The Demise of Hypothetical Jurisdiction in the Federal Courts

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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. Foremost among these is that federal power, although vast, is neither inherent nor unbounded, but consists only of that granted by the Constitution. In 1998, the Court remained steadfast


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*, the Court formally denounced the federal court practice of assuming the existence of subject-matter jurisdiction solely to reach the merits, and then rule against, manifestly unworthy claims. Often labeled "hypothetical jurisdiction," the now-repudiated practice had gradually infiltrated the decision making of every circuit court of appeals, becoming nothing less than "a familiar tenet" or "settled principle" of federal appellate jurisprudence.

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.")


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. 112, 113 (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 F.D.R. 6, 10 (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,' after Norton v. Mathews, 427 U.S. 507, 118 S. Ct. 2117 (1998)."), cert. denied, 127 U.S. 1003 (1998). The majority opinion was authored by Justice Scalia.


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 powers.

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 Rehki, 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 “[w]hatever 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, and it has long been held that their jurisdiction cannot "be expanded by judicial decree" and should be "carefully guarded against expansion by judicial interpretation." 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. 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. 378, 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."); 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.").


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. Loper, 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. 4, and section five of the Fourteenth Amendment 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)(1)(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 . . . infringing 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 458, 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, 25 U.S.C. § 2710(d)(1)(a), (d)(7)) (1994); 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, 599 F. Supp. 785, 787-89 (N.D. Ala. 1984) (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).
In the 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

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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.6 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) ("Ripeness 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 Dept 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, 366 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 the[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 these explicit legislative directives [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

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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/Osanne 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, 76 (D.C. Cir. 1984) (quoting Tuck v. Pan Am. Health Org., 666 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, 1011 (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 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 dispute 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) ("If 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, 469 (1926) (stating in dictum that "if there was an absence of federal jurisdiction this Court could not consider the

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.").
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—regardless of whether it was previously raised, of whether the parties stipulate or consent to jurisdiction, and of how far along the litigation has proceeded.
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. 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.” Alternatively, the Supreme Court’s
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.” 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]” 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) (“When 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.”


32. *Wong v. Ickert*, 908 F.2d 661, 662 (9th Cir. 1990); see also *Markgraf v. Storage Tech. Corp.*, No. 97-1166, 1998 WL 51449, at *2 (10th Cir. Jan. 28, 1998) (“Because 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

33. Freeman v. Principal Fin. Group, No. 96-35947, 1997 WL 377084 (9th Cir. July 3, 1997); 33. Zavala-Zaragoza v. INS, No. 95-70104, 1996 WL 413869 (9th Cir. July 23, 1996); 33. 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., 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? Of course, not every aspect of hypothetical jurisdiction breeds economy—most glaringly, the doctrine sustains uncertainty and encourages future litigation over the same jurisdictional issue—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. 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. 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,” 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); Switlik, 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.”).

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

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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.


43. Browning-Ferris, 899 F.2d at 158; see also Curry v. Baker, 802 F.2d 1992, 1319-13 & n.6 (11th Cir. 1986) (assuming standing in a challenge to a state electoral process because "[the] 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. Forssenius, 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. 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. 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. After all, the jurisdiction of the lower federal courts does not flow directly from Article III; 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. Shah, No. 95-3063, 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. 461, 468 (1987) (noting that where a statute is facially challenged under the Free Speech Clause 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] interpreted by a state tribunal... it is the duty of the federal court to exercise its properly invoked jurisdiction'" (quoting Horman, 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. 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, 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, "Where 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."

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" is almost nonsensical. In disputes where the bypassed jurisdictional issue is itself one of the case-or-controversy requirements, such as standing, it is extraordinarily
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. 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. 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" and would simply "entail expenditure of significant judicial resources to no avail." By contrast, "if 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," 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." 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, 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-

59. Decker & Co. v. West, 76 F.3d 1873, 1884 (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.").
61. Crocco v. Xerox Corp., 137 F.3d 105, 108 (2d Cir. 1998); see also RNR Enters. 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.1 (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 Nemizer v. Baker, 793 F.2d 58, 62 (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 1062 (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, although it is true that a litigant, once properly in federal court, may then have a personal interest in independent and impartial adjudication.

