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The Demise of Hypothetical Jurisdiction in the Federal Courts

Scott C. Idleman

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**The Demise of Hypothetical
Jurisdiction in the Federal Courts**

*Scott C. Idleman**

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I. INTRODUCTION

Recent years have witnessed a modest but expanding Supreme Court effort to return the national government to its structural first principles.¹ Foremost among these is that federal power, although vast, is neither inherent nor unbounded, but consists only of that granted by the Constitution.² In 1998, the Court remained steadfast

1. See, e.g., *United States v. Lopez*, 514 U.S. 549, 552 (1995) (opening its analysis by declaring: "We start with first principles."); H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. CHI. L. REV. 365, 369 (1998) (book review) ("[T]he past few years have seen a dramatic resurgence in the Supreme Court's interest in enforcing the limits on Congress's powers that derive from their enumeration in Article I and from the federal structure of the Republic."); see also Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 133 (1997) (noting this trend with particular regard to federalism limitations).

2. See U.S. CONST. art. I, § 1 (vesting in Congress only those "legislative Powers herein granted"); *id.* art. VI, cl. 2 (according supremacy only to "the Laws of the United States which shall be made in Pursuance" of the Constitution); *id.* amend. X (exhorting that the United States possesses only those "powers . . . delegated to [it] by the Constitution"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). Recent restatements of this principle include *Lopez*, 514 U.S. at 552 ("The Constitution creates a

to this precept, thwarting yet another attempt by a federal branch to exceed its limited and enumerated constitutional powers. This time, however, the perpetrator was none other than the Article III judiciary itself. In *Steel Co. v. Citizens for a Better Environment*,³ the Court formally denounced the federal court practice of assuming the existence of subject-matter jurisdiction solely to reach the merits of, and then rule against, manifestly unworthy claims. Often labeled “hypothetical jurisdiction,”⁴ the now-repudiated practice had gradually infiltrated the decision making of every circuit court of appeals,⁵ becoming nothing less than “a familiar tenet”⁶ or “settled principle”⁷ of federal appellate jurisprudence.⁸

Federal Government of enumerated powers. As James Madison wrote, “[t]he powers delegated by the proposed Constitution to the federal government are few and defined.” (citation omitted) (quoting THE FEDERALIST NO. 45, at 292-93 (Clinton Rossiter ed., 1961)), and *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 2162 (1997) (“Under our Constitution, the Federal Government is one of enumerated powers.”).

3. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 118 S. Ct. 1003 (1998). The majority opinion was authored by Justice Scalia.

4. This label apparently derives from a student article, see Comment, *Assuming Jurisdiction Arguendo: The Rationale and Limits of Hypothetical Jurisdiction*, 127 U. PA. L. REV. 712, 713 (1979) [hereinafter *Assuming Jurisdiction Arguendo*], and is by no means universally employed. See, e.g., John R. Knight, *The Requirement of Subject Matter Jurisdiction on Appeal: A Cardinal Rule with a Twist*, 44 FED. LAW., Jan. 1997, at 16 (referring to its appellate manifestation as “assumed appellate jurisdiction” and “the Norton doctrine,” after *Norton v. Mathews*, 427 U.S. 524 (1976)). Nonetheless, the label, like the doctrine it describes, has attained fairly broad usage and the Supreme Court took particular note of it. See *Steel Co.*, 118 S. Ct. at 1012 (“The Ninth Circuit has denominated this practice—which it characterizes as ‘assuming’ jurisdiction for the purpose of deciding the merits—the ‘doctrine of hypothetical jurisdiction.’”) (citing, for example, *United States v. Troescher*, 99 F.3d 933, 934 n.1 (1996)). Accordingly, and for the sake of convenience, “hypothetical jurisdiction” will be employed here to denote the practice described in the text, whether or not any given court invoking the practice similarly employed the term.

5. See, e.g., *Crocco v. Xerox Corp.*, 137 F.3d 105, 108-09 (2d Cir. 1998); *Aves v. Shah*, No. 96-3063, 1997 WL 589177, at *1 (10th Cir. Sept. 24, 1997); *Sesler v. Pitzer*, 110 F.3d 569, 572 n.5 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 197 (1997); *Troescher*, 99 F.3d at 934 n.1; *House the Homeless, Inc. v. Widnall*, 94 F.3d 176, 179 n.7 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1434 (1997); *Smith v. Avino*, 91 F.3d 105, 108 (11th Cir. 1996); *United States v. Stoller*, 78 F.3d 710, 715 (1st Cir. 1996), *cert. dismissed*, 117 S. Ct. 378 (1996); *Decker & Co. v. West*, 76 F.3d 1573, 1584 (Fed. Cir. 1996); *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *City of Charleston v. Public Serv. Comm’n*, 57 F.3d 385, 390 n.5 (4th Cir. 1995), *cert. denied*, 516 U.S. 974 (1995); *J.C. Wyckoff & Assocs. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1490 (6th Cir. 1991); *Cross-Sound Ferry Servs., Inc. v. ICC*, 934 F.2d 327, 333-34 (D.C. Cir. 1991); *Switlik v. Hardwicke Co.*, 651 F.2d 852, 856 n.3 (3d Cir. 1981), *cert. denied*, 454 U.S. 1064 (1981).

6. *Stoller*, 78 F.3d at 715; see also *Rekhi v. Wildwood Indus.*, 61 F.3d 1313, 1316 (7th Cir. 1995) (noting that “it is well established in the courts of appeals”). Even two decades ago, one writer observed that there was “an increasing number of cases in which federal courts, confronted with difficult and far-reaching jurisdictional challenges, have assumed jurisdiction arguendo and proceeded to deny relief on the merits.” *Assuming Jurisdiction Arguendo*, *supra* note 4, at 713. By the 1990s, judges became so comfortable with the practice that one scholar could observe without qualification that “courts have retreated from the proposition that they must always decide jurisdictional issues before reaching the merits.” Perry Dane,

Notwithstanding its relative popularity among lower court judges, the doctrine of hypothetical jurisdiction was so clearly deviant from the constitutional mandate that federal judicial power may only be exercised—and indeed only exists—with the presence of subject-matter jurisdiction that its eventual invalidation by the Supreme Court was all but inevitable.⁹ The federal courts, after all, are simply one branch of a tripartite government of limited and enumerated

Jurisdictionality, Time, and the Legal Imagination, 23 HOFSTRA L. REV. 1, 118-19 & n.347 (1994).

7. *United States v. Eyer*, 113 F.3d 470, 474 (3d Cir. 1997).

8. The Ninth Circuit—singled out by the *Steel Co.* majority, *see supra* note 4—appears to have led the pack in terms of invoking the doctrine, and frequently did so by way of analytically cursory, unpublished opinions. *See, e.g.*, *NAACP v. Jones*, 131 F.3d 1317, 1321 n.4 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 48 (1998); *Freeman v. Principal Fin. Group*, No. 96-35947, 1997 WL 377084 (9th Cir. July 3, 1997); *Jones v. Peterson*, No. 96-35370, 1997 WL 75550 (9th Cir. Feb. 20, 1997), *cert. denied*, 118 S. Ct. 300 (1997); *Adams v. INS*, No. 96-70025, 1997 WL 75709 (9th Cir. Feb. 20, 1997); *Contreras-Tarango v. INS*, No. 95-70424, 1997 WL 43355 (9th Cir. Jan. 31, 1997); *United States v. Stanley*, No. 94-10113, 1996 WL 738700 (9th Cir. Dec. 24, 1996); *Troescher*, 99 F.3d at 934 n.1; *SEC v. American Capital Invs., Inc.*, 98 F.3d 1133, 1139-42 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1468 (1997); *Zavala-Zaragoza v. INS*, No. 95-70104, 1996 WL 413669 (9th Cir. July 23, 1996); *Navis v. Aeronaves de Mexico, S.A. (In re Air Crash Disaster Near Cerritos)*, No. 94-56433, 1996 WL 413658 (9th Cir. July 23, 1996); *Lewin v. INS*, No. 94-70867, 1996 WL 335359 (9th Cir. June 17, 1996); *Medrano-Dominguez v. INS*, No. 94-70367, 1995 WL 761690 (9th Cir. Dec. 21, 1995); *Bennett v. Plenart*, 63 F.3d 915, 922 (9th Cir. 1995), *rev'd*, 117 S. Ct. 1154 (1997); *Silva v. United States (In re Grand Jury Subpoena Issued to Bailin)*, 51 F.3d 203, 206 (9th Cir. 1995), *cert. dismissed*, 515 U.S. 1189 (1995), *and cert. denied*, 516 U.S. 973 (1995); *Craig v. United States*, No. 92-35400, 1994 WL 408250 (9th Cir. Aug. 4, 1994); *Sumitomo Bank v. Tokai Credit Corp. (In re Eve Marie, Inc.)*, No. 92-55972, 1993 WL 530457 (9th Cir. Dec. 21, 1993); *Wong v. Ilchert*, 998 F.2d 661, 662-63 (9th Cir. 1993); *United States v. IRC*, No. 92-50673, 1993 WL 212524, at *1 n.2 (9th Cir. June 17, 1993); *Clow v. HUD*, 948 F.2d 614, 616-17 n.2 (9th Cir. 1991) (*per curiam*); *Federal Ins. Co. v. Scarsella Bros.*, 931 F.2d 599, 602 (9th Cir. 1991); *Forster v. County of Santa Barbara*, 896 F.2d 1146, 1147 n.2 (9th Cir. 1990) (*per curiam*); *Sundance Land Corp. v. Community First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 666 n.15 (9th Cir. 1988); *Wolder v. United States*, 807 F.2d 1506, 1507 (9th Cir. 1987) (*per curiam*); *Lehner v. United States*, 685 F.2d 1187, 1189-90 (9th Cir. 1982); *United States v. Walker*, 575 F.2d 209, 212 (9th Cir. 1978). *But cf. Knight, supra* note 4, at 16 (according this honor to the First Circuit, though relying only on reported decisions).

9. As the *Steel Co.* Court noted,

[Hypothetical jurisdiction] carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 118 S. Ct. 1003, 1012 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)); *see also Rehhi*, 61 F.3d at 1316 (postulating, correctly as it turns out, that hypothetical jurisdiction "may be out of keeping with the Supreme Court's current thinking, which is more formalistic"); *Cross-Sound Ferry Servs.*, 934 F.2d at 345 (Thomas, J., concurring in part and concurring in the denial of the petition for review) (concluding that "[h]owever valid this circuit's cases [permitting hypothetical jurisdiction] once might have been, in my view they do not survive the Supreme Court's most recent pronouncements").

powers,¹⁰ and it has long been held that their jurisdiction cannot “be expanded by judicial decree”¹¹ and should be “carefully guarded against expansion by judicial interpretation.”¹² To be sure, the federal judiciary has itself not hesitated to strike down the actions of a co-equal branch where that branch defended its exercise of seemingly extraconstitutional power exclusively on hypothetical grounds.¹³ In this respect, *Steel Co.* is the judicial equivalent to the watershed 1995

10. See *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) (“Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute . . .”); *Stockman v. FEC*, 138 F.3d 144, 151 (5th Cir. 1998) (“Federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute, lack the power to adjudicate claims. It is incumbent on all federal courts to dismiss an action whenever it appears that subject matter jurisdiction is lacking.”) (citation omitted); *Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984) (“Federal courts are courts of limited jurisdiction, whose constitutional or congressional limitations must be neither disregarded nor evaded.”).

11. *Kokkonen*, 511 U.S. at 377.

12. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951); see also *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938) (“A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators.”).

13. The seminal case in this regard is, of course, *Marbury v. Madison*, which held that Congress lacks the power to vest the Supreme Court with jurisdiction not granted in the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-76 (1803). The most recent cases include *United States v. Lopez*, discussed *infra* notes 14-15 and accompanying text, as well as *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997) (holding that Congress lacks the power under section five of the Fourteenth Amendment and in light of the separation of powers to subject states, as it did in the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-bb4 (1994), to substantive requirements exceeding the Free Exercise Clause); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress lacks the power under the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, to abrogate the states’ Eleventh Amendment immunity by authorizing tribes to sue states in federal court for failure to negotiate in good faith as provided by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2710(d)(3)(a), (d)(7)) (1994); *New York v. United States*, 505 U.S. 144, 174-77 (1992) (holding that Congress either acted “outside [its] enumerated powers, or . . . infringed] upon the core of state sovereignty reserved by the Tenth Amendment” by requiring states either to regulate low level radioactive waste disposal or to take title to the waste within their borders, see 42 U.S.C. § 2021e(d)(2)(C)) (1994). Recent lower federal court decisions include: *Condon v. Reno*, 155 F.3d 453, 463-65 (4th Cir. 1998) (holding that Congress lacks the power under section five of the Fourteenth Amendment to prohibit states from disclosing certain information obtained in connection with a driver’s motor vehicle record, as provided by the Driver’s Privacy Protection Act, 18 U.S.C. § 2721); *Schlossberg v. Maryland Comptroller (In re Creative Goldsmiths)*, 119 F.3d 1140, 1144-47 (4th Cir. 1997) (holding that Congress lacks the power under the Bankruptcy Clause, U.S. CONST. art. I, § 8, cl. 4, and section five of the Fourteenth Amendment to abrogate the states’ Eleventh Amendment immunity pursuant to the Bankruptcy Code, 11 U.S.C. § 106 (1994)), *cert. denied*, 118 S. Ct. 1517 (1998); *Mills v. Maine*, 118 F.3d 37, 42-49 (1st Cir. 1997) (holding that Congress lacks the power under the Interstate Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and section 5 of the Fourteenth Amendment to abrogate the states’ Eleventh Amendment immunity by authorizing federal court suits for damages for alleged violations of the Fair Labor Standards Act pay provisions, see 29 U.S.C. § 216(b)) (1994); *MacPherson v. University of Montevallo*, 938 F. Supp. 785, 787-89 (N.D. Ala. 1996) (holding that Congress lacks the power under the Interstate Commerce Clause to abrogate the states’ Eleventh Amendment immunity by authorizing Age Discrimination in Employment Act actions against state employers in federal court).

case of *United States v. Lopez*,¹⁴ in which the Court struck down the federal criminalization of gun possession within school zones, in no small part because Congress's interstate commerce power was essentially being exercised on a hypothetical, and not an empirical, basis.¹⁵

Despite the outward correctness of the Court's position in *Steel Co.*, the matter of hypothetical jurisdiction is substantially more complicated than it may first appear and the doctrine's demise may be markedly less definitive than the Court's outright denunciation might lead readers to believe. For one thing, the Justices were not fully united in their treatment of the doctrine; of the five members of the majority, for example, two expressed an unwillingness to go as far as the others desired. For another thing, the repudiation was achieved only by distinguishing several related doctrines, and this effort left behind a host of unresolved issues. At the same time, the scope of the repudiation itself was not clearly delineated by the Court, a fact that has already generated substantial uncertainty and conflicting decisions among lower federal courts. These various deficiencies have, in turn, created an atmosphere in which lower courts remain free to test the bounds of *Steel Co.* and, in some instances, to continue to engage in hypothetical jurisdiction through different guises and manifestations.

This Article not only recounts the life and death of hypothetical jurisdiction, from its emergence and corruption in the lower courts to its demise in *Steel Co.*, but also examines what these developments reveal about the nature and character of the federal judiciary, particularly the Supreme Court. Part II sets forth and critiques the doctrine of hypothetical jurisdiction as developed by the lower federal courts prior to its attempted interment by the Court. Part III then describes the circumstances, merits, and scope of the doctrine's repudiation, with particular emphasis on the substance and

14. *United States v. Lopez*, 514 U.S. 549 (1995).

15. *See id.* at 562-64 (emphasizing the importance of factual findings and noting that "[t]o the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here"). To be sure, the statutory provision struck down, 18 U.S.C. § 922(q) (1994), suffered from even more fundamental flaws. *See id.* at 561 ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms" and "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.") (footnote omitted); *id.* ("[Section] 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."). These shortcomings were clearly aggravated, however, by the lack of specific factual findings linking the mere possession of guns in school in zones to interstate commerce.

significance of various related doctrines which *Steel Co.* preserved. Part IV then explains why the doctrine attracted the judicial following that it did and why, despite the Court's efforts, the essence of hypothetical jurisdiction will likely persist in the jurisdictional decision making of the federal courts. In so doing, Part IV examines five possible techniques by which these courts may attempt to sidestep the repudiation. Finally, Part V explores the deeper significance of both the doctrine and its repudiation, particularly in terms of the institutional responsibility and jurisprudential methodology of the Supreme Court.

II. THE DOCTRINE OF HYPOTHETICAL JURISDICTION

The utility and significance of hypothetical jurisdiction can only be fully appreciated relative to certain principles of federal judicial power as developed under Article III of the Constitution.¹⁶ As a prelude to analyzing the doctrine, therefore, Subpart A will first present a concise overview of these principles. Subpart B will then trace the doctrine's contours, offering critical commentary on each of its elements and highlighting its inconsistencies with these basic tenets of federal jurisdiction. Lastly, Subpart C will demonstrate that, apart from such inherent inconsistencies, the doctrine of hypothetical jurisdiction also suffered from its excessive, even abusive, application by courts.

A. *The Federal Jurisdictional Framework*

For both constitutional and institutional reasons, the subject-matter jurisdiction of the federal courts is jealously guarded by its Article III keepers. This judicial conservatism manifests itself through a number of doctrines, all of which serve to restrict the power and thereby maintain the institutional integrity of the federal bench. First, as a general matter, Article III courts tend to construe their conferred jurisdictional authority narrowly. Even where the Constitution has expressly granted them jurisdiction, or where Congress has expressly affirmed a jurisdictional grant set forth in the Constitution, the federal courts have often circumscribed these grants

16. These principles, set forth in Subpart A, may have shallower roots than one might expect, see *Assuming Jurisdiction Arguendo*, *supra* note 4, at 715, but they have been more or less fixed within the law of federal jurisdiction for at least the last century.

and affirmations by judge-made, prudential limitations¹⁷ or by narrowing statutory constructions,¹⁸ respectively. Second, in any given dispute the courts essentially adopt "a presumption against subject matter jurisdiction that must be rebutted by the party bringing an action to federal court."¹⁹ Thus, in apparent contrast to the political branches, whose actions are generally presumed constitutional,²⁰ the

17. The case-or-controversy doctrine of standing, for example, has been held to contain not only constitutional requirements, but several prudential limitations as well. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992); *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). So also have the doctrines of ripeness, *see Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) ("[R]ipeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction."), and mootness, *see Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) ("Closely related to Article III mootness is the 'prudential mootness' arising from doctrines of remedial discretion. Prudential mootness addresses 'not the power to grant relief but the court's discretion in the exercise of that power.'") (quoting *Chamber of Commerce v. United States Dep't of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980)).

18. *See, e.g.*, *Ankenbrandt v. Richards*, 504 U.S. 689, 693-703 (1992) (reaffirming the domestic relations exception to federal jurisdiction, under which federal courts will generally not issue divorce, alimony, and child custody decrees, and maintaining that it is a limiting construction of 28 U.S.C. § 1332); *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967) (noting that the complete diversity requirement articulated in *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806), and today relevant under 28 U.S.C. § 1332, is a narrow judicial construction of the congressional affirmation of diversity jurisdiction); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 510 (5th Cir. 1997) (noting that "[a]lthough th[e] language [of 28 U.S.C. § 1331] suggests that Congress intended . . . to confer upon federal courts the full breadth of permissible 'federal question' jurisdiction [found in Article III, § 2], § 1331 has been construed more narrowly than its constitutional counterpart"); *Medical Malpractice Joint Underwriting Ass'n v. Pfeiffer*, 832 F.2d 240, 242-43 (1st Cir. 1987) (noting that "[i]n spite of th[e] explicit legislative directive [of 28 U.S.C. § 1331], and due to overriding principles of federalism, comity and judicial economy, the United States Supreme Court has carved out several limited exceptions to this mandated original jurisdiction").

19. *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996); *see also Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) ("It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.") (citations omitted); *Casey v. Lewis*, 4 F.3d 1516, 1519 (9th Cir. 1993) ("Federal courts are presumed to lack jurisdiction, 'unless the contrary appears affirmatively from the record.'") (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986)); CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* § 7, at 27-28 (5th ed. 1994) (same).

20. *See, e.g.*, *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (noting the "presumption of constitutionality" that attaches to congressional enactments); *In re Air Crash Disaster Near Roselawn*, 96 F.3d 932, 944 (7th Cir. 1996) ("An Act of Congress bears a strong presumption of constitutionality."); *Littlewolf v. Lujan*, 877 F.2d 1058, 1063 (D.C. Cir. 1989) ("[F]ederal statutes enjoy a presumption of constitutionality . . ."). In cases where constitutional strict scrutiny is applied, it is often said that the government action is presumed unconstitutional unless the government can demonstrate that the action is necessary to achieve a compelling interest. *See, e.g.*, *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) ("Any governmental action that classifies persons by race is presumptively unconstitutional and subject to the most exacting judicial scrutiny. To be constitutional, a racial classification, regardless of its purported motivation, must be narrowly tailored to serve a compelling governmental interest, an extraordinary justification.") (citation omitted), *cert. denied*, 118 S. Ct. 397 (1997). This presumption arises, however, only *after* an initial showing by the plaintiff that strict scrutiny is warranted because, for example, the government employs a suspect classification or burdens a fundamental right. Prior to and absent that initial showing, the government action is presumed

judiciary self-consciously begins with the premise that it lacks the power to act.²¹

Arising from this premise is yet a third principle, namely, that “a court should first confirm the existence of . . . jurisdiction . . . before tackling the merits of a controverted case.”²² If a court finds subject-matter jurisdiction, it may then proceed. If, however, the court “determines that it lacks subject matter jurisdiction, it cannot decide the case on the merits. It has no authority to do so.”²³ Indeed, should it become evident on appeal that jurisdiction is absent, the customary remedy is to vacate and order dismissal of all proceedings to that point.²⁴ Finally, to the extent that there is ever any question about

constitutional. *See, e.g., Heller v. Doe*, 509 U.S. 312, 319 (1993) (“[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.”).

21. That said, “the plaintiff’s burden to prove federal question subject matter jurisdiction is not onerous. The plaintiff must show only that the complaint alleges a claim under federal law, and that the claim is ‘substantial.’ A federal claim is substantial unless ‘prior decisions inescapably render [it] frivolous.’” *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996) (quoting *Transcontinental Leasing, Inc. v. Michigan Nat’l Bank*, 738 F.2d 163, 165 (6th Cir. 1984)); *see also Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1317 (7th Cir. 1997).

22. *Berner v. Delahanty*, 129 F.3d 20, 23 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1305 (1998); *see also 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.”); *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) (quoting *Tuck v. Pan Am. Health Org.*, 668 F.2d 547, 549 (D.C. Cir. 1981)) (“Jurisdiction is, of necessity, the first issue for an Article III court.”). As noted in *Steel Co.*, “[t]he requirement that jurisdiction be established as a threshold matter ‘spring[s] from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 118 S. Ct. 1003, 1012 (1998) (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)). *But cf. id.* at 1011 (“It is true . . . that the issue of Article III standing which is addressed at the end of the opinion [in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987)] should . . . have been addressed at the outset if the statutory question was not jurisdictional. But that . . . did not really matter, since Article III standing was in any event found.”).

23. *Ray v. Eyster (In re Orthopedic “Bone Screw” Prods. Liab. Litig.)*, 132 F.3d 152, 155 (3d Cir. 1997); *accord Memphis Am. Fed’n of Teachers, Local 2032 v. Board of Educ.*, 534 F.2d 699, 701 (6th Cir. 1976) (“It was inappropriate for the District Court to assume the existence of jurisdiction and then to proceed to decide the merits of this case. Without a finding that there is federal jurisdiction over a particular claim for relief the federal courts are without power to proceed.”); *see also Cross-Sound Ferry Servs., Inc. v. ICC*, 934 F.2d 327, 339 (D.C. Cir. 1991) (Thomas, J., concurring in part and concurring in the denial of the petition for review) (“When federal jurisdiction does not exist, federal judges have no authority to exercise it, even if everyone—judges, parties, members of the public—wants the disputo resolved.”).

24. *See, e.g., Taylor v. FDIC*, 132 F.3d 753, 767 (D.C. Cir. 1997) (“[A]fter finding no standing, we may not affirm the district court’s grant of summary judgment but must vacate and remand with instructions to dismiss.”); *see also United States v. Corrick*, 298 U.S. 435, 440 (1936) (“[I]f the record discloses that the lower court was without jurisdiction . . . we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.”); *Smith v. McCullough*, 270 U.S. 456, 459 (1926) (stating in dictum that “if there was an absence of federal jurisdiction this Court could not consider the

the subject-matter jurisdiction of a federal court, it can be raised by any party at any time—and the court is obligated to raise it *sua sponte*²⁵—regardless of whether it was previously raised,²⁶ of whether the parties stipulate or consent to jurisdiction,²⁷ and of how far along the litigation has proceeded.²⁸

merits, but would have to reverse the decrees of both courts below and remand the cause to the District Court with a direction to dismiss the bill for want of jurisdiction.”). This may be true even if the jurisdictional defect, such as mootness, arises at the time of the appeal. *See, e.g.,* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S. Ct. 1055, 1071 (1997) (“When a civil case becomes moot pending appellate adjudication, [t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.”) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)); *Remus Joint Venture & Envtl. Disposal Sys., Inc. v. McAnally*, 116 F.3d 180, 185 (6th Cir. 1997) (“[W]hen a case becomes moot on appeal, the proper procedure is for us to vacate the judgment below.”); *In re Tax Refund Litig.*, 915 F.2d 58, 59 (2d Cir. 1990) (same).

25. *See* *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (“[F]ederal courts are under an independent obligation to examine their own jurisdiction . . .”); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (“[E]very federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction . . .” (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934))); *Public Interest Research Group v. Magnesium Elektron, Inc.*, 123 F.3d 111, 117 (3d Cir. 1997) (“[F]ederal appellate courts have a bedrock obligation to examine both their own subject matter jurisdiction and that of the district courts.”). A federal court’s obligation to assess its own jurisdiction *sua sponte* may even extend to the prudential (nonconstitutional) counterparts to the case-or-controversy requirements, although this proposition is somewhat disputed. *Compare* *Thompson v. County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994) (“Our obligation . . . extends ‘to the prudential rules of standing that, apart from Art. III’s minimum requirements, serve to limit the role of the courts in resolving public disputes,’ and, thus, constitute ‘self-imposed . . . limitations on our jurisdiction.’” (alteration in original) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *National Wildlife Fed’n v. United States*, 626 F.2d 917, 924 n.13 (D.C. Cir. 1980))), *and* *Davis v. Blackburn*, 803 F.2d 1371, 1372-73 & n.1 (5th Cir. 1986) (maintaining in dictum that an alleged defect in prudential standing can be raised *sua sponte*), *with* *MacLauchlan v. Prudential Ins. Co. of America*, 970 F.2d 357, 359 n.1 (7th Cir. 1992) (“[W]e may not raise prudential standing issues *sua sponte*.”), *and* *NAACP v. California*, 511 F. Supp. 1244, 1260 n.15 (E.D. Cal. 1981) (“In light of the fact that prudential considerations are not constitutional limitations on the court’s power, the court chooses not to consider, *sua sponte*, the applicability of these considerations.”), *aff’d*, 711 F.2d 121 (9th Cir. 1983).

26. *See, e.g.,* *Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (“Subject-matter jurisdiction . . . is an Art. III as well as a statutory requirement [N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.”) (citations omitted); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 68 (1978) (“As a threshold matter, we must address the question of whether the District Court had subject-matter jurisdiction over appellees’ claims, despite the fact that none of the parties raised this issue and the District Court did not consider it.”); *see also* SUP. CT. R. 15.1 (providing for waiver of any objection if not presented in brief in opposition, except jurisdictional objections).

27. *See, e.g.,* *Bender*, 475 U.S. at 541 (stating that a court’s obligation to verify jurisdiction obtains “even though the parties are prepared to concede it”); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978) (“Federal judicial power does not depend upon ‘prior action or consent of the parties.’”) (quoting *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-18 (1951)); *Sosna v. Iowa*, 419 U.S. 393, 398 (1975) (“While the parties may be permitted to waive nonjurisdictional defects, they may not by stipulation invoke the judicial power of the United

B. *The Substance and Scope of the Doctrine*

Standing in sharp contrast to these bedrock tenets of federal judicial power is—or at least was—the doctrine of hypothetical jurisdiction. In essence, this doctrine allowed a court to reach the merits of a dispute without first having to verify its subject-matter jurisdiction, hence the notion that jurisdiction was “hypothetical” or assumed.²⁹ Over its lifetime, the doctrine acquired a number of formulations. The standard one, here expressed by the Fifth Circuit, provided that “[w]hen the merits of the case are clearly against the party seeking to invoke the court’s jurisdiction, the jurisdictional question is especially difficult and far-reaching, and the inadequacies in the record make the case a poor vehicle for deciding the jurisdictional question, we may rule on the merits without reaching the jurisdictional contention.”³⁰ Alternatively, the Supreme Court’s

States in litigation which does not present an actual ‘case or controversy.’”); *People’s Bank v. Calhoun*, 102 U.S. 256, 260-61 (1880) (“[T]he mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case.”); *Cutler v. Rae*, 48 U.S. (7 How.) 729, 731 (1849) (“[T]he consent of parties cannot give jurisdiction to the courts of the United States, in cases where it has not been conferred by the Constitution and laws.”); *Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 342 (9th Cir. 1996) (“This court . . . must consider whether federal jurisdiction exists . . . even if both parties stipulate to federal jurisdiction . . .” (citation omitted)); *Bolin v. Secretary of Health & Human Servs.*, 32 F.3d 449, 450 (10th Cir. 1994) (“Parties may not, by stipulation or other means, usurp our Article III powers.”); *National Wildlife Fed’n v. United States*, 626 F.2d 917, 924 n.13 (D.C. Cir. 1980) (“Appellee purported to waive challenge to appellant’s standing. Because standing implicates our jurisdiction under Article III . . . this ‘waiver’ is necessarily ineffective.”) (citation omitted).

28. See, e.g., *Freytag v. Commissioner*, 501 U.S. 868, 896 (1991) (Scalia, J., concurring in part and concurring in the judgment) (“[A]n error [in federal subject matter jurisdiction] may be raised by a party, and indeed must be noticed *sua sponte* by a court, at all points in the litigation.”); *United States v. Gotcher (In re Grand Jury)*, 604 F.2d 69, 72 (10th Cir. 1979) (“The question of ripeness affects our subject matter jurisdiction. Thus, we may raise the issue *sua sponte* at any time.”); see also FED. R. CIV. P. 12(h)(3) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”). Although the Federal Rules of Appellate Procedure contain no similar provision, several courts of appeals have adopted local rules to the same effect. See, e.g., 1ST CIR. R. 27.1; 6TH CIR. R. 8; 9TH CIR. R. 3-6; 10TH CIR. R. 27.2.1.

29. See *Assuming Jurisdiction Arguendo*, *supra* note 4, at 713-14 (stating that the “thesis of hypothetical jurisdiction” is “that a federal court may render a valid judgment on the merits while expressly avoiding jurisdictional challenges to its power to hear the case”).

30. *House the Homeless, Inc. v. Widnall*, 94 F.3d 176, 179 n.7 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1434 (1997); see also *Smith v. Avino*, 91 F.3d 105, 108 (11th Cir. 1996) (“[I]t is permissible for the Court to bypass jurisdictional questions and decide the case on the merits when the jurisdictional issue is difficult, the law is not well-established, and a decision on the merits favors the party who has raised the jurisdictional bar.”); *United States v. Stoller*, 78 F.3d 710, 715 (1st Cir. 1996) (“[W]hen an appeal presents a jurisdictional quandary, yet the merits of the underlying issue, if reached, will in any event be resolved in favor of the party challenging the court’s jurisdiction, then the court may forsake the jurisdictional riddle and simply dispose of the appeal on the merits.”); *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) (holding it permissible to “proceed directly to the merits” where there are “potentially difficult juris-

rendition in *Steel Co.*, assertedly summarizing the "position embraced by several Courts of Appeals," was that it is "proper to proceed immediately to the merits question, despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied."³¹ Finally, some courts, perhaps finding these multifactorial tests too cumbersome, simply reduced the inquiry to a two-factor comparative test. For these courts, hypothetical jurisdiction was appropriate if the "difficulty of resolving [the jurisdictional question] is far greater than the difficulty of resolving [the merits of the suit]"³² or, condensed even further, if

dictional issues," where "the merits . . . are simple, straightforward, and easily resolved," and where "there is no practical difference in the outcome"; *Silva v. United States (In re Grand Jury Subpoena Issued to Bailin)*, 51 F.3d 203, 206 (9th Cir. 1995) ("The doctrine has several . . . elements: (1) the jurisdictional question must be difficult; (2) the merits of the appeal must be insubstantial; (3) the appeal must be resolved against the party asserting jurisdiction; and (4) undertaking a resolution on the merits as opposed to dismissing for lack of jurisdiction must not affect the outcome."); *Cross-Sound Ferry Servs., Inc. v. ICC*, 934 F.2d 327, 333 (D.C. Cir. 1991) ("[W]hen the merits of a case are . . . against the party seeking . . . the court's jurisdiction, the jurisdictional question is . . . difficult and far-reaching, and the inadequacies in the record . . . make the case a poor vehicle for deciding the jurisdictional question, we may rule on the merits without reaching the jurisdictional contention.") (quoting *Adams v. Vance*, 570 F.2d 950, 954 n.7 (D.C. Cir. 1978)); *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151, 159 (2d Cir. 1990) (stating that "the assumption of jurisdiction should not do injustice to the parties by determining the outcome of the case"; that "the merits should be clearly in favor of one party"; that "the jurisdictional issues should be difficult and far-reaching"; and that "inadequacies in the record or briefs may be a factor persuading a court to assume jurisdiction without deciding").

31. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1012 (1998). Although, as *Steel Co.* suggests, the practice was substantially confined to federal courts of appeals, from time to time it made its way into the decisions of federal district courts as well. *See, e.g.*, *Fraser v. New York City Bd. of Educ.*, No. 96 Civ. 0625, 1998 WL 55170, at *4 (S.D.N.Y. Feb. 10, 1998); *Franquiz v. INS*, No. 96 Civ. 7924, 1997 WL 159626, at *1 (S.D.N.Y. Apr. 3, 1997); *Zheng v. INS*, 933 F. Supp. 338, 339-40 (S.D.N.Y. 1996); *United States v. Funds Contained in Checking Account*, 788 F. Supp. 664, 666 n.3 (D.P.R. 1992); *Jones v. RCA Music Serv.*, 530 F. Supp. 767, 768 & n.1 (E.D. Pa. 1982); *Chatterjee v. Due*, 511 F. Supp. 183, 188 & n.5 (E.D. Pa. 1981); *Chappelle v. Chase*, 487 F. Supp. 843, 845 & n.1 (E.D. Pa. 1980); *Crowley v. Smithsonian Inst.*, 462 F. Supp. 725, 726 (D.D.C. 1978), *aff'd*, 636 F.2d 738 (D.C. Cir. 1980); *see also Lee v. City of Beaumont*, 12 F.3d 933, 937-38 (9th Cir. 1993) (citing to cases involving the assumption of subject-matter jurisdiction as a basis for approving the district court practice of assuming personal jurisdiction even absent jurisdictional complexity). In some instances, district courts would engage in hypothetical jurisdiction with no apparent sense of their transgression. *See, e.g.*, *Zwerling v. Reagan*, 576 F. Supp. 1373, 1375 (C.D. Cal. 1983) (remarking that "[t]he pleadings and the declarations of the various plaintiffs leave this court without enough to decisively answer the standing question" but then, instead of either dismissing the action or soliciting additional pleadings and declarations, announcing that the defendant's motion on the pleadings "can be resolved on a more fundamental consideration" and proceeding to address the merits).

32. *Wong v. Ilchert*, 998 F.2d 661, 662 (9th Cir. 1993); *see also Markgraf v. Storage Tech. Corp.*, No. 97-1166, 1998 WL 31449, at *2 (10th Cir. Jan. 28, 1998) ("[B]ecause the merits of the appeal are much easier to resolve against [the appellant] than the jurisdictional issue, we will assume jurisdiction without deciding the matter and proceed to the merits."); *Lawrence v. Board*

the merits of the suit “are substantially clearer than the jurisdictional question.”³³

1. The Rationales for Its Existence

More often than not, the rationales articulated in defense of hypothetical jurisdiction were judicial economy and (paradoxically) judicial restraint.³⁴ The first of these is more or less straightforward. By reaching and disposing of the merits, the court effectively terminates the litigation. A district court’s use of the doctrine, for example, essentially precludes an appeal from what would purportedly have been a difficult and thus appeal-worthy jurisdictional ruling, and strongly discourages an appeal from a merits-based ruling (at least where the court correctly finds the merits to be easily resolvable).³⁵ Likewise, a circuit court’s use of the doctrine essentially precludes certiorari review of the jurisdictional ruling, and, to the extent the jurisdictional issue might have been clarified by further fact-finding or argument, obviates the need for either a remand or for supplemental briefing. As Justice Breyer asks in his separate opinion in *Steel Co.*, “[w]hom does it help to have appellate judges spend their time and

of Immigration Appeals, No. 97 Civ. 5669, 1997 WL 698140, at *1 (S.D.N.Y. Nov. 10, 1997) (acknowledging applicability of the doctrine “where questions of subject-matter jurisdiction are nettlesome but the decision on the merits is simple and straightforward”).

33. *Freeman v. Principal Fin. Group*, No. 96-35947, 1997 WL 377084 (9th Cir. July 3, 1997); see also *Zavala-Zaragoza v. INS*, No. 95-70104, 1996 WL 413669 (9th Cir. July 23, 1996); *Lewin v. INS*, No. 94-70867, 1996 WL 335359 (9th Cir. June 17, 1996). Other shorthand comparative analyses can be found. For example, one district court, faced with both statute of limitations and jurisdictional defenses, chose to assume jurisdiction because “[t]he time-bar defenses, though more modest in implication than the jurisdictional defenses, are broader in scope, since, if meritorious, they bar most of the claims made against all of the defendants.” *Chappelle v. Chase*, 487 F. Supp. 843, 845 (E.D. Pa. 1980).

34. See, e.g., *RNR Enters., Inc. v. SEC*, 122 F.3d 93, 96 (2d Cir. 1997) (citing “judicial efficiency and restraint”); *House the Homeless*, 94 F.3d at 180 n.7 (“Rather than remand the cause to the district court to more fully develop the record, in the interest of judicial economy we invoke the exception to the general rule that calls for reaching the standing issue and proceed to the merits of this appeal.”), *cert. denied*, 117 S. Ct. 1434 (1997); *Browning-Ferris*, 899 F.2d at 158 (“The rationales for avoiding difficult jurisdictional issues to reach the merits are those of judicial efficiency and restraint.”); *Switlik v. Hardwicke Co.*, 651 F.2d 852, 856 n.3 (3d Cir. 1981) (citing “reasons of policy and considerations of judicial economy”); *Assuming Jurisdiction Arguendo*, *supra* note 4, at 730-31 (arguing that hypothetical jurisdiction furthers the policies of “avoiding constitutional rulings unless they are absolutely or ‘strictly’ necessary to the disposition of the case” and of “the conservation of judicial energies”); *Dane*, *supra* note 6, at 119 (“The reasons offered center on some unsurprising considerations—such as judicial efficiency—and some more ironic ones—such as ‘restraint.’”).

35. See, e.g., *Assuming Jurisdiction Arguendo*, *supra* note 4, at 729 (“This was recognized by the Supreme Court . . . observing that ‘even the most diligent and zealous advocate could find his ardor somewhat dampened in arguing a jurisdictional issue where the decision on the merits is thus foreordained.’”) (quoting *Secretary of the Navy v. Avrech*, 418 U.S. 676, 678 (1974)).

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?"³⁶ Of course, not every aspect of hypothetical jurisdiction breeds economy—most glaringly, the doctrine sustains uncertainty and encourages future litigation over the same jurisdictional issue³⁷—but the essential connection between the doctrine and the rationale of economy is more or less self-evident.

The restraint rationale, by comparison, is somewhat more questionable, although the basic idea is also relatively simple. Depending upon the particular jurisdictional issue, its avoidance by a court may serve any number of constitutional values. First, to the extent that the jurisdictional question is constitutional in nature, its avoidance can be seen as furthering the principle that constitutional questions should not be unnecessarily addressed.³⁸ Second, where the jurisdictional question involves an issue of justiciability—either a case-or-controversy doctrine, particularly standing, or the political question doctrine—its avoidance may very well further the separation of powers.³⁹ The Supreme Court, after all, has made clear that “the law of Article III standing is built on a single basic idea—the idea of separation of powers,”⁴⁰ and it goes without saying that the political

36. *Steel Co.*, 118 S. Ct. at 1021 (Breyer, J., concurring in part and concurring in the judgment). Such a practice, he argued, “in today’s world of federal court caseloads that have grown enormously over a generation means unnecessary delay and consequent added cost.” *Id.*

37. See *infra* text accompanying notes 75-76.

38. See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 623 (3d Cir. 1996) (bypassing various jurisdictional issues in part because “many of these issues implicate constitutional questions”), *aff’d*, 521 U.S. 591 (1997); *Browning-Ferris*, 899 F.2d at 158 (linking the restraint rationale “to the doctrine that constitutional claims should not be decided unnecessarily”) (citing cases); *Swidlik*, 651 F.2d at 856 n.3 (asserting that resolution of the jurisdictional question—“whether the entry and enforcement of the state court judgment constituted ‘state action’ for purposes of a collateral attack in the federal district court”—“poses a rather high risk of committing constitutional error” and that assuming jurisdiction “permits a proper and lawful resolution of the dispute without facing the dangers lurking in the murky waters surrounding the state action question”); *Assuming Jurisdiction Arguendo*, *supra* note 4, at 730 & un.106-07; *Dane*, *supra* note 6, at 119 n.348 (“The restraint arguments center on the imperatives to avoid difficult constitutional questions (when jurisdictional issues take that form) and to avoid deciding difficult questions in the absence of hard-edged controversies.”). On the principle itself, see generally *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-74 (1947); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994); Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85 (1995).

39. See *Browning-Ferris*, 899 F.2d at 158 (“One of the controlling rationales of judicial restraint in these cases is the desire to minimize the intrusion of the federal judiciary into the business of the . . . branches of the federal government.”).

