The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be, Part I: Justiciability and Jurisdiction (Original and Appellate)

Joan E. Steinman, Chicago-Kent College of Law
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)

Joan Steinman*

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* Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology.  A.B. 1969, University of Rochester; J.D. 1973, Harvard University.  The author thanks Stephen Newman, Gary Savine, and especially Cyndi Hackerott, current students and recent graduates of Chicago-Kent, for their research assistance. She also thanks her colleagues, Dean Richard Matasar and Professor Margaret Stewart, for their valuable comments on drafts of this Article and in discussions of its subject matter, and the Marshall Ewell Research Fund for providing financial support.
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INTRODUCTION

Due largely to caseload pressures, the federal courts are consolidating increasing numbers of cases, and many experts are advocating statutory enactments designed to facilitate the consolidation of cases by federal and state courts. For example, in 1990 the Federal Courts Study Committee recommended that Congress broaden the statute governing multidistrict litigation, 28 U.S.C. § 1407, to authorize consolidated trial as well as consolidated pretrial proceedings. It also urged Congress to enact a jurisdictional statute predicated on minimal diversity to enable co-citizen adversaries to be included in such consolidations. The Committee gave its imprimatur to the proposition that, “federal district judges should consolidate separate cases and sever common issues for combined disposition if

1. The nature of “consolidation” is a central issue in this Article. See infra notes 16–20 and accompanying text. Generally speaking, as the term has been used by the courts, to consolidate is to order separately filed cases to be litigated in joint proceedings for one, some, or all phases of the litigation. Although the Administrative Office of the United States Courts has not gathered statistics on the number of cases consolidated pursuant to FED. R. CIV. P. 42, it and the Clerk's Office of the Judicial Panel on Multidistrict Litigation (JPML) maintain statistics on multidistrict transfers for pretrial coordination or consolidation, pursuant to 28 U.S.C. § 1407 (1988). Since the Panel was created in 1968, it has transferred 57,786 civil actions for consolidated pretrial. The Panel ordered coordinated or consolidated pretrial proceedings in 39,082 of those 57,786 civil actions (approximately 68%) in the fifteen month period from July 1, 1991, through September 30, 1992. 1992 DIR. ADMIN. OFF. U.S. CTS. ANN. REP. 76–77. The multidistrict consolidation of litigation for pretrial purposes obviously has accelerated enormously.

2. “Minimal diversity” exists when any plaintiff is diverse from any defendant. The United States Supreme Court has held that Article III of the Constitution is satisfied by a jurisdictional statute that requires minimal diversity; complete diversity, each plaintiff being diverse from each defendant, is not constitutionally required. State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967).

they can do so efficiently and fairly." Recognizing that consolidation is not always desirable, however, the Committee invited the Board of Editors of the Manual for Complex Litigation, 2d, or the drafters of the Federal Rules of Civil Procedure to create guidelines prescribing the circumstances in which cases should be consolidated, so as to both encourage desirable consolidations and deter inappropriate consolidations.5

Still more recently, The American Law Institute proposed legislation to facilitate and expand the scope of case consolidations beyond that which is possible under current law. The A.L.I. first sketched several problems created by complex litigation,6 including repeated relitigation of common issues which “unduly expends the resources of attorney and client, burdens already overcrowded dockets, delays recompense for those in need, results in disparate treatment for persons harmed by essentially identical or similar conduct, and contributes to the negative image . . . of the legal system.”7 After noting these problems, the A.L.I. recommended consolidation as a primary solution. It urged both state and federal courts to develop new procedures to facilitate consolidation and, more importantly, proposed a variety of consolidation schemes for both the state and federal courts.8

4. Id. For a wide ranging discussion of the movement toward aggregate litigation and its impact on prevailing conceptions of the appropriate work of the federal judiciary, see Judith Resnik, From “Cases” to “Litigation,” 54 LAW & CONTEMP. PROBS., Summer 1991, at 5.

5. FCSC Report, supra note 3. The Committee cited as undesirable consolidations those that are not economical, and those that result in a bifurcated trial, separating liability from relief, with a consequent skewing of results. Id. The academic literature addressing the pros and cons of consolidation is voluminous. For a survey of the arguments see Edward F. Sherman, Aggregate Disposition of Related Cases: The Policy Issues, 10 REV. LITIG. 231 (1991); see also Edward Brunet, The Triumph of Efficiency and Discretion over Competing Complex Litigation Policies, 10 REV. LITIG. 273 (1991) (distinguishing systemic efficiency from individual efficiency, and arguing that what may be efficient for the court system may be inefficient for particular litigants).

6. For purposes of the A.L.I.’s recommendations and analysis, “complex litigation” is defined as multiparty, multiforum litigation characterized by related claims dispersed in several forums, often involving events that occurred over long periods of time. COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS 7 (A.L.I. 1994) [hereinafter A.L.I. Recommendations].

7. Id.

Federal legislators have proposed bills that would expand the scope of the consolidated actions that federal courts can hear, acting consistently with the recommendations of both the Federal Courts Study Committee and the A.L.I. It is likely that Congress will enact some expansion of consolidation, if not during the current Term, then in the near future.

Because of the increasing importance of case consolidation and the growing number of litigants whose cases will be consolidated with others, this is a fitting time not only to refine the circumstances under which cases should be consolidated, but also to examine the effects of consolidation on the procedural rights of litigants. For a number of reasons, it is essential for courts, lawyers, and litigants to understand the implications for litigants' procedural rights, before consolidation is ordered. When the parties understand the consequences, they may perceive them to be so prejudicial as to counsel against consolidation, and can so argue to the court. Similarly, if the parties understand the ordinary consequences of consolidation, they may ask the court to enter orders altering some of those consequences. Alternatively, parties and courts may perceive the consequences of consolidation to be desirable, and their understanding may encourage parties to seek and courts to grant consolidations. If the parties and the courts do not understand the consequences from the outset, they may discover that consequences they neither foresaw nor intended have attached, when it is too late.

The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal, 10 J.L. & COM. 1, 5–31 (1990) (arguing that the Proposal overstates the social gains from further elimination of duplicative litigation and inconsistent outcomes while it neglects or understates the losses and costs of consolidation, including the adverse incentives upon parties to bring suit). See also the ABA Commission on Mass Torts Report to the House of Delegates, Recommendations 2 and 3, at 4–7 (1989) (advocating legislation to permit federal court consolidation of tort actions arising from a single accident or from use or exposure to the same product or substance, and expanding federal subject matter jurisdiction over actions within the scope of "mass tort litigation").

9. H.R. 2450, 102d Cong., 1st Sess. (1991) became H.R. 1100, 103d Cong., 1st Sess. (1993), the Multiparty, Multiforum Jurisdiction Act of 1993. The bill would create federal jurisdiction over civil actions involving minimal diversity that arise from a single accident in which at least 25 persons incur injury and damages exceed $50,000 per person. Federal jurisdiction would be proper when defendants reside in different states, substantial parts of the accident occurred in different states, or defendant's residence and a substantial part of the accident were in different states. The bill would provide for liberal intervention of injured parties and would be accompanied by facilitative amendments to the venue statute, the removal statutes, and to the statute governing multidistrict litigation, 28 U.S.C. § 1407 (1988). In particular, the bill would allow a transferee court hearing cases brought pursuant to this statute to retain the actions for determinations of liability and punitive damages and even of compensatory damages if that served convenience and the interests of justice. The bill also would free district courts from the choice of law rules of any state and would allow the courts to apply the law of a single jurisdiction to all the actions arising from the same accident. Finally, the bill would give the courts nationwide service of process for these cases.

10. This task I leave, for the most part, to those whom the FCSC invited to undertake it.
late to alter them. This Article begins the examination of the consequences that the law has attached to case consolidation, in the context of the federal court system.\textsuperscript{11} It evaluates these consequences individually and in the aggregate. In addition, it offers a perspective on what effects consolidation ought to have on the procedural rights of litigants.

Part I of the Article looks, first, at whether consolidation affects, or should affect, compliance with Article III’s requirements for a justiciable case or controversy (standing, mootness, and ripeness). Part I then examines whether consolidation alters, or should alter, the application of the requirements for subject matter jurisdiction (including the claims that may be heard and their procedural posture), personal jurisdiction, and venue. Third, Part I asks whether consolidation changes, or should change, the analysis as to whether plaintiffs have failed to join an indispensable party. Finally, it considers the various respects in which consolidation may alter the timing, scope, location, and parties to an appeal.

Part II\textsuperscript{12} will proceed more or less chronologically through a lawsuit. It will explore the implications of a consolidated complaint for the parties’ procedural rights not discussed in Part I, and will consider the effects of consolidation on (1) the posture and framing of claims, (2) the availability of particular discovery devices and other aspects of discovery, (3) the right to voluntarily dismiss a suit, (4) choice of law, (5) the scope of a jury demand, and the range of issues on which courts will, in their discretion, allow determination by a jury, (6) the circumstances under which judges should recuse themselves, (7) the number of peremptory challenges to which litigants are entitled, (8) “law of the case” and preclusion doctrines, and (9) the award of costs and attorneys’ fees.

Consolidation may affect other procedural matters that I have neither envisioned nor found in the reported cases. My hope is that this two part Article will provoke other lawyers, judges, and law reformers to ponder what the procedural implications of consolidation are, and should be, in the many contexts in which the issue can arise.

A number of issues are beyond the scope of this Article. The Article does not address procedural matters (such as transfer of litigation) that are

\textsuperscript{11} Even persons who are well educated in the law and have years of experience are largely oblivious to the effects of consolidation upon the procedural rights of litigants. The general belief seems to be that consolidation does not affect litigants’ procedural rights. Invariably, when I told friends—law professors, practitioners, magistrate judges—what I was writing about, their response was, “Can you give me an example?”

affected by the mere possibility of the consolidation of one lawsuit with others.\textsuperscript{13} Nor does it address generally the circumstances in which consolidation ought or ought not to be ordered. Parties often argue against the consolidation of their case with others because they fear that the consolidation would prejudice their interests. Typically, their arguments rest on the burdens in time, money, and effort that consolidation will entail, or on concerns that go to basic fairness or due process in the proceeding. Parties are concerned that the trier of fact will be confused by the welter of facts and legal theories, or will fail to separate the facts pertinent to their case from those pertinent to the cases of other plaintiffs or defendants.\textsuperscript{14} While these fears, and the circumstances in which consolidation ought or ought not to be ordered, are matters of great importance, they fall outside the purview of this Article. They are outside the ambit of specific Constitutional, common law, statutory and rule based rights altered by consolidation. Finally, the Article does not delve in depth into matters that tend to be, but are not necessarily, concomitants of consolidation that are in some degree attributable to consolidation. These matters include the appointment of lead and liaison counsel, the bifurcation of issues for trial, and the complexity that endangers the ability of a jury to understand a litigation and render a rational verdict. All of these are phenomena that occur outside the context of consolidated cases, as well as within the universe of consolidated cases.


\textsuperscript{14} See, e.g., Malcolm v. National Gypsum Co., 995 F.2d 346, 352 (2d Cir. 1993) (Defendant in asbestos litigation was prejudiced by consolidation of 48 cases for trial where jury's ability to distinguish between direct and bystander exposure may have been compromised.); Werner v. Satterlee, Stephens, Burke & Burke, 797 F. Supp. 1196, 1210-12 (S.D.N.Y. 1992) (rejecting defendant's arguments that it would be prejudiced by consolidation because the cases were at different stages, its narrow role would be grouped with the wider fraud alleged against other defendants, and it would be forced to participate in extensive discovery); see generally 5 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 42.02[3], at 42-22 to 42-23 (2d ed. 1994); 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2383, at 439-33 (2d ed. 1995). In state law cases, it may even be difficult to determine whether common questions of law are presented by the various bodies of state law that must be applied.
I. PRELIMINARIES

A. The Broad Questions

In the early 1930s, the Supreme Court declared that, "consolidation . . . does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another."\textsuperscript{15} This pronouncement has influenced court decisions ever since, although it has not always controlled them. As this Article will reveal, this view of consolidation has some virtues. One might count among them its clear constitutionality, its apparent clarity, and the degree of autonomy that it affords to litigants to determine the contours of their lawsuit. But this conception of consolidation also has some drawbacks and imposes some limitations on the courts. It may lessen courts' ability to modify litigants' decisions defining the boundaries of lawsuits, to create the most efficient litigation units, and to manage litigation most productively and fairly.

This Article considers whether the Constitution and the statutes and rules that govern federal court procedure permit the opposite view, a concept of consolidation that \textit{would} merge suits into a single cause, make those who are parties in one suit parties in a larger whole, and change the rights of the parties accordingly. Having concluded that such a concept of consolidation is permissible, the Article examines the circumstances and the contexts in which such a conception of consolidation would make a difference and what differences it would make. Legal professionals then can judge whether either the model implied by taking the Supreme Court's words to their logical extreme, or the model recommended by this Article, is workable. We also can judge which view creates the preferable procedural landscape. A third possibility is that the procedural effects of consolidation should be decided case by case, issue by issue. This last alternative is facially least desirable because it creates enormous uncertainty for litigants and requires repeated analysis by courts as to what they really intended in consolidating a set of cases.

\textsuperscript{15} Johnson v. Manhattan Ry., 289 U.S. 479, 496–97 (1933).
B. The Concept of Consolidation

The “consolidation” of which Rule 42 of the Federal Rules of Civil Procedure\(^6\) speaks is a very malleable concept. Courts may limit consolidation to particular issues, may order actions consolidated for limited purposes such as pre-trial only or trial only, or may order consolidation for “all” purposes.\(^7\) Unless otherwise indicated, when this Article says “consolidation” it refers to consolidation for all purposes, or for purposes that include trial.

Treatise writers have offered alternative constructs of the term. One of the definitional sets that courts often cite is the following:

(1) Where all except one of several actions are stayed until one is tried, in which case the judgment in the one trial is conclusive as to the others. This is not actually a consolidation [because the separately filed cases are not being litigated in joint proceedings. Only one of the cases is being litigated, and the judgment in which it results is conclusive as to the other actions through res judicata.]

\(^{16}\) Fed. R. Civ. P. 42(a) provides that “When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

\(^{17}\) The consolidation that is authorized by the statute governing multidistrict litigation is less malleable because that statute authorizes only consolidated pretrial proceedings. See 28 U.S.C. § 1407 (1988). That may change. Congress has before it proposals to permit multidistrict transfer and consolidation for trial, as well. See A.L.I. Recommendations, supra note 6, Appendix A, at 437–44; supra note 9.

It is hard to understand why courts would consolidate cases for trial only, and not also for pretrial, if they planned a consolidated trial. The difference in case filing times and belated consolidation, after pretrial preparation has been largely completed in some cases, sometimes furnishes explanations. It is easier to understand consolidation for pretrial only. Courts may consolidate for pretrial purposes to avoid duplicative discovery and motions, but be convinced that a consolidated trial would overwhelm or confuse the trier, or otherwise prejudice some litigants. Rather than consolidate for all purposes and then bifurcate the trial along issue lines, courts may prefer simply to consolidate for pretrial and keep the case trials whole but separate. A number of commentators have observed that bifurcation of issues affects the outcome of cases. See, e.g., Richard L. Marcus & Edward F. Sherman, Complex Litigation: Cases and Materials on Advanced Civil Procedure 881 (2d ed. 1992) (“It may be that the principal impact of bifurcation is its effect on the outcome of the case. In routine personal injury cases it has long been reported that the defense wins almost twice as frequently when the liability issues are tried separately.”).
(2) Where several actions are combined into one, lose their separate identity, and become a single action in which a single judgment is rendered. An illustration of this is the situation in which several actions are pending between the same parties stating claims that might have been originally set out as separate counts in one complaint.

(3) Where several actions are ordered to be tried together but each retains its separate character and requires the entry of a separate judgment. This type of consolidation does not merge the suits into a single action or cause the parties to one action to be parties to another.\(^{18}\)

This Article will never use the term “consolidation” to refer to the notion described in (1), above; nor do the courts typically do so. As the Article will reflect, courts do use “consolidation” to refer to both the second and the third conceptions set forth above.\(^{19}\) This ambiguity has not stymied analysis, but it has complicated it by requiring courts to take into account the precise nature of the combination ordered in determining the effects of a consolidation on the procedural rights of litigants. For reasons elaborated below,\(^{20}\) I urge that we reserve use of the term “consolidation” for situations in which courts combine separately filed actions for all purposes or for trial, and that we use such terms as unified multi-case pleadings, joint (or multi-case) hearings, and multi-case discovery or pretrial to refer to limited purpose conglomerations.

C. A Typology of Cases

It also is worth noting that one can classify consolidated cases into a very few categories. Some cases that courts consolidate with others constitute “repetitive” suits; they represent “multiple suits on the same claim by the same plaintiff against the same defendant.”\(^{21}\) Others are “reactive” suits, where “a separate suit [has been] filed by a defendant to the first action, seeking a declaratory judgment that he is not liable under the conditions of the first action or asserting an affirmative claim that arises out of

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18. 9 WRIGHT & MILLER, supra note 14, § 2382, at 254.
19. Although Wright & Miller write that “the cases read the rule as providing only for the third of these procedures,” id. at 255 (accord Frazier v. Garrison I.S.D., 980 F.2d 1514, 1532 (5th Cir. 1993) (Although the language of Rule 42 suggests combination into a single action, case law has shown a preference for limiting consolidation to the third situation.)), that is no longer true, as this Article will demonstrate.
21. MARCUS & SHERMAN, supra note 17, at 147 (citing Allan D. Vestal, Repetitive Litigation, 45 IOWA L. REV. 525 (1960)).
the same transaction or occurrence as the subject matter of the first action.\textsuperscript{22} In both instances, at least some of the parties and issues are so closely related that the judgment in one suit will have preclusive effects on the other.\textsuperscript{23} Finally, some or all of the cases that a court consolidates may be merely "related." Separate suits by various plaintiffs against the same or overlapping defendants and arising out of the same transaction or series of occurrences, and separate suits by different parties litigating claims to the same rights, property, or res are examples of related cases.\textsuperscript{24} The courts have seldom made use of these lines of distinction, but they may prove to be analytically useful. Whether consolidated cases are repetitive, reactive, or merely related does influence whether courts treat the consolidation as a single civil action, with attendant consequences.

II. JUSTICIABILITY

At first blush, one would not expect consolidation of cases to alter whether an Article III Case or Controversy exists, that is, whether a justiciable dispute is present that is ripe, that the plaintiffs have standing to assert, that has not become moot, and that does not pose a political question that is inappropriate for judicial resolution. The jurisdiction of the federal courts is limited by Article III, which permits Congress to confer on federal district and appellate courts (inferior to the Supreme Court) jurisdiction over enumerated Cases and Controversies.\textsuperscript{25} These concepts—"case" and "controversy"—have been construed to embrace the elements of

\begin{itemize}
  \item \textsuperscript{22} Id. (citing Allan D. Vestal, \textit{Reactive Litigation}, 47 \textit{Iowa L. Rev.} 11 (1961)).
  \item \textsuperscript{23} Id. (citing Michael M. Wilson, Note, \textit{Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings}, 44 \textit{U. Chi. L. Rev.} 641 (1977)).
  \item \textsuperscript{24} Id. at 148.
  \item \textsuperscript{25} Article III of the Constitution provides in part:
    \begin{itemize}
      \item Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
      \item Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Law of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
    \end{itemize}
\end{itemize}
justiciability noted above.\textsuperscript{26} Rule 82 of the Federal Rules of Civil Procedure provides in pertinent part, "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."\textsuperscript{27} Consequently, case consolidation, a creature of the Rules, seemingly ought to have no effect on matters of justiciability.

Relatively few cases have even considered the possibility that consolidation might alter justiciability analysis. The first question addressed here is whether those courts that have considered justiciability in the context of consolidated cases have taken an approach consistent with the traditional expectation, expressed above, that consolidation of cases will not alter whether an Article III Case or Controversy exists.

The answer turns out to be, "only sometimes yes." Invoking the shibboleth that, "consolidation . . . does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another,"\textsuperscript{28} a number of trial courts have held that the proper approach is "to make separate standing determinations with respect to the plaintiffs in each case under consideration."\textsuperscript{29} In so holding, those courts assured that consolidation did not alter the justiciability of the matters at bar. The courts made the same inquiries and reached the same

\textsuperscript{26} See generally, Erwin Chemerinsky, Federal Jurisdiction 37–145 (1989). In a recent article, Professor Robert J. Pushaw, Jr. notes that the Supreme Court has collapsed the words "Cases" and "Controversies" into a single requirement of justiciability. He argues that this is a mistake and that, while justiciability doctrines should continue to inhere in the notion of a "controversy," those doctrines should be "radically reoriented" in the contexts of a "case" because the federal courts' main function in hearing the "cases" enumerated in Article III is to declare the law; to resolve disputes between particular litigants is secondary. Robert J. Pushaw, Jr., Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts, 69 Notre Dame L. Rev. 447, 450 & n.14, 482, 519 (where the "radically reoriented" language is found), 524–25 (1994). For purposes of this Article, I follow the Court in treating justiciability, as traditionally defined, as a requirement for both cases and controversies.

\textsuperscript{27} Fed. R. Civ. P. 82.

\textsuperscript{28} Johnson v. Manhattan Ry., 289 U.S. 479, 496–97 (1933).

\textsuperscript{29} Synar v. United States, 626 F. Supp. 1374, 1379 (D.D.C. 1986), aff'd on other grounds sub nom., Bowsher v. Synar, 478 U.S. 714 (1986); accord American Motorcyclist Ass'n v. Watt, 534 F. Supp. 923, 930–33 (C.D. Cal. 1981) (examining separately the standing of each of the three plaintiffs), aff'd, 714 F.2d 962 (9th Cir. 1983) (affirming refusal to issue injunction even assuming that plaintiffs had standing to assert some claims that district court had found they did not have standing to assert); Blue Cross Ass'n v. Califano, 473 F. Supp. 1047, 1060–65 (W.D. Mo. 1979), rev'd on other grounds, 622 F.2d 972 (8th Cir. 1980) (investigating separately the standing of plaintiffs in each of two consolidated actions, in part because plaintiffs in one had asserted some claims not asserted by plaintiffs in the other); Cornelius v. City of Parma, 374 F. Supp. 730 (N.D. Ohio 1974), vacated without op., 506 F.2d 1400 (6th Cir. 1974), vacated 422 U.S. 1052 (1975) (vacated for further consideration in light of Warth v. Selden, 422 U.S. 490 (1975), a standing case not involving consolidation), remanded without op., 521 F.2d 1401 (6th Cir. 1975), cert. denied, 424 U.S. 955 (1976).
conclusions on justiciability that they would have made and reached absent consolidation.

Often, however, courts have adopted an approach that, at least arguably, is inconsistent with the reasoning outlined above. Appellate courts generally have held it unnecessary to consider each plaintiff's standing so long as a justiciable controversy was presented by virtue of some plaintiff's standing. They have taken this position both in single cases brought by multiple plaintiffs and in consolidated cases in one or more of which the standing of a solo plaintiff was questioned, apparently without recognizing that the two situations may not be fungible. District courts sometimes have adopted this stance as well. Superficially, this tack treats all

30. See, e.g., Director, Office of Workers' Compensation Programs v. Perini N. River Assoc., 459 U.S. 297, 303-05 (1983) (Because injured worker, who had been a party in the lower court proceedings and was a respondent under the Court's rules, had standing to urge consideration of the decision below—concerning whether he was covered by an Act of Congress—the standing of the Director, who had participated as a respondent below, did not have to be considered.); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264 & n.9 (1977) (Because a plaintiff who sought and qualified for proposed housing had standing, Court did not need to address the standing of the Metropolitan Housing Development Corporation to assert the rights of potential inhabitants of the proposed housing.); Jackson v. Okaloosa County, 21 F.3d 1531, 1536-37, 1539-40 & n.14 (11th Cir. 1994) (Court should allow case to go forward on all claims where one plaintiff had standing to assert all claims but it was not clear whether the other plaintiff had standing as to some claims; it was not necessary to determine the latter plaintiff's standing, at least at this point in the litigation. Because one plaintiff had standing, the court had jurisdiction to consider the claims.); Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366, 1369 (9th Cir. 1992) (Because plaintiff health care providers had standing to challenge an anti-abortion statute, it was not necessary to determine the standing of other plaintiffs.), cert. denied, 113 S. Ct. 633 (1992).

31. They also have taken this position when faced with consolidated cases in one or more of which the standing of all plaintiffs was questioned. See, e.g., Bowsher v. Synar, 478 U.S. 714, 721 (1986) (Where union members clearly had standing, the Court did not need to consider whether the union itself or Members of Congress, additional plaintiffs, also had standing. Only Members of Congress were plaintiffs in one of the consolidated cases.); Secretary of Interior v. California, 464 U.S. 312, 319 n.3 (1984) (Where California clearly had standing, Court need not address the standing of the other plaintiffs: environmental groups and local governmental agencies. The environmental groups had sued separately; the local governments had intervened in the case commenced by the state.); Director, Office of Workers' Compensation Programs v. Rasmussen, 440 U.S. 29 (1979) (It was unnecessary for Court to consider the standing of the Director because a justiciable controversy was before the Court by virtue of petitions for certiorari by an employer and insurer with standing. The Director had been the sole defendant in one of the consolidated actions.); Board of Natural Resources v. Brown, 992 F.2d 937, 942 (9th Cir. 1993) (Since state boards, one of the three categories of plaintiffs in the consolidated cases, had standing, the court could reach the merits without considering the standing of the other two categories of plaintiffs. The latter two groups had sued together, but not as co-plaintiffs with any of the state boards.).

32. See, e.g., New York City Employees' Retirement Sys. v. SEC, 843 F. Supp. 858, 872 n.20 (S.D.N.Y. 1994) (a multiple plaintiff case); John Nuveen & Co. v. New York City Hous. Dev. Corp., slip op., Nos. 86C 2583, 86C 2817 (N.D. Ill. May 7, 1986) (Since cases were consolidated for all purposes and Nuveen's standing was unchallenged, the court did not need to reach
litigation alike, whether it is comprised of one civil action or several consolidated civil actions. In asking the same question—that is, does some plaintiff have standing?—in both contexts, the courts seem not to be permitting a consolidation to alter the justiciability of the matters at bar. Actually, in so operating, the courts have permitted consolidation to alter whether particular plaintiffs were permitted to act as and be bound as parties to litigation. Presumably, some plaintiffs who would have been dismissed for lack of standing, had their suit been the only one, have been permitted to proceed as an incident of the consolidation.

This approach (let us call it the "look only for one good plaintiff" approach) makes sense from a number of viewpoints. It serves judicial economy by allowing courts to avoid deciding potentially difficult issues of standing. More fundamentally, it comports with a number of the basic values that are served by standing doctrine.33 That is, so long as some plaintiff has standing, the courts can be assured that, by hearing the case, they are fulfilling the role of the federal judiciary in our governmental system, but not exceeding their proper sphere as a matter of separation of powers. Similarly, so long as some plaintiff has standing, the courts are conforming to the policy to prevent lawsuits by persons who have only an ideological stake in the outcome. So long as some plaintiff has standing, a specific controversy is being presented to the court by an advocate with "sufficient personal concern to effectively litigate the matter."34

Moreover, the failure to exclude improper plaintiffs who raise issues identical to those raised by proper plaintiffs35 will not impose on defend-

33. See generally, CHEMERINSKY, supra note 26, at 48–52.
34. Id. at 50.
35. A court can properly decline to address whether a plaintiff has standing and whether his claim is ripe and not moot, only if all the issues that the plaintiff raises also are raised by another plaintiff whose standing, and the ripeness and "liveness" of whose claims, are either conceded or have been recognized by the court. See, e.g., Secretary of Interior v. California, 464 U.S. 312, 319 n.3 (1984) (noting that the Court did not need to address the standing of respondents "whose
ants any greater burden of defense than the proper plaintiffs alone could impose. Similarly, the failure to exclude such plaintiffs is not unfair to them. An improper plaintiff has voluntarily undertaken the burden of litigation and can lay down that burden by voluntarily dismissing the action. However, the lawsuits in these standing cases typically have been such that the plaintiffs who on examination would be found to lack a justiciable case would, as a practical matter, benefit from success by the proper plaintiffs and suffer from their defeat, whether or not the improper plaintiffs were formal parties to the litigation. Because of their felt interest, such plaintiffs are unlikely to voluntarily dismiss. It is true that, as formal parties, these improper plaintiffs will be legally bound by a judgment under res judicata and collateral estoppel, while they would not be legally bound if they had been dismissed. As formal parties, they also will have standing to enforce a favorable judgment. The importance of even those consequences wanes, however, in view of the presence of at least one proper plaintiff, with standing to enforce a favorable judgment, and the ability of

position here is identical to the State’s”); Blue Cross Ass’n v. Califano, 473 F. Supp. 1047, 1060-65 (W.D. Mo. 1979), rev’d on other grounds, 622 F.2d 972 (8th Cir. 1980) (investigating separately the standing of plaintiffs in each of two consolidated actions, in part because plaintiffs in one had asserted some claims not asserted by plaintiffs in the other). However, the interests of the “ignored” plaintiffs frequently are quite different from the interests of the plaintiffs whose standing is recognized. See, e.g., Bowsher v. Synar, 478 U.S. 714 (1986) (Certain injuries to Congressmen who challenged Gramm-Rudman-Hollings Act, such as interference with their duties to enact federal spending legislation, differed from injury to union of federal employees: automatic reductions had suspended their cost-of-living adjustments.); Thorsted v. Greigore, 841 F. Supp. 1068 (W.D. Wash. 1994) (Injuries to officials barred from re-election by legislation imposing term limits differed from injury to registered voters’ right to vote.). The courts are not concerned that the interests of some plaintiffs differ from the interests of the plaintiffs whose standing is recognized.

36. See Fed. R. Civ. P. 41(a). A plaintiff may need the permission of the court and may be permitted to dismiss only upon conditions laid down by the court, however.

37. For example, when the constitutionality of an Act of Congress is questioned, all who would be affected by the Act will be affected by the decision. See, e.g., Bowsher v. Synar, 478 U.S. 714 (1986); Board of Natural Resources v. Brown, 992 F.2d 937 (9th Cir. 1993); Thorsted v. Greigore, 841 F. Supp. 1068 (W.D. Wash. 1994). When governmental action is challenged as in violation of the law, all who would be affected by the governmental action will be affected by the decision. See, e.g., Secretary of the Interior v. California, 464 U.S. 312 (1984) (claim that federal sale of oil and gas leases to land on outer continental shelf of California violated federal law.); John Nuveen & Co. v. New York City Hous. Dev. Corp., slip op., Nos. 86 C 2583, 86 C 2817 (N.D. Ill. May 7, 1986) (challenging a proposed redemption of municipal bonds, vacated in part on other grounds sub nom. New York City Hous. Dev. Corp. v. Hart, 796 F.2d 976 (7th Cir. 1986). An exception to the generalization in the text, and a different justification, may apply when the person whose standing is not examined is a public official responsible for the administration and enforcement of the Act that a private person has been found to have standing to enforce. See, e.g., Director, Office of Workers’ Compensation Programs v. Rasmussen, 449 U.S. 29 (1979).

38. This statement assumes that the dismissed plaintiffs would not be in privity with the remaining plaintiffs for res judicata/collateral estoppel purposes.
both sides to appeal or collaterally to attack any judgment against them on the ground of lack of justiciability or subject matter jurisdiction.\textsuperscript{39} In sum, courts' unwillingness to inquire into plaintiffs' standing, once the courts have identified one good plaintiff, seems to have no untoward consequences for the parties.

While the approach of requiring only one plaintiff to have standing makes sense as a matter of policy, it treats consolidated cases as a single civil action, even arguably as a single case or controversy, in the Article III sense.\textsuperscript{40} A key question is whether that is problematic.

A. May Consolidated Cases Be Treated as a Single Civil Action Consistently with the Rules, as Interpreted, and with Congressional Intent?

The Supreme Court has the last word on the scope of an Article III case or controversy and also on the proper construction of congressional legislation and Federal Rules governing procedure in the federal courts.\textsuperscript{41}

\textsuperscript{39} Although theoretically available, such collateral attacks would be likely to fail. See Restatement (Second) of Judgments §§ 11, 12, 69 (1980). Section 11 states that, "A judgment may properly be rendered against a party only if the court has authority to adjudicate the type of controversy involved in the action." Section 12 sets out the circumstances under which a judgment precludes the parties from litigating the question of the rendering court's subject matter jurisdiction in subsequent litigation. Section 69 recites that, "A judgment rendered in a contested action may be avoided in the circumstances stated in § 12, except when relief should be denied in order to protect a justifiable interest of reliance on the judgment." See generally, 13A Wright et al., Federal Practice and Procedure § 3531.15, at 106 (2d ed. 1984)("[i]t is possible that a final judgment might be subject to . . . collateral attack for want of standing. Ordinarily such attacks should be rejected, even if the Article III requirements of standing were not met.") (footnote omitted); Daniel O. Bernstine, A "Standing" Amendment to the Federal Rules of Civil Procedure, 1979 Wash. U. L.Q. 501, 520 (advocating amendment of the rules to prohibit collateral attacks for lack of standing). Ordinarily, res judicata and collateral estoppel principles will defeat a post-judgment challenge to plaintiffs' standing. See Cutler v. Hayes, 818 F.2d 879, 887-89 (D.C. Cir. 1987).

\textsuperscript{40} Accord Sandwiches, Inc. v. Wendy's Int'l, Inc., 822 F.2d 707, 710 (7th Cir. 1987) (concluding, on the basis of standing cases that treat consolidation as eliminating the need for an independent Article III case or controversy in each suit, that district court consolidations merge cases for at least some jurisdictional purposes).

Nonetheless, Congress has considerable influence over the scope of the matters that federal courts may hear. Congress is empowered to confer on the federal courts authority to hear all of the categories of cases and controversies enumerated in Article III or a lesser included set of cases and controversies.\textsuperscript{42} Similarly, Congress is empowered to confer on the federal courts authority to hear cases and controversies to the full extent permitted by Article III or a lesser authority. Thus, responding to restrictive judicial interpretation of certain jurisdictional statutes,\textsuperscript{43} Congress, in the supplemental jurisdiction statute, 28 U.S.C. § 1367,\textsuperscript{44} conferred on the district courts supplemental jurisdiction over all claims so related to the claims in an action within original jurisdiction that they form part of the same case or controversy under Article III, subject to exceptions that Congress wrote into the statute. By the same token, if Congress (itself, or through those to whom it has delegated the authority to promulgate the Federal Rules of Civil Procedure) made clear its choice not to authorize case consolidation that would merge lawsuits into a single civil action for purposes of jurisdiction granting statutes or of the Federal Rules of Civil Procedure, or into a single Article III case or controversy, then the Court could not properly disregard Congress’ decision. The Court could not properly regard the product of such a consolidation to constitute a single civil action or a single Article III case or controversy. This would be true even if Congress constitutionally could have made a different choice.