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. 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. 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, 226 (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 Monksy v. Moraghan, 127 F.3d 248, 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 arguendo”).
its resolution has far-reaching consequences. Unraveling them as best as possible, it appears as if a “difficult” or “complex” issue was one that possessed some inherent level of intricacy, including factual uncertainty, and that had not already been decided by the Supreme Court or by any court, or over which there was a split of authority. In addition, at least one court held that “[j]urisdictional questions may be considered difficult... if they are of constitutional stature,” 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,” or if, combined with its complexity, it “poses a rather high risk of committing constitutional error.”

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

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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.

one court as a means to avoid resolving such a question—to “leave [it] for another day,” 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. 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. That said, even this requirement

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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 CHEMERINSKY, 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, 381 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., Salel v. Boardwalk Regency Corp., 913 F. Supp. 993, 1009 (E.D. Mich. 1996) (noting that “[s]uch statutory 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.' ”
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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. 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." 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


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 [plaintiff]'s argument 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 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 reconstructed facts, but to assume for present purposes that they do have standing" because "the 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-finding and resolution of the jurisdictional issue would therefore require a remand.

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." 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... farreaching 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 Intl 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., 80 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 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").

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 Envt, 523 U.S. 83, 118 S. Ct. 1003, 1016 (1998); see also Clow v. HUD, 948 F.2d 614, 626 (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-

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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.


89. See, e.g., Cole v. USDA, 138 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. 95-030, 1996 WL 760573, at *1 (2d Cir. 1996); Bennett v. Plenert, 83 F.3d 915, 922 (9th Cir. 1996), 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. Among these were mootness, federal sovereign immunity, the Rooker-Feldman doctrine, the political question


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., 924 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 make[e] all the elements of the cause of action . . . jurisdictional”) (quoting United States v. Vanness, 566 F.2d 661, 663 n.2 (D.C. Cir. 1980)).


92. See, e.g., Aves v. Shah, No. 96-3636, 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, 945 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, immediate appealability or other questions of non-administrative finality, removal from state to federal court, defective allegations of jurisdictional diversity, jurisdictional sufficiency of a complete preemption claim, lack of in rem jurisdiction in a civil forfeiture action, state action as a jurisdictional element, administrative compliance as a jurisdictional


defective allegations of jurisdictional diversity, jurisdictional sufficiency of a complete preemption claim, lack of in rem jurisdiction in a civil forfeiture action, state action as a jurisdictional element, 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.3d 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"); 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).

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 an ERISA plan administrator is immediately appealable"); American Capital Ins., 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 145, 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. U.Sery, 539 F.2d 386, 393 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 reinindictment 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").


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 52, 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. Util., 825 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, 1302 (1st Cir. 1980) (assuming jurisdiction over Title VII action); Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 22, 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).


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

In short, the federal courts appear to have been quite unable to control the spread of the doctrine. 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 glib abuse of the hypothetical jurisdiction technique can satisfy that urge." 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. 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. v. Compagnie des Bauxites de Guinee, 458 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 Invvs., Inc., 99 F.3d 1133, 1158-42 (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, 51 F.3d 5, 8 n.2 (1st Cir. 1995) (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 288, 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.

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,

[without 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


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." Similarly, although courts generally honored the requirement of jurisdictional difficulty, they frequently omitted the requirement that resolution of the jurisdictional question would be far-reaching. 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. 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.

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.") (en banc), affd, 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. Toyotomi 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. 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. 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.”

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 litigants—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. The omission of authority is all the more inexplicable given that relevant authority from virtually all the circuits was readily at hand, and given

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123. See, e.g., United States v. Tomy, 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 ...”).


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.”); Pelfrene 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)).

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

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. 5569, 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. 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"—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." 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).


134. United States v. Troescher, 99 F.3d 933, 934 n.1 (9th Cir. 1996).
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, the doctrine was not entirely without its detractors. Two circuit judges, in particular, stood their ground despite the doctrine’s seeming popularity: then-Judge Clarence Thomas of the District of

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135. See Browning-Ferris Indus. v. Muszyński, 899 F.2d 151, 159 (2d Cir. 1990) (noting that, “[in 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 “ineslegant” 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. 96-6297, 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 Circuit\textsuperscript{138} and Judge Diarmuid O'Scanlain of the Ninth Circuit.\textsuperscript{139} It was not until \textit{Steel Co.} was decided in 1998, however, that the principled steadfastness of these judges was fully vindi-
cated.\textsuperscript{140} The following Subparts will explore the nature and scope of the \textit{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.

