HYPOTHETICAL STATUTORY JURISDICTION AND THE LIMITS
OF FEDERAL JUDICIAL POWER

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ABSTRACT

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

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

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

Moreover, the efficiency case for hypothetical statutory jurisdiction is overstated. Abandoning hypothetical statutory jurisdiction under current law will be far less costly than it must have seemed in Steel Co.’s
immediate aftermath. Hypothetical statutory jurisdiction can also create inefficiencies of its own, both by causing courts to reach merits issues unnecessarily, and by incentivizing collateral attacks on subject-matter jurisdiction in follow-on litigation. More fundamentally, even if hypothetical statutory jurisdiction might lead to immediate efficiency gains for the litigants and the judge, it is not an effective way to dispose of a case expeditiously while simultaneously respecting the interests of Congress, state judiciaries, and fundamental separation-of-powers and federalism values.

INTRODUCTION

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

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

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

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2. However, if the Plaintiff comes to doubt whether she had properly invoked federal jurisdiction, she may have an incentive to seek a jurisdictional dismissal on appeal to preserve the ability to refile in state court. See infra notes 47, 337 and accompanying text.
3. See infra note 48 and accompanying text.
powers. But the often ambiguous opinion contained contradictory hints as to whether the ban on hypothetical jurisdiction applied to all jurisdictional issues—including statutory issues—or only to Article III jurisdictional issues. For instance, the Court ambiguously pronounced that the “statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers”—perhaps indicating that statutory subject-matter jurisdiction was “essential,” or perhaps signaling that it was less fundamental and subject to circumvention.

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

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

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

5. Id. at 94.
8. See infra note 185 and accompanying text (noting that difficult statutory jurisdictional issues can be expected to arise more frequently than difficult Article III jurisdictional issues in typical private-rights litigation).
9. See infra notes 105–12 and accompanying text.
10. See Bechtel v. Competitive Techs., Inc., 448 F.3d 469, 480 n.1 (2d Cir. 2006) (using term “hypothetical statutory jurisdiction” (emphasis omitted)).
11. See, e.g., Telles v. Lynch, 639 F. App’x 658, 661 & n.6 (1st Cir. 2016) (assuming hypothetical statutory jurisdiction); In re Grand Jury Subpoenas Dated March 2, 2015, 628 F. App’x 13, 14 (2d Cir. 2015) (same); Byrd v. Republic of Hond., 613 F. App’x 31, 33 (2d Cir. 2015) (same).
12. See infra Part II.A.
and that constitutional-avoidance and efficiency values do not justify retaining the doctrine. It presents the first sustained treatment of this issue in the literature.\textsuperscript{13}

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

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

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

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


\textsuperscript{14} 134 S. Ct. 1377 (2014).}
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Corp., which held that personal jurisdiction and forum non conveniens issues could be addressed prior to subject-matter jurisdiction. These cases cast further doubt on hypothetical statutory jurisdiction. The posture in which these cases were decided indicates that the Supreme Court assumes that Steel Co.’s ban on hypothetical jurisdiction extends to statutory jurisdictional issues. Moreover, these cases’ insistence that courts may not bypass issues of subject-matter jurisdiction to reach the merits, without distinguishing between statutory and constitutional jurisdiction, strongly suggests that hypothetical statutory jurisdiction is impermissible.

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

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

I. THE ORIGINS OF HYPOTHETICAL STATUTORY JURISDICTION

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

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

Issues of subject-matter jurisdiction are generally divorced from the merits issue of whether the plaintiff will prevail on his claim. A court may lack subject-matter jurisdiction over claims that would be successful on the merits while having jurisdiction over unsuccessful merits claims.
There are two components of federal subject-matter jurisdiction, both of which must generally be present to reach the merits of a case—Article III subject-matter jurisdiction and statutory subject-matter jurisdiction. Article III provides that the federal “judicial power . . . extend[s] only] to” an enumerated class of cases, including “all [c]ases . . . arising under this Constitution, [and] the [l]aws of the United States” and “[c]ontroversies . . . between [c]itizens of different [s]tates,” known as federal question jurisdiction and diversity jurisdiction, respectively. Article III also limits the federal courts to addressing “cases” or “controversies,” which the Supreme Court has interpreted to require a plaintiff to possess “standing.” To establish Article III standing, a plaintiff must show that (a) she suffered a “concrete and particularized” “injury in fact,” (b) that is “fairly traceable to the challenged action of the defendant,” and (c) that can be prevented or redressed by a favorable ruling.

Showing that the case falls within one of the enumerated Article III categories of cases and that a plaintiff possesses Article III standing, however, is insufficient to establish subject-matter jurisdiction. A federal statute must also grant jurisdiction to hear the case. Under the constitutional scheme, the lower courts are creatures of statute. The Constitution grants Congress the power to create them and abolish them, and expand and constrict their jurisdiction within the constitutional boundaries. A federal statute must therefore grant the lower federal courts
jurisdiction over a case, and jurisdiction is lacking if a constitutionally valid federal statute bars the federal courts from entertaining the case. While Article III establishes the Supreme Court of its own force, it has also been interpreted to vest Congress with at least some power to control the Supreme Court’s jurisdiction—so the Supreme Court must also possess both Article III jurisdiction and the absence of a constitutionally valid statutory jurisdictional restriction to reach a case’s merits.

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

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

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

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

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

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


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

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

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

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

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37. See generally Tafflin, 493 U.S. at 458 (discussing “dual sovereignty”).
38. See Chemerinsky, supra note 15, at 33–38. This can be true even of Article III standing requirements, since some state courts will entertain federal claims for which Article III standing is lacking. See generally F. Andrew Hessick, Standing in Diversity, 65 Ala. L. Rev. 417, 424–26 (2013).
39. See, e.g., Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, supra note 21, § 3522 at 100–03 (3d ed. 2008) (“A federal court’s entertaining a case that is not within its subject matter jurisdiction is no mere technical violation; it is nothing less than an unconstitutional usurpation of state judicial power.” (emphasis added)).
40. See generally Chemerinsky, supra note 15, at 56, 328.
41. See infra notes 172–75 and accompanying text.
43. Union Pac. R.R. Co., 558 U.S. at 78.
45. Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434 (2011); Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 127 (1804) (“[T]he duty of the Court to see that they had jurisdiction, for the consent of parties could not give it.”). In contrast, “[n]onjurisdictional rules usually are defined as having all the inverse effects of jurisdictionality—they can be waived, forfeited, or consented to, and they are subject to equitable exceptions, estoppel, and judicial discretion.” Mank, supra note 15, at 430 (quoting Scott Dodson, Hybridizing Jurisdiction, 99 Cal. L. Rev. 1439, 1445 (2011)).
after a lengthy and expensive trial, the case will still be dismissed if subject-matter jurisdiction is lacking.47

B. Hypothetical Jurisdiction Before Steel Co.

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

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

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

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

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

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

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

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

53. But see infra Part III.B.2.b (discussing problem of preclusive effects of a judgment based on hypothetical jurisdiction).
value of judicial restraint by avoiding resolving uncertain jurisdictional issues.\textsuperscript{54}

