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The Emergence of Jurisdictional Resequencing in the Federal Courts

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THE EMERGENCE OF JURISDICTIONAL RESEQUENCING IN THE FEDERAL COURTS

Scott C. Idleman†

The Supreme Court recently held that federal courts may address personal jurisdiction, and dismiss a lawsuit for its absence, without first or ever verifying their subject-matter jurisdiction. The Court's ruling effectively invites lower courts to sidestep subject-matter jurisdictional issues and dispose of lawsuits on any non-merits threshold ground that is functionally equivalent to, but more easily resolved than, the question of subject-matter jurisdiction. In this Article, Professor Idleman examines the genealogy, components, legitimacy, and future application of this emerging doctrine of resequencing, as well as the extent to which it accords with the Court's professedly restrained approach to federal power. Professor Idleman contends that the doctrine represents an unsettling departure from both precedent and jurisdictional theory, including principles of inherent judicial power. Moreover, the doctrine's elements and scope are neither carefully delineated nor grounded in a coherent theory of judicial power, a reality that has already spawned several lower court conflicts. Notwithstanding these difficulties, the Article attempts to assess the potential resequencibility of various threshold issues, most notably personal jurisdiction, Eleventh Amendment immunity, and federal sovereign immunity. Professor Idleman concludes that despite the potential appeal of the resequencing doctrine, its jurisprudential flaws overshadow its practical benefits.

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INTRODUCTION

As the nation's third century unfolds, American constitutionalism finds itself in the midst of a structural counterrevolution, waged largely by a Supreme Court that is at once institutionally conservative yet doctrinally activist.[1] At the forefront of this constitutional resurgence are foundational concepts such as the limited and enumerated nature of congressional power and the reserved powers of the several states.[2] So resolute is the Court's commitment to structuralism that even the judiciary's own powers, as exemplified by recent standing and sovereign immunity decisions, have been circumscribed if not

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[1] *See, e.g.*, Litman v. George Mason Univ., 186 F.3d 544, 555 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000); Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 892–93 (4th Cir. 1999) (Wilkinson, C.J., concurring), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000); Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1379–81 (1998) ("[T]he U.S. Supreme Court is again policing textually-provided-for structural jurisdictional lines in a way that has not occurred in this country since before 1937. This constitutional development is nothing less than a quiet revolution.").

[2] *See, e.g.*, Dickerson v. United States, 530 U.S. 428 (2000); United States v. Morrison, 529 U.S. 598 (2000); Alden v. Maine, 527 U.S. 706 (1999); Printz v. United States, 521 U.S. 898 (1997); City of Boerne v. Flores, 521 U.S. 507 (1997); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992).

curtailed.[3] That, at least, is what the more conspicuous cases might lead one to believe. In fact, closer scrutiny reveals that the Court's commitment is not so thoroughgoing after all, and that its efforts to constrain federal power—particularly judicial power—have been less than exhaustive, if not less than principled, especially in areas of perceived public insignificance.[4]

Illustrative in this regard is the recently announced doctrine of "jurisdictional resequencing": the power of a court, when confronted both by a challenge to subject-matter jurisdiction and by some alternative threshold issue, to address the alternative issue first (hence "resequencing"), to dispose of the litigation on that basis, and thus to sidestep entirely the subject-matter jurisdiction question. In its 1999 decision, *Ruhrgas AG v. Marathon Oil Co.*, the Supreme Court explicitly countenanced the resequencing of personal jurisdiction prior to, and in lieu of, subject-matter jurisdiction.[5] Since that time, lower courts have gone so far as to suggest that the option of resequencing prior to subject-matter jurisdiction may extend to *any* threshold question as long as it does not implicate the merits.[6]

These developments are striking to say the least. Not only does resequencing represent a marked departure from precedent—one scholar charitably described it as "somewhat of a surprise"[7]—it introduces substantial instability into an otherwise settled region of juris-

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[3] In regard to standing doctrine, see *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); and *Riley v. St. Luke's Episcopal Hospital*, 196 F.3d 514, 532 (5th Cir. 1999) (DeMoss, J., specially concurring) (remarking that "the Supreme Court's recent structuralist approach to jurisdiction heralds a new era in the evolution of the standing doctrine"), *rev'd en banc on other grounds*, 252 F.3d 749 (5th Cir. 2001). In regard to Eleventh Amendment immunity, see *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

[4] At the same time, the Court's enforcement of certain principles, such as the separation of powers, has effectively *expanded* federal judicial power—as illustrated by recent cases involving the power of judicial review. *Compare, e.g., Dickerson*, 530 U.S. at 437 (stating that "Congress may not legislatively supersede [the Supreme Court's] decisions interpreting and applying the Constitution"), *and City of Boerne*, 521 U.S. at 519–29, 535–36 ("When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them . . . , and contrary expectations must be disappointed."), *with* Katzenbach v. Morgan, 384 U.S. 641, 651 & n.10 (1966) (implying that Congress may have the power under § 5 of the Fourteenth Amendment to interpret constitutional guarantees more expansively, though not more restrictively, than they are interpreted by the judiciary).

[5] Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999). The Court described the practice as the "sequencing of jurisdictional issues." *Id.* at 584.

[6] *See* Young v. Ill. State Bd. of Elections, No. 00-3713, 2000 WL 1611115, at *1 (7th Cir. Oct. 25, 2000); Galvan v. Fed. Prison Indus., Inc., 199 F.3d 461, 463 (D.C. Cir. 1999).

[7] Jack H. Friedenthal, *The Crack in the* Steel *Case*, 68 GEO. WASH. L. REV. 258, 259 (2000). "Since 1804, when the Supreme Court decided *Capron v. Van Noorden*, federal

dictional law. This is particularly true if these lower courts are correct—and nothing in *Ruhrgas* suggests the contrary—that courts may resequence threshold inquiries other than personal jurisdiction prior to subject-matter jurisdiction.[8] More fundamentally, the emergence of resequencing casts serious doubt upon the structuralist commitment to limited federal power, not merely because it effectively expands the authority of courts, but also because it has arisen without meaningful discussion of whether it actually conforms to the legitimating principles of judicial power.

