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## After Steel Co.: "Hypothetical Jurisdiction" in the Federal Appellate Courts

Joan Steinman

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# After *Steel Co.*: "Hypothetical Jurisdiction" in the Federal Appellate Courts

Joan Steinman\*

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### *Introduction*

In *Steel Co. v. Citizens for a Better Environment*,<sup>1</sup> the United States Supreme Court, sua sponte, denounced the doctrine of "hypothetical jurisdiction," a doctrine that, in some circumstances, allowed courts to assume, arguendo, the existence of jurisdiction and to address the merit questions presented by cases. Several of the Justices distanced themselves from the denunciation, however, and despite the vociferousness of the position taken by the majority, even it found that there were exceptional circumstances in which the Court had acted properly (and presumably in which other courts would act appropriately) in assuming jurisdiction arguendo and addressing merits questions. The opinion left open a number of questions with which the federal courts and commentators have begun to grapple. In this Article, I focus on matters left unclear by *Steel Co.* and, in particular, on the effects of the Court's denunciation of the work of the federal appellate courts.

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1. 523 U.S. 83 (1998).

The first Part describes the *Steel Co.* opinion and highlights several of the questions it raised. Part II considers how the Court's denunciation of hypothetical jurisdiction has changed the appellate courts' approach to cases in which they find issues concerning the *district* courts' jurisdiction. It does not attempt to answer all the interpretive issues left open by *Steel Co.*, as that case applies to district court jurisdiction, nor does it tackle the myriad issues that courts will face in determining whether particular matters go to the district courts' "jurisdiction," for *Steel Co.*'s purposes. Part II does, however, focus, by way of example, on the primary area of controversy that arose in the wake of *Steel Co.* as it applies to district court jurisdiction: whether the Eleventh Amendment defense is jurisdictional in the sense that courts may no longer assume it to be inapplicable or unavailable, and may decide cases on their merits.

Part III initially provides a transition from appellate handling of issues of district court jurisdiction to issues of appellate jurisdiction. It begins by addressing the apparent tension between the Court's denunciation of hypothetical jurisdiction and its restriction of the scope of appellate jurisdiction when hearing interlocutory appeals, and stakes out a position on which matters of district court jurisdiction appellate courts may entertain upon interlocutory appeals. Part III then examines how appellate courts had employed hypothetical *appellate* jurisdiction and how the Court's seeming prohibition on hypothetical jurisdiction applies to matters of appellate jurisdiction. This undertaking requires consideration of the constitutional provisions, statutes, rules and doctrines that govern appellate jurisdiction and an evaluation of which requirements no longer may be assumed to be satisfied, to allow an appellate court to reach merits issues.

Finally, Part IV looks at the effect of *Steel Co.* on the kinds of issues that the courts of appeals are deciding. It then comments on the value of this effect.

### *I. The Many Questions Left Unanswered by Steel Co. v. Citizens for a Better Environment*

#### *A. The Court's Opinion and an Initial Critique*

An environmental protection organization, Citizens for a Better Environment (CBE), had sued, alleging that the defendant had violated the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA) by failing to timely file certain reports. CBE sought declaratory and injunctive relief. The Court granted certiorari to decide whether EPCRA authorizes suits for purely past violations.<sup>2</sup> The Court decided instead that it had no jurisdiction

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2. *Id.* at 86-88.

to resolve this merits issue because the plaintiffs lacked standing to sue.<sup>3</sup> A diatribe against "hypothetical jurisdiction" was not necessary to its decision, and the parties had neither briefed nor argued the subject.<sup>4</sup> Nonetheless, en route to its conclusion as to plaintiffs' standing, the Court attacked the practice of many district courts and several federal courts of appeals to decide merits questions that are more readily resolved than jurisdictional objections, when "the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied."<sup>5</sup>

In an opinion by Justice Scalia, joined by the Chief Justice and Justices O'Connor, Thomas, and Kennedy, the Court stated, "We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers."<sup>6</sup> Adverting to courts' lack of power to declare the law in the absence of jurisdiction, the Court added that, when jurisdiction ceases to exist, a court's only function is to announce that fact and dismiss the case. Moreover, "[o]n every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes."<sup>7</sup> "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'"<sup>8</sup>

The Court conceded that some of its own decisions had "diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent

3. *Id.* at 109-10.

4. *See id.* at 121-22 (Stevens, J., concurring in judgment) (commenting on Court's discussion of hypothetical jurisdiction not having been informed by adversary submissions of parties); Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 271-72 (1999) (stating that neither party raised hypothetical jurisdiction at district court, court of appeals, or Supreme Court level; rather, Supreme Court decided issue sua sponte, without notice to parties) (citations omitted); *id.* at 274-80 (commenting on jurisprudential and institutional significance, as well as irony, of Court's reaching out, in these circumstances, to address hypothetical jurisdiction *inter alia* prior to verifying subject-matter jurisdiction over case).

5. *Steel Co.*, 523 U.S. at 93. For a description of the variations in the doctrine as adopted by various courts of appeals, see Idleman, *supra* note 4, at 245 (noting that "standard" formulation provides that courts may rule on merits without reaching jurisdictional contention "[w]hen the merits of the case are clearly against the party seeking to invoke the court's jurisdiction, the jurisdictional question is especially difficult and far-reaching, and the inadequacies in the record make the case a poor vehicle for deciding the jurisdictional question"). Idleman found that some courts had looked only to whether the difficulty of resolving the jurisdictional question was far greater than that entailed in resolving the merits of a suit. *Id.* at 246-47.

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

7. *Id.* (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)).

8. *Steel Co.*, 523 U.S. at 94-95 (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

question,<sup>9</sup> but insisted that all of the decisions that the lower federal courts or other Justices relied upon as precedent legitimating hypothetical jurisdiction were distinguishable from and did not "even approach[ ] approval of a doctrine . . . that enables a court to resolve contested questions of law when [the court's] jurisdiction is in doubt."<sup>10</sup> None of those cases "pretermi[tted] the jurisdictional question as a device for reaching a question of law that otherwise would have gone unaddressed."<sup>11</sup> The Court thus excoriated hypothetical jurisdiction as "produc[ing] nothing more than a hypothetical judgment[,] . . . an advisory opinion, disapproved by this Court from the beginning."<sup>12</sup> It concluded that

[t]he statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. . . . For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.<sup>13</sup>

Foreshadowing an array of issues that lower federal courts have to resolve in the wake of *Steel Co.*, the Court rejected Justice Stevens's view that the question whether EPCRA authorized the cause of action that plaintiffs sought to assert was "jurisdictional" and so had equal claim to being resolved first.<sup>14</sup>

Focusing on the Supreme Court cases that the lower federal courts had relied upon as legitimating hypothetical jurisdiction, the Court portrayed several cases as having characterized as jurisdictional issues or requirements that had been assumed *arguendo*, when that characterization was in error.<sup>15</sup> When one looks at the cases in question, particularly *Secretary of Navy v. Avrech* and *United States v. Augenblick*, one sees that the Court explicitly

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

10. *Id.*; see *infra* text accompanying notes 15-23 and notes 29-31.

11. *Id.* at 98.

12. *Id.* at 101.

13. *Id.* at 101-02 (citations omitted).

14. *Id.* at 90-93; see *id.* at 112-31 (Stevens, J., concurring). Justice Stevens opined that actionability of past violations of EPCRA was statutory jurisdictional question that could be addressed before Article III standing issues, and normally should be addressed before constitutional questions. *Id.*

15. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98-100 (1998) (describing issue in both *Sec'y of Navy v. Avrech*, 418 U.S. 676 (1974), and *United States v. Augenblick*, 393 U.S. 348 (1969), as whether court-martial judgment could be collaterally attacked by suit for back pay, among other relief, alleging constitutional defect in military decision); *Schlesinger v. Councilman*, 420 U.S. 738, 744-53 (1975) (squarely holding this issue not to be jurisdictional).

stated that it was assuming *arguendo* the jurisdiction of the federal court.<sup>16</sup> Even if the Court later changes its mind about the jurisdictional nature of an issue, the cases that assumed *arguendo* matters that the Court then regarded as jurisdictional continue to exemplify the Court's earlier approbation of hypothetical jurisdiction.

The Court sought to destroy the value of additional decisions as precedents for hypothetical jurisdiction by now characterizing as jurisdictional the issue that the Court had reached prior to other jurisdictional issues.<sup>17</sup> In *Chandler v. Judicial Council of Tenth Circuit*,<sup>18</sup> for example, a federal district judge had challenged the authority of a Judicial Council to strip him of cases that had been assigned to him and to impose conditions on the exercise of his constitutional powers as a judge.<sup>19</sup> The Court declared that the "very knotty"<sup>20</sup> "threshold question in this case is whether we have jurisdiction to entertain the petition for extraordinary relief."<sup>21</sup> However, the court declined to decide whether it had appellate jurisdiction, and concluded that, because other avenues of relief remained open, the complaining judge had not made a case for extraordinary relief.<sup>22</sup> There is no indication that the *Chandler* Court itself regarded the issue of exhaustion of alternatives as jurisdictional, although the *Steel Co.* Court viewed the issue that way. Despite the Court's later change of mind about the jurisdictional nature of an issue, cases in which the Court decided what it then regarded as non-jurisdictional matters before the Court decided issues that it then regarded as jurisdictional may again exemplify the Court's earlier approbation of hypothetical jurisdiction.<sup>23</sup>

### B. Questions Left Unanswered

Beyond this questionable handling of precedent, the *Steel Co.* majority opinion raises a number of questions. For example, a great deal of language in the opinion suggests that the Court sought to ensure that lower federal

16. *Avrech*, 418 U.S. at 677-78; *Augenblick*, 393 U.S. at 350-52.

17. See *Steel Co.*, 523 U.S. at 100 (describing *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74 (1970), as having permissibly addressed whether petitioner for writ of prohibition or mandamus had exhausted all alternative avenues of relief, while reserving question of Court's jurisdiction to issue such writ in that case, because exhaustion question itself was "at least arguably jurisdictional, and was clearly treated as such").

18. 398 U.S. 74 (1970).

19. *Chandler*, 398 U.S. at 82.

20. *Id.* at 88.

21. *Id.* at 86.

22. *Id.* at 86-89.

23. See *infra* text at notes 48-59, however, concerning the decision of procedural issues before merits issues.

courts will not reach merits questions<sup>24</sup> without first determining that an Article III case or controversy is present.<sup>25</sup> Insofar as only constitutional limitations on judicial jurisdiction are the Court's concern, lower federal courts may be free to resolve merits questions before jurisdictional questions that are of a merely statutory, prudential or common law nature.<sup>26</sup> But this is not entirely clear. Other language in the opinion, in particular that in which the Court stated that "[t]he statutory and (especially) constitutional elements

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24. These would include whether the complaint stated a claim on which relief could be granted.

25. See *Steel Co.*, 523 U.S. at 92, 95 (arguing that Justice Stevens had failed to cite any case in which Supreme Court had decided whether complaint stated claim before resolving "the existence of an Article III case or controversy," and stating that arguments asserting that court may decide cause of action question before resolving Article III jurisdiction are readily refuted). In *Steel Co.*, the Court conceded that some of its cases had "diluted the absolute purity of the rule that *Article III jurisdiction* is always an antecedent question." *Id.* at 101 (emphasis added).

26. See *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 455-56, 464-65 & n.13 (1974) (determining merits question – whether private right of action existed to enforce particular statutory duties, thereby pretermittting issues of plaintiff's statutory standing to bring such suit and whether district court had statutory jurisdiction to entertain such suit); *Bd. of Educ. v. Kelly E. ex rel. Nancy E.*, 207 F.3d 931, 934 (7th Cir. 2000) (holding prudential standing requirements to be forfeited when not raised in timely manner because such requirements are nonjurisdictional); *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1042 n.3 (9th Cir. 1999) (concluding that, in assuming Article III standing and resolving case based on plaintiffs' failure to establish prerequisite for equitable relief, court did not violate *Steel Co.*'s denunciation of hypothetical jurisdiction because it affirmed summary judgment for defendants based on scope of its equitable power to grant injunctive relief, not based on merits of plaintiff's claims); *Cablevision, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 100 n.9 (1st Cir. 1999) (finding that "whatever the scope of *Steel Co.*'s recommended order of analysis, . . . [it] does command that initial consideration be given to the existence of Article III standing, where such . . . is in doubt"); *Parella v. Ret. Bd. of the R.I. Employees' Ret. Sys.*, 173 F.3d 46, 53-54 (1st Cir. 1999) (describing *Steel Co.* as having "declared that courts should generally determine whether Article III jurisdiction exists before reaching the merits," and as having distinguished between Article III and statutory jurisdiction, "holding that the former should ordinarily be decided before the merits, but the latter need not be"); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 663 n.4, 669 n.13 (7th Cir. 1998) (holding that, because complaint alleged Article III case or controversy and Article III standing, court had jurisdiction to address questions of statutory standing and merits issues; but, it addressed only merit issues, concluding that it could "elide" issue of prudential standing); *Idleman*, *supra* note 4, at 318-20 (noting that insofar as *Steel Co.* holds that Article III court cannot decide merits of dispute without first verifying that Article III's case or controversy requirements have been satisfied, it does not necessarily prohibit decision of merits issues without prior verification of merely statutory or judge-made jurisdictional requirements). Professor Freer has noted that a "case in which the plaintiff lacks only statutory standing nonetheless falls within Article III. Determining the merits of such a case without addressing the statutory standing issue does not implicate the constitutional separation of powers problem at the center of *Steel Company*." Richard D. Freer, *Observations on the Scope of the Supreme Court's Rejection of "Hypothetical Jurisdiction"*, 8 FED. LIT. GUIDE RPTR. 247, 250 (Oct. 1999) (emphasis added).



of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects," suggests that the Court's denunciation of hypothetical jurisdiction extends to arguendo assumptions of jurisdiction that, while unquestionably constitutional, are doubtful as a statutory matter.<sup>27</sup> Thus, the Court has laid the groundwork for playing *Steel Co.* either way.

The majority opinion also raises questions about the scope of the denunciation of hypothetical jurisdiction by its embrace, rather than disavowal, of cases in which the Court itself "diluted the absolute purity of the rule"<sup>28</sup> that jurisdiction always is a threshold question. If *Norton v. Mathews*,<sup>29</sup> *Philbrook v. Glodgett*,<sup>30</sup> *Secretary of Navy v. Avrech*,<sup>31</sup> *Chandler v. Judicial Council of*

27. *Steel Co.*, 523 U.S. at 1016.

28. *Id.*

29. 427 U.S. 524 (1976). In *Norton*, the Court declined to decide the jurisdictional question whether the action had properly been brought in a three-judge district court and hence was properly before the Supreme Court on a direct appeal. *Norton v. Mathews*, 427 U.S. 524, 527-31 (1976). The Court justified its bypass of the jurisdictional question on the grounds that, because the merits question was decided in a companion case, resolution of the jurisdictional question would have had no effect on the outcome: if jurisdiction had been invoked correctly, the Court would have affirmed summary judgment for the defendant. If jurisdiction were lacking, the Court would have dismissed the appeal, vacated the judgment and remanded, but the identical outcome would have been foreordained in subsequent proceedings before a single federal judge. *Id.* at 531-32. Thus, avoidance of the jurisdictional question did not allow the Court to decide a question that otherwise would have gone unaddressed. In *Steel Co.*, the Court also indicated that *Norton* could be read not to have avoided the jurisdictional question at all, but to have concluded that, in light of the companion case, *Norton* should be dismissed for lack of a substantial federal question. *Steel Co.*, 523 U.S. at 98; see *Norton*, 427 U.S. at 530-31 (stating that disposition of companion case rendered "the merits in the present case a decided issue and thus one no longer substantial in the jurisdictional sense"). For commentary on *Norton*, see Idleman, *supra* note 4, at 301-02 (observing that second reading "legitimizes the power of an appellate court to issue a prejudicial judgment (an affirmance on the merits)" and commenting on how the two readings of *Norton* differ in *how* they undermine the Court's effort to repudiate hypothetical jurisdiction, but asserting that both do so).

Judge O'Scannlain, dissenting in *Clow v. U.S. Dep't of Housing & Urban Dev.*, 948 F.2d 614 (9th Cir. 1991), argues that *Norton* is in no way precedent for hypothetical jurisdiction because

the knotty jurisdictional question that the *Norton* Court abstained from deciding was not a question of jurisdiction *vel non*, but a question of which of two jurisdictional schemes . . . properly applied. . . . [I]t implicitly acknowledged that the district court's jurisdiction – in one form or another – was certain and that nothing depended upon a resolution of the precise nature of that jurisdiction because the same party would prevail *on the merits* in either event.

*Id.* at 627 (O'Scannlain, J., dissenting).

30. 421 U.S. 707 (1975). *Philbrook* presented an issue of pendent party jurisdiction under 28 U.S.C. § 1343(3) that the parties had not adequately briefed and that the Court

*Tenth Circuit*,<sup>32</sup> and *United States v. Augenblick*<sup>33</sup> – all cases that lower federal courts had relied upon as legitimating hypothetical jurisdiction – remain good law, the line separating assumptions of jurisdiction that are forbidden

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regarded as a "subtle and complex question with far-reaching implications." *Id.* at 721. Despite or perhaps because of this, the Court concluded that the "unusual context" of the appeal permitted an exception to the general rule that the Court has a duty to inquire into the jurisdiction of the district court. *Id.* The unusual context apparently consisted of the foregoing circumstances and the additional facts that (1) the substantive issue decided by the district court would have been decided in regard to a co-defendant even if the Secretary of HEW were not a proper party and (2) the pendent party Secretary had announced his intent to comply with the judgment if the Court's decision on the merits was adverse. Concluding that the exercise of jurisdiction over the claim against the Secretary had resulted in no adjudication on the merits that could not have been properly made without him, and had resulted in no issuance of process against him which he properly contended to be wrongful, the Court bypassed the question of statutory subject-matter jurisdiction over the claim against the Secretary (and perhaps even the question of the constitutionality under Article III of pendent party subject-matter jurisdiction), and simply dismissed the Secretary's appeal from the judgment below. *Id.* at 721-22; *see also* *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 n.16 (1978) (declining to resolve whether Duke Power was proper party because jurisdiction over claims against Nuclear Regulatory Commission was established, and Duke's presence or absence made no material difference either to Court's consideration of merits or to its authority to award requested relief).

In later cases, the Court assumed *arguendo* that Article III would permit the exercise of pendent party jurisdiction (so long as the claim against the pendent party arose out of a common nucleus of operative fact with a substantial federal question claim and was such that, disregarding the claims' federal and state natures, respectively, the plaintiff would normally be expected to try them together), but the Court disapproved such exercises of jurisdiction as inconsistent with the statutory bases of jurisdiction on which the courts had to rely. *See* *Finley v. United States*, 490 U.S. 545, 549 (1989) (disapproving pendent party jurisdiction under 28 U.S.C. § 1346, having assumed, without deciding, that constitutional criteria for pendent party jurisdiction are analogous to those for pendent claim jurisdiction); *Aldinger v. Howard*, 427 U.S. 1, 15-18 (1976) (disapproving pendent party jurisdiction under 28 U.S.C. § 1343(3), after stating that extension of *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), to pendent party jurisdiction "presents rather different statutory jurisdictional considerations") (emphasis added); *see also* *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371 n.10 (1978) (assuming, without deciding, that common nucleus of operative fact test also determines outer boundaries of constitutionally permissible federal jurisdiction based upon diversity of citizenship).

31. 418 U.S. 676 (1974). *Avrech* also presented a situation in which a Supreme Court decision, *Parker v. Levy*, 417 U.S. 733 (1974), decided after certiorari had been granted in *Avrech* but a few weeks before *Avrech* was decided, definitively answered the question presented on the merits by *Avrech*. *Id.* at 678. Thus, *Avrech* too could be viewed as exemplifying the notion that hypothetical jurisdiction may be permissible when the merits determination would not constitute a holding with precedential significance. *See* *Steel Co.*, 523 U.S. at 98-99 (noting that *Avrech* should not be cited for proposition that courts may decide "easy" merits questions based on assumption of jurisdiction).

32. 398 U.S. 74 (1970); *see supra* text accompanying notes 18-22.

33. 393 U.S. 348 (1969); *see supra* text accompanying note 16.

from those that are permissible is blurry.<sup>34</sup> By way of example, as Professor Freer has noted, *Norton* could be read "to permit hypothetical jurisdiction whenever the merits determination does not require a *precedential* holding."<sup>35</sup> The same could be said of *Avrech* and *Philbrook*.<sup>36</sup> The pre-*Steel Co.* understanding that hypothetical assumptions of jurisdiction are proper only when the merits are easy to decide<sup>37</sup> is consistent with this principle, for it is precisely when precedent clearly dictates the outcome of a case (so that its decision will not be of significant precedential value) that decision of the case on the merits is easiest.

Even on the Court's own reading of *Chandler*, that case can be read to permit one jurisdictional question to be avoided or assumed in favor of deciding another such question.<sup>38</sup> As so interpreted, *Chandler* is a precursor

34. See *Steel Co.*, 523 U.S. at 98-100 (purporting to distinguish these cases); see also *Cross-Sound Ferry Servs., Inc. v. I.C.C.*, 934 F.2d 327, 342-45 (D.C. Cir. 1991) (Thomas, J., concurring in part and concurring in denial of petition for review) (arguing that none of four cases sometimes cited in support of hypothetical jurisdiction does so; in particular, arguing that "[i]n *Augenblick*, . . . the ground passed over was at least arguably non-judicial, and in *Chandler*, *Avrech*, and *Norton*, the ground rested upon was at least arguably judicial"). The view of then-Judge Thomas seemed to be, however, that, given the "woolliness" and elusiveness of the concept of jurisdiction and the fact that some provisions can be judicial in some contexts and not in others, the rule that federal courts must satisfy themselves of their jurisdiction and not decide cases when they lack jurisdiction to do so may not apply if the ground passed over sufficiently partakes of the nature of a merits ground or if the ground rested upon sufficiently partakes of the nature of a judicial bar. *Cross-Sound Ferry*, 934 F.2d at 341.

Extensive discussion of the Supreme Court cases that lower federal courts relied on as authority for the assumption of jurisdiction *arguendo* can be found in Idleman, *supra* note 4; Comment, *Assuming Jurisdiction Arguendo: The Rationale and Limits of Hypothetical Jurisdiction*, 127 U. PA. L. REV. 712, 746 (1979).

Another Supreme Court opinion that may be viewed as employing hypothetical jurisdiction, but only as to one aspect of the case, is *New York v. United States*, 505 U.S. 144, 183-85 (1992). There, in considering plaintiffs' contention that certain provisions of a congressional act were inconsistent with the Constitution's Guarantee Clause (guaranteeing to every state a republican form of government), the Court avoided deciding whether the claim was a non-justiciable political question. *Id.* The court stated, "Even if we assume that petitioners' claim is justiciable, [the challenged provisions did not] deny any State a republican form of government." *Id.* at 185. *But see* Comment, *supra*, at 746 (arguing that deciding a case on its merits while assuming *arguendo* the nonexistence of a political question creates a logical conflict). In doing so, "[t]he issue purportedly reserved – whether the controversy is a proper subject for judicial resolution – has in fact been decided in the affirmative . . . [D]eciding the issue on the merits necessarily implies a decision that no political question exists." *Id.*

35. Freer, *supra* note 26, at 250 (emphasis added).

36. See *supra* notes 30-31.

37. See *supra* text accompanying note 5.

38. Professor Idleman has written that, in addition to the doctrines discussed above that *Steel Co.* apparently preserved despite its denunciation of hypothetical jurisdiction generally, the Court also appears to have left intact some other doctrines that relate to hypothetical jurisdiction.

of the Court's decision in *Ruhrgas AG v. Marathon Oil Co.*,<sup>39</sup> where the Court held that there is "no unyielding jurisdictional hierarchy" requiring a federal court to decide that it has subject-matter jurisdiction over a removed case before deciding whether it has personal jurisdiction over the defendant.<sup>40</sup>

If issues concerning a court's subject-matter jurisdiction may be postponed, and perhaps permanently avoided, while the court addresses personal jurisdiction issues and other jurisdictional requirements, one may well ask what other issues are "jurisdictional" so that courts may give them sequencing priority over issues that bear upon subject-matter jurisdiction and so that

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It left intact the doctrine that federal courts may dismiss a case for lack of subject-matter jurisdiction when the ostensibly federal claim asserted is wholly "insubstantial" and frivolous. Idleman, *supra* note 4, at 290-91; see *Steel Co.*, 523 U.S. at 89 (stating that district courts have jurisdiction unless purportedly federal claims fit this description). The Court also left intact the converse doctrine that whether a cause of action exists is not a question of jurisdiction. In Professor Idleman's view, there are a number of tensions between the insubstantiality doctrine and *Steel Co.*'s position on hypothetical jurisdiction. See Idleman, *supra* note 4, at 293-97.

39. 526 U.S. 574 (1999); see also *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66-67 (1997) (deciding case on basis of mootness, without first determining whether appellants had standing to appeal, explaining that both questions affect Article III jurisdiction).

40. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999). Marathon Oil and others had sued Ruhrgas in state court, and Ruhrgas had removed to district court, asserting three bases of federal jurisdiction: diversity of citizenship, federal question, and 9 U.S.C. § 205 (1999), which authorizes removal of cases that relate to international arbitration agreements. *Id.* at 579. Ruhrgas then moved to dismiss the complaint for lack of personal jurisdiction, and Marathon moved to remand for lack of federal subject-matter jurisdiction. *Id.* at 580. The district court granted the former motion, finding that Ruhrgas lacked the minimum contacts with Texas that were required by Fourteenth Amendment due process and hence by the Texas long-arm statute. *Id.* The Fifth Circuit, sitting en banc, vacated and remanded, holding that the district court ought to have reached the question of personal jurisdiction only after concluding that it had subject-matter jurisdiction. *Id.* at 582. By so sequencing the issues, the district court would have reduced the threat of usurping the state court's authority to decide the sweep of its power to exercise personal jurisdiction. See *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 218-19 (5th Cir. 1998), *rev'd*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999).

The Supreme Court declined to conclude that the nature and unwaivability of the subject-matter jurisdiction requirement made it necessarily more fundamental than the requirement of personal jurisdiction, observing that, in this case, the objection to the former was merely statutory whereas the objection to the latter was constitutionally based. *Ruhrgas*, 526 U.S. at 584-85. It found that, in a dismissal for want of personal jurisdiction, there was no assumption of power that violated the jurisdiction-before-merits principle emphasized in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). *Id.*

The Court opined generally that the federal design permitted federal courts to consider such matters as judicial economy, the relative difficulty and novelty of the two jurisdictional questions, and federalism, that is, sensitivity to state courts' coequal stature, in deciding whether to address first a motion to remand for lack of subject-matter jurisdiction or a motion to dismiss for lack of personal jurisdiction. *Id.* at 587-88. Thus, although subject-matter jurisdiction ordinarily should be decided first, "where . . . a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction." *Id.* at 588.

courts must address *them* before reaching issues on the merits.<sup>41</sup> The candidates include a defendant's Eleventh Amendment immunity from suit,<sup>42</sup> the argument that a federal court should abstain from deciding a case under the doctrine of *Younger v. Harris*<sup>43</sup> or other abstention doctrines,<sup>44</sup> and many

41. See *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 353 n.4 (1984) (concluding that Congress's preclusion of judicial review of Secretary of Agriculture's market orders when sought by consumers was "in effect jurisdictional," and therefore that Court did not need to address challenge to consumers' standing to challenge those orders); *Moor v. Alameda County*, 411 U.S. 693, 711-17 (1973) (approving discretionary declination of pendent jurisdiction without deciding non-discretionary jurisdictional question whether pendent jurisdiction could extend to state law claims against new party); *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehabilitative Servs.*, 225 F.3d 1208, 1227 n.14 (11th Cir. 2000) (concluding that question of mootness ought to be resolved before Eleventh Amendment issues because former is an "even more basic question of jurisdiction that cannot be waived and goes to the very heart of the 'case or controversy' requirement of Article III"); *United States v. Hurd*, No. 98-7129, 1999 U.S. App. LEXIS 8715, at \*6 (10th Cir. May 7, 1999) (finding serious question as to whether appellant had filed timely notice of appeal of denial of post-judgment motion to dismiss, but vacating district court's ruling on basis of latter's lack of jurisdiction to consider merits of motion); *La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1384-85 (D.C. Cir. 1996) (dismissing for lack of ripeness where plaintiffs also may have lacked standing); *Can v. United States*, 14 F.3d 160, 162 (2d Cir. 1994) (affirming on political question grounds district court's judgment dismissing claim for lack of subject-matter jurisdiction, reasoning that justiciability also is threshold question and, where it poses a less knotty question, may be addressed first). But see *In re Papandreou*, 139 F.3d 247, 256 (D.C. Cir. 1998) (advising that, because Supreme Court has classified "act of state" doctrine as substantive rule of law, resolution of this case on that ground, without addressing jurisdiction under Foreign Sovereign Immunities Act (FSIA), would exceed district court's power).

42. Compare *Parella v. Ret. Bd. of the R.I. Employees' Ret. Sys.*, 173 F.3d 46, 53-56 (1st Cir. 1999) (holding that *Steel Co.* does not require courts to address arguments of entitlement to Eleventh Amendment immunity before addressing merits of claim, reading *Steel Co.* to hold that only Article III jurisdictional questions ordinarily should be decided before merits; and concluding that Eleventh Amendment issues do not fall into category of Article III questions that *Steel Co.* would define as necessarily antecedent given, *inter alia*, ways in which Eleventh Amendment differs from ordinary restrictions on subject-matter jurisdiction and fact that decision of merits before consideration of Eleventh Amendment arguments does not threaten court's underlying power to decide law) with *Seaborn v. Fla. Dep't of Corr.*, 143 F.3d 1405, 1407 (11th Cir. 1998) (holding that Eleventh Amendment issues must be addressed before merits, having characterized assertion of Eleventh Amendment immunity as challenge to federal subject-matter jurisdiction) (citing *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996)). For further discussion of the Eleventh Amendment issue, see *infra* text at notes 81-142.

43. 401 U.S. 37 (1971). The Court in *Younger* held that federal courts may not enjoin pending state criminal proceedings except where the threat to federally-protected rights cannot be adequately addressed by plaintiff's defense of that prosecution. *Id.* at 54. Compare *Weekly v. Morrow*, 204 F.3d 613, 614-16 (5th Cir. 2000) (concluding that *Younger* abstention is not based on lack of jurisdiction but reflects prudential decision not to exercise equity jurisdiction that court possesses, and dismissing suit without reaching *Younger* issue where district court lacked jurisdiction under *Rooker-Feldman* doctrine), and *Falanga v. State Bar of Ga.*, 150 F.3d 1333, 1335 n.2 (11th Cir. 1998) (concluding that appeals court could assume that lower court's refusal to abstain was proper and address merits because *Younger* abstention issues are not jurisdictional), with *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 100-01 n.3 (1998) (purporting to distinguish its decision in *Ellis v. Dyson*, 421 U.S. 426, 434-35 (1975), from

others.<sup>45</sup> Insofar as these issues are *not* jurisdictional in the relevant sense, courts will have to address "truly" jurisdictional issues before reaching them, but courts may continue to assume *arguendo* against them<sup>46</sup> and address the

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situations of hypothetical jurisdiction). In *Ellis*, the Court reversed and remanded a case, to be reconsidered in light of recent Court precedent in the *Younger* line of cases, despite having grave doubts as to whether a case or controversy existed. According to the *Steel Co.* Court, this was permissible because the Court has treated *Younger* as jurisdictional. *Steel Co.*, 523 U.S. at 100-01 n.3. The Court however instructed the district court, on remand, to decide the Article III issues before reaching the *Younger* issues. *Ellis*, 421 U.S. at 435; *see also* *Kendall-Jackson Winery, Ltd. v. Branson*, 212 F.3d 995, 997 (7th Cir. 2000) (distinguishing *Younger* abstention from subject-matter jurisdiction, relying upon waivability of former, which court found to be incompatible with subject-matter jurisdiction); *Benavidez v. Eu*, 34 F.3d 825, 829 (9th Cir. 1994) (holding that trial court had jurisdiction to permit or deny intervention after having dismissed plaintiffs' case on *Younger* grounds because *Younger* abstention is not jurisdictional but reflects prudential decision not to exercise jurisdiction that court does possess).

44. *See* *Kendall-Jackson Winery, Ltd.*, 212 F.3d at 997 (distinguishing *Pullman* abstention from matters of subject-matter jurisdiction); *Black Sea Inv., Ltd. v. United Heritage Corp.*, 204 F.3d 647, 650-52 (5th Cir. 2000) (addressing whether abstention doctrines announced in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), and in *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942), are jurisdictional). The Fifth Circuit concluded that the *Colorado River* abstention doctrine is not jurisdictional, and that the *Brillhart* abstention doctrine "speaks to the propriety of assuming federal jurisdiction over the instant case" and, in part for that reason, was properly addressed upon review of a *Colorado River* stay of proceedings, although the issue was raised for the first time on appeal. *Id.* at 652. *See* *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925, 929 (5th Cir. 1999) (opining that, before reaching preclusion issues, bankruptcy court should have decided issues concerning its jurisdiction and its obligation under bankruptcy laws, to abstain from hearing case).

45. Idleman asserts that there are "countless issues the status of which – especially their bypassability – remains uncertain in the wake of *Steel Co.*" Idleman, *supra* note 4, at 328. Those issues include the amount in controversy requirement for diversity jurisdiction, supplemental jurisdiction, the reviewability of detention decisions related to deportations, the procedural requirements of Rules 3(c) and 4(b) of the Federal Rules of Appellate Procedure, certain exhaustion of remedies requirements, and certificate of appealability requirements. *Id.* at 328-29. A sample of additional issues that courts recently have had to categorize as jurisdictional or not includes the following: *Hill v. City of Seven Points*, 230 F.3d 167, 168 (5th Cir. 2000) (whether absence of judge's signature from order of reference to magistrate judge is jurisdictional defect); *United States v. Gama-Bastidas*, 222 F.3d 779, 784-85 (10th Cir. 2000) (whether law of the case or mandate rule, which generally requires trial courts to conform with articulated appellate remands, is jurisdictional); *Lemons v. St. Louis County*, 222 F.3d 488, 492 (8th Cir. 2000) (whether *Rooker-Feldman* doctrine is jurisdictional, so that it may be addressed for first time on appeal and raised sua sponte); *Hurley v. Motor Coach Indust., Inc.*, 222 F.3d 377, 379 (7th Cir. 2000) (whether "forum defendant rule," which prohibits removal of non-federal question case only if no properly joined and served defendant is citizen of state in which action was brought, is jurisdictional, so that its violation is non-waivable defect).

