FINALITY, APPEALABILITY, AND THE SCOPE OF INTERLOCUTORY REVIEW

Bryan Lammon*

Abstract: Most of the law of federal appellate jurisdiction comes from judicial interpretations of 28 U.S.C. § 1291. That statute gives the courts of appeals jurisdiction over only "final decisions" of the district courts. The federal courts have used this grant of jurisdiction to create most of the rules governing appellate jurisdiction. But those efforts have required giving many different meanings to the term "final decision." And those many different meanings are to blame for much of the confusion, complexity, unpredictability, and inflexibility that plague this area of law. The literature has accordingly advocated reform that would base most of the law on something other than case-by-case interpretations of what it means for a decision to be "final." Before any reform, however, it is crucial to understand the ways in which the federal courts have interpreted the term "final decision."

This article unearths the three contexts in which courts have interpreted § 1291 to create three different kinds of rules: (1) rules about when district court proceedings have ended and parties can take the classic, end-of-proceedings appeal on the merits; (2) rules about when litigants can appeal before the end of those proceedings; and (3) rules limiting or expanding the scope of review in those before-the-end-of-proceedings appeals. Though related, these contexts are distinct, involve unique interests, and raise unique issues. Successful reform must fill all of the roles that interpretations of the term "final decision" have played. In the meantime, federal courts could bring some much-needed candor and transparency to this area of law by acknowledging the three different ways in which they have used this term.

INTRODUCTION 1810
I. FINAL DECISIONS & MODERN FEDERAL APPELLATE JURISDICTION 1814
  A. The Role of the "Final Decision" in Federal Appellate Jurisdiction 1814
  B. The Many Meanings of "Final" 1815
  C. The Proposed Rejection of § 1291's "Final Decision" as the Foundation for Federal Appellate Jurisdiction ... 1820
II. THE THREE CONTEXTS IN WHICH COURTS HAVE INTERPRETED FINAL DECISIONS 1825
  A. True Finality 1825

* Associate Professor, University of Toledo College of Law. My thanks to Chris Bryant, Edward Cooper, Scott Dodson, Robin Effron, Richard Freer, Ken Kilbert, Elizabeth McCuskey, Andrew Pollis, Cassandra Burke Robertson, Michael Solimine, Sandra Sperino, Adam Steinman, and Evan Zoldan, as well as to participants in workshops at the University of Cincinnati College of Law and University of Toledo College of Law. Thanks also to the University of Toledo College of Law for providing summer funding for this project. And special thanks, as always, to Nicole Porter.

1. Attorneys' Fees Decisions 1827
2. The Ministerial/Technical Rule 1829
3. Consolidated Actions 1830
4. Microsoft Corp. v. Baker 1833
5. The Administrative Remand Rule 1834
B. Appealability 1837
1. The Collateral-Order Doctrine 1838
2. Pragmatic Appeals 1843
C. The Scope of Interlocutory Review 1844
1. The Assumed Facts in a Qualified Immunity Appeal 1845
2. Pendent Appellate Jurisdiction 1848
III. FINAL DECISIONS AND REFORM 1850
CONCLUSION 1852

INTRODUCTION

The law of federal appellate jurisdiction is widely regarded as a mess.[1] In past work, I have argued for wholesale, rules-based reform of this area.[2] Rules-based reform could bring some much-needed clarity and predictability to this area of the law.[3] It could reduce some of the difficulty lawyers and judges often have.[4] Rules-based reform might even reduce the frequency of odd decisions that courts sometimes make in this area.

Then, in 2017's *Microsoft Corp. v. Baker*,[5] the Supreme Court appeared to hold that the district court proceedings in a case never ended.[6]

---

1. Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules*, 1 J. APP. PRAC. & PROCESS 287, 291 (1999); Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 430 (2013) [hereinafter Lammon, *Rules, Standards, and Experimentation*]; Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1649, 1651 (2011) [hereinafter Pollis, *Multidistrict Litigation*]; Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1238–39 (2007).

2. *See generally* Bryan Lammon, *Cumulative Finality*, 52 GA. L. REV. 767 (2018) [hereinafter Lammon, *Cumulative Finality*]; Bryan Lammon, *Dizzying* Gillespie*: The Exaggerated Death of the Balancing Approach and the Inescapable Allure of Flexibility in Appellate Jurisdiction*, 51 U. RICH. L. REV. 371 (2017) [hereinafter Lammon, *Dizzying* Gillespie]; Bryan Lammon, Perlman *Appeals After* Mohawk, 84 U. CIN. L. REV. 1 (2016) [hereinafter Lammon, Perlman *Appeals*].

3. *See* Lammon, *Dizzying* Gillespie, *supra* note 2, at 414–15.

4. *See* Lammon, *Cumulative Finality*, *supra* note 2, at 830.

5. 582 U.S. __, 137 S. Ct. 1702 (2017).

6. *Id.* at 1715.

The plaintiffs in *Baker* voluntarily dismissed all of their claims with prejudice, and the district court had nothing else to do.[7] But according to the Court, the voluntary dismissal in *Baker* was not a "final decision" and thus could not be appealed.[8] A final decision is normally defined as one that marks the end of district court proceedings, leaving nothing else for the district court to do but enforce the judgment.[9] That standard definition suggests that the decision in *Baker* was final. The Supreme Court said, however, that it wasn't. So it would seem that the district court proceedings in *Baker* were interminable.

That's silly, of course. What the Court really meant was that the plaintiffs could not appeal the voluntary dismissal. That conclusion was unmistakably correct.[10] But in reaching that conclusion, the Court had to once again determine what it means for a decision to be "final" in the context of appellate jurisdiction.

Baker illustrates the source of many problems that plague federal appellate jurisdiction. Most of the law in this area is built atop 28 U.S.C. § 1291,[11] which gives the courts of appeals jurisdiction over only "final decisions" of the district courts. And although that term has a standard definition, the federal courts have not limited themselves to that single definition. Instead they regularly elaborate on what it means for a decision to be "final," and those elaborations account for much of the current law.

Therein lies the problem. The federal courts have given the term "final decision" a variety of meanings. Those meanings often deviate from—and are occasionally inconsistent with—the standard definition just mentioned. For example, decisions (like the one in *Baker*) that mark the actual end of district court proceedings are not always considered "final." But other decisions that come before—sometimes long before—the end of those proceedings are deemed "final." Courts have even held that certain parts of a district court's decision are "final" while others are not. Appellate jurisdiction has thus become a world of Orwellian doublespeak, where the meaning of "final" changes from context to context, occasionally in ways that defy any intuitive understanding of the term.[12]

---

7. *Id.* at 1711.

8. *Id.* at 1707.

9. *See* 28 U.S.C. § 1291 (2012); Gelboim v. Bank of Am. Corp., 574 U.S. __, 135 S. Ct. 897, 902 (2015); Catlin v. United States, 324 U.S. 229, 233 (1945); United States v. Williams, 796 F.3d 815, 817 (7th Cir. 2015) (concluding that a judgment was appealable if it "end[ed] the litigation and [left] nothing but execution of the court's decision, the standard definition of 'final' under § 1291").

10. *See infra* section II.A.4 for a discussion of why the outcome in *Baker* was correct.

11. 28 U.S.C. § 1291 (2012).

12. The final decision is not the only procedural term that has suffered from a variety of meanings. Jurisdiction, for example, was often used to mean different things, though the Supreme Court has

The result is our often-criticized system of federal appellate jurisdiction. Although many of the rules governing appeals in everyday cases are sufficiently clear, the rest have been maligned as complex, confusing, inconsistent, unpredictable, and insufficiently flexible.[13] Courts and lawyers expend significant time and effort (and clients expend money) on side issues of appellate jurisdiction rather than the merits.[14] Despite the array of opportunities for immediate appeals, most believe that there should be more.[15] And litigants occasionally lose their right to appeal due to confusion about the law.[16]

The culprit, according to the literature, is the federal courts' dependence on interpretations of the term "final decision" as the source for most of the law of appellate jurisdiction. The solution is to break that dependence by instead basing the law on more candid discussions of the issues and interests in this area.

Before we do that, however, there is something to be learned from the ways in which the courts have interpreted § 1291. The literature has largely focused on one kind of appellate-jurisdiction rule that the federal courts have created: deciding when litigants can appeal before the normal end of district court proceedings. These rules—which I call rules of "appealability"—are important. But they are not the only kind of jurisdictional rules that the courts have created out of § 1291 and the term "final decision."

They have instead created three kinds of rules. First are what I call rules governing "true finality." These are rules about when litigants can take their traditional, end-of-proceedings appeal on the merits. But the end of district court proceedings, at least for appeal purposes, can be surprisingly elusive. Second are the just-mentioned rules governing appealability. And third are rules governing the scope of interlocutory review. These are rules that limit or expand the issues that a court of appeals can review in an

---

recently tried to clean up the use of the term. *See generally* Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619 (2017); Howard M. Wasserman, *The Demise of "Drive-by Jurisdictional Rulings"*, 105 NW. U. L. REV. 947 (2011).

13. *See* Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, 47 L. & CONTEMP. PROBS. 165, 165–66 (1984); Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, 47 L. & CONTEMP. PROBS. 157, 157 (1984); Eisenberg & Morrison, *supra* note 1, at 291; Pollis, *Multidistrict Litigation*, *supra* note 1, at 1651; Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 556 (2002).

14. *See* Cooper, *supra* note 13, at 157; Luther T. Munford, *Dangers, Toils, and Snares: Appeals Before Final Judgment*, 15 LITIG. 18, 18 (1989); Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 L. & CONTEMP. PROBS. 171, 172 (1984).

15. Kenneth K. Kilbert, *Instant Replay and Interlocutory Appeals*, 69 BAYLOR L. REV. 267, 278 (2017); Pollis, *Multidistrict Litigation*, *supra* note 1, at 1660.

16. *See* Ray Haluch Gravel Co. v. Cent. Pension Fund, 571 U.S. 177 (2014).

appeal that comes before the end of district court proceedings. Although these contexts are related to one another, each raises unique issues and involves distinct considerations.

This Article unearths the three contexts in which courts have interpreted § 1291 to create rules of appellate jurisdiction. It describes each of these contexts and gives examples of rules the courts have created in each. And although the appellate-jurisdiction literature has given substantial attention to the ways in which courts have interpreted § 1291 to create rules of appealability, it has overlooked the other two contexts.

The revelation of all three contexts is crucial for both courts and rulemakers. For courts, it gives some structure to the various ways that they have interpreted the term "final decision" to craft rules of appellate jurisdiction. Using this single term to craft three different kinds of rules—and doing so without acknowledging the three different contexts—accounts for much of the confusion and complexity in this area of the law. Courts accordingly might benefit from acknowledging these three related-but-distinct kinds of rules. Doing so would inject some clarity into the law of appellate jurisdiction. It might also focus courts on the unique interests at stake when forming each of these rules, ultimately leading to more practically sound rules of appellate jurisdiction.

More importantly, understanding the three contexts in which courts have interpreted § 1291 is essential to reform. Reform is the main focus of the appellate-jurisdiction literature. Because of the uncertainty and complexity that reliance on the term "final decision" has created, much of the literature would abandon that term in favor of some other foundation for federal appellate jurisdiction, such as appellate court discretion or codified rules. Most calls to abandon reliance on the term (including some of my own) focus on only one way in which the courts use § 1291: crafting rules of appealability. But courts have used § 1291 to do much more. Abandoning the term "final decision" and replacing it with rules that address only issues of appealability will leave crucial gaps in the law. For any reform to adequately replace courts' reliance on § 1291 and the term "final decision," it must fill the role that the term has played in all three contexts.

I proceed as follows. Part I describes the central role of final decisions in modern federal appellate jurisdiction, the many meanings of that term, and the proposed rejection of final decisions as the organizing principle of appellate jurisdiction. Part II breaks down the term, revealing the three contexts in which courts have interpreted it to craft rules of appellate jurisdiction. Part III explains why distinguishing between these three contexts would help courts bring some clarity to this area of the law. It

also contends that reformers must reckon with each context if reform is to succeed. A brief conclusion follows.

I. FINAL DECISIONS & MODERN FEDERAL APPELLATE JURISDICTION

A. The Role of the "Final Decision" in Federal Appellate Jurisdiction

The key jurisdictional statute for the federal courts of appeals is 28 U.S.C. § 1291. This statute gives those courts jurisdiction to review only "final decisions" of the district courts.[17] And for nearly all federal appeals, § 1291 is the source of appellate jurisdiction.[18]

To be sure, several statutes and rules provide alternative grounds for appellate jurisdiction. The Federal Circuit, for example, gets its unique jurisdiction from 28 U.S.C. § 1295.[19] Other statutes allow appeals over non-final decisions. 28 U.S.C. § 1292(a)(1) allows for the immediate appeal of certain orders regarding injunctive relief.[20] 28 U.S.C. § 1292(b)

---

17. 28 U.S.C. § 1291 (2012) ("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. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.").

