HYPOTHETICAL STATUTORY JURISDICTION AND THE LIMITS OF FEDERAL JUDICIAL POWER

Joshua S. Stillman[*]

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 Associate, Issues & Appeals Group, Jones Day, New York, N.Y. The views set forth herein are the personal views of the author, and do not necessarily reflect those of the law firm with which he is associated. A short, practitioner-oriented summary of portions of this Article appeared in the Fall 2015 issue of the American Bar Association Appellate Practice Journal. Thanks to Glen Cheng, Vinay Harpalani, Jesse Jensen, Michael Jo, Frederick J. Lee, Brian J. Levy, Joshua J. Libling, Jeffrey A. Mandell, Rajeev Muttreja, David L. Noll, Lauren Pardee Ruben, David B. Rochelson, Jeffrey E. Sandberg, and Alan M. Trammell for their invaluable comments and feedback. Most of all, thanks to Joelle Asaro Berman for her unending patience and support throughout this Article's long gestation.

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ABSTRACT

When federal courts exercise hypothetical jurisdiction, they bypass tough questions of subject-matter jurisdiction to dismiss cases on easy merits grounds. Because exercising hypothetical jurisdiction often appears to be more efficient, lower federal courts widely adopted the practice prior to 1998. But the Supreme Court rejected at least some, and perhaps all instances of hypothetical jurisdiction in Steel Co. v. Citizens for a Better Environment, *since it violated the well-established duty to confirm subject-matter jurisdiction prior to reaching the merits. Soon after, in order to preserve maximum flexibility for themselves, most lower courts read* Steel Co. *narrowly. They reasoned that the often ambiguous* Steel Co. *opinion banned bypassing only constitutional—and not statutory—issues of subject-matter jurisdiction. Today, the practice of assuming "hypothetical statutory jurisdiction" is widespread in the lower federal courts—though it is also the subject of a circuit split.*

This Article challenges this consensus, and argues that assuming hypothetical statutory jurisdiction violates Article III as interpreted by Steel Co. *and its progeny. Hypothetical statutory jurisdiction's basic premise—that statutory subject-matter jurisdiction limitations are less inviolable than their constitutional counterparts—is faulty. The constitutional scheme itself dictates that statutory subject-matter jurisdiction is equally necessary to reach the merits, vitally important for promoting separation-of-powers and federalism values, and often instrumental in protecting the federal courts' limited judicial resources. Moreover, the principal doctrinal argument for hypothetical statutory jurisdiction, which depended on characterizing issues of statutory standing as jurisdictional, has been undermined by recent Supreme Court precedent holding that such issues are not jurisdictional. Furthermore, subsequent Supreme Court cases elaborating on* Steel Co. *have tacitly assumed that hypothetical statutory jurisdiction is unconstitutional, and have emphasized that subject-matter jurisdiction—without qualification—is necessary for a federal court to reach the merits of a case.*

This Article also argues that constitutional-avoidance and efficiency concerns do not justify retaining the unconstitutional doctrine of hypothetical statutory jurisdiction. Even in the case of potentially unconstitutional jurisdiction-stripping statutes, constitutional-avoidance values are far more ably served by the applicable clear-statement rules, which avoid grave constitutional issues without trenching on fundamental separation-of-powers principles.

Moreover, the efficiency case for hypothetical statutory jurisdiction is overstated. Abandoning hypothetical statutory jurisdiction under current law will be far less costly than it must have seemed in Steel Co.*'s*

immediate aftermath. Hypothetical statutory jurisdiction can also create inefficiencies of its own, both by causing courts to reach merits issues unnecessarily, and by incentivizing collateral attacks on subject-matter jurisdiction in follow-on litigation. More fundamentally, even if hypothetical statutory jurisdiction might lead to immediate efficiency gains for the litigants and the judge, it is not an effective way to dispose of a case expeditiously while simultaneously respecting the interests of Congress, state judiciaries, and fundamental separation-of-powers and federalism values.

INTRODUCTION

Suppose you are a federal district judge faced with a motion to dismiss, in which the question whether a federal statute grants subject-matter jurisdiction is particularly difficult. Yet, it is clear that the plaintiff—the party invoking federal jurisdiction—will lose on the merits of his claim. While you are aware that subject-matter jurisdiction is described as the "power to . . . exercise *any* judicial power" over a case,[1] it would seem more efficient to assume hypothetically that subject-matter jurisdiction exists, and to dismiss the complaint on the merits.

Moreover, neither plaintiff nor defendant would appear to be aggrieved by assuming hypothetical jurisdiction. The plaintiff—who has invoked federal jurisdiction—will be granted the benefit of the doubt on the difficult jurisdictional issue and likely will not appeal the decision to bypass that issue.[2] The defendant will ultimately secure a merits victory, making it, too, less likely to challenge the assumption of jurisdiction on appeal. The allure of assuming hypothetical jurisdiction, thereby seemingly resolving the matter efficiently and without drawing the parties' ire, is evident. Thus, it is no surprise that prior to 1998 every circuit had endorsed the practice.[3]

Things changed when the Supreme Court declared at least some, and perhaps all, instances of hypothetical jurisdiction unconstitutional in *Steel Co. v. Citizens for a Better Environment*.[4] The Court forcefully rejected the practice "because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of

1. Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 718 (1838) (emphasis added); *see also* Joan Steinman, *After* Steel Co.*: "Hypothetical Jurisdiction" in the Federal Appellate Courts*, 58 WASH. & LEE L. REV. 855, 890 (2001).

2. However, if the Plaintiff comes to doubt whether she had properly invoked federal jurisdiction, she may have an incentive to seek a jurisdictional dismissal on appeal to preserve the ability to refile in state court. *See infra* notes 47, 337 and accompanying text.

3. *See infra* note 48 and accompanying text.

4. 523 U.S. 83 (1998).

powers."[5] But the often ambiguous opinion contained contradictory hints as to whether the ban on hypothetical jurisdiction applied to *all* jurisdictional issues—including statutory issues—or only to *Article III* jurisdictional issues.[6] For instance, the Court ambiguously pronounced that the "statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers"[7]—perhaps indicating that statutory subject-matter jurisdiction was "essential," or perhaps signaling that it was less fundamental and subject to circumvention.

Given their strong incentives to read *Steel Co.* narrowly to preserve maximum flexibility, most lower federal courts soon ruled that *Steel Co.* should be read to ban only the assumption of Article III subject-matter jurisdiction. This narrow reading preserved the courts' ability to bypass *statutory* jurisdictional issues to dismiss cases on clear merits grounds.[8] Almost every circuit to have addressed the matter has agreed, leading to a lopsided circuit split.[9] Today, the use of hypothetical *statutory* jurisdiction[10] continues largely unabated.[11]

This self-serving consensus is incorrect. Hypothetical statutory jurisdiction has always been deeply questionable because it is contrary to a fundamental principle of federal jurisdiction—that federal courts are powerless to reach the merits of a case in the face of a valid statutory jurisdictional restriction. Under the constitutional scheme, Congress's control of the federal courts' jurisdiction is one of the primary democratic "checks" on the unelected judiciary, and a principal means of protecting the state courts' exclusive domain over certain cases.[12] When federal courts bypass statutory jurisdictional limits, they offend Congress, the states, and the Constitution. Subsequent doctrinal developments have only cast further doubt on hypothetical statutory jurisdiction. Eighteen years after *Steel Co.*, it is time to put to rest the dubious doctrine of hypothetical statutory jurisdiction.

This Article argues that hypothetical statutory jurisdiction is contrary to Article III as interpreted by *Steel Co.* and subsequent Supreme Court cases,

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5. *Id.* at 94.

6. *See infra* notes 97–99 and accompanying text. *See generally infra* Part I.A (providing background on federal subject-matter jurisdiction).

7. *Steel Co.*, 523 U.S. at 101.

8. *See infra* note 185 and accompanying text (noting that difficult statutory jurisdictional issues can be expected to arise more frequently than difficult Article III jurisdictional issues in typical private-rights litigation).

9. *See infra* notes 105–12 and accompanying text.

10. *See* Bechtel v. Competitive Techs., Inc., 448 F.3d 469, 480 n.1 (2d Cir. 2006) (using term "hypothetical statutory jurisdiction" (emphasis omitted)).

11. *See, e.g.*, Telles v. Lynch, 639 F. App'x 658, 661 & n.6 (1st Cir. 2016) (assuming hypothetical statutory jurisdiction); *In re* Grand Jury Subpoenas Dated March 2, 2015, 628 F. App'x 13, 14 (2d Cir. 2015) (same); Byrd v. Republic of Hond., 613 F. App'x 31, 33 (2d Cir. 2015) (same).

12. *See infra* Part II.A.

and that constitutional-avoidance and efficiency values do not justify retaining the doctrine. It presents the first sustained treatment of this issue in the literature.[13]

Part I provides the relevant background. First, Part I.A provides a general overview of the subject-matter jurisdiction of the federal courts. Next, Part I.B discusses hypothetical jurisdiction prior to *Steel Co.*, and Part I.C examines *Steel Co.*'s repudiation of the practice. Then, Part I.D charts the rise of hypothetical statutory jurisdiction in the lower courts after *Steel Co.*

Part II argues that hypothetical statutory jurisdiction is contrary to Article III as interpreted by *Steel Co.* and subsequent Supreme Court cases. Part II.A argues that the fundamental premise of hypothetical statutory jurisdiction—that statutory jurisdictional restrictions are entitled to lesser respect and are less inviolable than Article III jurisdictional restrictions—is incorrect. Like its constitutional counterpart, statutory subject-matter jurisdiction is essential for the federal courts to exercise jurisdiction, vitally important for promoting the fundamental separation-of-powers and federalism values at the core of Article III, and crucial for protecting federal courts' limited judicial resources. Since Article III itself establishes a scheme under which statutory subject-matter jurisdiction is essential, any argument that Article III jurisdictional restrictions are inviolable while statutory jurisdictional restrictions are dispensable is unjustifiable.

Part II.B rebuts the primary doctrinal argument for hypothetical statutory jurisdiction. This argument relied heavily on a prior Supreme Court case that appeared to skip an issue of statutory standing to dismiss on the merits, and depended on characterizing issues of statutory standing as jurisdictional. However, the Supreme Court recently ruled in *Lexmark International, Inc. v. Static Control Components, Inc.*[14] that these statutory issues are *not* jurisdictional but rather go to the merits. Thus, in light of current law, the prior Supreme Court case did not exercise hypothetical statutory jurisdiction, and the doctrinal argument for hypothetical statutory jurisdiction fails.

Part II.C examines *Steel Co.*'s progeny, *Ruhrgas AG v. Marathon Oil Co.* and *Sinochem International Co. v. Malaysia International Shipping*

13. While other articles have discussed hypothetical statutory jurisdiction in passing, none have offered a sustained discussion or critique of the doctrine, and none have analyzed the issue in light of current law, including *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). *See, e.g.*, Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 708–09 (2013); Jack H. Friedenthal, *The Crack in the* Steel *Case*, 68 GEO. WASH. L. REV. 258, 259–60, 264–65 (2000); Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 318 (1999); Steinman, *supra* note 1, at 860–62; Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099, 1126–27 (2013); Micah J. Revell, Comment, *Prudential Standing, the Zone of Interests, and the New Jurisprudence of Jurisdiction*, 63 EMORY L.J. 221, 256 (2013).

14. 134 S. Ct. 1377 (2014).

Corp., which held that personal jurisdiction and forum non conveniens issues could be addressed prior to subject-matter jurisdiction. These cases cast further doubt on hypothetical statutory jurisdiction. The posture in which these cases were decided indicates that the Supreme Court assumes that *Steel Co.*'s ban on hypothetical jurisdiction extends to statutory jurisdictional issues. Moreover, these cases' insistence that courts may not bypass issues of subject-matter jurisdiction to reach the merits, without distinguishing between statutory and constitutional jurisdiction, strongly suggests that hypothetical statutory jurisdiction is impermissible.

Part III argues that constitutional-avoidance and efficiency concerns do not justify maintaining the doctrine. Part III.A argues that even in the seemingly most compelling case for hypothetical statutory jurisdiction—in which a court seeks to avoid determining the constitutionality of a statute stripping the federal courts of jurisdiction to hear constitutional claims—the doctrine does not serve its intended purpose. It is ill-suited to such a scenario since the *statutory* issue in such a case is unlikely to be difficult. And the courts have a better tool at their disposal to avoid the constitutional issue: clear-statement rules, which allow courts to avoid the constitutional issue without offending fundamental separation-of-powers and federalism values.

Part III.B argues that the efficiency gains from hypothetical statutory jurisdiction—the doctrine's primary justification—are overstated, and do not justify retaining the doctrine. First, Supreme Court cases decided after *Steel Co.* greatly diminish the efficiency costs of abolishing hypothetical statutory jurisdiction by allowing various "threshold" non-merits issues to be decided before subject-matter jurisdiction and by limiting the number of statutory jurisdictional issues. Second, in certain cases, hypothetical statutory jurisdiction can inefficiently encourage needless litigation of merits issues and relitigation of jurisdictional issues—both in subsequent proceedings in a case and in follow-on litigation. Third, and more fundamentally, hypothetical statutory jurisdiction is not an effective way to dispose of a case quickly while simultaneously respecting the interests of Congress, the states, and the fundamental separation-of-powers and federalism values protected by honoring statutory jurisdictional limitations.

I. THE ORIGINS OF HYPOTHETICAL STATUTORY JURISDICTION

This Part provides background on the origins of hypothetical statutory jurisdiction. Part I.A first provides a general overview of the federal courts' subject-matter jurisdiction. Part I.B discusses the emergence of hypothetical jurisdiction prior to 1998, and Part I.C examines the Supreme Court's repudiation of the doctrine in *Steel Co.* Then, Part I.D reviews the rapid rise of hypothetical statutory jurisdiction after *Steel Co.*

A. The Federal Courts' Subject-Matter Jurisdiction

Article III of the Constitution provides that the federal courts are courts of limited jurisdiction, possessing only the jurisdiction granted to them and unable to reach the merits of cases falling outside of that jurisdiction.[15] The federal courts' "[s]ubject-matter jurisdiction . . . refers to a tribunal's 'power to hear a case'" and the "power to declare the law."[16] Without subject-matter jurisdiction, "the court cannot proceed at all in any cause"[17] and it may only "announc[e] th[at] fact and dismiss[] the cause."[18] Therefore, the "received wisdom" is that "jurisdiction [must] be established as a threshold matter" before reaching the merits of a case—a requirement that "spring[s] from the nature and limits of the judicial power of the United States" and has been described as "inflexible and without exception."[19]

Issues of subject-matter jurisdiction are generally divorced from the merits issue of whether the plaintiff will prevail on his claim.[20] A court may lack subject-matter jurisdiction over claims that would be successful on the merits while having jurisdiction over unsuccessful merits claims.[21]

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15. *See, e.g.*, Bradford C. Mank, *Is Prudential Standing Jurisdictional?*, 64 CASE W. RES. L. REV. 413, 444 (2013) ("[F]ederal courts only possess limited jurisdiction, unlike the broad common law jurisdiction of the state courts."); Jason Wojciechowski, *Federalism Limits on Article III Jurisdiction*, 88 NEB. L. REV. 288, 315 (2009) ("The concept of limited subject matter jurisdiction is one expression of the larger idea of federalism."). *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 31, 33–38 (6th ed. 2012).

16. Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67, 81, 84 (2009) (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 510 (2006); then quoting Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 94 (1998)); *accord* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 160 (2010) ("[J]urisdiction" is a court's "adjudicatory authority" (quoting Kontrick v. Ryan, 540 U.S. 443, 455 (2004))).

17. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868). *See generally* Howard M. Wasserman, *Jurisdiction, Merits, and Substantiality*, 42 TULSA L. REV. 579, 579 n.1 (2007) (collecting authorities).

18. *Ex parte* McCardle, 74 U.S. (7 Wall.) at 514. Furthermore, "[i]t is . . . presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (citations omitted).

19. Trammell, *supra* note 13, at 1107 (quoting *Steel Co.*, 523 U.S. at 94–95); *see also, e.g.*, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981) ("A court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . ."); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978) ("The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded."); United States v. More, 7 U.S. (3 Cranch) 159, 172 (1805) ("[D]oubt has been suggested, respecting the jurisdiction of this court . . . and this question is to be decided, before the court can inquire into the merits of the case.").

20. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 254 (2010) ("Subject-matter jurisdiction . . . refers to a tribunal's power to hear a case . . . [and] presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief." (citations and internal quotation marks omitted)); Wasserman, *supra* note 16, at 598 (same).

21. *See* Wasserman, *supra* note 16, at 582–83 n.34. *See generally* 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3522, at 138 (3d ed. 2008).

There are two components of federal subject-matter jurisdiction, both of which must generally be present to reach the merits of a case—Article III subject-matter jurisdiction and statutory subject-matter jurisdiction. Article III provides that the federal "judicial [p]ower . . . extend[s only] to" an enumerated class of cases, including "all [c]ases . . . arising under this Constitution, [and] the [l]aws of the United States" and "[c]ontroversies . . . between [c]itizens of different [s]tates,"[22] known as federal question jurisdiction and diversity jurisdiction, respectively.[23] Article III also limits the federal courts to addressing "cases" or "controversies," which the Supreme Court has interpreted to require a plaintiff to possess "standing."[24] To establish Article III standing, a plaintiff must show that (a) she suffered a "concrete and particularized" "injury in fact," (b) that is "fairly traceable to the challenged action of the defendant," and (c) that can be prevented or redressed by a favorable ruling.[25]

Showing that the case falls within one of the enumerated Article III categories of cases and that a plaintiff possesses Article III standing, however, is insufficient to establish subject-matter jurisdiction. A federal statute must also grant jurisdiction to hear the case.[26] Under the constitutional scheme, the lower courts are creatures of statute.[27] The Constitution grants Congress the power to create them and abolish them, and expand and constrict their jurisdiction within the constitutional boundaries.[28] A federal statute must therefore grant the lower federal courts

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22. U.S. CONST. art. III, § 2.

23. *See generally* Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 43 nn.243–44 (2001).

24. *See, e.g.*, S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 99 (2014) (through standing doctrine, "the federal judicial power is reserved to the 'adjudication of actual disputes between adverse parties'" (quoting Richardson v. Ramirez, 418 U.S. 24, 36 (1974))).

25. Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180–81 (2000)). Additionally, there are certain "prudential" standing doctrines of judicial self-restraint—many of which have recently been reclassified as constitutional issues or non-jurisdictional merits issues. *See generally* Brown, *supra* note 24, at 108–15.

26. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005) (lower federal courts may not exercise jurisdiction absent a statutory basis); Ins. Corp. of Ir. Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982) (same); Idleman, *supra* note 23, at 44 ("Statutory law . . . is the principal medium by which federal judicial power is delineated."); Idleman, *supra* note 13, at 251 n.51.

27. Article III provides that "[t]he 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." U.S. CONST. art. III, § 1; *see infra* Part II.A (discussing the Madisonian Compromise).

28. *See, e.g.*, Kontrick v. Ryan, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction."); Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991) ("[The] power of lower federal courts can be limited by statute and rule, for '[t]hese courts were created by act of Congress.'" (quoting *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 511 (1873))); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433 (1989) (noting the "settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good.'" (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845))).

jurisdiction over a case, and jurisdiction is lacking if a constitutionally valid federal statute bars the federal courts from entertaining the case.[29] While Article III establishes the Supreme Court of its own force, it has also been interpreted to vest Congress with at least some power to control the Supreme Court's jurisdiction—so the Supreme Court must also possess both Article III jurisdiction and the absence of a constitutionally valid statutory jurisdictional restriction to reach a case's merits.[30]

Subject-matter jurisdiction serves to protect and promote the separation-of-powers and federalism values at the core of Article III.[31] It confines the federal courts to a traditional judicial role, preventing them from interfering with the prerogative of the political branches to resolve political issues.[32] It thereby expresses the "central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from . . . the excessive use of judicial power."[33] Because many federal judicial rulings cannot be overturned by the political branches,[34] Congress's ability to control the jurisdiction of the federal courts serves as a democratic check on the unelected judicial branch's authority.[35]

Moreover, when a federal court lacks subject-matter jurisdiction, a state court will often be the only forum in which the case can be heard.[36]

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29. *See, e.g.*, Hagans v. Lavine, 415 U.S. 528, 538 (1974) ("Jurisdiction is essentially the authority conferred by Congress to decide a given type of case one way or the other.").

30. *See generally Ex parte* McCardle, 74 U.S. (7 Wall) 506, 512–13 (1868) ("[W]hile 'the appellate powers of this court are not given by the judicial act, but are given by the Constitution,' they are, nevertheless, 'limited and regulated by that act, and by such other acts as have been passed on the subject.'" (quoting Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810))); Idleman, *supra* note 13, at 251 & n.50; Steinman, *supra* note 1, at 905 & n.184 (discussing debate over Congress's power to limit Supreme Court's appellate jurisdiction). Since appellate courts lack jurisdiction if the district court lacks jurisdiction, statutory jurisdictional restrictions on the lower courts can also affect the Supreme Court's jurisdiction. *See generally* Arizonans for Official English v. Arizona, 520 U.S. 43, 73 (1997); Idleman, *supra* note 13, at 892 n.145.

31. *See, e.g.*, Trammell, *supra* note 13, at 1141 ("Subject matter jurisdiction primarily serves separation of powers interests, and it also vindicates certain federalism principles.").

32. *See, e.g.*, Brown, *supra* note 24, at 100 (constitutional standing requirements promote "'separation-of-powers principles' . . . by 'identifying[] those disputes which are appropriately resolved through the judicial process.'" (quoting Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013); then quoting Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014) (footnotes omitted)).

33. U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 77 (1988).

34. Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Congress has been unable to "reverse" the Supreme Court's constitutional rulings, though it may effectively "reverse" statutory rulings. *See* Idleman, *supra* note 23, at 46 & n.260.

35. *See infra* notes 172–75 and accompanying text.

36. State courts possess concurrent jurisdiction over federal claims unless Congress vests federal courts with exclusive jurisdiction. Tafflin v. Levitt, 493 U.S. 455, 458 (1990). Indeed, general federal question jurisdiction did not exist prior to 1875, and most federal claims were adjudicated in state court. *See generally* Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 71 & n.124 (1975).

Under our constitutional system of dual sovereignty, the states possess sovereign authority limited only by federal law, and their judiciaries often possess exclusive or concurrent jurisdiction over legal claims.[37] Subject-matter jurisdiction allocates cases between the federal and state judicial systems,[38] which preserves the exclusive adjudicative domain of the state courts[39] and protects the limited judicial resources of the federal courts.[40] The constitutional scheme thus furthers separation-of-powers and federalism values by allowing Congress to protect the states' prerogative or restrict it when necessary.[41]

Because federal courts are generally powerless to decide the merits of a case without subject-matter jurisdiction, unique and inflexible procedural rules apply. Unlike most arguments against a plaintiff's right to recover, arguments that the court lacks subject-matter jurisdiction "can never be forfeited or waived"[42] and "may be raised at any stage"[43] in a proceeding—even on appeal.[44] Moreover, "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction," and must themselves "raise and decide jurisdictional questions that the parties either overlook or elect not to press."[45] These rules are unyielding to countervailing equitable considerations[46]—and can lead to seemingly harsh and inefficient results. For example, if the issue is first raised on appeal

37. *See generally Tafflin*, 493 U.S. at 458 (discussing "dual sovereignty").

38. *See* CHEMERINSKY, *supra* note 15, at 33–38. This can be true even of Article III standing requirements, since some state courts will entertain federal claims for which Article III standing is lacking. *See generally* F. Andrew Hessick, *Standing in Diversity*, 65 ALA. L. REV. 417, 424–26 (2013).

39. *See, e.g.*, CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *supra* note 21, § 3522 at 100–03 (3d ed. 2008) ("A federal court's entertaining a case that is not within its subject matter jurisdiction is no mere technical violation; it is nothing less than an unconstitutional usurpation of *state* judicial power." (emphasis added)).

40. *See generally* CHEMERINSKY, *supra* note 15, at 56, 328.

41. *See infra* notes 172–75 and accompanying text.

42. Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67, 81 (2009); *see also* Clinton v. New York, 524 U.S. 417, 428 (1998) (parties may not waive challenges to constitutional or statutory subject-matter jurisdiction); People's Bank v. Calhoun, 102 U.S. 256, 260–61 (1880) (stating that "the mere consent of parties cannot confer" subject-matter jurisdiction).

43. *Union Pac. R.R. Co.*, 558 U.S. at 78.

44. FED. R. CIV. P. 12(h)(3); Arbaugh v. Y & H Corp., 546 U.S. 500, 506 (2006).

45. Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 434 (2011); Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 127 (1804) ("[I]t was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it."). In contrast, "[n]onjurisdictional rules usually are defined as having all the inverse effects of jurisdictionality—they can be waived, forfeited, or consented to, and they are subject to equitable exceptions, estoppel, and judicial discretion." Mank, *supra* note 15, at 430 (quoting Scott Dodson, *Hybridizing Jurisdiction*, 99 CAL. L. REV. 1439, 1445 (2011)).

46. Bowles v. Russell, 551 U.S. 205, 214 (2007) (noting that the "Court has no authority to create equitable exceptions to jurisdictional requirements"); Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (subject-matter jurisdiction cannot be "expanded by judicial decree").

after a lengthy and expensive trial, the case will still be dismissed if subject-matter jurisdiction is lacking.[47]

B. Hypothetical Jurisdiction Before Steel Co.

The longstanding rule that a federal court generally must first determine whether subject-matter jurisdiction exists before reaching a case's merits had been weakened considerably in the two decades prior to *Steel Co.* By that time, every circuit had endorsed the doctrine of hypothetical jurisdiction,[48] under which courts bypassed subject-matter jurisdiction to dismiss cases on the merits when "the jurisdictional question [was] especially difficult and far-reaching" and the "merits of the case [were] clearly against the party seeking to invoke the court's jurisdiction."[49] The doctrine was generally limited to those circumstances and was not available when the jurisdictional question was easy or when the plaintiff would win on the merits, due to the unfairness to the defendant of a judgment against it in the absence of verified jurisdiction.[50]

Hypothetical jurisdiction was justified principally by the value of judicial economy.[51] As Justice Breyer put it, "[w]hom does it help to have . . . judges spend their time and energy puzzling over the correct answer to an intractable jurisdictional matter, when (assuming an easy answer on the substantive merits) the same party would win or lose regardless?"[52] Hypothetical jurisdiction appeared to save overburdened federal courts considerable time and energy by allowing them to skip to easy merits issues, and seemed to leave the plaintiff in the same position—with its case dismissed.[53] Courts also justified the doctrine as promoting the

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47. *See, e.g.*, *Henderson*, 562 U.S. at 435 ("[I]f the trial court lacked jurisdiction, many months of work on the part of the attorneys and the court may be wasted."). In one seminal case, the defendants "removed the case to federal court, lost on the merits at trial, and then complained that the federal courts lacked jurisdiction." Trammell, *supra* note 13, at 1144 (discussing Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379 (1884)). "Despite the *Mansfield* defendants' chutzpah," the Supreme Court found subject-matter jurisdiction lacking. *Id.*; *accord* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988) ("Such situations inhere in the very nature of jurisdictional lines . . . .").

48. Idleman, *supra* note 13, at 237 & n.5.

49. House the Homeless, Inc. v. Widnall, 94 F.3d 176, 179 n.7 (5th Cir. 1996); *see* Idleman, *supra* note 13, at 245–47 & nn.30–33.

50. *See, e.g.*, Browning-Ferris Indus. of S. Jersey, Inc. v. Muszynski, 899 F.2d 151, 159 (2d Cir. 1990) ("[T]he assumption of jurisdiction should not do injustice to the parties. . . . Usually this will mean that the merits be against the party invoking jurisdiction."), *abrogated by* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998). In rare cases not involving such prejudice to the defendant, hypothetical jurisdiction was used to decide the merits against the defendant. *See id.*

51. *See generally* Idleman, *supra* note 13, at 247–52 (discussing rationales supporting hypothetical jurisdiction).

52. *Steel Co.*, 523 U.S. at 111 (Breyer, J., concurring in part and in the judgment).

53. *But see infra* Part III.B.2.b (discussing problem of preclusive effects of a judgment based on hypothetical jurisdiction).

value of judicial restraint by avoiding resolving uncertain jurisdictional issues.[54]

While hypothetical jurisdiction began as an infrequently invoked doctrine reserved for extraordinary circumstances—"an extremely narrow exception . . . to [courts'] obligation to determine [their] jurisdiction"[55]—courts were often unable to resist the urge to bypass even less difficult jurisdictional issues. "[T]he doctrine gradually became a regular feature of federal court jurisprudence."[56] Indeed, certain courts relaxed the requirements for invoking the doctrine such that the merits needed only to be "substantially clearer than the jurisdictional question," regardless of the issues' intrinsic difficulty.[57] The doctrine was used to bypass numerous jurisdictional issues prior to 1998, such as standing and diversity issues.[58]

C. Steel Co.*'s Repudiation of Hypothetical Jurisdiction*

In 1998, the Supreme Court appeared to reject hypothetical jurisdiction in *Steel Co. v. Citizens for a Better Environment*.[59] But the fractured nature of the decision and its often confusing language[60] raised many questions regarding the scope of its ban on hypothetical jurisdiction.

Steel Co. concerned whether the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA),[61] which imposes annual reporting requirements for users of certain toxic chemicals, created liability for historical reporting failures that had been remedied by the time litigation was initiated.[62] Steel Company, the defendant, had previously failed to file the required reports, but filed the overdue reports after the plaintiff citizens group informally complained.[63] The citizens group then sued Steel Company under EPCRA's citizen-suit provision, principally seeking to require Steel Company to pay civil penalties to the government.[64] The case presented two questions: (1) the "merits" question whether EPCRA authorized suits for purely historical violations and (2) the Article III

54. *See Browning-Ferris Indus.*, 899 F.2d at 158 (2d Cir. 1990) ("The rationales for [hypothetical jurisdiction are] judicial efficiency and restraint."), *abrogated by Steel Co.*, 523 U.S. at 93–94; Idleman, *supra* note 13, at 256–57 (discussing judicial restraint rationale).

55. Nat'l Law Ctr. on Homelessness & Poverty v. Kantor, 91 F.3d 178, 180 (D.C. Cir. 1996).

56. Idleman, *supra* note 13, at 266.

57. *Id.* (quoting Freeman v. Principal Fin. Grp., No. 96-35947, 1997 WL 377084, at *1 (9th Cir. July 3, 1997)).

58. *See id.* at 260–64 (discussing many different jurisdictional issues avoided).

59. 523 U.S. 83 (1998).

60. Idleman, *supra* note 13, at 285 (describing *Steel Co.* as "not an exemplar of clarity").

61. 42 U.S.C. § 11046 (2012).

62. Idleman, *supra* note 13, at 271 & n.141.

63. *Steel Co.*, 523 U.S. at 87–88.

64. *Id.*

jurisdictional issue of whether the relief requested by the plaintiffs would remedy the injury in fact they allegedly suffered from the purely historical violations.[65] The district court sided with Steel Company on both questions, the Seventh Circuit reversed, and the Supreme Court granted certiorari on both questions.[66]

The propriety of hypothetical jurisdiction was neither raised by the parties' briefs nor at argument.[67] Rather, in an unusual turn of events,[68] the majority only reached the issue in response to Justice Stevens's concurrence in the judgment.[69] Citing the long-standing policy of avoiding the unnecessary resolution of constitutional issues, Justice Stevens argued that the Court should bypass the Article III issue to dismiss the case on the merits.[70] In response to Justice Stevens and the "substantial body of court of appeals precedent" endorsing the doctrine,[71] Justice Scalia's opinion for the Court addressed the issue of hypothetical jurisdiction.[72]

Justice Scalia forcefully rejected hypothetical jurisdiction "because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers."[73] He cited the "long and venerable line of . . . cases" declaring that since "[j]urisdiction is power to declare the law, . . . when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[74] Thus, "[t]he requirement that jurisdiction be established as a threshold matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'"[75] The Court elaborated that "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment," which amounts to a constitutionally impermissible "advisory opinion."[76] Because the "statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and

65. *Id.* at 88–89.

66. *Id.*

67. Steinman, *supra* note 13, at 274–80.

68. *See id.*; *see also, e.g.*, Alderman v. United States, 394 U.S. 165, 183–84 (1969) (discussing general need for adversary presentation of issues, especially complex ones).

69. Idleman, *supra* note 13, at 272. Justice Stevens also viewed the "merits" statutory issue as jurisdictional—a contention the Court rejected. *See Steel Co.*, 523 U.S. at 88–94.

70. *Steel Co.*, 523 U.S. at 112 (Stevens, J., concurring in the judgment).

71. *Id.* at 93–94 & 94 n.1.

72. The often-confusing nature of the *Steel Co.* opinion thus likely stems from the fact that the issue of hypothetical jurisdiction was unbriefed and unargued. *See supra* note 68 and accompanying text. *See also* Idleman, *supra* note 13, at 171–80 (discussing whether *Steel Co.*'s decision to address hypothetical jurisdiction was dicta or itself an instance of impermissibly addressing an issue in the absence of subject-matter jurisdiction).

73. *Steel Co.*, 523 U.S. at 94.

74. *Id.* at 94 (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868)).

75. *Id.* at 94–95 (quoting Mansfield, Coldwater & Lake Mich. Ry. v. Swan, 111 U.S. 379, 382 (1884)).

76. *Id.* at 102.

equilibration of powers, . . . [f]or a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."[77]

However, the Court acknowledged that certain prior cases had "diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question."[78] In *Norton v. Mathews*,[79] two companion cases reached the Supreme Court presenting the same merits issue.[80] Although there was also a jurisdictional issue in *Norton*, the merits issue had been definitively resolved in its companion case before the *Norton* decision was issued.[81] Since the merits had already been decided in *Norton*'s companion case, the Court bypassed the jurisdictional issue and disposed of *Norton* on merits grounds.[82]

The *Steel Co.* opinion distinguished *Norton* by noting that it "did not use the pretermission of the jurisdictional question as a device for reaching a question of law that otherwise would have gone unaddressed."[83] Moreover, the *Norton* Court seemed to have viewed "the merits judgment . . . as equivalent to a jurisdictional dismissal for failure to present a substantial federal question"—i.e., the *Norton* Court may have only reordered two jurisdictional questions rather than exercising hypothetical jurisdiction.[84] Regardless, it was ultimately the "extraordinary procedural posture[]" that justified the result in *Norton*, and the *Steel Co.* opinion emphatically rejected the notion that *Norton* would apply outside this exceptional posture.[85] Indeed, since *Steel Co.*, courts have generally confined the so-called "*Norton* doctrine" to instances in which the merits issue has already been decided in another case.[86]

Steel Co. also distinguished other cases that were essentially "variant[s]" on *Norton*[87]—cases with unusual procedural postures, typically involving multiple parties or companion cases, in which the merits had already been addressed.[88] Notably, the *Steel Co.* opinion did not argue that

77. *Id.* at 101–02.

78. *Id.* at 101. *See* Steinman, *supra* note 1, at 862 (noting that *Steel Co.* had "embrace[d], rather than disavow[ed]," these cases).

79. 427 U.S. 524 (1976).

80. *See Steel Co.*, 523 U.S. at 98 (discussing *Norton*).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *See, e.g.*, Ctr. for Reprod. Law & Policy v. Bush, 304 F.3d 183, 195 (2d Cir. 2002) (invoking *Norton* doctrine when the "outcome on the merits [was] . . . 'foreordained'" by a recent case deciding the same merits issue (quoting *Steel Co.*, 523 U.S. at 98)).

87. Idleman, *supra* note 13, at 300 n.283.

88. First, while *Secretary of Navy v. Avrech*, 418 U.S. 676 (1974) (per curiam) appeared to be similar to *Norton*, the so-called "jurisdictional" issue in *Avrech* was later ruled to be non-

bypassing the jurisdictional issue in those cases was justified by the fact that most of those cases involved statutory rather than constitutional jurisdictional issues[89]—although that likely would have been an easier way to distinguish those cases than relying on their "extraordinary procedural postures."[90]

Having explained that hypothetical jurisdiction was impermissible[91] and that *Norton* and its variants do not apply outside of their unique procedural contexts, the Court turned to confront the Article III issue in *Steel Co.*[92] It concluded that the plaintiff citizens group lacked Article III standing principally because its alleged injuries could not be redressed by a

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jurisdictional—so *Avrech* did not actually exercise hypothetical jurisdiction. *Steel Co.*, 523 U.S. at 98–99. The same is true of *Chandler v. Judicial Council*, 398 U.S. 74 (1970). *Steel Co.*, 523 U.S. at 100; *see also infra* notes 245–46 (discussing "drive-by" jurisdictional rulings, which are not entitled to precedential effect). Second, *Steel Co.* distinguished *Philbrook v. Glodgett*, 421 U.S. 707 (1975) on the basis of its extraordinary procedural posture. *See Steel Co.*, 523 U.S. at 100. There, the identical merits issue was present as to two defendants, but jurisdiction was questionable only as to one of them. *Id.* That defendant had failed to adequately brief the far-reaching jurisdictional issue, which led the Court to dismiss that defendant's appeal. *See id.*; Idleman, *supra* note 13, at 300 n.283.

