (b)(2) and (b)(3) class certifications, resolving some of the questions now, while reserving others until after final judgment, would be neither practical nor desirable; hence, the court had jurisdiction to consider all facets of the class certification order); Ducre v. The Executive Offices of Halter Marine, Inc., 752 F.2d 976, 983 n.16 (5th Cir. 1985) (in determining the defendant employers' liability for alleged intentional torts under Louisiana's Workmen's Compensation Act, deciding whether the Act precluded indemnity and contribution claims against those employers because the latter issues were included within the order and provided grounds for reversal); Walsh v. Ford Motors Co., 807 F.2d 1000 (D.C. Cir. 1986) (in reviewing the certified question whether the Magnuson-Moss Act required class representatives to send individual notice to all ascertainable class members, vacating the district court's finding that common questions of law or fact predominated).

308. *See* United Indus. v. Eimco Process Equip. Co., 61 F.3d 445 (5th Cir. 1995) (in

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dence demonstrates that pendent appellate jurisdiction under § 1292(b) is accepted and acceptable, within uncertain limits. Of course, the appellate courts may refrain from exercising jurisdiction over issues that they conclude are not closely related to the certified controlling question, even if decided in the same order; over issues that because of their factual rather than legal nature and the state of the record, or for other reasons, are not yet well-positioned for review; and over issues that the district court has explicitly declined to certify for interlocutory appeal.[309]

* * *

This discussion reveals that pendent appellate jurisdiction has long been an aspect of determining the scope of jurisdiction that is statutorily authorized by § 1292(b). It provides further basis for concluding that the § 1291-based doctrine is a parallel development that used the same reasoning and the same legal tests, at least until the Court's decision in *Swint*, and is not at all an aberration from interlocutory appeals law generally. The discussion of pendent appellate jurisdiction in the context of § 1292(b) appeals also shows both the utility and acceptance of pendent appellate jurisdiction that reaches beyond "inextricably intertwined" issues and beyond what is necessary to ensure meaningful review.

As was argued above regarding § 1292(a)(1), the pendent appellate jurisdiction exercised under § 1292(b) has been the product of statutory interpretation, and its legitimacy should remain untarnished. Despite the broad implications one might draw from *Finley*

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dicta as to § 1292(b) where the case was on appeal pursuant to a Rule 54(b) certification, citing *Swint* and *Abney* in support of the proposition that the court had no jurisdiction to consider orders outside the scope of certification; not discussing the relation, if any, between the certified orders and the rulings proposed to be heard as a matter of pendent appellate jurisdiction).

309. *See, e.g.*, PYCA Indus. v. Harrison County Waste Water Management Dist., 81 F.3d 1412, 1421-22 & n.13 (5th Cir. 1996) (declining jurisdiction over grant of summary judgment because the relevant issues were not inextricably intertwined with the certified controlling issues and were not part of the same order); Sperling v. Hoffman-La Roche, Inc., 862 F.2d 439, 443-44 (3d Cir. 1988) (where all three of the factors mentioned in the text influenced the decision not to review an order declining to void consents of opt-in plaintiffs), *aff'd on other grounds*, 493 U.S. 165 (1989); Federal Deposit Ins. Corp. v. Dye, 642 F.2d 833, 837 & nn. 6-7 (5th Cir. 1981) (declining to review denials of summary judgment that were unrelated to the certified aspects of the order and bore upon separate claims).

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and *Swint*, it is unclear whether the Court intended to draw into question the scope of jurisdiction (the pendent appellate jurisdiction) that it and the intermediate appellate courts have exercised under § 1292(b). The only case decided by the Supreme Court since *Swint* which discusses the scope of review under § 1292(b) is the *Yamaha* case, and it did not refer to *Swint* in explicating the scope of appellate review available under § 1292(b). The federal appeals courts hearing these cases appear, for the most part, to be operating just as they did before *Swint*, and appear not to view *Swint* as governing the scope of their § 1292(b) jurisdiction. A few of the courts of appeals, however, have seen that *Swint* may cast doubt on the practice of exercising pendent appellate jurisdiction in the context of § 1292(b) appeals.[310]

Yamaha re-affirmed the courts' power to entertain simultaneous appeals of all aspects of the orders appealable under the § 1292(b). Because of *Swint*, the Court should also re-affirm the power of the federal courts to address additional orders that are the predicate for or are otherwise inextricably entwined with certified orders, *or* whose simultaneous review serves sound judicial administration by virtue of the factual, legal or logical relationship between those orders and the § 1292(b) certified order. Later in the Article, I will propose more specifically what the contours of the jurisdiction should be. For the present, I can say the following.

As we have seen, the appealability of all aspects of certified orders follows from the language of the statute. The appealability of related orders is not precluded by the statutory language, and may well not be inconsistent with anything in § 1292(b)'s legislative history or with the statutory structure. While one *could* view the dual certification requirement and Congress's rejection of a proposal to allow the appellate courts unilateral power to certify appeals for interlocutory hearing as reflecting Congressional intent to disallow pendent appellate jurisdiction in the context of § 1292(b) appeals,

310. *See, e.g.*, Durkin v. Shea & Gould, 92 F.3d 1510 (9th Cir. 1996) (citing "*see also Swint*" in support of conclusion that the court lacked jurisdiction over the appeal from a denial of summary judgment on fiduciary duty and fraudulent transfer claims against certain shareholders and their attorneys when hearing a 1292(b) appeal from the denial of a motion for summary judgment or partial summary judgment on a malpractice claim against Shea & Gould in a companion case), *cert. denied*, 117 S. Ct. 1553 (1997); Sevier v. City of Lawrence, 60 F.3d 695, 701 (10th Cir. 1995) (dismissing appeal after holding that it lacked jurisdiction; indicating in dicta that *Swint* narrowed pendent appellate jurisdiction in § 1292(b) cases).

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one need not read the statute or its history that way. *To recognize appellate power to hear related issues on a pendent basis when a district court, in its sole discretion, has decided to certify an interlocutory appeal is not the same as to confer unilateral power on the appellate courts to decide whether to permit any interlocutory appeal at all.* Once the district court has chosen to authorize the appeal and the appellate courts has accepted it, which is *not* something that occurs with great frequency,[311] the interests in effective review, judicial economy, and avoiding piecemeal review of ripe issues all argue for recognition of power to exercise pendent appellate jurisdiction.

As the earlier description of decided cases demonstrates, the courts of appeals generally have reviewed issues beyond the certified order only when *effective* review of that order depended upon an enlarged reviewing power *or* when strong arguments for judicial economy, grounded in overlapping questions of law or fact, dictated expanded review. The decisions of the courts of appeals recognizing pendent appellate jurisdiction under 28 U.S.C. § 1292(b), and judiciously exercising the discretion to exercise that power, thus make good sense as a matter of judicial administration. In their own way, they further the policy of avoiding piecemeal appeals, for they keep together the appeal of issues that, because of their factual, legal or logical relationship, should be heard simultaneously.[312] When the requirements of the doctrine are met, to require the courts to postpone review of such related issues until after final judgment is antithetical to, rather than in furtherance of, the policies behind the final judgment rule. Thus, such jurisdiction *is* consistent with sound judicial policy, as well as with a long history of § 1292(b)'s interpretation.

Other concerns that some courts and individual judges have expressed can adequately be handled through the discretion of the appellate court. For example, when an exercise of pendent appellate jurisdiction would prematurely take a matter out of the district judge's hands and usurp her role, particularly as to a matter on which she might alter her decision, the court can decline to hear the pendent

311. *See* Solomine, *supra* note 93, at 1176, 1198-99. Solomine found that district courts, in published opinions from 1987-1989, granted over 60% of 102 motions for § 1292(b) certification. During that same time period, the appellate courts accepted between 28% and 38% of the § 1292(b) appeals. *See id.* The Administrative Office of the U.S. Courts has ceased to compile data concerning these appeals.

312. *Cf. infra* text at note 321.

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matter.[313] When either the district court or the appellate court suspects abuse of the appellate process through a request for certification of an order as a vehicle to obtain interlocutory review of other issues, it can bar the way: the district court by refusing to certify the order, and the appellate court by declining to accept the appeal at all or by declining to hear the pendent matter.[314]

D. Mandamus

Courts of appeals also review trial court decisions in advance of final judgment when the higher courts grant litigants' petitions for writs of mandamus or similar extraordinary relief under the All Writs Act.[315] The courts have endeavored to prevent the writs from becoming a substitute for appeal whenever appeal seemed desirable but no other procedure was available to immediately place a case before the appellate court.[316] Courts thus say that mandamus is appropri-

313. *See, e.g.*, Jackson v. Fort Stanton Hosp. & Training Sch., 964 F.2d 980, 990 (10th Cir. 1992) (declining to review remedial issues that would be further developed before the district court, having noted that among the factors that enter into whether to exercise pendent appellate jurisdiction is whether the otherwise nonappealable issue is sufficiently developed for review, factually and legally).

314. *See, e.g.*, Sperling v. Hoffman-La Roche, Inc., 862 F.2d 439 (3d Cir. 1988), *aff'd*, 493 U.S. 165 (1989) (expressing concern that if the court were to expand its jurisdiction under 28 U.S.C. § 1292(b) to an issue that the district court had held inappropriate for certification, it would undermine the discretion that Congress vested in the district court, and nothing in the case warranted taking such an exceptional step); Garner v. Wolfinbarger, 433 F.2d 117, 120 (5th Cir. 1970) (after determining that one could not appeal a transfer order under § 1292(b), warning in dicta that "[t]he ad hoc approach invites the parties to inject a sham issue as the vehicle to bring the case to this court at the interlocutory stage for a declaration of an order not otherwise reviewable").

315. 28 U.S.C. § 1651 (1994) provides, "Writs (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction." *See, e.g.*, Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964). Although the request for an extraordinary writ is an original application to the court of appeals, the grant of the writ to an inferior court is an appellate power. *See Ex parte* Republic of Peru, 318 U.S. 578, 582 (1943); *Ex parte* Crane, 30 U.S. (5 Pet.) 190, 193 (1831).

316. *See, e.g.*, Helstoski v. Meanor, 442 U.S. 500 (1979) (stating that mandamus must be denied where petitioner could have appealed the denial of a motion to dismiss an indictment on the ground that it violated rights secured by the Speech or Debate Clause of the Constitution under the collateral order doctrine, and despite expiration of the time to take such an appeal); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 27-31 (1943) (reversing a grant of mandamus to compel the trial court to set aside an order striking pleas in abatement to an indictment, because of the absence of special circumstances justifying

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ately issued only when there is a usurpation of judicial power or a clear abuse of discretion.[317] Our concern here is not with the occasions on which exercise of the mandamus power is proper, a complex subject unto itself,[318] but rather with the following question: When appeals courts review decisions pursuant to a petition for writ of mandamus or similar extraordinary relief, is their jurisdiction limited to the precise orders that usurp judicial power, constitute a clear abuse of discretion, or otherwise justify the grant of extraordinary relief? Experience shows that it is not.

In *Schlagenhauf v. Holder*,[319] for example, the Supreme Court approved not only the recognition by the Court of Appeals for the Seventh Circuit of its power to review "the basic, undecided question of whether a district court could order the mental or physical examination of a defendant," but also the exercise of power to review the further question whether the district court exceeded its authority in ordering such examinations when defendant Schlagenhauf argued that his mental and physical condition was not in controversy.[320] The Court went still further to hold that:

> [Where] the petition was properly before the court on a substantial allegation of usurpation of power in ordering any examination of a defendant . . . [and the] meaning of Rule 35's requirements of "in controversy" and "good cause" also raised issues of first impres-

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the writ); *In re* City of Springfield, 818 F.2d 565, 568-69 (7th Cir. 1987) (finding that city's ability to obtain relief by eventual appeal doomed its request for mandamus); *In re* Lane, 801 F.2d 1040, 1042 (8th Cir. 1986) (stating that mandamus is limited to prevent litigants from obtaining review of orders that otherwise could not be appealed until after final judgment).

317. *See, e.g.*, Will v. United States, 389 U.S. 90, 95 (1967) ("The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' . . . While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' . . . only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy. . . . Its office is . . . to confine the lower court to the sphere of its discretionary power.") (quoted with approval in Gulfstream Aerospace v. Mayacamas Corp., 485 U.S. 271, 289 (1988) and Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980)).

318. With respect to that question, see 16 WRIGHT ET AL., *supra* note 62, § 3932-36. With respect to the mandamus power generally, see Robert S. Berger, *The Mandamus Power of the United States Courts of Appeals: A Complex and Confused Means of Appellate Control*, 31 BUFF. L. REV. 37 (1982).

319. 379 U.S. 104 (1964).

320. *Id.* at 110-11.

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> sion[,] ... the Court of Appeals should have also ... determined the "good cause" issue, so as to avoid piecemeal litigation and to settle new and important problems ....[321]

The Court adopted this holding even though "in the ordinary situation where the sole issue presented is the district court's determination that 'good cause' has been shown for an examination, mandamus is not an appropriate remedy, absent ... a clear abuse of discretion."[322] Rather than remand for consideration of the "good cause" issue, the Court then went on to determine for itself, on the merits, all of the issues presented so that it could "formulate the necessary guidelines in this area."[323] Although an argument could be made that, on the facts of *Schlagenhauf*, mandamus was independently appropriate with respect to the "good cause" and "in controversy" requirements in order to correct a clear abuse of discretion by the district court in ordering the defendant to submit to examinations by nine specialists when the petition sought only four kinds of examinations, the reasoning of the Court indicates that it approved exercises of appellate jurisdiction beyond the review warranted by the extraordinary writs, taking each issue presented on its own merits.[324]

Both courts and commentators generally have approved this development. Thus, the Wright & Miller treatise opines that:

> [T]he determination that the scope of mandamus review might properly be extended to related questions that would not independently support such review seems entirely appropriate. All of the damage that may be done by mandamus procedure has been realized once the question of power is brought before the court of appeals. If closely related matters can be determined without additional delay, burden on the parties or the courts, or expansion beyond the powers a court of appeals might exercise on other methods of review, they are better determined on the petition. But if the related issues would require consideration of substantial additional parts of the case, or if correction of an error involves a matter that is still basically within the discretion of the trial court, an otherwise proper exercise of the writ power should not be extended to

321. *Id.* at 111.

322. *Id.*

323. *Id.* at 112.

324. *See* Nixon v. Sirica, 487 F.2d 700, 708 (D.C. Cir. 1973) (noting that one of the problems raised in *Schlagenhauf* would not normally have justified an exercise of mandamus authority, but that the Court recognized the propriety of avoiding piecemeal litigation by resolving all issues arising out of the same set of operative facts).

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[the] additional and inappropriate uses.[325]

A number of cases are in accordance with this broad view of the scope of appellate jurisdiction upon a petition for writ of mandamus or other extraordinary writ.[326]

This brief description of the utilization of pendent appellate jurisdiction in conjunction with mandamus further illustrates the pervasiveness and utility of the doctrine when appellate courts hear matters in advance of final judgment. It also shows that such jurisdiction need not be tied to specific statutory language,[327] although in many contexts it can be. The Supreme Court, like the intermediate appellate federal courts, has freely exercised such jurisdiction when it made sense as a matter of judicial administration. Any narrow circumscription of pendent appellate jurisdiction exercised when mandamus is granted would depart from the practice exemplified by the *Schlagenhauf* case.

E. Rule 54(b) Appeals and Appeals of Interlocutory Orders Entered After Final Judgment

Appeals before final judgments fully disposing of all the issues

325. 16 WRIGHT ET AL, *supra* note 62, § 3934, at 232-33 (citations omitted).

326. *See In re* Chambers Development Co., 148 F.3d 214, 228-29 (3d Cir. 1998) (addressing judicial estoppel ruling that was so tied to district court's disregard of the appellate court's mandate that the appeals court could not remedy the disregard, on a mandamus petition, without addressing the estoppel ruling); Southern Pac. Transp. Co. v. San Antonio, 748 F.2d 266, 270 (5th Cir. 1984) (on mandamus to review stay of enforcement of partial summary judgment, reviewing the related issues of the merits of the claim and prejudgment interest although the latter might not independently be grounds for mandamus); *Nixon*, 487 F.2d at 708 (in entertaining U.S. President's petition for mandamus raising the question whether the district court exceeded its authority in ordering *in camera* inspection of tapes, considering the validity of the proposed *in camera* inspection (which was to precede any production to a grand jury) *and* the need for instructions governing any such inspection); Miller v. United States, 403 F.2d 77, 79 (2d Cir. 1968) (in entertaining petition for mandamus challenging district court power to enjoin defendant and his agents from inquiring into the effect on jurors of extrinsic communications, also deciding other questions concerning the propriety of the injunctive order, to avoid piecemeal litigation and to settle a new and important problem); *cf.* Heathman v. District Court, 503 F.2d 1032 (9th Cir. 1974) (declining jurisdiction over question of documents' relevance as an adjunct to mandamus concerning order compelling production of documents claimed to be privileged).

327. The statutory basis for mandamus jurisdiction is 28 U.S.C. § 1651, which simply states that "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651 (1994).

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and claims in a civil action also are permitted when courts direct the entry of a final judgment as to fewer than all of the claims or parties, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.[328] When a district court properly has certified one or more orders under Rule 54(b), the question may arise whether the appellate court also should hear other issues, under pendent appellate jurisdiction. A survey of the cases decided before *Swint* reveals that appellate courts approached the questions of power and of discretion raised by these cases in the same way that they approached those questions in the contexts already discussed, and they cited as authority cases that arose under other heads of interlocutory appellate jurisdiction. Thus, the concerns one finds are whether the appealable and the otherwise non-appealable issues sufficiently overlapped to warrant the exercise of jurisdiction,[329] whether the issues were substantially interdependent[330] or inextricably intertwined,[331] whether review of the uncertified ruling was necessary to ensure meaningful review of the certified order,[332] and whether refusal to accept jurisdiction would waste judicial resources.[333]

The utilization of pendent appellate jurisdiction in conjunction with Rule 54(b) again illustrates the pervasiveness, utility, and consistency of the doctrine that appellate courts use when they hear matters in advance of final judgment. It shows that pendent appellate jurisdiction has long been synonymous with determining the scope of

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

329. *See, e.g.*, Akerman v. Oryx Communications, Inc., 810 F.2d 336, 340 (2d Cir. 1987); Howard v. Parisian, Inc., 807 F.2d 1560, 1567 (11th Cir. 1987) (finding insufficient overlap to justify pendent jurisdiction).