18. Precise statistics on the grounds for appellate jurisdiction are not available. But in the period between March 31, 2016 and March 31, 2017, litigants commenced 58,951 proceedings in the twelve regional courts of appeals. *Federal Judicial Caseload Statistics 2017*, U.S. COURTS, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017 [https://perma.cc/98HU-TJ8K]. Original proceedings in those courts—which can have a variety of jurisdictional bases besides § 1291—accounted for 13,391 of those proceedings (or about 23%). *Id.* Appeals from administrative agencies accounted for another 6,463 (or about 11%), while appeals from the bankruptcy courts added another 671 (or 1%). *Id.* Of the remaining 38,426 proceedings commenced in that twelve-month period (about 65%), most were probably from what the federal courts consider to be "final decisions." *Id.*

19. 28 U.S.C. § 1295 (2012 & Supp. III 2015). That jurisdiction covers, for example, appeals involving patents or claims for the recovery of paid taxes, as well as appeals from the U.S. Court of Federal Claims and the U.S. Court of International Trade. *See* Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1461–64 (2012). Although the present focus is on appeals from district courts, it is worth mentioning that several statutes give the courts of appeals jurisdiction to review administrative actions. *See, e.g.*, 28 U.S.C. § 2342 (granting jurisdiction over, among other things, certain orders of the Federal Communication Commission and Secretary of Agriculture). For more on appellate jurisdiction over administrative actions, see generally THOMAS E. BAKER, FED. JUDICIAL CTR., A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 85–90 (2d ed. 2009); 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3940–3944 (3d ed. 2008).

20. Specifically, § 1292(a)(1) gives the courts of appeals jurisdiction over orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1292(a)(1).

allows a district court to certify an interlocutory order for an immediate appeal in civil cases, which the courts of appeals then have discretion to review.[21] And Federal Rule of Civil Procedure 23(f) gives the courts of appeals discretion to review certain interlocutory orders regarding class certification.[22] Other examples exist.[23]

Still, these statutes and rules cover a relatively small portion of federal appeals. Appellate jurisdiction for the majority of federal appeals comes from § 1291 and its grant of jurisdiction over only "final decisions."

B. The Many Meanings of "Final"

So most federal litigants who want to appeal can do so only after the district court enters a final decision. But on its face, it's not obvious what that term means. Most every district court proceeding ends in a "final judgment"—a document that reflects the disposition of all claims in an action. But Congress did not give the courts of appeals jurisdiction over

---

21. *See id.* § 1292(b) ("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 . . . ."). For more on § 1292(b), see generally 16 WRIGHT ET AL., *supra* note 19, § 3929; Alexandra B. Hess, Stephanie L. Parker & Tala K. Toufanian, *Permissive Interlocutory Appeals at the Court of Appeals for the Federal Circuit: Fifteen Years in Review (1995–2010)*, 60 AM. U. L. REV. 757 (2011); Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165 (1990); Tory Weigland, *Discretionary Interlocutory Appeals Under 28 U.S.C. § 1292(b): A First Circuit Survey and Review*, 19 ROGER WILLIAMS U. L. REV. 183 (2014); Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333 (1959); Mackenzie M. Horton, Note, *Mandamus, Stop in the Name of Discretion: The Judicial "Myth" of the District Court's Absolute and Unreviewable Discretion in Section 1292(b) Certification*, 64 BAYLOR L. REV. 976 (2012); Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607 (1975).

22. FED. R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered."). For more on Rule 23(f), see generally Lori Irish Bauman, *Class Certification and Interlocutory Review: Rule 23(f) in the Courts*, 9 J. APP. PRAC. & PROCESS 205 (2007); Richard D. Freer, *Interlocutory Review of Class Action Certification Decisions: A Preliminary Study of Federal and State Experience*, 34 W. ST. U. L. REV. 13, 16–22 (2007); Kenneth S. Gould, *Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions*, 1 J. APP. PRAC. & PROCESS 309 (1999); Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531 (2000).

23. *See, e.g.*, 9 U.S.C. § 16 (2012 & Supp. II 2014) (allowing immediate appeals from certain orders regarding arbitration); 18 U.S.C. § 3731 (2012) (allowing the prosecution in a criminal case to appeal certain district court decisions before a final judgment).

only "final judgments." It instead used the term "final decisions,"[24] which requires some interpretation.

Historically, a final decision was one that ended trial court proceedings. That was the understanding in the English courts of law, from which the current final-judgment rule originates.[25] In those courts, appellate review waited until the end of trial court proceedings.[26] And that made sense; most proceedings at law involved relatively simple issues and procedure, and most produced a single judicial decision at the end of a single hearing.[27] So delaying appeals imposed few hardships on litigants.[28] When Congress created the federal courts in the First Judiciary Act of 1789, it adopted the same approach to appeals, allowing review of only "final decrees and judgments."[29] That general grant of jurisdiction has persisted to modern times and is now found in § 1291.[30]

In modern practice, the federal courts typically equate a final decision and a final judgment. When defining what constitutes a "final decision," courts often invoke what they call the "final-judgment rule"—a final decision marks the end of district court proceedings, when all issues have been decided and all that remains is enforcing the judgment.[31]

Were that the only definition of a "final decision," § 1291 would allow appeals only at the end of district court proceedings. But that's not the only definition. Federal courts have instead given the term a variety of meanings. Consider just some of the ways in which the courts have elaborated on what constitutes a final decision:

- A decision that resolves an action on the merits but leaves open an issue of attorneys' fees (such as the entitlement to them or their

---

24. *See* 28 U.S.C. § 1291.

25. *See* Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 540–44 (1932); Waters, *supra* note 13, at 532–33.

26. *See* Crick, *supra* note 25, at 540–44; Waters, *supra* note 13, at 532–33.

27. *See* Crick, *supra* note 25, at 553; Waters, *supra* note 13, at 532–33.

28. Extraordinary circumstances that required immediate review were addressed through extraordinary writs. *See* Waters, *supra* note 13, at 532–33.

29. *See* Judiciary Act of 1789, ch. 20, §§ 21, 22, 1 Stat. 73, 83–86.

30. *See* BAKER, *supra* note 19, at 35; Cooper, *supra* note 13, at 157; Solimine, *supra* note 21, at 1168.

31. *See* Gelboim v. Bank of Am. Corp., 574 U.S. __, 135 S. Ct. 897, 902 (2015); Catlin v. United States, 324 U.S. 229, 233 (1945); United States v. Williams, 796 F.3d 815, 817 (7th Cir. 2015) (concluding that a judgment was appealable if it "end[ed] the litigation and [left] nothing but execution of the court's decision, the standard definition of 'final' under § 1291"); Dig. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994); Mitchell v. Forsyth, 472 U.S. 511, 543 (1985) (Brennan, J., concurring in part and dissenting in part); Abney v. United States, 431 U.S. 651, 657 (1977); Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353, 356–60 (2007) (discussing the final-judgment rule's history).

amount) is a final decision, even though more (namely, resolving any issues on fees) remains to be done in the district court.[32]

- A decision on liability that leaves for later resolution the calculation of damages is not normally final.[33] But when calculation of damages would be a ministerial or technical matter—that is, easily determined and likely uncontested—a decision on liability *is* final, even though more remains to be done in the district court.[34]
- A plaintiff's decision to voluntarily dismiss all claims with prejudice in a purported class action—along with the district court's decision accepting that dismissal—is not final.[35]
- District court orders that remand a dispute back to an executive agency are normally not final decisions.[36] But they are final when the remand might leave one of the parties without a later opportunity for appellate review.[37]
- Under the collateral-order doctrine, a district court decision that conclusively resolves an issue that is important and completely separate from the merits, and that would be effectively unreviewable in an appeal at the end of district court proceedings, is final.[38]
- Under the pragmatic or balancing approach to appeals, courts may deem a district court decision final and thus appealable when the benefits of an immediate appeal outweigh the costs.[39]
- Finally, in the context of qualified immunity appeals—that is, interlocutory appeals from decisions denying a claim of qualified immunity—courts have held that only parts of a district court's

---

32. *See* Ray Haluch Gravel Co. v. Cent. Pension Fund, 571 U.S. 177, 179 (2014); Budinich v. Becton Dickinson & Co., 486 U.S. 196, 203 (1988); *see also infra* section II.A.1.

33. *See* Liberty Mut. Ins. v. Wetzel, 424 U.S. 737, 744 (1976).

34. *See* Goodwin v. United States, 67 F.3d 149, 151 (8th Cir. 1995); Prod. & Maint. Emps. Local 504 v. Roadmaster Corp., 954 F.2d 1397, 1401–02 (7th Cir. 1992); Woosley v. Avco Corp., 944 F.2d 313, 317 (6th Cir. 1991).

35. Microsoft Corp. v. Baker, 582 U.S. __, 137 S. Ct. 1702, 1707, 1712–13 (2017).

36. *See* N.C. Fisheries Ass'n v. Gutierrez, 550 F.3d 16, 19 (D.C. Cir. 2008).

37. *See* Davies v. Johanns, 477 F.3d 968, 971 (8th Cir. 2007); Travis v. Sullivan, 985 F.2d 919, 923 (7th Cir. 1993); Perales v. Sullivan, 948 F.2d 1348, 1353 (2d Cir. 1991); Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 329–30 (D.C. Cir. 1989).

38. *See* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); BAKER, *supra* note 19, at 42–45; 15A WRIGHT ET AL., *supra* note 19, §§ 3911–3911.5.

39. *See* Gillespie v. U.S. Steel Corp., 379 U.S. 148, 149–50 (1964); United States v. Bokhari, 757 F.3d 664, 668 (7th Cir. 2014); United States v. ADT Sec. Servs., Inc., No. 11-15670, 2013 U.S. App. LEXIS 12114, at *12 (11th Cir. June 13, 2013) (per curiam).

> decision are final. In those appeals, the courts of appeals normally have jurisdiction over relatively abstract legal questions: do the facts make out a constitutional violation, and was the constitutional right clearly established at the time?[40] That part of the order is final.[41] The courts lack jurisdiction to review the more fact-bound issue of whether the summary judgment record supports the district court's assumed version of the facts.[42] That part is not final.[43] That is, unless something in that record blatantly contradicts those assumed facts.[44] In such a case, the entire decision is final and the court of appeals has jurisdiction over all of it.[45]

I discuss these and other examples in further depth below. The point for now is merely to illustrate the many inconsistent meanings of a final decision. Sometimes a decision that marks the end of district court proceedings is final. But sometimes it's not. And sometimes, decisions that come long before the end of those proceedings are final. Other, seemingly similar decisions are not. And the courts have even cut up district court decisions, concluding that some parts are final and some aren't.

These and other interpretations of § 1291 account for the bulk of the law of federal appellate jurisdiction; all of these rules rest atop § 1291 and its use of the term "final decision." And that's necessarily been the case. The statutes and procedural rules governing federal appellate jurisdiction are few. But the practicalities of modern federal litigation have required more than this handful of statutes and rules of procedure if the system is to work. The courts have been left the task of filling in the rather large gaps. They've chosen to create their own rules. Virtually the only tool the courts have used to do so is case-by-case interpretations of § 1291.[46]

But courts have had to appear circumspect when doing so. Congress, after all, has final say over the lower federal courts' jurisdiction. Courts are not supposed to create exceptions to those congressionally mandated

---

40. *See* Johnson v. Jones, 515 U.S. 304, 314 (1995).

41. *See id.*

42. *See id.* at 313.

43. *See id.*

44. *See* Plumhoff v. Rickard, 572 U.S. __, 134 S. Ct. 2012, 2019–20 (2014); Scott v. Harris, 550 U.S. 372, 380–81 (2007).

45. *See Scott*, 550 U.S. at 380–81.

46. The one exception is the Supreme Court's use of its rulemaking power to adopt Federal Rule of Civil Procedure 23(f). *See supra* note 22.

rules.[47] Indeed, courts often hesitate to call these rules "exceptions" to § 1291.[48] They are instead characterized as "interpretations" or "practical constructions" of that statute.[49]

Perhaps this is all by design. Congress gave the courts of appeals jurisdiction to review final "decisions," not final "judgments," suggesting that this grant of jurisdiction was to be elaborated on through common law decisionmaking. Congress thus might have intended that the courts have both a standard definition as well as various elaborations for other circumstances.[50]

In this sense, "final decision" is a term of art. Determining whether a decision is final would require looking not only at whether district court proceedings had ended, but also at the variety of considerations that underlie the law of appellate jurisdiction. The Supreme Court has occasionally acknowledged the common-law approach to § 1291. In 1940, the Court observed that finality "is not a technical concept of temporal or physical termination."[51] It is instead "the means for achieving a healthy legal system."[52] The Court repeated this observation in *Baker*.[53]

Whatever the intention, federal litigants are left with an immense body of law built atop varied and inconsistent interpretations of a single term. "Final decision" has become a term of art.

---

47. *See* Papotto v. Hartford Life & Accident Ins., 731 F.3d 265, 271 (3d Cir. 2013) ("To be clear, we do not engage in this analysis to determine if there is an exception to the finality rule; courts of appeals do not have authority to create exceptions to congressional limits on jurisdiction.").

48. *See id. But see* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430 (1985) ("Section 1291 accordingly provides jurisdiction for this appeal only if orders disqualifying counsel in civil cases fall within the 'collateral order' exception to the final judgment rule."); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) ("Our decisions have recognized . . . a narrow exception to the requirement that all appeals under § 1291 await final judgment on the merits.").

49. *See, e.g.*, Dig. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994) ("The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." (citation omitted)); Will v. Hallock, 546 U.S. 345, 349 (2006) (same). I have argued that this distinction between exceptions and interpretations can be unnecessarily confusing. *See* Lammon, Perlman *Appeals*, *supra* note 2, at 27–28.

50. Even if Congress did not initially intend for a common-law approach to interpreting § 1291, there is some indication that it has subsequently done so. In 1990, Congress amended the Rules Enabling Act to empower the Supreme Court to promulgate rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291 of this title." 28 U.S.C. § 2072(c) (2012). In doing so, Congress appears to have acknowledged and accepted that "final decision" does not have a single meaning.