To date, the lower federal courts have expressed both uncertainty and disagreement over the proper interpretation of the resequencing doctrine, and given its recent vintage, there has been only limited academic commentary on either its validity or its implications.[9] The principal purpose of this Article is to fill this void by systematically assessing the resequencing doctrine from its initial articulation by the Supreme Court to its gradual emergence and evolution through lower court decisions. To this end, the Article is divided into three parts. Part I describes the nature of the doctrine, including both its immediate genealogy and its basic components. Part II evaluates the doctrine's legitimacy, examining its relation to precedent and prior judicial practice, to principles of jurisdictional theory, to the nature of federal judicial power, and to matters of methodological integrity. Finally, Part III explores the potential future application of the doctrine, with particular emphasis on personal jurisdiction, Eleventh Amendment immunity, and federal sovereign immunity. Part III also explores the possible convergence of the resequencing doctrine with the recently articulated and theoretically related prohibition on so-called hypothetical jurisdiction.

The conclusions that emerge from this assessment are not entirely positive. Two of these conclusions are particularly disconcerting. First, the Article reveals that the jurisdictional resequencing doctrine is substantially illegitimate in relation to virtually all measures of doctrinal validity, including precedential fidelity, theoretical congruence, jurisdictional conformity, and methodological adherence. The doctrine does have some elements of legitimacy, of course, and it is not without its own virtues, especially the potential for judicial economy.[10] In the final analysis, however, the doctrine manifests little more than a desire for expediency, obtained at the expense of actual legitimacy. Second, the undertheorized and analytically undeveloped

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courts have generally assumed that unless a federal court has subject-matter jurisdiction, it cannot determine any other issue in a case." *Id.* (footnote omitted).

8 *See Galvan*, 199 F.3d at 463.

9 *See, e.g.*, Friedenthal, *supra* note 7, at 266–75.

10 *See id.* at 269.

nature of the doctrine renders its future application uncertain, thereby inviting unpredictability, inconsistency, and even abuse. Not only does this state of affairs effectively subvert the judicial effort to implement the structural limits of federal power, it also calls into question the very integrity and intentions of that effort.

I
THE NATURE OF THE DOCTRINE

This first Part provides an overview of the doctrine's immediate genealogy and apparent analytical parameters, both for their own sake and as a prelude to assessing the doctrine's legitimacy and potential reach in Parts II and III. The genealogical examination primarily focuses on two recent Supreme Court decisions: *Steel Co. v. Citizens for a Better Environment*,[11] which generally disallowed the practice of addressing the merits prior to subject-matter jurisdiction, and *Ruhrgas AG v. Marathon Oil Co.*,[12] which nevertheless allowed the practice of addressing personal jurisdiction prior to subject-matter jurisdiction.[13] The parametric examination, by comparison, will largely shift to the *Ruhrgas* decision and to the lower court cases construing it, although the overlapping significance of *Steel Co.* will necessarily be revisited in Part III.

A. The Doctrine's Proximate Genealogy

In *Steel Co.*, a 1998 decision, the Court ostensibly pronounced the death of hypothetical jurisdiction.[14] This practice, which by the 1990s every federal circuit court had utilized,[15] allowed courts to adjudicate a dispute and render a judgment on the merits without first verifying that subject-matter jurisdiction, particularly Article III jurisdiction, actually existed. Most often, the practice was employed when a court was faced with a difficult jurisdictional question but could simultaneously perceive that the party asserting jurisdiction would lose on the merits.[16] As a matter of judicial economy and restraint, therefore, the court would bypass the jurisdictional question (essentially hypothesiz-

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11 523 U.S. 83 (1998).

12 526 U.S. 574 (1999).

13 Regarding the genealogical link between *Steel Co.* and *Ruhrgas*, see *id.* at 577 (noting that "*Steel Co.* is the backdrop for the issue now before us"); and Rick Knight, *Recent Developments in Federal Litigation*, FED. LAW., Oct. 1999, at 45, 46–47 (similar).

14 *Steel Co.*, 523 U.S. at 93–102; *see also* Ugo Colella & Adam Bain, *The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation*, 67 FORDHAM L. REV. 2859, 2876–79 (1999) (examining *Steel Co.*'s repudiation of hypothetical jurisdiction); Friedenthal, *supra* note 7, at 260–66 (same). *See generally* Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235 (1999) (examining hypothetical jurisdiction in greater depth).

15 Idleman, *supra* note 14, at 237 & n.5.

16 *See Steel Co.*, 523 U.S. at 93–94 (collecting cases).

ing jurisdiction), proceed to address the merits of the dispute, and then dispose of the case on that basis.[17]

The Court's repudiation of the practice was correct for several reasons, of which the Court itself articulated two. First, the practice necessarily "carries the courts beyond the bounds of authorized judicial action"[18] because judgments issued in the absence of an Article III case or controversy are advisory[19] and federal courts have long been prohibited from rendering advisory opinions.[20] Second, the practice "offends fundamental principles of separation of powers"[21] because "[t]he statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers."[22]

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17 *See id.*

18 *Id.* at 94.

19 *Id.* at 101.

20 *See, e.g.*, Pennell v. City of San Jose, 485 U.S. 1, 8 (1988); Flast v. Cohen, 392 U.S. 83, 96 (1968). In addition, "the doctrine is fundamentally inconsistent with the constitutionally based principle that federal courts are courts of limited jurisdiction" because it "relieves a plaintiff of the burden of proving subject matter jurisdiction." Colella & Bain, *supra* note 14, at 2876.

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

22 *Id.* at 101; *see also* Colella & Bain, *supra* note 14, at 2876 & n.62 (explaining that an exercise of hypothetical jurisdiction offends both formalist and functionalist notions of the separation of powers). To the Court's rationales one could add precedent, institutional integrity, judicial accountability, and logical consistency. The Court's own cases, for example, had clearly provided that "jurisdiction cannot be assumed on mere hypothesis," City of New Orleans v. Benjamin, 153 U.S. 411, 424 (1894), and that "[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction," Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981). *See also* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988) ("Our agreement with the Federal Circuit's conclusion that it lacked jurisdiction, compels us to disapprove of its decision to reach the merits anyway . . . ."); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."). One can also make a strong argument that the federal judiciary's integrity and legitimacy, especially when holding that the other federal branches have exceeded their powers, is undermined when it ignores the limits on its own power. *See* United States Catholic Conf. v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 77 (1988); Idleman, *supra* note 14, at 282. Likewise, there is an argument from accountability. Explaining why "[t]he first thing a federal judge should do . . . is . . . to see that federal jurisdiction is properly alleged," Judge Posner of the Seventh Circuit has remarked:

> Because federal judges are not subject to direct check by any other branch of government—because the only restraint on our exercise of power is self-restraint—we must make every reasonable effort to confine ourselves to the exercise of those powers that the Constitution and Congress have given us.