330. *See, e.g., Akerman*, 810 F.2d at 340.

331. *See, e.g.*, Cooper v. Town of East Hampton, 83 F.3d 31, 36 (2d Cir. 1996) (citing *Swint*, and opining that it might be proper to exercise jurisdiction over an appeal inextricably intertwined with a Rule 54(b) appeal, but leaving the decision to the merits panel); Martin v. Consultants & Adm'rs Inc., 966 F.2d 1078, 1084 (7th Cir. 1992) (exercising jurisdiction over cross-appeal found to be inextricably entwined with the certified order where both involved the same facts and turned on the same issue, and concerns of judicial economy justified jurisdiction).

332. *See, e.g.*, National Union Fire Ins. Co. v. City Sav., F.S.B., 28 F.3d 376, 382 & n.4 (3d Cir. 1994) (holding that to address whether plaintiffs would be able to raise rescission as a defense or affirmative defense to a counterclaim was necessary to meaningful review of the certified order barring defendants from bringing a declaratory judgment action; because the otherwise non-appealable order met this stringent standard, the court did not address whether it would have been sufficient to meet the more liberal standard looking to sufficient overlap in the facts).

333. *See, e.g., Akerman*, 810 F.2d at 340; *Martin*, 966 F.2d at 1084.

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jurisdiction that is "statutorily" authorized, in this case by Rule 54(b). It also provides further basis for concluding that the § 1291-based doctrine is a parallel development, using the same reasoning and the same legal tests, and is not at all an aberration from interlocutory appeals law generally.

The doubt that *Swint* has cast on this body of law has been recognized by some of the courts of appeals, however, and may be altering some decisions.[334] As I have said in connection with other appeals that precede final judgment that ends an entire case, in my view the Court should re-affirm the power to address orders that are the predicate for or are otherwise inextricably entwined with the Rule 54(b) certified order, *or* whose simultaneous review serves sound judicial administration by virtue of the factual, legal or logical relationship between those orders and the Rule 54(b) certified order. Later in the Article, I will propose more specifically what the contours of the jurisdiction should be.

The doctrine of pendent appellate jurisdiction also may come into play after the entry of final judgment as to *all* claims and parties when trial courts enter post-judgment interlocutory orders. The most common situation of this sort involves final judgments that are accompanied or followed by rulings that parties are entitled to attorney's fees but that do not set the amount of such fees, leaving that to the future. Because such an attorney's fee order is not final, the question arises whether an appellate court should exercise pendent appellate jurisdiction over it when hearing the appeal from the final judgment. The circuits are split on the question.[335]

334. *See* Newfound Management Corp. v. Lewis, 131 F.3d 108 (3d Cir. 1997) (stating that the court did not need to decide whether the case was appropriate for pendent appeallate jurisdiction where it concluded that a challenge to the district court's resolution of disputes in a quiet title suit, before a jury addressed the same issues in a consolidated trespass action, was fairly within the scope of the Rule 54(b) certified order in the quiet title action); Rodabaugh v. Continental Cas. Co., 62 F.3d 1429, *reported in full*, No. 94-8016, 1995 U.S. App. LEXIS 21552 (10th Cir. Aug. 10, 1995). Where the trial court had certified a grant of partial summary judgment under Rule 54(b) and the court was asked to hear, under its pendent jurisdiction, the partial denial of defendant's motion for summary judgment, the court interpreted *Swint* to allow the review of such an order only pursuant to § 1292(b). *See id.* at *5-7. In addition, although the court had held that it could review a denial of summary judgment if it reversed the grant of a cross-motion for summary judgment on the same issue, it would not do so here, where the trial court had found genuine issues of material fact. *See id.*

335. Some have held or suggested that a fee liability order can be appended to the final judgment appeal. Others have flatly rejected that position or expressed skepticism

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The most thorough and thoughtful post-*Swint* analysis of the attorney fee issue appears in *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*[336] The D.C. Circuit recognized that *Swint* left the door open to applications of pendent appellate jurisdiction, despite its generally restrictive position, and further recognized that a numbers of factors rendered *Swint* distinguishable: the appeal proposed for pendent appellate jurisdiction in *Swint* involved pendent parties and a cause of action separate from that as to which an immediately appealable order had been entered, whereas a finding of liability for attorney's fees is "an ancillary matter" between the same parties as are before the court for the final judgment appeal; in addition, the appealable order was itself interlocutory in *Swint*, while a final judgment is not.[337] After considering that attorney's fee orders are within the courts' Article III power and that only the timing of their consideration on appeal was at issue,[338] and after considering further the desirability of giving jurisdictional statutes a practical construction and the need for sensible allocation of judicial resources, the D.C. Circuit decided not to absolutely bar pendent appellate jurisdiction over non-final attorney's fee liability orders. It anticipated reviewing them sparingly, however.[339]

The court reached this conclusion for the reasons stated in *Swint* but, in the most interesting portion of its opinion, the court articulated the considerations that it believed ought to determine whether pendent appellate jurisdiction ought to be exercised in a particular case. First, it acknowledged that such jurisdiction should be exercised "only when substantial considerations of fairness or efficiency demand it."[340] But it cited the situations described by the *Swint* court (inextricable intertwining and the necessity to ensure meaningful review) as mere *examples* of when exercise of the jurisdiction would be

about it. Cases on both sides are cited in Gilda Marx, Inc. v. Wildwood Exercise, Inc., 85 F.3d 675, 677 (D.C. Cir. 1996). *Compare* Pridgen v. Andresen, 113 F.3d 391, *reported in full*, No. 96-7456, 1997 U.S. App. LEXIS 11630 at *7-*10 (2d Cir. May 19, 1997) (rejecting jurisdiction) *with* BASF Corp. v. Old World Trading Co., 41 F.3d 1081, 1099 (7th Cir. 1994) (allowing review). *See also* Krumme v. Westpoint Stevens Inc., 143 F.3d 71, 87 (2d Cir. 1998) (declining to exercise jurisdiction); Gates v. Central States Teamsters Pension Fund, 788 F.2d 1341, 1343 (8th Cir. 1986) (rejecting jurisdiction).

336. 85 F.3d 675 (D.C. Cir. 1996).

337. *See id.* at 678.

338. The same is true generally of orders that are candidates for pendent appellate jurisdiction.

339. *See Gilda Marx*, 85 F.3d at 678.

340. *Id.* at 679.

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warranted which it viewed as *not intended* to "prescribe a definitive or exhaustive list of conditions."[341] The court recognized that in other situations as well "the appeals may be so closely related, or turn on such similar issues, that a single appeal should dispose of both simultaneously."[342] For example, if pendent review would likely terminate the entire case, that would favor its exercise.[343] The factors that the court indicated ought to be considered and would *dis*favor the exercise of pendent appellate jurisdiction are:

a) if the time to appeal the challenged order already has passed;[344]
b) if the appealing party, intentionally or not, has circumvented the district court's authority under 28 U.S.C. § 1292(b) to decide whether to endorse an interlocutory appeal;[345]
c) if the record is inadequate or the district court has not yet had an opportunity to render a considered opinion on the

341. Gilda Marx, Inc. v. Wildwood Exercise, 85 F.3d 675, 679 & n.4. (D.C. Cir. 1996). *But see* Rein v. Socialist People's Libyan Arab Jamahiriya, No. 98-7467, 1998 U.S. App. LEXIS 31223 (2d Cir. Dec. 15, 1998) (concluding that the situations described in *Swint* specify the only circumstances in which courts may review immediately an issue that does not independently qualify for interlocutory appeal; moreover, regarding the two tests as essentially identical). The Second Circuit found that most circuits have adopted "restrictive understandings" of the *Swint* exceptions.

342. *Gilda Marx*, 85 F.3d at 679.

343. *See Thornburgh*, 476 U.S. at 757; *Deckert*, 311 U.S. at 287.

344. *Gilda Marx*, 85 F.3d at 679; *see also* Consarc Corp. v. Iraqi Ministry, 27 F.3d 695, 700 (D.C. Cir. 1994) (pendent appellate jurisdiction should be invoked when consideration with immediately appealable order will obviate need for later proceedings and should not be invoked to review orders appealed out of time).

345. *Gilda Marx*, 85 F.3d at 679. The appellate courts have disparate views on the propriety of utilizing pendent appellate jurisdiction to hear the appeal of an order as to which the district court refused § 1292(b) certification or the appellate court denied § 1292(b) review. *Compare* Marks v. Clarke, 102 F.3d 1012 (9th Cir. 1996) (asserting jurisdiction over grant of partial summary judgment where the liability rulings were found to be inextricably intertwined with decisions to deny qualified immunity, and despite the appellate motions panel's denial of the § 1292(b) petition concerning the same orders), *cert. denied*, 118 S.Ct. 264 (1997); Briggs v. Goodwin, 569 F.2d 10, 25-26 (D.C. Cir. 1977) (stating in dicta that because the dissent regarded a witness immunity argument as dispositive, the court addressed it though the district court had refused to certify the question under § 1292(b); the panel majority held the witness immunity question appealable under the collateral order doctrine) *with* Mason v. Stallings, 82 F.3d 1007, 1009-10 (11th Cir. 1996) (declining to review denial of relief for failure to state a claim in conjunction with interlocutory qualified immunity appeal where the district court denied § 1292(b) certification of the former).

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subject;[346]

d) if the issue might be mooted or altered by subsequent trial court proceedings;[347] or

e) if the pendent appeal would substantially predominate over the independently appealable orders.[348]

Applying these factors to the case at bar, the court declined to assert jurisdiction over the order imposing liability for attorney's fees. It found that the order was not inextricably intertwined with the judgment on the merits and did not need to be reviewed to meaningfully review the latter. Early review was not likely to terminate the case or obviate further proceedings in the trial or appellate courts. Rather, the merits review might cause the district court to revisit and alter its holding concerning the liability for attorney's fees and the scope of the fee award. Moreover, in this case where there was some ambiguity as to the identity of the claims for which fees were awarded, the absence of a specific fee amount made it more difficult for the court to assess the propriety of the liability-for-fees ruling. Thus, it was not clear that the interests of fairness or judicial economy would be served by early review.[349]

The utilization of pendent appellate jurisdiction in conjunction with post-judgment interlocutory orders illustrates yet again the per-

346. *Gilda Marx*, 85 F.3d at 679; *see also* Swint v. Chambers County Comm'n, 514 U.S. 35, 47 n.5; Colorado v. Idarado Mining Co., 916 F.2d 1486, 1491 (10th Cir. 1990); Gross v. Winter, 876 F.2d 165, 168 & n.4 (D.C. Cir. 1989) (declining to review denial of motion to dismiss for failure to state a claim where, *inter alia*, trial court indicated that the factual record might make a motion for summary judgment appropriate).

347. *See Gilda Marx*, 85 F.3d, 679 (D.C. Cir. 1996); *see also* Rendall-Speranza v. Nassim, 107 F.3d 913, 917 (D.C. Cir. 1997); Del A. v. Edwards, 855 F.2d 1148, 1152 (5th Cir. 1988); Dellums v. Powell, 660 F.2d 802, 804 n.6 (D.C. Cir. 1981).

348. *See Gilda Marx*, 85 F.3d at 679 (D.C. Cir. 1996); Johnson v. Jones, 115 S. Ct. 2151, 2159 (1995); Abney v. United States, 431 U.S. 651, 663 (1977); Robinson v. Volkswagenwerk AG, 940 F.2d 1369, 1374 (10th Cir. 1991) (declining to exercise pendent appellate jurisdiction over Federal Rule of Civil Procedure 60(b) and res judicata issues where they would predominate over the immediately appealable absolute immunity issues, the pendent issues were not integral to the immediately appealable decision and a clearer, more complete record would facilitate sound resolution of the Rule 60(b) issues). In *Robinson*, attorneys claimed to be absolutely immune from civil liability for their discovery and courtroom conduct in a prior trial. *Robinson*, 940 F.2d at 1370.

349. *See Gilda Marx*, 85 F.3d at 679-80. For a discussion of *Gilda Marx*, see Timothy B. Smith, Note, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Civil Procedure*, 65 Geo. Wash. L. Rev. 653, 659-60 (1997) (criticizing the court's failure to discuss *Finley* and the "separation of powers issues arising from court-created expansion of jurisdictional statutes").

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vasiveness, utility, and consistency of the doctrine.

F. Jurisdiction of the U.S. Supreme Court

Operating primarily under 28 U.S.C. §§ 1254 and 1257[350] and under Supreme Court Rules promulgated under the authority of the enabling legislation in 28 U.S.C. § 2071,[351] the Court has similarly granted itself an elastic scope of appellate jurisdiction for reasons of efficiency and sound judicial administration. For example, Supreme Court Rule 14.1(a), describing the content of petitions for writ of certiorari, whether before or after final judgment, requires the petition to contain a concise statement of the questions presented for review. It then provides that "[o]nly the questions set forth in the petition, *or fairly included therein*, will be considered by the Court," and that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein."[352] In addition, under Supreme Court Rule 24.1(a), "[a]t its option . . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide."[353] In both these respects, the Court has provided itself with latitude in its scope of review. A spirit at least as generous should infuse the doctrine of pendent appellate jurisdiction.

G. Pendent Appellate Jurisdiction in the Context of Collateral Order Appeals

Writing in 1990, Riyaz A. Kanji found that the courts of appeals for the First, Third, Fourth, Ninth and D.C. Circuits refused to exercise jurisdiction over claims pendent to the collateral orders properly before them. By contrast, the courts of appeals for the Second, Fifth, Sixth, Eighth and Eleventh Circuits had appended additional orders

350. The Supreme Court also has appellate jurisdiction under 28 U.S.C. § 1253 (concerning direct appeals from decisions of three-judge district court), § 1258 (concerning appeals from final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico), and under § 1259 (concerning appeals from decisions of the United States Court of Appeals for the Armed Forces).

351. 28 U.S.C. § 2071 (1994). The statute provides in part that "[t]he Supreme Court ... may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title." *Id.*

352. SUP. CT. R. 14.1(a) (emphasis added).

353. SUP. CT. R. 24.1(a)

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to the collateral orders appealed to them.[354] Before *Swint* was decided, the First, Third, Fourth, and Ninth Circuits had joined the others that exercised pendent appellate jurisdiction in the collateral order context, in some cases. The Second, Fifth, Eighth, and Eleventh Circuits continued to exercise the jurisdiction; the Seventh and Tenth Circuits joined the group, in limited circumstances, while the Sixth Circuit first retreated from these exercises of pendent appellate jurisdiction but, since *Swint*, has resumed the practice, subject to *Swint*'s limitations.[355]

Prior to *Swint*, the courts' articulations of the circumstances in which they would exercise pendent appellate jurisdiction on the occasion of collateral order appeals adumbrated the word formulas that the courts had developed when hearing other interlocutory appeals. Most circuits utilized such tests as whether the pendent issues were bound up in, were inexorably (or inextricably) intertwined with, underlay, were interwoven with, were closely related to, were imbricated with, or substantially (or reasonably) overlapped, factually or legally, with review of, the interlocutory issue properly before them (usually qualified immunity).[356] The Eleventh Circuit *sometimes* articulated the scope of its jurisdiction most liberally, saying, for example, that the court of appeals "retains discretion to exercise pendent jurisdiction over the balance of the action after jurisdiction attaches as to any part of the action."[357]

The appeals courts collectively also regarded as relevant to whether, as a matter of discretion, pendent appellate jurisdiction should be exercised such factors as whether the district court's ruling

354. Kanji, *supra* note 40, at 520-21.

355. *See infra* notes 370, 375, 377-79, 381, 384-86, 388-89, 397-98, 413-20, 431, 435-37, 442-44.

356. *See, e.g.*, DiMeglio v. Haines, 45 F.3d 790, 808 (4th Cir. 1995); Hill v. City of New York, 45 F.3d 653, 664 (2d Cir. 1995); Weaver v. Brenner, 40 F.3d 527, 537-38 (2d Cir. 1994); Bisbee v. Bey, 39 F.3d 1096, 1102-03 (10th Cir.1994), *cert. denied*, 115 S. Ct. 2577 (1995); Roberson v. Mullins, 29 F.3d 132, 136 (4th Cir. 1994); Williams v. Kentucky, 24 F.3d 1526, 1542 (6th Cir. 1994), *cert. denied sub nom.* Allen v. Williams, 513 U.S. 947 (1994); Dellums v. Powell, 660 F.2d 802, 804 n.6 (D.C.Cir.); Triad Associates, Inc. v. Robinson, 10 F.3d 492, 497 n.2 (7th Cir. 1993); Brown v. Grabowski, 922 F.2d 1097, 1106 n.3 (3d Cir. 1990); Morales v. Ramirez, 906 F.2d 784, 787 & n.2 (1st Cir. 1990); Drake v. Scott, 812 F.2d 395, 399 (8th Cir. 1987).

357. Menuel v. City of Atlanta, 25 F.3d 990, 994 n.7 (11th Cir. 1994). *But see* Hill v. DeKalb Regional Youth Detention Ctr., 40 F.3d 1176, 1183 (11th Cir. 1994) (stating, more conservatively, that pendent jurisdiction permitted it to hear related claims when other claims were properly reviewable).

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addressed the contentions at issue and was clear, whether the pendent issues were sufficiently developed for review, whether the pendent issues had been briefed and argued on appeal, whether the pendent issues would likely be mooted by subsequent trial court proceedings, whether judicial resources would be conserved by hearing the pendent issues, whether failure to do so might leave an entire district court proceeding tainted by error, and whether the exercise would constitute injudicious intermeddling or would facilitate just disposition, advance the litigation, or avoid further appeals.[358] Since *Swint*, the courts of all circuits tend to invoke the language and circumstances that the Court there tentatively approved: approving pendent appellate jurisdiction over orders that are not themselves independently appealable but are inextricably intertwined with a collateral order or when necessary to ensure meaningful review of a collateral order.