One important question is whether Congress has made the restrictive choice described above. Assuming that nothing in Article III precludes consolidations of lawsuits from creating or constituting a single civil action or constitutional case or controversy, does anything in the Federal Rules of Civil Procedure or federal statutes preclude that result? In particular, could

\textsuperscript{42} As Professor McLaughlin put it, “Article III, Section 2 sets the outer limits of potential judicial power for the federal courts, but such power ‘lies dormant’ unless authorized by a jurisdictional statute enacted by Congress.” Denis F. McLaughlin, The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis, 24 ARIZ. ST. L.J. 849, 862 (1992) (citation omitted); see, e.g., Finley v. United States, 490 U.S. 545 (1989) (distinguishing between the jurisdiction that Congress may confer and the lesser jurisdiction that it has conferred under various statutory schemes). Compare 28 U.S.C. § 1332 (1988) (the direct predecessor of which was held, in Strawbridge v. Curtis, 7 U.S. (3 Cranch) 267 (1806), to require each plaintiff to be diverse from each defendant) with the Court’s interpretation of Article III to permit jurisdiction over litigation in which any plaintiff is diverse from any defendant (State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967)). Statutory amount in controversy requirements also limit federal jurisdiction to a smaller universe of cases than Article III would permit.


Case Consolidation and Procedural Rights

a group of consolidated civil actions constitute a single civil action or Article III case or controversy without violating Rules 42 and 82 of the Federal Rules of Civil Procedure, or the Rules Enabling Act?\textsuperscript{45}

Rule 42(a) merely provides,

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

On its face, Rule 42 does not seem to speak to the combinations of claims or parties that can be litigated within the confines of a single "civil action" or constitutional "case or controversy." However, the Supreme Court in Johnson v. Manhattan Railway\textsuperscript{46} arguably construed the predecessor of Rule 42 not to permit the product of a consolidation to constitute a single civil action. It was there that the Court pronounced that, "consolidation . . . does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another."\textsuperscript{47} The pertinent question addressed by the Court was whether an attack on the appointment of receivers of railroad property was a collateral or a direct attack when made in a suit that initially was separate from the action in which the receivers were appointed but sought the appointment of receivers of the same property, was brought in the court that had appointed the receivers, and had been consolidated with the earlier action. The district court had thought that consolidation of the two suits would resolve any doubt and would render the attack direct. The Court held to the contrary, that the consolidation did not alter the collateral nature of the attack, using the oft cited language quoted above.\textsuperscript{48} If Johnson is read as proposed above—that is, not to permit the product of a consolidation to constitute a single civil action—the approach taken by those federal courts that "look only for one good plaintiff" would be impermissible insofar as it treats the consolidation as if it were a single civil action.\textsuperscript{49}

However, it can be argued that Johnson should not be read so broadly. First, Johnson predates the Federal Rules; it is not an interpretation of Rule

\textsuperscript{46} 289 U.S. 479 (1933).
\textsuperscript{47} Id. at 496–97.
\textsuperscript{48} Id. at 494–97.
\textsuperscript{49} It should also be noted that if Johnson is read as proposed above, one never reaches the question whether a Rule providing for consolidation creating a single civil action would be valid under the Rules Enabling Act or the Constitution.
42 or of the current Rules generally. The consolidation ordered in Johnson was pursuant to then existing 28 U.S.C. § 734, which provided as follows:

§ 734. Orders to save costs; consolidation of causes of like nature.

When causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so. 50

One commentator, Gaylord Virden, who investigated the amendment process leading from § 734 to the current Rule 42, concluded that the intent of the Advisory Committee on the Rules was to preserve Johnson. 51 Although the first Preliminary Draft of Proposed Rules, published in 1936, explicitly authorized actions involving a common question of law or fact to be "consolidated in a single action, if they might originally have been joined in a single action" under the rules, 52 the language of consolidation "in a single action" was dropped from later drafts. 53 While the deletion might be explained as grounded in the drafters' belief that the language was superfluous, Mr. Virden argued that it is more consistent with principles of statutory construction to interpret the deletion as reflecting an abandonment of the intention to override Johnson. He argued similarly that if the Advisory

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52. RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA 87–88 (Preliminary Draft, Advisory Committee on Rules for Civil Procedure 1936) [hereinafter Preliminary Draft of 1936]. Preliminary Draft, Rule 49. Consolidation and Severance. When actions of a like nature or involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in such actions; it may order all such actions consolidated in a single action, if they might originally have been joined in a single action under these rules; and it may make such orders and rules concerning proceedings therein as may tend to avoid unnecessary costs or delay in the administration of justice.

Id. (emphasis added).

53. The next proposal simply said that the court might consolidate actions of a like nature or involving common questions of law or fact pending before it. Proposed Rule 43. The version of Rule 42 in the Advisory Committee's Final Report was to like effect. See Virden, supra note 51, at 177-78.
Committee drafters intended to override Johnson, they would have felt obligated to express that intent clearly.\(^4\) On the other hand, a note by the Advisory Committee, which remains to this day, states that Rule 42(a) "is based on U.S.C., Title 28, § 734 . . . but in so far as the section differs from this rule, it is modified."\(^5\) One might infer that Rule 42(a) does modify its predecessor § 734, even in respects that cast doubt upon the vitality or breadth of interpretation appropriate to Johnson. However, even if Virden's reading of the history is correct and even if that legislative history is important to proper interpretation of Rule 42, the question remains what exactly the preservation of Johnson entails.

Because Johnson dealt with the distinction between direct and collateral attacks, it is distinguishable from the matter currently under scrutiny here: the effect of consolidation on the conception or scope of a civil action for purposes of determining whose standing should be examined and what litigation should be permitted to go forward. Thus, nothing in the cases on justiciability is inconsistent with the Supreme Court's holding in Johnson. As discussed earlier in connection with justiciability, the Supreme Court itself has declined to implement the broad language of Johnson.\(^6\)

\(^4\) See Virden, supra note 51, at 177–78.

\(^5\) Preliminary Draft of 1936, supra note 52, at 88. Thus, the Note originated with the first Preliminary Draft, which contained the later deleted language noted earlier in the text. The Advisory Committee Note to Rule 49 of the Preliminary Draft issued in 1936 read, "This Rule continues the substance of U.S.C., Title 28, § 734 . . . but in so far as the section differs from this rule, it is modified." Preliminary Draft of 1936, supra note 52, at 88.

\(^6\) Since the adoption of the Federal Rules, there have been only two occasions on which members of the Court have discussed whether consolidation had particular implications. In Butler v. Dexter, 425 U.S. 262, 267 n.12 (1976), the Court held that consolidation with cases for which a three-judge court had been proper under 28 U.S.C. § 2281 (because those cases questioned the constitutionality of a state statute) did not make such handling proper for the case at bar, so as to permit appeal to the Supreme Court without review by an intermediate appellate court. Each case before the Court had to be considered separately to determine whether the Court had jurisdiction to consider its merits. The Court did not cite Johnson. It should be noted, however, that even in the context of single civil actions, the Court would not assert jurisdiction over non-three judge claims that were beyond the supplemental jurisdiction of the three-judge court. See, e.g., Lawrence gebhardt, Pendent Claims in Three Judge Court Litigation, 30 Wash. & Lee L. Rev. 487, 489 (1973). Nothing in Butler indicated the nature of the commonality that had been the basis of the consolidation. The district court's opinion reveals that a district judge had consolidated many very different cases in each of which defendants sought to have their obscenity prosecutions enjoined. See Universal Amusement Co. v. Vance, 404 F. Supp. 33, 36–37 (S.D. Tex. 1975) aff'd in part, rev'd in part, 559 P.2d 1286 (1977), aff'd, 445 U.S. 308 (1980). When an allegedly supplemental claim that a statute had been unconstitutionally applied was joined to a claim that the same statute was unconstitutional, the three-judge court had jurisdiction over both. Gebhardt, supra, at 490. However, the statutes whose constitutionality was questioned were not the same as the statute whose application was challenged in Butler. Universal Amusement, 404 F. Supp. at 38, 47, 51. The Butler case was not tied to the cases that challenged the constitutionality of state statutes by either a common question of law or a com-
While it would be desirable for there to be a single, uniform answer to whether consolidation merges suits into a single cause, makes parties in one antecedent suit parties to others, and changes the rights of the parties, the Johnson Court could not have envisioned all the present-day implications of its decision and of its broad language. Particularly in view of the changed litigation landscape and changes in the statutes and rules that govern federal court procedure, courts today should hesitate to accept Johnson as the last word on issues it did not directly address. If Johnson does not foreclose the issue, the question recurs whether the courts should interpret the Rules to permit consolidation to alter the boundaries of a civil action or "case" for purposes of deciding who must have standing.

mon nucleus of operative fact. In those circumstances, the Court would not have asserted jurisdiction over Butler even if the claims asserted there had been brought as part of the same action as the three-judge court claims.

Shortly thereafter, the Court decided Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976), on the basis of the "act of state" doctrine. The dissenters discussed the contention of Dunhill, an importer, that it could assert a counterclaim for the full amount it claimed to be owed where the counterclaim exceeded Cuba's claim against it but was less than the amount Cuba had been held to owe the group of importers whose separate and distinct claims had been consolidated for trial. Citing Johnson, the dissenters opined that such a rule would be capricious. Id. at 734–35 & n.22.

In cases decided under a predecessor of Rule 42, the Court had dismissed three cases, consolidated for trial only, for lack of the requisite amount in controversy, where plaintiffs sought $2500 in each of the three cases. Hanover Fire Ins. Co. v. Kinneard, 129 U.S. 176 (1889). A dozen years later, the Court aggregated the amounts in controversy in eleven consolidated actions. Baltimore & Ohio Southwestern R.R. v. United States, 220 U.S. 94, 106 (1911). Responding to a contention that the Court had no jurisdiction because of the amount involved, the Court said, "as consolidated, the amount of the possible penalties sued for in the eleven actions was fifty-five hundred dollars." Id. That was enough for jurisdiction. The Court also approved treatment of consolidated cases as one in Gila Reservoir Co. v. Gila Water Co., 202 U.S. 270 (1906). There, the appellant objected that a suit, No. 1995, was a proceeding in rem; that the lower court did not acquire jurisdiction over the subject property because it was in the custody of the court in a different suit; and that the court in the latter suit had no power to order the sale of the property by the receiver appointed in the latter suit. The Court rejected the objections, finding it clear that the district court considered No. 1996 as the complement of the other suit, regarded the causes as in fact consolidated, and empowered the receiver appointed in the other suit to sell the property and distribute the proceeds as directed by the decree in No. 1996. The Court found nothing objectionable in these behaviors.

57. It also should be noted that the precise nature of the consolidation ordered in Johnson is unclear. The district judge had consolidated the two cases because he had some doubt of the propriety and efficacy of an order he entered only in Johnson's suit. That order vacated orders by which a Senior Judge had assigned himself to hear all matters in American Brake Shoe's suit and which the Senior Judge had then entered in that suit. Johnson v. Manhattan Ry., 289 U.S. 479, 493–94 (1933). Thus, the consolidation was not motivated by the usual considerations and may have been for limited purposes. The basis for, or the limited nature of, the consolidation may make Johnson distinguishable from contemporary cases and may make the language for which it is cited inapplicable to those cases.
Since no clear answer appears in Rule 42 itself, one should consider other components of the system of rules. It might be argued that to regard consolidated cases as merged into one civil action for this purpose would be inconsistent with the Federal Rules governing joinder of parties and claims.\textsuperscript{58} A less extreme view would be that to so regard consolidated cases would be inconsistent with the Federal Rules governing joinder of parties and claims when, but only when, the consolidated actions could not have been brought as a single civil action. Thus, there would be no problem viewing consolidated actions as one when a single suit of precisely the same scope could have been brought. That approach has some appeal. It avoids circumvention of the limitations on joinder of claims and parties, while avoiding total inflexibility. Yet, even that approach may be unduly restrictive.

There seems to be no reason why a consolidation \emph{could not} create a single, expanded “civil action,” and there may be persuasive reasons why it should do so. A consolidation never can be effected by the unilateral activity of litigants. It comes into existence only when a court determines that, by virtue of common questions of law or fact, actions pending before the court should be consolidated. Ordinarily, the decision is predicated on findings that consolidation will serve systemic and perhaps the parties’ interests in economy and efficiency by conserving judicial resources and providing expeditious resolution of the disputes, thereby saving time, labor, and money, and in some instances lessening the risk of inconsistent results. Through consolidation, the courts seek to attain all of these benefits without unduly inconveniencing the parties or prejudicing their ability to get a just resolution.\textsuperscript{59} Thus, Rule 42 provides protections against undue expansion of the scope of litigation that substitute for the protections built into

\textsuperscript{58} While consolidation is available so long as “actions involving a common question of law or fact are pending before the court,” \textit{Fed. R. Civ. P. 42}, plaintiffs may join in one action only if they assert a right to relief “in respect of or arising out of the same transaction, occurrence, or series” thereof and if a “question of law or fact common to all these persons will arise in the action.” \textit{Fed. R. Civ. P. 20}. Similarly, plaintiffs may join defendants in one action only if plaintiffs assert against defendants a “right to relief in respect of or arising out of the same transaction, occurrence, or series . . . [thereof] and if any question of law or fact common to all defendants will arise in the action.” \textit{Fed. R. Civ. P. 20}. Despite the greater liberality of Rule 42, it is my impression that most cases that courts consolidate do indeed relate to a single transaction, occurrence, or series of transactions or occurrences. See \textit{5 Moore et al., supra} note 14, \textsuperscript{¶} 42.02[3], at 42–16 to 42–20. When such a transactional link is missing, use of procedural devices short of consolidation but available to the courts under Rule 42 and otherwise, might well be preferable. See infra text accompanying note 211.

\textsuperscript{59} See generally \textit{5 Moore et al., supra} note 14, \textsuperscript{¶} 42.02[3], at 42–15, 42–22 to 42–26; \textit{9 Wright & Miller, supra} note 14, § 2383.
Rule 20, governing permissive joinder of parties. Moreover, given the policy arguments that support the approach to standing that this Article has illuminated, to view consolidations as creating a single, expanded "civil action" for standing purposes would be consistent with the mandate in Rule 1 that the Rules "be construed and administered to secure the just, speedy, and inexpensive determination of every action." As previously discussed, ceasing analysis after identifying "one good plaintiff" saves the courts and parties time and energy. To so view consolidations also may conform to Rule 2's dictate that, "There shall be one form of action to be known as 'civil action.'" Finally, it is noteworthy that a civil action remains a single civil action upon the entry of permissive intervenors, although no greater commonality may exist between their claims and defenses and the "main action" than exists when lawsuits are consolidated. Similarly, a class action, a single civil action, is authorized when "there are questions of law or fact common to the class" and other requirements of Rule 23 (which need not entail any greater bond among the class members) are met. In each instance, all that the Rules require is one or more questions of law or fact in common.

60. One could similarly say that Rule 42 provides protections against undue expansion of the scope of litigation, which substitute for the protections built into Rule 13 on cross-claims (which limits cross-claims to claims arising out of the transaction or occurrence that is the subject of the original action or a counterclaim, or relates to property that is the subject of the original action), Rule 14 on third party practice (which allows a third party defendant to be brought into an action only when that person is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff), Rules 19 and 22 (which limit the parties whom the court may order to be joined as necessary for just adjudication or when interpleader is appropriate), and Rule 24 (which limits the right to intervene along some of the same parameters used in Rule 19, and gives the court discretion to permit intervention "when an applicant's claim or defense and the main action have a question of law or fact in common").

61. See supra text accompanying notes 33–39.


63. Fed. R. Civ. P. 2. Rule 2 was primarily intended to reflect the abolition of forms of action with their attendant procedural distinctions, and the merger of law and equity. See Fed. R. Civ. P. 2 Advisory Committee's note (1937). Nonetheless, regarding the product of a consolidation as a civil action seems consistent with the spirit of the Rules' recognition of only one form of action. However, regarding a consolidation as a single civil action is in some tension with Fed. R. Civ. P. 3, which states that, "A civil action is commenced by filing a complaint with the court." The "greater" civil action would be created by consolidation.

64. Fed. R. Civ. P. 23(a)(2). A class action may be maintained if the requirements of Rule 23(a) are satisfied and, inter alia, "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

65. See Fed. R. Civ. P. 42 (at text following note 45).
The question remains to be addressed whether Rule 82 of the Federal Rules of Civil Procedure would prohibit such an interpretation of the Rules, and of Rule 42 in particular. As previously noted, Rule 82 provides, in pertinent part, "Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." 66

In considering whether a group of consolidated lawsuits could constitute a single civil action or Article III case, one must probe the meaning and scope of Rule 82's prohibition. The most significant effort to explore Rule 82 was done by Professor Carole E. Goldberg in her article, "The Influence of Procedural Rules on Federal Jurisdiction." 67 Professor Goldberg argued that procedural rules properly may influence the interpretation of constitutional limitations on federal jurisdiction, because both "the history and [the structure of article III suggest that the concept of a case should expand along with ideas about optimal procedures." 68 Moreover, the criteria which distinguish constitutional provisions that represent timeless decisions from those that favor ongoing accommodations 69 do not clearly indicate that "case" is among the immutable or less changeable provisions. 70 Professor Goldberg advocated "deference to contemporary perceptions of trial economy and convenience in determining the contours of a constitutional 'case,'" 71 so long as a procedure is otherwise proper.

Based on the parameters of propriety proposed by Professor Goldberg, consolidation of cases is an otherwise proper procedural mechanism. The possibility of consolidation with suits that raise common questions of law or fact may encourage litigants whose claims are within federal jurisdiction to file in federal, rather than state, court because of the potential savings and the potential increase in resources and leverage that may come of combining forces with others who share a common interest. Provisions for consolidation thus may be a means of facilitating the vindication of substantive federal rights and of the state-created rights of those individuals, diverse from their adversaries, to whom Congress believes federal courts should be available. At the same time, provisions for consolidation argu-

66. FED. R. CIV. P. 82.
68. Id. at 448-49.
69. Professor Goldberg identifies those criteria as whether provisions "set political boundaries rather than protect individuals' rights and [whether] their language is specific rather than general and open-ended." Id. at 449.
70. Id.
71. Id. at 450.
ably do not undermine interests in gatekeeping because they need not open the federal courts' doors to any actions not otherwise eligible for federal adjudication. In addition, to the extent the consolidation rules express a federal preference for combined litigation, based on a policy to promote judicial economy, they are worthy of serious consideration in determining what is a constitutional "case." Thus, it appears that Rule 82 would not prohibit an interpretation of the Rules, including Rule 42, to authorize creation of a single expanded civil action, or even an interpretation that influenced the definition of an Article III case.

Would an interpretation of Rule 82 to permit case consolidation to influence the scope of an Article III case violate the Rules Enabling Act? Professor Goldberg persuasively argued that, under the prevailing approaches to distinguishing "substantive" from "procedural" rights, subject matter jurisdiction should be considered procedural. If so, Rule 82's prohibition on extension or limitation of federal jurisdiction by the Federal Rules would not be mandated by the Enabling Act, nor would such an interpretation of Rule 82 run afoul of the Enabling Act's demand that the Rules "not abridge, enlarge or modify any substantive right." Construing the Federal Rules of Civil Procedure, including Rule 42, to affect matters of justiciability should be considered to affect procedural, and not substantive, rights, since matters of justiciability are among the requirements for subject matter jurisdiction. Hence such interpretations should be permissible under the Enabling Act.

72. See infra text at notes 149-160. Federal courts could be made accessible to litigants, or available to hear claims, that otherwise would not be eligible for federal adjudication only through congressional amendment of jurisdictional statutes or through judicial interpretation of those statutes. Presumably, any such interpretation would be done with an appreciation of the gatekeeping function of those statutes.

73. I am borrowing here from Professor Goldberg, who wrote, "To the extent the joinder rules express federal preference for complex litigation in order to promote economy of a suit, they are worthy of serious consideration in determining what is a constitutional 'case.'" Goldberg, supra note 67, at 471.

74. Nothing in the Supreme Court cases decided since Professor Goldberg wrote in 1976 weakens the conclusion that subject matter jurisdiction is procedural. The policies that inform the contours of statutory subject matter jurisdiction, such as concerns for accuracy, uniformity, and a hospitable forum for the decision of federal rights; concern for an impartial forum for out of state litigants; and docket-control concerns, are clearly procedural, "designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes," and not in derogation of "substantive" rights. See John Hart Ely, The Irrepressible Myth of Erie, 87 HARV. L. REV. 693, 724 (1974).

75. Goldberg, supra note 67, at 433-37.

B. May Consolidated Cases Be Treated as a Single Civil Action Consistently with the Constitution?

An interpretation of the Rules to permit case consolidation to influence the scope of an Article III case also would be constitutional. "Rule 82 is not compelled by any constitutional limits on Congress' power to delegate its control over federal subject matter jurisdiction to the Supreme Court,"77 and "the limits of article III judicial power do not preclude rule-making that affects subject matter jurisdiction."78 Thus, there is no reason why the Court may not exercise the delegated rulemaking power to make rules that may be interpreted to affect subject matter jurisdiction. Rather, Rule 82 "is a self-imposed rule of judicial restraint,"79 which should be read in conjunction with Rule 1.80 The consequence, in Professor Goldberg's view, is that Rule 82 would proscribe only those Federal Rules that serve no procedural purposes apart from altering jurisdictional tests. Rule 42 clearly would not be such a rule, since it serves procedural purposes of enhancing efficiency, conserving judicial resources, expediting resolution, and lessening the risk of inconsistent outcomes, whether or not it has jurisdiction-altering consequences as applied to particular actions.

Professor Goldberg's view that, "Analogizing to Hanna [v. Plumer]81, the Court might properly establish a presumption that the jurisdictional boundaries suggested by procedural rules are the correct boundaries for purposes of defining the limits of article III judicial power," is quite similar to views expressed more recently by other scholars who have explored the scope of a constitutional case or controversy. Thus, Professor (now Dean) Richard Matasar elaborated the argument that, "matters would be within one 'case' or 'controversy' as long as lawfully adopted procedural rules permitted them to be brought together;"82 "case' or 'controversy' as used

77. Goldberg, supra note 67, at 438.
78. Id. at 441.
79. Id. at 442.
80. "These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.
81. 380 U.S. 460 (1965). In Hanna, the Court held that promulgation of a rule by the Supreme Court constituted prima facie evidence that the rule transgressed neither the Rules Enabling Act, 28 U.S.C. § 2072 (1988), nor constitutional restrictions on the power of the federal government to govern a matter.
82. Richard A. Matasar, Rediscovering "One Constitutional Case:" Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction, 71 CAL. L. REV. 1401, 1410 (1983) (citations omitted). But see McLaughlin, supra note 42, at 910. The Court should "hold that a constitutional 'case or controversy' under Article III consists of all claims that bear some 'logical
in article III refers to the limits of joinder of claims and parties set by the
system of rules lawfully adopted to govern procedure in the federal
courts."\textsuperscript{83} Although Matasar's formulation might be improved upon,\textsuperscript{84} it
and similar formulations support the view that case consolidation could
create an entity that falls within the concepts of a constitutional case or
controversy. A case or controversy whose bounds were set pursuant to Rule
42 would be predicated on lawfully adopted procedural rules permitting the
constituent actions to be litigated together. To read Article III broadly and
flexibly also is consistent with the Court's traditional approach, as reflected
in cases such as Osborn v. Bank of the United States,\textsuperscript{85} State Farm Fire &
Casualty Co. v. Tashire,\textsuperscript{86} and United Mine Workers v. Gibbs.\textsuperscript{87}

It also should be noted that because Johnson was addressing the effect
of consolidation on civil actions—no Article III questions were at issue—it
does not address the effect of consolidation on the scope of Article III
cases. That is, Johnson does not address whether consolidated cases, while
remaining separate civil actions under the Rules, may constitute one consti-
tutional case or controversy. The Court has made clear that the phrase
"civil action," as used in the Rules and jurisdictional statutes, often is not
synonymous or congruent with "case" within the meaning of Article III.
The Court long ago so held in its interpretation of the general federal
question jurisdictional statute, 28 U.S.C. § 1331,\textsuperscript{88} and it affirmed that

\textsuperscript{83} Matasar, supra note 82, at 1478–79; see also id. at 1479–90.
\textsuperscript{84} See, e.g., supra note 82 and infra text at note 100.
\textsuperscript{85} 22 U.S. (9 Wheat.) 738 (1824).
\textsuperscript{86} 386 U.S. 523, 530–31 (1967).
\textsuperscript{87} 383 U.S. 715 (1966).
\textsuperscript{88} 28 U.S.C. § 1331 (1988). See, e.g., Franchise Tax Bd. v. Construction Laborers Vac-
ation Trust, 463 U.S. 1, 8–9 n.8 (1983) (Article III "arising under" jurisdiction "has long been
recognized . . . to be broader than . . . jurisdiction under [28 U.S.C.] § 1331."); Verlinden B.V.
Tashire, 386 U.S. 523, 530–31 (1967) ( contrasting Article III's requirement of minimal diversity
with the complete diversity requirement of 28 U.S.C. § 1332). A number of commentators have
conclusion recently in Finley v. United States.\textsuperscript{89} The Court there invoked a number of precedents in support of the proposition that, "with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly."\textsuperscript{90} In Finley itself, the Court refused to construe the Federal Tort Claims Act's\textsuperscript{91} grant of exclusive federal jurisdiction over civil actions on certain claims against the United States to permit the exercise of pendent party jurisdiction over a state law claim asserted by a plaintiff against a nondiverse defendant whom plaintiff sought to sue along with the Federal Aviation Authority. The Court assumed without deciding that it would be constitutional for the federal court to hear the state law claim.\textsuperscript{92}

Since an Article III "case or controversy" can include but also be more encompassing than a statutory "civil action," a group of consolidated civil actions could constitute a single Article III case without violating Johnson. But could such a group constitute a single Article III case without violating the doctrines laid down by the Court in cases that do address the scope of Article III? In other words, could a case or controversy be composed of consolidated claims by multiple plaintiffs, or against multiple defendants, where the only commonality among the claims is in one or more questions of law or one or more questions of fact, not necessarily amounting to a "common nucleus of operative fact"?

\textsuperscript{89} HeinOnline -- 42 UCLA L. Rev. 743 1994-1995


\textsuperscript{90} 490 U.S. 545 (1989).

\textsuperscript{91} Id. at 549. The cases cited by the Court in support of this proposition include Owen Equip. & Erection Co. v. Kroger, 437 U.S. 266 (1978); Aldinger v. Howard, 427 U.S. 1 (1976); and Zahn v. International Paper Co., 414 U.S. 291 (1973).

\textsuperscript{92} Finley, 490 U.S. at 549; see id. at 560 & n.7 (Stevens, J., dissenting) ("Federal jurisdiction is supported not only by the fact that the case is one arising under a law of the United States, but also that it is a controversy to which the United States is a party."). Similarly, in the removal context, the Court has recognized the removability under 28 U.S.C. § 1441(a) of claims within the federal courts' supplemental jurisdiction, where § 1441(a) states in pertinent part, "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court . . ." (emphasis added). See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988). Defendants cannot, however, remove combinations of federal and state claims under §§ 1441(a),(b) that are beyond the district courts' original jurisdiction. See generally Joan Steinman, \textit{Removal, Remand, and Review in Pendent Claim and Pendent Party Cases}, 41 Vand. L. Rev. 923, 944-45 (1988).
Let us consider first the concept of a "case" that has emerged from the Court's exploration of the scope of federal question jurisdiction; in particular, what is encompassed by the phrase "Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority." Consolidated cases only sometimes would fall within the definition of a "case" announced by the Supreme Court in United Mine Workers v. Gibbs and subsequently assumed arguendo by the Court in actions raising federal claims accompanied by state law claims presented in different postures, such as pendent party claims. Because all that is necessary for cases to be consolidated is that they involve a common question of law or fact and are pending in the same court, only sometimes would consolidated cases derive from a common nucleus of operative fact. Moreover, a second prong of the Gibbs test looks to whether, "considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding." This second prong, which may or may not have an independent function, arguably is not satisfied in the context of consolidation since the plaintiff or plaintiffs will not have brought the actions together.

However, the foregoing analysis is misguided. The Gibbs test really has never been intended to describe the outer limits of an Article III case. A "common nucleus of operative fact" (and any other operative aspect of Gibbs) has merely been held essential to the courts' exercise of subject matter jurisdiction over claims that otherwise would be beyond that jurisdiction. When factually and legally independent claims have been pre-
sent to a federal court within the confines of a single action and each has been supported by an independent basis of subject matter jurisdiction, the Court never has indicated that the bounds of a constitutional case were exceeded. Thus, the courts have long adjudicated permissive counterclaims and the claims of permissive intervenors, with no argument being made that such adjudication exceeded the courts' authority. In view of this history, so long as a federal court has jurisdiction to hear claims in and of themselves, those claims may be constituents of a single "case" notwithstanding the absence of a common nucleus of operative fact among them. The absence of such a nucleus among consolidated claims therefore would not seem to disqualify them from constituting a single constitutional "case."

I propose that a constitutional "case" includes (1) all claims that are jurisdictionally self-supporting, which the Rules now allow the parties to assert together or which the Rules reasonably might allow the parties to assert together, consistently with federal jurisdictional policies, plus (2) all claims within the courts' supplemental jurisdiction, as defined by the cases concerning pendent, ancillary, and pendent party jurisdiction and by any future cases further refining the requirements. Guided by the requirements for supplemental jurisdiction, the drafters of the Rules and, in the face of their silence, the courts, making procedural common law, can determine whether claims are such that one would ordinarily expect to try them all in one judicial proceeding, so that it is reasonable to allow the owners of those claims to assert them within the confines of a particular "case."

On this view, one could forcefully argue that consolidated actions can constitutionally be deemed a single constitutional "case." All the claims are either jurisdictionally self-supporting or within the supplemental juris-

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100. For articles that trace the evolution of pendent, ancillary, or pendent party jurisdiction, see Susan Bandes, The Idea of a Case, 42 STAN. L. REV. 227, 228 nn.10 & 12, 236-45, 270-75, 304-08 (1990); Matasar, supra note 82, at 1401-17; Richard A. Matasar, A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction, 17 U.C. DAVIS L. REV. 103 (1983); McLaughlin, supra note 42, at 868-90; Mary B. McManamon, Dispelling the Myths of Pendent and Ancillary Jurisdiction: The Ramifications of a Revised History, 46 WASH. &LEE L. REV. 863 (1989).
diction of the federal courts.\textsuperscript{101} Since, by virtue of Rule 42, the actions necessarily share at least one common question of law or fact, the Rules might reasonably allow the plaintiffs to assert their claims together, consistently with federal jurisdictional policies, including efficiency concerns.

Viewing consolidated actions as a single constitutional case would allow federal courts to hear additional claims, within their supplemental jurisdiction. Thus, for example, if A sued C on a federal question claim, and that suit were consolidated with a suit by B against C, based on diversity, it would be constitutional for the court to hear a state law claim by B against A, arising out of the same transaction, occurrence, or series, as A’s claim against C. Under a liberalized view of Article III, it would suffice that B’s claim against A share a question of law or fact with A’s claim against C.\textsuperscript{102}

The definition or bounds of an Article III “controversy” has received less attention from the Court and commentators. Scholars generally have believed that Article III does not distinguish between a case and a controversy for purposes of the justiciability doctrines\textsuperscript{103} or supplemental jurisdiction.\textsuperscript{104} Article III authorizes Congress to confer jurisdiction over controversies between citizens of different states, and between other specified litigants.\textsuperscript{105} So long as the requisite diversity (or, more generally, the

\textsuperscript{101} The court should dismiss any claim that is neither jurisdictionally self-supporting nor within the supplemental jurisdiction of the federal courts, if the action of which it is part was commenced in federal court. If such a claim was removed to federal court along with claims over which federal jurisdiction does exist, it may be appropriate for the court to dismiss or remand the offending claim only or to remand the entire action. See 28 U.S.C. § 1441 (1988 & Supp. IV 1992); see generally Steinman, supra note 92, at 979–84. Compare Frances J. v. Wright, 19 F.3d 337 (7th Cir. 1994) (An action that contains claims barred by sovereign immunity cannot, in whole or in part, be removed as an action within the district court’s original jurisdiction, and if removed, must be remanded in its entirety.) with Henry v. Metropolitan Sewer Dist., 922 F.2d 332 (6th Cir. 1990) (The district court should remand claims that the Eleventh Amendment precludes the federal court from hearing but should adjudicate other claims that arise under federal law.).

\textsuperscript{102} See Pushaw, supra note 26, at 448, 457. Pushaw points out that some scholars recently have suggested two possible distinctions between “Cases” and “Controversies.” One group of scholars contends that the former concept encompasses both civil and criminal actions while the latter term includes only civil suits, a view that Pushaw finds flawed. In addition, Akhil Amar views the two concepts as representing two tiers of jurisdiction, but primarily because the word “all” modifies only “Cases” in Article III. Id. at 460–65. Pushaw elaborates on the historical meaning of each of the terms and emphasizes the different emphasis in the judicial function in the two categories. See supra note 26.

\textsuperscript{103} See McLaughlin, supra note 42, at 905.

\textsuperscript{104} Specifically, Article III extends the judicial power, inter alia, “to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different
requisite alignment of parties) is present, a federal court can hear the controversy, if authorized by Congress. 106 Nothing in Article III, the primary implementing statute, 28 U.S.C. § 1332, 107 or the Federal Rules, requires the claims asserted among the parties to share any factual kinship, subject to the following caveat: When parties have sought to have the court exercise supplemental jurisdiction, it has become an issue whether a common nucleus of operative fact linked the jurisdictional “anchor” claims with claims that the court otherwise could not properly hear. 108 In the class action context, not even that has been required, as courts assert jurisdiction over the claims of nondiverse class members—if their non-joint claims independently satisfy the amount in controversy requirements 109—so long as their claims share common questions of fact or law with the claims of the class representatives. 110 Thus, no limiting principle is to be found in the Court’s decisions or in its discussions of the concept of an Article III con-

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106. As previously noted, supra note 2, Article III and some jurisdictional statutes, such as 28 U.S.C. § 1335 (1988), require only minimal diversity between citizens of different states, whereas the general diversity statute, 28 U.S.C. § 1332 (1988), requires “complete” diversity. In addition, each claim, or collectively the claims that may be aggregated, must place in controversy any minimum amount set by Congress.


108. E.g., Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978). Owen was a diversity case in which supplemental jurisdiction over a plaintiff’s claim against a third-party defendant was at issue. The Court stated that Gibbs delineated the constitutional limits of federal judicial power, id. at 371, and assumed without deciding that the common nucleus test determines the outer boundaries of constitutional federal jurisdiction in diversity cases. Id. at 371 n.10.

109. Zahn v. International Paper Co., 414 U.S. 291 (1974) (Each plaintiff class member must have a claim that independently meets the jurisdictional amount requirement, unless plaintiffs are asserting a common undivided interest.). It is, of course, necessary that the named parties (the class representatives and the opposing parties) be completely diverse and that the claims of the named plaintiffs satisfy any applicable amount in controversy requirements. Snyder v. Harris, 394 U.S. 332 (1969); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

110. See supra note 64. Similarly, “In statutory interpleader cases [under 28 U.S.C. § 1335(b) (1988)], supplemental jurisdiction extends to all claims, ‘although the titles or claims of the conflicting claimants do not have a common origin.’” McLaughlin, supra note 42, at 902–03. Professor McLaughlin continues, “[w]hile minimal diversity may permit the exercise of subject matter jurisdiction over claims involving non-diverse parties, these claims must, nevertheless, form part of the same constitutional ‘case’ as the claim that establishes minimal diversity.” Id. at 903 n.309. But cf. Teledyne, Inc. v. Kone Corp., 892 F.2d 1404, 1408 (9th Cir. 1989) (questioning whether the “common nucleus of operative fact” test applies to the constitutional authority to adjudicate “controversies” where minimal diversity was all that was required, and was present). However, Professor McLaughlin proposes a reformulation of the test for supplemental jurisdiction pursuant to which a constitutional case or controversy would consist of “all claims that bear some ‘logical relationship’ to the original jurisdiction claim sufficient to justify joinder of the claims in a single action.” McLaughlin, supra note 42, at 910. He would find that a common question of law can satisfy the logical relationship test. Id. at 919.
trovery that suggests that multiple, jurisdictionally sufficient, diversity civil actions could not constitute a single Article III case and controversy, when properly consolidated.