51. Cobbledick v. United States, 309 U.S. 323, 326 (1940).

52. *Id.*

53. *See* Microsoft Corp. v. Baker, 582 U.S. __, 137 S. Ct. 1702, 1715 (2017).

C. *The Proposed Rejection of § 1291's "Final Decision" as the Foundation for Federal Appellate Jurisdiction*

As a term of art, the "final decision" has failed for at least three reasons.

First, the term is misleading. For those steeped in the law of appellate jurisdiction, treating "final decision" as a term of art might pose relatively few problems; experts can navigate much of this law, though it will still produce instances of uncertainty.[54] But the rules of appellate jurisdiction exist for everyone, not just experts. And those who aren't expert can face a steep learning curve when determining whether a decision is final.[55] Indeed, giving the term "final decision" anything except its standard and intuitive meaning risks misleading those who must apply it. Giving the term multiple and often inconsistent meanings multiplies that risk.

Second, reliance on the term has sown confusion in the law of appellate jurisdiction. This is due in part to the term's just-discussed misleading nature. But this confusion is due also to the ways that courts have used § 1291. In using interpretations of § 1291 to create most of the rules that a modern system of appellate jurisdiction requires, the courts have been pulled in different directions.[56] On the one hand, the courts try to create clear, consistent, and predictable rules.[57] On the other hand, modern federal litigation requires flexibility in the timing of appeals; not all appeals can wait until the end of district court proceedings.[58] Sometimes the courts focus on the former interest—clarity, consistency, and predictability—and give the term "final decision" its standard, established meaning.[59] Other times courts address the latter interest—flexibility—and give the term new meanings, some of which conflict with prior pronouncements on what it means for a decision to be final.[60] These interests are in tension, and they are occasionally irreconcilable. Courts have nevertheless tried to satisfy both interests by interpreting the same term—"final decision."[61]

---

54. *See* Cooper, *supra* note 13, at 157 ("Lawyers and judges who are expert in working with the system are able to identify the doctrinal rules and lines of argument, but often encounter elusive uncertainty in seeking clear answers to many problems.").

55. *Id.* ("Those who are less than expert are apt to go far astray.").

56. *See* Bryan Lammon, Hall v. Hall *and the Courts' Lose-Lose Approach to Appellate Jurisdiction*, 68 EMORY L.J. ONLINE 1001, 1011 (2018).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1011–12.

61. *See id.*

The results are not always pretty. By nearly every account, the current system of federal appellate jurisdiction—a general final-judgment rule coupled with a handful of statutory and rule-based exceptions and an immense variety of judicial elaborations on what it means for a decision to be final—is unacceptable.[62] These criticisms have been covered extensively elsewhere and need not be repeated in depth here.[63] Suffice it to say that most everyone views the system as overly complex and insufficiently predictable.[64] A little over ten years ago, Adam Steinman assembled a not-too-flattering collection of ways authors had characterized the law of appellate jurisdiction. It had been described as "'hopelessly complicated,' 'legal gymnastics,' 'dazzling in its complexity,' 'unconscionable intricacy' with 'overlapping exceptions, each less lucid than the next,' 'an unacceptable morass,' 'dizzying,' 'tortured,' 'a jurisprudence of unbelievable impenetrability,' 'helter-skelter,' 'a crazy quilt,' 'a near-chaotic state of affairs,' a 'Serbonian Bog,' and 'sorely in need of limiting principles.'"[65] Subsequent years have not been any kinder.[66] Indeed, in one recent decision out of the Sixth Circuit, the court candidly acknowledged that it couldn't figure out whether it had

62. *See* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 729 (1993) ("[T]he unanimous view of commentators is that the rule has either too many or too few exceptions, but in any event requires revision."). Some suggest that the system is functioning relatively well. *See, e.g.*, Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 179 (2001) ("[T]he current regime is in far better shape than commonly appreciated."); Steinman, *supra* note 1, at 1272 ("The federal courts . . . have worked within the cumbersome doctrinal and procedural framework to implement a system of interlocutory appellate review that, in practice, is fairly sensible. If one looks at the results on the ground—i.e., which interlocutory orders are immediately appealable and which are not—the jurisdictional landscape is commendable."). But they, too, note that there is still room for reform. *See* Glynn, *supra*, at 181; Steinman, *supra* note 1, at 1277.

63. *See* Lammon, *Rules, Standards, and Experimentation*, *supra* note 1; Steinman, *supra* note 1.

64. *See, e.g.*, Carrington, *supra* note 13 at 165–66 (noting "the unconscionable intricacy of the existing law, depending as it does on overlapping exceptions, each less lucid than the next"); Cooper, *supra* note 13, at 157 ("The final judgment requirement has been supplemented by a list of elaborations, expansions, evasions, and outright exceptions that is dazzling in its complexity."); Eisenberg & Morrison, *supra* note 1, at 291 (calling the current system "arcane and confusing"); Rosenberg, *supra* note 14, at 172 ("The existing federal finality-appealability situation is an unacceptable morass."); Waters, *supra* note 13, at 556 (noting the "dizzying array of statutory and judicially-created [finality] exceptions").

65. Steinman, *supra* note 1, at 1238–39 (citations omitted).

66. *See* Lammon, *Dizzying* Gillespie, *supra* note 2, at 412 (calling the system "a mess"); Lammon, *Rules, Standards, and Experimentation*, *supra* note 1, at 431 ("The broader exceptions are much less predictable. They are plagued by vague terms and inconsistent treatment in the courts, such that both litigants and judges spend far too much time trying to determine what can be appealed and when."); Petty, *supra* note 31, at 355 (noting that "[p]redictability has been an elusive goal in the courts' implementation of the final judgment rule"); Pollis, *Multidistrict Litigation*, supra note 1, at 1651 (noting the "labyrinthian conglomeration of jurisdictional rules").

jurisdiction over the appeal.[67] This uncertainty did not affect the ultimate outcome; the court was either affirming the district court's denial of qualified immunity or dismissing the appeal for lack of jurisdiction.[68] But it wasn't sure which.[69]

The costs of all this confusion can be substantial. Occasionally, litigants lose their one opportunity to appeal.[70] More commonly, judges and lawyers spend far too much time and effort (and clients' money) untying appellate jurisdiction knots.[71] It's not uncommon for litigants in an appeal to brief both jurisdiction and the merits, only for the court of appeals to hold that it lacks jurisdiction over the appeal. All that effort arguing the merits winds up wasted, at least for the time being.

The third problem with treating final judgment as a term of art is that doing so is unnecessary. Alternatives exist. Much of the appellate-jurisdiction literature urges some sort of reform of the current system. Some authors focus on whether a particular type of district court order should be immediately appealable.[72] Others address issues presented by

---

67. Estate of Allen v. City of West Memphis, 509 F. App'x 388, 393 (6th Cir. 2012), *rev'd sub nom.* Plumhoff v. Rickard, 572 U.S. __, 134 S. Ct. 2012 (2014).

68. *Id.*

69. *Id.*

70. *See* Ray Haluch Gravel Co. v. Cent. Pension Fund, 571 U.S. 177, 190 (2014); Budinich v. Becton Dickinson & Co., 486 U.S. 196, 203 (1988).

71. *See* Cooper, *supra* note 13, at 157 (arguing that even "[l]awyers and judges who are experts in working with the system . . . often encounter elusive uncertainty in seeking clear answers to many problems"); Munford, *supra* note 14, at 18 (noting that the appealability regime "provides the kind of excursions into legal history and abstract analysis that can drive practical litigators crazy"); Rosenberg, *supra* note 14, at 172 ("Entirely too much of the appellate courts' energy is absorbed in deciding whether they are entitled under the finality principle and its exceptions to hear cases brought before them—and in explaining why or why not.").

72. *See* Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539 (1998); Jason Kornmehl, *State Action on Appeal:* Parker *Immunity and the Collateral Order Doctrine in Antitrust Litigation*, 39 SEATTLE U. L. REV. 1 (2015); Pollis, *Multidistrict Litigation*, *supra* note 1; Cassandra Burke Robertson, *Forum Non Conveniens on Appeal: The Case for Interlocutory Review*, 18 SW. J. INT'L L. 445 (2012); Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733 (2006); Waters, *supra* note 13; Owen R. Wolfe, *Immediate Appeals: The Circuit Split on the Applicability of the Collateral Order Doctrine to Statutes of Repose*, 48 U. TOL. L. REV. 1 (2016); Chloe Booth, Comment, *Good Things Don't Come to Those Forced to Wait: Denial of a Litigant's Request to Proceed Anonymously Can be Appealed Prior to Final Judgment in the Wake of* Doe v. Village of Deerfield, 58 B.C. L. REV. E. SUPP. 205 (2017); Robyn R. English, Note, *Limitations on the U.S. District Courts' Discretion: Immediate Review of Post-*Aérospatiale *Discovery Orders*, 44 GEO. J. INT. L. 1455 (2013); Brad D. Feldman, Note, *An Appeal for Immediate Appealability: Applying the Collateral Order Doctrine to Orders Denying Appointed Counsel in Civil Rights Cases*, 99 GEO. L.J. 1717 (2011); Note, *Motions for Appointment of Counsel and the Collateral Order Doctrine*, 83 MICH. L. REV. 1547 (1985).

existing avenues of appeal.[73] Still others advocate new trans-substantive ways to appeal.[74] And then there are those that take a more wholesale approach to appellate jurisdiction, most of which advocate replacing the current system with one based on categorical rules or appellate court discretion.[75]

One common theme in the literature is abandoning reliance on interpretations of § 1291 and the "final decision" as the foundation of federal appellate jurisdiction. Indeed, all wholesale reform efforts share one key characteristic: abandoning interpretations of the term final decision as the basis for most of federal appellate jurisdiction in favor of a more candid discussion of the issues and interests in this area.[76]

That's not to say that any alternative is forthcoming; reform is by no means certain. But there's some hope. Congress has given the Supreme Court power to adopt rules of procedure governing appellate jurisdiction.[77] And the Court has recently endorsed this rulemaking as the proper means of changing the law of appellate jurisdiction. In *Mohawk Industries, Inc. v. Carpenter*,[78] the Court reiterated its admonition that

---

73. *See* Pierre H. Bergeron, *District Courts as Gatekeepers? A New Vision of Appellate Jurisdiction over Orders Compelling Arbitration*, 51 EMORY L.J. 1365 (2002); James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. PA. L. REV. 493 (2011); Petty, *supra* note 31; Andrew S. Pollis, *Civil Rule 54(b): Seventy-Five and Ready for Retirement*, 65 FLA. L. REV. 711 (2013); Solimine, *supra* note 21; Matthew R. Pikor, Note, *The Collateral Order Doctrine in Disorder: Redefining Finality*, 92 CHI.-KENT L. REV. 619 (2017); Matthew O. Wagner, Note, *Fixing* Perlman*: How the Misapplication of a 100-Year-Old Doctrine Threatens to Undermine* Mohawk Industries Inc. v. Carpenter, 79 U. CIN. L. REV. 1631 (2011).

74. *See, e.g.*, Kilbert, *supra* note 15 (challenge appeals, inspired by instant replay practices in professional sports); James E. Pfander & David R. Pekarek Krohn, *Interlocutory Review by Agreement of the Parties: A Preliminary Analysis*, 105 NW. U. L. REV. 1043 (2011) (appeals by consent of the parties and the district court); Ankur Shah, *Increase Access to the Appellate Courts: A Critical Look at Modernizing the Final Judgment Rule*, 11 SETON HALL CIR. REV. 40 (2014) (manufactured finality); Joseph Struble, Comment, *An Early Roll of the Dice: Appeal under Conditional Finality in Federal Court*, 50 HOU. L. REV. 221 (2012) (manufactured finality).

75. Arguments for discretionary appeals include Cooper, *supra* note 13, at 163–64; Crick, *supra* note 25, at 564; Eisenberg & Morrison, *supra* note 1, at 293–302; Martineau, *supra* note 62, at 748–87; and John C. Nagel, Note, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200, 214–22 (1994). *See also* Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 124–27 (1975); Steinman, *supra* note 1, at 1278–82. Arguments for categorical rules include Carrington, *supra* note 13, at 167–68; Glynn, *supra* note 62, at 259; Lammon, Perlman *Appeals*, *supra* note 2, at 21–25; Rosenberg, *supra* note 14, at 179. I have suggested a wholesale reform model that combines categorical rules and a discretionary catch-all. *See* Lammon, *Cumulative Finality*, *supra* note 2; Lammon, *Dizzying* Gillespie, *supra* note 2, at 415–18.

76. *See* Glynn, *supra* note 62; Lammon, *Dizzying* Gillespie, *supra* note 2; Steinman, *supra* note 1.

77. 28 U.S.C. § 1292(e); *id.* § 2072(c). *See generally* Martineau, *supra* note 62; *infra* notes 215 and accompanying text.

78. 558 U.S. 100 (2009).

Congress has designated rulemaking as the proper avenue for changes to the rules of appellate timing.[79] Congress's decision, the Court explained, deserves "the Judiciary's full respect."[80] The *Mohawk* Court also noted that rulemaking "draws on the collective experience of bench and bar, and it facilitates the adoption of measured, practical solutions."[81] And the Court's recent decision in *Microsoft Corp. v. Baker* stated that changes to appellate jurisdiction "are to come from rulemaking . . . , not judicial decisions in individual controversies or inventive litigation ploys."[82] So rulemaking—"not expansion by court decision"—is now "the preferred means for determining whether and when prejudgment orders should be immediately appealable."[83]

The Advisory Committee on Appellate Rules (the body from which any new rules of procedure on appellate jurisdiction would originate) has also shown some interest in reform, though its efforts have so far been false starts. Shortly after the Supreme Court held in *Mohawk* that discovery decisions could not be appealed under the collateral-order doctrine, the Committee took up the issues of discovery appeals and reform more generally.[84] More recently, the Committee considered codifying the collateral-order doctrine as part of a more general effort to make federal litigation more efficient.[85] Both of these items, however, were eventually removed from the Committee's agenda.[86]

---

79. *Id.* at 113–14.