89. *See* Norton v. Mathews, 427 U.S. 524, 529–30 (1976) (presenting statutory subject-matter jurisdiction issue); *Philbrook*, 421 U.S. at 720 (same); *Avrech*, 418 U.S. at 677 (same).

90. *Steel Co.*, 523 U.S. at 98. Despite Justice Scalia's attempt to distinguish *Norton* and its ilk, the *Steel Co.* "exception" based on those cases is difficult to reconcile with the opinion's strict vision of jurisdiction as the power to reach a case's merits. *See, e.g.*, Joshua Schwartz, Note, *Limiting* Steel Co.*: Recapturing A Broader "Arising Under" Jurisdictional Question*, 104 COLUM. L. REV. 2255, 2272 (2004). Perhaps the *Norton* doctrine might be defended as merely an instance of a jurisdictional dismissal for lack of a colorable merits claim. *See supra* note 84; *infra* 238 and accompanying text. Regardless, *Steel Co.* made it clear that these cases—whatever their merit and continued validity—do not justify hypothetical jurisdiction.

91. The various long-standing rules governing how and when subject-matter jurisdiction must be proven at each stage of litigation are not instances of forbidden hypothetical jurisdiction.

First, subject-matter jurisdiction must be proven with varying degrees of certainty and methods of proof at different stages of litigation. *See, e.g.*, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2342 (2014). A party's failure to prove jurisdiction at a later, more demanding stage of the litigation doesn't mean that the court had exercised hypothetical jurisdiction when it found jurisdiction at an earlier, less demanding stage. *Steel Co.* doesn't require jurisdiction to be proven to a certainty at the outset. Instead, *Steel Co.* only requires that the rules of proof governing subject-matter jurisdiction are respected at each stage of litigation. *See* All. for Envtl. Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82, 87–89 (2d Cir. 2006).

Second, the diversity statute has long been interpreted to assess the diversity of the parties and the amount in controversy only as of the time the litigation is initiated in federal court. CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 13E FEDERAL PRACTICE & PROCEDURE § 3608 (3rd ed. 2009); CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 14A FEDERAL PRACTICE & PROCEDURE § 3702.4 (4th ed. 2009 & Supp. 2016). Subsequent changes in the citizenship of the parties and the amount in controversy will not divest the court of diversity jurisdiction. *Id.* Similarly, courts may eliminate dispensable non-diverse parties under Federal Rule of Civil Procedure 21 to preserve diversity jurisdiction. *See* Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832–37 (1989). Once again, these are not instances of hypothetical jurisdiction. *Steel Co.* is not concerned with these long-standing procedural rules governing how and when jurisdiction is established or maintained. Rather, *Steel Co.* only forbids bypassing a properly presented jurisdictional objection to resolve the merits definitively. *Cf. All. for Envtl. Renewal, Inc.*, 436 F.3d at 87.

92. *Steel Co.*, 523 U.S. at 102.

favorable ruling ordering Steel Company to pay civil penalties to the U.S. government.[93]

Adding to observers' confusion, two of the five justices to join the majority—Justice O'Connor, joined by Justice Kennedy—concurred separately. They did so to express their view that the Court's discussion of *Norton* and similar cases "should not be read as [providing] . . . an exhaustive list of circumstances under which federal courts may" bypass a difficult jurisdictional issue to dismiss on the merits.[94]

Justice Breyer concurred in part and in the judgment, arguing that efficiency values justify hypothetical jurisdiction. Although he agreed that jurisdictional questions "typically" should precede the merits, he argued that "[t]he Constitution does not impose a rigid judicial 'order of operations,' when doing so would cause serious practical problems."[95] He contended that the assumption of hypothetical jurisdiction was reasonable and constitutional when efficiency demanded it, especially in light of the federal courts' heavy caseload.[96]

Steel Co. raised numerous questions,[97] including whether it forbade bypassing only constitutional jurisdictional issues, or statutory jurisdictional issues as well.[98] The *Steel Co.* opinion contained contradictory hints in this regard.[99] On one hand, the Court's insistent characterization of jurisdiction as law-declaring power does not differentiate between the constitutional and statutory limits on or components of that power.[100] *Steel Co.* explicitly abrogated circuit court opinions bypassing only statutory jurisdictional issues.[101] Critically, Justice Scalia wrote that the "*statutory* and (especially) constitutional elements of jurisdiction are an *essential* ingredient of separation and equilibration of

93. *Id.* at 102, 106.

94. *Id.* at 110–11 (O'Connor, J., concurring).

95. *Id.* at 111–12 (Breyer, J., concurring in part and in the judgment).

96. *Id.*

97. *See* Idleman, *supra* note 13, at 240 ("[T]he scope of the repudiation itself was not clearly delineated by the Court, a fact that has . . . generated substantial uncertainty . . . .").

98. *See, e.g.*, Coenen, *supra* note 13, at 708 & n.99 (noting uncertainty as to permissibility of hypothetical statutory jurisdiction post-*Steel Co.*); Idleman, *supra* note 23, at 7 (same).

99. *See* Friedenthal, *supra* note 13, at 259–60, 264–65 (describing *Steel Co.*'s "apparent wandering" between appearing to ban all instances of hypothetical jurisdiction, and banning only hypothetical Article III jurisdiction); Steinman, supra note 1, at 860–62 (stating that language in *Steel Co.* could be read "either way" in this regard); Trammell, *supra* note 13, at 1126–27 (observing that *Steel Co.*'s inconsistencies created uncertainty as to the permissibility of hypothetical statutory jurisdiction).

100. *See supra* notes 73–77 and accompanying text.

101. *See Steel Co.*, 523 U.S. at 94 (abrogating United States v. Troescher, 99 F.3d 933, 934 n.1 (9th Cir. 1996) (bypassing only a statutory jurisdictional issue); Browning-Ferris Indus. of S. Jersey, Inc. v. Muszynski, 899 F.2d 151, 154 (2d Cir. 1990) (same)); *see also id.* at 93–94 (abrogating SEC v. Am. Capital Invs., Inc., 98 F.3d 1133, 1139 (9th Cir. 1996) (bypassing statutory and constitutional jurisdictional issues)).

powers," without which a court acts "ultra vires."[102] On the other hand, the modifier "especially" could perhaps indicate that statutory jurisdictional issues are of lesser importance and may be bypassed.[103] Additionally, the opinion's opaque discussion of "statutory standing"—discussed in detail below in Part II.B—seemed to endorse a prior case that, on a superficial reading, appeared to have exercised hypothetical statutory jurisdiction.[104]

D. The Rise of Hypothetical Statutory Jurisdiction After Steel Co.

The Courts of Appeals soon developed a consensus that *Steel Co.* only concerned Article III jurisdictional issues and allowed courts to continue to bypass statutory jurisdictional issues to dismiss on easier merits grounds—often providing little explicit reasoning for this view.[105] This is perhaps unsurprising, given their interest in maintaining flexibility to efficiently dispose of cases on their dockets.[106] Yet, the issue is now the subject of a lopsided circuit split in hypothetical statutory jurisdiction's favor.[107]

The First Circuit read "*Steel Co.*'s underlying rationale" to be that "a court without Article III jurisdiction has no power to declare the law—it would only be in a position to render an advisory opinion, which 'offends fundamental principles of separation of powers.'"[108] The Second Circuit tentatively stated that "[o]n its facts, *Steel Co.*" applies only to Article III standing, and "it arguably does not prohibit . . . hypothetical [statutory] jurisdiction."[109] Soon after, the Second Circuit held, without elaboration, that "the Supreme Court has barred the assumption of 'hypothetical jurisdiction' only where the potential lack of jurisdiction is a constitutional question."[110] The Third Circuit followed suit, emphasizing that only an

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102. *Steel Co.*, 523 U.S. at 101–02 (emphasis added); *see also* Revell, *supra* note 13, at 256 ("While the *Steel Co.* discussion was set in the context of the Article III question, Justice Scalia did not cabin the prohibition against hypothetical jurisdiction to issues of constitutional jurisdiction.").

103. Justice Scalia also at times ambiguously emphasized the constitutional aspects of subject-matter jurisdiction—perhaps because only a constitutional jurisdictional issue was presented in *Steel Co. See* 523 U.S. at 97 (noting that statutory standing has "nothing to do with whether there is case or controversy under Article III"); *id.* at 98 (discussing lower courts' reasoning defending the "practice of deciding the cause of action before resolving Article III jurisdiction"); *id.* at 101 (admitting that prior Supreme Court cases had "diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question").

104. *See infra* notes 111, 191 and accompanying text.

105. *See* Coenen, *supra* note 13, at 709 ("The rationale for this distinction remains unarticulated.").

106. *See, e.g.*, Schwartz, *supra* note 90, at 2262, 2272 ("[T]he lower courts are unhappy with a strict reading of *Steel Co.*" and "seem to like flexibility over what they must decide.").

107. *See infra* notes 124–25 and accompanying text.

108. Parella v. Ret. Bd. of R.I. Emps.' Ret. Sys., 173 F.3d 46, 55 (1st Cir. 1999) (citations omitted) (quoting *Steel Co.*, 523 U.S. at 94).

109. Boos v. Runyon, 201 F.3d 178, 182 n.3 (2d Cir. 2000) (citation omitted).

110. Fama v. Comm'r of Corr. Servs., 235 F.3d 804, 816 n.11 (2d Cir. 2000).

Article III issue was involved in *Steel Co.* and relying on *Steel Co.*'s unclear discussion of "statutory standing," discussed *infra* Part II.B.[111] The Eighth, Ninth, Tenth, D.C., and Federal Circuits joined them.[112]

Courts have used hypothetical statutory jurisdiction to bypass a wide array of statutory subject-matter jurisdiction issues,[113] such as those under the Foreign Sovereign Immunities Act,[114] the Contract Disputes Act,[115] the False Claims Act,[116] the Freedom of Information Act,[117] the supplemental jurisdiction statute,[118] the Administrative Procedure Act,[119] and the Alien Tort Statute.[120] Courts have also bypassed various issues of statutory appellate jurisdiction,[121] diversity jurisdiction,[122] and even explicit prohibitions on judicial review.[123]

However, in *Friends of the Everglades v. EPA*,[124] the Eleventh Circuit held that *Steel Co.* prohibits hypothetical statutory jurisdiction—creating a circuit split. It reasoned that "[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and

111. Bowers v. NCAA, 346 F.3d 402, 415–16 (3d Cir. 2003).

112. Minesen Co. v. McHugh, 671 F.3d 1332, 1337 (Fed. Cir. 2012) ("[*Steel Co.*] only requires federal courts to answer questions concerning their Article III jurisdiction—not necessarily their statutory jurisdiction—before reaching other dispositive issues."); NLRB v. Barstow Cmty. Hosp., 474 F. App'x 497, 499 (9th Cir. 2012) (same); Yancey v. Thomas, 441 F. App'x 552, 555 n.1 (10th Cir. 2011) (same); Kramer v. Gates, 481 F.3d 788, 791 (D.C. Cir. 2007) (same); Lukowski v. Immigration & Naturalization Serv., 279 F.3d 644, 647 n.1 (8th Cir. 2002) (same); *see also* Coenen, *supra* note 13, at 708–09 & n.100; Idleman, *supra* note 23, at 7 n.23 (discussing cases endorsing hypothetical statutory jurisdiction); Trammell, *supra* note 13, at 1125 & nn.121–24.

113. These courts, rightly or wrongly, viewed these statutory issues as jurisdictional. Given recent changes in the law, they may have been incorrect. *See infra* notes 323–29 and accompanying text.

114. *See, e.g.*, Byrd v. Republic of Hond., 613 F. App'x 31, 33 (2d Cir. 2015) (collecting cases).

115. *Minesen Co.*, 671 F.3d at 1337.

116. Wood *ex rel.* U.S. v. Applied Research Assocs., 328 F. App'x 744, 746 (2d Cir. 2009).

117. Reynolds v. Att'y Gen. of the U.S., No. 09-cv-0434, 2009 WL 1938964, at *2 (S.D.N.Y. July 7, 2009), *aff'd*, 391 F. App'x 45 (2d Cir. 2010).

118. Mortimer Off Shore Servs., Ltd. v. Fed. Republic of Ger., No. 1:10-cv-11551, 2012 WL 1067648, at *11 n.19 (D. Mass. Mar. 28, 2012), *aff'd in part sub nom.*, Fulwood v. Fed. Republic of Ger., 734 F.3d 72 (1st Cir. 2013).

119. Puerto Rico v. United States, 490 F.3d 50, 70 (1st Cir. 2007).

120. Liu Bo Shan v. China Constr. Bank Corp., 421 F. App'x 89, 91 (2d Cir. 2011).

121. United States v. Adebayo, 416 F. App'x 123, 124 n.1 (2d Cir. 2011) (timeliness of notice of appeal); Miles v. Beneficial Mass., Inc., 436 F.3d 291, 293–94 (1st Cir. 2006) (finality of district court order); Restoration Pres. Masonry, Inc. v. Grove Eur., Ltd., 325 F.3d 54, 59 (1st Cir. 2003) (appealability of remands in favor of arbitration).

122. Grimsdale v. Kash N'Karry Food Stores, Inc. (*In re* Hannaford Bros. Customer Data Sec. Breach Litig.), 564 F.3d 75, 77 n.1 (1st Cir. 2009) (minimal diversity under Class Action Fairness Act); Umsted v. Umsted, 446 F.3d 17, 20 n.2 (1st Cir. 2006) (probate exception); Barash v. Siler, 124 F. App'x 689, 690 n.1 (2d Cir. 2005) (same); *see also* Idleman, *supra* note 13, at 318 (hypothetical statutory jurisdiction would allow courts to bypass statutory "complete diversity requirement").

123. Conyers v. Rossides, 558 F.3d 137, 150 (2d Cir. 2009) (bypassing Civil Service Reform Act's prohibition on constitutional challenges to adverse employment actions by certain federal civil servants).

124. 699 F.3d 1280 (11th Cir. 2012).

statute, which is not to be expanded by judicial decree."[125] Therefore, it recognized that *Steel Co.* "reaffirmed" the principle "that an inferior court must have both statutory and constitutional jurisdiction before it may decide a case on the merits."[126] And while the First Circuit has not retreated from its endorsement of hypothetical statutory jurisdiction, it has expressed doubts that the doctrine should be used to bypass jurisdiction-stripping statutes.[127] In declining to use the doctrine in those circumstances, it reasoned that "[a] federal court acts 'ultra vires' regardless of whether its jurisdiction is lacking because [the plaintiff lacks Article III standing or] because Congress has repealed its jurisdiction to hear a particular matter."[128]

II. THE UNCONSTITUTIONALITY OF HYPOTHETICAL STATUTORY JURISDICTION

This Part argues that hypothetical statutory jurisdiction violates Article III as interpreted by *Steel Co.* and subsequent Supreme Court cases. First, it argues that Article III dictates that statutory and constitutional limits on subject-matter jurisdiction are equally inviolable, so neither may be bypassed to reach the merits. Second, this Part refutes the primary doctrinal argument for hypothetical statutory jurisdiction—that *Steel Co.*'s opaque discussion of "statutory standing" somehow approved of the doctrine. Third, this Part argues that the Supreme Court's subsequent jurisdictional resequencing cases—*Ruhrgas* and *Sinochem*—further undermine hypothetical statutory jurisdiction. Like hypothetical Article III jurisdiction, hypothetical statutory jurisdiction "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers,"[129] and is therefore unconstitutional.

125. *Id.* at 1289 (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)).

126. *Id.* at 1288. The position of certain other circuits is less clear. They may have only held that hypothetical statutory jurisdiction was not justified under the facts presented by a particular case, *see, e.g.*, Ameur v. Gates, 759 F.3d 317, 322 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1155 (2015), or they may have instead meant to ban hypothetical statutory jurisdiction categorically. *Compare* Leibovitch v. Islamic Republic of Iran, 697 F.3d 561, 573 (7th Cir. 2012) (appearing to ban hypothetical statutory jurisdiction categorically), *with* Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 672 (7th Cir. 1998) (appearing to endorse hypothetical statutory jurisdiction), *abrogated on other grounds*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010). *See also* Edwards v. City of Jonesboro, 645 F.3d 1014, 1017 (8th Cir. 2011) (observing that "[w]hether [the *Steel Co*.] rule also applies to statutory jurisdiction . . . is a matter of some dispute").

127. Seale v. Immigration & Naturalization Serv., 323 F.3d 150, 154–56 (1st Cir. 2003).

128. *Id.* (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998)).

129. *Steel Co.*, 523 U.S. at 94.

A. The Equal Inviolability of Statutory and Constitutional Subject-Matter Jurisdiction Limitations

Although it rests on largely "unarticulated" rationales, hypothetical statutory jurisdiction is ultimately based on the premise that statutory subject-matter jurisdiction limitations are not as important, fundamental, and deserving of respect as Article III limitations, and therefore may be bypassed even though their constitutional counterparts may not be.[130] Put differently, it assumes that "jurisdictional transgressions of a constitutional nature are qualitatively worse than those of a nonconstitutional nature."[131] But this premise is wrong in this context: Federal courts are equally bound by constitutional and statutory jurisdictional rules, and they are equally inviolable. The constitutional design itself dictates that both statutory and constitutional subject-matter jurisdiction are necessary for a federal court to exercise jurisdiction and reach the merits of a case. Both are vitally important to effectuate the separation-of-powers and federalism values at the core of Article III. And both serve as indispensable bulwarks protecting the federal courts' limited judicial resources.

1. Statutory and Article III Subject-Matter Jurisdiction are Equally Necessary to Reach the Merits

The story of Article III's genesis shows that statutory and constitutional subject-matter jurisdiction are equally indispensable to decide a case's merits. The enacted text of Article III was a product of the debate running throughout the Constitution's framing between those who wanted the states to retain much of the nation's political power, and those who favored a stronger, centralized federal government.[132] While there was broader support for the creation of a federal Supreme Court, a Federalist plan to establish lower federal courts proved extraordinarily divisive among the delegates at the Constitutional Convention.[133] Opponents protested that constitutionally mandated lower federal courts would be unnecessary and expensive encroachments on the states' sovereignty.[134] In order to mollify objectors, James Madison successfully proposed compromise constitutional language that allows but does not require Congress to create lower federal courts.[135]

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130. Coenen, *supra* note 13, at 709 (citing *Steel Co.*, 523 U.S. at 101).