By the same token, if jurisdictionally sufficient diversity civil actions are properly consolidated with jurisdictionally sufficient federal question cases, the product always can be a single Article III controversy or case, if "case" is defined broadly enough to include claims that are related by a common question of law or fact.\footnote{See supra text accompanying notes 99–110.}

C. Implications

The first implication of the foregoing discussion is that there is no constitutional impediment to the courts' ceasing their exploration of standing, upon discovery of a lone "good" plaintiff among the plaintiffs to consolidated cases. This Article already concluded that the Rules and jurisdictional statutes may fairly be interpreted to authorize the creation of a single civil action through Rule 42 consolidation. Thus, the courts that cease their exploration of standing upon discovery of a lone "good" plaintiff among the plaintiffs to consolidated cases (and that includes the U.S. Supreme Court) appear to be acting permissibly, unless one reads Johnson to preclude their approach. If Johnson does preclude that approach, the Supreme Court should either overrule Johnson or insist that a plaintiff with standing be identified from among the plaintiffs in each civil action that has been consolidated with others and disavow its past decisions to the contrary. For reasons elaborated earlier, however, I believe that Johnson can be distinguished.

In light of many courts' adoption of the "look only for one good plaintiff" approach to standing, I looked for a similar blurring of the boundaries between once independent but now consolidated cases in the context of other facets of justiciability. I looked in vain, however, for any cases holding that consolidation with other litigation allowed a case to proceed which otherwise would have had to be dismissed as not ripe for decision, or holding that consolidation with other litigation required a case to be dismissed for lack of ripeness which otherwise would have continued.\footnote{Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580–81 (1985) (The ripeness doctrine requires federal courts to refrain from deciding abstract disagreements that might never become real disputes); Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S. 99 (1977) ("[B]oth the fitness of the issues [and the record] for judicial decision and the hardship to the parties of withholding court consideration" must be considered.); Thorsted v. Gregoire, 841 F. Supp. 1068 (W.D. Wash. 1994) (same); see
cases even raising the issue.\textsuperscript{113} The absence (or rarity) of such cases could be seen as evidence that the parties accept, and the courts implement, the notion that cases retain their separate character after consolidation for this Article III purpose. However, since each claim in a single multi-claim suit is individually examined for ripeness and disposed of accordingly, the fact that courts approach claims within a consolidated action in the same way is equally consistent with the proposition that parties and courts treat a consolidation as a single civil action for purposes of making ripeness determinations.

I similarly looked to see whether any cases held that consolidation with other litigation allowed a case to proceed which otherwise would have had to be dismissed as moot, or held that consolidation with other litigation required a case to be dismissed as moot which otherwise would have continued.\textsuperscript{114} I thought I might find cases of the former type, but I failed to locate any case of either variety. Again, the absence (or rarity) of such cases could be seen as evidence that the parties accept, and the courts implement, the notion that cases retain their separate character after consolidation for this Article III purpose. However, again, since each claim in a single multi-claim suit is individually examined for mootness and disposed of accordingly, the fact that courts approach claims within a consolidated action in the same way is equally consistent with the proposition that parties and courts treat a consolidation as a single civil action for purposes of making mootness determinations.\textsuperscript{115}

\textsuperscript{113} Generally Chemerinsky, supra note 26, \S\ 2.4.

\textsuperscript{114} United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)," quoting Henry P. Monaghan, \textit{Constitutional Adjudication: The Who and When}, 82 \textit{Yale L.J.} 1363, 1384 (1973)); Roe v. Wade, 410 U.S. 113, 125 (1973) ("The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated.").

\textsuperscript{115} For another case determining the justiciability of consolidated cases by reference to the justiciability of each component part, see General Instrument Corp. v. United States, 65 Cust. Ct. 648 (1970) (Where court had retroactively consolidated two protests with two others that had been tried the previous day, the parties having stipulated that the evidentiary record would serve for all, but those tried were found not to have presented a justiciable controversy, a new trial had to be held for the remaining two protests.).

Spiri v. Teachers Ins. & Annuity Ass'n, 93 F.R.D. 627 (S.D.N.Y.), aff'd in part and rev'd in part on other grounds, 691 F.2d 1054 (2d Cir. 1982), erred in some of its reasoning, although it
The conclusion that both the constitutional concepts of "case" and "controversy" and the statutory notion of a "civil action" might properly be construed to encompass the litigation product of consolidation has implications that reach far beyond the realm of justiciability issues. Numerous situations, statutes, and Rules pose the question whether a consolidation creates a single civil action and makes the parties to the antecedent constituents parties to the larger whole. A single clear answer—a bright line rule—would alleviate uncertainty that sometimes engenders significant problems for parties, and would facilitate the work of the courts as well. The discussions that follow will examine when it would make a difference for courts to treat consolidations as single civil actions (for it may not always matter which view one takes), and will test whether courts can treat consolidations as single civil actions for all purposes, without unacceptable costs.

III. ORIGINAL JURISDICTION AND VENUE

The questions to be addressed in this part are whether, when, and how consolidation of actions presently alters, and how it might alter or should alter, the application of the requirements for subject matter jurisdiction, personal jurisdiction, and venue, or the analysis as to whether plaintiffs have failed to join an indispensable party.

A. "Cases" and "Controversies" Commenced in or Removed to Federal Court

When considering ostensible Article III "cases" and "controversies" commenced in, or removed to, federal court and subsequently consolidated reached the correct result. The court properly had concluded that it could not consolidate for all purposes two cases, one of which was before the court on a limited remand from the court of appeals, the purpose of which was district court supervision of settlement negotiations. Id. at 632. The court commented, however, that where the issue of law shared in common by the two actions was not justiciable in one of them (the Spirit action) because the opposing parties in that case had come to desire precisely the same result (they agreed that a particular method of calculating the benefits to be received from future contributions to TIAA and CREF plans fully complied with Title VII, id. at 649) an order consolidating the two actions for all purposes would make that issue justiciable in Spirit, and thereby threaten to delay adjudication of that case, prejudice the original parties to it, and confuse the subsequent litigation of both cases. Id. at 639. This dictum is erroneous. Consolidation could not turn an agreed upon matter into a matter in dispute as between the parties in Spirit even if the consolidation merged the cases into a single civil action or allowed them collectively to be considered a single Article III case. Having found the Title VII sufficiency of the agreed upon benefit calculation to be nonjusticiable in Spirit, the court correctly dismissed the pertinent portion of the complaint in that case. Id. at 649.
(or the subject of motions to consolidate), the district and appellate courts that have considered the issue almost uniformly have determined subject matter jurisdiction by considering each component action, independent of the others. That is, they have not regarded the consolidation (or proposed consolidation) as an entity and inquired whether an independent basis of subject matter jurisdiction or supplemental jurisdiction supported each claim embraced within it; instead, the courts have made each component action separately the focus of the subject matter jurisdiction inquiry. Consequently, consolidation generally has not been permitted either to create jurisdiction over civil actions when it would not exist but for the

116. See United States v. Tippett, 975 F.2d 713, 717 (10th Cir. 1992) ("[N]o suit filed independently could escape the jurisdiction requirements of federal question or diversity because it was consolidated with another after filing."); Kuehne & Nagel v. Geosource, Inc., 874 F.2d 283, 287 (5th Cir. 1989) (Where one case was brought in federal court ostensibly within admiralty and diversity jurisdiction and a second, with which the first had been consolidated for trial, had been brought as a diversity action in which counterclaims possibly within admiralty jurisdiction were asserted, the court had to view each case separately to determine whether the court had jurisdiction over each of them.); Harris v. Illinois-California Express, Inc. 687 F.2d 1361, 1368 (10th Cir. 1982) (Dicta suggest that if diversity jurisdiction exists for individual suits, consolidating them will not destroy jurisdiction despite some plaintiffs being of the same citizenship as some defendants.); Cole v. Schenley Indus., 563 F.2d 35, 38 (2d Cir. 1977) (Where cases have been consolidated, court must consider the jurisdictional basis of each complaint separately.); Oregon Egg Producers v. Andrew, 458 F.2d 382 (9th Cir. 1972) (Case removed improperly, because removed by plaintiff, therefore could not be consolidated with antitrust case pending in federal court.); Copra v. Suro, 236 F.2d 107, 116 (1st Cir. 1956) (In litigation involving a labor dispute within the Norris-LaGuardia Act, the court expressed doubt that a consolidation of two cases eliminates the need to establish jurisdiction separately to sustain judgment in either.); Mopaz Diamonds, Inc. v. Institute of London Underwriters, 822 F. Supp. 1053 (S.D.N.Y. 1993) (rejecting argument that jurisdictional amount requirement for diversity jurisdiction could be satisfied by defendant’s alleged membership in a de facto class of parties whose cases had been consolidated before the court, where the plaintiffs had made claims, in the aggregate, exceeding $3 million); Stone v. Williams, 792 F. Supp. 749, 751 n.5 (M.D. Ala. 1992) (District court could not consolidate removed action over which it lacked federal question jurisdiction with pending action, even when the complaint in the federal question lawsuit was essentially identical to the counterclaim filed by the defendant in the removed case.); Cuomo v. Long Island Lighting Co., 589 F. Supp. 1387 (E.D.N.Y. 1984) (Motion to consolidate denied on ground that Rule 42 authorizes consolidation only of cases “pending before the court,” where removed case that defendant sought to have consolidated with an action commenced in federal court was not within federal question jurisdiction.); In re Crescenti, slip op., No. 82 Civ. 5447 (CBM) (S.D.N.Y. Sept. 9, 1982) (Where court lacked federal question jurisdiction over state disciplinary proceeding, it could not consolidate that action with a related matter pending before the court.); Keene Corp. v. United States, No. 80 Civ. 401 (OLC) (S.D.N.Y. Sept. 30, 1981) (The court could not determine whether maritime jurisdiction existed as to a group of 6000 lawsuits, but had to make its determination on a more individualized basis.); Fratto v. Northern Ins. Co., 242 F. Supp. 262 (W.D. Pa. 1965) (In consolidated diversity cases, the court separately examined the jurisdictional amount for each case.); Suburban Trust Co. v. National Bank of Westfield, 211 F. Supp. 694 (D.N.J. 1962) (Case commenced in federal court would be consolidated with action removed to federal court where court had federal question jurisdiction in each.).
consolidation or to eliminate jurisdiction when it would otherwise exist. Similarly, consolidation of diversity cases with federal question cases has not altered the applicability of state or federal law to claims within the consolidated cases.

Thus, for example, in United States ex rel. Owens-Corning Fiberglas Corp. v. Brande Construction Co., the Court of Appeals for the Seventh Circuit rejected the argument that the district court could take supplemental jurisdiction over a removed action that had been consolidated with a federal question action commenced in the federal court. The removed action lacked an independent basis of federal jurisdiction. Although the court assumed arguendo that the two cases involved a common question of law or fact, the court relied on the principle that an improperly removed action was not pending before the court, as required by Rule 42 as a prerequisite for consolidation. Consequently, the consolidation was erroneous and could not provide a basis for jurisdiction. Several other cases have been decided similarly.

117. See supra note 116; see also Adler v. Seaman, 266 F. 828 (8th Cir. 1920), appeal dismissed, 254 U.S. 621 (1921) and cert. denied, 254 U.S. 655 (1921) (decided under Act of July 22, 1813, ch. 14, § 3, 3 Stat. 21, repealed by Judicial Code of 1948, ch. 646, § 39, 62 Stat. 869, and authorizing consolidation of causes "of like nature or relative to the same question . . . [for] avoiding unnecessary costs or delay . . . " as to the court shall appear reasonable.) The court held it erroneous to consolidate two suits so as to force the complainant in one into the position of an intervenor in the other, over his objection. Id. at 837–38.

118. See supra note 116; see also Continental Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1523 n.1 (9th Cir. 1987) (Realignment of a party, with the consequence of destroying diversity jurisdiction in one suit of a consolidation, had no effect on the court’s jurisdiction in the other consolidated cases); Webb v. Just In Time, Inc., 769 F. Supp. 993 (E.D. Mich. 1991) (Consolidation did not destroy the complete diversity that existed in each of the suits although citizens of the same state ended up as adversaries, where the second action should have been brought as a compulsory counterclaim, with the non-diverse party brought in as an additional counterdefendant under Rule 13(h))).


120. 826 F.2d 643 (7th Cir. 1987), cert. denied, 484 U.S. 1026 (1988).

121. Id. at 647. The court did not consider whether to assume arguendo that the two actions shared a common nucleus of operative fact; but the court’s refusal to find supplemental jurisdiction did not depend on the absence of such a relationship between the actions.

122. Id.

123. Accord Xaros v. United States Fidelity & Guar. Co., 820 F.2d 1176, 1180 n.1 (11th Cir. 1987) finding to be spurious the argument that the court would be able to exercise pendent party jurisdiction over certain subcontractors and sureties, defendants who were not signatories to a collective bargaining agreement and hence not subject to ERISA, if the case were consolidated with another in which signatory contractors were parties. Consolidation does not result in a merger of suits or parties such that federal jurisdiction in one case can be engrafted upon a case
Some courts, however, have viewed themselves as bending or making exceptions to the rule that each component action in a consolidation must be considered independently in determining subject matter jurisdiction. In Nanavati v. Burdette Tomlin Memorial Hospital,¹²⁴ the Third Circuit was confronted with two consolidated actions initially encompassing reciprocal antitrust, slander and tortious interference with business relations claims, and race discrimination claims by Nanavati. "[A]rguably the viability of certain pendent state claims in one action depended upon their relationship to federal claims in the other action."¹²⁵ The appellate court noted that consolidation is "not a means for joining new parties or claims to old actions. It does not ... circumvent[] the established procedures for amending complaints or joining new parties."¹²⁶ Nonetheless, because the parties and the district court had treated the consolidated action as one unified action, the appellate court decided to do the same; it concluded that, "any putative jurisdictional problems were solved by the healing effect of Federal Rule of Civil Procedure 15(b) under which pleadings may be deemed

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¹²５  Id. at 99.
¹²６  Id. at 104.
amended to conform to proof."127 In particular, the court rejected Nanavati’s contention that the trial court lacked jurisdiction over defendant Sorensen’s slander claim because it was not properly within the court’s pendent jurisdiction and complete diversity did not exist. The court held both Sorensen’s slander claim and his tortious interference claim to be ancillary to Nanavati’s antitrust claim.128

Although the Third Circuit viewed itself here as blurring the lines between consolidated actions, and as permitting state law claims asserted in one action to be heard by virtue of their relationship to federal claims in the other consolidated action, that really is not what occurred. First, it may be (although one cannot determine this from the opinion) that Sorensen’s state law claims derived from a common nucleus of operative fact with his antitrust claim. In that circumstance, the federal court would have had power to hear his state law claims, as a matter of traditional pendent jurisdiction, notwithstanding that Sorensen lost his antitrust claim on summary judgment. Second, even if Sorensen’s state law claims shared a common nucleus of operative fact with Nanavati’s antitrust claim, but not with Sorensen’s own antitrust claim, Nanavati’s antitrust claim was asserted as a counterclaim in Sorensen’s action, not in Nanavati’s separate action. Consequently, no cross-case version of supplemental jurisdiction was necessary to support jurisdiction over Sorensen’s state law claims. The court would have had supplemental jurisdiction over those claims by analogy to the jurisdiction over compulsory counterclaims, since they shared a common nucleus with a jurisdictionally sufficient claim of an opposing party.129

Another case which can be viewed as holding an action to be within the federal court’s supplemental jurisdiction by virtue of its consolidation

127. Id. at 99. It is unclear how conforming the pleadings to the proof would have cured jurisdictional problems. Perhaps the court had in mind an amendment of the pleadings so as to create one civil action which embraced all the claims asserted by all of the parties. Then, the cross-case version of supplemental jurisdiction that the court believed it needed to apply would have been obviated. See also Tse-Ming Cheung v. New York State Office of Mental Health, 1989 U.S. Dist. LEXIS 5931 (W.D.N.Y. Apr. 20, 1989) (Where plaintiff suggested consolidation of an action to enforce an arbitration award, over which the court lacked jurisdiction, with a federal question suit that arose in connection with the same events, to enable the court to hear the former under pendent jurisdiction, the court rejected the idea but only on the grounds that economy, convenience, and comity would not be served by the consolidation.).

128. Nanavati, 857 F.2d at 105, 106 & n.10.

129. See also Siegel v. Merrick, No. 74 Civ. 2475, No. 74 Civ. 2630 (S.D.N.Y. Aug. 31, 1979) (Where one shareholder’s derivative action was supported by diversity jurisdiction, and the federal securities law claims had been dismissed from another such action, the two having been consolidated, the court would exercise pendent jurisdiction over the state law claims that remained in the latter.).
with an anchoring case is *County of Oakland v. City of Berkeley*. There, the district court had entered a consent decree in an action against the City of Detroit and others, charging violation of the Federal Water Pollution Control Act. Later, Oakland County, Michigan, filed an action seeking a declaratory judgment that the city of Madison Heights, Michigan, was contractually obligated to pay certain service charges for storm water disposal. Despite Madison Height's contention that federal jurisdiction was lacking over the later case, the district court consolidated the two cases, reasoning that the second action could be considered under pendent jurisdiction. The Sixth Circuit concluded that the two actions derived from a common nucleus, the Detroit water pollution problem, and that the district court had not abused its discretion in retaining jurisdiction over the later case. Thus, this court also reasoned that an action may be within federal supplemental jurisdiction if anchored by another action with which it was consolidated. However, the Sixth Circuit also offered a less controversial rationale for the result. Both parties in the second (later filed) suit had been parties to the first, the plaintiff by intervention and the defendant by virtue of joinder pursuant to Rule 19. Thus, their dispute, although filed as a separate action, could be seen as a dispute between parties to the original action, over which the court could assert ancillary jurisdiction in a traditional sense. Because their dispute "affected the district court's ongoing efforts to bring the Detroit Wastewater Treatment System into compliance with statutory requirements and [with] the terms of the consent judgment," the court had ancillary jurisdiction over it.  

*Horizon Creditcorp. v. Oil Screw "Innovation I"* is a third example of a court allowing consolidation to affect its conclusions regarding subject matter jurisdiction. The purchasers of a yacht sued their lender for con-

130. 742 F.2d 289 (6th Cir. 1984).
132. *County of Oakland, 742 F.2d at 290–91, 293, 295.*
133. *Id. at 296.*
134. *Id. at 296–97; see Kokkonen v. Guardian Life Ins. Co., 114 S. Ct. 1673, 1676 (1994)* (remarking that the Court had asserted ancillary jurisdiction "to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent . . . [and] to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."); see also *Associated Elec. & Gas Ins. Servs. v. Texas E. Transmission Corp., 15 F.3d 1230, 1236 (5th Cir. 1994)* (Having found federal jurisdiction in one of three cases consolidated pursuant to 28 U.S.C. § 1407 (1988) and that all of the parties to the other consolidated cases also were parties to that first case, the court noted the possibility that ancillary jurisdiction might be invoked to ground subject matter jurisdiction in the remaining two cases. It did not rely on ancillary jurisdiction, however, because it found an independent source of jurisdiction in each of the other cases.).
135. 730 F.2d 1389 (11th Cir. 1984).
version, in state court, after the yacht was repossessed. The lender removed the case on the basis of diversity jurisdiction, and counterclaimed for breach of contract—that is, for nonpayment and default. This action was consolidated with an in rem proceeding that the lender had brought in federal court, and which had led to a judicial order permitting sale of the repossessed yacht. The appellate court indicated that the district court lacked admiralty jurisdiction over the in rem proceeding but, rather than squarely decide that question, it concluded that the question had become moot by reason of the consolidation.136

What analysis is proper when subject matter jurisdiction is in question in consolidated cases, or cases proposed to be consolidated? If one reads Rule 42 and the other Federal Rules, or the pertinent jurisdictional statutes, or Johnson v. Manhattan Railway,137 not to permit the product of a consolidation to constitute a single civil action, within the meaning of the jurisdictional statutes (28 U.S.C. §§ 1331, 1332 and the like), then the question whether jurisdiction exists must be asked with respect to each component suit in the (actual or prospective) consolidation, as each was framed when commenced in or removed to federal court. The question of jurisdiction is logically prior to the question whether suits can be consolidated. In view of the length of time that the Supreme Court’s decision in Johnson has been law, and the number of occasions that Congress has considered federal jurisdiction since then, one could read congressional intent to be that consolidation will not alter the scope of a civil action for purposes of determining subject matter jurisdiction. Similarly, if one construes Article III to preclude the courts from regarding a consolidation as a single case or controversy, the question whether jurisdiction exists would have to be asked with respect to each component suit. One would have to condemn as erroneous the fancy footwork, the efforts at creative reasoning, described in the cases previously discussed, although the result in each of those cases seems defensible on other grounds.

On the other hand, if the Rules, the jurisdictional statutes, Supreme Court precedent, congressional silence, and Article III permit the product of a consolidation to constitute a single civil action within the meaning of the jurisdictional statutes, the courts (at least arguably) could consolidate

136. Id. at 1392; see also id. at 1393 (Clark, J., concurring in part and dissenting in part) ("T]he consolidation of the two actions conferred diversity jurisdiction on the district court."). However, the majority opinion may be interpreted instead to mean that subject matter jurisdiction over the in rem action was irrelevant because the court’s jurisdiction over the diversity action alone sufficed to ground the judgment holding the plaintiffs liable in personam for money damages. See id. at 1392.
137. 299 U.S. 479 (1933).
first and ask the jurisdictional question later—the jurisdictional question being whether all the claims asserted are supported either by an independent basis of jurisdiction or supplemental jurisdiction under 28 U.S.C. § 1367. Although Rule 42 authorizes consolidation only of actions "pending before the court," that language does not preclude this alternative approach. While the courts heretofore have construed that language to require the actions to be properly pending—which includes considerations of subject matter jurisdiction, hence making the jurisdictional question logically prior again—it could be otherwise construed. In a very real sense, actions that are commenced in or removed to federal court are pending there, until they are dismissed or remanded, even if they never came within the ambit of the federal courts' jurisdictional power. Hence, I do not think the language of Rule 42 prohibits courts from consolidating actions pending before the court and only then asking whether the resulting combination of claims is within the courts' jurisdiction. This Article explained earlier that Supreme Court precedent and Article III itself would permit the product of a consolidation to constitute a single civil action. Silence is an unreliable predicate for concluding that Congress has prohibited the courts from considering (or has failed to authorize them to consider) a consolidation as an entity in determining whether federal subject matter jurisdiction requirements have been fulfilled. Congress may never have considered the question. Moreover, when Congress has focused on subject matter jurisdiction, it has expanded it as to federal questions and repeatedly declined to curtail it in significant respects as to diversity. In view of this history, there is really nothing to support the assertion that Congress intends consolidation not to alter the scope of a civil action for purposes of determining subject matter jurisdiction.

Under this view, if a federal question case (A v. C) were consolidated with a case (B v. C) held to fall outside federal question jurisdiction and to assert only a state law claim which arose out of the same transaction or

140. Congress has, however, repeatedly increased the amount in controversy requirement for diversity cases, and in 1990 it eliminated the possibility of removing diversity cases under 28 U.S.C. § 1441(c) (Supp. V 1993).
occurrence as A's claim against C, the federal court could retain the latter claim and hear it as a matter of supplemental jurisdiction.\textsuperscript{141}

Even the "radical" approach imagined here would not legitimate every consolidation composed, in part, of jurisdictionally inadequate pieces. First, even when the district courts have jurisdiction over some claims as a function of federal question jurisdiction, this approach would not furnish jurisdiction over state law claims that lack a common nucleus of operative fact with the federal question claims, or that otherwise fail the Gibbs test. Absent diversity of citizenship (or some other jurisdictional basis) state law claims that merely share a common question of law or fact with the federal questions would continue to be beyond federal judicial power unless Article III came to be interpreted to require only that lesser relationship. Such claims would have to be dismissed from federal court.

Second, given the language of the basic removal statute, lawsuits removed from state court which, in and of themselves, are not within the district courts' original jurisdiction, could not be saved by consolidation with self-sufficient actions, even if the claims shared a common nucleus of operative fact. Unlike many courts, I do not reach this conclusion on the ground that the erroneously removed suits are not "pending" in the federal court. I reach it because 28 U.S.C. § 1441(a) authorizes the removal only of a "civil action brought in a State court of which the district courts . . . have original jurisdiction." This seems to me to require courts to determine whether the removal was proper (including whether federal jurisdiction existed) before they consider whether to consolidate the removed suit with others, because only those suits are removable which themselves are within federal jurisdiction. The counterargument would be that defendants should be able to remove and have the court consolidate first, and ask about jurisdiction later; then, the removed piece can have become part of a civil action of which the district courts have jurisdiction. Defendants might argue that refusing to take this tack in the removal context while taking it as to cases commenced in federal court sets up an inequity between plaintiffs and defendants that is contrary to the spirit of the removal

\textsuperscript{141} Similarly, if in Xaros v. U.S. Fidelity & Guar. Co., 820 F.2d 1176 (11th Cir. 1987), the suit against Landmark, the employer, to collect delinquent contributions to a laborers' trust fund was a federal question case under ERISA, then the trust fund's suit against other defendants, held not to arise under ERISA but which was consolidated with the suit against Landmark, could be heard under the court's supplemental jurisdiction.
statutes. However, those statutes have already created asymmetries;\textsuperscript{142} such differences are not anathema to the scheme, and courts do have to take account of the removal and remand statutes when they apply. I think the first argument I made has the better of the debate as a matter of statutory construction, although the consequence is not the most efficient. Moreover, if a court consolidates first and only thereafter investigates whether a component case was properly removed, that should not alter the substance of the inquiries it makes.

Third, in situations where federal jurisdiction is founded solely on diversity (28 U.S.C. § 1332), the limitations in the supplemental jurisdiction statute, 28 U.S.C. § 1367(b), often would preclude consolidation from creating jurisdiction over claims between non-diverse plaintiffs and defendants. Imagine that the court has diversity jurisdiction over a suit by P of Illinois against D of New York, and that it consolidates it with a state law lawsuit by A of New York against B, who is later determined also to be a citizen of New York. If the consolidation constitutes a civil action, and A v. B forms part of the same case or controversy under Article III as P v. D (and let us assume it does, by virtue of arising out of a common nucleus of operative fact and the claims being such that one would ordinarily expect them to be tried together), the court can hear A v. B, as well as P v. D, under § 1367(a). However, §1367(b) declares that the district courts shall not have supplemental jurisdiction over claims, inter alia, by plaintiffs against persons made parties under Rule 20 of the Federal Rules. "A" is a plaintiff and B would be a person made a party under Rule 20 (assuming that A commenced his suit in federal court). Consequently, consolidation would not create federal jurisdiction over A's claim against B.\textsuperscript{143}

\textsuperscript{142} The universe of cases that is removable under 28 U.S.C. § 1441 (1988 & Supp. V 1993) is not identical to the universe of cases that can be commenced in federal court. The grant of removal jurisdiction is limited by exceptions provided by Congress, such as those provided for in 28 U.S.C. § 1445 (1988). Congress has precluded removal in diversity cases when any properly joined and served defendant is a citizen of the state in which the action was brought, 28 U.S.C. § 1441(b), has imposed time limits on removal, 28 U.S.C. § 1446(b) (1988), and has prohibited removal on the basis of diversity jurisdiction more than 1 year after commencement of an action, 28 U.S.C. § 1446(b). In 28 U.S.C. § 1441(c), Congress authorized removal over combinations of claims that could not be sued upon together in actions commenced in federal court.

\textsuperscript{143} Note that treating consolidations as single civil actions, in making subject matter jurisdiction determinations, would be less expansive of the universe of cases federal courts could hear than would some current proposals that require only minimal diversity; see \textsuperscript{supra} note 9. Thus, in Kuehne & Nagel v. Geosource, Inc., 874 F.2d 283 (5th Cir. 1989), consolidation would not have created jurisdiction over Kuehne & Nagel's claim against Geosource, as the alter ego of Ucamar; in Continental Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519 (9th Cir. 1987), consolidation would not have created diversity between Continental and Sargent; in Empire Distrib., Inc. v. American Express Travel Related Servs. Co., 1990 U.S. Dist. LEXIS 6596 (N.D.
I would be concerned if my proposal destroyed diversity jurisdiction which existed in each of the component cases. I do not believe that would occur, however. If the suits are repetitive, the alignment of the parties should be the same from one to the other, and so long as there is diversity jurisdiction in each, combining the actions into one will not destroy jurisdiction. Imagine, for example, that in each case a citizen of Illinois sues a citizen of New York. Even if an additional party is added in one of the actions, so long as there is diversity in it, diversity should remain after unification.144 If the suits are reactive, the court will have to realign the parties before it determines whether diversity is present. Once that is done, jurisdiction should remain.145 If the suits are merely related, commonly one would have multiple plaintiffs suing the same defendants. If there is diversity jurisdiction in each, there will be diversity jurisdiction in a single action created by consolidation.146 Of course, that need not be the configuration, and the court may have to realign the parties before it determines whether there is diversity, because there may be a preemptive strike or mutual claims, with the defendant in one suit being plaintiff in another. If there are situations in which regarding the consolidation as a single civil action puts co-citizens on opposite sides of the “v.” I would argue that the court could assert supplemental jurisdiction over their claims. I would argue that this would be permissible, so long as the claims form part of the same case or controversy under Article III as jurisdictionally sufficient claims,147 because the exercise of supplemental jurisdiction over such claims would not be inconsistent with 28 U.S.C. § 1332, given the existence of diversity jurisdiction in each antecedent component of the consolidation.148 The “fact” that a consolidation would create a civil action need not negate the history of the proceedings so as to make the antecedent configuration of the actions irrelevant.

Although the consequence of the three limitations described above is that the “radical” approach would not legitimate every consolidation composed, in part, of jurisdictionally inadequate pieces, it would expand the

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145. Imagine, for example, Illinois citizen v. N.Y. citizen and N.Y. citizen v. Illinois citizen. Realign: the New Yorkers are on one side and the Illinoisans are on the other.
universe of claims that the federal court could hear, and it could expand
the dimensions of consolidations. Thus, this is a context in which treating
consolidations as single civil actions would make a difference. Although I
have elsewhere expressed doubts and reservations about the virtues of large
consolidations,\(^{149}\) I believe that statutory interpretation that expands the
universe of claims that federal courts can hear, along with other claims they
already will hear, is desirable. In making the discretionary decision
whether to consolidate and the further discretionary decisions as to what
claims within supplemental jurisdiction they will hear, federal courts can
decline case-by-case whether to avail themselves of the elasticity in their
power.

One final point: One goal of this Article is to determine whether
consolidation can be regarded as creating a single civil action, without
unacceptable costs. For those who find the suggestions above too far-reaching,
there is a less expansive approach which still views consolidations as
creating a single civil action for jurisdictional purposes. One could regard
consolidation as doing so, without embracing the “consolidate first, ask
jurisdictional questions later” approach urged above. That is, one could
initially make the question of jurisdiction logically prior to the question
whether suits could be consolidated, and consolidate only when each com-
ponent, independently considered, is jurisdictionally sufficient. But once
the consolidation has been effected, the question whether the court could
hear additional proposed claims would be determined by considering the
whole as a single action. Thus, in a variation on Nanavati, for example, if
after consolidation Sorenson asserted a slander claim that arose out of the
same transaction or occurrence as Nanavati’s antitrust claim against
Sorenson, with the two being part of the same post-consolidation civil
action, the slander claim would simply be a compulsory counterclaim within
the court’s supplemental jurisdiction, regardless of which case originally
encompassed the antitrust claim.

B. Issues Confined to Consolidations of Cases Some of Which Have Been
    Removed from State Court

When only claims commenced in federal court are involved in consoli-
dations, the courts can simply dismiss any actions or claims over which they
lack subject matter jurisdiction, and retain the others.\(^{150}\) When removed

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\(^{150}\) FED. R. CIV. P. 12(h)(3) requires dismissal of an action where the court lacks subject
matter jurisdiction.
claims are involved, additional questions arise. For example, when a district court has consolidated an action brought in federal court with an action removed from state court and later concluded that it lacked jurisdiction over either component, may the court remand or dismiss the entire consolidation? In this context as well, the courts generally have refused to treat the consolidation as an entity, but have “unmixed” the parts and held that any removed component that lacked federal jurisdiction had to be remanded,\footnote{28 U.S.C. § 1447(c) (1988) provides, in part: “If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” See, e.g., Bradgate Assoc., Inc. v. Fellows, Read & Assoc., Inc., 999 F.2d 745 (3d Cir. 1993); Thomas v. Shelton, 740 F.2d 478 (7th Cir. 1984) (remanding a component action that the court held had been removed without right by the United States, which had been interpleaded into the action, while retaining the component of the consolidation that had been properly commenced in federal court); McKenzie v. United States, 678 F.2d 571 (5th Cir. 1982) (remanding improperly removed action while affirming judgment in action properly before the court); Texas v. Synchronal Corp., 800 F. Supp. 1456 (W.D. Tex. 1992) (remanding removed component of a consolidation upon finding no diversity and no federal preemption which furnished federal jurisdiction, while separately disposing of the component commenced in federal court); Simmons v. Skyway of Ocala, 592 F. Supp. 356 (S.D. Ga. 1984) (remanding component for lack of diversity jurisdiction).} and that any component over which the court had jurisdiction could remain pending, subject of course to other doctrines that might make appropriate some other disposition.\footnote{Logically prior to the questions of what must or may be remanded is the question what may be removed. The language of some cases suggests that consolidation can have far reaching consequences. See, e.g., Vial v. First Commerce Corp., 1983-2 Trade Cas. (CCH) ¶ 65,692, at 69,536–37 (E.D. La. May 4, 1983) (If a federal officer removes a cause, "the power of the state court is ended not only as to his case, but as to any other removed cases which have been consolidated with his case. Moreover, even if subsequent to removal, the federal officer is eliminated from the case, the federal court does not lose jurisdiction over the related consolidated cases."). However, the reality is less powerful than the language suggests. State court power over other consolidated cases would be lost only if those cases, considered individually, were properly removed; otherwise, they would have to be remanded. The notion that federal judicial power is not lost when federal claims are dismissed is familiar and applies to cases commenced in federal court as well as to those removed, whether or not federal officers are involved. Whether to hear remaining state law claims becomes a matter within the federal courts' discretion. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).} In Bradgate Associates, Inc. v. Fellows, Read & Associates,
Inc., a suit decided in the context of actions ostensibly in federal court by virtue of diversity jurisdiction, the Court of Appeals for the Third Circuit reasoned that remand of the entire consolidation, when the district court had concluded that it lacked jurisdiction over either component, impermissibly diminished the rights of the defendant in the action commenced in federal court by prolonging litigation over claims that should have been dismissed. It noted that, "[n]o federal statute authorizes transfer of cases from a federal to a state court." The court consequently held that the district court had to "apply the rules pertaining to dismissal and remand as if the cases had retained their separate identities and had never been consolidated."

