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Hall v. Hall: A Lose-Lose Case for Appellate Jurisdiction

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HALL V. HALL: A LOSE-LOSE CASE FOR APPELLATE JURISDICTION

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INTRODUCTION

As a general rule, federal litigants can appeal only at the end of district court proceedings, when all issues have been decided and all that remains is enforcing the judgment.[1] This general limit on appellate jurisdiction is commonly called the "final-judgment rule," and it is a judicial gloss on 28 U.S.C. § 1291. That statute gives the courts of appeals jurisdiction over only "final decisions" of the district courts.[2] And that statute—or more accurately, judicial interpretations of that statute that elaborate on what it means for a decision to be "final"—is the source for most of the rules of federal appellate jurisdiction.[3]

In 2018's *Hall v. Hall*, the Supreme Court addressed the meaning of § 1291 in the context of actions consolidated under Rule 42(a) of the Federal Rules of Civil Procedure.[4] That Rule permits district courts to consolidate multiple actions into a single joint proceeding.[5] In *Hall*, the Court held that the resolution of a single action consolidated with other actions is a "final decision," regardless of whether the other actions remain pending.[6] Litigants in the resolved action can thus immediately appeal the resolution of that action.[7] The courts of appeals had split on this issue for decades, developing four different answers to the question of which decision in consolidated actions was a final one.[8] *Hall* finally resolved this split.

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[1] *See* 28 U.S.C. § 1291 (2012); Gelboim v. Bank of Am. Corp., 135 S. Ct. 897, 902 (2015); Catlin v. United States, 324 U.S. 229, 233 (1945) (discussing § 128 of the Judicial Code, the predecessor to what is currently § 1291).

[2] 28 U.S.C. § 1291.

[3] *See* Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. (forthcoming 2018) (manuscript at 4) (on file with author).

[4] Hall v. Hall, 138 S. Ct. 1118, 1122 (2018).

[5] FED. R. CIV. P. 42(a).

[6] *Hall*, 138 S. Ct. at 1131.

[7] *Id.*

[8] *Compare, e.g.*, *In re* Mass. Helicopter Airlines, Inc., 469 F.2d 439, 441–42 (1st Cir. 1972), *with* Bergman v. City of Atlantic City, 860 F.2d 560, 563 (3d Cir. 1988), *and* Huene v. United States, 743 F.2d 703, 705 (9th Cir. 1984).

But the Court had no great options in deciding *Hall*. Its narrow reading of § 1291—holding that the resolution of a single action is immediately appealable[9]—was the most straightforward reading of § 1291 and the Court's prior decisions. But the Court adopted a practically sub-optimal rule; its holding will likely produce multiple, related, and duplicative appeals, with the resolution of each action being separately appealable. A better rule would generally delay appeals until the resolution of all actions that were consolidated into the joint proceeding. Reaching that rule, however, requires a new elaboration on § 1291 and risks injecting further uncertainty and complexity into this area of law.

Hall was thus a lose-lose case for appellate jurisdiction. The Court had to adopt either a straightforward but unsound rule or a pragmatic one that would add to the confusion that exists in matters of appellate jurisdiction. But *Hall* also illustrates the alternative way forward: rulemaking. The situation addressed in *Hall* is an ideal one for rulemaking. Indeed, given the less-than-ideal options the Court had in *Hall* and the sub-optimal one that the Court picked, *Hall*'s legacy might be its spurring the Rules Committee to address this matter.

In this essay, I provide background on the circuit split that led to *Hall*. I then show that the Court had no great options in deciding the case. I end by explaining how rulemaking provides a superior way forward with issues of federal appellate jurisdiction like that addressed in *Hall*.

I. THE SPLIT OVER APPEALS IN CONSOLIDATED ACTIONS

The Federal Rules of Civil Procedure permit the liberal joinder of claims and parties into a single action.[10] But occasionally, multiple actions are filed that have some relation to each other. Despite some overlap in the parties or issues (or both), the actions are filed separately, have different case numbers, and—absent some action by the district court—proceed independently. Sometimes these actions are filed separately because they don't satisfy even the liberal joinder rules. Other times plaintiffs simply choose to file separate actions. Whatever the reason, these separate filings result in related actions proceeding independently.