Wis. Knife Works v. Nat'l Metal Crafters, 781 F.2d 1280, 1282 (7th Cir. 1986). Finally, there is an argument purely from logical consistency or symmetry. It is well-established that a federal court's power to decide the merits of a claim does not arise simply because the claim is legally or morally compelling. *See Christianson*, 486 U.S. at 818; Utah v. Babbitt, 137 F.3d 1193, 1202 (10th Cir. 1998). Surely it would be a strange jurisdictional doctrine that would allow such power to arise precisely because the claim is *not* legally or morally compelling.

Yet the *Steel Co.* decision was not seamless. The opinion did not clearly delineate the extent of the repudiation, including whether a court can bypass certain non–Article III jurisdictional inquiries, such as statutory or prudential standing, en route to the merits.[23] In addition, two of the five Justices in the majority were not willing to prescribe a categorical rule against hypothetical jurisdiction, suggesting instead that its invocation should remain a matter of judgment[24] and leading some lower courts to conclude that *Steel Co.* produced only a plurality opinion.[25] Lastly, the Court, though conceding that its own cases had "diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question,"[26] nevertheless declined to tidy up the field, thereby leaving several related doctrines intact and several derivative yet significant questions unresolved.[27]

Among the questions left open was whether an Article III court could address a *non*-merits issue, other than a core subject-matter jurisdictional issue, without first verifying its subject-matter jurisdiction. Issues of this sort might include alternative forms of jurisdiction (such as personal or in rem jurisdiction) as well as a variety of semi- or quasi-jurisdictional matters (such as Eleventh Amendment immunity or administrative exhaustion).[28] The difficulty with such issues is precisely

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23 *Compare Steel Co.*, 523 U.S. at 101 (justifying the repudiation in part by noting the importance of both "[t]he statutory and (especially) constitutional elements of jurisdiction"), *and* Jones v. Am. Postal Workers Union, 192 F.3d 417, 422 (4th Cir. 1999) (same), *and* United States v. Universal Mgmt. Servs., Inc., 191 F.3d 750, 756–57 (6th Cir. 1999) (applying *Steel Co.* to nonconstitutional jurisdiction issues), *cert. denied*, 530 U.S. 1274 (2000), *and* Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266, 268 (7th Cir. 1998) (same), *and* McCarty Farms, Inc. v. Surface Transp. Bd., 158 F.3d 1294, 1298–1300 (D.C. Cir. 1998) (same), *and* Virginia v. Reno, 117 F. Supp. 2d 46, 51–53 (D.D.C. 2000) (same), *aff'd mem.*, 531 U.S. 1062 (2001), *with* Fama v. Comm'r of Corr. Servs., 235 F.3d 804, 816 n.11 (2d Cir. 2000) (limiting *Steel Co.* to constitutional jurisdiction issues), *and* United States v. Woods, 210 F.3d 70, 74 n.2 (1st Cir. 2000) (same), *and* Cablevision of Boston, Inc. v. Pub. Improvement Comm'n, 184 F.3d 88, 100 n.9 (1st Cir. 1999) (same), *and* Larsen v. Senate of Pa., 152 F.3d 240, 245 (3d Cir. 1998) (implying the same), *and* Broad v. DKP Corp., No. 97 Civ. 2029 (LAP), 1998 WL 516113, at *4 (S.D.N.Y. Aug. 19, 1998) (same), *aff'd*, No. 98-9271, 1999 WL 447632 (2d Cir. June 16, 1999).

24 *Steel Co.*, 523 U.S. at 110–11 (O'Connor, J., concurring, joined by Kennedy, J.); *see* Whitehead v. Grand Duchy of Lux., No. 97-2703, 1998 WL 957463, at *3 (4th Cir. Sept. 11, 1998) (noting this "caveat" of Justices O'Connor and Kennedy); Knight, *supra* note 13, at 46 (similar).

25 *See, e.g.*, *Cablevision of Boston*, 184 F.3d at 100 n.9; *cf.* United States *ex rel.* Foulds v. Tex. Tech Univ., 171 F.3d 279, 287 n.11 (5th Cir. 1999) ("It is not entirely clear . . . that th[e] [relevant] portion of the Supreme Court's opinion [in *Steel Co.*] attracted five votes."), *cert. denied*, 530 U.S. 1202 (2000).

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

27 *See* United States v. Bell, Nos. 97-5676, 97-5726, 1999 WL 220119, at *4 n.10 (6th Cir. Apr. 7, 1999), *cert. denied*, 528 U.S. 839 (1999); *Whitehead*, 1998 WL 957463, at *3; Idleman, *supra* note 14, at 321–32, 336–37.

28 *E.g.*, Marra v. Papandreou, 216 F.3d 1119, 1122–23 (D.C. Cir. 2000) (expressing uncertainty as to a forum-selection clause dismissal without verifying subject-matter jurisdiction).

their intermediate nature. On the one hand, they are not inherently related to the merits, so reaching them prior to addressing subject-matter jurisdiction would not appear to offend *Steel Co.* insofar as the merits are left unadjudged. On the other hand, many of them are not wholly or paradigmatically jurisdictional, let alone constitutive of Article III, so that reaching them under such circumstances would still be wielding judicial authority neither in the presence of verified subject-matter jurisdiction nor in an effort to verify such jurisdiction.

Not long after *Steel Co.*, it became evident that personal jurisdiction—especially its reachability prior to subject-matter jurisdiction—posed essentially this type of question. On the one hand, personal jurisdiction is not ordinarily tied to the merits.[29] On the other hand, it is not a species of subject-matter jurisdiction, nor is it obviously as fundamental as subject-matter jurisdiction. As a result, many courts were uncertain whether subject-matter jurisdiction had to be determined first. In 1996, two years before *Steel Co.*, a Second Circuit panel had held that courts could address personal jurisdiction prior to reaching subject-matter jurisdiction.[30] Less than four months after *Steel Co.*, however, the en banc Fifth Circuit held nine-to-seven that subject-matter jurisdiction had to be addressed first.[31] Accordingly, by the end of that same year, the Court granted review in *Ruhrgas*[32] to decide "'[w]hether a federal district court is absolutely barred in all circumstances from dismissing a removed case for lack of personal jurisdiction without first deciding its subject-matter jurisdiction.'"[33]

Speaking unanimously through Justice Ginsburg, the Court held that federal district courts are not in fact categorically barred from addressing personal jurisdiction, and dismissing for its absence, without initially addressing their subject-matter jurisdiction. "Customarily," the Court noted, "a federal court first resolves doubts about its jurisdiction over the subject matter, but there are circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry."[34] These circumstances include, at the very least, "[w]here . . . 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

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29 *See* Val Leasing, Inc. v. Hutson, 674 F. Supp. 53, 55 (D. Mass. 1987).