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

question doctrine virtually always implicates this concern as well.⁴¹ Third, in cases where the jurisdictional question involves the potential immunity of states or state officials, such as Eleventh Amendment immunity,⁴² its avoidance could further the values of federalism to the extent that such avoidance “minimize[s] the intrusion of the federal judiciary into the business of the states.”⁴³ Fourth and finally, at least one court has maintained that the doctrine manifests restraint because its use is congruent with “the common-law tradition of requiring hard edged, sharply defined real controversies as the basis for shaping developing law.”⁴⁴

What makes the restraint rationale questionable is that it tends to be significantly undermined by its own logic, by actual judicial implementation of the doctrine, or by both. Most obviously, it is rather ironic to depict the assumption of jurisdiction as an act of “restraint” precisely when there may be no jurisdiction at all, regardless of what values might happen to be served.⁴⁵ It is one thing to forego clear jurisdiction, as is the case under the abstention doctrines;⁴⁶ it is quite another to fabricate or hypothesize jurisdiction

41. See *Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”). The Court in *Baker v. Carr* further noted:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

42. See, e.g., *Aves v. Shah*, No. 96-3063, 1997 WL 589177, at *1 (10th Cir. Sept. 24, 1997) (assuming jurisdiction by avoiding a question of Eleventh Amendment immunity).

43. *Browning-Ferris*, 899 F.2d at 158; see also *Curry v. Baker*, 802 F.2d 1302, 1312-13 & n.6 (11th Cir. 1986) (assuming standing in a challenge to a state electoral process because “[t]he prudence of granting standing to voters in the present situation is highly questionable. The ultimate thrust of the individual plaintiffs' contention is that any voter can invoke federal jurisdiction to review the resolution of any vote tabulation or election contest with which he is dissatisfied.”).

44. *Browning-Ferris*, 899 F.2d at 158; see also *Dane*, *supra* note 6, at 119 n.348.

45. See *Dane*, *supra* note 6, at 119 (describing the restraint justification as “ironic”).

46. The two most prominent abstention doctrines are *Pullman* abstention, pursuant to which a federal court declines its jurisdiction if the necessity of deciding a federal question hinges on the resolution of a difficult and unsettled question of state law, see *Harman v. Forsenius*, 380 U.S. 528, 534-35 (1965); *Railroad Comm'n. v. Pullman Co.*, 312 U.S. 496, 501 (1941); *Martha A. Field*, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974), and *Younger* abstention, pursuant to which a federal court avoids interference with ongoing state proceedings implicating important state interests, see *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431-32 (1982); *Younger v. Harris*, 401 U.S. 37 (1971).

where it may not exist in the first place.⁴⁷ The former is an act of restraint; the latter an act of rationalized usurpation. In turn, one could legitimately take the position that hypothetical jurisdiction cannot seriously be justified as a matter of restraint, even if it might appear to advance various constitutional principles.

The restraint rationale is further contradicted by the actual application of hypothetical jurisdiction. It may be true, for example, that the avoidance of jurisdictional questions with constitutional dimensions in general prevents courts from addressing unnecessary constitutional issues. Yet in some cases the merits reached under the method of assumed jurisdiction have themselves involved constitutional issues, albeit of an allegedly simpler nature.⁴⁸ It is difficult to argue, moreover, that hypothetical jurisdiction is a mode of restraint with regard to the separation of powers when the assumption of jurisdiction pushes the federal courts beyond the explicit jurisdictional bounds that Congress, following the Constitution, has established for them.⁴⁹ After all, the jurisdiction of the lower federal courts does not flow directly from Article III;⁵⁰ rather, the jurisdictional grants of

47. For a perspective that might not support such a stark contrast between the relative validity or invalidity of the doctrines, see Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (arguing that the abstention doctrines, especially when they result in total abstention, violate the separation of powers where Congress has not delegated the power to decline statutorily affirmed jurisdiction).

48. See, e.g., *Aves v. Shali*, No. 96-3063, 1997 WL 589177, at *1 (10th Cir. Sept. 24, 1997) (bypassing jurisdictional inquiry under the Eleventh Amendment and resolving challenges based on the Contract, Due Process, and Equal Protection Clauses); *Edwards v. Carter*, 580 F.2d 1055, 1056-57 (D.C. Cir. 1978) (bypassing jurisdictional inquiry into standing and resolving a challenge premised on the constitutional treaty power). In addition, the Court has indicated that the principle of avoiding constitutional controversies should not be accorded undue importance, and that there are definite limits to its application. See, e.g., *City of Houston v. Hill*, 482 U.S. 451, 468 (1987) (noting that where a statute is facially challenged under the Free Speech Clause and the court is asked to abstain under the *Pullman* doctrine, which seeks to avoid unnecessary constitutional adjudications, "[i]f the statute is not obviously susceptible of a limiting construction, then even if the statute has 'never [been] intorpretd by a state tribunal . . . it is the duty of the federal court to exercise its properly invoked jurisdiction'" (quoting *Harman*, 380 U.S. at 535)); *United States v. Locke*, 471 U.S. 84, 96 (1985) (noting that a court should not "press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question") (quoting *George Moore Ice Cream Co. v. Rese*, 289 U.S. 373, 379 (1933)).

49. As the *Steel Co.* majority noted, "the proposition that the court can reach a merits question when there is no Article III jurisdiction opens the door to all sorts of 'generalized grievances,' that the Constitution leaves for resolution through the political process." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1013 n.2 (1998) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974)).

50. The most prominent exception is the Supreme Court's original jurisdiction, which, being susceptible to neither congressional expansion nor congressional diminishment, is operative even absent statutory affirmation. See *California v. Arizona*, 440 U.S. 59, 65 (1979) ("The original jurisdiction of the Supreme Court is conferred not by the Congress but by the Constitution itself. This jurisdiction is self-executing, and needs no legislative implementa-

Article III must be first affirmed by statute.⁵¹ This is not to mention the fact that many invocations of hypothetical jurisdiction have involved statutory causes of action with specific jurisdictional provisions and requirements set out by Congress,⁵² such that Congress—let alone the separation of powers—might be doubly offended by the unauthorized exercise of judicial power. Even the principles of federalism are not always furthered by hypothetical jurisdiction, and in some cases may be quite undermined. As the Fifth Circuit has noted, “[w]here a federal court proceeds in a matter without first establishing that the dispute is within the province of controversies assigned to it by the Constitution and statute, the federal tribunal poaches upon the territory of a coordinate judicial system.”⁵³

Finally, the notion that hypothetical jurisdiction amounts to judicial restraint because it preserves “the common-law tradition of requiring hard edged, sharply defined real controversies as the basis for shaping developing law”⁵⁴ is almost nonsensical. In disputes where the bypassed jurisdictional issue is itself one of the case-or-controversy requirements, such as standing,⁵⁵ it is extraordinarily

tion.”). Whether the Court’s appellate jurisdiction is similarly self-executing is a matter of some debate. See, e.g., Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 714 & nn.205-06 (1997).

51. See, e.g., *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233-34 (1922) (“Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, [within] the boundaries fixed by the Constitution.”); *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868) (“As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction. . . . The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. Their concurrence is necessary to vest it.”); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 509-10 (5th Cir. 1997) (“Federal courts have only the power authorized them by Congress pursuant to Article III of the Constitution The enumeration in Section 2 of Article III of the cases and controversies to which the federal judicial power extends is not self-executing in relation to the inferior federal courts.”); cf. *Carey v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) (“[T]he judicial power of the United States . . . is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of [C]ongress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.”).

52. See *infra* notes 96, 98, 103-06 and accompanying text.

53. *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (5th Cir. 1981). As the Supreme Court has admonished, “[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined.” *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

54. *Browning-Ferris Indus. v. Musynski*, 899 F.2d 151, 158 (2d Cir. 1990).

55. See *infra* note 89 and accompanying text.

difficult to conceive of assumed jurisdiction as a show of restraint. No doubt the court that fashioned this rationale must have had something less contradictory in mind, and it did carefully refer to the common law as opposed to the requirements of Article III. Nevertheless, it stretches the imagination to think what that might be, and in all events the actual, unrestrained practice of hypothetical jurisdiction—recounted below in Subpart C—renders the utility of this rationale questionable at best.

2. The Conditions for Its Invocation

In addition to assessing these rationales at a general level, it is also important to examine to what extent they are congruent or incongruent with the specific conditions established by courts for the exercise of hypothetical jurisdiction. In its most exhaustive and thus doctrinally rigorous form, hypothetical jurisdiction contained five such conditions, although courts periodically omitted one or more.⁵⁶ These five are as follows: (1) the merits must be easily resolvable, or at least substantially easier than the jurisdictional issue; (2) the resolution of the merits must be against the party alleging jurisdiction; (3) the jurisdictional issue must be particularly difficult or complex; (4) the implications of deciding the jurisdictional issue must be far-reaching; and (5) the record or briefing must be inadequate to decide the jurisdictional issue.⁵⁷ In the following paragraphs, each of these conditions will be examined and critiqued in depth.

The first and second conditions—that the merits be simple and that they be resolved against the party asserting jurisdiction—relate jointly to two considerations, judicial economy and fairness. The linkage to judicial economy or efficiency, which is one of hypothetical jurisdiction's primary rationales, is fairly straightforward. Hypothetical jurisdiction makes most sense, and is most attractive, if the outcome would be the same whether jurisdiction is found lacking or whether the claim is found meritless. According to the logic of the doctrine, why should the federal court dismiss and allow for refiling in another federal or state court—or, if on appeal, why remand to the district court—when the plaintiff's substantive claim could not possibly result in a favorable judgment? To allow for further proceedings

56. See *infra* notes 118-21 and accompanying text.

57. These five are drawn from the formulations set forth *supra* note 30 and accompanying text. Although courts typically stated three or four requirements, they have been further subdivided here for purposes of analysis.

under such circumstances would be “futile”⁵⁸ and would simply “entail expenditure of significant judicial resources to no avail.”⁵⁹ By contrast, “[i]f the case is close on the merits, the court may have to expend as much energy deciding the merits as it would deciding the jurisdictional issues,”⁶⁰ and the case for assuming jurisdiction would be substantially weaker.

Somewhat less straightforward are the logic and relevance of the second consideration, that of fairness. The appropriate inquiry, according to one court, is whether “[t]he assumption of jurisdiction . . . [would] do injustice to the parties.”⁶¹ In turn, the basic idea is apparently that (1) the plaintiff should not be put out of his or her misery unnecessarily, and only terminal cases should warrant death by assumed jurisdiction, and (2) the opposing party should not be subjected to further proceedings, let alone an adverse judgment, if jurisdiction is not entirely certain. Omitted from this calculus, however, are a few critical details. For example, to the extent that this plaintiff then faces an adverse judgment on the merits and cannot refile in any court,⁶² it is hard to see how this does not “do injustice” to the party seeking jurisdiction. This is especially true when one considers that a similarly situated plaintiff before a different panel of the same court might very well end up with a simple jurisdictional dis-

58. *Jones v. RCA Music Serv.*, 530 F. Supp. 767, 768 (E.D. Pa. 1982) (disallowing leave to amend the pleadings to correct defective allegations of diversity because the case failed on the merits).

59. *Decker & Co. v. West*, 76 F.3d 1573, 1584 (Fed. Cir. 1996); see also *Mitchell v. West Feliciana Parish Sch. Bd.*, 507 F.2d 662, 667 n.9 (5th Cir. 1975) (“[A]ny other course—given our decision on the merits—is nonsense.”).

60. *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151, 159 (2d Cir. 1990).

61. *Crocco v. Xerox Corp.*, 137 F.3d 105, 108 (2d Cir. 1998); see also *RNR Entors. v. SEC*, 122 F.3d 93, 96 (2d Cir. 1997) (assuming jurisdiction in part because “assumption of jurisdiction here will not work any injustice to the parties”); *Browning-Ferris*, 899 F.2d at 159 (“[T]he assumption of jurisdiction should not do injustice to the parties by determining the outcome of the case. Usually this will mean that the merits be against the party invoking jurisdiction.”).

62. See *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 n.2 (2d Cir. 1996) (noting that “a judgment rendered by a court assuming subject-matter jurisdiction and sustained on direct appeal is entitled to preclusive effect as long as the District Court did not ‘plainly usurp jurisdiction’ over the action”) (quoting *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986)); *Assuming Jurisdiction Arguendo*, *supra* note 4, at 730 n.110 (explaining why merits judgments in hypothetical jurisdiction cases should have *res judicata* effect). Cases such as *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995), are not to the contrary. The *Furrer* Court held that circuit precedents in which “the defendants did not raise the issue of subject matter jurisdiction and neither the district courts nor this Court addressed it *sua sponte* . . . reflect no consideration of the jurisdictional issue” but “instead . . . simply assume subject matter jurisdiction *sub silentio* and deal with the merits” and, as such, “are not *stare decisis* on the issue” decided on the merits. *Id.* at 1101. The rule of *Furrer* presumably had little relevance to the doctrine of hypothetical jurisdiction because, under the doctrine, the merits-based ruling must be simple—that is, clearly dictated by existing law—and hence a discussion of *stare decisis* would be beside the point.

missal and no adverse judgment on the merits where the other panel chooses to reach the jurisdictional issue and finds jurisdiction lacking. Moreover, the fairness consideration, though perhaps well-intentioned, is not obviously related to the two basic rationales of judicial economy and restraint, at least as they are conceptualized above. To be sure, fairness is normally not a consideration in the jurisdiction of the federal courts. Rather, jurisdiction is fundamentally a question of the power of the judiciary and not an individual's right of access to the courts,⁶³ although it is true that a litigant, once properly in federal court, may then have a personal interest in independent and impartial adjudication.⁶⁴

The third and fourth conditions—that the jurisdictional issue be difficult or complex, and that the implications of its resolution be far-reaching—are of course at the very heart of hypothetical jurisdiction.⁶⁵ Most obviously, if the jurisdictional issue could be easily resolved, then there would presumably be no need to bypass it and assume that jurisdiction exists.⁶⁶ Concomitantly, if there were few or no implications of its resolution, then restraint-related concerns, such as the separation of powers and federalism, would likely be minimized. Unfortunately from an analytical perspective, courts tended to conflate the matter of difficulty or complexity with the issue of whether

63. See, e.g., Nora Pomerantz, Note, *Nonparty Witness Challenge to Federal Court's Subject Matter Jurisdiction—In re United States Catholic Conference and National Conference of Catholic Bishops*, 61 TEMP. L. REV. 213, 236 (1988) ("Subject matter jurisdiction . . . arises out of concern for the appropriate scope of judicial power, not the protection of specific individual rights.") (footnote omitted). This is certainly true as well for the abstention doctrines. See, e.g., *Waldron v. McAtee*, 723 F.2d 1348, 1351 (7th Cir. 1983) ("When a court abstains in order to avoid unnecessary constitutional adjudication . . . it is not seeking to protect the rights of one of the parties; it is seeking to promote a harmonious federal system by avoiding a collision between the federal courts and state (including local) legislatures.") (citation omitted). *But cf.* *Palmer v. Hospital Auth.*, 22 F.3d 1559, 1569 (11th Cir. 1994) (holding that "fairness to the parties" can be a consideration in district court decisions to exercise or not to exercise supplemental jurisdiction under 28 U.S.C. § 1367, although actual jurisdiction must already exist before it is exercised or declined).

64. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (noting that the Court's "prior discussions of Article III, [§ 1's] guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural, interests"). More generally, of course, the Constitution has been held to embody an unenumerated right of access to the courts, see *Monsky v. Moraghan*, 127 F.3d 243, 246-47 (2d Cir. 1997) (discussing the possible sources and scope of the right), *cert. denied*, 119 S. Ct. 66 (1998), but the existence of that right does not alter the structural limits on federal judicial power.

65. See *Browning-Ferris Indus.*, 899 F.2d at 159.

66. *Cf. id.* (commenting that "a case that does not present a claim of even colorable jurisdiction is not appropriate for assuming jurisdiction *arguende*").

its resolution has far-reaching consequences.⁶⁷ Unraveling them as best as possible, it appears as if a “difficult” or “complex” issue was one that possessed some inherent level of intricacy,⁶⁸ including factual uncertainty,⁶⁹ and that had not already been decided by the Supreme Court or by any court,⁷⁰ or over which there was a split of authority.⁷¹ In addition, at least one court held that “[j]urisdictional questions may be considered difficult . . . if they are of constitutional stature,”⁷² although it is hard to see how that aspect, standing alone, would render an issue difficult or complex. Correspondingly, it appears as if the resolution of a jurisdictional issue is “far-reaching” if it “affect[s] large numbers of potential litigants, implicate[s] separation of powers or federalism concerns, or concern[s] the activities of administrative agencies,”⁷³ or if, combined with its complexity, it “poses a rather high risk of committing constitutional error.”⁷⁴

Whether any of these criteria, singularly or in synergy, is sufficient to justify avoiding resolution of a jurisdictional question, let alone then assuming jurisdiction, is certainly debatable. This is especially true with regard to the matter of difficulty or complexity. With some exceptions, virtually all questions of subject-matter jurisdiction at some point in their existence are undecided and, depending upon the circumstances and depth of inquiry, are likely to have difficult or complex dimensions. What is more, the assumption of jurisdiction by

67. See, e.g., *Crocco v. Xerox Corp.*, 137 F.3d 105, 109 (2d Cir. 1998) (considering the jurisdictional issue “far-reaching” because “it is one of first impression in this circuit, it ‘involve[s] the interpretation of a complex statutory scheme,’ and it ‘affect[s] large numbers of potential litigants’”—even though the first two factors arguably relate to the difficulty or complexity of the jurisdictional issue, not the degree to which its resolution is far-reaching) (alterations in original) (quoting *Browning-Ferris*, 899 F.2d at 159).

68. See, e.g., *Crocco*, 137 F.3d at 109 (finding that the jurisdictional issue “‘involve[s] the interpretation of a complex statutory scheme’”) (alterations in original) (quoting *Browning-Ferris*, 899 F.2d at 159).

69. See, e.g., *RNR Enters. v. SEC*, 122 F.3d 93, 96 (2d Cir. 1997) (noting that a claim of mootness was “rendered . . . more dubious” due to a particular reservation by the party challenging jurisdiction).

70. See, e.g., *Crocco*, 137 F.3d at 109 (noting that the issue “is one of first impression in this circuit”); *RNR Enters.*, 122 F.3d at 96 (noting that the court itself had not previously decided the issue); *Browning-Ferris*, 899 F.2d at 159 (“Jurisdictional questions may be considered difficult if they are of first impression and involve the interpretation of a complex statutory scheme . . .”).

71. See, e.g., *Crocco*, 137 F.3d at 109 (“We have not yet decided whether a remand to a plan administrator is immediately appealable, but . . . the other circuits that have considered the question are in disagreement.”); *RNR Enters.*, 122 F.3d at 96 (“The circuits that have considered the . . . question are not unanimous.”).

72. *Browning-Ferris*, 899 F.2d at 159; see also *RNR Enters.*, 122 F.3d at 96.

73. *Browning-Ferris*, 899 F.2d at 159; see also *Crocco*, 137 F.3d at 109; *RNR Enters.*, 122 F.3d at 96.

74. *Switlik v. Hardwicke Co.*, 651 F.2d 852, 856 n.3 (3d Cir. 1981).

one court as a means to avoid resolving such a question—to “leave [it] for another day,”⁷⁵ as it were—merely perpetuates the condition of difficulty for the next court. In turn, not only does this fail to reduce the extant uncertainty, but it also leaves available the option of hypothetical jurisdiction for subsequent tribunals. Hypothetical jurisdiction, in other words, is a conveniently self-perpetuating doctrine in that both the principal condition for its invocation and the necessary consequence of its use are one and the same.

As for the requirement that the jurisdictional issue’s resolution be “far-reaching,” the pragmatic justifiability—and thus the linkage to restraint—are substantially more evident. The specter of either spawning or preempting novel suits or expanded intrusions on the states or other federal branches, all because jurisdiction is or is not found, should most certainly give a court pause and should evoke the value of judicial restraint.⁷⁶ The proper bounds of jurisdiction, after all, are defined not only by the separation of powers but also by the intrinsic institutional capacity of the federal courts to process cases in a meaningful and efficient manner.⁷⁷ That said, even this requirement

75. *Crocco*, 137 F.3d at 109; see also *United States v. Stoller*, 78 F.3d 710, 715 (1st Cir. 1996) (proceeding to the merits by assuming jurisdiction and “leaving for another day” the jurisdictional dispute); *Nance v. EPA*, 645 F.2d 701, 716 (9th Cir. 1981) (concluding that the “claim is so patently without merit that the standing question can be left for another day”).

76. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 316-17 (1996) (discussing the importance of judicial and academic sensitivity to the potential negative effects of expanding or recognizing rights).

77. See, e.g., *Ankenbrandt v. Richards*, 504 U.S. 689, 703-04 (1992) (reaffirming the domestic relations exception to 28 U.S.C. § 1332 in part because of “judicial economy”); *Corlew v. Denny’s Restaurant, Inc.*, 983 F. Supp. 878, 879 (E.D. Mo. 1997) (“Federal courts are to strictly construe the amount in controversy requirement of diversity jurisdiction, as the purpose underlying the requirement is to limit the federal courts’ diversity caseload.”); ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 2.1, at 43 (2d ed. 1994) (noting that “the justiciability doctrines conserve judicial resources, allowing the federal courts to focus their attention on the matters most deserving of review”); POSNER, *supra* note 76, at 315 (“[J]udges legitimately may consider caseload effects . . . in areas such as jurisdiction and procedure where judicial economy is an accepted factor in judicial decision-making.”); see also *Fleming v. Rhodes*, 331 U.S. 100, 108 (1947) (Frankfurter, J., dissenting) (“In considering the scope of our appellate jurisdiction, great weight should be given to the strong policy of the Congress, ever since the Judiciary Act of 1891, to keep the docket of this Court within manageable proportions for the wise disposition of causes by the ultimate judicial tribunal.”). Having acknowledged the role of pragmatic or prudential considerations in the delineation of jurisdiction, it should also be reiterated that—contrary to the doctrine of hypothetical jurisdiction—courts are not free to sidestep constitutional constraints on jurisdiction merely by invoking such considerations. See, e.g., *Salei v. Boardwalk Regency Corp.*, 913 F. Supp. 993, 1009 (E.D. Mich. 1996) (noting that “[s]uch salutary effects as judicial economy or convenience cannot save a statutory provision that defies the jurisdictional limits set forth in Article III, § 2” and that “courts are not free to ignore the restraints imposed upon them by the Constitution simply because a statute serves judicial efficiency”). As the Court has remarked, the “separation of powers was adopted in the Constitution ‘not to promote efficiency but to preclude the exercise of arbitrary power.’ ”

is not free from either internal or external inconsistency. For one thing, to the extent that jurisdiction (if fully addressed) turns out not to exist, then it is the assumption of jurisdiction that is unrestrained. This is so because such an assumption would not foreclose suits that should in fact be foreclosed, thereby perpetuating judicial activity in the absence of either necessity or authority. For another thing, there may be some tension between the requirement that the issue's resolution be far-reaching and the requirement that the issue itself be difficult or complex. The mere fact that a question has remained unanswered despite decades and thousands of federal jurisdictional rulings could be evidence that it rarely surfaces and, in turn, that its resolution will ultimately have limited legal significance.

The fifth and final condition is that the record or briefings be inadequate to decide the jurisdictional issue.⁷⁸ In one case of assumed jurisdiction, for example, the Second Circuit found it important that, "because the appellants' assertion of jurisdiction was not challenged and the parties did not address the matter at oral argument, the record is not fully developed with respect to this issue."⁷⁹ Needless to say, this requirement is closely related to the rationale of judicial economy. Hypothetical jurisdiction under such circumstances plainly saves the parties and the court the time and resources that further development of the record would inevitably entail. In particular, to the extent the jurisdictional question is tied to unpleaded or undetermined facts, this requirement makes most sense at the appellate

Bartkus v. Illinois, 359 U.S. 121, 137 (1959) (quoting Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)).

78. See *Assuming Jurisdiction Arguendo*, *supra* note 4, at 731 n.112 ("A factor commonly cited by courts as contributing to the decision to avoid the jurisdictional issues is inadequacy in the record, briefing, or argument.") (citing cases).

79. *Crocco*, 137 F.3d at 109; see also *RNR Enters. v. SEC*, 122 F.3d 93, 96 (2d Cir. 1997) (noting that "the record is inadequate to resolve the jurisdictional issue: the issue was raised shortly before oral argument; the [appellee's] briefing is incomplete; and the *pro se* appellant has had insufficient opportunity to respond"); *Contreras-Tarango v. INS*, No. 95-70424, 1997 WL 43355, at *3 (9th Cir. Jan. 31, 1997) (noting that the jurisdictional issue "was first raised after initial briefing on appeal, and the record is not as fully developed as it should be"); *McCormack v. NCAA*, 845 F.2d 1338, 1343 (5th Cir. 1988) (deciding "not to resolve the issue whether the [plaintiffs] are proper plaintiffs, but to assume for present purposes that they do have standing" because "[t]he issue is close, and we lack the benefit of full briefing of it by the parties"); *Adams v. Vance*, 570 F.2d 950, 954 & n.7 (D.C. Cir. 1978) (assuming jurisdiction in part because the determination of whether the claim involved a political question was "difficult on this appeal in view of the abbreviated record and compressed briefing necessitated by the upcoming deadline").

level, where there is little capacity for fact-finding⁸⁰ and resolution of the jurisdictional issue would therefore require a remand.⁸¹

Having acknowledged its pragmatic value, a few peculiarities about this final condition should be noted. It differs from the others, first of all, in that the others focus largely if not exclusively on the extant state of the law, while this condition focuses on the behavior of the parties. Whether the jurisdictional issue is difficult and far-reaching, and whether the merits are easily resolved adverse to the party seeking jurisdiction—these are matters generally determinable relative to preexisting legal doctrine, although obviously the pleadings will have legal significance in this regard. That the record and the briefs are inadequate, however, is solely a function of the parties' (and perhaps the court's) omissions. Moreover, and as a consequence of its nonlegal nature, the means of rectifying this condition—further development of the record or supplemental briefings—is both obvious and, judicial economy notwithstanding, readily available. Lastly, and perhaps because of these first two peculiarities, at least one court has suggested that this final condition “is not a necessary factor, since both parties may deeply desire to obtain a decision on the jurisdictional issue and their briefs may be exhaustive, yet the insubstantiality of the claim on the merits may make the jurisdictional issue unsuitable for decision at the moment.”⁸² In other words, this condition may have been essentially a makeweight—relevant only to the extent

80. See, e.g., *Mitchell v. West Feliciana Parish Sch. Bd.*, 507 F.2d 662, 666-67 (5th Cir. 1975) (“[I]t was suggested that jurisdiction may be lacking The point . . . was not considered by the court below . . . [and] no evidence . . . appears in the record. Nor was the question briefed or seriously argued We would be unwilling to attempt such a difficult issue, . . . having potential . . . far-reaching consequences, without being fully advised.”). On the general propriety of a remand in fact-deficient situations, see *McCurry v. Tesch*, 824 F.2d 638, 640 (8th Cir. 1987) (“The trial court is the place for facts to be found. Appellate courts should not find the facts, nor should they, in the ordinary situation, refer to facts outside the record.”); *Brock v. TIC Int'l Corp.*, 785 F.2d 168, 171 (7th Cir. 1986) (“[D]istrict judges are specialists in finding facts, as we are not, and that our primary function, which is to maintain the uniformity and coherence of the law, is not engaged by a judgment so dependent on the specific circumstances of each case.”).

81. See *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (“If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings.”); *United Food & Commercial Workers Union Local 919 v. CenterMark Props. Meriden Square, Inc.*, 30 F.3d 298, 306 (2d Cir. 1994) (remanding in a removal case premised on diversity of citizenship because “the record, at least as it has developed to this point in the proceedings, is inconclusive and fails to establish to a reasonable probability that the amount in controversy exceeds the statutory minimum in this case” and citing cases to like effect); *Getty Oil Corp. v. Insurance Co. of N. Am.*, 841 F.2d 1254, 1260 n.8 (5th Cir. 1988) (explaining that when subject-matter jurisdiction is not clear from the district court's decision, “the better solution is to remand the case to the district court for determination of the jurisdictional questions”).

82. *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151, 159 (2d Cir. 1990).

that it reinforced the judicial inefficiency of not assuming jurisdiction in the face of easily resolved merits.

C. *The Degeneration of the Doctrine*

Thus far, two fundamental problems with hypothetical jurisdiction have been noted. First and most importantly, the doctrine is simply contrary to our scheme of constitutional government, in effect permitting the federal courts to act in excess of their limited, enumerated powers. As the *Steel Co.* Court pointedly remarked, “[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*.”⁸³ Second, as illustrated by the previous section, even from a pragmatic or functional perspective, it is not nearly as logically compelling as its proponents portrayed it. In particular, neither judicial economy nor judicial restraint turned out to be watertight rationales, especially when the conditions for the invocation of hypothetical jurisdiction are subjected to closer scrutiny.

This section will address yet a third set of problems that plagued the doctrine prior to *Steel Co.* Specifically, the focus will be on the doctrine’s implementation and the manifest inability of courts to keep it within manageable, even marginally principled, bounds. This inability increased not only the doctrine’s illegitimacy, but also the likelihood that the Supreme Court would, as it ultimately did, intercede and denounce the doctrine altogether. Two implementation problems in particular will be examined. First, the courts failed to contain the doctrine to one or two jurisdictional areas, or to one or two types of circumstances. Second, as hinted earlier, the courts failed to apply the doctrine rigorously, often omitting its requirements without explanation, applying it without meaningful analysis, and, in some instances, invoking it without any citation to authority.

1. The Doctrine’s Overuse

One means of tempering the inherent illegitimacy of the doctrine would have been to confine it to a small number of well-defined jurisdictional issues or circumstances. As an example, it could have

83. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 118 S. Ct. 1003, 1016 (1998); see also *Clow v. HUD*, 948 F.2d 614, 628 (9th Cir. 1991) (O’Scannlain, J., dissenting) (“Within the context of our constitutional system, the concept of hypothetical jurisdiction simply has no place. A court has no discretion where it has no power, and to suggest otherwise is to erode a fundamental limitation on the exercise of judicial authority.”).

been limited to certain procedural or statutory elements of jurisdiction, as opposed to the Article III case-or-controversy requirements, thereby minimizing its constitutional offensiveness. Or, if used in the case-or-controversy context, it could have been limited to a single requirement, such as standing, and then applied only to certain aspects of standing, such as redressability. These sorts of limitations, even if artificial and mildly unprincipled, would have at least bolstered the judiciary's claim that the doctrine itself was grounded in restraint. To be sure, those courts invoking the doctrine were hardly oblivious to its aberrant nature, and regularly advised that it be viewed as "an extremely narrow exception . . . to our obligation to determine our jurisdiction."⁸⁴ In turn, they urged that it be used only infrequently,⁸⁵ although such admonitions varied in their rhetorical force. While some limited its application to "exceptional situations"⁸⁶ or to the "rare case,"⁸⁷ others simply pointed out that the doctrine was appropriate "[o]n some occasions."⁸⁸ Be that as it may, by categorically limiting the doctrine's applicability, the judiciary could at least have demonstrated that these admonitions were genuine.

As it turns out, expediency rather than exigency dictated the range and frequency of the doctrine's use. Not only did the courts apply it to issues of standing,⁸⁹ which by all appearances was its para-

84. *National Law Ctr. on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 180 (D.C. Cir. 1996). The D.C. Circuit also noted that it was "rather controversial at that." *Id.* (citing *Cross-Sound Ferry Servs., Inc. v. ICC*, 934 F.2d 327, 339-46 (D.C. Cir. 1991) (Thomas, J., concurring in part and concurring in the denial of the petition for review)).

85. *See, e.g., Crocco v. Xerox Corp.*, 137 F.3d 105, 108 (2d Cir. 1998) (stating that "this court does not depart . . . lightly" from the "normal rule" that jurisdiction be determined before proceeding to the merits); *Berner v. Delahanty*, 129 F.3d 20, 23 (1st Cir. 1997) (cautioning that the doctrine is necessarily "an exception, which, in light of the danger that an ensuing decision on the merits might be rendered sterile by the tribunal's lack of authority to resolve the case, should be used sparingly"), *cert. denied*, 118 S. Ct. 1305 (1998); *Browning-Ferris*, 899 F.2d at 159 ("[W]e do not . . . suggest that difficult jurisdictional issues should be avoided whenever possible. . . . In applying the rule of judicial restraint and conservation of energy to avoid a difficult jurisdictional issue, the following principles need to be observed in order to avoid restraint becoming lethargy and efficiency mere avoidance."); *see also Dane*, *supra* note 6, at 119 n.348 ("Courts and commentators have emphasized that 'hypothetical jurisdiction' should only be assumed rarely, when the jurisdictional questions are particularly difficult, the merits issue particularly easy, and the consequences for the parties (of reaching the same conclusion on merits rather than jurisdictional grounds) particularly minimal.").

86. *Decker & Co. v. West*, 76 F.3d 1573, 1584 (Fed. Cir. 1996).

87. *Cross-Sound Ferry Servs., Inc.*, 934 F.2d at 333.

88. *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996).

89. *See, e.g., Cole v. USDA*, 133 F.3d 803, 808 n.6 (11th Cir. 1998); *NAACP v. Jones*, 131 F.3d 1317, 1321 n.4 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 48 (1998); *Rojas v. Fitch*, 127 F.3d 184, 187 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998); *House the Homeless, Inc. v. Widnall*, 94 F.3d 176, 179 n.7 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1434 (1997); *United States v. Coppola*, No. 95-6030, 1995 WL 760573, at *1 (2d Cir. 1995); *Bennett v. Plenert*, 63 F.3d 915, 922 (9th Cir. 1995), *rev'd on other grounds*, 117 S. Ct. 1154 (1997); *United States v. Saccoccia*, 58

digmatic use, but they also extended it to the full gamut of jurisdictional or quasi-jurisdictional issues.⁹⁰ Among these were mootness,⁹¹ Eleventh Amendment immunity,⁹² federal sovereign immunity,⁹³ the *Rooker-Feldman* doctrine,⁹⁴ the political question

F.3d 754, 767 n.6 (1st Cir. 1995); *City of Charleston v. Public Serv. Comm'n*, 57 F.3d 385, 390 n.5 (4th Cir. 1995); *J.C. Wyckoff & Assocs. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1490 (6th Cir. 1991); *Huguley v. General Motors Corp.*, No. 89-2172, 1991 WL 22013, at *1 (6th Cir. Feb. 22, 1991); *Henry v. Connolly*, 910 F.2d 1000, 1004 (1st Cir. 1990); *Glasgow, Inc. v. Federal Hwy. Admin.*, 843 F.2d 130, 136 (3d Cir. 1988); *Curry v. Baker*, 802 F.2d 1302, 1312-13 (11th Cir. 1986); *Richland Park Homeowners Ass'n v. Pierce*, 671 F.2d 935, 941 n.3 (5th Cir. 1982); *Nance v. EPA*, 645 F.2d 701, 716 (9th Cir. 1981); *United Steelworkers v. Marshall*, 647 F.2d 1189, 1309 n.167 (D.C. Cir. 1980); *Crowley v. Smithsonian Inst.*, 636 F.2d 738, 740 n.4 (D.C. Cir. 1980); *United States v. Callabross*, 607 F.2d 559, 563 n.1 (2d Cir. 1979); *United States v. Tonry*, 605 F.2d 144, 148 n.12 (5th Cir. 1979); *Association of Am. R.R. v. ICC*, 600 F.2d 989, 999 n.34 (D.C. Cir. 1979); *Edwards v. Carter*, 580 F.2d 1055, 1056-57 (D.C. Cir. 1978); *Spinkellink v. Wainwright*, 578 F.2d 582, 609 n.31 (5th Cir. 1978); *American Cylinder Mfrs. Comm. v. Department of Transp.*, 578 F.2d 24, 26 (2d Cir. 1978); *Chinese Am. Civic Council v. Attorney Gen. of United States*, 566 F.2d 321, 325 (D.C. Cir. 1977); *Friedman v. Beame*, 558 F.2d 1107, 1110 n.3 (2d Cir. 1977); *Reserve Life Ins. Co. v. Provident Life Ins. Co.*, 499 F.2d 715, 721 (8th Cir. 1974); *United States v. Marihart*, 472 F.2d 809, 811-12 (8th Cir. 1972); *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194, 205 (D.C. Cir. 1969); *Chattorjee v. Due*, 511 F. Supp. 183, 188 & n.5 (E.D. Pa. 1981).

90. See *In re DN Assocs.*, 3 F.3d 512, 515 (1st Cir. 1993) (noting that the doctrine can apply to "a difficult jurisdictional or quasi-jurisdictional question"). The "quasi-jurisdictional" category presumably exists to cover issues that are technically jurisdictional in nature, but perhaps not as fundamental or inflexible as, say, the case-or-controversy requirements of Article III. As then-Judge Thomas noted:

The term "jurisdiction" . . .—"an all-purpose word denoting adjudicatory power"—bears different meanings in different contexts. Sometimes, for example, characterizing a provision as "jurisdictional" implies that a court cannot temper the application of the provision through otherwise available equitable doctrines such as waiver, tolling, and estoppel. Other times, characterizing a provision as bearing on an inferior tribunal's "jurisdiction" might signify that on appeal, that tribunal's interpretation of the provision is not entitled to deference.

Cross-Sound Ferry Servs., Inc., 934 F.2d at 340-41 (Thomas, J., concurring in part and concurring in the denial of the petition for review) (citations omitted); see also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1010 (1998) (noting that "[j]urisdiction . . . is a word of many, too many, meanings." and explaining that, merely because a statute employs the word "jurisdiction" in conjunction with the provision of cause of action does not "mak[e] all the elements of the cause of action . . . jurisdictional") (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1986)).

91. See, e.g., *RNR Enters. v. SEC*, 122 F.3d 93, 96 (2d Cir. 1997); *Wells v. SEC*, No. 96-6237, 1997 WL 274270, at *1 (2d Cir. May 22, 1997), cert. denied, 118 S. Ct. 386 (1997); *SEC v. American Capital Invs., Inc.*, 98 F.3d 1133, 1140-42 (9th Cir. 1996), cert. denied, 117 S. Ct. 1468 (1997); *Sumitomo Bank v. Tokai Credit Corp. (In re Eve Marie, Inc.)*, No. 92-55972, 1993 WL 530457, at *1 n.1 (9th Cir. Dec. 21, 1993); *Federal Ins. Co. v. Scarsella Bros., Inc.*, 931 F.2d 599, 602 (9th Cir. 1991).

92. See, e.g., *Aves v. Shah*, No. 96-3063, 1997 WL 589177, at *1 (10th Cir. Sept. 24, 1997) ("Because we find the Plaintiffs' claims under the . . . Constitution to be without merit, we do not reach the issue of whether the Eleventh Amendment bars their claims. We may assume jurisdiction . . . where the jurisdictional issues are difficult and the merits clearly and obviously run against the party seeking jurisdiction.").

93. See, e.g., *Clow v. HUD*, 948 F.2d 614, 616 & n.2 (9th Cir. 1991) (per curiam) (bypassing "jurisdictional considerations of sovereign immunity" in a suit for money damages against the

doctrine,⁹⁵ immediate appealability⁹⁶ or other questions of non-administrative finality,⁹⁷ removal from state to federal court,⁹⁸ defective allegations of jurisdictional diversity,⁹⁹ jurisdictional sufficiency of a complete preemption claim,¹⁰⁰ lack of in rem jurisdiction in a civil forfeiture action,¹⁰¹ state action as a jurisdictional element,¹⁰² administrative compliance as a jurisdictional

federal government under the Administrative Procedure Act); *see also* *Can v. United States*, 14 F.3d 160, 162 & n.1 (2d Cir. 1994) (bypassing question of federal sovereign immunity, as well as alleged nonexhaustion of administrative remedies, and holding that the suit was barred by the political question doctrine).

94. *See, e.g.,* *Rekhi v. Wildwood Indus.*, 61 F.3d 1313, 1316 (7th Cir. 1995); *cf. Marquez v. Aviles*, 252 F.2d 715, 718 (1st Cir. 1958) (assuming jurisdiction in a *Rooker-Feldman*-type situation, "however much technical niceties might suggest that we ought not to make that assumption").

95. *See, e.g.,* *Adams v. Vance*, 570 F.2d 950, 954 & n.7 (D.C. Cir. 1978).

96. *See, e.g.,* *Crocco v. Xerox Corp.*, 137 F.3d 105, 109 (2d Cir. 1998) (assuming "hypothetical jurisdiction" on appeal and thereby obviating the need to address "whether a remand to a[n] ERISA plan administrator is immediately appealable"); *American Capital Inv., Inc.*, 98 F.3d at 1139-40 (involving appealability of various orders), *cert. denied*, 117 S. Ct. 1468 (1997); *United States v. Steller*, 78 F.3d 710, 715 (1st Cir. 1996) (assuming the immediate appealability of a double jeopardy claim alleging multiple punishments arising in two separate, successive proceedings); *Hewlett-Packard Co. v. Berg*, 61 F.3d 101, 105 (1st Cir. 1995) ("Whether or not the refusal to allow the set-off is an appealable issue, the refusal at this time turns out not to be a legal error, so the jurisdictional issue need not be decided."); *In re Villa Marina Yacht Harbor, Inc.*, 984 F.2d 546, 548 n.2 (1st Cir. 1993) (holding in regard to the appealability of a pay-into-court order that, "[b]ecause the case is straightforward, and the party in whose favor the jurisdictional issue would operate is entitled to prevail on the merits, we elect to forgo unnecessary work and to bypass the question of appellate jurisdiction"); *Rhode Island Hosp. Trust Nat'l Bank v. Howard Communications Corp.*, 980 F.2d 823, 829 (1st Cir. 1992) (assuming appealability of a civil contempt order because "the contempt finding and sanctions were abundantly warranted"); *Massachusetts v. Hale*, 618 F.2d 148, 145 n.3 (1st Cir. 1980) (bypassing inquiry into the appealability of a denial of a party's motion for judgment on the record, concerning nondischargeability in the bankruptcy context, because it was a "close issue" and "the merits compel affirmance"); *Brick v. CPC Int'l, Inc.*, 547 F.2d 185, 187 (2d Cir. 1976) (declining to address validity and applicability of the then-controversial "death knell" doctrine); *Southern Pac. Transp. Co. v. Usery*, 539 F.2d 386, 389 n.1 (5th Cir. 1976); *see also* *Jeffers v. Heavrin*, 10 F.3d 380, 382 n.2 (6th Cir. 1993) (reaching the issue of qualified immunity, even though it would not otherwise be immediately appealable in the company of other unresolved claims, because "(1) the district court may have erroneously thought its qualified immunity ruling disposed of all claims, and (2) we endeavor to serve judicial economy by resolving the qualified immunity issue"); *cf. Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980).