80. *Id.* at 114 (quoting Swint v. Chambers Cty. Comm'n, 514 U.S. 35, 48 (1995)).

81. *Id.*

82. Microsoft Corp. v. Baker, 582 U.S. __, 137 S. Ct. 1702, 1714 (2017); *see also* Hall v. Hall, 584 U.S. __, 138 S. Ct. 1118, 1131 (2018) (repeating this admonition).

83. *Mohawk*, 558 U.S. at 113.

84. *See* ADVISORY COMM. ON APPELLATE RULES, MINUTES OF SPRING 2014 MEETING 15–16 (2014), http://www.uscourts.gov/sites/default/files/fr_import/appellate-minutes-04-2014.pdf [https://perma.cc/4QB7-DW8N]; Catherine T. Struve, *Memorandum re: Item Nos. 09-AP-D & 11-AP-F (Oct. 20, 2014)*, *in* AGENDA BOOK FOR THE ADVISORY COMMITTEE ON APPELLATE RULES 169 (2014), http://www.uscourts.gov/sites/default/files/fr_import/2014-10-Appeals-Agenda-Book.pdf [https://perma.cc/6EWY-XCHG] (Fall 2014 meeting); Andrea L. Kuperman, *Memorandum re: Immediate Appealability of Prejudgment Orders (Sept. 20, 2013)*, *in* AGENDA BOOK FOR THE ADVISORY COMMITTEE ON APPELLATE RULES 367 (2014), http://www.uscourts.gov/sites/default/files/fr_import/2014-04-Appeals-Agenda-Book.pdf [https://perma.cc/QH9U-UBVX] (Spring 2014 meeting).

85. *See* Gregory E. Maggs, *Memorandum re: Further Discussion of Ideas for Making Federal Appellate Litigation More Efficient (May 2, 2017)*, *in* AGENDA BOOK FOR THE ADVISORY COMMITTEE ON APPELLATE RULES 432–35 (2017), http://www.uscourts.gov/sites/default/files/2017-05-appellate-agenda-book_0.pdf [https://perma.cc/Z99X-J2S4] (Spring 2017 meeting); Stephen E. Sachs, *Memorandum re: Collateral Order Doctrine*, *in* AGENDA BOOK FOR THE ADVISORY COMMITTEE ON APPELLATE RULES, *supra*, at 436–44.

86. *See* ADVISORY COMM. ON APPELLATE RULES, MINUTES OF SPRING 2017 MEETING 10 (2017), http://www.uscourts.gov/sites/default/files/ap05-2017-min_0.pdf [https://perma.cc/6EAF-HRY6]

But whatever the likelihood of reform, the fact remains that the system of federal appellate jurisdiction does not need to be built atop § 1291 and its use of the term "final decisions." And if wholesale reform occurs, it will almost certainly abandon that approach to crafting the rules of federal appellate jurisdiction.

II. THE THREE CONTEXTS IN WHICH COURTS HAVE INTERPRETED FINAL DECISIONS

Before abandoning the term "final decision," however, there's something to be learned from it. Previous calls to reject the term (some of my own included) have focused on one way in which the courts use it: to craft rules about when litigants can appeal before the end of district court proceedings.[87] This is a key role that interpretations of § 1291 have played. But it's not the only one. Courts have also interpreted § 1291's use of the term "final decisions" to create two other kinds of jurisdictional rules. First, courts have given the term a variety of meanings to craft rules about when litigants can take their traditional, end-of-proceedings appeal on the merits. Second, courts have used the term "final decision" to limit or expand the issues that a court can address in an appeal before the end of district court proceedings.

These other two uses of the term "final decisions" have been overlooked in the literature. But they have produced rules that are essential to a well-functioning system of appeals. Reform efforts that abandon case-by-case interpretations of § 1291 and the term "final decision" must therefore adopt rules that fill all of the roles that the term has played. Otherwise, reform will leave gaps in the law and unaddressed issues.

A. True Finality

The first context in which courts have interpreted § 1291 involves rules on what I call "true finality." These rules involve what might be called the traditional "end-of-proceedings" appeal as of right. (The scare quotes

---

(declining to add a project that would codify the collateral-order doctrine to the Advisory Committee's agenda); ADVISORY COMM. ON APPELLATE RULES, MINUTES OF FALL 2014 MEETING 9 (2014) http://www.uscourts.gov/sites/default/files/appellate-minutes-10-2014_0.pdf [https://perma.cc/8LCU-2UBW] (removing a proposal to craft rules on privilege appeals from the Advisory Committee's agenda).

87. *See* Carrington, *supra* note 13; Cooper, *supra* note 13; Eisenberg & Morrison, *supra* note 1; Glynn, *supra* note 62; Lammon, *Dizzying* Gillespie, *supra* note 2; Lammon, Perlman *Appeals*, *supra* note 2; Martineau, *supra* note 62; Nagel, *supra* note 75; Petty, *supra* note 31; Redish, *supra* note 75; Steinman, *supra* note 1; Lawyers Conference Comm. on Fed. Courts & the Judiciary, *The Finality Rule: A Proposal for Change*, 19 JUDGES J. 33 (1980).

around "end-of-proceedings" are required since, as we'll soon see, these appeals don't always come at the actual end of district court proceedings.) And these rules interpret the term "final decision" to identify the point at which litigants can take this traditional appeal.

The point at which litigants can take this traditional appeal is a key point in federal litigation for two reasons. First, aggrieved litigants have a near-absolute right to appeal at this point. Regardless of any uncertainty about when litigants can appeal before this point, the traditional appeal is a certain and reliable opportunity that exists in nearly every case. Lawyers unfamiliar with all the rules allowing appeals before a final judgment likely know that they can appeal at this point. And all decisions up to this point merge into the final disposition of the action.[88] In this appeal, aggrieved litigants can thus appeal any issue that the district court decided so long as subsequent events have not rendered that decision moot.

Second, litigants have a brief window of time in which to begin this traditional appeal. These appeals normally begin with the filing of a notice of appeal.[89] Litigants have a limited time to file that notice. In most civil cases, for example, they have thirty days after entry of the judgment.[90] When the government is a party to a civil case, the time extends to sixty days.[91] In criminal cases, defendants generally must file their notice within fourteen days of the judgment or order being appealed.[92]

Compliance with these time limits is critical. In *Bowles v. Russell*,[93] the Supreme Court held that a late filed notice in a civil case is ineffective.[94] The time limits for filing a notice of appeal in a civil case come from a statute—28 U.S.C. § 2107. The *Bowles* Court reasoned that this statutory period is "jurisdictional"—that is, it limits the courts of appeals' jurisdiction.[95] So a late-filed notice has fatal consequences for litigants: it

88. *See* 15A WRIGHT ET AL., *supra* note 19, § 3905.1.

89. *See* FED. R. APP. P. 3(a)(1). When the court of appeals has discretionary jurisdiction over an interlocutory appeal, the appeal begins with the filing of a petition to appeal under Federal Rule of Appellate Procedure 5(a)(1). An appeal in post-conviction proceedings can begin with the filing of a request for a certificate of appealability. *See id.* R. 22(b)(2).

90. *Id.* R. 4(a)(1)(A).

91. *Id.* R. 4(a)(1)(B).

92. *Id.* R. 4(b)(1)(A).

93. 551 U.S. 205 (2007).

94. *Id.* at 214. For an in-depth discussion of appellate jurisdiction and late-filed notices of appeal, see 16A WRIGHT ET. AL., *supra* note 19, at §§ 3950.1, 3950.5.

95. *Bowles*, 551 U.S. at 213; *see also* Hamer v. Neighborhood Hous. Servs. of Chi., 583 U.S. __, 138 S. Ct. 13, 20 (2017) ("If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional; otherwise, the time specification fits within the claim-processing category." (citation omitted)). *Bowles* was part of a larger Supreme Court effort to clarify which rules are jurisdictional (and thus not open to judge-made

deprives the appellate court of jurisdiction and requires dismissing the appeal; the parties cannot waive the matter; the court must raise the issue on its own initiative; and no equitable exceptions are allowed.[96] Although the courts have not yet definitively determined the jurisdictional nature of every one of Rule 4's notice-of-appeal deadlines, "the prudent appellant will act as though all the . . . time limits are jurisdictional."[97] Litigants accordingly must be able to determine when district court proceedings have ended. Failure to do so risks losing their right to appeal.

The point at which litigants can take their traditional, "end-of-proceedings" appeal as of right is thus an important one. And ideally litigants would be able to easily and readily identify that point. But, perhaps surprisingly, identifying that point is not always simple. Often the right to take a traditional, "end-of-proceedings" appeal arises at the actual end of district court proceedings—the "final decision" for purposes of § 1291 comes when the district court proceedings are over. But not always.

This section provides five examples of this phenomenon. In three—attorneys' fees decisions, the technical/ministerial rule, and consolidated proceedings—courts have held that a decision near the end of district court proceedings is final even though more remains to be done. In another two—*Microsoft Corp. v. Baker* and administrative remands—courts have held that there is no final decision even though district court proceedings are over. Some of these rules make some practical sense or produce pragmatically sound outcomes. But importantly, they all stem from interpretations of the term "final decision."

Note, each of these situations deals with district court decisions that come near or at the actual end of district court proceedings. I discuss in the next section decisions deemed final even though they came well before the end of those proceedings.

1. Attorneys' Fees Decisions

The first example of a true finality rule governs district court decisions that resolve the merits of a dispute but leave open an issue of attorneys' fees, such as the entitlement to them or their amount. In *Budinich v.*

---

exceptions) and which are claims-processing rules (and thus open to waiver and judge-made exceptions). *See generally* Wasserman, *supra* note 12.

96. *Bowles*, 551 U.S. at 214.

97. 16A WRIGHT ET AL., *supra* note 19, § 3950.1. *But see Hamer*, 138 S. Ct. at 22 (holding that Rule 4(a)(5)(C)'s limit on extensions of time to file a notice of appeal was not jurisdictional).

Becton Dickinson & Co.,[98] the Supreme Court held that a decision on the merits was final even though an outstanding issue of attorneys' fees remained.[99] The district court first entered judgment in favor of the plaintiff on the merits and then, several months later, granted the plaintiff's request for attorneys' fees.[100] The plaintiff (seeking a larger damages award) filed his only notice of appeal after the decision on fees.[101] When it came to appealing the merits, the Court concluded that this notice was late—the district court's merits decision was final once judgment was entered on the merits, and the plaintiff had thirty days after that to file a notice of appeal.[102] The Court reasoned that a final decision is one that resolves the merits of a case, and an issue that will not affect the decision on the merits (such as a request for attorneys' fees) does not affect the finality of that decision.[103] The Court recently reiterated this holding in *Ray Haluch Gravel Co. v. Central Pension Fund*,[104] which held that the same rule applies even if the entitlement to attorneys' fees is a contractual (rather than statutory) matter.[105]

In both *Budinich* and *Ray Haluch*, district court proceedings were not over once the merits were decided. More remained to be done—determine the entitlement to, and possibly the amount of, attorneys' fees. Those proceedings would end only after a decision on the attorneys' fees issues. The Supreme Court nevertheless held that the merits decision was the final one. At that point, the aggrieved parties had a right to appeal. The time for filing the notice of appeal also had begun running. The case was "over" for the purpose of the right to appeal the merits, even though district court proceedings were only close to being over. Indeed, if a final decision is one that ends district court proceedings, proceedings end *twice* in these cases—once when the district court decides the merits and again when the district court resolves the attorneys' fees issue. Both produce a final decision from which a party has a right to appeal. And so both, oddly enough, would mark the end of district court proceedings.

The wisdom of this rule is questionable. Why not delay the appeal until after the attorneys' fees issue has been resolved? That way, both the merits and any subsequent dispute over fees could be resolved in a single appeal.

98. 486 U.S. 196 (1988).

99. *Id.* at 203.

100. *Id.* at 197–98.

101. *Id.* at 198.

102. *Id.* at 200; *see also* FED. R. APP. P. 4(a)(1).

103. *Budinich*, 486 U.S. at 199–200.

104. 571 U.S. 177 (2014).

105. *Id.* at 179.

As things stand, the attorneys' fees rule can require two different appeals—one of the merits and another on fees.

But for present purposes, it's enough to note that besides illustrating the use of § 1291 to create a rule governing true finality, the rule from the attorneys' fees cases illustrates one approach to interpreting the term "final decision." *Budinich* involved a highly formalistic interpretation of that term. The Court said that a final decision is one that resolves *the merits* of a dispute.[106] Attorneys' fees have not historically been considered part of a dispute's merits.[107] So, according to the Court, unresolved attorneys' fees issues do not affect the finality of a decision on the merits.[108] Hence, the rule for outstanding issues of attorneys' fees.

2. The Ministerial/Technical Rule

A much less formalistic interpretation of the term "final decisions" can be seen in the ministerial/technical rule, which sometimes deems a decision on liability final even though the amount of damages has not yet been decided.[109] Generally speaking, a decision on liability that leaves open the amount of damages is not final or appealable.[110] And rightfully so; a decision on only liability does not end district court proceedings.