30 Cantor Fitzgerald, L.P. v. Peaslee, 88 F.3d 152, 155 (2d Cir. 1996); *see also In re* Papandreou, 139 F.3d 247, 255–56 (D.C. Cir. 1998) ("[D]ismissal for want of personal jurisdiction is independent of the merits and does not require subject-matter jurisdiction.").

31 Marathon Oil Co. v. A.G. Ruhrgas, 145 F.3d 211 (5th Cir. 1998) (en banc), *rev'd*, 526 U.S. 574 (1999).

32 Ruhrgas AG v. Marathon Oil Co., 525 U.S. 1039 (1998) (granting certiorari).

33 Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 578 (1999) (quoting petition for certiorari).

34 *Id.*

question."[35] In such a situation, "the court does not abuse its discretion by turning directly to personal jurisdiction."[36] This rule is equally applicable, moreover, whether the dispute is filed originally in federal court or, as in *Ruhrgas*, a party has removed it from state court.[37]

The Court's analysis was divided into several components. At the outset, it rejected the Fifth Circuit's effort to distinguish subject-matter from personal jurisdiction for purposes of resequencing. Though agreeing that "[t]he character of the two jurisdictional bedrocks unquestionably differs"[38]—subject-matter jurisdiction being a nonwaivable delimitation of federal power, personal jurisdiction a waivable guarantee of individual liberty[39]—the Court disaffirmed the notion "that subject-matter jurisdiction is ever and always the more 'fundamental.'"[40] Two points were offered to support this premise. Citing its own precedent, the Court first noted that "[p]ersonal jurisdiction, too, is 'an essential element of the jurisdiction of a district . . . court,' without which the court is 'powerless to proceed to an adjudication.'"[41] Second, it noted that in some instances, and indeed in *Ruhrgas*, subject-matter jurisdiction may "rest[ ] on statutory interpretation, not constitutional command" while personal jurisdiction may rest "on the constitutional safeguard of due process."[42]

Next, the Court cited three of its own precedents for the proposition that "[i]t is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits."[43] The Court invoked *Moor v. County of Alameda*[44] for the rule that "district courts do not overstep Article III limits when they decline jurisdiction of state-law claims on discretionary grounds without determining whether those claims fall within their pendent jurisdiction."[45] The Court invoked *Ellis v. Dyson*[46] for the rule that district courts likewise may "abstain under *Younger v. Harris* without deciding whether the parties present a case or controversy."[47] Finally, the

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35 *Id.* at 588.

36 *Id.*

37 *See id.* at 585–87.

38 *Id.* at 583.

39 *See id.* at 583–84.

40 *Id.* at 584.

41 *Id.* (omission in original) (quoting Employers Reinsurance Corp. v. Bryant, 299 U.S. 374, 382 (1937)).

42 *Id.* In *Ruhrgas*, the subject-matter jurisdictional issue implicated the complete diversity requirement, which is a construction of 28 U.S.C. § 1332, not a mandate of Article III, § 2. *See id.* at 584.

43 *Id.* at 585.

44 411 U.S. 693 (1973).

45 *Ruhrgas*, 526 U.S. at 585 (citing *Moor*, 411 U.S. at 715–16).

46 421 U.S. 426 (1975).

47 *Ruhrgas*, 526 U.S. at 585 (citation omitted) (citing *Ellis*, 421 U.S. at 433–34) (referring to Younger v. Harris, 401 U.S. 37 (1971)).

Court cited *Arizonans for Official English v. Arizona*[48] for the rule that a court may "pretermit[ ] [a] challenge to . . . standing and [instead] dismiss[ ] on mootness grounds."[49] Accordingly, because personal jurisdiction is simply another threshold matter and (here, at least) does not implicate the merits, a dismissal for want of personal jurisdiction is not an "'assumption of law-declaring power that violates the separation of powers principles.'"[50]

Nor, held the Court, should dismissals for lack of personal jurisdiction be categorically less permissible in the removal context, even though such dismissals might subsequently bind state courts and thereby raise federalism concerns.[51] For one thing, "[i]ssue preclusion in subsequent state-court litigation . . . may also attend a federal court's subject-matter determination,"[52] such as a ruling that permissible damages under state law would not satisfy the amount-in-controversy requirement of diversity jurisdiction[53] or a ruling on state law within the context of supplemental jurisdiction.[54] For another thing, concerns about preclusion or other aspects of "[a] State's dignitary interest"[55] can and should influence a court's discretionary selection between Rules 12(b)(1) and 12(b)(2) of the Federal Rules of Civil Procedure.

> If personal jurisdiction raises "difficult questions of [state] law," and subject-matter jurisdiction is resolved "as eas[ily]" as personal jurisdiction, a district court will ordinarily conclude that "federalism concerns tip the scales in favor of initially ruling on the motion to remand." In other cases, however, the district court may find that concerns of judicial economy and restraint are overriding.[56]

Finally, the Court rejected the hypothesis "that state-court defendants will abuse the federal system with opportunistic removals" by "manufactur[ing] . . . convoluted federal subject-matter theories designed to wrench cases from state court."[57] Federal courts, in the Justices' view, must be presumed both to comprehend and to enforce congressionally prescribed rules for removal, while parties will be de-

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48 520 U.S. 43 (1997).

49 *Ruhrgas*, 526 U.S. at 585 (citing *Arizonans for Official English*, 520 U.S. at 66–67).

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

51 *See id.* at 585–87.

52 *Id.* at 585.

53 *See id.* at 585–86.

54 *See id.* at 586. Another example, not cited by the Court, would be a ruling on damages recoverable under state law as part of a removal-based jurisdictional analysis pursuant to a federal statute having its own amount-in-controversy requirement. *See, e.g.*, Boyd v. Homes of Legend, Inc., 188 F.3d 1294, 1298–1300 (11th Cir. 1999).

55 *Ruhrgas*, 526 U.S. at 586.