The vast majority of collateral order appeals involve the denials of motions to dismiss or motions for summary judgment predicated on qualified, or sometimes absolute, immunity defenses. The Article therefore initially concentrates on cases of that kind. It provides some background on qualified immunity doctrine and then discusses how courts are handling pendent appellate jurisdiction issues in cases on pre-judgment appeal by virtue of the denial of a claim to qualified or absolute immunity. The matters as to which pendent appellate jurisdiction issues arise include issues on the merits of the claims as to which qualified immunity was sought, cross-appeals, defenses, miscellaneous rulings (such as rulings concerning pleadings and discovery) and rulings on other claims in the civil action. The Article then addresses the practice of the courts in exercising pendent appellate jurisdiction when collateral orders other than immunity denials are the occasion for interlocutory appeals. Finally, it surveys the law of pendent party appellate jurisdiction.

Having mapped the law, and having earlier made arguments for pendent appellate jurisdiction of *some* dimension in appeals under § 1291 that precede final judgment, the Article will concentrate on the latitude that appellate courts *should* enjoy in their power to exercise pendent appellate jurisdiction.

358. *See DiMeglio*, 45 F.3d at 808; *Weaver*, 40 F.3d at 537-38; *Bisbee*, 39 F.3d at 1102-03; *Roberson*, 29 F.3d at 136; *Williams*, 24 F.3d at 1542; Dellums v. Powell, 660 F.2d 802, 804 n.6 (D.C. Cir. 1981).

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(1) Denials of Immunity

Unfortunately, the law concerning qualified immunity is rather complex. To make the cases more comprehensible, a brief description of the law in this area follows.

(a) Background: Qualified Immunity Doctrine

Government officers performing discretionary functions are given immunity from liability for civil damages (a) for conduct that did not violate rights that were clearly established at the time of the government official's actions or (b) if it was objectively reasonable for the officers to believe that their acts did not violate clearly established rights, *i.e.*, if the contours of the asserted right were not sufficiently clear that reasonable officials would have understood that what they were doing violated that right.[359] Because this qualified immunity entails a limited entitlement not to stand trial or face other burdens of litigation, the Court has held that government officials may immediately appeal a federal district court decision denying the claim of qualified immunity, whether the denial is expressed through denial of a motion to dismiss for failure to state a claim, through denial of a motion for summary judgment, or both, when the appeal concerns whether given facts constitute a violation of clearly established law.[360] Appeals of such orders fall under the collateral order doctrine.[361] Recently, the Court emphasized that these appeals may be taken only when the immunity decision turns on a question of law, and that appellate courts do not have jurisdiction to review denials of qualified immunity insofar as they are based on a determination that there exist genuine issues of material fact as to defendants' conduct.[362] The Court conceded that courts sometimes might have difficulty in separating those two determinations, and even in ascertaining which

359. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982); Penilla v. City of Huntington Park, 115 F.3d 707, 709 (9th Cir. 1997); Jemmott v. Coughlin, 85 F.3d 61 (2d Cir. 1996).

360. *See* Behrens v. Pelletier, 516 U.S. 299 (1996); Johnson v. Jones, 515 U.S. 304, 312-13 (1995) (interpreting *Mitchell v. Forsyth*); Mitchell v. Forsyth, 472 U.S. 511 (1985). However, in a state court system, officials have *no* federal right to an interlocutory appeal from the denial of qualified immunity, because the right to immediate appellate review of that ruling is a federal procedural right having no application outside the federal forum. *See* Johnson v. Fankell, 117 S. Ct. 1800 (1997).

361. *See Mitchell*, 472 U.S. at 525-30.

362. *See Johnson*, 515 U.S. at 304.

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was the basis of a district court's denial of summary judgment.[363] However, it advised appellate courts faced with that difficulty to "take, as given, the facts that the district court assumed when it denied summary judgment ... [and] if the district court [did not] state those facts ... to review ... the record to determine what facts the district court, in the light most favorable to the moving party, likely assumed."[364] Then the court can decide whether, viewing the facts in the light most favorable to the plaintiff, the facts support a claim that defendants violated clearly established law.[365]

(b) Pendent Appellate Jurisdiction over Issues on the Merits of the Claims as to which Qualified Immunity was Sought

When one examines the post-*Swint* interlocutory appeals cases predicated on a denial of qualified immunity and in which the issue proposed for pendent appellate jurisdiction had to do with the merits

363. *See id.* at 318-20. The appellate courts have in fact struggled with which appeals *Johnson*, as illuminated by Behrens v. Pelletier, 516 U.S. 299 (1996), permits them to hear and which appeals it indicates they lack jurisdiction to hear. *See, e.g.*, Diaz v. Martinez, 112 F.3d 1, 3-5 (1st Cir. 1997) (finding that *Behrens* placed a gloss on *Johnson* that reopened an appellate avenue that some had thought *Johnson* foreclosed); Winfield v. Bass, 106 F.3d 525, 528-30 (4th Cir. 1997) (finding application of the distinction drawn in *Johnson* to be difficult); Collins v. Jordan, 102 F.3d 406, 412-13 (9th Cir. 1996) (sorting out which aspects of a qualified immunity appeal it could hear and which it could not hear), *reprinted as amended*, 110 F.3d 1363 (9th Cir. 1997); Cottrell v. Caldwell, 85 F.3d 1480, 1486 (11th Cir. 1996) (concluding that *Johnson* did not affect the court's authority to decide "those evidentiary sufficiency issues that are part and parcel of the core qualified immunity issues, *i.e.*, the legal issues"); Miller v. Schoenen, 75 F.3d 1305 (8th Cir. 1996) (concluding that, even after *Johnson*, the court had jurisdiction to determine what was known by a defendant, to determine if the known facts would inform a reasonable actor that his actions violated established legal standard); Dolihite v. Maughon *ex rel* Videon, 74 F.3d 1027, 1033-35 n.3 (11th Cir.) ("Identification of the actions and knowledge of each public official is part and parcel of the core qualified immunity issue which is immediately appealable."), *cert. denied sub nom.* Dolihite v. King, 117 S. Ct. 185 (1996).

364. *Johnson*, 515 U.S. at 318-20.

365. *See, e.g.*, Penilla v. City of Huntington Park, 115 F.3d 707, 709 (9th Cir. 1997). For arguments critical of broad interlocutory appellate jurisdiction over orders denying qualified immunity, see Kathryn R, Urbonya, *Interlocutory Appeals from Orders Denying Qualified Immunity: Determining the Proper Scope of Appellate Jurisdiction*, 55 Wash. & Lee L. Rev. 3 (1998) (arguing that appeallate courts are overprotecting government officials and underprotecting plaintiffs, that the doctrine of frivolity, allowing district and appellate courts to simultaneously exercise jurisdiction, should be used to limit erroneous assertion of appellate jurisdiction, and that interlocutory appellate jurisdiction should be limited in a number of other specified ways). The article does not focus upon pendent appellate jurisdiction, but refers to it in passing. *See id.* at 19 n. 100.

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of the claim as to which qualified immunity had been denied, one finds the following: some courts interpret *Swint* to have narrowly circumscribed all exercises of pendent appellate jurisdiction, and others interpret it to have narrowly circumscribed exercises of pendent appellate jurisdiction only in the context of pendent *party* appellate jurisdiction.[366] On a number of occasions, courts have declined to exercise pendent issue appellate jurisdiction. The reason often is insufficient overlap between the independently appealable immunity issues and the other issues going to the merits of the claims.[367] At

366. *Compare* United States v. Lopez-Lukis, 102 F.3d 1164, 1167 n.10 (11th Cir. 1997) (viewing *Swint* as a bar to pendent party appellate jurisdiction but not to pendent issue appellate jurisdiction), *and* Kaluczky v. City of White Plains, 57 F.3d 202, 207 (2d Cir. 1995) (holding that while the Court in *Swint* cautioned that a claim involving a pendent party cannot be resolved under pendent appellate jurisdiction, *Swint* did not otherwise narrow the scope of such jurisdiction) *with* Nolen v. Jackson, 102 F.3d 1187, 1189-90 (11th Cir. 1997) (concluding that the existence of pendent issue appellate jurisdiction is uncertain in the wake of *Swint*, declining to exercise it over issues not specified in the opinion), McCloud v. Testa, 97 F.3d 1536, 1545 n.11 (6th Cir. 1996) (stating that *Johnson* suggests that the Supreme Court disfavors exercises of pendent appellate jurisdiction), Archie v. Lanier, 95 F.3d 438, 443 (6th Cir. 1996) ("*Swint* intended to restrict discretionary pendent appellate jurisdiction. . . . [T]he 'inextricably intertwined' requirement was not meant to be loosely applied. . . . Rather, the terms can only be understood . . . to mean that pendent jurisdiction may be exercised only when the immunity issues absolutely cannot be resolved without addressing the nonappealable collateral issues."), *and* Pickens v. Hollowell, 59 F.3d 1203, 1208 (11th Cir. 1995) (declining to exercise jurisdiction over denial of summary judgment to defendants being sued in their official capacities, on the same basis as that stated in *Nolen, supra*).

367. *See* Murphy v. Arkansas, 127 F.3d 750, 754 (8th Cir. 1997) (declining jurisdiction over issues presented on cross-appeal going to whether federal claims were time barred and whether pendent claims should be reinstated where the issues were not intertwined with the Eleventh Amendment and qualified immunity issues over which court had jurisdiction); Ierardi v. Sisco, 119 F.3d 183, 189 (2d Cir. 1997) (declining jurisdiction over question whether plaintiff could pursue a particular state law claim); Harris v. Board of Educ., 105 F.3d 591, 595 (11th Cir. 1997) (holding that the court lacked appellate jurisdiction to review unspecified issues that were found not to be sufficiently interwoven with the qualified immunity issues because the court could resolve the latter without reaching the merits of those other issues); Archie v. Lanier, 95 F.3d 438 (6th Cir. 1996) (holding that the court lacked appellate jurisdiction to review the partial denial of defendant's motion to dismiss for failure to state a claim on the grounds that the merits of the claims were not inextricably intertwined with the question of immunity and review of the former would not ensure meaningful review of the latter: whether defendant's alleged sexual abuse of plaintiffs was a judicial act was not in any way connected to whether plaintiffs had stated a claim); Veneklase v. City of Fargo, 78 F.3d 1264, 1270 n.7 (8th Cir.) (declining to review ruling that residential picketing ordinance was unconstitutional as applied because not necessary to resolution of the qualified immunity appeal), *cert. denied*, 117 S. Ct. 178 (1996); Cantu v. Rocha, 77 F.3d 795, 805 (5th Cir. 1996) (dismissing for lack of

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least one court declined to exercise pendent appellate jurisdiction over the question whether the complaint met the heightened pleading standard that the court had applied to complaints seeking damages against government officials.[368] Although the *Hafley* court did not say so, its conclusion may have been a product of its realization that the factors determinative of that pleading issue would not overlap those that controlled the denial of defendants' motion to dismiss, predicated on qualified immunity. Sometimes courts have declined to exercise jurisdiction over aspects of a case that were not themselves independently appealable, apparently without considering whether they could hear those issues under pendent appellate jurisdiction.[369]

On many other occasions, courts *have exercised* pendent appellate jurisdiction where the issue as to which pendent appellate jurisdiction was proposed had to do with the merits of the claim as to which qualified immunity had been unsuccessfully sought. Courts have, for example, exercised appellate jurisdiction over determinations that a plaintiff has stated particular claims,[370] even when the dis-

jurisdiction the appeals concerning non-immunity grounds of the district court's denials of defendants motions for summary judgment upon finding that the issues raised by the qualified immunity appeals were separate from and much narrower than whether plaintiff had adduced sufficient evidence to avoid summary judgment, and in the wake of *Swint*, the court was disinclined to "explore the uncharted terrain of pendant appellate jurisdiction"); Kincade v. City of Blue Springs, 64 F.3d 389, 394-95 (8th Cir. 1995) (declining to exercise jurisdiction over a contention, in support of reversal of the denial of summary judgment, that was not inextricably intertwined with the qualified immunity appeal), *cert. denied*, 116 S. Ct. 1565 (1996); Reece v. Groose, 60 F.3d 487, 491-92 (8th Cir. 1995) (declining to exercise jurisdiction over a contention that went to the objective component of the alleged violation of plaintiff's rights because it was distinct from the qualified immunity issues such as what defendant knew or should have known); Triad Associates, Inc. v. Robinson, 10 F.3d 492, 497 n.2 (7th Cir. 1993) (refusing to assert pendent appellate jurisdiction over the issue of plaintiff's standing when it was not inextricably entwined with the qualified immunity issue and was merely a matter of prudential standing that did not bear on the existence of a viable § 1983 claim).

368. *See* Hafley v. Lohman, 90 F.3d 264, 266 (8th Cir. 1996), *cert. denied*, 519 U.S. 1149 (1997); *see also* Bult v. Beadle County, 73 F.3d 366, *reported in full*, 1995 U.S. App. LEXIS 33704, 1995 WL 710860 (8th Cir. Dec. 5, 1995) (without explanation, dismissing for lack of jurisdiction appeal of denial of motion to dismiss for failure to state a claim, review of which was sought in conjunction with review of denial of qualified immunity).

369. *See, e.g.*, Ward v. Dyke, 58 F.3d 271 (6th Cir. 1995) (on qualified immunity appeal, holding that the court lacked jurisdiction to review a denial of partial summary judgment with respect to liability).

370. *See* Southard v. Texas Bd. of Criminal Justice, 114 F.3d 539, 548 (5th Cir. 1997) (stating that appeals court could determine whether facts that the district court assumed when it denied summary judgment stated a claim under clearly established law); Jackson v. Long, 102 F.3d 722, 731 (4th Cir. 1996) (exercising pendent appellate jurisdiction to

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trict court had not decided issues raised by the qualified immunity defense, such as whether the rights asserted were clearly established at the time of defendants' conduct or whether the defendants' acts were objectively reasonable.[371] Although the Court has said that denials of immunity are conceptually distinct from the merits[372] (that is,

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hold that the complaint against defendant sheriff, in his official capacity, should have been dismissed for failure to state a claim where it failed to allege violation of any policy or practice that authorized constitutionally proscribed action, stating that "while we ordinarily would decide an immunity claim before reaching the merits of the underlying claim ... when the complaint alleges no claim ... we need not decide the immunity issue"); McMillian v. Johnson, 88 F.3d 1554, 1564 (11th Cir. 1996) (stating that so long as an immediately appealable qualified immunity issue is raised, the court has jurisdiction to determine whether the plaintiff has stated a constitutionally cognizable claim), *cert. denied sub nom.* McMillian v. Tate, 117 S. Ct. 2514 (1997); Taylor v. Waters, 81 F.3d 429, 435-37 (4th Cir. 1996) (holding, on qualified immunity appeal, that assertions that investigator failed to disclose exculpatory evidence to prosecutor did not allege deprivation of any constitutional right); Armendariz v. Penman, 75 F.3d 1311, 1318 (9th Cir. 1996) (deciding, upon a qualified immunity appeal, that plaintiffs failed to state a claim of violation of their substantive due process rights); Jackson v. City of Atlanta, 73 F.3d 60, 63 (5th Cir.) (holding that plaintiff's § 1983 claims should have been dismissed because the same allegations formed the basis of a Title VII claim, in hearing a qualified immunity appeal), *cert. denied*, 117 S. Ct. 70 (1996); Flint Electric Membership Corp. v. Whitworth, 68 F.3d 1309, 1315 n.8 (11th Cir. 1995) (concluding on qualified immunity appeal from denial of motions for summary judgment that the complaints failed to allege a § 1983 claim, and therefore that court did not need to decide whether, as an exercise of pendent appellate jurisdiction, it could review the denial of summary judgment insofar as it was on the merits), *op. withdrawn in part not pertinent here, substituted op.*, 77 F.3d 1321 (11th Cir. 1996); Kaluczky v. City of White Plains, 57 F.3d 202, 207 (2d Cir. 1995) (stating that because the objective reasonableness of defendants' belief that their conduct did not violate plaintiff's clearly established rights entailed inquiry into the nature and extent of plaintiff's rights, there was sufficient overlap in the factors relevant to the two issues to justify pendent appellate jurisdiction over determination of the plaintiff's rights); Smyth v. Williams, 78 F.3d 585, *reported in full*, 1996 WL 99329 at **7 (6th Cir. March 6, 1996) (on qualified immunity appeal, holding that several of plaintiff's claims would be dismissed for failure to allege a constitutional violation and one would be dismissed for failure to state a claim against a defendant in his individual capacity); *see also* McCloud v. Testa, 97 F.3d 1536, 1545 n.12 (6th Cir. 1996) (stating that under the law of the Sixth Circuit the court may consider whether the plaintiffs have stated a claim for violation of § 1983, when hearing qualified immunity appeals). *But see* Sizemore v. Aliff, 64 F.3d 659, *reported in full*, No. 94-2347 1995 U.S. App. LEXIS 25277 (4th Cir. Aug. 25, 1995) (without explanation, declining—in the exercise of discretion—to consider denial of summary judgment on the merits, which would have entailed consideration of whether plaintiff's job was such that defendant legally could fire her on raw political patronage grounds and/or the contention that he fired her for non-political reasons).

371. *See, e.g.*, Rivera v. Senkowski, 62 F.3d 80, 83-84 (2d Cir. 1995).

372. *See* Mitchell v. Forsyth, 472 U.S. 511, 527 (1985). This conclusion was necessary to the decision that such denials satisfy the requirements of the collateral order doctrine.

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immunity issues are distinguishable from whether a plaintiff has stated a claim on which relief can be granted),[373] such jurisdiction is justified by the Supreme Court's recognition in *Siegert v. Gilley*[374] that the determination whether plaintiff has asserted a violation of a constitutional right at all is a necessary concomitant of determining whether the right asserted was clearly established at the time defendant acted.[375] Although it would be possible to uphold a claim to

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The Court reached this conclusion by reasoning that a court needs to decide only whether the legal norms allegedly violated were clearly established at the time of the incident or, when summary judgment was denied on the ground that even under defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed those actions. *See id.* at 528.

373. *See* Green v. Carlson, 826 F.2d 647, 651-52 n.3 (7th Cir. 1987).

374. 500 U.S. 226 (1991).