Rule 42(a) allows a district court to consolidate these separately filed actions so long as they involve a common question of law or fact. Actions can be consolidated for different purposes. They might be consolidated for a single

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[9] *Hall*, 138 S. Ct. at 1131.

[10] *See* FED. R. CIV. P. 18, FED. R. CIV. 20.

hearing. Or they might be consolidated for pretrial litigation, eventually separated if they go to trial. Or actions can be consolidated for all purposes, including trial. Consolidation often has some efficiency benefits—duplication of work is reduced—and imposes few (if any) costs in district court proceedings.

Consolidated actions can create problems, however, when it comes to appeals. The courts of appeals' general grant of jurisdiction—28 U.S.C. § 1291—gives them jurisdiction over only "final decisions" of the district courts. A final decision is normally defined as one that marks the end of district court proceedings, when all issues have been decided and all that remains is enforcing the judgment.[11] Until *Hall*, it was not clear *which* decision is final when actions are consolidated. Assume a district court consolidated two actions—Action A and Action B—and each action involved a single claim. Later in the joint proceedings, the district court dismissed the sole claim in Action A. The claim in Action B, however, remains pending. Before *Hall*, it was unclear when the decision dismissing the claim in Action A would become final and appealable—is the judgment in Action A final and appealable at its dismissal, or is it not final until Action B is also resolved?

Rules exist to address a similar problem that can arise in a single, non-consolidated action that involves multiple claims or parties. A district court decision that resolves some (but not all) of the claims in a multi-claim or multi-party suit is normally not a final or appealable decision.[12] That's because more—namely, resolution of the other claims—remains to be done. But sometimes it makes sense to allow an immediate appeal after the district court's resolution of some (but not all) of the claims. For example, one party might have been involved only in the resolved claims; it might make sense to allow an immediate appeal of that claim rather than force that party to wait until all other issues are decided. Enter Rule 54(b) of the Federal Rules of Civil Procedure, which allows the district court to certify an order resolving some (but not all) claims for an immediate appeal.[13] If the district court does so, the decision becomes final and can then be appealed without waiting for the resolution of the other claims.[14]

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[11] *E.g.*, Gelboim v. Bank of Am. Corp., 135 S. Ct. 897, 902 (2015); Catlin v. United States, 324 U.S. 229, 233 (1945).

[12] *See* FED. R. CIV. P. 54(b); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 434 (1956).

[13] FED. R. CIV. P. 54(b).

[14] For an in-depth study of Rule 54(b), see Andrew S. Pollis, *Civil Rule 54(b): Seventy-Five and Ready for Retirement*, 65 FLA. L. REV. 711 (2013).

No such rule exists for appeals in cases consolidated under Rule 42. And the courts of appeals developed four different approaches to the issue.[15] For simplicity's sake, I call them the (1) "immediate-appeals rule," (2) the "delayed-appeals rule," (3) the "case-by-case rule," (4) and the "presumptive rule":

- *The Immediate-Appeals Rule.* One group of cases applied a bright-line rule, holding that so long as actions are not consolidated "for all purposes" they remain separate actions; a judgment in any one of those actions is thus final and appealable.[16]

- *The Delayed-Appeals Rule.* A second group of cases applied the opposite bright-line rule: when actions have been consolidated, judgment in one is not final or appealable (absent a Rule 54(b) certification) so long as any the others remain pending.[17]

- *The Case-by-Case Rule.* A third group took a case-by-case approach to the issue that considers, among other things, "the overlap in the claims, the relationship of the various parties, and the likelihood of the claims being tried together."[18]

- *The Presumptive Rule.* Finally, the Second Circuit applied a strong presumption that resolution of all claims in all consolidated actions is necessary before any litigant can appeal (absent a Rule 54(b)