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

\textbf{C. Steel Co.'s Repudiation of Hypothetical Jurisdiction}

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

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

\begin{itemize}
  \item \textsuperscript{54} See Browning-Ferris Indus., 899 F.2d at 158 (2d Cir. 1990) ("The rationales for [hypothetical jurisdiction are] judicial efficiency and restraint.").\textsuperscript{abrogated by Steel Co.}, 523 U.S. at 93–94; Idleman, \textit{supra} note 13, at 256–57 (discussing judicial restraint rationale).
  \item \textsuperscript{55} Nat’l Law Ctr. on Homelessness & Poverty v. Kantor, 91 F.3d 178, 180 (D.C. Cir. 1996).
  \item \textsuperscript{56} Id., \textit{supra} note 13, at 266.
  \item \textsuperscript{57} \textit{Id.} (quoting Freeman v. Principal Fin. Grp., No. 96-35947, 1997 WL 377084, at *1 (9th Cir. July 3, 1997)).
  \item \textsuperscript{58} See \textit{id.} at 260–64 (discussing many different jurisdictional issues avoided).
  \item \textsuperscript{59} 523 U.S. 83 (1998).
  \item \textsuperscript{60} Idleman, \textit{supra} note 13, at 285 (describing \textit{Steel Co.} as "not an exemplar of clarity").
  \item \textsuperscript{61} 42 U.S.C. § 11046 (2012).
  \item \textsuperscript{62} Id., \textit{supra} note 13, at 271 & n.141.
  \item \textsuperscript{63} \textit{Steel Co.}, 523 U.S. at 87–88.
  \item \textsuperscript{64} \textit{Id.}
The propriety of hypothetical jurisdiction was neither raised by the parties’ briefs nor at argument. Rather, in an unusual turn of events, the majority only reached the issue in response to Justice Stevens’s concurrence in the judgment. Citing the long-standing policy of avoiding the unnecessary resolution of constitutional issues, Justice Stevens argued that the Court should bypass the Article III issue to dismiss the case on the merits. In response to Justice Stevens and the “substantial body of court of appeals precedent” endorsing the doctrine, Justice Scalia’s opinion for the Court addressed the issue of hypothetical jurisdiction.

Justice Scalia forcefully rejected hypothetical jurisdiction “because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers.” He cited the “long and venerable line of . . . cases” declaring that since “[j]urisdiction is power to declare the law, . . . when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” Thus, “[t]he requirement that jurisdiction be established as a threshold matter ‘springs from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’” The Court elaborated that “[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment,” which amounts to a constitutionally impermissible “advisory opinion.” Because the “statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and jurisdictional issue of whether the relief requested by the plaintiffs would remedy the injury in fact they allegedly suffered from the purely historical violations. The district court sided with Steel Company on both questions, the Seventh Circuit reversed, and the Supreme Court granted certiorari on both questions.

65. Id. at 88–89.
66. Id.
68. See id.; see also, e.g., Alderman v. United States, 394 U.S. 165, 183–84 (1969) (discussing general need for adversary presentation of issues, especially complex ones).
69. Idleman, supra note 13, at 272. Justice Stevens also viewed the “merits” statutory issue as jurisdictional—a contention the Court rejected. See Steel Co., 523 U.S. at 88–94.
70. Steel Co., 523 U.S. at 112 (Stevens, J., concurring in the judgment).
71. Id. at 93–94 & 94 n.1.
72. The often-confusing nature of the Steel Co. opinion thus likely stems from the fact that the issue of hypothetical jurisdiction was unbriefed and unargued. See supra note 68 and accompanying text. See also Idleman, supra note 13, at 171–80 (discussing whether Steel Co.’s decision to address hypothetical jurisdiction was dicta or itself an instance of impermissibly addressing an issue in the absence of subject-matter jurisdiction).
73. Steel Co., 523 U.S. at 94.
74. Id. at 94 (quoting Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868)).
75. Id. at 94–95 (quoting Mansfield, Coldwater & Lake Mich. Ry. v. Swan, 111 U.S. 379, 382 (1884)).
76. Id. at 102.
equilibration of powers, . . . [f]or a court to pronounce upon the meaning or
the constitutionality of a state or federal law when it has no jurisdiction to
do so is, by very definition, for a court to act ultra vires.”

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

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

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

77. Id. at 101–02.
78. Id. at 101. See Steinman, supra note 1, at 862 (noting that Steel Co. had “embrace[d], rather
than disavow[ed],” these cases).
80. See Steel Co., 523 U.S. at 98 (discussing Norton).
81. Id.
82. Id.
83. Id.
84. Id.
85. Id.
86. See, e.g., Ctr. for Reprod. Law & Policy v. Bush, 304 F.3d 183, 195 (2d Cir. 2002) (invoking
Norton doctrine when the “outcome on the merits [was] . . . ‘foreordained’” by a recent case deciding
the same merits issue (quoting Steel Co., 523 U.S. at 98)).
87. Idelman, supra note 13, at 300 n.283.
88. First, while Secretary of Navy v. Avrech, 418 U.S. 676 (1974) (per curiam) appeared to be
similar to Norton, the so-called “jurisdictional” issue in Avrech was later ruled to be non-
bypassing the jurisdictional issue in those cases was justified by the fact that most of those cases involved statutory rather than constitutional jurisdictional issues—although that likely would have been an easier way to distinguish those cases than relying on their “extraordinary procedural postures.”

Having explained that hypothetical jurisdiction was impermissible and that Norton and its variants do not apply outside of their unique procedural contexts, the Court turned to confront the Article III issue in Steel Co. It concluded that the plaintiff citizens group lacked Article III standing principally because its alleged injuries could not be redressed by a jurisdictional—so Avrech did not actually exercise hypothetical jurisdiction. Steel Co., 523 U.S. at 98–99. The same is true of Chandler v. Judicial Council, 398 U.S. 74 (1970). Steel Co., 523 U.S. at 100; see also infra notes 245–46 (discussing “drive-by” jurisdictional rulings, which are not entitled to precedential effect). Second, Steel Co. distinguished Philbrook v. Glodgett, 421 U.S. 707 (1975) on the basis of its extraordinary procedural posture. See Steel Co., 523 U.S. at 100. There, the identical merits issue was present as to two defendants, but jurisdiction was questionable only as to one of them. Id. That defendant had failed to adequately brief the far-reaching jurisdictional issue, which led the Court to dismiss that defendant’s appeal. See id.; Ideman, supra note 13, at 300 n.283.