56 *Id.* at 586 (alterations in original) (citation omitted) (quoting Allen v. Ferguson, 791 F.2d 611, 616 (7th Cir. 1986)).

57 *Id.* at 587.

terred by the risk of "'a swift and nonreviewable remand order, attended by the displeasure of a district court whose authority has been improperly invoked.'"[58]

Ultimately, the Court adopted a discretionary rule for the resequencing of threshold issues, subject to appellate review for abuse of discretion. Where subject-matter jurisdiction "involve[s] no arduous inquiry . . . . both expedition and sensitivity to state courts' coequal stature should impel the federal court to dispose of that issue first."[59] "Where, . . . however, 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."[60]

B. The Doctrine's Analytical Parameters

Although *Ruhrgas* may appear to articulate a narrow, single-inquiry analysis—namely, whether personal jurisdiction can precede subject-matter jurisdiction in a particular case—there is no reason to believe that *Ruhrgas*'s relevance is confined to the specific issue of personal jurisdiction. Absent such a limitation, *Ruhrgas* actually suggests a much broader analysis which courts might apply to a variety of threshold issues, a prospect that Part III examines more closely.

This analysis consists of two inquiries. The first is whether a court, for purposes of resequencing, may consider a given threshold issue equivalent to subject-matter or personal jurisdiction. If not, then the analysis is at an end: the court simply may not address the issue prior to these core jurisdictional questions. If the threshold issue can be considered equivalent, however, then a second inquiry examines whether the court should in fact resequence the issue and address it prior to subject-matter or personal jurisdiction in light of the specific legal and factual circumstances of the case.

1. *The Question of Equivalence*

For purposes of illustration, consider a situation in which a defendant presents a district court with two preliminary grounds for dismissal—an alleged want of Article III jurisdiction and an assertion of Eleventh Amendment immunity. Following *Ruhrgas*, the district court

58 *Id.* (citation omitted) (quoting Caterpillar Inc. v. Lewis, 519 U.S. 61, 77–78 (1996)).

59 *Id.* at 587–88.

60 *Id.* at 588. Although the Court seemed to approve of the district court's action in the *Ruhrgas* case itself, it remanded the abuse of discretion issue to the Fifth Circuit. *Id.* at 588 n.8. The en banc Fifth Circuit then returned the matter to the original three-judge panel which in turn ultimately affirmed the district court's dismissal for lack of personal jurisdiction. Marathon Oil Co. v. A.G. Ruhrgas, 182 F.3d 291, 293, 295 (5th Cir. 1999).

has two options. It can simply address the Article III issue at the outset, in which case neither *Ruhrgas* nor *Steel Co.* is implicated. Assume further, however, that the court perceives some reason to sidestep the Article III issue, such as complexity or novelty. In that circumstance, the court may also have the option of addressing the Eleventh Amendment issue at the outset, thereby potentially avoiding the Article III issue altogether.

The first of *Ruhrgas*'s two inquiries determines the availability of this latter option. The crux of this inquiry is *equivalence*, which (in contrast to the discretionary second inquiry) appears to pose a purely legal question subject to de novo appellate review.[61] Thus in the above hypothetical, the question would be whether Eleventh Amendment immunity, like personal jurisdiction, is sufficiently equivalent to Article III jurisdiction that the court could ever address the former prior to the latter.

The composition of this equivalence inquiry presumably consists of the two elements that *Ruhrgas* itself invokes to establish the equivalence and thus resequencibility of personal and subject-matter jurisdiction. These elements, once again, are first, that "[p]ersonal jurisdiction, too, is 'an essential element of the jurisdiction of a district . . . court,' without which the court is 'powerless to proceed to an adjudication'";[62] and second, that personal jurisdiction can have a constitutional dimension—"the constitutional safeguard of due process"[63]—while subject-matter jurisdiction may in some cases actually "rest[ ] on statutory interpretation, not constitutional command."[64] In other words, the Court concluded that personal jurisdiction is equivalent to subject-matter jurisdiction because it is an *essential* and *constitutional* aspect of federal judicial power.

a. *Essentiality*

Of these two elements, essentiality appears to be the more vital. There is, after all, an intuitive correctness to the Court's suggestion that if any inquiry is to precede subject-matter jurisdiction, the object of that inquiry should at the very least be a prerequisite to the exercise of judicial power.

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61 This view is congruent with the position, articulated *infra* in Part II.C, that resequencing is predicated on inherent judicial power. While the exercise of inherent power is generally reviewed for abuse of discretion, *see infra* note 277 and accompanying text, a "District Court's conclusions about the scope of its inherent powers is a question of law that is reviewed de novo," Holland v. N.J. Dep't of Corr., 246 F.3d 267, 271 (3d Cir. 2001); *accord* Montrose Med. Group Participating Sav. Plan v. Bulger, 243 F.3d 773, 780 (3d Cir. 2001).

62 *Ruhrgas*, 526 U.S. at 584 (omission in original) (quoting Employers Reinsurance Corp. v. Bryant, 299 U.S. 374, 382 (1937)).

63 *Id.*

64 *Id.*

In the case of personal jurisdiction, satisfaction of this element is relatively simple. Like subject-matter jurisdiction, courts have repeatedly characterized personal jurisdiction as an essential element of the exercise of judicial power,[65] specifically embodying "the court's power to exercise control over the parties."[66] Accordingly, "[e]very court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter."[67] By the same token, judgments entered in the absence of personal jurisdiction normally do not bind a person who "is not designated as a party or . . . has not been made a party by service of process"[68] and may even be deemed void.[69]

b. *Constitutionality*

The second element is that of constitutionality. As used in an equivalence inquiry, the notion of "constitutionality" does not denote its common usage, that is, congruence with the Constitution and authoritative constitutional interpretations. Rather, it is intended to mean that the threshold issue in question, such as personal jurisdiction, itself possesses a palpable constitutional dimension, and perhaps also that the subject-matter jurisdictional question, in the case under consideration, does *not* possess such a dimension. Thus, in *Ruhrgas* the Court found it significant that personal jurisdiction directly involved a constitutional question (due process) while subject-matter jurisdiction, being statutory, did not.[70] There is, of course, a great deal less intuitive correctness to the Court's invocation of this second element, and it is unclear to what extent the holding of *Ruhrgas* ultimately relied upon its satisfaction. These, however, are matters more

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65 *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969); *Ex parte* Craig, 282 F. 138, 151–52 (2d Cir. 1922), *aff'd sub nom.* Craig v. Hecht, 263 U.S. 255 (1923); United States *ex rel.* McIntosh v. Crawford, 47 F. 561, 566 (C.C.W.D. Ark. 1891); *see also Bryant*, 299 U.S. at 381–82 ("[T]he presence of the defendant in a suit in personam . . . is an essential element of the jurisdiction of a district . . . court as a federal court, and . . . in the absence of this element, the court is powerless to proceed to an adjudication." (footnote omitted)).