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[15] For in-depth discussions of this split, see 15A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3914.7 (2d ed. 1987); Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be: Part 1: Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. REV. 717, 794–807 (1995) [hereinafter Steinman, *Part 1*]; Gaylord A. Virden, *Consolidation Under Rule 42 of the Federal Rules of Civil Procedure: The U.S. Courts of Appeals Disagree on Whether Consolidation Merges the Separate Cases and Whether the Cases Remain Separately Final for Purposes of Appeal*, 141 F.R.D. 169 (1991); Marianne Fogarty, Note, *The Finality of Partial Orders in Consolidated Cases Under Rule 54(b)*, 57 FORDHAM L. REV. 637, 639 (1989); Jacqueline Gerson, Comment, *The Appealability of Partial Judgments in Consolidated Case*, 57 U. CHI. L. REV. 169, 170 (1990).

[16] *See, e.g.*, Global NAPs, Inc. v. Verizon New England, Inc., 396 F.3d 16, 22 (1st Cir. 2005); Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546, 551 (6th Cir. 1994); Kraft, Inc. v. Local Union 327, Teamsters, 683 F.2d 131, 133 (6th Cir. 1982); *In re* Mass. Helicopter Airlines, Inc., 469 F.2d 439, 441 (1st Cir. 1972).

[17] *See, e.g.*, Trinity Broad. Corp. v. Eller, 827 F.2d 673, 675 (10th Cir. 1987) (per curiam); Huene v. United States, 743 F.2d 703, 705 (9th Cir. 1984).

[18] United States v. $8,221,877.16 in U.S. Currency, 330 F.3d 141, 146 (3d Cir. 2003); *see, e.g.*, United States *ex rel.* Hampton v. Columbia/HCA Healthcare Corp., 318 F.3d 214, 216 (D.C. Cir. 2003); Eggers v. Clinchfield Coal Co., 11 F.3d 35, 39 (4th Cir. 1993); Bergman v. City of Atlantic City, 860 F.2d 560, 566 (3d Cir. 1988); Ivanov-McPhee v. Washington Nat. Ins. Co., 719 F.2d 927, 930 (7th Cir. 1983); Ringwald v. Harris, 675 F.2d 768, 771 (5th Cir. 1982).

certification), though that presumption could be overcome in "highly unusual" circumstances.[19]

Then came the Supreme Court's recent decision in *Gelboim v. Bank of America Corp.*,[20] which added further uncertainty to the issue. *Gelboim* involved a different kind of consolidation: multidistrict litigation, in which cases presenting a common question of fact are consolidated in a single district court only for pretrial purposes.[21] The Court in *Gelboim* held that litigants could immediately appeal the resolution of one action that was joined in an MDL, regardless of the state of the other actions.[22] The Court reasoned that actions consolidated in an MDL ordinarily retain their independent identity; they are consolidated only for pretrial purposes, and they are returned to their originating court if they make it to trial.[23] The resolution of a single action that was consolidated in an MDL is accordingly a final decision, just like an independent action that was never consolidated would be final and appealable upon resolution of all the claims in that action.[24]

Gelboim did not address what to do in cases consolidated under Rule 42. The Supreme Court granted cert in *Hall* to finally resolve the issue.[25]

II. DECIDING *HALL*

In deciding *Hall*, however, the Court had no great options. Its first option was the immediate-appeals rule, in which the judgment in an action that was consolidated with others is final and immediately appealable regardless of whether the other actions remain pending. This rule fits best with the existing law on both final decisions and consolidation. Judgment in an independent action—that is, an action filed alone and never consolidated—is a final and appealable decision. Consolidation is not normally thought to affect the independence of the consolidated actions—they do not merge into a single action, but instead retain their independent identity.[26] So consolidation should

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[19] *See, e.g.*, Hageman v. City Investing Co., 851 F.2d 69, 71 (2d Cir. 1988).

[20] 135 S. Ct. 897 (2015).

[21] 28 U.S.C. § 1407 (2012).

[22] *Gelboim*, 135 S. Ct. at 905–06.

[23] *See id.* at 904.

[24] *Id.*

[25] Hall v. Hall, 679 Fed. Appx. 142 (3d Cir. 2017), *cert. granted*, 135 S. Ct. 54 (U.S. Sept. 28, 2017) (No. 16-1150).