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

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

Second, the diversity statute has long been interpreted to assess the diversity of the parties and the amount in controversy only as of the time the litigation is initiated in federal court. CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 13E FEDERAL PRACTICE & PROCEDURE § 3608 (3rd ed. 2009); CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 14A FEDERAL PRACTICE & PROCEDURE § 3702.4 (4th ed. 2009 & Supp. 2016). Subsequent changes in the citizenship of the parties and the amount in controversy will not divest the court of diversity jurisdiction. Id. Similarly, courts may eliminate dispensable non-diverse parties under Federal Rule of Civil Procedure 21 to preserve diversity jurisdiction. See Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832–37 (1989). Once again, these are not instances of hypothetical jurisdiction. Steel Co. is not concerned with these long-standing procedural rules governing how and when jurisdiction is established or maintained. Rather, Steel Co. only forbids bypassing a properly presented jurisdictional objection to resolve the merits definitively. Cf. All. for Envtl. Renewal, Inc., 436 F.3d at 87.
favorable ruling ordering Steel Company to pay civil penalties to the U.S. government.93

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

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

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

93. Id. at 102, 106.
94. Id. at 110–11 (O’Connor, J., concurring).
95. Id. at 111–12 (Breyer, J., concurring in part and in the judgment).
96. Id.
97. See Idleman, supra note 13, at 240 (“[T]he scope of the repudiation itself was not clearly delineated by the Court, a fact that has . . . generated substantial uncertainty . . . .”).
98. See, e.g., Coenen, supra note 13, at 708 & n.99 (noting uncertainty as to the permissibility of hypothetical statutory jurisdiction post-Steel Co.); Idleman, supra note 23, at 7 (same).
99. See Friedenthal, supra note 13, at 259–60, 264–65 (describing Steel Co.’s “apparent wandering” between appearing to ban all instances of hypothetical jurisdiction, and banning only hypothetical Article III jurisdiction); Steinman, supra note 1, at 860–62 (stating that language in Steel Co. could be read “either way” in this regard); Trammell, supra note 13, at 1126–27 (observing that Steel Co.’s inconsistencies created uncertainty as to the permissibility of hypothetical statutory jurisdiction).
100. See supra notes 73–77 and accompanying text.
101. See Steel Co., 523 U.S. at 94 (abrogating United States v. Troscher, 99 F.3d 933, 934 n.1 (9th Cir. 1996) (bypassing only a statutory jurisdictional issue); Browning-Ferris Indus. of S. Jersey, Inc. v. Muszynski, 899 F.2d 151, 154 (2d Cir. 1990) (same); see also id. at 93–94 (abrogating SEC v. Am. Capital Invs., Inc., 98 F.3d 1133, 1139 (9th Cir. 1996) (bypassing statutory and constitutional jurisdictional issues)).
powers,” without which a court acts “ultra vires.”102 On the other hand, the modifier “especially” could perhaps indicate that statutory jurisdictional issues are of lesser importance and may be bypassed.103 Additionally, the opinion’s opaque discussion of “statutory standing”—discussed in detail below in Part II.B—seemed to endorse a prior case that, on a superficial reading, appeared to have exercised hypothetical statutory jurisdiction.104

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

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

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

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

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

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

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

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

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


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

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

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

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

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112. Minesen Co. v. McHugh, 671 F.3d 1332, 1337 (Fed. Cir. 2012) (“[Steel Co.] only requires federal courts to answer questions concerning their Article III jurisdiction—not necessarily their statutory jurisdiction—before reaching other dispositive issues.”); NLRB v. Barstow Cnty. Hosp., 474 F. App’x 497, 499 (9th Cir. 2012) (same); Yancey v. Thomas, 441 F. App’x 552, 555 n.1 (10th Cir. 2011) (same); Kramer v. Gates, 481 F.3d 788, 791 (D.C. Cir. 2007) (same); Lukowski v. Immigration & Naturalization Serv., 279 F.3d 644, 647 n.1 (6th Cir. 2002) (same); see also Coenen, supra note 13, at 708–09 & n.100; Idleman, supra note 23, at 7 n.23 (discussing cases endorsing hypothetical statutory jurisdiction); Trammell, supra note 13, at 1125 & nn.121–24.
113. These courts, rightly or wrongly, viewed these statutory issues as jurisdictional. Given recent changes in the law, they may have been incorrect. See infra notes 323–29 and accompanying text.
115. Minesen Co., 671 F.3d at 1337.
119. Puerto Rico v. United States, 490 F.3d 50, 70 (1st Cir. 2007).
122. Grimsdale v. Kash N’Karry Food Stores, Inc. (In re Hannaford Bros. Customer Data Sec. Breach Litig.), 564 F.3d 75, 77 n.1 (1st Cir. 2009) (minimal diversity under Class Action Fairness Act); Umsted v. Umsted, 446 F.3d 17, 20 n.2 (1st Cir. 2006) (probate exception); Barash v. Siler, 124 F. App’x 689, 690 n.1 (2d Cir. 2005) (same); see also Idleman, supra note 13, at 318 (hypothetical statutory jurisdiction would allow courts to bypass statutory “complete diversity requirement”).
123. Conyers v. Rossides, 558 F.3d 137, 150 (2d Cir. 2009) (bypassing Civil Service Reform Act’s prohibition on constitutional challenges to adverse employment actions by certain federal civil servants).
124. 699 F.3d 1280 (11th Cir. 2012).
statute, which is not to be expanded by judicial decree.\textsuperscript{125} Therefore, it recognized that \textit{Steel Co.} “reaffirmed” the principle “that an inferior court must have both statutory and constitutional jurisdiction before it may decide a case on the merits.”\textsuperscript{126} And while the First Circuit has not retreated from its endorsement of hypothetical statutory jurisdiction, it has expressed doubts that the doctrine should be used to bypass jurisdiction-stripping statutes.\textsuperscript{127} In declining to use the doctrine in those circumstances, it reasoned that “[a] federal court acts ‘ultra vires’ regardless of whether its jurisdiction is lacking because [the plaintiff lacks Article III standing or] because Congress has repealed its jurisdiction to hear a particular matter.”\textsuperscript{128}

\section*{II. The Unconstitutionality of Hypothetical Statutory Jurisdiction}

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

\textsuperscript{125} \textit{Id.} at 1289 (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)).

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

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

\textsuperscript{128} \textit{Id.} (quoting \textit{Steel Co.} v. Citizens for a Better Env’t, 523 U.S. 83, 101 (1998)).

\textsuperscript{129} \textit{Steel Co.}, 523 U.S. at 94.
A. The Equal Inviolability of Statutory and Constitutional Subject-Matter Jurisdiction Limitations

Although it rests on largely “unarticulated” rationales, hypothetical statutory jurisdiction is ultimately based on the premise that statutory subject-matter jurisdiction limitations are not as important, fundamental, and deserving of respect as Article III limitations, and therefore may be bypassed even though their constitutional counterparts may not be.\footnote{Coenen, supra note 13, at 709 (citing Steel Co., 523 U.S. at 101).} Put differently, it assumes that “jurisdictional transgressions of a constitutional nature are qualitatively worse than those of a nonconstitutional nature.”\footnote{Id.} But this premise is wrong in this context: Federal courts are equally bound by constitutional and statutory jurisdictional rules, and they are equally inviolable. The constitutional design itself dictates that both statutory and constitutional subject-matter jurisdiction are necessary for a federal court to exercise jurisdiction and reach the merits of a case. Both are vitally important to effectuate the separation-of-powers and federalism values at the core of Article III. And both serve as indispensable bulwarks protecting the federal courts’ limited judicial resources.