But courts have occasionally allowed appeals from these determinations of liability under the ministerial/technical rule.[111] Under that rule, so long as the determination of damages would be a ministerial or technical matter—that is, the parties don't really dispute the amount of damages and the district court could calculate it simply—courts have called the liability decision a final one and allowed the appeal.

---

106. *Budinich*, 486 U.S. at 199–200.

107. *See id.*

108. *Id.* The Court also noted the importance of a bright-line, uniform rule in this context. *See id.* at 202. But it seems to have used a formalistic definition of the merits to pick its bright line.

109. For a more in-depth discussion of the ministerial/technical rule, see Lammon, *Dizzying* Gillespie, *supra* note 2, at 400–02.

110. *See* Liberty Mut. Ins. v. Wetzel, 424 U.S. 737, 744 (1976); HSBC Bank USA, N.A. v. Townsend, 793 F.3d 771, 776 (7th Cir. 2015) ("Damages are part of the judgment and essential to finality; lack of quantified damages prevents an appeal.").

111. *See* Goodwin v. United States, 67 F.3d 149, 151 (8th Cir. 1995) (holding in a tax-refund suit that a district court order granting a refund but not calculating the amount was appealable, as "the calculation of this refund [was] merely a ministerial task"); Prod. & Maint. Emps. Local 504 v. Roadmaster Corp., 954 F.2d 1397, 1401–02 (7th Cir. 1992) (holding that a district court order concluding that an employer had wrongfully amended a retirement plan was appealable even though the court had not calculated the proper amount of accrued benefits because "[d]etermining that amount [was] just a matter of plugging information into the formula"); Woosley v. Avco Corp., 944 F.2d 313, 317 (6th Cir. 1991).

There's some pragmatic force to the technical/ministerial rule. Courts in these cases often see few costs in allowing the appeal; all issues the parties might dispute have been decided, so there is little or no risk of an additional appeal.[112] And a lot of time and effort would be wasted were the appeal dismissed and subsequently refiled after the district court calculated damages.

But the technical/ministerial rule has costs. For one thing, however pragmatic the rule might be in a particular case, it creates systemic risks. Allowing some appeals under the ministerial/technical exception invites future parties to argue the point, and that effort is wasted when appellate courts decline to apply the rule.[113]

And importantly for present purposes, the ministerial/technical rule requires another definition of what it means for a decision to be final: a decision on liability is final so long as the calculation of damages would be a ministerial or technical matter. That definition is inconsistent with the standard definition of a final judgment, the general rule that a decision on liability that leaves open the amount of damages is not final, and the attorneys' fees cases (damages are part of the merits, so a decision on only liability is not a decision on the merits). The technical/ministerial rule thus requires a further elaboration on the meaning of the term "final decision," and it adds further uncertainty to identifying when the actual end of district court proceedings is a final decision.

3. Consolidated Actions

Another rule on true finality comes from consolidated actions. Federal Rule of Civil Procedure 42(a) allows a district court to consolidate actions that present a common issue of law or fact.[114] Actions that present common questions of fact can also be consolidated under 28 U.S.C.

---

112. *See* Martin v. Brown, 63 F.3d 1252, 1260 (3d Cir. 1995) (noting that an outstanding calculation of expenses was "unlikely to result in a later appeal"); Morgan v. United States, 968 F.2d 200, 204 (2d Cir. 1992) ("The rationale is that when what remains to be done is merely routine, that routine decision will not spark an appeal; hence permitting the earlier review will not thwart the policy against piecemeal appeals.").

113. *See* Marshak v. Treadwell, 240 F.3d 184, 190–92 (3d Cir. 2001); Apex Fountain Sales, Inc. v. Kleinfeld, 27 F.3d 931, 934–37 (3d Cir. 1994).

114. FED. R. CIV. P. 42(a). For in-depth studies of consolidation, see generally Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be Part II: Non-Jurisdictional Matters*, 42 UCLA L. REV. 967 (1995); 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 (1995) [hereinafter Steinman, *Part 1*].

§ 1407 for pretrial proceedings as part of multidistrict litigation.[115] In either situation, what were once independent actions proceed jointly for at least some purposes. But all actions are not necessarily resolved at the same time. Particularly in multidistrict litigation (MDL), individual actions might be resolved while others with which they were consolidated continue. Difficulties have arisen when trying to identify the final decision in these cases.

In a pair of recent cases, the Supreme Court held that the resolution of a single action—regardless of consolidation—is a final and thus appealable decision.

In *Gelboim v. Bank of America Corp.*,[116] the Court held that dismissal of an action that was consolidated with others in an MDL is a final decision, regardless of any other ongoing actions in the MDL.[117] The *Gelboim* Court noted that although cases in an MDL are consolidated for pretrial purposes, they retain their individual identities.[118] Independent actions are final once all issues in each action have been resolved. So the resolution of all issues in an individual action is the final decision for that action, and thus immediately appealable, regardless of what might be happening in other consolidated actions.[119]

And in last term's *Hall v. Hall*,[120] the Court held that dismissal of one action consolidated with another under Rule 42 was final, regardless of the status of other actions with which it was consolidated.[121] Like actions consolidated in an MDL, individual actions consolidated under Rule 42 retain their independent character.[122] So, again, resolution of all issues in a single action is a final decision for that action.[123]

---

115. *See* 28 U.S.C. § 1407 (2012). For in-depth discussions of multidistrict litigation, see generally Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711 (2017); Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259 (2017); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understanding of Procedure*, 165 U. PA. L. REV. 1669 (2017).

116. 574 U.S. __, 135 S. Ct. 897 (2015).

117. *Id.* at 904.

118. *Id.*

119. *Id.* The Court also noted that any other rule would pose practical difficulties; not only would dismissed plaintiffs need to wait until all other cases are resolved, but they would also face difficulties figuring out which point marks that resolution. *See id.* at 905.

120. 584 U.S. __, 138 S. Ct. 1118 (2018).

121. *Id.* at 1131.

122. *Id.*

123. *Id.*

Gelboim and *Hall* have the merit of being consistent decisions; both cases define a "final decision" so that resolution of a single action is final and thus appealable, regardless of the status of any actions with which it has been consolidated. But they also illustrate the pragmatically unsound results that can come from interpretations of § 1291.

Gelboim makes sense; forcing the parties in one action in an MDL to wait for resolution of all other actions would be terribly inconvenient. MDLs often involve cases with little relation to one another beyond common questions of fact, and we cannot expect litigants to monitor the status of all other actions in waiting for their moment to appeal.

Hall, however, makes less sense. Cases consolidated under Rule 42 can bear a closer relationship to one another than cases consolidated in an MDL.[124] Separate appeals in these actions risk producing multiple, related, and duplicative appeals.[125] Each action in a consolidated action could be resolved at a different time. If each action is separately appealable, then consolidated proceedings could produce several appeals. Those appeals would also likely be related, as consolidated actions generally involve some overlap in the facts. With separate appeals, separate appellate panels will have to familiarize themselves with the same record. And consolidated actions necessarily involve at least one common question. If each action is separately appealable, those actions might be presented in multiple appeals.

Avoiding multiple, related, and duplicative appeals is one of the main reasons for the general final-judgment rule.[126] It is often more efficient (at least from the appellate court's perspective) to hear all related appeals at once, requiring only one panel to learn the record, and deciding the overlapping issues in a single decision. The immediate-appeals rule therefore conflicts with one of the main interests that underlies the rules of appellate timing.[127]

---

124. Actions consolidated as part of an MDL often come from across the country (hence the "multidistrict"). Consolidation under Rule 42 involves parties in the same district court, meaning that the scope of consolidation under Rule 42 is narrower than that of MDL, resulting in a closer relationship between the consolidated actions.

125. *See* Lammon, *supra* note 56, at 1006.

126. *See* Lammon, *Rules, Standards and Experimentation*, *supra* note 1, at 428.

127. This isn't to say that all appeals should wait until the resolution of all consolidated actions. There might be times when it makes sense to allow the parties to a resolved action to appeal before resolution of all consolidated actions, such as when the parties to the resolved action are not involved in any of the other actions. In arguing for a rule of procedure that would overrule *Hall* and normally delay appeals in consolidated actions until the resolution of all actions, I have also argued for a rule that would allow district courts to certify one action for an immediate appeal. *See* Lammon, *supra* note 56, at 1012–13.

Consolidated actions thus illustrate not only another way in which the courts have used § 1291 to craft rules of true finality. They also illustrate the sometimes practically unsound outcomes that these efforts to keep those interpretations consistent produce.

4. Microsoft Corp. v. Baker

The Supreme Court recently crafted a new rule of true finality in *Microsoft Corp. v. Baker*. The *Baker* Court held that district court proceedings were not final when the plaintiffs in a purported class action had voluntarily dismissed all of their claims with prejudice.[128] The plaintiffs in *Baker* brought a purported class action on behalf of all owners of Microsoft's Xbox 360 gaming console, claiming that a defect in the console scratched game discs during normal use.[129] After the district court declined to certify the class, the plaintiffs sought permission to appeal that decision under Rule 23(f).[130] When the Ninth Circuit declined to hear the Rule 23(f) appeal, the named plaintiffs voluntarily dismissed their claims with prejudice and then, in an appeal from that dismissal, sought review of the certification decision.[131] The named plaintiffs assumed that reversal of the certification decision would allow them to reinstate their individual claims and represent the class.[132]

The Supreme Court held, however, that the voluntary dismissal was not a final decision under § 1291.[133] The Court saw many problems with the

128. Microsoft Corp. v. Baker, 582 U.S. __, 137 S. Ct. 1702, 1707, 1712–13 (2017).

129. *Id.* at 1710.

130. *Id.*

131. *Id.* at 1711.

132. This tactic is sometimes called "manufactured finality," and some courts had allowed it before *Baker*. *See generally* Shah, *supra* note 74; Struble, *supra* note 74. Manufactured finality essentially involves gambling on the chance of reversal, and it arises when plaintiffs suffer an adverse interlocutory ruling that severely harms, but does not entirely undercut, their case. For example, a court might rule that a plaintiff is not entitled to punitive damages on its claim. The plaintiff hasn't lost on the merits at that point, but the compensatory damages alone might not make the case worth pursuing. The manufactured finality tactic would allow that plaintiff to dismiss the claim not only with prejudice, but also with the understanding that the plaintiff could appeal the interlocutory decision on punitive damages. And if the appellate court reverses that decision, the plaintiff could reinstate the claim. The Rules Committee once considered adopting a manufactured finality rule but decided against doing so. *See* ADVISORY COMM. ON APPELLATE RULES, MINUTES OF SPRING 2015 MEETING 32–33 (2015), http://www.uscourts.gov/sites/default/files/2015-04-appellate-minutes_final_0.pdf [https://perma.cc/6HDR-CBEH]; CIVIL RULES ADVISORY COMM., MINUTES OF APR. 9, 2015 MEETING 21–25 (2015), http://www.uscourts.gov/sites/default/files/cv04-2015-min_0.pdf [https://perma.cc/3NQE-EJCC] (voting to do nothing about manufactured finality). Manufactured finality has an uncertain future after *Baker*.

133. *Baker*, 137 S. Ct. at 1707.

plaintiffs' attempt at appeal: it increased the risk of multiple, piecemeal appeals; it undercut Rule 23(f)'s grant of discretionary appellate jurisdiction in favor of an absolute right to appeal; and it benefitted only plaintiffs, not defendants.[134] For these reasons, the Court held that the order was not final—and thus not appealable—under § 1291.[135]

The outcome in *Baker* was undoubtedly correct—the plaintiffs were trying to circumvent Rule 23(f) and manufacture the appeal of an order that they should not have been able to appeal. But the Court's reasoning is odd. As Justice Thomas pointed out in his concurrence, district court proceedings in *Baker* were over.[136] The court had entered an order dismissing all of the plaintiffs' claims with prejudice.[137] So all issues had been resolved, and there was nothing left for the district court to do. Under any straightforward understanding of the term, *Baker* reached a final decision. Indeed, as mentioned in the introduction, the majority's conclusion that the last order in *Baker* was not final suggests that there was *never* a final decision in the case; district court proceedings in *Baker* never ended.

Granted, that's absurd; of course district court proceedings ended. But to reach the outcome it did—which, again, was a pragmatically proper outcome—the Court had to give a new meaning to § 1291: a decision that marks the end of district court proceedings is final, unless that decision involves an attempt to circumvent Rule 23(f). The Court thus defined a "final decision" in a way that prevents parties like the plaintiffs in *Baker* from manufacturing an appealable decision.

5. The Administrative Remand Rule

The administrative remand rule provides another illustration of a true finality rule.[138] This doctrine addresses a problem that sometimes arises in district court review of administrative agency adjudication. Many administrative adjudications can be reviewed in federal district courts.[139] And it is not uncommon for district courts to remand cases back to the agency for further proceedings. This can occur, for example, when the

134. *Id.* at 1713–15.

135. *Id.* at 1712–13.

136. *Id.* at 1716 (Thomas, J., concurring in the judgment).

137. *Id.*

138. For a more in-depth discussion of the administrative remand rule, see 15A WRIGHT ET AL., *supra* note 19, § 3914.32; Lammon, *Dizzying* Gillespie, *supra* note 2, at 386–93.