[26] *See* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2386 (3d ed. 2018).

not affect the finality of an action. This reasoning seemed especially compelling after *Gelboim*; the independence of the individual actions consolidated into an MDL was the primary reason for deeming them separately appealable.

The Court in *Hall* ultimately went with this immediate-appeals rule. It began by noting that the resolution of a single action normally marks the point at which the parties to that action can appeal.[27] Absent any change to the independent nature of actions consolidated under Rule 42(a), resolution of a single action would thus be final and appealable regardless of any remaining actions.[28] The Court then rejected the argument that consolidation under Rule 42(a) merged independent actions into a single unit; consolidation had long been understood to not merge actions, and that understanding persisted through the creation of Rule 42(a).[29] The Court thus adhered to this "settled understanding of the consequences of consolidation."[30] Given that understanding, the Court held that "when one of several consolidated cases is finally decided, a disappointed litigant is free to seek review of that decision in the court of appeals."[31]

The immediate-appeals rule makes little practical sense, as it creates a risk of multiple, related, and duplicative appeals. Each action in a consolidated proceeding could be resolved at a different time. If each action is separately appealable, then consolidated proceedings could produce several appeals. Consolidated actions also likely involve some overlap in the facts. If each action is separately appealable, separate appellate panels might have to become familiar with the same record. And consolidated actions necessarily involve at least one common question. If each action is separately appealable, those common questions might be presented in multiple, separate appeals. Avoiding these consequences is one of the main reasons for the general final-judgment rule.[32] It is often more efficient (at least from the appellate court's perspective) to hear all related appeals at once, which requires only one panel to learn the record and allows that panel to decide the overlapping issues in a single decision. The immediate-appeals rule thus conflicts with one of the main reasons for the general final-judgment rule.

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[27] Hall v. Hall, 138 S. Ct. 1118, 1124 (2018).

[28] *Id.*

[29] *Id.* at 1125–31 (discussing the history of consolidation).

[30] *Id.* at 1131.

[31] *Id.*

[32] *See, e.g.*, Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 428 (2013) (explaining the general benefits of the final-judgment rule, which include avoiding multiple appeals from a single action and the presentation of the same or overlapping issues in separate appeals).

The immediate-appeals rule also creates a perverse incentive. Recall that in a single action with multiple claims, each claim is not independently appealable; absent a Rule 54(b) certification, the appeal of any single claim must await resolution of all claims. But litigants don't always want to wait for the resolution of all claims. A clever plaintiff with multiple claims could avoid this rule by filing each claim as a separate action and then consolidating them. Resolution of each action would be separately appealable without any requirement of securing a Rule 54(b) certification from the district court. Granted, this tactic would add additional costs for the plaintiff, namely filing fees. But it would allow that plaintiff to circumvent the normal rule against appealing separate claims.

Granted, there is some merit to the immediate-appeals rule. Like in a single action that presents multiple claims, it might occasionally make sense to allow litigants to appeal resolution of a single action before all consolidated actions are resolved. After all, it might be years before the other actions are resolved. Absent a rule allowing immediate appeals, the litigants in a resolved action would need to wait until the resolution of all actions to appeal. They would also need to continually monitor the joint proceedings and watch for the resolution of all other claims. This could be burdensome. More importantly, litigants who are not sufficiently vigilant might lose their right to appeal. Litigants must file a timely notice of appeal for the court to have jurisdiction, and they often have a brief window after the end of district court proceedings in which to file a notice of appeal.[33] If litigants no longer involved in the joint proceedings go too long without noticing the final resolution of all actions, the time for filing their appeal might run out, depriving them of their right to appeal.

There is also another, more general benefit to the immediate-appeals rule. Allowing immediate appeals in consolidated actions does not require a new definition of what it means for a decision to be final. Calling a judgment in an action final and appealable, regardless of the status of any other consolidated actions, is consistent with the common definition of a final decision. So this rule requires no new interpretations of, or elaborations on, § 1291. It will probably not add much to the complexity and unpredictability that currently exists in federal appellate jurisdiction.