131. *Id.*

132. *See generally* RICHARD H. FALLON, JR., ET AL., HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1–3 (6th ed. 2009).

133. *See* Redish & Woods, *supra* note 36, at 53.

134. *See id.* at 53–54. *See generally* FALLON ET AL., *supra* note 132, at 4–9.

135. *See* Redish & Woods, *supra* note 36, at 54.

The "Madisonian Compromise" embodied in Article III implies that Congress has the power not only to create or abolish the lower federal courts but also to control the extent of their jurisdiction.[136] Since Article III vests Congress with the greater power not to establish the lower federal courts, Congress possesses the lesser power to constrict their jurisdiction from the constitutionally permissible maximum—such as by stripping them of jurisdiction to hear certain claims, imposing statutory amount-in-controversy requirements, or classifying certain statutory prerequisites to recovery as jurisdictional.[137] As the Supreme Court explained in 1850, "Courts created by statute can have no jurisdiction but such as the statute confers."[138] And as it elaborated in 1922, the lower federal courts "derive[] [their] jurisdiction wholly from the authority of Congress," which "may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."[139]

While academics debate just how far Congress may go in exercising this power,[140] it is well established that lower federal courts must possess both statutory and constitutional subject-matter jurisdiction to exercise jurisdiction.[141] And the trappings of subject-matter jurisdiction limitations that stem from their inviolability—non-waivability and the requirement that courts raise them sua sponte—apply equally to statutory jurisdictional issues.[142] Conversely, for a court to reach the merits in the absence of either Article III or statutory jurisdiction is for it to act beyond its granted powers.[143] And since Congress possesses some authority to limit the Supreme Court's appellate jurisdiction, the Court must also possess both

136. *See id.* at 54–56.

137. *See, e.g.*, Bowles v. Russell, 551 U.S. 205, 212 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.").

138. Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850).

139. Kline v. Burke Const. Co., 260 U.S. 226, 234 (1922) (citations omitted); *accord id.* ("The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. And . . . Congress [may] take [it] away in whole or in part . . . ." (citations omitted)).

140. *See generally* CHEMERINSKY, *supra* note 15, at 200–16. *See also* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 2–3 (1990) (challenging congressional primacy theory of federal jurisdiction and arguing that the scope of federal jurisdiction results from a dialogue between "Congress and the Court").

141. *See generally id.* at 278–80.

142. *See generally id.*

143. *See, e.g.*, Seale v. Immigration & Naturalization Serv., 323 F.3d 150, 156 (1st Cir. 2003) ("A federal court acts 'ultra vires' regardless of whether its jurisdiction is lacking because of the absence of a requirement specifically mentioned in Article III, such as standing or ripeness, or because Congress has repealed its jurisdiction to hear a particular matter." (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998))); Coenen, *supra* note 13, at 709 n.104 ("Why the former sort of ultra vires action is more problematic than the latter is not self-evident.").

Article III jurisdiction and the absence of a constitutionally valid statutory jurisdictional restriction.[144]

Thus, statutory jurisdictional grants and limitations ultimately derive their authority from Article III.[145] Article III establishes a scheme in which Congress is vested with the discretion to control the federal courts' jurisdiction within constitutional boundaries through statutory grants and restrictions of subject-matter jurisdiction. Article III thus sets the ceiling on the scope of statutory jurisdiction that Congress may bestow.[146] But Article III envisions that both statutory and constitutional subject-matter limitations will play a fundamental and synergistic role in establishing the contours of the federal courts' jurisdiction.

Of course, by setting the bounds on Congress's authority to grant and limit jurisdiction by statute, Article III's jurisdictional limitations are "superior" in the sense that they trump invalid jurisdictional statutes[147]—but only in that sense.[148] For example, if Congress purports to create jurisdiction for a plaintiff who lacks constitutional standing, such a statute would be invalid.[149] But the trumping function of Article III jurisdiction should not be misread to imply that the need for a federal court to satisfy statutory jurisdictional requirements is any less essential than the need to satisfy Article III's requirements.[150] A federal court must possess both constitutional and statutory authority to reach the merits of a case, and Article III jurisdiction alone remains insufficient for the exercise of federal judicial power.[151] As the Supreme Court has cautioned, "The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded."[152] It follows, as one commentator has observed, that "courts have a duty to police [statutory jurisdictional] restriction[s] just as rigorously as . . . constitutional limitation[s]," given

144. *See* U.S. CONST. art. III, § 2, cl. 2 ("[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."); FALLON ET AL., *supra* note 132, at 251–52 (discussing statutory restrictions on the Supreme Court's original jurisdiction); *supra* note 30 and accompanying text.

145. *See* Idleman, *supra* note 23, at 75–76 ("By nature of the judiciary's limited jurisdiction, and especially in light of Congress's undisputed authority over lower court jurisdiction, every potential exercise or nonexercise of federal judicial power manifests a constitutional dimension.").

146. *See generally* CHEMERINSKY, *supra* note 15, at 200–16.

147. *See, e.g.*, Bowles v. Russell, 551 U.S. 205, 212 (2007).

148. *See generally* Coenen, *supra* note 13, at 684–85 (arguing that fact that "[c]onstitutional law trumps nonconstitutional law" does not mean that constitutional law is deserving of greater respect than nonconstitutional law).

149. *See generally* Lujan v. Defs. of Wildlife, 504 U.S. 555, 571–78 (1992).

150. *Cf.* Coenen, *supra* note 13, at 713 ("Supremacy and preeminence, however, are two different things.").

151. *See supra* notes 138–39 and accompanying text. The possible exception is the Supreme Court's original jurisdiction, but even there, Congress has constricted the Constitution's jurisdictional grant. *See supra* note 144.

152. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978).

both sorts of limitations' key "structural role" in articulating the power and proper domain of the federal courts.[153] Ultimately, by refusing to verify its statutory jurisdiction before reaching the merits, a federal court assuming hypothetical statutory jurisdiction circumvents Congress's authority to determine the scope of federal judicial power.

It is with this understanding that *Steel Co.*'s language should be understood. *Steel Co.* stated paradoxically that "[t]he statutory and *(especially)* constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers."[154] The word "especially" here likely refers only to the fact that constitutional limits on subject-matter jurisdiction trump any contrary statutory grant of jurisdiction—not that statutory jurisdiction is less essential than Article III jurisdiction for a court to reach the case's merits.[155] In any event, if statutory jurisdiction is an "essential" ingredient of the separation of powers, and constitutional jurisdiction is an "especially essential" ingredient, they are both still essential, meaning that neither can be dispensed with.[156] Therefore, this dictum should not be read as implying that statutory jurisdiction is not essential to reach the merits or endorsing hypothetical statutory jurisdiction.

2. Statutory Subject-Matter Jurisdiction is Vitally Important for Protecting Separation-of-Powers and Federalism Values

Just like their constitutional counterparts, statutory jurisdictional grants and restrictions play a vitally important role in promoting and protecting the two values at the core of Article III—separation of powers and federalism.[157] While Article III jurisdictional restrictions and statutory jurisdictional restrictions sometimes promote those values in differing ways, the constitutional scheme relies on both to effectuate these values.

Article III jurisdictional limitations are centrally concerned with preventing the federal courts from usurping power committed to the other branches of the federal government or to the states. The Court has explained that "the law of Art[icle] III standing is built on a single basic

153. Trammell, *supra* note 13, at 1128; *see also* Idleman, *supra* note 23, at 75 n.410 ("[I]t is normally of no functional significance that a subject-matter jurisdictional requirement is imposed by constitutional or statutory command," as both must be verified prior to reaching the merits); Steinman, *supra* note 1, at 939.

154. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998) (emphasis added).

155. *See supra* notes 147–53 and accompanying text.

156. *See Essential*, MERRIAM-WEBSTER's ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/essential (last visited Jan. 4, 2016) (listing "indispensable" and "necessary" as synonyms for "essential"). "Especially essential" might even be an oxymoron. *See* BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE 603–04 (2009) (discussing oxymorons).

157. *See supra* note 31 and accompanying text.

idea—the idea of separation of powers,"[158] and that the Article III jurisdictional doctrines are "founded in concern about the proper—and properly limited—role of the courts in a democratic society."[159] These doctrines "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."[160] Thus, the federal courts are prevented from issuing "advisory opinions"—opinions which will not remedy an actual injury in fact but rather will opine on abstract law in the absence of a concrete adversary dispute.[161] Without these jurisdictional minima, a plaintiff's grievance must be directed to the political branches.[162] Likewise, Article III's limitations on the types of cases federal courts may hear protect the state judicial systems' exclusive domain. For instance, these limits ensure that Congress may not authorize the lower courts to exercise diversity jurisdiction over a non-federal suit between two citizens of the same state, which would greatly limit the state courts' exclusive adjudicatory domain.[163]

Soon after *Steel Co.*, the First Circuit cited these key ways in which Article III jurisdiction promotes separation-of-powers and federalism values to argue that only Article III jurisdiction, and not statutory subject-matter jurisdiction, must be addressed prior to the merits.[164] It reasoned that "*Steel Co.* [only] rejects the assertion of 'hypothetical jurisdiction' where a court's Article III jurisdiction is in doubt, because a court without Article III jurisdiction . . . would only be in a position to render an advisory opinion, which 'offends fundamental principles of separation of powers.'"[165]

But the First Circuit's reasoning was faulty: bypassing statutory jurisdictional issues also "offends fundamental principles of separation of powers"[166]—and closely related federalism principles—because Congress's ability to control the jurisdiction of the lower federal courts is crucially important for protecting and promoting these values. Article III was structured to allow Congress to decide whether certain categories of cases should be extended a federal forum (or, in many cases, should instead be

158. Allen v. Wright, 468 U.S. 737, 752 (1984).

159. Warth v. Seldin, 422 U.S. 490, 498 (1975) (citing Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 221–27 (1974)).

160. Flast v. Cohen, 392 U.S. 83, 95 (1968).

161. *See generally* CHEMERINSKY, *supra* note 15, at 46–55.

162. *See supra* note 32 and accompanying text.

163. *See generally* CHEMERINSKY, *supra* note 15, at 309–11; FALLON ET AL., *supra* note 132, at 13–18.

164. Parella v. Ret. Bd. of R.I. Emps.' Ret. Sys., 173 F.3d 46, 55 (1st Cir. 1999).

165. *Id.* (citation omitted) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998)).

166. *Id.* (quoting *Steel Co.*, 523 U.S. at 94).

left to the state judiciaries) and to alter its decision as circumstances require.[167] And Congress is in a much better position to do this than the courts, which lack the democratic legitimacy and institutional expertise and capacity to decide such matters.[168] Bypassing Congress's jurisdictional directives transfers this authority from the democratically responsive and accountable Congress to the courts.[169]

Separation-of-powers values are also furthered by allowing Congress to set jurisdictional requirements for federal statutory claims. In doing so, Congress exercises its core lawmaking power to set certain procedural requirements for the cause of action it has created by dictating that a given requirement is so important that it can be raised anytime, may not be waived, and must be raised by the courts sua sponte.[170]

Moreover, in the constitutional system of checks and balances, which reinforces the separation of powers,[171] congressional control over federal jurisdiction is one of Congress's primary checks on the judicial branch—which, since *Marbury v. Madison*, has claimed unreviewable power to invalidate statutes it deems unconstitutional.[172] By allowing the popularly elected branches of government to set limits upon the judiciary, which enjoys life tenure and is not directly accountable to the voters, the democratic legitimacy of federal rulings is promoted.[173] As Professor Charles Black put it, congressional control over the lower federal courts "is the rock on which rests the legitimacy of the judicial work in a democracy."[174] And if hypothetical statutory jurisdiction were permissible, "courts could expand their jurisdiction to the limits of Article III even though Congress, exercising its constitutional prerogative, has plainly

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167. *See supra* note 41 and accompanying text. *See generally* Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1031 (1982) (under the Madisonian Compromise, "the question whether access to the lower federal courts was necessary to assure the effectiveness of federal law should not be answered as a matter of constitutional principle, but rather, should be left a matter of political and legislative judgment").

168. *See, e.g.*, Lumen N. Mulligan, Gully *and the Failure to Stake a 28 U.S.C. § 1331 "Claim,"* 89 WASH. L. REV. 441, 454–55 & nn.70–74 (2014); *see also supra* notes 172–75 and accompanying text.

169. *Supra* notes 168, 172–75 and accompanying text.

170. *See supra* notes 326–27 and accompanying text.

171. *See, e.g.*, Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2106 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part).

172. *See, e.g.*, Int'l Union of Operating Eng'rs, Local 150 v. Ward, 563 F.3d 276, 281 (7th Cir. 2009) (Congress's power to control the federal courts' jurisdiction "is one of the many checks and balances built into the three-branch system of American government").

173. *See, e.g.*, Wis. Knife Works v. Nat'l Metal Crafters, 781 F.2d 1280, 1282 (7th Cir. 1986) ("Because federal judges are not subject to direct check by any other branch of government . . . we must make every reasonable effort to confine ourselves to the exercise of those powers that the Constitution and Congress have given us.").

174. Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975).

affirmed less jurisdiction than the Constitution has granted"—thereby removing this essential check on federal judicial power.[175]

Steel Co.'s reference to hypothetical jurisdiction as producing a "hypothetical judgment" or "advisory opinion" should be understood against this backdrop.[176] While the term "advisory opinion" is generally used to refer to a judgment rendered without satisfying Article III standing and justiciability requirements,[177] the Court also has used it in a broader sense to mean the judicial resolution of actual controversies based on hypothetical legal principles.[178] Thus, even when Article III standing existed, the Court disapproved of a proposed rule that would require federal courts to apply stipulations of law.[179] Such a rule would allow litigants "to extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles[—]an opinion that would be difficult to characterize as anything but advisory."[180] Similarly, a "hypothetical judgment" assuming that Congress permitted the federal courts to reach the merits amounts to an advisory opinion in the sense that the issuing court has simply assumed hypothetically that the governing law does not forbid resolving the merits in federal court. Therefore, contrary to the First Circuit's and other courts' assumption, *Steel Co.*'s reference to advisory opinions should not be read to indicate that its principles do not apply to statutory jurisdictional issues—especially given statutory subject-matter jurisdiction's key role in effectuating separation-of-powers and federalism principles.[181]

In sum, statutory restrictions on subject-matter jurisdiction play a vitally important role in promoting separation-of-powers and federalism values, just like their constitutional counterparts. From the perspective of these core Article III values, statutory and constitutional subject-matter jurisdiction are both "essential ingredients."[182] At bottom, hypothetical statutory jurisdiction impermissibly negates the democratically accountable

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175. Idleman, *supra* note 13, at 320; *accord* Idleman, *supra* note 23, at 6 n.22 ("[T]he federal judiciary's integrity and legitimacy . . . is undermined when it ignores the limits on its own power."); Steinman, *supra* note 1, at 939 (statutory jurisdictional limitations "are of sufficient stature, by virtue of their source, and of sufficient importance as a matter of policy, that they too should not be subject to judicial circumvention").

176. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998).

177. *See, e.g.*, U.S. Nat'l Bank v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 446–47 (1993).

178. *Cf.* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 644 (1992) (describing the "many different ways" in which the "Supreme Court has used the phrase 'advisory opinions'").

179. *U.S. Nat'l Bank*, 508 U.S. at 447.

180. *Id.*

181. *See supra* note 165 and accompanying text; *see also* Revell, *supra* note 13 at 256 ("While the *Steel Co.* discussion was set in the context of the Article III question, Justice Scalia did not cabin the prohibition against hypothetical jurisdiction to issues of constitutional jurisdiction.").

182. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998).

Congress's "check" on the judiciary's power, often while poaching cases from the state courts' exclusive domain.

3. Statutory Subject-Matter Jurisdiction Restrictions are Crucial for Protecting Federal Dockets

Moreover, statutory jurisdictional restrictions are just as important for protecting the federal courts' dockets as their constitutional counterparts—both in terms of the number and types of cases they can exclude. Article III limitations screen out a large number of potential cases—for instance, suits by so-called "private attorneys general" who did not suffer any injury in fact themselves, but only seek to vindicate the generalized public interest in seeing the law obeyed.[183] Justice Scalia alluded to the wide array of potential cases screened out by Article III in *Steel Co.* when he remarked that hypothetical Article III jurisdiction "opens the door to all sorts of 'generalized grievances' that the Constitution leaves for resolution through the political process."[184] These limitations exclude certain types of cases that are anathema to Article III. Yet, in typical "private-rights" litigation, in which a plaintiff who claims she was injured by the defendant sues for monetary compensation, Article III standing limitations cannot be expected to screen out very many cases at all.[185]

Similarly, statutory limitations are often crucially important for excluding many cases that Congress has deemed unfit for a federal forum.[186] The statutory limitations on diversity jurisdiction are a prime example. Constitutional diversity jurisdiction is present without regard to the amount in controversy and is present in cases of minimal diversity—in which at least one litigant on each side of the litigation is a citizen of a different state.[187] Statutory limitations considerably constrict this wide grant of jurisdiction by imposing a $75,000 amount-in-controversy requirement and requiring complete diversity—in which no parties on opposite sides of the controversy are citizens of the same state.[188] These limits ensure that only monetarily consequential and nonlocal state-law disputes are allowed into federal court. To see how vitally important statutory jurisdictional limitations are for protecting limited federal judicial

183. *See generally* Lujan v. Defs. of Wildlife, 504 U.S. 555, 575–77 (1992). Certain state courts permit these suits. *See generally* Hessick, *supra* note 38, at 425–26 .

184. *Steel Co.*, 523 U.S. at 97 n.2 (citing Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208, 217 (1974)).

185. *See generally* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 278–79 (2008) (discussing private rights model of adjudication and history of Article III standing doctrine).

186. *See, e.g.*, Snyder v. Harris, 394 U.S. 332, 339–40 (1969).

187. *See generally* CHEMERINSKY, *supra* note 15, at 315–18.

188. *See generally id.* at 315–18, 328–29.

resources (and the domain of the state courts), it need only be considered how many low-value, essentially local disputes would flood the federal court system if these statutory jurisdictional limitations were removed.[189] Thus, statutory jurisdictional limits are often crucially important for excluding many cases that Congress has deemed unfit for a federal forum. And even if a court might deem a particular statutory jurisdictional restriction an unimportant obstacle to reaching the merits, the Constitution empowers Congress, not the courts, to make that judgment.

* * *

To summarize, Article III itself dictates that statutory limits on jurisdiction are no less inviolable than their constitutional counterparts. Both are equally necessary for the exercise of federal jurisdiction, both are vitally important for promoting and protecting the separation-of-powers and federalism values at the core of Article III, and both are instrumental in protecting federal dockets. Therefore, any attempt to justify hypothetical statutory jurisdiction based on statutory jurisdictional limitations' supposed second-class status must fail. Ultimately, hypothetical statutory jurisdiction impermissibly negates the democratically responsive Congress's constitutional prerogative to determine the bounds of federal judicial power, often while simultaneously intruding on the state courts' exclusive domain.