375. *See id.* at 232; *Rivera*, 62 F.3d at 84. *See also* McEvoy v. Spencer, 124 F.3d 92, 96 (2d Cir. 1997) (exercising pendent appellate jurisdiction over whether officials violated plaintiff's first amendment rights); Jenkins v. Medford, 119 F.3d 1156, 1159 n.2 (4th Cir. 1997) (exercising pendent jurisdiction over the denial of a motion to dismiss for failure to state a claim), *cert. denied*, 118 S.Ct. 881 (1998); Nolan v. Jenkins, 102 F.3d 722, 731 (11th Cir. 1997) (same as *Jenkins v. Medford*); Coleman v. Houston Independent Sch. Dist., 113 F.3d 528, 531-33 (5th Cir. 1997) (following *Siegert*); Forman v. Richmond Police Dep't, 104 F.3d 950, 957 (7th Cir. 1997) (stating that in two-step approach to analyzing a qualified immunity defense, the first step is to ask whether the alleged conduct set out a constitutional violation); Almand v. DeKalb County, 103 F.3d 1510, 1515 n.12 (11th Cir. 1997) (following *Siegert*); Collins v. Jordan, 102 F.3d 406, 412 (9th Cir. 1996) (stating that in two-part qualified immunity analysis, first step is whether plaintiff alleged a violation of right that is clearly established), *reprinted as amended*, 110 F.3d 1363, 1369 (9th Cir. 1996); Heidemann v. Rother, 84 F.3d 1021, 1027 (8th Cir. 1996) (considering whether a federal violation was asserted is the first step in qualified immunity analysis). In *Rivera*, the court addressed whether plaintiff had asserted cognizable violations of his equal protection and eighth amendment rights even though the district court had found to be premature the question whether defendants were entitled to qualified immunity on the equal protection claim, and had not addressed the eighth amendment claim, "perhaps treating it as subsumed within Rivera's equal protection claim." *Rivera*, 62 F.3d at 83.

The distinction between the merits and the affirmative defense of qualified immunity also is blurred in that the courts are unclear or contradictory in their holdings as to who has certain burdens of proof. *Compare* Perkins v. City of W. Covina, 113 F.3d 1004, 1008 (9th Cir. 1997) (stating that plaintiff bears the burden of showing that the right allegedly violated was clearly established at the time of the alleged misconduct), *Forman*, 104 F.3d at 957-58 (same), *Collins*, 102 F.3d at 412 (same, although it is official's burden to show that a reasonable officer could have believed that he was not violating a constitutional or statutory right), *and* McCloud v. Testa, 97 F.3d 1536, 1541 (6th Cir. 1996) (stating that plaintiffs must establish that defendant's conduct violated a federal right so clearly established that any official in his position would have understood that he was under a duty to refrain from such conduct), *with Penilla*, 115 F.3d at 709 (stating that to be entitled to qualified immunity, the officers must show that their conduct did not violate any clearly established rights of which a reasonable person should have known) *and In re* State Police

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qualified immunity without reference to whether a complaint stated a claim when, for example, the rights claimed by the plaintiff were not clearly established at the time of defendant's conduct although those rights since had become clearly established,[376] the Court never has restricted appellate jurisdiction so narrowly. If a questioning of the very existence of the underlying right underlies a motion to dismiss, that issue begs to be answered, and the Court is correct to view the two questions as inextricably intertwined. Thus, an appeals court reviewing the denial of qualified immunity may consider whether the conduct alleged constitutes a constitutional violation (a "12(b)(6) question"), en route to considering whether the constitutional standards were clearly established at the time in controversy, even though denial of a motion simply seeking dismissal for failure to state a claim would not be immediately appealable.

Similarly, if summary judgment was denied on the ground that, even under defendant's version of the facts, the defendant's conduct violated law that was clearly established at the time of the incident at issue, the questions whether the law then or even now clearly proscribes those actions are raised. Thus, when defendants have made motions for summary judgment based on qualified immunity, courts have exercised pendent appellate jurisdiction to determine whether violations of constitutional rights were substantiated.[377]

Litigation, 88 F.3d 111, 123 (2d Cir. 1996) (noting that qualified immunity is an affirmative defense and that defendants may establish immunity by showing that reasonable persons in their position would not have understood that their conduct was within an established prohibition).

376. *See* Mitchell, 472 U.S. at 528. The Court concluded that "[a]n appellate court reviewing the denial of the defendant's claim of immunity *need not* . . . *determine* whether the plaintiff's allegations actually state a claim." *Id.* (emphasis added).

377. *See, e.g.*, Samuels v. Meriwether, 94 F.3d 1163, 1166 (8th Cir. 1996) (where qualified immunity issues and plaintiff's claims required application of the same constitutional tests and the analyses of the claims were subsumed in the quality immunity analyses, exercising jurisdiction over both, when reviewing a denial of summary judgment sought by defendants); Johnson v. Clifton, 74 F.3d 1087, 1091 (11th Cir. 1996) (stating that if the determination of what the defendant's conduct was, viewed in the light most favorable to the plaintiff, were not part of the core qualified immunity analysis, it would be inextricably intertwined with that analysis and so within pendent appellate jurisdiction), *cert. denied*, 117 S. Ct. 51 (1996); Kincade v. City of Blue Springs, 64 F.3d 389, 394-95 (8th Cir. 1995) (having adopted the definition of pendent appellate claims stated in *Moore*, to the extent it qualified as the Eighth Circuit's own jurisdictional test, which it had phrased as jurisdiction to decide "closely related issues of law," the court exercised jurisdiction over defendants' contention that plaintiff's speech was not constitutionally protected because that issue was inextricably intertwined with the qualified immunity arguments; both re-

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Courts also have exercised pendent appellate jurisdiction over grants of plaintiffs' cross-motions for summary judgment when, in the context of a qualified immunity appeal, the court's holding that the plaintiff's rights were not violated necessitated the same holding for purposes of plaintiff's right to obtain affirmative relief, or where a holding that defendants were entitled to qualified immunity (for example, because their conduct did not violate clearly established law) rendered anomalous the summary judgment granted to plaintiffs.[378]

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quired application of the same constitutional test, and the former question was coterminous with or subsumed in the latter), *cert. denied*, 116 S. Ct. 1565 (1996); Allen v. Sakai, 48 F.3d 1082, 1085, 1090-91 (9th Cir. 1994) (holding that, on appeal from denial of qualified immunity asserted in motion for summary judgment, court had jurisdiction to decide whether plaintiff made an adequate showing of actual injury to a constitutional right). *But see* Haygood v. Johnson, 70 F.3d 92, 95 (11th Cir. 1995), *cert. denied sub nom.* Haygood v. Savage, 117 S. Ct. 359 (1996) (stating that, in light of *Swint*, court no longer had jurisdiction to address the merits of the plaintiff's constitutional claims, on a qualified immunity appeal).

Riyaz A. Kanji criticizes a Second Circuit case, San Filippo v. United States Trust Co., 737 F.2d 246 (2d Cir. 1984), for taking this approach. *See* Kanji, *supra* note 40, at 529. Kanji would have had the court ignore the insufficiency of the plaintiff's claims and of the evidence to support them after it had rejected defendants' claim to absolute immunity. To have done so might have led to a wasted trial, however, when the court could avoid that waste by addressing the aforementioned issues, which it properly could address because whether plaintiffs' have stated a claim is an element of immunity analysis. In addition, failure to state a claim was another of the grounds argued by defendants in support of their motion to dismiss or for summary judgment. For the court to operate as Kanji recommends certainly would not serve the interests in judicial economy, conserve the litigants' resources, or protect defendant officials from the burdens of litigation. Kanji also criticizes the decision in *Stewart v. Baldwin County Board of Education*, 908 F.2d 1499, 1508-11 (11th Cir. 1990), where the court (in Kanji's view unnecessarily) considered whether the defendant school board was an arm of the state, and therefore entitled to Eleventh Amendment immunity, in order to determine whether its members might be entitled to that immunity. It has since been established, however, that denial of Eleventh Amendment immunity is itself immediately appealable under the collateral order doctrine. *See* Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993). The courts are not required to resolve qualified immunity issues before Eleventh Amendment immunity issues. While decision of one immunity question may make it unnecessary, it does not necessarily make it improper, to reach other immunity issues.

378. *See, e.g.*, Marks v. Clarke, 102 F.3d 1012, 1018 (9th Cir. 1996) (reviewing grants of partial summary judgment to plaintiffs because liability rulings were inextricably intertwined with and predicated, in part, upon the lower court decisions to deny qualified immunity, and because the appellate court holdings that defendants were entitled to qualified immunity rendered anomalous the summary judgment granted to plaintiffs); Brennan v. Township of Northville, 78 F.3d 1152, 1158 (6th Cir. 1996) (exercising pendent appellate jurisdiction to reverse partial summary judgment on liability granted to plaintiff where the holding, made in reviewing denial of qualified immunity, that plaintiff had failed to raise a constitutional claim "ha[d] everything to do with the merits of the sum-

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Courts similarly have exercised pendent appellate jurisdiction over grants of plaintiffs' cross-motions for summary judgment when, in the context of a qualified immunity appeal, their holding that genuine issues of material fact precluded summary judgment for the defendant dictated that the same conclusion preclude summary judgment for the plaintiff.[379]

Some courts have exercised pendent appellate jurisdiction over issues as to which they perceived themselves to lack an independent basis of jurisdiction by virtue of *Johnson v. Jones*,[380] holding that a district court denial of summary judgment (on a claim as to which qualified immunity has been sought) is not immediately appealable under the collateral order doctrine insofar as it is predicated on the existence of one or more genuine issues of material fact. For example, in *Blue v. Koren*[381] the court exercised pendent appellate jurisdiction over such a denial of summary judgment when the lower court's ruling was intertwined with the appealable issue of the standards to be applied to allegations and proof when a claim of retaliation is made, and review of the summary judgment ruling was necessary to meaningful review of the immediately appealable standards issue.[382]

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mary judgment in favor of plaintiff").

379. *See, e.g.,* Smith v. Arkansas Dep't of Correction, 103 F.3d 637, 650 (8th Cir. 1996) (finding jurisdiction because "the material dispute of fact that precludes ... qualified immunity is not only 'inextricably intertwined' with, but is precisely the same issue of fact that precludes summary judgment on liability") (citing *Swint*, 514 U.S. at 1212). In the *Smith* case, the appellate court's conclusion that genuine issues of material fact precluded summary judgment sought on the basis of qualified immunity was a ground for affirming a denial of qualified immunity that the district court had not grounded in genuine issues of material fact. Hence, the appeal was not barred by *Johnson v. Jones*, 515 U.S. 304 (1995) (holding that denials of summary judgment predicated on conclusion that there are genuine issues of material fact regarding defendant's entitlement to immunity are not immediately appealable as collateral orders). *See also* Marks v. Clarke, 102 F.3d 1012, 1018 (9th Cir. 1996) (reversing summary judgment rulings for plaintiffs to the extent court held that triable issues existed regarding qualified immunity).

380. 515 U.S. 304 (1995).

381. 72 F.3d 1075 (2d Cir. 1995).

382. *Id.* at 1084 n.6. The court explained that:

> Explication of the proper standard in the abstract is clearly far less helpful to the parties or the district court than an application of it in a concrete setting, particularly when we deal with an issue of first impression. Moreover, the facts here are rather typical of retaliation claims, and an abstract application by use of hypothetical facts would tread very close to a review of the record itself .... For similar reasons, meaningful review of the appealable issue of the proper standard requires us to determine whether a material dispute exists, at least in the first case in the circuit to address the former issue.

Id. See also Wilson v. Meeks, 98 F.3d 1247, 1252 (10th Cir. 1996) (retroactively holding

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Where courts have declined to exercise jurisdiction, that decision generally has flowed from the absence of overlap sufficient to justify pendent appellate jurisdiction, or from doubt about the power to exercise pendent issue appellate jurisdiction at all.[383]

(c) Pendent Appellate Jurisdiction over Cross-Appeals, Defenses, Miscellaneous Rulings and Other Claims in conjunction with the Review of Denials of Qualified Immunity

Litigants also may seek to have courts of appeals exercise pendent appellate jurisdiction over rulings concerning defenses other than qualified immunity, over rulings challenged by cross-appeal, or over rulings that concern other claims than that as to which qualified immunity was denied. In those circumstances, the law governing pendent appellate jurisdiction generally has been applied rather rou-

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that, when the case was up on a prior qualified immunity appeal, the court had had pendant appellate jurisdiction to consider whether plaintiffs' excessive force claim presented a genuine issue of material fact); McCloud v. Testa, 97 F.3d 1536, 1545 (6th Cir. 1996) (stating that *Johnson* leaves open "whether it may be appropriate, when an interlocutory appeal includes a straightforward issue of law," to exercise pendent appellate jurisdiction over questions of fact); McMillian v. Johnson, 88 F.3d 1554, 1563 (11th Cir. 1996) (holding that so long as an immediately appealable qualified immunity issue is raised, the court has jurisdiction to hear challenges to the determination that genuine issues of material fact exist as to defendant's conduct), *cert. denied sub nom.* McMillian v. Tate, 117 S. Ct. 2514 (1997); Dolihite v. Maughon *ex rel.* Videon, 74 F.3d 1027, 1034-35 n.3 (11th Cir. 1996) (holding identification of precise acts and knowledge of each appealing public official inextricably intertwined with, if not part of, the core qualified immunity issue because it is necessary to resolve the core qualified immunity issue and thus is within pendent appellate jurisdiction), *cert. denied sub nom.* Dolihite v. King, 117 S.Ct. 185 (1996).

383. *See* Chappel v. Montgomery County Fire Protection Dist. No. 1, 131 F.3d 564, 573 (6th Cir. 1997) (stating that even if the court had discretion to exercise pendent appellate jurisdiction over finding regarding sufficiency of evidence, it would decline to exercise it because the defendants had misread the scope of the complaint); Armendariz v. Penman, 75 F.3d 1311, 1317-18 (9th Cir. 1996) (having opined that no court had definitively decided whether pendent appellate jurisdiction in conjunction with a collateral order appeal ever is permissible, the court declined to exercise such jurisdiction over denial of summary judgment rendered nonappealable by *Johnson* where that decision was not inextricably intertwined with the lower court decision that plaintiff's allegations supported a claim of violation of clearly established law, and review of the former was not necessary to ensure meaningful review of the latter); Genas v. New York Dep't of Correctional Services, 75 F.3d 825, 833 (2d Cir. 1996) (refusing pendant appellate jurisdiction over interlocutory review of a denial of summary judgment on a retaliation claim for lack of sufficient overlap in the factors relevant to the two issues on appeal); Ratliff v. DeKalb County, 62 F.3d 338, 341 (11th Cir. 1995) (stating that even if court had power to exercise pendent appellate jurisdiction over the district court's allegedly erroneous assumptions of fact, court would decline to exercise such jurisdiction).

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tinely.

The courts have exercised pendent appellate jurisdiction over inextricably intertwined cross-appeals, alternative defenses and other interlocutory rulings. Thus, in *Jones v. Clinton*,[384] the Court of Appeals for the Eighth Circuit exercised pendent appellate jurisdiction over Paula Jones' cross-appeal from orders staying trial of her sexual harassment action against the President, in conjunction with hearing the President's appeal from the denial of absolute, but temporary, immunity from suit. It found that both those challenges and the President's challenge to the allowance of discovery were inextricably intertwined because they all would be resolved by answering the single question of whether a sitting President is entitled to immunity, for the duration of his presidency, from civil suit for unofficial acts.[385]

When the courts have found federal claims for injunctive relief to be inextricably intertwined with the federal claims for money

384. 72 F.3d 1354, 1357 n.4 (8th Cir. 1996), *aff'd*, 117 S. Ct. 1636 (1997).

385. *Id.* at 1357 n.4; *see also* Gardner v. Howard, 109 F.3d 427, 431 (8th Cir. 1997) (addressing plaintiff's contention that he was entitled to discovery to support assertion of widespread violations of governmental policy, in conjunction with qualified immunity appeal); Schmeltz v. Monroe County, 954 F.2d 1540, 1543 (11th Cir. 1992) (in conjunction with appeal from denial of qualified immunity and in the interest of judicial economy, exercising pendent appellate jurisdiction over denial of Eleventh Amendment immunity, as well as over defendant's contention that complaint did not sufficiently allege a custom or policy resulting in plaintiff's injury, where resolution of those issues could end all federal aspects of the case); Golino v. New Haven, 950 F.2d 864, 868-69 (2d Cir. 1991) (finding jurisdiction to review a denial of summary judgment grounded in part on a conclusion that plaintiff could not be collaterally estopped from relitigating whether there was probable cause to arrest him, where that ruling was purely legal and affected whether qualified immunity was available to defendants; given the close relationship between the collateral estoppel issue and the merits of the probable cause issues, exercising discretion to review the ruling that there existed genuine issues of material fact as to probable cause and the objective reasonableness of defendants' belief that there existed probable cause to arrest plaintiff); Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1509 (11th Cir. 1990) (in conjunction with appeal from denial of qualified immunity and in the interest of judicial economy, exercising pendent appellate jurisdiction over denial of Eleventh Amendment immunity). It should be noted however that, with the exceptions of *Jones* and *Gardner*, the cases cited above in this footnote were decided before the Court's decision in *Swint*. The decisions above concerning pendent appellate jurisdiction over denials of eleventh amendment immunity were decided before the Court held in *Puerto Rico Aqueduct and Sewer Authority. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), that such denials are immediately appealable collateral orders. *But see* Armijo *ex rel.* Chavez Wagon Mound Public Schools, 159 F.3d 1253, 1264-65 (10th Cir. 1998) (declining to exercise jurisdiction over a cross-appeal where the ruling on qualified immunity would not resolve the cross-appeal).