The Court's other main option in deciding *Hall* was to approach the issue more flexibly and adopt any of the three other rules for appeals in consolidated actions—the delayed-appeals rule, the case-by-case rule, or the presumptive

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[33] *See, e.g.*, FED. R. APP. P. 4(a)(1).

rule. All of these rules would require a new elaboration on what it means for a decision to be final. But they have the potential to produce more practically sound outcomes; compared to the immediate-appeals rule, the three other rules would do a better job of avoiding multiple, related, and duplicative appeals while still allowing for immediate appeals when doing so makes practical sense.

Of these other rules, the best option is probably the delayed-appeals rule—i.e., when actions have been consolidated, judgment in one is not final or appealable (absent certification for immediate appeal) so long as others remain pending. This rule would generally delay appeals in consolidated proceedings until all of the actions are resolved. As a result, all parties, claims, and issues would normally be addressed in a single appeal by a single panel in a single opinion. So long as some method existed to certify the resolution of one action for an immediate appeal, there would be some way to address unique situations when delay was not warranted. This certification would likely be something like Rule 54(b)—I address momentarily why the current Rule 54(b) probably doesn't apply—which would allow the district court to decide when an action should be appealed. After all, the district court probably has the best sense of one action's relation to other consolidated actions, so the district court is probably in the best position to decide when an immediate appeal is warranted. Indeed, several former district court judges made this point in an amicus brief in *Hall*.[34]

The case-by-case rule and the Second Circuit's presumptive rule are less than ideal. Both require the courts of appeals to decide—as part of the appeal—whether to allow the appeal. Both accordingly create the risk of wasted time and effort; the parties to the appeal would likely brief both jurisdiction *and* the merits, but there is a chance (sometimes a significant chance) that the appeal would be dismissed for lack of jurisdiction, wasting all the time, effort, and money spent addressing the merits. While both of these approaches give the courts flexibility to tailor the outcome to the facts of a specific case, they do so at a potentially very high cost of wasted proceedings. The case law does not suggest that this much flexibility is necessary.

Adopting any of these more pragmatic rules, however, creates larger problems for federal appellate jurisdiction. None of them flows easily from the standard definition of a final decision. For the Supreme Court to adopt any of them, it would have had to further elaborate on what it means for a decision to

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[34] *See* Brief of Retired United States District Judges as Amici Curiae in Support of Respondents at 5, *Hall*, 138 S. Ct. at 1118 (No. 16-1150).

be final. This is particularly true when it comes to the case-by-case and presumptive rules. Under those rules, resolution of a single action is sometimes final, sometimes not, depending on the appellate court's assessment of the case. These elaborations and novel meanings add to the complexity and uncertainty of federal appellate jurisdiction.[35] Although they might create a sound rule for appeals in consolidated actions, they might also create trouble down the line for other issues of appellate jurisdiction. Courts in subsequent cases might have to wrestle with the new definition of a final decision in a different context. More likely, new definitions of and elaborations on what constitutes a final decision would provide grist for future litigation about whether some other district court decision is a final one.

There is one additional problem with the delayed-appeals rule: it would likely require a novel and stretched reading of Rule 54(b). Were the Court to adopt one of these more pragmatic rules, it almost certainly would want to allow for district courts to certify an action for immediate appeal when the situation warrants. Before *Hall*, courts had used Rule 54(b) to do so. But by its plain terms, that Rule applies only to "an action" that involves multiple claims or multiple parties: "[W]hen *an action* presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties." Rule 54(b) thus does not clearly apply to the resolution of individual actions that are consolidated with others. Again, each action consolidated with other actions retains its separate, independent identity. And in the situation at issue here, all—not some—of the claims in a single action have been resolved. To hold otherwise requires ignoring the Rule 54(b)'s text.