97. *See, e.g.,* *United States v. Correia*, 531 F.2d 1095, 1097 (1st Cir. 1976) (bypassing appealability of dismissal of an indictment where reindictment was still possible).

98. *See, e.g.,* *Menorah Ins. Co. v. INX Reinsurance Corp.*, 72 F.3d 218, 223 n.9 (1st Cir. 1995) (assuming that there was removal jurisdiction, a determination otherwise barred from appellate review under 28 U.S.C. § 1447(d), because the party challenging jurisdiction "easily wins an affirmance on the substantive issue of waiver").

99. *See, e.g.,* *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996); *Jones v. RCA Music Serv.*, 530 F. Supp. 767, 768 & n.1 (E.D. Pa. 1982).

100. *See, e.g.,* *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 496 n.8 (5th Cir. 1988) (*en banc*).

101. *See, e.g.,* *United States v. 5 Sylvan Rd.*, 928 F.2d 1, 4 (1st Cir. 1991).

prerequisite,¹⁰³ foreclosure of review under the Administrative Procedure Act,¹⁰⁴ foreclosure of review of deportation orders under the Antiterrorism and Effective Death Penalty Act of 1996,¹⁰⁵ foreclosure of jurisdiction under the Tax Injunction Act,¹⁰⁶ alleged noncompliance with appellate procedural rules,¹⁰⁷ and claims that the exercise of jurisdiction would violate equal protection.¹⁰⁸ From time to time, hypothetical jurisdiction had even been extended to assumptions of

102. See, e.g., *Switlik v. Hardwicke Co.*, 651 F.2d 852, 856 n.3 (3d Cir. 1981) (assuming jurisdiction rather than deciding "whether the entry and enforcement of the state court judgment constituted 'state action' for purposes of a collateral attack in the federal district court").

103. See, e.g., *Noovan v. Secretary of Health and Human Servs. (In re Ludlow Hosp. Soc'y, Inc.)*, 124 F.3d 22, 25 n.7 (1st Cir. 1997); *Craig v. United States*, No. 92-35400, 1994 WL 408250, at *1 (9th Cir. Aug. 4, 1994) (declining "to reach the thorny jurisdictional issue of whether [a plaintiff] may bring a quiet title action under 28 U.S.C. § 2410" without first filing a refund claim with the IRS); *Robinson v. Department of Pub. Utils.*, 835 F.2d 19, 21 (1st Cir. 1987) (per curiam) (assuming that the court had jurisdiction over electric consumer's challenges to denial of intervention); *Bailey v. Delta Air Lines, Inc.*, 722 F.2d 942, 944 (1st Cir. 1983) (assuming jurisdiction over Title VII action for preliminary relief where the EEOC has not issued a final disposition or a right-to-sue letter); *Manning v. Trustees of Tufts College*, 613 F.2d 1200, 1202 (1st Cir. 1980) (assuming jurisdiction over Title VII action); *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 226 (1st Cir. 1976) (same); *Fraser v. New York City Bd. of Educ.*, No. 96 Civ. 0625, 1998 WL 55170, at *4 (S.D.N.Y. Feb. 10, 1998) (same); see also *Can v. United States*, 14 F.3d 160, 162 & n.1 (2d Cir. 1994) (bypassing question of alleged nonexhaustion of administrative remedies, as well as federal sovereign immunity, and holding that the suit was barred by the political question doctrine).

104. See, e.g., *Slocum v. United States*, 515 F.2d 237, 238 n.2 (5th Cir. 1975).

105. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended at scattered sections of 8, 15, 18, 22, 28, 40, 42, 50 U.S.C.); see also *Jorge v. Hart*, No. 97 Civ. 1119, 1997 WL 531309, at *1, *12, *14 (S.D.N.Y. Aug. 28, 1997) (assuming jurisdiction and citing cases); *Anjali Parekh Prakash, Note, Changing the Rules: Arguing Against Retroactive Application of Deportation Statutes*, 72 N.Y.U. L. REV. 1420, 1433 n.87 (1997) (citing additional cases).

106. See, e.g., *Rojas v. Fitch*, 127 F.3d 184, 187 (1st Cir. 1997), cert. denied, 118 S. Ct. 2341 (1998); *Safeco Life Ins. Co. v. Musser*, 65 F.3d 647, 650 (7th Cir. 1995).

107. See, e.g., *United States v. Scheckley*, No. 96-1786, 1997 WL 701370, at *1 n.1 (2d Cir. Nov. 10, 1997) (declining to address timeliness of notice of appeal under FED. R. APP. P. 4); *Brooks v. Toyotomi Co.*, 86 F.3d 532, 586-87 (6th Cir. 1996) (bypassing question over proper substance of the notice of appeal); *Knecht v. United States*, No. 96-2265, 1996 WL 570242, at *1 (2d Cir. Oct. 4, 1996) (declining to address possible need for certificate of appealability under 28 U.S.C. § 2253 in light of the Antiterrorism and Effective Death Penalty Act of 1996); *Caribbean Transp. Sys. Inc. v. Autoridad De Las Navieras*, 901 F.2d 196, 197 (1st Cir. 1990) (same); *Kaiser v. Armstrong World Indus., Inc.*, 872 F.2d 512, 514 (1st Cir. 1989) (bypassing dispute over whether certain parties were properly specified in the notice of appeal); *FDIC v. Caledonia Inv. Corp.*, 862 F.2d 378, 381 (1st Cir. 1988) (bypassing question of FED. R. CIV. P. 54(b) certification); cf. *Markgraf v. Storage Tech. Corp.*, No. 97-1166, 1998 WL 31449 (10th Cir. Jan. 28, 1998) (assuming jurisdiction despite possibility that appellant was not a real party in interest); *United States v. Connell*, 6 F.3d 27, 29 n.3 (1st Cir. 1993) (assuming that the district court, despite the expiration of the appeal period, had jurisdiction to entertain a party's motion for reconsideration).

108. See, e.g., *Contreras-Tarango v. INS*, No. 95-70424, 1997 WL 43355 (9th Cir. Jan. 31, 1997) (addressing section 440 of the Antiterrorism and Effective Death Penalty Act of 1996); see also *Prakash, supra* note 105, at 1433 n.87.

personal jurisdiction,¹⁰⁹ although the considerations in that context generally differ from those of subject-matter jurisdiction.¹¹⁰

In short, the federal courts appear to have been quite unable to control the spread of the doctrine.¹¹¹ To some extent, this is no doubt attributable to its highly convenient nature and to the effective unreviewability of its use, two aspects that will be addressed at length in Part IV. In at least a few cases, it may also be attributable to a predetermined desire to reach the merits despite potential jurisdictional defects. As one author prophetically observed nearly two decades ago, "[w]hen the substantive issues are of great import, the temptation to decide them may be strong, and the ghb abuse of the hypothetical jurisdiction technique can satisfy that urge."¹¹² Finally, the doctrine's uncontainability must in part be attributed to the simple fact that principled limits were not necessarily available, and the momentum of legal reasoning, such as it is, could apparently not be meaningfully restrained by either the art or the artifice of arbitrary line-drawing.¹¹³ The Second Circuit, for its part, attempted

109. See *Republic of Pan. v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 941 (11th Cir. 1997) (noting that "courts have held that it is permissible in some circumstances to bypass the issue of personal jurisdiction if a decision on the merits would favor the party challenging jurisdiction and the jurisdictional issue is difficult") (citing *Lee v. City of Beaumont*, 12 F.3d 933, 937-38 (9th Cir. 1993); *Feinstein v. RTC*, 942 F.2d 34, 40-41 (1st Cir. 1991)); *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 821 F. Supp. 802, 811 (D.P.R. 1993) (similarly extending subject-matter-based doctrine of hypothetical jurisdiction to the personal jurisdiction context), *vacated on other grounds*, 19 F.3d 745 (1st Cir. 1994).

110. See *Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982) ("The concepts of subject-matter and personal jurisdiction . . . serve different purposes, and these different purposes affect the legal character of the two requirements."); *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979) ("[N]either personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties."); *Marathon Oil Co. v. A.G. Ruhrgas*, 145 F.3d 211, 217-18 (5th Cir. 1998) (en banc) (elaborating on the differences), *cert. granted*, 119 S. Ct. 589 (1998) (No. 98-470).

111. In some instances, in fact, the doctrine was invoked multiple times in the same decision in regard to multiple jurisdictional disputes. See, e.g., *SEC v. American Capital Invs., Inc.*, 98 F.3d 1133, 1139-42 (9th Cir. 1996) (assuming immediate appealability and assuming, on multiple issues, a lack of mootness), *cert. denied*, 117 S. Ct. 1468 (1997). This is not to say that courts, when presented with the opportunity, invariably invoked the doctrine. See, e.g., *Francis v. Goodman*, 81 F.3d 5, 8 n.2 (1st Cir. 1996) (giving "consideration to bypassing the jurisdictional question entirely" but declining to do so and remanding to the district court); *Silva v. United States (In re Grand Jury Subpoena Issued to Bailin)*, 51 F.3d 203, 206 (9th Cir. 1995) (declining to extend "hypothetical jurisdiction"); *Tataranowicz v. Sullivan*, 959 F.2d 268, 271-72 (D.C. Cir. 1992) (refusing to assume jurisdiction); *Getty Oil Corp. v. Insurance Co. of N. Am.*, 841 F.2d 1254, 1260 n.8 (5th Cir. 1988) (same).

112. *Assuming Jurisdiction Arguendo*, *supra* note 4, at 754. The author continued: "If . . . the limits on [the technique's] exercise are not observed, hypothetical jurisdiction can be used to assume restrictions on federal judicial power out of existence, and thereby to unravel the constitutional fabric, stitch by stitch." *Id.*

113. Cf. Patrick L. Baude, *Constitutional Reflections on Abortion Reform*, 4 U. MICH. J.L. REFORM 1, 1 (1970) (observing that "the attraction of consistency and the momentum of reform"

to keep the doctrine in check by proposing that “a judgment rendered by a court assuming subject-matter jurisdiction and sustained on direct appeal is entitled to preclusive effect as long as the District Court did not ‘plainly usurp jurisdiction’ over the action.”¹¹⁴ But this limitation was arguably dead in the water from its inception, for the simple reason that *every* exercise of hypothetical jurisdiction is, by its very nature, a usurpation of jurisdiction.¹¹⁵ As Judge Diarmuid O’Scannlain observed in 1991,

[w]ithout a coherent rationale to justify its application or to limit its reach, the concept of hypothetical jurisdiction threatens to swallow numerous statutory restraints on the federal courts. In fact, the continued proliferation of this notion could lead to a regime in which the only check on judicial power is a court’s own disinclination to reach the merits. That, I would suggest, invites judicial arrogance.¹¹⁶

Whether arrogance or mere abandon is the proper descriptor can obviously be debated, but there can be little doubt that the doctrine, case-by-case and issue-by-issue, far exceeded its prudential bounds by the time the Supreme Court finally confronted it in 1998.

2. The Doctrine’s Misuse

Excess was not the only vice of the doctrine’s implementation, however. Nor was it the worst. Arguably more problematic than overuse was the tendency of courts to apply the doctrine with virtually no rigor or integrity—as if no one were looking,¹¹⁷ or as if the passage of time and the acquiescence of the legal community somehow had absolved the doctrine of its illegitimacy and thus the bench of its

can lead the supporters of a legal rule to ultimately embrace extensions of the rule that were “not only disowned but also denounced at the time” the original rule was proposed).

114. *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)).

115. Perhaps the court was attempting to preclude uses of the doctrine where jurisdiction was not difficult, but instead manifestly lacking. That, however, is uncomfortably reminiscent of the mythical code of honor among criminals, distinguishing between honorable and dishonorable forms of illegality.

116. *Clow v. HUD*, 948 F.2d 614, 628 (9th Cir. 1991) (O’Scannlain, J., dissenting).

117. In the Ninth Circuit, at least, the correlation between use of the doctrine and nonpublication of the opinion might, to a cynical mind, suggest indeed that some judges may have been sweeping the problem of misuse under the judicial rug. *See supra* note 8; *see also* *National Classification Comm. v. United States*, 765 F.2d 164, 173 n.2 (D.C. Cir. 1985) (Wald, J., separate statement) (noting the arguments “that unpublished opinions: result in less carefully prepared or soundly reasoned opinions; reduce judicial accountability; increase the risk of nonuniformity; allow difficult issues to be swept under the carpet; and result in a body of ‘secret law’ practically inaccessible to many lawyers”).

responsibility to justify the doctrine at every invocation. Three principal techniques of misuse will be addressed here: the omission of one or more requirements for its application, the use of the doctrine in the absence of meaningful analysis, and the use of the doctrine without a single citation to authority.

The most glaring misuse of the doctrine was its application when the conditions for its invocation were not fully satisfied. As noted, one of the mitigating characteristics of the doctrine, given its inherent illegitimacy, was that it would be used only sparingly. As further noted, however, this limitation proved illusory, and the doctrine gradually became a regular feature of federal court jurisprudence. For the most part, this regularity was achieved by the omission of one or more of the required conditions for its application. No longer, for example, did the merits have to be inherently easy or simple or straightforward; rather, they needed only be "substantially clearer than the jurisdictional question."¹¹⁸ Likewise, although courts generally honored the requirement of jurisdictional difficulty, they frequently omitted the requirement that resolution of the jurisdictional question would be far-reaching.¹¹⁹ In one case, a Sixth Circuit panel even conceded that it found the jurisdictional issue resolvable, indicating how it was "strongly inclined" to rule, but apparently found the issue difficult only because its strong inclination conflicted with an existing en banc precedent.¹²⁰ Finally, relatively few courts even discussed the adequacy or inadequacy of the record, although such an omission is not inconsistent with the earlier analysis indicating that this condition was essentially a makeweight in the hypothetical jurisdiction calculus.¹²¹

Misuse also took the form of applying the doctrine without meaningful analysis. Not surprisingly, this second type of omission tended to go hand-in-hand with the omission of one or more conditions for the doctrine's application. In several instances, for example, one finds only a single sentence containing both the reasoning and the declaration of a court's decision to assume jurisdiction: "Because this

118. *Freeman v. Principal Fin. Group*, No. 96-35947, 1997 WL 377084, at *1 (9th Cir. July 3, 1997). For other cases and comparable tests, see *supra* notes 32-33 and accompanying text. At least one court suggested that the relative clarity or simplicity of the merits was not even relevant at all. See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 623 (3d Cir. 1996) ("[A] court need not reach difficult questions of jurisdiction when the case can be resolved on some other ground in favor of the same party."), *aff'd*, 521 U.S. 591 (1997).

119. See, e.g., *Craig v. United States*, No. 92-35400, 1994 WL 408250, at *1 (9th Cir. Aug. 4, 1994).

120. *Brooks v. Toyotemi Co.*, 86 F.3d 582, 586-87 (6th Cir. 1996).

121. See *supra* note 82 and accompanying text.

appeal presents issues that are substantially clearer than the jurisdictional question, we apply the doctrine of hypothetical jurisdiction and simply decide the issues presented."¹²² In other cases, one finds even less—merely a declaration that jurisdiction would be assumed, perhaps prefaced by a discussion of jurisdiction giving the reader some indication of its difficult or uncertain nature.¹²³ Or, when a declaration of jurisdictional difficulty was provided, it was sometimes so conclusory as to be entirely unhelpful. In one opinion, for example, the Ninth Circuit simply declared that “we find the complexities involved in resolving the mootness issue *to be such* as to warrant the invocation of hypothetical jurisdiction to reach the merits.”¹²⁴

A third form of misuse, also consisting of an omission, was the application of the doctrine without citing any authority at all. Given the standard legal practice of citing authority—a practice most definitely required of litigants¹²⁵—and particularly given the extraordinary nature of hypothetical jurisdiction, one might have thought that the omission of supporting authority under such circumstances would only rarely have happened. Such was not the case, however, and there is no shortage of examples of this third form of misuse.¹²⁶ The omission of authority is all the more inexplicable given that relevant authority from virtually all the circuits was readily at hand, and given

122. *Freeman*, 1997 WL 377084, at *1; see also *Zavala-Zaragoza v. INS*, No. 95-70104, 1996 WL 413669, at *1 (9th Cir. July 23, 1996) (identical language); *Lewin v. INS*, No. 94-70867, 1996 WL 335359, at *1 (9th Cir. June 17, 1996) (identical language).

123. See, e.g., *United States v. Tonry*, 605 F.2d 144, 148 n.12 (5th Cir. 1979) (“We will assume, without deciding, that [the party’s] stake in the outcome of this case gives him standing to assert the contentions made under the tenth amendment.”); *Chatterjee v. Due*, 511 F. Supp. 183, 188 & n.5 (E.D. Pa. 1981) (“Assuming arguendo, that plaintiff has standing . . .”).

124. *Sumitomo Bank v. Tokai Credit Corp. (In re Eve Marie, Inc.)*, No. 92-55972, 1993 WL 530457, at *6 n.1 (9th Cir. Dec. 21, 1993) (emphasis supplied).

125. See, e.g., FED. R. APP. P. 28(a)(6) (providing that an appellant’s “argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on”); *United States ex rel. Verdone v. Circuit Court*, 73 F.3d 669, 673 (7th Cir. 1995) (per curiam) (“Even pro se litigants, particularly one so familiar with the legal system, must expect to file a legal argument and some supporting authority.”); *Pelfresne v. Village of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir. 1990) (“A litigant who fails to press a point by supporting it with pertinent authority . . . forfeits the point. We will not do his research for him.” (citations omitted)).

126. See, e.g., *Cole v. USDA*, 133 F.3d 803, 808 n.6 (11th Cir. 1998); *Brooks v. Toyotomi Co.*, 86 F.3d 582, 586-87 (6th Cir. 1996); *Siers v. United States Parole Comm’n*, No. 94-6103, 1994 WL 200999, at *1 (4th Cir. May 19, 1994) (per curiam); *J.C. Wyckoff & Assocs. v. Standard Fire & Ins. Co.*, 936 F.2d 1474, 1490 (6th Cir. 1991); *Huguley v. General Motors Corp.*, No. 89-2172, 1991 WL 22013, at *2 (6th Cir. Feb. 22, 1991); *United Steelworkers v. Marshall*, 647 F.2d 1189, 1309 n.167 (D.C. Cir. 1980); *Slocum v. United States*, 515 F.2d 237, 238 n.2 (5th Cir. 1975); *Reserve Life Ins. Co. v. Provident Life Ins. Co.*, 499 F.2d 715, 721 (8th Cir. 1974); *United States v. Marihart*, 472 F.2d 809, 811-12 (8th Cir. 1972); *National Ass’n of Theatre Owners v. FCC*, 420 F.2d 194, 205 (D.C. Cir. 1969).

that, in contrast to the first two forms of misuse, there is no obvious reason why such authority should be omitted, especially where the doctrine is otherwise expressly invoked. It is one thing to assume jurisdiction *sub silentio*, where authority would of course be omitted; it is quite another to assume jurisdiction explicitly and then not cite any precedent for doing so.

In addition to these three principal forms of misuse, one can find a full assortment of other abusive techniques which further undermined whatever integrity the doctrine may have originally possessed. One court, for example, assumed jurisdiction in part because "th[e] action [was] being litigated pro se by plaintiff."¹²⁷ Not only is this consideration not part of the doctrine—including the particular authority cited by the court¹²⁸—but it is entirely irrelevant to the rationales and elements of hypothetical jurisdiction. It bears no relationship to judicial economy or restraint, for instance, nor does it bear any obvious linkage to the five standard conditions for invoking the doctrine.¹²⁹ Courts engaging in hypothetical jurisdiction also had a tendency to conflate the conditions for its use,¹³⁰ or to be careless or indulgent with their use of terminology and concepts. In one case, the Second Circuit framed the question of assuming jurisdiction as a choice between whether "to deny standing" or whether "to give standing" to certain litigants, concluding that it was "preferable" to give standing.¹³¹ But, of course, Article III courts do not have such a choice, nor do they have the power to "give" standing. Jurisdiction is

127. *Fraser v. New York City Bd. of Educ.*, No. 96 Civ. 0625 (SHS), 1998 WL 55170, at *4 (S.D.N.Y. Feb. 10, 1998).

128. The district court cited *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151, 159 (2d Cir. 1990), as authority for the assumption of jurisdiction, see *Fraser*, 1998 WL 55170, at *4, but *Browning-Ferris* makes no mention of the plaintiff's litigation status.

129. One might try to link this factor to the fairness consideration, which, as noted earlier, underlay the conditions that the merits be straightforward and resolved against the party seeking jurisdiction. See *supra* notes 61-64 and accompanying text. Presumably, the idea would be that the claims of pro se plaintiffs should be more readily rejected on the merits in the absence of clear jurisdiction, perhaps to spare these plaintiffs the costs of refiling or otherwise proceeding further with their suits. This would be quite a perversion of the notion of fairness, however, and one suspects that no court would be willing to stand by this rationale once it is explicitly articulated.

130. See *supra* note 67 and accompanying text.

131. *Friedman v. Beame*, 558 F.2d 1107, 1110 n.3 (2d Cir. 1977) ("If we were to deny standing to Arena and Harrison, we would then have to decide the difficult question, discussed *infra*, of whether the district court should have abstained from considering Friedman's claims. We consider it preferable to give standing to Arena and Harrison."). Likewise, in *Lawrence v. Board of Immigration Appeals*, No. 97 Civ. 5669, 1997 WL 698140, *1 (S.D.N.Y. Nov. 10, 1997) the court stated that "where questions of subject-matter jurisdiction are nettlesome but the decision on the merits is simple and straightforward, the Second Circuit permits district courts to dispose of the case on the merits." But, of course, the Second Circuit is not vested with the authority to "permit" what is, at least in some cases, a constitutional violation.

not some kind of equitable remedy, dispensed by the dictates of justice; it is a concept fixed by the Constitution, by statute, and by precedent, and triggered by the appropriate party's adequate pleadings.¹³² In another case, the Sixth Circuit assumed that the plaintiff had standing and then declared that such an assumption "is without consequence and should not be construed as a decision on the merits of the standing issue"¹³³—but, of course, its decision is not "without consequence" in a more general sense, given that the substantive merits have been determined, the plaintiff has lost with prejudice, the defendant has correspondingly prevailed, and the court, by assuming jurisdiction, has effectively announced that the standing issue is difficult and far-reaching.

While other instances of misuse no doubt occurred, there is little value in dredging them up in this forum. It is quite apparent, merely from the examples provided, that hypothetical jurisdiction was frequently twisted and diluted by the courts that invoked it. Short of crude expediency, moreover, it is far from obvious how judges could rationalize to themselves this level of misuse, especially when it was the courts that initially imposed many of the limits in order to mitigate the doctrine's inherent illegitimacy. The Ninth Circuit, for its part, maintained that the several conditions for the doctrine's application were not really "mandated by historical practice" as found in Supreme Court precedent and that, as a consequence, their consideration could "in some instances be flexible."¹³⁴ This view, however, seriously misapprehends the logic and necessity of the doctrine's conditions. These elements were devised and instituted not because anyone believed that they were mandated by historical practice, but because they were the only thing standing between the doctrine's suspected illegitimacy and its complete and outright illegitimacy. In the face of sound arguments that the doctrine was constitutionally devi-

132. See, e.g., *Harris v. United States*, 149 F.3d 1304, 1308 (11th Cir. 1998) ("As federal courts, we are courts of limited jurisdiction, deriving our power solely from Article III of the Constitution and from the legislative acts of Congress."). That said, Article III courts do claim to possess, in possible contradiction to constitutional text or design, "inherent" or "implied" power. See, e.g., *Ray v. Eyster (In re Orthopedic "Bone Screw" Prods. Liab. Litig.)*, 132 F.3d 152, 156 (3d Cir. 1997) ("It has long been recognized that courts are vested with certain inherent powers that are not conferred either by Article III or by statute, but rather are necessary to all other functions of courts."); *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 561-64 (3d Cir. 1985) (en banc) (explaining the background and justifications for inherent judicial power and categorizing such power into three areas).

133. *J.C. Wyckoff & Assocs. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1490 (6th Cir. 1991); see also *Huguley v. General Motors Corp.*, No. 89-2172, 1991 WL 22013, at *2 (6th Cir. 1991) (using identical language).

134. *United States v. Troescher*, 99 F.3d 933, 934 n.1 (9th Cir. 1996).

ant, they provided some assurance that the doctrine would remain a rare exception to be invoked only after careful and rigorous analysis.¹³⁵

Although the doctrine would likely have been repudiated in time, the magnitude and frequency of its misuse may very well have accelerated the process. From the Supreme Court's perspective, few things are more unsightly than the federal courts engaging in a pattern of unconstitutional conduct. As a matter of institutional integrity, the federal judiciary—which holds the power to declare the acts of the other branches unconstitutional—must be diligent, even zealous, in the enforcement of its own constitutional limitations. By using and then misusing the doctrine of hypothetical jurisdiction, the federal courts degraded not only themselves as an institution, but also the very idea of constitutional governance.

III. THE REPUDIATION OF HYPOTHETICAL JURISDICTION IN *STEEL CO.*

Even though many federal judges condoned the practice of hypothetical jurisdiction, in some cases fully aware of its deficiencies,¹³⁶ the doctrine was not entirely without its detractors.¹³⁷ Two circuit judges, in particular, stood their ground despite the doctrine's seeming popularity: then-Judge Clarence Thomas of the District of

135. See *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151, 159 (2d Cir. 1990) (noting that, "[i]n applying the rule of judicial restraint and conservation of energy to avoid a difficult jurisdictional issue," the conditions for assuming jurisdiction "need to be observed in order to avoid restraint becoming lethargy and efficiency mere avoidance").

136. Speaking for the Seventh Circuit in *Rekhi v. Wildwood Industries*, 61 F.3d 1313, 1316 (7th Cir. 1995), Chief Judge Posner correctly noted that the doctrine, which he described as potentially "inelegant" and even "illogical" may be "out of keeping with the Supreme Court's current thinking, which is more formalistic." "But," he continued, "the Court has not repudiated the doctrine, and it is well established in the courts of appeals, including our own; so we should adhere to it at least until we have a clearer signal of the Court's current view." *Id.* These latter observations may indeed explain why the Seventh Circuit might have considered the doctrine to be still available. However, given that the doctrine was discretionary and not mandatory, *see id.*, they hardly justified its actual continued use, including in the *Rekhi* case itself. *See id.* (bypassing the applicability of the *Rooker-Feldman* doctrine).

137. *See, e.g., Santos v. District Council of United Bhd. of Carpenters*, 547 F.2d 197, 199 (2d Cir. 1977) ("The court below assumed standing *arguendo* and proceeded to consider the merits, a practice that must be disapproved. It is axiomatic that a court should not consider the merits of an action if the plaintiff cannot show some cognizable injury."). It is not clear whether Judge Oakes, who authored *Santos*, was specifically criticizing the assumption of jurisdiction by district courts, or by all federal courts, especially since the Second Circuit subsequently exercised hypothetical jurisdiction without qualification, *see, e.g., Crocco v. Xerox Corp.*, 137 F.3d 105, 108-09 (2d Cir. 1998); *RNR Enters. v. SEC*, 122 F.3d 93, 96 (2d Cir. 1997); *Wells v. SEC*, No. 96-6237, 1997 WL 274270, at *1 (2d Cir. May 22, 1997), *cert. denied*, 118 S. Ct. 386 (1997); *Browning-Ferris Indus.*, 899 F.2d at 158-59, and since Judge Oakes himself sat on the panels in both *RNR Enterprises* and *Wells*.

Columbia Circuit¹³⁸ and Judge Diarmuid O'Scannlain of the Ninth Circuit.¹³⁹ It was not until *Steel Co.* was decided in 1998, however, that the principled steadfastness of these judges was fully vindicated.¹⁴⁰ The following Subparts will explore the nature and scope of the *Steel Co.* decision, explaining why the repudiation was in many ways exceptional, what benefits will likely result from it, how the Justices coalesced and divided on the issue of repudiation, and which related doctrines were not repudiated by the decision.

A. *The Exceptional Nature of the Repudiation*

Two questions were raised before the Court in *Steel Co.*: first, whether the Emergency Planning and Community Right-to-Know Act authorizes citizen suits for violations that are remedied prior to filing of the suit; and second, whether the plaintiff-respondent had standing under Article III to bring such a suit.¹⁴¹ At the outset, it is important to note that neither question, in the manner and at the time raised, had anything whatsoever to do with the doctrine of hypothetical jurisdiction. Indeed, all indications are that the issue of hypothetical jurisdiction was neither raised by the parties before the district or circuit court nor addressed by either court,¹⁴² nor listed as a question presented on certiorari,¹⁴³ nor briefed by the parties on certiorari,¹⁴⁴

138. See *Cross-Sound Ferry Servs., Inc. v. ICC*, 934 F.2d 327, 339-46 (D.C. Cir. 1991) (Thomas, J., concurring in part and concurring in the denial of the petition for review).

139. See *Clow v. HUD*, 948 F.2d 614, 625-28 (9th Cir. 1991) (O'Scannlain, J., dissenting); see also *Koff v. United States*, 3 F.3d 1297, 1300 (9th Cir. 1993) (O'Scannlain, J., concurring in the judgment).

140. To be sure, both judges' opinions were cited in the majority's analysis. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1014-15 (1998) (citing *Clow*, 948 F.2d at 627 (O'Scannlain, J., dissenting)); *Cross-Sound Ferry Servs.*, 934 F.2d at 344-45 & n.10 (Thomas, J., concurring in part and concurring in the denial of the petition for review). Perhaps for good measure, or perhaps out of antagonism, Justice Stevens also cited once to the Thomas opinion, see *Steel Co.*, 118 S. Ct. at 1023-24 (Stevens, J., concurring in the judgment) (citing *Cross-Sound Ferry Servs.*, 934 F.2d at 341 (Thomas, J., concurring in part and concurring in the denial of the petition for review)), the only lower court opinion, in fact, Justice Stevens cited as authority in his discussion of jurisdictional principles.

141. See *Steel Co.*, 118 S. Ct. at 1008 ("The case presents the merits question . . . whether EPCRA authorizes suits for purely past violations. It also presents the jurisdictional question whether respondent, plaintiff below, has standing to bring this action."); *id.* at 1009 ("Petitioner . . . both in its petition for certiorari and in its briefs on the merits, has raised the issue of respondent's standing to maintain the suit, and hence this Court's jurisdiction to entertain it."). For an overview of the other issues addressed in *Steel Co.*, see generally Janet A. Brown & Jeremy Rosen, Note, *Spring 1998 Term: Steel Company v. Citizens for a Better Environment*, 4 ENVTL. LAW. 957 (1998).

142. See *Steel Co.*, No. 95 C 4534, 1995 WL 758122 (N.D. Ill. Dec. 21, 1995), *rev'd*, 90 F.3d 1237 (7th Cir. 1996).

143. Only one question was presented to the Court on certiorari:

nor broached at oral argument,¹⁴⁵ nor even injected into the case by one of the amici curiae.¹⁴⁶ Rather, the Court itself raised and decided the issue *sua sponte*, without notice to, let alone briefing or argument by, the parties.¹⁴⁷

According to the majority opinion, it was Justice Stevens' concurrence that injected the doctrine of hypothetical jurisdiction into the case,¹⁴⁸ and, in turn, the majority's "disposition ma[de] it appropriate

Whether, in enacting the citizen suit provision of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11046, Congress intended to authorize citizens to seek penalties for violations that were cured before the citizen suit was filed, thereby granting EPCRA citizen suit plaintiffs greater enforcement authority than that granted to citizen suit plaintiffs under other federal environmental statutes.

Brief for Petitioner at i, *Steel Co.*, 523 U.S. 83 (1993) (No. 96-643), available in 1997 WL 221790.

144. See *id.*; Brief for Respondent, *Steel Co.*, 523 U.S. 83 (No. 96-643), available in 1997 WL 343462; Reply Brief for Petitioner, *Steel Co.*, 523 U.S. 83 (No. 96-643), available in 1997 WL 429733.

145. See Transcript of Oral Arguments (Oct. 6, 1997), *Steel Co.*, 523 U.S. 83 (No. 96-643), available in 1997 WL 631058.

146. See generally Brief Amici Curiae of the American Iron & Steel Institute et al. in Support of Petitioner, *Steel Co.*, 523 U.S. 83 (No. 96-643), available in 1997 WL 218627; Brief Amicus Curiae of the Pacific Legal Foundation in Support of Petitioner, *Steel Co.*, 523 U.S. 83 (No. 96-643), available in 1997 WL 218629; Brief of American Forest & Paper Association and the National Association of Manufacturers as Amicus Curiae in Support of Petitioner, *Steel Co.*, 523 U.S. 83, available in 1997 WL 218632; Brief Amicus Curiae of the Washington Legal Foundation in Support of Petitioner, *Steel Co.*, 523 U.S. 83 (No. 96-643), available in 1997 WL 218635; Brief Amicus Curiae of the Clean Air Implementation Project in Support of Petitioner, *Steel Co.*, 523 U.S. 83 (No. 96-643), available in 1997 WL 218638; Brief Amicus Curiae of the Chemical Manufacturers Association in Support of Petitioner, *Steel Co.*, 523 U.S. 83 (No. 96-643), available in 1997 WL 218639; Brief Amicus Curiae of the Mid-America Legal Foundation et al. in Support of Petitioner, *Steel Co.*, 523 U.S. 83 (No. 96-643), available in 1997 WL 221815; Brief Amicus Curiae of the United States in Support of Respondent, *Steel Co.*, 523 U.S. 83 (No. 96-643), available in 1997 WL 348166; Brief Amicus Curiae of the State of New York et al. in Support of Respondent, *Steel Co.*, 523 U.S. 83 (No. 96-643), available in 1997 WL 348211; Brief Amicus Curiae of the Natural Resources Defense Council, Inc., et al. in Support of Respondent, *Steel Co.*, 523 U.S. 83 (No. 96-643), available in 1997 WL 351105. In fact, it appears as if the only Supreme Court brief in which it appeared was an amicus brief in a case before the Court in the prior term (an amicus which also happened to file a brief in *Steel Co.*). See Brief of Amici Curiae of the Washington Legal Foundation et al. at 5 n.1, *Bennett v. Spear*, 520 U.S. 154 (1997) (No. 95-813), available in 1996 WL 279768 ("[T]he court of appeals rejected plaintiffs' NEPA claim under the doctrine of hypothetical jurisdiction, i.e., even if plaintiffs did have standing under NEPA, under Ninth Circuit precedent, no NEPA claim lies for a violation of ESA critical habitat designation.") (citation omitted). In all events, the Court has clearly indicated that it "do[es] not ordinarily address issues raised only by amici." *Kamen v. Kempor Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991).

147. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1026 (1998) (Stevens, J., concurring in the judgment) ("The Court[']s . . . discussion of 'hypothetical jurisdiction' . . . is . . . not informed by any adversary submission by either party. Neither the topic of 'hypothetical jurisdiction,' nor any of the cases analyzed, distinguished, and criticized . . . was the subject of any comment in any of the briefs submitted by the parties or their amici.").

148. See *id.* at 1012 (contending that "Justice Stevens' concurrence proceeds to argue the bolder point that jurisdiction need not be addressed first" and that "[t]his is . . . the position embraced by . . . Courts of Appeals, which find it proper to proceed immediately to the merits question, despite jurisdictional objections . . . at least where (1) the merits question is more

to address” the doctrine as found in a “substantial body of court of appeals precedent.”¹⁴⁹ The divide between the majority and Justice Stevens was, in the first instance, one of legal characterization: Was the disputed actionability of a citizen suit for past violations a jurisdictional or nonjurisdictional question? Justice Stevens, maintaining that it was jurisdictional, contended that it could be addressed before the obviously jurisdictional issue of Article III standing, given that a court can choose between jurisdictional questions and, where one is constitutional and one is not, should normally address the latter first.¹⁵⁰ The majority, by contrast, characterized the question of actionability as nonjurisdictional¹⁵¹ and, after repudiating both Justice Stevens’ characterization¹⁵² and the doctrine of hypothetical jurisdiction,¹⁵³ eventually found no constitutional standing¹⁵⁴ and thus declined to address the actionability question.¹⁵⁵

Rather than viewing Justice Stevens’ advocacy of addressing actionability first as solely a difference of characterization, the Court viewed it as advocacy of the approach of hypothetical jurisdiction used by the lower courts.¹⁵⁶ In turn, this reading of Justice Stevens’ position necessarily opened up an entirely new debate over the propriety of hypothetical jurisdiction, one rather removed from either the question presented on certiorari or the question of standing. As recounted below, this tangential debate then produced not only a majority position, but also various degrees of agreement or disagreement by Justices O’Connor and Kennedy in the former’s concurrence, by Justice Breyer in his partial concurrence, and, of course, by Justice Stevens in his concurrence in the judgment, which at points was joined by Justices Souter and Ginsburg.

readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied”).

149. *Id.* at 1012 n.1.

150. *See id.* at 1022-25 (Stevens, J., concurring in the judgment).

151. *See id.* at 1010.

152. *See id.* at 1010-12.

153. *See id.* at 1012-16.

154. *See id.* at 1017-20 (specifically finding no redressability, the third of three requirements for Article III standing).

155. *See id.* at 1020:

Having found that none of the relief sought by respondent would likely remedy its alleged injury in fact, we must conclude that respondent lacks standing to maintain this suit, and that we and the lower courts lack jurisdiction to entertain it. However desirable prompt resolution of the merits EPCRA question may be, it is not as important as observing the constitutional limits set upon courts in our system of separated powers. EPCRA will have to await another day.

156. *See id.* at 1012 n.1 (contending that “Justice Stevens’ concurrence takes essentially the same approach” as “the approach taken by this substantial body of court of appeals precedent”).

Whether or not the Court correctly perceived the need or justification to address hypothetical jurisdiction can itself be debated. Justice Stevens, for one, thought not, contending that the Court's "long excursion"¹⁵⁷ into the doctrine was "pure dictum because it [was] entirely unnecessary to an explanation of the Court's decision."¹⁵⁸ But the fact that the Court addressed an unpleaded, unbrieffed legal theory at all is itself noteworthy. This noteworthiness stems not only from the jurisprudential and institutional significance that naturally attends a decision to address a theory under such circumstances, but also from the apparent irony—in light of the circumstances—of reaching out to address the particular theory in question.

There is, to begin with, enormous jurisprudential and institutional significance to addressing an unargued issue of law in light of the Court's own rules, two of which are directly relevant. The first is that "[o]nly the questions set out in the petition [for certiorari], or fairly included therein, will be considered by the Court."¹⁵⁹ The second is that, "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."¹⁶⁰ While the Court has "on occasion rephrased the question presented by a petitioner, or requested the parties to address an important question of law not raised in the petition for certiorari,"¹⁶¹ and while its "power to decide is not limited by the precise terms of the question presented"¹⁶² and extends to "subsidiary question[s] fairly included" in the questions actually presented,¹⁶³ the Court has admon-

157. *Id.* at 1025 (Stevens, J., concurring in the judgment).

158. *Id.* at 1026.

159. SUP. CT. R. 14.1(a). According to the Court, this rule serves two purposes: (1) "[I]t provides the respondent with notice of the grounds upon which the petitioner is seeking certiorari, and enables the respondent to sharpen the arguments as to why certiorari should not be granted," *Yee v. City of Escondido*, 503 U.S. 519, 535-36 (1992), and (2) it "assists the Court in selecting the cases in which certiorari will be granted." *Id.* at 536; *see also id.* at 538 (noting the "benefit of developed arguments on both sides and lower court opinions squarely address[ing] the question").

160. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *see, e.g., White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 214 n.12 (1983) (declining to address a particular issue the lower court did not resolve because it "has not been, to any great extent, briefed or argued in this Court," and because the Court "did not grant certiorari on the issue").

161. *Yee*, 503 U.S. at 535 (citation omitted); *see also* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 5.11, at 246 (7th ed. 1993) (noting that the Court, particularly after ordering reargument of a case, may "specify or add[] certain questions to be addressed by the parties in additional briefs and oral arguments"); *id.* § 6.25(g), at 340-41 (discussing the power of the Court to rephrase or add to the questions presented).

162. *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978).

163. SUP. CT. R. 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein."); *see generally* STERN ET AL., *supra* note 161, § 6.25(f), at 338-39.

ished that there is a “heavy presumption”¹⁶⁴ that it will “not consider questions outside those presented in the petition for certiorari.”¹⁶⁵ But “[t]his rule is prudential in nature,” and the presumption it creates can be overcome or “disregard[ed] . . . in the most exceptional cases.”¹⁶⁶ In particular, while the Court remains “generally reluctant”¹⁶⁷ to consider an issue not presented in the certiorari petition or not raised in the lower courts,¹⁶⁸ the Court may do so where the issue is “important,”¹⁶⁹ or “significant,”¹⁷⁰ or poses an “important question of judicial administration,”¹⁷¹ or where it is “recurring,”¹⁷² or “where reasons of urgency or of economy suggest the

164. *Yee*, 503 U.S. at 537.

165. *Id.* at 535; *cf.* *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (“Ordinarily, this Court does not decide questions not raised or resolved in the lower court.”); *Adickes*, 398 U.S. at 147 n.2 (same).

166. *Yee*, 503 U.S. at 535; *cf.* *Duignan v. United States*, 274 U.S. 195, 200 (1927) (“It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.”). While the rule is entirely prudential in cases arising from federal courts—which would thus encompass the hypothetical jurisdiction scenario—the Court has “expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts.” *Yee*, 503 U.S. at 533.

167. *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984).

168. Some of the legal standards cited in the text, *see infra* notes 169-73 and accompanying text, are drawn from the Court’s discussion of addressing questions not raised in the lower courts, though possibly raised in the certiorari petition. Because of fundamental similarities between that situation and one in which the Court addresses a question not set forth in the certiorari petition, and because hypothetical jurisdiction in fact presented both situations, those cases are cited here as relevant authority. *Cf.* *STERN ET AL.*, *supra* note 161, § 6.26, at 348 (noting that the Court itself has not always separated these analyses).

169. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); *Blonder-Tongue Labs., Inc. v. University Found.*, 402 U.S. 313, 320 n.6 (1971) (noting that the rule “does not limit our power to decide important questions not raised by the parties”).

170. *Cf. Blonder-Tongue Labs.*, 402 U.S. at 320 n.6 (reaching a question not presented in the petition for certiorari in part because “it is a significant one,” though also noting that it is “in the same general field” as judicial administration and “has been fully briefed and argued by the parties and amici”).

171. *Id.* (noting that in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), “a landmark decision involving an important question of judicial administration in the federal courts, this Court overruled a prior decision of many years’ standing although the parties did not urge such a holding in their briefs”); *see also Carlson*, 446 U.S. at 17 n.2 (reaching a question not presented below because “the interests of judicial administration will be served by addressing the issue on its merits,” though also noting that “the issue is squarely presented and fully briefed” and “is properly raised in another petition for certiorari being held pending disposition of this case”).