139. *See, e.g.*, 5 U.S.C. § 702 (2012) (providing for judicial review of adverse agency actions).

district court concludes that the agency applied the wrong legal standard.[140]

On the one hand, these remand decisions seem final. District court proceedings have ended, and all issues before that court have been resolved. There's nothing left for the district court to do. The district court's decision should therefore be ripe for review. On the other hand, more remains to be done in the action, albeit not in the district court. Instead, more remains to be done in the agency. And in many cases, immediate review of the district court's remand order could disrupt administrative proceedings—they might be stayed during the appeal. Immediate review could also lead to piecemeal review—the court of appeals might hear a case twice—once after the administrative remand and again after any further administrative proceedings. Delaying review, in contrast, would consolidate all issues—issues from both the earlier agency action and the later agency action—into one appeal.

The general rule in these circumstances is that district court orders remanding a case to an agency for further proceedings are not final decisions.[141] In *Western Energy Alliance v. Salazar*,[142] for example, the Tenth Circuit held that it lacked jurisdiction to review an order remanding a dispute to the U.S. Bureau of Land Management so the Bureau could take action on the plaintiffs' lease applications.[143] The appeal in *Western Energy Alliance* was brought by the lease applicants, not the Bureau.[144] And the applicants, if not satisfied with the Bureau's subsequent actions, could seek additional review in the district court and, if necessary, on appeal.[145] So the remand in *Western Energy Alliance*, like most

140. *See* Davies v. Johanns, 477 F.3d 968, 971 (8th Cir. 2007); Travis v. Sullivan, 985 F.2d 919, 923 (7th Cir. 1993); Perales v. Sullivan, 948 F.2d 1348, 1353 (2d Cir. 1991); Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 329–30 (D.C. Cir. 1989); Bender v. Clark, 744 F.2d 1424, 1427–28 (10th Cir. 1984).

141. *See* N.C. Fisheries Ass'n v. Gutierrez, 550 F.3d 16, 19 (D.C. Cir. 2008) ("It is black letter law that a district court's remand order is not normally 'final' for purposes of appeal under 28 U.S.C. § 1291."); Papotto v. Hartford Life & Accident Ins., 731 F.3d 265, 270 (3d Cir. 2013) (quoting Bhd. of Maint. Way Emps. v. Consol. R.R., 864 F.2d 283, 285 (3d Cir. 1988)); Sierra Club v. U.S. Dep't of Agric., 716 F.3d 653, 656 (D.C. Cir. 2013); W. Energy All. v. Salazar, 709 F.3d 1040, 1048–49 (10th Cir. 2013); Hanauer v. Reich, 82 F.2d 1304, 1306 (4th Cir. 1996); *Perales*, 948 F.2d at 1353; Crowder v. Sullivan, 897 F.2d 252, 252 (7th Cir. 1990) (per curiam); Chugach Alaska Corp. v. Lujan, 915 F.2d 454, 457 (9th Cir. 1990); Mall Prop., Inc. v. Marsh, 841 F.2d 440, 441 (1st Cir. 1988); *Bender*, 744 F.2d at 1426–27; 15B WRIGHT ET AL., *supra* note 19, § 3914.32 ("The general rule is that a remand [to an administrative agency] is not appealable as a final decision.").

142. 709 F.3d 1040 (10th Cir. 2013).

143. *Id.* at 1042, 1051.

144. *Id.* at 1042. I have adapted the discussions of *Western Energy Alliance* and *Bender* (in the next paragraph) from Lammon, *Dizzying* Gillespie, *supra* note 2, at 390–91.

145. *W. Energy All.*, 709 F.3d at 1050–51.

administrative remands, was not final. Although proceedings in the district court had ended, there was no final decision.

But sometimes administrative remands are deemed final. Courts have occasionally held that a particular case requires an exception to this general rule, primarily when the lack of an immediate appeal from an administrative remand might leave a party (most commonly the government) without any chance for appellate review.[146] In *Bender v. Clark*, for example, the Tenth Circuit held that the U.S. Bureau of Land Management could immediately appeal a remand that ordered the Bureau to apply a preponderance-of-the-evidence standard to determine whether land contained a particular geologic structure.[147] The Bureau had rejected a lease application after the applicant had failed to prove by "clear and definite" evidence that the land in question did not contain the particular structure.[148] On appeal from the district court's decision that a different standard of proof applied, the Tenth Circuit noted that if the applicant prevailed on remand, the Bureau would have no way to seek review of the district court's decision; it could not appeal its own administrative decisions.[149] For there to be any guarantee of appellate review, the *Bender* court had to deem the remand decision a final one.

In the administrative remand context, the finality of the district court's decision depends on the consequences of the remand—whether the remand might leave one of the parties without any chance for appellate review. These decisions make some practical sense. They generally consolidate all issues in administrative reviews into a single appeal, thereby avoiding multiple, duplicative appeals. They also ensure that parties don't lose their right to have an appellate court review the district court's decision. But in all of these decisions, district court proceedings are over. Litigants often don't know whether the remand is final until the court of appeals tells them as much. The administrative remand rule thus illustrates both another meaning of the term "final decision" and the confusion that sometimes arises in determining when the end of district court proceedings is a final decision.

The true finality cases are a distinct context in which courts have used § 1291 to craft rules of appellate jurisdiction, specifically rules about

146. *See, e.g.*, *In re* Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig., 751 F.3d 629, 633–34 (D.C. Cir. 2014); Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1175–76 (9th Cir. 2011); Davies v. Johanns, 477 F.3d 968, 971 (8th Cir. 2007); Chang v. United States, 327 F.3d 911, 925 (9th Cir. 2003); Travis v. Sullivan, 985 F.2d 919, 923 (7th Cir. 1993); *Perales*, 948 F.2d at 1353; Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 329–30 (D.C. Cir. 1989); *Bender*, 744 F.2d at 1427–28.

147. *Bender*, 744 F.2d at 1425–28.

148. *Id.* at 1425–26.

149. *Id.* at 1428.

when litigants have a right—and a limited amount of time—to take their classic, end-of-proceedings appeal on the merits. As will be seen in studying the other two ways in which courts have used that term, true finality rules involve a particular point in litigation and particular considerations. Rules on true finality govern the traditional, "end-of-proceedings" appeal as of right, which comes at or near the actual end of district court proceedings. And underlying these rules is a tension between clarity and flexibility. Because the end of district court proceedings is so important, courts want to craft clear, predictable, and unchanging rules defining when that point has arrived.[150] The rules on attorneys' fees and actions consolidated under Rule 42 illustrate times when this interest has prevailed. At the same time, courts want some flexibility to reach pragmatically sound outcomes. *Baker* and the administrative-remand rule illustrate times when this interest has won out.

B. Appealability

The second and probably most common context in which courts interpret § 1291 involve what I call "appealability." Appealability rules address when litigants can appeal before the end of district court proceedings. Unlike true finality rules, appealability rules involve district court decisions that come long before the actual end of district court proceedings. And they address situations in which the normal balancing of interests that underlies appellate timing has shifted for some reason.

Delaying appeals until the end of district court proceedings has several efficiency benefits.[151] Those proceedings are free from appellate interruption or interference, allowing the district court to manage the proceedings.[152] Delaying appeals also requires appellate judges to address a case only once, avoiding multiple piecemeal appeals and requiring appellate judges to learn a case only once.[153] Litigants are saved the cost

150. This is not to say that all jurisdictional rules—or even all rules of appellate jurisdiction—should be simple and clear. *See* 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). But so long as a final decision provides an opportunity to appeal—what is often the *only* opportunity to appeal—and a jurisdictional time limit in which to begin that appeal, making that point as clear and easily identifiable as possible seems wise.

151. *See* BAKER, *supra* note 19, at 35–36; Cooper, *supra* note 13, at 157–58; Kilbert, *supra* note 15, at 270–71; Solimine, *supra* note 21, at 1168–69; Solimine & Hines, *supra* note 22, at 1547–48.

152. *See* Solimine, *supra* note 21, at 1168.

153. *See id.*

and potential harassment of multiple appeals.[154] And interlocutory appeals that might eventually become unnecessary—say, because the aggrieved party ultimately prevails at trial—are avoided.[155]

But delaying appeals also has costs. Appellate decisions can develop unclear areas of the law and correct errors. Appellate intervention can speed along trial court proceedings and cut short what would later turn out to be unnecessary litigation. And the delay between an erroneous district court decision and vindication on appeal can cause substantial, sometimes irreparable, harms.[156]

Congress has struck this balance in favor of generally delaying appeals until the end the district court proceedings. But occasionally the balance of benefits and costs shifts (or is perceived to shift), such that immediate appeals are warranted in a particular context. The statutes and rules allowing immediate appeals reflect this shifting balance.

The same goes for the judicial decisions on appealability. In these cases, the courts address whether a decision is final even though it came long before the end of district court proceedings. The courts do so by considering the benefits and costs of allowing an immediate appeal from a particular decision or a particular kind of decision. Finality, in these cases, is merely a conclusion—it encompasses all of the considerations that go into the timing of appeals.

This section discusses two examples of appealability rules—the collateral-order doctrine and pragmatic appeals. I discuss these examples only briefly, as courts' use of § 1291 to allow immediate appeals has been extensively discussed elsewhere.[157]

1. The Collateral-Order Doctrine

The collateral-order doctrine provides the best example of an appealability rule. That doctrine generally allows immediate appeals of orders that (1) conclusively decide an issue, (2) resolve an important issue that is completely separate from the merits of the action, and (3) are effectively unreviewable in an appeal after a final judgment.[158] The

154. *Id.*; Solimine & Hines, *supra* note 22, at 1548.

155. *E.g.*, Will v. Hallock, 546 U.S. 345, 350 (2006); Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987).

156. For example, parties who cannot obtain immediate review of an interlocutory district court order might feel compelled to abandon or settle a case—even if they would have won on appeal—rather than bear the costs of discovery and trial.

157. *See supra* notes 1–2, 13–15 & 62 and sources cited therein.

158. *See* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

doctrine originated in *Cohen v. Beneficial Industrial Loan Corp.*,[159] where the Supreme Court held that an order refusing to require posting of a litigation bond was a final decision.[160] In *Cohen*, a state law required a losing plaintiff to pay the defendant's costs—thereby discouraging frivolous or baseless suits—and the bond ensured that plaintiffs could do so before proceeding with their claims.[161] A corporate defendant had asked the district court to require the plaintiff in a shareholder derivative action to post a bond.[162] The district court refused, and the defendant appealed.[163]

The *Cohen* Court held that the court of appeals had jurisdiction over the bond decision, even though it did not mark the end of district court proceedings.[164] The Court reasoned that § 1291 was meant to bar appeals from tentative decisions that the district court might reexamine, as well as decisions that are steps toward—and will eventually merge into—the final judgment.[165] The bond issue in *Cohen*, according to the Court, was neither tentative nor part of the final judgment.[166] It had been definitively decided, and it was separate from the merits of the plaintiff's claim.[167] And lack of an immediate appeal would likely result in irreparable harm: the bond requirement protected the corporation from baseless suits, and a reversal after the corporation had defended the claim would do nothing to vindicate that right.[168] So if there was to be any appeal of the bond decision at all, it had to be immediate.

The *Cohen* Court reached a sensible and practical result. But it did so only by giving "final" a new meaning. Rather than simply being the end of district court proceedings, final decisions also included a "small class [of district court decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is

159. 337 U.S. 541 (1949).
160. *Id.* at 546–47.
161. *Id.* at 544–45.
162. *Id.*
163. *Id.* at 545.
164. *Id.* at 546–47.
165. *Id.* at 546.
166. *Id.*
167. *Id.*
168. *Id.*

adjudicated."[169] The Court added that it had "long given [§ 1291] this practical rather than a technical construction."[170]

The Supreme Court has since elaborated on what it means for a decision to be final in the collateral-order context, eventually settling on the three requirements mentioned above. Courts have applied the doctrine to hold that a wide variety of district court decisions are final and thus immediately appealable.[171] The doctrine allows appeals from orders denying a criminal defendant's claim that bail is excessive.[172] It allows appeals from decisions that criminal proceedings would not violate a defendant's right to be free from double jeopardy.[173] It allows appeals from an order that a pretrial detainee be involuntarily medicated.[174] And it allows appeals from orders denying a variety of defenses, including those based on absolute executive immunity, state sovereign immunity, and the speech and debate clause of the constitution.[175] All of these decisions, according to the Supreme Court, are final ones under the collateral-order doctrine.

Other decisions aren't. The Court has held, for example, that discovery orders cannot be immediately appealed under the collateral-order doctrine.[176] Nor can orders regarding the disqualification of counsel or class certification (although those can be appealed at the court of appeals' discretion under Rule 23(f)).[177] And the denial of other defenses—such as those based on forum selection clauses, improper venue, a prior settlement, or vindictive prosecution—cannot be appealed under the

169. *Id.*

170. *Id.*

171. For examples of more in-depth discussions of the collateral-order doctrine, see generally BAKER, *supra* note 19, at 42–45; Anderson, *supra* note 72; Lammon, *Rules, Standards, and Experimentation*, *supra* note 1, at 445–59; Petty, *supra* note 31, at 377–86; Steinman, *supra* note 1; Pikor, *supra* note 73.

172. *See* Stack v. Boyle, 342 U.S. 1, 7 (1951).

173. *See* Abney v. United States, 431 U.S. 651, 662 (1977).

174. *See* Sell v. United States, 539 U.S. 166, 177 (2003).

175. *See* P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) (state sovereign immunity); Nixon v. Fitzgerald, 457 U.S. 731, 743 (1982) (absolute immunity); Helstoski v. Meanor, 442 U.S. 500 (1979) (speech or debate clause immunity).

176. *See* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 109 (2009).