The Supreme Court had a few other options in *Hall v. Hall*. A third would have been to focus on the final-judgment rule's use of the word "proceedings"—i.e., a final decision is normally one that marks the end of district court *proceedings*. The Court could plausibly have said that when actions are consolidated, the relevant proceedings are the joint proceedings of all the

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[35] *See generally, e.g.*, Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539 (1998) (discussing the complications and uncertainty that have sprung from the collateral-order doctrine, which was based on an interpretation of what it means for a decision to be final); *see also* Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1660–61 (2011) [hereinafter *Non-Discretionary Interlocutory Appellate Review*] (recounting criticisms of the current system); Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1238–39 (2007) [hereinafter *Reinventing Appellate Jurisdiction*] (same).

consolidated actions. The end of district court proceedings, in other words, would be the end of the joint proceedings. So any appeals must wait until those joint proceedings are resolved. By changing the definition of proceedings in this context, the Court could have avoided modifying what it means for a decision to be final.

Fair enough. But this third option has its own problems. First, it requires a new definition of proceedings, one that the Court has not used up to this point. As the experience with new definitions of a final decision shows, adding new definitions to a term to reach a reasonable resolution in a single case can have repercussions for future cases. Second, this option creates a tension with *Gelboim*. Recall that in *Gelboim* the Court held that the end of proceedings in a single action consolidated for an MDL was final.[36] The litigants did not need to wait until the entire MDL proceedings were over.[37] So instead of giving "final" a new meaning, this holding would have required giving proceedings a new and novel meaning. And third—just like any of the just-discussed pragmatic rules for consolidated actions—it would likely require a stretched reading of Rule 54(b).

This leaves one final option: the Supreme Court could have changed what it means for cases to be consolidated. It could have held that the consolidation of cases for all purposes merges those cases together—the multiple actions become one. This interpretation would have avoided the problems of defining finality and would allow a straightforward adoption of the bright-line delayed-appeals rule. And because the joint proceedings would become a single action, Rule 54(b) would comfortably apply.

But this last option simply ducks the jurisdiction question. And changing the meaning of consolidation could have many consequences outside of the appellate jurisdiction context. Joan Steinman's work on consolidation illuminates the many procedural matters that consolidation might affect, including justiciability, personal jurisdiction, venue, discovery, choice of law, the right to a jury trial, and attorneys' fees (not to mention appellate

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[36] 135 S. Ct. 897, 905–06 (2015).

[37] *Id.*

jurisdiction).[38] Avoiding the jurisdictional problem might simply create more problems for consolidated actions in the future.

III. A LOSE-LOSE CASE FOR APPELLATE JURISDICTION

So the Supreme Court did not have any great options in *Hall*. It could have narrowly construed § 1291 and adopted a sub-optimal rule. Or it could have approached § 1291 more expansively to create a pragmatically sound rule that would further complicate the law of federal appellate jurisdiction. (Or it could have ducked the issue by redefining proceedings or consolidation, but I'll limit myself to the first two.)

Hall is not unique in this respect. When interpreting § 1291, courts are often pulled in two irreconcilable directions. Courts sometimes want to create clear and predictable rules of appellate jurisdiction.[39] After all, the entry of a final decision gives litigants both a right to appeal and a brief window of time in which to file that appeal. Litigants accordingly must be able to identify a final decision; otherwise, they risk losing their opportunity to appeal. Clear and predictable appellate jurisdiction rules also minimize side litigation over procedural matters, which can distract from the merits. Courts often satisfy this need for clarity and predictability by giving the term "final decision" a narrow and strict meaning, invoking the oft-given definition of a decision that marks the end of district court proceedings.

Other times, they don't stick to this narrow and strict meaning. Modern litigation cannot survive on appeals that come only after the end of district court proceedings; matters are occasionally too complicated and the stakes are occasionally too high to delay all appeals until that point. So courts also occasionally interpret § 1291 expansively to create flexible rules that meet the needs of modern federal litigation.[40] Doing so often requires elaborating on what

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[38] *See generally* Steinman, *Part 1*, *supra* note 15; Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be: Part 2: Non-Jurisdictional Matters*, 42 UCLA L. REV. 967 (1995).

[39] *But see generally* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1 (2011); Elizabeth Y. McCuskey, *Clarity and Clarification: Grable Federal Questions in the Eyes of Their Beholders*, 91 NEB. L. REV. 387 (2012).