172. *Carlson*, 446 U.S. at 17 n.2 (reaching an “important, recurring” question); *cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 & n.15 (1981) (reaching an issue that was neither properly preserved below nor suitable for plain error review in part because it “is important and appears likely to recur,” although noting that “the question was squarely presented and decided on a complete trial record by the court of first resort, was argued by both sides to the Court of Appeals, and has been fully briefed before this Court”).

need to address the unrepresented question in the case under consideration."¹⁷³

Apparently, though with little discussion, *Steel Co.* must have been a "most exceptional case" and this presumption must have been overcome, for the Court quite obviously reached the propriety of hypothetical jurisdiction despite the doctrine's total absence from any of the pleadings or proceedings to that point.¹⁷⁴ The Court's decision to do so likely reflected several considerations that only underscore the jurisprudential and institutional significance of the decision itself. Foremost among these is that the issue of hypothetical jurisdiction did indeed pose an important and recurring question of judicial administration. Though it did not concern the Court's own jurisdiction as such, in which case the Court clearly could have addressed it despite its having been "neither raised by the parties nor passed upon by the courts below,"¹⁷⁵ it did concern the jurisdiction of the Article III judiciary as a whole and the obligation of the lower courts to obey the Supreme Court's interpretations of Article III.¹⁷⁶

173. *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

174. By contrast, the Court, just a few months later in a decision also authored by Justice Scalia, summarily declined to address a constitutional issue raised in the petitioner's brief, but not addressed by the lower courts. See *Pennsylvania Dep't of Corrections v. Yeskey*, — U.S. —, 118 S. Ct. 1952, 1956 (1998).

175. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967) ("Before considering the issues presented by the petition for certiorari, we find it necessary to dispose of a question neither raised by the parties nor passed upon by the courts below. Since the matter concerns our jurisdiction, we raise it on our own motion."); see also *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it.") (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)); STERN ET AL., *supra* note 161, § 6.26, at 346 ("Jurisdictional issues, of course, can always be considered, even *sua sponte*, whether or not raised below.").

176. See Thomas J. Long, Note, *Deciding Whether Conflicts with Supreme Court Precedent Warrant Certiorari*, 59 N.Y.U. L. REV. 1104, 1105 (1984) (arguing that once a conflict is found between the Supreme Court and a lower court decision, "the certiorari decision should be informed by two interrelated considerations unique to vertical conflicts: whether and to what extent the allegedly conflicting lower court decision (1) compromises the precedential value of Supreme Court decisions, or (2) undermines the integrity of the judicial hierarchy"). Needless to say, "[f]ederal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court. . . . [U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Jaffree v. Wallace*, 705 F.2d 1526, 1532 (11th Cir. 1983) (quoting *Hutte v. Davis*, 454 U.S. 370, 375 (1982)), *aff'd*, 472 U.S. 38 (1985); see also David C. Bratz, Comment, *Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent*, 60 WASH. L. REV. 87, 91 (1984) ("[L]ower courts are . . . constrained by their subordinate position in the judicial system. The American judicial hierarchy deprives lower courts of the right simply to refuse to follow binding Supreme Court precedent."). For a comprehensive, provocative, and well-reasoned analysis of this obligation, see Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994).

More than that, it implicated the federal judiciary's constitutional fidelity and institutional integrity, given the special "province and the duty of the judicial department to say what the law is"¹⁷⁷ and, in particular, its unique obligation to articulate and preserve the constitutional limits of governmental power.¹⁷⁸

Furthermore, the use of hypothetical jurisdiction by the lower federal courts was so manifestly aberrant that there was arguably no need to solicit arguments from the parties or to be presented with a lower court decision invoking the doctrine. In other contexts, the Court has recognized its own "authority to notice plain error" despite the absence of briefings or arguments,¹⁷⁹ just as it has recognized that "a federal appellate court is justified in resolving an issue not passed on below . . . where the proper resolution is beyond any doubt."¹⁸⁰ Given the apparent futility of any debate over the validity of the doctrine, at least in light of its ultimate repudiation by the Court, the criterion of economy certainly disfavored additional briefing or avoidance of the issue altogether.¹⁸¹ Moreover, as explained elsewhere in this

177. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

178. The Court in *City of Boerne* noted:

Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 2172 (1997); see also *Powell v. McCormack*, 395 U.S. 486, 549 (1969) ("[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution."); *Baker v. Carr*, 369 U.S. 186, 211 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government . . . is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."); *Jaffree*, 705 F.2d at 1532 ("Under our form of government and long established law and custom, the Supreme Court is the ultimate authority on the interpretation of our Constitution and laws; its interpretations may not be disregarded.")

179. *Blonder-Tongue Labs., Inc. v. University Found.*, 402 U.S. 313, 320 n.6 (1971) (noting the option "where the parties have not briefed or argued a question that the Court nevertheless finds controlling under its authority to notice plain error"); see also SUP. CT. R. 24.1(a) ("At its option . . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide."); STERN ET AL., *supra* note 161, § 3.20, at 138-40, § 6.26, at 346-49 (reviewing the doctrine).

180. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). For a general discussion, see Rhett R. Dennerline, Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985 (1989).

181. In any event, to the extent that competing arguments were necessary, they could be readily found in various federal appellate opinions. Compare, e.g., *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151, 154-60 (2d Cir. 1990) (defending the doctrine at length), with *Clow v.*

Article, the likelihood of the Court ever being squarely presented with the question was extremely remote, despite the doctrine's recurring incidence.¹⁸² Thus, much like the exception allowing consideration of an otherwise moot dispute where the issue is "capable of repetition, yet evading review,"¹⁸³ the lifting of the prudential bar against addressing unrepresented questions on certiorari did have a certain compelling logic in this case.¹⁸⁴ Finally, though quite speculatively, one can imagine that the doctrine of hypothetical jurisdiction had likely been in a few justices' sights for some time,¹⁸⁵ and that *Steel Co.* (particularly Justice Stevens' concurrence) came "close enough" for purposes of isolating and eliminating the doctrine.

The significance of addressing hypothetical jurisdiction despite its absence from the pleadings and lower court decisions is further magnified by an unusual degree of irony. After all, the Court in *Steel Co.* reached out amidst this total absence to address, of all things, the unauthorized reaching out by federal courts to address the merits in the absence of jurisdiction. It did so, moreover, prior to the verification of subject-matter jurisdiction,¹⁸⁶ despite its simultaneous adnomi-

United States Dep't of Hous. & Urban Dev., 948 F.2d 614, 625-28 (9th Cir. 1991) (O'Scannlain, J., dissenting) (criticizing the doctrine at length), and *Cross-Sound Ferry Servs., Inc. v. ICC*, 934 F.2d 327, 339-46 (D.C. Cir. 1991) (Thomas, J., concurring in part and concurring in the denial of the petition for review) (same).

182. See *infra* notes 306-11 and accompanying text. Had the doctrine's validity been squarely presented as a question in a certiorari petition, the Court could easily have justified granting review. The circuits were more or less unified in their general condemnation of the doctrine, and the paradigmatic basis for review is a circuit split, see SUP. CT. R. 10(a) (indicating that the Court will consider granting review when there is a split of authority between federal circuit courts); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("[I]t is very important that we be consistent in not granting the writ of certiorari except . . . in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals."). However, the Court could have determined that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c); see also STERN ET AL., *supra* note 161, § 4.5, at 176 (noting that certiorari may be appropriate where a lower court decision "involves a question upon which prior decisions of the Supreme Court are irreconcilable or inconsistent, or where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification") (citations omitted).

183. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam); *Roe v. Wade*, 410 U.S. 113, 125 (1973); *National Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 350 (D.C. Cir. 1997).

184. Cf. *Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981) (reaching an issue "not raised on appeal below or included as a question in the petition for certiorari" in part because the circumstances of the case were such that it was "unlikely" that the attorney below would have raised the issue).

185. Justice Thomas, of course, had vigorously dissented from the doctrine's use in 1991 while sitting on the District of Columbia Circuit. See *supra* note 138 and accompanying text.

186. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1025 (1998) (Stevens, J., concurring in the judgment) ("The Court . . . argu[es] that the standing question

tion to lower federal courts that “jurisdiction be established as a threshold matter,” a requirement which it described as “inflexible and without exception.”¹⁸⁷ Finally, as Justice Stevens argued, the Court’s repudiation of hypothetical jurisdiction was “entirely unnecessary to an explanation of the Court’s decision”¹⁸⁸ and, not having been adversarially addressed by the parties, was comparable to an advisory opinion.¹⁸⁹ To be sure, in light of the Court’s eventual holding that the plaintiff-respondent lacked standing and thus the federal courts lacked jurisdiction, it is difficult to see how a lower court on remand could have invoked hypothetical jurisdiction, which requires that the jurisdictional issue be difficult and heretofore unresolved.

Whether or not there is ultimate meaning to this depth of irony is, of course, unclear, particularly since irony is not necessarily or intrinsically a legally significant phenomenon.¹⁹⁰ It is at times, however, an indicator of deeper instability or tectonic change amidst the strata and substrata of a legal or jurisprudential culture.¹⁹¹ The foundational case of *Marbury v. Madison*,¹⁹² in which Chief Justice Marshall discussed the merits at length only to conclude that the Court lacked jurisdiction, is perhaps the classic (and perhaps the most relevant) example. If nothing else, then, the rich irony of *Steel Co.* may reveal a level of turbulence within the law of jurisdiction not evident from the surface of the majority’s opinion (though confirmed

must be addressed first. Ironically, however, before ‘first’ addressing standing, the Court takes a long excursion that entirely loses sight of the basic reason why standing is a matter of such importance to the proper functioning of the judicial process.”). The majority reasoned that:

[Standing] would normally be considered a threshold question that must be resolved in respondent’s favor before proceeding to the merits. Justice Stevens’ opinion concurring in the judgment, however, claims that the question whether section 11046(a) permits this cause of action is *also* ‘jurisdictional,’ and so has equivalent claim to being resolved first. Whether that is so has significant implications for this case and for many others, and so the point warrants extended discussion.

Id. at 1009.

187. *Id.* at 1012 (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

188. *Steel Co.*, 118 S. Ct. at 1026 (Stevens, J., concurring in the judgment).

189. *See id.*

190. *Cf. Amanullah v. Nelson*, 811 F.2d 1, 18 (1st Cir. 1987) (observing that “irony is no stranger to the law”).

191. For an extremely useful inventory of other grammatical or rhetorical devices used in judicial opinion writing, accompanied by commentary on their deeper meaning and culminating in an analysis of their deployment specifically in jurisdictional opinions, see Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75 (1998).

192. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

as well by the many divisions among the Court's members and by the confusion that the decision has already engendered).¹⁹³

B. *The Reasoning and Merits of the Repudiation*

Notwithstanding the exceptionality of the Court's decision to address hypothetical jurisdiction at all, what is most significant is that ultimately it did reach, and did repudiate, the doctrine.¹⁹⁴ In light of the doctrine's renegade nature, this repudiation was more or less straightforward and, in the Court's words, "should [have] come as no surprise."¹⁹⁵ Though noting that several circuit courts had embraced some version of it, the Court "decline[d] to endorse [it],"¹⁹⁶ principally on two interdependent grounds of constitutional structure. First, the practice of hypothetical jurisdiction transgresses the limited and enumerated powers of the judiciary—if not the very concept it-

193. Some courts have described the Court's action in general terms in a manner that portrays the repudiation as straightforward. See, e.g., *Seaborn v. Florida*, 143 F.3d 1405, 1407 n.2 (11th Cir. 1998) ("The Supreme Court squarely rejected the doctrine of hypothetical jurisdiction in *Steel* and instructed that a challenge to Article III subject matter jurisdiction must be resolved before a court may address the merits of the underlying claim in any manner."), *petition for cert. filed*, 67 U.S.L.W. 3409 (U.S. Sept. 14, 1998) (No. 98-998); *Nagel v. ADM Inv. Servs., Inc.*, No. 96 CV 2675, 1998 WL 381978, at *4 (N.D. Ill. July 6, 1998) (stating that *Steel Co.* "abolish[ed]" hypothetical jurisdiction"). Several other courts, however, have found the decision slightly less lucid. See, e.g., *Hardemon v. City of Boston*, 144 F.3d 24, 26 (1st Cir. 1998) ("The Supreme Court . . . has recently issued a decision in which a plurality disapproves [the assumption of jurisdiction]. The various opinions in the case, read as a whole, are not entirely clear as to whether (or to what extent) *Steel Co.* undermines our earlier practice.") (citation omitted); *East Bay Mun. Util. Dist. v. United States Dep't of Commerce*, 142 F.3d 479, 482 (D.C. Cir. 1998) (noting that it is "uncertain whether *Steel Co.*'s holding requires us to resolve the government's waiver claim first, when, as here, even the merits evidence that would be excluded under the government's waiver theory comes nowhere near establishing liability, and when we are certain of our jurisdiction over the suit itself"); *Democratic Senatorial Campaign Comm. v. FEC*, 139 F.3d 951, 952 (D.C. Cir. 1998) ("*Steel Co.* seems to hold that before deciding the merits, federal courts must . . . decide . . . standing whenever it is in doubt. We say 'seems' because two of the Justices comprising the five-Justice majority on this point interpreted the Court's opinion as not setting down an absolute, rigid, unbending rule."); *Oil, Chem. & Atomic Workers Int'l Union v. Peña*, 18 F. Supp. 2d 6, 14 n.6 (D.D.C. 1998) (acknowledging the uncertainty expressed, the D.C. Circuit in *Democratic Senatorial Campaign Committee*; see also *Marathon Oil Co. v. A.G. Ruhrgas*, 145 F.3d 211 (5th Cir. 1998) (en banc) (dividing 9-7 over whether *Steel Co.* allows personal jurisdiction to be assessed prior to the verification of subject-matter jurisdiction), *cert. granted*, 119 S. Ct. 589 (1998) (No. 98-470).

194. The judgment in *Steel Co.* was 9-0, but the Justices parted ways on the reasoning. Justice Scalia authored the majority opinion, which was joined in whole by four other Justices (Rehnquist, O'Connor, Kennedy, and Thomas) and in part by Justice Breyer, who also filed an opinion concurring in part and concurring in the judgment. Justice O'Connor, joined by Justice Kennedy, filed a concurring opinion. Justice Stevens filed an opinion concurring in the judgment, which was joined in selected parts by Justices Souter and Ginsburg, the latter of whom also filed her own opinion concurring in the judgment. See generally *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003 (1998).

195. *Id.* at 1012.

196. *Id.*

self—by “carr[ying] the courts beyond the bounds of authorized judicial action.”¹⁹⁷ Federal courts, after all, are limited to the adjudication of “cases” and “controversies” within the meaning of Article III, Section 2,¹⁹⁸ which is essentially to say they are prohibited from rendering advisory opinions.¹⁹⁹ According to the Court, “[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning.”²⁰⁰ Second and relatedly, the practice of hypothetical jurisdiction “offends fundamental principles of separation of powers.”²⁰¹ This is so because “[t]he statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.”²⁰²

Given the Court’s willingness to address the doctrine of hypothetical jurisdiction *sua sponte*, without briefing or argument, this Article propounds that the doctrine, and hence the doctrine’s repudiation, are of more than passing importance. This is indeed the case,

197. *Id.*

198. U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases [enumerated] . . . [and] to Controversies [enumerated]”); *see also* Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990) (“Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies.”).

199. *See, e.g.*, Pennell v. City of San Jose, 485 U.S. 1, 8 (1988) (noting “Art. III’s proscription against advisory opinions”). The Court has noted:

[I]t is quite clear that “the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.” Thus, the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions on federal courts. When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III.

Flast v. Cohen, 392 U.S. 83, 96 (1968) (footnote omitted) (quoting CHARLES A. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 34 (1st ed. 1963)).

200. *Steel Co.*, 118 S. Ct. at 1016 (citing *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792)); *see also* *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1092 (D.C. Cir. 1996) (rejecting a party’s “suggest[ion] . . . that we need not reach its jurisdictional arguments until after we consider the merits of the case” because “we have an affirmative obligation ‘to consider whether the constitutional and statutory authority exist for us to hear each dispute’” and “[i]f . . . federal courts cannot grant any of the relief sought . . . a decision of this court would be an advisory opinion barred by Article III of the Constitution” (quoting *Herbert v. National Academy of Sciences*, 974 F.2d 192, 196 (D.C. Cir. 1992))), *cert. denied*, 117 S. Ct. 737 (1997).

201. *Steel Co.*, 118 S. Ct. at 1012.

202. *Id.* at 1016 (citing *United States v. Richardson*, 418 U.S. 166, 179 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)).

and it is well worth noting the value of this repudiation to the judiciary as an institution and to the nation's system of constitutional governance. To be sure, while the doctrine itself may have possessed certain potential attributes, such as judicial economy and restraint, these attributes are simply incomparable to the benefits that arise from its avoidance. The most obvious such benefit is the legitimacy that derives from adhering, even formalistically, to the structural mandates of the Constitution. In order to remain authoritative in its enforcement of such mandates against the other branches and the states, the federal judiciary must first keep its own house in order, especially since the vestiture of constitutional review exclusively with the courts, combined with the institution of life tenure, effectively makes them the only case-by-case check on their own power.²⁰³ Not only, then, must the federal bench avoid constitutional impropriety, it must arguably avoid even the appearance of constitutional impropriety, and hypothetical jurisdiction—which amounted to the exercise of power without authority—posed a serious obstacle to the fulfillment of these commitments. The constitutional promise of limited government, both as a recognition of popular sovereignty and as a safeguard against the abridgment of liberty,²⁰⁴ demands that there must be discernible boundaries to federal power. By clarifying the necessity of confirmed subject-matter jurisdiction, the *Steel Co.* decision demarcates one such boundary and, in so doing, reaffirms this promise of limited government.

The consequences of the *Steel Co.* decision extend well beyond the abstractions of constitutional principle, however. The decision, after all, not only repudiated a doctrine; it also terminated the abuse

203. In theory, Congress may generally and prospectively restrict, or even abolish, the jurisdiction of the lower courts. See *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) ("There can be no question of the power of Congress . . . to define and limit the jurisdiction of the inferior courts of the United States."); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("[H]aving a right to prescribe, Congress may withhold from any court of its creation jurisdiction . . . [over] any of the enumerated controversies."). Congress may also qualify the Supreme Court's appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2. But the actual extent of Congress's power to limit jurisdiction remains uncertain, see generally Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress's Authority To Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). The separation of powers clearly prohibits Congress from "prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it," or "retroactively commanding the federal courts to reopen final judgments" for purposes of revision. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218, 219 (1995) (quoting *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872)).

204. See, e.g., Lewis F. Powell, Jr., *Our Bill of Rights*, 25 IND. L. REV. 937, 940 (1992) ("The structure of limited government that the Constitution imposes . . . protects freedom by dispersing power (i) between the state and national governments and (ii) among the three branches of federal authority.").

of this doctrine. As illustrated earlier, the federal courts apparently could not limit the doctrine even to its own requirements, leading both to its overapplication and to its misapplication.²⁰⁵ Additionally, there is some evidence that the doctrine was not applied, or even misapplied, on an even-handed or random basis, but instead was employed in certain contexts more than in others. Appeals involving claims arising under section 440 of the Antiterrorism and Effective Death Penalty Act,²⁰⁶ for example, appear to have been especially good candidates for its invocation.²⁰⁷ In turn, to the extent that this non-randomness transgressed congressional will, or fell upon politically or legally vulnerable classes, the judicial misuse of hypothetical jurisdiction may have been even more unlawful and problematic—and thus its repudiation even more salutary—than one might have first supposed.²⁰⁸

In addition, the aberrant nature of hypothetical jurisdiction, as often happens with deviant legal phenomena, necessarily generated secondary disturbances in the jurisprudential field. It has already been noted, for instance, that the doctrine effectively perpetuated itself by encouraging courts to avoid difficult jurisdictional issues, simply tossing them from one case to another, or one tribunal to another, in the manner of a hot potato.²⁰⁹ Because these issues will now require resolution, the legal system in theory should benefit by marginal reductions both in uncertainty and in needless and redundant litigation over identical jurisdictional questions.²¹⁰ At the same time, the elimination of hypothetical jurisdiction will obviate the need for courts, which after already having assumed jurisdiction in an earlier case decide or discover that jurisdiction did not in fact exist, to have to wait until the issue is raised again in a different, subsequent case to set the record straight. Forcing a jurisdictional determination at the

205. See *supra* Part III.C.

206. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended at scattered sections of 8, 15, 18, 22, 28, 40, 42, 50 U.S.C.).

207. See Prakash, *supra* note 105, at 1433 n.87 (listing cases).

208. The disfigurement of jurisdictional doctrines in a manner adverse to vulnerable legal classes, potentially justified as a matter of judicial economy, is apparently not unprecedented. See generally Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989).

209. See *supra* text accompanying note 75.

210. As noted by then-Justice Rehnquist, “[w]ith the vast expansion in the case dockets of all federal courts in recent years, the more settled the procedural system by which these cases are to run the judicial gauntlet, the better off will be litigants, lawyers, and judges.” *Yazoo County Indus. Dev. Corp. v. Suthoff*, 454 U.S. 1157, 1161 (1982) (Rehnquist, J., dissenting from the denial of certiorari).

time it is raised will, in other words, not only reduce uncertainty but will do so in a prompt, efficient manner.²¹¹

Finally, the availability of hypothetical jurisdiction undermined certain jurisdictional principles, which in turn undermined certain judicial practices. It has sometimes been asserted, for example, that a prior or lower court's silence on the issue of subject-matter jurisdiction, though itself not necessarily a desirable circumstance,²¹² could nevertheless amount to an unphed finding of jurisdiction of which a subsequent or higher court could take notice.²¹³ But this

211. Of course, it is also true that a jurisdictional determination, even if erroneous, will likely enjoy the force of *res judicata*, such that courts will now, more than before, have to live with their jurisdictional errors as well. See *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938); *Assuming Jurisdiction Arguendo*, *supra* note 4, at 719-20. This rule would not apply, however, to cases that are still pending. Cf. *United States v. Kuhn*, 638 F.2d 17, 17 (5th Cir. 1981) (*per curiam*) (holding in regard to a prior opinion in the same case that, because the court "expressly reserv[ed] th[e] question" of jurisdiction and the court in a different case had held against jurisdiction on similar facts, that the earlier opinion is "of no effect" and that "[w]e withdraw it").

212. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1011 (1998) (labeling such practices "drive-by jurisdictional rulings").

213. See, e.g., *Trans World Airlines, Inc. v. Morales*, 949 F.2d 141, 144 (5th Cir. 1991) (noting in a later appeal of the same case that, "[w]hile the prior opinion does not explicitly discuss it, the necessary assumption is that the prior panel found subject matter jurisdiction present. Otherwise, the panel would not have reached the merits and affirmed the preliminary injunction."), *aff'd in part and rev'd in part on other grounds*, 504 U.S. 374 (1992); *Schultz v. Wellman*, 717 F.2d 301, 304 n.7 (6th Cir. 1983) (noting on appeal that, "[w]hile not explicitly stated, we assume that the [district court] found jurisdiction to consider such claims under 28 U.S.C. § 1331, federal question jurisdiction"); *River Park, Inc. v. City of Highland Park*, 703 N.E.2d 883, 890-91 (Ill. 1998) (concluding that a particular claim, previously filed in federal court, must have been dismissed by the federal court for failure to state a claim rather than for lack of subject-matter jurisdiction, in part because the federal court had reviewed the merits and "without subject matter jurisdiction, they would have had no power to conduct this sort of review") (citing *Steel Co.*, 118 S. Ct. at 1012); *Assuming Jurisdiction Arguendo*, *supra* note 4, at 714 ("If the court reaches the merits of a dispute without expressly addressing subject matter jurisdiction, a finding of jurisdiction is implied.") (citing *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938)). Although a finding of jurisdiction may generally be implied or inferred, it need not be, and the normal rule is that "[i]ssues, even jurisdictional issues, lurking in the record but not addressed do not bind the court in later cases." *R.R. Donnelley & Sons Co. v. FTC*, 931 F.2d 430, 433 (7th Cir. 1991); see also *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) ("[T]he existence of unaddressed jurisdictional defects has no precedential effect."); *Kershaw v. Shalala*, 9 F.3d 11, 13 n.3 (5th Cir. 1993) (noting that the Court's exercise of jurisdiction in a prior decision does not "constitute a binding precedent . . . because the jurisdictional issue was neither raised by the parties nor addressed by the Court"); *Grant v. Shalala*, 989 F.2d 1332, 1341 (3d Cir. 1993) ("[S]ince the district court's authority to make findings was not challenged or addressed in the district court, the court of appeals, or the Supreme Court, the mere fact that findings were made is inconsequential for precedential purposes."); *National Cable Television Ass'n, Inc. v. American Cinema Editors, Inc.*, 937 F.2d 1572, 1581 (Fed. Cir. 1991) ("When an issue is not argued or is ignored in a decision, such decision is not precedent to be followed in a subsequent case in which the issue arises."); *Brooks v. Flagg Bros., Inc.*, 553 F.2d 764, 774 (2d Cir. 1977) (stating that "such a *sub silentio* jurisdictional ruling is not binding precedent in this court . . ."), *rev'd on other grounds*, 436 U.S. 149 (1978); *Shattuck v. Hoegl*, 523 F.2d 509, 514 n.8 (2d Cir. 1975) ("[T]he precedential value of a *per curiam* exercise of jurisdiction noting an affirmance in open court is at best doubtful where the issue of jurisdiction apparently was not raised but passed *sub silentio*"); *Association of Westinghouse Salaried Employees v.*

practice can operate only if two basic principles are observed: first, that a court cannot proceed to the merits without subject-matter jurisdiction, and second, that a court is under an obligation to raise and assess its jurisdiction, *sua sponte* if necessary.²¹⁴ Hypothetical jurisdiction, however, directly undermines both foundational principles, for it allows courts to reach the merits without confirming jurisdiction and, as a practical matter, essentially excuses them from their obligation to undertake such confirmation. Accordingly, by repudiating hypothetical jurisdiction the Court has restored the reliability of these principles and, in turn, has once again rendered operative the various practices that derive their validity from them.

C. *The Strength of the Repudiation*

For all its merit, the *Steel Co.* Court's repudiation of hypothetical jurisdiction is, when viewed as a whole, not an exemplar of clarity, which itself is perhaps one more ironic feature of the decision. At least three factors cause this ambiguity. First, several justices—including two of the five majority justices—wrote separately in a manner that potentially undercut the reach, or at least the rigidity, of the repudiation. Second, the majority opinion itself, rather than overruling the Court's cases that spawned the doctrine in the lower courts, attempted instead to distinguish them categorically, which in turn preserved a number of related doctrines and effectively left intact a number of potential loose ends. And third, as decisions often do, the *Steel Co.* opinion generated or left unresolved a number of related questions, some of which have already been raised in the decision's wake. This Subpart will discuss the breakdown of the Justices in *Steel Co.*, while the following Subpart will discuss the doctrines apparently preserved by the decision.

Westinghouse Elec. Corp., 210 F.2d 623, 628-29 (3d Cir. 1954) (noting that where "the question of federal jurisdiction was passed *sub silentio*" it does not amount to "binding precedent on the issue of jurisdiction"), *aff'd*, 348 U.S. 437 (1955). Few cases, however, expressly prohibit implied findings of jurisdiction—some candidates include *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254, 1261 (5th Cir. 1988) ("Since the district court did not even mention jurisdiction before entering a final judgment, we cannot assume that it made such a determination, nor can we affirm its judgment."), and *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986) ("[D]ecisions that fail to remark [on] a jurisdictional issue are not assumed to have resolved it by their silence.")—rather, it appears to be a matter within the prerogative of the subsequent or appellate court.

214. See, e.g., *Harper v. National Flood Insurers Ass'n*, 494 F. Supp. 234, 239-40 (M.D. Pa. 1980) (noting the importance of this latter requirement as a premise for implying a finding of jurisdiction).

The repudiation of hypothetical jurisdiction was accomplished in Part III of the majority opinion, which was supported by no more than five votes. These include its author, Justice Scalia, and the four who signed on to that part—Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas.²¹⁵ In addition to the majority opinion, there were four separate opinions of differing alignments. Justice O'Connor, joined by Justice Kennedy, concurred, specifically expressing some hesitation over the majority's treatment of the doctrine of hypothetical jurisdiction. Justice Breyer concurred in part (but not in Part III) and concurred in the judgment, specifically disagreeing with the majority's treatment of the doctrine. Justice Stevens, joined in part by Justice Souter and in lesser part by Justice Ginsburg, concurred only in the judgment, offering a different conceptualization of the issues and, from the majority's perspective, a contrary view of the doctrine of hypothetical jurisdiction. Finally, Justice Ginsburg also concurred in the judgment only, offering no commentary whatsoever on the doctrine.

Of these separate opinions, two aspects in particular render the repudiation less than definitive: the O'Connor concurrence and the uncertain positions of Justice Ginsburg and, potentially, of Justices Stevens and Souter. First, Justices O'Connor and Kennedy "agree[d] with the Court's statement that federal courts should be certain of their jurisdiction before reaching the merits of a case"²¹⁶ and further that the Court's precedents seemingly to the contrary were "defensible."²¹⁷ But they "wr[ote] separately to note that . . . the Court's opinion should not be read as cataloging an exhaustive list of circumstances under which federal courts may exercise judgment in 'reserv[ing] difficult questions of . . . jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.'"²¹⁸

While this is hardly a loss of two of the five votes supporting repudiation at a general level, it is potentially significant in a number of ways. At the very least, it corrodes the seemingly rigid stance articulated by the majority,²¹⁹ which in turn could invite the lower fed-

215. Justice Breyer joined only Parts I and IV of the majority opinion.

216. *Steel Co.*, 118 S. Ct. at 1020 (O'Connor, J., concurring).

217. *Id.*

218. *Id.* (quoting *Norton v. Mathews*, 427 U.S. 524, 532 (1976)).

219. This is precisely what one panel of the District of Columbia Circuit concluded. See *Democratic Senatorial Campaign Comm. v. FEC*, 139 F.3d 951, 952 (D.C. Cir. 1998) (per curiam) ("*Steel Co.* seems to hold that before deciding the merits, federal courts must always decide Article III standing whenever it is in doubt." (citing *Steel Co.*, 118 S. Ct. at 1020 (O'Connor, J., concurring))); see also *Dao v. Knightsbridge Int'l Reinsurance Corp.*, 15 F. Supp.

eral courts—as well as the Court itself, for that matter—to view certain applications of hypothetical jurisdiction as unaffected and to experiment once again with the concept of hypothetical jurisdiction in different or uncharted contexts.²²⁰ Moreover, to the extent that the O'Connor concurrence deprives the main opinion of its majority status—reducing it, as one court has concluded, to a plurality opinion²²¹—then the O'Connor-Kennedy position would itself assume a more important status. Although some courts treat plurality opinions simply as non-binding,²²² the Supreme Court has explained that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”²²³ In other words, the holding would comprise the “common ground shared by five or more justices”²²⁴—in *Steel Co.*, the main opinion as qualified by the O'Connor concurrence. Having articulated the rule, it should further be noted that Justices O'Connor's and Kennedy's joining of the main opinion, apart from their concurrence, renders the actual formal status of the main opinion uncertain, and lower courts should not be eager to relegate it to plurality status. Should it be so relegated, however, then the O'Connor concurrence, and not the main opinion, would ultimately provide the holding on the issue of hypothetical jurisdiction.

Lest the matter were not already sufficiently complicated, there is also some uncertainty in the other direction. Because Justice

2d 567, 578 n.9 (D.N.J. 1998) (noting that “the split among the Supreme Court suggests that this may not exactly be an unbending rule,” although further noting that “the better practice is not to test the outer limits of the [Supreme] Court's tolerance”) (quoting *Hardemon v. City of Boston*, 144 F.3d 24, 26 (1st Cir. 1998)); *Bowers v. NCAA*, 9 F. Supp. 2d 460, 498 n.15 (D.N.J. 1998) (same).

220. As the First Circuit further observed, “[t]he various opinions in the case, read as a whole, are not entirely clear as to whether (or to what extent) *Steel Co.* undermines our earlier practice [of assuming jurisdiction].” *Hardemon*, 144 F.3d at 26.

221. *See id.* (“The Supreme Court . . . has recently issued a decision in which a plurality disapproves such an approach.”).

222. *See, e.g., United States v. Stewart*, 65 F.3d 918, 924 (11th Cir. 1995) (“[P]lurality opinions do not bind this Court.”); *Guam v. Gill*, 59 F.3d 1010, 1013 (9th Cir. 1995) (“[A] plurality decision . . . does not by its own force act as binding precedent on this court.”).

223. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)); *see also King v. Palmer*, 950 F.2d 771, 781-82 (D.C. Cir. 1991) (en banc) (elaborating on the *Marks* approach); *United States v. Martino*, 664 F.2d 860, 872-73 (2d Cir. 1981) (same); *see generally Note, Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981); Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 (1980).

224. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992) (“In essence, what we must do is find common ground shared by five or more justices.”).

Ginsburg, for example, did not join the relevant portions of the majority's, of Justice Breyer's, or of Justice Stevens' opinions, it cannot be stated with genuine confidence that, in a different milieu, she might not be willing to repudiate hypothetical jurisdiction as the majority did in *Steel Co.*²²⁵ Even the positions of Justices Stevens and Souter, the latter of whom for the most part joined the former's separate opinion, remain somewhat unclear on the ultimate propriety of hypothetical jurisdiction. Justice Stevens, after all, fundamentally rejected the majority's characterization of his legal stance, proclaiming that "[t]he doctrine of 'hypothetical jurisdiction' [wa]s irrelevant"²²⁶ and that the majority's discussion of it was "pure dictum because it [wa]s entirely unnecessary to an explanation of the Court's decision."²²⁷ Accordingly, even while the majority's repudiation of hypothetical jurisdiction is possibly weakened by the O'Connor concurrence, it may simultaneously enjoy the unarticulated support, at least under different circumstances, of anywhere from one to three of the Justices who did not join the majority.

D. *The Doctrines Preserved Despite the Repudiation*

Even by its own terms, putting aside the separate opinions, the majority opinion is less than straightforward in its repudiation of the doctrine. As a consequence of the Court's own handiwork over the last few decades, the majority spent most of its analysis distinguishing its prior cases, explaining why in each case the seeming as-

225. A search of the decisions of the District of Columbia Circuit, on which Justice Ginsburg sat prior to her elevation to the Supreme Court, reveals her participation in only one case where jurisdiction was assumed, and the assumption may actually not have been inconsistent with *Steel Co.* See *Burlington N. R.R. Co. v. ICC*, 985 F.2d 589, 593-94 (D.C. Cir. 1993) (determining the merits over a portion of the case in which jurisdiction was established, and then applying that determination to another portion of the case in which jurisdiction was disputed—a practice arguably consistent with either *Philbrook v. Glodgett*, 421 U.S. 707 (1975), or *Norton v. Mathews*, 427 U.S. 524 (1976), both of which were reaffirmed in *Steel Co.*). By contrast, Justice Breyer, while sitting as a judge on the First Circuit, not only participated in several such cases—see, e.g., *Rhode Island Hosp. Trust Nat'l Bank v. Howard Communications Corp.*, 980 F.2d 823, 829 (1st Cir. 1992) (assuming appealability of a civil contempt order); *Robinson v. Dep't of Pub. Utils.*, 835 F.2d 19, 21 (1st Cir. 1987) (per curiam) ("assum[ing] *arguendo*" that the court had jurisdiction over a denial to intervene)—but even authored one of the opinions, see *Caribbean Transp. Sys. Inc. v. Autoridad De Las Navieras*, 901 F.2d 196, 197 (1st Cir. 1990) (bypassing dispute over whether certain parties were properly specified in the notice of appeal). Justice Souter, also a judge on the First Circuit prior to his elevation to the Supreme Court, authored no opinions while sitting in that capacity and the one panel opinion in which he fully participated, *United States v. Waldeck*, 909 F.2d 555 (1st Cir. 1990), did not implicate in any way the issue of hypothetical jurisdiction.

226. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1026 (1998) (Stevens, J., concurring in the judgment).

227. *Id.*

sumption of jurisdiction was defensible, and why none of these “look-alike-but-inapposite cases”²²⁸ provided support for the doctrine of hypothetical jurisdiction as formulated and practiced in the lower federal courts. This effort, in turn, generated essentially a laundry list of doctrines, each somehow related to hypothetical jurisdiction, that appear nonetheless to remain intact after *Steel Co.*

These unrepudiated doctrines provide the focus of this Subpart of the Article. Before exploring these doctrines, two qualifications should be noted. First, this Article will confine itself to the principal doctrines left intact by *Steel Co.*, even though *Steel Co.* necessarily preserved other related principles and doctrines, whether or not the majority took note of them.²²⁹ It is quite clear, for example, that *Steel Co.* does not prevent non-Article III tribunals from assuming jurisdiction as a constitutional matter,²³⁰ just as the Constitution itself does not,²³¹ although such courts may be bound by prudential

228. *Id.* at 1016 n.3 (“The more numerous the look-alike-but-inapposite cases Justice Stevens cites, the more strikingly clear it becomes: his concurrence cannot identify a single opinion of ours deciding the merits before a disputed question of Article III jurisdiction.”).

229. For example, the Court’s summary distinguishments of *Secretary of Navy v. Avrech*, 418 U.S. 676 (1974) (per curiam), *Chandler v. Judicial Council*, 398 U.S. 74 (1970), *United States v. Augenblick*, 393 U.S. 348 (1969), and *Neese v. Southern Railroad Co.*, 350 U.S. 77 (1955), will not be addressed below. The Court noted that both *Avrech* and *Augenblick* involved issues that at the time were deemed jurisdictional but were later held not to be. *See Steel Co.*, 118 S. Ct. at 1014-15. *Chandler*, in its view, did not truly involve an assumption of jurisdiction, but rather ultimately resulted in a declination of jurisdiction. *See id.* at 1015. And in *Neese*, “the issue pretermitted . . . was not Article III jurisdictional at all.” *Id.* at 1015-16 n.3.

230. *See, e.g., Kay v. Pick*, 711 A.2d 1251, 1256 (D.C. 1998) (retaining for the District of Columbia Court of Appeals—an Article I court—the doctrine that “[w]here . . . the answer to a jurisdictional issue is ‘a very complicated one’ and where ‘the merits of the underlying claim . . . can easily be resolved,’ this Court has held that ‘we do not need to consider the jurisdictional issue,’” while explicitly acknowledging the *Steel Co.* ruling) (quoting *Stevens v. Quick*, 678 A.2d 28, 31 (D.C. 1996)). Recent cases from the United States Court of Federal Claims, also an Article I court, would appear to be to the contrary. *See Ramcor Servs. Group, Inc. v. United States*, 41 Fed. Cl. 264, 266 (Fed. Cl. 1998) (concluding that the Supreme Court’s repudiation of hypothetical jurisdiction “require[s] the court” to address jurisdictional issues at the outset); *see also Stolco Holding Co. v. United States*, 42 Fed. Cl. 101, 103, 117-18 (Fed. Cl. 1998) (similar). The Court of Federal Claims considers itself bound by the Article III case-or-controversy requirements so as not to preclude appellate review by the Federal Circuit Court of Appeals and the Supreme Court, both Article III courts. *See American Maritime Transp., Inc. v. United States*, 18 Cl. Ct. 283, 290-91 (Cl. Ct. 1989) (“The United States Claims Court, although an entity of Article I . . . applies the Article III standing requirements enforced by other federal courts. . . . Under Article III of the Constitution, neither [the Federal Circuit nor the Supreme Court] would be able to enforce such actions in the absence of a justiciable case or controversy.”); *Welsh v. United States*, 2 Cl. Ct. 417, 420-21 (Cl. Ct. 1983) (noting that issuance of an advisory ruling by the Claims Court, though authorized in specific instances, “would remove the matter from the rubric of ‘case or controversy’ essential to justiciability under the Constitution” and neither the Federal Circuit nor the Supreme Court “would be able to confirm the advice or reject it”).

231. *See, e.g., Neely v. Benefits Review Bd.*, 139 F.3d 276, 279 n.2 (1st Cir. 1998) (observing that the case-or-controversy requirements “pertain to jurisdiction of federal courts and do not

requirements to like effect.²³² Second, of no particular concern at this juncture is the relative accuracy of the majority's, or of Justice Stevens', or of the lower federal courts' interpretations of prior Supreme Court cases where jurisdiction was apparently assumed. That inquiry, though interesting and not unimportant, is greatly complicated by the indeterminacy of many of those prior cases²³³ and, from a practical standpoint, is largely mooted by the simple fact that five Justices have now held that most of those cases do not, in fact, support the doctrine of hypothetical jurisdiction as it had been expounded by the lower federal courts. It will, however, be revisited in Part V, where the deeper institutional significance of hypothetical jurisdiction will be examined.

1. The Substantiality Doctrine

No sooner did *Steel Co.* repudiate hypothetical jurisdiction than it reaffirmed the equally curious "substantiality doctrine," which provides that federal courts may dismiss for lack of subject-matter jurisdiction where the claim asserted, even though federal, is insubstantial and frivolous.²³⁴ To fully understand the odd nature of this

necessarily apply to Executive Branch agencies"); *Northwest Env'tl. Defense Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527-28 (9th Cir. 1997) ("Article III's standing requirement does not apply to agency proceedings . . ."); *Zevalkink v. Brown*, 102 F.3d 1236, 1243 (Fed. Cir. 1996) ("As a court established under Article I of the U.S. Constitution, the Court of Veterans Appeals is not bound to the 'case or controversy' requirement of Article III.") (citation omitted), *cert. denied*, 117 S. Ct. 2478 (1997).

232. See, e.g., *Zevalkink*, 102 F.3d at 1243 ("[The Court of Veterans Appeals] has decided, based on the same prudential considerations behind the 'case or controversy' requirement, i.e., courts should only decide real and substantial controversies, not hypothetical claims, that it would refrain from deciding cases that do not present an actual case or controversy.") (citation omitted); *Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447, 451 (10th Cir. 1983) ("[A]n agency possesses substantial discretion in determining whether the resolution of an issue before it is precluded by mootness. However, in exercising this discretion, an agency receives guidance from the policies that underlie the 'case or controversy' requirement of Article III.") (citation omitted).

233. See, e.g., *Tisza v. Communications Workers*, 953 F.2d 298, 300 (7th Cir. 1992) (noting interpretive disagreement over Supreme Court precedent); *Dane*, *supra* note 6, at 119 n.347 (concluding that the attempt of then-Judge Clarence Thomas to distinguish the Supreme Court's own precedents as not invoking hypothetical jurisdiction, was not "completely convincing"). To be sure, though the *Steel Co.* majority denied that the precedents dredged up by Justice Stevens, and before him by lower federal courts justifying their exercise of hypothetical jurisdiction, truly supported such a doctrine, it did concede that "some of the[se] . . . cases must be acknowledged to have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1016 (1998).