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damages as to which qualified immunity was denied by the trial court, they have exercised pendent appellate jurisdiction;[386] but if the requisite nexus was lacking, they have held that they lack jurisdiction.[387]

The courts of appeals are split on whether they should exercise pendent appellate jurisdiction over denials of motions to dismiss or for summary judgment on state law claims (typically for monetary relief) asserted against the defendants who appeal from the denial of qualified immunity on federal money-damage claims. The Fifth and Eleventh Circuits have exercised pendent appellate jurisdiction over such adverse rulings on the theory that refusal of jurisdiction would defeat the principal purpose of allowing an interlocutory appeal before a government employee is forced to go to trial,[388] and the Tenth Circuit has held pendent appellate jurisdiction appropriate over state law claims that are coterminous with or subsumed in a qualified immunity appeal.[389] Most circuits, however, including the Second, Third, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits, have declined to exercise pendent appellate jurisdiction over such adverse rulings, sometimes in the belief that they lacked jurisdiction, sometimes merely because of the absence of the necessary nexus between

386. *See, e.g.*, Gardner v. Howard, 109 F.3d 427, 431 (8th Cir. 1997) (reversing denial of summary judgment to defendants on injunctive claim); *see also* United States v. Lopez-Lukis, 102 F.3d 1164 (11th Cir. 1997) (exercising pendent appellate jurisdiction over the striking of part of an indictment where that ruling was closely related to the immediately appealable exclusion of government evidence, both orders having sprung from the same determination, and review of the evidentiary ruling necessarily implicating review of the striking order); Williams v. Delo, 49 F.3d 442, 445 (8th Cir. 1995).

387. *See, e.g.*, Malik v. Brown, 71 F.3d 724, 727 (9th Cir. 1995). *See also infra* note 390.

388. *See* Hart v. O'Brien, 127 F.3d 424, 436 (5th Cir. 1997) (exercising pendent appellate jurisdiction over officials' appeal of denial of summary judgment on grounds of official immunity for state law claims); Morin v. Caire, 77 F.3d 116, 119-20 (5th Cir. 1996) (citing judicial economy and the close relationship with the immediately appealable issue); Kelly v. Curtis, 21 F.3d 1544, 1555-56 (11th Cir. 1994) (exercising pendent appellate jurisdiction only over state law claims as to which the record and briefs allowed review with confidence).

I believe that the reasoning stated in the text at this note is erroneous in the absence of a state created immunity from suit. If defendants enjoy no state created immunity from suit on the state law claims asserted against them, there is no reason for the federal courts to protect the defendants from standing trial on those claims. *Cf.* Johnson v. Fankell, 117 S. Ct. 1800, 1803-04 (1997) (holding that even where defendants have a federal immunity from suit, state courts need not permit an interlocutory appeal from denial of such immunity).

389. *See, e.g.*, Moore v. City of Wynnewood, 57 F.3d 924, 930 (10th Cir. 1995).

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the immediately appealable orders and the state law claims, and sometimes for reasons not articulated in the opinions.[390]

The qualified immunity cases in which the courts declined to exercise pendent appellate jurisdiction over cross-appeals, alternative defenses and other interlocutory rulings out-number those in which the courts chose to exercise it. Courts have held that they lack power to exercise such jurisdiction when they lack all jurisdiction over a purported interlocutory appeal.[391] Other reasons range from a per-

390. *See, e.g.*, Eagle v. Morgan, 88 F.3d 620, 629 (8th Cir. 1996) (declining for insufficient intertwining with the issues properly before the court and because review was not necessary to meaningful review of the appealable order); Taylor v. Waters, 81 F.3d 429, 437 (4th Cir. 1996) (holding that court lacked power to review whether evidence was sufficient to raise a genuine issue of fact on state law claims not inextricably intertwined with nor necessary to review the qualified immunity issues); Rodriguez v. Phillips, 66 F.3d 470, 482-83 (2d Cir. 1995) (declining, as a matter of discretion, despite acknowledgement that some of the state law claims might be sufficiently intertwined with the qualified immunity claims to allow pendent appellate jurisdiction, and not stating reasons); Woods v. Smith, 60 F.3d 1161, 1166 & n.29 (5th Cir. 1995) (stating that the court lacked jurisdiction to hear the refusal to dismiss certain state law claims, citing *Swint*, and observing that "defendants had not advanced reasons for review more compelling than those rejected in *Swint*"); Sevier v. City of Lawrence, 60 F.3d 695, 701 (10th Cir. 1995) (declining jurisdiction over state law claim both for lack of any appellate jurisdiction and because it was unlikely that the issues would be coterminous with the proposed qualified immunity appeal); Garraghty v. Virginia Dep't of Corrections, 52 F.3d 1274, 1279 n.5 (4th Cir. 1995) (doubting power and declining to exercise pendent appellate jurisdiction over federal and state law claims as to which defendants had not claimed qualified immunity); L.S.T., Inc. v. Crow, 49 F.3d 679, 683 n.8 (11th Cir. 1995) (declining jurisdiction over some federal counts for lack of inextricably intertwining with the collateral order); *In re* City of Philadelphia Litig., 49 F.3d 945, 957 (3d Cir. 1995) (declining for insufficient intertwining with the issues properly before the court). *See also* Doe *ex rel.* Doe v. Petaluma City Sch. Dist., 54 F.3d 1447, 1449 (9th Cir. 1995) (holding that court lacked pendent appellate jurisdiction to decide whether defendant could be sued for Title IX violation under 42 U.S.C. § 1983).

391. *See, e.g.*, Shinault v. Cleveland County Bd. of County Comm'rs, 82 F.3d 367, 371 (10th Cir. 1996) (refusing pendent appellate jurisdiction over unspecified claims, for lack of jurisdiction over appeal from denial of qualified immunity which was predicated on disputed facts); Decker v. IHC Hospitals, Inc., 982 F.2d 433 (10th Cir. 1992) (finding it unnecessary to consider whether to exercise pendent appellate jurisdiction over an exhaustion of remedies issue where absence of collateral order resulted in lack of appellate jurisdiction); Langley v. Coughlin, 888 F.2d 252, 254 (2d Cir. 1989) (finding it unnecessary to consider whether to exercise pendent appellate jurisdiction over a denial of summary judgment to defendants, with respect to the merits of plaintiff's claim, where court lacked jurisdiction over immunity issue that turned on questions of fact); Group Health, Inc. v. Blue Cross Ass'n, 793 F.2d 491, 497-98 (2d Cir. 1986) (lacking an immediately appealable collateral order, court would not review a related issue of whether plaintiff's misrepresentation claims were barred).

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ceived lack of power to review any matters other than qualified immunity,[392] to insufficient nexus between the immediately appealable and the proposed pendent issues,[393] to conservatism in exercising such discretion to prevent exceptions from swallowing the rule against piecemeal appeals.[394]

(d) Absolute Immunity Cases

In the pre-*Swint* era, courts sometimes exercised pendent appellate jurisdiction when hearing collateral order appeals from orders denying sovereign immunity under the Foreign Sovereign Immunities Act (FSIA).[395] Orders denying claims of Eleventh Amendment im-

392. *See, e.g.,* Goyco De Maldonado v. Rivera, 849 F.2d 683, 684 (1st Cir. 1988) (stating that the court could not properly review any matters other than the denial of qualified immunity); Browning v. Clerk, United States House of Representatives, 789 F.2d 923, 930-31 (D.C. Cir. 1986) (declining to decide whether claim was barred by a failure to exhaust legislative remedies, where the only question "properly" before the court on interlocutory appeal was the Speech or Debate Clause immunity).

393. *See, e.g.,* Vista Community Services v. Dean, 107 F.3d 840, 843 (11th Cir. 1997) (stating that issues raised by ruling permitting plaintiff to amend its complaint and by arguments that claims were barred by res judicata or by waiver, were not sufficiently intertwined with qualified immunity issue to warrant pendent jurisdiction); Smith v. Arkansas Dep't of Correction, 103 F.3d 637, 650 (8th Cir. 1996) (declining to exercise jurisdiction over discovery ruling upon which district court had not relied in reaching its qualified immunity decision and which was not inextricably intertwined with the immunity issue); Renn v. Garrison, 100 F.3d 344, 352 (4th Cir. 1996) (also stating that many or even all of the questions remaining in the case might well be answered by its decision here); P.B. v. Koch, 96 F.3d 1298, 1305 (9th Cir. 1996) (noting that denial of motion to strike affidavit was not properly before the court where district court had disregarded challenged portions of affidavits in ruling on qualified immunity); Garramone v. Romo, 94 F.3d 1446, 1452 (10th Cir. 1996) (stating that lower court decision that res judicata and collateral estoppel did not apply to claims against defendants in their official capacities could not be reviewed because it had no relationship with the decision to deny immunity to the defendants); White v. Harmon, No. 94-1456, 1995 WL 518865, at *1 (6th Cir. Aug. 31, 1995) (refusing to review denial of summary judgment on the basis of collateral estoppel where it was neither inextricably intertwined with qualified immunity decision nor necessary to ensure meaningful review of the latter); Roque-Rodriguez v. Lema Moya, 926 F.2d 103, 105 & n.2, 109 (1st Cir. 1991) (stating that the First Circuit had refrained from exercising pendent appellate jurisdiction over matters beyond those bound up in the qualified immunity inquiry and expressing no view on several claims and issues outside that as to which immunity had been denied).

394. *See, e.g.,* K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 854 (7th Cir. 1990) (in its discretion, declining to hear non-immunity grounds for dismissal); Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 568 (6th Cir. 1986) (in its discretion, declining to review denial of state action antitrust exception).

395. 28 U.S.C. §§ 1602-11 (1994 & Supp. 1997).

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munity or immunity under the FSIA are immediately appealable under the collateral order doctrine.[396] On this basis, the appellate courts heard defenses based on the act of state doctrine[397] and on preemption,[398] but they declined to exercise pendent appellate jurisdiction over issues that were sharply distinct from the immunity issues.[399]

Post-*Swint*, the courts typically cite the language used by the Court in *Swint* to describe when pendent appellate jurisdiction might be permissible. Where the proposed pendent issues do not overlap with the immediately appealable orders, the courts continue to eschew jurisdiction.[400] Some additional conservatism is reflected in oc-

396. *See* Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) (regarding Eleventh Amendment immunity); Compania Mexicana De Aviacion, S.A. v. United States District Court, 859 F.2d 1354, 1358 (9th Cir. 1988) (regarding sovereign immunity).

397. *See, e.g.*, Honduras Aircraft Registry v. Gov't of Honduras, 129 F.3d 543, 550 (11th Cir. 1997) (exercising pendent appellate jurisdiction over district court rejection of defendant's argument for abstention based on the act of state doctrine); Walter Fuller Aircraft Sales v. Republic of the Philippines, 965 F.2d 1375, 1387 (5th Cir. 1992) (exercising jurisdiction where act of state issue was closely related to the sovereign immunity issue).

398. *See* Broughton v. Courtney, 861 F.2d 639, 641 n.1 (11th Cir. 1988) (seeking to avoid finding claims preempted after a full jury trial where the same facts were needed to decide both absolute immunity and preemption by the Civil Service Reform Act).

399. *See, e.g.*, Barrett v. United States, 853 F.2d 124, 131 (2d Cir. 1988) (declining to exercise pendent appellate jurisdiction over res judicata and release defenses that were entwined with unresolved fact issues and were sharply distinct from the Eleventh Amendment issue on which jurisdiction was predicated).

400. *See Honduras Aircraft Registry*, 129 F.3d at 550 (declining to exercise pendent appellate jurisdiction over ruling denying dismissal based on forum non conveniens because that issue was not closely related to the considerations involved in reviewing decisions concerning sovereign immunity); Lane v. National Airmotive Corp., No. 95-16968 1997 U.S. App. LEXIS 293, at *4 (9th Cir. Jan. 3, 1997) (unpublished opinion) (holding that court lacked jurisdiction to review the sufficiency of plaintiff's claim); Phaneuf v. Republic of Indonesia, 106 F.3d 302, 304 (9th Cir. 1997) (declining to review refusal to dismiss for lack of venue in connection with appeal from denial of motion to dismiss on the basis of sovereign immunity); Carver v. Foerster, 102 F.3d 96, 101 n.4 (3d Cir. 1996) (declining pendent jurisdiction over a causation argument made in conjunction with a claim to legislative immunity that was rejected below, where the two were not inextricably intertwined); Mancuso v. New York State Thruway Authority, 86 F.3d 289, 292 (2d Cir. 1996) (refusing to exercise pendent appellate jurisdiction over state law defenses that were neither inextricably intertwined with nor necessary to the resolution of Eleventh Amendment and sovereign immunity claims); Martin v. Memorial Hospital, 86 F.3d 1391, 1401 (5th Cir. 1996) (declining pendent appellate jurisdiction over a refusal to dismiss claims, in conjunction with the appeal of a refusal to grant summary judgment based on state action immunity in an antitrust suit, where no more compelling argument for review was made than the Court rejected in *Swint*); McKesson Corp. v. Islamic Republic of Iran,

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casional absolute statements that "jurisdiction to review collateral orders . . . does not confer pendent appellate jurisdiction."[401] In *Rendall-Speranza v. Nassim*,[402] one of the more interesting recent cases, the court exercised pendent appellate jurisdiction over the trial court's allowance of some claims despite asserted statute of limitations defenses where the appeals court had jurisdiction over the denial of defendants' claimed sovereign immunities under the International Organizations Immunities Act[403] and, in the view of the court of appeals, substantial considerations of judicial economy, efficiency and sound judicial administration favored the exercise of pendent jurisdiction.[404] As a matter of general principle, the court favored the exercise of such jurisdiction when an order is inextricably intertwined with the order (or part of the order) that is immediately appealable, or if the exercise will likely terminate the entire case.[405] It disfavored the exercise of such jurisdiction when the record is inadequate for review, the issue "might well be rendered moot or altered by further proceedings in the district court," or a relatively insignificant order is appealable and the orders proffered for pendent appellate jurisdiction are numerous or complex.[406] In the particular case, the court held the exercise of pendent appellate jurisdiction to be appropriate because the statute of limitations defenses could not be mooted or altered by further district court proceedings, and because by addressing the issue the court might be able to dispose of the entire case and thus save judicial resources and avoid immunity issues that were both difficult and delicate in view of their implications for United States' foreign relations.[407]

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52 F.3d 346, 353 (D.C. Cir. 1995) (holding that court lacked pendent appellate jurisdiction over an order refusing to sanction Iran for alleged violation of discovery orders, because that order was not inextricably intertwined with the denial of Iran's motion to dismiss under the FSIA; the district court had found Iran subject to suit without considering whether Iran had breached its discovery obligations).

401. *Lane*, No. 95-16968 1997 U.S. App. LEXIS 293, at *2-3 (holding that the court lacked jurisdiction to review the sufficiency of plaintiff's claim, in conjunction with review of a denial to dismiss based on FSIA immunity).

402. 107 F.3d 913 (D.C. Cir. 1997).

403. 22 U.S.C. §§ 288-288j (1994 & Supp. 1997).

404. *Rendell-Speranza*, 107 F.3d at 917.

405. *See id.*

406. *See id.*

407. *See id. But see* Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1026-27 (D.C. Cir. 1997) (when hearing the interlocutory appeal from a denial of immunity under the FSIA, asserting pendent appellate jurisdiction over denials of motions to

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(e) The Law Before Swint

The additional case law decided before *Swint* does not seem to warrant any lengthy comment. As suggested by the citations earlier, the tests that the courts used to determine whether they could and should exercise pendent appellate jurisdiction,[408] the exercises of, and the choices not to exercise, such jurisdiction typically were quite mundane and predictable, and to a large extent the same choices were made before *Swint* as are being made under it. On some occasions, however, courts have indicated that they now feel constrained not to exercise jurisdiction that they once would have exercised, and *Swint* most certainly restrains courts from exercising pendent *party* appellate jurisdiction.[409]

Regardless of the differences between the pre-*Swint* and the post-*Swint* law, the most important questions are: under what circumstances should judicial power be found to exercise pendent appellate jurisdiction over issues and over additional parties, and what factors should courts take into account when deciding whether, as a matter of discretion, to exercise that jurisdiction? These questions are addressed in Part IV, below.

(2) Miscellaneous Collateral Order Appeals

The courts' practices have been similar when miscellaneous collateral orders were appealed. Thus, before the Supreme Court held that orders disqualifying or refusing to disqualify counsel are not immediately appealable under the collateral order doctrine,[410] courts

dismiss for lack of personal jurisdiction, stating that such pendent jurisdiction is not limited to circumstances where issues are so closely related that review of pendent issues is necessary to review of, or will dispose of, the independently appealable issues; finding that because review of the rulings on personal jurisdiction might dispose of the case, and the parties' discovery had sufficiently illuminated the relevant facts, the exercise of appellate jurisdiction furthered the interests in fairness and efficiency), *criticized in* Rein v. Socialist People's Libyan Arab Jamahiriya, No. 98-7467, 1998 U.S. App. LEXIS 31223 (2d Cir. Dec. 15, 1998) (criticizing *Jungquist* for reserving to the appeals courts too much discretion to review pendent issues).

408. *See supra* Section III.

409. *See, e.g.*, United States v. Bloom, 149 F.3d 649, 657 (7th Cir. 1998) (observing that, since *Swint*, the Seventh Circuit has not exercised pendent appellate jurisdiction in any case).

410. *See* Richardson-Merrell Inc. v. Koller, 472 U.S. 424 (1985) (regarding orders granting motions to disqualify counsel); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) (regarding orders denying motions to disqualify counsel). These decisions preceded *Swint*.

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hearing those appeals exercised or refrained from exercising pendent appellate jurisdiction depending upon the relationship between the allegedly pendent issues and the order concerning disqualification, and upon application of the factors bearing upon the proper exercise of discretion. For example, in *General Motors Corporation v. City of New York*,[411] the Second Circuit refused to exercise pendent appellate jurisdiction over an order granting class action status in conjunction with the immediate appeal of an order refusing to disqualify an attorney because review of the latter would not entail consideration of factors relevant to the former, the trial judge might modify or strike the class aspect in light of later developments, and the class certification was not a patent abuse of discretion.[412] On the other hand, the immediate appealability of a disqualification order carried with it authority to review all aspects of the order including a requirement of total withdrawal from the case after 60 days, an allowance of a 60 day consultation period, and permission for disqualified counsel to turn over its work product to new counsel.[413]

In earlier days, one also found exercises of pendent appellate jurisdiction in conjunction with what are or were viewed as collateral orders related to class actions. *Sanders v. Levy*[414] held a class certification order to be appealable along with the collateral order directing the defendant to bear the cost of extracting the names and addresses of class members from computer tapes, because of the overlap in the factors relevant to both issues.[415] *Green v. Wolf Corporation*[416] even

411. 501 F.2d 639 (2d Cir. 1974).