\textbf{A. The Exceptional Nature of the Repudiation}

Two questions were raised before the Court in \textit{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.\textsuperscript{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,\textsuperscript{142} nor listed as a question
presented on certiorari,\textsuperscript{143} nor briefed by the parties on certiorari.\textsuperscript{144}

\begin{itemize}
\item \textbf{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).
\item \textbf{139.} See Clow v. HUD, 948 F.2d 614, 625-28 (9th Cir. 1991) (O'Scanlain, J., dissenting); see also Hoff v. United States, 3 F.3d 1297, 1300 (9th Cir. 1993) (O'Scanlain, J., concurring in the judgment).
\item \textbf{140.} To be sure, both judges' opinions were cited in the majority's analysis. See \textit{Steel Co. v. Citizens for a Better Env't}, 523 U.S. 83, 118 S. Ct. 1003, 1014-15 (1998) (citing \textit{Clow}, 948 F.2d at 627 (O'Scanlain, J., dissenting)); \textit{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 \textit{Steel Co.}, 118 S. Ct. at 1023-24 (Stevens, J., concurring in the judgment) (citing \textit{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.
\item \textbf{141.} See \textit{Steel Co.}, 118 S. Ct. at 1006 ("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."); \textit{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 \textit{Steel Co.}, see generally Janet A. Brown & Jeremy Rosen, Note, Spring 1998 Term: Steel Company v. Citizens for a Better Environment, 4 Envtl. L. 927 (1998).
\item \textbf{142.} See \textit{Steel Co.}, No. 95 C 4534, 1995 WL 758122 (N.D. Ill. Dec. 21, 1995), rev'd, 90 F.3d 1237 (7th Cir. 1996).
\item \textbf{143.} Only one question was presented to the Court on certiorari:
\end{itemize}
nor broached at oral argument, nor even injected into the case by one of the amici curiae. Rather, the Court itself raised and decided the issue sua sponte, without notice to, let alone briefing or argument by, the parties.

According to the majority opinion, it was Justice Stevens’ concurrence that injected the doctrine of hypothetical jurisdiction into the case, and, in turn, the majority’s “disposition made 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.


147. See Steel Co. v. Citizens for a Better Env’t, 593 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 “[i]t 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.” 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. The majority, by contrast, characterized the question of actionability as nonjurisdictional and, after repudiating both Justice Stevens’ characterization and the doctrine of hypothetical jurisdiction, eventually found no constitutional standing and thus declined to address the actionability question.

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. 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" into the doctrine was "pure dictum because it [was] entirely unnecessary to an explanation of the Court's decision." But the fact that the Court addressed an unpleaded, unbriefer 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." 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." 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," and while its "power to decide is not limited by the precise terms of the question presented" and extends to "subsidiary question[s] fairly included" in the questions actually presented, the Court has admonished.

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, 536-36 (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).
ished that there is a "heavy presumption" that it will "not consider questions outside those presented in the petition for certiorari." But "[t]his rule is prudential in nature," and the presumption it creates can be overcome or "disregard[ed]...in the most exceptional cases." In particular, while the Court remains "generally reluctant" to consider an issue not presented in the certiorari petition or not raised in the lower courts, the Court may do so where the issue is "important," or "significant," or poses an "important question of judicial administration," or where it is "recurring," 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. 185, 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.
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 Court "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., 463 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 unpresented question in the case under consideration.”

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. 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,” 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.

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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 Dept of Corrections v. Yeskey*, 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) (“Every 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) (“Lower 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"\textsuperscript{177} and, in particular, its unique obligation to articulate and preserve the constitutional limits of governmental power.\textsuperscript{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,\textsuperscript{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."\textsuperscript{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.\textsuperscript{181} Moreover, as explained elsewhere in this

\textsuperscript{177} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

\textsuperscript{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 \textit{stare decisis}, and contrary expectations must be disappointed.

\textsuperscript{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."); \textit{Stenberg et al. v. Carhart}, 530 U.S. 914 (2000) (reviewing the doctrine).