66 Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979).

67 Stoll v. Gottlieb, 305 U.S. 165, 171–72 (1938).

68 *Zenith Radio*, 395 U.S. at 110.

69 *See, e.g.*, Cent. Laborers' Pension, Welfare & Annuity Funds v. Griffee, 198 F.3d 642, 644 (7th Cir. 1999); Parsons v. Plotkin (*In re* Pac. Land Sales, Inc.), 187 B.R. 302, 309 (B.A.P. 9th Cir. 1995); Williams v. Life Sav. & Loan, 802 F.2d 1200, 1202–03 (10th Cir. 1986); *see also In re* NAACP, Special Contribution Fund, Nos. 87-3366, 87-2673, 1988 WL 61504, at *3 (6th Cir. June 13, 1988) (per curiam). For an explanation of the history of the voidness rule, see *Burnham v. Superior Court*, 495 U.S. 604, 608–10 (1990).

70 Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999). The subject-matter jurisdiction issues included questions of fraudulent joinder, removal under 9 U.S.C. § 205, and federal common law. Petitioner's Brief at 33–36, *Ruhrgas* (No. 98-470), *available at* 1999 WL 23658.

properly addressed in Part II.D, at which point a full-fledged critique of both elements, essentiality and constitutionality, is undertaken.

2. *The Question of Resequencing*

Once the court has found equivalence, it must then decide whether it should reach the issue prior to subject-matter or personal jurisdiction. The second inquiry, in other words, addresses the question of *resequencing*—a term reflecting the premise, more fully developed in Part II, that the courts ought presumptively to address subject-matter jurisdiction at the outset. Like the first inquiry, this question also consists of two elements, a comparison of the issues and a balancing of interests. Unlike the first inquiry, however, this second inquiry is discretionary, turning on the particular legal and factual circumstances of the case and subject to appellate review for abuse of discretion.[71]

a. *Assessing Relative Difficulty*

The court's initial task is to compare the relative difficulty of the issues—the issue of subject-matter or personal jurisdiction on the one side, and whichever issue it has deemed equivalent (Eleventh Amendment immunity, for example) on the other.[72] In *Ruhrgas*, the Court identified two criteria of difficulty—complexity and novelty[73]—though it neither elaborated on their content nor detailed the extent to which one or both must be present before a discretionary resequencing of issues is appropriate. Without such guidance, at best it is possible to state only a few general principles.[74] It does not seem critical, first of all, that the equivalent issue actually has to be easier to

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71 *See Ruhrgas*, 526 U.S. at 587–88; Alpine View Co. v. Atlas Copco AB, 205 F.3d 208, 213–14 (5th Cir. 2000). It is not clear, however, whether the empirical determinations underlying the district court's ultimate resequencing decision are themselves reviewed for abuse of discretion or, instead, for clear error. *See infra* note 430 and accompanying text.

72 As a practical matter, it is presumably the relative difficulty of the former issue that would have initially triggered the *Ruhrgas* analysis. As a doctrinal matter, however, the formal process of comparing the issues properly belongs at this stage.

73 *Ruhrgas*, 526 U.S. at 587–88. In actuality, the Court employs several terms to describe the notion that an issue is or is not difficult. *See id.* (using the terms "arduous," "'not easily resolved,'" "straightforward," "complex," and "difficult and novel" (quoting Cantor Fitzgerald, L.P. v. Peaslee, 88 F.3d 152, 155 (2d Cir. 1996))). The overall inquiry, however, is plainly of the relative difficulty or simplicity of the issues.

74 The D.C. Circuit, in a somewhat related context, has proposed a "sample decision procedure" for calculating the relative burdens imposed by multiple jurisdictional challenges. *In re* Papandreou, 139 F.3d 247, 254 (D.C. Cir. 1998). Under this procedure, a court "would . . . eyeball each jurisdictional defense and, for each, divide the estimated burdens of evaluation by the estimated chance of success, and then evaluate the defenses in increasing order of the corresponding quotient." *Id.* at 254 & n.5. The court conceded, however, that "[p]recise calculation will generally be impossible, and which defense should be decided first is a question ultimately within the discretion of the district court." *Id.* at 254.

resolve than the subject-matter or personal jurisdictional issue; equal difficulty should suffice. That said, the equivalent issue presumably cannot be more difficult to resolve than the subject-matter or personal jurisdictional issue, and a resequencing of issues under such circumstances would likely constitute an abuse of discretion, irrespective of how the remaining resequencing considerations are aligned.[75]

Fortunately, there is a discrete body of case law that sheds light on the notion of relative difficulty. In particular, the now-defunct but related doctrine of hypothetical jurisdiction also employed relative difficulty as a prerequisite to its invocation,[76] specifically when comparing subject-matter jurisdiction to the merits.[77] To borrow from the hypothetical jurisdiction cases, accordingly:

> it appears as if a "difficult" or "complex" issue [i]s one that possesse[s] some inherent level of intricacy, including factual uncertainty, and that ha[s] not already been decided by the Supreme Court or by any court, or over which there [i]s a split of authority. In addition, at least one court held that "[j]urisdictional questions may be considered difficult . . . if they are of constitutional stature," although it is hard to see how that aspect, standing alone, would render an issue difficult or complex.[78]

Finally, and perhaps relatedly, one court expressed concern about addressing a jurisdictional issue that "poses a rather high risk of committing constitutional error."[79]

To date, only two post-*Ruhrgas* decisions have meaningfully addressed the task of assessing relative difficulty.[80] In one case, "the

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75 *Compare* Faulk v. Owens-Corning Fiberglass Corp., 48 F. Supp. 2d 653, 659 n.5 (E.D. Tex. 1999) (declining to reach "other jurisdictional challenges" prior to subject-matter jurisdiction because "the subject-matter jurisdictional question is the most easily resolved jurisdictional question"), *with Alpine View*, 205 F.3d at 213–14 (affirming a resequencing decision despite the district court's failure to assess comparative difficulty). The *Alpine View* case is discussed *infra* in the text accompanying notes 85–89. *See generally* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) (articulating the standard for abuse of discretion).