This approach is obviously correct if the product of a consolidation cannot or does not constitute a single civil action, case, or controversy. Even on the view that consolidation creates a single civil action, I believe that this outcome is proper. Treating the consolidation as a single civil action turns out not to make a difference in this context. This outcome is supported by the remand statute, which contemplates the remand of a case "to the State court from which it was removed." A case cannot be remanded to the state court from which it was removed if it never was removed. It would make no sense (and would be unfair to the litigants who properly filed in federal court) to remand the entire consolidation on the basis of a defect in removal procedure that concerned only part of the consolidation, or to remand the entire consolidation if the court lacked subject matter jurisdiction over only the removed portion, or even over all the components of the consolidation when some were commenced in federal court. There are at least two ways to reconcile these conclusions with the view that consolidation creates a single civil action. The first is to say that improper removal of an action (whether because of lack of federal consolidation upon finding no diversity and no federal preemption which furnished federal jurisdiction, while dismissing without prejudice, on the basis of Pullman abstention, the component commenced in federal court).

154. 999 F.2d 745 (3d Cir. 1993).
155. Id. at 751 (quoting Weaver v. Marine Bank, 683 F.2d 744, 751 (3d Cir. 1982)).
156. Id. Another aspect of the court's reasoning was less cogent. The court pointed out that lack of federal jurisdiction does not extinguish a removed case; it merely requires remand, whereas lack of federal jurisdiction terminates a case originally filed in federal court. Id. However, the latter case is not extinguished or permanently terminated either. If the statute of limitations does not bar its refiling, it can be refiled in a state court, where the limitations on federal subject matter jurisdiction are inapplicable.
158. Section 1447(c) speaks of remanding "the case" on the basis of a defect in removal procedure, and of remanding "the case" if the court lacks jurisdiction. 28 U.S.C. § 1447(c) (1988).
subject matter jurisdiction or because of a defect in removal procedure) nullifies the consolidation of that action with others, since the consolidation is predicated upon proper removal. With the consolidation nullified, the court can obey the commands of the removal and remand statutes, without contradicting the notion that consolidation creates a single civil action. A second, less satisfactory alternative, would be to say that one can consider a continuing consolidation a single civil action and still remand only the offending portion which was removed, by an interpretation of the removal and remand statutes that permits courts to remand certain claims (in a unitary action) while retaining others. While there is precedent for the remand of properly removed pendent claims that a federal court decides as a matter of discretion not to hear (and a district court theoretically could so remand while retaining federal question claims for adjudication in federal court), the remand of improperly removed claims while properly removed claims in the same civil action remain in federal court is virtually unknown. It is virtually unknown because the presence, in the state court action, of claims beyond even supplemental federal jurisdiction typically bars removal altogether. In sum, given the language and structure of the removal and remand statutory scheme, even if the product of a federal court consolidation constitutes a single civil action or case, only those actions may be removed that are jurisdictionally sufficient in and of themselves, and only erroneously removed actions should be remanded, whether or not a federal court subsequently consolidated them with actions commenced in federal court.

One case which departed from the pattern described above is Baker, Watts & Co. v. Miles & Stockbridge, where the court had before it identical actions filed against the defendants in federal and state court, the latter action having been removed and consolidated with the former. Seeing no purpose in having the suits retain separate identities, the appellate court concluded that unpreempted pendent common law claims should have been dismissed without prejudice rather than remanded, after the district court had correctly dismissed plaintiff's federal law claims for failure

160. See generally Steinman, supra note 92, at 943–46. Although there is case law in support of the proposition that a district court should remand claims that the Eleventh Amendment precludes the federal court from hearing, while adjudicating other claims in the same action that arise under federal law, see, e.g., Henry v. Metropolitan Sewer Dist., 922 F.2d 332 (6th Cir. 1990), claims which the Eleventh Amendment bars federal courts from hearing may nonetheless be properly removed. Mitchell N. Berman, Removal and the Eleventh Amendment: The Case for District Court Remand Discretion to Avoid a Bifurcated Suit, 92 Mich. L. Rev. 683, 685–709 (1993).
161. 876 F.2d 1101 (4th Cir. 1989).
to state a claim.\textsuperscript{162} I believe that the approach taken and the result reached by the Fourth Circuit here do not make sense. Under the circumstances, keeping the identical claims together accomplished nothing as a matter of judicial economy. If the court had dismissed without prejudice those claims that had been brought in federal court, and remanded the identical claims that had been removed, the state court could have proceeded with the latter claims, without plaintiff having to file anew and without any duplicative litigation remaining in federal court.

A second issue that can arise in the removal context, and which also was discussed in \textit{Bradgate}, is the appealability of an order remanding an entire consolidation to state court on the ground that the court lacked jurisdiction to hear the claims. Section 1447(d) makes an order remanding a case unreviewable on appeal or otherwise, except in civil rights cases.\textsuperscript{163} Pointing out that there nonetheless are situations in which an appellate court may review a remand order, the \textit{Bradgate} court held that section 1447(d) of 28 U.S. Code did not bar appellate review of an order remanding, rather than dismissing, an action that had been commenced in federal court where the court had remanded the action simply because it had been consolidated with a removed case.\textsuperscript{164}

This is not the place for an exhaustive look at the circumstances under which remand orders are reviewable notwithstanding section 1447(d). However, I believe that the \textit{Bradgate} court is correct in its conclusion, because remand of a suit commenced in federal court, predicated in part on consolidation of that suit with another that was removed, is not among the statutory grounds for remand.\textsuperscript{165}

Summarizing the discussion thus far, to regard a consolidation as creating a single civil action for purposes of determining federal subject matter jurisdiction does not impose any untoward consequences, and indeed confers potential benefits by enabling, without compelling, federal courts to

\textsuperscript{162} \textit{Id.} at 1103 & n.2.
\textsuperscript{164} \textit{Bradgate Assocs., Inc. v. Fellows, Read & Assocs., Inc.}, 999 F.2d 745, at 750 (3d Cir. 1993). \textit{Thermtron Prods., Inc. v. Hermansdorfer}, 423 U.S. 336 (1976), is the seminal case on the availability of review when a remand order is not based on grounds permitted by the controlling statute. See also \textit{Briscoe v. Bell}, 432 U.S. 404, 414 n.13 (1977) ("Where the order is based on one of the enumerated grounds, review is unavailable . . . ."); see generally Steinman, \textit{supra} note 92, at 988–1005 (citing cases in which the courts have found the statutory prohibition on appellate review to be inapplicable). For more recent scholarship on the subject see Rhonda Wasserman, \textit{Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute}, 43 EMORY L.J. 83, at 119–30 (1994) (discussing court of appeals decisions that have seized upon the exceptions to § 1447(d)).
\textsuperscript{165} \textit{See supra} note 164.
hear claims that can efficiently be adjudicated together. In the context of section 1441(a), (b) removal and remand, it seems not to matter whether one regards consolidations as creating single civil actions. For the reasons elaborated above, given the language and structure of the removal and remand statutory scheme, even if the product of a federal court consolidation constitutes a single civil action or "case," only actions that are jurisdictionally sufficient in and of themselves may be removed, and only erroneously removed actions should be remanded, whether or not the federal courts subsequently consolidated them with actions commenced in federal court.

Some different problems arise when one applies 28 U.S.C. § 1441(c) to consolidated cases. The statute provides:

Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters in which State law predominates. 166

The issue is: When cases have been consolidated, one or more of which contain a separate and independent claim that falls within federal question subject matter jurisdiction, does the component containing the federal question claim alone constitute "the entire case" that may be removed, or does that statutory language encompass all the components of the consolidation? Individually, those other components could be comprised entirely of state law claims between non-diverse parties.

If one takes the view that, despite the consolidation, each component retains a separate identity and the actions are not merged into single case, then section 1441(c) permits the removal of only the component containing the federal question claim. It is my view that (at least in the federal court system) cases retain their separate identities when they are combined for limited purposes but not consolidated for all purposes or for purposes including trial. If one subscribes to the view that a single civil action or case, which "joins" all of the claims asserted in all of the consolidated actions, is created by consolidation for all purposes or for purposes including trial, however, then section 1441(c) permits the removal of all the components of the consolidation, so long as the claims therein meet the test of being "separate [from] and independent [of]" the anchoring federal question.

claim. The federal courts could nonetheless protect themselves from having a spate of state law litigation imposed upon them by defendants’ use of section 1441(c) in consolidated cases, by invoking the power that section 1441(c) bestows, in their discretion, to “remand all matters in which State law predominates.”

It is true that such a regime would put plaintiffs at risk of losing their choice of the state court forum by virtue of plaintiffs, in other antecedent actions, asserting federal question claims, either before or after the state court consolidation; that plaintiffs may have no control over such other plaintiffs; and that the latter plaintiffs may have interests that conflict with the interests of the former. This risk is not unique to state court plaintiffs in consolidated cases, however. All state court plaintiffs run the risk that an uncontrollable co-plaintiff may assert a separate and independent federal question claim and that a defendant may then remove the entire case. This Article’s proposal would increase the degree of risk to state court plaintiffs in consolidated cases, however, for consolidation may throw together parties who would not voluntarily sue together. Nonetheless, it should be remembered that removal will not determine that plaintiffs with state law claims will be forced to litigate in federal court. In its discretion, that court can remand any and all matters in which state law predominates, and plaintiffs who are dragged into federal court against their will have the opportunity to argue to the court the reasons it should remand their claims. The fact that such arguments will not always prevail is not a powerful argument against the procedure.

Just the kind of issues described above arose recently in the litigation arising out of the Exxon Valdez oil spill. In Eyak Native Village v. Exxon Corp., the Exxon defendants removed to federal court the lawsuits commenced by four environmental organizations and by some individuals, whom the court referred to collectively as the “trust plaintiffs,” as well as all related cases. In doing so pursuant to 28 U.S.C. § 1441(c), defend-

167. Id. Of course, all the components must share a common question of law or fact and be pending in the same court in order for them to have been consolidated, assuming that the state law requirements for consolidation are at least as rigorous as those in the federal court system.
169. These defendants include various companies with Exxon in their name as well as current and former Exxon employees. See id. at 774 n.1.
170. Id. at 775.
ants removed both (what the court held to be) a federal question claim and otherwise non-removable state law claims.

The litigation that was removed included lawsuits that had been commenced as fifteen separate class actions. The state court had entered an order consolidating all Exxon Valdez cases before it “for pre-trial purposes,” and, on their own initiative, the plaintiffs in these class actions then had filed, in state court, an Amended Consolidated Class Action Complaint, and a single omnibus class action motion. Approximately two years later, defendants filed a removal notice. The federal district court denied plaintiffs’ motion to remand the consolidation as improperly removed under 28 U.S.C. § 1441(c), and also their motion to remand their state law claims.

The question whether fourteen of the class actions were properly removed turned on whether the consolidated complaint joined all fifteen class actions so as to make them removable as a group. The Court of Appeals for the Ninth Circuit found that the consolidated complaint, which was voluntarily filed before defendants answered, created five new, superseding, proposed classes and designated which of the plaintiffs from the various predecessor actions would be representatives of each class. The court concluded that the plaintiffs did not seek to preserve the individual identities of their former class action complaints, and agreed with the district court that the original fifteen class actions could not be transformed into five proposed classes without the claims being joined.

Plaintiffs argued that by listing each title and docket number in the caption of the consolidated complaint, plaintiffs preserved the separate

171. Id. at 777–79. This Article will not discuss the correctness of that holding, which is the second question posed by plaintiff's petition for writ of certiorari. Petition for A Writ of Certiorari, at 1 (i), Eyak Native Village v. Exxon Corp., 25 F.3d 773 (9th Cir.) (No. 94-650), cert. denied, 115 S. Ct. 351 (1994) (on file with the author).

172. Petition for A Writ of Certiorari at 3, Eyak Native Village (No. 94-650).

173. Eyak Native Village, 25 F.3d at 780.

174. Petition for A Writ of Certiorari at 4, Eyak Native Village (No. 94-650).

175. Id. at 4–5.

176. District Court Order No. 80 (unreported), Petition for A Writ of Certiorari at Appendix B, A.23a, at 40a, Eyak Native Village (No. 94-650).

177. Eyak Native Village, 25 F.3d at 779–80. The court said that it was clear that the fifteenth class action had been properly removed because plaintiffs therein had joined the trust plaintiffs’ action. Id. at 780.

178. Id. at 780. “The same principle applie[d] to the plaintiffs in the Wiser case, who later joined in the consolidated action.” Id.; see id. at 781. See also Respondents’ Brief in Opposition to Petition for A Writ of Certiorari at 6 (The consolidated complaint "obliterated the boundaries between the previously separate complaints, proposing 'omnibus' classes . . . and intermingling plaintiffs from various predecessor actions as proposed representatives [and class members] of those proposed classes."); Respondents’ Brief at 9.
identities of the cases, and that, under the law, consolidation could not effect a physical merger of the actions. The court rejected both pleas. It noted that no case cited by the plaintiffs involved the certification of classes that drew plaintiffs from other class actions, and that the removal context, among other things, distinguished this case from the others. It concluded that, "we have more than consolidation alone," and that the class actions were joined. Because all the plaintiffs were in the same case as the trust plaintiffs who asserted a removable federal question claim, and because the claims of the class action plaintiffs were "separate and independent" from the trust plaintiffs' claim, removal of the latter claims was permissible under 28 U.S.C. § 1441(c). Plaintiffs filed an initial petition for writ of certiorari which was denied and, after the Court of Appeals denied a motion for rehearing, they filed a second petition for writ of certiorari, which also was denied.

Whether the Ninth Circuit's decision is correct turns in part, and perhaps primarily, on the correctness of its conclusions concerning the effects of the proposal, and certification, of classes with representatives and class members from multiple cases. That is beyond the scope of this Article. However, whether the court's decision is correct may turn on the effect of case consolidation, and in particular, the effect of case consolidation under the governing state law, since it is the state court that consolidated the several cases involved. It is not for the state to say whether a collection of claims constitutes an "entire case" within the meaning of 28 U.S.C. § 1441(c); that is a federal question which is posed exclusively to the federal court. But the federal court ought to consider what state court


180. The court distinguished this case from one or more of those plaintiffs cited in that the state court judge had not ordered plaintiffs to file a consolidated complaint and had not indicated that, at the conclusion of pretrial proceedings, he would consider whether the separate identities of the actions should be preserved. Eyak Native Village, 25 F.3d at 780–81. The district court had rebuffed plaintiffs' argument based on the use of the various case names and docket numbers, saying, "If the Class Plaintiffs had intended to join the claims, a voluntary consolidated class action complaint listing all affected class action cases is the way to have accomplished that." District Court Order No. 80 (unreported), Petition for A Writ of Certiorari at Appendix B, at A.23a, 36a, Eyak Native Village (No. 94-650).

181. Eyak Native Village, 25 F.3d at 781.

182. The court so held. Id. at 782. This Article will not discuss the correctness of that decision.

183. Id. at 781.

184. See supra note 168.
consolidatation means under state law, as a predicate for construing and applying section 1441(c). In their second petition for writ of certiorari, petitioners argued, inter alia, that the state court's order, consolidating the cases for pre-trial purposes, included a proviso that "[n]o action taken hereunder shall have the effect of making any person, corporation, or other entity a party to any action in which he or it has not been named, served, or added as such in accordance with the Alaska Rules of Civil Procedure." That factor was not discussed by the Ninth Circuit, and argues against the court's opinion.\textsuperscript{186}

In addition, insofar as federal law is determinative, under the arguments made in this Article, it would be permissible for the district court to interpret "the entire case" of which section 1441(c) speaks to include all components of the consolidation, but only if the consolidation had been for all purposes or for purposes including trial.\textsuperscript{187} If the "consolidation" in Eyak Native Village was only for pre-trial, then under the arguments of this Article, to regard the components as a single civil action or case, within the meaning of 28 U.S.C. § 1441(c), because of the "consolidation," would be inappropriate.\textsuperscript{188}

\textsuperscript{185} Petition for A Writ of Certiorari at 3-4, \textit{Eyak Native Village} (No. 94-650).

\textsuperscript{186} The District Court regarded the protections afforded by Pre-Trial Order No. 1 as inoperative because, in its view, the consolidated complaint named or added parties from the separate actions as parties to a greater consolidated whole, and the protections of the pre-trial order applied only where the parties were not named or added to another action. District Court Order No. 80 (unreported), Petition for A Writ of Certiorari at Appendix B, A.23a, at 36a, \textit{Eyak Native Village} (No. 94-650). In that court's view, adopted by the Ninth Circuit, additional actions, which were not covered by the consolidated complaint, had become part of the larger whole by virtue of a state court motion for class certification that was joined in by the plaintiffs in those actions, and by the ensuing certification of classes by the state court. \textit{Id.} at 37a; see supra note 178.

\textsuperscript{187} I do not address here the serious question of the constitutionality of § 1441(c), which exists whether "the entire case" that it makes removable consists of all components of a consolidation or only one. With respect to that question of constitutionality, see supra note 98.

\textsuperscript{188} This Article argues below that if the consequence of consolidating cases for pre-trial were to be that the cases would be merged into a single civil action, courts might be deterred from ordering combined discovery. See infra text preceding note 241. Counsel in \textit{Eyak Native Village} make the similar point that if merger is to be the consequence, counsel will be deterred from voluntary cooperative and collaborative effort in complex litigation. Petition for A Writ of Certiorari at 11, \textit{Eyak Native Village} (No. 94-650) ("If [cooperative efforts and initiatives] have the effect of merging separate cases into one and thereby subjecting each cooperating plaintiff to serious jeopardy from actions that any other cooperating plaintiff might take in pursuit of his individual interests, they will cease.").
C. Indispensable Parties

Analysis of whether a person is an indispensable party is closely related to matters of subject matter jurisdiction, personal jurisdiction, and venue. If a person who should be joined if feasible cannot be made a party because joinder will deprive the court of subject matter jurisdiction, or because the person has valid objections to the exercise of personal jurisdiction or to the venue, the court must decide whether the action should nonetheless proceed or should be dismissed, "the absent person being thus regarded as indispensable." 189 The question posed here is whether the actual or prospective consolidation of an action in which a person is a party with an action from which he is absent but in which he allegedly is an indispensable party has any effect on the Rule 19 analysis in the latter action.

Little case law touches upon this question. That which does, responds to the question only indirectly, and not uniformly. On the one hand, some opinions bolster their conclusion that a person is not indispensable by referring to the possibility that a case in which that person is a party may be consolidated with the instant case. 190 Additional opinions grant consolidation when faced with motions to dismiss for failure to join an indispensable party or, in the alternative, to consolidate. 191 Both of these judicial responses suggest that consolidating the cases somehow will cure or ameliorate the problems that would exist absent consolidation. Other cases

190. E.g., Steingut v. National City Bank of New York, 38 F. Supp. 451, 452 (S.D.N.Y. 1941). While implying that the United States was in any event not indispensable to plaintiff's suit, the court also indicated that because the defendant bank might be able to consolidate the present action with one brought against it by the United States, the United States was not an indispensable party. Id. The United States was assignee of credit balances, on deposit in the defendant bank, which the plaintiff here, receiver of the depositor company, sued to recover.
191. E.g., United Properties, Inc. v. March Co., No. 89-2322-0 1989 U.S. Dist. LEXIS 12989 (D. Kan. Oct. 2, 1989); see also Andros Marine Chartering Co. v. Tug Gladiator, 307 F. Supp. 17, 26 (D.P.R. 1969) (opining that if one Feldman really were an indispensable party, "a separate action should have been filed in this Court and then consolidated with this case, or an impleading petition . . . made"); Alabama Vermiculite Corp. v. Patterson, 149 F. Supp. 534 (W.D.S.C. 1955) (Where, by virtue of T.M. Patterson having warranted leased premises against all claims, he was held to be an indispensable party to a suit by his wife, asserting an inchoate dowery claim against the property lessor, the court would consolidate the wife's suit with a suit between the property lessors and their lessee.).
indicate that consolidation cannot cure the absence of an indispensable party.\textsuperscript{192}

The latter approach is correct if consolidation cannot or does not create a single civil action, case, or controversy. Imagine two suits, Suit One and Suit Two, and that Lucy Litigant is a party to Suit Two only. In these circumstances, Lucy’s presence in Suit Two (which might fall within federal question jurisdiction) will not make it any less true that her joinder would destroy complete diversity in Suit One. Similarly, Lucy’s presence in Suit Two (in which she may have consented to personal jurisdiction) need not render her subject to an exercise of personal jurisdiction in Suit One, particularly since the suits may have been consolidated only because of common questions of law. Of course, Lucy’s activities in Suit Two may properly bear on whether personal jurisdiction can be exercised over her in Suit One if they help to establish minimum contacts with the United States or with the forum state, or help to establish that Lucy falls within the applicable long-arm statute. But whether litigation activities have such a bearing on personal jurisdiction can, and under the “separate actions” view should, be determined without regard to whether Suits One and Two were consolidated.

Likewise, consolidation of Suit Two, in which venue is proper, with Suit One, will not \textit{ipso facto} cure venue defects that would exist in Suit One if Lucy were joined. Venue could be proper in Suit Two as a function of where events giving rise to the claim occurred. If common questions of law are the basis for the consolidation, the same may not be true of Suit One, and Lucy’s addition may destroy proper venue in Suit One. Such joinder might, for example, result in fewer than all defendants residing in the same state. If Lucy, the party proposed to be joined as a defendant in Suit One, also is not subject to personal jurisdiction in the district (or, in a federal question case, if she may not be “found” there)\textsuperscript{193} the court will not be a proper venue, absent some pendent venue notion.\textsuperscript{194}

On the other hand, if the Rules, the jurisdictional statutes, Supreme Court precedent, Congressional silence, and Article III permit the product of a consolidation to constitute a single civil action, the courts (at least

\textsuperscript{192} See Seaman v. McCulloch, 8 F.2d 820, 825–26 (8th Cir. 1925), cert. denied, 271 U.S. 671 (1926) (discussing Adler v. Seaman, 266 F. 828 (8th Cir. 1920), appeal dismissed, 254 U.S. 621 and cert. denied, 254 U.S. 655 (1921), and indicating that the earlier opinion had correctly rejected consolidation of two lawsuits where an indispensable party, a receiver for a corporation, was absent from the Seaman case, although he was a party to the Adler case, the case with which consolidation was urged).


\textsuperscript{194} See infra text accompanying note 239.
arguably) could consolidate first and ask later whether the action must be dismissed for lack of an indispensable party. How much difference would this make? Ordinarily one would not have indispensability problems with federal question jurisdiction. That is, if a plaintiff, in federal court under federal question jurisdiction, had only a state law claim against a non-diverse party X and X were someone to be joined if feasible under Rule 19(a), then under section 1367 the court could assert supplemental jurisdiction over plaintiff's claim against X, so long as it was part of the same "case" as one of plaintiff's federal claims. If X is someone to be joined if feasible, it is highly likely, given the requirements of Rule 19(a),\textsuperscript{195} that that test would be met. Since one would not have indispensability problems as a result of the limitations on federal question jurisdiction, one would never even reach the question whether consolidation of plaintiff's lawsuit with some other suit in which X is a party would somehow cure the problem.

If the problem before consolidation would have been that joining X would destroy diversity jurisdiction, consolidation generally would not cure that problem, because of the limitations on supplemental jurisdiction discussed above. Section 1367 proscribes the exercise of supplemental jurisdiction over claims by plaintiffs against nondiverse defendants.\textsuperscript{196} I would not think that having consolidation bring the plaintiff and defendant together so that plaintiff could assert a claim against defendant would be any less inconsistent with the requirements of 28 U.S.C. § 1332 than if they were brought together by other mechanisms.\textsuperscript{197}

Discussion of whether and how treating a consolidation as a single action would influence analysis if the problem with joining a person arose out of his having objections to the venue or to the court's exercise of per-

\textsuperscript{195} FED. R. CIV. P. 19(a) provides in part that, "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party . . . if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

\textsuperscript{196} See supra text at note 143.

\textsuperscript{197} Any other rule would enable litigants to circumvent the complete diversity requirement. See Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978). However, if a person is a nondiverse Rule 19 defendant and yet plaintiff does not seek to assert a claim against him, § 1367 seems to permit the courts to exercise supplemental jurisdiction. See also Joan Steinman, Supplemental Jurisdiction in § 1441 Removed Cases: An Unsurveyed Frontier of Congress' Handbook, 35 ARIZ. L. REV. 305, 339–40 (1993); Joan Steinman, Section 1367—Another Party Heard From, 41 EMORY L.J. 85, 107–11 (1992).
sonal jurisdiction over him is integrated into the discussions of personal jurisdiction and venue, found later in this Article.\textsuperscript{198}

D. The Assertability and Posture of Claims

Although not a matter of jurisdiction per se, closely related to matters of jurisdiction (particularly subject matter jurisdiction) are the questions: who can assert claims against whom in a consolidated action, and precisely what is the posture of the claims asserted? Can parties to one consolidated case assert claims against persons who are parties only to other consolidated cases? Of course, in a variety of circumstances, the Federal Rules allow claims to be asserted against persons who previously were non-parties,\textsuperscript{199} and if such claims are proper, they certainly ought not to be rendered improper by the fortuity that the new "defendants" are parties to cases with which the first has been consolidated. But the question recurs whether the consolidation makes claims permissible that otherwise would not be, or alters the posture in which claims are asserted.

By and large, courts have rejected efforts to give consolidation such effects. In \textit{A.L. Williams & Associates, Inc. v. D.R. Richardson & Associates, Inc.},\textsuperscript{200} for example, the court rejected purported counterclaims asserted against persons not named in the complaint or joined by the defendants, but who were plaintiffs in actions consolidated for pre-trial with the action in which the would-be counterclaimants were defendants. The court invited the defendants to move to join their proposed counterdefendants, however.\textsuperscript{201} Since the defendants could do so, the decision merely altered the formalities with which the defendants had to comply. To have treated the consolidation as a single civil action would have facilitated assertion of these claims without having any "substantive" impact.\textsuperscript{202}

\textsuperscript{198} See infra text accompanying notes 216–239.

\textsuperscript{199} See, e.g., Fed. R. Civ. P. 13(h), 14, 15(c), 19, 21, 25.

\textsuperscript{200} 98 F.R.D. 748 (N.D. Ga. 1983).

\textsuperscript{201} \textit{Id.} at 754 & n.16; see also Geddes v. United Fin. Group, 559 F.2d 557, 561 (9th Cir. 1977) (Trial court erred in incorporating a withdrawal of claims in one case into the judgments entered in another case, where the cases had been consolidated for discovery only.). In \textit{Geddes}, the trial court violated the due process rights of plaintiffs in providing that certain assets of the defendant would be forfeited to an SEC receiver created in a different one of the actions that had been consolidated for discovery only, where the effect was to transfer, without a hearing, assets to which plaintiffs had a rightful claim. \textit{Id.} at 561.

\textsuperscript{202} However, if the would-be counterdefendants might have a valid objection to personal jurisdiction, having to bring them into an action, rather than being able to treat them as present parties, could alter their amenability to suit. See infra text accompanying notes 216–226.
In Enterprise Bank v. Saettele, the Eighth Circuit vacated the judgment of a district court that had consolidated the suits of two creditors against a single defendant, for the purpose of determining the relative priority of the two creditors, as against one another. Noting that the question upon which their relative priority turned—the validity of a prejudgment attachment by one of the two creditors (Landmark)—was not at issue in either of the consolidated suits, the court held that the two suits contained no common issues of law or fact, and that the trial court’s consolidation was therefore an abuse of discretion. The court further concluded that the consolidation was a jurisdictional error, because it effectively created a third lawsuit for which there was no apparent jurisdictional basis.

Even if the original two actions had been properly subject to consolidation, had they been treated as separate civil actions, one creditor would have had to commence a separate action against the other to have the court determine their relative rights. If there were subject matter jurisdiction over that action, presumably it could have been consolidated with the other two (for if the first two shared a common question of law or fact, the third probably would have shared that commonality as well). If the creditors’ actions had been properly subject to consolidation and the consolidation had been treated as creating a single civil action, then the two creditors could have cross-claimed against one another and the court could have exercised supplemental jurisdiction over the cross-claims, if an independent basis of jurisdiction had been lacking. As it was, with the consolidation being improper, neither creditor could assert a claim against the other without bringing a separate action, and the court’s vacation of the lower court’s judgment was correct.

Consolidation has sometimes confused parties and courts. In Dudziński v. RTC Transportation, Inc., the plaintiff sued the above named defendant and the driver of its tractor-trailer truck, Ruth. Plaintiff’s driver, Paz, separately sued the same defendants. The actions were consolidated for trial, and the parties stipulated that defendants could “counterclaim”

203. 21 F.3d 233 (8th Cir. 1994).
204. Id. at 236–237. The court did not actually go so far as to say there was no jurisdictional basis; it observed that the parties had made no jurisdictional allegations and that the district court had not determined whether the newly adverse parties were diverse. Id. at 237.
205. An alternative was for one creditor to intervene in the action brought by the other against their mutual debtor. Enterprise had moved to intervene in Landmark’s suit, but its motion was denied, and Enterprise failed to appeal the denial of its motion. Id. at 235. The debtor also might have attempted to bring an interpleader action against both its creditors, but it did not do so.
against Paz for contribution or indemnity for any damages found against them in Dudzinski’s action. When Paz sought to undo the stipulation and have the “counterclaim” severed or dismissed, the court not only canceled the “counterclaim” order. It simultaneously attributed the procedural problems that had arisen to the failure to have two truly separate actions, bifurcated the trial on liability, and stated that the common question as to causation made it necessary to maintain a single consolidated action. Putting aside the contradictory nature of these utterances, the court ought to have allowed defendants’ claim for indemnity to proceed against Paz. The only difference the consolidation could make would be that the claim could be regarded as a counterclaim rather than as a third-party claim.207

Once again, if consolidation cannot or does not create a single civil action, case, or controversy, it ought not to affect who can assert claims against whom or the posture of any claims that are asserted. On the other hand, if the Rules, the jurisdictional statutes, Supreme Court precedent, Congressional silence, and Article III permit the product of a consolidation to constitute a single civil action within the meaning of the Rules and jurisdictional statutes, the courts (at least arguably) could consolidate first and then consider whether particular claims could be asserted and whether they would be original claims, counterclaims, cross-claims, third-party

207. See also Miller v. United States Postal Serv., 729 F.2d 1033, 1036 (5th Cir. 1984) (Claims would not be preempted by virtue of their consolidation with claims that were subject to dismissal on grounds of preemption, nor would consolidation prevent plaintiff from asserting claims, in a second suit, against defendants who could not be named as defendants in the other suit in the consolidation); Kraft, Inc. v. Local Union 327, Teamsters, 683 F.2d 131 (6th Cir. 1982) (A district court had dismissed Kraft’s suit against the union because the court erroneously construed the suit as an attempt to improperly join the third party beneficiaries of a contract to the suit, between a pension fund and Kraft, with which Kraft’s suit had been consolidated. The Sixth Circuit held that Kraft’s suit was not subject to dismissal as a motion for joinder in the companion case); State Mut. Life Assurance Co. v. Deer Creek Park, 612 F.2d 259 (6th Cir. 1979) (Consolidation did not cause a merger precluding the independent settlement of two actions). But see A/S J. Ludwig Mowinckles Rederi v. Tidewater Constr. Corp., 559 F.2d 928, 933 (4th Cir. 1977) (Where, for lack of ripeness of the action, the court vacated judgment in an indemnity suit and recommended consolidation of that suit with the underlying personal injury and wrongful death actions, the court commented that, “[c]onsolidation . . . may be used to achieve the same result as could be reached by means of third-party practice.” This was so only because the defendants in the underlying actions were plaintiffs or other claimants in the indemnity suit); Alabama Vermiculite Corp. v. Patterson, 149 F. Supp. 534, 545–47 (W.D.S.C. 1955) (Where, by virtue of T.M. Patterson having warranted leased premises against all claims, he was held to be an indispensable party to a suit by his wife who was asserting an inchoate dowry claim against the property lessor, the court would consolidate the wife’s suit with a suit between the property lessors and their lessee. The court believed that this consolidation obviated the necessity of making Mrs. Patterson a defendant in the latter action).
claims, and the like. While, so far as the Rules are concerned, a consolidation should not alter who can assert claims against whom, it could alter the posture in which claims are asserted.

In any lawsuit, a person B against whom a party A would like to assert a claim will either be (1) a co-party; (2) an adverse or opposing party (who already has asserted a claim against A); (3) a party to the suit who is not yet formally adverse to A (such as a third-party defendant who has not asserted a claim against the plaintiff, nor has plaintiff yet asserted a claim against him); or (4) a stranger to the lawsuit. If consolidated cases are regarded as separate from one another, a person, call him Sam, who is not a party to every one of the cases will be a stranger to some of them. Parties to the suits in which Sam has not been joined will be able to assert claims against him pursuant only to those rules that authorize such claims—rules such as FRCP 13(h), 14, and 19. Moreover, the claimants will have to serve summonses, as well as pleadings, on Sam. On the other hand, if consolidation is regarded as creating a single civil action to which all of the parties in any of the components also is a party, the claimants will not be able to utilize those Rules against Sam because they authorize claims only against persons who are not already parties. As a result, parties "from" different components will be able to assert claims against one another only if the various plaintiffs (or defendants) are regarded as co-parties eligible to assert cross-claims, the various defendants are regarded as adverse to the various plaintiffs (even those who have asserted no claims against them) so as to be eligible to assert counterclaims, or the various parties are regarded as non-adverse parties who can assert claims against one another, as a third-party defendant can assert a claim against a plaintiff. In light of the fact that parties in a consolidation are likely to have claims against one another only if they were involved in the same transaction, occurrence, or series of transactions and occurrences, so that they could have sued together, or sued one another, it does not seem very problematic to regard the claims that they seek to assert as cross-claims, counterclaims, or third-party claims. Doing so has the advantage of enabling the court to hear these claims as a matter of

208. Which is to say, that the Rules put aside issues of subject matter and personal jurisdiction and venue.

209. See, e.g., Duhon v. Koch Exploration Co., 628 F. Supp. 925, 927 & n.1 (W.D. La. 1986) (It is proper to name the plaintiff in one action as a third-party defendant in another action with which the first has been consolidated); Silver Reed Am., Inc. v. United States, 600 F. Supp. 852, 857–58 (Ct. Int'l Trade 1985) (Intervention into consolidated case component was neither barred nor rendered superfluous by prior intervention into a different component of the consolidation where movant could assert a particular claim if, but only if, permitted to intervene in Silver Reed's action.).
supplemental jurisdiction, when the court otherwise might not be able to do so, for lack of complete diversity or of a federal question. 210

To view defendants as adverse to plaintiffs who have asserted no claims against them could, however, make certain claims compulsory counterclaims, which otherwise would not be. In the interest of avoiding unfair surprise, I would urge the courts not to treat as compulsory a claim that a defendant from one component action has against a plaintiff from another component action, unless Rule 13(a) is amended to make clear that such claims are compulsory when they derive from the same transaction or occurrence that binds the consolidation together. I would urge that Rule 13(a) be so amended. 211 I would take the further position that persons already parties should not have to be served with a summons as well as a pleading when a party from a different antecedent case desires to assert a claim against them. 212 Only persons not parties to an action have to be

210. Compare John D. Bessler, Defining "Co-Party" Within Federal Rule of Civil Procedure 13(g): Are Cross-Claims Between Original Defendants and Third-Party Defendants Allowable?, 66 Ind. L.J. 549, 555, 569–70, 576 (1991) (Some courts have interpreted "co-party" to mean parties having like status; others allow cross-claims against any party that is not an opposing party; and another regards "co-parties" as those parties on the same side of the main litigation. Invoking the policies of avoiding multiple suits, and encouraging determination of an entire controversy with the fewest procedural steps, the author proposes that "co-party" be defined as "any party that is not an opposing party."); cf. Pennsylvania v. Budget Fuel Co., Inc., 122 F.R.D. 184, 186 (E.D. Pa. 1988) (Where state Attorney General's parens patriae action, alleging a price-fixing conspiracy, was consolidated with a consumer's action alleging the same conspiracy, the state AG had standing to challenge the consumer's class action allegations. In light of the consolidation, the court rejected the argument that the state's non-party status in the action brought by the consumer caused it to lack standing to make such a challenge.); Hooker Chemicals & Plastics Corp. v. Diamond Shamrock Corp., 96 F.R.D. 46 (W.D.N.Y. 1982) (Because consolidation brought a particular group of issues before the court in one proceeding, certain proposed amendments to counterclaims were unnecessary.); United States v. Learner, 298 F. Supp. 1104, 1106–07 (S.D. Ill. 1969) (Where court consolidated an action brought by one Donaldson to enjoin compliance with an Internal Revenue summons and an action to enforce the summons, intending thereby to make Donaldson a party to "the consolidated cases" who would be permitted to participate in the show cause hearing scheduled in the enforcement action, the court nonetheless vacated its earlier order denying Donaldson's motion to intervene in the enforcement action and granted that motion, "lest some technical distinction[,] which escapes this court, between consolidation and intervention in these circumstances, . . . confuse the real issues here.").