234. See *Steel Co.*, 118 S. Ct. at 1010 (stating that "the District Court has jurisdiction . . . unless the claim . . . is wholly insubstantial and frivolous") (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)).

exception, and hence both the significance and the irony of its retention by the Court, a brief overview of two of the principal bases for dismissal may prove helpful.

Normally, the assertion of a federal claim that is ultimately without legal merit will give rise, upon a defendant's proper motion, to a Rule 12(b)(6) dismissal for failure to state a claim upon which relief can be granted.²³⁵ Correspondingly, the assertion of a claim that turns out not to present a federal question at all—even though it may have merit if asserted in, say, state court—will give rise, either by a defendant's proper motion or by the court *sua sponte*, to a Rule 12(b)(1) dismissal for lack of subject-matter jurisdiction.²³⁶ Much more than nomenclature is at stake, however, in terms of whether one's dispute is dismissed under 12(b)(1) or 12(b)(6).²³⁷ A Rule 12(b)(1) dismissal is entirely jurisdictional and in theory indicates nothing about the merits of the suit; accordingly, with the exception of the jurisdictional issue itself,²³⁸ the dismissal is without prejudice or

235. FED. R. CIV. P. 12(b)(6).

236. FED. R. CIV. P. 12(b)(1), (b)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

237. In addition to the difference of res judicata effect, whether one's dispute is challenged or addressed under 12(b)(1) or 12(b)(6) will affect both the nonwaivability of the challenge, and the allocation and nature of the burden of proof, *see* *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1408-09 (3d Cir. 1991) (explaining the ways in which "[t]he legal standards governing these two motions are different"); *Crowley Cutlery Co. v. United States*, 849 F.2d 273, 276-77 (7th Cir. 1988) ("The most important difference between dismissing a case on the merits and dismissing it for lack of jurisdiction because it is frivolous is that the latter form of dismissal is possible, indeed mandatory, even if the defendant fails to preserve the ground that demonstratos the suit's lack of merit."). The type of dismissal may even affect "[p]rivate agreements among the parties or between the parties and their attorneys or indemnitors." *Clow v. HUD*, 948 F.2d 614, 627 n.4 (9th Cir. 1991) (O'Scannlain, J., dissenting).

238. *See, e.g., Ricketts v. Midwest Nat'l Bank*, 874 F.2d 1177, 1182 n.4 (7th Cir. 1989) ("Where . . . a plaintiff responds to a jurisdictional dismissal by filing a substantially similar complaint in federal court, the district court's earlier dismissal is binding."). The jurisdictional holding will have res judicata effect. *See Winslow v. Walters*, 815 F.2d 1114, 1116 (7th Cir. 1987) ("[A] ruling granting a motion to dismiss for lack of subject matter jurisdiction is not on the merits; its res judicata effect is limited to the question of jurisdiction."). This is true even if the jurisdictional holding is erroneous. *See Assuming Jurisdiction Arguendo*, *supra* note 4, at 719-20 (discussing the contemporary doctrine that jurisdictional determinations, even if jurisdiction is not found or is erroneously found, normally enjoy the force of res judicata). Such effect may not be recognized, however, where the error involved federal preemption or an improper waiver of sovereign immunity. *See Durfee v. Duke*, 375 U.S. 106, 114 (1963) (noting that "the general rule of finality of jurisdictional determinations is not without exceptions" and that "[d]octrines of federal pre-emption or sovereign immunity may in some contexts be controlling"); *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1059 (9th Cir. 1991) (noting such exceptions). An "allegation of fraud in obtaining the judgment" may also prevent preclusion. *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). Finally, preclusion may be foreclosed where there was no opportunity to litigate jurisdiction. *See Sherrer v. Sherrer*, 334 U.S. 343, 350 (1948) ("[T]he doctrine of res judicata applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings

res judicata effect as to any subsequent suit that the party may file in federal or state court.²³⁹ This is so for the simple reason that "in the absence of subject matter jurisdiction there can be no preclusive findings or conclusions on the merits."²⁴⁰ A Rule 12(b)(6) dismissal, by contrast, amounts to an adverse judgment on the merits and, as such, is prejudicial insofar as it may enjoy the force of res judicata.²⁴¹ This fundamental distinction—that "a dismissal for failure to state a claim is with prejudice whereas a dismissal for lack of jurisdiction is without prejudice"²⁴²—is obviously of paramount importance to both litigants and the legal system, and it is for this very reason that courts have warned against conflating the two categories of dismissal.²⁴³

Notwithstanding such admonitions, courts have also conceded that, "[w]hile distinguishing between a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) and a dismissal for failure to state a claim under Rule 12(b)(6) appears straightforward in theory, it is often much more difficult in practice."²⁴⁴ In turn, they have devised

in which those questions were in issue and in which the parties were given full opportunity to litigate.) (footnote omitted); see also *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1052-53 (5th Cir. 1987) (noting that "the parties need only have had the opportunity to raise the question of jurisdiction").

239. See, e.g., *In re Orthopedic "Bone Screw" Prods. Liab. Litig.*, 132 F.3d 152, 155-56 (3d Cir. 1997) (citing cases); *Richetts*, 874 F.2d at 1182 n.4 ("[T]he proper application of the doctrine [of dismissal for lack of subject matter jurisdiction] should effectively redirect plaintiffs with state law claims to their rightful forum."); *Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1348 (5th Cir. 1985) ("A dismissal for want of jurisdiction bars access to federal courts and is res judicata only of the lack of a federal court's power to act. It is otherwise without prejudice to the plaintiff's claims, and the rejected suitor may reassert his claim in any competent court."); see also FED. R. CIV. P. 41(b) (specifically exempting "a dismissal for lack of jurisdiction" from the general rule that an involuntary dismissal "operates as an adjudication upon the merits"); cf. *Neal v. District of Columbia*, 131 F.3d 172, 175 n.5 (D.C. Cir. 1997) (noting that "[d]ismissals for lack of supplemental jurisdiction are without prejudice"), cert. denied, 119 S. Ct. 46 (1998).

240. *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572 (Fed. Cir. 1996); accord *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1188 (2d Cir. 1996) ("[B]ecause a dismissal pursuant to Rule 12(b)(1) is not on the merits, it can have no res judicata effect."); *Johnson v. Boyd-Richardson Co.*, 650 F.2d 147, 148 (8th Cir. 1981) ("[W]hen a dismissal is for 'lack of jurisdiction,' the effect is not an adjudication on the merits, and therefore the res judicata bar does not arise.>").

241. See, e.g., *Daigle*, 774 F.2d at 1348 ("If . . . a plaintiff's complaint fails to state a claim, . . . dismissal [of the complaint] operates as res judicata of the claim alleged and of other claims that might have been asserted.>").

242. *Republic of Pan. v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 940 (11th Cir. 1997); see also *Exchange Nat'l Bank v. Touche Ross & Co.*, 544 F.2d 1126, 1130-31 (2d Cir. 1976) (noting "the important difference that judgments under Rule 12(b)(6) are on the merits, with res judicata effects, whereas judgments under Rule 12(b)(1) are not"), modified by *Chemical Bank v. Arthur Anderson & Co.*, 726 F.2d 930 (2d Cir. 1984), cert. denied, 469 U.S. 884 (1984).

243. Noting the distinction, Judge Friendly once remarked that "[t]his lesson has been taught as often in decision as it has been ignored in argument and dicta." *Fogel v. Chestnutt*, 668 F.2d 100, 106 (2d Cir. 1981).

244. *Nowak*, 81 F.3d at 1187.

a handful of supplementary doctrines to deal with cases located in what one court has described as “the admittedly hazy boundary between Rules 12(b)(1) and 12(b)(6).”²⁴⁵ Among the more prominent is the substantiality doctrine, which provides that subject-matter jurisdiction itself will be lacking “when the question presented is too insubstantial to consider.”²⁴⁶ But “[t]he claim must be ‘so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court.’”²⁴⁷ In other words, “even if a federal claim is asserted on the face of the complaint,”²⁴⁸ if the claim is frivolous or insubstantial, then the suit will actually be dismissed under 12(b)(1) for lack of subject-matter jurisdiction, not under 12(b)(6) for failure to state a claim upon which relief can be granted.²⁴⁹ The obvious significance of the doctrine to would-be plaintiffs is that, “[w]hereas dismissal based on failure to state a claim requires a judgment on the merits and cannot be decided before the court assumes jurisdiction, a substantiality doctrine dismissal does not operate as a judgment on the merits and ‘thus allows a plaintiff the opportunity to seek relief in state court or to assert a claim for which the federal courts have jurisdiction.’”²⁵⁰

Note, however, the tension between this doctrine and the jurisdictional mandate reiterated in *Steel Co.* While a dismissal under

245. *Thomason v. Norman E. Lehrer, P.C.*, 182 F.R.D. 121, 128, (D.N.J. 1998).

246. *Cook v. Peter Kiewit Sons Co.*, 775 F.2d 1030, 1035 (9th Cir. 1985). The other principal exception is where “the claim ‘clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction . . .’” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 118 S. Ct. 1003, 1010 (1998) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

247. *Cook*, 775 F.2d at 1035 (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974)); see also *Bell*, 327 U.S. at 682-83 (noting that “a suit may sometimes be dismissed for want of jurisdiction . . . where such a claim is wholly insubstantial and frivolous”); *Crowley Cutlery Co. v. United States*, 849 F.2d 273, 276 (7th Cir. 1988) (“The Supreme Court has frequently said that a suit which is frivolous does not invoke the jurisdiction of the federal courts.”). According to the Fifth Circuit, “[t]his ‘standard is met only where the plaintiff’s claim ‘has no plausible foundation’ or ‘is clearly foreclosed by a prior Supreme Court decision.’” *Eubanks v. McCotter*, 802 F.2d 790, 793 (5th Cir. 1986) (quoting *Williamson v. Tucker*, 645 F.2d 404, 416 (5th Cir. 1981)).

248. *Nowak*, 81 F.3d at 1189.

249. However, as the Seventh Circuit has observed, the standard for a dismissal for lack of substantiality is “[b]y its own terms . . . a rigorous one.” *Ricketts v. Midwest Nat’l Bank*, 874 F.2d 1177, 1182 (7th Cir. 1989). “The Supreme Court has repeatedly employed exacting adjectives to define the degree of insubstantiality required before a case is to be dismissed on these grounds—a claim must be ‘wholly,’ ‘obviously,’ or ‘plainly’ insubstantial or frivolous; it must be ‘absolutely devoid of merit’ or ‘no longer open to discussion.’ As these adjectives imply, insubstantiality dismissals should be applied only in extraordinary circumstances.” *Id.* (quoting *Hagens v. Lavine*, 415 U.S. 528, 536-39 (1974) (footnote omitted)).

250. *Cook*, 775 F.2d at 1035 (quoting *Franklin v. Oregon State Welfare Div.*, 662 F.2d 1337, 1343 (9th Cir. 1981)).

the substantiality doctrine may not yield a judgment on the merits per se, it most certainly entails a thorough assessment of the merits and a ruling based on that assessment.²⁵¹ Yet it does so ultimately in the absence of jurisdiction, as must formalistically be the case given the reliance on 12(b)(1). Superficially, at least, this is inconsistent with the repudiation of hypothetical jurisdiction and with the fundamental principles warranting that repudiation.²⁵² In fact, if anything, a 12(b)(1) insubstantiality dismissal is even more troubling than the assumption of jurisdiction: while there may or may not be jurisdiction in the latter case, there is technically none in the former. Moreover, though a federal court always has subject-matter jurisdiction to determine its own subject-matter jurisdiction,²⁵³ it does not automatically follow from this principle that a court is empowered to assess the substantiality of a claim in order to reach its jurisdictional determination. Much to its discredit, the *Steel Co.* Court did little to recon-

251. See *Thomason v. Norman E. Lehrer, P.C.*, 182 F.R.D. 121, 128 (D.N.J. 1998) (noting that when courts dismiss under the substantiality doctrine of 12(b)(1), rather than for failure to state a claim under 12(b)(6), they risk "mak[ing] preliminary forays into the merits of a case under the guise of ruling on a jurisdictional issue").

252. Not unlike hypothetical jurisdiction, the substantiality doctrine "has been questioned," *Crowley Cutlery*, 849 F.2d at 276, and has "evoked sharp criticism directed at its vitality as a jurisdictional first principle." *Ricketts*, 874 F.2d at 1180; see also *Yazoo County Indus. Dev. Corp. v. Suthoff*, 454 U.S. 1157, 1160-61 & n.* (1982) (Rehnquist, J., dissenting from the denial of certiorari) (questioning the clarity, if not the validity, of the doctrine); *Bell*, 327 U.S. at 683 (noting that "[t]he accuracy of calling these dismissals jurisdictional has been questioned"); *Assuming Jurisdiction Arguendo*, *supra* note 4, at 733-34 & n.126 (citing cases). It appears to survive, however, for two somewhat unprincipled reasons. First, it enjoys the force of stare decisis to a seemingly irrational degree at every level of the federal judiciary. See, e.g., *Crowley Cutlery*, 849 F.2d at 276 ("[I]t is an established principle of federal jurisdiction and 'remains the federal rule.' It is the basis of a large number of lower-court decisions, and at this late date only the Supreme Court can change it.") (quoting *Hagans*, 415 U.S. at 538). Second, it is perceived as useful insofar as its invocation can forestall "the use of frivolous federal claims as pretexts for bringing pendent claims into federal court." *Assuming Jurisdiction Arguendo*, *supra* note 4, at 734. Today, the assertion of such claims—now called supplemental claims—is governed statutorily by 28 U.S.C. § 1367. The supplemental jurisdiction statute effectively reinforces the utility of the substantiality doctrine by providing that a "district court may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction . . ." 28 U.S.C. § 1367 (1994 & Supp. 1996). The substantiality doctrine authorizes the summary jurisdictional dismissal of the federal claim, and section 1367 then authorizes the dismissal of any nonfederal claims.

253. See *Rosado v. Wyman*, 397 U.S. 397, 403 n.3 (1970) (noting "the truism that a court always has jurisdiction to determine its own jurisdiction"); *Stell v. Gottlieb*, 305 U.S. 165, 171-72 (1938) ("There must be admitted . . . a power to interpret the language of the jurisdictional instrument and its application to an issue before the court. . . . Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter.") (footnote omitted); *Shamon v. Shannon*, 965 F.2d 542, 545 (7th Cir. 1992) ("A primordial element of our jurisprudence is that federal courts have jurisdiction to determine whether they have subject matter jurisdiction."); see also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1024 (1998) (Stevens, J., concurring in the judgment) (noting that "a court always has jurisdiction to determine its own jurisdiction") (citing *United States v. Mine Workers*, 330 U.S. 258, 290 (1947)).

cile the apparent contradiction. Instead, it merely reaffirmed that district courts may invoke 12(b)(1) to dismiss insubstantial federal claims,²⁵⁴ even while admonishing that federal jurisdiction should normally not turn on the merits of a claim²⁵⁵ and, in all events, that the merits should not be determined without a definite jurisdictional footing.²⁵⁶

2. The *Bell* Doctrine

A second doctrine preserved by *Steel Co.* is one commonly associated with *Bell v. Hood*, which held that whether or not a cause of action exists is not a jurisdictional issue as such²⁵⁷ and that “the nonexistence of a cause of action [i]s no proper basis for a jurisdictional dismissal.”²⁵⁸ With regard to hypothetical jurisdiction, this doctrine is particularly relevant “when the basis of jurisdiction is also an element in the plaintiff’s federal cause of action.”²⁵⁹ In such cases:

[T]he proper course of action for the district court (assuming that the plaintiff’s federal claim is not immaterial and made solely for the purpose of obtaining federal jurisdiction and is not insubstantial and frivolous) is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff’s case.²⁶⁰

254. The Court stated:

[A] District Court has jurisdiction if “the right of 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,” unless the claim “clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.”

Steel Co., 118 S. Ct. at 1010 (quoting *Bell*, 327 U.S. at 682-83, 685).

255. The *Steel Co.* Court further asserted:

It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts’ statutory or constitutional *power* to adjudicate the case. As we stated in *Bell v. Hood*, “[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.”

Id. (citations omitted).

256. See generally *id.* at 1012-16 (repudiating hypothetical jurisdiction).

257. *Bell*, 327 U.S. at 682 (asserting that jurisdiction remains even if “averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled 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”).

258. *Steel Co.*, 118 S. Ct. at 1013 (summarizing its holding in *Bell*).

259. *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981).

260. *Id.*; accord *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1189 (2d Cir. 1996) (“[W]here the asserted basis for subject matter jurisdiction is also an element of the plaintiff’s allegedly federal cause of action,” the court only looks at whether “the complaint . . . seeks recovery under federal law or the Constitution.” If so, the court “assume[s] or find[s] a sufficient basis for jurisdiction, and reserve[s] further scrutiny for an inquiry on the

In turn, "the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial."²⁶¹

This judicial posture can be defended on several grounds. For one thing, it is essentially warranted by the basic jurisdictional principles reaffirmed in *Steel Co.* As the Court noted in *Bell*, "[w]hether the complaint states a cause of action on which relief could be granted is a question of law and just as questions of fact it must be decided after and not before the court has assumed jurisdiction over the controversy."²⁶² For another thing, "no purpose is served by indirectly arguing the merits in the context of federal jurisdiction. Judicial economy is best promoted when the existence of a federal right is directly reached and, where no claim is found to exist, the case is dismissed on the merits."²⁶³ In addition, the "refusal to treat indirect attacks on the merits as Rule 12(b)(1) motions provides . . . [more] protection to the plaintiff who in truth is facing a challenge to the validity of his claim: the defendant is forced to proceed under Rule[s] . . . which place

merits."). As the *Williamson* decision indicates, the substantiality doctrine may actually be conceptualized as an exception to the *Bell* rule that jurisdictional dismissals normally should not be merits-based. *Williamson*, 645 F.2d at 416 (noting that generally, "a claim cannot be dismissed for lack of subject matter jurisdiction because of the absence of a federal cause of action. The exceptions to this rule are narrowly drawn, and are intended to allow jurisdictional dismissals only in those cases where the federal claim is clearly immaterial or insubstantial."); accord *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1316-17 (7th Cir. 1997) (describing the substantiality doctrine as a "common-sense exception to this cardinal rule").

261. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); cf. *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986) (citing *Augustine*, 704 F.2d at 1077-78, and explaining that "[m]aybe in some cases the jurisdictional issue will be so bound up with the merits that a full trial on the merits may be necessary to resolve the issue"). Post-*Steel Co.* cases involving intertwined jurisdictional and merits issues include *Johnson v. State Technology Center*, 24 F. Supp. 2d 833, 844 (W.D. Tenn. 1998) (deeming Eleventh Amendment immunity to be jurisdictional, and therefore in need of determination at the outset, but recognizing that the merits question—namely, whether Congress validly abrogated Eleventh Amendment immunity—will be resolved by that determination), and *Mixer v. M.K.-Ferguson Co.*, 17 F. Supp. 2d 569, 575 (S.D. W. Va. 1998) (determining, as part of the threshold jurisdictional analysis in a removal case, whether plaintiff's state law claim was preempted by federal law—a merits issue in its own right—insofar as federal subject-matter jurisdiction turned on preemption). For examples of pre-*Steel Co.* cases of this ilk, see *In re Grand Jury*, 821 F.2d 946, 951 n.3 (3d Cir. 1987) (bypassing issue of whether intervenors had standing to assert a legislative privilege claim because "[w]hether the intervenors have standing . . . depends on the scope of the privilege, and we cannot determine the scope of a hypothetical privilege if it does not exist"); *Locals 2222, 2320-2327 v. New England Telephone & Telegraph Co.*, 628 F.2d 644, 646-47 (1st Cir. 1980) (bypassing issue of appealability of a remand order in the arbitration context because "[t]he matter of appealability is . . . intertwined with one of the central substantive issues, namely, the proper characterization of the present section 301 action [and] the resolution of the appealability issue does not affect the outcome of the case").

262. *Bell*, 327 U.S. at 682.

263. *Williamson*, 645 F.2d at 415.

greater restrictions on the district court's discretion."²⁶⁴ Lastly, as the Fifth Circuit has observed, "[i]f federal jurisdiction turned on the success of a plaintiff's federal cause of action, no such case could ever be dismissed on the merits"²⁶⁵—in other words, all dismissals would necessarily be jurisdictional.

Regarding the relationship between the *Bell* doctrine and the doctrine of hypothetical jurisdiction, two points are of note. First and foremost, "[t]he question of whether a cause of action exists is not a question of jurisdiction, and therefore may be assumed without being decided."²⁶⁶ Accordingly, the repudiation of hypothetical jurisdiction theoretically leaves the *Bell* doctrine unaffected and intact, a matter which the Court itself implicitly acknowledged by its restatement and implementation of the doctrine in *Steel Co.*²⁶⁷ Second, the Court's disjunction of the doctrines was warranted precisely because of a tendency by some to invoke the case in support of hypothetical jurisdiction. In *Steel Co.*, it was Justice Stevens' interpretation of *Bell* that prompted the Court to address the issue,²⁶⁸ although, as it turns out, some lower courts had in fact treated *Bell* as a hypothetical jurisdiction case.²⁶⁹

3. The *National Railroad Passenger Corp.* Doctrine

Steel Co. also preserved the authority of a court to bypass a nonconstitutional jurisdictional question and reach a merits question, as long as the court's constitutional subject-matter jurisdiction is first established. Relying on *National Railroad Passenger Corp. v.*

264. *Id.* The court further noted:

The court must take the plaintiff's allegations as true when a Rule 12(b)(6) motion is raised, and in addition must determine that no genuine issue of material fact exists when a Rule 56 motion is granted. . . . [H]owever, a Rule 12(b)(1) motion can be based on the court's resolution of disputed facts as well as on the plaintiff's allegations and undisputed facts in the record.

Id. at 415-16; see also *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1408-09 (3d Cir. 1991) (noting the different standards governing 12(b)(1) and 12(b)(6) analyses).

265. *Eubanks v. McCotter*, 802 F.2d 790, 795 (5th Cir. 1986).

266. *Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979).

267. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1010, 1013 (1998).

268. Compare *id.* at 1010 (explaining why *Bell* is not a hypothetical jurisdiction case), with *id.* at 1024 (Stevens, J., concurring in the judgment) (contending that "*Bell* demonstrates that the Court has the power to decide whether a cause of action exists even when it is unclear whether the plaintiff has standing").

269. See, e.g., *Browning-Ferris Indus., Inc. v. Muszynski*, 899 F.2d 151, 157-58 (2d Cir. 1990) (basically lumping the *Bell* doctrine in with other cases allegedly supporting the assumption of jurisdiction).

National Association of Railroad Passengers,²⁷⁰ and refuting Justice Stevens' contrary interpretation, the Court explained that this case "determined whether a statutory cause of action existed before determining whether . . . the plaintiff came within the 'zone of interests' for which the cause of action was available. The latter question is an issue of statutory standing [not one of] whether there is case or controversy under Article III."²⁷¹ Thus, as the Seventh Circuit has concluded in light of *Steel Co.*, "th[is] latter type of jurisdictional issue ('prudential standing' as it is sometimes called) may be bypassed in favor of deciding the merits when the outcome is unaffected and the merits issue is easier than the jurisdictional issue."²⁷²

The Court's reaffirmation of *National Railroad Passenger Corp.* is noteworthy in a number of respects. First, there was some uncertainty prior to *Steel Co.* as to whether *National Railroad Passenger Corp.* authorized the assumption of any jurisdictional requirement, or simply those of a statutory or nonconstitutional nature.²⁷³ *Steel Co.* now makes clear that the case relates only to the lat-

270. *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974).

271. *Steel Co.*, 118 S. Ct. at 1013 (citation omitted).

272. *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 444 (1998); *see also* *George E. Warren Corp. v. United States Env'tl. Protection Agency*, 164 F.3d 676, 676 (D.C. Cir. 1999) ("Although Article III precludes us from deciding a matter on the merits before determining that the party presenting it has constitutional standing to do so, there is no such barrier to deciding a matter on the merits before determining that the party presenting it has prudential standing." (citing *Steel Co.*, 118 S. Ct. at 1013 & n.2)), *amending* 159 F.3d 616 (D.C. Cir. 1998); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 669 n.13 (7th Cir. 1998) ("Because this standing question is prudential in nature, we may 'elide the jurisdictional issue' in order to reach the merits of the district court's grounds for dismissing the securities claims." (quoting *McNamara*, 138 F.3d at 1222) (citing *Steel Co.*, 118 S. Ct. at 1013 n.2)), *cert. denied*, 119 S. Ct. 890 (1999); *id.* at 671 ("Taking note of the issue, we too decide that this question more appropriately awaits another day when we are required to determine the appropriate approach for the extraterritorial application of RICO. Because this is a statutory standing question, we need not resolve it definitively before addressing merits questions." (citing *Steel Co.*, 118 S. Ct. at 1013 & n.2)). In *McNamara*, the Seventh Circuit noted that "the jurisdictional issue is not whether the plaintiffs have been harmed (Article III) but whether they should be allowed to sue for that harm (zone of interests)." *McNamara*, 138 F.3d at 1222.

273. *Cf. Gillis v. United States Dep't of Health and Human Servs.*, 759 F.2d 565, 570 n.5 (6th Cir. 1985) (noting that the "language . . . in *Passenger Corp.* appears to support the idea, argued by one of the parties, that constitutional standing can be bypassed in favor of determining whether a statute authorizes a private cause of action," but ultimately rejecting that reading). The Court in *National Railroad Passenger Corp.* repeatedly employed the unmodified terms of standing and jurisdiction, without expressly limiting them to their statutory or prudential dimensions. *National R.R. Passenger Corp.*, 414 U.S. at 455-56. In *Steel Co.*, the Court observed that "there was no question of injury in fact or effectiveness of the requested remedy," *Steel Co.*, 118 S. Ct. at 1013, which is more or less consistent with a prior disposition by the circuit court. *See Potemac Passengers Ass'n v. Chesapeake & Ohio Ry. Co.*, 475 F.2d 325, 330-31 (D.C. Cir. 1973) (finding factual injury). Instead, the Court said, *National Railroad Passenger Corp.* involved "an issue of statutory standing. It has nothing to do with whether there is case or controversy under Article III." *Steel Co.*, 118 S. Ct. at 1013.

ter. Second, there was also some uncertainty, despite *National Railroad Passenger Corp.*, regarding the bypassability of prudential jurisdictional requirements, such as prudential standing.²⁷⁴ *Steel Co.* now also makes clear that such requirements can be bypassed, other possible conditions notwithstanding, as long as constitutional jurisdiction is confirmed.²⁷⁵ Third, and conversely, *Steel Co.*'s reading of *National Railroad Passenger Corp.* appears to indicate that such assumptions of jurisdiction are only prohibited, or more specifically are only unconstitutional, when they implicate the core constitutional requirements of Article III.²⁷⁶ This distinction is important, for it simultaneously narrows the scope of the repudiation, leaving a world of jurisdictional issues subject to assumption, yet also renders the repudiation itself relatively non-negotiable, putting aside the various indeterminacies of the majority opinion.

4. The Norton Doctrine

Of all the Supreme Court cases cited by the lower federal courts to justify the doctrine of hypothetical jurisdiction, *Norton v.*

274. See, e.g., *Busse Broad. Corp. v. FCC*, 87 F.3d 1456, 1462 (D.C. Cir. 1996) ("Whether th[e] test [for assuming jurisdiction] applies to prudential standing issues is not entirely clear . . .") (citing *Cross-Sound Ferry Servs., Inc. v. ICC*, 934 F.2d 327, 333 (D.C. Cir. 1991); *National Maritime Union v. Commander, Military Sealift Command*, 824 F.2d 1228, 1238 (D.C. Cir. 1987)).

275. As it turns out, several courts—including the Supreme Court—had done so prior to *Steel Co.* See, e.g., *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990) (assuming third party standing, a prudential doctrine, and adversely deciding the merits of a constitutional challenge); *Clopper v. Merrill Lynch Relocation Management, Inc. (In re Merrill Lynch Relocation Management, Inc.)*, 812 F.2d 1116, 1121-22 (9th Cir. 1987) (assuming third party standing where the issue appeared "questionable" and "had not been briefed" and where the court "ha[d] no difficulty disposing of appellants' arguments on the merits"); *Shiffler v. Schlesinger*, 548 F.2d 96, 102-03 (3d Cir. 1977) (bypassing inquiry into prudential standing because the claim was barred under the doctrine of laches); see also *Whitaker v. Frito-Lay, Inc. (In re Olympia Holding Corp.)*, 88 F.3d 952, 959 n.13 (11th Cir. 1996) (noting that, under *National Railroad Passenger Corp.*, the issue of statutory standing "need not be addressed" where "a cause of action does not exist in favor of the plaintiff").

276. The principal contrary passage in *Steel Co.* is the following, which appears in the concluding paragraph of Part III of the opinion: "The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." *Steel Co.*, 118 S. Ct. at 1016. The Court is obviously hedging here, not wanting to invite assumptions of nonconstitutional jurisdiction but obviously realizing that its preceding analysis, especially of the *National Railroad Passenger Corp.* case, does not permit it to foreclose such assumptions. Despite this passage, therefore, the repudiation should only be limited to the assumption of constitutional jurisdictional requirements, and more specifically of Article III jurisdictional requirements, and possibly of only Article III case-or-controversy requirements.

*Mathews*²⁷⁷ was perhaps the most common. It is hardly surprising, therefore, that the case is cited or discussed not only by the *Steel Co.* majority,²⁷⁸ but also by Justices O'Connor, Breyer, and Stevens in each of their separate opinions.²⁷⁹ And it is hardly surprising that the majority made certain to explain why the case did not, in fact, support the hypothetical jurisdiction doctrine.

Norton had reached the Court with a companion case, *Mathews v. Lucas*,²⁸⁰ and the Court's threshold resolution of *Lucas* necessarily resolved the merits of *Norton*. But *Norton* also posed a separate jurisdictional question. *Norton* had been decided below by a three-judge district court, rather than a standard one-judge court, and there was some dispute as to whether the district court was properly convened and, thus, whether the Supreme Court properly had appellate jurisdiction.²⁸¹ The Court bypassed this dispute, however, and, pursuant to *Lucas*, entered judgment on the merits. According to *Steel Co.*, the *Norton* Court's decision to do so could be interpreted and thereby justified in two ways, and neither way was "meant to overrule, sub silentio, two centuries of jurisprudence affirming the necessity of determining jurisdiction before proceeding to the merits."²⁸² The first reading is that the *Norton* Court "declined to decide that jurisdictional question . . . with the consequence that the jurisdictional question could have no effect on the outcome Thus, *Norton* did not use the pretermission of the jurisdictional question as a device for reaching a question of law that otherwise would have gone unaddressed."²⁸³ The

277. *Norton v. Mathews*, 427 U.S. 524 (1976).

278. *Steel Co.*, 118 S. Ct. at 1014.

279. See *id.* at 1020 (O'Connor, J., concurring); *id.* at 1021 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 1026 n.15 (Stevens, J., concurring in the judgment).

280. *Mathews v. Lucas*, 427 U.S. 495 (1976).

281. The Court noted that:

The question whether the three-judge court was properly convened upon appellant's demand for injunctive relief is relevant, of course, to our appellate jurisdiction. If the court was not empowered to enjoin the operation of a federal statute, then three judges were not required to hear the case under 28 U.S.C. § 2282, and this Court has no jurisdiction under 28 U.S.C. § 1253.

Norton, 427 U.S. at 528-29.

282. *Steel Co.*, 118 S. Ct. at 1014.

283. *Id.* (citation omitted). The Court quoted from *Norton*: "If the three-judge court had been properly convened, we would have affirmed, and if not we would have vacated and remanded for a fresh decree from which an appeal could be taken to the Court of Appeals, the outcome of which was foreordained by *Lucas*." *Id.* (quoting *Norton*, 427 U.S. at 531). Another case reaffirmed by *Steel Co.*, arguably a variation on *Norton*, was *Philbrook v. Glodgett*, 421 U.S. 707 (1975). That case involved materially identical claims against a state and a federal official, but the joinder of the federal defendant under 28 U.S.C. § 1343(3) was jurisdictionally questionable. Resolving the merits of the claim as it pertained to the state defendant, see *Philbrook*, 421 U.S. at 713-19, the Court ultimately dismissed the federal defendant's appeal for failure to brief the jurisdictional question adequately, but nevertheless directed the injunction

second reading is that the *Norton* Court “seems to have regarded the merits judgment . . . as equivalent to a jurisdictional dismissal for failure to present a substantial federal question. The Court said: ‘This disposition [*Lucas*] renders the merits in the present case a decided issue and thus one no longer substantial in the jurisdictional sense.’”²⁸⁴ Lest a third means of distinguishing *Norton* were necessary, the Court also invoked the reliable adjectival method, labeling it a “peculiar case” that exhibited an “extraordinary procedural posture[].”²⁸⁵

Importantly, these first two readings of *Norton* differ in their potential consequences, and each in its own way undermines the Court’s larger effort to repudiate hypothetical jurisdiction. The first reading, for example, essentially authorizes hypothetical jurisdiction in comparable circumstances, such as where, in a companion case or elsewhere in the same case, the merits are already decided and where the issue reached is not one “that otherwise would have gone unaddressed.”²⁸⁵ It is perhaps this very realization that would explain the Court’s adjective-heavy effort to emphasize the decision’s unique-

at the state and federal defendants alike, on the grounds that the merits would have been decided in any event and that the federal defendant did not allege that the issuance was wrongful. See *id.* at 721-22; see also *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998) (holding in light of *Steel Co.*, though not citing to the analysis of either *Norton* or *Philbrook*, that it was proper to “elide the jurisdictional issue” of whether certain plaintiffs had standing where three other plaintiffs did have standing and “the merits issue cannot be avoided”) (citing *Steel Co.*, 118 S. Ct. at 1013, *cert. denied*, 119 S. Ct. 444 (1998)).

284. *Steel Co.*, 118 S. Ct. at 1014 (quoting *Norton*, 427 U.S. at 530-31) (alteration in original).

285. *Id.* Another potentially notable aspect of *Norton*, at least in comparison to cases on the Court’s discretionary docket, is that it presented an appeal within the Court’s mandatory jurisdiction pursuant to 28 U.S.C. § 1253 and (the now-repealed) 28 U.S.C. § 2282. As such, the Court theoretically could not simply deny review at the outset in the face of jurisdictional ambiguity—as it could (perhaps inappropriately) in the certiorari context—nor, once it took up the case, could it later simply dismiss the appeal without resolving the ambiguity—as it could (again, perhaps inappropriately) in the certiorari context. See STERN ET AL., *supra* note 161, § 4.27(b), at 214-15 (noting that consideration of factors other than the merits “would have been inconsistent with the statutes providing for appeals and the accepted difference between appeal and certiorari” although noting that the Court’s rules appeared to allow consideration of, and thus the Court may have considered, such factors).

286. The clearest post-*Norton* example is one also involving the issue of whether the district court should have been comprised of one or three judges, although here it was the district court that bypassed the issue. See *Hodges v. Weinberger*, 429 F. Supp. 756, 759 (D. Md. 1977). Another post-*Norton*, pre-*Steel Co.* case involving an analogous assumption of jurisdiction is *Burlington Northern Railroad Co. v. ICC*, 985 F.2d 589 (D.C. Cir. 1993), in which the court bypassed an “exceptionally difficult” jurisdictional question in one segment of the case, where “the [merits] decision on the segment where our jurisdiction is clear fully determines the outcome on the segment as to which it is disputed.” *Id.* at 593. The court noted that “resolving the merits issues is exceptionally easy (at least in the sense that it requires no extra expenditure of judicial resources) because we necessarily must resolve them in the portion of the case over which we plainly have jurisdiction.” *Id.* at 594.

ness. The second reading, and the Court's rhetorical effort to marginalize it as well, are even more interesting than the first. The *Steel Co.* majority, as indicated above, stated that the *Norton* Court "seems to have regarded the merits judgment that it entered on the basis of *Lucas* as equivalent to a jurisdictional dismissal for failure to present a substantial federal question."²⁸⁷ But that characterization is too equivocal, for it is quite clear that the *Norton* Court *did* so regard its merits judgment. This is evident not only from the *Norton* passage quoted in *Steel Co.*—that "[t]his disposition . . . renders the merits in the present case a decided issue and thus one no longer substantial in the jurisdictional sense"²⁸⁸—but also from the concluding paragraph of *Norton*, which stated that "we perceive no reason why we may not so proceed in this case where the merits have been rendered plainly insubstantial."²⁸⁹ What is striking about the *Norton* Court's reasoning, and what might explain the *Steel Co.* Court's uncertain rendition of it, is that it effectively legitimizes the power of an appellate court to issue a prejudicial judgment (an affirmance on the merits, as in *Norton*) on the ground that the claim, being insubstantial, should or could be subject to jurisdictional dismissal, even though such a dismissal would normally be prejudicial only on the issue of federal court jurisdiction. Read this way, in other words, *Norton* legitimates the doctrine of hypothetical jurisdiction in a more general sense, albeit under the guise of insubstantiality, and this is obviously significant in terms of sidestepping the doctrine's apparent repudiation.

5. The Alternative Jurisdictional Grounds Doctrine

Steel Co. also preserved the power of a court to bypass one jurisdictional question in favor of another, especially if the question bypassed is constitutional in nature and the one reached is not.²⁹⁰ In

287. *Steel Co.*, 118 S. Ct. at 1014.

288. *Id.*

289. *Norton*, 427 U.S. at 532.

290. See, e.g., *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 118 S. Ct. 1665, 1670 (1998) (dismissing a suit for lack of ripeness, at least partly prudential, without addressing standing) (citing *Steel Co.*, 118 S. Ct. at 1015 n.3); *ONRC Action v. Bureau of Land Management*, 150 F.3d 1132, 1140 (9th Cir. 1998) (citing *Steel Co.* for the proposition that "a decision of statutory standing may take priority over an issue of Article III standing") (citing *Steel Co.*, 118 S. Ct. at 1013 n.2). But see *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 225 (3d Cir. 1998) (interpreting *Steel Co.* as stating that the "question of Art. III standing is [a] threshold issue that should be addressed before issues of prudential and statutory standing" despite no such statement in the Court's opinion); *Mixer v. M.K.-Ferguson Co.*, 17 F. Supp. 2d 569, 575-76 (S.D. W. Va. 1998) (holding that, when faced with two jurisdictional issues—whether a federal question has been presented (an Article III issue), and

particular, the Court distinguished hypothetical jurisdiction from the situations in both *Moor v. County of Alameda*,²⁹¹ where the Court decided “a discretionary jurisdictional question before a nondiscretionary jurisdictional question,”²⁹² and *Ellis v. Dyson*,²⁹³ where the Court invoked *Younger* abstention, which it has “treated as jurisdictional,”²⁹⁴ without first deciding whether a case or controversy existed.²⁹⁵ To be sure, this doctrine had been previously distinguished from hypothetical jurisdiction by the lower federal courts,²⁹⁶ and, when invoked, clearly did not pose the sort of conceptual or doctrinal difficulties that accompanied the latter.²⁹⁷

This doctrine, in fact, is quite defensible in terms of both logic and principle. As elsewhere noted, a court always has jurisdiction to determine its own jurisdiction,²⁹⁸ and all jurisdictional questions, therefore, may presumptively be reached in the first instance. In turn, to the extent that an earlier-reached jurisdictional question yields a finding of no jurisdiction, there would simply be no need to identify, let alone determine, any remaining jurisdictional issues.²⁹⁹

whether the plaintiff was obligated to exhaust arbitral remedies (a statutory issue)—the court must, under *Steel Co.*, first address the existence of a federal question).

291. *Moor v. County of Alameda*, 411 U.S. 693 (1973).

292. *Steel Co.*, 118 S. Ct. at 1015 n.3 (citing *Moor*, 411 U.S. at 715-16).

293. *Ellis v. Dyson*, 421 U.S. 426 (1975).

294. *Steel Co.*, 118 S. Ct. at 1015 n.3 (citing *Ellis*, 421 U.S. at 436).

295. *See Steel Co.*, 118 S. Ct. at 1015 n.3 (citing *Ellis*, 421 U.S. at 436); *see also Steel Co.*, 118 S. Ct. at 1013-14 n.2 (noting that “a statutory standing question can be given priority over an [A]rticle III question” and referring to cases cited by Justice Stevens, *id.* at 1022-23 (Stevens, J., concurring in the judgment)).

296. *See, e.g., Louisiana Env'tl. Action Network v. Browner*, 87 F.3d 1379, 1384-85 (D.C. Cir. 1996) (“Although we would be reluctant to prepermit a jurisdictional question in order to reach a merits question, we have no difficulty dismissing a case based on one jurisdictional bar rather than another.”) (citing *Cross-Sound Ferry Servs., Inc. v. ICC*, 934 F.2d 327, 343-46 (D.C. Cir. 1991) (Thomas, J., concurring in part and concurring in the denial of the petition for review)).

297. *See, e.g., Steel Co.*, 118 S. Ct. at 1022-24 (Stevens, J., concurring in the judgment) (noting that “[w]e have routinely held that when presented with two jurisdictional questions, the Court may choose which one to answer first”); *Louisiana Env'tl. Action Network*, 87 F.3d at 1384-85 (expounding the doctrine and citing cases); *Can v. United States*, 14 F.3d 160, 162 & n.1 (2d Cir. 1994) (bypassing jurisdictional questions of federal sovereign immunity and nonexhaustion of administrative remedies, and holding that the claim was nonjusticiable under the political question doctrine).

298. *See supra* note 253 and accompanying text.