177. *See* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 440 (1985) (disqualification of counsel); Flanagan v. United States, 465 U.S. 259, 260 (1984) (same); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981) (same); Coopers & Lybrand v. Livesay, 437 U.S. 463, 465 (1978) (class action certification).

collateral-order doctrine.[178] These decisions, the Court has held, are not final and thus not immediately appealable.

All of these examples—those in which the decision was final and those in which it was not—involved a district court decision that came before (often long before) the end of district court proceedings and left more (often much more) to be done in the district court. Some of them were deemed final. Others were not. But most of the decisions applying the collateral-order doctrine have little or nothing to do with any intuitive understanding of what it means for a decision to be final. The doctrine instead adds a new definition to what it means for a decision to be final: decisions that meet the three collateral-order requirements are final. And those requirements reflect some of the general interests that underlie rules of appellate timing.

For example, the requirement that a decision be conclusively decided avoids unnecessary appeals. If a district court's decision is not conclusive—that is, the district court might reexamine the issue later in litigation—there is less need for immediate appellate intervention. The district court might subsequently reexamine the issue and reverse its position. If it does so, the party that would have appealed the earlier decision is no longer aggrieved, and an appeal is no longer necessary.

The requirement that a decision be separate from the merits works to minimize appellate courts' interference with ongoing district court proceedings. When litigants appeal an issue that is close to the merits, district court proceedings might need to be stayed until resolution of the appeal. This can cause substantial delays, as appeals can take years. By requiring that an order be separate from the merits to be appealed, district court proceedings can (at least in theory) continue without much concern about the appeal.

The requirement that a decision be effectively unreviewable captures the more fundamental concern that aggrieved litigants be given some opportunity for appellate review. Some issues become moot by the end of district court proceedings. *Cohen* provides one example. Recall that the purpose of the litigation bond in *Cohen* was to ensure that a plaintiff could pay the defense's expenses if the claim turned out to be meritless; if the plaintiff can't post the bond, the plaintiff cannot litigate his claim. An eventual appellate decision that the plaintiff should have posted a litigation bond cannot affect the fact that the plaintiff litigated his claim without doing so. And the protection the bond requirement meant to

178. *See, e.g.*, Dig. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 884 (1994) (prior settlement); Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 496 (1989) (forum selection clause); Van Cauwenberghe v. Biard, 486 U.S. 517, 527 (1988) (forum non conveniens); United States v. Hollywood Motor Car Co., 458 U.S. 263, 264 (1982) (per curiam) (vindictive prosecution).

provide—protecting against meritless suits—is lost once the litigation proceeds without the bond. No appellate decision can remedy that.

Finally, the requirement that an order be important reflects the belief that some issues are simply too important for an appeal to wait; the nature of a particular decision makes the benefits of an immediate appeal simply outweigh the costs.

The collateral-order doctrine requirements thus involve a balancing of the benefits and costs of allowing an immediate appeal for a particular type of order. Indeed, they're not even really requirements; courts occasionally fudge some of them when they think the benefits of an immediate appeal outweigh the costs.[179] So in the context of collateral orders, the term final decision is used as a conclusion that something is appealable. Based on its assessment of the benefits and costs of an immediate appeal, a court concludes that the decision in question should be appealable. Calling that decision final makes it appealable. So the decision is deemed final, adding a new wrinkle to the meaning of that term.

Rarely is the collateral-order doctrine mentioned without accompanying criticism.[180] Most criticisms fall into one of three groups. First, the doctrine's requirements obscure the considerations that actually go into the collateral-order analysis.[181] Second, courts' applications of the doctrine—especially the Supreme Court's—have been inconsistent and often irreconcilable; the three requirements mean different things in different cases, and the outcomes reached don't always make sense in light of previous decisions.[182] And third, this opaqueness and inconsistency has plagued courts and litigators who must deal with the doctrine's intricacies.[183]

What's important here is that the collateral-order doctrine comes from interpretations of § 1291 and its grant of jurisdiction over only final decisions. Collateral orders are final decisions. The doctrine thus requires further elaborations on the meaning of that term. And it illustrates one

---

179. *See, e.g.*, Bryan Lammon, Qualified Immunity Appeals and the *Bivens* Question (Sept. 13, 2018) (unpublished manuscript) (on file with author) (arguing that the Supreme Court's decision that denials of qualified immunity were immediately appealable collateral orders fudged the requirement that an order be completely separate from the merits).

180. Indeed, it is probably the most maligned rule of federal appellate jurisdiction. Lammon, *Rules, Standards, and Experimentation*, *supra* note 1, at 431.

181. *See* Steinman, *supra* note 1, at 1255.

182. *See* Anderson, *supra* note 72, at 540.

183. *See* Lammon, *Rules, Standards, and Experimentation*, *supra* note 1, at 431.

way in which courts have used that term to allow (or disallow) appeals before the end of district court proceedings.

2. Pragmatic Appeals

Another group of appealability cases involve the doctrine of pragmatic appeals. This doctrine goes by several names—pragmatic appeals, practical finality, the balancing approach—and it involves an explicit balancing of the costs and benefits of an immediate appeal in a particular case.[184] The doctrine originated in *Gillespie v. United States Steel Corp.*,[185] in which the Supreme Court held that a decision dismissing a plaintiff's state law claims was final, and thus immediately appealable, even though the plaintiff had other pending claims.[186] The *Gillespie* Court suggested that finality was to be determined practically, not technically.[187] And it essentially engaged in a balancing of the costs and benefits of an immediate appeal in the context of the case before it.[188] On the facts in *Gillespie*, the Court concluded that the balance weighed in favor of allowing the appeal.[189] Multiple appeals, the Court thought, were unlikely; the parties had fully briefed the merits and the question presented was "fundamental to the further conduct of the case."[190]

Nowadays, purely pragmatic appeals are rare. The Supreme Court questioned *Gillespie* in a later decision,[191] and the courts of appeals are often reluctant to apply it.[192] Despite this general reluctance, litigants still invoke the doctrine, and courts must spend time addressing (and often rejecting) their arguments.[193] But pragmatic appeals have influenced the

---

184. Lammon, *Dizzying* Gillespie, *supra* note 2, at 377. For examples of more in-depth discussions of pragmatic appeals, see generally BAKER, *supra* note 19, at 45–47; 16 WRIGHT ET AL., *supra* note 19, § 3919; Lammon, *Dizzying* Gillespie, *supra* note 2; Redish, *supra* note 75.

185. 379 U.S. 148 (1964).

186. *Id.* at 154.

187. *Id.* at 152 (noting that it was "impossible to devise a formula to resolve all marginal cases coming within what might be called the 'twilight zone' of finality," and that the Court had accordingly "held that the requirement of finality is to be given a 'practical rather than technical construction'" (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949))).

188. *Id.* at 152–53 (noting that "in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other'" (quoting Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950))).

189. *Id.* at 153.

190. *Id.* at 153–54 (quoting United States v. General Motors Corp., 323 U.S. 373, 377 (1945)).

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

192. *See generally* Lammon, *Dizzying* Gillespie, *supra* note 2, at 408–09.

193. *See generally id.* at 405–08.

resolution of several other issues in federal appellate jurisdiction.[194] Pragmatic appeals live on in those decisions.

The important point, however, is that *Gillespie*'s pragmatic approach to final decisions provides another definition of what it means to be final. Unlike the collateral-order doctrine, pragmatic appeals involve case-by-case decision-making. Collateral-order decisions, in contrast, are supposed to be decided on a categorical basis, holding that a particular type of order is (or is not) final and appealable.[195] So under the pragmatic approach, a decision is final when the benefits of an immediate appeal in a particular case outweigh the costs.

Appealability rules illustrate a second context in which the federal courts use § 1291 to craft rules on appellate jurisdiction, and that context involves a particular point in litigation and particular interests. Unlike true finality rules, appealability rules involve district court decisions that come well before the end of district court proceedings; district court proceedings are indisputably not over. There is also little pretense that the appeal is the traditional, end-of-proceedings appeal. It is instead an interlocutory appeal, after which district court proceedings very well might continue. And as both the collateral-order doctrine and pragmatic appeals illustrate, underlying appealability rules is often the balancing of costs and benefits of an immediate appeal.[196] Courts want to avoid multiple, duplicative, costly, and potentially unnecessary appeals. But they also want to avoid imposing costs—perhaps irreparable costs—on litigants by forcing them to wait until the end of district court proceedings.

C. The Scope of Interlocutory Review

A third group of rules governs the scope of review in an interlocutory appeal. In any appeal, the court must determine which issues are properly before it—that is, within its scope of review.[197] When an appeal is from a final judgment, this rarely presents any problems; most every decision that came before the final judgment merges into that judgment, so every

194. *See generally id.* at 386–405.

195. *See* Cunningham v. Hamilton Cty., 527 U.S. 198, 206 (1999); Johnson v. Jones, 515 U.S. 304, 315 (1995).

196. To be sure, true finality rules also involve striking a balance between conflicting interests. But true finality rules and appealability rules involve some different interests, and those that overlap do not carry the same importance.

197. *See* 16 WRIGHT ET AL., *supra* note 19, § 3937 ("Once a court of appeals acquires jurisdiction, it is necessary to determine the extent of its power to act on the case.").

district court decision is within the scope of review so long as subsequent events have not rendered them moot.[198]

But when dealing with appeals before the end of district court proceedings, questions sometimes arise as to which issues are within the appellate court's jurisdiction. The courts have crafted rules about what can be appealed in these situations. And, again, they've done so under the rubric of defining a final decision.

This section discusses two examples of rules on the scope of interlocutory review—qualified immunity appeals and pendent appellate jurisdiction.

1. The Assumed Facts in a Qualified Immunity Appeal

The Supreme Court has created some rather intricate rules on the scope of review in "qualified immunity appeals"—appeals from district court decisions denying a government defendant's claim of qualified immunity. Qualified immunity is a judge-made defense in civil rights actions.[199] When plaintiffs allege that government officials violated their constitutional rights, qualified immunity requires that the constitutional right at issue be "clearly established."[200] It's not enough that government officials violated the plaintiffs' constitutional rights; the contours of the violated constitutional rights must have been sufficiently clear at that time for the government officials to know that their actions violated the law.[201] If the right was not sufficiently established, the plaintiffs cannot recover any damages for the violation. The idea is to ensure that government officials have notice that their actions violated the constitution and allow for those officials to make reasonable mistakes.[202] This is done in the hope

198. *See id.* ("If appeal has been taken from a true final judgment that concludes all proceedings in the trial court, the appeal extends to all orders that have been properly preserved and that have not been mooted by subsequent events.").

199. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982). The qualified immunity literature is vast. For examples of more in-depth discussions of the defense, see generally William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL OF RIGHTS J. 913 (2015); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207 (2013); Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. 62 (2016); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

200. *See* Mullenix v. Luna, 577 U.S. __, 136 S. Ct. 305, 308 (2015).

201. *See id.*

202. *See* Ziglar v. Abbasi, 582 U.S. __, 137 S. Ct. 1843, 1866 (2017).

that government officials can then perform their official duties without constant concern about the cost and inconvenience of litigation.[203]

The Supreme Court has held that officials can immediately appeal a district court decision that denies a claim of qualified immunity.[204] This, according to the Supreme Court, is a final decision under the collateral-order doctrine.[205]

But not all aspects of that decision are always final. In *Johnson v. Jones*,[206] the Supreme Court held that the courts of appeals generally have jurisdiction over only the more purely legal issues in a qualified immunity appeal.[207] Understanding this rule requires understanding the various issues that can arise in a decision denying qualified immunity. Denying qualified immunity at the summary judgment stage often involves three steps: (1) determine the most-plaintiff-favorable version of the facts that the summary judgment record supports; (2) assuming those facts are true, determine whether they make out a constitutional violation; and (3) if they do, determine whether the law was clearly established at the time of the violation.[208]

Johnson holds that in a qualified immunity appeal the court has jurisdiction over only the second and third questions—what the Supreme Court has characterized as the more purely legal questions.[209] The appellate court generally lacks jurisdiction to review the more fact-based question of whether the record supports the district court's assumed version of the facts.[210] It must instead assume the same facts as the district court and address the other issues.[211]

This limitation makes some practical sense. Record review can be time consuming, slowing down the interlocutory appeal and thus further delaying district court proceedings.[212] And appellate courts have no comparative advantage in determining which facts a summary judgment

---

203. *See id.*

204. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

205. *See* Behrens v. Pelletier, 516 U.S. 299, 307 (1996); *Mitchell*, 472 U.S. at 530.

206. 515 U.S. 304 (1995).

207. *Id.* at 311–12.

208. *See id.* at 313; Pearson v. Callahan, 555 U.S. 223, 232 (2009); Scott v. Harris, 550 U.S. 372, 378 (2007). After determining the factual basis for deciding the issue (step 1), a court has discretion to address only one of the following steps—whether there was a constitutional violation and whether that constitutional right was clearly established—if doing so would result in the granting of qualified immunity. *See Pearson*, 555 U.S. at 236.

209. *See Johnson*, 515 U.S. at 313.

210. *See id.*

211. *See id.* at 319.

212. *See id.* at 316.

record supports. The likelihood of a reversal on that issue is low. The need for immediate appellate review is thus low, too.[213] So in qualified immunity appeals, the appellate courts must not review the district court's assumed facts.