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

The story of Article III’s genesis shows that statutory and constitutional subject-matter jurisdiction are equally indispensable to decide a case’s merits. The enacted text of Article III was a product of the debate running throughout the Constitution’s framing between those who wanted the states to retain much of the nation’s political power, and those who favored a stronger, centralized federal government.\footnote{See generally Richard H. Fallon, Jr., et al., Hart & Weschler’s The Federal Courts and the Federal System 1–3 (6th ed. 2009).} While there was broader support for the creation of a federal Supreme Court, a Federalist plan to establish lower federal courts proved extraordinarily divisive among the delegates at the Constitutional Convention.\footnote{See Redish & Woods, supra note 36, at 53.} Opponents protested that constitutionally mandated lower federal courts would be unnecessary and expensive encroachments on the states’ sovereignty.\footnote{See id. at 53–54. See generally Fallon et al., supra note 132, at 4–9.} In order to mollify objectors, James Madison successfully proposed compromise constitutional language that allows but does not require Congress to create lower federal courts.\footnote{See Redish & Woods, supra note 36, at 54.}
The “Madisonian Compromise” embodied in Article III implies that Congress has the power not only to create or abolish the lower federal courts but also to control the extent of their jurisdiction. Since Article III vests Congress with the greater power not to establish the lower federal courts, Congress possesses the lesser power to constrict their jurisdiction from the constitutionally permissible maximum—such as by stripping them of jurisdiction to hear certain claims, imposing statutory amount-in-controversy requirements, or classifying certain statutory prerequisites to recovery as jurisdictional. As the Supreme Court explained in 1850, “Courts created by statute can have no jurisdiction but such as the statute confers.” And as it elaborated in 1922, the lower federal courts “derive[their] jurisdiction wholly from the authority of Congress,” which “may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.

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

136. See id. at 54–56.
137. See, e.g., Bowles v. Russell, 551 U.S. 205, 212 (2007) (“Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.”).
139. Kline v. Burke Const. Co., 260 U.S. 226, 234 (1922) (citations omitted); accord id. (“The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. And . . . Congress [may] take [it] away in whole or in part . . . .” (citations omitted)).
140. See generally CHEMERINSKY, supra note 15, at 200–16. See also Barry Friedman, A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction, 85 NW. U. L. REV. 1, 2–3 (1990) (challenging congressional primacy theory of federal jurisdiction and arguing that the scope of federal jurisdiction results from a dialogue between “Congress and the Court”).
141. See generally id. at 278–80.
142. See generally id.
143. See, e.g., Seale v. Immigration & Naturalization Serv., 323 F.3d 150, 156 (1st Cir. 2003) (“A federal court acts ‘ultra vires’ regardless of whether its jurisdiction is lacking because of the absence of a requirement specifically mentioned in Article III, such as standing or ripeness, or because Congress has repealed its jurisdiction to hear a particular matter.” (citing Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 101 (1998))); Coenen, supra note 13, at 709 n.104 (“Why the former sort of ultra vires action is more problematic than the latter is not self-evident.”).
Article III jurisdiction and the absence of a constitutionally valid statutory jurisdictional restriction.144

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

Of course, by setting the bounds on Congress’s authority to grant and limit jurisdiction by statute, Article III’s jurisdictional limitations are “superior” in the sense that they trump invalid jurisdictional statutes147—but only in that sense.148 For example, if Congress purports to create jurisdiction for a plaintiff who lacks constitutional standing, such a statute would be invalid.149 But the trumping function of Article III jurisdiction should not be misread to imply that the need for a federal court to satisfy statutory jurisdictional requirements is any less essential than the need to satisfy Article III’s requirements.150 A federal court must possess both constitutional and statutory authority to reach the merits of a case, and Article III jurisdiction alone remains insufficient for the exercise of federal judicial power.151 As the Supreme Court has cautioned, “The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded.”152 It follows, as one commentator has observed, that “courts have a duty to police [statutory jurisdictional] restriction[s] just as rigorously as . . . constitutional limitation[s],” given

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

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

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

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


149. Cf. Coenen, supra note 13, at 713 (“Supremacy and preeminence, however, are two different things.”).

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

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

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

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

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

153. Trammell, supra note 13, at 1128; see also Idleman, supra note 23, at 75 n.410 (“[I]t is normally of no functional significance that a subject-matter jurisdictional requirement is imposed by constitutional or statutory command,” as both must be verified prior to reaching the merits); Steinman, supra note 1, at 939.
155. See supra notes 147–53 and accompanying text.
157. See supra note 31 and accompanying text.
idea—the idea of separation of powers,” 158 and that the Article III jurisdictional doctrines are “founded in concern about the proper—and properly limited—role of the courts in a democratic society.” 159 These doctrines “define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.” 160 Thus, the federal courts are prevented from issuing “advisory opinions”—opinions which will not remedy an actual injury in fact but rather will opine on abstract law in the absence of a concrete adversary dispute. 161 Without these jurisdictional minima, a plaintiff’s grievance must be directed to the political branches. 162 Likewise, Article III’s limitations on the types of cases federal courts may hear protect the state judicial systems’ exclusive domain. For instance, these limits ensure that Congress may not authorize the lower courts to exercise diversity jurisdiction over a non-federal suit between two citizens of the same state, which would greatly limit the state courts’ exclusive adjudicatory domain. 163

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

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

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162.  See supra note 32 and accompanying text.
165.  Id. (citation omitted) (quoting Steel Co. v. Citizens for a Better Envt’, 523 U.S. 83, 94 (1998)).
166.  Id. (quoting Steel Co., 523 U.S. at 94).
left to the state judiciaries) and to alter its decision as circumstances require.167 And Congress is in a much better position to do this than the courts, which lack the democratic legitimacy and institutional expertise and capacity to decide such matters.168 Bypassing Congress’s jurisdictional directives transfers this authority from the democratically responsive and accountable Congress to the courts.169

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

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

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


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

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


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

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

affirmed less jurisdiction than the Constitution has granted”—thereby removing this essential check on federal judicial power.  

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

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

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


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


180. Id.

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

Congress’s “check” on the judiciary’s power, often while poaching cases from the state courts’ exclusive domain.

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

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

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


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


\(^{187}\) See generally CHEMERINSKY, supra note 15, at 315–18.

\(^{188}\) See generally id. at 315–18, 328–29.
resources (and the domain of the state courts), it need only be considered how many low-value, essentially local disputes would flood the federal court system if these statutory jurisdictional limitations were removed. Thus, statutory jurisdictional limits are often crucially important for excluding many cases that Congress has deemed unfit for a federal forum. And even if a court might deem a particular statutory jurisdictional restriction an unimportant obstacle to reaching the merits, the Constitution empowers Congress, not the courts, to make that judgment.

* * *

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

B. The Faulty Doctrinal Argument for Hypothetical Statutory Jurisdiction

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

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

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

190. Seale v. Immigration & Naturalization Serv., 323 F.3d 150, 156 (1st Cir. 2003).
jurisdiction. Justice Stevens’s concurrence argued that hypothetical jurisdiction was permissible because the Court had previously exercised it in National Railroad Passenger Corp. v. National Ass’n of Railroad Passengers. In response, Justice Scalia distinguished National Railroad on the basis that the issue skipped in that case was not an Article III standing issue but rather an issue of statutory standing—so National Railroad did not support skipping the Article III jurisdictional issue to reach the merits issue in Steel Co.