299. *See, e.g., Sierra Club v. Glickman*, 156 F.3d 606, 619-20 (5th Cir. 1998) (“[W]e read [*Steel Co.*] as making Article III jurisdiction . . . the threshold issue that a court must address. When two or more Article III jurisdictional grounds are presented to the court . . . the court need [not] address all of those arguments or address the arguments in any particular order.”); *Louisiana Env'tl. Action Network*, 87 F.3d at 1385 (“Because issues of standing, ripeness, and other such ‘elements’ of justiciability are each predicate to any review on the merits, a court need not identify all such elements that a complainant may have failed to show in a particular case.”). Conversely, where the earlier-reached jurisdictional inquiry yields a finding of jurisdic-

This doctrine is not obviously inconsistent with *Steel Co.*, which holds only that a court cannot reach the merits of the suit prior to verifying jurisdiction and does not necessarily speak to the niceties of verification itself. Moreover, to the extent that the doctrine encourages the determination of nonconstitutional questions before constitutional questions, it obviously furthers the values of restraint, and in some cases may preserve the separation of powers or federalism.³⁰⁰

IV. THE POTENTIAL PERSISTENCE OF HYPOTHETICAL JURISDICTION

Although the general doctrine of hypothetical jurisdiction has officially been repudiated, there is reason to believe that it will persist under alternative guises and manifestations well after its interment in pages of the *United States Reports*. It is precisely this possibility that is the subject of this Part of the Article. Subpart A, building on Parts II and III, will explain why the doctrine was so attractive to judges and, more importantly, why it will remain so despite *Steel Co.* Subpart B will then discuss five techniques by which judges might attempt to sidestep the prohibition on the doctrine's use, some of which are likely to work and some of which are not. In so doing, this Article is by no means contending that federal judges are overwhelmingly committed to the crafty avoidance of the *Steel Co.* decision, and that

tion, the court would simply proceed through the remaining jurisdictional questions one by one. See, e.g., *Peoples Gas, Light & Coke Co. v. United States Postal Serv.*, 658 F.2d 1182, 1188-94 & n.3 (7th Cir. 1981) (addressing first the statutory jurisdictional question concerning reviewability of an agency determination and then, only after finding such jurisdiction, addressing constitutional standing).

300. See, e.g., *Louisiana Envtl. Action Network*, 87 F.3d at 1385 ("[A]s precedent and prudence counsel us to avoid unnecessary dicta, especially that on potentially difficult constitutional questions, we see substantial reason not to review each element of justiciability in a dispute that we ultimately conclude does not lie within our jurisdiction.") (citations omitted). As between two jurisdictional requirements of Article III, there may be no principled method of analytical triage. Cf. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 n.5 (1974) (remarking, though not remedying, "[t]he lack of a fixed rule as to the proper sequence of judicial analysis of contentions involving more than one facet of the concept of justiciability"). In *O'Hair v. White*, 675 F.2d 680 (5th Cir. 1982), the court confronted both a constitutional standing challenge and an allegation that the claim was nonjusticiable under the political question doctrine insofar as it posed a challenge under the Republican Guarantee Clause, U.S. CONST. art. IV, § 4. Acknowledging that "as a general matter courts should decide standing issues first," the court nevertheless bypassed this issue because, as was the case there, "if an issue is clearly nonjusticiable for reasons other than lack of standing a court may make its decision without reaching the standing question." *Id.* at 684 n.5. For other perspectives, see *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1382 (9th Cir. 1988) ("When both standing and political question issues are before the court, the court should determine the question of standing first."); *Clark v. Valeo*, 559 F.2d 642, 647 (D.C. Cir. 1977) (concluding that the court "need not address those [questions] pertaining to standing or political question, because the unripeness of the action is so pervasive"), *aff'd*, 431 U.S. 950 (1977).

their decisions will ultimately reveal a pattern of duplicity and deviance as they attempt to sidestep the decision's holding. The evidence to date, in fact, suggests at least moderate compliance,³⁰¹ and the repudiation has even helped some judges to see certain jurisdictional questions with greater clarity.³⁰² That said, the potential for such avoidance, whether conscious or not, remains quite real, and this Article is intended merely to highlight both this potential and the means by which it might be actuated.

A. *The Attractiveness of Hypothetical Jurisdiction*

Any analysis of the apparent demise of hypothetical jurisdiction must confront the reality that its application by every single circuit court of appeals was neither coincidental nor accidental. Rather, the doctrine was (and remains) an extremely useful device—so useful, apparently, that judges were willing to overlook the fundamental problem of judicial power inherent in its application. This Part will explore the doctrine's utility in greater depth, mostly as a prelude to an analysis of whether, or perhaps simply why, the doctrine may persist in some form or another despite its repudiation by the Supreme Court.

1. Diminished Likelihood of Appeal or Reversal

Although one might have thought that a discussion of the doctrine's utility would begin with judicial economy or restraint—the two rationales typically articulated by its defenders—this one will begin

301. See, e.g., *Seaborn v. Florida Dep't of Corrections*, 143 F.3d 1405, 1407 & n.2 (11th Cir. 1998) (concluding in light of *Steel Co.* that because “[a]n assertion of Eleventh Amendment immunity essentially challenges a court’s subject matter jurisdiction” it “must be resolved before a court may address the merits of the underlying claim[s]”), *petition for cert. filed*, 67 U.S.L.W. 3409 (U.S. Sept. 14, 1998) (No. 98-998); *Democratic Senatorial Campaign Comm. v. FEC*, 139 F.3d 951, 952 (D.C. Cir. 1998) (deliberately forgoing the assumption of jurisdiction in light of *Steel Co.*, and remanding to the district court for a determination of standing); see also *Hayden v. New York Stock Exch., Inc.*, 4 F. Supp. 2d 335, 337 (S.D.N.Y. 1998) (restating the *Bell* doctrine as articulated in *Steel Co.* and noting that “[c]areful adherence to this rule is essential to preserve the prohibition against advisory opinions as a meaningful limitation upon the power of the federal judiciary”).

302. In *Hardemon v. City of Boston*, 144 F.3d 24, 25-26 (1st Cir. 1998) (citing *Rojas v. Fitch*, 127 F.3d 184, 187 (1st Cir. 1997)), *cert. denied*, 118 S. Ct. 2341 (1998), the court noted that it was “[i]nitially . . . tempted to bypass the jurisdictional issue because the [defendant] easily prevails on the merits”—and presumably because the jurisdictional issue was difficult. Then, however, in a moment of apparent revelation brought about by *Steel Co.*'s elimination of this bypass option, the court was able to conclude that, in fact, “[t]here is no doubt” that jurisdiction existed. *Hardemon*, 144 F.3d at 26.

on a slightly more strategic note. Put bluntly, it is quite probable that the doctrine in many instances effectively reduced the likelihood either that the losing party would appeal or, if he or she did, that the appellate court would reverse. This, of course, would render it particularly significant to lower court judges, who by nature try to avoid reversal wherever and however possible.³⁰³

This diminished likelihood stems from several factors. First of all, to the extent that the lower court is correct on the merits—and hypothetical jurisdiction, in its classic formulation, necessitates an easy merits-based ruling—it is doubtful that the losing party would seek appellate review. As the Supreme Court has noted, in a case often invoked in support of hypothetical jurisdiction, “even the most diligent and zealous advocate could find his ardor somewhat dampened in arguing a jurisdictional issue where the decision on the merits is . . . foreordained.”³⁰⁴ Indeed, even if the improper ruling on the merits is vacated for want of jurisdiction, the plaintiff-appellant would still find herself out of federal court, albeit without prejudice. If she had an interest in refileing in state court, this would obviously be beneficial insofar as it eliminated the bar of *res judicata*—although, realistically speaking, the state court judge would presumably not blind himself to the federal court’s determination that her suit was meritless.³⁰⁵ And if she had no interest in refileing in state court, then an appeal would serve no immediate interest of hers. There would, of course, be an interest in not having an adverse judgment on record, but one suspects that the run-of-the-mill plaintiff, weighing the costs and benefits of an appeal, would not distinguish

303. “Most participants in and observers of trial courts perceive reversal to be a major concern of trial judges.” Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 130 (1980); Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right To Appeal*, 57 U. CHI. L. REV. 1, 37 n.92 (1990) (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 506 (3d ed. 1986)); see also Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 391 (1995) (noting that “[j]udges may fear reversal because it may result in harm to their reputation . . . or the likelihood of their promotion”).

304. *Secretary of the Navy v. Avrech*, 418 U.S. 676, 678 (1974).

305. State courts, in certain circumstances and in some jurisdictions, may take judicial notice of federal court rulings. See, e.g., *Roberts v. Hollandsworth*, 616 P.2d 1058, 1060 (Idaho 1980) (holding that “Idaho state courts may take judicial notice of the judgments and decisions of the federal courts which affect the subject matter of an action before the state court”); *Pfaff v. Chrysler Corp.*, 610 N.E.2d 51, 67 (Ill. 1992) (taking judicial notice of a federal district court remand order); *Collins v. Industrial Bearing & Transmission Co.*, 575 S.W.2d 875, 879 (Mo. Ct. App. 1978) (taking judicial notice of a federal circuit court decision). Likewise, federal courts may often take judicial notice of state court proceedings. See, e.g., *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979) (“[F]ederal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.”).

between a merits-based and a jurisdictional dismissal, both of which, superficially at least, are adverse rulings. There would also be an interest in confining the federal courts within their constitutional and statutory limits, the very principle vindicated in *Steel Co.*, but few litigants are so devoted to purifying our constitutional structure that they would be willing to bankroll an otherwise meritless appeal merely to achieve such purification. Needless to say, if the offending tribunal is a circuit court, then the prospect of higher review is particularly low,³⁰⁶ given both the nature of certiorari as a discretionary writ³⁰⁷ and the enormity of the Supreme Court's docket.³⁰⁸ That reality alone might be enough to ward off some would-be petitioners.

Even if an appeal were taken, the reviewing court would be unlikely to reverse, which of course is yet another factor diminishing the value of an appeal. Several factors combine to reduce the

306. See Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions To Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 766 (1995) ("[T]he courts of appeals have become the effective courts of last resort in the federal system. In more than 99 [percent] of the cases the courts of appeals hear, they bear ultimate law-making responsibility.") (footnote omitted). This is especially true if, as was the case with many of the Ninth Circuit's hypothetical jurisdiction cases, see *supra* note 8, the opinion remains unpublished (or if the decision yields no opinion whatsoever, published or unpublished). Judge Wald explained the inimportance of publishing opinions in her separate statement in *National Classification Committee v. United States*:

[T]he parties have little chance of prevailing on a suggestion for rehearing en banc in this court or a petition for certiorari in the Supreme Court when the court renders judgment with no opinion. Given the large number of suggestions for rehearing en banc which come through the court in a year . . . an unpublished opinion with no precedential effect and no opinion to highlight the issues and reasoning of the court is not likely to draw significant attention from the overburdened judges in our court.

National Classification Comm. v. United States, 765 F.2d 164, 174 (D.C. Cir. 1985) (Wald, J., separate statement)

307. See generally SUP. CT. R. 10 (1998) (nonexhaustively delineating the circumstances warranting a grant of certiorari, and providing that "[a] petition for a writ of certiorari will be granted only for compelling reasons" and that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

308. Judicial economy, if nothing else, dictates that the Court simply cannot and obviously does not grant review in every case, even where a lower court conflict might actually exist or the law is grossly uncertain. See *Yee v. City of Escondido*, 503 U.S. 519, 536 (1992) ("Last Term alone we received over 5,000 petitions for certiorari, but we have the capacity to decide only a . . . fraction of these cases on the merits. To use our resources most efficiently, we must grant certiorari only in those cases that will enable us to resolve particularly important questions."); *Beaulieu v. United States*, 497 U.S. 1038, 1040 (1990) (White, J., dissenting from denial of certiorari) ("Being current in our docket is a major consideration; and it may not be wise to delay prompt review in every case, even though many of them involve issues of paramount importance, simply to overcrowd our argument docket with many other cases of lesser significance."); STERN ET AL., *supra* note 161, § 6.31(b), at 355 ("Whether a case is important enough to review may . . . depend on the size of the Court's workload and how many other cases are deemed more important.").

probability of reversal. For one thing, by not deciding a contestable jurisdictional issue, the lower court has eliminated by avoidance what was likely the most vulnerable legal issue for review. Because there was no actual jurisdictional determination, there would be no basis for appellate review, unless perhaps the appellate court itself desired to take up the jurisdictional issue *sua sponte*. Absent that circumstance, however, the appellate court itself would only be compounding the constitutional error by effectively issuing an advisory opinion. For another thing, the lower court's highlighting of the difficulty of the jurisdictional question may itself be enough to keep the higher court from reaching the jurisdictional issue, even if it were properly within the scope of appellate review.³⁰⁹ After all, if the reviewing court is a court of appeals, then that court, too, must be concerned about reversal by the Supreme Court, and there are few better ways to increase the chances of certiorari review than to create or solidify a federal circuit court split,³¹⁰ especially if the issue has constitutional dimensions.³¹¹ In short, unless the lower court were thoroughly off-the-wall—either because the merits were complicated or should have gone the other way or because the jurisdictional issue was actually simple—hypothetical jurisdiction potentially provided a safe harbor for merits-based determinations, essentially insulating them from appeal or reversal.

309. In addition, there is a classic fox-guarding-the-henhouse problem with regard to hypothetical jurisdiction. Because courts of appeals themselves found the doctrine so useful, the likelihood that they would have overridden a district court's assumption of jurisdiction—unless that assumption were truly misguided—was also diminished, lest they might have had to explain why district courts, but not circuit courts, are bound to the requirement that subject-matter jurisdiction must be verified as a threshold matter. Needless to say, any such explanation would have been rather untonable given that both types of courts are equally subject to the limitations of Article III. *Cf.* *United States v. Igbonwa*, 120 F.3d 437, 440 n.2 (3d Cir. 1997) (assuming jurisdiction and observing that the particular challenge to jurisdiction “relate[s] to both the district court and this court” and that, if accepted, would result not only in the dismissal of the appeal but also “in the district court order being vacated”), *cert. denied*, 118 S. Ct. 1059 (1998).

310. *See* SUP. CT. R. 10(a) (providing that the Court will consider granting certiorari review if “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter”); *Braxton v. United States*, 500 U.S. 344, 347 (1991) (“A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.”).

311. *See* SUP. CT. R. 10(c) (providing that the Court will consider granting certiorari review if “a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court”); *Braxton*, 500 U.S. at 347 (distinguishing between constitutional and other federal law questions for purposes of certiorari review, and noting with respect to the latter, review may be less compelling because “we are not the sole body that could eliminate such conflicts, at least as far as their continuation into the future is concerned”).

2. Judicial Economy

On one point at least, both the supporters and the detractors of hypothetical jurisdiction seem generally to agree—namely, that the doctrine potentially fostered judicial economy or the more efficient use of limited judicial resources. This perspective is found not only in decisions justifying the doctrine prior to its repudiation,³¹² but also in pre-repudiation decisions criticizing it,³¹³ post-repudiation opinions observing its passing,³¹⁴ and various academic works.³¹⁵ Perhaps the best statement of this perspective is found in Justice Breyer's partial concurrence in *Steel Co.*, in which he clearly expresses his pragmatic conceptualization of federal jurisdiction, a conception rather at odds with that of Justice Scalia. In Justice Breyer's view:

This Court has previously made clear that courts may “reserve[] difficult questions of . . . jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.” That rule makes theoretical sense, for the difficulty of the jurisdictional question makes reasonable the court's jurisdictional assumption. And that rule makes enormous practical sense. Whom does it help to have appellate judges spend their time and energy

312. See, e.g., *House the Homeless, Inc. v. Widnall*, 94 F.3d 176, 179-80 n.7 (5th Cir. 1996) (“Rather than remand the cause to the district court to more fully develop the record [on standing], in the interest of judicial economy we invoke the exception to the general rule that calls for reaching the standing issue and proceed to the merits of this appeal.”), *cert. denied*, 117 S. Ct. 1434 (1997).

313. See, e.g., *Koff v. United States*, 3 F.3d 1297, 1300 (9th Cir. 1993) (O’Scannlain, J., concurring in the judgment) (observing that “assuming for purposes of jurisdiction that we have jurisdiction, and deciding this case on the merits . . . is undeniably an attractive and, in general, a useful [solution]” to an apparent jurisdictional conflict).

314. See, e.g., *Legal Aid Soc’y v. Legal Servs. Corp.*, 145 F.3d 1017, 1029-30 (9th Cir. 1998) (White, J.) (“The Supreme Court [in *Steel Co.*] rejected th[e] doctrine [of hypothetical jurisdiction] . . . Thus, we must ‘spend [our] time and energy puzzling over the correct answer to an intractable jurisdictional matter,’ even if we think that the substantive merits are easily disposed of by well-settled law.” (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 118 S. Ct. 1003, 1021 (1998) (Breyer, J., concurring in part and concurring in the judgment))), *cert. denied*, 119 S. Ct. 539 (1998); *Hardemon v. City of Boston*, 144 F.3d 24, 25-26 (1st Cir. 1998) (conceding that “[i]nitially we were tempted to bypass the jurisdictional issue because the City easily prevails on the merits” but declining to do so in light of *Steel Co.*); *City of Chicago v. Shalala*, No. 97 C 4384, 1998 WL 164889, at *2 (N.D. Ill. Mar. 31, 1998) (“The court notes that its task would be greatly simplified if it could dispense with threshold jurisdictional issues and simply reach the merits under the doctrine of hypothetical jurisdiction. . . . The Supreme Court, however, has recently abolished this doctrine.”) (citing *Steel Co.*, 118 S. Ct. at 1012-16).

315. See, e.g., 3 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 16.6, at 45-46 (3d ed. 1994) (contending that “it would be a waste of scarce resources for a court to engage in a protracted hearing to resolve difficult issues of causation rather than to moot the standing question by writing a brief opinion resolving the easy merits question against the petitioner”) (citing *Norton v. Mathews*, 427 U.S. 524, 530-32 (1976)); *Assuming Jurisdiction Arguendo*, *supra* note 4, at 730 (“From an administrative standpoint, substantial savings in judicial resources can be achieved by allowing courts to skirt complex and time-consuming jurisdictional arguments when the questions on the merits are more simply resolved.”).

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? More importantly, to insist upon a rigid "order of operations" in today's world of federal court caseloads that have grown enormously over a generation means unnecessary delay and consequent added cost. It means a more cumbersome system. It thereby increases, to at least a small degree, the risk of the "justice delayed" that means "justice denied."³¹⁶

Not only does hypothetical jurisdiction promote economy within a given case, say, by obviating the need for a remand, it also promotes economy by discouraging suits involving similar claims on the merits. This very point was expressed by the First Circuit in a case in which it bypassed a "close issue of appealability" in order to reach the merits.³¹⁷ Concluding that its view of the merits compelled affirmance, the court then specifically noted its hope that its "views on the merits may provide useful guidance in recurring situations of this character."³¹⁸ In light of the fact that the dockets of the federal judiciary already are more or less saturated, it is not difficult to see how the prospect of preempting nonmeritorious suits could be sufficiently attractive that a court might be willing, from time to time, to bend the jurisdictional rules.

3. Judicial Restraint

As discussed in Part II, hypothetical jurisdiction was often defended as a medium of judicial restraint, insofar as it purportedly kept the courts from addressing unnecessary constitutional questions and helped to reduce friction with the other branches and with the states. Although at times there may be reason to doubt the integrity of this justification,³¹⁹ most federal judges are genuinely sensitive to these concerns, which in turn can powerfully affect their decisionmaking. To be sure, this justification is also an important factor in the

316. *Steel Co.*, 118 S. Ct. at 1021 (Breyer, J., concurring in part and concurring in the judgment) (citations omitted) (quoting *Norton*, 427 U.S. at 532).

317. See *Massachusetts v. Hale*, 618 F.2d 143, 145 n.3 (1st Cir. 1980).

318. *Id.*

319. See, e.g., Ian Shapiro, *Richard Posner's Praxis*, 48 OHIO ST. L.J. 999, 1046 (1987) (concluding that despite the call for greater judicial restraint sounded by Richard Posner, "Posner adheres to principles of judicial restraint as and when it suits him, and he happily violates these to advance his own particular neoclassical conceptions of the economics of labor and antitrust law"); see also *Rodriguez v. City of Chicago*, 156 F.3d 771, 778-80 (7th Cir. 1998) (Posner, C.J., concurring) (contending that Title VII of the Civil Rights Act of 1964 should be deemed categorically inapplicable to claims by public safety officers seeking religiously based exemptions from assigned duties, even though the text of Title VII contains no such exception and, in fact, provides for a case-by-case balancing of employer-employee interests), *petition for cert. filed*, 67 U.S.L.W. 3409 (U.S. Dec. 21, 1998) (No. 98-1005).

substance and execution of the prudential components of standing,³²⁰ ripeness,³²¹ mootness,³²² political question doctrine,³²³ and of the various abstention or abstention-like doctrines.³²⁴ As the District of Columbia Circuit has said, describing the ripeness doctrine: "If we do not decide it now, we may never need to. Not only does this rationale protect the expenditure of judicial resources, but it comports with our theoretical role as the governmental branch of last resort. Article III courts should not make decisions unless they have to."³²⁵

320. See, e.g., *United States v. Doe (In re Grand Jury Investigation)*, 59 F.3d 17, 19 (2d Cir. 1995) ("[T]he prudential limitation on standing 'stem[s] from a salutary 'rule of self-restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative.'"); *Sullivan v. Syracuse Hous. Auth.*, 962 F.2d 1101, 1106 (2d Cir. 1992) ("The prudential requirements of standing have been developed by the Supreme Court on its own accord and applied in a more discretionary fashion as rules of judicial 'self-restraint,' further to protect, to the extent necessary under the circumstances, the purpose of Article III" (citation omitted)).

321. See, e.g., *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996) ("Prudentially, the ripeness doctrine exists to prevent the courts from wasting our resources by prematurely entangling ourselves in abstract disagreements, and . . . to protect the other branches from judicial interference until their decisions are formalized and their 'effects felt in a concrete way by the challenging parties.'") (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)).

322. "Prudential mootness addresses 'not the power to grant relief but the court's discretion in the exercise of that power.'" *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) (quoting *Chamber of Commerce v. United States Dep't of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980)). A controversy may be "so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant." *Southern Utah Wilderness Alliance*, 110 F.3d at 727.

323. See, e.g., *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1378-79 (D.C. Cir. 1981) (noting that the "concept of justiciability . . . traces its origins both to inherent limitations on the capabilities of judicial tribunals as well as to the separation of powers concerns central in our system of government" and that "so-called political questions are denied judicial scrutiny, not only because they invite courts to intrude into the province of coordinate branches of government, but also because courts are fundamentally underequipped to formulate national policies or develop standards of conduct for matters not legal in nature" (footnotes omitted)), *cert. denied*, 455 U.S. 999 (1982).

324. See, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (noting that "federal courts may decline to exercise their jurisdiction, in otherwise 'exceptional circumstances,' where denying a federal forum would clearly serve an important countervailing interest, for example where abstention is warranted by considerations of 'proper constitutional adjudication,' 'regard for federal-state relations,' or 'wise judicial administration'" (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976))). Other abstention-like doctrines govern the relationships between federal courts and military legal proceedings, see *United States ex rel. New v. Perry*, 919 F. Supp. 491, 495-99 (D.D.C. 1996), *dismissal of habeas corpus aff'd*, 129 F.3d 639 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 1364 (1998), foreign legal proceedings, see *Turner Entertainment Co. v. Degeto Film GmbH*, 25 F.2d 1512 (11th Cir. 1994), tribal court proceedings, see *Pittsburgh & Midway Coal Min. Co. v. Watchman*, 52 F.3d 1531, 1536-40 (10th Cir. 1995), and the legal proceedings or determinations of religious institutions, see *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *O'Connor v. Diocese of Honolulu*, 885 P.2d 361 (Haw. 1994).

325. *National Treasury Employees Union*, 101 F.3d at 1431 (citation omitted).

But judicial sensitivity to such concerns is arguably not the most attractive aspect of judicial restraint. Rather, it is that such restraint places one on a sort of moral high ground, variously reflecting the virtues of humility, respect, prudence, and self-control. And there is no better means of whitewashing a usurpation of power, as is hypothetical jurisdiction, than to simultaneously express the unselfishness of one's motives and the forbearance of one's conduct. Such was the case with Chief Justice Marshall's foundational opinion in *Marbury v. Madison*,³²⁶ which has been described as "the most famous case in our history"³²⁷ and "the decision that rendered constitutional law itself possible,"³²⁸ yet also as a "masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another."³²⁹ There is, in turn, little reason not to believe that it was also the case in some, even several, of the decisions invoking hypothetical jurisdiction.

4. Institutional Values

Hypothetical jurisdiction was also attractive—and remains so—because of its capacity to preserve certain institutional values of the federal bench, including the exercise of judgment, respect for coordinate federal courts, and maintenance of the Article III judiciary

326. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). As one commentator has explained:

Marshall's constitutional fault was not that he chose to discuss issues not absolutely necessary to the resolution of a case properly before the Court. That would have been a venial transgression—one that the Court frequently commits. It was, instead, to pronounce its conclusions on the merits of a case over which, according to its own judgment in that very case, the Constitution prohibited Congress to grant the Court, or the Court to assume, jurisdiction. The decision to rule on the merits was therefore as much a violation of the Constitution as anything Jefferson or Madison or Congress may have done. It was a deliberate flouting by the Court of the constitutional limits on its authority that were specifically identified by the Court in the very same case in which it ignored them.

Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 389.

327. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567 (1985) (Powell, J., dissenting); see also Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 8 (1983) (calling it "our most important decision").

328. Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 740 (1989).

329. ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 40 (1960). McCloskey contends that Marshall's "pre-eminence among builders of the American constitutional tradition rests not only on his well-known boldness, his 'tiger instinct for the jugular vein' as an enthusiastic metaphorist once called it, but also on his less-noticed sense of self-restraint." *Id.* *Marbury*, he maintains, "appears to contradict this proposition but in fact confirms it." *Id.*

as a forum for meritorious suits.³³⁰ In her concurrence, for example, Justice O'Connor declined to limit the types of cases in which jurisdiction may defensibly be assumed, as had the majority when it distinguished and preserved the various doctrines noted earlier. "[I]n my view," she wrote, "the Court's opinion should not be read as cataloging an exhaustive list of circumstances under which federal courts *may exercise judgment* in 'reserv[ing] difficult questions of . . . jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.'"³³¹ What Justice O'Connor did not want to foreclose, in other words, was the ability of the federal courts to engage in the act of reasoned judgment, which, after all, is a primary interpretive function of judges,³³² but which could be stifled by too rule-bound or formalistic a methodology.³³³

Another institutional value ostensibly served by hypothetical jurisdiction is the maintenance of congruity or institutional harmony among federal courts. In one case, for example, the Sixth Circuit "simply assume[d] the existence of appellate jurisdiction *arguendo*, without holding that jurisdiction exists," largely "in the interest of avoiding an unnecessary conflict with the en banc court on the jurisdictional issue."³³⁴ Likewise, in another case the Third Circuit declined to address what was arguably a jurisdictional issue, thereby obviating the need to possibly override the district court's reasoning, in part because "the interests of an appellate system of jurisprudence

330. For a more general discussion of institutional values, see Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200, 208-14 (1984) (discussing "values that concern the judge's conception of the role of the courts and other sources of law, the judge's view of the federal system, and the judge's informed sense of the process of adjudication").

331. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1020 (1998) (O'Connor, J., concurring) (emphasis added) (quoting *Norton v. Mathews*, 427 U.S. 524, 532 (1976)).

332. See THE FEDERALIST NO. 78, at 440 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (maintaining that "[t]he courts must declare the sense of the law;" that they should "exercise . . . JUDGMENT" as opposed to "WILL"; and that an "independent spirit in the judges" is "essential to the faithful performance of so arduous a duty" as the enforcement of a "limited Constitution against legislative encroachments").

333. Justice O'Connor's approach in *Steel Co.*, joined by Justice Kennedy, appears to be consistent with their earlier approach in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which called for "reasoned judgment" in the constitutional scrutiny of abortion-restrictive legislation. Justice O'Connor stated that "[t]he inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule." *Id.* at 849; see also Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 79 & n.395 (1992) (expanding on the concept of reasoned judgment or reasoned elaboration).

334. *Brooks v. Toyotomi Co.*, 86 F.3d 582, 587 (6th Cir. 1996).

are well served when reviewing courts, if possible, dispose of cases on grounds correctly decided by the trial court.³³⁵ Finally, and as noted in the discussion of judicial economy, hypothetical jurisdiction can be employed to deter the initiation of nonmeritorious suits, thereby preserving the capacity of the federal courts to process those of a more worthy nature. At the same time, because the judgment rendered is on the merits adverse to the plaintiff, the doctrine effectively allows for the punishment of the initiators of such suits, thereby preserving the integrity of the federal docket as well.

B. The Means To Avoid the Rule Against Hypothetical Jurisdiction

Given the attractiveness of hypothetical jurisdiction, it would be quite remarkable were the doctrine, or at least the concept underlying it, to be totally eradicated by a single Supreme Court decision. In fact, there arguably are several ways by which courts may either avoid the repudiation or achieve substantially similar effects as hypothetical jurisdiction despite the *Steel Co.* decision. Examined here are five such techniques, each of which varies in its propriety, efficacy, and legal consequences.³³⁶

1. Ignore the Repudiation Entirely

The most obvious means of avoiding *Steel Co.* is, of course, simply to avoid it. This can be accomplished two ways—either remain unaware of it or disregard it outright. Lest these seem like heretical alternatives, it should be noted that the former has already come about. Five weeks after *Steel Co.*, a panel of the Second Circuit issued a decision plainly relying on the repudiated doctrine of hypothetical jurisdiction, even referring to it by name in a citation.³³⁷ And the

335. *Switlik v. Hardwicke Co.*, 651 F.2d 852, 856 n.3 (3d Cir. 1981).

336. Needless to say, the five techniques examined do not comprise an exhaustive list of possibilities. Not included, for example, is the notion of manipulating the jurisdictional doctrines of standing and ripeness, which, at least at the margins, are sufficiently flexible that courts seeking a merit-based dismissal may simply find jurisdiction without substantial fear of creating unavoidable precedent.

337. See *Hayes v. Coombe*, 142 F.3d 517, 519 (2d Cir. 1998) (per curiam) ("Because we agree with the government that petitioner's claim is patently devoid of merit, we may affirm the dismissal of his petition without addressing the procedural complications that have been raised by the appellee. And we may do so even if these complications are jurisdictional in nature.") (citing *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151, 159 (2d Cir. 1990)). Less than three weeks after that, a panel of the same circuit did acknowledge the doctrine's demise. See *Fidelity Partners, Inc. v. First Trust Co.*, 142 F.3d 560, 565 (2d Cir. 1998). But then, six weeks later and over three months after *Steel Co.*, yet another panel engaged in hypothetical jurisdiction. See *Karacsonyi v. United States*, No. 97-1220, 1998 WL 401273, at *1 n.2 (2d Cir. June 10, 1998)

Second Circuit is not alone in its oversight.³³⁸ Needless to say, such inadvertence can persist for only so long, and in all events cannot be justified under even the most charitable view of the judicial process. “Article III judges,” after all, “are presumed to know the law.”³³⁹

The second approach, deliberate disregard, presents a more interesting but equally problematic means of avoidance. Because an actual holding of the Supreme Court cannot be ignored by a lower federal court,³⁴⁰ the only justifiable basis for completely disregarding *Steel Co.* is to adopt Justice Stevens’ position that “[t]he Court[s] . . . discussion of ‘hypothetical jurisdiction’ . . . is . . . pure dictum because it is entirely unnecessary to an explanation of the Court’s decision.”³⁴¹ In turn, because “dictum is not authoritative” and “is the part of an opinion that a later court, even if it is an inferior

(declining to address whether the appellant’s notice of appeal was timely because the “appeal is meritless” and citing *Browning-Ferris Indus.*, 899 F.2d at 154-60, a case specifically referenced by the *Steel Co.* Court in its repudiation of hypothetical jurisdiction, see *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 118 S. Ct. 1003, 1012 (1998)). The district courts of the Second Circuit appear to be following its lead. See, e.g., *Perez v. McElroy*, No. 97 Civ. 7811, 1998 WL 557592, at *1 (S.D.N.Y. Sept. 2, 1998) (declining to address, over five months after *Steel Co.*, whether administrative remedies had been exhausted and whether the court was divested of jurisdiction under the Illegal Immigration Reform and Immigrant Responsibility Act, because “[w]here questions of jurisdiction are nettlesome but decision on the merits is simple and straightforward, the court may dispose of the case on its merits” and citing the pre-*Steel Co.* hypothetical jurisdiction case of *Cantor Fitzgerald L.P. v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996)).

338. See, e.g., *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 559 n.11 (5th Cir. 1998) (explaining matter-of-factly, over two months after *Steel Co.*, that “[f]or purposes of deciding a particular case, courts of appeal will occasionally assume *arguendo* a variety of questions, including, *inter alia*, standing to assert a claim, the existence of a cause of action, a material disputed fact, etc.” and citing several hypothetical jurisdiction cases); *Society Hill Towers Owners’ Ass’n v. Rendell*, 20 F. Supp. 2d 855, 859 n.3 (E.D. Pa. 1998) (assuming that plaintiffs had standing and ultimately granting summary judgment in favor of defendants on all counts).

339. *United States v. Kezerle*, 99 F.3d 867, 870 (7th Cir. 1996).

340. See, e.g., *Jaffree v. Wallace*, 705 F.2d 1526, 1532-33 (11th Cir. 1983) (explaining the binding nature of Supreme Court rulings on lower federal courts), *aff’d*, 472 U.S. 38 (1985). This is true even if the Supreme Court decision appears to have been implicitly overruled. See, e.g., *Redriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”); *West v. Anne Arundel County*, 137 F.3d 752, 760 (4th Cir. 1998) (observing that “[l]ower federal courts have repeatedly been warned about the impropriety of preemptively overturning Supreme Court precedent”), *cert. denied*, *Anne Arundel County v. West*, 119 S. Ct. 607 (1998); see generally Margaret N. Kniffen, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 *FORDHAM L. REV.* 53 (1982) (thoroughly analyzing this and related issues); Bratz, *supra* note 176, at 91-93 (setting forth the position in favor of implicit overruling).

341. *Steel Co.*, 118 S. Ct. at 1026 (Stevens, J., concurring in the judgment).

court, is free to reject,³⁴² one could conclude syllogistically that lower courts are free to reject the Court's discussion of hypothetical jurisdiction. Though in many respects Justice Stevens' characterization is probably correct, the Court's repudiation of hypothetical jurisdiction is more than just some stray passage mingled amidst the text or relegated to a footnote of the opinion. Rather, it is what is often labeled "considered dictum," and as such should command the obedience of all but the most obnoxious lower court judges.

Two reasons, one doctrinal and one practical, compel such obedience. The doctrinal reason is that, while considered dictum may not be fully binding as such, "federal courts 'are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . [the dicta] is of recent vintage and not enfeebled by any [later] statement.'"³⁴³ In other words, even if a Supreme Court passage is arguably dictum, lower courts should generally adhere to it where it is "clear, direct, explicit, and unqualified."³⁴⁴ The practical reason is that, while considered dictum may not amount to a holding as such, it is often an excellent predictor of how the Court would hold if squarely presented with the issue.³⁴⁵ Were the Court's discomfort with hypothetical jurisdiction not evident prior to *Steel Co.*, it is fairly evident in the decision's wake, regardless of how one categorizes the Court's treatment of the issue. In short, courts will likely find it quite difficult to sidestep entirely the Court's

342. *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988); see also Kniffen, *supra* note 340, at 57-58 & n.27. Karl Llewellyn speaks of "kill[ing] off a dictum, as such and without more." KARL N. LEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 86 (1960).

343. *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993) (alterations in original) (quoting *McCoy v. Massachusetts Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991)); see also *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995) ("[C]onsidered dictum emanating from the High Court carries great persuasive force.").

344. *Public Serv. Co. v. General Elec. Co.*, 315 F.2d 306, 310 n.6 (10th Cir. 1963) ("The contention is made that the quoted phrase is dictum to which the lower courts are not required to yield. Without exploring the intricate distinctions between dictum and language necessary to decision, we conclude that we must recognize the clear, direct, explicit, and unqualified statement of the Supreme Court.").

345. See *Reich v. Continental Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994):

When the Court's view is embodied in a holding, the Court's reluctance to overrule its precedents enables a confident prediction that that holding is 'the law.' When the view is embodied in a dictum, prediction cannot be made with the same confidence. But where it is a recent dictum that considers all the relevant considerations and adumbrates an unmistakable conclusion, it would be reckless to think the Court likely to adopt a contrary view in the near future. In such a case the dictum provides the best, though not an infallible, guide to what the law is, and it will ordinarily be the duty of a lower court to be guided by it.

repudiation of hypothetical jurisdiction, even if, as Justice Stevens maintained, it is nothing but “pure dictum.”

2. Interpret the Repudiation Narrowly

Although *Steel Co.* cannot realistically be avoided altogether, it may still be susceptible to limiting interpretations. As a general matter, the binding scope of precedent may be determined and circumscribed by several means.³⁴⁶ It may, for example, be confined to its facts.³⁴⁷ Alternatively, it can be construed in terms of the legal rule, doctrine, or standard invoked in support of its holding.³⁴⁸ Or it can be read in light of the substantive or institutional purposes that animated and shaped the holding.³⁴⁹ In the following paragraphs, the potential utility of each of these techniques will be more closely examined.

One of the most convenient and effective ways of limiting a precedent is to distinguish it on factual grounds, given both the probable variation of the facts and the mechanical nature of the method.³⁵⁰ In the case of *Steel Co.*, however, this method will likely prove fruitless. Because the Court’s treatment of hypothetical jurisdiction, being dictum rather than a holding, was not directly attached to a set of

346. See, e.g., Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 763 (1988) (noting that “precedent . . . has been viewed as limited to the ‘decision’ on the ‘material facts’ as seen by the precedent court . . . for others, the term means the ‘rules’ formulated by the precedent court; for still others, the term includes the reasons given for the rules formulated”) (footnotes omitted).

347. See, e.g., LLEWELLYN, *supra* note 342, at 84, 86-87.

348. See, e.g., Monaghan, *supra* note 346, at 764 (“What the Court said must include the Court’s rule or standard. This constitutes the ‘enactment force of precedent,’ in Dworkin’s phrase, or the ‘precept,’ in Pound’s. This is the core of the precedent.”) (footnotes omitted) (quoting RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 111 (1978); Roscoe Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1, 9-10 (1941)).

349. See, e.g., *Velasquez v. Frapwell*, 160 F.3d 389, 394 (7th Cir. 1998) (noting that “a lower court should reexamine its cases in light of the reasoning as well as the narrowest possible holding of a subsequent Supreme Court decision”), *vacated in part on other grounds*, No. 98-1547, 1999 WL 25681 (7th Cir. Jan. 20, 1999) (per curiam); Monaghan, *supra* note 346, at 758-59 (discussing the analogical mode of judicial reasoning which looks to “the grounds of the decision—the underlying reasoning or principles that generated the rule or standard”); *id.* at 764-65 (arguing that the underlying reasoning should be included within the concept of precedent).

350. Factual variation for legal purposes has at least two components: the facts as they actually are, which must always differ to some extent, and the characterization of these facts, which can either bring two cases closer together or set them further apart. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 577 (1987) (“For a decision to be precedent for another decision does not require that the facts of the earlier and the later cases be absolutely identical. . . . [T]he relevance of an earlier precedent depends upon how we characterize the facts arising in the earlier case [and] characterizations are inevitably theory-laden.”) (footnotes omitted).

facts, it would be difficult to limit the repudiation on factual grounds. To be sure, the Court's disapproval of hypothetical jurisdiction is more or less stated as a matter of principle, and as such does not lend itself particularly well to situational negotiation. In addition, courts have repeatedly warned against confining a Supreme Court ruling, especially a constitutional ruling, to the particular facts of the case.³⁵¹ As a general rule, "unless the Supreme Court expressly limits its opinion to the facts before it, it is the principle which controls and not the specific facts upon which the principle was decided."³⁵²

This rule, however, simply means that any effort to limit *Steel Co.* would likely have to focus on the principle, and not the facts, of the case. Narrowly viewed, the basic principle of *Steel Co.* is that an Article III court cannot decide the merits of a dispute without first verifying that the Article III case-or-controversy requirements have been satisfied. So stated, the principle leaves a number of related practices intact, each of which has already been examined or will be examined in the rest of this Part. For example, the principle does not prohibit non-Article III federal courts from engaging in hypothetical jurisdiction. Nor does it necessarily prohibit Article III courts from deciding non-merits issues without first establishing that the case-or-controversy requirements are met, although, as will be discussed shortly in Part IV.B.3, this is presently a matter of dispute among lower courts. Nor does the principle prohibit Article III courts from merely assessing the merits of a dispute, as long as they do not enter judgment based on that assessment. Nor does it necessarily prohibit such courts from deciding merits issues where non-Article III jurisdictional requirements are not verified, as long as the Article III requirements are met, although this too is presently disputed and will also be addressed in Part IV.B.3. This would encompass not only statutory or judge-made requirements, including the prudential aspects of standing, ripeness, and mootness as well as the complete diversity requirement,³⁵³ but possibly also various non-Article III

351. See, e.g., *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993) ("Federal courts . . . are not free to limit Supreme Court opinions precisely to the facts of each case.") (quoting *McCoy v. Massachusetts Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991)); *United States v. Underwood*, 717 F.2d 482, 486 (9th Cir. 1983) (en banc) ("The Supreme Court cannot limit its constitutional adjudication to the narrow facts before it in a particular case. . . . The system could not function if lower courts were free to disregard such guidelines whenever they did not precisely match the facts of the case in which the guidelines were announced."). But see *Long*, *supra* note 176, at 1109 ("The most legitimate method of avoiding Supreme Court precedent is to distinguish factually the case at hand from the precedent.").

352. *Walker v. Georgia*, 417 F.2d 5, 8 (5th Cir. 1969).

353. The requirement, in a case premised on diversity jurisdiction, that the opposing parties be completely diverse is not a constitutional mandate, but rather a judge-made limitation

constitutional requirements such as those arising from the Eleventh Amendment or the doctrine of sovereign immunity.³⁵⁴ It may even include the political question doctrine insofar as that doctrine may not be a genuine case-or-controversy component of Article III, although there is debate over that issue,³⁵⁵ and at least one commentator has

that is presently conceptualized as a construction of 28 U.S.C. § 1332. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967). Under the same logic, courts may also be able to bypass other aspects of section 1332, such as the amount-in-controversy requirement, but see *Iglesias v. Mutual Life Ins. Co.*, 156 F.3d 237, 242-43 (1st Cir. 1998) (holding that the amount-in-controversy requirement is not bypassable under *Steel Co.*), or the so-called domestic relations exception, which limits the scope of federal jurisdiction in cases of divorce, alimony, and child custody, see *Ankenbrandt v. Richards*, 504 U.S. 689, 693-703 (1992).