B. The Faulty Doctrinal Argument for Hypothetical Statutory Jurisdiction

The principal doctrinal argument for hypothetical statutory jurisdiction relies on *Steel Co.*'s ambiguous discussion of "statutory standing"—a term referring to the question whether a particular plaintiff may bring suit under a statute—as evidence that *Steel Co.* approved of the doctrine. This Part argues that this argument for hypothetical statutory jurisdiction is wrong, especially in light of subsequent Supreme Court cases.

Numerous courts and commentators have read an ambiguous section of *Steel Co.* discussing statutory standing, which the First Circuit described as "complicated and not entirely clear,"[190] as supporting hypothetical statutory

189. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005) ("To ensure that diversity jurisdiction does not flood the federal courts with minor disputes, § 1332(a) [imposes a $75,000 amount-in-controversy jurisdictional requirement] . . . ."). Other examples include statutes such as the Foreign Sovereign Immunities Act and the Federal Tort Claims Act, which grant jurisdiction over state claims against certain defendants but narrowly limit that grant by imposing various jurisdictional prerequisites. *See generally* CHEMERINSKY, *supra* note 15, at 291–92, 663–78.

190. Seale v. Immigration & Naturalization Serv., 323 F.3d 150, 156 (1st Cir. 2003).

jurisdiction.[191] Justice Stevens's concurrence argued that hypothetical jurisdiction was permissible because the Court had previously exercised it in *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers.*[192] In response, Justice Scalia distinguished *National Railroad* on the basis that the issue skipped in that case was not an Article III standing issue but rather an issue of statutory standing—so *National Railroad* did not support skipping the Article III jurisdictional issue to reach the merits issue in *Steel Co*.[193]

The manner in which Justice Scalia distinguished *National Railroad* led various courts and commentators to argue that *Steel Co.* meant only to disapprove of hypothetical jurisdiction when a constitutional jurisdictional issue was involved, not a statutory one. Justice Scalia did not question the continued validity of *National Railroad*, but rather argued that the *National Railroad* Court's supposed bypassing of a statutory standing issue did "not support allowing merits questions to be decided before *Article III* questions."[194] Since *Steel Co.* seemed to approve of *National Railroad* and since *National Railroad* seemed (on a superficial reading) to have skipped a statutory jurisdictional issue to reach the merits, this section of *Steel Co.* seemed to support hypothetical statutory jurisdiction.[195] However, *National Railroad* did not actually bypass any statutory jurisdictional issues, so *Steel Co.*'s seeming endorsement of *National Railroad* does not support hypothetical statutory jurisdiction.

1. National Railroad *Appeared to—but Did Not—Bypass Jurisdictional Issues*

The central issue in *National Railroad* was whether the plaintiffs enjoyed an implied right of action under the Rail Passenger Service Act of 1970 (Amtrak Act), even though the statute did not explicitly grant them a cause of action.[196] In *National Railroad*, the Central of Georgia Railway Company announced that it would discontinue certain passenger-train lines.[197] Plaintiff, the National Association of Railroad Passengers (NARP), brought suit to enjoin the discontinuance, arguing that it violated the

191. *See, e.g.*, Bowers v. NCAA, 346 F.3d 402, 415–16 (3d Cir. 2003) (*Steel Co.*'s discussion of statutory standing permits hypothetical statutory jurisdiction); Idleman, *supra* note 13, at 298–99 (same); Schwartz, *supra* note 90, at 2270 (same).

192. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 119–20 (1998) (Stevens, J., concurring in the judgment) (citing Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 465 n.13 (1974)).

193. *Id.* at 97 & n.2 (majority opinion).

194. *Id.* at 97 n.2 (emphasis added).

195. *See supra* notes 111, 191 and accompanying text.

196. *Nat'l R.R.*, 414 U.S. at 455–56.

197. *Id.* at 454.

Amtrak Act.[198] Although the Amtrak Act explicitly gave the Attorney General and certain railroad employees the right to sue to enforce its terms, the Amtrak Act was silent as to passengers' right to sue.[199] Did the Amtrak Act nonetheless vest NARP with an implied right of action?

The district court found that NARP could not bring suit, but the court of appeals reversed.[200] Reflecting an earlier jurisprudential era in which the terms "standing" and "jurisdiction" were often used in loose and imprecise ways,[201] the court of appeals reasoned that the question could be framed as whether NARP had standing to bring suit, as whether the Amtrak Act created a private "right of action" available to NARP, and as whether the Amtrak Act vested the courts with jurisdiction over NARP's suit.[202] Rather than decide which approach was correct, it held that NARP could bring suit under all three approaches.[203]

As for statutory standing, the court inquired "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute."[204] It concluded that NARP satisfied the zone-of-interests statutory-standing test based on the Amtrak Act's stated purpose of improving travelers' access to convenient travel.[205] Nor did the court find Congress's failure to provide passengers an explicit "right of action" fatal, due to the "strong presumption in favor of [judicial] review."[206] Last, the court reasoned that jurisdiction was present under 28 U.S.C. § 1337, providing for federal-question jurisdiction in cases arising under commerce-regulating statutes, such as the Amtrak Act.[207] Thus, under all three formulations of the central issue, the D.C. Circuit concluded that NARP's suit could proceed.[208]

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198. *Id.*

199. The statute provided that district courts "shall have jurisdiction . . . to grant [appropriate] equitable relief" in cases brought by "the Attorney General" and certain railroad "employee[s]." *Id.* at 456–57.

200. *Id.* at 455.

201. *See, e.g.*, Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 n.4 (2014) (describing the Supreme Court's recent efforts to eliminate imprecise jurisdictional language); *infra* note 326.

202. Potomac Passengers Ass'n v. Chesapeake & Ohio Ry. Co., 475 F.2d 325, 327 (D.C. Cir. 1973), *rev'd sub nom.* Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

203. *Id.* at 329.

204. Data Processing Serv. v. Camp, 397 U.S. 150, 153 (1970).

205. *Potomac Passengers*, 475 F.2d at 330–38.

206. *Id.* at 340.

207. *Id.* at 339. This provision provides jurisdiction over "any civil action or proceeding arising under any Act of Congress regulating commerce . . . ." 28 U.S.C. § 1337 (2012).

208. *Potomac Passengers*, 475 F.2d at 340. The D.C. Circuit's decision was a product of an earlier jurisprudential era more favorable to implied causes of action. Modern courts hold that "implied causes of action are disfavored." Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009).

The Supreme Court reversed, holding that NARP could not bring suit under the Amtrak Act because its text did not grant passengers the right to sue.[209] Rather than analyzing all three of the issues identified by the D.C. Circuit, the Supreme Court first determined that no cause of action existed and then declined to decide any issues of statutory standing or jurisdiction.[210] The Court noted that these three questions "overlap[ped]" in the context of the case and that "however phrased, the threshold question clearly is whether the Amtrak Act . . . create[d] a cause of action" for NARP.[211] And in an ambiguous passage cited by defenders of hypothetical statutory jurisdiction, it stated that "[s]ince we hold that no right of action exists, questions of standing and jurisdiction become immaterial."[212]

Were any statutory jurisdictional issues bypassed in *National Railroad*, such that *National Railroad* and *Steel Co.*'s approval of that case support hypothetical statutory jurisdiction? Modern case law has clarified that the answer is "no." First, the Supreme Court's recent decision in *Lexmark International, Inc. v. Static Control Components, Inc.*[213] clarifies that there was no separate statutory standing issue that the *National Railroad* Court bypassed. Even if there was, *Lexmark* held that statutory standing issues are merits issues, not jurisdictional issues—so *National Railroad* did not exercise hypothetical statutory jurisdiction. Second, older Supreme Court authority establishes that *National Railroad* did not bypass the question whether jurisdiction was present under 28 U.S.C. § 1337. Therefore, any misleading statements in *National Railroad* implying that it had bypassed a statutory jurisdictional issue are not entitled to precedential effect, and *Steel Co.*'s endorsement of bypassing statutory standing issues to reach the merits likewise is not an endorsement of hypothetical statutory jurisdiction.

2. National Railroad *Did Not Bypass Statutory Standing—Which, in Any Event, Is Not Jurisdictional*

The Supreme Court's recent decision in *Lexmark* clarified the law of statutory standing and shows that *National Railroad* did not bypass any statutory jurisdictional issues. The term "'statutory standing' is used to describe the legal rule that a plaintiff cannot recover [under a federal statute] unless he or she falls within the class of persons to whom Congress has granted [a] private right of action."[214] This question is sometimes

209. Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 465 (1974).

210. *Id.* at 455.

211. *Id.* at 456.

212. *Id.* at 465 n.13.

213. 134 S. Ct. 1377 (2014).

214. Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 OKLA. L. REV. 89, 94 (2009).

answered by determining whether the "plaintiff's grievance . . . arguably fall[s] within the zone of interests protected or regulated by the statutory provision" at issue.[215]

Lexmark clarified that the zone-of-interests test functions as a default rule "against" which Congress is "presumed to 'legislat[e].'"[216] It does not apply if "it is expressly negated."[217] It provides a default interpretive rule when Congress does not explicitly delineate the class of plaintiffs who may bring suit under a statute.[218] Thus, the test does not apply to *expand* the class of plaintiffs that may sue beyond those expressly enumerated in the statute.[219]

Lexmark also confirmed that, despite conflicting signals in prior cases and the misleading standing label, statutory standing and the zone-of-interests test were merits issues, not jurisdictional issues.[220] It explained that "[w]hether a plaintiff comes within the 'zone of interests' is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim."[221] And "since 'the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional power to adjudicate the case,'" statutory standing and the zone-of-interests test are not jurisdictional.[222]

Lexmark shows that no issue of statutory standing was skipped in *National Railroad*. The Amtrak Act itself provided the answer to whether passengers such as NARP could bring suit. By listing the classes of plaintiffs who could bring suit, the statute obviated the need to apply the zone-of-interests test, and the zone-of-interests test could not have expanded that list to include passenger plaintiffs such as NARP.[223] Thus, Justice Douglas was correct when he insisted in dissent that the statutory standing and "cause of action" questions in *National Railroad* were in fact

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215. *Id.* at 97; *see also* Bennett v. Spear, 520 U.S. 154, 162–63 (1997) (describing the development of the "zone of interests" test).

216. *Lexmark*, 134 S. Ct. at 1388 (quoting *Bennett*, 520 U.S. at 163).

217. *Bennett*, 520 U.S. at 163. Congress is free to direct courts to extend a statutory cause of action beyond what the zone-of-interests test would usually provide. *See id.*

218. *See* Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 288 (1992) (Scalia, J., concurring in the judgment) ("The [statutory language] makes clear that the zone of interests does not extend *beyond* those [expressly enumerated] . . . ."); *see also Lexmark*, 134 S. Ct. at 1388 (citing previous statement).

219. *See Holmes*, 503 U.S. at 288 (Scalia, J., concurring in the judgment).

220. *See* Brown, *supra* note 24, at 113 ("*Lexmark* returns the zone of interests inquiry to its origins . . . [as] one component of the presumptive limits of a statutory cause of action.").

221. *Lexmark*, 134 S. Ct. at 1387 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 97 n.2 (1998)).

222. *Id.* at 1388 n.4.

223. *See supra* notes 199, 218 and accompanying text.

the same question.[224] Furthermore, Justice Scalia's implication in *Steel Co.* that the two issues had "overlap[ped]" entirely and become "identical" in *National Railroad* was also correct.[225] Under *Lexmark*, those two supposedly separate issues in *National Railroad* were in fact the very same statutory merits issue: whether NARP could bring suit under the statute.[226]

Second, even if it could be maintained that statutory standing was a separate issue that was bypassed to reach the merits cause-of-action issue, *Lexmark* teaches that statutory standing is a merits issue, not a jurisdictional issue.[227] It is simply another merits question that must be answered in the affirmative if a plaintiff is to recover under a statutory cause of action, along with other questions such as whether "the defendant(s) engaged in conduct prohibited by the statute[, and whether] the defendant(s)' conduct is governed by the statute."[228] Therefore, even if the two issues were separate, bypassing a statutory standing issue to dismiss for lack of a cause of action is simply the act of reordering two merits issues—an uncontroversial practice[229]—rather than an exercise of hypothetical statutory jurisdiction.

Thus, *Lexmark* has resolved one of the key ambiguities in *Steel Co.* No statutory standing issue was bypassed in *National Railroad*, and even if it was, statutory standing is a merits issue. Therefore, *National Railroad* (and *Steel Co.*'s endorsement of that case) does not support hypothetical statutory jurisdiction. And even if *Steel Co.* endorsed bypassing statutory standing issues to reach merits issues, this was not an endorsement of hypothetical statutory jurisdiction.

3. National Railroad *Did Not Bypass Whether 28 U.S.C. § 1337 Provided Jurisdiction*

Statutory standing aside, did *National Railroad* nonetheless skip a statutory jurisdictional issue to reach the merits, namely whether 28 U.S.C. § 1337 provided jurisdiction? Justice Stevens, in his *Steel Co.* concurrence in the judgment, seems to have read *National Railroad* as doing so.[230] But

224. *See* Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 467 (1974) (Douglas, J., dissenting) ("[T]he difference here is only a matter of semantics.").

225. *Steel Co.*, 523 U.S. at 97 n.2.

226. *Lexmark*, 134 S. Ct. at 1387.

227. *Id.* at 1387 n.4.

228. Pathak, *supra* note 214, at 94–95.

229. *See generally* Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 301–07 (2011) ("The law sees fit to put few limits on the judge's power to sequence [the issues presented for decision].").

230. *Steel Co.*, 523 U.S. at 119–20, 119 n.10 (Stevens, J., concurring in the judgment).

long-standing Supreme Court precedent shows that not to be the case, since NARP had a colorable claim to relief.

One of the seminal 20th-century cases providing guidance on how to distinguish jurisdictional issues from merits issues is *Bell v. Hood*.[231] In *Bell*, the plaintiffs sued the FBI for compensatory damages for allegedly violating their Fourth and Fifth Amendment rights.[232] At the time, no such cause of action was recognized.[233] The district court in *Bell* dismissed the suit for lack of subject-matter jurisdiction on the ground that there was no such federal cause of action, so the suit supposedly did not arise under federal law.[234]

The Supreme Court reversed on the ground that "the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction."[235] The Court explained that federal-question jurisdiction exists if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another."[236] Jurisdiction is determined not by whether the complaint *successfully* invokes a federal right to recover, but on whether the complaint *attempts* "to seek recovery directly under the Constitution or laws of the United States."[237] An exception to this rule exists when the "claim is wholly insubstantial and frivolous," in which case jurisdiction is lacking.[238] Since the *Bell* plaintiffs attempted to seek recovery directly under the Constitution, and because their claims were not wholly frivolous, subject-matter jurisdiction was present.[239]

The *National Railroad* Court's statement that issues of "jurisdiction" became "immaterial" upon finding no cause of action must be read in light of *Bell*.[240] Assuming that NARP's claim was not frivolous—and it was not treated by the courts as such[241]—NARP's assertion that the Amtrak Act created a private right of action for passengers was enough to confer

231. 327 U.S. 678 (1946).

232. *Id.* at 679.

233. *Bell* predated *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), which recognized an implied right of action for such constitutional claims. *See Steel Co.*, 523 U.S. at 95–96.

234. *Bell*, 327 U.S. at 680.

235. *Id.* at 682.

236. *Id.* at 685.

237. *Id.* at 681.

238. *Id.* at 682–83; *see also* Idleman, *supra* note 13, at 290–95 (criticizing this exception).

239. *Bell*, 327 U.S. at 684–85.

240. Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 465 n.13 (1974).

241. *See id.* at 453–65; Potomac Passengers Ass'n v. Chesapeake & Ohio Ry. Co., 475 F.2d 325, 325 (D.C. Cir. 1973), *rev'd sub nom.* Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

"arising-under" jurisdiction under 28 U.S.C § 1337.[242] As in *Bell*, the *National Railroad* plaintiff asserted that a provision of federal law provided it with a heretofore-unrecognized cause of action, thereby establishing arising-under jurisdiction.[243] The jurisdictional issue in *National Railroad* thus became immaterial in the sense that jurisdiction could not *help* but be established by the plaintiff's allegations and the Court's finding that no cause of action existed.

Admittedly, *National Railroad*'s language[244] could easily be misinterpreted to suggest that it bypassed the jurisdictional issue. But recent Supreme Court cases have taken great pains to correct courts' (including the Supreme Court's) "sloppy and profligate" use of jurisdictional language.[245] The Court has stressed that prior cases that had unthinkingly discussed jurisdiction—so called "drive-by" jurisdictional rulings—are not entitled to precedential effect.[246] Therefore, *National Railroad*'s imprecise language should not be given precedential weight in light of the fact that *Lexmark* and *Bell* show that *National Railroad* did not bypass any statutory jurisdictional issues.[247]

C. Further Undermining of Hypothetical Statutory Jurisdiction by Subsequent Supreme Court Cases

After *Steel Co.*, two subsequent Supreme Court cases clarified that courts remain free to bypass issues of subject-matter jurisdiction to dismiss on various threshold nonmerits grounds.[248] These two cases cast serious doubt on hypothetical statutory jurisdiction. It is unlikely that the Court would have reached the issues in those cases if the *Steel Co.* rule only applied to Article III jurisdictional issues. And the rule laid down by those

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242. *See, e.g.*, Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 249 (1951); Karn v. Borough, No. 11-cv-0196, 2011 WL 2173622, at *1 (W.D. Pa. June 2, 2011) ("Provided that the federal claim is material . . . a federal question will exist for purposes of sections 1331 and 1337.").

243. *See Nat'l R.R.*, 414 U.S. at 456–58, 464–65; *Bell*, 327 U.S. at 681.

244. *Nat'l R.R.*, 414 U.S. at 465 n.13 ("Since we hold that no right of action exists, questions of standing and jurisdiction become immaterial.").

245. Mank, *supra* note 15, at 434 (quoting Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 184 (D.C. Cir. 2012) (Kavanaugh, J., dissenting)).

246. Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91(1998)).

247. *See id.* Even if *National Railroad* had deemed NARP's claim frivolous, such a ruling would have been jurisdictional—so either way, no jurisdictional issue was bypassed to reach the merits. *See Bell*, 327 U.S. at 682–83.