211. Even in the context of a civil action unaffected by consolidation of cases, there is some ambiguity as to who is an opposing party within the meaning of Rule 13(a). 6 Wright et al., Federal Practice and Procedure § 1404, at 26 (2d ed. 1990) (Courts sometimes have held parties not to be opposing parties based on the lack of an adversarial relationship between them. A stakeholder in an interpleader suit who makes no claim to the fund sometimes has been held not to be an opposing party for purposes of counterclaims. Similar problems have arisen in determining whether an intervenor may assert a counterclaim against a plaintiff who has asserted no claim against him.); see also 7C Wright et al., Federal Practice and Procedure § 1921, at 494–502 (2d ed. 1986) (discussing the law concerning intervenors' rights and obligations to assert counterclaims, and arguing what it ought to be).

212. See infra text accompanying notes 222–226.
joined through service of summons contemporaneously with service of a claim.\textsuperscript{243}

E. Abstention

A court's decision to exercise jurisdiction, or instead abstain from doing so, can be influenced by whether cases have been consolidated in federal court. In \textit{Continental Airlines, Inc. v. Goodyear Tire \\& Rubber Co.},\textsuperscript{244} for example, the appellate court rejected Continental's argument that the district court had abused its discretion by failing to dismiss or stay the federal proceedings in favor of earlier filed state litigation commenced by Continental against McDonnell Douglas Corporation ("MDC") and another. In the court's view, if the only federal court action had been a diversity-based declaratory judgment action filed by MDC, Continental would have had a stronger argument. But where, on Continental's motion, the district court had consolidated MDC's action with two coercive suits (in which Continental was plaintiff), resolution of which necessarily involved adjudication of the validity and scope of the very exculpatory clause that MDC sought to have construed, abstention in MDC's suit, in favor of Continental's state court suit, would have served no purpose.\textsuperscript{245} It may be, however, that it was the \textit{existence} of Continental's federal court suits, as much as their consolidation with MDC's action, that made it inappropriate for the court to abstain in the declaratory judgment action, in favor of state court proceedings.

F. Personal Jurisdiction

Does consolidation alter application of the requirements for personal jurisdiction? That is, does (actual or prospective) consolidation of an action in which a party is subject to the personal jurisdiction of the court with an action in which that same party asserts an objection to the court's exercise of jurisdiction over him alter the analysis or the ruling on that objection?

Some cases answer "no." In \textit{Jaehning v. Schoner},\textsuperscript{246} the court consolidated two actions. In one, transferred from another district court, the

\begin{itemize}
\item \textsuperscript{243} As explained below, \textit{infra} text accompanying notes 216--226, one's view of consolidation as either creating a single civil action or not also can affect personal jurisdiction determinations, with the "single civil action" view facilitating exercises of personal jurisdiction.
\item \textsuperscript{244} 819 F.2d 1519 (9th Cir. 1987).
\item \textsuperscript{245} \textit{Id.} at 1524.
\item \textsuperscript{246} 96 F.R.D. 58 (M.D.N.C. 1982).
\end{itemize}
purported purchasers of land and personal property in Jamaica sued the alleged seller for specific performance or damages. In the other, the alleged sellers sued the would be buyers and brokers for a declaration of the parties' rights under a written offer to purchase. The court asserted jurisdiction over the purchasers for purposes of the action they had brought, but concluded, citing Johnson v. Manhattan Railway Co.,\textsuperscript{217} that it had to decide without regard to the consolidation whether North Carolina's long arm statute authorized jurisdiction over them as defendants and whether they had minimum contacts with North Carolina. Concluding that they lacked such contacts, the court granted their motion to dismiss.\textsuperscript{218}

Other courts, however, view the filing of a related action in the forum as bearing upon personal jurisdiction. In General Contracting & Trading Co. v. Interpole, Inc.,\textsuperscript{219} for instance, a defaulted third-party defendant (Trasco) brought a separate action against the company that had been the third-party plaintiff, and the two suits were consolidated for purposes of calculating damages. The First Circuit held that, by initiating its own suit in the forum, involving the same underlying matters, Trasco submitted to the district court's jurisdiction in the prior action.\textsuperscript{220} The court did not rely on the consolidation as essential to its conclusion, however.\textsuperscript{221}

\textsuperscript{217} 289 U.S. 479 (1933).
\textsuperscript{218} Id. at 59–60. One does have to wonder, however, why the seller defendants in the transferred case did not assert their claim against the purchasers as a counterclaim, thereby obviating the personal jurisdiction problem. See also Meyer v. Indian Hill Farm, Inc., 258 F.2d 287, 290 (2d Cir. 1958) (whether personal jurisdiction had been obtained over a party, so that appointment of a receiver with respect to its property was valid, could not rest on the jurisdiction acquired in another action, with which this one had been consolidated); Greenberg v. Gianni, 140 F.2d 550, 552 (2d Cir. 1944) (validity of service upon a party to two consolidated component cases had to be decided as though the two actions had remained unconsolidated); Vanhooser v. Ling, 872 S.W.2d 913 (Tenn. Ct. App. 1993) (consolidation for trial did not render an unserved party a served party, and the participation of a lawyer employed by the plaintiff in one suit did not affect his rights as a defendant in the other suit, in which he had not been served or retained counsel).
\textsuperscript{219} 940 F.2d 20 (1st Cir. 1991).
\textsuperscript{220} Id. at 24. The court rejected the argument that Trasco should be treated as one who filed a compulsory counterclaim and did not waive its jurisdictional objection in doing only what was required of it, since that was not what happened, and could not have happened in light of Trasco's default. Id. at 24 & n.6.
\textsuperscript{221} See also Horizon Creditcorp. v. Oil Screw "Innovation I," 730 F.2d 1389, 1392–93 (11th Cir. 1984) (Clark, J., concurring in part and dissenting in part) (characterizing the majority as having reasoned that the consolidation of the removed Spielvogels' action with the action instituted by Horizon established in personam jurisdiction over the Spielvogels for all purposes). However, personal jurisdiction over the Spielvogels, making permissible the money judgment that was entered against them, also could be justified by the consent to jurisdiction that courts typically infer for purposes of a counterclaim. Horizon had filed a counterclaim for nonpayment against the Spielvogels in the action they commenced.
One might argue that only if the party to whom jurisdiction is in question is the movant for consolidation should the consolidation be significant, in and of itself. Alternatively, without regard to who the movant was, regarding a consolidation as creating a single civil action could make a difference to a court's willingness to hold that a person consented to its jurisdiction for purposes of claims that parties from other of the consolidated suits seek to assert. 222 Imagine again a Suit One and a Suit Two that a court consolidates. After a consolidation that is regarded as creating a single civil action, the court might be more willing than it otherwise would be to hold that Y, by initiating Suit Two, consented to the jurisdiction of the court for purposes of claims that parties from Suit One seek to assert against Y. With a single civil action, the court might invoke the long-accepted principle that plaintiffs impliedly consent to the jurisdiction of the court for purposes of counterclaims, cross-claims, and the like. 223 Although claims by parties whom a particular plaintiff did not sue are not true counterclaims, and claims by persons with whom a particular plaintiff did not sue are not true crossclaims, a court might nonetheless take the position that the plaintiff should be held to have consented to jurisdiction for purposes of their claims, particularly when those claims arose out of the same transaction or occurrence that is the basis of plaintiff's claims. 224 In that situation, it would be difficult for the plaintiff to argue persuasively that it would be unfair to require him to defend against such claims. Along the same lines, the court might be more willing to utilize a "pendent personal jurisdiction" notion 225 than it would be if it regarded the actions as

222. See supra text accompanying note 209.

223. See Adam v. Saenger, 303 U.S. 59 (1938) (implying consent to jurisdiction for purposes of counterclaims).

224. That commonality would also probably be the reason for the consolidation.

225. See IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1053, 1056-57 (2d Cir. 1993), petition for cert. filed, 63 U.S.L.W. 3001 (1994) (No. 93-2038) (Where complaint stated a federal claim under ERISA's Multiemployer Pension Plan Amendments Act (MPAA), 29 U.S.C. §§ 1381, 1383, 1391 (1988), a federal claim under 29 U.S.C. §§ 1451(a)(1), 1392(c) (1988), which imposes liability on those who try to avoid liability under the MPAA or who adversely affect a pension fund, and three state law claims, and the MPAA provided for nationwide service of process, the court did not need to address whether personal jurisdiction over the defendants was otherwise available to support the state law claims because the federal and state claims arose from a common nucleus of operative facts.); Oetiker v. Jurid Werke, G.m.b.H., 556 F.2d 1, 4 (D.C. Cir. 1977) (Statute, 35 U.S.C. § 293 (1970), that provided for personal jurisdiction over defendant with respect to patent claims was interpreted also to allow personal jurisdiction over defendant for any claims that arose out of the same core of operative fact); Robinson v. Penn Cent. Co., 484 F.2d 553, 556 (3d Cir. 1973) (Where each of four complaints against the same defendant alleged federal Securities Exchange Act of 1934 violations, two of the complaints alleged violations of the Securities Exchange Act of 1933, each complaint alleged one or more state law complaints, and the defendant was properly before the court due to extraterritorial
separate, notwithstanding the consolidation.226 Of course, if the plaintiff were subject to personal jurisdiction in the forum court even absent consent, that would obviate any problem. Similarly, if we envision a situation in which a party from Suit One seeks to assert a claim against a defendant from Suit Two which arises out of the transaction or occurrence giving rise to the common questions that provoked consolidation, the same facts that legitimate personal jurisdiction over the defendant in Suit Two are likely to legitimate it for the proposed claim. If a court did not regard itself as a convenient and appropriate forum for some element of the action, it always could sever and transfer that element to another district in which it might have been brought.

G. Venue


(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

When jurisdiction is not founded solely on diversity, venue is proper in the judicial districts described in (1) and (2) above, or in "a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought."228

Ordinarily, venue would be proper in each of the consolidated actions, either because the requirements of the applicable venue statutes were met

service of process authorized by the two federal securities statutes, the district court did not err in exercising pendent personal jurisdiction. "The district court properly weighed considerations of judicial economy, convenience, and fairness, and concluded that it would entertain the pendent claims.".

226. As previously noted, such parties are likely to have claims against one another only if they were involved in the same transaction, occurrence, or series of transactions and occurrences. See supra text accompanying note 210. By contrast, courts might well be persuaded that requiring parties to defend on other claims (not arising out of the same transactions or occurrences) would impose an unfair burden of defense.


Case Consolidation and Procedural Rights

or because defendants waived their defense of improper venue by failing to raise it within the time prescribed by Federal Rule of Civil Procedure 12(h)(1).

A court can consolidate only actions that are pending in that court (by virtue of having been commenced there, removed there, or transferred there), and the time to raise venue objections usually would have passed before the court considered consolidating an action with others. However, it could happen that defendants have asserted a venue objection that has not been ruled upon at the time of consolidation, or that a party to be joined if feasible in a case component of a consolidation (but who is a party to one of the other cases in the consolidation) has a venue objection.

Would consolidation alter application of the requirements for venue? That is, would (actual or prospective) consolidation of an action in a proper venue with an action in which a party asserts an objection to the venue alter the analysis or the ruling on that objection?

In determining the propriety of venue, who is considered a defendant, who the defendants collectively are, what the claims are, and what the subject property is, all become important questions. It is of central importance whether the court should consider each lawsuit separately, as it existed prior to consolidation, or whether it can and should consider the consolidation as an entity in addressing the requirements of section 1391 and specialized venue statutes.

Since Rule 82 of the Federal Rules provides that the Rules shall not be construed to extend the venue of actions in the district courts, it can be argued that courts must examine each component suit separately, as it existed prior to consolidation (and consider only that), in determining whether venue is proper. Whether or not Rule 82 compels this approach, the usual approach has been to treat each suit separately, as it existed prior to consolidation, in determining whether venue is proper. As a consequence, courts will not dismiss all consolidated actions when the defendant has a valid objection to venue as to one or more, but fewer than all, of the consolidated cases; they will dismiss only those components as to which

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229. Under Fed. R. Civ. P. 12(h)(1), a defense of improper venue is waived if omitted from a pre-answer motion filed under Rule 12, if the defense was then available to the party or, if the defendant makes no such motion, if it is not included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

230. This is not very likely but it might occur if the party's addition created a situation in which all defendants to the component did not reside in the same state, and if the party proposed to be joined also had a valid objection to the court's exercise of personal jurisdiction over him in this action. See 28 U.S.C. § 1391(a), (b) (Supp. V 1993).

231. Fed. R. Civ. P. 82; see supra text accompanying note 27.
venue is improper. 232 Similarly, courts ordinarily do not regard consolidation as curing venue defects that otherwise would entitle a defendant to dismissal or transfer of a case that has been made part of a consolidation. 233 However, situations occasionally have arisen in which courts have loosely construed a venue statute in order to keep consolidated cases together.

In Indiana Hospital Ass’n, Inc. v. Schweiker, 234 for instance, four cases which grew out of an administrative group appeal of denials of claimed Medicare reimbursements had been consolidated, after transfer of two of the cases pursuant to 28 U.S.C. § 1404. 235 The defendants argued that the transfer had violated the governing venue statute, 42 U.S.C. § 1395(o)(1), 236 which provides that actions to obtain judicial review of decisions by the Provider Reimbursement Review Board or the Secretary of Health & Human Services “shall be brought in the district court of the United States for the judicial district in which the provider is located . . . or in the District Court for the District of Columbia.” Noting that the governmental defendants had allowed the plaintiffs to pursue their claims as one case through the entire administrative process, and that Congress had not anticipated group appeals when it enacted the venue statute, the court concluded that it was most consistent with what Congress would have wished and also most sensible to loosely construe the statutory term “provider” to encompass the entire group. “Therefore, since many of the group members are located in the Southern District, the transferee court, the group could have brought suit here.” 237 The court upheld the transfers and denied defendants’ motions to sever and retransfer the cases allegedly transferred in error or to transfer all four components to the District of Columbia. 238

232. Weigand v. Long Transp. Co., 25 F.R.D. 496, 497 (E.D. Pa. 1960) (declaring it “highly inequitable to permit defendant, at whose instance the three cases were consolidated, to seize upon the consolidation as a lever for dismissing all the actions upon a ground which would not have been valid against two of them”).

233. Bartel v. FAA, 617 F. Supp. 190 (D.D.C. 1985) (Consolidation cannot have cured any venue defects; court must determine whether venue lies in its district for the claims asserted in each of the consolidated actions.).


237. Indiana Hospital Ass’n, 544 F. Supp. at 1175.

238. Id. at 1174–75. Parenthetically, the Indiana Hospital Ass’n case also may be viewed as exemplifying the broader reality that the prospect of consolidation of cases influences venue by influencing discretionary judicial decisions to transfer or to retain cases. See supra note 13.
Returning to the main current of the argument, Rule 82 arguably would not prohibit an interpretation of 28 U.S.C. § 1391 or other venue statutes to allow courts to focus on the consolidation as a whole as the "civil action" which is the relevant litigation unit. Rule 82 speaks only to how the Rules, not statutes, are to be construed. Regarding the entire consolidation as the pertinent civil action for venue purposes might facilitate finding proper venue through section 1391(a)(2)'s and section 1391(b)(2)'s test of "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated." When the consolidation was justified by common questions of fact, that test would likely be met when it was satisfied in any of the component actions. Thus, being able to view the consolidation as a single civil action would make a difference. It sometimes could solve venue problems.

In the less common situation where the consolidation was predicated upon common questions of law, "pendent venue" might be the only answer. That is, a court might conclude, in view of the unobjectionable presence of a party in some components of a consolidation, that that party's venue objection in another component should be denied because he cannot persuasively argue that forcing him to defend against additional claims will be unduly burdensome, so long as the claims are legally related to the purposes for which he already is defending. A similar response could be made to a party in some components who is a person to be joined to another component, if feasible, but who raises a venue objection. Indeed, one might say he already has been joined, and answer his venue objection as just indicated. If, despite the propriety of venue, a court did not regard

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239. Beattie v. United States, 756 F.2d 91, 100-04 (D.C. Cir. 1984) (Where complaint alleged claims under the Federal Tort Claims Act and common law negligence, and venue was proper with respect to the former claims, the court found venue requirements proper as to the negligence claim either as a matter of finding a single cause of action or as a matter of pendent venue. The court cited numerous other cases utilizing the concept and argued that when claims derive from a common nucleus of operative fact, pendent venue furthers the goals of judicial economy, convenience to parties, witnesses, and the court system, avoidance of piecemeal litigation, and fairness to the litigants.); Dooley v. United Technologies Corp., 786 F. Supp. 65, 80-81 (D.D.C. 1992) (Where complaint alleged both RICO and state law claims and venue was proper with respect to the RICO claims, court applied the doctrine of pendent venue to find venue proper for the state law claims because the federal and state claims had a "common basis in fact."); VMS/PCA Ltd. Partnership v. PCA Partners Ltd. Partnership, 727 F. Supp. 1167, 1173-74 (N.D. Ill. 1989) (Where venue over RICO claims was proper, court applied the doctrine of pendent venue where the state law claims arose out of the same nucleus of operative fact as the RICO claims and judicial economy, convenience of the parties and fairness mandated that the state and RICO claims to be tried together.); see generally 15 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3808 (2d ed. 1986).
itself as a convenient location for the particular strand of the litigation, it always could sever and transfer that strand to another district in which it might have been brought.

H. The Effect of Consolidated Pleadings on Justiciability, Jurisdiction, and Venue

Courts sometimes order the parties in consolidated litigation to file consolidated complaints, answers, and other pleadings. The primary purposes of such consolidated or “unified” pleadings include the following: to encourage the parties to refine their claims and defenses, to facilitate rulings on motions (such as motions to dismiss and motions to certify a class action), to reduce duplication and the volume of paper consumed by the litigation, to clarify the issues (for better litigation of the case as well as for res judicata and collateral estoppel purposes), to permit the relevance and other determinations that will have to be made during discovery to be made by reference to one set of pleadings, and to facilitate the writing of pre-trial orders.240 While unified pleadings often are worthwhile for all these purposes, determinations about justiciability, subject matter jurisdiction, personal jurisdiction, and venue should not be influenced very much by whether the court has ordered unified pleadings.

The reasons are these. First, if the Rules, applicable statutes, or Supreme Court precedents preclude the courts from treating consolidations as single civil actions or cases for jurisdictional and venue purposes, then courts cannot overrule that decision by ordering consolidated pleadings or otherwise. Second, assuming the courts are free to treat consolidations as single civil actions or cases, a court’s reasons, if any, for maintaining multiple complaints are likely to have nothing to do with matters of jurisdiction and venue. A court’s failure to order consolidated pleadings may not even reflect an actual decision, but merely represent an overlooked option. Since the absence of consolidated pleadings is, at best, weak evidence of an intent not to create a single civil action, it should not preclude the court from treating the consolidation as an entity for jurisdictional or venue purposes. Similarly, a court’s decision to order consolidated pleadings should not commit the court to treating the consolidation as an entity for jurisdictional or venue purposes, because its reasons very likely were of the kind indicated above (having to do with simplifying management, stream-

lining discovery, and the like), and having nothing to do with jurisdiction or venue. The presence of consolidated pleadings in no way necessitates treating a consolidation as a unit for jurisdictional or venue purposes. Thus, since the presence of consolidated pleadings is, at best, weak evidence of an intent to create a single civil action, the court should give such pleadings limited weight in making determinations about justiciability, jurisdiction, or venue.

I. The Single Civil Action and Degrees of Consolidation

This Article has argued that it would be constitutional for courts to regard a consolidation as a single civil action so long as any claims that are not jurisdictionally self-sufficient share a common nucleus of operative fact with a federal question among the claims or if there is minimal diversity among the parties. It also argued that courts could constitutionally regard a consolidation as a single civil action if all claims are linked by a common question of fact or law, and there is either a federal question or minimal diversity, if the Court liberalized its construction of an Article III case or controversy so that such commonality sufficed. In making those arguments, this Article always contemplated a consolidation for all purposes or for trial.

Realistically, if cases share only one, or a few, common questions of law, it is very unlikely that a federal court would consolidate them for all purposes, although a court might do so if the cases raised few or no disputed issues of fact. Consolidated briefing of legal issues would typically be more appropriate. Similarly, if cases share only one or a few common questions of fact, it is very unlikely that a federal court would consolidate them for all purposes, unless those questions are the only (or nearly the only) disputed factual questions that the cases raise. The fewer the common fact questions and the more numerous the fact questions peculiar to the individual cases, the less likely a court is to order consolidation for all purposes. Joint discovery as to the common issues would be more appropriate. Where only such joint activities are ordered or are appropriate (including all “consolidations” pursuant to 28 U.S.C. § 1407, as it is presently constituted), the cases share only a temporary embrace. I would not regard a “consolidation” for such limited purposes as creating a single civil action.

One could conclude that even “consolidation” only for discovery or pretrial should result in the affected cases being regarded as a single civil action, absent a court order to the contrary. On reflection, however, I believe that such a view would not be best for litigants or for the judicial system. “Consolidation” for pretrial that merged the actions might deter courts from ordering combined discovery, with resultant duplication, added
cost and inconvenience. Alternatively, it might bind cases together in ways that would serve the interest of no one. For example, in many circuits, parties to one of the antecedent actions in a consolidation that is treated as a single civil action have to await final judgment in the other cases, or obtain a certification under Federal Rule of Civil Procedure 54(b), in order to immediately appeal the decision of their claims.\textsuperscript{241} The imposition of such delay or of such hurdles to immediate appellate review would be inappropriate when cases had been combined for pretrial only and thereafter had taken separate paths to resolution. If an immediate appeal in an individual case that reached final judgment raised issues of significance in other cases with which it had been “consolidated” for pretrial, the courts could permit interested non-parties to be heard on that appeal. Thus, from the perspective of appeals, it is preferable for actions “consolidated” for pretrial only to remain separate actions, and not be treated as a single civil action. The advantages of a single-action system, if any, would not outweigh the incursions on litigants’ autonomy and the other complications such a system would cause.

Consideration of other aspects of litigation reinforces this conclusion. If cases are “consolidated” for discovery or pretrial only, it makes no sense to permit cross-component claims or to permit parties to one component action to refuse to join, and thereby bar, a Rule 41(a)(1) stipulated dismissal in a second component action, when the two will not be tried together.\textsuperscript{242} Moreover, issues such as the effects of consolidation-into-a-single-action on the scope of jury demands, and on the number of peremptory challenges to which litigants are entitled, never arise in “consolidations” for pretrial only. After the temporary marriage for pretrial, the actions revert to separate paths to resolution. Thus, I see little sense and no advantages to treating pretrial “consolidations” as single civil actions for purposes that transcend the pretrial proceedings.

Even during the course of the pretrial proceedings, I believe it best to continue to regard the case components as separate actions, because of complications that otherwise would arise after the “consolidation” has been dissolved. For example, suppose that pretrial “consolidation” created a single civil action and, as a result, party A to Suit One was permitted to demand interrogatory answers or answers to Rule 36 requests to admit from party D to Suit Two. Suppose further that the suits parted company after pretrial, but party A sought to introduce those answers into evidence in

\textsuperscript{241} See infra text at notes 251–252, 263–270, 275–285.

\textsuperscript{242} These matters will be further discussed in Part II of this work forthcoming in April 1995, see supra note 12.
Suit One. Complications would arise because D no longer would be a party to Suit One. Such complications can be avoided if courts treat Suits One and Two as separate throughout each litigation. 243

It is primarily where cases share a common nucleus of operative fact and derive from the same transaction, occurrence, or series of transactions or occurrences, that it makes sense to consolidate for all purposes, and it is only where such consolidations are ordered or appropriate that I would regard the consolidation as creating a single civil action. If actions have been consolidated for trial, consolidating them for discovery and other pretrial activities as well ordinarily would have been appropriate, so I would reach the same result as to such cases. When cases do share a common nucleus of operative fact and derive from the same transaction, occurrence, or series thereof, the claims all could have been brought together so far as the Rules are concerned, if not also as a matter of jurisdiction and venue. It is not nearly so radical to suggest that the courts treat the resulting consolidation as a single civil action in these circumstances.

If suits are consolidated for all purposes but bifurcated for trial, 244 I believe it still would be better to treat the suits as a single civil action than to treat them as multiple actions. Imagine mass tort suits that involve a number of common questions (such as what a manufacturer knew about the dangerous properties of its product, and when it learned of them), but also involve significant individual issues of causation and damages. Such a situation might be posed by lawsuits concerning a contraceptive device or cigarettes. Suppose that the court consolidates the cases for all purposes, but later decides that it will try all of the common issues in one trial and will fragment the trials of the issues that pertain to the individual plaintiffs, if the resolution of the common issues is such that the defendant may be held liable. Alternatively, one could imagine a further division of the case in which one or more selected common issues would be tried before other common issues. Either way, if the defendant prevails on any determinative common issue, the court would enter judgment against all of the consolidated plaintiffs, and any who desired to appeal could immediately do so.

If the plaintiffs prevailed on all the common issues, individual plaintiffs would proceed to separate trials on the issues that pertained individually to them. Absent a Rule 54(b) certification, the defendant could not appeal until a final judgment was entered. As previously noted, under a

243. Recusal issues require different handling. They will be discussed in Part II, forthcoming in April 1995, see supra note 12.
244. I use the term "bifurcated" loosely, and intend it to include situations of trifurcation or further segmentation.
single-action model and under existing law in many circuits, a final judgment will not be rendered until all of the component actions have been completely resolved. This need not lead to an untenable situation, however. If, after a particular jury reaches a verdict on an individual plaintiff’s claims, the losing party (whether plaintiff or defendant) wants to appeal, but only with respect to issues peculiar to this plaintiff or this individual proceeding,245 the court ought to enter a Rule 54(b) certification to enable the parties to the tried component to promptly resolve the issues between them.

Still assuming a single action model or litigation in a circuit that treats a consolidation as a single action for appeals purposes, if the defendant wants to appeal any rulings made during the trial of the common issues, defendant would have to persuade the trial court246 to enter a Rule 54(b) certification, to enable defendant to immediately appeal. Ordinarily, the court should be inclined to make the certification so as to avoid trials of the issues peculiar to other individual plaintiffs, which would be fruitless if the court of appeals reversed and held for the defendant on a determinative common issue.247 In addition, certifying an immediate appeal would save the plaintiff, who might be very needy, from what could be a long delay waiting for a final judgment encompassing all of the consolidated cases. The time required for appeal, affirmance, and payment of the judgment is substantial in itself. Certification also would save both parties from an extended delay before re-trial, if one were necessary. A benefit of this model is that, in any such certified appeal, all of the interested plaintiffs would be appellees, since they are parties to the civil action created by the consolidation and their interests would be directly at issue on the appeal.

The main disadvantage of the approach sketched above seems to be that it creates a risk that the first trial court to resolve a component will not certify its decision for appeal.248 If the components were not regarded

245. Issues peculiar to a particular plaintiff would include such matters as the contention that insufficient evidence of causation was presented to get the jury, or that the damages assessed were not supported by the evidence.

246. I refer here to the trial court that brought the individual plaintiff’s action to resolution.

247. For simplicity, one can assume that the decisions of the appeals court would govern in all the trial courts hearing the individual-issues trials. That may not be the case.

248. Such a denial would rarely be disturbed by an appellate court. See 6 MOORE’S FEDERAL PRACTICE, ¶ 54.41[3], at 54–277, 54–278 (2d ed. 1994) (“[T]here may be exceptional cases where an appellate court is justified in mandamusng the district court to execute the certificate or in forthwith reviewing the interlocutory order by the medium of a prerogative writ. But certainly as a general proposition the district court’s refusal to execute a certificate involves an exercise of discretion that will not be interfered with by an appellate court.”); accord Middleby Corp. v. Hussman Corp., 962 F.2d 614, 616 (7th Cir. 1992).
as a single action, there would be no question that that resolution would be expressed in an immediately appealable final judgment. However, the risk of serious delay is substantially reduced by the fact that every time an individual component is resolved by a court, that court will have the opportunity to enter a Rule 54(b) certification. In addition, treating the collective components as a single civil action would entail benefits in terms of justiciability, jurisdiction, and venue, as described earlier in this Part of the Article, and additional benefits that will be described in Part II of the Article. Those benefits would be lost if bifurcation for trial, of cases previously consolidated for purposes including trial of common issues, were to preclude or undo the merger of the cases into a single civil action. Among other things, if consolidation were not treated as a single civil action when the trial is segmented, the parties to the other components would not necessarily have rights as parties to an appeal of rulings made during the trial of common issues. Although the appeals court could allow them to be heard, their entitlement to be heard as a full party would be unclear and insecure. On balance, it appears best to treat as a single civil action lawsuits that are consolidated for all purposes or for purposes that include trial of common issues, but which are bifurcated for trial.

Of course, if the degree of consolidation is to have far-reaching consequences, it will be (indeed, even in the current procedural world it is) important for courts to state clearly whether they are consolidating only certain issues or whole actions and whether they are doing so for limited purposes or for all purposes. Failure to do so will create the very uncertainties that litigants are entitled to be spared and will require appellate courts to make inferences from what trial courts have done. A different vocabulary for less-than-complete consolidations, which never would create single civil actions, would help courts to accurately reflect their intentions. Courts could employ such a different vocabulary under the current Rule 42 (which distinguishes between consolidations and joint hearings and trials), or the Rule could be amended to furnish a new vocabulary. Such a new vocabulary would not be difficult to invent. Under the proposals of this Article, a revised Rule could speak of “consolidation” when referring to consolidation for all purposes and “consolidation for trial” when that is intended. A revised Rule could speak of unified multi-case pleadings, joint (or multi-case) hearings, and multi-case discovery or pretrial, when referring to limited purpose conglomerations. Only consolidated cases and cases consolidated for trial would be treated as a single civil action in the myriad contexts where that characterization matters.
J. Summary

To quickly sum up the most important points made thus far, there is good reason to believe that the Federal Rules and jurisdictional statutes can be interpreted to permit the product of lawsuit consolidation to constitute a single civil action which would not exceed the boundaries of an Article III case or controversy. Neither the Federal Rules of Civil Procedure, nor the Rules Enabling Act, nor the Congressional statutes conferring jurisdiction over prescribed categories of civil actions, would be violated by considering the litigation unit created by case consolidation a single civil action. Furthermore, such an all encompassing civil action would be constitutional under Article III when each of the component cases is jurisdictionally self-sufficient or when any claims that are not jurisdictionally self-sufficient arise out of a common nucleus of operative fact with claims (within the consolidation) that are. Whether the Supreme Court's 1933 decision in Johnson v. Manhattan Railway precludes that outcome is debatable. This Article has argued that Johnson is not preclusive, as evidenced by the fact that, in making decisions about standing, the Court itself and lower courts often treat a consolidation as a single case or action. My position, that courts should treat a consolidation as a single civil action, thus follows case law in some respects, while it would lead case law in others.

The foregoing portions of this Article also have examined how courts treat consolidations for purposes of other justiciability doctrines and in determining subject matter jurisdiction, personal jurisdiction, and venue. It explored how analyses and outcomes would change if courts treated consolidations as a single case or action for these purposes. This Article has shown when it makes a practical difference whether a consolidation is treated as a single civil action and what differences it makes. The Article concluded that to treat a consolidation as a single civil action and Article III case for purposes of subject matter jurisdiction would expand the universe of claims the federal courts could hear, although doctrinal and statutory limits constrain that expansion. Moreover, through discretion in the decisions whether to consolidate and whether to exercise supplemental jurisdiction, the federal courts would determine case-by-case when and to what extent they actually would hear more claims than they do at present.

For reasons explained above, treating a consolidation as a single civil action also could expand the array of persons over whom courts exercise personal jurisdiction and the number of proper venues. In so doing, it would reduce the situations in which courts would have occasion to dismiss an action for lack of an indispensable party. In my view, the expansions of jurisdiction and of proper venues that this view of consolidations would
permit would facilitate just and efficient decision making, and would not impose unfair burdens on litigants.249

My argument that courts should treat a consolidation as a single civil action applies, however, only when cases have been consolidated for all purposes or for trial, including bifurcated trials. In order to encourage courts to think carefully about the extent to which they want to jointly litigate separately filed proceedings, and in order to facilitate the clear communication of their intent to the parties and to courts of appeals, I urge courts and rulemakers to elaborate their vocabulary. They can speak of "consolidation" only when referring to consolidation for all purposes, of "consolidation for trial" when that is intended, of unified multi-case pleadings, joint (or multi-case) hearings, and multi-case discovery or pretrial when referring to limited purpose consolidations. Then, all concerned will be better able to anticipate the consequences of the court's order.

This Article next addresses how and under what circumstances courts have permitted consolidation to affect the procedural rights of litigants in matters related to appellate jurisdiction. It will again consider whether a better system can be built on the treatment of trial level consolidations as single civil actions than can be built on the assumption that each component retains a separate identity.