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

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

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

191. See, e.g., Bowers v. NCAA, 346 F.3d 402, 415–16 (3d Cir. 2003) (Steel Co.’s discussion of statutory standing permits hypothetical statutory jurisdiction); Idleman, supra note 13, at 298–99 (same); Schwartz, supra note 90, at 2270 (same).
193. Id. at 97 & n.2 (majority opinion).
194. Id. at 97 n.2 (emphasis added).
195. See supra notes 111, 191 and accompanying text.
197. Id. at 454.
Amtrak Act.\textsuperscript{198} Although the Amtrak Act explicitly gave the Attorney General and certain railroad employees the right to sue to enforce its terms, the Amtrak Act was silent as to passengers’ right to sue.\textsuperscript{199} Did the Amtrak Act nonetheless vest NARP with an implied right of action?

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

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

\begin{quote}
198. \textit{Id.}

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

200. \textit{Id.} at 455.

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


203. \textit{Id.} at 329.


206. \textit{Id.} at 340.


208. \textit{Potomac Passengers}, 475 F.2d at 340. The D.C. Circuit’s decision was a product of an earlier jurisprudential era more favorable to implied causes of action. Modern courts hold that “implied causes of action are disfavored.” Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009).
\end{quote}
The Supreme Court reversed, holding that NARP could not bring suit under the Amtrak Act because its text did not grant passengers the right to sue. Rather than analyzing all three of the issues identified by the D.C. Circuit, the Supreme Court first determined that no cause of action existed and then declined to decide any issues of statutory standing or jurisdiction.210 The Court noted that these three questions “overlap[ped]” in the context of the case and that “however phrased, the threshold question clearly is whether the Amtrak Act . . . create[d] a cause of action” for NARP.211 And in an ambiguous passage cited by defenders of hypothetical statutory jurisdiction, it stated that “[s]ince we hold that no right of action exists, questions of standing and jurisdiction become immaterial.”212

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


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

210. Id. at 455.
211. Id. at 456.
212. Id. at 465 n.13.
answered by determining whether the “plaintiff’s grievance . . . arguably fall[s] within the zone of interests protected or regulated by the statutory provision” at issue.215

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

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

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

215. Id. at 97; see also Bennett v. Spear, 520 U.S. 154, 162–63 (1997) (describing the development of the “zone of interests” test).
216. Lexmark, 134 S. Ct. at 1388 (quoting Bennett, 520 U.S. at 163).
217. Bennett, 520 U.S. at 163. Congress is free to direct courts to extend a statutory cause of action beyond what the zone-of-interests test would usually provide. See id.
219. See Holmes, 503 U.S. at 288 (Scalia, J., concurring in the judgment).
220. See Brown, supra note 24, at 113 (“Lexmark returns the zone of interests inquiry to its origins . . . [as] one component of the presumptive limits of a statutory cause of action.”).
221. Lexmark, 134 S. Ct. at 1387 (quoting Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 97 n.2 (1998)).
222. Id. at 1388 n.4.
223. See supra notes 199, 218 and accompanying text.
the same question. Additionally, Justice Scalia’s implication in Steel Co. that the two issues had “overlap[ped]” entirely and become “identical” in National Railroad was also correct. Under Lexmark, those two supposedly separate issues in National Railroad were in fact the very same statutory merits issue: whether NARP could bring suit under the statute.

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

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


Statutory standing aside, did National Railroad nonetheless skip a statutory jurisdictional issue to reach the merits, namely whether 28 U.S.C. § 1337 provided jurisdiction? Justice Stevens, in his Steel Co. concurrence in the judgment, seems to have read National Railroad as doing so. But
long-standing Supreme Court precedent shows that not to be the case, since NARP had a colorable claim to relief.

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

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

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

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\(^{231}\) 327 U.S. 678 (1946).

\(^{232}\) Id. at 679.


\(^{234}\) *Bell*, 327 U.S. at 680.

\(^{235}\) Id. at 682.

\(^{236}\) Id. at 685.

\(^{237}\) Id. at 681.

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

\(^{239}\) *Bell*, 327 U.S. at 684–85.


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

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

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

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


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

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


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

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

248. See infra Part II.C.1–2.
cases—that subject-matter jurisdiction must be verified prior to reaching the merits but not necessarily prior to reaching a threshold issue, such as personal jurisdiction or forum non conveniens—also strongly indicates that hypothetical statutory jurisdiction is impermissible.

1. Ruhrgas Casts Doubt on Hypothetical Statutory Jurisdiction

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

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

250. Id. at 578–79.
251. Id. at 580.
252. Id.
253. Id. at 580–81.
254. Id. at 581–82.
255. Id. at 578.
256. Id. at 583.
257. See id. at 584.
Values of judicial minimalism, to which the Court professes to adhere, dictate that the Court must not decide difficult and important constitutional issues unless it must. The Court’s decision to rule as it did in Ruhrgas would be very difficult to explain if Steel Co. had preserved hypothetical statutory jurisdiction.

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

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

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

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

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

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


264. Ruhrgas, 526 U.S. at 584–85.

265. Id. at 577.

266. Id. at 583 (emphasis added).

267. Id. at 577 (emphasis added) (citations omitted) (quoting Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 94 (1998)).
federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case.”

The *Ruhrgas* Court explained, however, that *Steel Co.* permitted a court to reach an issue of personal jurisdiction prior to an issue of subject-matter jurisdiction. Personal jurisdiction—although waivable—is also “‘an essential element of [a court’s jurisdiction]’ without which the court is ‘powerless to proceed to an adjudication.’”

While *Steel Co.* reasoned that subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues.

*Ruhrgas’s* refusal to distinguish between statutory and constitutional subject-matter jurisdiction—while holding that courts may not bypass subject-matter jurisdiction (without qualification) to reach the merits—casts significant doubt on hypothetical statutory jurisdiction.

*Ruhrgas* does contain seemingly inconsequential dicta that the personal jurisdiction issue was more “fundamental” than the subject-matter jurisdiction issue because it was of constitutional stature. But the *Ruhrgas* Court was clear that it was not the constitutional or statutory character of either issue that justified the result. Rather, it was justified by the fact that subject-matter jurisdiction was bypassed to reach a nonmerits threshold issue: “[A] court that dismisses on . . . nonmerits grounds . . . before finding subject-matter jurisdiction[] makes no assumption of law-declaring power that violates the separation of powers principles underlying [*Steel Co.*].”

*Ruhrgas*’s refusal to ground its decision on the distinction between statutory and constitutional issues further undermines the case for hypothetical statutory jurisdiction.