412. *See id.* at 648. *See also* MacKethan v. Peat, Marwick, Mitchell & Co., 557 F.2d 395, 396 (4th Cir. 1977) (holding that court lacked pendent appellate jurisdiction over dismissal of a third party complaint upon appeal of order denying disqualification of counsel); Akerly v. Red Barn Sys., Inc., 551 F.2d 539, 545 (3d Cir. 1977) (concluding that jurisdiction over order denying disqualification of counsel did not empower court to consider denial of motion to dismiss the complaint even where the latter motion was based on alleged attorney misconduct).

413. *See* International Bus. Mach. Corp. v. Levin, 579 F.2d 271, 278 (3d Cir. 1978). In another miscellaneous collateral order case that has something to do with counsel, the court decided whether the trial court had erred in denying appointment of counsel under 28 U.S.C. § 1915(d), when hearing the interlocutory appeal from a denial of leave to proceed *in forma pauperis*. It noted that both issues require examination of the financial resources of the party seeking relief. *See* Sears, Roebuck & Co. v. Charles W. Sears Real Estate, Inc., 865 F.2d 22 (2d Cir. 1988).

414. 558 F.2d 636 (2d Cir. 1976) (en banc), *rev'd on other grounds sub nom.* Oppenheimer Funds, Inc. v. Sanders, 437 U.S. 340 (1978).

415. *See id.* at 643. *See also In re* Nissan Motor Corp Antitrust Litig., 552 F.2d 1088,

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held that when, under the "death knell" doctrine, the order striking the class action aspects of a complaint was immediately appealable and the appeals court was reversing, the order striking the prayer for punitive damages also would be heard so as to give the district court guidance on important problems of first impression, in order to expedite the trial and to minimize the possibility of re-trial.[417]

Other collateral orders involve abstention or stays of proceedings. Among the most notable recent decisions is *Federated Rural Electric Insurance Corporation v. Arkansas Electric Cooperatives, Inc.*,[418] a decision rendered shortly before *Swint* and rehearing in which was denied after the *Swint* decision came down. There, the court exercised jurisdiction over the trial court's failure to rule on the insurer's cross-motion for summary judgment, in conjunction with hearing the insurer's appeal from a grant of a *Colorado River*[419] stay.[420] The court did not cite *Swint* or discuss the factors usually discussed when pendent appellate jurisdiction is at issue; it merely quoted 28 U.S.C. § 2106, to the effect that, jurisdiction having been conferred by a collateral order:

> [The court was free to] affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully before [us] for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.[421]

Although a tenuous argument in support of pendent appellate jurisdiction might be made based on some overlap between the fac-

1096 (5th Cir. 1977) (where plaintiffs appealed an order prescribing the manner in which class notice was to be given and that plaintiffs bear the cost, finding jurisdiction to review an order requiring separate notice of a proposed settlement, because both related to absent class members rights, to the cost of notice and thus to each member's share of the provisional settlement fund); Peritz v. Liberty Loan Corp., 523 F.2d 349, 352 (7th Cir. 1975) (where order assessing costs of class notice against defendant was immediately appealable, holding that decision to try liability before class certification also was appealable because it underlied and was basic to the cost assessment order); *cf.* Brick v. CPC Int'l, Inc., 547 F.2d 185, 187 n.5 (2d Cir. 1976) (refusing pendent appellate jurisdiction over a refusal to retransfer the case, an order that did not overlap with the order denying class certification).

416. 406 F.2d 291 (2d Cir. 1968).

417. *See id.* at 302.

418. 48 F.3d 294 (8th Cir. 1995).

419. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

420. *Federated Rural Electric*, 48 F.3d at 300.

421. *See id.* (citations omitted).

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tors considered by the court in doing its *Colorado River* analysis and in directing the lower court in how it should resolve the summary judgment motion,[422] absent such justification, this opinion goes too far in extending the scope of appellate jurisdiction upon a pre-final judgment appeal.[423] More typical are cases in which appeals courts exercised pendent appellate jurisdiction over issues that were basic to and underlied the immediately appealable stay order.[424]

In the post-*Swint* world, another of the more interesting appellate decisions in the context of stay appeals is the Seventh Circuit's decision in *IDS Life Insurance Co. v. SunAmerica, Inc.*[425] Putting aside complications of the case that are not pertinent for present purposes, the court concluded that the trial judge had denied a stay pending arbitration to defendants who were not members of the NASD (National Association of Securities Dealers), and that that denial was immediately appealable under the Federal Arbitration Act.[426] The court was asked to assert pendent appellate jurisdiction

422. *Compare id.* at 298-99 *with id.* at 300.

423. Another expansive exercise of pendent appellate jurisdiction is found in McKnight v. Blanchard, 667 F.2d 477 (5th Cir. 1982) (finding jurisdiction to review an order indefinitely staying a trial until the plaintiff's release from prison, and resolving "connected issues" whose immediate resolution would avoid further appeals and indefinite prolongation of the litigation; these orders included the denial of a motion for speedy trial, an order directing answers to interrogatories, and denial of a motion to have counsel appointed).

424. *See, e.g.*, Allied Paper Inc. v. United Gas Pipe Line Co., 561 F.2d 821, 825 (Temp. Emer. Ct. App. 1977) (exercising jurisdiction over cross-appeal from substantive law ruling concerning the scope of certain regulations of the price of natural gas where that ruling was basic to the decision to stay the federal proceedings).

425. 103 F.3d 524 (7th Cir. 1996).

426. *See id.* at 525; *see also* 9 U.S.C. § 16(a)(1)(A) (1994 & Supp. 1997). In general, when an order compelling arbitration is made in an independent proceeding—that is, a proceeding in which the sole issue is whether to compel arbitration—the order is immediately appealable. When the order is "embedded" in a proceeding which puts other issues before the court, most actions are stayed pending arbitration and courts generally hold the orders to be interlocutory and not immediately appealable. *See* Napleton v. General Motors Corp., 138 F.3d 1209 (7th Cir. 1998); McCarthy v. Providential Corp., 122 F.3d 1242, 1243-44 (9th Cir. 1997), *cert. denied*, 142 L. Ed. 2d 227 (1998). The Third, Sixth, and Tenth Circuits, however, have allowed immediate appeals of pro-arbitration *dismissals* in embedded proceedings. *See* Armijo v. Prudential Ins. Co., 72 F.3d 793, 796-97 (10th Cir. 1995); Arnold v. Arnold Corp. – Printed Communs. For Business, 920 F.2d 1269, 1274-76 (6th Cir. 1990) (finding jurisdiction where district court dismissed proceedings and entered Rule 54(b) judgment); Nationwide Ins. Co. v. Patterson, 953 F.2d 44, 46 (3rd Cir. 1991). The Seventh Circuit has refused to allow immediate appeal even in that circumstance. *See Napleton, supra.*

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over plaintiff's cross-appeal which argued error in the ruling that plaintiff's dispute with *other* defendants who *were* NASD members was subject to arbitration and error in the stay of the court proceedings with respect to that dispute.[427] The court speculated that by expressly denying immediate appealability to orders staying federal court proceedings pending arbitration, Congress might have precluded the application of pendent appellate jurisdiction doctrine to orders staying proceedings pending arbitration, as Congress would have the power to do.[428] Recognizing that the doctrine was unlikely to have been in the consciousness of legislators, the court purported to treat the issue as open.[429] However, the court interpreted the Arbitration Act to preclude pendent appellate jurisdiction over stays pending arbitration,[430] notwithstanding the contention that the orders statutorily made immediately appealable and the orders in controversy on the cross-appeal were inextricably intertwined.[431]

Still other collateral order appeals involve contempt citations and other sanctions. Issues of pendent appellate jurisdiction also may arise in these interlocutory appeals. For example, in *Morley v. Ciba-Geigy Corporation*,[432] after noting that a Rule 11[433] order against

427. *See IDS Life Insurance*, 103 F.3d at 525.

428. *See id.* at 528.

429. *See id.*

430. The court stated that "[w]e hold that section 16 precludes application of the doctrine of pendent appellate jurisdiction to refusals to stay arbitration." *Id.* at 528.

431. *See id.* at 528; *cf.* Freeman v. Complex Computing Co., 119 F.3d 1044, 1049-50 (2d Cir. 1997) (expressly disagreeing with *SunAmerica*, and, in the context of an anchoring cross-appeal under the Federal Arbitration Act, exercising pendent jurisdiction over the appeal of an order to arbitrate in an embedded proceeding and staying legal action pending arbitration, given substantial factual overlap, inextricable intertwining of the issues, and that resolution of the appeal would facilitate arbitration); *In re* United States Lines, Inc., 199 Bankr. 465 (S.D.N.Y. 1996) (exercising pendent and pendent party appellate jurisdiction over determination that some proceedings were "core" where resolution would have a "serious," if not dispositive, impact on whether the bankruptcy court erred in refusing to send certain matters to arbitration and denying a stay pending arbitration, while rejecting pendent appellate jurisdiction over issues that were not related to the denial of the stay), *modified on other grounds*, 220 B.R. 5 (S.D.N.Y. 1997); Hewlett-Packard Co. v. Berg, 61 F.3d 101, 104-05 (1st Cir. 1995) (stating that where order confirming arbitration award was immediately appealable by statute, contention that confirmation proceeding should have been stayed could be considered at the same time where argument for stay of the confirmation proceeding also was an objection to the confirmation order itself; declining to decide the immediate appealability of a refusal to allow the appealing party a set-off, stating that the jurisdictional issue need not be decided because the refusal to allow the set-off was not a legal error).

432. 66 F.3d 21 (2d Cir. 1995).

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an attorney is appealable under the collateral order doctrine,[434] the court concluded that where the issues were substantially the same with respect to the plaintiff and her attorney, it would exercise its discretion to accept pendent *party* appellate jurisdiction over plaintiff's immediate appeal.[435] Pre-*Swint*, the Fourth Circuit, too, had exercised pendent *party* appellate jurisdiction, in the interest of efficiency, to hear the appeal of a union local from a contempt conviction when the court had held that the civil contempt "conviction" of union officials (for the same conduct) was immediately appealable, the officials having been dismissed from the case.[436] Instances of "straight" pendent issue appellate jurisdiction in the contempt context also exist, of course.[437]

Another set of collateral order appeals arises in the context of criminal prosecutions. In the shadow of the *Abney* case,[438] in which the Court disapproved review of the sufficiency of an indictment

433. FED. R. CIV. P. 11.

434. This is not always so. *See, e.g.,* Cleveland Hair Clinic, Inc. v. Puig, 104 F.3d 123, 125 (7th Cir. 1997) (holding that decision imposing sanctions jointly and severally on attorney who has withdrawn and on his former client was not immediately appealable by attorney when the decision did not end the litigation or determine amount due).

435. *Morley*, 66 F.3d at 22 n.1; *see also In re* Tutu Wells Contamination Litigation, 120 F.3d 368, 373, 381-82, 385-86 (3rd Cir. 1997) (where court had jurisdiction over suspension and monetary sanctions imposed on attorneys no longer involved in the case, exercising pendent party appellate jurisdiction over inextricably intertwined sanctions issues raised by attorney's former client and by other parties pertaining to the level of monetary sanctions awarded to them, since the appeals raised identical legal issues and resolution of the one would govern the other).

436. *See* Consolidation Coal Co. v. Local 1702, 683 F.2d 827, 831 (4th Cir. 1982).

437. *See, e.g.,* Thorton v. General Motors Corp., 136 F.3d 450, 453-54 (5th Cir. 1998) (exercising pendent appellate jurisdiction over order to pay as yet unspecified attorney fees as a sanction for pre-filing conduct, in conjunction with appeal of suspension from practice, since the two were inextricably intertwined); United States v. Martin Linen Supply Co., 485 F.2d 1143, 1146, 1148-49 (5th Cir. 1973) (having jurisdiction over appeal from dismissal of criminal contempt petition, also considering appeal from dismissal of virtually identical civil contempt petition, and where order interpreting consent decree in civil antitrust case was the basis for denying the contempt petitions, finding jurisdiction to review the interpretive order).

An additional case involving pendent appellate jurisdiction in the collateral order context that does not fit within any of the foregoing categories is Wilson v. United States Dep't of Agric., No. 95-70403, 1996 WL 740850, at *2 n.1 (9th Cir. Dec. 16, 1996) (having statutory jurisdiction over the portion of an order withdrawing poultry inspection services, exercising pendent appellate jurisdiction over the portion of the order withdrawing meat inspection services because both arose out of a consolidated proceeding, involved a common nucleus of fact and presented the same issues).

438. Abney v. United States, 431 U.S. 651 (1977).

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pendent to the interlocutory appeal of the denial of a motion to dismiss on double jeopardy grounds and observed that the requirement of finality is particularly strict in criminal proceedings because the disruption and delay caused by interlocutory appeals are especially inimical to fair and effective administration of criminal law,[439] the courts of appeals have been particularly reluctant to exercise pendent appellate jurisdiction in criminal cases.[440] In at least one instance in which an appeals court did exercise such jurisdiction, the Supreme Court reversed, holding that the court lacked jurisdiction to entertain the defendant's speedy trial appeal, as pendent to his double jeopardy claim or otherwise.[441] The courts have, however, considered ar-

439. *See id.* at 657.

440. *See* United States v. Rostenkowski, 59 F.3d 1291, 1301 (D.C. Cir. 1995) (when reviewing the denial of motions to dismiss and a motion for *in camera* review of grand jury materials pursuant to the Speech or Debate clause and separation of powers doctrine, finding no jurisdiction to review the denial of the defendant congressman's motion for a pretrial hearing to review the evidence generally); United States v. McDade, 28 F.3d 283, 288-89, 297, 298 n.19, 301, & 302 n.24 (3d Cir. 1994) (relying on *Abney* to hold that the court's jurisdiction extended no further than to orders satisfying the collateral order doctrine, and therefore declining to consider whether a count did not state a RICO offense, whether the indictment was sufficient, whether the government provided sufficient notice of the charges, whether it was error to refuse to strike allegations of overt acts not essential to the offense charged, and evidentiary questions, to the extent that none of these was based on the Speech or Debate Clause); United States v. Van Engel, 15 F.3d 623, 628-29 (7th Cir. 1993) (noting that interlocutory appeals are even more disfavored in the criminal than in the civil arena, and that before exercising pendent appellate jurisdiction in a criminal case the court should "insist . . . at a minimum that the main and pendent claims display a very large degree of overlap so that the pendent claim is unlikely to slow down the case by making the appeal more complicated;" on that basis and because pertinent facts and legal principles were different, declining to review alleged infringement of defendant's right to a grand jury, pendent to appeal alleging infringement of the right to counsel); United States v. Blackwell, 900 F.2d 742 , 743 (4th Cir. 1990) (declining to consider questions of venue and transfer as pendent to a double jeopardy appeal); United States v. Barket, 530 F.2d 181, 186 (8th Cir. 1975) (declining to consider alleged failure to charge an offense and unconstitutionality of a law that defendant was charged with violating, pendent to a double jeopardy appeal, but considering as part of the double jeopardy prong an argument that the second prosecution was barred by collateral estoppel); United States v. Klein, 582 F.2d 186, 196 (2d Cir. 1978) (declining to hear questions concerning prosecutorial misconduct and allegedly erroneous rulings, pendent to a double jeopardy appeal); United States v. Cerilli, 558 F.2d 697, 700-01 (3d Cir. 1977) (declining to hear questions concerning prosecutorial misconduct and the statute of limitations, pendent to a double jeopardy appeal; noting that the trial judge had reserved decision on a change of venue and had power to otherwise protect the defendants from prejudicial publicity, induced by the prosecutors or otherwise).

441. *See* United States v. MacDonald, 531 F.2d 196, 199 & n.3, 209 (4th Cir. 1976)

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guments and issues insofar as they underlaid the contention of a violation of the right not to be subjected to double jeopardy.[442] Occasionally, a bold appellate court has gone further and exercised pendent appellate jurisdiction: in one instance over the contention that public filing by the government of briefs and memoranda containing unsuppressed material gained through electronic surveillance would violate defendants' right to a fair trial, in conjunction with a collateral order appeal of an order allowing such filing and rejecting defendants' claim that their statutorily guaranteed privacy rights were thus violated;[443] and, in another instance, over the contention that an indictment failed to allege an offense.[444] Even the Court of Appeals for the Eleventh Circuit, whose earlier decision was reversed by *Swint*, upheld pendent appellate jurisdiction in a criminal case in which the government had taken an interlocutory appeal.[445] The court both distinguished *Swint* as having "dealt only with the use of pendent [appellate] jurisdiction over a nonappealable issue involving *parties* different from those involved in the appealable issue,"[446] and held

(exercising pendent appellate jurisdiction over speedy trial claim and deciding it *rather than* the double jeopardy claim, although noting the close relation between the two; also addressing other issues on a pendent basis which, the court found, if not presented immediately might delay termination of the litigation), *rev'd*, 435 U.S. 850, 857 & n.6 (1978) (concluding that the argument for pendent jurisdiction over the speedy trial claim was vitiated by *Abney*).

442. *See, e.g.*, United States v. Russotti, 717 F.2d 27, 32 n.2 (2d Cir. 1983) (concluding that to extent collateral estoppel claim related to the double jeopardy question it was reviewable on interlocutory appeal with the latter); United States v. Wright, 622 F.2d 792, 793 (5th Cir. 1980) (considering prosecutorial overreaching but only insofar as it supported the double jeopardy question); *Barket*, 530 F.2d at 186 (considering collateral estoppel and double jeopardy claims).

443. *See* United States v. Gerena, 869 F.2d 82, 84 (2d Cir. 1989) (relying upon the overlap in the factors relevant to the two issues, and the consequent judicial economy in simultaneous review).

444. *See* United States v. Myers, 635 F.2d 932, 936 (2d Cir. 1980) (so concluding when the other issues presented arose under the Speech or Debate Clause or the doctrine of separation of powers, the Supreme Court having decided in *Helstoski v. Meanor*, 442 U.S. 500 (1979), that denials of motions to dismiss based on the former were immediately appealable and the Second Circuit having held here that denials of motions to dismiss based on the latter were as well). The *Myers* decision was criticized in *Rostenkowski*, 59 F.3d at 1301.