IV. APPELLATE JURISDICTION

This Article next considers the various respects in which consolidation may alter the timing, scope, location, and parties to an appeal. The focus

249. This Article's proposals could be adopted if the consolidation proposals of the American Law Institute became law. The A.L.I. Recommendations contemplate consolidation of actions that involve common questions of fact. A.L.I. Recommendations, supra note 6, § 3.01(a), at 37–38. They also provide that, "[t]ransfer and consolidation need not be denied simply because one or more of the issues are not common so that consolidated treatment of all parts of the dispersed actions cannot be achieved." Id. at § 3.01(d), at 38. See also id. § 3.05(c), at 94 ("In an appropriate case, transfer and consolidation may be ordered only for pretrial purposes or only with regard to certain issues."). These principles are familiar from current consolidation law. I agree with them and urge that if there are so many uncommon issues that treating actions as a single civil action would not promote their just and efficient conduct, tools short of consolidation for all purposes should be employed. See infra text accompanying note 145. It also is worth mention that the A.L.I. Recommendations authorize transferee courts to exercise personal jurisdiction over parties "to the full extent of the power conferrable on a federal court under the United States Constitution." A.L.I. Recommendations, supra note 6, § 3.08, at 147. There are no limits on the venue to which cases can be sent for consolidation. Id. at § 3.04, at 85. Finally, the A.L.I. Recommendations propose that cases be removable to federal court for consolidation if they arise from the same transaction, occurrence, or series as an action pending in federal court and share a common question of fact with that action, id. at § 5.01, at 220–21, and confers supplemental jurisdiction to hear such actions. Id. at § 5.03, at 256.
here is not on consolidations for appeal but rather on the effect on appeal of case consolidations effected in the trial courts. In examining these effects, one must again interpret Rule 42 and consider the relevance and implications of Johnson v. Manhattan Railway. One also must interpret additional Federal Rules of Civil Procedure, Federal Rules of Appellate Procedure, and statutes governing appellate jurisdiction. A constellation of issues provides the framework for this area of the law. The focus will again be in what circumstances, and in answer to what questions, it would make a difference to regard a consolidation as a single civil action, and what differences it would make. Once that analysis has been done, one can judge which view creates the preferable procedural landscape.

A. The Existence of an Immediately Appealable Final Judgment

The most frequently litigated issue in this area is whether those parties against whom a court has entered a judgment have an immediately appealable final judgment if the judgment disposes of all the claims by all the parties in their lawsuit, but their suit was consolidated with other actions in which one or more claims remain pending. The decisions of the courts generally follow one of two models. Under Model I, the immediate appeal model, an immediately appealable final judgment exists under the circumstances described above. Under Model II, the delayed appeal model, no immediately appealable final judgment exists. Those who have lost in the trial court must await the entry of judgment on all the claims in the consolidated actions, before they may appeal as a matter of right. They may appeal sooner if, but only if, the trial court expressly directs entry of a final judgment and expressly determines that there is no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, or if some other exception to the "final judgment rule" applies. Which model

250. Some similar issues can arise in the context of cases prosecuted independently at the trial level but consolidated for purposes of appeal. See United States v. Tippett, 975 F.2d 713, 716 (10th Cir. 1992) (raising the question whether, by virtue of appeals having been administratively consolidated in the court of appeals, a prisoner seeking witness fees was a party to a United States Supreme Court case in which another prisoner had successfully sought witness fees, and whether the party status recognised by Supreme Court Rule 12.4 rendered a legislative exception, allowing the witness fee allowed in that companion appeal, applicable to this prisoner's claims for fees). Under Fed. R. App. P. 3(b), "Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals."

251. Under the "final judgment rule," which is codified for the federal courts in 28 U.S.C. § 1291 (1988) ("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
governs varies among the federal appellate circuits, and in most circuits also
depends on a variety of circumstances.252

The two circuits, the First and the Sixth, that purport to adopt Model
I as the norm rely primarily on Johnson and its concept of consolidation as a
grouping of lawsuits for "convenience and economy in administration, but
[which] does not merge the suits into a single cause, or change the rights of
the parties, or make those who are parties in one suit parties in another."253 On this view, the judgments entered in individual cases are
unquestionably final judgments within 28 U.S.C. § 1291.254 Even these

United States, . . . except where a direct review may be had in the Supreme Court."). "Appeals
are allowed only after all the issues involved in a particular lawsuit have been finally
determined by the trial court." Jack H. Friedenthal et al., Civil Procedure 582 (2d ed. 1993).
For an example of a case in which an exception to the final judgment rule other than Rule
54(b) applied, see Meyer v. Indian Hill Farm, Inc., 258 F.2d 287, 290 (2d Cir. 1958) (Where
interlocutory order was appealable pursuant to 28 U.S.C. § 1292(2)), appellate jurisdiction was
unaffected by suit being part of a consolidation or by absence of Rule 54(b) certification.

252. For earlier and quite useful scholarly writings on the appealability of judgments in con-
solidated actions, see generally Jacqueline Gerson, The Appealability of Partial Judgments in Consol-
didated Cases, 57 U. Chi. L. Rev. 169 (1990) (comparing the three most common approaches to
the question, and making recommendations); Virden, supra note 51 (making a circuit by circuit
survey); Marianne Fogarty, Note, The Finality of Partial Orders in Consolidated Cases under Rule
54(b), 57 Fordham L. Rev. 637 (1989).

First Circuit also purported to find in Rule 2 ("There shall be one form of action to be known as
'civil action.' ") and Rule 3 ("A civil action is commenced by filing a complaint with the court.") of
the Federal Rules of Civil Procedure reason to conclude that Rule 54(b) cannot properly be
read to apply to the circumstances in question because it applies to "an action," and consoli-
dations constitute several actions. In re Massachusetts Helicopter Airlines, Inc., 469 F.2d 439,
441 (1st Cir. 1972). For arguments contra, see Gerson, supra note 252, at 180 ("Rule 3 . . . does
not preclude the possibility that a consolidated lawsuit should also be treated as one action under
the rules. A 'literal' reading of the rules simply does not resolve whether Rule 54(b) applies to
consolidated cases."); supra note 63 and text accompanying notes 62–63.

over appeals from all final decisions of the federal district courts.

See, e.g., Beil v. Lakewood Eng’g & Mfg. Co., 15 F.3d 546, 551 (6th Cir. 1994) (Summary
judgment entered as a sanction against actor, terminating one action, was final appealable order
despite consolidation with a continuing wrongful death and personal injury action.); Lundblad v.
Celeste, 874 F.2d 1097, 1103 (6th Cir.), vacated on other grounds, 882 F.2d 207 (6th Cir. 1989)
(en banc), vacated in part on other grounds, 924 F.2d 627 (6th Cir. 1991) (en banc), cert. denied,
501 U.S. 1258 (1991) (entertaining cross-appealed dismissal of the claim against a defendant
despite consolidation of other claims, which were continuing); Kraft, Inc. v. Local Union 327,
Teamsters, 683 F.2d 131, 133 (6th Cir. 1982) (Dismissal of one among consolidated actions was a
final appealable order.); see also FDIC v. Caledonia Inv. Corp., 862 F.2d 378, 380–81 (1st Cir.
1988) (While choosing not to decide the jurisdictional issue where the court believed that affir-
mauce on the merits led to the same result, the court noted that a decision for jurisdiction ap-
peared to be required by In re Massachusetts Helicopter Airlines, Inc., 469 F.2d 439, 441–42 (1st
Cir. 1972), where summary judgment had been granted in one of two consolidated cases, at least
if the reason for consolidation was convenience and judicial efficiency.); Gulf Coast Fans, Inc. v.
Midwest Elecs. Importers, Inc., 740 F.2d 1499, 1506–07 (11th Cir. 1984) (Where cases consoli-
circuit actually adopt Model I as the norm only under certain circumstances, however. Thus, in In re Massachusetts Helicopter Airlines,\textsuperscript{255} the seminal case of this variety, the First Circuit noted that the cases at bar had maintained their separate identities (although in unspecified ways) throughout the litigation, and that the trial court had entered separate judgments.\textsuperscript{256} It declined to say that consolidated actions must remain separate under every conceivable set of circumstances, indicating it doubted this to be so.\textsuperscript{257}

Model I has certain virtues. It honors litigants' historic right to an immediate appeal when the trial court has entered a final judgment in their case. It expedites final resolution of civil actions in which all the claims have been resolved. It protects litigants against delay in the appellate process occasioned solely by their case having been consolidated with others. By its clarity, this rule eliminates uncertainties that could lead to mistaken delay in the filing of an appeal, which could preclude an appeal at any time.\textsuperscript{258} The approach of Model I is subject to a number of criticisms, however. It reads more into the Federal Rules, Johnson, and 28 U.S.C. § 1291 than any of them demands, since none need be read to

dated for trial had been severed, the time to appeal in one was unaffected by the course of proceedings in the other.). \textit{But cf.} Firestone Tire & Rubber Co. v. General Tire & Rubber Co., 431 F.2d 1199, 1200 (6th Cir. 1970), \textit{cert. denied}, 401 U.S. 975 (1971) (Order adjudicating a party guilty of fraud on the court in a case the court then dismissed was not immediately appealable where trial court had “consolidated” the issues of that case into another.); In re Belmont Place Assoc. v. Blyth, Eastman, Dillon & Co., 565 F.2d 1322-23 (5th Cir. 1978) (Consolidation of a counterclaim with another action did not constitute a Rule 21 severance from the case of which it originally was part so as to render dismissal of the latter immediately appealable) discussed in Ringwald v. Harris, 675 F.2d 768, 771 n.7 (5th Cir. 1982); Massachusetts Helicopter Airlines, Inc., 469 F.2d at 441-42 (The court held judgments after trial in cases consolidated for pretrial and trial to be immediately appealable despite new trial order in another of the consolidated cases. The court based its conclusion upon Johnson, language from 5 \textsc{Moore et al.}, supra note 14 ¶ 42.02, at 42-21, 42-22 (“merger is never so complete even in consolidation as to deprive any party of any substantial rights which he may have possessed had the actions proceeded separately”), its ability to distinguish cases that arguably could support a contrary result, and its interpretation of Rule 54(b).).

\textsuperscript{255} 469 F.2d 439 (1st Cir. 1972).

\textsuperscript{256} Id. at 440-441; see also Minnesota v. United States Steel Corp., 44 F.R.D. 559, 581-82 (D. Minn. 1968) (relating the number of rights to appeal to the number of judgments, consolidating for pretrial and trial, but envisioning a consolidation that would eventuate in separate judgments and in appellate rights that should not be consolidated).

\textsuperscript{257} Massachusetts Helicopter, 469 F.2d at 442 n.3.

\textsuperscript{258} \textit{But see} Albert v. Maine Cent. R.R., 898 F.2d 5, 6-7 (1st Cir. 1990) (Despite the supposed certainty in the First Circuit, the appeals of ten summary judgment losers were dismissed as untimely when brought within 30 days of the dismissal of the remaining cases in a consolidation for pretrial, but approximately seven months after the post-summary judgment severance of their cases from the others. The appellants could appeal only within 30 days of the entry of judgment terminating all claims and all parties in their case.)
compel a district court order disposing of one case consolidated with others to constitute a final appealable judgment. In addition, this approach may result in appellate courts making decisions as to the merits on the basis of a less complete record than would be ideal and than will be available after the disposition of the entire consolidation. Because this approach ignores the degree of similarity among the consolidated cases, it risks inefficient use of appellate judicial resources through duplicative and piecemeal appeals of the final judgments to be entered in the various consolidated cases. For the same reason, it imposes a risk of prejudice on the parties whose cases continue at the trial level, because the governing court of appeals may determine issues in which those parties have an interest, in a proceeding in which they may have no role. Such appellate decisions are likely to have at least stare decisis effect and may have collateral estoppel or res judicata effects as well in the remaining consolidated cases. Thus, a per se rule of finality can be faulted for requiring all appeals of completely resolved components of consolidated cases to be heard immediately, even when the benefits are slight and the drawbacks considerable. This approach also has untoward strategic implications. It may encourage plaintiffs to file separate actions and seek to have them consolidated, rather than join all the claims and parties that they might, in one action. In this way, the losing party may immediately appeal adverse judgments, as of right, while related claims remain pending in the district court.

It may be that the drawbacks of this approach are really not that severe: that if identical issues are appealed later, the court should be able to dispose of them summarily; that if parties to other components of the consolidated cases have an interest in the issues on appeal, they may seek and be afforded an opportunity to be heard, and if that opportunity is denied, they still are no worse off than if the courts had not consolidated the actions; that if the issues appealed later are not identical, separate appeals will not be duplicative; and that the feared strategic gamesmanship is unlikely to occur because plaintiffs are not typically so pessimistic and lawyers frame their lawsuits based on more immediate and less speculative concerns than the posture on appeal. However, the fact that most courts of appeals

259. See supra text accompanying notes 50–111.
260. Because of this problem, the court in Bergman v. City of Atlantic City, 860 F.2d 560, 565 n.6, 567 (3d Cir. 1988), held that a defendant in a consolidated action continuing in the trial court was entitled to be heard as an appellee on the issues which directly affected its interests. See infra text accompanying notes 365–372.
262. See Bergman, 860 F.2d at 566 n.9, 566–67. For criticisms of this approach, see generally Gerson, supra note 252, at 180–83.
have eschewed Model I indicates that most are concerned that affording all parties to consolidated cases an unconditional right to appeal immediately, when their component is finally disposed of, would adversely affect both the appeals courts' workload and other parties to the consolidation.

The decisions of the two circuits, the Ninth and Tenth, that purport to adopt Model II, the delayed appeal method, as the norm share three characteristics. First, they implicitly distinguish Johnson. They can distinguish Johnson on the grounds that it is a pre-Federal Rules decision and was not directed to appeal rights. Remarkably, the opinions in this category of cases have not explicitly even mentioned Johnson. Second, they treat consolidations as single civil actions. Again remarkably, the cases do not acknowledge that they are doing so. Consequently, the cases do not explicitly consider whether it is permissible to treat consolidations as single civil actions for purposes of the final judgment rule. Third, the opinions of these two courts make policy arguments in support of limiting the parties in a consolidated action to a single appeal at the termination of all of the consolidated cases, absent a Rule 54(b) certification of the kind that would expedite appeals in a completely independent case in which the trial court had reached a decision as to fewer than all of the claims or parties.

The leading case of this genre, Huene v. United States, relied exclusively on policy arguments. It criticized the treatment of consolidated cases as separate actions for purposes of the final judgment rule as overly mechanical, stressing that “an appeal prior to the conclusion of the entire action could well frustrate the purpose for which the cases were originally consolidated, ... could ... complicate matters in the district court ...

263. Ringwald v. Harris, 675 F.2d 768, 770 (5th Cir. 1982), also observes that, “the precise nature of the consolidation ordered in Johnson is not clear.” In Johnson, a district court judge had consolidated two cases, one by the American Brake Shoe Company and one by Johnson. The judge consolidated the cases because he had some doubt of the propriety and effectiveness that an order entered only in Johnson’s suit would enjoy, when that order vacated orders by which a senior circuit judge had assigned himself to hear all matters in American Brake Shoe’s suit and which he then entered in that suit. Johnson v. Manhattan Ry., 289 U.S. 479, 493–94 (1933). Thus, the consolidation was not motivated by the usual considerations and may have been for limited purposes. The Supreme Court did not review the propriety of the consolidation order because the petitions had not sought reversal of the consolidating decree. Id. at 494.

264. See, e.g., Trinity Broadcasting Corp. v. Eller, 827 F.2d 673, 675 (10th Cir.), adhered to, reh’g denied, en banc, 835 F.2d 245 (10th Cir. 1987), and cert. denied, 487 U.S. 1223 (1988); Huene v. United States, 743 F.2d 703, 704–705 (9th Cir. 1984).

265. See, e.g., Trinity Broadcasting Corp., 827 F.2d at 675 (not acknowledging the question); Huene, 743 F.2d at 704–05 (same).

266. 743 F.2d 703 (9th Cir. 1984).
[and] cause an unnecessary duplication of efforts in the appellate court." It criticized a more flexible, case-by-case approach for making the appellate, rather than the trial court, the tribunal deciding whether and when an appeal is appropriate, and for creating uncertainty as to when judgments become final. "It is essential that the point at which a judgment is final be crystal clear because appellate rights depend upon it." Uncertainty may cause litigants either to waste time and resources by filing premature notices of appeal or to lose the opportunity to appeal by dint of filing late, in the mistaken belief that a judgment was not final and immediately appealable. The Huene court held absolutely that "where an order disposes of only one of two or more cases consolidated at the district court level, the order is not appealable under 28 U.S.C. § 1291 absent a Rule 54(b) certification."

The absolute rejection of immediate appeals of consolidated cases, absent Rule 54(b) certification, has the virtue of clarity and consequently of avoiding the waste or prejudice that may come of uncertainty as to when an immediately appealable final judgment comes into existence. It has the further virtue of giving the trial court the decision whether to permit

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267. Id. at 704.
268. Id.
269. Id.
270. Id. at 705; accord Trinity Broadcasting Corp. v. Eller, 827 F.2d 673, 675 (10th Cir.), adhered to, reh'g denied, en banc 835 F.2d 245 (10th Cir. 1988), and cert. denied, 487 U.S. 1223 (1988) (ruling prospectively only, so as not to inequitably treat the appellant, who had filed a notice of appeal after summary judgment had been granted to defendants in one among other consolidated cases, but before the trial court made a Rule 54(b) certification); see also Phillips v. Heine, 984 F.2d 489, 490 (D.C. Cir.), cert. denied, 114 S. Ct. 285 (1993) (sounding quite absolute, relying on Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of America, 808 F.2d 133, 136 (D.C. Cir. 1987) which held that where civil actions are consolidated for all purposes, and court enters a single final judgment simultaneously disposing of all the cases, all parties have 60 days to file a notice of appeal if the United States is a party in at least one of the consolidated actions); Kerah v. General Council of the Assemblies of God, 804 F.2d 546, 547 n.1 (9th Cir. 1986) overruled in part by Hollinger v. Titan Capital Corp., 914 F.2d 1546 (9th Cir. 1990) (where the issue was finessed by entry of a Rule 54(b) certification after appellants, who had lost a consolidated case on summary judgment, had filed their notice of appeal); Wyoming ex rel. Pacific Intermountain Express, Inc. v. District Court, 387 P.2d 550, 552-53 (Wyo. 1963).
271. It was to overcome uncertainty as to the time for taking an appeal from a final decision on fewer than all of the claims in a multiple claims action that Fed. R. Civ. P. 54(b) was amended in 1946 (the amendments to take effect in 1948) to provide:

When more than one claim for relief is presented in an action, . . . the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims.

an immediate appeal. A trial court arguably is in a better position than an appellate court to make the decision because of its greater familiarity with the consolidated cases, and because it can decide the parties' appeal rights sooner than an appellate court could. However, as the courts have employed it, the delayed appeal model is theoretically unsatisfying because the courts have avoided the threshold issue of whether and when a consolidation may be treated as a single civil action for purposes of the final judgment rule and Rule 54. Absent justification of that position, arguments predicated on efficiency should not suffice, any more than they preclude immediate appeals of judgments in unconsolidated cases merely because similarities among parties and issues might lead to duplication of effort by the appeals courts.

Returning then to the threshold issue of whether and when a consolidation may be treated as a single civil action for purposes of the final judgment rule, this Article argued earlier that neither Johnson nor the Federal Rules precludes the federal courts from regarding a consolidation as a single civil action, and that there are persuasive reasons why the courts should do so. A civil action could be defined to include all claims, albeit originally brought separately, that share a common question of law or fact, so long as Article III of the Constitution is not violated. Certainly, insofar as each of the consolidated cases, considered independently, is supported by a basis of subject matter jurisdiction, a consolidation would not exceed the limits imposed on the federal courts by Article III. Moreover, opposition to regarding a consolidation as a single civil action for purposes of determining original jurisdiction, based upon a preference to hold constant or shrink the universe of cases and claims that federal courts may hear, is out of place in the appeals context where such treatment poses no danger of expanding the universe of claims that the federal district courts can hear. This Article thus bolsters the delayed appeal approach (Model II) by providing a theoretical basis for regarding consolidations as single civil actions.

Thus bolstered, Model II is theoretically justified, brings certainty to the parties, provides the opportunity for immediate appeal through Rule 54(b) certification, and affords a mechanism for determining when an im-

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272. See id. at 437 ("The timing of such a release is, with good reason, vested by [Rule 54(b)] primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay.").

273. See supra text accompanying notes 45–76.

274. This Article showed that, in general, the federal courts require that to be true, see supra text accompanying notes 116–123, although it argued that regarding consolidations as single civil actions so as to expand the universe of claims the federal courts could hear also would be constitutional. See supra text accompanying notes 138–141.
mediate appeal is appropriate which utilizes the expertise of the trial courts. Its primary drawback is that it imposes delay on parties who would have had a right to immediately appeal, had the court not consolidated their actions. But it may be best to accept some curtailment of the traditional right to appeal immediately in exchange for the benefits of consolidation, softened by Rule 54, which can be used to expedite appeals both “of” and “within" each component of a consolidation. The alternative is to accept the costs of recognizing an immediate right of appeal as if there had been no consolidation, the Model I approach.

I do not believe that there is any satisfactory middle ground. I considered the possibility that the broad definition of a “civil action” that this Article proposes is poorly suited for the appeals context and that, even without Rule 54(b) certification, parties to consolidated cases sometimes should have a right of immediate appeal when their own case has been entirely resolved. However, there seems to be no workable method for identifying such situations.

One approach would be for the courts to adopt a definition of a “civil action” that is more restrictive than “everything consolidated,” but broader than “each lawsuit component of the consolidation.” By weakening the underpinnings of the delayed approach model (Model II) with respect to consolidations that exceed the boundaries of a single civil action (in whatever intermediate manner it is defined), this approach would make it difficult for courts to justify disallowing an immediate appeal of right to the losers in a completely disposed of case that is part of a consolidation but constitutes a distinct civil action. The civil action is the unit we typically use to determine whether a final, immediately appealable, judgment exists.

Under this approach, one would get some immediately appealable judgments, without Rule 54(b) certifications. Imagine, for example, that in the context of consolidations a civil action were defined as those claims that could have been brought together pursuant to the Federal Rules on joinder of claims and parties. Some claims in a consolidation may fall outside those bounds because, although they share a common question of law or fact with the other claims, they do not arise out of the same transaction, occurrence, or series thereof. Insofar as plaintiffs originally brought such “outside" claims in a separate suit that the court has disposed of early (as by a motion for summary judgment), under this approach, the courts would have difficulty justifying a refusal to recognize an immediate right of appeal in the losing parties. By definition, theirs would be a civil action distinct from the rest of the consolidation. This approach might not make a great deal of sense when considered in conjunction with the policies that underlie the final judgment rule, however, for the very common questions
that predicated the consolidation might be at issue on appeal. This Article argued earlier that consolidations should be treated as single civil actions when they are consolidations for all purposes or for trial. My conclusion here, in the appellate context, is consistent with that previous argument. Although most cases consolidated for all purposes or for trial will have arisen out of the same transaction, occurrence, or series thereof (one ordinarily will not have in the consolidation the "outsider" suits I described), if "outsider," limited commonality suits have been made part of a consolidation for all purposes or trial, the courts nonetheless should regard the whole as a single civil action for appeal purposes, to avoid the anomaly described above.

The circuits that take a case-by-case approach (to the immediate appealability of judgments that determine all the claims in a particular case that is part of a consolidation) have taken a tack somewhat similar to the middle ground I reject. They employ multi-factor tests to determine whether to follow Model I or Model II in a particular case. Whether or not they recognize it, these courts' choice between the two models turns primarily upon factors that indicate whether the whole consolidation should be viewed (and treated) as a single civil action, using a more restrictive notion than "everything that has been consolidated." Having made that multi-factor analysis, the courts sometimes bolster their conclusion, where appropriate, with arguments for the greater efficiency of a single appeal, to occur at the termination of the entire consolidation.

If one looks at this set of cases collectively, one finds that the courts rely on just a few basic criteria, and several subsidiary indicia. One primary criterion is whether the consolidated actions could have been filed as a single case. \(^{275}\) Strangely, having made that their touchstone, the courts do not analyze whether the parties could have met the requirements of Rule

\(^{275}\) See, e.g., Road Sprinkler Fitters Local Union v. Continental Sprinkler Co., 967 F.2d 145, 151 (5th Cir. 1992) (concluding the two actions could have been filed as one: "[B]oth arose out of the single employer/alter ego issue and their theories of recovery are virtually identical"); Hagman v. City Investing Co., 851 F.2d 69, 71 (2d Cir. 1988) (concluding the actions could have been filed as one where the crux of both was that plaintiff's employment had been wrongfully terminated); Bank S. Leasing v. Williams, 769 F.2d 1497, 1500 n.1 (11th Cir. 1985), vacated on other grounds, 778 F.2d 704 (11th Cir. 1985); Ivanov-McPhee v. Washington Nat'l Ins. Co., 719 F.2d 927, 927-28, 930 (7th Cir. 1983) (concluding the actions could have been filed as one where the crux of both was that plaintiff's employment had been wrongfully terminated with respect to a number of suits by the same plaintiff alleging employment discrimination); Ringwald v. Harris, 675 F.2d 768, 768-69, 771 (5th Cir. 1982) (same, with respect to suits by the same plaintiff on related transactions).
20, governing permissive joinder of parties.\textsuperscript{276} The courts do consider related matters, but their test seems to be both tighter and looser than Rule 20. Thus, the courts consider the degree to which the parties, and the complaints and answers or legal theories asserted, are the same or substantially similar from one component case to another. Another factor is whether an appellate decision in one component case would be likely to determine the rights of the parties to the still pending actions.\textsuperscript{277} The greater the overlap in parties and claims, the more likely the court is to conclude implicitly that it may appropriately treat the consolidation as a single civil action for purposes of the final judgment rule.

For reasons explained below, I do not endorse the case-by-case approach.\textsuperscript{278} Those courts which continue to embrace it should, however, consider the classification of litigation into repetitive, reactive, and related cases.\textsuperscript{279} Presumptively, cases that are essentially repetitive or reactive, even if not identical in all respects, should be treated as one, so that no immediate appeal will lie until all the repetitive or reactive consolidated cases have come to final judgment. On the other hand, cases that are neither repetitive nor reactive, but are merely related to one another by one or more common questions of law or fact, should not presumptively be treated as one for appeals purposes. A closer look would be required. Even when cases share only some of the same parties or issues, separate appeals can be duplicative and can generate uncertainty as to the impact of the appeals court’s decisions on the continuing consolidated lawsuits. But the

\textsuperscript{276} \textit{Fed. R. Civ. P. 20}. Joinder of parties turns on whether the rights to relief asserted arise out of the same transaction, occurrence, or series thereof and share one or more common questions of law or fact. The courts that employ this test also do not focus on matters of personal jurisdiction, subject matter jurisdiction, and venue, all matters that determine whether and where a set of claims properly could have been brought together in federal court. In this context, the courts are right to ignore those matters. Personal jurisdiction, subject matter jurisdiction, and venue all should be proper in the individual cases that constitute the consolidation, whether they were commenced in, transferred to, or removed to the district court where they have been pending. To consider the consolidated cases as one in determining whether these requisites have been satisfied is neither necessary nor appropriate when considering for appeals purposes whether the cases could have been brought as a single action.

\textsuperscript{277} See, e.g., \textit{Road Sprinkler}, 967 F.2d at 151; \textit{Kamerman v. Steinberg}, 891 F.2d 424, 429–30 (2d Cir. 1989) (relying in part on fact that the case on appeal was the only one to present derivative claims); \textit{Bergman v. City of Atlantic City}, 860 F.2d 560, 564–65 (3d Cir. 1988) (relying in part on substantially similar complaints and parties); \textit{Hageman}, 851 F.2d at 71 (citing fact that crux of both actions was the same, parties and defenses overlapped); \textit{Sandwiches, Inc. v. Wendy’s Int’l, Inc.}, 822 F.2d 707, 709 (7th Cir. 1987) (cases were characterized by overlap in parties and legal issues); \textit{Ivanov-McPhee}, 719 F.2d at 927–30 (citing common plaintiff, presence of a particular defendant in a number of the cases, and that actions could have been brought as one suit).

\textsuperscript{278} See infra text accompanying note 285.

\textsuperscript{279} See supra text accompanying notes 21–24.
overlap in the cases may be so slight, and the issues that are ripe for appeal so separate from the issues in the cases that remain in district court, that denial of an immediate appeal might serve no valid purposes for the continuing cases, but only delay resolution of those in which a final decision has been rendered.

A second primary criterion on which the courts rely is whether the trial courts consolidated the cases for all purposes, as opposed to consolidating them only for pre-trial or only for trial purposes, or the like. A district judge has made clear whether he or she ordered consolidation for all purposes. Particularly when the degree of the consolidation is ambiguous, the appellate court may look to other signs of the district court's intent, such as whether that court ordered the filing of consolidated pleadings or instead preferred separate pleadings and the maintenance of separate docket sheets, whether there were any purposes for which the trial court did not treat the consolidation as one, and whether the district court entered a separate judgment in favor of the appellee or otherwise indicated its intent to enter a final judgment. If the appellate court finds the consolidation to have been for all purposes, it is likely to conclude that treating the consolidation as a single civil action for purposes of the final judgment rule is appropriate, if the court also concluded, based on the parties, claims, and defenses, that the consolidation should be treated as a

280. See, e.g., Road Sprinkler, 967 F.2d at 151; Middleby Corp. v. Hussmann Corp., 962 F.2d 614, 615 (7th Cir. 1992); Kameran, 891 F.2d at 429–30 (finding circumstances to overcome strong presumption against appealability, despite consolidation for all purposes); Lewis Charters, Inc. v. Huckins Yacht Corp., 871 F.2d 1046, 1048–49 (11th Cir. 1989) (finding that the judgment was immediately appealable where actions were consolidated only for joint hearings and trial); Bergman, 860 F.2d at 563, 565; Hageman, 851 F.2d at 71; Sandwicthes 822 F.2d at 709 (The link between the legal positions of the parties indicated that the cases be treated as consolidated for all purposes, even if that was imperfectly accomplished.); Bank S., 769 F.2d at 1500 n.1; Ivanov-McPhee, 719 F.2d at 930 (pointing out that there was no clear evidence that the actions had in substance been consolidated only for limited purposes); Ringwald, 675 F.2d at 771 (Where "there is proper consolidation of causes that could have been filed as a single suit, and the consolidation is clearly for all purposes, ... Rule 54(b) must be complied with."); Jones v. Den Norske Amerikalinje A/S, 451 F.2d 985, 986–87 (3d Cir. 1971) (Because the consolidation was only for trial, the judgment was immediately appealable.).

281. See, e.g., Road Sprinkler, 967 F.2d at 150 (noting district court order of a single caption and docket number); Lewis Charters, 871 F.2d at 1048 (noting order that each action be pleaded separately and that jointly styled pleadings be filed in each action); Ivanov-McPhee, 719 F.2d at 929 (noting that, apart from separate docket entries, the cases had been treated as one for all purposes).

282. See Ivanov-McPhee, 719 F.2d at 929.

283. See, e.g., Kameran, 891 F.2d at 428 & n.4 (upholding jurisdiction, finding that the district court's failure to enter a separate final judgment, after having directed the entry of a final judgment, was without jurisdictional significance); Jones, 451 F.2d at 986 (noting entry of separate judgment).
single civil action. In that circumstance, no immediate appeal will be permitted absent a Rule 54(b) certification or another pertinent exception to the final judgment rule. If the appellate court finds the consolidation not to have been for all purposes, it is likely to conclude that an immediately appealable final judgment does exist (since treating the consolidation as a single civil action for purposes of the final judgment rule would not be appropriate), particularly if the court also concluded, based on differences in the parties, claims, and defenses, that the consolidation could not have been brought as a single action. 284

When the consolidated actions do substantially overlap in claims and defenses, and perhaps also parties, and when they have been consolidated for all district court purposes, it is likely that for those very reasons an immediate appeal in one of the consolidated actions, while others remain pending, will be inefficient and the potentially prejudicial to the rights at issue

284. This footnote describes the determinative combination of factors with respect to each case in this group. See, e.g., Road Sprinkler, 967 F.2d at 151 (denying immediate appeal absent Rule 54(b) certification where the consolidation was for all purposes, and the cases could have been tried as a single suit and asserted virtually identical legal theories); Kamerman, 891 F.2d at 429–30 (granting immediate appeal absent Rule 54(b) certification where the consolidation was for all purposes, but the case on appeal was the only one of the consolidated cases that presented derivative claims, it decided all such claims and the district court clearly intended a final judgment); Lewis Charters, 871 F.2d at 1048–49 (granting immediate appeal absent Rule 54(b) certification where the consolidation was for joint hearings and trial only); Bergman, 860 F.2d at 564–65, 567 (denying immediate appeal absent Rule 54(b) certification where the consolidation was for all purposes of discovery and trial, the complaints were substantially similar, the central dispute was the same, and the plaintiffs represented the same groups); Hageman, 851 F.2d at 71 (denying immediate appeal absent Rule 54(b) certification where the consolidation was for all purposes, the suits could have been brought as one action, the key defendant was sued and relied on the same defense in both actions, and appellant would not be harmed by delay of the appeal); Trinity Broadcasting Corp. v. Eller, 827 F.2d 673, 675 (10th Cir.), adhered to, reh'g denied, en banc, 835 F.2d 245 (10th Cir. 1987), and cert. denied, 487 U.S. 1223 (1988) (prospectively requiring Rule 54(b) certification, but regarding immediate appeal from summary judgment against a plaintiff as timely filed, to avoid inequity to the plaintiff); Sandwiches, 822 F.2d at 709–11 (denying immediate appeal absent Rule 54(b) certification where the cases were sufficiently closely related that the consolidation should be treated as having been for all purposes, there was a substantial risk that the issues would return on a later appeal, deferring the appeal would allow issues on appeal to be resolved with knowledge of the consequences of their resolution, and the parties and questions in the consolidated cases were not readily distinct); Bank S., 769 F.2d at 1500 n.1 (relying on Ringwald to deny appeal); Ivanov-McPhee, 719 F.2d at 930:

[Where consolidated cases could, without undue burden, have been brought as one action, where there is no clear evidence that they have in substance been consolidated only for limited purposes, and where there is no showing that the appellant's interests will be seriously undermined by dismissal of the appeal, the provisions of Rule 54(b) must be complied with . . . .

Id.; Ringwald, 675 F.2d at 771 (denying immediate appeal absent Rule 54(b) certification where the consolidation was for all purposes and the suits could have been brought as one action); Jones, 451 F.2d at 986 (allowing immediate appeal where the consolidation was for trial only and a separate judgment had been entered in favor of the appellee).
in the remaining cases. Consequently, appellate courts that have decided, on the basis of the criteria discussed above, that the consolidation should be treated as a single civil action for purposes of the final judgment rule sometimes further support their conclusion by invoking the policies that militate against piecemeal appeals. 285

Because consolidations (even consolidations for all purposes) vary in the extent to which the parties and issues overlap, fact-specific determinations of appealability seem appropriate. The case-by-case approach has the virtue of honing in on whether a particular consolidation should be treated as a single civil action for appeals purposes. This approach similarly allows a particularized determination as to whether litigants would be prejudiced by a postponement of their appeal. I believe that the Model II approach is superior, however, because it has all of these virtues and does not share the drawbacks of the case-by-case approach. Through its use of Rule 54(b), the Model II approach provides a better developed vehicle for determining the equities of permitting or prohibiting an immediate appeal. At the same time, it avoids the uncertainty that the case-by-case approach creates for litigants who must determine when they have a right of immediate appeal, especially the risk that the court will inform a litigant who reasonably supposed he could not appeal earlier that he waived his right to appeal, while sparing appellate courts the burden of determining appealability, case-by-case. As previously noted, the appellate court typically is less well equipped than a trial court to make this determination, and cannot do so as soon as a trial court could. The case-by-case approach also may be faulted for its failure to forthrightly address the threshold issue of whether a consolidation may be treated as a single civil action for purposes of the final judgment rule and Rule 54—a gap this Article seeks to fill.