46. For example, courts might assume *arguendo* that no Eleventh Amendment immunity requires dismissal, and might assume *arguendo* that abstention would be inappropriate. *See Davoll v. Webb*, 194 F.3d 1116, 1129-30 (10th Cir. 1999) (having concluded that whether Title II of ADA applies to employment discrimination does not raise jurisdictional question; court assumed that it applied and turned to issues on appeal).

merits first.<sup>47</sup>

On the other hand, if there is a category of matters that may be addressed before (and even instead of) statute-based or even Article III-based subject-matter jurisdictional issues (the latter issues sometimes being entirely bypassed), the questions arise whether that category encompasses matters that are not jurisdictional in any sense and how broad that category is. It appears that Article III issues may be bypassed in favor of procedural issues,<sup>48</sup> although theoretically not in favor of merits issues. As Professor Freer has noted, there is some evidence that this is the Supreme Court's view of the law. In *Ortiz v. Fibreboard Corporation*,<sup>49</sup> the Court concluded that it could avoid addressing the argument that some of the members of a "limited fund" class,<sup>50</sup>

47. For further discussion of Eleventh Amendment immunity issues, see *infra* text at notes 81-142.

48. As Professor Idleman has noted, some issues are neither jurisdictional nor merits-based. Idleman, *supra* note 4, at 321. Being something other than merits-based, these issues can be reached by the courts without the courts first having satisfied themselves of their jurisdiction, or, at least, so *Steel Co.* seems to imply. *Id.* at 321-23. The issues in this category often would be categorized as procedural, remedial or evidentiary. *Id.* at 322 & n.364.

Both Eleventh Amendment immunity and *Younger* abstention have a procedural cast because they speak to whether the federal court may or ought to hear a dispute, not to who should win "on the merits." Eleventh Amendment immunity always would be raised by a defendant, and requests for abstention typically come from defendants as well, because plaintiffs would not have sued in federal court if they did not want that court to decide the dispute.

49. 527 U.S. 815 (1999). The Court decided *Ortiz* about five weeks after deciding *Ruhrgas*.

50. Rule 23(b)(1)(B), FED. R. CIV. P., provides that

[a]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: the prosecution of separate actions by or against individual members of the class would create a risk of . . . (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication, or substantially impair or impede their ability to protect their interests.

Situations in which "claims are made by numerous persons against a fund insufficient to satisfy all claims" fall within this description. See FED. R. CIV. P. 23(b)(1)(B) Advisory Committee Note.

In *Ortiz*, the Court examined the varieties of suits traditionally encompassed by Rule 23(b)(1)(B) and discerned three characteristics that typify "limited fund" class actions and whose presence suffices to justify (b)(1)(B) certification. *Ortiz*, 527 U.S. at 838. The traits are:

- a fund with an ascertained limit which, at its maximum, is demonstrated to be exceeded by aggregate liquidated claims, set at their maxima;
- all of which fund is to be distributed to those with liquidated claims that are based on a common theory of liability; and
- all claimants sharing a common theory of recovery to be treated equitably, typically by a pro rata distribution of the fund.

*Id.* at 838-41.

certified by the district court, had not suffered a cognizable injury in fact and thus lacked standing to sue, and could instead (first) address the propriety of the class certification, although the Court remained "'mindful that [the Rule's] requirements must be interpreted in keeping with Article III constraints'."<sup>51</sup> The Court rationalized this result in part on the ground that the certification issues themselves "pertain[ed] to statutory standing [an assertion that the Court did not explain],<sup>52</sup> which may properly be treated before Article III standing,"<sup>53</sup> and in part on the theory that the propriety of class certification was "logically antecedent" to standing because, absent proper certification of a class including these individuals, no issue as to their standing would arise.<sup>54</sup>

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The Court concluded that these characteristics are presumptively necessary for limited fund (b)(1)(B) certification and that a proponent of any departure from those norms would have the burden of justifying that departure. *Id.* at 841-42.

51. *Ortiz*, 527 U.S. at 831 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997)). The sentence in *Amchem* quoted in *Ortiz* continued, "[and mindful that Rule 23's requirements must be interpreted in keeping with] the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right'." *Amchem*, 521 U.S. at 612-13.

In *Ortiz* the Court overturned a global agreement settling the personal injury claims of a large class of persons who had sued Fibreboard for asbestos exposure, finding that the requirements of Rule 23 were not satisfied. The class members alluded to in the text were those who had been exposed to asbestos but had, as yet, manifested no physical injury.

52. *Ortiz*, 527 U.S. at 831. The assertion is by no means self-evident. FED. R. CIV. P. 23(a) recites that

[o]ne or more members of a class may sue . . . as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims . . . of the representative parties are typical of the claims . . . of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

*See supra* note 50 (reciting FED. R. CIV. P. 23(b)(1)(B)). The only aspects of these requirements that seem to be remotely redolent of standing requirements are the references to parties and claims.

53. The power of the courts to bypass the Article III standing question apparently was thought to fall within the scope of *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974), *supra* note 26. *See Steel Co.*, 523 U.S. at 96-97 (noting that *National Railroad Passenger Corp.* decided issue of statutory standing, not whether there was Article III case or controversy); *accord* Grand Council of the Crees v. Fed. Energy Regulatory Comm'n, 198 F.3d 950, 954 (D.C. Cir. 2000) (holding that, under *Steel Co.*, court properly could consider prudential standing while leaving constitutional standing in doubt because there was no required sequencing of jurisdictional issues).

54. *Ortiz*, 527 U.S. Ct. at 831; *see also Amchem*, 521 U.S. at 612 (approving opinion of Court of Appeals for Third Circuit in this case, in which it had bypassed challenges to justiciability and subject-matter jurisdiction on grounds that issues of jurisdiction in this case "would not exist but for the [class action] certification" (quoting *Georgene v. Amchem Prods.*, 83 F.3d 610, 632 (3d Cir. 1996))).

It is not entirely clear why the jurisdictional or standing issues in either *Amchem* or *Ortiz* would not have existed without the class certification. If one or more of the purported class



In the Court's view, these circumstances made it proper to address the propriety of the class certification without first addressing the standing of all those in the plaintiff class.<sup>55</sup>

Still another recent example of the Court's view that Article III issues may be bypassed in favor of procedural issues is *Lambrix v. Singletary*.<sup>56</sup> The Court indicated there that, when a state court rejects a convicted person's

representatives, suing individually as well as on behalf of a class, were exposure-only plaintiffs, their standing to sue would be before the court regardless of whether class certification was proper.

55. See *Pederson v. La. State Univ.*, 213 F.3d 858, 866 & n.5 (5th Cir. 2000) (purporting to follow *Ortiz*, concluding that it would address jurisdictional issues of standing, mootness, state sovereign immunity, and class certification "in no particular order," and noting that class certification issues that were not outcome determinative (unlike in *Ortiz* and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)), did not need to be treated first, although court did discuss them first).

The *Ortiz* Court's avoidance of the standing issues is questionable on a number of grounds. In addition to those suggested in notes 52, 54, *supra*, I would add these: Although the Court often has allowed non-class suits to go forward so long as *some* plaintiff had standing, typically in those instances injunctive relief was sought that would benefit those whose standing was left unresolved even if they did not remain formal parties. See, e.g., *Waters Corp. v. Millipore Corp.*, 140 F.3d 324, 325-26 (1st Cir. 1998) (concluding that court did not need to decide whether Waters plan and its fiduciaries were proper plaintiffs because individual plaintiffs had standing as participants in Millipore plan, which enabled court to address substantive issues posed by appeal); *Director, Office of Workers' Comp. Programs v. Perini N. River Assocs.*, 459 U.S. 297, 302-05 (1983) (holding that Court did not have to consider standing to appeal of Director because injured worker had standing to seek review of court of appeal's decision concerning whether he was covered by Longshoremen's and Harbor Workers' Compensation Act); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263-64 & n.9 (1977) (holding that Court did not need to address standing of Metropolitan Housing Development Corporation to assert rights of potential inhabitants of proposed housing because plaintiff who sought and qualified for proposed housing had standing). By contrast, in *Ortiz* money damages were sought that would individually benefit those whose standing was in question.

In addition, past case law had indicated that a court can properly decline to address whether a plaintiff has standing, and whether his claim is ripe and not moot, only if all the issues on the merits that the plaintiff raises also are raised by another plaintiff who has standing, and the ripeness, and "liveness" of whose claims have been recognized by the court. See, e.g., *Sec'y of Interior v. California*, 464 U.S. 312, 319 n.3 (1984) (noting that Court need not address standing of respondents "whose position here is identical to the State's" because State of California had standing); *Blue Cross Ass'n v. Califano*, 473 F. Supp. 1047, 1060-65 (W.D. Mo. 1979), *rev'd on other grounds*, *Blue Cross Ass'n v. Harris*, 622 F.2d 972 (8th Cir. 1980) (investigating separately standing of plaintiffs in each of two consolidated actions, in part because plaintiffs in one had asserted some claims not asserted by plaintiffs in other). In *Ortiz*, the issues on the merits raised by absent plaintiff class members whose standing was challenged may well have differed in some particulars from those posed by other absent class members. For example, only the former would have presented the question whether persons who had not yet manifested any physical injury resulting from their exposure to asbestos had stated a claim upon which relief could be granted.

56. 520 U.S. 518 (1997).

federal law contention as procedurally barred, without considering its merits, a federal court hearing a challenge to that rejection ordinarily should consider it before determining whether the rule that the criminal defendant seeks to have applied to him is applicable retroactively on federal habeas under *Teague v. Lane*.<sup>57</sup> This "ordinary" sequence is consistent with the view that the courts should consider their appellate jurisdiction before reaching issues on the merits or even unrelated procedural issues because, if the federal law contention was properly procedurally barred in the State courts, that bar constitutes an adequate and independent state law ground which the federal courts, including the U.S. Supreme Court, lack jurisdiction to review.<sup>58</sup> The question whether an argument is available under *Teague* is not jurisdictional, despite the Court's instruction that *Teague* retroactivity decisions should be made before courts consider the merits of a case.<sup>59</sup>

What is remarkable about *Lambrix* is that, having said all this, the Court cautioned that it did not "mean to suggest that the procedural-bar issue must invariably be resolved first . . . . Judicial economy might counsel giving the *Teague* question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law."<sup>60</sup> The Court thus again recognized that judicial economy in general, and ease of resolution of issues in particular, have a rightful place in the courts' decisions as to the sequence in which they should address issues. Moreover, faced with several contentions as to why *Lambrix's* claim was not procedurally barred, the Court chose not to prolong the litigation by

57. 489 U.S. 288 (1989) (holding that habeas petitions cannot seek recognition of new constitutional rights unless those rights would apply retroactively).

58. In *Lambrix*, the Court noted that

[t]he "independent and adequate state ground" doctrine is not technically jurisdictional when a federal court considers a state prisoner's petition for habeas corpus pursuant to 28 U.S.C. § 2254, since the federal court is not formally reviewing a judgment, but is determining whether the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." [To further federalism and comity,] [w]e have nonetheless held that the doctrine applies to bar consideration on federal habeas of federal claims that have been defaulted under state law.

*Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) (citations omitted). When neither the challenge to the procedural bar nor the *Teague* issue is jurisdictional, the sequence in which the issues are addressed is unimportant for purposes of this Article.

59. *Id.* at 524; see *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (holding rule of *Teague v. Lane*, 489 U.S. 288 (1989), prohibiting retroactive application of new rules to cases on collateral review, not to be jurisdictional in that Court must raise and decide issue sua sponte). The Court thus addressed the merits of a criminal defendant's *ex post facto* claim, without first deciding the *Teague* retroactivity issue that the State had not argued. *Collins*, 497 U.S. at 41; see *Lambrix*, 520 U.S. at 524 (noting that postponing *Teague* inquiry also is consistent with general principle that constitutional issues are generally to be avoided).

60. *Lambrix*, 520 U.S. at 525.

remanding for the lower federal courts to address those contentions, but instead decided the case on the *Teague* grounds. This appears to me to be an exercise of hypothetical appellate jurisdiction (or something very like it),<sup>61</sup> with the Court assuming, without deciding, that its jurisdiction was not lacking by virtue of an adequate and independent state ground for the decision (in the form of a procedural bar), and proceeding to decide the case against the petitioner on non-jurisdictional grounds that the Court apparently views as procedural, or at least as other than "on the merits."

If federal courts sometimes may bypass Article III issues in favor of procedural issues, *which* procedural issues may be given such sequential preference, and under what circumstances, remain to be elucidated. More fundamentally, *why* federal courts should have authority to address such procedural issues without having first satisfied themselves of their subject-matter jurisdiction and of compliance with related Article III requirements (including the standing of all plaintiffs seeking individual relief), when it would be *ultra vires* for them to resolve *merits* issues, has not been well-explained by the Court, although the Court repeatedly has *asserted* courts' authority to decide procedural issues before they address their jurisdiction.<sup>62</sup> Intuitively, the notion that, if a court lacks subject-matter jurisdiction in a case, it ought not to resolve any issues, procedural or on the merits, has some appeal. Perhaps the answer lies in practicalities: A court may need to enter orders regarding pleadings and discovery before it can make a well-grounded determination as to whether subject-matter (or personal) jurisdiction exists. It may appropriately impose sanctions if such discovery orders are disobeyed. In light of the propriety of the courts' ruling upon procedural matters to enable the courts to determine their subject-matter (or personal) jurisdiction, the Court may implicitly have concluded that, as a matter of power, there are no limits on the procedural issues that a federal court can decide before determining its jurisdiction. I would suggest, however, that deciding procedural issues that have no bearing on the court's jurisdiction before determining that the court has jurisdiction might, in many circumstances, constitute an abuse of discretion.<sup>63</sup>

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61. See *supra* note 4.

62. See, e.g., *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 20-22 (1994) (concluding that no statute could authorize federal court to decide legal question posed in absence of Article III case or controversy . . . "[b]ut reason and authority refute the quite different notion that a federal appellate court may not take any action with regard to a piece of litigation once it has been determined that the requirements of Article III no longer are (or indeed never were) met"; noting that, in cases that have become moot, courts nonetheless have power to award costs and enter dismissal, and holding that they have power to vacate judgments entered by lower courts).

63. See *Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923, 927 (7th Cir. 2000) (noting that "courts possess no more authority to issue advisory opinions (or otherwise exceed their jurisdiction) in 'procedural matters' than in other matters").

The distinction between procedural issues and merits issues, even if theoretically justifiable, is difficult to implement in light of the overlap that often exists between procedural questions and the merits. The Court itself has held that the propriety of class certification is not sufficiently separate from the merits issues presented by a proposed class action to permit the grant or denial of class certification to be immediately appealed under the collateral order doctrine.<sup>64</sup> Other courts have observed overlaps between the merits and Eleventh Amendment immunity claims<sup>65</sup> and other procedural issues.<sup>66</sup>

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64. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (finding that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action'" (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963))). Immediate appeal is permitted under the collateral order doctrine only when an order is conclusive on the matter it addresses, resolves questions that are too independent of the merits to need to be deferred, is too important to be denied review, and involves important rights that will be lost if immediate review is not afforded. *Id.* at 468; see *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867-68 (1994) (reiterating requirement of collateral order doctrine); *Cohen v. Beneficial Indus. Loan Corp.* 337 U.S. 541, 546 (1949) (for first time, articulating collateral order doctrine); see also *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999) (observing that "[d]isputes about class certification cannot be divorced from the merits").

65. See *United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 890, 895-966 (D.C. Cir. 1999), *cert. denied*, 530 U.S. 1202 (2000) (positing that analysis of whether states' Eleventh Amendment immunity had been abrogated would entail analysis similar to that for determining whether statute allowed states to be liable); *Parella v. Ret. Bd. of the R.I. Employees' Ret. Sys.*, 173 F.3d 46, 56 n.6 (1st Cir. 1999) (concluding that to address whether state retirement board was protected from suit by Eleventh Amendment would require court to first consider merits of plaintiffs Takings Clause and Contract Clause claims). *But cf.* *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993) (upholding appeal, under collateral order doctrine, from order denying claim of state sovereign immunity pursuant to Eleventh Amendment, and finding, *inter alia*, that motion to dismiss on Eleventh Amendment grounds involves issue, resolution of which "generally will have no bearing on the merits of the underlying action").

66. The Court has held immediate appeal unavailable under the collateral order doctrine when such appeal was sought of the following: an order denying a motion to disqualify counsel, see *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376 (1981) (assuming, without deciding, that disqualification question was completely separate from merits); an order granting a motion to disqualify counsel, see *Flanagan v. United States*, 465 U.S. 259, 268-69 (1984) (noting that requirement of complete separation from merits is not satisfied if violation of petitioner's right requires prejudice to defense); *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 437-40 (1985) (observing that, if prejudice is prerequisite to reversal, disqualification orders are not sufficiently separate from merits to qualify for immediate appeal); an order denying intervention as of right and allowing permissive intervention, subject to limits on participation, see *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987) (assuming, *arguendo*, that intervention issue was completely separate from merits); an order denying a stay of federal court proceedings pursuant to *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), pending completion of parallel state court proceedings, see *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 278 (1988) (finding that order

Given the absence of hard and fast separation between procedural and jurisdictional issues, on the one hand, which the Court has held or implied *may* be addressed before subject-matter jurisdiction, and merits issues, on the other hand, the absoluteness of the prohibition against addressing merits issues before subject-matter jurisdiction seems untenable in some applications. Indeed, the *Steel Co.* Court itself recognized that the merits question whether a particular plaintiff has stated a cause of action under a statute, and the standing question whether any plaintiff has such a cause of action, are closely connected, and may even be identical.<sup>67</sup> This makes it artificial at best to say that the courts may decide the latter, but not the former, in advance of reaching other aspects of subject-matter jurisdiction.<sup>68</sup>

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failed to meet requirement of conclusive determination of disputed question); an order denying a motion to dismiss on forum non conveniens grounds or because the defendant claims immunity from service of process, *see* *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527-29 (1988) (holding that convenience of forum is not distinct from merits); an order refusing to give effect to a forum selection clause, *see* *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498-501 (1989) (denying interlocutory appeal because order was adequately vindicable after final judgment); and an order vacating a settlement agreement and a dismissal, thereby subjecting the parties to trial, *see* *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 & 869 n.2 (1994) (resting decision on same grounds as *Lauro Lines*, commenting that court of appeals' conclusion that separability condition was satisfied was not beyond question). *See generally* 15A WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3911-12 (1992 & Supp. 2001). In *Flanagan*, *Richardson-Merrell*, and *Van Cauwenberghe* the reasoning was, at least in part, that the merits and procedural issues were not sufficiently independent to make an interlocutory appeal appropriate.

Courts generally have regarded decisions to abstain as immediately appealable under the collateral order doctrine. *See, e.g.*, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714-15 (1996) (holding abstention based on *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), appealable under collateral order doctrine, and noting that order determines whether federal court should decline to exercise its jurisdiction in interest of comity and federalism, which is issue separate from merits); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983) (holding *Colorado River* abstention appealable under collateral order doctrine, having found that "[a]n order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits"); *Confederated Salish v. Simonich*, 29 F.3d 1398, 1403 (9th Cir. 1994) (holding abstention based on *Younger* to present important issue separate from merits, although order here failed to satisfy requirement that review after final judgment would be inadequate); *Mazanec v. N. Judson-San Pierre Sch. Corp.*, 750 F.2d 625, 627 (7th Cir. 1984) (holding abstention under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), immediately appealable). Immediate appealability under the collateral order doctrine implies that the order is separate from the merits, at least sufficiently so that there is no need to postpone appeal until after final judgment.

67. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998).

68. *See* *Grand Council of the Crees v. Fed. Energy Regulatory Comm'n*, 198 F.3d 950, 959-60 (D.C. Cir. 2000) (noting that *Steel Co.* permits decision of merits questions, such as whether plaintiff has stated claim, before statutory standing questions, because they may overlap).

There also is an irony that federal courts (1) may decide merits issues before determining whether to certify a class<sup>69</sup> and other procedural issues and

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Consider also the doctrine that when a factual attack on subject-matter jurisdiction overlaps with the merits of a dispute, the proper course is for the district court to find that jurisdiction exists and treat the objection as going to the merits. *See, e.g., United States v. North Carolina*, 180 F.3d 574, 580-81 (4th Cir. 1999) (because merits of action [alleging pattern or practice of discrimination] related closely to issue that court characterized as jurisdictional, latter issue was not suited for resolution by motion to dismiss for lack of subject-matter jurisdiction); *Garcia v. Copenhagen, Bell & Assocs., M.D.'s*, 104 F.3d 1256, 1261 (11th Cir. 1997) (stating that proper course is to treat such jurisdictional question as going to merits); *Clark v. Tarrant County*, 798 F.2d 736, 741-42 (5th Cir. 1986) (interpreting law to be that "[w]here the challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, and assuming that the plaintiff's federal claim is neither insubstantial [or] frivolous, . . . the district court should find that it has jurisdiction over the case and deal with the defendant's challenge as an attack on the merits"); *Williamson v. Tucker*, 645 F.2d 404, 415-16 & n.10 (5th Cir. 1981) (stating that when defendant's challenge to jurisdiction is also challenge to existence of federal cause of action, it is proper to deal with jurisdictional objection as attack on merits because no purpose is served by indirectly arguing merits in context of federal jurisdiction, and because judicial economy is better served by dismissal of claim on merits). *Williamson* sees such jurisdictional attacks as indirect attacks on the merits, from which plaintiffs can be better protected if defendants are forced to proceed under Federal Rule of Civil Procedure 12(b)(6) or by moving for summary judgment. *Id.* The court finds the scope of the district court's power in each of these contexts to provide greater protection than a court can provide when operating under Federal Rule of Civil Procedure 12(b)(1). *Id.* at 416.

*Steel Co.* seems implicitly to disallow this approach. *But see United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 890, 896 (D.C. Cir. 1999) (arguing that Court's explanation in *Steel Co.* that merits questions can be decided before statutory or prudential standing questions because they overlap to such extent that it would be artificial to distinguish between them indicates that merits questions can be decided before at least quasi-jurisdictional matters, such as Eleventh Amendment issues, when they overlap). Even without regard to *Steel Co.* issues, courts may determine subject-matter jurisdiction without reaching the merits. *See, e.g., Gould Electronics, Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000) (in context of FTCA claim, merits of which overlapped with jurisdictional issues, asserting that court may determine subject-matter jurisdiction without reaching merits so long as court demands less in jurisdictional proof than would be appropriate at trial of merits).

69. Indeed, an empirical study by the Federal Judicial Center found that merits decisions on motions to dismiss or for summary judgment frequently precede certification, *see Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 105-08 (1996) (discussing conclusion of studies on whether courts believe that ruling on motion to dismiss may precede ruling on class certification), although that is not the preferred course. *See* 2 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 7.15 (3d ed. 1992) (explaining that, for reasons of judicial efficiency, to guide litigation strategy, and to avoid one-way intervention, class certification issues generally should be addressed before dispositive motions); MANUAL FOR COMPLEX LITIGATION § 30.11 at 214 (3d ed. 1995) (stating that precertification merits ruling raises concerns: "[w]hile it binds only the individual parties, it may have precedential effect on the putative class members. When it is clear that the action lacks merit, dismissal will avoid unnecessary expense . . . and burdens . . . , but the court should consider whether the interests of putative class members may be prejudiced." (citations omitted)).

(2) under *Ortiz*, may decide class certification issues before reaching standing and other jurisdictional issues, but (3) under *Steel Co.*, may not decide merits issues before reaching standing issues – at least those that arise under Article III. The response of the *Steel Co.* majority to an analogous argument made by Justice Stevens was that such a combination of results is "no more illogical than many other 'broken circles' that appear in life and the law."<sup>70</sup> Adapting the rest of its answer to the particular irony noted above, the Court presumably would say that the reasons to allow merits questions to be decided before certification questions do not support allowing merits questions to be decided before Article III questions. Deciding such questions as whether any cause of action exists before-or-rather-than the questions implied by Rule 23's certification requirements "does not take the court into vast, uncharted realms of judicial opinion-giving, whereas the proposition that the court can reach a merits question when there is no Article III jurisdiction opens the door to all sorts of 'generalized grievances,' . . . that the Constitution leaves for . . . the political process."<sup>71</sup>

### C. *The Concurring and Dissenting Opinions in Steel Co.*

Still additional questions concerning the scope of *Steel Co.*'s repudiation of hypothetical jurisdiction are raised by the concurring and dissenting opinions in the case. Only five of the Justices joined in the repudiation by joining Part III of Justice Scalia's opinion.<sup>72</sup> Two of them (Justices O'Connor and Kennedy) expressed a significantly less hard-line stance in a concurring opinion authored by Justice O'Connor. The two urged that the Court's opinion not be read exhaustively to catalog the circumstances in which federal courts may exercise judgment in reserving difficult questions of jurisdiction, in order to resolve a case on the merits in favor of the party challenging jurisdiction.<sup>73</sup> This concurrence raises the question whether Justice Scalia's position is due even the respect ordinarily commanded by the dicta in majority opinions of the Supreme Court.<sup>74</sup>

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70. *Steel Co.*, 523 U.S. at 97 n.2. This is not a very satisfying response.

71. *Id.* (citations omitted).

72. The other signatories were Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. *Id.* at 85.

73. *Steel Co.*, 523 U.S. at 110 (O'Connor, J., concurring).

74. See *Hardemon v. City of Boston*, 144 F.3d 24, 26 (1st Cir. 1998) (noting that various opinions in *Steel Co.*, read as whole, do not make clear whether, or to what extent, that case undermined Circuit's earlier practice of bypassing jurisdictional issues when party challenging jurisdiction would easily prevail on merits); see Idleman, *supra* note 4, at 286-88 (discussing alignment of Justices and its effect on strength of repudiation). Several, if not all, circuits take the position that they should follow the carefully considered dicta of the Court. See, e.g., Stone

Justice Breyer agreed only that courts *often and typically* should decide standing and other jurisdictional questions in advance of the merits. He rejected the notion that the Constitution requires them always to do so, opining that the doctrine that courts may reserve difficult questions of jurisdiction when a case may more easily be resolved on the merits in favor of the jurisdiction-challenging party makes both theoretical and practical sense, especially in a world of heavy caseloads. Rigid rules that make the judicial system unnecessarily cumbersome may increase the risk that justice will be denied.<sup>75</sup>

Justice Stevens's and Justice Ginsburg's views of hypothetical jurisdiction were not revealed in *Steel Co.*; the former proclaimed the doctrine irrelevant to the case at hand,<sup>76</sup> while the latter concurred in the judgment but offered no comment on the hypothetical jurisdiction controversy.<sup>77</sup> At a later date, either or both of them might embrace the denunciation in *Steel Co.* or explicitly disagree with it.

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As the different views of the courts of appeals and particular judges in the district and appellate courts, of commentators, and of the Supreme Court Justices illustrate, the cases that generated the doctrine of hypothetical jurisdiction are subject to varying interpretations. In light of the cases' malleability, the views that the courts, especially the Supreme Court, take of these cases and of cases since and yet to be decided will determine the degree of flexibility that the federal courts will have in reaching and deciding the issues that cases potentially raise. The courts have ample "ammunition" for interpreting the cases to either stringently limit, or to facilitate flexibility in selecting, the issues that they may decide. Thus, I proceed to an examination of the possibilities for hypothetical jurisdiction in the federal courts whose decisions have weight as precedent and whose decisions usually constitute the last judicial word, the courts of appeals. In that context, I further elaborate my views on how past cases are best understood.

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Container Corp. v. United States, 229 F.3d 1345, 1350 (Fed. Cir. 2000) (giving respect to Supreme Court statements that were explicit and carefully considered), *cert. denied*, Smurfit-Stone Container Corp. v. United States, 121 S. Ct. 1601 (2001); Natural Res. Def. Council, Inc. v. NRC, 216 F.3d 1180, 1189 (D.C. Cir. 2000) (stating that carefully considered language of Supreme Court, even if dictum, generally must be treated as authoritative); Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996) (stating that court considers itself bound by Supreme Court dicta, almost as firmly as by Court's outright holdings, particularly when dicta is recent and not enfeebled by later statements).

75. *Steel Co.*, 523 U.S. at 111-12 (Breyer, J., concurring).

76. *Id.* at 123 (Stevens, J., concurring).

77. *Id.* at 134 (Ginsburg, J., concurring).



## II. *The Handling of District Court Jurisdiction by the Courts of Appeals*

The ambiguities in *Steel Co.*, elaborated earlier, leave it unclear whether district courts are completely forbidden to exercise hypothetical jurisdiction. Part of *Steel Co.*'s legacy is that it compels not only the district courts, but also the courts of appeals, to sort out just how far *Steel Co.* goes in limiting district court exercises of hypothetical jurisdiction.<sup>78</sup> Among the tasks both tiers of the courts face is that of deciding what issues are jurisdictional for purposes of the prohibition against arguendo assumption and for purposes of the mandate that jurisdictional issues be decided before merits issues.

This Article does not tackle the myriad issues that courts will face in determining whether particular matters go to the district courts' "jurisdiction," for *Steel Co.*'s purposes, nor does it attempt to answer all the other interpretive issues left open by *Steel Co.* as it applies to district court subject-matter jurisdiction. It does however focus, by way of example, on the primary area of controversy that arose in the wake of *Steel Co.* as it applies to district court jurisdiction: whether the Eleventh Amendment defense is jurisdictional in the sense that courts may no longer assume it to be inapplicable or unavailable, and may decide cases on their merits issues. Although the Supreme Court resolved this particular issue in the year 2000, the lower courts' prior struggle with it illustrates the kinds of challenges courts face. Moreover, I believe that the Court's decision of this issue further muddies the sequence in which issues must be addressed.

### Example: Eleventh Amendment Issues after *Steel Co.*

There generally is no sequence or hierarchy in which courts inevitably must address jurisdictional issues, among themselves, or merits issues, among

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78. *But see* Prayze FM v. FCC, 214 F.3d 245, 250-51 & n.3 (2d Cir. 2000) (finding that assuming jurisdiction of district court to decide constitutional contentions did not violate *Steel Co.* because *Steel Co.* prohibited courts from assuming only their own jurisdiction to reach case on merits). Where it was unclear whether the district court had jurisdiction to consider the constitutionality of FCC regulations in an FCC enforcement proceeding, and it was necessary for Prayze to establish its jurisdiction to successfully defend, the courts of appeals nonetheless concluded that it did not need to resolve the jurisdictional question because, even assuming that such jurisdiction existed, Prayze would lose its appeal of a preliminary injunction entered against it because the FCC had sufficiently demonstrated that it was likely to prevail. *Id.* at 250-51. The appeals court concluded that this assumption of jurisdiction did not violate *Steel Co.*'s proscription of hypothetical jurisdiction which it found prohibited courts from assuming their own jurisdiction. *Id.* at 251 n.3. Here, the appeals court's jurisdiction was clear, "as was the district court's jurisdiction to issue the injunction." *Id.* For purposes of deciding whether the FCC sufficiently established a likelihood of prevailing on the constitutional challenge, the Second Circuit concluded that it could assume, arguendo, that the constitutional contentions could be brought properly before the district court. *Id.*

themselves.<sup>79</sup> In addition, it appears that courts often can decide issues that fall into neither category (jurisdictional or merits), such as procedural issues, in advance of, as well as interspersed among, jurisdictional issues and merits issues. *Steel Co.* indicates, however, that the federal courts must address and confirm their subject-matter jurisdiction before deciding the merits issues that cases present. This scheme makes it essential for courts to be able to distinguish jurisdictional issues from merits issues.

One of the most challenging tasks of issue categorization concerns Eleventh Amendment defenses and sovereign immunity defenses more generally. Distinguishing jurisdictional issues often is difficult because the meaning of the term "jurisdiction" is protean and elusive.<sup>80</sup> The Eleventh Amendment area is extraordinarily challenging because the Court has given many contradictory signals concerning the nature of this defense.

#### A. A Brief Background Discussion of the Nature of Eleventh Amendment Immunity

The Eleventh Amendment, as construed by the Court over the years, is an exceedingly complex matter, and the scholarly literature concerning its correct interpretation is mammoth.<sup>81</sup> I will, for the most part, confine my

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79. Sometimes logic, policy or precedent suggests a sequence, however. See *Kalka v. Hawk*, 215 F.3d 90, 96-98 (D.C. Cir. 2000) (finding that courts should address nonconstitutional grounds before addressing constitutional questions); *id.* at 99-102 (Tatel, J., concurring in part and in judgment) (discussing at length whether, in evaluating claim of qualified immunity, court must first determine whether plaintiff alleged deprivation of actual constitutional right before examining whether such right was clearly established at time of alleged violation).

80. See *Prou v. United States*, 199 F.3d 37, 45 (1st Cir. 1999) (referring to "chameleon-like quality" of term "jurisdiction"); *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 40 (1st Cir. 1999) (observing that word "jurisdiction" is "protean" with meanings varying depending on context); *United States v. Vaughan*, 13 F.3d 1186, 1188 (8th Cir. 1994) (noting that jurisdiction is protean concept); *Cross-Sound Ferry Servs., Inc. v. I.C.C.*, 934 F.2d 327, 341-45 (D.C. Cir. 1991) (Thomas, J., concurring in part and concurring in denial of petition for review) (commenting upon elusiveness of concept of jurisdiction and noting that some provisions can be jurisdictional in some contexts and not in others); see also *Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923, 926 (7th Cir. 2000) (observing that courts may have jurisdiction to decide some issues but not others). The court of appeals held here that the court had jurisdiction to award costs and attorneys' fees to the prevailing party, although it lacked jurisdiction to resolve the merits of plaintiff's claim. *Id.* at 926-27. In his concurrence, Justice Ripple explained that "lack of jurisdiction" has different meanings including lack of subject-matter jurisdiction; loss of power to proceed although a case is within federal judicial power – as when a court has entered a final judgment; and a lack of power to proceed that rests on the case or controversy requirement of Article III, as when a plaintiff "packs up . . . and goes home." *Id.* at 932-33.

81. See generally Symposium, *State Sovereign Immunity and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 817 (2000); Symposium, *Federalism After Alden*, 31 RUTGERS L.J. 631 (2000); Carlos Manuel Vazquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927 (2000); F. Ryan Keith, *Must Courts Raise the Eleventh Amendment Sua*

attention here to the Court's pronouncements on the nature of the Amendment and the effects of that nature, and to the federal courts of appeals' attempts to respect *Steel Co.* as applied to the Eleventh Amendment and other sovereign immunities.

The initial language of the Amendment ("The Judicial power of the United States shall not be construed to extend to . . ."<sup>82</sup>) appears to impose a constitutional limit on federal subject-matter jurisdiction,<sup>83</sup> although, in the view of several commentators and U.S. Supreme Court Justices, the Amendment, correctly construed, limits only diversity subject-matter jurisdiction.<sup>84</sup> A majority of the current Justices on the Court does not regard the bar of the Amendment as so limited, but instead takes the broad view that this prohibition of suits against a State applies regardless of the basis of federal subject-matter jurisdiction, and hence applies to suits against a State by its own citizens.<sup>85</sup> This position is particularly difficult to justify because the Eleventh Amendment does not, by its literal terms, address such suits. It speaks only of the judicial power of the United States not extending to suits in law or equity "commenced or prosecuted against one of the United States by Citizens of *another* State, or by Citizens or Subjects of any Foreign State."<sup>86</sup>

The Court has suggested that the Eleventh Amendment may not even be a matter of subject-matter jurisdiction, however, pointing out, as recently as

*Sponte?: The Jurisdictional Difficulty of State Sovereign Immunity*, 56 WASH. & LEE L. REV. 1037 (1999).

82. U.S. CONST. amend. XI.

83. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (noting that principle of sovereign immunity limits federal judicial power established by Constitution in Article III); *Missouri v. Fiske*, 290 U.S. 18, 25 (1933) (noting that Eleventh Amendment explicitly limits judicial power of United States).

84. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 301-02 (1985) (Brennan, Marshall, Blackmun, & Stevens, J.J., dissenting) (arguing that if federal jurisdiction is based on federal question, Eleventh Amendment is irrelevant). See generally David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983).

85. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996) (indicating that Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas subscribe to view that Eleventh Amendment bars suits founded on either diversity or federal question subject-matter jurisdiction); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 39 (1989) (Scalia, J., concurring in part and dissenting in part) (expressing view of some Justices that Eleventh Amendment reflects broad constitutional principle of sovereign immunity, applicable regardless of subject-matter jurisdictional basis for suit); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (same).

86. U.S. CONST. amend. XI (emphasis added).

1998, that it has not decided that question.<sup>87</sup> Citing the importance of state law in analyzing Eleventh Amendment questions and the ability of States to waive this defense, the Court had earlier declined to reach Eleventh Amendment issues that had not been briefed to the Court, stating, "[W]e have never held that [the Eleventh Amendment] is jurisdictional in the sense that it must be raised and decided by this Court on its own motion."<sup>88</sup> On the other hand, the Court still earlier had approved a court of appeals' resolution of an Eleventh Amendment defense that had not been raised in the district court because "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."<sup>89</sup> The Court's statement, in its 1998 decision in *Wisconsin Department of Corrections v. Schacht*,<sup>90</sup> that "a court" need not raise the Eleventh Amendment on its own<sup>91</sup> may alter the weight of authority in the appellate courts as to whether they (as distinguished from the Supreme Court) have a duty to raise Eleventh Amendment issues sua sponte.

In another noteworthy aspect of *Schacht*, the Court held that the presence, in an otherwise removable case, of a claim that the Eleventh Amendment *may* bar does not destroy jurisdiction, upon removal of the case from State court.<sup>92</sup> Emphasizing that the Eleventh Amendment does not automatically destroy original jurisdiction because the defense it provides is waivable,

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87. *Wis. Dep't of Corrections v. Schacht*, 524 U. S. 381, 391 (1998).

88. *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 515 n.19 (1982); *see Schacht*, 524 U.S. at 389 (citing *Atascadero State Hosp.* 473 U.S. at 241, as well as *Patsy*).

89. *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974). The courts of appeals have been divided on the issue, although it appears that, at least up until a few years ago, more regarded it as appropriate to raise Eleventh Amendment immunity sua sponte, because of its jurisdictional nature, than took the opposing view. *Compare Sullivan v. Barnett*, 139 F.3d 158, 179-80 (3d Cir. 1998) (raising issue sua sponte), *V-1 Oil Co. v. Utah State Dep't of Pub. Safety*, 131 F.3d 1415, 1419 (10th Cir. 1997) (same), *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 227 (4th Cir. 1997) (same), *and Atlantic Healthcare Benefits Trust v. Googins*, 2 F.3d 1, 4 (2d Cir. 1993) (same), *with Boochard Transp. Co. v. Florida Dep't of Env'tl. Protection*, 91 F.3d 1445, 1448 (11th Cir. 1996) (stating that Eleventh Amendment is not jurisdictional in sense that courts must raise it sua sponte). *See also Flores v. Long*, 110 F.3d 730, 732-33 (10th Cir. 1997) (finding it unclear whether Supreme Court would consider Eleventh Amendment affirmative defense or waivable jurisdictional bar for purposes of removal statute); *Archuleta v. Lacuesta*, 131 F.3d 1359, 1363 (10th Cir. 1997) (Baldock, J., dissenting) (stating that assumption that Eleventh Amendment is limit on federal subject-matter jurisdiction, rather than waivable affirmative defense, is debatable at best); *Texas Hosp. Ass'n v. Nat'l Heritage Ins. Co.*, 802 F. Supp. 1507, 1517 (W.D. Tex. 1992) (concluding that because Eleventh Amendment immunity appears to be hybrid of subject-matter jurisdiction, personal jurisdiction, and general prudential concerns, it does not defeat federal court's original jurisdiction and therefore does not bar removal of action containing claims barred by Amendment).

90. 524 U.S. 381 (1998).

91. *Id.* at 389.

92. *Id.*

the Court concluded that post-removal invocation of the Amendment places particular claims beyond the power of the federal court to decide, but does not destroy jurisdiction over the entire case that was removed.<sup>93</sup> In so holding, the Court again distinguished the effects of the Eleventh Amendment from ordinary aspects of federal subject-matter jurisdiction. Normally, if the sole claim ostensibly to "arise under" federal law (and hence to fall within federal subject-matter jurisdiction) is held not to do so, the entire case (that claim and any claims asserted as supplemental thereto) must be dismissed or, if it was removed, remanded, for lack of subject-matter jurisdiction – assuming, of course, that no other basis of jurisdiction, such as diversity, empowers federal courts to hear the case or controversy.<sup>94</sup> By contrast, under *Schacht*, if a plaintiff were to assert a federal question claim against a state and supplemental claims against non-state parties, successful post-removal invocation of the Eleventh Amendment would not require remand of the supplemental claims for lack of subject-matter jurisdiction, although a court might choose to remand them, in its discretion.<sup>95</sup>

Thus, the Amendment is unlike limits on federal subject-matter jurisdiction in that states may waive Eleventh Amendment immunity while other limits on subject-matter jurisdiction are not waivable. Furthermore, courts appear *not* to have the same duty to raise and determine Eleventh Amendment objections *sua sponte* as they have with respect to other defects in subject-matter jurisdiction.<sup>96</sup> Alternative theories of the Eleventh Amendment view it as a common law immunity from suit, rather than as a limit on subject-matter jurisdiction.<sup>97</sup>

93. *Id.* at 390-91.

94. 28 U.S.C. § 1447(c) provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c) (1994) (emphasis added). *See, e.g.,* *Jones v. General Tire & Rubber Co.*, 541 F.2d 660, 665 (7th Cir. 1976) (remanding case to state court in absence of federal question); *see also* *Fent v. Okla. Water Res. Bd.*, 235 F.3d 553, 557-59 (10th Cir. 2000) (holding that where suit against federal and state defendants was properly removed but claim against United States was barred by sovereign immunity and claim against state was barred by Eleventh Amendment immunity, court was required by 28 U.S.C. § 1447(c) to remand suit to state court for lack of subject matter jurisdiction).

95. *See* *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988) (upholding remand to state court of pendent claims after plaintiff dismissed all federal claims).

96. *See supra* text accompanying note 89. Whether lower courts, as opposed to the Supreme Court, are free of the obligation to raise Eleventh Amendment issues *sua sponte* has been somewhat controversial. *See* *Coolbaugh v. Louisiana ex rel. La. Dep't of Pub. Safety & Corr.*, 136 F.3d 430, 442 n.5 (5th Cir. 1998) (Smith, J., dissenting) (noting cases taking differing positions on question and observing that most academicians seemed to have concluded that ban on *sua sponte* review is prudential and discretionary, rather than mandatory).

97. *See generally* ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* §7.3 (3d ed. 1999) (describing different theories of Eleventh Amendment).

*B. The Lower Federal Courts' Categorization of Eleventh Amendment Issues for Purposes of Steel Co.*

When one examines the cases that had to categorize the Eleventh Amendment and sovereign immunity as jurisdictional or not, for purposes of *Steel Co.*, one finds (not surprisingly) that they were as inconsistent, and sometimes as ambiguous, as the Court's signals have been. On the one hand, several cases held that the Eleventh Amendment, and sovereign immunity generally, are jurisdictional for *Steel Co.* purposes.<sup>98</sup> They relied upon the Court's references to a state's consent-to-suit as defining the courts' jurisdiction,<sup>99</sup> the Court's characterizations of the sovereign immunity defense as jurisdictional and as restricting the judicial power under Article III,<sup>100</sup> and the Court's

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98. See *Galvan v. Fed. Prison Indus.*, 199 F.3d 461, 463 (D.C. Cir. 1999) (holding that court could properly address sovereign immunity before deciding whether suit presented case or controversy or was nonjusticiable, and stating that "[s]overeign immunity questions clearly belong among the non-merits decisions that courts may address even where subject matter jurisdiction is uncertain"); *Mixon v. Ohio*, 193 F.3d 389, 397 & n.6 (6th Cir. 1999) (concluding that court had to address Eleventh Amendment immunity issue because it is jurisdictional, and choosing to raise issue of lack of jurisdiction sua sponte); *United States ex rel. Foulds v. Tex. Tech. Univ.*, 171 F.3d 279, 285-87 (5th Cir. 1999), *cert. denied*, 530 U.S. 1202 (2000) (declaring that because Eleventh Amendment is jurisdictional and supplements restraints on judicial power provided in Article III, court must resolve Eleventh Amendment issues before deciding statutory issues going to merits); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 929-32 (2d Cir. 1998) (addressing whether defendant was immune from suit under FSIA before addressing other issues, viewing that sequence as consistent with *Steel Co.*, and advising lower court that it need not address issue of international comity unless it resolved question of subject-matter jurisdiction in favor of plaintiff); *United States v. Vazquez*, 145 F.3d 74, 79-80 (2d Cir. 1998) (addressing sovereign immunity, among other issues, before reaching merits); *Seaborn v. Dep't of Corr.*, 143 F.3d 1405, 1407 (11th Cir. 1998) (concluding that "an assertion of Eleventh Amendment immunity must be resolved before a court may address the merits of the underlying claims(s)"); *East Bay Mun. Util. Dist. v. United States Dept. of Commerce*, 142 F.3d 479, 482 (D.C. Cir. 1998) (viewing "claim" to federal sovereign immunity as jurisdictional, and broadly construing Supreme Court opinions to require decision of scope of waiver of immunity before addressing merits, even when there was no question that court had jurisdiction over some aspects of suit); *In re Papatandreu*, 139 F.3d 247, 256 (D.C. Cir. 1998) (opining that it would exceed district court's power to resolve case under "act of state" doctrine, substantive rule of law, before addressing jurisdiction under Foreign Sovereign Immunities Act); see also *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998) (deciding whether inmate's declaratory judgment action challenging limitations period applied in habeas corpus proceedings presented Article III case or controversy before reaching Eleventh Amendment issue). *Calderon's* sequencing is not inconsistent with the conclusion that the Eleventh Amendment is jurisdictional for *Steel Co.* purposes and must be decided against the party claiming immunity before the court may address merits issues.

99. See *East Bay*, 142 F.3d at 482 (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

100. See *Galvan*, 199 F.3d at 463 (citing *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)); *Foulds*, 171 F.3d at 285 (citing *Atascadero State Hosp.*, 473 U.S. at 238 (quoting *Pennhurst* for proposition that "[t]he significance of [the Eleventh Amendment] lies in its affirmation

willingness to consider Eleventh Amendment issues urged for the first time on appeal to the Court.<sup>101</sup> On the other hand, a number of cases resolved merits questions without reaching disputed issues of a defendant's entitlement to an Eleventh Amendment or other sovereign immunity, concluding that, because these immunities are not jurisdictional, proceeding to the merits did not violate *Steel Co.*<sup>102</sup> While acknowledging similarities between the Eleventh Amendment and a jurisdictional bar, these courts emphasized that the Eleventh Amendment and other sovereign immunities are waivable,<sup>103</sup> that the

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that . . . sovereign immunity limits the grant of judicial authority in Article III"). The court also cited *Seminole Tribe*, 517 U.S. at 54, and *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991), for the proposition that the Eleventh Amendment restricts judicial power and authority under Article III. *Foulds*, 171 F.3d at 285 n.9. The court also referenced *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993), for the proposition that "[the Eleventh Amendment's] withdrawal of jurisdiction effectively confers immunity from suit." *Id.* at 285.

101. *Mixon*, 193 F.3d at 397 (citing *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 467 (1954)); see also *Parella v. Ret. Bd. of the R.I. Employees' Ret. Sys.*, 173 F.3d 46, 54 (1st Cir. 1999) (citing courts of appeals decisions that Eleventh Amendment questions can be introduced sua sponte).

102. See *In re Sealed Case No. 99-3091*, 192 F.3d 995, 1000-01 (D.C. Cir. 1999) (concluding that court did not have to decide quasi-jurisdictional issue of sovereign immunity before merits, and would not do so where disposing of case on merits had virtues of avoiding constitutional issue of first impression and providing needed clarification); *Kennedy v. Nat'l Juvenile Det. Ass'n*, 187 F.3d 690, 696 (7th Cir. 1999), cert. denied, 528 U.S. 1159 (2000) (affirming dismissal of complaint for failure to state claim, and deciding that court would decide case on non-constitutional grounds because Eleventh Amendment immunity is not jurisdictional); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 9 F. Supp. 2d 460, 498 n.15 (D.N.J. 1998) (dismissing Sherman Act claim for failure to state claim as against certain defendants without resolving whether those defendants were entitled to assert sovereign immunity, viewing latter as basis for dismissal on merits); see also *Lorubbio v. Ohio Dep't of Transp.*, No. 98-3578, 1999 U.S. App. LEXIS 10916, \*3-4 (6th Cir. May 21, 1999) (affirming summary judgment for defendant without reaching question whether Congress abrogated Eleventh Amendment in enacting Americans with Disabilities Act because plaintiff could not state ADA claim); *Gordon v. Texas*, 153 F.3d 190, 196 n.4 (5th Cir. 1998) (rejecting argument that court had to decide Eleventh Amendment issues before reaching justiciability questions); *Whitehead v. The Grand Duchy of Lux.*, No. 97-2703, 1998 U.S. App. LEXIS 22307, \*10-12 (4th Cir. Sept. 11, 1998) (concluding that Foreign Sovereign Immunities Act's limitation on federal jurisdiction flowed from respect for other nations' sovereignty rather than from inherent inability of federal courts to hear cases against those nations, and so long as court did not affront nation's sovereignty, it could resolve case on grounds other than claimed immunity).

Whether a decision grounded upon a forum selection clause is procedural or on the merits is not entirely clear. See *Marra v. Papandreou*, 216 F.3d 1119, 1122-24 (D.C. Cir. 2000) (exploring whether disposition of case on forum-selection grounds was non-merits dismissal and permissible under *Steel Co.* before consideration of FSIA defense, but ultimately concluding that reliance on forum selection clause was waiver of FSIA defense with respect to that clause, giving district court jurisdiction to address forum-selection defense first).

103. See *Kennedy*, 198 F.3d at 696 (concluding that because Eleventh Amendment immunity can be waived, it is not jurisdictional); *In re Sealed Case*, 192 F.3d at 1000 (concluding

Court has distinguished Eleventh Amendment immunity from subject-matter jurisdiction,<sup>104</sup> and that the Court has held that it is not *obliged* to raise Eleventh Amendment issues *sua sponte*.<sup>105</sup>

Some courts noted that the *Steel Co.* prohibition on the exercise of hypothetical jurisdiction does not appear to be absolute, and viewed *Steel Co.* as indicating that the jurisdiction that ordinarily must be decided before merits issues is Article III jurisdiction.<sup>106</sup> Thus, the Court of Appeals for the First Circuit in *Parella v. Ret. Bd. of the Rhode Island Employees' Retirement System*<sup>107</sup> framed the question as "whether Eleventh Amendment questions should be treated as Article III jurisdiction questions for the purposes of *Steel Co.*"<sup>108</sup> After surveying the reasons for treating Eleventh Amendment questions in that fashion, the court cited all of the previously mentioned reasons *not* to view Eleventh Amendment questions as Article III jurisdiction questions for purposes of *Steel Co.*<sup>109</sup> It added that the latter reasons suggest that the Amendment is as much a defense as it is a limitation on courts' jurisdiction, which, in turn, implies that Eleventh Amendment issues are not in the category that *Steel Co.* requires be given priority.<sup>110</sup> Most notably, the court explained that, as compared with exercising hypothetical jurisdiction where a court's Article III jurisdiction is in doubt, deciding the merits before reaching an Eleventh Amendment argument does not present the same risks of acting without power to declare the law, offending separation of powers principles:

[B]ecause Eleventh Amendment immunity can be waived, the presence of an Eleventh Amendment issue does not threaten the court's underlying power to declare the law. If this were not the case, *sua sponte* consideration of a possible Eleventh Amendment bar would have to be obligatory, not discretionary – but the Supreme Court has now clearly stated that

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that because Eleventh Amendment immunity can be waived it is less than purely jurisdictional); *Bowers*, 9 F. Supp. 2d at 498 n.15 (citing *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997) (stating that "[t]he Eleventh Amendment . . . enacts a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction.")).

104. See, e.g., *Gordon*, 153 F.3d at 196 n.4 (citing *Coeur d'Alene Tribe*, 521 U.S. at 267, which states that Amendment enacts sovereign immunity from suit, rather than non-waivable limit on federal subject-matter jurisdiction).

105. See, e.g., *United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 890, 892 (D.C. Cir. 1999) (citing *Wis. Dep't of Corrections v. Schacht*, 524 U.S. 381 (1998)).

106. See, e.g., *Parella v. Ret. Bd. of the R.I. Employees' Ret. Sys.*, 173 F.3d 46, 53 (1st Cir. 1999) (noting that "Supreme Court recently declared that courts should generally determine whether Article III jurisdiction exists before reaching the merits").

107. 173 F.3d 46 (1st Cir. 1999).

108. *Id.* at 54.

109. *Id.* at 54-55.

110. *Id.* at 55.



courts are free to ignore possible Eleventh Amendment concerns if a defendant chooses not to press them.<sup>111</sup>

So viewing the situation, the most relevant maxim became that which admonishes courts to avoid constitutional questions when reaching them is not necessary. Abiding by this principle allowed the court to save the resources that otherwise would have had to be devoted to Eleventh Amendment issues, and avoided forcing the defendants to expend their resources on Eleventh Amendment issues that they preferred to avoid, without waiving the immunity.<sup>112</sup>

Probably the most carefully reasoned intermediate court of appeals opinion on this subject was that of the Court of Appeals for the District of Columbia in *United States ex rel. Long v. SCS Business & Technical Institute, Inc.*<sup>113</sup> Acknowledging the conflicting signals that the Court has given concerning the nature of the Eleventh Amendment bar, and also acknowledging that the Court recently had stated that whether Eleventh Amendment immunity is a matter of subject-matter jurisdiction is an open question,<sup>114</sup> the court elaborated several reasons for deciding whether the False Claims Act provides for a qui tam action against a state before or, depending on the answer to that question, instead of, addressing whether the Eleventh Amendment bars such a suit in federal court. First, it argued that the state's request that the court initially decide the statutory question amounted to a consent-to-suit on the statutory question which permitted, if not required, the court to proceed in that order, in light of the court's probable lack of obligation to raise the Eleventh Amendment issue sua sponte.<sup>115</sup>

*Steel Co.*'s rule is premised on a court's lack of power to reach the merits without establishing its jurisdiction. In the Eleventh Amendment context, where a court lacks power only if a state claims that it does, it is arguable that we have no obligation to decide the Eleventh Amendment issue first if the state does not demand that we do so.<sup>116</sup>

Second, the court focused upon the Supreme Court's decision in *Calderon v. Ashmus*,<sup>117</sup> as indicating that the Eleventh Amendment is not sufficiently

111. *Id.*

112. *Id.* at 56-57 & n.7; see also *U.S.I. Prop. Corp. v. M.D. Constr. Co.*, 230 F.3d 489, 495 (1st Cir. 2000) (purporting to follow *Parella* in concluding that it could forego difficult Eleventh Amendment issue in favor of more readily disposing of case in favor of state on basis of lack of ancillary enforcement jurisdiction).

113. 173 F.3d 890 (D.C. Cir. 1999), *cert. denied*, 530 S. Ct. 1202 (2000).

114. *Id.* at 892 (citing *Schacht*, 524 U.S. at 391).

115. *Id.* at 892-93.

116. *Id.* at 893.

117. 523 U.S. 740 (1998).

jurisdictional to require a federal court to decide a state's claim of Eleventh Amendment immunity before turning to the merits. As described in *Long*, in *Calderon*,

the Supreme Court decided that it "must first address" whether a particular action for a declaratory judgment was an Article III case or controversy before deciding the Eleventh Amendment question on which *certiorari* had been granted, observing that the Eleventh Amendment is "not co-extensive with the limitations of judicial power in Article III." . . . That the Court in *Calderon* thought itself *obliged* to decide the case or controversy question first suggests that the Eleventh Amendment, a less than pure jurisdictional question, need not be decided before a merits question.<sup>118</sup>

Third, the court argued, as the U.S. Supreme Court later did in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,<sup>119</sup> that the determination that a particular action is properly asserted against a state is a logical prerequisite to the jurisdictional inquiry, and that the "merits" question is inextricably related to the "jurisdiction" question.<sup>120</sup> The Eleventh Amendment "bars a federal court from hearing only a 'suit in law or equity, commenced or prosecuted against one of the United States,' and so it would seem perfectly appropriate – perhaps even necessary – for courts to determine whether there even is such a suit before the court."<sup>121</sup> Elaborating, the court continued,

[W]e have not chosen to decide a pure (and relatively easier) merits question on the *assumption* that we have jurisdiction – the paradigm of the hypothetical jurisdiction model. When a court decides, as we do, that a statute does not provide for a suit against the states, there is no risk at all that the court is issuing a hypothetical judgment – an advisory opinion by a court whose very power to act is in doubt . . . . Rather, the conclusion that the statute does not provide for suits against the states in federal court is, in effect, a resolution of the jurisdictional question, in that the Eleventh Amendment can no longer be said to apply (which is quite different from saying, as courts do under the hypothetical jurisdiction doctrine, that jurisdiction does not matter because the same party arguing a lack of jurisdiction prevails on the merits) . . . . The Fifth Circuit's view instead is that a court must *assume* that states are defendants under the Act and address the Eleventh Amendment question at the outset, lest the court give an interpretation of the statute that it has no power to give. . . . But such an approach ostensibly avoids the evils of 'hypothetical jurisdiction' (not

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118. *Long*, 173 F.3d at 893-94 (citations omitted).

119. 529 U.S. 765 (2000).

120. *Long*, 173 F.3d at 894.

121. *Id.* For reasons that are not entirely clear to me, the court referred to this inquiry as falling within the category of "jurisdiction to determine jurisdiction." *Id.*

really at issue) in favor of deciding a purely hypothetical jurisdictional issue—that is, a jurisdictional issue that arises *solely by virtue* of the statutory question assumed. Since the Eleventh Amendment issue in this case "would not exist but for" that assumption, . . . we think it is appropriate for us to decide the logically prior issue first.<sup>122</sup>

In explicating how the court viewed the merits and the jurisdictional questions as intertwined, the court said,

[E]ven if we were to assume that states are defendant persons, and then actually to decide that the Eleventh Amendment applied, we would then have to ask whether, for abrogation purposes, the statute contains a clear statement that states are to be defendants—which is more-or-less the same statutory analysis that we previously undertook.<sup>123</sup>

It believed that these logical and factual relationships between the questions provided an independent ground on which to distinguish *Steel Co.*<sup>124</sup>

Finally, the Court found the conclusion to which all of the foregoing reasoning leads (that the statutory interpretation question of application to the states can be addressed before Eleventh Amendment issues) to be confirmed by pre-*Steel Co.* cases in which the Court had addressed "cause of action" questions before turning to Eleventh Amendment issues, and not to be prohibited by any Supreme Court decisions.<sup>125</sup> Given that history, and the preference for avoiding difficult constitutional issues, it adhered to its decision to decide the case on statutory grounds.<sup>126</sup>

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*<sup>127</sup> the Supreme Court answered the question that had tested the federal appeals

122. *Id.* at 896 (citations omitted).

123. *Id.* at 895. This is apparently the way in which the court viewed the merits and the jurisdictional questions to be inextricably related.

124. *Id.* at 895.

125. *Id.* at 896-98.

126. The opinion discussed here was a supplemental opinion which complemented the earlier decision on the merits in *United States ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870 (D.C. Cir. 1999). See also *Riley v. St. Luke's Episcopal Hosp.*, 196 F.3d 514, 522-23 (5th Cir. 1999) (reasoning that Article III standing is more basic jurisdictional requirement than Eleventh Amendment, that it therefore has to be addressed before court may consider latter, and that discussion of standing in *Foulds*, see *supra* note 98, was not dictum, despite case's additional conclusion that Eleventh Amendment barred suit). But see *id.* at 537-38 (DeMoss, J., specially concurring) (disapproving court's interpretation of *Foulds* case and of Supreme Court's opinion in *Calderon v. Ashmus*, 523 U.S. 740 (1998), concluding that *Ruhrgas* "abolishes any inference from *Calderon*, that the *Foulds* panel must have necessarily decided the Article III issue to reach its determination that the Eleventh Amendment posed jurisdictional barriers").

127. 529 U.S. 765 (2000).

courts. Like *Long*, this was a qui tam action brought against a state agency under the False Claims Act. The defendant had moved to dismiss, arguing both that a state agency is not a "person" subject to liability under the FCA and that the action was barred by the Eleventh Amendment.<sup>128</sup> Consistent with *Steel Co.*, the Court first addressed whether the plaintiff had Article III standing to maintain the suit.<sup>129</sup> Having found that a qui tam relator under the FCA has Article III standing, the Court "turn[ed], then, to the merits."<sup>130</sup> Recognizing that questions of jurisdiction should be addressed first and that courts of appeals had disagreed as to the order in which statutory and Eleventh Amendment questions should be resolved, the Court observed that it had routinely addressed the question whether a statute permitted a cause of action to be asserted against states *before* addressing whether the Eleventh Amendment forbade the particular cause to be so asserted.<sup>131</sup> The Court justified this sequencing by finding the statutory question "logically antecedent" to the immunity issue, and by reference to the lack of possibility that, in addressing the statutory question, the Court would expand its power beyond the limits that the jurisdictional restriction imposed.<sup>132</sup> That is, as a practical matter, the Court would not "pronounce upon any issue, or upon the rights of any person, beyond the issues and persons that would be reached under the Eleventh Amendment inquiry anyway."<sup>133</sup> It concluded that the "combination of logical priority and virtual coincidence of scope" made it appropriate to decide the statutory question first.<sup>134</sup>

Aspects of the reasoning in *Long* and *Vermont Agency* can be challenged. For example, the *Long* court concedes that one could argue that whether a cause of action has been pleaded is logically antecedent to whether a court has jurisdiction over that cause, but the Court in *Steel Co.* nonetheless held that the jurisdictional issue has to be decided first.<sup>135</sup> The argument that the inquiry into whether a particular civil action is properly asserted against a state logically precedes any inquiry into whether the Eleventh Amendment nonetheless bars the suit should not be persuasive if, as *Steel Co.* suggests, logical antecedence is not a compelling reason to put a merits question before a jurisdictional

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128. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 770 (2000).

129. *Id.* at 771.

130. *Id.* at 778.

131. *Id.* at 778-79.

132. *Id.* at 779 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997)).

133. *Id.*

134. *Id.* at 779-80. *Vermont Agency* was followed and extended in *Floyd v. Thompson*, 227 F.3d 1029, 1035 (7th Cir. 2000) (holding that appeals court could bypass Eleventh Amendment issue in favor of more readily made determination, based on settlement agreement suggesting that there was no possible basis for suit against state).

135. *Long*, 173 F.3d at 896 n.4.

one. One also could question the *Long* court's and the Supreme Court's reliance on their conclusion, on the merits, that states are not persons suable under the FCA, in support of their position that it is permissible to reach that merits issue before Eleventh Amendment issues. That reasoning allows the *outcome* of the merits question to determine whether it may be addressed first, which seems inappropriate. Had the courts decided that states *are* suable under the FCA, they would not have been able to say that resolution of the statutory question in effect resolved the jurisdictional question; the applicability of the Eleventh Amendment would have remained in issue.

It seems to me that *Vermont Agency*, at least arguably, represents yet another instance of the Court diluting the purity of the principle that jurisdictional issues should be resolved before merits issues.<sup>136</sup> While one *can* address whether states can be sued under a statute before addressing whether unconsenting states can be so sued, one could address the latter question, while assuming arguendo an affirmative answer to the former.<sup>137</sup> Since the statutory interpretation question is non-jurisdictional, there is no prohibition against making an arguendo assumption about its answer. The "logical priority" of the statutory question,<sup>138</sup> therefore, is not a compelling reason to depart from the usual sequence of decision, which the Court supports with weighty invocations that, "if there is no jurisdiction[,] there is no authority to sit in judgment of anything else."<sup>139</sup> In the *Vermont Agency* opinion itself, the Court characterizes the Eleventh Amendment as jurisdictional and yet addresses first what is clearly a merits question, whether the FCA provides for suits against states.

The second purported justification offered for addressing the statutory question first, that as a practical matter the Court would not "pronounce upon any issue, or upon the rights of any person, beyond the issues and persons that would be reached under the Eleventh Amendment inquiry anyway,"<sup>140</sup> seems to me similarly assailable. In addressing the statutory question whether the FCA provides for suits against states, the Court *is* pronouncing upon an issue that it would not have to reach under the Eleventh Amendment (as suggested

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136. This is true, so long as the Eleventh Amendment is viewed as jurisdictional. Insofar as the Eleventh Amendment is viewed as inextricably bound-up with Article III limits on federal court jurisdiction, the case arguably represents another instance of the Court diluting the purity of the principle that Article III jurisdictional issues must be resolved before merits issues.

137. See, e.g., *United States ex rel. Foulds v. Tex. Tech. Univ.*, 171 F.3d 279, 288 (5th Cir. 1999) (addressing Eleventh Amendment question, having assumed that states are defendants under act of Congress in order to avoid interpreting statute that court had no power to interpret).

138. I do concede that the question whether particular entities can be sued under a statutory scheme is, or can be viewed as, logically antecedent to the question whether those entities are entitled to an immunity from the suits.

139. *Vt. Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778 (2000).

140. *Id.* at 779.

above, the Court could assume arguendo an affirmative answer to this question) and, because of the precedential authority of the Court's opinions, the Court is, as a practical matter, potentially affecting the rights of persons beyond the current parties. Had the Court decided, for example, that the states were persons suable under the FCA,<sup>141</sup> then qui tam relators could have sued various states under the statute and succeeded in their suits where the facts supported their claims and where the pertinent states had waived their Eleventh Amendment immunity or where the states' immunity had effectively been abrogated. Had the *Vermont Agency* Court not addressed the statutory question, that question would have remained open, to be reached only if and when an immunity-waiving state were sued under the FCA, or if the Court held the immunity to have been abrogated. At the very least, we now have yet another qualification to the *Steel Co.* rule: a court may reach merits issues before Eleventh Amendment issues (and perhaps other quasi-jurisdictional or even purely jurisdictional issues) when the "combination of logical priority and virtual coincidence of scope" makes it appropriate to decide a statutory merits question first.<sup>142</sup>

The lower courts' struggle with the Eleventh Amendment illustrates the kinds of challenges courts face in determining what issues are jurisdictional for *Steel Co.* purposes. I believe that the Court's decision of that particular issue has, if anything, further muddied the sequence in which issues must be addressed. But whatever the "right answer" to the Eleventh Amendment question, and whatever effects *Vermont Agency* will have on the analysis of other sequencing dilemmas, the judicial debate concerning the status of the Eleventh Amendment for *Steel Co.* purposes illustrates how the *Steel Co.* opinion has invigorated and compelled appellate (as well as district court) attention to questions that those courts otherwise might not have addressed. At the same time, *Steel Co.* requires district and appellate courts to eschew merits questions that they might prefer to address, when they find that the district court lacked jurisdiction.

### III. Hypothetical Appellate Jurisdiction Before and After *Steel Co.*

#### A. The Determinants of Federal Appellate Jurisdiction

Article III, Section 1, of the United States Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>143</sup> Section 2 then states the categories of cases and controversies to

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141. In fact, it held to the contrary. See *id.* at 783-84 (finding that while certain provisions of FCA define "person" to include states, particular provisions relating to qui tam liability do not, thereby indicating that states are not persons under that provision).

142. *Vt. Agency*, 529 U.S. at 779-80.

143. U.S. CONST. art. III, § 1.

which the judicial power shall extend and declares which of those cases shall be within the Supreme Court's original jurisdiction and which shall be within its appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."<sup>144</sup>

Pursuant to the powers alluded to in Article III, Congress has passed legislation detailing the original and appellate jurisdiction of the Supreme Court.<sup>145</sup> Although the Supreme Court has promulgated rules to govern the practice before it,<sup>146</sup> and some of those rules could be read to impose additional jurisdictional requirements,<sup>147</sup> these restrictions are not truly "jurisdic-

144. U.S. CONST. art. III, § 2. It also provides in pertinent part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States: – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

*Id.*

145. See, e.g., 28 U.S.C. §§ 1251-59 (1999). These sections are set forth in the Appendix to this Article.

Just how much power Congress has to limit the jurisdiction of the Supreme Court is a controversial matter, but one beyond the scope of this article. See generally The Supreme Court, 1995 Term, *Congressional Power to Restrict the Supreme Court's Appellate Jurisdiction*, 110 HARV. L. REV. 277 (1996); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction*, 85 NW. L. REV. 1 (1990); Eugene Gressman & Eric Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 GEO. WASH. L. REV. 495 (1983); Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385 (1983); Lawrence Gene Sager, *The Supreme Court, 1980 Term – Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 19-20 (1981). Additional writings are cited in Louise Weinberg, *The Article III Box: The Power of "Congress" to Attack the "Jurisdiction" of "Federal Courts"*, 78 TEX. L. REV. 1405, 1406 n.2 (2000).

146. 28 U.S.C. § 2071(a) provides in part that "[t]he Supreme Court . . . may from time to time prescribe rules for the conduct of [its] business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title." 28 U.S.C. § 2071(a) (1994).

147. See SUP. CT. R. 14.1(a) (stating in part that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court"); see also *Quilloin v. Walcott*,

tional or absolute. They have been created by the Court, and are subject to modification by the Court when it believes that the reasonable procedures embodied in the general rules are outweighed by other considerations.<sup>148</sup> Thus, the rules do not limit the Court's power.

Pursuant to the power conferred in Article I, section 8, "to constitute Tribunals inferior to the supreme Court,"<sup>149</sup> Congress also has created federal appellate courts<sup>150</sup> and conferred a defined appellate jurisdiction upon them.<sup>151</sup>

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434 U.S. 246, 253 n.13 (1977) (finding that, where contention that adoption statutes created gender-based distinctions which violated Equal Protection Clause of Constitution was not presented in appellant's jurisdictional statement, although it was raised in final paragraph of appellant's brief, Court would not consider that claim); *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 386 n.12 (1960) (commenting that Court considers only issues raised by jurisdictional statement in appellate brief or petition for certiorari).

In a number of cases, the Court has specifically held that Supreme Court Rules governing times for filing and docketing and governing service are not jurisdictional. *See Parker v. Levy*, 417 U.S. 733, 742-43 n.10 (1974) (holding that technical noncompliance with rule requiring persons not admitted to bar of Supreme Court to prove service by affidavit does not deprive Court of jurisdiction over appeal from grant of habeas corpus where court-martialed serviceman had actual notice of filing of notice of appeal with Court); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 445-46 & n.4 (1974) (holding timely docketing of jurisdictional statement not to be jurisdictional requisite, where notice of appeal to Court was timely); *Schacht v. United States*, 398 U.S. 58, 63-64 (1970) (holding that rule requiring petition for certiorari to review judgment in criminal case to be filed within 30 days after court of appeals' judgment is not jurisdictional and can be waived by Court, and stating generally that procedural rules adopted by Court to govern its own judicial business are not jurisdictional, and can be relaxed in Court's discretion when ends of justice so require); *Taglianetti v. United States*, 394 U.S. 316, 316 n.1 (1969) (per curiam) (holding time limitation for filing petition for certiorari not jurisdictional, and that failure to timely file petition did not bar Court's exercise of discretion to consider case); *United States v. Adams*, 383 U.S. 39, 42 (1966) (holding that petitioner's failure to comply with Supreme Court rule requirements as to service did not defeat jurisdiction because requirements were not jurisdictional, no prejudice resulted, and failure was inadvertent).

148. ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* § 6.26, at 345 (7th ed. 1993) (citing cases in which Court addressed questions not raised in petition for certiorari, and sometimes not raised by parties at all, with Court sometimes bolstering its authority to decide such questions with option reserved by Court in Supreme Court Rule 24.1(a), to "consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide").

149. U.S. CONST. art. I, § 8.

150. These include the circuit courts of appeals and the United States Court of Appeals for the Federal Circuit. In the past it had created others such as the Temporary Emergency Court of Appeals (created by section 211(b) of the Economic Stabilization Act of 1970, and abolished by section 102(d),(e) of Pub. L. 102-572 (Oct. 29, 1992)).

151. *See, e.g.*, 28 U.S.C. §§ 1291, 1292, 1295 (1999). These sections are set forth in the Appendix to this Article.

Just how much power Congress has to limit the jurisdiction of the lower federal courts is a controversial matter, too, but also is beyond the scope of this article. For recent writing on the subject, *see generally* Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of*



The intermediate courts of appeals have statutorily-conferred jurisdiction over appeals from final decisions of the federal district courts<sup>152</sup> and over specified interlocutory decisions.<sup>153</sup> Through the collateral order doctrine, an interpretation of the final judgment rule,<sup>154</sup> the intermediate appellate courts also have jurisdiction to hear appeals from particular orders: those that are conclusive on the matter they address, resolve questions that are too independent of the merits to need to be deferred until final judgment and too important to be denied review, and involve important rights that will be lost if the order is not immediately reviewed.<sup>155</sup> In addition to this and other less well-known common law refinements of the notion of finality,<sup>156</sup> the Rules Enabling Act allows the Court to prescribe rules defining when a district court ruling is "final" for purposes of the final judgment rule codified in 28 U.S.C. § 1291.<sup>157</sup>

1789, 138 U. PA. L. REV. 1499 (1990); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997); Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts – Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445 (1998); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); Weinberg, *supra* note 145. For a listing of additional distinguished writings on the subject, see Weinberg, *supra* note 145, at 1405 n.1.

152. This generalization is subject to an exception for those situations in which a direct review may be had in the Supreme Court. See 28 U.S.C. § 1291 (1999), Appendix; see, e.g., 28 U.S.C. § 1253 (1999) (providing for direct appeals from decisions of three-judge district courts).

153. See, e.g., 28 U.S.C. § 1292 (1999); see also *Carr Park, Inc. v. Tesfaye*, 229 F.3d 1192, 1194 (D.C. Cir. 2000) (holding that 28 U.S.C. § 1292(b)'s ten-day filing period is jurisdictional).

154. In earlier times, the collateral order doctrine was (more frequently than nowadays) characterized as an *exception to the final judgment rule*. See, e.g., *Behrens v. Pelletier*, 516 U.S. 299, 314-15 (1996) (Breyer, J., dissenting) (stating that collateral order doctrine is, in effect, judge-made exception to 28 U.S.C. § 1291); *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798-800 (1989) (referring to collateral order "exception" to final judgment rule); *Abney v. United States*, 431 U.S. 651, 663 (1977) (same); see also Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1167 n.10, 1168-71 (1990) (referring to collateral order doctrine as exception to finality requirement).

155. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (articulating requirements for order to be immediately appealable as collateral order); see *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (same). For a thoughtful exegesis of the prongs of *Cohen*, see generally *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997).

156. Regarding other common law refinements of the notion of finality, see generally 15A-B WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D* §§ 3095-3939.10 (1992 & Supp. 2001).

157. The Rules Enabling Act provides:

Rules of procedure and evidence; power to prescribe:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

Rule 54(b) of the Federal Rules of Civil Procedure, which the Court also promulgated under the authority of the Rules Enabling Act, further determines the jurisdiction of the intermediate appellate courts by permitting district courts to direct the entry of a final judgment as to fewer than all of the claims or parties in a civil action, in prescribed circumstances.<sup>158</sup> Congress also has allowed the Court to authorize by rules immediate appeal of interlocutory decisions not provided for under 28 U.S.C. § 1292(a),(b), (c), or (d).<sup>159</sup> The sole exercise of this power thus far is the 1998 addition of Rule 23(f) of the Federal Rules of Civil Procedure, which authorizes a court of appeals, in its discretion, to permit appeal from a district court order granting or denying class action certification, if application is made to the appeals court within ten days after entry of the order.<sup>160</sup> The courts of appeals and the Supreme Court

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(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

The Rules Enabling Act, 28 U.S.C. § 2072 (1994).

Note in particular section (c). Thus far, no rules have been promulgated under this section. The Seventh Circuit has opined that this grant has gone unused at least in part because "it invites the question whether a particular rule truly 'defines' or instead expands appellate jurisdiction." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 833 (7th Cir. 1999).

158. See FED. R. CIV. P. 54(b). It provides in pertinent part:

When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

*Id.* If an order is erroneously certified under Rule 54(b) and no other basis for immediate appeal exists, the appellate court must dismiss for lack of appellate jurisdiction. See, e.g., *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 740, 742 n.2 (5th Cir. 2000) (holding that Rule requirement that court have disposed of one or more claims or parties is jurisdictional, although requirement that court have made express determination that there is no just reason for delay is not, and dismissing appeal of partial summary judgment, for want of jurisdiction, where former requirement was not met given strong factual overlap between appealed claim and matters still pending in trial court).

159. 28 U.S.C. § 1292(e) (1994).

160. FED. R. CIV. P. 23(f). In *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999), the Seventh Circuit became the first court to apply the new Rule. *Blair*, 181 F.3d at 833. It took the occasion to review the reasons Rule 23(f) came into being. *Id.* at 834-35. In its view, the Rule is intended to provide the opportunity for immediate appellate review of an order granting or denying class certification when denial of class status seems likely to be fatal and the plaintiff has a solid argument that the district court's decision was in error, when "the stakes are large and the risk of a settlement or other disposition that does not reflect the merits . . . is substantial," if appellant demonstrates "that the ruling on class certification is questionable" considering the deferential standard of review that applies, and when an interlocutory appeal would facilitate development of the law on fundamental issues that otherwise would be likely

also review trial court decisions in advance of final judgment when the higher courts grant litigants' petitions for writs of mandamus or similar extraordinary relief under the All Writs Act.<sup>161</sup> On the other hand, on some occasions, Congress has specifically denied appellate jurisdiction that the courts otherwise would enjoy.<sup>162</sup>

The Supreme Court and several intermediate federal appellate courts have held a few of the requirements imposed by the Federal Rules of Appellate Procedure to be jurisdictional, so that the appeals courts lack authority to act on the merits of cases in which those requirements have not been satisfied. Most prominent among these requirements are Rule 3(a)'s requirement that an appeal permitted as of right from a district court to a court of appeals be taken by filing a notice of appeal with the district clerk within the time allowed by Federal Rule of Appellate Procedure 4; Rule 3(c)'s requirements that the notice of appeal (1) specify the parties taking the appeal by naming each in the caption or body of the notice (subject to a liberalization for attorneys representing more than one party), (2) designate the judgment, order, or part thereof being appealed, and (3) name the court to which the appeal is

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to evade effective review at the end of the case. *Id.* The court noted that, in this last instance, it is less important that the trial judge's decision be "shaky." *Id.* at 835. The court also indicated that when class certification has induced judges to remake substantive doctrine in order to render litigation manageable, that too justifies an interlocutory appeal of the certification decision. *Id.* at 834; *see also* Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 294 (1st Cir. 2000) (following *Blair* with modification that third category be restricted to "instances in which an appeal will permit the resolution of an unsettled legal issue . . . important to the particular litigation as well as . . . in itself"). *See generally* Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531 (2000).

161. 28 U.S.C. § 1651 (1994) provides: "Writs: (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law; (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction." *See, e.g.*, *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (upholding grant of mandamus to determine district court authority to order Rule 35 examinations of defendant). Although the request for an extraordinary writ is an original application to the court of appeals, the grant of the writ to an inferior court is an appellate power. *See Ex parte Republic of Peru*, 318 U.S. 578, 582 (1943) (noting that Supreme Court has authority to issue writs of mandamus or prohibition to district courts only insofar as such writs aid appellate jurisdiction).

162. *See, e.g.*, 28 U.S.C. § 1447(d) (stating that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise"). Congress has denied this review notwithstanding that remand orders are final decisions because they effectively put litigants out of federal court. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 713-15 (1996); *see also* *United States v. Key*, 205 F.3d 773, 774-75 (5th Cir. 2000) (holding that, because 28 U.S.C. § 2244(B)(3)(A) is jurisdictional bar to district court's assertion of jurisdiction over successive habeas petitions until appellate court has granted petitioner permission to file, appeals court lacked jurisdiction to review denial of motion for appointment of counsel to file habeas petition).

taken; and Rule 4(a)(1)'s requirements concerning the time for filing a notice of appeal.<sup>163</sup> Perhaps these Rules are regarded as jurisdictional while com-

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163. FED. R. APP. P. 3(a),(c), 4(a)-(c). Cases holding the aforementioned Rules to be jurisdictional include the following:

Rules 3(a), 4(a): *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988) (holding both party specification provision of Federal Rule of Appellate Procedure 3(c) and time limits for filing appeal set forth in Federal Rule of Appellate Procedure 4 to be jurisdictional). "[A] litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court." *Id.* at 317 n.3. *See Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982) (per curiam) (observing that timely filing of notice of appeal is mandatory and jurisdictional, and concluding that premature notice of appeal was nullity under Federal Rule of Appellate Procedure 4(a)(4), as it was then framed); *Browder v. Dir.*, Dept. of Corr., 434 U.S. 257, 264 (1978) (stating that compliance with Federal Rule of Appellate Procedure 4 is mandatory and jurisdictional); *United States v. Robinson*, 361 U.S. 220, 224 (1960) (holding that late notice of appeal under Federal Rules of Criminal Procedure does not confer jurisdiction on appellate court); *United States v. Hirsch*, 207 F.3d 928, 930-31 (7th Cir. 2000) (dismissing late-filed appeal for lack of jurisdiction despite contention that clerk failed to file notice on defendant's behalf despite request to do so, but inviting defendant to claim inadequate assistance of counsel entitling him to vacation of judgment and reimposition of sentence, permitting appeal); *Anderson v. Pasadena Indep. Sch. Dist.*, 184 F.3d 439, 446-47 (5th Cir. 1999) (holding that, where time to appeal had not been extended by motion for reconsideration, notice of appeal that was filed late did not vest court of appeals with jurisdiction to review sanction); *see also* FED. R. APP. P. 26(b) (disallowing courts from extending time to file notice of appeal or similar petition, except as authorized in Federal Rule of Appellate Procedure 4). *But see Torres*, 487 U.S. at 321-22 (Brennan, J., dissenting) (disagreeing with interpretation of party-specification provision as jurisdictional and characterizing Court as having held Rule 3(c)'s judgment-designation requirement not to be jurisdictional in *Foman v. Davis*, 371 U.S. 178 (1962)).

Rule 3(c): *See Smith v. Barry*, 502 U.S. 244, 248-50 (1992) (stating that dictates of Federal Rule of Appellate Procedure 3 are jurisdictional and their satisfaction prerequisite to appellate review; holding that appellant's brief may serve as notice of appeal that Rule 3 requires); *Torres*, 487 U.S. at 315, 316-18 (stating that Federal Rule of Appellate Procedure 3(c)'s requirement that notice of appeal specify parties taking appeal is jurisdictional prerequisite to appellate review, although appeals court should find notice sufficient so long as it provides functional equivalent of what Rule requires; holding that use of "et al." in notice of appeal was insufficient to notify appellees or appellate court that intervening plaintiff who, due to clerical error, was not otherwise named in notice was appealing; hence, prior judgment of dismissal was final as to him); *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 756-57 (6th Cir. 1999) (holding that, because notice of appeal referred only to summary judgment rulings, court lacked jurisdiction to consider issues raised by motion for reconsideration); *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 571-72 (7th Cir. 1999) (stating that Federal Rule of Appellate Procedure 3(c)'s requirement that notice of appeal designate what is appealed from is jurisdictional prerequisite to appellate review; thus, holding that because order granting preliminary injunction necessarily encompassed refusal to refer antitrust claim to arbitration, identification of former order in notice of appeal sufficiently manifested intent to appeal latter, but because injunctive order did not necessarily constitute refusal to stay, there was no appellate jurisdiction over refusal); *Burgess v. Suzuki Motor Co.*, 71 F.3d 304, 306-07 (8th Cir. 1995) (stating that, although court may construe Federal Rules of Appellate Procedure liberally in determining whether those Rules have been complied with, court may not waive jurisdictional requirement that notice of appeal designate judgment, order or part thereof appealed from). *But see Osterberger v. Relocation Realty Serv. Corp.*, 921 F.2d 72, 74 (5th Cir.

parable Supreme Court Rules are not so regarded because, while the Court is comfortable modifying its own rules where that seems appropriate, it believes that it would be inappropriate for the lower federal courts to determine that the procedures that the Court and Congress have promulgated to govern the appellate courts<sup>164</sup> should yield in particular cases.<sup>165</sup>

Finally, some judge-made doctrines also are regarded as setting jurisdictional bounds upon appellate jurisdiction. In addition to the collateral order doctrine and other doctrines defining "finality,"<sup>166</sup> an example is the precedent holding that, unless a district court mistakenly believed that it lacked legal authority to impose a sentence below the range established by the United

1991) (stating that, while portion of Federal Rule of Appellate Procedure 3(c) requiring notice of appeal to specify parties is jurisdictional, portion requiring notice of appeal to designate proper judgment is construed broadly).

Other requirements of the Federal Rules of Appellate Procedure are *not* jurisdictional. Federal Rule of Appellate Procedure 3(a)(2) provides, "An appellant's failure to take any step other than the timely filing of a notice of appeals does not affect the validity of the appeal," and Federal Rule of Appellate Procedure 3(d)(3) states, "[T]he district clerk's failure to serve notice does not affect the validity of the appeal." See *Smith*, 502 U.S. at 249 (holding proper briefing not to be jurisdictional requirement). As of this writing, the Court has granted certiorari on the question whether a court of appeals must dismiss a prisoner's appeal in which a timely, but unsigned, notice of appeal was filed. *Becker v. Montgomery*, 531 U.S. 1110 (2001).

But some of the Federal Rules of Civil Procedure that have an impact on appellate jurisdiction have been held to be jurisdictional for the appellate courts. For example, the time limits in Federal Rule of Civil Procedure 59(e) have been held to be jurisdictional when applied in connection with Federal Rule of Appellate Procedure 4(a). See *FED. R. CIV. P. 59(e)* ("A motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment"); *EF Operating Corp. v. Am. Bldgs.*, 993 F.2d 1046, 1049 n.1 (3d Cir.) (stating that time requirements in Federal Rule of Appellate Procedure 4(a) and Federal Rule of Civil Procedure 59(e) are jurisdictional); *Fuente v. Central Elec. Coop., Inc.*, 703 F.2d 63, 65 (3d Cir. 1983) (per curiam) (stating that ten day period of Federal Rule of Civil Procedure 59(e) is jurisdictional); see also *Browder v. Director, Dept. of Corr.*, 434 U.S. 257, 267, 270-71 (1978) (holding appeal jurisdictionally defective because untimely motion under Federal Rule of Civil Procedure 59 did not toll time for filing notice of appeal, and observing that time limits of Federal Rules of Civil Procedure 52(b) and 59 are mandatory and jurisdictional).

164. Pursuant to 28 U.S.C. § 2074, Congress has the opportunity to reject or alter Rules proposed by the Court. Section 2074 provides in pertinent part that, "(a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law."

165. See *Cross-Sound Ferry Servs., Inc. v. ICC*, 934 F.2d 327, 341 (D.C. Cir. 1991) (Thomas, J., concurring in part and concurring in denial of petition for review) (in discussing different meanings that "jurisdictional" has in different contexts, observing that "[s]ometimes . . . characterizing a provision as 'jurisdictional' implies that a court cannot temper the application of the provision through otherwise available equitable doctrines").

166. See *supra* notes 64, 66, 154-55 and accompanying text for discussion of the collateral order doctrine. Regarding other doctrines defining finality, see generally 15A-B WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D* §§ 3095-3939.10 (1992 & Supp. 2000).

States Sentencing Guidelines, a district court's refusal to depart downward is not appealable.<sup>167</sup>

### B. *Reconciling Steel Co. and Swint*

There appears to be tension between the Court's denunciation of hypothetical jurisdiction and its restriction of the scope of appellate jurisdiction on interlocutory appeals. If a case is dismissed for lack of subject-matter jurisdiction in the district court, an immediately appealable final judgment is entered, and the appeals court reviews the dismissal. If a district court assumes or holds that it has subject-matter jurisdiction and adjudicates to final judgment, if and when that final judgment is appealed, the appeals court can review the district court's subject-matter jurisdiction; indeed, it is the appeals court's duty to confirm the district court's jurisdiction if there is any question about it.<sup>168</sup> If a district court assumes or holds that it has subject-matter jurisdiction and another of its orders is properly appealed before final judgment (whether under the collateral order doctrine, under 28 U.S.C. § 1292(a) or (b), pursuant to Federal Rules of Civil Procedure 23(f) or 54(b), by grant of a petition for writ of mandamus, or otherwise), the question may arise whether the appeals court is free to review the district court's jurisdiction in the context of the interlocutory appeal, even though the district court's affirmation of its own jurisdiction would not, in and of itself, be appealable before final judgment. In *Swint v. Chambers County Commission*,<sup>169</sup> the Supreme Court strongly criticized the doctrine of pendent appellate jurisdiction, which the Court described as the authority of "a court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are not themselves independently appealable."<sup>170</sup> Disavowing the thoroughgoing rejection that its opinion otherwise might have implied, the Court cautioned:

We need not definitively or preemptively settle here whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently

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167. See, e.g., *United States v. Henderson*, 209 F.3d 614, 617 (6th Cir. 2000) (taking position described in text); *United States v. Matthews*, 209 F.3d 338, 352 (4th Cir. 2000) (same); *United States v. Wetchie*, 207 F.3d 632, 636 (9th Cir. 2000) (same).

168. See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 150 (1908) (dismissing case for lack of federal-question subject-matter jurisdiction, where Court raised issue); *Local 1351 Int'l Longshoremen's Ass'n v. Sea-Land Serv. Inc.*, 214 F.3d 566, 569-70 (5th Cir. 2000) (confirming district court's jurisdiction).

169. 514 U.S. 35 (1995).

170. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51 (1995). For a close examination of the opinion's criticism of pendent appellate jurisdiction doctrine, see generally Joan Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After Swint*, 49 HASTINGS L.J. 1337 (1998).

appealable . . . . The parties do not contend that the District Court's decision to deny the Chambers County Commission's summary judgment motion was inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or that review of the former decision was necessary to ensure meaningful review of the latter.<sup>171</sup>

The Court thus left the door open to approval of pendent appellate jurisdiction over rulings that fit the categories described by the court (that is, those inextricably intertwined with the immediately appealable orders or necessary to ensure meaningful review of the latter) and perhaps even beyond those parameters.

Based upon *Swint*, it would be possible to argue that, despite the Court's condemnation of hypothetical jurisdiction in *Steel Co.*, when there is an interlocutory appeal, a court of appeals should address only the issues that are immediately and independently appealable and those that are pendent to them, as narrowly defined by the Court in *Swint*. On this view, there would be tension between *Steel Co.* and *Swint* insofar as the former insists that district court jurisdiction not be assumed, but examined by the court of appeals, and the latter insists that courts of appeals hearing interlocutory appeals confine themselves to immediately appealable orders and orders inextricably intertwined with them or necessary to ensure their meaningful review. Recent case law has tended to determine whether to entertain issues as to Article III requirements and as to subject-matter jurisdiction, on the occasion of interlocutory appeals, by reference to whether the issues fall within the categories described by *Swint*. Some courts regard issues that go to justiciability and to the district court's subject-matter jurisdiction as necessary to ensure meaningful review of the immediately appealable order.<sup>172</sup> Others, rejecting that tack, have declined to consider such issues when they were not "inextricably intertwined" with the other issues presented.<sup>173</sup>

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171. *Swint*, 514 U.S. at 50-51.

172. See *Merritt v. Shuttle, Inc.*, 187 F.3d 263, 267-69 (2d Cir. 1999) (confirming appellate jurisdiction under collateral order doctrine and addressing district court's subject-matter jurisdiction over claims that were basis of appeal in order to ensure meaningful review of order denying qualified immunity). The court expressly stated that it did not run afoul of the boundaries on appellate jurisdiction articulated in *Swint* in determining whether the district court had subject-matter jurisdiction. *Id.* at 268. It found such determination necessary to ensure meaningful review of the order denying qualified immunity because, without such jurisdiction, the district court would have lacked power to issue the immunity rulings in question. *Id.* at 269; see also *Larsen v. Senate of Pa.*, 152 F.3d 240, 245-46 (3d Cir. 1998), *cert. denied*, *Larsen v. Afflerbach*, 525 U.S. 1145 (1999) (reaching justiciability of plaintiff's claim under political question doctrine, as necessary to decide § 1292(b)-certified issues on appeal).

173. See *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1277-78 (11th Cir. 2000) (finding that, outside context of FED. R. CIV. P. 23(f) appeals, "issues of standing normally are not available for review on interlocutory appeal"); *Summit Med. Assocs., PC. v. Pryor*, 180 F.3d 1326, 1335 & n.8 (11th Cir. 1999) (following *Moniz v. City of Fort Lauderdale*, 145 F.3d 1278

Jurisdictional rulings typically are not inextricably intertwined with the immediately appealable issues,<sup>174</sup> and it is debatable whether they ought to be considered necessary to ensure meaningful review. On a previous occasion, I nonetheless argued that, when there is an interlocutory appeal,<sup>175</sup> a court of appeals may consider, and indeed should consider, whether the district court had subject-matter jurisdiction over the case.<sup>176</sup> The court of appeals should make this inquiry regardless of whether any of the parties moved, either in the district court or on appeal, to have the case dismissed for lack of subject-matter jurisdiction<sup>177</sup> and regardless of whether there is any factual overlap (or any overlap of legal issues) between the jurisdictional issue and the issues raised by the order that is the occasion for the appeal. I adhere to that view. It is the appellate court's duty to raise the issue of subject-matter jurisdiction, even *sua sponte* – whatever the occasion for a case being before the appellate

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(11th Cir. 1998), in appeal from denial of Eleventh Amendment immunity); *Moniz v. City of Fort Lauderdale*, 145 F.3d 1278, 1281 n.3 (11th Cir. 1998) (holding that appeals court did not have pendent jurisdiction to review ruling that plaintiff had standing to assert claims in question because standing issue was neither "inextricably intertwined with" nor "necessary to ensure meaningful review of" qualified immunity ruling); see also *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31-32 (D.C. Cir. 2000) (declining to exercise pendent appellate jurisdiction over propriety of district court's denial of permissive intervention, in conjunction with interlocutory appeal from rejection of appellants' bid to intervene as of right).

174. *But see* *Carter v. West Publ. Co.*, 225 F.3d 1258, 1262-63 (11th Cir. 2000) (stating that upon interlocutory appeal of order granting class certification, court of appeals could review determination that named plaintiffs had constitutional standing to bring class suit because standing was properly part of class certification analysis).

175. When I speak of "interlocutory appeals," I intend to include all appeals before final judgment, including appeals of orders that are considered "final decisions" within the meaning of 28 U.S.C. § 1291. This usage is consistent with the Black's Dictionary of Law definitions of "interlocutory" as "[s]omething intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy" and of "interlocutory appeal" as "[a]n appeal of a matter which is not determinable of the controversy, but which is necessary for a suitable adjudication of the merits." BLACK'S LAW DICTIONARY 815 (6th ed. 1990). A later edition of BLACK'S LAW DICTIONARY defines "interlocutory" as an "interim or temporary [order, judgment, appeal, etc.] not constituting a final resolution of the whole controversy," and "interlocutory appeal" as "an appeal that occurs before the trial court's final ruling on the entire case." BLACK'S LAW DICTIONARY 819, 94 (7th ed. 1999).

176. The Court took this approach in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940) (considering issue of subject-matter jurisdiction of district court in action under Securities Act of 1933).

177. See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) (noting that federal courts have duty to determine whether they have subject-matter jurisdiction and should address that issue *sua sponte* if parties have not raised it); *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 108 (2d Cir. 1997) (finding that even if defendant challenged only sufficiency of complaint, court was "entitled at any time *sua sponte* to delve into" factual basis for subject-matter jurisdiction); *Cvelbar v. CBI Ill., Inc.*, 106 F.3d 1368, 1373 (7th Cir. 1997) (stating court's "independent duty to assess *sua sponte*" questions of federal jurisdiction).



court – because judicial action beyond the subject-matter jurisdiction of a federal district court, as established by Congress, violates separation of powers, affronts judicial federalism (the relationship between federal and state courts), and may violate Article III of the Constitution.<sup>178</sup> Moreover, because the issue is before the appeals court whether or not the parties raised it, and because the issue is properly addressed *before* the issues directly raised by the immediately appealable order<sup>179</sup> and without regard to whether the jurisdictional and the merits issues share any factual nexus or any overlapping legal issues, as a matter of linguistic usage, the jurisdictional issue should not be regarded as being within the court's "pendent" appellate jurisdiction.<sup>180</sup> Once that is recognized, the notion that an appeals court may explore the jurisdiction of the district court only if that issue falls within the exceptions noted in *Swint* falls away.<sup>181</sup>

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178. See *Finley v. United States*, 490 U.S. 545, 552-56 (1989) (finding lower court's exercise of supplemental jurisdiction, which had not been explicitly authorized by Congress, to be unconstitutional usurpation of power); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) (striking down, as violative of Article III, statute purporting to confer federal jurisdiction over all suits involving aliens because Constitution extends judicial power of United States only to cases between aliens and U.S. citizens); see generally 13 WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS* 2D § 3522, at 60-62, 66-69 (1984 & Supp. 2001) (emphasizing unconstitutionality of federal courts taking jurisdiction over cases that they lack jurisdiction to hear under U.S. Constitution and Acts of Congress; restrictions on jurisdiction of federal courts involve "delicate problems of federal-state relations").

179. See *Mottley*, 211 U.S. at 152 (raising issue of subject-matter jurisdiction sua sponte and noting Court's responsibility to do so; not reaching merits of case once Court concluded that federal courts lacked jurisdiction); *Bertulli v. Indep. Ass'n of Continental Pilots*, 242 F.3d 290, 294 (5th Cir. 2001) (concluding that, despite limited scope of appeal from class certification orders, appeals court may consider plaintiffs' constitutional standing to sue, when reviewing grant or denial of class certification); *Children's Healthcare Is A Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1419 (6th Cir. 1996) (Batchelder, J., writing separately) (concluding that, on collateral order appeal, issue of plaintiff's standing also comes before appeals court); *Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 693-94 (5th Cir. 1995) (upon appeal of grant of preliminary injunction, court determined only that district court did not have subject-matter jurisdiction over action and remanded with instructions to district court to remand removed action to state court); *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 421 (9th Cir. 1991) (reviewing district court's subject-matter jurisdiction before reviewing grant of preliminary injunction).

180. If the issue is raised by the appeals court sua sponte, lawyers probably do not consider it a matter of pendent appellate jurisdiction. We might so regard it if a party seeks to have the appellate court review the district court's denial of a motion to dismiss for lack of subject-matter jurisdiction in conjunction with the § 1292(a)(1) appeal. However, for the reasons stated above, it seems more accurate to regard the court's jurisdiction to determine the district court's and its own subject-matter jurisdiction as independent (rather than pendent), although admittedly the *occasion* for immediate appellate consideration of the issue is created by the interlocutory appeal. But for that appeal the jurisdictional issue would be reviewable only after final judgment.

181. Much of the above discussion concerning pendent appellate jurisdiction is derived from Steinman, *supra* note 170, at 1399-1401.

In contrast to my view that matters of district court subject-matter jurisdiction should be addressed on interlocutory appeals regardless of whether they fit within the *Swint* categories of acceptable occasions for pendent appellate jurisdiction, it is my view that, even though personal jurisdiction also is a prerequisite to the proper entry of judicial orders against parties, appellate courts should consider the propriety of a district court's exercise of personal jurisdiction over defendants, on the occasion of an interlocutory appeal, only when that issue properly can be heard as matter of pendent appellate jurisdiction, or when the decision to exercise personal jurisdiction was rendered in an order that was § 1292(b) certified or that entered or denied an injunction and hence is part of an order that is immediately appealable in its entirety. (As construed, §§ 1292(a)(1) and 1292(b) directly confer jurisdiction over the entire such orders. *See Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996) (stating that under §1292(b), "appellate jurisdiction applies to the *order* certified . . . and is not tied to the particular question formulated by the district court"); *Smith v. Vulcan Iron Works*, 165 U.S. 518, 525-26 (1897) (finding §1292(a)(1) intended to authorize appeal from whole interlocutory order or decree, not from only that part which grants or continues injunction).) The jurisdiction would be pendent because appellate courts do not consider issues of personal jurisdiction *sua sponte* and could not consider such issues unless the defendants had timely objected to, or moved to dismiss for, lack of personal jurisdiction in the district court and then appealed the denial of their motion in conjunction with their interlocutory appeal. (Had the defendants failed to make timely objection in the trial court, they would have waived their objections under the Federal Rules of Civil Procedure. FED. R. CIV. P. 12(h)(1).) Moreover, judicial action in the absence of personal jurisdiction over defendants violates only the due process liberty interests of the individuals involved; it is no longer viewed as an affront to another sovereign. *See Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites des Guinee*, 456 U.S. 694, 703 n.10 (1982) ("The restriction on state sovereign power . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause"). Consequently, no interests equivalent to those that support appellate consideration of subject-matter jurisdiction at the first opportunity dictate similarly prompt appellate consideration of personal jurisdiction. Thus, if the propriety of the trial court's exercise of personal jurisdiction over defendants can be heard on the occasion of an interlocutory appeal, it can be heard only as pendent to that appeal or when the personal jurisdiction ruling is part of an immediately appealable order.

In the former instance, it should be so heard only if the issues raised by the interlocutory appeal and by the controversy over personal jurisdiction share a common nucleus of operative fact or overlapping legal issues, because only then may the economies gained by simultaneous decisions outweigh the policies that normally would postpone review of personal jurisdiction issues until after final judgment. The system should work in this way even though personal jurisdiction is a threshold issue that may be dispositive while the interlocutory appeal may not have the potential to dispose of the case because, if it were otherwise, the mere fortuity of an interlocutory appeal would overturn the policies that led Congress to conclude that there ordinarily should be no immediate appeal of denials of motions to dismiss for lack of personal jurisdiction. Limiting pendent appellate jurisdiction over personal jurisdiction issues also has the virtue of sharply reducing the occasions on which litigants might be tempted to appeal an order primarily as a vehicle to get an early appellate ruling on personal jurisdiction issues. While allowing courts of appeals to address unrelated issues of personal jurisdiction on the occasion of an interlocutory appeal would not interrupt otherwise uninterrupted trial court proceedings, it would have other disadvantages: such a system would lessen district court control and authority, might cause district courts to be less careful in making rulings that they foresaw would soon be reviewed, would result in the consumption of appellate time and energy that might never have had to be expended, and would delay the resolution of interlocutory appeals

Upon an interlocutory appeal, the court of appeals also has to confirm that *it* has jurisdiction to hear the appeal at that time, under an exception to, or an interpretation of, the final judgment rule.

*C. Appellate Jurisdiction as a Prerequisite to Appellate Action  
on the Merits*

Just as district courts must have subject-matter jurisdiction over actions and personal jurisdiction over parties to render binding judgments on the merits,<sup>182</sup> so too appellate courts must have appellate jurisdiction over actions and personal jurisdiction over parties to render binding judgments. The black letter principles are well established. Speaking of subject-matter jurisdiction, the Court has said, "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of [the appellate] court, and then of the court[s] from which the record comes,"<sup>183</sup> regardless of whether the

by expanding their scope. This would create a less efficient system. *See* Steinman, *supra* note 170, at 1401-04 (arguing that appellate courts should hear questions of personal jurisdiction along with § 1292(a)(1) appeal only if controversy over personal jurisdiction shares facts or legal issues with injunctive order that is occasion for appeal).

182. RESTATEMENT (SECOND) OF JUDGMENTS § 11 (1982) states that "[a] judgment may properly be rendered against a party only if the court has authority to adjudicate the type of controversy involved in the action." Section 1 also makes subject-matter jurisdiction requisite for entry of a valid judgment. RESTATEMENT (SECOND) OF JUDGMENTS § 1 (1982). Judgments entered by district courts that lack personal or subject-matter jurisdiction are voidable, in specified circumstances. Sections 12 and 69 declare the circumstances in which the parties may challenge a court's subject-matter jurisdiction in subsequent litigation when a court has rendered a judgment in a contested action, while sections 65 and 66 provide the circumstances in which a default judgment rendered by a court lacking subject-matter jurisdiction may be avoided. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 12, 65, 66, 69 (1982) (noting requirements for challenging judgment of court without subject-matter jurisdiction). The Restatement similarly makes personal jurisdiction a prerequisite to entry of a valid judgment. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 1-9 (1982) (explaining requirements for courts to have personal jurisdiction). It also declares the methods by which parties may challenge a court's exercise of personal jurisdiction for the purpose of invalidating its judgment. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 10, 65, 66, 78-82 (1982) (describing process through which judgments may be challenged for lack of personal jurisdiction).

183. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)); *accord* *United States v. Brown*, 218 F.3d 415, 420 (5th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3479 (U.S. 2001) (noting that "appellate jurisdiction is not a matter of consent"); *Nilssen v. Motorola Inc.*, 203 F.3d 782, 784 (Fed. Cir. 2000) (holding that Federal Circuit lacked appellate jurisdiction over state law claims that remained after patent infringement claim had been dismissed without prejudice because case no longer arose under patent laws); *Brookes v. Comm'r*, 163 F.3d 1124, 1125-26, 1128-29 (9th Cir. 1998) (supporting dismissal of appeal for lack of jurisdiction for want of final order by concluding that precedent that permitted appellate review of final decision of tax liability as to separate tax years in multi-year claim, without certification as to finality of order under Rule 54(b), violated *Steel Co.*'s prohibition against exercise of hypothetical jurisdiction); *Williamson*

parties raise the issue. When a lower court lacked jurisdiction, the appeals court has jurisdiction, not to decide the merits, but to correct the error of the lower court in entertaining the suit.<sup>184</sup> If jurisdiction has ceased to exist in any federal court, by virtue of a case having become moot for example,<sup>185</sup> an appellate court's primary function is to announce that fact and dismiss the case.<sup>186</sup> If the lower court had original jurisdiction but the appeals court lacks

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v. UNUM Life Ins. Co., 160 F.3d 1247, 1250 (9th Cir. 1998) (stating that appellate jurisdiction always must be resolved before merits); *United States v. Vazquez*, 145 F.3d 74, 79 (2d Cir. 1998) (addressing before merits whether appellant was sufficiently aggrieved to have standing to appeal and whether her notice of appeal was defective).