[40] *See generally, e.g.*, Bryan Lammon, *Dizzying* Gillespie*: The Exaggerated Death of the Balancing Approach and the Inescapable Allure of Flexibility in Appellate Jurisdiction*, 51 U. RICH. L. REV. 371, 385–410 (2017) [hereinafter Lammon, *Dizzying* Gillespie] (discussing various areas in which the courts have used a pragmatic balancing approach to resolve issues of appellate jurisdiction).

it means for a decision to be final, giving the term new and sometimes unintuitive meanings.

Both of these forces—towards clarity and towards flexibility—are not without problems. When courts interpret § 1291 narrowly to produce clear and predictable rules, they sometimes produce pragmatically unsound outcomes. But when courts take the more flexible approach to § 1291 and interpret it broadly, they inject complexity and uncertainty into an already complicated area of law. The law in this area is already often maligned for its complexity and unpredictability.[41] Giving additional meanings to § 1291 adds to this problem.

Hall is thus another example of the Supreme Court's problematic efforts to create the law of federal appellate jurisdiction. But *Hall* also illustrates the other way forward: rulemaking. The Rules Committee has the power to address this matter through rulemaking.[42] And the issue in *Hall* is an ideal one for rulemaking. Indeed, at oral argument, the Court even seemed to recognize the appropriateness of rulemaking in this context, with the Justices asking counsel for the petitioners how he would argue his case to the Rules Committee.[43] In the opinion itself, the Court suggested (once again) that creating novel rules of appellate jurisdiction be left to the Committee.[44]

The Rules Committee could address appeals in consolidated actions without any regard to adhering to the oft-given definition of a final decision; it could instead craft rules designed specifically for this situation.[45] It could, for example, generally delay appeals in consolidated actions but also create a Rule 54(b)-like power for district courts to certify certain actions for an immediate appeal. It might be as simple as adding a provision to Rule 42 that, unless the district court orders otherwise, a decision resolving an action joined or consolidated with others under the rule is not final until the resolution of all consolidated actions. Or the rule could be more specific, providing that a decision resolving an action

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[41] *E.g.*, Pollis, *Non-Discretionary Interlocutory Appellate Review*, *supra* note 35; Steinman, *Reinventing Appellate Jurisdiction*, *supra* note 35.

[42] *See* 28 U.S.C. §§ 1292(e), 2072 (2012). Technically the power is the Supreme Court's, which has assigned to the Rules Committee the responsibility for amending the rules.

[43] *See* Transcript of Oral Argument at 16–17, Hall v. Hall, 138 S. Ct. 1118 (2018) (No. 16-1150).

[44] *Hall*, 138 S. Ct. at 1131; *see also* Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1714 (2017) (suggesting that changes to appellate jurisdiction come from rulemaking); Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 114 (2009) (same).

[45] For further discussion on rules-based reform of appellate jurisdiction, see Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 259 (2001); Bryan Lammon, *Cumulative Finality*, 52 GA. L. REV. 767, 827–30 (2018); Lammon, *Dizzying* Gillespie, *supra* note 40, at 415–18; Bryan Lammon, Perlman *Appeals After* Mohawk, 84 U. CINN. L. REV. 1, 23–25 (2016).

is not final until the resolution of all consolidated actions and then allowing the district court to certify the resolution of an action for an immediate appeal if certain conditions are met (such as the "no just reason for delay" requirement of Rule 54(b)).

Hall's sticking to the straightforward reading of § 1291 and adopting a rule that doesn't work all that well might ultimately be its biggest benefit. The pragmatically unsound immediate-appeals rule—though not ideal—might force the Rules Committee's hand.

CONCLUSION

Hall illustrates the tension inherent in the judge-made law of federal appellate jurisdiction. The Supreme Court had the choice between creating a clear but sub-optimal rule or creating a more pragmatic rule that might raise new problems in the future. It was a classic lose-lose scenario. *Hall* also shows the other way forward: rulemaking. The federal courts alone cannot resolve the tension between clarity and flexibility in this area of the law. It's up to the Rules Committee to act.