That is, unless something in the summary judgment record blatantly contradicts the assumed version of the facts. The Supreme Court has not fully articulated this rule. But in two cases—*Scott v. Harris*[214] and *Plumhoff v. Rickard*[215]—the Court rejected the version of facts the district court had assumed because something in the record blatantly contradicted that assumption.[216] *Scott* involved an excessive force claim stemming from a high-speed car chase that ended in an officer ramming a suspect's vehicle.[217] The district court in *Scott* denied the officers' claims of qualified immunity because, the district court concluded, a jury could conclude that the officers' actions were unreasonable.[218] But when the case reached the Supreme Court, that Court rejected the district court's version of the facts.[219] Without discussing appellate jurisdiction, the Court concluded that a video of the chase blatantly contradicted the district court's assumptions.[220] So the Court assumed its own most-plaintiff-favorable version of the facts and concluded that the video left no doubt that the use of force was reasonable.[221] The officer was accordingly entitled to qualified immunity.[222] The Supreme Court—again without any real discussion of appellate jurisdiction—did the same thing a few years later in *Plumhoff v. Rickard*.[223]

These two cases gave short shrift to appellate jurisdiction; *Scott* didn't mention it, and *Plumhoff* simply said that it was following *Scott*'s lead.

---

213. *See id.*

214. 550 U.S. 372 (2007).

215. 572 U.S. 765 (2014).

216. *See id.* at 2021–22; *Scott*, 550 U.S. at 380. For in-depth discussions of this development in qualified immunity appeals, see Tobias Barrington Wolff, Scott v. Harris *and the Future of Summary Judgment*, 15 NEV. L.J. 1351, 1368–76 (2015); Mark R. Brown, *Qualified Immunity and Interlocutory Fact-Finding in the Courts of Appeals*, 114 PENN ST. L. REV. 1317 (2010); Arielle Herzberg, *"The Right of Trial by Jury Shall be Preserved": Limiting the Appealability of Summary Judgment Orders Denying Qualified Immunity*, 18 U. PA. J. CONST. L. 305 (2015).

217. *See Scott*, 550 U.S. at 375–76.

218. *See id.* at 376.

219. *See id.* at 378.

220. *See id.* at 378–80.

221. *See id.* at 381.

222. *See id.* at 386.

223. *See* Plumhoff v. Rickard, 572 U.S. 765, 775–77 (2014) (rejecting the plaintiff's version of the facts in a qualified immunity appeal because those facts were blatantly contradicted by a video recording).

The Supreme Court has thus not clearly articulated the "blatant contradiction" exception to the general rule on the scope of a qualified immunity appeal. But several courts of appeals have done so, interpreting *Scott* and *Plumhoff* to create an exception to *Johnson*'s normal bar on reviewing the assumed facts.[224]

Johnson, *Scott*, and *Plumhoff* all necessarily involved an interpretation of § 1291. That statute provides the jurisdictional basis for qualified immunity appeals. Any jurisdictional limit on the scope of those appeals (or exceptions to that limit) must come from that statute. So *Johnson*, *Scott*, and *Plumhoff* all involve new definitions of what it means for a decision to be final. And unlike cases on true finality and appealability, these cases conclude that only *parts* of a district court's decision are final. *Johnson* provides the general rule that only the more purely legal issues—whether the constitution was violated and whether that violation was clearly established—are final. A more fact-based issue of whether the record supports the assumed facts is not. But under *Scott* and *Plumhoff*, that more fact-based question becomes final if something in the summary judgment record blatantly contradicts it. In such a case, the court of appeals has jurisdiction to review that, too.

2. Pendent Appellate Jurisdiction

The other main way in which courts have used § 1291 to define the scope of an interlocutory appeal is called pendent appellate jurisdiction. Pendent appellate jurisdiction allows courts of appeals to review a decision that would not normally be final or appealable when the court has jurisdiction over another, related decision.[225] The non-appealable decision piggybacks on the appealable one, giving the court jurisdiction over issues or parties (or both) that it would not normally have.[226] The Supreme Court has placed tight restrictions on the use of pendent appellate jurisdiction. In *Swint v. Chambers County Commission*,[227] the Court suggested that pendent appellate jurisdiction exists when either a non-appealable issue is inextricably intertwined with an appealable one,

---

224. *See, e.g.*, Williams v. Brooks, 809 F.3d 936, 942 (7th Cir. 2016); Wallingford v. Olson, 592 F.3d 888, 892 (8th Cir. 2010); *see also* George v. Morris, 736 F.3d 829, 836 (9th Cir. 2013); Romo v. Largen, 723 F.3d 670, 675 (6th Cir. 2013).

225. *See generally* 16 WRIGHT ET AL., *supra* note 19, § 3937; Joan Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After* Swint, 49 HASTINGS L.J. 1337 (1998).

226. *See* 16 WRIGHT ET AL., *supra* note 19, § 3937.

227. 514 U.S. 35 (1995).

or when review of the non-appealable decisions is necessary to ensure meaningful review of the appealable one.[228]

Application in the courts of appeals, however, has not been as strict. Qualified immunity appeals again provide an example. Civil rights actions can involve claims against both individual government officials and the municipality that employed the officials.[229] Municipal defendants do not get qualified immunity.[230] They are also not liable through normal theories of respondeat superior. They are instead liable for their employees' actions only if those actions were the result of the municipality's policy or custom.[231] If the district court denies a municipality's motion to dismiss a civil rights action due to the absence of a practice or policy, that decision is not final or appealable.[232]

The courts of appeals have nevertheless occasionally reviewed issues of municipal liability in a qualified immunity appeal by the individual officers.[233] In these cases, the appellate courts conclude that the qualified immunity and municipal liability questions are intertwined, as the municipality is liable only if the government officials violated the constitution.[234] So while denials of the municipality's defense are not normally final, they can be.

These decisions are difficult to reconcile with *Swint*, which involved a municipality attempting to piggyback on a qualified immunity appeal. It's also difficult to see how municipal liability is inextricably intertwined with qualified immunity. Determining whether an officer is entitled to qualified immunity requires addressing only whether the official violated a constitutional right and whether that right was clearly established. There is no need to address whether a municipality has an unconstitutional policy or custom to decide whether one of that municipality's officials is entitled to qualified immunity. An official's entitlement to qualified immunity has nothing to do with the municipality's liability; there's no intertwinement. And an individual's entitlement to qualified immunity

228. *See id.* at 50–51.

229. *See, e.g.*, Soto v. Gaudett, 862 F.3d 148, 152 (2d Cir. 2017) (addressing excessive-force claims against individual police officers and the city that employed them).

230. *See* Owen v. City of Independence, 445 U.S. 622 (1980).

231. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

232. *See Swint*, 514 U.S. at 41–43.

233. *See, e.g.*, Novoselsky v. Brown, 822 F.3d 342, 357 (7th Cir. 2016); Pollard v. City of Columbus, 780 F.3d 395, 404 (6th Cir. 2015); Hidden Village, LLC v. City of Lakewood, 734 F.3d 519, 524 (6th Cir. 2013); Evans v. Chalmers, 703 F.3d 636, 654 n.11 (4th Cir. 2012); Cooper v. Martin, 634 F.3d 477, 481–82 (8th Cir. 2011).

234. *See, e.g.*, *Novoselsky*, 822 F.3d at 357; *Pollard*, 780 F.3d at 401; Altman v. City of High Point, 330 F.3d 194, 207 n.10 (4th Cir. 2003); Huskey v. City of San Jose, 204 F.3d 893, 904–05 (9th Cir. 2000).

can be meaningfully reviewed without addressing the municipality's liability.

Decisions on the scope of an interlocutory review are thus the third context in which the courts have interpreted § 1291 to craft rules of appellate jurisdiction. Unlike rules of true finality or appealability, rules on the scope of interlocutory review address issues that arise when a case is already in the court of appeals—there is no concern about whether a litigant can appeal at all. The concern is instead with what issues the litigant can appeal. And as the special rules for qualified immunity appeals and the rules on pendent appellate jurisdiction illustrate, the considerations that underlie these rules are different than those of true finality and appealability. The concerns are largely those of efficiency and necessity. *Johnson*'s general limitations on the scope of qualified immunity appeals makes those appeals more efficient. As the Supreme Court saw it, the legal issues were the more important ones in that context. The *Johnson* rule let the appellate court get straight to those issues without getting bogged down in possibly cumbersome record review. Pendent appellate jurisdiction, in contrast, can be explained by necessity: if the appellate court is to decide the issue over which it has jurisdiction, it must be able to address a related issue. Otherwise, the appeal would be ineffective.

III. FINAL DECISIONS AND REFORM

Courts have thus interpreted § 1291's grant of jurisdiction over final decisions in three different contexts to create three different kinds of appellate jurisdiction rules. Recognizing these three kinds of rules is important for two reasons.

First, acknowledging these distinct ways in which courts have used § 1291 could bring some clarity to the law in this area. For now, the task of crafting the rules of appellate jurisdiction will remain with the courts. When confronting issues of appellate jurisdiction, it might benefit the courts to more candidly distinguish the different contexts in which they interpret § 1291. Doing so would bring some clarity and precision to these decisions. Courts could recognize the distinct issues that a particular issue raises and directly address them. This would not only avoid confusing the issues, but it would also inject some much-needed transparency into the decisions.

Granted, asking courts to candidly discuss these issues might be a lost cause. Courts have purported to interpret the term final decision for decades and are deeply enmeshed in that practice. Courts also might be wary to so candidly acknowledge their law-making role when it comes to

appellate jurisdiction. Still, a little more candor in this context might go a long way to resolving some of the confusion in this area of the law.

The second and more important reason for recognizing the three kinds of rules concerns rulemaking. Rulemakers are a much better target audience because recognizing these distinctions is crucial to reform. As discussed in Part II, most reform efforts have focused only on issues of appealability.[235] But as this article shows, that's not the only role that interpretations of the term final decision have played. Reform focused on only appealability will not address all of the issues that plague the current system. More importantly, if interpretations of the term final decision no longer form the basis for most of appellate jurisdiction, new rules will have to fill all three roles that that the term final decision has played.

Fortunately, every task to which the term final decision has been put can be addressed through rulemaking. An amendment to the Rules Enabling Act in the early 1990s—found at 28 U.S.C. § 2072(c)—empowers the Supreme Court to promulgate rules on when a district court decision is final for purposes of § 1291.[236] This power is perfectly suited to address issues of true finality. And in using it, the Court could establish a new baseline for a final decision that is clear, easily identifiable, and unchanging. That point might be one that already occurs in the course of federal district court proceedings, such as entry of the judgment under Rule 58.[237] Or the Court could create a new point in litigation at which the district court expressly declares that it is done with the case.[238] Such a rule might obviate some of the difficulties litigants have identifying the end of district court proceedings and minimize the occasions when litigants lose their right to appeal due to a late-filed notice.

This is not to say that appeals would be allowed only at the actual end of district court proceedings. There must be other, earlier opportunities for review in certain circumstances. But those opportunities can still be created without resorting to interpreting the term final decision. Another statute, 28 U.S.C. § 1292(e), allows the Supreme Court to adopt rules

---

235. *See supra* note 76 and sources cited therein.

236. 28 U.S.C. § 2072(c) (2012). Rules prescribed by the Supreme Court "may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title." *Id.*

237. This is somewhat similar to the old Federal Rule of Civil Procedure 58, which required entry of a written judgment before the time for filing a notice of appeal began to run.

238. Arizona has something like this in Arizona Rule of Civil Procedure 54(c), which provides that "[a] judgment as to all claims and parties is not final unless the judgment recites that no further matters remain pending and that the judgment is entered under Rule 54(c)." ARIZ. R. CIV. P. 54(C). The federal rules could adopt a similar provision whereby a district court must expressly state that it has disposed of all issues and is done with the case; only at that point do litigants have a right (and a specific amount of time) in which to begin their appeal.

allowing the immediate appeal of district court orders.[239] Rules promulgated under this statute could address issues of appealability and the scope of interlocutory review. As to appealability, rules-based reform could candidly address whether to allow appeals from particular district court decisions, either through categorical rules or a general grant of discretion. In crafting these rules, rulemakers could directly address the efficiency, error-correction, and law-development interests that underlie the timing of appeals. As to the scope of interlocutory review, rules could similarly provide for any limits or expansions on that scope. And those rules can be candidly based on notions of efficiency and fairness that underlie the current doctrines. In both cases, rulemakers could address these matters without the baggage of interpreting what it means for a decision to be final.

The point for now, however, is to simply recognize that the federal courts have interpreted the term final decision in three contexts to create three kinds of appellate jurisdiction rules. This insight is crucial to both the understanding of our current system and any attempts to change it.

CONCLUSION

Jurisdiction over nearly all federal appeals comes from 28 U.S.C. § 1291's grant of jurisdiction over only "final decisions" of the district courts. But that term—final decisions—has many meanings. An immense body of law has been built atop it through judicial interpretations. The effort to build a body of law with these interpretations has failed, and a new foundation for appellate jurisdiction is necessary.

Before abandoning the term, however, it is important to recognize the work it has done. The federal courts have interpreted the term final decision in three contexts to create three kinds of rules: (1) rules about when district court proceedings have ended and parties can take the traditional, end-of-proceedings appeal on the merits; (2) rules about when litigants can appeal before the end of those proceedings; and (3) rules limiting or expanding the scope of review in those appeals. Though related, these contexts are distinct and involve unique issues and interests. The future of federal appellate jurisdiction—whether it comes from rulemaking or further judicial decisions—must reckon with these three distinct kinds of rules and the unique interests that they entail. And successful reform must fill each of the roles that interpretations of the term "final decision" have played.

---

239. 28 U.S.C. § 1292(e) (2012) ("The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).").