184. *United States v. Corrick*, 298 U.S. 435, 440 (1936); see *Steel Co.*, 523 U.S. at 95 (explaining appellate courts' duty to correct lower courts' errors in exercising jurisdiction); *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 342 n.5 (6th Cir. 2000) (raising sua sponte and deciding favorably to relators in qui tam action issue of relators' standing to sue); *Mirage Resorts, Inc. v. Quiet Nacelle Corp.*, 206 F.3d 1398, 1400-01 (11th Cir. 2000) (reciting principles that federal appellate court must satisfy itself of both its own jurisdiction and that of lower courts and dismissing controversy without prejudice upon finding that district court lacked subject matter jurisdiction); *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000) (invoking obligation to confirm appellate and district court jurisdiction as predicate for examining ripeness of plaintiffs' claims for declaratory relief); *Harline v. DEA*, 148 F.3d 1199, 1202-03, 1206 (10th Cir. 1998) (relying on this principle to vacate judgment and remand with instructions to dismiss all claims without prejudice for lack of subject matter jurisdiction due to failure to exhaust administrative remedies).

185. See, e.g., *Bd. of Educ. v. Nathan R.*, 199 F.3d 377, 381 (7th Cir. 2000) (vacating district court's judgment and remanding with instructions to dismiss aspects of case regarding claim for special education services where merits became moot after district court issued its opinion); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 149 F.3d 303, 306-07 (4th Cir. 1998) (concluding that action was moot where plaintiffs had not appealed denial of only forms of relief that might be available to redress their injuries and therefore vacating district court's order and remanding with instructions to dismiss action), *rev'd*, 120 S. Ct. 693, 700 (Jan. 12, 2000) (reversing on grounds that case had not become moot); *Fidelity Partners, Inc. v. First Trust Co. of N.Y.*, 142 F.3d 560, 565 (2d Cir. 1998) (viewing *Steel Co.* as requiring court to address whether appeal had become moot, before addressing merits, and suggesting that it otherwise would have invoked "hypothetical jurisdiction").

186. See *Steel Co.*, 523 U.S. at 94 (relying on *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). An appeals court's power actually extends somewhat further. See, e.g., *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 20-22 (1994) (concluding that even when requirements of Article III are no longer met by piece of litigation, federal appellate courts may take some actions, including vacating judgment rendered by lower court and remanding with directions to dismiss, or deciding to let lower court judgment stand, or awarding costs); *Willy v. Coastal Corp.*, 503 U.S. 131, 137-39 (1992) (explaining that Article III court's order imposing sanctions under FED. R. CIV. P. 11 is constitutionally permissible even if it is later determined that court lacked jurisdiction, reasoning that no constitutional concern is implicated when order does not address merits of underlying suit, but only collateral issues); *United States v. Key*, 205 F.3d 773, 775 n.1 (5th Cir. 2000) (ruling on motions to supplement and correct record and for leave to file exhibits with appellate reply brief in case where appellate jurisdiction was lacking). The Court in *U.S. Bancorp* affirmed the principle that, if a case becomes moot, while the Court may not consider its merits, it may dispose of the case as justice requires and enter orders that are

appellate jurisdiction, the latter must dismiss the appeal,<sup>187</sup> although it may impose sanctions and enter housekeeping orders, where appropriate.<sup>188</sup>

In a number of instances, the Supreme Court has taken a hard line on the necessity for appellate jurisdiction. For example, in *Budinich v. Becton Dickinson & Co.*,<sup>189</sup> the Court held that, once the appeals court had concluded that an appeal from a final judgment was untimely, it lacked discretion to make its jurisdictional ruling prospective only and to consider the merits of the case.<sup>190</sup> The Court so concluded even though the consequence was that the losing party never could appeal.<sup>191</sup> The Court reached the same conclusion where an appeals court lacked jurisdiction for want of an immediately appealable final decision under the collateral order doctrine,<sup>192</sup> and where the Federal Circuit lacked statutory authority to hear a case but had acted on the merits in the interest of justice when the circuit court of appeals to which it had transferred

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necessary and appropriate to final disposition. *U.S. Bancorp*, 513 U.S. at 21-22. There is some inconsistency in federal appeals court decisions as to whether a court lacking subject-matter jurisdiction can properly impose a sanction that terminates a case on the merits. Compare *Ray v. Eyster*, 132 F.3d 152, 156 (3d Cir. 1997) (deciding that court without subject matter jurisdiction may not impose sanction that will terminate case on merits) with *Allen v. Exxon Corp.*, 102 F.3d 429, 431 (9th Cir. 1996) (affirming dismissals with prejudice, imposed as sanctions, despite district court's lack of subject matter jurisdiction).

187. See *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064 & n.1, 1067 (7th Cir. 1981) (stating that court of appeals must dismiss on its own motion when appellate jurisdiction is lacking, and doing so in this case); *State Fire & Cas. Co. v. Red Top Supermarkets, Inc.*, 304 F.2d 161, 162 (5th Cir. 1962) (stating that court of appeals without jurisdiction must dismiss appeal, and doing so here); *Lockwood v. Hercules Powder Co.*, 172 F.2d 775, 776-77 (8th Cir. 1949) (stating that if appealed orders are not appealable, court of appeals is without jurisdiction and must dismiss appeal, and doing so here); see also cases cited *supra* note 185.

188. See *Judd v. Univ. of N.M.*, 204 F.3d 1041, 1044-45 (10th Cir. 2000) (dismissing appeal for lack of jurisdiction to consider its merits and concluding that court had jurisdiction to impose filing restrictions on appellant); *supra* note 186.

189. 486 U.S. 196 (1988).

190. See *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (explaining reasons for appeals court's lack of jurisdiction). The plaintiff had not filed the notice of appeal within the time limits set by Federal Rules of Appellate Procedure 4(a)(1) and (a)(4), having erroneously believed that the time to appeal did not begin to run until entry of the trial court's attorney's fee award. See *Budinich*, 486 U.S. at 197-98 (stating cause for untimely appeal).

191. See *Budinich*, 486 U.S. at 203 (noting that judgment on merits was final when entered and appealable at that time). Petitioner's failure to file timely appeal foreclosed his chance to appeal. *Id.*

192. See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375-77, 379 (1981) (holding that where court of appeals was without jurisdiction to hear appeal under collateral order doctrine, it was without authority to decide merits and could not make its jurisdictional ruling prospective). The *Firestone* Court also noted that, in light of its conclusion that the Eighth Circuit lacked jurisdiction over the appeal, the Court had no occasion to address the issue of the petitioner's standing to attack the order from which appeal had been taken, an order allowing respondent to continue to represent the plaintiffs. *Id.* at 379 n.14.

the appeal had denied its own jurisdiction and transferred the case back.<sup>193</sup> "Equitable considerations are altogether irrelevant when a court lacks adjudicatory power."<sup>194</sup>

These scrupulous observances of the limits upon federal appellate jurisdiction do not occupy the field and tell the whole story, however. For example, the Court has reversed appellate judgments without reaching challenges to the appeals courts' jurisdiction, in part on the basis of the "traditional practice" of refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not the latter were properly raised by the parties. Thus, in *Neese v. Southern Railway Co.*,<sup>195</sup> the Court chose not to reach a Seventh-Amendment-based challenge to the court of appeals' jurisdiction to review the denial of a motion for a new trial based on alleged excessiveness of the verdict.<sup>196</sup> The Court concluded instead that, on the record, the court of appeals had erred in finding an abuse of discretion by the district court in its denial of the new trial motion, upon a remittitur of part of the verdict.<sup>197</sup> One could view this as an instance in which the Court assumed argu-

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193. See *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818-19 (1988) (vacating judgment of Federal Circuit and remanding with instructions to transfer case to Seventh Circuit, where Federal Circuit lacked jurisdiction and its only choices therefore were to dismiss or transfer case to court of appeals that had jurisdiction).

194. See *Felzen v. Andreas*, 134 F.3d 873, 877-78 (7th Cir. 1998) (dismissing appeal for want of jurisdiction upon conclusions that nonparty shareholders were entitled to appeal judgment in shareholders' derivative action and finding, on equitable grounds, that such holding could not be made prospective only), *aff'd by an equally divided court*, *Cal. Pub. Employees' Ret. Sys.*, 525 U.S. 315 (1999); see also *El Paso Natural Gas. Co. v. Neztosie*, 526 U.S. 473, 482 (1999) (observing that neither Rule 4 nor Rule 26(b) of Federal Rules of Appellate Procedure, and perhaps referring to that set of Rules generally, nor interests animating cross-appeal requirement, offered any leeway for making exceptions to cross-appeal requirement); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274-75 (1994) (mentioning that statutes repealing grants of jurisdiction operate on pending cases and explaining that Court regards parties as having "diminished reliance interests" in matters of procedure); *McLucas v. De Champlain*, 421 U.S. 21, 28-32 (1975) (carefully reviewing Supreme Court's own jurisdiction under 28 U.S.C. §§ 1252-53).

195. 350 U.S. 77 (1955).

196. See *Neese v. S. Ry. Co.*, 350 U.S. 77, 77-78 (1955) (reversing court of appeals while refusing to comment on constitutional question of jurisdiction when other grounds for decision were available). The argument was that the Seventh Amendment to the Constitution denies appellate power to judge excessiveness of a verdict. The Amendment states in pertinent part that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

197. *Neese*, 350 U.S. at 77-78; see also *Grunenthal v. Long Island R.R.*, 393 U.S. 156, 158 (1968) (stating that Court "had no occasion" to consider argument that court of appeals exceeded its constitutional or statutory powers in reviewing denial of motion to set aside verdict as excessive, where it assumed, without deciding, that appeals court was empowered to make review, and concluded that it nonetheless had erred in disturbing district court's denial of said motion). The "traditional practice" of refusing to decide constitutional questions when the

endo that the appellate court had jurisdiction and decided the case in favor of the party challenging appellate jurisdiction.<sup>198</sup>

As *Neese* illustrates, in the appellate context, decisions "on the merits" often are framed in procedural terms.<sup>199</sup> Because appeals prototypically assert that the district court judge erred in one or more ways, the issues presented on appeal often are framed in procedural terms: did the district court judge err in granting or denying a motion, in admitting or refusing to admit evidence, in giving or refusing particular jury instructions, and the like? These issues constitute "the merits" of the appeal, although they generally are one or more steps removed from substantive law or fact questions.

In *Norton v. Mathews*<sup>200</sup> the Court declined to decide whether the action properly had been brought in a three-judge district court and hence whether it correctly was before the Supreme Court on a direct appeal.<sup>201</sup> This time, the Court justified its bypass of the appellate jurisdictional question on the grounds that, because the merits question was decided in a companion case,<sup>202</sup> resolution of the jurisdictional question would have had no effect on the outcome: if its jurisdiction had correctly been invoked, the Court would have affirmed summary judgment for the defendant, and if jurisdiction were lacking, the Court would have dismissed the appeal, vacated the judgment, and remanded, but the identical outcome would have been foreordained in subsequent proceedings before a single federal judge.<sup>203</sup>

It seems to me that the Court also has taken the position that other values sometimes can predominate over the need for "actual" appellate jurisdiction. This position seems implicit in the Court's prescription that, under "law of the

record discloses other grounds of decision does not explain the Court's assumption in *Grunenthal* of power to undertake the challenged review under the Federal Employers' Liability Act. *See id.* at 156-57 (noting Court's grant of certiorari to review of Federal Employers' Liability Act).

198. The party challenging appellate jurisdiction had won in the trial court, and thus opposed review of the denial of a motion for a new trial. The effect of finding error in the appeals court's reversal of the trial court was to affirm the trial court's judgment on the merits. Thus, the same party prevailed in the case as would have prevailed had the intermediate court of appeals been held to lack jurisdiction, as is typical of hypothetical jurisdiction situations. *See infra* text accompanying note 230.

199. *See Neese*, 350 U.S. at 77 (noting that procedural decision that court of appeals abused its discretion acts as decision based on merits of case).

200. 427 U.S. 524 (1976).

201. *See Norton v. Mathews*, 427 U.S. 524, 530-31 (1976) (refusing to address jurisdictional issues).

202. *See Mathews v. Lucas*, 427 U.S. 495, 497-503, 516 (1976) (upholding denial of social security benefits to illegitimate children of deceased parent on grounds that Congress's failure to extend presumption of dependency to illegitimate children not living with their parent at time of parent's death did not constitute illegal discrimination).

203. *See Norton*, 427 U.S. at 525, 528-32 (discussing ramifications of Court's decision to invoke jurisdiction); *supra* note 29.

case" principles, if a transferee appellate court can find the transfer decision "plausible," its jurisdictional inquiry should end so that cases do not become the ball in a game of "jurisdictional ping-pong."<sup>204</sup> Thus, because law of the case is not itself jurisdictional,<sup>205</sup> an appeals court can assume, without deciding, that it has jurisdiction over an appeal (based on law of the case), and proceed to decide the merits. In my view, that is close to an example of hypothetical (or assumed) appellate jurisdiction, although it is distinguishable from most instances in that *some* court has addressed and decided the issue.

These cases illustrate that, in the context of appellate jurisdiction (as in the realm of district court jurisdiction), the Court has rendered some decisions that have diluted the purity of the principle that courts must not resolve contested questions "on the merits" when their jurisdiction is in doubt.

#### D. Hypothetical Appellate Jurisdiction before Steel Co.

##### 1. The Theory

The standard formulation of the doctrine of hypothetical jurisdiction was essentially that, "when the merits of the case are clearly against the party seeking to invoke the court's jurisdiction, the jurisdictional question is especially difficult and far-reaching, and the inadequacies in the record make the case a poor vehicle for deciding the jurisdictional question, [a court] may rule on the merits without reaching the jurisdictional contention."<sup>206</sup> The primary rationales for hypothetical jurisdiction were judicial economy and judicial restraint, although it also could serve other institutional values.<sup>207</sup> Federal

204. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818-19 (1988).

205. Law of the case does not limit a court's power but merely embodies a practice of courts to refuse, in general, to reopen what has been decided. See *United States v. Gama-Bastidas*, 222 F.3d 779, 784-85 (10th Cir. 2000) (noting that "law of the case" is not jurisdictional, but discretionary). See generally Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 597-613 (1987) (describing how "law of the case" precludes relitigation of issues within single case and establishes rules of sound practice that permit progress toward judgment without disabling courts from altering interlocutory decisions when appropriate); Allan D. Vestal, *Law of the Case: Single-Suit Preclusion*, 12 UTAH L. REV. 1, 1-4 (1967) (describing and evaluating how "law of the case" operates).

206. *House the Homeless, Inc. v. Widnall*, 94 F.3d 176, 179 n.7 (5th Cir. 1996). Professor Idleman characterizes this as the standard formulation. Idleman, *supra* note 4, at 245. The Court in *Steel Co.* summarized the doctrine as making it proper for a court to proceed to the merits when the merits question is more readily resolved than jurisdictional objections and the prevailing party on the merits would be the same as he who would prevail were jurisdiction denied. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93 (1998); see Idleman, *supra* note 4, at 246-47 (describing other formulations).

207. See Idleman, *supra* note 4, at 247, 312-13 (discussing rationales for hypothetical jurisdiction); *infra* text accompanying notes 226-27 (discussing institutional values); see also Comment, *supra* note 34, at 713 (arguing that "the principled exercise of hypothetical jurisdiction



courts believed it permissible to reap these benefits and to slight the ordinary sequence of decision because, with the litigation's outcome remaining the same, there was no unfairness to the parties.

How do the doctrine and these justifications apply to hypothetical appellate jurisdiction?

*a. Application of the Doctrine*

The doctrine can apply to appellate jurisdiction. Cases on appeal can pose merits questions that are more readily resolved than objections to the appellate court's jurisdiction, and the prevailing party on the merits can be the person who would prevail if appellate jurisdiction were denied. Questions of appellate jurisdiction can be difficult and far-reaching, and the inadequacies in the record can make a case a poor vehicle for deciding the jurisdictional question.

*b. Justifications: Judicial Economy, Judicial Restraint, Other Institutional Values, and Fairness*

*(1) Judicial Economy*

The doctrine's requirement that the merits be easily, or at least more easily, resolved than the jurisdictional issue is a critical underpinning of the judicial economy argument. Without relative ease of resolution, the economies to be gained would be small.<sup>208</sup> But, if the merits are substantially easier to resolve than the issues of appellate jurisdiction, the appellate court saves substantial resources in focusing only on the former. There is economy in appellate judges sparing themselves "the time and energy [required for] 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."<sup>209</sup> Moreover, as Professor Idleman has written, "a circuit court's use of the doctrine essentially precludes certiorari review of the jurisdictional ruling, and, to the extent the jurisdictional issue might have been clarified by further fact-finding or argument, obviates the need for either a remand or for supplemental briefing."<sup>210</sup> Thus, appellate use of hypothetical jurisdiction may save resources of the United States Supreme Court, of intermediate appellate courts, of district courts, and of participants in their processes. While Professor Idleman may

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can avoid unnecessary consideration of constitutional questions, conserve judicial resources, and aid in the administration of justice").

208. See Idleman, *supra* note 4, at 252-53 (explaining that judicial economy is gained when outcome is same regardless if based on lack of jurisdiction or on lack of merits). If the jurisdictional issue were easily resolved, there would be no reason to bypass it. *Id.* at 254.

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

210. Idleman, *supra* note 4, at 247.

have been thinking primarily about courts of appeals hypothetically assuming the *district* court's jurisdiction and proceeding to the merits, his explication of judicial economies to be gained by a hypothetical assumption of jurisdiction applies equally to appellate jurisdiction.<sup>211</sup>

As indicated above, the condition of exercising hypothetical jurisdiction used by some courts, that the record or briefing of the jurisdictional issue be inadequate, also relates to judicial economy.<sup>212</sup>

Hypothetical jurisdiction under such circumstances plainly saves the parties and the court the time and resources that further development of the record [or further brief-writing] would inevitably entail. In particular, to the extent the jurisdictional question is tied to . . . undetermined facts, this requirement makes most sense at the appellate level, where there is little capacity for fact-finding and resolution of the jurisdictional issue would therefore require a remand.<sup>213</sup>

The quoted statement holds true whether the jurisdictional question as to which the record is inadequate, or that has not been adequately briefed, involves district court or appellate jurisdiction.

By allowing a court to reach the merits, the exercise of hypothetical jurisdiction, if permissible, also would enable courts, especially courts of appeals, to establish precedent on merits issues, reducing uncertainty in the substantive law. Particularly when that precedent would eliminate nonmeritorious suits, substantial economies would result for both courts and parties.<sup>214</sup> However, to the extent that hypothetical jurisdiction would be exercised in situations that are easy to resolve on the merits precisely because precedent already has been set on the issue presented, this argument loses much of its punch.

Prior to *Steel Co.*, the discretionary nature of the Supreme Court's jurisdiction,<sup>215</sup> the low probability that the Court would grant certiorari in any

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211. Of course, as Idleman observes, the failure to confront a jurisdictional question can be uneconomical insofar as it creates or perpetuates uncertainty and future litigation over the same jurisdictional issue. *Id.* at 248, 255-56. Moreover, the assertion of hypothetical jurisdiction where jurisdiction, if examined, would be found not to exist, is uneconomical insofar as it keeps courts engaged in adjudicating cases that they otherwise would have dismissed (in the case of a district court) or remanded (in the case of an appellate court). *See id.* at 256 (noting how judicial economy may be lost if courts utilize hypothetical jurisdiction to avoid deciding jurisdictional issues).

212. *Id.* at 257-58.

213. *Id.*

214. *See id.* at 310 (explaining attraction to courts of using hypothetical jurisdiction to eliminate suits without merit).

215. Where a statute provides for "appeal" to the Supreme Court and appellate review is requested, the Court is obligated to take and decide a case. However, under current statutes, almost all cases go to the Court by writ of certiorari, and the Court has unfettered discretion as

particular case,<sup>216</sup> and the Supreme Court's apparent approval of hypothetical appellate jurisdiction, gave courts of appeals minimal reason to fear a Supreme Court reversal founded upon their exercise of hypothetical appellate jurisdiction. Thus, courts of appeals could largely rest assured that their efforts on the merits would not be wasted.<sup>217</sup> After *Steel Co.*, the risk is far greater that the Supreme Court will reverse, require attention to the issue of appellate jurisdiction, and create the risk that the appellate court's decision on the merits will have to be vacated.

## (2) *Judicial Restraint*

As Professor Idleman has noted, "[I]t is rather ironic to depict the assumption of jurisdiction as an act of 'restraint' . . . when there may be no jurisdiction at all."<sup>218</sup> Nonetheless, the argument that exercise of hypothetical jurisdiction is an exercise in judicial restraint has roots in the canon that a court should not decide a constitutional question when it can decide a case on

to whether to grant the writ. See generally ERWIN CHEMERINSKY, FEDERAL JURISDICTION §10.3.2 (3d ed. 1999) (distinguishing between writs of certiorari and direct appeals). Rule 10 of the Supreme Court Rules states that "[a] petition for writ of certiorari will be granted only for compelling reasons," and indicates that the reasons that the Court will consider include whether a matter is an important federal question and is a subject on which federal courts of appeals or such courts and state courts of last resort, or state courts of last resort among themselves, are in conflict; whether an important question of federal law should be settled by the Court; whether an important lower federal court decision conflicts with decisions of the Court; and whether a decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's supervisory power. SUP. CT. R. 10.

216. Data compiled by the Harvard Law Review for the 1996-99 Supreme Court Terms (the last Terms for which the data has been published, at present) indicates that review was granted in the following percentage of cases in which it was sought: 1996-97 Term: 3.6%; 1997-98 Term: 3.56%; 1998-99 Term: 3.5%. See *The Supreme Court, 1998 Term - The Statistics*, 113 HARV. L. REV. 400, 406-07 (1999) (discussing statistics of numbers of cases reaching Supreme Court); *The Supreme Court, 1997 Term - The Statistics*, 112 HARV. L. REV. 366, 372-73 (1998) (same); *The Supreme Court, 1996 Term - The Statistics*, 111 HARV. L. REV. 431-35 (1997) (same). The notes to the respective tables explain how the figures were derived.

For a combination of reasons, it also was unlikely that the issue of the propriety of hypothetical jurisdiction ever would have been squarely presented. Among other things, if the lower court was correct on the merits, which it likely would be on a merits issue viewed as easily resolved, the losing party would not likely seek appellate review because the alternative outcome of dismissal from federal court for lack of jurisdiction, to be left to a state court proceeding that would likely reach the same result, would not be attractive. See Idleman, *supra* note 4, at 278, 305-08 (listing reasons why losing parties may choose not to appeal).

217. In the wake of *Steel Co.*, the Supreme Court could grant certiorari, vacate the judgment, and reverse for reconsideration in light of *Steel Co.*, if the Court thought that a court of appeals was guilty of impermissibly exercising hypothetical appellate jurisdiction.

218. Idleman, *supra* note 4, at 249. Idleman then argues that the actual applications of hypothetical jurisdiction do not fit comfortably with the restraint rationale. *Id.* at 250-52.

another basis.<sup>219</sup> This rationale can apply in the context of appellate jurisdiction when the jurisdictional issues to be foregone are of constitutional stature, as issues of mootness may be. The restraint argument also may be rooted in an idea that courts should, if possible, avoid decisions of jurisdictional questions that touch upon delicate matters of separation of powers, as issues of justiciability may do.<sup>220</sup> This rationale can apply in the context of appellate jurisdiction, because issues of justiciability (including limitations on adjudication of "political questions") can be presented in the context of appellate jurisdiction. By contrast, the rationale that avoidance of a jurisdictional issue can further the values of federalism by "minimiz[ing] the intrusion of the federal judiciary into the business of the states" (for example, when the immunity of states or state officials would be in question)<sup>221</sup> seems not to be as relevant when intermediate appellate, rather than federal district court, jurisdiction is the focus of attention. While district court jurisdiction typically has federalism implications because the litigation that the federal courts are not empowered to hear typically belongs to the state judiciaries, the division of authority between federal trial and intermediate appellate courts is, for the most part, a matter of federal concern only.<sup>222</sup> The exercise of federal appellate jurisdic-

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219. *Id.* at 248. The Supreme Court has counseled that federal courts should not decide constitutional questions unless it is necessary to do so; thus, a federal court should consider whether there is a non-constitutional ground of decision, and, if there is, should decide the case on that ground. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981) (implementing requirement that, prior to reaching constitutional questions, federal courts must consider non-constitutional grounds for decision, by considering whether district courts have authority under Federal Rules to impose sweeping limits on communications by named plaintiffs and their counsel to prospective class members, and deciding case under Federal Rules, despite Court's grant of certiorari to decide whether order so limiting such communications was constitutionally permissible); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (summarizing rules through which Court has avoided passing upon constitutional questions, including rule that Court will not pass upon properly presented constitutional question if record presents some other ground on which case may be decided); *Burton v. United States*, 196 U.S. 283, 295 (1905) (noting that it is not "habit" of Court to decide constitutional questions unless absolutely necessary to decision of case). However, the canon permits courts to avoid constitutional questions only "where the saving construction is not 'plainly contrary to the intent of Congress,'" *Miller v. French*, 530 U.S. 327, 341 (2000) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)), and where the court is not pressing statutory construction "to the point of disingenuous evasion." *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933).

220. *See Idleman, supra* note 4, at 248-49 (noting that political question doctrine implicates separation of powers concerns).

221. *Id.* at 249.

222. Professor Rhonda Wasserman traced the bar of appellate review of remand orders in an effort to relieve the Supreme Court of an overloaded docket in the days prior to the creation of the intermediate federal appellate courts, a rationale that has long since lost its relevance. *See Rhonda Wasserman, Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 EMORY L.J. 83, 100-01 (1994) (explaining rationale behind bar of appellate

tion can, however, continue an intrusion of the federal judiciary into the business of the states. Moreover, when the jurisdiction of the U.S. Supreme Court to hear appeals from the highest court of a state is the focus, avoidance of a jurisdictional issue *can* further the values of federalism by minimizing intrusion of the federal judiciary into the business of the states. For example, intrusion might be avoided if the Court declined to question the clarity of a declaration by the highest court of a state that its decision was supported by an adequate and independent state ground.<sup>223</sup> Under current law, however, if the adequacy and independence of the state ground is not sufficiently clear, the Court *will* review the state court decision, rather than dismiss the case, vacate for clarification, or take some other less intrusive tack.<sup>224</sup>

Insofar as courts, in deciding whether to exercise hypothetical jurisdiction, also looked to whether decision of the jurisdictional issues would have far-reaching implications (seeking to avoid decision of such issues, as a matter of self-restraint) and gave this prong of the test a meaning independent of concerns about separation of powers or federalism,<sup>225</sup> the focus became

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review of remand orders). However, the bar has both additional purposes and effects that relate to federalism: it reduces disruption of state judicial proceedings with the concomitant delay and possible harassment that appeal of a remand order might entail, but when the remand is erroneous, the bar has the effect of denying defendants the congressionally conferred right to litigate, in a federal forum, claims within the district courts' jurisdiction. *Id.* at 108, 132; see *Heaton v. Monogram Credit Card Bank*, 231 F.3d 994 (5th Cir. 2000) (noting that justification for rule of non-review of 28 U.S.C. § 1447(d) remands is preventing delay in trial of remanded cases by extended litigation over jurisdictional issues); Comment, *Removal, Waiver, and the Myth of Unreviewable Remand in the Fifth Circuit*, 45 BAYLOR L. REV. 723, 735, 748 (1993) (noting that bar furthers state court's interest in speedy resolution of merits). For criticisms of 28 U.S.C. § 1447(d), see Michael E. Solomine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 MO. L. REV. 287, 232-33 (1993) (arguing that § 1447(d) needs to be repealed or modified); Joan Steinman, *Postremoval Changes in the Party Structure of Diversity Cases: the Old Law, the New Law, and Rule 19*, 38 KAN. L. REV. 863, 951-54 (1990) (describing perverse aspects of law governing reviewability of remands and dismissals); Joan Steinman, *Removal, Remand, and Review in Pendent Claim and Pendent Party Cases*, 41 VAND. L. REV. 923, 1007 (1988) (arguing that Congress "should reconsider the statutory prohibition against appellate review of remand orders").

223. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (declaring that "[i]f the state court decision indicates clearly and expressly that it is . . . based on bona fide separate, adequate, and independent grounds, we . . . will not undertake to review the decision").

224. See *id.* at 1038-39 (discussing various approaches Court historically had taken when unsure whether state court decision was supported by adequate and independent state grounds). Thus, one might conclude that the notion that avoidance of jurisdictional issues can further federalism by minimizing intrusion into the business of the states now seems inapplicable in the context of Supreme Court review of final decisions from the highest court of a state because it is only by questioning its jurisdiction, on grounds such as the adequate and independent state ground doctrine, that the Supreme Court can avoid intrusion upon state judiciaries.

225. Idleman indicates that some courts conflated these concerns. See Idleman, *supra* note 4, at 254-55 (stating that, if implications of jurisdictional determination were few, "restraint-related concerns, such as the separation of powers and federalism, would likely be minimized").

whether the jurisdictional decision would likely affect large numbers of litigants. In the context of appellate jurisdiction, this prong would "mean" that, other things being equal, an appellate court would tend to hypothetically assume (rather than decide an issue of) appellate jurisdiction if decision of the issue would likely affect large numbers of appellants or appellees, more than when the issue would likely affect few, if any, parties beyond those presently before the court.

### (3) *Other Institutional Values*

Exercises of hypothetical jurisdiction may (a) contribute to reasoned judgments as to the circumstances in which federal courts may reserve difficult questions of jurisdiction in favor of deciding more easily resolved merits issues;<sup>226</sup> (b) avoid disagreements with coordinate federal courts on jurisdictional issues, thereby avoiding inconsistency; (c) lead to the resolution of substantive law issues; and (d) conserve federal judicial resources by dismissing claims on grounds that would prevent the parties from later re-asserting those claims.<sup>227</sup> These values can be served by hypothetical appellate jurisdiction, as well as by hypothetical district court jurisdiction.

When it is unclear how a jurisdictional question should be resolved, an error in concluding that jurisdiction exists or an arguendo assumption that jurisdiction exists seems less serious than a clearly erroneous assertion of jurisdiction. For that reason, at least arguably, competing policies such as those favoring the avoidance of constitutional questions, conserving judicial energy, and improving judicial administration in other respects, might justify the assertion of hypothetical appellate jurisdiction in cases involving difficult jurisdictional issues as to which there are substantial grounds for difference of opinion.<sup>228</sup>

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226. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 110-11 (1998) (O'Connor, J., concurring) (opining that Court's opinion should not be read to exhaustively list circumstances in which federal courts may exercise judgment in reserving difficult questions of jurisdiction when case could be resolved on merits in favor of same party). See generally Idleman, *supra* note 4, at 312-13 (noting that courts' use of hypothetical jurisdiction can preserve institutional values of federal courts - "exercise of judgment, respect for coordinate federal courts, and maintenance of the Article III judiciary as a forum for meritorious suits"); Kathleen M. Sullivan, *The Supreme Court, 1991 Term - Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 79-80 n.395 (1992) (discussing reasoned judgment, described as capacity which, by tradition, courts always have exercised, and reasoned elaboration, described as judicial method that requires judges to investigate and to creatively extend purposes of legislature).

227. These grounds would include failure to state claims upon which relief can be granted, particular parties' lack of standing to sue, and the like. See Idleman, *supra* note 4, at 313 (noting that Justice O'Connor's concurrence in *Steel Co.* sought to avoid limiting federal courts' use of reasoned judgment in reserving difficult issues of jurisdiction).

228. See Comment, *supra* note 34, at 727, 729-32 (listing advantages in judicial economies gained by courts' use of hypothetical jurisdiction, especially in cases where jurisdictional issues could go either way).

It also may be that appellate courts, by virtue of their place in the judicial system, should have greater discretion than district courts to exercise hypothetical jurisdiction. Although intermediate courts of appeals (unlike the Supreme Court) do not have predominantly discretionary dockets, it can be argued that they too should have some ability to postpone decision of certain issues, while those issues percolate through other courts or while other events transpire that facilitate resolution. Exercise of hypothetical jurisdiction could be a useful tool for allowing the resolution of jurisdictional issues to be postponed to a time when a court can better resolve the issues,<sup>229</sup> a tool that augments the jurisdictional discretion that appellate courts have under such statutes and rules as 28 U.S.C. § 1292(b) and Rule 23(f), and on petitions for extraordinary writs.

#### (4) Avoidance of Unfairness

The requirement that the merits be resolved against the party seeking appellate jurisdiction also is essential to the exercise of hypothetical appellate jurisdiction. If a court dismisses for lack of appellate jurisdiction, the decision below stands. Thus, a court can assume hypothetical appellate jurisdiction only if its decision on the merits has the same consequence as a dismissal for lack of appellate jurisdiction would have; that is, only if its decision on the merits goes against the appellant, who seeks appellate jurisdiction, and favors the challenger of appellate jurisdiction, who would be the winner below and the appellee. The effect of either a dismissal for lack of appellate jurisdiction or a decision on the merits must be the equivalent of an affirmance.<sup>230</sup>

This "fits" with the theory that, since the litigation's outcome is the same whether the route to it is jurisdictional or on the merits, there is no unfairness to the parties in slighting the ordinary sequence of decision. In the context of

229. See also *id.* at 732, 744 n.172 (arguing that "[c]onsiderations of judicial economy . . . justify allowing the range of discretion to increase with the degree of authority attaching to the court's judgment").

230. For example, assume that plaintiff *P* wins in the trial court, defendant *D* appeals, and *P* challenges appellate jurisdiction. A successful challenge to jurisdiction would lead to dismissal of the appeal and maintenance of *P*'s win at trial. The appeals court can assume hypothetical appellate jurisdiction only if its decision on the merits is in favor of *P* and against appellant *D*, who seeks appellate jurisdiction. Similarly, assume that defendant *D* wins in the trial court, plaintiff *P* appeals, and *D* challenges appellate jurisdiction. A successful challenge to jurisdiction would lead to dismissal of the appeal and maintenance of *D*'s win at trial. The appeals court can assume hypothetical appellate jurisdiction only if its decision on the merits is in favor of *D* and against appellant *P*, who seeks appellate jurisdiction.

As others have noted, by contrast, when one's focus is district court jurisdiction, it is not true that the consequence is the same whether a court rules for a party on jurisdictional grounds or on the merits, for *res judicata* effects will attach only to a decision on the merits. Moreover, "[p]rivate agreements among the parties or between the parties and their attorneys or indemnitors may also be affected by the form of the court's decision." *Clow v. United States Dep't of Housing & Urban Dev.*, 948 F.2d 614, 627 n.4 (9th Cir. 1991) (O'Scannlain, J., dissenting).

hypothetical *district court* jurisdiction, there may *be* unfairness if a party suffers an adverse judgment on the merits – which presumptively will have *res judicata* effect – when the judgment-rendering court lacked jurisdiction to enter the judgment and when an appeals court that did not hypothetically assume the district court's jurisdiction would have vacated the judgment and simply dismissed the case without prejudice.<sup>231</sup> This argument of unfairness is inapplicable in the context of hypothetical appellate jurisdiction, however. As long as the district court had subject-matter jurisdiction over the case and personal jurisdiction over the parties, its final judgment on the merits, if any, is valid, and is entitled to *res judicata* effects, regardless of whether the appellate court correctly assumed jurisdiction over the appeal and affirmed the judgment.<sup>232</sup> It is not clear that the losing party is treated unfairly by the use of hypothetical appellate jurisdiction except in the sense that one might loosely say it is "unfair" for an appellate court to assert jurisdiction over an appeal, and render a decision on the merits against a party, when it lacks jurisdiction to hear the appeal. Other litigants, who find themselves faced with an adverse precedent that the appeals court really did not have jurisdiction to create, seem to have a stronger argument of "unfairness" than the losing party in the case giving rise to the precedent.<sup>233</sup>

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231. See *Idleman*, *supra* note 4, at 253-54 (opining that adverse judgment, with prejudice, is unjust when courts lack jurisdiction, and that similarly-situated litigants might receive jurisdictional dismissal from different panel).