\textsuperscript{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. Musznisky, 899 F.2d 151, 154-60 (2d Cir. 1990) (defending the doctrine at length), \textit{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.\textsuperscript{182} Thus, much like the exception allowing consideration of an otherwise moot dispute where the issue is “capable of repetition, yet evading review,”\textsuperscript{183} the lifting of the prudential bar against addressing unpresented questions on certiorari did have a certain compelling logic in this case.\textsuperscript{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,\textsuperscript{185} and that \textit{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 \textit{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,\textsuperscript{186} despite its simultaneous admonish-
tion to lower federal courts that “jurisdiction be established as a threshold matter,” a requirement which it described as “inflexible and without exception.” Finally, as Justice Stevens argued, the Court’s repudiation of hypothetical jurisdiction was “entirely unnecessary to an explanation of the Court’s decision” and, not having been adversarially addressed by the parties, was comparable to an advisory opinion. 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. It is at times, however, an indicator of deeper instability or tectonic change amidst the strata and substrata of a legal or jurisprudential culture. The foundational case of Marbury v. Madison, 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

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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).
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. 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." Though noting that several circuit courts had embraced some version of it, the Court "decline[d] to endorse [it]," 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-
Federal courts, after all, are limited to the adjudication of “cases” and “controversies” within the meaning of Article III, Section 2, which is essentially to say they are prohibited from rendering advisory opinions. 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.” Second and relatedly, the practice of hypothetical jurisdiction “offends fundamental principles of separation of powers.” 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.”

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,

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:

"It 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.


200. See 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.) 409 (1792)); see also James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1092 (D.C. Cir. 1996) (rejecting a party’s suggestion 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. See 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. 205, 227 (1974)).
and it is well worth noting the value of this repudiation to the judi-
cracy as an institution and to the nation's system of constitutional gov-
ernance. To be sure, while the doctrine itself may have possessed cer-
tain 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 ne-
cessity of confirmed subject-matter jurisdiction, the Steel Co. decision demarcates one such boundary and, in so doing, reaffirms this prom-
ise 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
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. 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, for example, appear to have been especially good candidates for its invocation. In turn, to the extent that this nonrandomness 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.

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. 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. 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.
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, 84 NOTRE DAME L. REV. 321 (1989).
209. See supra text accompanying note 75.
210. As noted by then-Justice Rehnquist, “With 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, 464 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.\footnote{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,\footnote{212} could nevertheless amount to an implied finding of jurisdiction of which a subsequent or higher court could take notice.\footnote{213} But this

\footnote{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. \textit{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] the 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”).}


\footnote{213. \textit{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.”), \textit{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 450, 453 (7th Cir. 1991); see also Lewis v. Casey, 518 U.S. 343, 352 n.2 (1996) (“The existence of unaddressed jurisdictional defects has no precedential effect.”); Kershaw v. Shalala, 9 F.3d 430, 433 (7th Cir. 1991); Grant v. Shalala, 989 F.2d 1332, 1341 (3d Cir. 1993) (“Since 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 \textit{sub silention} jurisdictional ruling is not binding precedent in this court . . .”), \textit{rev’d on other grounds}, 436 U.S. 149 (1978); Shattuck v. Hoegl, 523 F.2d 509, 514 n.8 (2d Cir. 1975) (“The precedential value of a per curiam exercise of jurisdiction noting an affirmation in open court is at best doubtful where the issue of jurisdiction apparently was not raised but passed \textit{sub silention}.”); 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. 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) (“It is not enough simply to assert that no decision was made on jurisdiction; such a decision must be made explicit.”)—rather, it appears to be a matter within the prerogative of the subsequent or appellate court.

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. 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" and further that the Court's precedents seemingly to the contrary were "defensible." But they "wr[a]te 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 alternat-ively could be resolved on the merits in favor of the same party.'"

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, which in turn could invite the lower fed-

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

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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) ("[T]he plurality decision . . . does not by its own force act as binding precedent on this court.").


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.\textsuperscript{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\textsuperscript{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.\textsuperscript{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.

\textbf{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-

\textsuperscript{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., 960 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) ("assuming 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.