Additionally, *Lexmark* calls into question *Steel Co.*'s statement that a "statutory standing question can be given priority over an Article III question" and the cases it cited for that proposition. *Steel Co.*, 523 U.S. at 92, 97–98 n.2. After *Lexmark*, statutory standing issues are merits issues, which may not be decided before Article III jurisdictional issues under *Steel Co. See supra* notes 59–77, 214–22 and accompanying text (discussing *Steel Co.* and *Lexmark*).

248. *See infra* Part II.C.1–2.

cases—that subject-matter jurisdiction must be verified prior to reaching the merits but not necessarily prior to reaching a threshold issue, such as personal jurisdiction or forum non conveniens—also strongly indicates that hypothetical statutory jurisdiction is impermissible.

1. Ruhrgas *Casts Doubt on Hypothetical Statutory Jurisdiction*

The Court began to provide guidance on *Steel Co.*'s scope in *Ruhrgas AG v. Marathon Oil Co.*,[249] unanimously holding that courts may dismiss for lack of personal jurisdiction before reaching subject-matter jurisdiction. In *Ruhrgas*, foreign plaintiffs sued foreign defendants for business torts in Texas state court.[250] The defendants removed the case to federal court, where they argued that personal jurisdiction was lacking.[251] In response, the plaintiffs argued that the district court should remand the case for lack of diversity jurisdiction under 28 U.S.C. § 1332.[252] The district court dismissed for lack of personal jurisdiction without reaching the subject-matter jurisdiction issue.[253] On appeal, the Fifth Circuit held that *Steel Co.* required the district court to decide the subject-matter jurisdiction question first.[254] The Supreme Court reversed,[255] holding that *Steel Co.* permits courts to decide issues of personal jurisdiction prior to subject-matter jurisdiction.[256]

If *Steel Co.* did not extend to statutory jurisdictional issues, the Supreme Court would not have had any reason to rule as it did in *Ruhrgas*. The issue of subject-matter jurisdiction in *Ruhrgas* was whether complete diversity existed under 28 U.S.C. § 1332—a *statutory* issue.[257] The Constitution only requires minimal diversity, while the diversity statute has long been interpreted more restrictively to require complete diversity.[258] If the *Steel Co.* rule did not apply to statutory jurisdictional issues, the Court would have had no occasion to reach the issue it did in *Ruhrgas*. In that case, it would have been much simpler, narrower, and more logical for the Court to hold that the *Steel Co.* rule did not apply to statutory jurisdictional limitations—instead of addressing whether an inapplicable rule required courts to decide personal jurisdiction before subject-matter jurisdiction.

249. 526 U.S. 574 (1999).
250. *Id.* at 578–79.
251. *Id.* at 580.
252. *Id.*
253. *Id.* at 580–81.
254. *Id.* at 581–82.
255. *Id.* at 578.
256. *Id.* at 583.
257. *See id.* at 584.
258. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967); *supra* notes 187–88 and accompanying text.

Values of judicial minimalism,[259] to which the Court professes to adhere,[260] dictate that the Court must not decide difficult and important constitutional issues unless it must. The Court's decision to rule as it did in *Ruhrgas* would be very difficult to explain if *Steel Co.* had preserved hypothetical statutory jurisdiction.[261]

Ruhrgas's reasoning also strongly undercuts hypothetical statutory jurisdiction. Rather than grounding the opinion on a distinction between statutory and constitutional issues—a possibility implicitly rejected in *Ruhrgas*[262]—the Court instead drew a firm line between threshold issues and merits issues. It ruled that threshold issues, such as personal jurisdiction, may be decided before subject-matter jurisdiction, while merits issues may not.[263] In doing so, *Ruhrgas* repeatedly emphasized that courts are powerless to reach the merits in the absence of subject-matter jurisdiction, without distinguishing between constitutional or statutory varieties.[264]

The unanimous *Ruhrgas* Court first described and reaffirmed *Steel Co.* in terms that strongly suggest *Steel Co.* extends to all types of subject-matter jurisdiction. *Steel Co.* held that "a federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits."[265] "Subject-matter limitations . . . keep the federal courts within the bounds the Constitution *and Congress* have prescribed."[266] *Steel Co.* "reiterated [that] [t]he requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception, . . . for [j]urisdiction is power to declare the law, and [w]ithout jurisdiction the court cannot proceed at all in *any cause*."[267] Thus, "Article III generally requires a

259. *See* Wasserman, *supra* note 16, at 602 (discussing judicial minimalism, under which "a court resolving a case says no more than necessary to justify an outcome and leaves as much as possible undecided," thereby "enhanc[ing] democracy by . . . leav[ing] the democratic branches . . . room to maneuver").

260. *See, e.g.*, Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1952–56 (2005) (explaining and critiquing the claim that the Supreme Court adheres to principles of judicial minimalism); *see also infra* note 295 (discussing the constitutional-avoidance principle).

261. *See also* Friedenthal, *supra* note 13, at 264–65; Trammell, *supra* note 13, at 1126–27 (observing that if *Steel Co.* had not banned hypothetical statutory jurisdiction, the *Ruhrgas* Court could have "proceeded directly to the question of personal jurisdiction without any fuss"). Given that the Court was focused explicitly on the reach of *Steel Co.*, it is unlikely that the Court's decision to rule as it did was an oversight.

262. *See Ruhrgas*, 526 U.S. at 584; *see also infra* note 272.

263. *See Ruhrgas*, 526 U.S. at 585; *see also* Sinochem Int'l Co. Ltd. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 430–31 (2007).

264. *Ruhrgas*, 526 U.S. at 584–85.

265. *Id.* at 577.

266. *Id.* at 583 (emphasis added).

267. *Id.* at 577 (emphasis added) (citations omitted) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998)).

federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case."[268]

The *Ruhrgas* Court explained, however, that *Steel Co.* permitted a court to reach an issue of personal jurisdiction prior to an issue of subject-matter jurisdiction. Personal jurisdiction—although waivable—is also "'an essential element of [a court's jurisdiction]' without which the court is 'powerless to proceed to an adjudication.'"[269] "While *Steel Co*. reasoned that *subject-matter jurisdiction necessarily precedes a ruling on the merits*, the same principle does not dictate a sequencing of jurisdictional issues."[270] *Ruhrgas*'s refusal to distinguish between statutory and constitutional subject-matter jurisdiction—while holding that courts may not bypass subject-matter jurisdiction (without qualification) to reach the merits—casts significant doubt on hypothetical statutory jurisdiction.

Ruhrgas does contain seemingly inconsequential dicta that the personal jurisdiction issue was more "fundamental" than the subject-matter jurisdiction issue because it was of constitutional stature.[271] But the *Ruhrgas* Court was clear that it was not the constitutional or statutory character of either issue that justified the result.[272] Rather, it was justified by the fact that subject-matter jurisdiction was bypassed to reach a *nonmerits* threshold issue: "[A] court that dismisses on . . . nonmerits grounds . . . before finding subject-matter jurisdiction[] makes no assumption of law-declaring power that violates the separation of powers principles underlying [*Steel Co.*]."[273] *Ruhrgas*'s refusal to ground its decision on the distinction between statutory and constitutional issues further undermines the case for hypothetical statutory jurisdiction.[274]

Additionally, while the fractured nature of the *Steel Co.* opinion may have created questions as to whether Justice Scalia's opinion actually

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268. *Id*. at 583.

269. *Id.* at 584 (quoting Emp'rs Reinsurance Corp. v. Bryant, 299 U.S. 374, 382 (1937)).

270. *Id.* (emphasis added).

271. *Id.* at 584 (opining that personal jurisdiction's waivability does "not mean that subject-matter jurisdiction is ever and always . . . more 'fundamental'" than personal jurisdiction, since both are essential prerequisites to reaching the merits; further observing that "[i]n this case, indeed, the impediment to subject-matter jurisdiction . . . rests on statutory interpretation, not constitutional command"); *see also* Idleman, *supra* note 23, at 75 (suggesting that this statement was dicta not "truly necessary to the conclusion").

272. *See Ruhgras*, 526 U.S. at 584–85 (emphasizing that threshold issues may be reached in any order when necessary, regardless of their constitutional or statutory status); *id.* at 587–88 (implying that even when subject-matter jurisdiction presents a statutory issue and personal jurisdiction presents a constitutional issue, courts should generally reach subject-matter jurisdiction first).

273. *Id.* at 584–85 (quoting *In re* Papandreou, 139 F.3d 247, 255 (D.C. Cir. 1998)).

274. Moreover, the Court has recently repeatedly referred to subject-matter jurisdiction as "the court's *statutory* or constitutional *power* to adjudicate the case." Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1388 n.4 (2014) (emphasis added) (quoting Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 643 (2002)).

expressed the views of the Court,[275] the *Ruhrgas* Court's unanimous reaffirmation of the core of Justice Scalia's opinion seems to remove any genuine doubts on that score.[276] Any argument for hypothetical statutory jurisdiction that attempts to deny the precedential force of *Steel Co.* is therefore unavailing after *Ruhrgas*.

2. Sinochem *Casts Further Doubt on Hypothetical Statutory Jurisdiction*

A similar analysis applies to the Supreme Court's latest case explicating the scope of *Steel Co.* In *Sinochem International Co. v. Malaysia International Shipping Corp.*,[277] the Court expanded on *Ruhrgas* by holding that courts may bypass subject-matter jurisdiction to dismiss based on the doctrine of forum non conveniens—i.e., when a foreign court "is the more appropriate and convenient forum for adjudicating the controversy."[278]

Sinochem involved a commercial shipping dispute between foreign corporations.[279] When the plaintiff corporation brought suit in the Eastern District of Pennsylvania, the district court bypassed the issue of personal jurisdiction and determined that China would be the more appropriate forum.[280] The Third Circuit reversed, holding that the court should have confirmed subject-matter jurisdiction and personal jurisdiction before reaching the forum non conveniens issue.[281] The *Sinochem* Court unanimously reversed, again holding that courts may reach the threshold issue of forum non conveniens prior to subject-matter jurisdiction.[282]

Sinochem again involved a *statutory* subject-matter jurisdiction issue—whether the alleged tort occurred on navigable water and whether it concerned traditional maritime activity such that admiralty jurisdiction under 28 U.S.C. § 1333 was present.[283] Even though the statute largely mirrors the constitutional language,[284] the Supreme Court has explained

275. *See* Idleman, *supra* note 13, at 285–88 (discussing various questions as to the precedential weight of Justice Scalia's *Steel Co.* opinion); Trammell, *supra* note 13, at 1107.

276. *See* Idleman, *supra* note 13, at 287–88 (noting that, given *Steel Co.*'s posture, potentially three justices who did not join the opinion for the *Steel Co.* Court may have agreed that hypothetical jurisdiction is unconstitutional).

277. 549 U.S. 422 (2007).

278. *Id.* at 425.

279. *Id.* at 427.

280. *Id.* at 427–28.

281. *Id.* at 428.

282. *Id.* at 435.

283. *See* Malay. Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349, 354 (3d Cir. 2006), *rev'd*, 549 U.S. 422 (2007).

284. *Compare* U.S. CONST. art. III, § 2, *with* 28 U.S.C. § 1333 (2012).

that this is a *statutory* jurisdictional issue.[285] Therefore, as in *Ruhrgas*, the *Sinochem* Court likely would not have reached the issue of whether forum non conveniens may be decided before subject-matter jurisdiction if the *Steel Co.* rule did not apply to statutory jurisdictional issues.[286]

Sinochem's reasoning again strongly undermines hypothetical statutory jurisdiction. The Court again held that "[j]urisdiction *is vital* only if the court proposes to issue a judgment on the merits."[287] Since a forum non conveniens dismissal "is a determination that the merits should be adjudicated elsewhere," it is a nonmerits, threshold issue that may be reached prior to subject-matter jurisdiction.[288] "The critical point" was that "[r]esolving a *forum non conveniens* motion does not entail any assumption . . . of substantive 'law-declaring power'" to decide the merits.[289] Once again, *Sinochem*'s refusal to ground its decision on a distinction between statutory and constitutional issues, while emphasizing that subject-matter jurisdiction (without qualification) is essential to reach the merits, casts further doubt on hypothetical statutory jurisdiction.

In sum, while *Ruhrgas* and *Sinochem* substantially softened *Steel Co.*'s impact by permitting various nonmerits issues to be decided before subject-matter jurisdiction, they only reaffirmed and strengthened *Steel Co.*'s unyielding prohibition on reaching merits issues before confirming subject-matter jurisdiction. And they did so without creating an exception for statutory subject-matter jurisdiction. Per the Court, "[S]ubject-matter jurisdiction *necessarily* precedes a ruling on the merits,"[290] and "[j]urisdiction *is vital* only if the court proposes to issue a judgment on the merits."[291] While it is true that these cases did not directly address the issue, they strongly indicate that hypothetical statutory jurisdiction is impermissible.[292]

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285. *See* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 531–34 (1995) (explaining the evolution of statutory requirements for admiralty jurisdiction and stating that "a party seeking to invoke federal admiralty jurisdiction *pursuant to 28 U.S.C. § 1333(1)* over a tort claim must satisfy conditions both of location and of connection with maritime activity") (emphasis added); *see also* 23 FEDERAL PROCEDURE, LAWYERS EDITION § 53:8, at 34–35 (Francis M. Dougherty et al. eds. 2012) ("[28 U.S.C. § 1333] was not intended by Congress to be coextensive with the grant of jurisdiction contained in the Constitution . . . .").

286. *See supra* notes 257–61 and accompanying text (discussing *Ruhrgas*'s posture).

287. *Sinochem*, 549 U.S. at 431 (emphasis added) (quoting Intec USA, LLC v. Engle, 467 F.3d 1038, 1041 (7th Cir. 2006)).

288. *Id.* at 432.

289. *Id.* at 433 (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584–85 (1999)).

290. *Ruhrgas*, 526 U.S. at 584 (emphasis added).

291. *Sinochem*, 549 U.S. at 431 (emphasis added) (quoting *Intec USA*, 467 F.3d at 1041).

292. *Ruhrgas* and *Sinochem*'s distinction between threshold issues and merits issues shows that when a court exercises hypothetical statutory jurisdiction, it is doing something forbidden and consequential. Exercising hypothetical statutory jurisdiction to decide the merits is an exercise of law-declaring power without the authority to do so. *Ruhrgas*, 526 U.S. at 584–85; *Sinochem*, 549 U.S. at 433. The practical consequences of this ultra vires ruling are most evident when the court resolves a

III. THE INSUFFICIENCY OF CONSTITUTIONAL-AVOIDANCE AND EFFICIENCY JUSTIFICATIONS

Hypothetical jurisdiction is principally defended not on strict Article III grounds but based on concerns for judicial minimalism and judicial economy.[293] This Part first argues that the strongest judicial minimalism concerns in this context—those rooted in the value of constitutional avoidance—do not support the doctrine. Second, it argues that the efficiency argument for the doctrine is flawed and overstated, and that the doctrine can create serious inefficiencies of its own. Thus, neither constitutional-avoidance nor efficiency concerns justify retaining the constitutionally dubious doctrine.

A. The Insufficiency of Constitutional-Avoidance Justifications

Steel Co. rejected the argument that exercising hypothetical jurisdiction was a "greater act of judicial restraint" than "confront[ing] the jurisdictional question at the outset"—even when hypothetical jurisdiction allowed the court to avoid deciding a constitutional issue.[294] Justice Stevens argued in his *Steel Co.* concurrence in the judgment that one of the key reasons to skip an Article III jurisdictional question to dismiss on a statutory merits basis is the longstanding doctrine of constitutional avoidance, under which courts will decide a case on a nonconstitutional ground if at all possible.[295] Yet, the weighty value of constitutional avoidance was insufficient to justify hypothetical Article III jurisdiction in *Steel Co*.[296]

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novel merits issue or when its merits ruling has preclusive effect. (As discussed *infra* Part III.B.2.b, it is doubtful that preclusion should attach.) But even if the merits are not novel and preclusion does not ultimately attach to the federal court's merits ruling, the merits ruling is likely to be followed as persuasive authority if the case is refiled in state court (and potentially in other unrelated cases)—despite the federal court's failure to verify its power to make that ruling. *See, e.g.*, Dewberry v. Kulongoski, No. 16-03-23044, 2010 WL 9932505, at *9 (Or. Cir. May 3, 2010) (declining to afford preclusive effect to a federal court judgment that had assumed hypothetical jurisdiction in the alternative to reach the merits, but noting that "this court [nonetheless] finds the federal court's analysis of the merits persuasive").

293. *See, e.g.*, *supra* note 54 and accompanying text.

294. Idleman, *supra* note 23, at 29 n.161; *accord* Idleman, *supra* note 13, at 248 & nn.38–39, 255 & n.72.

295. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 123–24 (1998) (Stevens, J., concurring) (citing Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.")). *See generally* Coenen, *supra* note 13, at 743–44 (discussing the constitutional-avoidance doctrine).

296. *See supra* note 295 and accompanying text.

A fortiori, the lack of any constitutional-avoidance rationale for hypothetical *statutory* jurisdiction only makes it even more questionable. Because a *statutory* issue is being bypassed when a court exercises hypothetical statutory jurisdiction—perhaps even to reach a constitutional merits issue—the constitutional-avoidance doctrine does not support it. Thus, the judicial-restraint rationales that were insufficient to support hypothetical Article III jurisdiction are even weaker here.

Nonetheless, courts might be tempted to resort to hypothetical statutory jurisdiction to avoid grave and difficult constitutional issues presented by statutes stripping them of jurisdiction to hear constitutional claims. These types of jurisdiction-stripping attempts—while rarely enacted—have received considerable scholarly attention because they are exceedingly troubling from the perspective of protecting fundamental constitutional rights.[297] It is one of the oldest principles of American constitutional law that the violation of a legal right usually requires a legal remedy[298]—which, throughout much of American history, has traditionally been provided in a federal forum.[299]

Is a ban on hypothetical statutory jurisdiction tenable even in the face of these strong constitutional-avoidance concerns? Suppose a plaintiff brings a claim asserting a violation of a constitutional right, but the defendant argues that a statute strips courts of jurisdiction to hear that claim. The constitutionality of the jurisdiction-stripping statute undoubtedly presents grave and difficult constitutional questions.[300] Suppose also that the plaintiff clearly loses on the merits of his constitutional claim. In such a case, the urge to avoid the grave constitutional issues and exercise hypothetical statutory jurisdiction might be overwhelming.

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297. *See generally* CHEMERINSKY, *supra* note 15, 177–216; FALLON ET AL., *supra* note 132, at 283–320.

298. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162–63 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. . . . The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

299. *See generally* FALLON ET AL., *supra* note 132, at 278–83 (discussing "parity" debate over whether state courts are sufficient to vindicate federal rights); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1106–15 (1977) (discussing the historical preference of plaintiffs pressing federal claims for a federal forum).