232. See *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22 (1994) (implying binding effect of judgments that are not reviewed on appeal in explaining that vacatur "clears the path for future relitigation of the issues between the parties" (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950))). See generally JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* § 14.7, at 666 (3d ed. 1999) (expounding upon requirements for application of *res judicata* that there be valid, final, judgment on merits, and noting that "[m]ost courts treat a judgment as final . . . if it conclusively disposes of the lawsuit in the rendering court, notwithstanding that an appeal has been taken or the time to appeals has not expired."); *supra* note 230 (explaining assertion that appellate court would be affirming trial court's judgment).

233. The litigants would not have any due process or similar argument because they would be bound by the judgment of the trial court, which had jurisdiction, and there is no constitutional right to an appeal. See, e.g., *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (observing in felony case that there is no "constitutional right to appeal"); *Abney v. United States*, 431 U.S. 651, 656 (1977) (stating that it is well established that there is no constitutional right to appeal of conviction); *Hill v. Hawes*, 320 U.S. 520, 525 (1944) (Stone, C.J., dissenting) (noting that in federal courts there is no right to appeal save as it is granted by Congress or by rule of court authorized by Congress); *United States v. Anglin*, 215 F.3d 1064, 1066 (9th Cir. 2000) (reiterating that there is no constitutional right to appeal, and that would-be appellant must find right to appeal in applicable statute). If the appeals court truly lacked jurisdiction, however, its decision on the merits might be subject to collateral attack. See Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 GA. L. REV. 399, 404 n.24 (1986) (arguing that if untimeliness of appeal were truly jurisdictional defect, decision on merits of untimely appeal would be forever subject to collateral attack). Ordinarily, a party that had an opportunity to litigate subject matter jurisdiction may not reopen that issue in a collateral attack. See *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982) (noting that



## 2. The Practice

Although exercised far less often than hypothetical jurisdiction concerning matters going to district court jurisdiction, hypothetical *appellate* jurisdiction had been exercised by the intermediate federal appellate courts. They had done all of the following:

— bypassed the jurisdictional question whether appellant had timely filed its notice of appeal, because of a factual dispute as to when appellant's Rule 59(e) motion was served;<sup>234</sup>

— assumed, without deciding, that a notice of appeal adequately named the court to which the appeal was being taken, as required by Federal Rule of Appellate Procedure 3(c);<sup>235</sup>

— asserted hypothetical appellate jurisdiction over the appeal of a criminal sentence, assuming, without deciding, that a plea agreement did not bar the defendant's appeal, where the agreement contained a waiver of the right to appeal a sentence within an indicated range but the district court had told the defendant that he could appeal the sentence if he thought there was anything illegal about it;<sup>236</sup>

— asserted hypothetical appellate jurisdiction over particular decisions by the Interstate Commerce Commission where the decision of a segment of a case as to which appellate jurisdiction was clear fully determined the out-

principles of res judicata apply to jurisdictional issues); see also Comment, *Hypothetical Jurisdiction and Interjurisdictional Preclusion: A "Comity" of Errors*, 28 PEPP. L. REV. 75, 85, 99-100 (2000) (urging that state courts should be free to relitigate non-merits issues that federal courts have decided when exercising hypothetical jurisdiction).

234. *Forster v. County of Santa Barbara*, 896 F.2d 1146, 1147 n.2 (9th Cir. 1990). The reference is to Rule 59(e) of the Federal Rules of Civil Procedure. See also *Karacsonyi v. United States*, No. 97-1220, 1998 U.S. App. LEXIS 15107, at \*4 (2d Cir. June 10, 1998) (concluding that court did not have to decide whether particular motion was civil or criminal and how long appellant had to appeal under Federal Rules of Appellate Procedure 4(a)(1) and (b), where appeal was meritless in any event); *United States v. Sheckley*, No. 96-1786, 1997 U.S. App. LEXIS 32024 (2d Cir. Nov. 10, 1997) (same); *United States v. Connell*, 6 F.3d 27, 29 n.3 (1st Cir. 1993) (questioning whether district court had jurisdiction to entertain motion for reconsideration long after appeal period had expired, but foregoing issue where appeal was easily resolved in favor of party challenging appellate jurisdiction).

235. See *Brooks v. Toyotomi Co., Ltd.*, 86 F.3d 582, 583, 586-87 (6th Cir. 1996) (accepting appeal and dismissing appeal on merits, thus allowing district court judgment to stand). The *Brooks* court explicitly chose to pretermitt the jurisdictional issue because it was strongly inclined to hold that appellate jurisdiction existed — where defects in the notice of appeal did not mislead or prejudice appellees and a proper notice would not have told them anything they could not readily have inferred — but it was concerned that such a decision would conflict with a holding of the Sixth Circuit sitting en banc. *Id.* *Brooks*'s vitality, in light of *Steel Co.*, was subsequently questioned in *United States v. Webb*, 157 F.3d 451, 453 (6th Cir. 1998). See also *Caribbean Transp. Sys., Inc. v. Autoridad de las Navieras*, 901 F.2d 196, 197 (1st Cir. 1990) (assuming that court had jurisdiction despite errors in notices of appeal and finding appellants' arguments to be without merit).

236. *United States v. Shepard*, 207 F.3d 455, 456 n.2 (8th Cir. 2000).

come of the segment (composed of other ICC decisions) as to which appellate jurisdiction was disputed;<sup>237</sup>

— asserted hypothetical appellate jurisdiction over the grant of a motion for summary judgment and indeed over an entire case, despite the lack of a Rule 54(b) certification, where the claims that technically were not yet resolved would be governed by law of the case on pure questions of law;<sup>238</sup>

— asserted hypothetical appellate jurisdiction over the appeal of an order requiring a witness to appear in response to an IRS summons, where the appellee conceded error as to the matter appealed;<sup>239</sup>

— asserted hypothetical appellate jurisdiction over orders of the Federal Communications Commission, while bypassing issues of prudential standing;<sup>240</sup>

— asserted hypothetical appellate jurisdiction over district court orders, without resolving whether the rulings were immediately appealable under the collateral order doctrine or otherwise as final decisions under 28 U.S.C. § 1291;<sup>241</sup>

237. *Burlington N. R.R. v. ICC*, 985 F.2d 589, 592-94 (D.C. Cir. 1993) (invoking hypothetical jurisdiction doctrine rather than resolving questions of appellate jurisdiction under 28 U.S.C. § 1336(b) and 49 U.S.C. § 10501(d), where resolving merits-issues required no extra expenditure of judicial resources because court had necessarily resolved those same issues in portion of case over which court plainly had jurisdiction); *see also* *Kaiser v. Armstrong World Indus., Inc.*, 872 F.2d 512, 513-14 (1st Cir. 1989) (assuming, without deciding, that court had jurisdiction over plaintiffs whose names did not appear in notice of appeal where court held that named appellant's action was time-barred and no argument was raised below that other plaintiffs' claims stood on any different footing with respect to statute of limitations); *S. Pac. Transp. Co. v. Usery*, 539 F.2d 386, 389 n.1 (5th Cir. 1976), (concluding that where finding that court lacked jurisdiction would produce same result as decision on merits and merits already were before court in other cases, court would not reach question whether order appealed from was reviewable).

238. *Federal Ins. Co. v. Scarsella Bros.*, 931 F.2d 599, 601 (9th Cir. 1991).

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

240. *Busse Broad. Corp. v. FCC*, 87 F.3d 1456, 1462-63 (D.C. Cir. 1996). The FCC argued, *inter alia*, that the appellants lacked prudential standing to challenge its waiver of its "duopoly rule." *Id.* at 1462. Although the court was unsure whether a situation had to meet all the usual requirements of hypothetical jurisdiction doctrine before the court could bypass a prudential standing issue, the court concluded that the case met all the usual criteria [of the merits being clearly against the party seeking jurisdiction, the jurisdictional question being exceptionally difficult and far-reaching, and inadequacies in the briefing making the case a poor vehicle for deciding the jurisdictional question]. *Id.* In addition, the parties who had lost below had filed a notice of appeal under 47 U.S.C. § 402(b)(6) and a petition for review under 47 U.S.C. § 402(a). *Id.* at 1460. On the ground that its analysis would be the same either way, the court also did not decide which provision governed. *Id.*

241. *Crocco v. Xerox Corp.*, 137 F.3d 105, 108-09 (2d Cir. 1998). The ruling in question remanded a claim to an ERISA plan administrator. The circuits are split on whether such orders are final appealable orders. *See id.* Compare *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975, 978-80 (7th Cir. 1999) (holding remands to ERISA plan administrators to be final appealable decisions), and *Snow v. Standard Ins. Co.*, 87 F.3d

— asserted hypothetical appellate jurisdiction in the face of unresolved questions of appealability under 28 U.S.C. § 1292(a)(1), as well as unresolved questions concerning the standing to appeal of the appellants and concerning whether some appellants had waived their right to appeal;<sup>242</sup>

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327, 332 (9th Cir. 1986) (same), *with* *Petralia v. AT&T Global Info. Solutions Co.*, 114 F.3d 352, 354 (1st Cir. 1997) (concluding that remands to ERISA plan administrators are not "final judgment[s]"), *and* *Shannon v. Jack Eckerd Corp.*, 55 F.3d 561, 563-64 (11th Cir. 1995) (holding that such remands are not final appealable decisions). The Second Circuit in *Crocco* also reversed the district court's determination that Xerox, plaintiff's employer, was a proper party, without discussion of whether the court had pendent appellate jurisdiction over that ruling. *Crocco*, 137 F.3d at 109. The court noted that the remedy plaintiff sought, the award of benefits, was available without Xerox's presence as a party. *Id.*; *see also* *SEC v. Am. Capital Inv., Inc.*, 98 F.3d 1133, 1136, 1139-42 (9th Cir. 1996) (concluding that where court had jurisdiction over appeal of one order under 28 U.S.C. § 1291(a)(1), court properly exercised hypothetical appellate jurisdiction over appeals of additional orders whose status as final appealable orders was unclear, appeal of which may have been rendered moot, and as to one of which it was unclear whether appeal had been timely); *United States v. Stoller*, 78 F.3d 710, 715 (1st Cir. 1996) (asserting jurisdiction over appeal from denial of motion to dismiss counts of indictment on double jeopardy/multiple punishment grounds where immediate appealability of order was unclear but merits would be resolved in favor of party challenging jurisdiction); *Jeffers v. Heavrin*, 10 F.3d 380, 382 n.2 (6th Cir. 1993) (addressing merits of interlocutory appeal of denial of qualified immunity, despite contention that there were unresolved pendent state claims, to serve judicial economy and because district court may have thought that its ruling disposed of all claims); *R.I. Hosp. Trust Nat'l Bank v. Howard Communications Corp.*, 980 F.2d 823, 829 (1st Cir. 1992) (concluding that court did not need to resolve whether lower court's finding of civil contempt was appealable because fine and sanctions were warranted); *FDIC v. Caledonia Inv. Corp.*, 862 F.2d 378, 380-81 (1st Cir. 1988) (affirming on merits after assuming that appellate jurisdiction would exist despite absence of Federal Rule of Civil Procedure Rule 54(b) certification where judgment was rendered that disposed of fewer than all claims in consolidated action but all claims in component thereof); *Locals 2222, 2320-2327, IBEW v. New England Tel. & Tel. Co.*, 628 F.2d 644, 646-47 (1st Cir. 1980) (assuming, without deciding, that order remanding to arbitration was appealable where jurisdictional question was "close" and overlapped with central substantive issue on merits and where district court's decision would be sustained whether appellate jurisdiction was exercised or not); *Massachusetts v. Hale*, 618 F.2d 143, 145 n.3 (1st Cir. 1980) (choosing not to resolve close issue of appealability concerning whether interlocutory order in question arose in proceeding in bankruptcy or in controversy arising in bankruptcy proceeding where merits compelled affirmance and court's views on merits might provide useful guidance in similar situations); *Brick v. CPC Int'l, Inc.*, 547 F.2d 185, 186-87 & n.5 (2d Cir. 1976) (affirming denial of class certification and denial of re-transfer of case, based on *arguendo* assumption that appeal was allowable under "death knell" doctrine).

242. *See* *Isby v. Bayh*, 75 F.3d 1191, 1195-97 (7th Cir. 1996) (exercising hypothetical appellate jurisdiction and affirming class action settlement in face of issues as to whether approval of settlement fell within 28 U.S.C. § 1292(a)(1), as to whether objectors lacked standing to appeal because they had failed to intervene, had been denied intervention or for other reasons, and as to whether some of objectors had waived their right to appeal); *see also* *Markgraf v. Storage Tech. Corp.*, No. 97-1166, 1998 U.S. App. LEXIS 1237, at \*6-7 (10th Cir. Jan. 28, 1998) (assuming appellant's standing to appeal in favor of resolving merits, which were much easier to resolve); *New York v. Vacco v. Reebok Int'l, Ltd.*, 96 F.3d 44, 48-49 (2d Cir. 1996) (concluding first that non-intervening beneficiaries of *parens patriae* suit had no standing

— asserted hypothetical jurisdiction rather than resolve whether an issue could properly be heard under the doctrine of pendent appellate jurisdiction;<sup>243</sup>

— assumed jurisdiction *arguendo* where it had been argued that the appeal should be dismissed as moot;<sup>244</sup>

— declined to decide whether appellate jurisdiction was precluded by 28 U.S.C. § 1447(d), where the challenger of jurisdiction easily prevailed on other grounds;<sup>245</sup>

— asserted hypothetical appellate jurisdiction to review a final order excluding an alien from the United States pursuant to the court's habeas jurisdiction, despite uncertainty as to whether § 440 (a) of the Antiterrorism and Effective Death Penalty Act affected that jurisdiction, when the court had determined that petitioner was not entitled to relief in any event;<sup>246</sup>

— asserted hypothetical appellate jurisdiction over an appeal from a judgment of conviction and sentence, despite the absence of a certificate of appealability<sup>247</sup> and without addressing the appellate court's jurisdiction to

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to appeal approval of settlement, then reviewing merits of their claims in view of circuit split on standing to appeal of absent class members and citing other cases in which courts had assumed standing *arguendo* or purported to make alternative holdings on merits); *United States v. Saccoccia*, 58 F.3d 754, 767 n.6 (1st Cir. 1995) (entertaining criminal defendant's argument that his trial and conviction transgressed principle of specialty, among other reasons because it was easier to dismiss his arguments on merits than to resolve dispute over whether criminal defendant has standing to raise such violation); *In re Villa Marina Yacht Harbor, Inc.*, 984 F.2d 546, 548 n.2 (1st Cir. 1993) (bypassing question whether district court order was appealable injunction, to resolve merits).

243. See *Hewlett-Packard Co. v. Berg*, 61 F.3d 101, 104-05 (1st Cir. 1995) (concluding that regardless of whether refusal to allow set-off was appealable in conjunction with appeal of confirmation of arbitration award or otherwise, refusal was not legal error so jurisdictional issue did not need to be decided).

244. See *RNR Enters., Inc. v. SEC*, 122 F.3d 93, 96 (2d Cir. 1997) (concluding that interests in judicial efficiency and restraint justified *arguendo* assumption of jurisdiction and consideration of merits where jurisdictional issue as to mootness was not previously decided and was difficult, issue was of constitutional stature, oral argument had indicated that further evidence might be necessary, the legal argumentation provided was incomplete, issue was "far-reaching" because it concerned investigative powers of administrative agency, and merits clearly favored party challenging appellate jurisdiction).

245. *Menorah Ins. Co. v. INX Reinsurance Corp.*, 72 F.3d 218, 223 n.9 (1st Cir. 1995).

246. *Hernandez-Rodriguez v. Pasquarell*, 118 F.3d 1034, 1045-47 (5th Cir. 1997); see also *Wong v. Ichert*, 998 F.2d 661, 662-63 (9th Cir. 1993) (assuming, without deciding, jurisdiction over appeal of order granting summary judgment against plaintiff in his action to enjoin INS and others from deporting him, when that jurisdictional question was far more difficult than issue on merits).

247. The certificate is required by 28 U.S.C. § 2253(c)(1)(B) (1994), in some circumstances. See *Mackey v. Dutton*, 217 F.3d 399 (6th Cir. 2000), *cert. denied*, 531 U.S. 1087 (2001) (stating that, when habeas petitioner seeks to appeal dismissal of his petition after effective date of Antiterrorism and Effective Death Penalty Act (AEDPA), right to appeal is governed by certificate of appealability requirements established by that statute). But see *Walker v. O'Brien*, 216 F.3d 626 (7th Cir.), *cert. denied*, *Hanks v. Pinfrack*, 121 S. Ct. 606 (2000)

grant or deny such a certificate in the absence of a district court ruling on whether to grant one;<sup>248</sup> and

— bypassed various other issues, characterized by the courts as jurisdictional, in favor of deciding cases more easily on merits grounds.<sup>249</sup>

I will not undertake here to assess whether each one of these assertions of hypothetical jurisdiction was justified under the specific, and somewhat varying, conditions that the various courts of appeals had established as necessary for an exercise of hypothetical jurisdiction. I am not so much concerned here with how well the courts respected the doctrinal requirements that they themselves framed as I am with whether and when hypothetical jurisdiction is theoretically defensible in the context of appellate jurisdiction and with how much in tension the doctrine, in that context, is with the Supreme Court's denunciation of hypothetical jurisdiction in *Steel Co.* In a later Part, I will indicate how I believe these exercises of hypothetical appellate jurisdiction fare against those standards. First, however, I want to explore what, if any, helpful perspective can be shed by other doctrines concerning appellate jurisdiction.

(concluding that state prisoners' habeas petitions challenging constitutionality of prison disciplinary proceedings as to fact or duration of confinement are not subject to AEDPA's certificate of appealability requirement).

248. *United States v. Williams*, 158 F.3d 736, 740-42 & n.4 (3d Cir. 1998). In this case, decided after *Steel Co.*, the court reasoned that, if it determined not to issue the certificate because the appellant failed to demonstrate his entitlement to one, it would find that the court lacked jurisdiction to proceed. *Id.* If it were to find itself powerless to issue the certificate, the same consequence would follow. *Id.* It said, "In these circumstances, . . . *Steel Co.* does not preclude us from treating Williams's notice of appeal as a request for a certificate of appealability and then denying it on the merits without first determining that Williams was not obliged initially to apply to the district court." *Id.* at 742. While the court recognized that it might have been appropriate to dismiss the appeal or remand to the district court for it to consider whether to grant a certificate of appealability, it chose not to do so because appellant's attorney acted in good faith, the result reached on the merits was straightforward, and the court did not want to protract the proceedings. *Id.* at 742 n.4; see also *United States v. Eyer*, 113 F.3d 470, 474-75 (3d Cir. 1997) (bypassing problems with certificate of appealability that could be considered jurisdictional, on basis of hypothetical jurisdiction doctrine, in part because order appealed from was undoubtedly final and only statutory provisions relating to such certificates cast doubt on court's jurisdiction).

I intend the list in text, *supra*, at notes 234-49 to be illustrative, not exhaustive.

249. See *United States v. Pion*, 25 F.3d 18, 22 n.3 (1st Cir. 1994) (bypassing question, characterized by court as jurisdictional, whether criminal defendant's constitutional challenges to jury composition are barred if not made in accordance with 28 U.S.C. § 1867(e) (1994), when jurisdictional question was difficult, parties had not raised it, and appellant would lose argument on merits); *Switlik v. Hardwicke Co.*, 651 F.2d 852, 856 n.3 (3d Cir. 1981) (in action to enjoin enforcement of state court judgment as violating plaintiff's First Amendment rights, declining to consider whether plaintiff had alleged state action sufficient to establish federal claim, stating that, to extent presence of state action is jurisdictional requirement, case was appropriate for assuming jurisdiction *arguendo* because state action issue was highly complex, its resolution posed high risk of being constitutionally erroneous, and judgment could be affirmed under well-settled principles of *res judicata* and collateral estoppel).

### 3. *The Perspective Shed by Other Doctrines Concerning Appellate Jurisdiction*

In the cases described above, the courts acted upon assumed or hypothesized appellate jurisdiction. In other cases, appellate courts found other ways to justify their exercise of appellate jurisdiction.

#### a. *Characterizing Potential Barriers as Non-Jurisdictional*

Appellate courts sometimes have found that they had authority to address merits issues after characterizing as non-jurisdictional matters that otherwise would have precluded the courts' consideration of those issues or cases.<sup>250</sup> For example, courts of appeals generally hold that they have jurisdiction to reach the merits of issues and of arguments not considered by the district court and first raised on appeal. Generally, they will *not* reach such matters, but the courts categorize the governing principle as a rule of practice that is subject to exceptions and leaves them discretion.<sup>251</sup> The Supreme Court has done

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250. See *Brown v. Bargery*, 207 F.3d 863, 865 & n.1 (6th Cir. 2000) (indicating that district court certification pursuant to 28 U.S.C. § 1915(a)(3) that appeal could not be taken in good faith is not jurisdictional bar to appeal); *United States v. Guzman-Landeros*, 207 F.3d 1034, 1035 (8th Cir. 2000) (determining that failure to advise appellant of his right, under treaty, to contact his consul was not jurisdictional defect and was therefore foreclosed by his plea of guilty to being alien found in United States after deportation).

251. See *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976) (stating that what questions may be addressed for first time on appeal is left primarily to discretion of courts of appeals and recognizing that there are circumstances in which federal appellate court is justified in resolving issue not passed upon below, such as when proper resolution is beyond doubt or where injustice otherwise might result); *Hormel v. Helvering*, 312 U.S. 552, 556-59 (1941) (stating that rule that appellate court ordinarily will not consider issues not raised below is essential so that litigants may not be surprised on appeal by final decision of issues upon which they had no opportunity to present evidence or legal argument, but adding that "[a] rigid and undeviating . . . practice under which courts of review would invariably . . . decline to consider all questions which had not previously been specifically urged would be out of harmony with . . . the rules of fundamental justice"); *United States v. Torres-Rosa*, 209 F.3d 4, 7 (1st Cir. 2000) (stating that, "absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal," and that this principle applies with undiluted force in criminal cases (quoting *Teamsters Union, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17, 21 (1st Cir. 1992)); *Jolly v. Knudsen*, 205 F.3d 1094, 1097 (8th Cir. 2000) (stating principles recited in text); *Gardenhire v. Schubert*, 205 F.3d 303, 319 (6th Cir. 2000) (applying principle that appellate courts are free to decline consideration of arguments made for first time on appeal); *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1372 n.5 (11th Cir. 1998) (exercising discretion to reach theories to support district court's jurisdiction, argued and supported by evidence but not decided below, where record was more than adequate, and judicial economy and fairness favored disposition of all asserted grounds); *Ochran v. United States*, 117 F.3d 495, 502-03 (11th Cir. 1997) (stating these principles; noting underlying policies, including that of avoiding prejudice to parties and serving judicial economy, and that little gain in judicial economy is achieved by refusing to consider pure legal arguments, as to which review is de novo; observing that court is justified in exercising its discretion to hear

something similar in repeatedly declining to decide whether the "not pressed or passed upon below" rule<sup>252</sup> is jurisdictional or merely prudential.<sup>253</sup> The Court usually says that it need not decide the character of the rule because, even assuming that the rule is merely prudential, the circumstances presented justify no exception.<sup>254</sup> By leaving the issue unresolved, however, the Court has left the door open to characterizing the rule as non-jurisdictional and entertaining unpressed, unaddressed issues if and when appropriate circumstances are presented.<sup>255</sup>

A second example: Federal Rule of Appellate Procedure 4(a)(3) provides for the filing of a cross-appeal within fourteen days after the date when the first notice of appeal was filed, or within the time otherwise prescribed by Rule 4(a), whichever ends later.<sup>256</sup> Courts of appeals permit appellees who

newly raised argument where interest of substantial justice is at stake; and reaching issue presented for first time on appeal where proper resolution was beyond doubt). *See generally* Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985, 1005-13 (1989) (examining general rule and principal exceptions, and proposing rule stating circumstances under which new issue should be heard on appeal).

252. This rule is that a federal claim must have been addressed by, or at least properly presented to, a state court before the Supreme Court will entertain it.

253. *See, e.g.*, *Adams v. Robertson*, 520 U.S. 83, 90 (1997) (concluding as described in text at notes 249-50); *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) (same); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988) (same; noting that "[c]arly opinions seemed to treat the requirement as jurisdictional, whereas more recent cases clearly view the rule as merely a prudential restriction"); *Illinois v. Gates*, 462 U.S. 213, 217-24 (1983) (discussing "not pressed or passed upon below" rule); *see also* *Lambrix v. Singletary*, 520 U.S. 518, 539 (1997) (describing Court as having found itself without jurisdiction to decide issue in *Sochor v. Florida*, 504 U.S. 527, 533-34 (1992), because defendant had failed to preserve his objection in state courts, and his failure was adequate and independent ground for state court's ruling).

The Court has concluded that in cases arising in federal courts the "not pressed or passed upon below" rule is only prudential. *See* *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (stating that, while Court normally does not decide issues that were not presented below, it may do so). The Court chose to entertain such a question when respondent did not object, the issue was squarely presented and fully briefed, and was an important, recurring issue, so that interests of judicial administration would be served by addressing it. *Id.*

254. *Adams v. Robertson*, 520 U.S. 83, 90-92 (1997); *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988); *Illinois v. Gates*, 462 U.S. 213, 221-24 (1983).

255. So long as the Court is declining to hear issues, it is not exercising hypothetical appellate jurisdiction over them. If and when it should desire to hear an unpressed, unaddressed issue, it would seem under *Steel Co.* that the Court would have to address whether it has jurisdiction to do so. Of course, if it then were to decide that the practice of eschewing such issues is merely prudential, it could hear the issue without violating *Steel Co.* Only if the Court were to assume without deciding that it had jurisdiction to hear an unpressed, unaddressed issue and did so, would it be exercising hypothetical appellate jurisdiction. But the point in the text is that courts have many ways of getting to the merits, one of which is to characterize as non-jurisdictional a matter that otherwise would preclude their consideration of an issue or case.

256. FED. R. APP. P. 4(a)(3).

have not cross-appealed to advance alternative grounds to affirm the judgment below; to that end, the courts often say that appellees may support the judgment through any matter appearing in the record, and may attack the lower court's reasoning or emphasize matters overlooked by the trial court.<sup>257</sup> By contrast, the courts generally declare that "[a]n appellee who fails to file a cross-appeal cannot attack a judgment with a view towards enlarging his own rights" and receiving more extensive relief than he received from the trial court.<sup>258</sup> However, several courts of appeals have held that the filing of a notice of cross-appeal is not a jurisdictional prerequisite and, in certain circumstances, may be waived by the court of appeals so as to enable it to reach issues, raised by the appellee, that otherwise would be beyond the scope

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257. See *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 479 (1999) (stating this principle as law and citing both *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924), and *Union Tool Co. v. Wilson*, 259 U.S. 107, 111 (1922), as authority for it); *Resolution Trust Corp. v. Fid. & Deposit Co.*, 205 F.3d 615, 635 (3d Cir. 2000) (reciting principles stated in text); see also *Froebel v. Meyer*, 217 F.3d 928, 933 (7th Cir. 2000) (stating that "[n]o cross-appeal is necessary unless the appellee wants the court of appeals to alter the judgment, not just the reasoning, of the district court"); *McLaughlin v. Bd. of Trustees*, 215 F.3d 1168, 1172 (10th Cir. 2000) (explaining that court of appeals may affirm on any ground supported by record).

258. *Spurlock v. FBI*, 69 F.3d 1010, 1018 (9th Cir. 1995); see *Dodd v. Hood River County*, 59 F.3d 852, 864 (9th Cir. 1995) (stating similarly that such appellee may not obtain from appellate court relief more extensive than it received from district court); see also *El Paso Natural Gas Co.*, 526 U.S. at 479 (stating this principle as law, and citing as authority for it *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937); *Am. Ry. Express Co.*, 265 U.S. at 435; *Union Tool Co.*, 259 U.S. at 111; and *M'Donough v. Dannery*, 3 U.S. (3 Dall.) 188, 198 (1796)).

A number of courts of appeals hold that the filing of a cross-appeal is a jurisdictional prerequisite to the court's entertainment of arguments that seek enlargement of appellee's rights or remedies. See, e.g., *Johnson v. Teamsters Local 559*, 102 F.3d 21, 28-9 (1st Cir. 1996) (dismissing late-filed cross-appeal for lack of jurisdiction after implying from broad language in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), concerning mandatory nature of timing rules in Federal Rules of Appellate Procedure 3 and 4, that cross-appeal time limit in Federal Rule of Appellate Procedure 4(a)(3) is mandatory and jurisdictional); *EF Operating Corp. v. Am. Bldgs.*, 993 F.2d 1046, 1049 n.1 (3d Cir. 1993) (interpreting recent Supreme Court jurisprudence as "seriously undermin[ing] the notion that the filing of a cross-appeal is a rule of practice," and concluding that court had no jurisdiction to review denial of motion to dismiss for lack of personal jurisdiction, absent cross-appeal, when appellant had appealed grant of summary judgment to appellee); *Francis v. Clark Equip. Co.*, 993 F.2d 545, 552-53 (6th Cir. 1993) (dismissing contentions that district court erred in denying motion for JNOV, based on principle that filing of notice of cross-appeal is jurisdictional when appellee wishes to attack part of final judgment to enlarge his rights or reduce those of his adversary); *Rollins v. Metro. Life Ins. Co.*, 912 F.2d 911, 917 (7th Cir. 1990) (refusing to consider, for lack of appellate jurisdiction, appellee's attack on imposition of constructive trust, but in dicta clearly indicating its view that district court did not err); *Savage v. Cache Valley Dairy Assoc.*, 737 F.2d 887, 889 (10th Cir. 1984) (holding that filing of timely cross-appeal is mandatory and jurisdictional, and dismissing late-filed cross appeal); see also *Langnes v. Green*, 282 U.S. 531, 538 (1931) (stating in dicta that Court's decisions do not deny power of Court to review objections by respondent, although he has not applied for certiorari, if Court finds good reason to do so).



of the court's jurisdiction.<sup>259</sup> As explained by the Court of Appeals for the Ninth Circuit, "The rationale . . . lies in the notion that the filing of the initial notice of appeal invokes the court's jurisdiction over the parties and the case and that, once this jurisdiction has been invoked, the court has the authority to fully adjudicate the appeal."<sup>260</sup> In deciding whether to allow a cross-appeal, notice of which has not been properly filed, courts consider factors such as

the interrelatedness of the issues on appeal and cross-appeal (particularly whether they involve the same parties), whether a notice of cross-appeal was merely late or not filed at all, whether the . . . district court opinion should have put the appellee on notice of the need to file a cross-appeal, the extent of any prejudice to the appellant caused by the absence of notice, . . . in a case involving the certification of an interlocutory appeal – whether the scope of the issues that could be considered on appeal was clear[.]<sup>261</sup>

any prejudice to the parties if the court refuses to entertain the matters raised without formal cross-appeal, and the interest in judicial efficiency.

The Supreme Court in 1999 avoided deciding the status of the prohibition on modifying judgments in favor of a non-appealing party as either an unqualified limit on the power of appellate courts or a rule of practice subject to exceptions. It said that, even if that prohibition is not strictly jurisdictional, the comity considerations that had been invoked by the court of appeals as reasons to make an exception to the rule were inadequate to defeat the institutional interests in fair notice and repose that the rule advances.<sup>262</sup> While explicitly declining to decide whether the rule is jurisdictional and acknowledging Court statements that might be taken to suggest the possibility of exceptions, the Court intimated that it would decide that the prohibition was absolute, if forced to a decision. It did this by characterizing the prohibition as "firmly entrenched," and by observing that, "in more than two centuries of repeatedly

259. *Accord* *Texport Oil Co. v. M/V Amolyntos*, 11 F.3d 361, 366 (2d Cir. 1993) (stating principle recited in text and exercising discretion to disregard lateness of cross-appeal's filing where appeal and cross-appeal were closely interrelated, involved same parties, notice was late by only one business day, and cross-appellee was neither surprised nor prejudiced); *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 33 (D.C. Cir. 1990) (stating that omission of cross-appeal can be excused when circumstances warrant that because cross-appeal is not jurisdictional requirement, and entertaining cross-appellant's arguments regarding personal jurisdiction where uncertainty generated by absence of judgment conforming to Federal Rule of Civil Procedure 58's separate document requirement explained and excused failure); *see Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1298 (9th Cir. 1999) (holding that filing of notice of cross-appeal is required as rule of practice, which court can waive; it is not non-waivable jurisdictional requirement); *see also Marts v. Hines*, 117 F.3d 1504, 1506 (5th Cir. 1997) (allowing modification of decision so as to benefit non-cross-appealing party).

260. *Mendocino*, 192 F.3d at 1298.

261. *Id.* at 1299.

262. *See El Paso Natural Gas Co.*, 526 U.S. at 480.

endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule."<sup>263</sup> The Court noted that it had "repeatedly expressed the rule in emphatic terms,"<sup>264</sup> although normally with reference to certiorari jurisdiction, rather than to the jurisdiction of the courts of appeals. Justice Souter commented in his opinion for the Court that the Court had made clear that it was a mistake to read one of its cases as countenancing exceptions to the cross-petition requirement, although dicta in that opinion sometimes had been otherwise construed. He also emphasized the institutional policies that underlie the cross-appeal requirement: the interests in "putting opposing parties and the appellate courts on notice of the issues to be litigated and encouraging repose of those that are not."<sup>265</sup>

A third example: In a 1999 case, the Court of Appeals for the Eighth Circuit held that the question whether parties and trial courts may manufacture appeals through the voluntary dismissal, without prejudice, of claims that remain after other claims have been dismissed with prejudice is not jurisdictional.<sup>266</sup> Although concluding that the grant of voluntary dismissal constituted a clear abuse of discretion which ordinarily would warrant reversal and remand for completion of the case, in the unique posture of this case, the court concluded that fairness to the certified plaintiff class justified reaching the merits.<sup>267</sup> Courts also conclude that some time limits are not jurisdictional.<sup>268</sup>

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263. *Id.* at 480.

264. *Id.* at 481 n.3.

265. *Id.* at 482.

266. *Great Rivers Coop. v. Farmland Indus., Inc.*, 198 F.3d 685, 688-89 (8th Cir. 1999) (concluding that district court judgment was nonetheless "final decision" within meaning of 28 U.S.C. § 1291 (1993)). *But see* *Chappelle v. Beacon Communications Corp.*, 84 F.3d 652, 654 (2d Cir. 1996) (dismissing appeal for lack of jurisdiction upon concluding that voluntary dismissal without prejudice is not final judgment because dismissed claims can be revived); *Mesa v. United States*, 61 F.3d 20, 21-22 (11th Cir. 1995) (same); *Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147, 148 (10th Cir. 1992) (same); *Cheng v. Comm'r*, 878 F.2d 306, 309-11 (9th Cir. 1989) (same); *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298, 303 (5th Cir. 1978) (same).