\textsuperscript{227} Id.
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sumption of jurisdiction was defensible, and why none of these “look-alike-but-inapposite cases” 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. It is quite clear, for example, that Steel Co. does not prevent non-Article III tribunals from assuming jurisdiction as a constitutional matter, just as the Constitution itself does not, 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. Aurech, 418 U.S. 676 (1974) (per curiam), Chandler v. Judicial Council, 398 U.S. 74 (1970), United States v. Augenblick, 330 U.S. 348 (1967), and Neese v. Southern Railroad Co., 350 U.S. 77 (1956), will not be addressed below. The Court noted that both Aurech 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., Ray 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 Rambor 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 Stoico 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. 383, 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. 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 cases 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. To fully understand the odd nature of this

necessarily apply to Executive Branch agencies”); Northwest Envtl. 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 Envt, 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. 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. 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). 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, the dismissal is without prejudice or

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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 demonstrates the suit's lack of merit.”). The type of dismissal may even affect “[private 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]ecisions of federal pre-emption or sovereign immunity may in some contexts be controlling”); United States v. Van Cauwenbergh, 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) (“The 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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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"\textsuperscript{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.\textsuperscript{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."\textsuperscript{244} In turn, they have devised
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).” 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.” 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.’” In other words, “even if a federal claim is asserted on the face of the complaint, 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.” 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.’”

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

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 “‘by 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 Hagans v. Lavine, 415 U.S. 528, 536-39 (1974) (footnote omitted)).
250. Cook, 775 F.2d at 1036 (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. 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. 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, 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-


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.9 (1982) (Rehnquist, J., dissenting from the denial of certiorari) (questioning the clarity, if not the validity, of the doctrine); Bell, 327 U.S. at 662 (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); Shannon 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, 291 (1947)).
cile the apparent contradiction. Instead, it merely reaffirmed that district courts may invoke 12(b)(1) to dismiss insubstantial federal claims, even while admonishing that federal jurisdiction should normally not turn on the merits of a claim and, in all events, that the merits should not be determined without a definite jurisdictional footing.

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 such and that "the nonexistence of a cause of action [is] no proper basis for a jurisdictional dismissal." 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." In such cases:

[The 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.]

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).


260. Id.; accord Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1189 (2d Cir. 1996) ("Where 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

\(^{261}\) 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 563, 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, 2230-327 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.
National Association of Railroad Passengers, 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." 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."

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. Steel Co. now makes clear that the case relates only to the lat-

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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 Envtl. 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 Dept. 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 Potomac 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. Steel Co. now also makes clear that such requirements can be bypassed, other possible conditions notwithstanding, as long as constitutional jurisdiction is confirmed. 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. 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.

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274. See, e.g., Busse Broad. Corp. v. FCC, 87 F.3d 1456, 1462 (D.C. Cir. 1996) ("Whether this 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 1226, 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., FWIPBS, 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 “had 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 was perhaps the most common. It is hardly surprising, therefore, that the case is cited or discussed not only by the Steel Co. majority, but also by Justices O'Connor, Breyer, and Stevens in each of their separate opinions. 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, 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. 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." 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." The
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." 286 It is perhaps this very realization that would explain the Court's adjective-heavy effort to emphasize the decision's unique-

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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—or, 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. 766, 769 (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 599 (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 603. 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.” 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”—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.”

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. In

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287. Steel Co., 118 S. Ct. at 1014.
288. Id.
290. See, e.g., Ohio Forestry Ass’n, Inc. v. Sierra Club, 523 U.S. 726, 118 S. Ct. 1685, 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, 576-76 (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,\textsuperscript{291} where the Court decided “a discretionary jurisdictional question before a nondiscretionary jurisdictional question,”\textsuperscript{292} and Ellis v. Dyson,\textsuperscript{293} where the Court invoked Younger abstention, which it has “treated as jurisdictional.”\textsuperscript{294} Without first deciding whether a case or controversy existed,\textsuperscript{295} To be sure, this doctrine had been previously distinguished from hypothetical jurisdiction by the lower federal courts,\textsuperscript{296} and, when invoked, clearly did not pose the sort of conceptual or doctrinal difficulties that accompanied the latter.\textsuperscript{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,\textsuperscript{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.\textsuperscript{299}
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

300. 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).

304. 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, 550 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.3 (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 refiling 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 refiling 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


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 F.2d 1038, 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, 903 F.2d 1165, 1172 (10th Cir. 1990) (“[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, given both the nature of certiorari as a discretionary writ and the enormity of the Supreme Court’s docket. 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

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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% 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 whatever, published or unpublished). Judge Wald explained the importance 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.


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.”); *Boulien 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 untenable 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 (6th 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 4884, 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."³

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 632).
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, 97 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
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 imselfishness 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,\(^3\) which has been described as “the most famous case in our history”\(^3\) and “the decision that rendered constitutional law itself possible,”\(^3\) 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.”\(^3\) 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.

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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.