The case-by-case method may be faulted in addition for utilizing a peculiar approach to determine whether to permit an immediate appeal. That is, the approach makes pivotal whether the consolidated cases all could have been brought as one action, but does not follow Rule 20 in reaching its answer. Perhaps the answer deviates from the question because the wrong question is being asked. As previously noted, common questions which provoked the consolidation may be among the issues on appeal even if the actions could not have been brought together. More fundamentally, a study of whether the action could have been filed as a single case seems

285. See, e.g., Hageman, 851 F.2d at 71–72 (Appellant's interest in expeditious resolution did not outweigh the public interest in judicial economy that would be injured by piecemeal appeals, where appellant would not be harmed by refusal to hear his appeal immediately.); Ivanov-McPhee, 719 F.2d at 929–30 (same).
beside the point, because in making the consolidation decision, the court decided that the cases ought to proceed as one litigation unit. Consequently, the cases should so proceed absent the kind of circumstances that justify expedited appeal in any case, that is, absent the kind of circumstances the courts have identified in doing Rule 54(b) analysis.

The case-by-case courts' focus on the degree to which the cases were consolidated is sensible, but this factor should operate earlier in the game. That is, courts should limit consolidation for all purposes to occasions on which they are prepared to treat a consolidation as a single civil action for all trial level and appellate purposes. When a court has so consolidated the cases, it needs to do only a Rule 54(b) analysis should one component case be finally determined before other components have been resolved. There is no need to consider the degree of consolidation a second time. Even if the court has bifurcated issues or a component action for trial, under this proposal one still would have one civil action unless the court formally severed the cases. But, of course, the court could certify a portion of the consolidation for early appeal, under Rule 54(b), if it found that to be appropriate. By contrast, when a court has consolidated only for a limited purpose such as discovery, the cases would be regarded as having retained their separate identities throughout. There would be no question that the losers have a right of immediate appeal when the court disposes of one of the actions. If a court decides to permit an interlocutory appeal of an order made during pretrial proceedings which affects cases consolidated for pretrial, that court can, and should, allow the appeal in each of the affected cases and the appellate court can, and should, consolidate them for appeal.\footnote{See FMC Corp. v. Glouster Eng’g Co., 830 F.2d 770, 773 (7th Cir. 1987), cert. dismissed sub nom. Reifenhauser GmbH & Co., Maschinenfabrik v. FMC Corp., 486 U.S. 1063 (1988) ("[C]onsolidation for pretrial purposes might be thought consolidation for purposes of appellate jurisdiction over orders made during pretrial proceedings.").}

For the foregoing reasons, I believe that the case-by-case approach is less desirable than Model II. Courts should simply carry the single action model through both the trial and the appellate phases of a consolidation, and should use Rule 54(b) to afford flexibility in the timing of appeals.

B. The Experience Under Rule 54(b)

Rule 54 itself is the product of recognition that, "[t]he liberalization of our practice to allow more issues and parties to be joined in one action . . . increased the danger of hardship and denial of justice through delay if each
issue must await the determination of all issues as to all parties before a
final judgment can be had." 287 Consolidation, which brings together
claims that not even the Rules' liberal joinder provisions would permit to
be brought together, even more clearly necessitates mechanisms for im-
mediate appeal when fewer than all of the claims reach final judgment. 288

The certification requirement established by Rule 54 was created to
dispel uncertainty as to the time for taking an appeal from a final decision
on fewer than all the claims in an action. Absent some mechanism for
clarification, parties had little choice but to "take immediate appeals in all
cases of doubtful appealability and the volume of appellate proceedings was
undesirably increased." 289 With the certification requirement, a party
knows that his time for appeal will not run until the certification has been
made.

The same kind of uncertainty that gave rise to Rule 54(b) is now pla-
guing litigants in consolidated cases. Both litigants and the court system
would benefit from a clear and nationally uniform message that Rule 54(b)
is the mechanism for dispelling their uncertainty as well. Right now, Rule
54(b) serves this function in only the few circuits that have embraced the
Model II approach. Elsewhere it is either inapplicable because the courts
treat each component of a consolidation as a separate action 290 or it fails
to serve its purposes because, given the uncertainty as to whether Rule
54(b) applies, losing litigants often file an immediate appeal, and await the
appeal court's case-by-case decision as to whether they, as losers in a
component, had a right to do so. In this way, they avoid waiting too long
to appeal and finding out they are out of luck. 291 It is only after an appel-
late court has informed such litigants that their appeal was premature, that
they might seek Rule 54(b) certification.

287. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950); see also Sears,
Roebuck & Co. v. Mackey, 351 U.S. 427, 432 (1956) (Liberal joinder of claims demonstrated a
need to relax the restrictions on what should be treated as a judicial unit for purposes of appellate
jurisdiction. Sound judicial administration demonstrated that some final decisions on fewer than
all claims should be appealable without delay.).

288. Courts may permit intervention on the basis of a common question of law or fact, how-

289. Sears, 351 U.S. at 434.

290. The Rule "does not apply to a single claim action nor to a multiple claim action in
which all of the claims have been finally decided." Sears, 351 U.S. at 435; Liberty Mutual Ins.
Co. v. Wetsel, 424 U.S. 737, 742–45 (1976) (Where the Court found only a single claim for
relief, Rule 54(b) certification did not make an order appealable.).

291. Dickinson, 338 U.S. at 511. "A rational system of jurisprudence should not attach
inexorable consequences to failure to guess right on a legal question for the solution of which
neither statutes nor court opinions have provided even a reasonably certain guide." Id. at 517
(Black, J., dissenting).
The Supreme Court has upheld Rule 54(b) as valid, both with respect to its authorization of the release of decisions for appellate review before they otherwise would be appealable, and with respect to its "negative effect" of restricting appeals to the situations in which the court has made the express determinations and directions called for by the Rule. 292 Although historically only the affirmative aspect of the Rule was seriously questioned, 293 in the context of consolidations, it is the "negative effect" that is suspect. To the extent that Rule 54(b) is invoked to restrict appeals when all the claims in a civil action component of a consolidation have been finally decided, it can be said to diminish or violate the common law right, integrated into federal law by 28 U.S.C. § 1291, to an immediate appeal when a whole case has been finally decided. 294 As I suggested above, one may finesse this problem by redefining the "whole case" or the "civil action," but ultimately one must justify this route by concluding that, in the interest of sound judicial administration, one must accept some curtailment of the traditional right to an immediate appeal in exchange for the benefits of consolidation. The trade-off is made more tolerable by the moderating influence of Rule 54(b), authorizing expedited appeals.

C. Articulating Criteria to Divide Collections of Claims into Suitable Appellate Units

In the context of making "finality" determinations, courts have struggled for more than a century with the problem of articulating criteria to divide collections of claims into suitable appellate units. They have continued to struggle with this problem in applying Rule 54. 295

The original version of Rule 54(b) permitted a district court to enter a judgment disposing of a claim when more than one claim had been presented for relief in an action, only when the court had determined the issues material to the particular claim and to all counterclaims arising out of

293. Id. at 435 ("Its 'negative effect' has met with uniform approval.").
294. See id. at 431-32 & n.3 (discussing how, prior to the Federal Rules, there was little authority for treating anything less than a whole case as a judicial unit for purposes of appeal). The Court does not indicate that there was any authority for treating anything more than a whole case as a judicial unit for purposes of appeal.
295. See Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1069 & n.5 (1985) (Stevens, J., concurring) (noting the difficulty of deciding whether multiple claims were presented); Dickinson, 338 U.S. at 511 (lamenting the difficulty of the problem and the history of the courts: "sometimes choosing one and sometimes another of the considerations that always compete in the question of appealability, the most important of which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other").
the same transaction or occurrence. As interpreted, the Rule modified the "single judicial unit theory" only when the decided claims were separate from and independent of the unadjudicated claims in the case. Parties found this standard so difficult to apply that the drafters added the certification requirement to aid them.

The Rule continues to make the first prerequisite that more than one claim for relief is presented. Since the 1948 amendment, the Rule also requires, in addition to a final judgment on one or more of the claims, that the trial court find that there is no just reason for delay in allowing an appeal. In a small number of cases the Court has given some indication of what is required, but it has construed the Rule to grant wide discretion to trial courts, particularly with respect to the latter finding.

Specifically, the Rule as amended in 1946 (effective in 1948) treats counterclaims like any other claims. Because the court need not have disposed of compulsory counterclaims, the amendment effectively eliminated "separate and independent" as an absolute requirement. As the Supreme Court stated in Cold Metal, "[T]he relationship of the adjudicated claims to the unadjudicated claims is [merely] one of the factors which the District Court can consider in the exercise of its discretion." In a companion case the Court upheld appellate jurisdiction, given the requisite certification, where it found the adjudicated claims not to be "so inherently inseparable from, or closely related to" the unadjudicated claims that they could not be decided independently of each other; thus, the certification was not an abuse of discretion. The two principles that Justice Frankfurter, concurring in one case and dissenting in the other, characterized as having been established as "exceptions" to the principle against piecemeal appeals were that appeals should be permitted before completion of the whole litigation "when failure to do so would preclude any effective review or would result in irreparable injury" and when "a party to the completed portion of the litigation has no interest in the rest of the pro-

297. See Sears, 351 U.S. at 434; Cold Metal, 351 U.S. at 452. As Justice Frankfurter phrased the test, it was whether the adjudicated claims were "based on a set of facts separate and independent from the facts on which the remainder of the litigation was based." Sears, 351 U.S. at 442 (Frankfurter, J., concurring); see also Reeves v. Beardall, 316 U.S. 283, 285 (1942) (The original Rule 54(b) permitted the entry of separate judgments where the claims were entirely distinct, differing transactions or occurrences forming the bases of separate units of judicial action.).
299. Cold Metal, 351 U.S. at 452.
300. Sears, 351 U.S. at 436.
301. Id. at 441. (Frankfurter, J., concurring).
ceedings and to make him await their outcome would merely cause unfairness." 302

More recently, in Curtiss-Wright Corp. v. General Electric Co., 303 the Court approved a district court’s consideration of whether the claims proposed for certification were separable from those awaiting adjudication, and were such that no appellate court would have to decide the same issues in subsequent appeals in the case. It cautioned, however, that

the presence of one of these factors would [not] necessarily mean that Rule 54(b) certification would be improper. . . . [A] possibility that an appellate court would have to face the same issues on a subsequent appeal . . . might perhaps be offset by a finding that an appellate resolution of the certified claims would facilitate a settlement of the remainder of the claims. 304

The Court also opined that the presence of nonfrivolous counterclaims did not render certification inappropriate. The significance of the counterclaims turned on their relationship with the claims whose certification was sought. 305 The Court concluded that the Court of Appeals had misinterpreted the Rule, as well as its appellate role, in concluding that the possibility of a set-off required certification to be denied unless the would-be appellant could show “harsh or unusual circumstances.” 306 It rejected that standard as unworkable and unreliable, 307 and advised generally as follows:

[T]he court of appeals must . . . scrutinize the district court’s evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units. But once such juridical concerns have been met, the discretionary judgment of the district court should be given substantial deference . . . . The reviewing court should disturb the trial court’s assessment of the equities only if . . . the judge’s conclusion was clearly unreasonable. 308

302. Id. at 442.
303. 446 U.S. 1 (1980).
304. Id. at 8 n.2.
305. Id. at 9.
306. Id.
307. Id. at 9–10.
308. Id. at 10. The scrutiny of the relationship among claims that is done by courts in the Rule 54(b) context is somewhat analogous to the scrutiny courts undertake when deciding whether to exercise pendent appellate jurisdiction over otherwise unappealable orders. In the latter context, courts consider whether there is sufficient overlap in the facts relevant to the appealable and nonappealable issues to warrant the exercise of authority over the ordinarily nonappealable issues. See Consarc Corp. v. Iraqi Ministry, 27 F.3d 695, 700 (D.C. Cir. 1994) (invoking the power only when the interlocutory order not yet subject to appeal is “closely related” to an appealable order); United States v. Spears, 859 F.2d 284, 287–88 (3d Cir. 1988). Courts
With respect to those equities, the Court approved the District Court's consideration of the size and liquidated nature of the debt at issue, the length of time the debt would remain unpaid absent immediate appeal, and the difference between the statutory prejudgment interest rate and market rates of interest. By contrast, the Court found it unnecessary that the party who prevailed on the certified claim show economic duress or insolvency or that the party who lost be insolvent.

If one surveys district and appellate court cases interpreting and applying the Rule, one finds a variety of factors taken into account. Because "more than one claim for relief," as opposed to one claim supported by multiple grounds, has to be present, some of the courts' analysis goes to making this distinction. Thus, the factual overlap, the logical relationship, and sometimes whether the "claims" are based on different legal theories, all come into play. If the claims are factually separate, multiple claims ordinarily are found. Certification for immediate appeal may be proper under the Rule even when adjudicated and unadjudicated claims share a substantial factual base, however. When the court enters a final judgment as to fewer than all of the parties, factual commonality in the claims is no bar.

In determining whether there is any just reason for delaying the appeal, courts look at a broad array of factors, although none is determinative. In addition to the factors cited in Curtiss-Wright, the following are among the factors one sees in lower court opinions: any hardship, prejudice, or injustice the would-be appellants would suffer if appeal were delayed.

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310. Id. at 12. For recent affirmation of the Court's Rule 54(b) decisions, see Reiter v. Cooper, 113 S. Ct. 1213, 1218 (1993) (expressing doubt that a Rule 54(b) judgment on a claim would be equitable where the claimant's insolvency made it very unlikely that a counterclaim would have any value except as a setoff).
311. 10 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2657 (2d ed. 1983).
312. See, e.g., New York v. Amro Realty Corp., 936 F.2d 1420, 1424 n.4 (2d Cir. 1991) (Where court relies on the parties prong of Rule 54(b), it need not address whether the complaint stated separate claims.); Bogosian v. Gulf Oil Corp., 561 F.2d 434, 440-41 (3d Cir. 1977) (By determining that a final decision which terminates the action as to fewer than all the parties or as to fewer than all the claims is an appropriate judicial unit, the court can dispatch decisions for appeal. Where summary judgment wholly terminated a defendant from a case, the appeals court did not need to consider whether the complaint stated a single or multiple claims for Rule 54(b) purposes.), cert. denied, 434 U.S. 1086 (1978).
whether the appellate court would be called upon to determine factual or legal issues that also are before the trial court; whether the appellate court is likely to be called upon to determine the same factual or legal issues when the remainder of the case is finally decided (the risk of repetitious appeals); whether determination of questions still pending in the trial court might allow the appellate court to avoid deciding novel or difficult issues; whether later developments in the trial court might moot issues on appeal; whether certification will produce res judicata effects; and whether treating the judgment as final and affording an immediate appeal would have useful consequences (such as obviating, simplifying, or facilitating resolution of the remaining trial level proceedings) or, to the contrary, would delay, prejudice, or have otherwise problematic effects on the remaining trial court proceedings. One sees here some overlap with the requirement that more than one claim for relief be presented.

When courts make Rule 54(b) determinations in the context of consolidated cases (and probably generally) they should focus precisely on the issues to be raised in the proposed appeal. When the issues are not self-evident, they should require the parties moving for certification to specify those issues, just as the parties should specify why failure to certify for immediate appeal would preclude effective review or otherwise prejudice them. Having ascertained the issues for appeal, the trial court can far more easily make the several determinations listed in the preceding paragraph. Such analysis is a much more refined tool, and is much better suited to the purpose, than the inquiries (as to whether a consolidation could have been filed as a single action and as to the degree of consolidation) made by courts adopting the “case-by-case” approach to the appealability of final decisions in certain components of a consolidation. To the extent the latter in-

313. See, e.g., Curtiss-Wright, 446 U.S. at 5-6; General Acquisition, Inc. v. GenCorp, Inc., 23 F.3d 1022, 1030 (6th Cir. 1994) (listing factors to consider); New York v. Amro Realty Corp., 936 F.2d 1420, 1426 (2d Cir. 1991) (pointing to prejudice that appellants would suffer if appeal were delayed and advantages that would likely flow to the remaining cases), aff'd without op., 999 F.2d 537 (2d Cir. 1993); Bogosian, 561 F.2d at 441-43 (considering whether the district court could dispose of claims pending there so as to moot issues on appeal, whether the questions presented by the appeal remained before the district court with respect to other parties, how much time would pass before all claims were disposed of, what prejudice the passage of such time would impose, and what benefits immediate appeal would confer); see generally 10 WRIGHT ET AL., supra note 311, § 2659.

314. Perhaps some courts do this; I found no evidence of it in the consolidation cases raising Rule 54(b) issues, however.
quaries are, or approximate, appropriate inquiries, they are necessary but not sufficient to decide whether an immediate appeal should be permitted.

D. The Availability of Rule 54(b) Certification

The foregoing discussion regarding Model II and the case-by-case approach assumed that if fewer than all actions composing a consolidation were resolved in the district court, that court could direct the entry of a final judgment, pursuant to Rule 54(b), as to the actions that were resolved, making the express determination that there is no just reason for delay. Whether a Rule 54(b) judgment may be entered under these circumstances is related to but distinct from whether litigants have an immediately appealable final judgment even without such certification. Deciding it requires interpretation of Rule 54(b), it requires, in particular, a decision as to whether a group of consolidated cases is “an action” for Rule 54(b) purposes.315

Sensitive to the disadvantage that litigants would suffer, by virtue of consolidation, if a judgment in a case component could not be certified under Rule 54(b) and was not immediately appealable as of right, each of the courts that has expressly considered this question has answered affirmatively, although without any careful analysis of whether and when a consolidation can be “an action” for Rule 54(b) purposes.316 Many additional courts have assumed that such certification is available in appropriate cir-

315. Federal Rule of Civil Procedure 54(b) states in part:
   When more than one claim for relief is presented in an action, . . . or when multiple
   parties are involved, the court may direct the entry of a final judgment as to one or more
   but fewer than all of the claims or parties only upon an express determination that there
   is no just reason for delay and upon an express direction for the entry of judgment.
   FED. R. CIV. P. 54(b) (emphasis added).
316. See Bogosian, 561 F.2d at 441 (Where summary judgment was entered for a defendant in
   one case component of a consolidation that was not for trial purposes, that judgment was subject
   to Rule 54(b) certification, despite the continuation of claims against the defendant in another of
   the consolidated cases. “At least absent consolidation for all purposes . . . each civil action is to
   be viewed as a separate unit” for Rule 54(b) purposes.); Genty v. Gloucester, 736 F. Supp. 1322,
   1327–30 (D.N.J. 1990) (Judgment in one consolidated action is certifiable under Rule 54(b) al-
   though other consolidated claims may be pending.); aff’d sub nom. Genty v. Resolution Trust
   Corp., 937 F.2d 899, 906 (3rd Cir. 1991); In re New York Asbestos Litig., 155 F.R.D. 61, 63
   (S.D.N.Y. 1994) (The court certified the judgment in certain consolidated cases for appeal pur-
   suant to Rule 54(b), where the cases had been consolidated for trial, each had retained its own
   civil action number and received its own separate judgment. Apparently, the would-be appel-
   lants had sought Rule 54(b) certification, rather than claiming an ability to appeal as of right.);
   Wyoming ex rel. Pacific Intermountain Express, Inc. v. District Court, 387 P.2d 550 (Wyo. 1963)
   (same as Genty).
circumstances.\textsuperscript{317} As a policy matter, such certification certainly should be available for those situations in which courts treat the resolved claims as part of an ongoing action and deny a right of immediate appeal. This Article has provided justifications for treating consolidations as just such continuing single actions. If Rule 54(b) needs to be amended to make clear the propriety of a Rule 54(b) judgment when a case component of a consolidation has been resolved, then it should be so amended.\textsuperscript{318}

\textsuperscript{317} Ironically, courts may cite Johnson as requiring Rule 54(b) certification to be available to avoid any prejudice to litigants' substantial rights, see supra text accompanying note 316, but, if Johnson suggests anything with respect to appealability, it suggests that upon the complete resolution of a civil action that becomes part of a consolidation, a final judgment should be entered that would be immediately appealable as of right. Johnson v. Manhattan Ry., 289 U.S. 479 (1933). Johnson says that consolidation does not merge actions. \textit{Id.} at 496-97. Yet, it is only if the consolidation as a whole is regarded as "an action" that Rule 54(b) applies.

\textsuperscript{318} The Advisory Committee notes to Rule 42 state, "For the entry of separate judgments, see Rule 54(b)." FED. R. CIV. P. 42 advisory committee note. But this does not make clear that Rule 54(b) certification is necessary or appropriate when a judgment resolves all the claims in a case consolidated with others. For a recommendation as to how the Rule might be amended, see Gerson, supra note 252, at 192. She suggests adding the following (italicized) language to Rule 54(b): "When more than one claim for relief is presented in an action, \textit{including a consolidated action resulting from a Rule 42(a) order} . . . ." \textit{Id.}

I do not attempt here any close analysis of the circumstances in which Rule 54(b) certification would be appropriate when other consolidated claims remain pending. I believe that the Rule 54(b) analysis that would be undertaken in that circumstance would not differ materially from the analysis that courts do in ordinary (unconsolidated) multi-party, multi-claim litigation. See, e.g., New York v. Amro Realty Corp., 936 F.2d 1420, 1425 (2d Cir. 1991) (refusing to hold that the possibility, or even probability, that certain parties might in the future be impleaded in an action rendered a Rule 54(b) certification impermissible in a consolidated action, where such certification was otherwise appropriate), \textit{aff’d \textit{without op.}}, 999 F.2d 537 (2d Cir. 1993); In re New York Asbestos Litig., 155 F.R.D. at 63-64 (The court certified the judgment in certain consolidated cases for appeal pursuant to Rule 54(b), where would-be appellants would suffer hardship and injustice if their appeal were delayed. The court refused certification in other of the consolidated cases where certification would not have been in conformity with the judicial gloss on Rule 54(b)). Gerson proposes that the court should consider "whether an early appeal would jeopardize the planned future structure of the case." Gerson, supra note 252, at 192. I agree, but such consideration would occur as part of the court’s consideration of whether an early appeal would delay, prejudice or cause otherwise problematic effects on the remaining trial court proceedings. I disagree with her suggestion, \textit{id.} at 193, that the court also should consider who requested the consolidation and who resisted it. Whatever arguments the parties may have made as to whether the court should consolidate the action, the court chose to do so, rendering its judgment not immediately appealable absent certification. Even a party who advocated the consolidation may now have valid reasons to resist an immediate appeal, and one who resisted the consolidation may now have valid reasons to oppose an immediate appeal.
E. An Aside: Final Judgment Issues in the Context of Consolidated Cases Raising Issues of Arbitrability

Specialized statutes may affect the appealability of particular kinds of orders. The Federal Arbitration Act ("FAA"), 319 for example, precludes review of interlocutory orders compelling arbitration, but permits appeals from interlocutory orders favoring litigation over arbitration and from final orders compelling arbitration. 320

In determining whether an order affecting arbitration is final or interlocutory, most courts distinguish between arbitration actions that are "independent" and those that are "embedded" among other claims. Generally, if the only issue before the court is the dispute's arbitrability, the action is considered independent and a court's decision on that issue constitutes a final decision. If, however, the case includes other claims for relief, an arbitrability ruling does not "end the litigation on the merits," but is considered interlocutory only. 321

This doctrine has given rise to the questions whether and when consolidation of actions can cause an otherwise "independent" order compelling arbitration to be "embedded," with the result that litigants lose a right of immediate appeal.

In McDermott International v. Underwriters at Lloyds, 322 the Court of Appeals for the Fifth Circuit held that, under Road Sprinkler, 323 when the cases at bar were consolidated they became a single judicial unit. The court so concluded because the cases were not consolidated for limited purposes, they grew out of the same fact situation and were based largely on the same operative facts, and at least some of the suits could have been brought as a

321. McDermott, 981 F.2d at 747 (citation omitted). Some courts have even held that Rule 54(b) may not be used to separate, for immediate appeal, an arbitration question that is embedded in a larger dispute. See Perera v. Siegel Trading Co., 951 F.2d 780, 786 (7th Cir. 1992).
322. 981 F.2d 744 (5th Cir.), cert. denied, 113 S. Ct. 2442 (1993).
single action. Consequently, the district court's orders compelling arbitration and staying litigation were interlocutory, not final, and appeal was barred by section 16(b) of the FAA. It is noteworthy that in determining whether to regard the arbitration order as embedded, the court relied on precedent that goes to whether consolidation alters the time when an immediately appealable final judgment comes into existence generally and used the same kind of analysis (based on the degree of consolidation and whether the consolidated actions should be treated as a single civil action) that it has used in the former context.

In the same mold, but reaching the opposite conclusion on the facts, is Sphere Drake Insurance PLC v. Marine Towing, Inc., another Fifth Circuit case. There, where actions had been consolidated for discovery purposes only, the court held that the suits were not merged into a single judicial unit, so as to embed an independent proceeding brought solely to test arbitrability. Consequently, the court found appellate jurisdiction. The Seventh Circuit as well has conducted the same kind of analysis as it conducts in the final judgment arena, when faced with questions of the appealability of orders compelling arbitration.

I recommend that courts treat these cases in the manner I outlined above. If, but only if, the consolidation was for all purposes or for trial,

324. McDermott, 981 F.2d at 747.
325. Accord West of England Ship Owners Mut. Ins. Ass'n v. American Marine Corp., 981 F.2d 749, 751 (5th Cir. 1993) (describing McDermott as having held that "where consolidation of an independent proceeding to compel arbitration with one or more actions rendered the cases a single judicial unit, orders compelling arbitration and staying litigation were considered interlocutory, not final, for § 16 purposes"); see In re American Marine Holding Co., 14 F.3d 276, 277 (5th Cir. 1994).
327. See Soo Line R.R. v. Escanaba & Lake Superior R.R., 840 F.2d 546, 548-50 (7th Cir. 1988) (concluding that the court did not have to decide whether consolidation had merged a case compelling arbitration and a second case, under Ivanov-McPhee v. Washington Nat'l Ins. Co., 719 F.2d 927 (7th Cir. 1983), because the judgments in each of the consolidated cases were final).
courts should treat the consolidation as having created a larger single action, in which the arbitrability question has become embedded.

F. For Whom Does the Time to Appeal Toll or Extend?

The effects attributable to consolidation take on a different aspect when all of the consolidated cases have been finally decided in the district court. Even if there were good reasons to focus on the individual case components of a consolidation when fewer than all have been finally decided in the trial court, there would be strong grounds to treat the consolidation as an entity when all components become ripe for appeal at the same time. This part considers issues that arise in that context.

Federal Rule of Appellate Procedure 4 contains a variety of provisions that extend the time for appeal. The questions arise whether and when parties to consolidated cases should get the benefit of these extensions.

For example, Federal Rule of Appellate Procedure 4(a)(1) provides:

(a) Appeal in a Civil Case.
(1) [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal . . . must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

Does the benefit of that more generous time period flow to parties to cases that have been consolidated with a case in which the United States is a party? Both the Ninth Circuit and the Court of Appeals for the District of Columbia have answered “yes.” In the more thoroughly reasoned of the two opinions, the Court of Appeals for the District of Columbia decided that holding the 60-day limit to apply to all parties to the consolidation, so as to apply a single time limit to all the consolidated cases, is most sensible, fair, and efficient. The court noted that, if cases are so closely related as to be suitable for consolidation, it is improbable that the appeal of any

328. FED. R. APP. P. 4(a)(1). The Rule in effect prior to the December 1993 amendments to the Rules was to the same effect.
one could practically go forward until all the eligible parties had appealed. The court also concluded that the right to be relieved of the risk of appeal after 30 days does not qualify as the sort of substantial or substantive right that Johnson has been interpreted to protect, and that resolution of the question should not turn on such matters as how many notices of appeal an appellant filed or how many filing fees he paid or was required to pay.330

The court over-generalizes in concluding it improbable that the appeal of any consolidated case component could practically go forward until all the eligible parties have appealed. Still, it is most sensible for appeals to go forward simultaneously when the cases have been adjudicated together and have become ripe for appeal at the same time. Little, if any, harm is done to the appellee in allowing potential appellants as much time as the potential co-appellant United States has to file their notice of appeal. Paretistically, these interpretations of Federal Rule of Appellate Procedure 4(a)(1) are consistent with the tendency of the Ninth and D.C. Circuits to treat consolidations as a unit for purposes of deciding when a final appealable judgment comes to exist. But the result they reach seems most sensible even for courts that treat separate judgments in case components of a consolidation, reached at different times, as immediately appealable. Under the view advocated in this Article, that consolidation for all purposes or for trial should create a single civil action, the results reached in the cases described above are clearly correct. This position has the advantage of clarity, certainty (which avoids inadvertent waiver of the right to appeal), and consistency with judicial treatment of consolidations for all purposes as single civil actions throughout the trial court proceedings.

Similarly, Federal Rule of Appellate Procedure 4(a)(3) provides, "[i]f one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires."331

Does the benefit of that more generous time period flow to parties to cases consolidated with that in which the notice of appeal was filed? The Court of Appeals for the Federal Circuit, in Jackson Jordan, Inc. v. Plasser American Corp.,332 held that it does. Indeed, it held the 14-day grace

330. Cabevisión, 808 F.2d at 135–36.
332. 725 F.2d 1373 (Fed. Cir. 1984); accord Lauderdale County Sch. Dist. Board of Educ. v. Enterprise Consol. Sch. Dist. Bd. of Educ., 24 F.3d 671, 681 (5th Cir. 1994) (The court concluded that, if two consolidated cases were treated as one, all notices of appeal were timely, relying in part on Federal Rule of Appellate Procedure 4(a)(3); the court also concluded that the
period applicable to any other appeal which might be taken in the consolidated proceeding, even though the consolidation at bar was for purposes of trial only, and the second of the two suits (or, at least, major issues in it) had been separated for a later trial. The court found that the Rule did not limit the grace period to cross-appeals and that such a limitation would be contrary to the intent of the drafters, as expressed in the Committee Note of 1966 to the Amended Rule. Under the approach I have advocated, too, the more generous time period that Federal Rule of Appellate Procedure 4(a)(3) allows to parties would apply to parties to cases consolidated with that in which the notice of appeal was filed, if the cases had been consolidated for all purposes or for trial. Thus, *Jackson Jordan* was correctly decided. These cases ought to have been consolidated for all purposes. They were largely repetitive. In one, *Jackson Jordan* sought a declaration that a patent was invalid and that it had not infringed the patent. In the second, it claimed that the defendant had obtained the patent by fraud, in violation of the antitrust laws. The issues of validity, infringement, and fraud were tried together, with the trial of other antitrust issues and damages postponed. It is hard to imagine why these cases were not consolidated for all purposes. Perhaps the trial court in fact treated them as one, with consolidated discovery and the like, even though that is not how its order read. Under these circumstances, the court’s application of Federal Rule of Appellate Procedure 4(a)(3) seems entirely appropriate.

Finally, until its revision, effective December 1, 1993, Federal Rule of Appellate Procedure 4(a)(4) provided:

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; . . . [or] (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within

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333. *Jackson Jordan*, 725 F.2d at 1374–75.
334. Id. at 1374.
the prescribed time measured from the entry of the order disposing of the motion as provided above.335

Were parties to consolidated cases “parties” within the meaning of Federal Rule of Appellate Procedure 4(a)(4), entitled to the benefit of the extension of time it authorized but subject to having their notices of appeal held to be premature and consequently ineffective if filed before the disposition of any of the named motions? Under the analysis I have advocated here, the answer would be “yes,” with respect to both the benefits and the detriments that the Rule imposes, if but only if the consolidation was for all purposes or for trial. Once again, this response should produce clarity, certainty, and consistency. The courts have given mixed responses.

In Eckstein v. Balcor Film Investors,336 the Seventh Circuit considered whether, by filing a Rule 59 motion, the plaintiffs in one component case had “destroyed” the subsequent notice of appeal filed in a second component. It reasoned that, if the district court fully consolidated the actions to produce a single case, appellate jurisdiction was lacking because the notice of appeal filed before disposition of the Rule 59 motion would have had no effect.337 The court concluded that the extent of the consolidation was unclear: While the district court had declared that the actions were neither consolidated for all purposes nor merged into a single cause, it had behaved otherwise in certifying a single class and certifying the plaintiffs in each of the actions as a subclass.338 Moreover, the commonality in plaintiffs’ claims was such that the two cases should have been consolidated for all purposes.339 Despite these considerations, because the district court entered two judgments and because litigants must be able to rely on judgments in determining the time for appeal,340 the Seventh Circuit

335. FED. R. APP. P. 4(a)(4), since superseded (emphasis added). The new Rule 4(a)(4) makes a number of changes, including adding to the list of motions, and providing for amended notices of appeal. These changes, inter alia, obviate the need to determine whether a post-trial motion made within 10 days of entry of a judgment is a Rule 59(e) motion to alter or amend or a Rule 60 motion for relief from the judgment. See infra text accompanying notes 361–363.
336. 8 F.3d 1121 (7th Cir. 1993), cert. denied, 114 S. Ct. 883 (1994).
337. Id. at 1124.
338. As the court explained: “Because neither case contained the entire class, if the cases were not fully consolidated, there could not have been subclasses.” Id. at 1125.
339. Id.
340. The court noted that different plaintiffs appealed from each judgment, and opined that, “[a]ppellate jurisdiction follows the judgment, providing the certainty that is essential when a misstep may forfeit a valuable right. Separate judgments are independently appealable, and no one need appeal until the formal judgment under Federal Rule of Civil Procedure 58 has been entered. . . . [A] party . . . is always entitled to wait for (and rely on) the separate Rule 58 judgment. . . . Anything else bails a trap for unwary litigants—for wary ones, too, the kind who pay particular attention to judgments.” Id. at 1125 (citations omitted).
decided that the Rule 59 motion did not affect the time to appeal, or the
efficacy of the notice of appeal filed, in the other consolidated action.\footnote{Id.}
The opinion is interesting in making the number of judgments entered the
overriding factor. In earlier Seventh Circuit cases in which the question
was whether to allow parties to a component of a consolidation to im-
mediately appeal when other components had not been entirely resolved,
the court considered multiple factors, and the presence of a judgment in the
completed component was not determinative.\footnote{See Sandwiches, Inc. v. Wendy's Int'l, Inc., 822 F.2d 707, 709 (7th Cir. 1987) (dismis-
sing appeal for lack of jurisdiction in the absence of a Rule 54(b) certification, despite entry of
judgment in the completed component); Ivanov-McPhee v. Washington Nat'l Ins. Co., 719 F.2d
927, 928, 930 (7th Cir. 1983) (same); supra text at nn. 275–285.}
I suspect that the court was more comfortable telling parties that they had to bring their appeal
later (the consequence of these earlier cases) than it would have been telling
them that their appeals could not be brought at all, by virtue of their
(reasonable) failure to cure a premature filing of their notice of appeal.\footnote{Under Federal Rule of Appellate Procedure 4(a)(4) as now revised, litigants who prema-
turely file a notice of appeal would not be barred. Litigants no longer have to file a new notice
of appeal within a prescribed time after entry of the order disposing of particular motions. In-
stead, a notice of appeal filed after entry of judgment but before disposition of specified motions
becomes effective at the date of entry of the order disposing of the last such outstanding motion.
746 F.2d 278 (5th Cir. 1984), aff'd on other grounds, 784 F.2d 665 (5th Cir.) (en banc),
cert. denied, 479 U.S. 930 (1986).}

In Harcon Barge Co. v. D & G Boat Rentals, Inc.,\footnote{Id. at 281.} the district court
had consolidated for trial five suits arising out of a collision between barges
and a bridge. After the entry of a single judgment, the Court of Appeals
for the Fifth Circuit held that timely filing of a motion to amend the judg-
ment by the defendants in only one of the consolidated cases nullified a
prior notice of appeal and cross-appeal by Southern Pacific, a party to all
five consolidated suits, appealing in all of them. Appellants having failed
to file new notices after entry of an amended judgment, the appellate court
lacked jurisdiction to hear any part of the appeal.