354. There is significant debate over whether federal sovereign immunity is a constitutional doctrine and, if so, the source of it in the Constitution. For cases claiming constitutional authority for the doctrine, see *Pullman Constr. Indus., Inc. v. United States*, 23 F.3d 1166, 1168 (7th Cir. 1994) (tying it to the Appropriations Clause, U.S. CONST. art. I, § 9, cl. 7); *Bartlett v. Bowen*, 824 F.2d 1240, 1248 (D.C. Cir. 1987) (joint statement dissenting from the vacatur of orders and from the denials of rehearing en banc) (stating that it "is derived from Article III, section 2, of the Constitution"); *Jaffee v. United States*, 663 F.2d 1226, 1251 (3d Cir. 1981) (Gibbons, J., dissenting) (stating that it "has constitutional underpinnings and citing U.S. CONST. art. I, § 9, cl. 7); Daniel E. O'Toole, *Regulation of Navy Ship Discharges Under the Clean Water Act: Have Too Many Chefs Spoiled the Broth?*, 19 WM. & MARY ENVTL. L. & POLY REV. 1, 25 (1994) (asserting that it is "grounded in the Supremacy Clause of the U.S. Constitution"). For assertions that federal sovereign immunity is a common law doctrine, see *Zych v. Unidentified Wrecked & Abandoned Vessel*, 19 F.3d 1136, 1142 (7th Cir. 1994) (describing it as such); Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 343 (1995) (asserting that it is "purely a creature of common law, with no statutory or constitutional basis"). Finally, for a claim that sovereign immunity derives from general public law, see *Alaska v. United States*, 64 F.3d 1352, 1354 n.3 (9th Cir. 1995) (stating that it "derives from public law, but it is not explicit in either the Constitution or statutes").

355. The general sense is that the political question doctrine is rooted in Article III. See, e.g., *Adams v. Vance*, 570 F.2d 950, 954 n.7 (D.C. Cir. 1978) (stating that "an allegation of non-justiciability [under the political question doctrine] calls into question our jurisdiction under Article III"). But it may or may not be a case-or-controversy requirement as such. Compare *INS v. Chadha*, 462 U.S. 919, 939-43 (1983) (separating its "case or controversy" analysis from its "political question" analysis), and *Baker v. Carr*, 369 U.S. 186, 198-99 (1962) (distinguishing between "nonjusticiability," which encompasses the political question doctrine, and "a lack of federal jurisdiction," which encompasses whether the cause "arise[s] under" federal law and whether it poses a "case or controversy"), and *Rescue Army v. Municipal Court*, 331 U.S. 549, 570 (1947) (differentiating in dictum between "the case and controversy limitation . . . and the policy against entertaining political questions"), with *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) ("[T]he concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art. III, embodies both the standing and political question doctrines . . ."), and *Neely v. Benefits Review Bd.*, 139 F.3d 276, 279 (1st Cir. 1998) ("The 'case or controversy' label is used to embrace . . . the requirement of a concrete dispute between adversaries, standing, ripeness, mootness and limitations relating to political questions."), and *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir. 1978) ("[P]olitical questions have been held to be nonjusticiable and therefore not a 'case or controversy' as defined by Article III."), and *Laura A. Smith, Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication*, 61 GEO. WASH. L. REV. 1548, 1559 (1993) (stating that "the political question doctrine . . . is derived from the 'case or controversy' requirement of Article III").

argued that the political question doctrine is simply incompatible with the logic of hypothetical jurisdiction.³⁵⁶

As this analysis illustrates, the technique of limiting *Steel Co.* to its doctrinal principle or rule is critical to determining the permissibility of related practices. A third and final technique is to view *Steel Co.* through a purposivist lens, seeking to discern the core objectives underlying the doctrinal principle. It should be noted at the outset, however, that this approach tends to expand rather than contract the scope of precedent, largely because these objectives are often articulated at a relatively general level. In *Steel Co.*, the majority expressly identified two underlying objectives: first, to keep courts within "the bounds of authorized judicial action";³⁵⁷ and second, by keeping them within these bounds, to preserve "fundamental principles of separation of powers."³⁵⁸ Immediately, one can see the difficulty of adverting to either of these objectives. The first would appear to bar every assumption of jurisdiction, including those reaffirmed by the Court, given that all are not "authorized" in one way or another (except, of course, by the Court). Even if one were to read this as "constitutionally authorized," this would only create more difficulties because then courts could expand their jurisdiction to the limits of Article III even though Congress, exercising its constitutional prerogative, has plainly affirmed less jurisdiction than the Constitution has granted. Likewise, the separation of powers rationale, which has already been echoed by certain lower courts,³⁵⁹ is either too broad or too narrow. If it means that the judiciary cannot override any congressionally established limits, then this is basically a restatement of the first rationale. Even purely judge-made limits,

356. See *Assuming Jurisdiction Arguendo*, *supra* note 4, at 746-48. According to the author:

When a court assumes *arguendo* the nonexistence of a political question and decides a case on its merits, a logical conflict is created. The issue purportedly reserved—whether the controversy on the merits is a proper subject for judicial resolution—has in fact been decided in the affirmative. . . . Hypothetical jurisdiction with respect to political questions is therefore logically barred, because deciding the issue on the merits necessarily implies a decision that no political question exists.

Id. at 746. But see *New York v. United States*, 505 U.S. 144, 185 (1992) (assuming without deciding that the suit did not pose a political question); *Adams v. Vance*, 570 F.2d 950, 954 & n.7 (D.C. Cir. 1978) (same).

357. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1012 (1998).

358. *Id.*

359. See, e.g., *Harline v. Drug Enforcement Admin.*, 148 F.3d 1199, 1202 (10th Cir. 1998) (construing *Steel Co.* as holding that the "assumption of jurisdiction to address merits violates separation of powers"), *cert. denied sub nom.*, *Harline v. Department of Justice*, 119 S. Ct. 798 (1999); *City of Orrville v. FERC*, 147 F.3d 979, 984-85 (D.C. Cir. 1998) ("Separation of powers principles oblige us to address the Commission's standing argument first . . .") (citing *Steel Co.*, 118 S. Ct. at 1012).

such as the doctrine of prudential ripeness, rest partly on the separation of powers and consequently might not be bypassable under such a broad approach. By contrast, if it means that the judiciary can override any jurisdictional limit unless the separation of powers is implicated, then this would potentially allow a court to assume that there is diversity of citizenship between the parties, for example, or that a question arises under federal law—textual requirements of Article III, to be sure, but ones whose assumption would primarily be objectionable on federalism grounds (as well as the obvious ground that the judiciary would be acting *ultra vires*).³⁶⁰ In short, it will probably best serve courts to interpret *Steel Co.* doctrinally, without attempting either to assess it on factual grounds (which, as noted, seems illogical) or to assess it in terms of its underlying objectives (which, as illustrated, seems unhelpful).

3. Categorize an Issue Appropriately

By requiring that courts address jurisdictional issues before addressing merits-related issues, the Court seems, at first blush, to have created a bipolar analytical scheme wherein a court must initially categorize an issue as either jurisdictional or merits-related. If jurisdictional, then it cannot be bypassed (as it could have been under hypothetical jurisdiction). If merits-related, then it cannot be reached without first verifying jurisdiction (again, as it could have been under hypothetical jurisdiction). But the doctrinal aftermath of Supreme Court decisions is rarely so uncomplicated, and *Steel Co.* is no exception. As it turns out, the analytical framework of *Steel Co.*—consistent with the decision's complex precedential context and with the inherent variability of legal questions—appears to include yet a third category of issues, the uncertain boundaries of which promise to complicate greatly the task of adhering to the decision.

This third category, which essentially falls between the other two, consists of at least two groups of issues. The first encompasses issues that are indeed jurisdictional, but that may not fall within the range of jurisdictional issues that must, under *Steel Co.*, be verified prior to reaching the merits. The *Steel Co.* Court, after all, seemingly intended to repudiate hypothetical jurisdiction only with regard to

360. Cf. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117-21 (1984) (holding that the doctrine of pendent jurisdiction does not override the Eleventh Amendment's general prohibition on state law claims against states in federal court).

core Article III jurisdictional issues, such as constitutional standing.³⁶¹ But the Court did not speak with absolute clarity,³⁶² and there is already disagreement over the extent to which the *Steel Co.* mandate applies to non-Article III jurisdictional questions.³⁶³ The second group under this intermediate third category encompasses issues that are neither jurisdictional nor merits-related. Though potentially fewer in number,³⁶⁴ they appear to have been entirely unaddressed by the *Steel Co.* Court, leaving lower courts to speculate as to their precise role in the *Steel Co.* framework.

361. See *Steel Co.*, 118 S. Ct. at 1013 (speaking exclusively of "Article III jurisdiction"); *id.* at 1013 n.2 (speaking exclusively of "Article III questions"); *id.* at 1014 (describing hypothetical jurisdiction as "the practice of deciding the cause of action before resolving Article III jurisdiction"); *id.* at 1016 (speaking of "the rule that Article III jurisdiction is always an antecedent question"); see also *supra* notes 270-76 and accompanying text (discussing the Court's reaffirmation of *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974), on the ground that the jurisdictional issue bypassed in order to reach a merits-related question was one of statutory, not constitutional, standing).

362. See *Steel Co.*, 118 S. Ct. at 1012 (speaking more generally of "jurisdictional objections"); *id.* at 1014 (discussing "the necessity of determining jurisdiction before proceeding to the merits"); *id.* at 1016 (justifying the rule against hypothetical jurisdiction by explaining that "[t]he statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers").

363. Compare *Larsen v. Senate of Pa.*, 152 F.3d 240, 245 (3d Cir. 1998) ("[A] federal court cannot proceed to consider the merits of an action until it is satisfied that the dispute falls within the class of cases or controversies to which Article III, [section] 2 of the United States Constitution has extended the judicial power of the United States.") (citing *Steel Co.*, 118 S. Ct. at 1012), *petition for cert. filed*, 67 U.S.L.W. 3437 (U.S. Dec. 22, 1998) (No. 98-1038), and *Broad v. DKP Corp.*, No. 97 Civ. 2029, 1998 WL 516113, at *4 (S.D.N.Y. Aug. 19, 1998) ("In *Steel Co.*, the Court reaffirmed the importance of considering threshold jurisdictional questions, which spring from the constitutional requirements of Article III, before reaching the merits of an action.") (citing *Steel Co.*, 118 S. Ct. at 1012-16), with *McCarty Farms, Inc. v. Surface Transp. Bd.*, 158 F.3d 1294, 1298-99 (D.C. Cir. 1998) (interpreting *Steel Co.* as requiring that it "must resolve all jurisdictional questions before proceeding to the merits" and proceeding to assess its jurisdiction under 28 U.S.C. § 1336(b)) (emphasis added), and *Williams v. General Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 268-70 (7th Cir. 1998) (citing *Steel Co.*, 118 S. Ct. at 1012, for the proposition that the court "must discuss two issues related to our appellate jurisdiction," even though the two issues did not involve the case-or-controversy requirements and one issue, in fact, did not implicate Article III at all). See also *Sierra Club v. Glickman*, 156 F.3d 606, 619 (5th Cir. 1998) (interpreting *Steel Co.* "as making Article III jurisdiction, of which standing, mootness, and ripeness are equally important parts, the threshold issue that a court must address," although specifically addressing the issue of whether *Steel Co.* was intended to apply exclusively or especially to standing).

364. As a matter of standard legal categorization, issues or doctrines that are neither jurisdictional nor merits-related will probably fall under the heading of procedural, remedial, or evidentiary. See, e.g., *American Hosp. Ass'n v. NLRB*, 899 F.2d 651, 653 (7th Cir. 1990) (distinguishing "substantive" from "jurisdictional, procedural, or remedial"), *aff'd*, 499 U.S. 606 (1991); *Coneau v. Rupp*, 810 F. Supp. 1172, 1180 n.4 (D. Kan. 1992) (distinguishing "substantive federal law" from "procedural and jurisdictional law"). One set of issues that would almost certainly fall into this nonjurisdictional, nonsubstantive category are the technical requirements of the federal removal statutes, which "[t]he Supreme Court has long treated . . . as procedural, not jurisdictional." *Peterson v. BMI Refractories*, 124 F.3d 1386, 1391 (11th Cir. 1997).

The reason that both types of issues have been categorically placed together is that they arguably have the same functional significance under *Steel Co.* This significance is two-fold, concerning both their bypassability and their reachability. First, they could theoretically be *bypassed* en route to the merits as long as Article III jurisdiction is first verified. Thus, a court could in fact reach the merits without verifying all aspects of jurisdiction—presumably to rule against the party alleging jurisdiction—because it would not be assuming any of the Article III requirements. (The validity of this technique depends, of course, on whether the Court intended to repudiate hypothetical jurisdiction as to all jurisdictional issues, or only as to Article III or perhaps other constitutional requirements.) Needless to say, this practice would amount to hypothetical jurisdiction, albeit of a constitutionally less problematic variety. Second, these issues could also theoretically be *reached* in the absence of verifying Article III jurisdiction. Thus, a court could in fact dispose of a suit without verifying its Article III jurisdiction—presumably against the party asserting jurisdiction—because it would not be reaching the merits in the absence of such jurisdiction. This practice as well would appear to be a form of hypothetical jurisdiction, although would not run afoul of *Steel Co.* insofar as the merits themselves would remain undetermined.

In light of the foregoing, it is obvious that the initial categorization of an issue—as Article III jurisdictional, as merits-related, as non-Article III jurisdictional, or as neither jurisdictional nor merits-related—is critical to a *Steel Co.* analysis. In turn, courts seeking to recapture the utility of the hypothetical jurisdiction doctrine will clearly have to consider the consequences of such categorization when making these threshold determinations. And lest one think that courts enjoy little or no flexibility in this regard, thus precluding consideration of the effect of such categorization under *Steel Co.*, nothing could be further from the truth. Well before *Steel Co.*, for example, courts expressed uncertainty and even disagreement as to whether, or to what extent, various issues were or were not jurisdictional.³⁶⁵ Such uncertainty and disagreement are not

365. See, e.g., *Monsky v. Moraghan*, 127 F.3d 243, 245 (2d Cir. 1997) (noting a circuit split over whether “a deficient allegation of the color-of-law-element” of 42 U.S.C. § 1983 is “a jurisdictional deficiency,” and thus analyzed under FED. R. CIV. P. 12(b)(1), or a nonjurisdictional, merits-related deficiency, and thus analyzed under FED. R. CIV. P. 12(b)(6)), *cert. denied*, 119 S. Ct. 66 (1998); *Flores v. Long*, 110 F.3d 730, 732 (10th Cir. 1997) (noting that “[w]hether the Eleventh Amendment is an affirmative defense or a jurisdictional bar which can nonetheless be

surprising, moreover, given that the concept of jurisdiction, although not beyond definition,³⁶⁶ has long had several meanings which may vary from context to context.³⁶⁷ Likewise, there has been—and will continue to be—disagreement over whether or not particular issues are merits-related. As the Court itself noted in *Steel Co.*, for example:

The question whether this plaintiff has a cause of action under the statute, and the question whether any plaintiff has a cause of action under the statute are closely connected—indeed, depending upon the asserted basis for lack of

waived is not clear” and observing that it had previously “noted the split in the circuit cases on whether a court was required to raise the issue *sua sponte*”.

366. At a general level, an issue is “jurisdictional” when “it affects . . . a court’s constitutional or statutory power to adjudicate a case.” *United States v. Martin*, 147 F.3d 529, 532 (7th Cir. 1998). Specific characteristics that may render a doctrine or issue jurisdictional include the following: (1) “it . . . speak[s] in jurisdictional terms or refer[s] . . . to the jurisdiction of the . . . courts,” *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982); (2) “its commands are addressed to courts rather than to individuals,” *Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059, 2071 (1997) (Rehnquist, C.J., dissenting) (calling this “the most salient characteristic of jurisdictional statutes”); (3) it normally cannot, if ever, be waived by the consent or inaction of litigants, *see Sanchez v. Pacific Powder Co.*, 147 F.3d 1097, 1101 (9th Cir. 1998) (“[U]nder Title VII, the requirement that a plaintiff name a defendant in the charge is not jurisdictional, but is merely a condition precedent to filing an action, which a defendant may waive or be estopped from asserting.”); *Norton v. Sam’s Club*, 145 F.3d 114, 118 (2d Cir. 1998) (“While the making of a renewed JNOV motion is mandatory, it is not jurisdictional. As a result, it can be waived . . .”), *cert. denied*, 119 S. Ct. 511 (1998); (4) noncompliance with its terms generally cannot be excused by the court, *see Neuman v. Rivers*, 125 F.3d 315, 323 (6th Cir. 1997) (noting that because a particular requirement “is not jurisdictional . . . failure to comply may be excused in the interest of justice”), *cert. denied*, 118 S. Ct. 631 (1997); (5) it generally can, and often must, be raised *sua sponte* by courts, *see Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (noting that “the nonretroactivity principle [of *Teague v. Lane*, 489 U.S. 288 (1989),] ‘is not jurisdictional’ in the sense that [federal courts] . . . must raise and decide the issue *sua sponte*”) (quoting *Collins v. Youngblood*, 497 U.S. 37, 41 (1990)), or may be raised by the parties at any time, *see United States v. Cordova*, 157 F.3d 587, 597 n.3 (8th Cir. 1998); and (6) it is most likely congressional in origin, not prudentially imposed by the courts themselves, *see Taylor v. United States Treasury Dep’t*, 127 F.3d 470, 475 (5th Cir. 1997) (noting that the exhaustion-of-administrative-remedies requirement, if not statutorily mandated, is judicially imposed and nonjurisdictional); *Ochran v. United States*, 117 F.3d 495, 502 (11th Cir. 1997) (noting the rule against addressing arguments not considered in the district court is judicially imposed and nonjurisdictional), or promulgated by an executive agency, *see Comet Enters. Ltd. v. Air-A-Plane Corp.*, 128 F.3d 855, 859 (4th Cir. 1997) (noting that a “requirement, promulgated by an executive agency, that limits federal court jurisdiction would raise serious constitutional concerns”).

367. *See, e.g.*, *Steel Co. v. Citizens for a Better Env’t*, 520 U.S. 83, 118 S. Ct. 1003, 1010 (1998) (“‘Jurisdiction,’ it has been observed, ‘is a word of many, too many, meanings . . .’”) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)); *Martin*, 147 F.3d at 531-33 (distinguishing the term “jurisdictional element” as used in Commerce Clause cases such as *United States v. Lopez*, 514 U.S. 549, 561-62 (1995), from “jurisdictional in the sense that it affects a court’s subject matter jurisdiction”); *In re Minister Papandreou*, 139 F.3d 247, 254 (D.C. Cir. 1998) (“Whether a defense is ‘jurisdictional’ is a question of some difficulty, given the ‘woolliness of the concept.’”) (quoting *Cross-Sound Ferry Servs. v. ICC*, 934 F.2d 327, 341 (D.C. Cir. 1991) (Thomas, J., concurring in part and concurring in the denial of the petition for review)).

statutory standing, they are sometimes identical, so that it would be exceedingly artificial to draw a distinction between the two.³⁶⁸

To date, the lower federal courts have been all over the map in their interpretation and implementation of *Steel Co.*'s repudiation of hypothetical jurisdiction. Illustrative in this regard is the conflicting treatment of personal jurisdiction, post-*Steel Co.*, by the Courts of Appeals for the Fifth and District of Columbia Circuits. In one case, the Fifth Circuit confronted the question of whether, under *Steel Co.*, a federal court in the removal context may reach and decide the issue of personal jurisdiction before it determines that there is subject-matter jurisdiction, on the theory that personal jurisdiction is "jurisdictional" and thus, like subject-matter jurisdiction, can be reached at the outset.³⁶⁹ Sitting en banc, the court held that it may not. Rejecting the notion that "jurisdiction is jurisdiction is jurisdiction,"³⁷⁰ the court observed that personal and subject-matter jurisdiction are vastly different requirements; while the former is heavily informed by the guarantee of due process and the protection of individual liberty, the latter is concerned exclusively with judicial power.³⁷¹ According to the court, it was the latter, and the latter alone, that provided the focus of the *Steel Co.* decision.³⁷² The Fifth Circuit also noted that a contrary rule would pose federalism and separation of powers concerns,³⁷³ "may . . . create incentives for defendants to subvert the orderly scheme for removing cases by acting opportunistically,"³⁷⁴ and, in all events, is not necessarily conducive to judicial economy.³⁷⁵

368. *Steel Co.*, 118 S. Ct. at 1013-14 n.2 (noting that "the merits inquiry and the statutory standing inquiry often 'overlap'") (quoting *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 456 (1974)).

369. See *Marathon Oil Co. v. A.G. Ruhrgas*, 145 F.3d 211, 215 (5th Cir. 1998) (en banc), (concluding that "the court should proceed to consider the issue of subject-matter jurisdiction (even if that is the more legally difficult issue) before proceeding to address whether it (or, for that matter, the state court) would have personal jurisdiction over the protesting defendant"), cert. granted, 119 S. Ct. 589 (1998) (No. 98-470). The original three-judge panel also so held. See *Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F.3d 315 (5th Cir. 1997), cert. denied, 118 S. Ct. 413 (1997).

370. *Marathon Oil Co.*, 145 F.3d at 217; cf. *Hanover Ins. Co. v. United States*, 880 F.2d 1503, 1504 (1st Cir. 1989) (cautioning against the notion that "a word is a word is a word").

371. See *Marathon Oil Co.*, 145 F.3d at 217-18.

372. See *id.* at 218 ("The *Steel Co.* majority opinion plainly contemplates Article III jurisdiction in its use of the term 'jurisdiction.'").

373. See *id.* at 218-19.

374. *Id.* at 219; see also *id.* at 224.

375. See *id.* at 219-20. The Fifth Circuit also devoted a substantial portion of its analysis to reconciling this holding with its prior case law. See *id.* at 220-22.

In sharp contrast to the Fifth Circuit, the District of Columbia Circuit held that a court may undertake either a personal jurisdiction or a forum non conveniens analysis, and that a dismissal may rest on either basis, without first verifying subject-matter jurisdiction.³⁷⁶ Faced with potential dismissal on several grounds—standing, the act of state doctrine, personal jurisdiction, forum non conveniens, and the jurisdictional bar of the Foreign Sovereign Immunities Act of 1976 (“FSIA”)³⁷⁷—the court properly noted that the threshold question in a *Steel Co.* analysis is whether the issue to be reached at the outset is jurisdictional or nonjurisdictional. “Whether a defense is ‘jurisdictional’ is a [difficult] question But the question is important, since resolving a merits issue while jurisdiction is in doubt ‘carries the courts beyond the bounds of authorized judicial action’ and violates the principle that ‘the first and fundamental question is that of jurisdiction.’”³⁷⁸ Though recognizing that “[s]tanding, of course, is jurisdictional,”³⁷⁹ the court then seemed to hold that personal jurisdiction and forum non conveniens are neither jurisdictional nor merits-related (and, as such, would fall under this Article’s third category as described above). “Forum non conveniens,” according to the court, “does not raise a jurisdictional bar but instead involves a deliberate abstention from the exercise of jurisdiction. While such abstention may appear logically to rest on an assumption of jurisdiction, it is as merits-free as a finding of no jurisdiction.”³⁸⁰ Thus, “it would be proper to dismiss on such grounds (if meritorious) without reaching the FSIA issue.”³⁸¹ “Similarly, dismissal for want of

376. See *In re Minister Papandreou*, 139 F.3d 247, 255-56 (D.C. Cir. 1998). The D.C. Circuit reaffirmed its stance in *Pace v. Bureau of Prisons*, No. 98-5025, 1998 WL 545414, at *1 (D.C. Cir. July 17, 1998) (per curiam) (“The district court was not required to resolve the issue of personal jurisdiction prior to ruling on the motion to dismiss for failure to state a claim because personal jurisdiction exists to protect the liberty interests of defendants, unlike subject-matter jurisdiction, which serves as a limitation on judicial competence.”). At least one other court, pre-*Steel Co.*, had reached a similar conclusion. See, e.g., *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996) (adopting such a rule, though relating it to the now-repudiated doctrine of hypothetical jurisdiction); cf. *Allen v. Ferguson*, 791 F.2d 611, 615 (7th Cir. 1986) (expressing “no opinion as to the correctness” of the proposition that courts, when faced with motions to dismiss for personal and subject-matter jurisdiction, may decide the former and forego the latter if the former is more convenient).

377. See *In re Papandreou*, 139 F.3d at 249.

378. *Id.* at 254-55 (quoting *Cross-Sound Ferry Servs. v. ICC*, 934 F.2d 327, 341 (D.C. Cir. 1991) (Thomas, J., concurring in part and concurring in the denial of the petition for review); *Steel Co.*, 118 S. Ct. at 1012; *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

379. *In re Papandreou*, 139 F.3d at 255. In actuality, the court expressed “no opinion as to whether th[e] defense [asserted] can properly be classified as standing,” *id.*, apparently leaving it for the district court on remand. See *id.* at 256.

380. *Id.* at 255 (citations omitted).

381. *Id.* at 256.

personal jurisdiction is independent of the merits and does not require subject-matter jurisdiction.³⁸² In short, “a court that dismisses on other non-merits grounds such as *forum non conveniens* and personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles underlying . . . *Steel Co.*”³⁸³

Another issue, the proper categorization and functional significance of which have similarly divided the lower federal courts, is Eleventh Amendment immunity. In particular, they differ over whether it can be bypassed as long as Article III jurisdiction is verified—which does seem permissible given that the Court distinguished and preserved the doctrine of *National Railroad Passenger Corp.*³⁸⁴—or whether Eleventh Amendment immunity, like Article III jurisdiction, must be verified prior to reaching the merits. A number of federal courts, for example, have opted for the latter view, holding that an Eleventh Amendment issue must be verified prior to reaching the merits.³⁸⁵ As one circuit court explained, “[a]n assertion of Eleventh Amendment immunity essentially challenges a court’s subject matter jurisdiction” and therefore “must be resolved before a court may address the merits of the underlying claim(s).”³⁸⁶ By contrast, at least one federal court has held that it is permissible, after otherwise verifying subject-matter jurisdiction, to bypass an issue of Eleventh Amendment abrogation and proceed to the merits (in that case, of an antitrust claim, which it ultimately dismissed).³⁸⁷ According to this court, “[d]espite the fact that sovereign immunity

382. *Id.*

383. *Id.* at 255. As part of its analysis, the court also noted *Steel Co.*’s reaffirmation of prior case law in which the Supreme Court declined pendent jurisdiction and abstained from exercising jurisdiction without first verifying that jurisdiction actually existed. *See id.* (discussing *Ellis v. Dyson*, 421 U.S. 426, 436 (1975); *Moor v. County of Alameda*, 411 U.S. 693, 715-16 (1973)). These reaffirmations are summarized *supra* at notes 290-300 and accompanying text.

384. *National R.R. Passenger Corp. v. National Ass’n of R.R. Passengers*, 414 U.S. 453 (1974); *see also supra* Part III.D.3.

385. *See, e.g., Johnson v. State Tech. Center*, 24 F. Supp. 2d 833, 938 (W.D. Tenn. 1998) (holding that “[a]n assertion of Eleventh Amendment immunity . . . challenges the court’s jurisdiction” and, under *Steel Co.*, “must be resolved before a court can determine the merits of the underlying claim”); *McGregor v. Goord*, 18 F. Supp. 2d 204, 206 (N.D.N.Y. 1998) (treating the Eleventh Amendment as a jurisdictional bar to which the rule of *Steel Co.* should be applied, and ultimately dismissing for lack of subject-matter jurisdiction) (citing *Steel Co. v. Citizens for a Better Env’t*, 520 U.S. 83, 118 S. Ct. 1003, 1012 (1998)).

386. *Seaborn v. Florida*, 143 F.3d 1405, 1407 & n.2 (11th Cir. 1998) (citing *Steel Co.*, 118 S. Ct. at 1012-16), *petition for cert. filed*, 67 U.S.L.W. 3409 (U.S. Sept. 14, 1998) (No. 98-998).

387. *See, e.g., Bowers v. NCAA*, 9 F. Supp. 2d 460, 498 n.15 (D.N.J. 1998); *cf. Palmer v. Arkansas Council on Econ. Educ.*, 154 F.3d 892, 895 n.3 (8th Cir. 1998) (avoiding the question of Eleventh Amendment abrogation and instead disposing of the case on the merits, though not characterizing its decision as an assumption of jurisdiction).

'partakes of the nature of a jurisdictional bar,' the Eleventh Amendment 'enacts a sovereign immunity from suit, *rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction.*'³⁸⁸ Thus, it stated, "all [that the court has] done is choose one among potentially numerous bases upon which to dismiss the Sherman Act claim on the merits."³⁸⁹ In other words, because the Eleventh Amendment (in the court's view) did not genuinely pose an issue of subject-matter jurisdiction strictly conceived, under *Steel Co.* it did not need to be determined before the court proceeded to the undisputed merits of the case.³⁹⁰

Unfortunately, personal jurisdiction and Eleventh Amendment immunity are but two of countless issues the status of which—especially their bypassability—remains uncertain in the wake of *Steel Co.* Among other jurisdictional issues that have been held to be nonbypassable are the amount-in-controversy element of diversity jurisdiction under 28 U.S.C. § 1332(a),³⁹¹ supplemental jurisdiction under 28 U.S.C. § 1367,³⁹² the reviewability under 28 U.S.C. § 2241 of

388. *Bowers*, 9 F. Supp. 2d at 498 n.15 (quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 117 S. Ct. 2028, 2033 (1997); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 365 (3d Cir. 1997)).

389. *Bowers*, 9 F. Supp. 2d at 498 n.15.

390. Whether or not the district court correctly characterized the Eleventh Amendment issue as nonjurisdictional for purposes of verifying subject-matter jurisdiction is unclear. The Supreme Court, in a recent decision in which it explicitly declined to address an Eleventh Amendment issue until after it had verified the existence of a case or controversy, remarked that "[w]hile the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, and therefore can be raised at any stage of the proceedings, we have recognized that it is not co-extensive with the limitations on judicial power in Article III." *Calderon v. Ashmus*, 523 U.S. 740, 118 S. Ct. 1694, 1697 n.2 (1998). This passage is rather vague, however, and its significance in terms of the situation raised in the text is uncertain. *Cf. Marathon Oil Co. v. A.G. Ruhrgas*, 145 F.3d 211, 218 n.8 (5th Cir. 1998) (en banc) (citing this passage as a reminder by the Supreme Court "of the distinction between restrictions on subject-matter jurisdiction inherent in Article III and those that operate as an external limitation on an Article III court's adjudication"), *cert. granted*, 119 S. Ct. 589 (1998) (No. 98-470).

391. *See, e.g., Iglesias v. Mutual Life Ins. Co.*, 156 F.3d 237, 242-43 (1st Cir. 1998).

392. *See, e.g., Gold v. Local 7 United Food & Commercial Workers Union*, 159 F.3d 1307, 1309-11 (10th Cir. 1998) (holding that, under *Steel Co.*, a district court must verify its supplemental jurisdiction pursuant to 28 U.S.C. § 1367 before assessing the merits of supplemental state law claims). The court noted that "[a]lthough *Steel* addresses standing in the context of a federal question claim, its rationale must certainly apply—with even greater force—to questions of supplemental jurisdiction, which implicate additional concerns of federalism and comity." *Id.* at 1310 (citing *Iglesias*, 156 F.3d at 240-41). "The proper course of conduct when declining supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c) is to dismiss the state law claims without prejudice, in order to permit them to be brought in state court." *Id.* at 1311. "Because a refusal to exercise supplemental jurisdiction means the district court is without subject matter jurisdiction, there can be no res judicata effect in state court when the district court has recourse to 28 U.S.C. § 1367(c). Accordingly, such a refusal is not contrary to the reasoning of *Marathon Oil*. . . ." *Id.* at 1311 n.5 (citing *Marathon Oil*, 145 F.3d at 218).

deportation-related detention decisions,³⁹³ and—though rather far-removed from Article III—the procedural requirements of Rules 3(c)³⁹⁴ and 4(b)³⁹⁵ of the Federal Rules of Appellate Procedure. By comparison, issues that have been held to be bypassable include the exhaustion of administrative remedies under 42 U.S.C. § 1997e(a),³⁹⁶ the quantitative employee element of 42 U.S.C. § 2000e(b),³⁹⁷ the certificate-of-appealability requirement of 28 U.S.C. § 2253(c)(2),³⁹⁸ and (possibly) *Younger* abstention.³⁹⁹ Typical of this latter category of

393. See, e.g., *Ncube v. INS Dist. Dirs. & Agents*, No. 98 Civ. 0282 HB AJP, 1998 WL 842349, at *4 (S.D.N.Y. Dec. 2, 1998).

394. See, e.g., *United States v. Webb*, 157 F.3d 451, 452-53 (6th Cir. 1998) (per curiam) (dismissing the appeal for lack of jurisdiction because the appellant's notice of appeal "fails to designate the name of the court to which his appeal is taken" as required by FED. R. APP. P. 3(c), insofar as "the requirements of Rule 3(c) are jurisdictional in nature" and, under *Steel Co.*, the court cannot reach the merits of the appeal without such jurisdiction); see also *United States v. Olds*, No. 97-5436, 1998 WL 833699, at *1-2 (6th Cir. Nov. 20, 1998) (per curiam) (same). The *Webb* court indicated that its prior decision, *Brooks v. Toyotomi Co.*, 86 F.3d 582, 586 (6th Cir. 1996), which "assumed[d] the existence of appellate jurisdiction *arguendo*" despite noncompliance with Rule 3(c), was effectively abrogated by *Steel Co.* See *Webb*, 157 F.3d at 452 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1012 (1998)).

395. See, e.g., *United States v. Rapepert*, 159 F.3d 1, 2-3 (1st Cir. 1998) (applying the rule of *Steel Co.* to a determination of whether a notice of appeal under FED. R. APP. P. 4(b) was timely filed and ultimately dismissing for lack of appellate jurisdiction).

396. See, e.g., *White v. Fauver*, 19 F. Supp. 2d 305, 318 n.16 (D.N.J. 1998) ("Failure to exhaust administrative remedies under [42 U.S.C.] § 1997e(a) is not a jurisdictional bar to bringing suit in federal court. Therefore, this Court is not engaging in the improper practice of 'assuming' jurisdiction.") (citing *Steel Co.*, 118 S. Ct. at 1012). For a contrary holding in a different context, see *Stelco Holding Co. v. United States*, 42 Fed. Cl. 101, 103-06 (Fed. Cl. 1998) (holding that filing an administrative refund claim is a jurisdictional prerequisite of the court in various refund actions, and that the merits of the actions cannot be reached in the absence of such a filing).

397. See, e.g., *Sharpe v. Jefferson Distrib. Co.*, 148 F.3d 676, 677-78 (7th Cir. 1998) ("A plaintiff's inability to demonstrate that the defendant has 15 employees is just like any other failure to meet a statutory requirement. . . . Surely the number of employees is not the sort of question a court (including appellate court) must raise on its own, which a 'jurisdictional' characterization would entail.") (citations omitted).

398. See, e.g., *United States v. Williams*, 158 F.3d 736, 741-42 (3d Cir. 1998). In *Williams*, the Third Circuit was faced with a habeas petitioner who had not first applied to the district court for a certificate of appealability under 28 U.S.C. § 2253(c)(2), which requires "a substantial showing of the denial of a constitutional right." The court was uncertain whether application to the district court was a jurisdictional prerequisite. Rather than resolving that issue, however, the court proceeded to determine that the showing had not been made and thus denied the appeal. It reasoned that this approach was consistent with *Steel Co.*:

[I]f we were to determine that we will not issue a certificate of appealability because [the petitioner] has not demonstrated that he is entitled to one under 28 U.S.C. § 2253(c)(3), then we would find that this court does not have jurisdiction to go forward in this appeal. On the other hand, if we were to find that we cannot issue a certificate of appealability because *Williams* did not apply for a certificate to the district court, we also would determine that we do not have jurisdiction to go forward.

Id. at 742. But the court obviously had already decided the merits issue, because it omitted a third possibility, namely, that it might find that the petitioner did demonstrate an entitlement to the certificate of appealability.

cases is the Second Circuit's holding that it may bypass the issue of whether or not a party is proper when service of process is not effectuated.⁴⁰⁰ Deeming this failure "excusable" and thus "not an exercise of hypothetical jurisdiction of the sort disapproved of by the Supreme Court in *Steel Co.*,"⁴⁰¹ the court held—in terms obviously derived from the hypothetical jurisdiction lineage—that "[b]ecause the merits of the case . . . are easily resolved, we assume, without deciding, that [the party in question] is a proper party to this action."⁴⁰²

Among other things, this rampant confusion in the application of *Steel Co.* raises several secondary issues regarding the interpretive responsibilities of lower federal courts in the face of an opaque jurisdictional ruling. Given the Court's ambiguity as to the reach of the repudiation beyond Article III requirements, for example, should these lower courts err on the side of overapplication or underapplication? Or, assuming it does reach non-Article III requirements, should a court, when confronted with an issue that may or may not be jurisdictional, err on the side of inclusion or exclusion? Unfortunately, neither principled analysis nor even expediency may yield clear answers to such questions. As a matter of principle, one might be tempted to err on the side of overapplication and inclusion, with the result being that all arguably jurisdictional questions are ultimately deemed jurisdictional, and that all or most questions deemed jurisdictional must be decided at the outset. Taking this approach, courts would effectively be immune from allegations that

399. The Eleventh Circuit held, post-*Steel Co.*, that *Younger* abstention is similarly bypassable, though it did not explicitly mention the *Steel Co.* decision. See *Falanga v. State Bar.*, 150 F.3d 1333, 1335 n.2 (11th Cir. 1998) ("assum[ing] without deciding" that the district court's abstention decision was proper "[b]ecause it appears that '*Younger* abstention is not jurisdictional'") (quoting *Benavidez v. Eu*, 34 F.3d 825, 829 (9th Cir. 1994)).

400. See *United States v. Vazquez*, 145 F.3d 74, 80 & n.3 (2d Cir. 1998).

401. *Id.* at 80 n.3 (citing *Steel Co.*, 118 S. Ct. at 1012-16). The court based its conclusion that a failure to effectuate service of process is excusable on FED. R. CIV. P. 4(m), which authorizes a court to extend the statutory service period "if the plaintiff shows good cause for the failure." See *id.* at 80.

402. *Id.* at 80 & n.3. The Seventh Circuit as well has already invoked this technique, twice in one case in fact. See *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 672 (7th Cir. 1998) (bypassing the issue of extraterritorial jurisdiction under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), "[b]ecause this is a statutory standing question" and therefore deciding that the court "need not resolve it definitively before addressing merits questions" (citing *Steel Co.*, 118 S. Ct. at 1013 & n.2)), *cert. denied*, 119 S. Ct. 890 (1999); *id.* at 669 n.13 (bypassing the issue of purchaser standing under 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5 because it "appears to us to be a statutory standing issue directly analogous to the 'zone of interests' doctrine, one of the 'set of prudential principles that bear on the question of standing,'" and therefore may be sidestepped) (quoting *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 1161-62 (1997)).

they were ever engaging in hypothetical jurisdiction, exercising power that the Congress (let alone the Constitution) had not in fact provided for them. This appears to have been the posture of a panel of the District of Columbia Circuit when confronted by an issue that was both complex and only arguably jurisdictional, precisely the sort of issue that a court might be expected to bypass.⁴⁰³ The issue was whether the waiver of federal sovereign immunity in an environmental statute extended to the government's regulatory activities, or whether it was limited to nonregulatory activities such as contracting—a question that was functionally jurisdictional in the sense that, if answered in favor of immunity, could bar the suit entirely. Though acknowledging that “the claim of immunity is jurisdictional” in a general sense,⁴⁰⁴ nevertheless the court was “uncertain whether *Steel Co.*'s holding requires us to resolve the government's waiver claim first, when, as here, even the merits evidence that would be excluded under the government's waiver theory comes nowhere near establishing liability, and when we are certain of our jurisdiction over the suit itself.”⁴⁰⁵ Taking “the more cautious approach,” the court eventually decided to resolve the jurisdictional question first, and only then proceeded to the merits-based question of liability.⁴⁰⁶

But was this panel correct? Is this approach, though seemingly “the more cautious,” truly justifiable? Depending on the circumstances, one could in fact argue that such an approach may actually defy the Court's intentions in *Steel Co.*, may undermine the separation of powers by overapplying various statutory jurisdictional devices enacted by Congress, and may result in a needlessly excessive and inefficient use of judicial resources. In addition, the treatment of all arguably jurisdictional issues as jurisdictional in the *Steel Co.* context will inevitably create friction with the dissimilar treatment of identical issues in other contexts, thus necessitating a justification for the differential treatment and, at the very least, spawning confusion among litigants and judges. Finally, the route of inclusion and overapplication may not always be so principled and cautious after

403. See *East Bay Mun. Util. Dist. v. United States Dep't of Commerce*, 142 F.3d 479, 482 (D.C. Cir. 1998).

404. *Id.*

405. *Id.*

406. *Id.*

all, given that some courts may be eager to deem an issue jurisdictional in order to avoid the option of bypassing it.⁴⁰⁷

Of course, the ultimate responsibility for properly interpreting the scope of *Steel Co.* must be assumed by each court or judge, acting in good faith, in the context of individual cases. Although several courts to date have extended the repudiation of hypothetical jurisdiction well beyond Article III requirements—an ironic development given the judiciary's prior overuse of hypothetical jurisdiction—a reasonable case can be made that these rulings, or at least some of them, are mistaken. Accordingly, the court or judge who does not believe that the Supreme Court intended to prohibit the practice of hypothetical jurisdiction outside of the strictures of Article III should feel free to employ this practice in the treatment of issues falling within this third category—that is, jurisdictional issues independent of Article III and issues that are neither jurisdictional nor merits-related. This is not to say that all such issues will lend themselves to the practice, or that various prudential considerations might not counsel against its invocation. But courts should not necessarily assume, despite a number of early rulings to the contrary, that the *Steel Co.* decision itself precludes this course of action.

4. Address the Merits in Dictum

A fourth method for sidestepping hypothetical jurisdiction's repudiation focuses less on what the case governs and more on what it does not. *Steel Co.* generally teaches that a court cannot proceed to the merits of a dispute without first verifying its Article III jurisdiction, no matter how difficult the jurisdictional question may appear. The constitutional reason for this rule is not, however, that

407. See, e.g., *Nagel v. ADM Inv. Servs., Inc.*, No. 96 CV 2675, 1998 WL 381978, at *4 (N.D. Ill. July 6, 1998) (holding that failure to fall within the Anti-Injunction Act, 28 U.S.C. § 2283 (1994 & Supp. 1996), meant that the court "lack[ed] jurisdiction" and that, under *Steel Co.*, "[f]urther consideration" of the merits "would, therefore, be inappropriate"); see also *Broad v. DKP Corp.*, No. 97 Civ. 2029, 1998 WL 516113, at *4 (S.D.N.Y. Aug. 19, 1998) (refusing to entertain a cross-motion alleging a new basis for jurisdiction (RICO) once the original basis (diversity) had been successfully challenged, because entertaining the cross-motion "would require [the court] to assume jurisdiction and resolve, in the context of [the defendant's] opposition to [the plaintiff's] cross-motion, a merits issue, i.e., whether the RICO claim is timely" and because "the broader teachings of *Steel Co.* counsel against such a result—jurisdiction is a threshold matter, without which I do not have the authority to entertain plaintiff's cross-motion to amend"). Importantly, the court also noted that its court of appeals, the Second Circuit, "has explicitly rejected the practice of retroactive jurisdiction, i.e., permitting a plaintiff belatedly to attempt to assert subject matter jurisdiction by amendment." *Id.* at *5 (citing *Pressroom Unions-Printers League Income Sec. Fund v. Continental Assurance Co.*, 700 F.2d 889, 893-94 (2d Cir. 1983)).