300. *See generally* Bartlett v. Bowen, 816 F.2d 695, 703 (D.C. Cir. 1987) ("[A] statutory provision precluding *all* judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right."), *opinion reinstated*, 824 F.2d 1240 (D.C. Cir. 1987) (en banc) (per curiam); CHEMERINSKY, *supra* note 15, at 182–84, 208–10; FALLON ET AL., *supra* note 132, at 300–03, 308–09; *infra* note 305 and accompanying text. *See supra* notes 297–98 and accompanying text.

Yet, hypothetical statutory jurisdiction would not serve the intended purpose here. First, the doctrine would be inapplicable, since hypothetical jurisdiction is generally acknowledged to be available only when the jurisdictional issue is difficult.[301] But the *statutory* issue in this case—whether Congress intended the jurisdictional strip to apply to the case at bar—will often not be difficult. Congress often speaks unequivocally when it truly intends to strip the courts of jurisdiction.[302] For example, there is nothing particularly difficult about determining whether a constitutional challenge to school prayer would fall within a jurisdiction-stripping provision purporting to divest the courts of the power to hear such challenges.[303] Rather, it is only the subsequent *constitutional* question whether that jurisdiction-stripping statute is constitutionally valid that is difficult. If anything, hypothetical statutory jurisdiction would be even more offensive to separation-of-powers values in this context than usual, since the court would be avoiding an *obvious* statutory jurisdictional limitation rather than avoiding determining the meaning of Congress's uncertain jurisdictional language.[304]

Second, should the statutory issue pose even a minor difficulty, the jurisdiction-stripping statute would fall prey to the Supreme Court's clear-statement rule for such statutes.[305] Under this rule, if there is any doubt regarding whether Congress meant to divest the courts of the ability to hear constitutional claims, the statute will be construed not to do so.[306] For example, the Court has applied the clear-statement rule to find that a statute appearing to strip the federal courts of jurisdiction to entertain constitutional claims relating to the CIA's employment decisions did not do so, since Congress had not said so clearly and explicitly.[307] The clear-statement rule serves to avoid the serious constitutional concerns involved[308] while providing certainty to Congress, which benefits from

301. *See supra* notes 48–50, 55–58 and accompanying text.

302. *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513–14 (1868) (treating Congress's intent to strip jurisdiction as obvious); Battaglia v. Gen. Motors Corp., 169 F.2d 254, 262 (2d Cir. 1948) (considering the jurisdiction-stripping provision of the Portal-to-Portal Act); *cf.* Hamdan v. Rumsfeld, 548 U.S. 557, 575–84 (2006) (analyzing a more difficult question of congressional intent to repeal jurisdiction).

303. *See* FALLON ET AL., *supra* note 132, at 277–78 (collecting examples of proposed jurisdiction-stripping legislation).

304. *See supra* notes 48–58 and accompanying text.

305. *See, e.g.*, Webster v. Doe, 486 U.S. 592, 603–04 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." (citations omitted) (quoting Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986))).

306. *See Webster*, 486 U.S. at 603–04.

307. *Id.*

308. *Id.*

clear background rules against which it can craft jurisdictional (and jurisdiction-stripping) statutes.[309]

This clear-statement rule thus obviates the need for hypothetical statutory jurisdiction in such a case. It also preemptively removes the statutory difficulty[310] that is a generally acknowledged prerequisite to the doctrine's invocation.[311] And it avoids the constitutional issue without causing the obvious affront to separation-of-powers values by judicially bypassing jurisdiction-stripping legislation. It is for this reason that the First Circuit, one of the earliest adopters of hypothetical statutory jurisdiction, refused to apply the doctrine to bypass jurisdiction-stripping legislation, intuiting that such a maneuver would be especially offensive to separation-of-powers principles.[312]

Moreover, unlike the clear-statement rule, hypothetical statutory jurisdiction cannot protect the principal value that makes such jurisdiction-stripping statutes constitutionally questionable in the first place—the value of protecting constitutional rights in the courts.[313] Rather than vindicating constitutional rights, hypothetical statutory jurisdiction can only be invoked to *dismiss* the plaintiff's constitutional merits claims, since the plaintiff is the party attempting to invoke the court's jurisdiction.[314] The clear-statement rule, on the other hand, is not so limited. The clear-statement rule also provides the benefit of certainty to other litigants regarding the constitutionality of the jurisdiction-stripping statute.[315]

In sum, given that courts have a far less problematic tool at their disposal to avoid the serious constitutional issues presented by jurisdiction-stripping statutes, constitutional-avoidance values do not present a compelling reason to retain hypothetical statutory jurisdiction.

B. The Insufficiency of Efficiency Justifications

The most trenchant argument supporting hypothetical statutory jurisdiction is based not on constitutional doctrine or the constitutional

309. *See, e.g.*, Aaron Tang, *Double Immunity*, 65 STAN. L. REV. 279, 324 (2013) ("[C]lear statement rules are, at their best, designed to create a 'predictable interpretive regime' that provides Congress with certainty over how particular statutory language (and gaps in the language) will be construed by the Court." (footnotes omitted) (quoting William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 86 (1994))).

310. *See supra* notes 305–09 and accompanying text (discussing the clear-statement rule).

311. *See supra* notes 48–58 and accompanying text. As this Article has argued, however, the First Circuit failed to understand that garden-variety hypothetical statutory jurisdiction likewise poses grave separation-of-powers and federalism problems. *See supra* Part II.A.

312. *See supra* notes 127–28 and accompanying text.

313. *See supra* notes 297–300 and accompanying text.

314. *See supra* notes 48–58 and accompanying text.

315. *See* Idleman, *supra* note 13, at 248 (criticizing hypothetical jurisdiction for "sustain[ing] uncertainty and encourag[ing] future litigation over the same jurisdictional issue").

values discussed so far but rather on the strong efficiency gains it can produce. As Justice Breyer put it, "[w]hom does it help to have appellate judges spend their time and energy puzzling over the correct answer to an intractable jurisdictional matter, when (assuming an easy answer on the substantive merits) the same party would win or lose regardless?"[316] Scholarly commentary has also decried the inefficiency of an inflexible, "jurisdiction first" approach.[317] While *Steel Co.* and its progeny rejected this argument—prohibiting some or (as this Article argues) all instances of hypothetical jurisdiction despite the inefficiency of doing so—efficiency concerns are likely to be the greatest obstacle to burying hypothetical statutory jurisdiction once and for all.

Undoubtedly, hypothetical statutory jurisdiction can be the more immediately efficient course for disposing of certain cases.[318] But this Part argues that the efficiency rationale for the doctrine is weaker than it appears and does not justify retaining the doctrine. First, the efficiency losses from abolishing hypothetical statutory jurisdiction under current law will be far milder than they would have been in the immediate aftermath of *Steel Co.* Second, there are various circumstances in which the doctrine creates serious inefficiencies of its own. Third, even if hypothetical statutory jurisdiction might lead to immediate efficiency gains for the litigants and the judge, it is not an effective way to dispose of a case expeditiously while simultaneously respecting the interests of Congress, state judiciaries, and fundamental separation-of-powers and federalism values.

1. Current Law Greatly Limits the Inefficiency of Abandoning Hypothetical Statutory Jurisdiction

The lower courts began to embrace hypothetical statutory jurisdiction in the immediate aftermath of *Steel Co.*[319] At that time, two major developments in the law of federal jurisdiction had yet to take place: (1) the Supreme Court had yet to clarify the kinds of issues that could be decided prior to subject-matter jurisdiction, and (2) there was much greater uncertainty about how to differentiate statutory jurisdictional issues from

316. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 111 (1998) (Breyer, J., concurring in part and in the judgment); *accord* Schwartz, *supra* note 90, at 2259 (arguing hypothetical jurisdiction "save[s] substantial time"). *But see supra* note 315 and accompanying text.

317. *See, e.g.*, Trammell, *supra* note 13, at 1118 ("[S]cholars [have decried an unyielding approach to jurisdiction as] an 'expensive habit' and have extolled the efficiency gains of a more pragmatic approach . . . ." (footnote omitted) (quoting David P. Currie, *The Federal Courts and the American Law Institute: Part II*, 36 U. CHI. L. REV. 268, 298 (1969))).

318. Idleman, *supra* note 13, at 248 (stating that the efficiency argument for hypothetical jurisdiction is "self-evident").

319. *See supra* notes 105–23 and accompanying text.

merits issues, and many more statutory issues were classified as jurisdictional. Without those clarifications, it may have seemed disastrous to read *Steel Co.* to prohibit hypothetical statutory jurisdiction.

First, lower courts began to embrace hypothetical statutory jurisdiction prior to *Ruhrgas* and *Sinochem*.[320] *Steel Co.* bred uncertainty as to whether courts had to consider subject-matter jurisdiction before *all* other issues, including nonmerits issues.[321] If *Steel Co.* required absolute priority for subject-matter jurisdiction, courts may have thought it prudent to limit the kinds of jurisdictional issues covered by that rule. But in a post-*Ruhrgas* and *Sinochem* world, extending the *Steel Co.* rule to statutory jurisdictional issues is not nearly as inefficient. These issues may be bypassed to dismiss a case on various nonmerits, threshold grounds, such as lack of personal jurisdiction or forum non conveniens.[322]

Second, hypothetical statutory jurisdiction was embraced by the lower courts prior to the Supreme Court's recent cases clarifying *which* statutory issues are jurisdictional. While *Steel Co.* and its progeny addressed which issues may be reached prior to subject-matter jurisdiction, they did not address the antecedent question of how to determine which statutory issues are jurisdictional and which are not. *Steel Co.* seems to have prompted the Court to turn to the latter issue in an attempt to achieve greater clarity and uniformity.[323]

In order to correct courts' (including the Supreme Court's) "sloppy and profligate" use of the term "jurisdictional,"[324] the Supreme Court in *Arbaugh v. Y & H Corp.*[325] and subsequent cases rejected an overly expansive application of the term.[326] It imposed a "bright[-]line" rule that a statutory issue is presumed nonjurisdictional unless Congress clearly states otherwise.[327] This bright-line rule greatly clarifies the procedure for determining whether a statutory requirement is jurisdictional and greatly

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320. *See supra* Part II.C.

321. *See* Idleman, *supra* note 23, at 77–91.

322. *See supra* Part II.C.

323. *See, e.g.*, Wasserman, *supra* note 16, at 600 ("*Steel Co.* depends on the existence of a firm line between jurisdiction and merits . . . ."); *see also* Stephen I. Vladeck, *The Increasingly "Unflagging Obligation": Federal Jurisdiction After* Saudi Basic *and Anna Nicole*, 42 TULSA L. REV. 553, 570 (2007) (arguing that *Steel Co.* incentivized lower courts to expand the universe of statutory jurisdictional issues, prompting the Supreme Court to focus on the issue).

324. Mank, *supra* note 15, at 434 (quoting Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 184 (D.C. Cir. 2012) (Kavanaugh, J., dissenting)).

325. 546 U.S. 500 (2006).

326. *See, e.g.*, Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region, 558 U.S. 67, 81 (2009) ("Recognizing that the word 'jurisdiction' has been used by courts, including this Court, to convey many, too many, meanings, we have cautioned, in recent decisions, against profligate use of the term." (citation omitted) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998))).

327. *See* Wasserman, *supra* note 16, at 603 ("[T]he default rule" is thus that a statutory requirement "goes to the merits unless and until Congress provides otherwise . . . .").

narrows the universe of statutory jurisdictional issues.[328] It also avoids the practical problems created by overapplying the jurisdictional label and rendering all sorts of merits issues nonwaivable and nonbypassable.[329]

Since there are likely to be far fewer statutory jurisdictional issues under current law, applying the *Steel Co.* rule to those issues will have a much smaller impact. Thus, the efficiency argument for hypothetical statutory jurisdiction has been significantly undercut by jurisprudential developments since *Steel Co.*

2. Hypothetical Statutory Jurisdiction Can Create Various Inefficiencies

Despite the immediate efficiency gains it can appear to produce in a given case, hypothetical statutory jurisdiction creates various systemic costs. As scholars have observed, it perpetuates uncertainty over the difficult bypassed jurisdictional issue, leaving subsequent litigants and courts to grapple with it in the future.[330] Additionally, there are various scenarios in which a court will have to confront the bypassed jurisdictional issue later in time. In these instances, it can be *less* efficient to bypass the statutory jurisdictional issue.

a. Subsequent Proceedings Within a Case

Hypothetical statutory jurisdiction can create inefficiencies in subsequent proceedings in the case. First, repleading after dismissal may force a district court to confront the bypassed jurisdictional issue.[331] Plaintiffs are generally given leave to file an amended complaint after a dismissal for failure to state a claim.[332] If a court bypasses a difficult jurisdictional issue to dismiss on the merits, a plaintiff may be able to amend her complaint to shore up her merits allegations to survive a motion

328. *See Arbaugh*, 546 U.S. at 512; *see also* Mank, *supra* note 15, at 433 (discussing "the recent Supreme Court trend to narrow which issues are jurisdictional"); Revell, *supra* note 13, at 239 ("Beginning with *Steel Co.*[,] . . . the Court has regularly spoken . . . to the definition of jurisdiction, gradually building a repository of what it is and what it is not."); Wasserman, *supra* note 16, at 601 ("*Arbaugh* and *Steel Co.* are of a piece.").

329. *See infra* notes 367–69 and accompanying text; *see also* Clermont, *supra* note 229, at 309 ("[W]hen a defense is 'nonbypassable,' . . . a court cannot skip over it and instead dismiss on the merits.").

330. *See, e.g.*, Idleman, *supra* note 13, at 317–18 (discussing the inefficiency of perpetuating jurisdictional uncertainty). Given that the merits issue reached by a court assuming hypothetical jurisdiction is generally neither novel nor difficult, a court is generally not providing any significant guidance to courts and litigants on the merits issue when it assumes hypothetical jurisdiction. *See supra* notes 48–58 and accompanying text.

331. I am indebted to Brian J. Levy for suggesting this possibility.

332. *See generally* FED. R. CIV. P. 15(a)(2); 6 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1474 (3d ed. 2010).

to dismiss. In a subsequent motion to dismiss, the district court will then be forced to confront the previously bypassed statutory jurisdictional issue. At best, if jurisdiction exists, no time will have been saved—both the original jurisdictional and merits issues will have been addressed, as well as the amended merits allegations. But at worst, if jurisdiction is lacking, the court may have needlessly reached the merits *twice*, wasting both litigant and judicial resources. In such a scenario, it would have been much more efficient to simply decide the jurisdictional issue first.

A similar dynamic can play out if the dismissal invoking hypothetical statutory jurisdiction is appealed. If the court of appeals reverses on the merits and finds that the plaintiff has stated a claim, it may remand the case for the district court to consider the jurisdictional issue.[333] At best, if jurisdiction exists, no time was saved—both the merits and the jurisdictional issue were ultimately addressed. At worst, if jurisdiction is lacking, both courts needlessly considered the merits. As these examples show, hypothetical statutory jurisdiction only works as intended when the court is able to keep the outcome of the jurisdictional issue shrouded in uncertainty—which it cannot always accomplish.

In these situations, courts also suffer serious legitimacy costs by being shown to have acted beyond their authority. Courts and commentators have long held that the legitimacy of the federal judiciary in a democratic society—composed of unelected and democratically unaccountable, life-tenured jurists—rests in large part on the judiciary's scrupulous observance of its jurisdictional boundaries.[334] By doing so, the federal courts avoid encroaching on the prerogative of the coordinate federal branches, the state courts, or both—by, for example, poaching a case that Congress has decreed should be heard in state court.[335] When a court is shown by a later ruling in the case to have exceeded its jurisdictional bounds by willfully refusing to consider the issue, the legitimacy and reputation of the judiciary suffer as a result.[336]

b. Subsequent Cases in Different Courts

Hypothetical statutory jurisdiction can also create inefficiencies in follow-on litigation, principally because of the uncertain preclusive effects of such a judgment. The usual practice in the federal courts is that a

333. *See generally* Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1525, 1530–31 (2012).

334. *See, e.g.*, Idleman, *supra* note 13, at 281–82, 343; Idleman, *supra* note 23, at 6 n.22.

335. *See, e.g.*, Snyder v. Harris, 394 U.S. 332, 340 (1969); *supra* notes 37, 167–70 and accompanying text (discussing the legitimacy costs of violating jurisdictional boundaries).

336. *See, e.g.*, Idleman, *supra* note 13, at 281–82, 343; Idleman, *supra* note 23, at 6 n.22.

dismissal for lack of subject-matter jurisdiction is without prejudice to the case's refiling in another forum.[337] It is generally thought that "in the absence of subject matter jurisdiction there can be no preclusive findings or conclusions on the merits."[338] A dismissal for failure to state a claim on the merits, in contrast, is with prejudice to refiling, and the merits judgment will have res judicata effect.[339] But if jurisdiction is assumed hypothetically, is the subsequent merits dismissal with or without prejudice to refiling?

Prior to *Steel Co.*, the courts developed the rule that merits judgments rendered pursuant to hypothetical jurisdiction would be "entitled to preclusive effect" so "long as the District Court did not 'plainly usurp jurisdiction' over the action."[340] This is an extension of the standard courts generally apply to determine whether any judgment may be collaterally attacked for lack of subject-matter jurisdiction.[341] Under the generally applicable rule, if the parties do not raise the jurisdictional issue or the court got the jurisdictional issue wrong, the judgment will nonetheless be entitled to preclusive effect so long as the lack of subject-matter jurisdiction was not manifest.[342] But applying this general rule in the context of hypothetical jurisdiction creates unique problems.

i. It Is Doubtful that Such Judgments Should Be Given Preclusive Effect

First, applying this general rule in the context of hypothetical statutory jurisdiction is highly dubious. The general rule is based in part on the assumption that a party had the ability to challenge subject-matter jurisdiction and receive a ruling on that objection in the first action.[343] But

337. *See, e.g.*, Idleman, *supra* note 13, at 291–92; Wasserman, *supra* note 16, at 597.

338. *See, e.g.*, Aerolineas Argentinas v. United States, 77 F.3d 1564, 1572 (Fed. Cir. 1996). However, if a federal court decides an issue that is also relevant to the merits in the course of determining that it lacks subject-matter jurisdiction, issue preclusion may attach to its decision on that issue and be binding in follow-on litigation in state court. *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999).

339. *Cf. Ruhrgas*, 526 U.S. at 585–86.

340. Cantor Fitzgerald, L.P. v. Peaslee, 88 F.3d 152, 155 n.2 (2d Cir. 1996) (quoting Nemaizer v. Baker, 793 F.2d 58, 65 (2d Cir. 1986)).

341. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 12 (AM. LAW. INST. 1982) (allowing collateral attack when "[t]he subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority"). The Supreme Court has not ruled on whether this exception is appropriate. *See* Travelers Indem. Co. v. Bailey, 557 U.S. 137, 153 n.6 (2009) (noting this exception but declining to consider whether to adopt it); *see also* Idleman, *supra* note 23, at 59 n.322.

342. *See Ruhrgas*, 526 U.S. at 586 ("When a court has rendered a judgment in a contested action, the judgment [ordinarily] precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation." (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 12, at 115)); *see also* Trammell, *supra* note 13, at 1146.

343. *See infra* note 344.

this assumption does not hold if the parties raised the issue, yet the court declined to address it and skipped to the merits. While there was an opportunity to raise the issue of subject-matter jurisdiction, there was no opportunity to obtain a decision on the issue.[344] This situation is not meaningfully different than if the parties were unable to obtain a ruling on the issue because the first tribunal had "inadequate capability for considering jurisdictional questions"—a situation in which the Restatement (Second) of Judgments allows collateral attack on the first court's judgment for lack of subject-matter jurisdiction.[345]

Nor would the mere fact that the *plaintiff* sought to invoke federal jurisdiction in the first court preclude it from challenging the judgment for lack of subject-matter jurisdiction. Despite the evident unfairness of allowing a plaintiff to change positions to escape an unfavorable merits ruling, preclusion law seeks to promote not only fairness and finality but also "validity"—i.e., "the premise that the proceeding had the sanction of law, expressed in the rules of subject matter jurisdiction."[346]

Second, as this Article has argued, *any* assumption of hypothetical statutory jurisdiction is a plain "usurpation" of judicial power prohibited by *Steel Co.* and its progeny—so merits judgments rendered by courts invoking hypothetical statutory jurisdiction should never be entitled to preclusive effect.[347] Attaching preclusive effect to a merits ruling made by a federal court "without first ascertaining its subject-matter jurisdiction raises the specter of preclusion without power,"[348] which is "offensive to the various states' sovereignty" and separation-of-powers principles.[349]

Since the parties had no opportunity to obtain a ruling on the challenge to subject-matter jurisdiction, and since hypothetical statutory jurisdiction

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344. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. c (*"[T]he opportunity for an independent determination* of the issue of subject matter jurisdiction that was protected in traditional doctrine remains available under the rule that the tribunal's determination of its own competency is res judicata." (emphasis added)); *id.* § 12 cmt. e ("The policies favoring finality over validity presuppose that fair opportunity is available to contest subject matter jurisdiction in the court whose jurisdiction is in question.").

345. *Id.* § 12 cmt. e (allowing collateral attack when "[t]he opportunity to challenge subject matter jurisdiction in such a forum [was] inadequate").

346. *Id.* § 12 cmt. a; *see, e.g.*, Chisolm v. United States, 82 Fed. Cl. 185, 197 (Fed. Cl. 2008) (refusing to afford preclusive effect to a district court judgment that had bypassed the issue of whether the claim fell within Court of Claims's exclusive jurisdiction, even though plaintiff chose to invoke that jurisdictionally deficient first forum), *aff'd*, 298 F. App'x 957 (Fed. Cir. 2008); *cf. supra* note 47 (discussing Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379 (1884)).

347. *See* Idleman, *supra* note 13, at 265 ("[*E]very* exercise of hypothetical jurisdiction is, by its very nature, a usurpation of jurisdiction.").

348. Heather Elliott, *Jurisdictional Resequencing and Restraint*, 43 NEW ENG. L. REV. 725, 736 (2009).

349. Ely Todd Chayet, *Hypothetical Jurisdiction and Interjurisdictional Preclusion: A "Comity" of Errors*, 28 PEPP. L. REV. 75, 76 (2000); *accord* Idleman, *supra* note 13, at 251 & n.53 (decrying "poach[ing]" cases that belong in state court).

is an unconstitutional transgression of the courts' jurisdictional limits, there is a powerful argument that preclusion should never attach when courts invoke hypothetical statutory jurisdiction.[350] This would avoid the serious separation-of-powers and federalism problems presented by illegitimately attaching preclusive effect to such a judgment.[351] Yet, doing so would obviously create serious inefficiencies. A plaintiff would be free to relitigate the merits in a second court even after losing on the merits in the first court, at significant private and judicial cost and with evident unfairness to the defendant. Thus, if such judgments are not entitled to preclusive effect, the first court invoking hypothetical statutory jurisdiction may have disposed of the case with a minimum of effort for itself, but larger inefficiencies may be created on a systemic level.[352]

ii. The "Plain-Usurpation" Standard Encourages Inefficient Relitigation

Even if hypothetical statutory jurisdiction is not a per se "plain usurpation" of jurisdiction and such judgments could be granted preclusive effect in some circumstances, it still inefficiently incentivizes relitigation of the first court's subject-matter jurisdiction in follow-on litigation. Plaintiffs have a powerful incentive to attack the prior judgment for lack of subject-matter jurisdiction so that their case may proceed—likely in state court. The plain-usurpation standard, although designed to prevent a judgment from being questioned for lack of subject-matter jurisdiction in all but the most egregious cases,[353] invites the parties to relitigate the issue.

The standard is quite vague and susceptible to varying interpretations of what constitutes usurpation, encouraging collateral attack on the first judgment.[354] And because hypothetical statutory jurisdiction is designed to be invoked only when the jurisdictional issue is difficult[355]—which is

350. *But see* Comment, *Assuming Jurisdiction Arguendo: The Rationale and Limits of Hypothetical Jurisdiction*, 127 U. PA. L. REV. 712, 730–31 n.110 (1979) (arguing, pre-*Steel Co.*, that preclusion should attach when courts assume hypothetical jurisdiction).

351. *See supra* note 349 and accompanying text.

352. *Cf.* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 48 (1999) ("A court that economizes on decision costs for itself may in the process 'export' decision costs to other people, including litigants and judges in subsequent cases who must give content to the law.").

353. *See, e.g.*, TC Healthcare I, LLC v Dupuis (*In re* Eldercare, LLC), 503 F. App'x 13, 15 (2d Cir. 2012) (explaining that plain usurpation of jurisdiction is not "[a] mere error," but rather "a total want of jurisdiction [with] no arguable basis" for jurisdiction (quoting Nemaizer v. Baker, 793 F.2d 58, 65 (2d Cir. 1986))).

354. *See* Karen Nelson Moore, *Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 534, 555 (1981) (noting that due to lack of "adequately articulate[d]" standards, "litigants will be tempted to characterize any jurisdictional error as a manifest abuse of authority").

355. *See supra* notes 48–58 and accompanying text.

another way of saying that jurisdiction is doubtful—the judgment may be especially prone to attack. Additionally, a collateral attack on the first judgment will generally be heard by a new judge, who may see the issue quite differently than the first judge. And since the first court has not expressed a view on the correct resolution of the jurisdictional issue, it may be easier for a second court to conclude that jurisdiction is plainly lacking, as the second court would not have to contradict a prior resolution of the jurisdictional issue to do so. Given all of this uncertainty, plaintiffs may have a high enough chance of success to lead them to challenge the prior ruling—even if only to exert leverage over their opponents in order to extract a settlement as the price for finality. And even if the second court finds that the first court did not plainly usurp jurisdiction, the costs to the parties and to the second court imposed by the process of relitigating the issue of subject-matter jurisdiction could be substantial.[356]

Nor is it highly unlikely that the second court might find a plain usurpation. True, hypothetical statutory jurisdiction is designed only to be deployed when the jurisdictional issue is truly difficult,[357] so it might be hard to say that hypothetically resolving the difficult issue amounted to a plain usurpation of power. But courts came to disregard that limitation on hypothetical jurisdiction prior to *Steel Co.*,[358] and hypothetical statutory jurisdiction is prone to the same kind of abuse.[359] Thus, it is not hard to imagine instances in which a second court will have little difficulty finding that the first court plainly usurped jurisdiction by bypassing what the second court deems a clear jurisdictional issue.[360] And should that happen,

356. *See, e.g.*, Brief for Appellant at 7, Worthington v. City of Bremerton, 176 Wash. App. 1035 (Wash Ct. App. 2013) (No. 68979-7-I), 2012 WL 7152645 (litigating the question of the preclusive effect of a prior federal court judgment addressing the merits in the alternative after dismissing for lack of subject-matter jurisdiction).

357. *See supra* notes 48–58 and accompanying text.

358. *See supra* notes 55–58 and accompanying text.

359. Courts that have recently utilized hypothetical statutory jurisdiction seem to vary as to the conditions for its invocation and how often it may be invoked. *Compare In re* Grand Jury Subpoenas Dated March 2, 2015, 628 F. App'x 13, 14 (2d Cir. 2015) ("As both sides urge us to reach the merits and it would be more efficient for us to do so, we assume we have [statutory] jurisdiction to hear this appeal."), *and* Byrd v. Republic of Hond., 613 F. App'x 31, 33 (2d Cir. 2015) ("In cases involving complex [statutory] jurisdictional issues under the FSIA, we may assume 'hypothetical jurisdiction' and affirm a dismissal on the merits."), *with* Ortiz-Franco v. Holder, 782 F.3d 81, 86 (2d Cir. 2015) (stating that hypothetical jurisdiction "is prohibited in all but the narrowest of circumstances"), *cert. denied sub nom.* Ortiz-Franco v. Lynch, 136 S. Ct. 894 (2016).

360. *See, e.g.*, Chisolm v. United States, 82 Fed. Cl. 185, 197 (Fed. Cl. 2008) (refusing to afford preclusive effect to a district court judgment that had bypassed the issue of whether the claim fell within Court of Claims's exclusive jurisdiction), *aff'd*, 298 F. App'x 957 (Fed. Cir. 2008); RFMS, Inc. v. United States, 736 F. Supp. 2d 1222, 1226 (S.D. Iowa 2010) (declining to give preclusive effect to an alternative merits holding when the federal court dismissed for lack of subject-matter jurisdiction); Dewberry v. Kulongoski, No. 16-03-23044, 2010 WL 9932505, at *9 (Or. Cir. May 3, 2010) (declining to afford preclusive effect to a federal court judgment that had assumed hypothetical jurisdiction in the alternative to reach the merits).

the efficiency costs will be severe—both the statutory subject-matter jurisdiction issue and the merits may ultimately be litigated *twice* by the parties before two courts. In such a case, it would have been much more efficient for the first court to decide the subject-matter jurisdiction issue first to prevent such relitigation.

3. A Myopic Efficiency Analysis Cannot Account for the Incommensurable Institutional Values Harmed by Hypothetical Statutory Jurisdiction

As the preceding analysis shows, any efficiency analysis of hypothetical statutory jurisdiction that focuses only on the immediate benefits to be gained by the judge and parties can fail to account for potentially serious inefficiencies imposed later in time. Even more fundamentally, such a myopic efficiency analysis fails to account for fundamental yet incommensurable interests—those of institutional nonparties and important institutional values.[361]

A myopic efficiency analysis fails to account for the interests of Congress in imposing a given statutory subject-matter restriction and disregards these interests for immediate efficiency gains to the parties and the judge.[362] It also fails to account, in many instances, for the interests of the state judiciaries in adjudicating claims lying beyond the federal courts' jurisdiction—for example, cases based on state law for which diversity jurisdiction is absent.[363] And to the extent the interests of Congress and the states are a proxy for the individual citizens they represent, federal courts' evasion of statutory subject-matter restrictions trenches on citizens' interest in seeing the federal courts stay within their statutorily prescribed bounds, as envisioned by the constitutional scheme.[364] While hypothetical statutory jurisdiction may be an efficient way to dispose of the individual case before

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361. The issue of how to account for the interests of individuals, groups, and institutions beyond the immediate parties to a suit is one courts and commentators have grappled with in various contexts. *See, e.g.*, Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 346 & n.31, 367–68 (discussing problems of accounting for the interests of toxic tort victims who have not yet developed injuries but may do so in the future in the class-action settlement context); Laura W. Stein, *The Court and the Community: Why Non-Party Interests Should Count in Preliminary Injunction Actions*, 16 REV. LITIG. 27, 33 (1997) (discussing problems of accounting for nonparty interests when considering injunctive relief).

362. *See, e.g.*, Trammell, *supra* note 13, at 1135 n.171 ("[The] institutional interest in conserving resources is quite different than the structural interests in separation of powers and federalism that undergird subject matter jurisdiction.").

363. *See, e.g.*, Chayet, *supra* note 349, at 84 ("[H]ypothetical jurisdiction . . . den[ies] state courts the autonomy that Congress, as well as the framers of the Constitution, sought to preserve.").

364. *See* Idleman, *supra* note 23, at 36–37 (arguing that hypothetical jurisdiction and violations of subject-matter jurisdiction restrictions harm "the people as a whole—the very source of federal sovereignty").

the court with as little effort as possible,[365] it is not an effective way to dispose of the case expeditiously while simultaneously respecting the fundamental separation-of-powers and federalism values served by honoring statutory subject-matter jurisdiction restrictions.

Indeed, a myopic efficiency analysis is particularly ill-suited for the law of federal jurisdiction, which is often animated more by abstract separation-of-powers and federalism values than by more concrete and immediate interests. For example, a myopic efficiency analysis will never be able to explain such inefficient consequences of the law of federal subject-matter jurisdiction as the dismissal of a case on appeal after a lengthy and expensive trial when a jurisdictional defect is belatedly discovered.[366] No reasonable observer would dispute that the result is inefficient from the standpoint of the parties to the suit, but the law sees fit to impose these high, immediate costs to keep the federal courts within their authorized domain and to ensure that fundamental separation-of-powers and federalism values are respected in the immediate case and in the future.

This is not to say that thoughtful observers should be blind to the high costs of inflexible jurisdictional rules. Rather, it is the outline of a plea for a more sophisticated sort of efficiency analysis that looks not only at immediate costs but also the potential follow-on and systemic costs, the interests of Congress and the states, and the paramount importance of respecting separation-of-powers and federalism values. Indeed, the Court seems to have taken just such an approach in *Arbaugh* and its progeny.[367] Recognizing the high costs of jurisdictional rules, the Court has imposed an easily administrable bright-line rule that gives Congress a clear background against which to legislate and decreases judicial befuddlement over which rules Congress has ranked as jurisdictional, serving separation-of-powers values.[368] It also has the laudable effect of decreasing the number of unexpected jurisdictional dismissals, as well as increasing certainty for litigants regarding which statutory requirements are jurisdictional. These cases can provide a model of serving efficiency values while maintaining respect for the incommensurable fundamental values animating the law of

365. *See* Trammell, *supra* note 13, at 1119–20 (arguing that even those who defend hypothetical jurisdiction on efficiency grounds "intuit that" viewing "jurisdictional rules simply as a means to th[e] end" of efficiency "can't be quite right," since they concede that courts "typically" should address jurisdiction first).

366. *See supra* note 47 and accompanying text (discussing the high costs of jurisdictional dismissals on appeal); *see also, e.g.*, Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."); Chayet, *supra* note 349, at 83–84 ("[J]udicial economy is not the sole end of the federal judiciary.").

367. *See supra* notes 323–29 and accompanying text.

368. *See supra* notes 323–29 and accompanying text.

federal jurisdiction, and while maintaining the inviolability of statutory limitations on subject matter jurisdiction.[369]

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To summarize: current law dramatically reduces the costs of banning hypothetical statutory jurisdiction. The efficiency argument for hypothetical statutory jurisdiction fails to account for the various inefficiencies that it can create. And the efficiency argument fails to account for the interests of Congress, the states, and the fundamental separation-of-powers and federalism values enshrined in Article III. Ultimately, efficiency is an insufficient reason to maintain this unconstitutional doctrine.

CONCLUSION

This Article has argued that hypothetical statutory jurisdiction is contrary to Article III of the Constitution. Article III dictates that statutory subject-matter jurisdiction is no less necessary for the exercise of jurisdiction, vitally important for protecting core separation-of-powers and federalism values, and indispensable for conserving limited federal judicial resources. Ultimately, hypothetical statutory jurisdiction impermissibly negates the democratically responsive Congress's constitutional prerogative to determine the bounds of the federal judiciary's power, and often intrudes on the state courts' exclusive domain.

The primary doctrinal argument in favor of hypothetical statutory jurisdiction—based on *Steel Co.*'s opaque discussion of statutory standing—has been fatally undercut by the Supreme Court's recent *Lexmark* case. And *Steel Co.*'s progeny, *Ruhrgas* and *Sinochem*, both tacitly assume that hypothetical statutory jurisdiction is impermissible. They also stress that courts are powerless to reach the merits without subject-matter jurisdiction, while refusing to distinguish between jurisdiction's statutory and constitutional components.

Moreover, constitutional-avoidance and efficiency concerns do not justify retaining hypothetical statutory jurisdiction. Courts have a far better tool at their disposal to avoid extremely grave and difficult constitutional issues regarding jurisdiction-stripping legislation—a clear-statement rule, which does not involve willfully bypassing statutory limits on courts' adjudicatory authority. Additionally, the efficiency costs of jettisoning hypothetical statutory jurisdiction are greatly diminished under current law. The doctrine can also create various inefficiencies of its own, while

369. *See supra* notes 323–29 and accompanying text.

simultaneously impinging on fundamental separation-of-power and federalism values.

Nonetheless, today, courts' use of hypothetical statutory jurisdiction continues unabated.[370] Given the lower courts' strong incentives to preserve maximum flexibility, likely only the Supreme Court can put an end to hypothetical statutory jurisdiction. The Supreme Court has far less to lose by banning hypothetical statutory jurisdiction, given its unique ability to control its largely discretionary docket.

Yet, despite the existence of a circuit split, the issue of the doctrine's constitutionality is unlikely to be presented to the Court by litigants. In most cases, the losing plaintiff would likely not seek certiorari review of this issue since the best it could hope for is a jurisdictional dismissal. Similarly, in most cases, the winning defendant would prefer to keep its merits victory. Thus, the issue is likely to be presented to the Supreme Court the same way it was in *Steel Co.*—inadvertently, if at all.[371] Given that fact, perhaps the courts of appeals that have endorsed hypothetical statutory jurisdiction have a special obligation to reexamine their own precedents en banc in order to avoid perpetuating an unconstitutional doctrine that is largely insulated from Supreme Court review.

As the Supreme Court has stated, "[t]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded."[372] But until the courts of appeals correct their course, or the Supreme Court is presented with the rare opportunity to settle the issue, they will be.

370. *See supra* note 11.

371. *See supra* notes 67–72 and accompanying text.

372. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978).