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

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268. *Id.* at 583.
269. *Id.* at 584 (quoting Emp’rs Reinsurance Corp. v. Bryant, 299 U.S. 374, 382 (1937)).
270. *Id.* (emphasis added).
271. *Id.* at 584 (opining that personal jurisdiction’s waivability does “not mean that subject-matter jurisdiction is ever and always . . . more ‘fundamental’” than personal jurisdiction, since both are essential prerequisites to reaching the merits; further observing that “[i]n this case, indeed, the impediment to subject-matter jurisdiction . . . rests on statutory interpretation, not constitutional command”); see also Idleman, * supra* note 23, at 75 (suggesting that this statement was dicta not “truly necessary to the conclusion”).
272. *See Ruhrgas*, 526 U.S. at 584–85 (emphasizing that threshold issues may be reached in any order when necessary, regardless of their constitutional or statutory status; *id.* at 587–88 (implying that even when subject-matter jurisdiction presents a statutory issue and personal jurisdiction presents a constitutional issue, courts should generally reach subject-matter jurisdiction first).
273. *Id.* at 584–85 (quoting *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998)).
expressed the views of the Court, the Ruhr gas Court’s unanimous reaffirmation of the core of Justice Scalia’s opinion seems to remove any genuine doubts on that score. Any argument for hypothetical statutory jurisdiction that attempts to deny the precedential force of Steel Co. is therefore unavailing after Ruhr gas.

2. Sinochem Casts Further Doubt on Hypothetical Statutory Jurisdiction

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

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

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

275. See Idleman, supra note 13, at 285–88 (discussing various questions as to the precedential weight of Justice Scalia’s Steel Co. opinion); Trammell, supra note 13, at 1107.
276. See Idleman, supra note 13, at 287–88 (noting that, given Steel Co.’s posture, potentially three justices who did not join the opinion for the Steel Co. Court may have agreed that hypothetical jurisdiction is unconstitutional).
278. Id. at 425.
279. Id. at 427.
280. Id. at 427–28.
281. Id. at 428.
282. Id. at 435.
that this is a statutory jurisdictional issue.\footnote{285}{See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 531–34 (1995) (explaining the evolution of statutory requirements for admiralty jurisdiction and stating that “a party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1) over a tort claim must satisfy conditions both of location and of connection with maritime activity”) (emphasis added); \textit{see also} \textit{23 FEDERAL PROCEDURE, LAWYERS EDITION} § 53:8, at 34–35 (Francis M. Dougherty et al. eds. 2012) (“[28 U.S.C. § 1333] was not intended by Congress to be coextensive with the grant of jurisdiction contained in the Constitution . . . .”).} Therefore, as in \textit{Ruhrgas}, the \textit{Sinochem} Court likely would not have reached the issue of whether forum non conveniens may be decided before subject-matter jurisdiction if the \textit{Steel Co.} rule did not apply to statutory jurisdictional issues.\footnote{286}{\textit{See supra} notes 257–61 and accompanying text (discussing \textit{Ruhrgas}’s posture).}

\textit{Sinochem}’s reasoning again strongly undermines hypothetical statutory jurisdiction. The Court again held that “[j]urisdiction is vital only if the court proposes to issue a judgment on the merits.”\footnote{287}{\textit{Sinochem}, 549 U.S. at 431 (emphasis added) (quoting Intec USA, LLC v. Engle, 467 F.3d 1038, 1041 (7th Cir. 2006)).} Since a forum non conveniens dismissal “is a determination that the merits should be adjudicated elsewhere,” it is a nonmerits, threshold issue that may be reached prior to subject-matter jurisdiction.\footnote{288}{\textit{Id.} at 432.} “The critical point” was that “[r]esolving a \textit{forum non conveniens} motion does not entail any assumption . . . of substantive ‘law-declaring power’” to decide the merits.\footnote{289}{\textit{Id.} at 433 (quoting \textit{Ruhrgas} AG v. Marathon Oil Co., 526 U.S. 574, 584–85 (1999)).} Once again, \textit{Sinochem}’s refusal to ground its decision on a distinction between statutory and constitutional issues, while emphasizing that subject-matter jurisdiction (without qualification) is essential to reach the merits, casts further doubt on hypothetical statutory jurisdiction.

In sum, while \textit{Ruhrgas} and \textit{Sinochem} substantially softened \textit{Steel Co.}’s impact by permitting various nonmerits issues to be decided before subject-matter jurisdiction, they only reaffirmed and strengthened \textit{Steel Co.}’s unyielding prohibition on reaching merits issues before confirming subject-matter jurisdiction. And they did so without creating an exception for statutory subject-matter jurisdiction. Per the Court, “[S]ubject-matter jurisdiction necessarily precedes a ruling on the merits,”\footnote{290}{\textit{Ruhrgas}, 526 U.S. at 584 (emphasis added).} and “[j]urisdiction is vital only if the court proposes to issue a judgment on the merits.”\footnote{291}{\textit{Sinochem}, 549 U.S. at 431 (emphasis added) (quoting \textit{Intec USA}, 467 F.3d at 1041).} While it is true that these cases did not directly address the issue, they strongly indicate that hypothetical statutory jurisdiction is impermissible.\footnote{292}{\textit{Ruhrgas} and \textit{Sinochem}’s distinction between threshold issues and merits issues shows that when a court exercises hypothetical statutory jurisdiction, it is doing something forbidden and consequential. Exercising hypothetical statutory jurisdiction to decide the merits is an exercise of law-declaring power without the authority to do so. \textit{Ruhrgas}, 526 U.S. at 584–85; \textit{Sinochem}, 549 U.S. at 433. The practical consequences of this ultra vires ruling are most evident when the court resolves a
III. THE INSUFFICIENCY OF CONSTITUTIONAL-AVOIDANCE AND EFFICIENCY JUSTIFICATIONS

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

A. The Insufficiency of Constitutional-Avoidance Justifications

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

293. See, e.g., supra note 54 and accompanying text.
295. See Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 123–24 (1998) (Stevens, J., concurring) (citing Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring) (“[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.”)). See generally Coenen, supra note 13, at 743–44 (discussing the constitutional-avoidance doctrine).
296. See supra note 295 and accompanying text.
A fortiori, the lack of any constitutional-avoidance rationale for hypothetical statutory jurisdiction only makes it even more questionable. Because a statutory issue is being bypassed when a court exercises hypothetical statutory jurisdiction—perhaps even to reach a constitutional merits issue—the constitutional-avoidance doctrine does not support it. Thus, the judicial-restraint rationales that were insufficient to support hypothetical Article III jurisdiction are even weaker here.

Nonetheless, courts might be tempted to resort to hypothetical statutory jurisdiction to avoid grave and difficult constitutional issues presented by statutes stripping them of jurisdiction to hear constitutional claims. These types of jurisdiction-stripping attempts—while rarely enacted—have received considerable scholarly attention because they are exceedingly troubling from the perspective of protecting fundamental constitutional rights.297 It is one of the oldest principles of American constitutional law that the violation of a legal right usually requires a legal remedy298—which, throughout much of American history, has traditionally been provided in a federal forum.299

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

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

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

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

300. See generally Bartlett v. Bowen, 816 F.2d 695, 703 (D.C. Cir. 1987) (“[A] statutory provision precluding all judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right.”), opinion reinstated, 824 F.2d 1240 (D.C. Cir. 1987) (en banc) (per curiam); CHEMERINSKY, supra note 15, at 182–84, 208–10; FALLOn ET AL., supra note 132, at 300–03, 308–09; infra note 305 and accompanying text. See supra notes 297–98 and accompanying text.
Yet, hypothetical statutory jurisdiction would not serve the intended purpose here. First, the doctrine would be inapplicable, since hypothetical jurisdiction is generally acknowledged to be available only when the jurisdictional issue is difficult. But the statutory issue in this case—whether Congress intended the jurisdictional strip to apply to the case at bar—will often not be difficult. Congress often speaks unequivocally when it truly intends to strip the courts of jurisdiction. For example, there is nothing particularly difficult about determining whether a constitutional challenge to school prayer would fall within a jurisdiction-stripping provision purporting to divest the courts of the power to hear such challenges. Rather, it is only the subsequent constitutional question whether that jurisdiction-stripping statute is constitutionally valid that is difficult. If anything, hypothetical statutory jurisdiction would be even more offensive to separation-of-powers values in this context than usual, since the court would be avoiding an obvious statutory jurisdictional limitation rather than avoiding determining the meaning of Congress’s uncertain jurisdictional language.