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 metaphormist 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. In her concurrence, for example, Justice O'Connor declined to limit the types of cases in which jurisdiction may defensively be assumed, as had the majority when it distinguished and preserved the various doctrines noted earlier. "In 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.' 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, but which could be stifled by too rule-bound or formalistic a methodology.

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." 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").


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).

are well served when reviewing courts, if possible, dispose of cases on
grounds correctly decided by the trial court. Finally, and as noted
in the discussion of judicial economy, hypothetical jurisdiction can be
employed to deter the initiation of nonmeritorious suits, thereby pre-
serving 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 under-
lying 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 hypo-
thetical jurisdiction despite the Steel Co. decision. Examined here are
five such techniques, each of which varies in its propriety, efficacy,
and legal consequences.

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. And the

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. Muszyński, 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
Second Circuit is not alone in its oversight. 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."

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, 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." In turn, because "dictum is not authoritative" and "is the part of an opinion that a later court, even if it is an inferior...
court, is free to reject, 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 oblivious 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." 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." 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. 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

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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. Llewellyn, 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) ("Considered 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 mat-
ter, the binding scope of precedent may be determined and circumscribed by several means.\textsuperscript{346} It may, for example, be confined to its
facts.\textsuperscript{347} Alternatively, it can be construed in terms of the legal rule,
doctrine, or standard invoked in support of its holding.\textsuperscript{348} Or it can be
read in light of the substantive or institutional purposes that ani-
mated and shaped the holding.\textsuperscript{349} In the following paragraphs, the
potential utility of each of these techniques will be more closely exam-
ined.

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

\begin{footnotes}
\item[346] See, e.g., Henry Paul Monaghan, \textit{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).
\item[347] See, e.g., Llewellyn, supra note 342, at 84, 86-87.
\item[348] See, e.g., Monaghan, \textit{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 \textit{SERIOUSLY} 111 (1978); Roscoe Pound, \textit{What of Stare
Decisis?}, 10 FORDHAM L. REV. 1, 9-10 (1941)).
\item[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,” \textit{vacated in part on other grounds}, No. 98-
1547, 1999 WL 25681 (7th Cir. Jan. 20, 1999) (per curiam); Monaghan, \textit{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).
\item[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, \textit{Precedent}, 39 STAN. L. REV. 571, 577 (1987) (“For a decision to be precedent for an-
other 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).
\end{footnotes}
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. 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."

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, 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
that is presently conceptualized as a construction of 28 U.S.C. § 1332. See State Farm Fire & Cas. Co. v. Tashire, 368 U.S. 522, 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 537, 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. 889, 893-703 (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, 22 F.3d 1340, 1348 (D.C. Cir. 1993) (joint statement dissenting from the vacatur of orders and from the denial of rehearing en banc) (stating that it is derived from Article III, section 2, of the Constitution); Jaffee v. United States, 653 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. & POL'Y 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 1186, 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 1552, 1564 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 nonjusticiability 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 (6th 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”).

constitutional requirements such as those arising from the Eleventh Amendment or the doctrine of sovereign immunity. 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, and at least one commentator has
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).


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. 738 (1998); 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). 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

core Article III jurisdictional issues, such as constitutional standing.\textsuperscript{361} But the Court did not speak with absolute clarity,\textsuperscript{362} and there is already disagreement over the extent to which the Steel Co. mandate applies to non-Article III jurisdictional questions.\textsuperscript{363} The second group under this intermediate third category encompasses issues that are neither jurisdictional nor merits-related. Though potentially fewer in number,\textsuperscript{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.

\begin{footnotesize}
\textsuperscript{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).

\textsuperscript{362} See Steel Co., 118 S. Ct. at 1013 (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 "the statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers").

\textsuperscript{363} Compare Larsen v. Senate of Pa., 152 F.3d 340, 345 (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 1012-13), 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. § 1331(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. Glackman, 156 F.3d 606, 619 (6th Cir. 1998) (interpreting Steel Co. as requiring 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).