445. *See* United States v. Lopez-Lukis, 102 F.3d 1164, 1167 n.10 (11th Cir. 1997). In some circumstances, 18 U.S.C. § 3731 authorizes an appeal by the United States from a decision or order of a district court suppressing or excluding evidence in a criminal proceeding. 18 U.S.C. § 3731 (1994).

446. *Lopez-Lukis*, 102 F.3d at 1167 n.10 (emphasis added).

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Swint's requirements to be met because of the relationship between an order striking a paragraph of the indictment and the order excluding some of the government's evidence. The court found that judicial economy would be served by simultaneous review and that review of the former order satisfied both the inextricably intertwined and the necessary to ensure meaningful review tests because "[b]oth orders resulted from the same determination—i.e., that the videotape incident cannot be used to support a charge of mail fraud .... Furthermore, review of the evidentiary ruling necessarily implicates review of the order striking ¶ 14 from the indictment."[447]

(3) Pendent Party Appellate Jurisdiction

The exercise of pendent appellate jurisdiction that the Court disapproved in *Swint* was an exercise of pendent *party* appellate jurisdiction, and the Court placed some emphasis upon this fact, implying that the exercise of jurisdiction consequently was all the more questionable.[448] The courts of appeals, both before and after *Swint*, have been grudging in their exercise of such jurisdiction. The number of cases in which courts have declined to exercise pendent party appellate jurisdiction far exceeds the number of cases in which courts have held that they may exercise such jurisdiction. The reasons range

447. *Id.*; *see also* Law v. NCAA, 134 F.3d 1025, 1030 (10th Cir. 1998) (holding that a contempt order that contains both punitive and coercive elements is appealable as a final judgment and the court has jurisdiction to review the entire sanction order); *In re* Sealed Case, 131 F.3d 208, 210-11 (D.C. Cir. 1997) (upon interlocutory appeal of a decision to transfer a juvenile for adult prosecution, exercising pendent appellate jurisdiction over the reviewability of a U.S. Attorney's certification of a substantial federal interest in the case because the two were inextricably related and federal subject matter jurisdiction depended upon the certification); United States v. Zafiro, 945 F.2d 881, 885 (7th Cir. 1991) (containing dicta stating if the government appeals an order made appealable by 18 U.S.C. § 3731, appeals court may permit it to challenge a severance in the exercise of pendent appellate jurisdiction), *aff'd*, 506 U.S. 534 (1993); United States v. Maker, 751 F.2d 614, 626 (3d Cir. 1984) (upholding jurisdiction over questions relating to the severance of charges and of the defendants as intertwined with the issues raised by dismissal of the indictment, which was properly before the court).

448. *See* Swint v. Chambers County Comm'n, 514 U.S. 35, 48 n.6 (1995) (noting that the appeals court had asserted "not merely pendent appellate jurisdiction, but pendent *party* appellate jurisdiction"). *But see In re* United States Lines, Inc., 199 Bankr. 465 (S.D.N.Y. 1996) (viewing Court's comments in *Swint* not to indicate that the Court disfavored pendent party appellate jurisdiction any more than it disfavored single party pendent appellate jurisdiction), *modified on other grounds*, 220 B.R. 5 (S.D.N.Y. 1997).

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from a failure of appellate jurisdiction altogether,[449] to an apparent belief that *Swint* disallows the exercise of pendent party appellate jurisdiction in any circumstances,[450] to the absence of sufficient intertwining of the issues proposed to be heard under pendent appellate jurisdiction with those independently reviewable on interlocutory appeal,[451] to unexplained but especial reluctance to extend jurisdiction to co-defendants to whom the qualified immunity defense is not available,[452] to reluctance to exercise pendent appellate jurisdiction of

449. *See, e.g.*, Woolfolk v. Smith, 81 F.3d 741, 743 (8th Cir. 1996); Babb v. Lake City Community College, 66 F.3d 270 (11th Cir. 1995); Moffitt v. Town of Brookfield, 950 F.2d 880, 886-87 (2d Cir. 1991).

450. *See* Harris v. Board of Educ., 105 F.3d 591, 595 (11th Cir. 1997) (concluding that there is no pendent party appellate jurisdiction; consequently rejecting jurisdiction over a co-defendant's appeal); Nolen v. Jackson, 102 F.3d 1187, 1189 (11th Cir. 1997) (finding no pendent party appellate jurisdiction); Grant v. City of Pittsburgh, 98 F.3d 116, 126 n.7 (3d Cir. 1996) (same); *Babb*, 66 F.3d at 272 (same); Smith v. Myers, 65 F.3d 169, *reported in full*, 1995 U.S. App. LEXIS 33103, at *11 (6th Cir. Sept. 1, 1995) (while acknowledging that the Court had not definitely and presumptively settled whether an appellate court may review related rulings that are not independently reviewable, opining that it could not exercise pendent party appellate jurisdiction); Haney v. City of Cumming, 69 F.3d 1098, 1102 (11th Cir. 1995) (stating that there is no pendent party appellate jurisdiction), *cert. denied*, 116 S. Ct. 1826 (1996) ; Barnette v. Folmar, 64 F.3d 598, 599 n.1 (11th Cir. 1995) (same); Ratliff v. DeKalb County, 62 F.3d 338, 339 n.2 (11th Cir. 1995) (same); Pickens v. Hollowell, 59 F.3d 1203, 1208 (11th Cir. 1995) (same); Henderson *ex rel.* Epstein v. Mohave County, 54 F.3d 592, 594 (9th Cir. 1995) (same); Swint v. City of Wadley, 51 F.3d 988, 1002 (11th Cir. 1995) (same). For a pre-*Swint* decision declining to exercise pendent party appellate jurisdiction for lack of jurisdiction, see Rich v. City of Mayfield Heights, 955 F.2d 1092, 1094 (6th Cir. 1992).

451. *See Woolfolk*, 81 F.3d at 743 (finding claims not inextricably intertwined); Foote v. Spiegel, 118 F.3d 1416, 1423-24 (10th Cir. 1997) (declining to exercise pendent appellate jurisdiction over a plaintiff's cross-appeal where resolution of the appealable portion of the denial of qualified immunity for a detention and strip search would not necessarily resolve plaintiff's claims that the district court erred in denying summary judgment in her favor on the legality of the initial stop and arrest, and resolution of the proposed pendent issues was not essential for effective review of the collateral order); Veneklase v. City of Fargo, 78 F.3d 1264, 1270 (8th Cir. 1996) (declining jurisdiction where issues concerning city's alleged failure to train and concerning constitutionality of residential picketing ordinance were not coterminous with or subsumed in the qualified immunity issue), *cert. denied*, 117 S. Ct. 178 (1996); Walter v. Morton, 33 F.3d 1240, 1242 (10th Cir. 1994) (declining jurisdiction where factual issues determinative of town's liability were not fully developed in the record and were not closely related to the officer's claim of qualified immunity).

452. *See, e.g.*, Myers v. Town of Landis, 107 F.3d 867, *reported in full*, 1997 U.S. App. LEXIS 2878 (4th Cir. Feb. 20, 1997) (stating court's reluctance to extend pendent jurisdiction over appeals of denials of qualified immunity to co-defendants who "may not even avail themselves of the defense"); Buckley v. Fitzsimmons, 919 F.2d 1230, 1239 (7th Cir.

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any variety, absent extraordinary circumstances.[453]

In a few cases, both pre- and post-*Swint*, courts of appeals *have* exercised pendent party appellate jurisdiction. In one, *Samuels v. Meriwether*, the Eighth Circuit did so without any indication that it recognized that it was doing so.[454] However, in an earlier case, that circuit had held that where its ruling on the merits of individual employees' assertions necessarily resolved the employer City's pendent claims, the City's appeal was inextricably intertwined with the qualified immunity appeal and properly could be heard.[455] The court apparently was applying this principle in its later decision in *Samuels*.

The Tenth Circuit has taken the same approach. It has held that when the following requirements are met, so that the ruling on the collateral appeal resolves all of the issues presented by the pendent appeal, a case falls into one of the narrow exceptions left open by *Swint*:[456]

> [A] pendent appellate claim can be regarded as inextricably intertwined with a properly reviewable claim on collateral appeal only if the pendent claim is coterminous with, or subsumed in, the [latter] claim . . . —that is, when the appellate resolution of the collateral appeal necessarily resolves the pendent claim as well.[457]

1990) (stating that pendent party appellate jurisdiction is especially problematic and declining to exercise it), *vacated on other grounds*, 502 U.S. 801 (1991); McKee v. City of Rockwall, 877 F.2d 409, 413 (5th Cir. 1989) (declining to exercise "so strange an animal" as pendent party appellate jurisdiction); *see also* Wilkie v. Board of Comm'rs, 110 F.3d 62, *reported in full*, 1997 U.S. App. LEXIS 5873 (4th Cir. March 28, 1997) (no specific reason stated).

453. *See, e.g.*, Natale v. Town of Ridgefield, 927 F.2d 101, 104 (2d Cir. 1991) (declining to exercise pendent party appellate jurisdiction because no extraordinary circumstances were present).

454. 94 F.3d 1163, 1165-68 (8th Cir. 1996) (exercising jurisdiction over the appeal by a city of the denial of its motion for summary judgment on the merits, in conjunction with the appeal by individual defendants of the denial of qualified immunity; the court merely pointed out that it could decide claims that are inextricably intertwined with the qualified immunity issues and found that the analyses of the constitutional claims against the city and its employees were "subsumed in" the qualified immunity analysis.)

455. *See* Eagle v. Morgan, 88 F.3d 620, 628 (8th Cir. 1996); *see also* Isibor v. City of Franklin, No. 97-5729, 1998 U.S. App. LEXIS 10766 (6th Cir. May 26, 1998) (unpublished opinion) (exercising jurisdiction over the city's appeal of the denial of its motion for summary judgment in connection with officers' appeals of their denials of their summary judgment motions, where resolution of the latter also would resolve the former); *In re* United States Lines, Inc., 199 Bankr. 465 (S.D.N.Y. 1996), *modified on other grounds*, 220 B.R. 5 (S.D.N.Y. 1997).

456. Moore v. City of Wynnewood, 57 F.3d 924, 930 (10th Cir. 1995).

457. *See id.*

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Thus, the court could assert jurisdiction over a city's appeal of the denial of its motion for summary judgment on federal and state law claims where plaintiff's claims against the city and its employee were predicated on alleged violations of plaintiff's First Amendment rights and the appellate court held that no such violations occurred—hence, disposition of the qualified immunity appeal fully disposed of the claims against the city.[458] The court cautioned however that a municipality's appeal is not necessarily inextricably intertwined with an appeal of the denial of qualified immunity and may not need to be resolved to ensure full review of the latter.[459] For example, if the plaintiff's rights had been violated and the city's liability turned on whether an individual defendant was a city policy maker, or if the individual defendants were qualifiedly immune because plaintiff's rights were not clearly established at the time of the events in controversy, the city's appeal might present different issues than the appeal of the denial of qualified immunity.[460] In such situations, the court implies, the assertion of pendent party appellate jurisdiction would be improper.[461]

IV. What "Rules" Should Govern Pendent Appellate Jurisdiction?

"Rules cannot be favored or disfavored in the abstract; everything depends on whether, in context, rules are superior to the alternatives."[462] Rules certainly play an important role in our legal system and codified rules can have a number of virtues.[463] But they are not

458. *See id.*

459. *See id.*

460. *See id.*

461. *See id.* at 930-31. In both *Samuels* and *Eagle*, it also was true that defendants were held not to have violated plaintiffs' rights. *See* Samuels v. Meriwether, 94 F.3d 1163, 1167-68 (8th Cir. 1996), Eagle v. Morgan, 88 F.3d 620, 624-28 (8th Cir. 1996). For a pre-*Swint* decision asserting pendent party appellate jurisdiction, *see* Barrett v. United States, 798 F.2d 565, 571 (2d Cir. 1986) (asserting jurisdiction over a plaintiff's cross-appeal of a grant of absolute immunity to an assistant attorney general, which was brought along with other defendants' appeal of the denial of qualified immunity to them, where all of the issues involved in the cross-appeal were found to be involved in the qualified immunity appeal).

462. Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 959 (1995).

463. Professor Sunstein catalogs some of the virtues of rules as follows: Rules minimize the informational and political costs of reaching decisions in particular cases; rules are impersonal and blind: they promote equal treatment and reduce the likelihood of bias

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always the optimal approach to governance. Rules tend to have certain vices: to be both overinclusive and underinclusive when measured against the reasons for them; to fail to keep up with changing circumstances and to operate perversely in unanticipated circumstances; to mask bias and produce inequality to the extent that they do not allow relevant differences to be taken into account; to drive discretion underground; to invite evasion; and sometimes to be dehumanizing or unfair as applied.[464] Moreover, for lack of information or for other reasons, it is not always feasible to draft good rules.

Whether particular orders ought to be immediately appealable as a matter of pendent appellate jurisdiction requires an evaluation of competing considerations concerning the best time for appellate review which is too subtle and complex to be well captured by a formal codified Rule. Rather than attempt to govern this determination by a Rule, the courts (or, if necessary, those who promulgate procedural Rules) should articulate the *factors* that should bear on the determination and leave the rest to case-by-case determination.[465] I propose the following considerations and the following non-exhaustive list of guidelines, standards and factors.

A. Power

First, there must be power to exercise pendent appellate jurisdiction. No constitutional provisions constrain the choices to be made concerning the timing of appeals, or in particular whether or under what circumstances rulings should be appealable on a pendent basis before final judgment. Thus, factors whose analogue in the realm of

and arbitrariness; rules serve appropriately both to embolden and to constrain decisionmakers in particular cases; rules promote predictability and planning for private actors and for the government; rules increase visibility and accountability; rules avoid the humiliation of subjecting people to exercises of official discretion in their particular case; and rules promote equal application of the law. *See id.* at 969-77. Elsewhere in his article he writes that rules "reduce costs, ease choice, limit the errors encountered in particular decisions, produce coordination, and make it unnecessary to debate issues of value and fact every time someone does something having social consequences." *Id.* at 1022.

464. *See id.* at 991-96.

465. Professor Sunstein describes a system based on factors as characterized by the following features: it may be impossible to identify in advance exactly what is relevant, but decisions are based on multiple and diverse criteria whose relative weights cannot be assigned in advance and which may not be commensurable—that is, we may value the factors involved in qualitatively different ways; the factors are attentive to much of the whole situation and to particulars; and attempts to ensure that similarly situated persons are treated similarly are made through comparisons with other cases. *See id.* at 998-1003.

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supplemental district court jurisdiction are essential for judicial power under the Constitution (such as a "common nucleus of operative fact") go at most to judicial power under the statutes and Rules governing the timing of appeals. Those statutes and Rules are highly relevant in determining the permissible scope of pendent appellate jurisdiction but, as the discussion earlier in this Article demonstrated, as a matter of historical practice their interpretation allows substantial latitude in framing the scope of pendent appellate jurisdiction. As a matter of essential power, the first and arguably only requirement is that there be an order that is appealable, and that has been properly appealed, before final judgment. Once that requirement has been met, I will posit that there is power to hear all issues theretofore decided in the case by the district court, or at least all such issues that relate in some manner to the subject matter of the appeal. Of course, the phrase "subject matter of the appeal" is itself malleable and elastic, but to some degree that is an inherent condition of words, and the phrase is not without intuitive content[466] or legal analogue.[467] Developments such as the mooting of the immediately appealable order affect sound exercise of the discretion to hear other rulings on a pendent basis,[468] but do not affect the court's power to do so.

Requirements that go to the factual, legal and logical connection between an independently appealable order and those orders proposed for review on a pendent basis could be viewed as dictated by the statutes and Rules authorizing interlocutory appeals (and hence as a matter of power), or they could be viewed as bearing only (although very significantly) on the sound exercise of the discretion to hear other rulings on a pendent basis. In their language, the Supreme Court and the appellate courts generally seem to have viewed these connection requirements as going to power, but in their actions the courts, including the Supreme Court, have exercised pendent appellate jurisdiction that goes beyond the word formulas that they have articulated in efforts to describe the parameters of their power. Consequently, I believe it would be truer to what the courts *do* to say (as I did in the preceding paragraph) that the federal appellate courts

466. *See infra* text at notes 469-75.

467. *Cf.* Fed. R. Civ. P. 26(b) which pegs the scope of discovery to what is "relevant to the subject matter involved in the pending action."

468. *See* Brown v. Clerks and Checkers Union Local 1497, 590 F.2d 161, 165 (5th Cir. 1979) (declining to exercise pendent appellate jurisdiction under § 1292(a)(1) where the only appealable order had become moot).

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have power to hear all issues theretofore decided in the case by the district court, or at least all such issues that relate in some manner to the subject matter of the appeal. Then the strength of the factual, legal and logical connections between an independently appealable order and an order proposed for review on a pendent basis remains a very significant factor, but one which affects the sound exercise of the discretion to hear rulings on a pendent basis. The question of how the appropriate relationship should be phrased becomes somewhat less critical, although it remains worthy of attention.

The Court's decisions in cases such as *Deckert*, *Eisen*, *Thornburgh*, *Schlagenhauf*, *Bauxite de Guinee*, and perhaps even *Jones v. Clinton* demonstrate that the Court has examined (and approved the appellate examination of) issues that were *not* entirely subsumed within the independently appealable orders presented and issues that did not inescapably need to be addressed on the interlocutory appeal. In fact, the Court has favored simultaneous hearing of several aspects of the same general subject matter. For example, in *Eisen*, it construed different aspects of Rule 23(c)(2) of the Federal Rules of Civil Procedure, even though the placement in that single provision of the legal requirements concerning notice to a certified class was the only legal connection between the issues reviewed;[469] and in *Schlagenhauf* the Court interpreted and applied different aspects of Rule 35, although collection in Rule 35 of the various requirements for ordering a physical or mental exam created the only legal connection between the issues reviewed there.[470] That is to say, one did not have overlap in the sense that the same (or some of the same) legal questions had to be addressed to decide whether there was "good cause" for an examination and whether a condition was "in controversy." *Schlagenhauf* also illustrates that the Court has recognized the utility and legitimacy of laying down guidelines to assist the lower courts, even when doing so entails going beyond the issues that are independently immediately appealable.[471] Cases such as these lead me to believe that the real "test" of the courts' power to hear issues on a pendent basis is whether they relate to the subject matter of the immediately appealable order: notice to the class in *Eisen*, and Rule 35 in *Schlagenhauf*.

469. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).
470. Schlagenhauf v. Holder, 379 U.S. 104, 114-22 (1964).
471. *Id.*

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Even *Clinton v. Jones*,[472] decided after *Swint*, may support my argument that the courts' power is limited only by the subject matter of the immediately appealable order. The Court there held that the stay of proceedings entered below *was* inextricably intertwined with the ruling that the President was protected from trial by a temporary immunity and that review of the stay was necessary to ensure meaningful review of the immunity.[473] However, the Court disposed of the immunity issue before addressing the stay and, without reference to the propriety of the stay, it held: (1) that the appeals court had erred in believing that the discretionary decision to stay the trial was the functional equivalent of a grant of temporary immunity; and (2) that the district court had erred in believing that a stay was supported by immunity precedents.[474] The issues raised by the stay, the claim to which the Court characterized as "analytically distinct,"[475] differed from those raised by the claimed immunity. In discussing the stay of trial, the Court's focus was on the plaintiff's interest in bringing the case to trial and the prematurity of any decision as to whether to postpone the trial, neither of which were considerations in determining whether the President enjoyed a temporary immunity from the suit. Arguably then, in its treatment of the stay, the Court went beyond reaching what was inextricably intertwined with or necessary to ensure meaningful review of the immunity claim. Certainly, the issues raised by the stay were not coterminous with or entirely subsumed within the independently appealable order; that is, appellate resolution of the collateral order appeal did not necessarily resolve the pendent claim as well. Yet the stay was part of the subject matter of the appeal, conceived as whether a President is subject to being actively "prosecuted" in a civil suit arising out of events that occurred before he took office. Arguably, it was important for the Court to address and reverse the stay because, had it not done so, its holding that the President was not immune from suit could have been undermined as a practical matter, although not as a technical legal matter.

A final factor to consider in determining power to assert pendent appellate jurisdiction is whether any statute explicitly or implicitly prohibits or negates pendent appellate jurisdiction over a particular

472. 117 S. Ct. 1636 (1997).
473. *See id.* at 1651 n. 41.
474. *See id.* at 1650-51 & n.41.
475. *Id.* at 1651 n.41.

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issue.[476]

B. Discretion

Once the requirement of power to hear a pendent issue on appeal is satisfied, numerous factors bear upon the court's discretion.

(1) *Connection.* Underlying policy considerations must undergird the connection "requirements." Very broadly speaking, we want standards that will reflect our system's commitment to, and will not unduly undermine, the final judgment rule; that will be consistent with our policies against piecemeal appeals; and that will properly respect the role of district court judges. We want to guard against standards that would encourage litigants to harass their adversaries or to disrupt our preferred division of authority between trial judges and appellate judges system-wide (to avoid the problem of "opening the floodgates") or even in individual cases. However, we also desire an appellate system that is efficient and serves the interests of justice. How do we translate these broad goals into a satisfactory system of pendent appellate jurisdiction?

Like the Court of Appeals for the D.C. Circuit, I believe that the word formulas articulated by the Court in *Swint* exemplify but should not exhaust the situations in which federal appeals courts may exercise pendent appellate jurisdiction.[477] I reach this conclusion in part because of the inherent ambiguity of any such verbal formulations, and in part because the formulations chosen by the Court can reasonably be interpreted to unduly limit pendent appellate jurisdiction. Some courts have construed the "inextricably intertwined" and "necessary to ensure meaningful review" tests to limit pendent appellate jurisdiction to situations in which the pendent issue is entirely subsumed within the independently appealable issue, such that decision of the latter issue also decides the former, leaving no additional work to be done on the former, and such that hearing the pendent issue at a later time would entail sheer duplication of effort.[478] Such a construction is both poor jurisdictional policy, and is cramped when compared with the exercises of pendent appellate jurisdiction in

476. *See* IDS Life Insurance Co v. SunAmerica, Inc., 103 F.3d 524 (7th Cir. 1996), discussed in text accompanying notes 425-31, *supra*.

477. *See* Gilda Marx, Inc. v. Wildwood Exercise, Inc., 85 F.3d 675, 679 n.4 (D.C. Cir. 1996).

478. *See* Moore v. City of Wynnewood, 57 F.3d 924, 930 (10th Cir. 1995).

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which the Court itself has engaged and of which it has approved.

A less cramped view of the scope of permissible pendent appellate jurisdiction than that articulated in *Swint*, and one which would implement better jurisdictional policy, would recognize strong reason to exercise pendent jurisdiction when there is a substantial factual or legal overlap or a strong logical relationship between the independently appealable and the pendent issues, so long as the pendent appeal would not substantially predominate over the independently appealable orders. Under this approach, courts could look for a "common nucleus of operative fact" in the issues (a test with which the courts are familiar), a common nucleus of legal issues, or a strong logical relationship between the issues, any of which might justify the exercise of jurisdiction, depending upon additional factors affecting the sound exercise of discretion.

Let me offer a few examples of a logical relationship between issues, since it may be the least familiar of the three relationships alluded to above. I submit that when a court, in reviewing a denial of qualified immunity, holds that the plaintiff has not alleged the violation of any recognized right, a ruling below that plaintiff is entitled to summary judgment on the claim as to which immunity was denied also should be immediately appealable because the latter ruling cannot stand in the face of the former. Although one would expect the district court to "reverse itself" on remand, there is little reason to take the chance that it will not do so, thus likely precipitating a second appeal. Similarly, when a court, in reviewing a denial of qualified immunity, holds that there exist genuine issues of material fact that preclude the immediate conferral of immunity upon the defendant, it may well be that those same fact issues preclude summary judgment for the plaintiff. Any trial court order entering such judgment should be immediately appealable for the reasons stated in connection with the first example. Third, for the same reasons, when a court, in reviewing a denial of qualified immunity, holds that the plaintiff has not alleged the violation of any recognized right, a ruling below that plaintiff is entitled to summary judgment against the defendant's employer for failure to adequately train defendant also should be immediately appealable *if* the failure to train claim is predicated on the alleged violation of right and cannot succeed absent a holding that plaintiff's right was violated by the defendant employee. In a different context, this Article also has discussed the logical relationship that often exists between class certification decisions

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and the determination of the proper scope of injunctive relief to be afforded. In these examples, legal overlap and factual overlap combine with a logical relationship between the issues, and perhaps that usually will be the situation to some degree, but the logical relationship between the issues nonetheless "feels important."

The commonalities and/or the logical connection between the issues would tend to render the exercise of pendent jurisdiction efficient and fair. Under this view, it would be enough that the simultaneous decision would avoid substantial duplicative effort later; the fact that *some* extra work would be entailed in deciding the pendent issue would not preclude the exercise of jurisdiction, so long as the pendent appeal would not substantially predominate over the independently appealable orders. The number of proposed pendent issues, their scope and complexity as compared with the number, scope and complexity of immediately appealable orders all would be pertinent in this regard. Thus, if the pendent issues would require consideration of substantial additional aspects of the case, that would argue against jurisdiction. This connection requirement also should deter efforts to abuse the appellate process by interjecting interlocutorily appealable orders as vehicles to obtain review of other issues, as by including perfunctory requests for injunctive relief. Parenthetically, I want to emphasize that this connection standard, although intended to be broader than the test endorsed in *Swint*, would not be determinative; as illustrated by the earlier discussion of Supreme Court decisions, on occasion there may be good reasons for the exercise of pendent appellate jurisdiction even absent an overlap of factual or legal issues or a truly logical connection between issues.

Courts also should consider questions such as:

(2) *Ripeness*. Is the proposed pendent issue well positioned for review, given the *finality* and *clarity* with which the district court has addressed it, and the *briefing* and oral argument of the issue before the appellate court? Or would it be premature to take the issue out of the district judge's hands (and might immediate appellate consideration usurp her role and constitute injudicious intermeddling) because: the *record is not adequately developed*; the district court has *not fully and finally addressed* and resolved the issue; *the issue will more appropriately be considered after a complete airing of additional aspects* of the dispute; *the district court may alter its decision* in light of further proceedings to be had there; *subsequent* trial court *proceedings are likely to moot the issue*; the district court's order is *am-*

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biguous; or the parties have not thoughtfully presented it to the appellate court?

(3) *Efficiency*. Can the pendent issue be efficiently determined by the appellate court now? Responding to this inquiry encompasses consideration of the workload of the appellate court, the work that remains to be done in the district court, the relative burden and expense to the parties of immediate appeal as compared with that attending a possible appeal after final judgment, and the incentives to appeal pendent issues that allowance of this and other pendent appeals will generate. Relevant factors in any single case include the degree to which immediate review in conjunction with an immediately appealable order may *avoid duplicative effort* by the appellate court and by the litigants on a post-judgment appeal, whether hearing pendent issues would *make appropriate a stay* of trial court proceedings that otherwise could go forward (a negative indicator), and *whether immediate review will obviate, narrow, or otherwise expedite and advance future trial proceedings, will* set them on a course that *cures or avoids* what otherwise would be *reversible error*, or *will avoid further appeals*.

(4) *Other Values*. On occasion, additional legal norms and values come into play. For example, the specially strong policies against delay and disruption of criminal proceedings militate against the exercise of pendent appellate jurisdiction in criminal cases. These policies are in part a manifestation of efficiency concerns, but they reflect other societal values as well. Values reflected in procedural rules also may properly play a role. Thus, some courts have regarded as relevant whether but for a procedural default the court would have had jurisdiction over the issue proposed for pendent treatment, or whether the time to appeal the challenged order already has passed. Some courts have deemed a district court's refusal to certify a question for appeal to be a reason not to hear the issue on a pendent basis. While it is reasonable for these factors to be in the mix, they should not be determinative. Of course, it always is relevant whether hearing the pendent issues will facilitate just disposition.

(5) *Some Factors may be Relevant in Multiple Respects*. Some factors, such as whether the same cause of action generates the various issues, and whether the same parties are interested in them, may have implications for more than one of the areas relevant to the wise exercise of discretion. For example, other things being equal, a court should be more inclined to exercise pendent appellate jurisdiction

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over issues generated by the claim from which the immediately appealable issue springs (than over issues generated by different claims), because of the desirability of avoiding repeated and piecemeal appeals of the same claim. Thus, this factor bears on both connection and efficiency. However, the overlap of factual or legal issues (and/or the logical relation between the issues, as may arise in vicarious liability situations) posed by *distinct* claims, and even involving different parties, easily can be great enough to justify the exercise of pendent appellate jurisdiction.[479] Similarly, while the exercise of pendent *party* appellate jurisdiction may speed the appeal by the pendent litigants and serve other interests of the pendent parties, it may well also spare their adversaries multiple appeals (interlocutory and then again after final judgment) and may serve the court's interests in efficiency and in simultaneously resolving issues that are closely connected. Just as the Court was disquieted by pendent party *original* jurisdiction but neither Congress nor the district courts seem to be troubled by it (as reflected in 28 U.S.C. § 1367(a) and the practice thereunder), so the Court's especial discomfort in *Swint* with pendent party appellate jurisdiction seems misplaced.

C. Consistency Across Authorizations

For the sake of simplicity and consistency, the analysis done to determine pendent appellate jurisdiction should be the same across authorizations for interlocutory appeal, except insofar as unavoidably dictated by differences among statutory schemes and between such schemes and common law authorizations of interlocutory appeals, such as the collateral order doctrine. The earlier discussion of these various bases of interlocutory appeal indicates however that while statutory authorizations such as 28 U.S.C. §§1292(a) and (b) may *broaden* the scope of jurisdiction to the entire order pertaining to injunctive or other specified relief or encompassing a certified question, nothing in them *requires* constriction of the normal breadth of pendent appellate jurisdiction.

Conclusion

In *Swint v. Chambers County Commission*, the Supreme Court

479. The doctrine of collateral estoppel (issue preclusion) is evidence that identical issues may be posed by different claims.

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cast doubt upon the propriety of pendent appellate jurisdiction, although indicating in dicta a circumscribed version of the doctrine that might be acceptable. The Court wrote in the context of collateral order appeals, but its opinion also cast doubt upon the exercise of pendent appellate jurisdiction when appellate review, in advance of final judgment, is available by virtue of statutory or Rule based authorizations.

This Article took issue with the Court's view that the existence and scope of pendent appellate jurisdiction properly lie exclusively with the legislature and with the Court, as Congress's delegated Rule maker. It posited that, consistent with our statutory appellate structure, the courts may recognize new categories of immediately appealable interlocutory orders and, more conservatively, that pendent appellate jurisdiction doctrine constitutes *interpretation*—of sections 1291, 1292 and other authorizations of pre-judgment appeals—that establishes the scope of appellate jurisdiction when an interlocutory appeal has been authorized. The Article argued that Congress, in conferring rule making authority to provide for appeal of new categories of interlocutory orders constituting new occasions for interlocutory appeal, did not intend to curtail such interpretation of jurisdictional grants. Thus, pendent appellate jurisdiction should not be threatened even if the Court's rule making authority is construed to preclude pure common law creation of new occasions for immediate appeal of interlocutory orders.

The Article also sought to demonstrate that the prudent use of pendent appellate jurisdiction is not only consistent with the post-judgment interpretation of § 1291, but is more consistent with the purposes of § 1291 and with appeals policy generally than is its rejection. Indeed, by examining the law of pendent appellate jurisdiction that the Supreme Court and the courts of appeals have developed in connection with 28 U.S.C. §§ 1292(a) and (b), mandamus, Federal Rule of Civil Procedure 54(b), interlocutory orders entered after final judgment, and the jurisdiction of the United States Supreme Court, the Article demonstrated the utility, the consistency, and the pervasiveness of the pendent appellate jurisdiction doctrine that appellate courts use when they hear matters in advance of final judgment. It showed that pendent appellate jurisdiction has long been synonymous with determining the scope of jurisdiction that is "statutorily" authorized.

Having mapped the law, and having made arguments for pendent appellate jurisdiction of *some* dimension in appeals under § 1291 that precede final judgment as well as in other contexts, the Article

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then concentrated on the latitude that appellate courts *should* enjoy in their power to exercise pendent appellate jurisdiction. First, it explained why Rule promulgation would not be the best way to define the circumstances in which pendent appellate jurisdiction may be exercised: whether particular orders ought to be immediately appealable as a matter of pendent appellate jurisdiction requires an evaluation of competing considerations concerning the best time for appellate review which is too subtle and complex to be well captured by a formal codified Rule.

Consensus concerning the circumstances under which the courts have power to exercise pendent appellate jurisdiction and concerning the factors that should guide their exercises of discretion to decide (or not to decide) particular issues on a pendent basis are desirable, however. This Article therefore set forth pertinent considerations and proposed both a test for power and a non-exhaustive list of guidelines, standards, and factors to govern when federal courts of appeals should review orders pursuant to pendent appellate jurisdiction. The proposal may be viewed as a recommendation as to how the doctrine should be elaborated to the extent that its contours are left to the courts to define in their adjudicatory capacity. In view of the Court's professed view that rule making is *the only* proper means to define when an interlocutory order is appealable, it also may be viewed as a recommendation as to what the "rules" should be, to the extent that they are left to rule makers to determine.

Among the noteworthy features of the proposal and its underpinnings are the conclusions that:

- A federal appellate court's power to address its own and the district court's subject matter jurisdiction is independent (rather than pendent), although the occasion for consideration of the issue may be an interlocutory appeal;

- As a matter of essential power, the first and arguably only requirement for the exercise of pendent appellate jurisdiction is that there be an order that is appealable, and that has been properly appealed, before final judgment. Once that requirement has been met, ordinarily there is power to hear all issues theretofore decided in the case by the district court, or at least all such issues that relate in some manner to the subject matter of the appeal; however

- Whether any statute explicitly or implicitly prohibits or negates pendent appellate jurisdiction over a particular issue also is a factor to consider in determining power to assert pendent appellate jurisdic-

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tion;

- On this view, the strength of the factual, legal and logical connections between an independently appealable order and an order proposed for review on a pendent basis remains a very significant factor, but one which affects the sound exercise of the discretion to hear rulings on a pendent basis. These considerations should influence whether the courts exercise pendent appellate jurisdiction over threshold issues of the kind raisable in the trial court pursuant to Federal Rule of Civil Procedure 12(b)(2-5, 7), as they should influence the decision with respect to other issues. So long as the pendent appeal would not predominate over the independently appealable orders, courts should incline toward exercising pendent appellate jurisdiction when there is a common nucleus of operative fact shared by the pendent and independently appealable issues, a common nucleus of legal issues, or a strong logical relationship between the issues. The number of proposed pendent issues, their scope and complexity as compared with the number, scope, and complexity of immediately appealable orders all would be pertinent in determining which issues predominate;

- Factors bearing on the ripeness of pendent issues for appellate review and on the efficiency of immediate appellate determination also should be heavily weighed, as occasionally should additional legal norms and values that may be either substantive or procedural at their root;

- The Court's especial discomfort with pendent party appellate jurisdiction is misplaced. The overlap of factual or legal issues and/or the logical relation between issues posed by distinct claims, and even involving different parties, easily can be great enough to justify the exercise of pendent appellate jurisdiction;

- Finally, for the sake of simplicity and consistency, the analysis done to determine pendent appellate jurisdiction should be the same across authorizations for interlocutory appeal, except insofar as unavoidably dictated by differences among statutory schemes or between such schemes and common law authorizations of interlocutory appeals such as the collateral order doctrine. My exploration of these various bases of interlocutory appeal indicated however that nothing in them *requires* constriction of the normal breadth of pendent appellate jurisdiction. In particular, recognition of appellate power to hear related issues on a pendent basis when a district court, in its sole discretion, has certified an interlocutory appeal under 28 U.S.C. §

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1292(b) is not inconsistent with the legislative decision not to confer unilateral power on the appellate courts to decide whether to permit any interlocutory appeal at all.

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