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

301. See supra notes 48–50, 55–58 and accompanying text.
303. See FALLON ET AL., supra note 132, at 277–78 (collecting examples of proposed jurisdiction-stripping legislation).
304. See supra notes 48–58 and accompanying text.
305. See, e.g., Webster v. Doe, 486 U.S. 592, 603–04 (1988) (“[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the ‘serious constitutional question’ that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.”) (citations omitted) (quoting Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986))).
306. See Webster, 486 U.S. at 603–04.
307. Id.
308. Id.
clear background rules against which it can craft jurisdictional (and jurisdiction-stripping) statutes.\textsuperscript{309}

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

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

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

\textbf{B. The Insufficiency of Efficiency Justifications}

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

\begin{footnotesize}
\textsuperscript{309} See, e.g., Aaron Tang, Double Immunity, 65 Stan. L. Rev. 279, 324 (2013) (“[C]lear statement rules are, at their best, designed to create a ‘predictable interpretive regime’ that provides Congress with certainty over how particular statutory language (and gaps in the law) will be construed by the Court.” (footnotes omitted) (quoting William N. Eskridge, Jr. & Philip P. Frickey, The Supreme Court, 1993 Term—Foreword: Law as Equilibrium, 108 Harv. L. Rev. 26, 86 (1994))).

\textsuperscript{310} See supra notes 305–09 and accompanying text (discussing the clear-statement rule).

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

\textsuperscript{312} See supra notes 127–28 and accompanying text.

\textsuperscript{313} See supra notes 297–300 and accompanying text.

\textsuperscript{314} See supra notes 48–58 and accompanying text.

\textsuperscript{315} See Idleman, supra note 13, at 248 (criticizing hypothetical jurisdiction for “sustain[ing] uncertainty and encourag[ing] future litigation over the same jurisdictional issue”).
\end{footnotesize}
values discussed so far but rather on the strong efficiency gains it can produce. As Justice Breyer put it, “[w]hom does it help to have appellate judges spend their time and energy puzzling over the correct answer to an intractable jurisdictional matter, when (assuming an easy answer on the substantive merits) the same party would win or lose regardless?”\(^{316}\) Scholarly commentary has also decried the inefficiency of an inflexible, “jurisdiction first” approach.\(^{317}\) While Steel Co. and its progeny rejected this argument—prohibiting some or (as this Article argues) all instances of hypothetical jurisdiction despite the inefficiency of doing so—efficiency concerns are likely to be the greatest obstacle to burying hypothetical statutory jurisdiction once and for all.

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

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

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

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

\(^{317}\) See, e.g., Trammell, supra note 13, at 1118 (“[S]cholars have decried an unyielding approach to jurisdiction as] an ‘expensive habit’ and have extolled the efficiency gains of a more pragmatic approach . . . .” (footnote omitted) (quoting David P. Currie, The Federal Courts and the American Law Institute: Part II, 36 U. Chi. L. Rev. 268, 298 (1969))).

\(^{318}\) Idleman, supra note 13, at 248 (stating that the efficiency argument for hypothetical jurisdiction is “self-evident”).

\(^{319}\) See supra notes 105–23 and accompanying text.
merits issues, and many more statutory issues were classified as jurisdictional. Without those clarifications, it may have seemed disastrous to read Steel Co. to prohibit hypothetical statutory jurisdiction.

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

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

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

320. See supra Part II.C.
322. See supra Part II.C.
323. See, e.g., Wasserman, supra note 16, at 600 (“Steel Co. depends on the existence of a firm line between jurisdiction and merits . . . .”); see also Stephen I. Vladeck, The Increasingly “Unflagging Obligation”: Federal Jurisdiction After Saudi Basic and Anna Nicole, 42 TULSA L. REV. 553, 570 (2007) (arguing that Steel Co. incentivized lower courts to expand the universe of statutory jurisdictional issues, prompting the Supreme Court to focus on the issue).
324. Mank, supra note 15, at 434 (quoting Grocery Mfrs. Ass’n v. EPA, 693 F.3d 169, 184 (D.C. Cir. 2012) (Kavanaugh, J., dissenting)).
326. See, e.g., Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment, Cent. Region, 558 U.S. 67, 81 (2009) (“Recognizing that the word ‘jurisdiction’ has been used by courts, including this Court, to convey many, too many, meanings, we have cautioned, in recent decisions, against profligate use of the term.” (citation omitted) (quoting Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83 (1998))).
327. See Wasserman, supra note 16, at 603 (“[T]he default rule” is thus that a statutory requirement “goes to the merits unless and until Congress provides otherwise . . . .”).
narrow the universe of statutory jurisdictional issues. It also avoids the practical problems created by overapplying the jurisdictional label and rendering all sorts of merits issues nonwaivable and nonbypassable. Since there are likely to be far fewer statutory jurisdictional issues under current law, applying the Steel Co. rule to those issues will have a much smaller impact. Thus, the efficiency argument for hypothetical statutory jurisdiction has been significantly undercut by jurisprudential developments since Steel Co.

2. Hypothetical Statutory Jurisdiction Can Create Various Inefficiencies

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

a. Subsequent Proceedings Within a Case

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

328. See Arbaugh, 546 U.S. at 512; see also Mank, supra note 15, at 433 (discussing “the recent Supreme Court trend to narrow which issues are jurisdictional”); Revell, supra note 13, at 239 (“Beginning with Steel Co., . . . the Court has regularly spoken . . . to the definition of jurisdiction, gradually building a repository of what it is and what it is not.”); Wasserman, supra note 16, at 601 (“Arbaugh and Steel Co. are of a piece.”).
329. See infra notes 367–69 and accompanying text; see also Clermont, supra note 229, at 309 (“This is ‘nonbypassable,’ . . . a court cannot skip over it and instead dismiss on the merits.”).
330. See, e.g., Idleman, supra note 13, at 317–18 (discussing the inefficiency of perpetuating jurisdictional uncertainty). Given that the merits issue reached by a court assuming hypothetical jurisdiction is generally neither novel nor difficult, a court is generally not providing any significant guidance to courts and litigants on the merits issue when it assumes hypothetical jurisdiction. See supra notes 48–58 and accompanying text.
331. I am indebted to Brian J. Levy for suggesting this possibility.
to dismiss. In a subsequent motion to dismiss, the district court will then be forced to confront the previously bypassed statutory jurisdictional issue. At best, if jurisdiction exists, no time will have been saved—both the original jurisdictional and merits issues will have been addressed, as well as the amended merits allegations. But at worst, if jurisdiction is lacking, the court may have needlessly reached the merits twice, wasting both litigant and judicial resources. In such a scenario, it would have been much more efficient to simply decide the jurisdictional issue first.