\textsuperscript{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.3d 651, 653 (7th Cir. 1990) (distinguishing "substantive" from "jurisdictional, procedural, or remedial"), aff'd, 499 U.S. 606 (1991); Consuau 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).
\end{footnotesize}
The reason that both types of issues have been categorically placed together is that they arguably have the same functional significance under \textit{Steel Co.} This significance is two-fold, concerning both their bypassability and their reachability. First, they could theoretically be \textit{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 \textit{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 \textit{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 \textit{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 \textit{Steel Co.}, nothing could be further from the truth. Well before \textit{Steel Co.}, for example, courts expressed uncertainty and even disagreement as to whether, or to what extent, various issues were or were not jurisdictional.\footnote{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, has long had several meanings which may vary from context to context. 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. 2039, 2071 (1997) (Rehnquist, 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) (“Under 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 (5th 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 Envt, 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 631-33 (distinguishing the term “jurisdictional element” as used in Commerce Clause cases such as United States v. Lopez, 514 U.S. 559, 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.\textsuperscript{368}

To date, the lower federal courts have been all over the map in their interpretation and implementation of \textit{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 \textit{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.\textsuperscript{369} Sitting en banc, the court held that it may not. Rejecting the notion that "jurisdiction is jurisdiction is jurisdiction,"\textsuperscript{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.\textsuperscript{371} According to the court, it was the latter, and the latter alone, that provided the focus of the \textit{Steel Co.} decision.\textsuperscript{372} The Fifth Circuit also noted that a contrary rule would pose federalism and separation of powers concerns,\textsuperscript{373} "may...create incentives for defendants to subvert the orderly scheme for removing cases by acting opportunistically,"\textsuperscript{374} and, in all events, is not necessarily conducive to judicial economy.\textsuperscript{375}

\textsuperscript{368} \textit{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)).

\textsuperscript{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 (6th Cir. 1997), cert. denied, 118 S. Ct. 413 (1997).

\textsuperscript{370} \textit{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").

\textsuperscript{371} See \textit{Marathon Oil Co.}, 145 F.3d at 217-18.

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

\textsuperscript{373} See id. at 218-19.

\textsuperscript{374} Id. at 219; see also id. at 224.

\textsuperscript{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.\(^7\) 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")\(^7\)7—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,"\(^3\)79 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

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\(^{376}\) 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. IOC*, 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 the 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.\footnote{327} 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 \ldots Steel Co."\footnote{328}

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.\footnote{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.\footnote{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)."\footnote{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).\footnote{387} According to this court, "despite the fact that sovereign immunity

\footnote{327. \textit{Id.}}
\footnote{328. \textit{Id.} at 255. As part of its analysis, the court also noted \textit{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. \textit{See id.} (discussing \textit{Ellis v. Dyson}, 421 U.S. 426, 436 (1975); \textit{Moor v. County of Alameda}, 411 U.S. 693, 715-16 (1973)). These reaffirmations are summarized supra at notes 290-300 and accompanying text.}
'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.' 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." 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.

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), supplemental jurisdiction under 28 U.S.C. § 1367, the reviewability under 28 U.S.C. § 2241 of

389. Bowers, 9 F. Supp. 2d at 496 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 "while 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).
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,\textsuperscript{393} and—though rather far-removed from Article III—the procedural requirements of Rules 3(c)\textsuperscript{394} and 4(b)\textsuperscript{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),\textsuperscript{396} the quantitative employee element of 42 U.S.C. § 2000e(b),\textsuperscript{397} the certificate-of-appealability requirement of 28 U.S.C. § 2253(c)(2),\textsuperscript{398} and (possibly) Younger abstention.\textsuperscript{399} Typical of this latter category of

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\begin{enumerate}
\item \textsuperscript{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 838699, 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)).
\item \textsuperscript{395} See, e.g., United States v. Rapoport, 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).
\item \textsuperscript{396} See, e.g., White v. Fauver, 19 F. Supp. 2d 305, 316 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).
\item \textsuperscript{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).
\item \textsuperscript{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.:

[If 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.]

\textit{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.
\end{enumerate}
\end{footnotesize}
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. Deeming this failure “excusable” and thus “not an exercise of hypothetical jurisdiction of the sort disapproved of by the Supreme Court in Steel Co.,” 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.”