76 *See, e.g.*, Crocco v. Xerox Corp., 137 F.3d 105, 109 (2d Cir. 1998); House the Homeless, Inc. v. Widnall, 94 F.3d 176, 179 n.7 (5th Cir. 1996).

77 Although the hypothetical jurisdiction cases may initially seem an inappropriate source of authority—they have been abrogated and their focus was only analogous to that of the *Ruhrgas* inquiry—they are nevertheless invoked because they remain valid predictors of the lower courts' likely approach to resequencing. *See, e.g.*, *Cantor Fitzgerald*, 88 F.3d at 155 (extending the standards developed in the hypothetical jurisdiction context, including a requirement that there be "a difficult question of subject-matter jurisdiction," to the resequencing context), *cited with approval in Ruhrgas*, 526 U.S. at 587–88. Additionally, and in all events, they appear to be the only useful authority available.

78 Idleman, *supra* note 14, at 255 (omission in original) (footnotes omitted) (quoting Browning-Ferris Indus. of S. Jersey, Inc. v. Muszynski, 899 F.2d 151, 159 (2d Cir. 1990)).

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

80 Interestingly, the *Ruhrgas* litigation itself is not one of them. On remand from the Supreme Court, and in turn from the en banc Fifth Circuit, the original Fifth Circuit panel appears simply to have assumed the propriety of resequencing, ultimately affirming the

question of the court's subject matter jurisdiction involve[d], if not an 'arduous inquiry,' certainly a rather complicated one, regarding 'fraudulent joinder' of a defendant and the more unusual question of 'fraudulent joinder' of a plaintiff,"[81] leading the court to conclude, per *Ruhrgas*, that "the 'alleged defect in subject-matter jurisdiction raises a difficult and novel question.'"[82] At the same time, the "court 'ha[d] before it a straightforward personal jurisdiction issue presenting no complex question of state law,'" a conclusion reached, at least in part, on the basis of the "plaintiffs' concession that they ha[d] no good faith resistance to the motions to dismiss for lack of personal jurisdiction."[83] After further concluding that reaching personal jurisdiction prior to subject-matter jurisdiction would not pose federalism concerns—which is part of the second question under the discretionary resequencing inquiry—the court ultimately opted for resequencing.[84]

Although the analysis in this first case could have been more detailed (including why the fraudulent joinder questions were complicated and unusual), it does provide some indication of what types of questions qualify as comparatively difficult under *Ruhrgas*. The second case, unfortunately, is less illuminating. Though it, too, involved a district court opting to address personal jurisdiction before subject-matter jurisdiction,[85] the court omitted entirely the question of relative difficulty, "instead cit[ing] judicial economy as the primary reason for considering motions for dismissal due to a lack of personal jurisdiction before addressing the subject-matter jurisdiction motions."[86] Remarkably, however, the Fifth Circuit held that the resequencing decision was not an abuse of discretion[87]—an outcome that can only be described as an appellate salvage operation. Indeed it was the circuit court, apparently on its own, which found that personal jurisdiction "d[id] not raise 'difficult questions of state law'"[88] (though it made no comparative findings on subject-matter jurisdiction), and that rese-

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district court's dismissal for lack of personal jurisdiction. Marathon Oil Co. v. A.G. Ruhrgas, 182 F.3d 291, 294–95 (5th Cir. 1999).

81 Foslip Pharm., Inc. v. Metabolife Int'l, Inc., 92 F. Supp. 2d 891, 899 (N.D. Iowa 2000) (quoting *Ruhrgas*, 526 U.S. at 587).

82 *Id.* (quoting *Ruhrgas*, 526 U.S. at 588).

83 *Id.* (quoting *Ruhrgas*, 526 U.S. at 588).

84 *Id.* at 899–900.

85 *See* Alpine View Co. v. Atlas Copco AB, 205 F.3d 208, 213–14 (5th Cir. 2000).

86 *Id.* at 214. The district court apparently presented no reasoning of its own, but rather adopted a magistrate judge's findings and recommendations. *See* Alpine View Co. v. Atlas Copco A.B., 180 F.3d 628, 629 (5th Cir. 1998) (per curiam), *vacated mem.*, 526 U.S. 1128 (1999).

87 *See Alpine View*, 205 F.3d at 214. Arguably the district court is not as culpable as the circuit court that found no abuse of discretion, given that the district court, unlike the circuit court, issued its decision prior to the Supreme Court's opinion in *Ruhrgas*.

88 *Id.* (quoting *Ruhrgas*, 526 U.S. at 586).

quencing would intrude only minimally on the state courts (again, part of the second resequencing question).[89] According to the Fifth Circuit, then, the task of assessing difficulty need not actually be comparative—the simplicity of the equivalent threshold issue may alone suffice—and even its total omission from the analysis will not necessarily be an abuse of discretion, especially if it can be constructed after the fact on appellate review.[90]

b. *Balancing Institutional Interests*

Assuming that a court does fully assess the relative difficulty of the issues and that the assessment favors resequencing, then the final step is to weigh the availability of resequencing in light of certain institutional interests. In *Ruhrgas*, the Court identified three such interests: judicial economy, judicial restraint, and judicial federalism.[91] Beyond their identity and location in the analysis, however, the precise role and relative weight of these interests are less than clear. In fact, given the prescribed nature of the analysis (balancing), the number and diversity of interests involved, and the lenient abuse-of-discretion standard of appellate review, predictability and determinacy were obviously not among the *Ruhrgas* Court's chief objectives in formulating this task. Perhaps the most useful undertaking at this juncture, therefore, is simply to discuss briefly the nature and potential relevance of each of the three enumerated institutional interests.

Judicial economy, of course, is the recognition and prudent conservation of the judiciary's limited resources.[92] In the resequencing context, this interest may cut either way, depending on the breadth of one's perspective. If the focus remains at the level of individual cases, then forgoing the difficult jurisdictional question and addressing instead the equivalent issue will likely serve judicial economy. If the focus is broadened to the legal system as a whole, however, such avoidance may not be economical to the extent that it "merely perpetuates the . . . difficulty for the next court"[93] and, indeed, for every court after that. From a system-wide perspective, in other words,

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89 *Id.*

90 *Accord* Cent. States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp., 230 F.3d 934, 939 n.2 (7th Cir. 2000) (affirming a resequencing of personal and subject-matter jurisdiction, citing *Ruhrgas*, 526 U.S. at 578, 587–88, but providing no indication that a relative-difficulty analysis—or any type of analysis for that matter—was undertaken), *cert. denied*, 121 S. Ct. 1406 (2001).