“the merits” as such are forbidden ground, but rather that the court’s issuance of a judgment on the merits without jurisdiction would transgress the authority and limits of Article III. “What is beyond the power of courts lacking jurisdiction,” in other words, “is adjudication on the merits, the act of deciding the case.”⁴⁰⁸ Thus, short of actually adjudicating the dispute and issuing a judgment—which is to say, short of making a difference to the parties—a court probably does not violate *Steel Co.* merely by commenting on the merits in the absence of verified subject-matter jurisdiction.⁴⁰⁹ Needless to say, such behavior may violate a host of prudential or quasi-constitutional, judge-made rules, such as those cautioning against the excessive use of dictum⁴¹⁰ or the formulation of a holding that is broader than necessary to dispose of the case,⁴¹¹ but it would not offend Article III and, presumably, would therefore not offend the rule of *Steel Co.*

Given this premise, one option for courts faced with a difficult jurisdictional question is to find that jurisdiction is lacking (if that is a justifiable finding), but nevertheless *in dictum* to express its view of the merits. Such undertakings—which certainly can be found prior to *Steel Co.*⁴¹²—are often called alternative holdings, although after *Steel Co.* the word “holding” may be problematic insofar as it implies that

408. *In re Minister Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998); see also *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (“Jurisdiction is authority to decide the case either way.”).

409. See *In re Papandreou*, 139 F.3d at 255 (noting that it is the “assumption of law-declaring power” in the absence of subject-matter jurisdiction “that violates the separation of powers principles underlying . . . *Steel Co.*”).

410. See, e.g., David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736 (1987) (observing that “the prevailing view of the judicial function . . . would support the judge who, as an individual, does not go so far as he might be willing to go if the case before him does not require it”).

411. See, e.g., *Rescue Army v. Municipal Court*, 331 U.S. 549, 569 (1947) (stating that “constitutional issues affecting legislation will not be determined . . . in broader terms than are required by the precise facts to which the ruling is to be applied” (citing *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring))).

412. See, e.g., *New York v. Reebek Int’l Ltd.*, 96 F.3d 44, 48 (2d Cir. 1996) (holding that the appellants lacked standing but then stating that “[o]n the basis of this holding, we could conclude our review of the challenged settlement approval. However, in view of the differences in the circuits on the issue of the appellate standing of unidentified class action members, we deem it advisable also to review the merits of appellants’ claims”); *Doyle v. Oklahoma Bar Ass’n*, 998 F.2d 1559, 1567 (10th Cir. 1993) (“to eliminate any doubt . . . we elect to proceed to an alternate holding on the merits”); *Halperin v. CIA*, 629 F.2d 144, 154 (D.C. Cir. 1980) (holding that the plaintiff lacked standing but then, in light of the “possibility” that the Supreme Court could narrow its precedent such that plaintiff would have standing “and considering that judicial economy is best served by our resolving all relevant issues at this stage, we proceed to consider the merits of plaintiff’s constitutional claim as an equal alternative ground of our decision”).

the judgment actually rests, even in part, on that basis.⁴¹³ Instead, courts will simply have to engage in dictum outright, explaining that even if jurisdiction did exist, the suit would likely have been dismissed in any event.⁴¹⁴ Some judges have apparently adopted this milder practice in the wake of *Steel Co.*,⁴¹⁵ while others had already employed it well before the repudiation of hypothetical jurisdiction.⁴¹⁶ In one post-repudiation diversity case, the First Circuit refused pursuant to *Steel Co.* to bypass the amount-in-controversy issue,⁴¹⁷ only then to offer its "initial impressions" on a merits issue because, though "non-binding," they "would be helpful."⁴¹⁸ Likewise, in another post-repudiation case, the Second Circuit, also noting the rule of *Steel*

413. See, e.g., *Schurr v. Resorts Int'l Hotel, Inc.*, 16 F. Supp. 2d 537, 551 n.5 (D.N.J. 1998) (dismissing a 42 U.S.C. § 1983 claim for lack of standing, specifically lack of injury and causation, and refusing pursuant to *Steel Co.* to consider an alternative but related basis for dismissal—namely, a lack of causation under section 1983—because, "not hav[ing] jurisdiction to consider [the plaintiffs] constitutional claims, the Court has no power to announce, even as an alternative basis, a decision on the question of whether Schurr could satisfy the causation aspect of a section 1983 claim") (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1012 (1998)).

414. For an assessment of this technique, see Phillip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. RICH. L. REV. 769, 785-96 (1998).

415. See, e.g., *Metropolitan Wash. Airports Auth. Prof'l Firefighters Local 3217 v. Metropolitan Wash. Airports Auth.*, 159 F.3d 630, 631 (D.C. Cir. 1998) (Henderson, J., concurring) (explaining that "[t]he holding in [*Steel Co.*] compels me to concur on the jurisdictional ground set forth in the majority opinion" but nevertheless commenting that "the Union's sole surviving claim is plainly *res judicata*"); *City of Chicago v. Shalala*, No. 97 C 4884, 1998 WL 164889, at *2 (N.D. Ill. Mar. 31, 1998) (deliberating on forgoing hypothetical jurisdiction in light of *Steel Co.*, deciding instead to "describe the parties' claims and sort out the various bars to the plaintiffs and plaintiffs-intervenors' claims before reaching the merits of the few claims that are ultimately left," but then noting that "its merits analysis would have applied equally to all of the constitutional challenges" to the statute in question); cf. *Starr v. Mandamici*, 152 F.3d 741, 751-52 (8th Cir. 1998) (Beam, J., concurring in part) (agreeing with "those portions of [the majority] opinion holding that [the plaintiff] ha[d] insufficient Article III standing . . . and with those portions holding that we do not have jurisdiction to reach the merits" but then, citing *Steel Co.*, criticizing the court for addressing matters not strictly necessary to the jurisdictional analysis).

416. See, e.g., *Wind River Multiple Use Advocates v. Espy*, No. 94-8031, 1996 WL 223925, at *1 n.2 (10th Cir. May 3, 1996) ("Courts routinely make alternative decisions on the merits while simultaneously holding that a plaintiff lacks standing to sue. This practice is in the best interest of judicial economy and does not violate the case and controversy requirement of Article III of the United States Constitution.") (citing *Sierra Club v. Rebertson*, 28 F.3d 753 (8th Cir. 1994); *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992)); *Garingalao v. Office of Personnel Management*, No. 91-3233, 1991 WL 181435, at *1 (Fed. Cir. Sept. 18, 1991) (per curiam) (dismissing for lack of jurisdiction but nevertheless concluding that "[e]ven assuming jurisdiction existed, we see no error in the [Administrative Judge]'s decision on the merits"); *Oro v. Office of Personnel Management*, No. 91-3225, 1991 WL 181436, at *1 (Fed. Cir. Sept. 18, 1991) (per curiam) (same); *Holz v. INS*, 309 F.2d 452, 454 (9th Cir. 1962) (proclaiming that "ours is a court of limited jurisdiction" and concluding that in the case at bar "we are required to dismiss the petition on the ground that this court is without jurisdiction," and then noting that "were we to assume this court has jurisdiction, we would reach an equivalent result on the merits").

417. See *Iglesias v. Mutual Life Ins. Co.*, 156 F.3d 237, 242-43 (1st Cir. 1998).

418. *Id.* at 243 (citing *Steel Co.*, 118 S. Ct. at 1012).

Co., vacated the judgment below and remanded for a more informed determination of subject-matter jurisdiction, but could not resist commenting to a "limited extent" on the district court's treatment of the merits.⁴¹⁹ And in another such case, one judge even dissented from the majority's reaching of the merits based on his conclusion that jurisdiction did not exist and that dismissal was thus warranted under *Steel Co.*, only then to remark: "I regret my inability to join in the majority's discussion and analysis (though I should add that if my view on the jurisdictional issue were different, I would be pleased to sign onto that persuasive opinion on the merits)."⁴²⁰ Despite his outward fidelity to the rule of *Steel Co.*, in other words, the judge nonetheless effectively sidestepped the rule by stating his view of the merits in the form of a postscript.

Of course, because this technique generates dictum rather than a holding, whereas hypothetical jurisdiction would generate the latter, there would be no *res judicata* on the merits and the precedential or *stare decisis* effect of a court's view of the merits would be lessened. To be sure, even a true alternative holding, outside the *Steel Co.* context, does not necessarily enjoy the same weight as the primary holding.⁴²¹ But this hardly renders such dictum inefficacious. In terms of precedential effect, for example, it was earlier noted that so-called considered dictum may indeed carry substantial weight.⁴²² Moreover, even if this weight is not formally acknowledged, it is quite likely that legal decision making will still be shaped by such dictum. For example, lawyers will not press a claim that appears to have been flatly rejected, "[p]rivate agreements among the parties or between the parties and their attorneys or indemnitors may also be affected,"⁴²³ and lower court judges may decide more readily against such a claim when it is subsequently confronted on the merits.⁴²⁴ All in all, then, this technique may prove

419. *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 930, 932 (2d Cir. 1998).

420. *Tara M. v. City of Phila.*, 145 F.3d 625, 629 (3d Cir. 1998) (Shadur, J., dissenting).

421. See Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. LEGAL EDUC. 431, 437 (1989) (speculating that courts do not "typically treat alternative holdings as dictum, though perhaps the authority of an alternative holding is less forceful than the authority of a single holding").

422. See *supra* notes 343-45 and accompanying text.

423. *Clow v. United States Dep't of Hous. & Urban Dev.*, 948 F.2d 614, 627 n.4 (9th Cir. 1991) (O'Scannlain, J., dissenting). Although Judge O'Scannlain was referring to the possible effect of a merits-based decision resting on hypothetical jurisdiction, as opposed to a pure jurisdictional dismissal, his point applies with equal force to a jurisdictional dismissal accompanied by a dictal discussion of the merits.

424. See Greenawalt, *supra* note 421, at 432-33 (discussing predictive capacities of attorneys and lower court judges confronted with apparent dictum).

both quite useful and increasingly common as a means of sidestepping the *Steel Co.* rule.

5. Deem the Merits Insubstantial

Finally, courts may turn to the substantiality doctrine, which was expressly preserved by *Steel Co.*, as a proxy for hypothetical jurisdiction. This doctrine, as noted earlier, allows a court to dismiss an insubstantial or frivolous claim for lack of subject-matter jurisdiction under Rule 12(b)(1). Such dismissals may prove a useful substitute in certain cases where subject-matter jurisdiction may be otherwise complicated but where the merits are so manifestly against the party seeking jurisdiction that a court could justifiably deem the claim insubstantial. Some courts, in fact, even formulated their doctrines of hypothetical jurisdiction to require, among other things, that "the merits of the appeal be insubstantial,"⁴²⁵ although in all likelihood they were not using the term "insubstantial" precisely as it is used in the 12(b)(1) setting.⁴²⁶

Naturally there would be important differences between a 12(b)(1) dismissal and a dismissal based on hypothetical jurisdiction, both for the plaintiff and for the court. Most obviously, a 12(b)(1) dismissal for insubstantiality, though essentially declaring the claim meritless, nevertheless would not be prejudicial and would not possess res judicata effect beyond the specific issue of subject-matter jurisdiction in federal court.⁴²⁷ Accordingly, a plaintiff subject to such a dismissal could theoretically refile in state court, absent exclusive federal court jurisdiction or other impediment.⁴²⁸ From the court's

425. *E.g.*, *United States v. Troescher*, 99 F.3d 933, 934 n.1 (9th Cir. 1996).

426. *Cf.* Comment, *The Significance of Dismissals "For Want of a Substantial Federal Question": Original Sin in the Federal Courts*, 68 COLUM. L. REV. 785, 786-89 (1968) (observing that the meaning of substantiality can differ among jurisdictional doctrines); *see also* *Thomason v. Norman E. Lehrer, P.C.*, 182 F.R.D. 121, 127 & n.1 (D.N.J. 1998) (noting difference between frivolousness for purposes of sanctions under FED. R. CIV. P. 11 and insubstantiality for purposes of 12(b)(1)).

427. *But cf. supra* text accompanying notes 286-89 (noting that the Court's opinion in *Norton* could be read as legitimizing dismissals for insubstantiality that are nevertheless prejudicial).

428. Refiling in federal court would be barred by res judicata on the issue of jurisdiction, *see supra* note 238 and accompanying text, and could trigger sanctions under FED. R. CIV. P. 11(c), which authorizes sanctions against attorneys or parties who, among other things, advance unwarranted or frivolous legal claims in their signed pleadings, as provided in Rule 11(b). *See* *Gutierrez v. Fox*, 141 F.3d 425, 427 (2d Cir. 1998) ("If an attorney alleges jurisdiction when reasonable inquiry would show that it did not exist, he may be held liable for sanctions substantial in amount."); *Weisman v. Rivlin*, 598 F. Supp. 724, 726 (D.D.C. 1984) (imposing a Rule 11 sanction for asserting diversity jurisdiction where reasonable inquiry would reveal its plain absence); *cf. Ricketts v. Midwest Nat'l Bank*, 874 F.2d 1177, 1182 n.4 (7th Cir. 1989) (noting

perspective, moreover, a dismissal for insubstantiality may give rise to at least two concerns. First, "the standard for [an insubstantiality] dismissal is a rigorous one" and such a dismissal "should be applied only in extraordinary circumstances."⁴²⁹ If only for fear of reversal, courts may thus be wary of pushing the substantiality doctrine too far simply to achieve indirectly what they can no longer achieve following the demise of hypothetical jurisdiction. Second, the finding of no jurisdiction would not only have *res judicata* effect within its own sphere, but, unlike hypothetical jurisdiction, would create jurisdictional precedent within the deciding district or circuit. Because jurisdictional doctrines can apply across the docket, the effect of such precedent could be significant, especially if courts noticeably distort the concept of insubstantiality in the process of foreclosing meritless suits. As long as courts remain aware of these risks, however, and especially where they are or can be minimized, the use of insubstantiality dismissals in lieu of hypothetical jurisdiction may very well turn out to be a serviceable technique.

V. THE DEEPER SIGNIFICANCE OF *STEEL CO.*

Having surveyed in full the doctrine of hypothetical jurisdiction—its emergence, its growth, its repudiation, and the means of its possible persistence—this Article would not be complete without some discussion of the deeper significance of both the existence of the doctrine and the Court's effort to eliminate it. That the doctrine of hypothetical jurisdiction emerged and thrived among the lower federal courts despite its patent illegitimacy is itself a significant revelation about the propensities and susceptibilities of the federal bench. Perhaps even more important, however, are that the

that "the district court is authorized to impose sanctions against a *pro se* plaintiff who successively seeks to press a wholly frivolous claim"). Additional discipline may also result if the federal court incorporates a state or model ethical rule prohibiting frivolous pleadings, such as Rule 3.1 of the Model Rules of Professional Conduct, which provides in part that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983); see also 6TH CIR. R. 32(b) (incorporating the Model Rules of Professional Conduct); 11TH CIR. addendum VIII, Rule 1(1)A (same).

429. *Ricketts*, 874 F.2d at 1182; see also *Thomason*, 182 F.R.D. at 127 (noting that "dismissal of a claim for lack of subject matter jurisdiction under Rule 12(b)(1), rather than for failure to state a claim under Rule 12(b)(6), is reserved for the truly extreme case"); *Bryant v. New Jersey Dep't of Transp.*, 998 F. Supp. 438, 443 n.4 (D.N.J. 1998) (calling it a "narrow and rarely invoked rule").

doctrine grew out of the Supreme Court's own decisions, that the Court—though “acknowledg[ing]” that these decisions “diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question”⁴³⁰—otherwise assumed no responsibility for the doctrine, and that the Court, even while denouncing hypothetical jurisdiction, seemed unable to repudiate it in an unconditional or unambiguous manner. This final Part will consider what these and related circumstances reveal both about the nature and accountability of the Court's jurisdictional decision making and about the jurisprudential debates that animate the Justices' conception of the Constitution and of the Article III judiciary.

A. *Judicial Accountability*

Despite the tenor of the *Steel Co.* majority opinion, it is this author's contention that the emergence and growth of hypothetical jurisdiction should ultimately be attributed to the Supreme Court itself—to its extant jurisdictional rulings and to its overall disposition towards Article III power. Among other things, these phenomena reflect the Court's chronic inability to adhere to its own formalist framework under Article III, its constant crafting of exceptions to rules and the transformation of such rules into standards and even guidelines, and its incorrect and arguably self-serving assumption that the lower federal courts would not follow suit, whether in doctrine or in attitude. Often it is said that actions speak louder than words, and the Court's own behavior (despite its accompanying rhetoric) did little to forestall, and plenty to encourage, the emergence and spread of the doctrine. From one perspective, of course, the long list of Supreme Court opinions that the lower courts invoked to justify the doctrine is simply an indication of the boundless resourcefulness, even the lawlessness, of these courts. That is not an inappropriate conception, and much of this Article either assumes or confirms its validity. From another perspective, however, it is a testament to the Court's recurrent jurisdictional untidiness and is a necessary byproduct of the Court's opportunistic handiwork when confronted with apparent constraints on its own adjudicatory power.⁴³¹

430. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1016 (1998).

431. For a strong critique of the Court's jurisdictional opinions, particularly in the area of personal jurisdiction, see Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 2-4 (1993):

The Court's never-ending opinions, larded with linguistic refinements that are intended to fill empty phrases with meaning and adorned with copious citations, inspire little confidence. . . .

This latter perspective is only confirmed, not contradicted, by the Court's opinion in *Steel Co.* Despite denouncing hypothetical jurisdiction, the Court left in its wake a mesmerizing jumble of related doctrines and new questions, the uncertain dimensions of which are magnified both by its failure to explain with any precision the boundaries of the repudiation and by a landslide of separate opinions that have already prompted one circuit court to conclude that only a "plurality" backed the repudiation and that it is "not entirely clear as to whether (or to what extent) *Steel Co.* undermines our earlier practice [of assuming jurisdiction]."⁴³² This inability to cleanly repudiate hypothetical jurisdiction, in turn, reflects a continuing tension between, on the one hand, the Court's self-recognized constitutional mandate to delineate and respect the limits of its own power and, on the other hand, its prudential, rather human desire to retain substantial discretion over its adjudicatory domain—the very same tension that allowed all thirteen circuit courts to employ the aberrant device of hypothetical jurisdiction while concomitantly expounding the virtues of restraint and the importance of adhering to the textual and doctrinal limitations of Article III.

Viewed from this perspective, *Steel Co.* is as much a tale about the federal bench, and the Supreme Court in particular, as it is a chronicle of the life and death of hypothetical jurisdiction. Doctrines come and go, but the institutional and psychological forces that create, animate, and legitimize them remain more or less constant over time. To appreciate fully the emergence and demise of hypothetical jurisdiction, one must therefore enter the psyche, if you will, of the federal judicial mind. By highlighting the prudential and strategic dimensions of jurisdictional decision making, this Article has attempted to do just that, and in so doing has demonstrated both the likelihood that the essence of hypothetical jurisdiction will endure

The befuddled case law and the disagreements in the Supreme Court suggest that the Justices themselves do not fully grasp the purport of the doctrines they propound. At any rate, they seem either unable or disinclined to make some order out of the chaos they have created. Indeed, in some of their opinions one senses a definite smugness about the confusion the Court has sown . . .

....
The confusion prevailing in the Supreme Court is mirrored and hypertrophied in countless lower court opinions. State and federal judges, exploring the mysteries of jurisdiction ad nauseam in endless pages of learned discourse embellished with myriad citations, fill the case reports with a fog of inconsistent and often obtuse majority, concurring and dissenting opinions.

Id. at 3-4 (footnote omitted).

432. *Hardemon v. City of Boston*, 144 F.3d 24, 26 (1st Cir. 1998).

among the lower federal courts and the several alternative techniques by which this possibility may become reality.

B. *Jurisprudential Discord*

Steel Co. and the history of hypothetical jurisdiction are important not only for what they reveal about the Court's role in fostering and perpetuating the doctrine, but also for what they reveal about the current Justices' discordant jurisprudential perspectives. Underlying the Court's inability to speak with a united and coherent voice is essentially a clash of opposing methodological or conceptual approaches to jurisdictional decision making and, more fundamentally, to the very enterprise of constitutional interpretation. Addressed here will be two of the more prominent conflicts: first, whether constitutional doctrine should be judicially promulgated in the form of rules or of standards; and second, whether the jurisdictional elements of Article III should be interpreted in a formalistic or a functionalistic manner.

1. Rules and Standards

The rules-versus-standards debate, as Professor Kathleen Sullivan has observed, is not an unprecedented source of division within the Court,⁴³³ and the relative propriety of rules or standards tends to vary according to one's premises, to the purposes of one's endeavor, to the constraints of one's institutional circumstances, and to the political context of one's decision making.⁴³⁴ A rule, to borrow Sullivan's definition, "binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts" and "aim[s] to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere."⁴³⁵ "A rule captures the background principle or policy in a form that from then on operates independently" but "necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness."⁴³⁶ A standard, by comparison, "tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation"⁴³⁷ and "allow[s] for

433. See Sullivan, *supra* note 333, at 26, 122-23 (noting the rules-standards debate between Justices Black and Frankfurter).

434. See, e.g., *id.* at 123.

435. *Id.* at 58.

436. *Id.*

437. *Id.*

the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules.⁴³⁸ The hallmark of a standard is that the decisionmaker is permitted to exercise judgment (often modified with “reasoned” or “informed”)⁴³⁹ and to “take into account all relevant factors or the totality of the circumstances.”⁴⁴⁰

In *Steel Co.*, Justice Scalia’s approach for the majority clearly comes down on the rules side of the debate. By eliminating the option of bypassing Article III subject-matter jurisdiction en route to the merits, Scalia confirms that such jurisdiction is an absolute requirement, with no exceptions and no discretion on the part of judges to consider, among other things, the difficulty of the jurisdictional question, the ease of the merits, the condition of the record or pleadings, or the efficiency of the alternatives.⁴⁴¹ Needless to say, Scalia’s effort in this regard is somewhat undermined by the ambiguous boundaries of the resulting rule and, relatedly, by the number and complexity of the doctrines that the Court chose to distinguish and reaffirm. Not only do these characteristics render the Court’s treatment of hypothetical jurisdiction less rule-like in appearance and operation,⁴⁴² they also tend to subvert several of the rationales for formulating rules in the first place, such as legal certainty and decisional economy.⁴⁴³ Be that as it may, the orientation of Justice Scalia clearly is towards rules rather than standards.

On the standards side of the debate in *Steel Co.* are Justices O’Connor and Kennedy, and possibly Justice Breyer as well (but arguably not Justice Stevens, even though his common law methodology would normally situate him there).⁴⁴⁴ Justices

438. *Id.* at 58-59 (footnote omitted).

439. For an earlier example of a jurisdictional doctrine expressed in the form of a “judgment”-based standard, see *Rescue Army v. Municipal Court*, 331 U.S. 549, 574 (1947) (stating that the applicability of the policy of not deciding constitutional questions unnecessarily “can be determined only by an exercise of judgment relative to the particular presentation, though relative also to the policy generally and to the degree in which the specific factors rendering it applicable are exemplified in the particular case”).

440. Sullivan, *supra* note 333, at 59.

441. Justice Scalia’s focus is on the rule-like or standard-like quality of the resulting doctrine which is intended to direct the conduct of lower courts. As Professor Sullivan has observed, however, the choice between rules and standards can relate to more than one aspect of constitutional decision making, including the treatment of precedent, the interpretation of text, and the formulation of doctrine. *See id.* at 26, 69-95.

442. *See id.* at 61 (“A rule may be corrupted by exceptions to the point where it resembles a standard . . .”).

443. *See, e.g., id.* at 62-66 (discussing such rationales).

444. *See id.* at 88 (“If Justice Scalia leads the charge for rules on the current Court, Justice Stevens is his most consistent, standard-bearing antagonist. Justice Stevens has long favored sliding-scale approaches over categorical rule-bound approaches.”); *see also* William D. Popkin,

O'Connor's and Kennedy's disposition in this regard is plainly evidenced by refusing to sign onto the majority's attempt to repudiate hypothetical jurisdiction *in toto*, and instead contending that "the Court's opinion should not be read as cataloging an exhaustive list of circumstances under which federal courts *may exercise judgment* in 'reserv[ing] difficult questions of . . . jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.'"⁴⁴⁵ While this stance does not position O'Connor and Kennedy too far on the standards side of the debate (just as Scalia's exception-ridden stance does not place him too far on the rules side), their hesitation to foreclose future exceptions and their invocation of "judgment" as a methodological principle unmistakably distance them from the rule-orientation of the other members of the majority.⁴⁴⁶

As for Justice Breyer, his positioning on the standards side of the debate would appear, at first blush, to be even more manifest. In his view, "federal courts often and typically should decide standing questions at the outset of a case"⁴⁴⁷ but "[t]he Constitution . . . does not require us to replace those words with the word 'always.' The Constitution does not impose a rigid judicial 'order of operations,' when doing so would cause serious practical problems."⁴⁴⁸ What makes Breyer's position difficult to classify is that while it is superficially quite standard-like, it does nevertheless articulate an alternative doctrine—namely, that jurisdiction must first be confirmed unless the jurisdictional question is difficult and the merits are easily resolved against the party asserting jurisdiction⁴⁴⁹—that is arguably more rule-like than the position of Justices O'Connor and Kennedy. Indeed, in contrast to these Justices, he does not advocate

A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens, 1989 DUKE L.J. 1087.

445. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1020 (1998) (O'Connor, J., concurring) (emphasis added) (quoting *Norton v. Mathews*, 427 U.S. 524, 532 (1976)).

446. The rules-standards divide between Justice Scalia and often Justice Thomas, on the one hand, and Justices O'Connor and Kennedy and often Justice Stevens and possibly Justice Breyer, on the other hand, can also be found in other decisions of the Court's 1997 term. See, e.g., *NEA v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 2184 (1998) (Scalia & Thomas, J.J., concurring in the judgment) (arguing for a bright-line rule under which the First Amendment "has no application to funding" at all, and criticizing the majority opinion—which was authored by O'Connor and joined by Rehnquist, Stevens, Kennedy, and Breyer—for interpreting the First Amendment as having "some ineffable effect upon funding, imposing constraints of an indeterminate nature").

447. *Steel Co.*, 118 S. Ct. at 1020 (Breyer, J., concurring in part and concurring in the judgment).

448. *Id.* at 1021.

449. See *id.* (embracing the formulation of hypothetical jurisdiction as articulated in *Norton*, 427 U.S. at 532).

leaving the door open for future exceptions and does not leave the decision making to the undefined realm of “judgment,” but rather to the somewhat objective determination of the difficulty and simplicity of the jurisdictional and merits questions, respectively.

Having mapped out the relative positions of the *Steel Co.* protagonists along the rules-standards continuum, it is important to consider the theoretical significance of adopting either a rule-oriented or a standard-oriented approach to questions of federal jurisdictional law. Justice Scalia’s rule-orientation appears largely to reflect the position that what legitimizes the federal judiciary is strict respect for the limits of its Article III power and, when consistent with these limits, for the constitutional prerogatives of the legislative and executive branches. Rules are thus a medium of legitimacy, and they are made all the more necessary by the fact that human beings—with all their susceptibilities—sit on the federal bench. In turn, federal jurisdictional law must be rule-based, lest its expositors might yield to these susceptibilities and engage in practices, like hypothetical jurisdiction, that “carr[y] the courts beyond the bounds of authorized judicial action and thus offend[] fundamental principles of separation of powers.”⁴⁵⁰ “For 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*”⁴⁵¹—and, from Scalia’s perspective, there can be no more illegitimate judicial transgression than that.

Justice O’Coimor’s standard-orientation, by comparison, appears largely to reflect the position that what legitimizes the federal judiciary is not simply observance of its power and, perhaps to a lesser extent, the prerogatives of the other branches, but also the exercise of informed discretion or reasoned judgment as an essential part of its decision-making process. For O’Coimor, then, standards are equally a medium of legitimacy, precisely because human beings—with all their deliberative powers—sit on the federal bench. In turn, federal jurisdictional law should (at least sometimes) be standard-based, lest its expositors might be unable to produce reflective judgments in light of the often-unforeseen complexities and circumstances of each case.⁴⁵²

450. *Id.* at 1012.

451. *Id.* at 1016.

452. See Sullivan, *supra* note 333, at 92 (discussing Justices O’Connor’s and Kennedy’s reliance in one case on “all the kinds of considerations that Justice Scalia would deplore as a devolution into open-ended fact-finding rather than law”).

2. Formalism and Functionalism

In addition to dividing on the use of rules versus standards, the current Court is somewhat divided over whether the elements and limits of Article III jurisdiction should be conceptualized in a formalistic or a functionalistic manner. Like the rules-standards debate, the formalism-functionalism debate is also deeply rooted in the Court's jurisprudential history,⁴⁵³ and the presence or reemergence of formalism in the Court's decision making has been critically noted in such areas as federalism,⁴⁵⁴ personal jurisdiction,⁴⁵⁵ and, of course, the separation of powers.⁴⁵⁶ In *Steel Co.*, this debate centered on the determination of constitutional subject-matter jurisdiction itself, in particular whether it always had to precede an analysis of the merits. As will be demonstrated below, Justice Scalia's position for the majority that it did have to be determined as a threshold matter essentially represents a formalistic approach to Article III jurisdiction, which for the most part also describes the position of Justices O'Connor and Kennedy in the former's concurrence. By contrast, Justice Breyer's position that such jurisdiction could be bypassed if warranted by judicial economy essentially represents a functionalistic approach.

Formalism in the jurisdictional context describes a perspective on Article III power that is both exclusively structural in emphasis and heavily categorical in analysis. First, it is concerned entirely with the limits of judicial power as they are enumerated in Article III and confined by the corresponding enumerations of legislative and executive power in Articles I and II, respectively. Nonstructural considerations such as judicial economy, fairness to litigants, and the like are simply irrelevant to the task of determining the scope of federal judicial power.⁴⁵⁷ Second, a formalist approach to Article III

453. See Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 201 (observing that "[s]cholars and jurists have engaged in a long-standing debate concerning the general propriety of formalist and functionalist approaches to constitutional interpretation").

454. See, e.g., *id.* See generally Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997).

455. See generally Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion*, 18 HASTINGS CONST. L.Q. 819 (1991).

456. See generally Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

457. Cf. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 537 (1988) ("What makes formalism formal is this very feature: the fact that taking rules seriously involves taking their mandates as reasons for decision independent of the reasons for decision lying *behind* the rule.").

deductively yields either an absolutely positive or an absolutely negative conclusion: either the judiciary has the power or it does not. There is no balancing of interests, no contextualization, and no middle ground.⁴⁵⁸ Functionalism, as its name implies, takes a more instrumental approach to the question of judicial power. In contrast to formalism, it is pragmatic in emphasis and circumstantial in analysis. Thus, for example, while the Article III enumerations are important, as is the separation of powers, also open to consideration are factors such as judicial economy or the efficacy or utility of the doctrine or scheme in question. At the same time, a functionalist approach will not always yield a clearly positive or clearly negative conclusion; often, the outcome or holding will be conditional or qualified, and the predictability of future outcomes may be proportionately diminished.

In *Steel Co.*, Justice Scalia's majority opinion (even including Justice O'Connor's concurrence) basically reflects a formalistic approach to Article III. Federal courts either do have or do not have the power to assume jurisdiction hypothetically (and they do not, end of analysis); this determination should be based solely on their enumerated power under Article III and in light of the separation of powers (the two rationales invoked by the majority); and other considerations, such as judicial economy, are simply irrelevant (and, in fact, played no express role in the majority opinion). In sharp contrast to the majority's analysis is Justice Breyer's separate concurring opinion, which is absolutely functionalist in its approach. According to Justice Breyer, whether federal courts have the power to assume jurisdiction hypothetically is not an either/or question⁴⁵⁹ (and, in his view, they should under some circumstances); and this determination can be based on the acknowledgment of "serious practical problems"⁴⁶⁰ such as considerations of judicial economy and

458. See Caminker, *supra* note 453, at 200 (labeling as "doctrinal formalism" the articulation of a rule that is "not subject to any case-by-case balancing of interests or measurement of burden"). This categorical nature of formalism both entails and is reinforced by a reliance on deduction as the overall mode of analysis. See, e.g., Chemerinsky, *supra* note 454, at 960 (describing as formalistic a process by which a court "reason[s] deductively from assumed major premises and . . . largely ignore[s] functional considerations").

459. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1020-21 (1998) (Breyer, J., concurring in part and concurring in the judgment) ("[F]ederal courts often and typically should decide standing questions at the outset of a case. . . . But my qualifying words 'often' and 'typically' are important. The Constitution, in my view, does not require us to replace those words with the word 'always.'").

460. *Id.* at 1021.

fairness to litigants.⁴⁶¹ For Scalia, then, “[m]uch more than legal niceties are at stake”⁴⁶²—the question is fundamentally and exclusively one of judicial power. For Breyer, what is at stake are “unnecessary delay and consequent added cost”⁴⁶³—and the question is thus one of efficient and efficacious judicial administration in “today’s world of federal court caseloads.”⁴⁶⁴

Several observations about the formalism-functionalism split are worth noting. First, the methodological division in *Steel Co.* between Justice Scalia and Justice Breyer is actually quite representative of their respective approaches to legal interpretation in general.⁴⁶⁵ Indeed, even when these two Justices find themselves on the same side of a decision—as with the recent invalidation of the Line Item Veto Act, which they both would have upheld⁴⁶⁶—their rationales do not deviate from the formalist and functionalist conceptions, respectively. Justice Scalia in *Clinton v. City of New York* simply did not find that the nation’s “history and traditions” forbade a spending cancellation device of the sort at issue,⁴⁶⁷ and he did not bolster his position with inquiries into its efficacy or soundness.⁴⁶⁸ Either the Constitution forbids it or allows it, and here, in his view, the Constitution allows it. Justice Breyer, by contrast,

461. See *id.* (discussing such factors as “unnecessary delay and consequent added cost” and alleging that the resulting “cumbersome system . . . increases, to at least a small degree, the risk of the ‘justice delayed’ that means ‘justice denied’”).

462. *Id.* at 1016.

463. *Id.* at 1021.

464. *Id.*

465. Their differing views on the propriety of using legislative history to construe statutory language is illustrative. Justice Scalia is a strict textualist and almost entirely rejects the use of legislative history, see *NEA v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 2182 (1998) (Scalia, J., concurring in the judgment) (criticizing the majority’s use of legislative history, asserting that “all this legislative history has no valid claim upon our attention at all”); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 29-37 (Amy Gutmann ed., 1997). Conversely, Justice Breyer considers legislative history to be a useful interpretive tool, see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992). For a general exposition of their respective views, see Kenneth R. Dortschbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161, 169-93 (1996).

466. See *Clinton v. City of New York*, -- U.S. --, 118 S. Ct. 2091, 2110, 2118 (1998). Justice Scalia filed an opinion concurring in part and dissenting in part, in which Justice Breyer joined in part, while Justice Breyer filed a dissenting opinion, in which Justice Scalia joined in part.

467. *Id.* at 2116 (Scalia, J., concurring in part and dissenting in part). Justice Scalia also argued that several appellees lacked standing. See *id.* at 2111-15.

468. Even Justice Scalia’s argument that “there is not a dime’s worth of difference between Congress’s authorizing the President to *cancel* a spending item, and Congress’s authorizing money to be spent on a particular item at the President’s discretion,” *id.* at 2116, is not a pragmatic one. He notes that “the latter has been done since the Founding of the Nation,” *id.*, and therefore the former is equally legitimate as a matter of logic.

viewed the separation of powers question as one of relative degree⁴⁶⁹ and explicitly took note of several functionalist considerations: “the Framers’ pragmatic vision,”⁴⁷⁰ the need for “institutional innovation,”⁴⁷¹ and the authority “to interpret nonliteral Separation of Powers principles in light of the need for ‘workable government.’”⁴⁷² According to Breyer, the means employed by the Line Item Veto Act “represent an experiment that may, or may not, help representative government work better,” and “[t]he Constitution . . . authorizes Congress and the President to try novel methods in this way.”⁴⁷³

Second, the formalism versus functionalism debate is by no means coextensive with the rules versus standards debate, and there is certainly no logical mandate that a formalist be an advocate of rules or that a functionalist be an advocate of standards. While it is true that formalists may generally find greater utility in the expression of legal doctrine through rules,⁴⁷⁴ and functionalists may find the same of standards,⁴⁷⁵ the correlation is certainly not a necessary one, as

469. See, e.g., *id.* at 2125 (Breyer, J., dissenting) (“The delegation of those powers to the President may strengthen the Presidency, but any such change in Executive Branch authority seems minute when compared with the changes worked by delegations of other kinds of authority that the Court in the past has upheld.”).

470. *Id.* at 2119.

471. *Id.*

472. *Id.* at 2120 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

473. *Id.* at 2131 (Breyer, J., dissenting). Yet another illustration of the methodological difference between Justices Scalia and Breyer can be found in *Printz v. United States*, 521 U.S. 87, 117 S. Ct. 2365 (1997). Writing for the Court, Justice Scalia concluded that a federal requirement that state law enforcement officers conduct background checks on prospective handgun purchasers categorically violated the Tenth Amendment because it “conscript[ed] the State’s officers directly.” *Id.* at 2384. According to Scalia’s opinion:

The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Id. (emphasis added). In dissent, Justice Breyer expressed dissatisfaction with the majority’s categorical or absolutist approach, arguing that it should have taken account of the practical justifiability and actual effects of the requirement. From his perspective, “[t]here is neither need nor reason to find in the Constitution an absolute principle, the inflexibility of which poses a surprising and technical obstacle to the enactment of a law that Congress believed necessary to solve an important national problem.” *Id.* at 2405 (Breyer, J., dissenting).

474. See, e.g., Schauer, *supra* note 457, at 538 (noting the close relationship between formalism and rules).

475. See, e.g., *id.* at 537 (“Functionalism focuses on . . . the outcome the decisionmaker deems optimal. Rules get in the way . . . and thus functionalism can be perceived as a view of decisionmaking that seeks to minimize the space between what a particular decisionmaker concludes . . . should be done and what some rule says should be done.”); see also T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 958 (1987) (“Balancing

evidenced by Justice Breyer's promulgation of a functionalist rule for hypothetical jurisdiction. Third and finally, it is interesting to note that Justice Breyer, though writing only for himself, was essentially speaking both on behalf of the lower federal courts, many of which had similarly defended the doctrine in terms of judicial economy, and on behalf of "a long academic tradition of criticizing certain jurisdictional doctrines for adhering too formalistically or rigidly or blindly to certain classical conceptions of jurisdictionality, and ignoring 'policy' concerns such as efficiency, fairness, or the integrity of the political or judicial system."⁴⁷⁶ Like those before him, however, what Breyer did not do—and this may partly explain why no other Justice joined his opinion—is to account for the judicial corruption of hypothetical jurisdiction prior to *Steel Co.*, and to give the reader a reason to believe that the doctrine would not continue to be overused and misused by lower courts. As noted earlier, even the critics of hypothetical jurisdiction recognized its capacity to promote judicial economy. But no one to date, including Justice Breyer, has adequately delineated a principle or method by which the doctrine's use can be meaningfully circumscribed, and functionalism is certainly not a license for the abdication of such limits.

VI. CONCLUSION

The life and death of hypothetical jurisdiction are not simply milestones in the genealogy of a doctrine. They are chapters in a story about the propensities, dynamics, and self-conceptions of the Article III judiciary. Such, in fact, is generally true of the jurisprudence of federal jurisdiction. More than just another corpus of related doctrines and principles, it is an expression, a projection both conscious and unconscious, of the nature and character of the federal bench—of the presidentially nominated and senatorially confirmed members who wear its robes; of the delicately configured influences of federalism and the separation of powers, and the tension between excess and restraint, that delineate the scope of its authority; of the rich aggregate of judicial traditions that inform its language, its habits, and even its reasoning; and of the particular history of its conflicts, failures, and triumphs as the least dangerous yet least democratic branch of the federal government. No doctrine or decision

openly embraced a view of the law as purposeful, as a means to an end; and it demanded a particularized, contextual scrutiny of the social interests at stake in a constitutional controversy.”).

476. Dane, *supra* note 6, at 9 n.18.

involving the scope of federal judicial power—hypothetical jurisdiction and *Steel Co.* included—can exist apart from these institutional factors, and no analysis of any such doctrine or decision can be undertaken without their consideration.

From a formalistic standpoint, of course, the repudiation of hypothetical jurisdiction was an easy call for the Court. Article III having no Necessary and Proper Clause, the tribunals that exercise its power either have jurisdiction or they do not, and only if they do can they reach the merits of a given dispute. But the fact that the doctrine became so widespread and found its apparent warrant in many of the Court's own decisions suggests that the problem of hypothetical jurisdiction ran much deeper than the need for doctrinal clarification, and that its eradication may necessitate more than a formalistic pronouncement. As this Article has argued, much of the responsibility for the doctrine's emergence and growth must be shouldered by the Supreme Court itself, both because it provided the doctrine with precedential foundation and because its own ad hoc decision making legitimized the expedient dilution of principle, which in turn facilitated the doctrine's proliferation.

Through its formalistic reading of Article III, the Court has for the most part rejected the practice of hypothetical jurisdiction. But unless this orthodoxy of formalism is accompanied by an orthopraxy of consistency, especially by its chief expositor, there is little reason to believe that the repudiation will prove meaningful in the long term. Even as it now stands, the repudiation's boundaries and the scope of several related but unrepealed doctrines remain murky. In turn, for reasons discussed in Part IV, courts will likely continue to gravitate to the concept of hypothetical jurisdiction and, using the techniques set forth in Part IV, will attempt to approximate its utility as closely as possible without running afoul of the *Steel Co.* decision. While the outward form and even the doctrinal core of hypothetical jurisdiction may have been eliminated by the Court's formalist decree, its value and thus its essence will long persist in the deliberations, and quite possibly the decisions, of the lower federal bench.