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

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

b. Subsequent Cases in Different Courts

Hypothetical statutory jurisdiction can also create inefficiencies in follow-on litigation, principally because of the uncertain preclusive effects of such a judgment. The usual practice in the federal courts is that a
dismissal for lack of subject-matter jurisdiction is without prejudice to the case’s refiling in another forum. It is generally thought that “in the absence of subject matter jurisdiction there can be no preclusive findings or conclusions on the merits.” A dismissal for failure to state a claim on the merits, in contrast, is with prejudice to refiling, and the merits judgment will have res judicata effect. But if jurisdiction is assumed hypothetically, is the subsequent merits dismissal with or without prejudice to refiling?

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

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

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

337. See, e.g., Idleman, supra note 13, at 291–92; Wasserman, supra note 16, at 597.
338. See, e.g., Aerolineas Argentinas v. United States, 77 F.3d 1564, 1572 (Fed. Cir. 1996). However, if a federal court decides an issue that is also relevant to the merits in the course of determining that it lacks subject-matter jurisdiction, issue preclusion may attach to its decision on that issue and be binding in follow-on litigation in state court. See Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999).
341. See RESTATEMENT (SECOND) OF JUDGMENTS § 12 (AM. LAW INST. 1982) (allowing collateral attack when “[t]he subject matter of the action was so plainly beyond the court’s jurisdiction that its entertaining the action was a manifest abuse of authority”). The Supreme Court has not ruled on whether this exception is appropriate. See Travelers Indem. Co. v. Bailey, 557 U.S. 137, 153 n.6 (2009) (noting this exception but declining to consider whether to adopt it); see also Idleman, supra note 23, at 59 n.322.
342. See Ruhrgas, 526 U.S. at 586 (“When a court has rendered a judgment in a contested action, the judgment [ordinarily] precludes the parties from litigating the question of the court’s subject matter jurisdiction in subsequent litigation.” (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 12, at 115)); see also Trammell, supra note 13, at 1146.
343. See infra note 344.
this assumption does not hold if the parties raised the issue, yet the court declined to address it and skipped to the merits. While there was an opportunity to raise the issue of subject-matter jurisdiction, there was no opportunity to obtain a decision on the issue. This situation is not meaningfully different than if the parties were unable to obtain a ruling on the issue because the first tribunal had “inadequate capability for considering jurisdictional questions”—a situation in which the Restatement (Second) of Judgments allows collateral attack on the first court’s judgment for lack of subject-matter jurisdiction.

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

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

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

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

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

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

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


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

\textit{ii. The “Plain-Usurpation” Standard Encourages Inefficient Relitigation}

Even if hypothetical statutory jurisdiction is not a per se “plain usurpation” of jurisdiction and such judgments could be granted preclusive effect in some circumstances, it still inefficiently incentivizes relitigation of the first court’s subject-matter jurisdiction in follow-on litigation. Plaintiffs have a powerful incentive to attack the prior judgment for lack of subject-matter jurisdiction so that their case may proceed—likely in state court. The plain-usurpation standard, although designed to prevent a judgment from being questioned for lack of subject-matter jurisdiction in all but the most egregious cases,\textsuperscript{353} invites the parties to relitigate the issue. The standard is quite vague and susceptible to varying interpretations of what constitutes usurpation, encouraging collateral attack on the first judgment.\textsuperscript{354} And because hypothetical statutory jurisdiction is designed to be invoked only when the jurisdictional issue is difficult\textsuperscript{355}—which is

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

\textsuperscript{351}. \textit{See supra} note 349 and accompanying text.

\textsuperscript{352}. \textit{Cf.} CAS R. SUNSTEIN, \textit{ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT} 48 (1999) (“A court that economizes on decision costs for itself may in the process ‘export’ decision costs to other people, including litigants and judges in subsequent cases who must give content to the law.”).

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


\textsuperscript{355}. \textit{See supra} notes 48–58 and accompanying text.
another way of saying that jurisdiction is doubtful—the judgment may be especially prone to attack. Additionally, a collateral attack on the first judgment will generally be heard by a new judge, who may see the issue quite differently than the first judge. And since the first court has not expressed a view on the correct resolution of the jurisdictional issue, it may be easier for a second court to conclude that jurisdiction is plainly lacking, as the second court would not have to contradict a prior resolution of the jurisdictional issue to do so. Given all of this uncertainty, plaintiffs may have a high enough chance of success to lead them to challenge the prior ruling—even if only to exert leverage over their opponents in order to extract a settlement at the price for finality. And even if the second court finds that the first court did not plainly usurp jurisdiction, the costs to the parties and to the second court imposed by the process of relitigating the issue of subject-matter jurisdiction could be substantial.356

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


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

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

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

360. See, e.g., Chisolm v. United States, 82 Fed. Cl. 185, 197 (Fed. Cl. 2008) (refusing to afford preclusive effect to a district court judgment that had bypassed the issue of whether the claim fell within Court of Claims’s exclusive jurisdiction), aff’d, 298 F. App’x 957 (Fed. Cir. 2008); RFMS, Inc. v. United States, 736 F. Supp. 2d 1222, 1226 (S.D. Iowa 2010) (declining to give preclusive effect to an alternative merits holding when the federal court dismissed for lack of subject-matter jurisdiction); Dewberry v. Kulongsoski, No. 16-03-23044, 2010 WL 9932505, at *9 (Or. Cir. May 3, 2010) (declining to afford preclusive effect to a federal court judgment that had assumed hypothetical jurisdiction in the alternative to reach the merits).
the efficiency costs will be severe—both the statutory subject-matter jurisdiction issue and the merits may ultimately be litigated twice by the parties before two courts. In such a case, it would have been much more efficient for the first court to decide the subject-matter jurisdiction issue first to prevent such relitigation.

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

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

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

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

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

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

364. See Idleman, supra note 23, at 36–37 (arguing that hypothetical jurisdiction and violations of subject-matter jurisdiction restrictions harm “the people as a whole—the very source of federal sovereignty”).
the court with as little effort as possible, it is not an effective way to dispose of the case expeditiously while simultaneously respecting the fundamental separation-of-powers and federalism values served by honoring statutory subject-matter jurisdiction restrictions.

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

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

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

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

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

368. See supra notes 323–29 and accompanying text.
federal jurisdiction, and while maintaining the inviolability of statutory limitations on subject matter jurisdiction. 369

* * *

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

CONCLUSION

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

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

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

369. See supra notes 323–29 and accompanying text.
simultaneously impinging on fundamental separation-of-power and federalism values.

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

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

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

370. See supra note 11.
371. See supra notes 67–72 and accompanying text.