267. *Great Rivers Coop. v. Farmland Indus., Inc.*, 198 F.3d 685, 690 (8th Cir. 1999). The unique circumstances included the parties and district court having gone to great lengths to create a final order, including giving notice to the plaintiff class, and the parties having fully briefed and argued the merits of the partial summary judgment orders that had been entered. *Id.*

268. *See* *Stone v. Powell*, 428 U.S. 465, 533-34 (1976) (Brennan, J., dissenting) (noting that time limits for invoking Court's certiorari jurisdiction in criminal cases emanating from state courts are non-jurisdictional); *Taglianetti v. United States*, 394 U.S. 316, 316 n.1 (1969) (concluding that 30 days allowed by Supreme Court Rule 22(2) to file petition for certiorari is not jurisdictional). *Taglianetti* was followed in *Schacht v. United States*, 398 U.S. 58, 63-64 (1970) (noting that "procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional"). *See also* *United States v. Lummi Indian Tribe*, 235 F.3d 443, 448 (9th Cir. 2000) (finding that Federal Rule of Civil Procedure 58's separate document

*b. Liberally Interpreting or Excusing Jurisdictional Requirements, Treating Notices of Appeal as Petitions for Writs of Mandamus, and Offering Dicta or Alternative Rulings on Matters Found to Be Beyond the Courts' Jurisdiction*

In still other cases (that is, where courts do not avoid an obstacle to a decision on the merits by deeming the obstacle non-jurisdictional), courts reach the merits after liberally interpreting jurisdictional requirements in order to hold that the parties or lower courts complied with them,<sup>269</sup> excusing

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requirement for judgments is not prerequisite to appellate jurisdiction); *Quinn v. Haynes*, 234 F.3d 837, 843 (4th Cir. 2000) (affirming that appellate court has jurisdiction to hear appeal despite non-compliance with Rule 58's separate document requirement, when three-factor test is met); *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 459 (3d Cir. 2000) (concluding that Federal Rule of Civil Procedure 54(d)'s time limit is not jurisdictional, and "courts may, in their discretion, consider untimely objections" to taxation of costs); *Soberay Mach. & Equip. Co. v. MRF Ltd.*, 181 F.3d 759, 770 (6th Cir. 1999) (concluding that untimely motion to review taxation of costs may properly be entertained because Federal Rule of Civil Procedure 54(d)'s time limit is not jurisdictional); *Lerro v. Quaker Oats Co.*, 84 F.3d 239, 241 (7th Cir. 1996) (noting that computational limits addressed in Federal Rule of Civil Procedure 6 are not jurisdictional); *Wujik v. Dale & Dale*, 43 F.3d 790, 792 (3d Cir. 1994) (holding that time limit for removal of case is not jurisdictional and may be waived); *White v. Bentsen*, 31 F.3d 474, 475 (7th Cir. 1994) (determining 21-day limit imposed by EEOC regulation for seeking review of administrative decision on Title VII claim not to be jurisdictional); *Hunger v. Leininger*, 15 F.3d 664, 668 (7th Cir. 1994) (holding failure to meet statutory deadline for submitting objections to magistrate judge's recommended decision not to be jurisdictional); *Wood-Ivey Sys. Corp. v. United States*, 4 F.3d 961, 962-64 (Fed. Cir. 1993) (indicating that Claims Court Rule 6(a), which is similar to Federal Rule of Civil Procedure 6(a) and provides method for computation of time prescribed or allowed, should be construed liberally and leniently, and is not jurisdictional).

269. See, e.g., *Foman v. Davis*, 371 U.S. 178 (1962) (holding that appellants had complied with Federal Rule of Appellate Procedure 3(c)'s requirement that notice of appeal "designate the judgment, order or part thereof being appealed," despite ineptness of notice); *Weiss v. Cooley*, 230 F.3d 1027 (7th Cir. 2000) (holding notice of appeal, filed after grant of summary judgment to one defendant, to be adequate to confer appellate jurisdiction over entire matter including earlier dismissal of claims against other defendants, who never had been formally served); *Cuoco v. Moritsugu*, 222 F.3d 99, 110 (2d Cir. 2000) (liberally construing Rule 54(b) to allow court to exercise jurisdiction over cross-appeal from partial final judgment dismissing claim against some defendants, where entire case was before court of appeals through interlocutory appeal by other defendants); *Anjelino v. N.Y. Times Co.*, 200 F.3d 73, 86-87 n.21 (3d Cir. 1999) (concluding that dismissal of severed claims was not appealable until district court had finally disposed of all claims made by all parties to action in its pre-severance posture, with consequence that appellants' notice of appeal was timely); *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 571-72 (7th Cir. 1999) (holding that notice of appeal gave adequate notice of intent to appeal trial court's refusal to refer antitrust claim to arbitration where preliminary injunction from which appeal was explicitly taken necessarily encompassed aforementioned refusal; stating that, in Seventh Circuit, "an error designating the judgment or a part thereof will not result in a loss of appeal if the intent to appeal . . . may be inferred from the notice and if the appellee has not been misled by the defect," (quoting *Cardoza v. Commodities Futures*

jurisdictional requirements in "unique circumstances,"<sup>270</sup> or avoiding possible

Trading Comm'n, 768 F.2d 1542, 1546 (7th Cir. 1985)); *United States v. Vazquez*, 145 F.3d 74, 79 (2d Cir. 1998) (citing principle that notices of appeal are to be liberally construed, taking into account parties' intentions, in holding notice of appeal sufficient to allow review of dismissal of defendant's counterclaims); *Good v. Ohio Edison Co.*, 104 F.3d 93, 95 (6th Cir. 1997) (holding that premature notice of appeal ripens upon entry of proper certification pursuant to Rule 54(b) regardless of whether certification is entered nunc pro tunc); *Martinez v. Arrow Truck Sales, Inc.*, 865 F.2d 160, 161-62 (8th Cir. 1988) (holding that subsequent Rule 54(b) certification validated otherwise premature notice of appeal in absence of prejudice to nonappealing party; citing cases reflecting division of federal courts of appeals on this issue); *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980) (assuming appellate jurisdiction over merits where portion of case remaining in district court at time of appeal had subsequently been decided); *see also Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 378-79 (1985) (stating that appellate court had jurisdiction to review district court's denial of motion to dismiss complaint as barred by res judicata where district court certified its denial pursuant to § 1292(b) only after defendant appealed order holding it in criminal contempt for refusing to comply with discovery order); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 161-62 (1984) (Stevens, J., dissenting) (viewing as "jurisdictional" question whether 10-day limit for filing petition to appeal certified interlocutory order, imposed by 28 U.S.C. § 1292(b) and Federal Rule of Appellate Procedure 5(a), can be circumvented by re-entry of interlocutory order, and concurring in majority's holding that there is jurisdiction over interlocutory appeal taken in such circumstances).

One also could put into this category the pragmatism that the Court has brought to making the determinations that decisions are "final" for purposes of 28 U.S.C. § 1291, and the determinations regarding what constitutes the grant or denial of an injunction within the meaning of 28 U.S.C. § 1292. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981) (allowing appeal from order refusing to enter proposed consent decree to settle class action on terms that would have encompassed immediate injunctive relief for plaintiff class); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-54 (1964) (discussing "pragmatic finality" doctrine); *Gen. Elec. Co. v. Marvel Rare Metals Co.*, 287 U.S. 430, 433 (1932) (upholding appeal of dismissal for want of jurisdiction of counterclaim in which defendants sought injunction against plaintiff's alleged infringement of patent); *Forgay v. Conrad*, 47 U.S. (6 How.) 201, 203-06 (1848) (allowing appeal from order that provided for immediate execution of command that property be delivered for sale to assignee in bankruptcy where all matters in controversy, except for accounting, had been completed); *supra* notes 64, 66, 154-55 (concerning Supreme Court decisions pursuant to collateral order doctrine). *See generally* 15A WRIGHT ET AL., *supra* note 66, § 3903 (Leading Finality Decisions); § 3911 (Collateral Orders); § 3913 (Pragmatic Finality) (noting that requirement of finality should be construed practically rather than technically); 16 WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2D* §§ 3921, 3924 (1996 & Supp. 2000) (discussing injunctions and appeals of grants of interlocutory injunctions).

In theory, as a matter of philosophy in construing jurisdictional provisions, at least some courts are of the view that, "[b]ecause the Constitution gives Congress discretion to confer jurisdictional power on the federal courts of appeal, 'federal courts should proceed with caution in construing constitutional and statutory provisions dealing with [their] jurisdiction.'" *Rembert v. Apfel*, 213 F.3d 1331, 1334 (11th Cir. 2000) (quoting *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409 (11th Cir. 1999)).

270. *See, e.g., Hollins v. Dep't of Corrections*, 191 F.3d 1324, 1326-29 (11th Cir. 1999) (holding habeas corpus petitioner's failure to file timely notice of appeal excused due to unique circumstances and further holding that appeals court had jurisdiction where belated filing

jurisdictional bars by treating notices of appeal as petitions for writs of mandamus.<sup>271</sup> Sometimes courts offer dicta or alternative rulings on the matters that they concluded they lacked jurisdiction to hear.<sup>272</sup>

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derived from counsel's reasonable and good faith reliance on district court's electronic docket sheet – constituting specific assurance by judicial officer – which failed to show that final order had been entered, thereby lulling petitioner into inactivity); *Schwartz v. Pridy*, 94 F.3d 453, 455-56 (8th Cir. 1996) (determining that technically untimely notice of appeal vested appellate jurisdiction in court where party relied in good faith on court clerk's erroneous refusal to accept his timely notice of appeal and erroneous representation that his premature notice of appeal was sufficient); *Prudential-Bache Secs., Inc. v. Fitch*, 966 F.2d 981, 984-86 (5th Cir. 1992) (holding appeal timely filed under unique circumstances doctrine where appellant reasonably relied upon clerk's inaccurate notification of date on which district court's order was entered). *But see* *Moore v. S.C. Labor Bd.*, 100 F.3d 162, 164 (D.C. Cir. 1996) (limiting unique circumstances doctrine to reliance upon written court orders or oral rulings made during hearing, and rejecting its use where relied upon statements were made by clerk's office staff); *United States v. Heller*, 957 F.2d 26, 29-32 (1st Cir. 1992) (concluding that, under Supreme Court precedent, unique circumstances doctrine may apply only when judicial officers upon whose acts parties rely are judges, not when they are clerk's office employees); *see also* *Quinn v. Haynes*, 234 F.3d 837, 843 (4th Cir. 2000) (finding that time to appeal had not begun to run, and appeal consequently was not untimely, where district court had failed to comply with separate document requirement of Federal Rule of Civil Procedure 58); *Songbyrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 177-78 (2d Cir.), *cert. denied*, 531 U.S. 824 (2000) (concluding that retransfer motion, made in transferee district court, should be required to preserve opportunity for review of transfer order in transferee circuit, because court of appeals normally has no jurisdiction to review decision of district court in another circuit, but excusing absence of such motion because this Circuit had not imposed that requirement in past and Estate did not contend that lack of retransfer motion forfeited opportunity for review).

271. *See, e.g.*, *Bacher v. Allstate Ins. Co.*, 211 F.3d 52, 57 n.1 (3d Cir. 2000) (recognizing that court could treat notice of appeal as petition for mandamus, but declining to consider that option here); *Morris v. West*, 232 F.3d 906, No. 00-7032, 2000 U.S. App. Lexis 5095, at \*2 (Fed. Cir. 2000) (treating appeal as petition for writ of mandamus); *Phinney v. Wentworth Douglas Hosp.*, 199 F.3d 1, 3 (1st Cir. 1999) (holding that if court lacked appellate jurisdiction over magistrate's order requiring party to pay sanctions for discovery violations because settlement may have rendered issue moot, court would treat notice of appeals as request for writ of mandamus, and grant that request); *United States v. Gonzales*, 150 F.3d 1246, 1250 & n.1 (10th Cir. 1998) (construing intervenor's appeal and defendants' cross-appeals as petitions for writs of mandamus and noting that writ of mandamus is appropriate vehicle for reviewing orders sealing or redacting court documents in criminal proceedings); *Parretti v. United States*, No. 96-55371, 1996 U.S. App. LEXIS 33294, at \*2 (9th Cir. Dec. 17, 1996) (treating appeal from order denying motion to disqualify U.S. Attorney as petition for mandamus, but denying petition); *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1453 (4th Cir. 1996) (treating notice of appeal of remand order as petition for writ of mandamus); *Wilkins v. Erickson*, 484 F.2d 969, 971 (8th Cir. 1973) (treating appeal of transfer order as petition for mandamus).

272. *See* *Horton v. Bd. of County Comm'rs*, 202 F.3d 1297, 1299-1302 (11th Cir. 2000) (concluding that 28 U.S.C. § 1447(d) deprived court of jurisdiction to review remand order that court found to be based on exhaustion or ripeness grounds, but explaining in extended dicta why district court erred in remanding); *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 757, 759 (6th Cir. 1999) (concluding that it lacked appellate jurisdiction to consider issues

The Supreme Court itself has approved and utilized a number of these practices.<sup>273</sup> In *Torres v. Oakland Scavenger Co.*,<sup>274</sup> for example, the Court stated that, although the requirements of Federal Rule of Appellate Procedure 3(c) [(1)(B)]<sup>275</sup> are jurisdictional and their satisfaction a prerequisite to appellate review, "mere technicalities" should not stand in the way of consideration of the merits, and courts should find a notice of appeal sufficient so long as it is the functional equivalent of what the Rule requires.<sup>276</sup> In *Smith v. Barry*,<sup>277</sup> invoking these principles, the Court reversed an appellate court's conclusion that a brief never could be considered a notice of appeal and remanded for the appeals court to determine whether appellant's brief contained the information required to function as a notice of appeal.<sup>278</sup> The Court

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raised in motion for reconsideration, including malfeasance of appellants' original trial counsel and whether individual could be personally subject to injunction, but addressing those very issues, prefacing its remarks with, "[i]n so far as we would be required to consider [the merits of the issues] as properly appealed").

273. In *Mayacamas Corp. v. Gulfstream Aerospace Corp.*, 806 F.2d 928, 930-31 (9th Cir. 1987), the court of appeals declined to treat the notice of appeal as a petition for mandamus where the party seeking review had not shown that serious hardship or prejudice would result from a refusal of its request. On the appeal of the case, the Supreme Court volunteered that it took no position on whether the court of appeals had acted appropriately in declining to treat petitioner's notice of appeal as an application for writ of mandamus. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 n.14 (1988). I found no other opinion in which the Court discussed treating a notice of appeal as a petition for writ of mandamus.

274. 487 U.S. 312 (1988).

275. See *supra* note 163.

276. See *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-17 (1988) (concluding that failure to name party in notice of appeal is more than excusable informality and constitutes jurisdictional failure which court of appeals cannot waive). Unfortunately for Torres, the Court found a failure to comply with the specificity requirement of Rule 3(c) of the Federal Rules of Appellate Procedure, even liberally construed. *Id.* at 317. Due to a clerical error, the name of Torres, one of several intervening plaintiffs, was omitted from the notice of appeal filed with the Ninth Circuit, in a case in which that court reversed the district court's dismissal of the complaint for failure to state a claim. *Id.* Partial summary judgment was then granted against Torres on the ground that the prior judgment of dismissal was final as to him, given his failure to appeal it. *Id.* at 313-14. The Supreme Court, holding to be jurisdictional both the requirement of Federal Rule of Appellate Procedure 3(c) that the notice of appeal specify the parties taking the appeal and the requirements of Federal Rule of Appellate Procedure 4 setting time limits for filing of a notice of appeal, held on these facts that the court of appeals was correct that it never had jurisdiction over an appeal by Torres. *Id.* at 317-18. It therefore affirmed the judgment against Torres. *Id.* at 318.

277. 502 U.S. 244 (1992).

278. See *Smith v. Barry*, 502 U.S. 244, 245 (1992) ("hold[ing] that a document intended to serve as an appellate brief may qualify as the notice of appeal required by [Federal Rule of Appellate Procedure] 3"). Smith had filed a notice of appeal that was invalid and ineffective under Federal Rule of Appellate Procedure 4(a)(4) because premature, having been filed before the trial court's disposition of a timely motion for judgment notwithstanding the verdict. *Id.* at 246. He then filed an "informal brief," within the deadline for filing a notice of appeal. *Id.*

also has approved some belated filings of notices of appeal under a "unique circumstances" doctrine.<sup>279</sup> And, in some very important cases, it has offered dicta on issues it found to be beyond its jurisdiction.<sup>280</sup>

While one certainly can distinguish the latter types of cases<sup>281</sup> from exercises of hypothetical jurisdiction, they lie along a spectrum of devices that appellate courts have used, and continue to use, to reach the merits of cases. Understanding this context may be important in determining how broadly and stringently (or, conversely, how narrowly and unrigorously) condemnations of hypothetical jurisdiction should be interpreted and applied in the context of appellate jurisdiction.<sup>282</sup> For example, this survey might lead one to conclude

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*Smith* held that a document intended to serve as an appellate brief also can qualify as the notice of appeal required by Rule 3 of the Federal Rules of Appellate Procedure. *Id.* at 245. It reasoned, *inter alia*, that because the purpose of a notice of appeal is to provide notice to other parties and the court, "the notice afforded by a document, not the litigant's motivation in filing it, determines the document's sufficiency as a notice of appeal." *Id.* at 248. Furthermore, the Rules' contemplation of a brief that is distinct from the notice of appeal did not preclude a court from treating a brief as a notice of appeal. *Id.* at 249. "Proper briefing is not . . . a jurisdictional requirement" under the Federal Rules of Appellate Procedure. *Id.* Indeed, "failure [of an appellant] to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal . . ." FED. R. APP. P. 3(a).

279. See *Panhorst v. United States*, 241 F.3d 367, 370-72 (4th Cir. 2001) (questioning continuing validity of unique circumstances doctrine, in light of more recent Supreme Court decisions); *Thompson v. INS*, 375 U.S. 384, 386-87 (1964) (approving some belated filings of notices of appeal under "unique circumstances" doctrine (quoting *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962))). *But see Osterneck v. Ernst & Whinney*, 489 U.S. 169, 178-79 (1989) (declining to apply rationale of *Thompson* to facts of case at bar).

280. See, e.g., *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 28-29 (1994) (in case involving motion to vacate judgment of court of appeals by reason of settlement, explaining relevance of Court's holding to motions, in courts of appeals, to vacate district court judgments); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 452, 454 (1857) (holding that slaves were not citizens and thus could not invoke diversity jurisdiction, but nonetheless rejecting Scott's claim on merits that his residence in Illinois made him free and declared Missouri Compromise unconstitutional); *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 167-68, 178-80 (1803) (holding that Court could not constitutionally hear, as matter of original jurisdiction, Marbury's petition for writ of mandamus to compel Secretary of State to deliver particular commission for offices, but nonetheless addressing merits issues including whether commission had vested).

281. I refer to those cases holding threshold matters that are being assumed to be non-judicial, those cases holding jurisdiction to exist upon a liberal interpretation of jurisdictional requirements, and those cases excusing jurisdictional requirements in unique circumstances.

282. Just as exercises of hypothetical jurisdiction at the district court level have been argued to be supported by analogy to other doctrines and policies that undermine the absolute purity of the "jurisdictional axiom" that "courts are powerless to act without jurisdiction over the subject matter, and that any order or judgment issued by a court without such jurisdiction is void and unenforceable," Comment, *supra* note 34, at 714, so exercises of hypothetical appellate jurisdiction may be supported by doctrines and policies that moderate the hard edges of the requirement that appellate courts decide cases only when they have jurisdiction over them.

that our courts have found so many ways to finesse jurisdictional problems that having one more, hypothetical appellate jurisdiction, can not much matter. Alternatively, one might conclude that if nothing in the existing arsenal of jurisdiction-finessers suffices to give an appellate court jurisdiction over a case or issue, that court ought to enforce the *Steel Co.* rule against allowing the courts to assume their jurisdiction hypothetically and reach the merits.

### *E. The Implications of Steel Co. for Hypothetical Appellate Jurisdiction*

In theory, federal courts could disregard *Steel Co.*'s repudiation of hypothetical jurisdiction, on the grounds that it was mere dictum, but the courts' practice is to give such "considered dicta" great weight, both out of respect for the Court and because that dicta is likely to foreshadow how the Court would decide an issue if that issue were squarely presented for decision.<sup>283</sup> Assuming then that the courts will take the denunciation seriously, what might this mean in the context of hypothetical appellate jurisdiction?

#### *1. A Broad Reading*

A broad reading of *Steel Co.*'s denunciation of hypothetical jurisdiction<sup>284</sup> would disapprove all instances in which federal appellate courts avoid questions concerning their appellate jurisdiction and reach the merits of cases when and because the merits are more readily resolved and the prevailing party below would prevail regardless of whether appellate jurisdiction were exercised. At a minimum, a broad reading would disapprove all exercises of hypothetical appellate jurisdiction that were not harmless error. Presumably, the error would be harmless when proper examination of the jurisdictional issue would have led to the conclusion that appellate jurisdiction existed. On this "strongest" view, it would make no difference if the jurisdictional issue being bypassed were of constitutional dimension, statute-based, rule-based, or a function of judicial glosses on jurisdictional texts for, if the denunciation is grounded upon the need to keep courts within the bounds of authorized judicial action and thereby preserve fundamental principles of separation of powers, *any* assumption of appellate jurisdiction that would exceed that which has been authorized would violate the Court's objectives.<sup>285</sup>

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283. See *Natural Res. Def. Council v. NRC.*, 216 F.3d 1180, 1189 (D.C. Cir. 2000) (quoting earlier cases for proposition that carefully considered language of Court, even if dicta, generally must be treated as authoritative, and relying upon such language of Court in D.C. Circuit's decision); Idleman, *supra* note 4, at 316-17 (noting that "considered dicta" of Supreme Court commands obedience by lower courts). *But see supra* text accompanying note 74 (questioning applicability of this norm when less than majority of Court subscribes to dicta).

284. See *supra* Part I.

285. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (declining to endorse doctrine of hypothetical jurisdiction as doctrine exceeds "authorized judicial action");



In its strongest form, this interpretation would entail viewing even the merely statutory and rule-based elements of jurisdiction (which carry Congress's imprimatur) as important components of separation of powers, with the legislature "restraining the [appellate] courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects."<sup>286</sup> The Court's reference in *Steel Co.* to jurisdictional elements that restrain the courts from acting at certain times easily can be understood to apply to statutory requirements for interlocutory appeals.<sup>287</sup> On this view, it would be inappropriate for courts to engage in ad hoc weighing of the concerns for efficiency that underlie appellate jurisdictional rules (such as the final judgment rule) against the like-kind concerns that underlie the doctrine of hypothetical jurisdiction. One would conclude that implicitly Congress and the Court, as rule promulgator, have decided that the need for statute-or-rule-based jurisdiction that a court has *found* to exist, rather than *assumed* arguendo, prevails over any competing policies. Indeed, this view is most consistent with the common law requirement that appellate courts confirm their jurisdiction before proceeding to the merits. To the extent that appeals courts can merely assume their jurisdiction hypothetically, the requirement that jurisdiction be confirmed becomes illusory.<sup>288</sup> This "strong" position also comports entirely with the long-standing admonitions against federal courts' acting where they cannot because action is beyond the bounds of authorized judicial activity and hence ultra vires.

While this understanding of *Steel Co.* might imply that all the examples listed above of courts exercising hypothetical appellate jurisdiction were wrong, I believe that, when one considers the Court's own qualifications of its denunciation and other factors, that inference would be unjustified.

## 2. Narrower Readings

Narrower readings of *Steel Co.* of course have different implications:

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*see also* *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (observing that power to judicially create non-constitutional rules of procedure for federal courts exists only in absence of relevant Act of Congress, and that "Congress retains the ultimate authority to modify or set aside any judicially created rules of . . . procedure that are not required by the Constitution").

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

287. The same may be true of the reference to jurisdictional elements that restrain the courts from acting even permanently regarding certain subjects, *see Steel Co.*, 523 U.S. at 101 (noting restrictions on courts' authority to entertain certain subjects), if one interprets the allusion to "any subjects" as applicable to subjects as to which losing litigants have failed to perfect an appeal.

288. On this broadest reading of *Steel Co.*, the position sketched above would govern even if the "merits" issue partook to some degree of a jurisdictional nature or the "jurisdictional" issue partook to some degree of non-jurisdictional qualities.

a. *Reading Steel Co. to preclude advisory opinions and opinions as to disputes that do not constitute Article III cases or controversies.* To the degree the *Steel Co.* Court was concerned that hypothetical jurisdiction produces only hypothetical judgments, that is, advisory opinions of the sort that the Court has disapproved from very early on,<sup>289</sup> its concerns would seem to be satisfied so long as an Article III case or controversy is presented. The concerns underlying the prohibition against advisory opinions relate to constitutional matters: to keeping the courts out of matters that belong in the legislative sphere for lack of an actual dispute between adverse litigants or because the courts are not in a position to have an effect.<sup>290</sup> As the Court stated in *Flast v. Cohen*,<sup>291</sup>

[T]he implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions. [The rule] implements the separation of powers . . . [and] also recognizes that such suits often "are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests."<sup>292</sup>

If the Court's intent was solely to deter federal courts from reaching merits questions without first determining that an Article III case or controversy is present,<sup>293</sup> federal appellate courts' hypothetical assumption that the merely statutory, rule-based or common law requirements of their own jurisdiction are satisfied, in order to reach more easily resolved merits issues,

289. See *Muskrat v. United States*, 219 U.S. 346, 362 (1911) (finding nonjusticiable suit authorized by Congress to test constitutionality of particular law, when interests of plaintiffs and defendant government were not at all adverse and, in Court's view, courts were being asked to issue advisory opinion on constitutionality of statute), noted in *Steel Co.*, 523 U.S. at 101; *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 411 (1792) (concluding that federal courts could not express nonbinding opinions on amount of benefits owed to Revolutionary War veterans, and stating that making mere recommendations regarding pensions was "not of a judicial nature").

290. See *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948) (concluding that federal courts could not review Civil Aeronautics Board decisions that President could disregard or modify, because judicial decisions would then be mere recommendations that would amount to advisory opinions); *United States v. Johnson*, 319 U.S. 302, 305 (1943) (declining to hear collusively brought suit, for lack of genuine adversary issue); *Muskat*, 219 U.S. at 361-62, *supra* note 289. See generally ERWIN CHEMERINSKY, FEDERAL JURISDICTION §2.2, at 56 (3d ed. 1999) (observing that "the other justiciability doctrines [concerning standing, ripeness and mootness] exist largely to ensure that federal courts will not issue advisory opinions").

291. 392 U.S. 83 (1968):

292. *Id.* at 96-97 (quoting in part *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)).

293. See *supra* text accompanying notes 24-26. "Narrowly viewed, the basic principle of *Steel Co.* is that an Article III court cannot decide the merits of a dispute without first verifying that the Article III case-or-controversy requirements have been satisfied." Idleman, *supra* note 4, at 318.

would not run afoul of *Steel Co.* Thus, for example, while avoidance of the questions whether a case had become moot and whether the appellant had Article III standing to appeal would be impermissible,<sup>294</sup> avoidance of issues concerning merely prudential or statute-based standing, and assumption, without decision, that the requirements of 28 U.S.C. § 1291 or § 1292 (or other jurisdictional statutes) are satisfied, or that the requirements of Rule 54(b) of the Federal Rules of Civil Procedure or of Rules 3 and 4 of the Federal Rules of Appellate Procedure (or other "jurisdictional" Rules) are satisfied, would not run afoul of *Steel Co.* The vast majority of the pre-*Steel Co.* exercises of hypothetical appellate jurisdiction were of this variety.<sup>295</sup> They bypassed rule-based jurisdictional questions concerning the timeliness of appeals and the adequacy of notices of appeal designating the court of appeals or the appellants, and they bypassed statute-based jurisdictional questions concerning the finality of lower tribunal decisions or the decisions' satisfaction of the requirements for interlocutory appeal or miscellaneous other statutory requirements that the courts had found to be "jurisdictional." Sometimes the exercises of hypothetical appellate jurisdiction bypassed issues of statutory or prudential standing.<sup>296</sup> Questions such as *which* federal appel-

294. Possible examples of such impermissible exercises of hypothetical jurisdiction would be the cases cited *supra* at note 242, in which the courts bypassed issues concerning parties' standing to appeal, although the cases are not always clear as to whether their concern was constitutional standing or merely statutory or prudential standing requirements, and the cases cited *supra* at note 244, in which the court bypassed a constitutional issue as to whether an appeal was moot.

295. See *supra* text accompanying notes 234-35, 237-38, 240-43, and 245-49. Professor Idleman notes that *Steel Co.*

does not necessarily prohibit . . . courts from deciding merits issues where non-Article III jurisdictional requirements are not verified, as long as the Article III requirements are met . . . . This would encompass not only statutory or judge-made requirements, including the prudential aspects of standing, ripeness, and mootness as well as the complete diversity requirement, but possibly also various non-Article III constitutional requirements such as those arising from the Eleventh Amendment or the doctrine of sovereign immunity. It may even include the political question doctrine insofar as [it] may not be a genuine case-or-controversy component of Article III . . . .

Idleman, *supra* note 4, at 319.

296. The courts sometimes have bypassed questions as to whether litigants had waived their right to appeal. See *United States v. Shepard*, 207 F.3d 455, 456 n.2 (8th Cir. 2000) (asserting hypothetical appellate jurisdiction over appeal of criminal sentence by assuming, and not deciding, that plea agreement did not bar defendant's appeal); *Isby v. Bayh*, 75 F.3d 1191, 1195-97 (7th Cir. 1996) (exercising hypothetical appellate jurisdiction and affirming class action settlement in face of issues as to whether approval of settlement fell within 28 U.S.C. § 1292(a)(1), as to whether objectors lacked standing to appeal because they had failed to intervene, been denied intervention, or for other reasons, and as to whether some objectors had waived their right to appeal). Insofar as the courts' jurisdiction turned on a common law doctrine of waiver, the courts' exercise of power seems generally acceptable because the courts

late court has jurisdiction to hear a case, at what point in a case's progress toward final judgment an appellate court may address the issues the case raises, and which issues may be reviewed on an interlocutory appeal or after final judgment, are simply not of constitutional stature. Article III requires only a case arising under the laws of the United States (including the Constitution and Treaties) and certain other specified cases, or a controversy between specified persons and entities.<sup>297</sup> Moreover, constitutionally-grounded federalism concerns rarely play a part in matters of intermediate federal appellate jurisdiction, although they arguably have a role in the prohibition on federal court review of remand orders predicated on lack of federal subject-matter jurisdiction.<sup>298</sup>

In some of the cases in which hypothetical appellate jurisdiction was utilized, none of the still narrower exceptions designated *b-e*, below, seems applicable. Those cases would remain good law, however, if *Steel Co.* precludes appeals courts from addressing merits issues only when those courts have not addressed jurisdictional issues of constitutional magnitude, as well as on some other possible views of *Steel Co.*'s proper scope.

*b. Reading Steel Co. to permit one jurisdictional question to be avoided or assumed in favor of deciding another such question.* If *Steel Co.* permits one jurisdictional question to be avoided or particular aspects of jurisdiction to be assumed in favor of deciding another such question, as it generally is understood to do,<sup>299</sup> then exercises of hypothetical jurisdiction with respect to some aspects of appellate jurisdiction are permissible when the court is addressing other aspects of appellate jurisdiction or perhaps is addressing aspects of the district court's jurisdiction over the case.<sup>300</sup>

*c. Reading Steel Co. to permit procedural issues to be addressed in advance of jurisdictional issues.* If *Steel Co.* permits at least some procedural issues to be addressed in advance of jurisdictional issues,<sup>301</sup> then exercises of

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have the discretion to hold that the appellants had not waived their right to appeal. This would seem to be, if anything, more acceptable than courts' assuming *arguendo* the satisfaction of basic, statutory, jurisdictional requirements and doctrines interpreting those requirements.

297. The aspects of an Article III case or controversy, that is, constitutional justiciability (standing, ripeness, non-mootness, and exclusion of political questions) would not be properly assumed.

298. See *supra* notes 221-22 and accompanying text.

299. See *supra* text accompanying notes 38-40.

300. See *United States v. Hurd*, No. 98-7129, 1999 U.S. App. LEXIS 8715, at n.1 (10th Cir. May 7, 1999) (concluding that despite serious question as to whether Hurd had filed timely notice of appeal, court did not need to remand for specific findings upon which that issue would turn when court was remanding for entry of order dismissing appellant's post-judgment "motion to dismiss" for lack of district court jurisdiction to consider that motion).

301. See *supra* text accompanying notes 48-59.

hypothetical appellate jurisdiction while the court decides non-jurisdictional issues of appellate procedure also may be permissible.<sup>302</sup>

*d. Reading Steel Co. to permit hypothetical jurisdiction when a merits determination does not require a precedential holding.* If *Steel Co.*, by virtue of the earlier Supreme Court cases that it embraces, permits hypothetical jurisdiction when a merits determination does not require a precedential holding,<sup>303</sup> then several exercises of hypothetical appellate jurisdiction cited above are permissible.<sup>304</sup>

*e. Reading Steel Co. to permit courts to speak to merits issues in dicta.* If *Steel Co.* permits courts to speak to merits issues in dicta, then exercises of hypothetical appellate jurisdiction followed by non-merits (for example, procedural) holdings and by opinions in which the court speaks to merits issues in dicta also appear to remain legitimate, so far as *Steel Co.* is concerned.<sup>305</sup> Such dicta might, however, test other constraints upon judicial behavior.

### 3. *My Own View of the Implications of Steel Co. for Hypothetical Appellate Jurisdiction*

My view is that *Steel Co.*'s denunciation of hypothetical jurisdiction should not be given its broadest possible reading, nor its narrowest reading, as described above. I believe that courts and commentators properly understand it to permit (1) one appellate jurisdictional question to be avoided or assumed in favor of deciding another such question, and issues of appellate procedure to be addressed in advance of appellate jurisdictional issues; and (2) courts of appeals to speak to merits issues in dicta, insofar as that is proper, independent of matters of hypothetical jurisdiction. It also may be proper, or at least harmless, for courts of appeals to exercise hypothetical appellate jurisdiction when its merits determination will not constitute a precedential holding. Because the effect of its decision will be an affirmance of the decision below,<sup>306</sup> the court's decision will not alter the rights of the parties, and if its merits determination will not constitute a precedential holding, its decision will not affect others.

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302. This limitation of *Steel Co.* would not, however, allow an appellate court to decide non-jurisdictional issues of district court procedure in advance of issues of appellate jurisdiction because the former would be part of the merits of the appeal. See *supra* text accompanying note 199 (discussing how merits of appeals tend to be procedural).

303. See *supra* text accompanying notes 35-36.

304. See, e.g., the cases cited *supra* at notes 237-39.

305. Accord Idleman, *supra* note 4, at 333 (explaining that courts could "comment[] on the merits in the absence of verified subject-matter jurisdiction").