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

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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, 1336 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 626, 629 (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 653, 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.\textsuperscript{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,\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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 \textit{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 \textit{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

\textsuperscript{403} See East Bay Mun. Util. Dist. v. United States Dep't of Commerce, 142 F.3d 479, 482 (D.C. Cir. 1998).
\textsuperscript{404} Id.
\textsuperscript{405} Id.
\textsuperscript{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 886, 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." 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. 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 dictum or the formulation of a holding that is broader than necessary to dispose of the case, 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.—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. Reebok Int'l Ltd., 96 F.3d 44, 48 (2d Cir. 1996) (holding that the appellants lacked standing but then stating that "[a]s 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. In
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. Some judges have apparently adopted this
closer practice in the wake of Steel Co., while others had already
employed it well before the repudiation of hypothetical jurisdiction. In
one post-repudiation diversity case, the First Circuit refused
pursuant to Steel Co. to bypass the amount-in-controversy issue, only
then to offer its “initial impressions” on a merits issue because,
though “non-binding,” they “would be helpful.” Likewise, in another
post-repudiation case, the Second Circuit, also noting the rule of Steel

(dissmissing a 42 U.S.C. § 1983 claim for lack of standing, specifically lack of injury and causa-
tion, and refusing pursuant to Steel Co. to consider an alternative but related basis for dis-
missal—namely, a lack of causation under section 1983—because, “not hav[ing] jurisdiction to
consider [the plaintiff’s] 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

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., concur-
ing) (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
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. Mandanici, 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. Robertson, 32 U. RICH. L. REV. 152 F.3d
884, 890-91 (9th Cir. 1998)); Garingalao v. Office of Personnel Management, No. 91-3225, 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.3d 459, 464 (9th Cir. 1998) (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”).


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. 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)." 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. 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. 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, "[private agreements
among the parties or between the parties and their attorneys or
indemnitors may also be affected," and lower court judges may
decide more readily against such a claim when it is subsequently
confronted on the merits. All in all, then, this technique may prove

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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 439-33 (discussing predictive capacities of attor-
neys 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," although in all
likelihood they were not using the term "insubstantial" precisely as it
is used in the 12(b)(1) setting.

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. Accordingly, a plaintiff subject to such
a dismissal could theoretically refile in state court, absent exclusive
federal court jurisdiction or other impediment. From the court's

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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." 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. 3.2(b) (incorporating the Model Rules of Professional Conduct); 11th Cir. addendum VIII, Rule 1(11)(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 Dept of Transp., 995 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"—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

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...
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, 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. A rule, to borrow Sullivan’s definition, “binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts” and “allow[s] for the direct application of the background principle or policy to a fact situation” and “allow[s] for irreducibly arbitrary and subjective value choices to be worked out elsewhere.” A rule captures the background principle or policy in a form that from then on operates independently” but “necessarily captures the background principle incompletely and so produces errors of over- or under-inclusiveness.” A standard, by comparison, “tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation” 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." The hallmark of a
standard is that the decisionmaker is permitted to exercise judgment
(often modified with "reasoned" or "informed") and to "take into
account all relevant factors or the totality of the circumstances."

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.

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, they also tend to subvert several of the
rationales for formulating rules in the first place, such as legal
certainty and decisional economy. 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).

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").
441. Justice Scalia's focus is on the rule-like or standard-like quality of the resulting doc-
trine which is intended to direct the conduct of lower courts. As Professor Sullivan has ob-
served, 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.'" 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.

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" but "the 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." 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 jurisdiction—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


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, D., 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 “carry[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’Connor’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’Connor, 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, and the presence or reemergence of formalism in the Court's decision making has been critically noted in such areas as federalism, personal jurisdiction, and, of course, the separation of powers. 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. 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").
457. Cf. Frederick Schauer, Formalism, 97 YALE L.J. 508, 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.").
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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. 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 question (and, in his view, they should under some circumstances); and this determination can be based on the acknowledgment of “serious practical problems” such as considerations of judicial economy and

455. 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 980 (describing as formalistic a process by which a court “reason[es] 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) (“Federal 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. For Scalia, then, "[m]uch more than legal niceties are at stake"—the question is fundamentally and exclusively one of judicial power. For Breyer, what is at stake are "unnecessary delay and consequent added cost"—and the question is thus one of efficient and efficacious judicial administration in "today's world of federal court caseloads."

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. 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 upheld—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, and he did not bolster his position with inquiries into its efficacy or soundness. Either the Constitution forbids it or allows it, and here, in his view, the Constitution allows it. Justice Breyer, by contrast,
viewed the separation of powers question as one of relative degree\(^469\) 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

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\(^469\) 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. at 2120 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

\(^472\) 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. 98, 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).

\(^473\) See, e.g., supra note 457, at 538 (noting the close relationship between formalism and rules).

\(^474\) 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. 946, 969 (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 formally 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." 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

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 unrepudiated 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.