The court reached this result for a combination of reasons. First,
notwithstanding that the consolidation had been only for trial, "the district
court, all parties, and the district clerk [had] treated the consolidated ac-
tions as a single combined suit—requiring but one judgment . . . and but
one notice of appeal by any one party to all or any of the combined
suits."\footnote{746 F.2d 278 (5th Cir. 1984), aff'd on other grounds, 784 F.2d 665 (5th Cir.) (en banc),
cert. denied, 479 U.S. 930 (1986).} The docket sheet in one of the cases had been treated as the
docket sheet for all, and the parties had filed all pleadings captioned by all
five case titles and docket numbers. The judgment was similarly captioned

and disposed of the claims as if asserted in a single action. With only one judgment, the motion to amend went to the judgment for all of the actions, not just to a judgment in the one action to which the movants were parties. The notice of appeal also was captioned with all five case titles and docket numbers, the appellant viewed its appeal as questioning all awards made in the judgment, and it paid only one filing fee. It was the appellant who had sought consolidation to begin with and it was only after oral argument that the appellant first argued that the motion to amend the judgment made the notice of appeal premature in only one of the actions. Under these circumstances, the notice of appeal was premature as to all the consolidated cases and, the prematurity not having been cured, the appeals court lacked jurisdiction over the entire set of consolidated cases. It should be noted that the very fact sensitive analysis by the court here is consistent with the case-by-case approach that the Fifth Circuit takes when the question is the finality of judgments resolving fewer than all of the cases in a consolidation.

By contrast, in Mendel v. Production Credit Ass'n, where two actions had been only informally, not "technically," consolidated through an arrangement for joint proceedings and hearings, the Eighth Circuit concluded that a timely motion for reconsideration under Rule 59(e) rendered a notice of appeal premature only with respect to the component action in which it was filed, not with respect to a consolidated component action. Because the cases had not been formally consolidated, to have held the notice of appeal premature with respect to any other actions would have unfairly surprised the appellants in those cases.

The year following the decision in Harcon Barge, the Court of Appeals for the Sixth Circuit was faced with a similar question in Stacey v. Charles J.

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346. Id. at 284.
347. Id. at 285.
348. Accord Lauderdale County Sch. Dist. v. Enterprise Consol. Sch. Dist., 24 F.3d 671, 681–82 (5th Cir. 1994) (Where two cases had been consolidated for trial and disposed of by one final judgment, they were to be considered the same case for purposes of notices of appeal. Thus, a not yet disposed of Rule 59(e) motion, ostensibly filed in one of the cases, made the notices of appeal filed in both cases ineffective until entry of an order disposing of the motion.); Barnett v. Petro-Tex Chemical Corp., 893 F.2d 800, 804–05 (5th Cir.) (The pendency of a motion for reconsideration filed by plaintiffs in one consolidated case rendered the notice of appeal filed by the plaintiffs in a different case component of the consolidation, and consequently the court rendered the notice of appeal a nullity. The court also observed that when cases have been consolidated in district court and disposed of by one final judgment, a single notice of appeal may be used by all the appealing parties.), cert. denied, 497 U.S. 1023 (1990).
349. 862 F.2d 180 (8th Cir. 1988).
350. Id. at 182.
Rogers, Inc.,\textsuperscript{351} where appellants timely filed their notice of appeal only if Rule 4 gave them an extension of time by virtue of plaintiffs, in a case consolidated with theirs, having filed a timely motion for new trial. Unlike the Fifth Circuit, the Sixth Circuit construed Rule 4(a)(3) to afford this benefit only to the parties to the cause of action of the moving party.\textsuperscript{352} Thus, the appeal was too late. It should be noted that this outcome is consistent with the Sixth Circuit's position that when all the claims in one component consolidated case are resolved, the losers have a right of immediate appeal, notwithstanding that other consolidated cases continue in the trial court.\textsuperscript{353} In both contexts, the Sixth Circuit treats the consolidated cases as actions separate from one another. It also is noteworthy, however, that although the Fifth and Sixth Circuits’ interpretations of Rule 4(a)(3) were diametrically opposed, both managed to deny jurisdiction over the appeals before them.

Finally, there is \textit{Advey v. Celotex Corp.},\textsuperscript{354} which involved two consolidated cases, in only one of which R.T. Vanderbilt Co. was a defendant. The same group of individuals were the plaintiffs in the two suits. After judgment, Vanderbilt filed a Rule 59(e) motion to alter the judgment. Before the trial court had ruled on that motion, plaintiffs filed a notice of appeal from the judgment order, as to both cases. After the court ruled on Vanderbilt's motion, one of the plaintiffs, Sparks, filed an appeal. The Sixth Circuit concluded that the original notice of appeal was premature as to all the consolidated actions. Notwithstanding its conclusion in \textit{Stacey} that “parties,” as used in Rule 4(a)(3), refers only to the parties to the cause of action of the moving party, it rejected the argument that the Rule 59(e) motion nullified the notice of appeal only as to the case in which Vanderbilt was a party.\textsuperscript{355} It distinguished \textit{Stacey} on a number of grounds, including the notion that that case “did not consider the effect of the pendency of a Rule 59 motion on the timeliness of a filing by other

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351. 756 F.2d 440 (6th Cir. 1985).
352. \textit{ld.} at 442.
353. See \textit{supra} text accompanying notes 253–256. By contrast, the Seventh Circuit, which has taken a case-by-case approach to determining whether litigants in consolidated cases have a right of immediate appeal when all claims in their component have been resolved, views the filing of a Rule 59(e) motion in any component case as extending the time to appeal for litigants in all the consolidated cases. See \textit{Hastert v. Illinois State Bd. of Election Comm’rs}, 28 F.3d 1430, 1439 (7th Cir. 1993) (The cases apparently were consolidated for all purposes.).
354. 962 F.2d 1177 (6th Cir. 1992).
355. As the dissent wrote, “Vanderbilt was not a party to \textit{Advey II}. For that reason, the filing of a Rule 59 motion by Vanderbilt could not affect the timing for filing a notice of appeal in \textit{Advey II} . . . .” \textit{ld.} at 1183 (Hillman, J., dissenting).}
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parties" and was based on a requirement that each plaintiff in a consolidated proceeding follow procedural rules as they apply to him or her. The court apparently did not view that "requirement" as helping the plaintiffs here, although the plaintiffs had a strong argument that, so long as one views the cases separately, as the Sixth Circuit generally has done, plaintiffs did just that. In addition, the motion to alter the judgment filed here affected plaintiffs' own claims, which differentiated these facts from those in Stacey. The Sixth Circuit also viewed the interpretation of Federal Rule of Appellate Procedure 4(a)(4) sought by plaintiffs as running afoul of the principle that two courts (the trial court and the appellate court) ought not to have simultaneous jurisdiction over a case—although that conclusion is predicated on viewing the consolidation as a single case. While "mindful of the principle that consolidation . . . does not merge . . . independent actions into one suit," the court concluded:

When the scope of consolidation is broad, the issues and parties virtually identical, and one suit is the result of an inadvertent omission of the defendant's name from the [original] complaint, we do not believe that the parties suffer an injustice by treating the consolidated cases as one for the purpose of considering the timeliness of the notice of appeal.

Perhaps the greatest problem with the Advey case is that it came as an unfair surprise to litigants who had studied the Sixth Circuit's previous decisions. A court that had taken an absolutist approach, treating consolidated cases as separate litigation units and the parties to one as strangers to

356. Id. at 1180–81 n.1.
357. Id. at 1180.
358. Id.
359. According to the dissent, plaintiffs contended that they had made no inadvertent omission; they filed separately against Vanderbilt because it manufactured different types of material than did the other defendants. Id. at 1184 (Hillman, J., dissenting). In the dissent's view, the majority's reliance on the reasons lawsuits were separately filed and on the degree of identity among the parties, the breadth of the consolidation, etc., creates an unworkable doctrine and undesirable results. Because appeal rights will depend on the trial court's findings, uncertainty will cause litigants to make repetitive filings, which in turn will leave district courts uncertain whether their jurisdiction has been divested by the filing of a timely notice of appeal. He also predicted that the approach taken by the majority would lead to litigants being deprived of an appeal through maneuvering on post-judgment procedures. Id. at 1184. He preferred the clear rule that Stacey had seemed to furnish. Id. at 1185.
360. Id. at 1181. The "party" language of Federal Rule of Appellate Procedure 4(a)(4) has been construed somewhat loosely in other contexts. See, e.g., Thurman v. FDIC, 889 F.2d 1441, 1448 (5th Cir. 1989) (motion for new trial filed by person later determined to have been improperly denied intervention triggered Rule 4(a)(4)); Boggs v. Dravo Corp., 532 F.2d 897, 900 (3d Cir. 1976) (Rule 59(a) motion filed by administratrix whom the court erroneously refused to permit to be substituted for a deceased plaintiff stopped the running of the period for filing notices of appeal).
the other consolidated cases, suddenly changed course and implemented a
case-by-case approach in such a way as to treat the consolidated cases as one for purposes of considering the timeliness of the notice of appeal.
Whatever the merits of this decision if rendered by a circuit where litigants expect a fact sensitive analysis, it was unfair in the Sixth Circuit.

The December 1993 amendment of Federal Rule Appellate Procedure 4(a)(4) changed the Rule in a number of respects.\textsuperscript{361} The amended Rule continues to provide that if any party makes a timely motion of a type specified in the subsection, "the time for appeal for all parties runs from the entry of the order disposing"\textsuperscript{362} of the last such motion outstanding. Consequently, the question will persist whether parties to consolidated cases are "parties" within the meaning of Federal Rule of Appellate Procedure 4(a)(4), entitled to the benefit of the extension of time it authorizes. However, the amended Rule also provides that:

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding.\textsuperscript{363}

The amendment thus cures the problem of waiver resulting from premature filing of a notice of appeal. As a result, the issues presented by the Eckstein, Harcon Barge, Mendel, and Advey cases discussed above no longer will arise, although the kind of benefits issue raised in Stacey will continue to arise under the amended Rule.

The ambiguity in the nature and extent of the consolidations wrought by the district courts in a number of these cases posed difficulties both for the parties and for the appellate courts. That lack of clarity may reflect equivocation by trial courts or their failure clearly to communicate their intentions. It reinforces the importance of unequivocal decisions by trial courts, concerning the nature and scope of the "consolidations" they intend. It also demonstrates the need for a vocabulary, such as that proposed earlier in this Article,\textsuperscript{364} that clearly differentiates between consolidation for all purposes or trial, on the one hand, and joint or multi-case proceedings of narrower scope or duration, on the other. Absent clearer messages from trial courts, appellate courts will continue to struggle to catego-

\textsuperscript{361} See supra note 335.
\textsuperscript{362} FED. R. APP. P. 4(a)(4) (emphasis added).
\textsuperscript{363} FED. R. APP. P. 4(a)(4)(F) (emphasis added).
\textsuperscript{364} See supra text following note 248.
rize what the trial courts ordered, whether the appellate courts adhere to their present approaches to determining Federal Rule of Appellate Procedure 4 issues or adopt mine. Litigants will continue to be the losers.

G. Who Exactly Are the Appellants and Appellees, and What is the Scope of Their Appeal?

The law in the area framed by this sub-title is rather fragmentary, but there follows a sample of the issues that may arise. One question presented when consolidated cases are appealed is who the appellants are. Federal Rule of Appellate Procedure 3(c), as it existed prior to the December 1993 amendments, provided in part that, "[t]he notice of appeal shall specify the party or parties taking the appeal; [and] shall designate the judgment, order or part thereof appealed from . . . ." Appellees sometimes have contended that a court of appeals lacked jurisdiction over an appeal by anyone other than appellants whose names appeared in the caption of the notice of appeal. The appeals courts often were not as demanding as appellees desired, but ruled in a way that is now dictated by the amendments to Federal Rule of Appellate Procedure 3 that became effective December 1, 1993.

365. FED. R. APP. P. 3(c). New Federal Rule of Appellate Procedure 3(c), effective December 1, 1993, provides, in part:

A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.,” or "all defendants except X." . . . An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

366. See, e.g., Hale v. Arizona, 993 F.2d 1387, 1390-91 (9th Cir.) (holding sufficient to confer appellate jurisdiction with respect to all consolidated plaintiffs a notice of appeal that was captioned "JOHN LEROY FULLER Plaintiffs" and the text of which referred to "plaintiffs consolidated in the captioned cause"), cert. denied, 114 S. Ct. 386 (1993); Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1323 (9th Cir. 1991) (Notice of appeal was adequate which read, "[c]ome now plaintiffs, as consolidated into this cause and do hereby appeal . . . .") Such description was adequate since appellees could have determined plaintiff-appellants' identities by referring to the records of the lower court.). But cf. Barnett v. Petro-Tex Chem. Corp., 893 F.2d 800, 804-05 (5th Cir.) (A notice of appeal that bore the caption assigned by the district court to the consolidated cases and designated "Robert H. Broughton, et al., Plaintiffs above-named" as the appealing parties failed to provide notice of the appellants, based on Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), and brought only the appeal of Broughton himself before the court. A timely filed notice of appeal that bore the caption, "Troy D. Barnett, et al., Plaintiffs," and stated that "Robert H. Broughton, et al., Plaintiffs above-named" appealed, rendered only Barnett and Broughton appellants. In one of the consolidated cases, the court refused to treat the Form of Appearance of Counsel, which listed all the plaintiffs represented by the filing
More fundamental is the question of who has standing to appeal in consolidated cases; in particular, does a party to a case consolidated with another have standing to appeal the judgment in that other case? In *Oelze v. Commissioner*, the Fifth Circuit said "no," in a situation where two individuals, husband and wife, each had filed a petition requesting a redetermination of the deficiency in their tax payments claimed by the I.R.S., and the tax court had consolidated the petitions for purposes of trial, briefing, and opinion. The tax court had dismissed each petition, by separate orders, for failure of the petitioner to comply with discovery requests. The Oelzes filed a joint notice of appeal, but the court granted a motion to dismiss Mrs. Oelze's appeal as untimely. Mr. Oelze's petition apparently was timely because he had earlier filed a motion for reconsideration. Mr. Oelze sought to appeal, *inter alia*, the decision of the tax court dismissing his wife's petition. Finding that the tax court had not consolidated the cases for the purpose of rendering judgment, the Fifth Circuit held that he had no standing to appeal the dismissal of her petition.

367. This is a different matter than who has standing to sue, the standing issue discussed supra text accompanying notes 28–111. The most obvious difference between standing to sue and standing to appeal is that, in the latter instance, the focus is injury caused by a judgment, rather than injury caused by the facts underlying the lawsuit. 15A WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3902 (2d ed. 1991).

368. 723 F.2d 1162 (5th Cir. 1983).

369. See FED. R. APP. P. 4(a)(4); supra text accompanying note 335.

370. Oelze, 723 F.2d at 1163. See Stone v. United States, 167 U.S. 178, 189 (1897) (Two actions by the same plaintiff had been consolidated and tried together. A defendant in both actions who exercised all his peremptory challenges in the case in which he was sole defendant would not be heard to complain, in his appeal from the judgment in that case, that the court had erred in limiting the defendants' peremptory challenges in the other consolidated case.); United States v. Tippett, 975 F.2d 713 (10th Cir. 1992); Hallowell v. Commissioner, 744 F.2d 406, 407 n.1 (5th Cir. 1984) (A notice of appeal filed as to one suit is not a notice of appeal with respect to another suit, dealing with different tax years, with which the first was consolidated for trial, briefing, and opinion); Taylor v. Ouachita Parish Sch. Bd., 648 F.2d 959, 971 (5th Cir. 1981) (Where school desegregation cases had been consolidated for the limited purpose of hearing the United States' motion for interdistrict relief, the court dismissed city's appeal from an order allowing construction of certain schools, because the city was not a party in the case in which the challenged order was issued. The city lacked standing to appeal.). But see Hayes v. Prudential Ins. Co., 819 F.2d 921, 924 (9th Cir. 1987) (An appeal by plaintiff in one of two consolidated cases, from decision in the other case, was permitted because his request to be joined as a defendant in that case had been treated as a motion to consolidate.), cert. denied, 484 U.S. 1060 (1988).
This result seems correct, and is consistent with regarding the consolidated cases as a single civil action. Even in an ordinary multi-party case a plaintiff (or defendant) does not have standing to appeal on behalf of a co-party unless their claims or defenses are joint or the co-party, for some other reason, is adversely affected by the judgment or may assert rights that nominally belong to his aggrieved co-party.371

The question of who the appellees are in consolidated cases seems to have been infrequently litigated. In at least one case, a court of appeals (the Third Circuit) held that a defendant in a continuing case was a proper appellee, entitled to be heard on the issues presented by an appeal which directly affected his interests, where a different component of a consolidation had been completely resolved through summary judgment and the losers sought an immediate appeal.372 The appellate court could allow such a party to be heard as an amicus curiae, to help protect his interests. Granting appellee status to such a person is questionable, however, absent a regime in which consolidation merges the consolidated actions. Had the cases not been consolidated, a person in this position (a party to different litigation, not an indispensable party to the litigation on appeal but with interests that might be affected by an appellate decision in that case) would not have any right to be heard in the appellate court. In my view, consolidation for all purposes or for trial makes the plaintiffs and the defendants, respectively, co-parties. When the interests of those co-parties will be

371. United States ex rel. La. v. Jack, 244 U.S. 397, 402 (1917) (One who is not a party to a record and judgment is not entitled to appeal therefrom.); United States v. Little Joe Trawlers, Inc., 780 F.2d 158, 161 (1st Cir. 1986) ("To have standing to appeal, an appellee ordinarily must have been a party to the proceeding below and have been aggrieved by the order appealed from."); United States v. 5.96 Acres of Land, 593 F.2d 884, 887 (9th Cir. 1979) (Where the court decided an appeal on a ground other than that in which the State had an interest, the State was not a proper party to bring an interlocutory appeal; a party may not appeal to protect the interests of a co-party. However, so far as pertinent to the issues on appeal, the State's briefs would be considered as amici curiae briefs.); see Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986) (Co-defendant school board member could not appeal in his individual capacity because relief was not sought or given on that basis, could not appeal in his official capacity because standing belonged only to the co-defendant school board, and could not ground his standing on a basis that had not been asserted in the district court.); Atlantic Mut. Ins. v. Northwest Airlines, 24 F.3d 958, 961 (7th Cir. 1994) ("A litigant dissatisfied with the analysis of an opinion, but not aggrieved by the judgment, may not appeal. . . . Persons who care about the legal principles that apply to a dispute may appear as amici curiae; they are not entitled to intervene.") (citations omitted); see generally 15A Wright et al., supra note 367, § 3902. The general rule against advancing the rights of others denies standing to advance, on appeal, the rights of a coparty, even when disposition of a claim between other parties may have had a significant effect on the would-be appellant. Id. at 70–72. Similarly, "a party may not appeal the disposition of claims in which it was not involved." Id. at 70–71.
372. See Bergman v. Atlantic City, 860 F.2d 560, 565 n.6 (3d Cir. 1988); supra note 260.
directly affected by the resolution of issues on appeal, they should have a right to be heard as appellees.

The effect of consolidation on the identity of the appellees will be in issue most often when consolidated cases reach judgment at different times. When consolidated cases simultaneously become ripe for appeal, the issue is unlikely to arise. Then, as a practical matter, an appellee in any of the cases will be heard on all the matters that affect his interest, whether he is technically regarded as being an appellee only in a component or in all of the consolidated cases viewed as an entity.

H. And Where Should the Appeal be Prosecuted?

Even when the who, what, and when of an appeal in consolidated cases are clear, litigants may be uncertain as to where they have the right to have their appeal heard. The Court of Appeals for the Federal Circuit is the primary trouble spot.

Subject to certain exceptions, the Court of Appeals for the Federal Circuit has exclusive jurisdiction under 28 U.S.C. § 1295 over an appeal from a final decision of a district court if the jurisdiction of that court was based at least in part on 28 U.S.C. § 1338. 28 U.S.C. § 1338 is the statute giving district courts exclusive jurisdiction over civil actions that arise under acts of Congress relating to patents and other specified matters. For present purposes, let us oversimplify and say that § 1338 gives the district courts jurisdiction over civil actions arising under the patent laws. The question that has arisen is whether the Federal Circuit has exclusive jurisdiction of a non-patent action that was consolidated, for limited or all purposes, with a civil action arising under the patent laws. If it does, that clearly changes the court of appeals that has jurisdiction to hear a case, solely as a function of its having been consolidated with a patent case.

Reasoning that, upon consolidation of the cases, the district court's jurisdiction over the consolidation, treated as an entity, came to be based at least in part on 28 U.S.C. § 1338, the Federal Circuit has held itself to 1993.

374. 28 U.S.C. § 1338 (1988). Section 1338 provides, in part, "(a) [t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases."
have jurisdiction in such circumstances.\textsuperscript{375} I make no judgment about whether this is the best result as a matter of the purposes for which the Court of Appeals for the Federal Circuit was created. In light of the statutory commitment of exclusive jurisdiction over an appeal from a final decision if the jurisdiction of the district court was based at least in part on 28 U.S.C. § 1338, the conclusion that consolidation of a patent case, even for limited purposes, suffices to justify Federal Circuit jurisdiction over the whole consolidation is reasonable and not in conflict with anything advocated here.\textsuperscript{376} The interpretation of 28 U.S.C. § 1295 would be more consistent with the argument of this Article, however, if it tied Federal

\textsuperscript{375} See, e.g., In re Innotron Diagnostics, 800 F.2d 1077, 1079–80 (Fed. Cir. 1986). Even where the district court had ordered a separate trial of the antitrust issues—which comprised the complaint in one action and a counterclaim in the consolidated action—from the patent issues, which were the subject of the other complaint, the circuit court held it had jurisdiction over the consolidation.\textit{Id.} The court said:

\[\text{whether allegations of patent infringement be filed ... as a ... counterclaim in a non-patent case, or as a separate complaint which is then consolidated with the non-patent case, the district court's jurisdiction is based “in part” on § 1338(a) and this court must exercise its exclusive appellate jurisdiction over the entire case.}\textit{Id.; Interpart Corp. v. Italia, 777 F.2d 678, 680–81 (Fed. Cir. 1985). But cf. FMC Corp. v. Glouster Eng’g Co., 830 F.2d 770, 772–73 (7th Cir. 1987) (When an antitrust case transferred pursuant to 28 U.S.C. § 1407 (1988), governing multidistrict litigation, is consolidated for pre-trial with a suit for patent infringement, and the transferee court certifies an order for appeal under 28 U.S.C. § 1292(b) (1988), the appeal should be heard by the court of appeals for the transferee circuit, not the Federal Circuit.), cert. dismissed sub nom. Reifenhauser GmbH & Co., Maschinenfabrik v. FMC Corp., 486 U.S. 1063 (1988); Christianson v. Colt Indus. Operating Corp., 822 F.2d 1544 (Fed. Cir.) (The court distinguished \textsl{Interpart} and \textsl{Innotron} where the consolidated actions were not between the same parties, consolidation did not produce a patent counterclaim and (it presumed that) if both actions had been tried, the district court would have entered separate judgments. As the court viewed the case, a patent question was raised only in an argument against a defense on cross-motions for summary judgment in an antitrust suit, and that did not create Federal Circuit jurisdiction.), cert. granted, 484 U.S. 985 (1987), vacated on other grounds, 486 U.S. 800 (1988), cert. denied, 493 U.S. 822 (1989).}\textsuperscript{376} Where an appeal should be prosecuted also may be affected by how one defines “the parties” for purposes of 28 U.S.C. § 636, the statute governing the powers and jurisdiction of federal magistrate judges. When specially designated by a district court, a magistrate judge may conduct all proceedings in a civil matter and enter judgment upon the consent of the parties. 28 U.S.C. § 636(c)(1) (1988). Upon entry of such a judgment, an aggrieved party may appeal directly to the appropriate court of appeals, unless the parties consent to appeal to a district court judge. 28 U.S.C. §§ 636(c)(3),(4) (1988). In the context of consolidated cases, how one defines “the parties” for purposes of these statutory provisions will determine whether proceedings before a magistrate judge were authorized and where the appeal properly lies. See, e.g., EEOC v. West La. Health Servs., Inc., 959 F.2d 1277 (5th Cir. 1992) (A magistrate judge lacked jurisdiction to hear a case in which the intervenor complainant had not consented to trial by the magistrate, but the magistrate judge had jurisdiction to hear the consolidated companion case.); \textit{cf. Atlantic Mut. Ins. v. Northwest Airlines, 24 F.3d 958, 960 (7th Cir. 1994) (A would-be intervenors, who was not a party within 28 U.S.C. §§ 636(c)(3),(4), whose lack of consent to a decision by a magistrate judge resulted in the court of appeals lacking appellate jurisdiction.).}
Circuit jurisdiction over non-patent actions to their consolidation with patent actions for all purposes or for trial.

CONCLUSION

Many legal professionals believe that consolidation does not merge lawsuits, change the rights of the parties, or make the parties to one suit parties to another or to a civil action that encompasses the whole consolidation. The reality is different, as illustrated here and as will be further demonstrated in Part II of this Article, which will be published separately. To enable participants in the legal system to protect their interests, the actual effects of consolidation on litigants' procedural rights need to be understood. This Article has taken a step in that direction, illuminating the effects of consolidation on matters of justiciability, subject matter and personal jurisdiction, venue, indispensable parties, the assertability and posture of claims, and the timing, scope, location, and parties to an appeal.

At the descriptive level, Part I found that consolidation often does alter standing determinations, because many courts permit consolidated cases to go forward so long as any plaintiff from among the consolidated cases has standing to pursue the claims. Consolidation has not, however, altered the analysis or outcome of mootness or ripeness issues. By and large, case consolidation also has not altered application of the requirements for subject matter jurisdiction, personal jurisdiction, or venue, and has not changed the analysis as to whether plaintiffs have failed to join an indispensable party. But there are cases that represent exceptions to these general rules: cases in which the courts have bent, or made exceptions to, the general rule that subject matter jurisdiction must be determined by considering each component action independently of the others; cases in which courts have indicated that consolidation could cure the problems caused by the absence of a party to be joined if feasible; cases in which courts have held the activities of a party in one component of a consolidation to be relevant to the court's right to assert personal jurisdiction over him in another component; and cases in which the courts have broadly construed venue statutes, to keep a set of consolidated cases together.

Consolidation has had more widespread and obvious effects on the timing, scope, location of, and the parties to an appeal. In most circuits, "all purpose" consolidation of cases results in the losing parties in any single component surrendering the right to an immediate appeal. Either as an across the board common law rule or as a matter determined case by case, in most circuits such losing litigants have to await the resolution of all
claims among all parties to the consolidation before they can appeal, absent a Rule 54(b) certification from the trial judge. In addition, by virtue of the courts’ regarding the parties to consolidated cases as parties to a civil action within the meaning of the various subparts of Federal Rule of Appellate Procedure 4, consolidation also often alters the time a litigant has to file a notice of appeal when all the consolidated cases have been resolved in the trial court. Litigants may benefit from an extension of time that otherwise would be unavailable to them, and in the past they have suffered from their notices of appeal being rendered premature and ineffective. Under the statutes that govern the Court of Appeals for the Federal Circuit, litigants may even find that consolidation has altered which court of appeals has jurisdiction over their case.

At a normative level, this Article argued that a better procedural system, a system that generates more accurate expectations, is fair, and is more efficient, would result from a shift in the paradigm. Such a system, even if preferable, can be created only if it is permissible. I believe it is. There is good reason to believe that the Federal Rules and jurisdictional statutes can be interpreted to permit the product of lawsuit consolidation to constitute a single civil action which would not exceed the boundaries of an Article III case or controversy. This Article has demonstrated that neither the Federal Rules of Civil Procedure, nor the Rules Enabling Act, nor the Congressional statutes conferring jurisdiction over prescribed categories of civil actions would be violated by considering the litigation unit created by case consolidation a single civil action. It has shown, furthermore, that such an all-encompassing civil action would be constitutional under Article III when each of the component cases is jurisdictionally self-sufficient or when any claims that are not jurisdictionally self-sufficient arise out of a common nucleus of operative fact with claims (within the consolidation) that are self-sufficient. If common questions of law, or common questions of fact not amounting to a common nucleus, link claims that are not jurisdictionally self-supporting to consolidated claims that are, the totality still could constitutionally be regarded as a single Article III case or controversy if the interpretation of supplemental jurisdiction were liberalized so that such lesser linkages suffice.

Some might argue that the Supreme Court’s 1933 decision in Johnson v. Manhattan Railway precludes viewing a consolidation as a single civil action or Article III case. This Article has argued that Johnson is not preclusive. It predates and thus does not interpret the Federal Rules of Civil Procedure, it was predicated upon a statutory section that Rule 42 modified, and it was decided in an era in which the procedural powers of the federal
courts were less evolved and when the pressures of the federal docket were far less than they are today. Johnson also did not address matters of justiciability or the scope of an Article III case, and it may have involved a limited purpose “consolidation.” In making decisions about standing, the Court itself has disregarded Johnson’s broad dicta and both the Court and the lower federal courts often treat a consolidation as a single action or case. Specifically, in holding it unnecessary to consider each plaintiff’s standing so long as a justiciable controversy is presented by virtue of some plaintiff’s standing, the federal courts have treated consolidations as a single action or case. In so doing, they have allowed consolidation to alter litigants’ procedural rights: particular plaintiffs’ ability to act as and be bound as parties.

Since an alternative view of consolidation is permissible, the Article explored how analyses and outcomes would change if courts treated consolidations as a single action or case for purposes of other justiciability doctrines and in determining subject matter jurisdiction, personal jurisdiction, and venue. With respect to ripeness and mootness, the Article concluded that whether a consolidation is treated as a single civil action makes no difference because courts now examine each claim independently for ripeness and mootness, regardless of the scope of the action of which it is part. By contrast, to treat a consolidation as a single civil action for purposes of subject matter jurisdiction would expand the universe of claims the federal courts could hear. It would enable federal courts to invoke supplemental jurisdiction when that doctrine otherwise would be unavailable because a jurisdictionally sufficient claim would be a constituent of a different civil action than that in which the jurisdictionally insufficient claim (the dependent claim) was asserted. The proposal made here would not however compel, or even permit, the federal courts to hear all claims that share a common question of law or fact with a jurisdictionally sufficient claim. The restrictions on supplemental jurisdiction imposed by Gibbs’ requirement of a common nucleus of operative fact and by 28 U.S.C. § 1367(b) governing diversity actions, and the statutory restrictions on removal, all would continue to limit federal jurisdiction. Moreover, through discretion in the decisions whether to consolidate and whether to exercise supplemental jurisdiction, the federal courts would determine case-by-case when and to what extent they actually would hear more claims than they do at present.

This Article also considered how treatment of a consolidation as a single civil action would affect the resolution of issues generated when consolidations include cases removed from state court. In light of the language and structure of section 1447, the statute governing remand, the
Article concluded that when a district court lacks jurisdiction over one or more case components of a consolidation that includes both actions commenced in federal court and removed actions, it should dismiss any jurisdictionally inadequate claims begun in federal court and remand any such claims removed from state court, but should neither dismiss nor remand as a package. Improper removal of an action nullifies the consolidation, so courts should apply the doctrines governing dismissal and remand as if the cases had never been consolidated. Thus, even if the product of a proper federal court consolidation constitutes a single civil action or case, only those actions may be removed that are jurisdictionally sufficient in and of themselves, and only erroneously removed actions should be remanded.

This Article also concluded that an order remanding an entire consolidation (of such "mixed" components) on the ground that the federal court lacked jurisdiction to hear the claims is appealable because, so far as the actions commenced in federal court are concerned, such an order relies on grounds that are not among the statutory grounds for remand. Treatment of a consolidation as a single civil action would expand the group of claims removable under 28 U.S.C. § 1441(c).

Treating consolidations as a single civil action also can expand the array of persons over whom courts exercise personal jurisdiction and the number of proper venues. It can affect decisions as to personal jurisdiction by influencing the scope of the consent to jurisdiction that courts may fairly infer from a party's commencement of a lawsuit or by influencing courts' use of the notion of "pendent personal jurisdiction." Treatment of a consolidation as a single civil action can affect the propriety of venue by influencing which parties are considered defendants, and how the claim or subject property is defined. In particular, it may alter whether a particular judicial district is one in which a substantial part of the events or omissions giving rise to a claim occurred. As a result, while consolidation would not cure the subject matter jurisdiction problems posed by a nondiverse indispensable party, treating a consolidation as a single civil action could cure problems of personal jurisdiction or venue that otherwise would preclude participation by a person who should be joined if feasible. I believe that the above-described expansions of jurisdiction and venue would facilitate just and efficient decision making, and would not impose unfair burdens on litigants. Although this approach intrudes on litigants' prerogatives to structure their lawsuits as they see fit, it does not differ fundamentally from the ways in which courts already limit litigant control through joinder...
requirements, supplemental jurisdiction, res judicata doctrine, and of course consolidation powers. 377

When the subject is appeals, many courts already treat consolidations as a single civil action. This approach is preferable. It avoids the drawbacks of rigidly permitting an immediate appeal when all the claims in a particular component are resolved or of making the right to an immediate appeal case-to-case. The disadvantages of these approaches include the risk of inefficient use of appellate resources through duplicative appeals, the risk that appeals courts may determine issues in which parties to other components have an interest and, when case-by-case determinations are made, the uncertainty concerning appealability which leads to wasted filings and waived rights. By contrast, delay of appeal until an entire consolidation has been resolved avoids these pitfalls, and enables the trial court to authorize an earlier appeal pursuant to Rule 54(b), where appropriate. It puts that decision in the trial court, which is more familiar with the consolidated cases than the appellate court (to whom the question is put when courts the take the case-by-case approach referred to above), and within the scope of a well developed vehicle for determining the equities of permitting an immediate appeal. As this Article also discussed, viewing a consolidation as a single civil action also works best, and accords with what a number of appeals courts already are doing, in the context of applying Federal Rule of Appellate Procedure 4(a), governing the time for appeal. If all courts were to adopt the delayed appeal model that follows from treating a consolidation as a single civil action, the uncertainty that now results in wasted notices of appeal and has resulted in inadvertent waivers of appeal rights would be dispelled. The possibility that surprising and consequently inequitable results would flow from this approach have been cured by the 1993 amendments to part (a)(4) of the Rule.

Finally, because courts should treat as a single civil action only those consolidations that are for all purposes or for trial, courts should clarify their expressions of intention. To assist courts to employ a vocabulary that clearly distinguishes among the degrees of joint proceedings that courts may order, this Article proposed some new terminology.

377. See Richard D. Freer, Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit, 50 U. Pitt. L. Rev. 809, 851 (1989) (concluding that “we need to expand the federal courts’ power to override plaintiff’s structuring of a lawsuit expressly for the purpose of avoiding multiplicity”).