306. See *supra* text accompanying note 230.

Beyond these deductions, I have concluded that *Steel Co.* should be read to preclude exercises of hypothetical jurisdiction in which a court of appeals otherwise might assume *arguendo* that the case before it satisfies Article III requirements or the jurisdictional requirements of congressional statutes such as 28 U.S.C. §§ 1291, 1292, and 1295, as interpreted by the courts (including the scope of pendent appellate jurisdiction), but that *Steel Co.* should be read to permit courts of appeals to assume *arguendo* that the cases before them satisfy the requirements of the Federal Rules of Appellate Procedure or the Federal Rules of Civil Procedure. More accurately, for reasons that appear below, I believe that neither the doctrine of hypothetical jurisdiction nor its denunciation should have any bearing upon the appellate courts' application of the Federal Rules. However, even if or to the extent that the Court insists that those rules are jurisdictional within the meaning of the doctrine, then *Steel Co.* should be read to permit courts of appeals to assume *arguendo* that the cases before them satisfy the requirements of the Federal Rules of Appellate Procedure or the Federal Rules of Civil Procedure, insofar as cases arise that meet the requirements of the hypothetical jurisdiction doctrine. When the requirements of the doctrine are not met, federal appeals courts should read and apply the Rules liberally, in some respects more liberally than they have done to date.

The conclusion that *Steel Co.* should be read to preclude exercises of hypothetical jurisdiction in which a court of appeals assumes *arguendo* that the case before it satisfies Article III requirements is inescapable. This is the bare minimum that the case represents, for a federal court acts outside the broadest possible scope of its jurisdiction if it acts on a case that does not fall within the judicial power as defined in Article III.

The jurisdictional requirements imposed by congressional statutes such as 28 U.S.C. §§ 1291, 1292, and 1295, 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 through exercises of hypothetical appellate jurisdiction.<sup>307</sup> Over the years, commentators sometimes have criticized Congress for making the requirements of these statutes "jurisdictional,"<sup>308</sup> and it may well be that our system would work better if the final

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307. See *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 441 (1956) (Frankfurter, J., concurring) (stating that "§ 1291 is not a technical rule in a game. It expresses not only a deeply rooted but a wisely sanctioned principle against piecemeal appeals governing litigation in the federal courts.").

308. See Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, 47 LAW & CONTEMP. PROBS. 165, 170 (Summer 1984) (proposing that defects of appellate jurisdiction under 28 U.S.C. § 1291 et seq. or under rules of court be waivable and appellate jurisdiction conferred by consent of parties). Carrington argues that law treating untimeliness as jurisdictional in the sense that it cannot be waived and must be raised by the court *sua sponte* is "a fetish which serves no significant systemic interest." *Id.* He would fix time limits for the raising

decision "rule" and the other prerequisites to appellate attention, mandated by these statutes, were not "jurisdictional" and therefore deemed to be unwaivable and subject to appellate policing even when the parties fail to object to defects in compliance. However, in light of the fact that, under the Constitution, federal appellate courts possess only those powers of review that are granted by acts of Congress,<sup>309</sup> those courts are duty-bound to review only those matters that Congress has in fact, at any given time, authorized them to hear. As long as the statutes set the scope and the boundaries of appellate jurisdiction, and Congress does not "demote" matters such as the existence of a "final decision" to something other than jurisdictional criteria, the federal

of such issues, to discourage dilatoriness and to avoid inefficiency. *Id.*; see Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, 47 LAW & CONTEMP. PROBS. 157, 157-63 (Summer 1984) (arguing for movement toward more flexibility and discretion in timing of appeals). Cooper's arguments imply the desirability of movement away from rigid jurisdictional rules governing the timing of appeals. *Id.* at 157-58. He also writes,

It is . . . important to avoid foolish forfeitures. Once a case has been submitted to an appellate court, the court should not refuse to decide simply on the ground that some mistake of timing has deprived it of "jurisdiction." Decision may be refused, but only if that course protects a proper relationship between courts for the particular case.

*Id.* at 163; see Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 LAW & CONTEMP. PROBS. 171, 178 (Summer 1984) (arguing against appealability requirements being "jurisdictional"). Rosenberg writes,

The issues of appealability of a decision . . . and of the timeliness of an appeal ought not to be treated as going to the power of an appellate court to act any more than the untimeliness of starting an action, making a motion, or serving a responsive pleading utterly divest the district court of power to deal with the case. All these questions should be treated as procedural rules – very important rules, to be sure, and subject to serious consequences if violated – but violation should be treated as a procedural failure, not as competence-destroying.

*Id.*

309. The Supreme Court frequently has asserted that the U.S. Constitution does not confer a right to appellate review and that the federal courts have only such appellate jurisdiction as Congress has conferred. See *Daniels v. R.R. Co.*, 70 U.S. (3 Wall.) 250, 254 (1866) (stating that "an act of Congress must supply the requisite authority. . . . [The appellate jurisdiction of the Supreme Court] is wholly the creature of legislation."); *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321, 327 (1796) (stating that "[i]f Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it"). See generally *Federal Civil Appellate Jurisdiction: An Interlocutory Restatement*, 47 LAW & CONTEMP. PROBS. 13, 91-92, § 12 cmt. c (Spring 1984) (describing current law as follows:

Federal appellate courts possess only those powers of review granted by acts of Congress, and thus the issue as to whether a given appeal is authorized by any such statute is jurisdictional. A court has no discretion to hear an appeal without jurisdiction; and . . . lack of appealability cannot be waived, nor may appellate jurisdiction be conferred by agreement of the parties. When a question exists on the record, a court has a duty to raise the issue of appealability on its own motion.

*Id.* (footnotes omitted)).

appellate courts must confine their decisionmaking on merits issues to the appeals that meet those jurisdictional requirements. An unexamined assumption of jurisdiction would contravene an appellate court's duty to confirm its own jurisdiction.

Although the line between "mere" common law and statutory interpretation sometimes is fuzzy,<sup>310</sup> courts should give equal respect to judicial interpretations of those jurisdictional statutory requirements. Statutes' meanings are inextricably intertwined with their interpretation by the courts, so it would be difficult, if not impossible, for courts to give due deference to statutory jurisdictional requirements if the courts were free to give significantly less deference to judicial constructions of those statutes. For example, because the collateral order doctrine is now regarded as interpretation of the final decision rule,<sup>311</sup> if appeals courts may not hypothetically assume that a final decision within the meaning of 28 U.S.C. § 1291 is presented, it follows that they equally may not hypothetically assume that the order from which an appeal has been taken falls within the collateral order doctrine. I believe that the scope of pendent appellate jurisdiction upon interlocutory appeals also is a matter of interpretation of the statutes authorizing interlocutory appeals.<sup>312</sup> If that view is correct, appeals courts also may not hypothetically assume that the non-discretionary requirements for exercise of pendent appellate jurisdiction have been satisfied, and move to the merits of the pendent issues.

If one were similarly to treat Rule 54(b)'s allowance of an immediate appeal when a district court reaches a final decision as to one or more but fewer than all of the claims in a multi-claim or multi-party case as an interpretation of § 1291's final decision requirement – substituting the claim, for the civil action, as the unit as to which final decision must have been reached, – the satisfaction of that requirement also would not be subject to hypothetical assumption.<sup>313</sup>

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310. See Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1095 (1993) (stating that, "[i]n both the statutory and Rules arenas, there is a continuum between the interpretation of a text and the development of federal common law").

311. See, e.g., *Cunningham v. Hamilton County*, 527 U.S. 198, 204 (1999) (describing Court as having interpreted 28 U.S.C. § 1291 to permit jurisdiction over appeals that meet conditions of collateral order doctrine); *Johnson v. Fankell*, 520 U.S. 911, 915 & n.3 (1997) (interpreting 28 U.S.C. § 1291 as authorizing immediate appeal of rejection of qualified immunity defense, which court construes as final decision); *United States v. Tsosie*, 966 F.2d 1357, 1359 (10th Cir. 1992) (characterizing collateral order doctrine as interpretative rule for courts to construe statutory jurisdictional requirements).

312. See Steinman, *supra* note 170, at 1375-88, 1393-99, 1429-43.

313. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 433-35 (1956) (describing Rule 54(b), as amended, as providing practical means of permitting appeal from final decisions on individual claims in multi-claim actions without waiting for final decisions on all claims in case,



By contrast to the foregoing treatment of statute-based and statute-derived jurisdictional requirements, I believe that neither the doctrine of hypothetical jurisdiction nor its denunciation should have any bearing upon the appellate courts' application of the Federal Rules. However, even if or to the extent that the Court insists that those Rules are jurisdictional within the meaning of the doctrine, *Steel Co.* should be read to *permit* courts of appeals to assume *arguendo* that the cases before them satisfy the requirements of the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure, insofar as cases arise that meet the requirements of hypothetical jurisdiction doctrine.

As described earlier, the U.S. Supreme Court, and the federal appeals courts, have characterized a few of the mandates of these Rules to be jurisdictional.<sup>314</sup> But, despite these judicial pronouncements, the Federal Rules of Civil Procedure explicitly declare that those Rules "shall not be construed to extend or limit the jurisdiction" of the district courts,<sup>315</sup> and the Federal Rules of Appellate Procedure explicitly declare that those Rules "do not extend or limit the jurisdiction of the courts of appeals."<sup>316</sup> The fact that, by their own terms, the Rules do not, and cannot properly be construed to, extend or limit the jurisdiction of the appeals courts supports the argument that they are not jurisdictional within the meaning of *Steel Co.*'s prohibition of hypothetical jurisdiction.<sup>317</sup> Indeed, it has been argued that a delegation of rulemaking

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relaxing former general practice that all claims had to be finally decided before appeal could be entertained from final decision upon any of them). The *Sears* Court also held Rule 54(b) to be a valid exercise of the Court's rulemaking authority which does not supercede any statute controlling appellate jurisdiction, and which scrupulously recognizes the statutory requirement of a final decision. *Id.* at 438. It stated that the Rule "merely administers that requirement in a practical manner." *Id.* at 438; *see also* *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445, 453 (1956) (holding that Rule 54(b), as amended, does not impair statutory concept of finality embraced in § 1291, and is within Court's rulemaking power).

On the other hand, the Rule's requirement of "despatch" by the district court, to the appeals court, goes beyond anything in § 1291. For reasons elaborated below in the discussion of Federal Rules generally, I would treat that aspect as being subject to hypothetical assumption.

314. *See supra* note 163 and accompanying text.

315. FED. R. CIV. P. 82.

316. FED. R. APP. P. 1(b).

317. *See* *Center for Nuclear Responsibility v. United States Nuclear Regulatory Comm'n*, 781 F.2d 935, 941 n.10 (D.C. Cir. 1986) (stating that time limits established by Federal Rule of Appellate Procedure 4 are not truly jurisdictional (citing 9 J. MOORE, FEDERAL PRACTICE ¶ 204.02[2] at 4-16 (2d ed. 1983))); *Haney v. Mizell Mem'l Hosp.*, 744 F.2d 1467, 1472 n.3 (11th Cir. 1984) (indicating that failure to comply with Rule 4(a) does not affect subject-matter jurisdiction of appellate court; "[r]ather, a timely notice of appeal is better understood as a 'mandatory prerequisite to the exercise of appellate jurisdiction'" (quoting *United States v. Ward*, 696 F.2d 1315, 1317 (11th Cir. 1983))); *Sanchez v. Bd. of Regents*, 625 F.2d 521, 522 n.1 (5th Cir. 1980) (noting that Federal Rule of Appellate Procedure 4(a) "cannot . . . affect the subject-matter jurisdiction and is rather a mandatory precondition to the exercise of jurisdiction"); *see also* 9 MOORE'S FEDERAL PRACTICE ¶ 204.02[2] (2d ed. 1996) (stating that require-

authority to define the subject-matter jurisdiction of the district or federal appellate courts, within the limits of Article III, § 2, would be unconstitutional because it would violate Article III's grant of that power to Congress alone.<sup>318</sup>

While only Congress may confer jurisdiction on the federal courts of appeals, it is well-established that Congress may delegate to the courts the power to regulate their own practice,<sup>319</sup> and it is similarly well-established that the courts have some inherent authority to regulate their procedures and the practices of those who appear before them.<sup>320</sup> More specifically, it is clear that Congress has delegated to the Court some power to regulate the timing of appeals. These delegations need not violate Congress's own authority to determine the subject-matter jurisdiction of the courts of appeals, and all the courts that have considered the issues to date have concluded that these delegations do not do so. Thus, 28 U.S.C. § 1292(e), authorizing the Court to prescribe rules to provide for appeal of interlocutory decisions not otherwise provided for under § 1292,<sup>321</sup> and Rule 23(f), promulgated pursuant thereto, Rule 54(b) of the Federal Rules of Civil Procedure, and Rules 3 and 4 of the Federal Rules of Appellate Procedure, all of which govern the timing of appeals, all have

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ment that notice of appeal be timely-filed "is not jurisdictional in the sense of subject matter jurisdiction, since both the time limits and the circumstances in which they may be extended are fixed by the rules;" indicating that time limit is instead "[m]andatory precondition to the exercise of jurisdiction;" and citing *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978), for proposition that Supreme Court in past years showed its awareness of distinction by placing quotation marks around term "jurisdictional" when speaking of filing of notice of appeal); 16A WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3947.1 (1999) (asserting that statutes giving Court power to make rules of appellate procedure do not give Court authority to diminish or enlarge jurisdiction of courts of appeals, and that jurisdictional statutes are "totally unaffected in scope or interpretation or application by promulgation of Appellate Rules").

318. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941) (observing that there are limitations on authority to prescribe rules that were not mentioned in Rules Enabling Act, including "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by statute"); LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 457 (2d ed. 2000) (implying that both text and history of Article III indicate that determination of inferior federal courts' jurisdiction cannot be delegated).

319. See *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (upholding Congress's delegation of authority to United States Sentencing Commission of judicial branch to promulgate federal criminal sentencing guidelines); *Sibbach*, 312 U.S. at 9-10 (finding that Congress has ability to delegate to federal courts Congress's power to regulate practice and procedure of federal courts by making rules not inconsistent with statutes or Constitution of United States); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825) (Marshall, C.J.) (noting that Congress may delegate powers that it may rightfully exercise itself).

320. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 35, 43-51 (1991) (discussing federal courts' inherent power to manage their own proceedings and to control conduct of those who appear before them, in such ways as fashioning appropriate sanctions for misconduct).

321. See also 28 U.S.C. § 2072(c) (1994) (authorizing Court, by rule, to define when district court ruling is final for purposes of appeal under § 1291).

been upheld against challenge.<sup>322</sup> Additionally, the courts, through case law, have long fashioned doctrines governing the timing of appeals.<sup>323</sup> As the Fifth Circuit recently commented, all of these affect when the courts of appeals may hear appeals, but not the matters reviewable; the timing is "an issue apart from the right to confer . . . jurisdiction."<sup>324</sup> This again suggests that the Rules are not truly jurisdictional or jurisdictional within the meaning of *Steel Co.*'s prohibition on the exercise of hypothetical jurisdiction.

Moreover, (with the possible exception of the final decision aspect of Rule 54(b) discussed above), I do not believe that the Rules are of sufficient importance, as a matter of policy, that the federal appellate courts should lack power to liberally construe them or even to hypothetically assume the Rules' satisfaction and reach the merits. The other aspects of the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure that have been characterized as jurisdictional are essentially procedural rules, adopted to facilitate orderly transaction of the appellate courts' business. They prescribe the details of the methods by which parties can invoke the jurisdiction granted to those courts by Congress. Appeal periods "involve primarily the interests of the immediate parties, not fundamental societal interests."<sup>325</sup> "There is no question of the courts' basic capacity or competency to exercise judicial authority. There is also no question of . . . political sensitivity vis-a-vis another forum or sovereign."<sup>326</sup> As a result, the interests in assuring accurately described and timely filed appeals are substantially accomplished by the vigilant application of Rules 3 and 4, when they are raised by the parties.<sup>327</sup> Moreover, even if one posited that there are efficiency values served by Rules 3 and 4 which are not subject to waiver by the parties, that would not respond

322. See *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 438 (1956) (upholding Rule 54(b)); *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445, 453 (1956) (upholding Rule 54(b)); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 973-74 (5th Cir. 2000) (upholding Federal Rule of Civil Procedure 23(f) and 28 U.S.C. § 1292(e) against challenge that § 1292(e)'s grant of authority constitutes impermissible delegation of power to confer jurisdiction, and holding that "the Supreme Court may address the timing of appeals as interstitial rulemaking without affecting Congress's authority to determine the subject matter jurisdiction of the lower federal courts" (emphasis in original)). But see *TEPLY & WHITTEN*, *supra* note 318, at 461-62 (seeing Federal Rule of Civil Procedure 23(f) as extension of appellate jurisdiction and thus questioning its constitutionality, although acknowledging that limitedness of extension might save validity of Rule by rendering it regulation of mere procedural detail which is within judicial rulemaking power).

323. See *supra* text accompanying notes 154-56.

324. *Bolin*, 231 F.3d at 974.

325. *Hall*, *supra* note 233, at 400; see *supra* text accompanying note 308 (discussing finality requirement).

326. *Hall*, *supra* note 233, at 420.

327. *Accord id.* at 424 (advocating mandatory application of Federal Rule of Appellate Procedure 4(a) when it is raised by parties).

to the argument that *courts* should be free to forego those efficiencies when they believe that other efficiencies can be gained, and the interests of justice served, by doing so – as was the situation when appellate courts exercised hypothetical appellate jurisdiction through an assumption that the Rules' requirements had been satisfied.

What should we make of the Court's holdings that certain requirements of the Federal Rules of Appellate Procedure are jurisdictional? We have to see these declarations as among the profligate uses of the term and "translate" these declarations to discern their precise meaning. As then-Judge Ginsburg once noted,

When we employ the word to mean many things—from the absence of a constitutional grant of judicial power to a statutory limit on time to appeal – we ought to bear firmly in mind that "the tendency to assume that a word which appears . . . in connection with more than one purpose . . . has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against."<sup>328</sup>

If, or to the extent that, notwithstanding all of the above, the Court were to insist that the Rules are jurisdictional within the meaning of *Steel Co.*'s prohibition on hypothetical jurisdiction, I would argue that *Steel Co.* nonetheless should be read to *permit* courts of appeals to assume *arguendo* that the cases before them satisfy the requirements of the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure, insofar as cases meet the requirements of hypothetical jurisdiction doctrine.

In support of that conclusion, I offer the following: First, the Rules (obviously) are not congressional statutes. Although they do bear Congress's imprimatur, in the sense that they exist by the grace of Congress, which has the power to veto them and chose not to do so,<sup>329</sup> as the Court's creation, the Rules should be subject to judicial relaxation. This is true in part because the separation of powers issues that arise if federal courts disregard or circumvent congressional legislation concerning appellate jurisdiction are not so acute if

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328. *Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n*, 781 F.2d 935, 945 n.4 (D.C. Cir. 1986) (Ginsburg, J., dissenting) (quoting Walter Wheeler Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 337 (1933)).

329. As previously noted, pursuant to 28 U.S.C. § 2074 (1994), Congress has the opportunity to reject or alter Rules proposed by the Court. Section 2074 provides in pertinent part that, "(a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law." The absence of adverse action by Congress is taken to indicate that Congress found "no transgression of legislative policy." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 16 (1941).

federal courts take some liberties with Federal Rules.<sup>330</sup> As Justice Harlan wrote, concurring in a 1970 case,

As a matter of statutory interpretation, the Court has not presumed the right to extend time limits specified in statutes where there is no indication of a congressional purpose to authorize the Court to do so. Because we cannot "waive" congressional enactments, the statutory time limits are treated as jurisdictional. On the other hand, for the time requirement of [a particular Supreme Court Rule], established under a broad statutory delegation, it is appropriate to apply the "general principle" that "[i]t is always within the discretion of a court . . . to relax or modify its procedural rules adopted for the orderly transaction of business before it when[,] in a given case[,] the ends of justice require it."<sup>331</sup>

The same principle that the Court applied to Supreme Court Rules in the case quoted above should govern the rules governing the courts of appeals, and those courts, unless prohibited by holdings of the Supreme Court, should be able, in the interests of justice, to exercise discretion to relax the procedural rules adopted for the orderly transaction of their business or, when the requisites of hypothetical jurisdiction doctrine have been met, to assume that the requirements of those rules have been satisfied.

The Rules' time limits for filing an appeal and concerning the naming of parties, identification of the judgment or order from which appeal is taken, and identification of the court to which it is being taken, may be "mandatory" requirements,<sup>332</sup> but these Rules "merely prescribe the method by which the jurisdiction granted the courts by Congress is to be exercised."<sup>333</sup> The requirement that appellants identify the court, the appellants, and the matters from

330. See *Schacht v. United States*, 398 U.S. 58, 64 (1970) (rejecting argument that S. Ct. Rule 22(2) was jurisdictional and could not be waived by Court). The Court noted that the Rule contained no language that called for so harsh a result, and that the Rule was not enacted by Congress but promulgated by the Court under authorization by Congress to prescribe rules concerning the time limitations for taking appeals and applying for certiorari in criminal cases. *Id.* The Court further commented that the "procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Id.*

331. *Id.* at 68 (Harlan, J., concurring) (quoting *Am. Farm Lines v. Black Ball*, 397 U.S. 532, 539 (1970) (in turn, quoting *NLRB v. Monsanto Chem. Co.*, 205 F.2d 763, 764 (8th Cir. 1953))).

332. Hall, *supra* note 233, argues that the Rules' timing requirements, although mandatory in the sense that courts have no authority to excuse untimely appeals when parties have raised the defect, should be waivable by the parties, and that the courts need not raise such issues *sua sponte*. The requirement that a court have personal jurisdiction over the parties in a civil action, too, could be viewed as mandatory, while also waivable by the parties and a matter that courts do not raise *sua sponte*.

333. 12 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D* § 3141 (1997) (speaking in connection with Federal Rule of Civil Procedure 82, but in language that is equally applicable to Federal Rules of Appellate Procedure).

which appeal is taken, provide notice to the appeals court and to the other parties of the subjects and place of the appeal.<sup>334</sup> In serving this function, they are analogous to a summons and complaint. But, just as defects in trial court venue are waivable and correctable by transfer to a court in which the action could have been brought,<sup>335</sup> just as complaints can be amended to add plaintiffs (as well as defendants) until the statute of limitations has run and, in instances when "relation back" of the amendment is appropriate, even thereafter,<sup>336</sup> and just as complaints are charitably construed and liberally amendable so long as adversaries are not prejudiced,<sup>337</sup> an error in the identification of the court to which appeal is taken should simply be corrected by transmission or transfer of the appeal to the proper court of appeals.<sup>338</sup> Moreover, broad construction, or even timely amendment, of the specification of the orders being appealed and of the parties who are appealing should be permissible, in the discretion of the court of appeals and in the interests of justice.<sup>339</sup> As the

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334. See *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988) (noting that purpose of specificity requirement concerning appellants' identity is to provide notice to opposition and to court); *Anderson v. District of Columbia*, 72 F.3d 166, 168 (D.C. Cir. 1995) (stating that "[c]entral to the specificity requirements of Rule 3(c) is the principle of fair notice to the opposing party and to the court.").

335. See FED. R. CIV. P. 12(h)(1) (stating circumstances in which defense of improper venue is waived); 28 U.S.C. § 1406 (2001) (providing for transfer of cases laying venue in wrong division or district).

336. See *Slaughter v. S. Talc Co.*, 949 F.2d 167, 174-75 (5th Cir. 1991) (finding that amendment of products liability complaint to add wrongful death claims and to substitute widows for allegedly injured deceased husbands related back to filing date of original complaint, and thus were not time-barred, where claims arose out of same injury as originally pleaded, defendants had notice of amendment within limitations period and, by amendment, widows sought to recover, as representatives of estates, for injury originally alleged and also as individuals injured in their own right); *Neufield v. Neufield*, 910 F. Supp. 977, 985-86 (S.D. N.Y. 1996) (stating that claims of plaintiff who was added in amended complaint related back to original filing date where substance of plaintiff's claims was fully set forth in original complaint).

337. Federal Rule of Civil Procedure 8(f) states that "[a]ll pleadings shall be so construed as to do substantial justice," and Federal Rule of Civil Procedure 15(a) states that leave to amend a pleading "shall be freely given when justice so requires."

338. 28 U.S.C. § 1631 (1994) authorizes transfer from one federal court of appeals to another "in which the . . . appeal could have been brought at the time it was filed," in order to cure the filing of an appeal in the incorrect court. See also *Bradley v. Work*, 154 F.3d 704, 706-07 (7th Cir. 1998) (allowing docketing statement to cure defects in notice of appeal, which had not named court to which appeal was taken); *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1125 (7th Cir. 1996) (holding it sufficient that intent to appeal to Seventh Circuit appeared from fact that that was only court to which appeal could have been taken and appellees were not misled); *Anderson v. District of Columbia*, 72 F.3d 166, 168 (D.C. Cir. 1995) (forgiving appellant's naming of wrong appellate court in his notice of appeal where it was obvious in which court appeal properly lay, for there was only one court to which he could properly appeal).

339. See generally 16A WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3949.4 (1999) (stating that "[a]mendment of the notice . . . may be allowed, particu-

citations in the margin indicate, courts frequently do follow these norms. By the same token, the appeals limitation period set in Rule 4 would better be viewed as analogous to a statute of limitations (rather than as a jurisdictional limit), setting a definite time when litigation shall be at an end, but waivable by the parties and not to be raised by a court *sua sponte*.<sup>340</sup>

Nothing in the view that these requirements are mandatory is inconsistent with the idea that appeals courts should, in some circumstances, be able to assume the requirements to be met. Requirements can be mandatory *upon the parties* and something that the courts must enforce upon a complaint of non-compliance registered by other litigants, while still being matters that a court can assume to have been satisfied, in the absence of any party complaint of non-compliance, and if the circumstances otherwise make such an assumption appropriate.<sup>341</sup>

It is the Court's conclusion that intermediate appellate courts have a duty to raise *sua sponte* a failure to comply with certain requirements, including especially the requirement of timely filing of the notice of appeal, that seems most inconsistent with my position that federal appeals courts should be recognized to have power, at least in some circumstances, to assume compliance and proceed to the merits. As to this, I say that the Court should either (1) abandon this position altogether, recognizing that, in imposing a duty to raise such matters *sua sponte*, it has gone too far in treating certain of the Rules'

larly if the amendment is made within the time allowed for initial filing," *id.* at 60-61). Notices are to be given a liberal interpretation. *Id.* at 61-65. "[A] notice of appeal that names the final judgment is sufficient to support review of all earlier orders that merge in the final judgment." *Id.* at 72-73. Some postjudgment orders may be so inseparable from the judgment as to be encompassed by a notice of appeal filed before entry of those orders. *Id.* at 73. The Advisory Committee Notes to the 1993 amendments to Federal Rule of Appellate Procedure 3(c), which, in several respects liberalized the requirements for specifying appellants, made clear the Committee's intent that an appeal not be dismissed when it is clear from the notice that a party intended to appeal. The Notes declare, "If a court determines [that] it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward." FED. R. APP. P. 3(c) Advisory Committee Note.

340. See FED. R. CIV. P. 8(c) (making statutes of limitations waivable affirmative defenses); Hall, *supra* note 233, at 414-15 (citing *Browder v. Dir., Dep't of Corrections*, 434 U.S. 257, 264 (1978) (finding that purpose of appeal limitations periods is to set definite time when litigation shall end unless, within time prescribed, application to appeal has been made and, if it has not, to advise prospective appellees that they are free of their adversary's demands)).

341. See Hall, *supra* note 233, at 411-18 (arguing that federal courts have "confused two distinct questions: the authority to excuse untimely appeals once raised and the authority to notice untimely appeals *sua sponte*"). Writing in 1986, Hall observed, "[I]n each instance where the Supreme Court has referred to the thirty-day appeal period [set by Rule 4(a) of the Federal Rules of Appellate Procedure] as 'mandatory and jurisdictional,' . . . the only issue was whether the court of appeals had authority to relax the exact requirements of Rule 4(a). In none of these cases did the Supreme Court or the court of appeals notice a timing defect on its own." *Id.* at 410 (footnotes omitted). The observation appears still to be accurate at this writing, in 2001.

requirements as if they were truly jurisdictional, or (2) recognize exceptions to this duty, including one for situations in which specifiable requisites for the exercise of hypothetical "jurisdiction" have been satisfied.<sup>342</sup> It may be that the cases will be rare that satisfy the requirements of hypothetical jurisdiction in the context of Rules-based issues. That is, it may be rare that the "jurisdictional" question posed by a Federal Rule will be especially difficult while the merits of a case are clearly against the appellant. Rarity is not a compelling reason to deny the courts power to assume satisfaction of the "jurisdictional" Rules' requirements, however. In the many cases where the requirements of hypothetical jurisdiction are not met, federal appeals courts should read and apply the Rules liberally. In light of what I hope will be increasing realization that the Rules are not truly jurisdictional, the courts should read and apply them in some respects more liberally than they have done.

#### *IV. Observations on the Effects of the Denunciation of Hypothetical Jurisdiction and Conclusion*

The denunciation of hypothetical jurisdiction, when it precludes the exercise of such jurisdiction, has the virtue of compelling resolution of jurisdictional issues, thereby reducing procrastination, postponement and uncertainty as to those matters.<sup>343</sup> Insofar as *Steel Co.* precludes district courts from indulging in exercises of hypothetical jurisdiction, appellate courts have to review jurisdictional determinations that otherwise would have been finessed, undertaking that review either early in litigation (if the district court dismisses for lack of jurisdiction), after final judgment (if the district court holds that it does have jurisdiction and adjudicates the case to final judgment), or in conjunction with authorized interlocutory appeals.

At the same time, precluding the appellate courts' exercise of hypothetical jurisdiction, concerning either their own or district court jurisdiction, eliminates or at least postpones appellate decision of merits issues that parties seek to have resolved. Appellate courts may find themselves making law on fewer substantive law issues, both because district courts will not reach those issues when they dismiss for lack of jurisdiction and because appeals courts will not

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342. To the degree that *Steel Co.* leaves the door open to exercises of hypothetical appellate jurisdiction (i.e., to the extent that there *is* power to act) when only statutory, rule-based, common law or prudential jurisdictional "requirements" are implicated, one should still ask when, as a matter of policy and discretion, the power should be exercised. The courts of appeals' efforts to articulate those considerations was ongoing at the time that the Court excoriated hypothetical jurisdiction in *Steel Co.*, which stopped the development of that body of doctrine in its tracks. Insofar as the courts find that they continue to have latitude to develop the doctrine – in the context of either appellate jurisdiction or original, typically district court, jurisdiction – they can pick up where they left off.

343. See Idleman, *supra* note 4, at 283-84 (explaining that hypothetical jurisdiction perpetuated itself, causing courts to defer decisions on jurisdictional matters, leading to uncertainty).



reach substantive law issues on the merits when they vacate judgments and dismiss cases for lack of federal subject-matter jurisdiction or lack of appellate jurisdiction. This consequence may not be bad; it may even be good, if the courts do not have jurisdiction to decide those issues. However, when appellate courts do not answer substantive law questions, society loses something of value. Even when merits issues are relatively "easy," the lack of answers leaves uncertainty that has real and sometimes great effects in society. The guidance to primary conduct that appellate courts can give is lost, at least for a time, with consequences for how time, energy, and other resources are expended in the world, and with consequences for future litigation that will likely be necessary to authoritatively answer the questions left unresolved.

When the potential obstacle to appellate decision is posed only by Federal Rules,<sup>344</sup> not by legislation nor by the Constitution, the harm attendant upon delay of the merits decision may far exceed that attendant upon relaxation of the Rules. For the several reasons discussed above, appellate courts should enjoy freedom to relax their application of the Rules, in view of the fact that the Rules' requirements are not truly jurisdictional mandates. Given the Rules' promulgation by the Court and the weakness of the systemic interests that they further, even if the Supreme Court insists that certain Rules' requirements are "jurisdictional," the appeals courts should be recognized to have power to assume that the rule-imposed appellate "jurisdictional" requirements have been satisfied, and to reach the merits, in the exercise of their sound discretion, under a doctrine of hypothetical appellate jurisdiction. The courts of appeals should have at least that much ability to control their agenda.<sup>345</sup>

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344. Again excepting the final decision aspect of Federal Rule of Civil Procedure 54(b), which is derived from § 1291.

345. It is a familiar adage that "[h]e who controls the agenda controls the outcome."

*Appendix*

28 U.S.C. §§ 1251-59 and 1291, 1292 and 1295 (1999) provide as follows:

§ 1251. Original jurisdiction

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

[§ 1252—repealed]

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

[§§ 1255-56—repealed]

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in

question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

§ 1258. Supreme Court of Puerto Rico; certiorari

Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

§ 1259. Court of Appeals for the Armed Forces; certiorari

Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

(1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.

(2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.

(3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.

(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

## § 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction –

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from

such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

[§ 1293 is repealed; § 1294 concerns appellate venue.]

**§ 1295 Jurisdiction of the United States Court of Appeals for the Federal Circuit**

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction –

(1) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights, exclusive rights in mask works, or trademarks and no other claims under section 1338(a) shall be governed by sections 1291, 1292, and 1294 of this title;

(2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title;

(3) of an appeal from a final decision of the United States Court of Federal Claims;

(4) of an appeal from a decision of –

(A) the Board of Patent Appeals and interferences of the Patent and Trademark Office with respect to patent applications and interferences, at the instance of an applicant for a patent or any party to a patent interference, and any such appeal shall waive the right of such applicant or party to proceed under section 145 or 146 of title 35;

(B) the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office or the Commissioner of Patents and Trademarks or the Trademark Trial and Appeal Board with respect to applications for registration of marks and other proceedings as provided in section 21 of the Trademark Act of 1946 (15 U.S.C. 1071); or

(C) a district court to which a case was directed pursuant to section 145 or 146 or 154(b) of title 35;

(5) of an appeal from a final decision of the United States Court of International Trade;

(6) to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337);

(7) to review, by appeal on questions of law only, findings of the Secretary of Commerce under U.S. note 6 to subchapter X of chapter 98 of the Harmonized Tariff Schedule of the United States (relating to importation of instruments or apparatus);

(8) of an appeal under section 71 of the Plant Variety Protection Act (7 U.S.C. 2461);

(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5;

(10) of an appeal from a final decision of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607 (g)(1)); and

(11) of an appeal under section 211 of the Economic Stabilization Act of 1970;

(12) of an appeal under section 5 of the Emergency Petroleum Allocation Act of 1973;

(13) of an appeal under section 506(c) of the Natural Gas Policy Act of 1978; and

(14) of an appeal under section 523 of the Energy Policy and Conservation Act.

(b) The head of any executive department or agency may, with the approval of the Attorney General, refer to the Court of Appeals for the Federal Circuit for judicial review any final decision rendered by a board of contract appeals pursuant to the terms of any contract with the United States awarded by that department or agency which the head of such department or agency has concluded is not entitled to finality pursuant to the review standards specified in section 10(b) of the Contract Disputes Act of 1978 (41 U.S.C. 609(b)). The head of each executive department or agency shall make any referral under this section within one hundred and twenty days after the receipt of a copy of the final appeal decision.

(c) The Court of Appeals for the Federal Circuit shall review the matter referred in accordance with the standards specified in section 10(b) of the Contract Disputes Act of 1978. The court shall proceed with judicial review on the administrative record made before the board of contract appeals on matters so referred as in other cases pending in such court, shall determine the issue of finality of the appeal decision, and shall, if appropriate, render judgment thereon, or remand the matter to any administrative or executive body or official with such direction as it may deem proper and just.

[§ 1296 – repealed]