91 *See Ruhrgas*, 526 U.S. at 586–88; *accord Alpine View*, 205 F.3d at 213.

92 *See, e.g.*, Thomas R.W. v. Mass. Dep't of Educ., 130 F.3d 477, 479 (1st Cir. 1997); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 36–37 (1994).

93 Idleman, *supra* note 14, at 256. This was one of the characteristics of the doctrine of hypothetical jurisdiction, the applicability of which, like the *Ruhrgas* analysis, turned partly on the presence of a complex or difficult jurisdictional question. *See id.* at 256–57.

resolving difficult jurisdictional issues at the time they are presented, though potentially inefficient for the court at hand, may ultimately be the more judicially economical approach.[94] Whether this is true in any given case generally depends on the source of the difficulty. If it stems from the particular facts or a unique combination of legal doctrines, then the likelihood of recurrence would be low and avoiding the issue would probably serve overall judicial economy. If, by contrast, it stems from an extant split of authority or from the lack of previous consideration of the issue (where, for example, the law is newly enacted), then avoidance of the issue could very well disserve overall judicial economy.

The second interest that the *Ruhrgas* Court identified is judicial restraint. In general, judicial restraint describes some measure of deliberate self-limitation in light of perceived intrinsic deficiencies (such as relative institutional incompetence),[95] background norms or traditions (such as stare decisis),[96] or extrinsic structural or substantive considerations (such as the separation of powers).[97] Within the interpretive context in particular—perhaps the most common focus of debate as to the meaning of judicial restraint—generally it denotes self-limitation in deference to the will of the people or their representatives, whether manifest in text, intent, or understanding.[98] Whatever the context, judicial restraint essentially defines the interval between the power that a court is capable of wielding and the power that it actually attempts to exercise—in short, the conscious decision not to wield power merely because one can.[99]

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94 *See id.* at 283; *cf.* Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 125 (1959) (contending that, by issuing more thoroughly reasoned opinions, the Court's "dockets would be freed of large numbers of cases which now come there only because of the uncertainties which are generated by the failures of reasoning of previous opinions").

95 *See, e.g.*, J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 6–7 (1981). Frequently this limited competence is expressed as a matter of constitutional mandate rather than judicial discretion. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 112–13 (1995) (O'Connor, J., concurring). But, of course, a judge's assessment of what the Constitution does or does not mandate can itself be a function of that judge's preexisting commitment to a relatively restrained judicial role.

96 *Compare* Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TUL. L. REV. 1267, 1317 (1992) (restraint is related to stare decisis), *with* Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 20 (1983) (restraint is not related to stare decisis).

97 Martin H. Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 COLUM. L. REV. 1378, 1400 (1985) (book review). *See generally* Posner, *supra* note 96, at 11–14 (discussing "'separation of powers judicial self-restraint,' or . . . 'structural restraint'").

98 *See, e.g.*, Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 20 (1985); Wallace, *supra* note 95, at 8–10, 11–14.

99 *Cf.* Rescue Army v. Mun. Court, 331 U.S. 549, 569 (1947) (describing, in the context of judicial avoidance of constitutional questions, the Court's "reluctance, indeed . . . refusal, to undertake the most important and the most delicate of the Court's functions, notwithstanding conceded jurisdiction, until necessity compels it in the performance of

The final interest that the *Ruhgras* Court identified is that of judicial federalism. Whether out of constitutional duty or institutional comity, judicial federalism entails a federal court's respectful consideration of "[a] State's dignitary interest" as embodied both generally in the state's law and legal system and particularly in its courts.[100] The interest in judicial federalism is arguably just a specific manifestation of judicial restraint, and the two essentially merge when, in the words of *Ruhrgas*, a "sensitivity to state courts' coequal stature"[101] limits federal court action. These interests may also merge, in the Court's view, when the relative difficulty of a particular jurisdictional issue is a function of state law.[102] According to *Ruhrgas*, "[i]f personal jurisdiction raises 'difficult questions of [state] law,' and subject-matter jurisdiction is resolved 'as eas[ily]' as personal jurisdiction, a district court will ordinarily conclude that 'federalism concerns tip the scales in favor of initially ruling on the motion to remand.'"[103]

Although the *Ruhrgas* resequencing option is potentially available both to suits filed initially in federal court and to suits filed initially in state court and removed to federal court, it is obviously in removal situations, such as *Ruhrgas* itself, that the federalism interest generally becomes more prominent.[104] In fact, the Court specifically had to confront the argument that, in a removal situation, the possible preclusive effect of a dismissal for lack of personal jurisdiction, compared to a state court remand for lack of subject-matter jurisdiction,

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constitutional duty"); Posner, *supra* note 96, at 10 (describing the five types of judicial restraint). As with relative difficulty, the case law from the hypothetical jurisdiction context may be one of the more helpful gauges of judicial restraint in the resequencing context, especially as judicial economy and restraint were the principal rationales for the now-defunct doctrine. A survey of this case law reveals four asserted principles of restraint: (1) the avoidance of contingent constitutional questions, *see* Idleman, *supra* note 14, at 248 & n.38; (2) the maintenance of the separation of powers, *see id.* at 248–49 & n.39; (3) the prevention of federal intrusion upon the states, *see id.* at 249 & nn.42–43; and (4) the confinement of judicial decisionmaking to well-defined disputes, *see id.* at 249 & n.44. Several of these principles, in turn, may likewise prove relevant to resequencing decisions, and indeed the *Ruhrgas* Court highlighted the federalism concern, which is addressed below. By contrast, the principle of avoiding contingent constitutional questions makes little sense in light of the earlier discussion of equivalence, in which the constitutional nature of an alternative threshold issue may justify *reaching* the issue at the outset.

100 Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 586 (1999). For more comprehensive definitions of judicial federalism, see Thomas E. Baker, *A Catalogue of Judicial Federalism in the United States*, 46 S.C. L. REV. 835, 841–46 (1995) [hereinafter Baker, *Catalogue*]; and Thomas E. Baker, *A View to the Future of Judicial Federalism: "Neither Out Far nor In Deep"*, 45 CASE W. RES. L. REV. 705, 790–93 (1995).

101 *Ruhrgas*, 526 U.S. at 587.

102 *See id.* at 588.

103 *Id.* at 586 (second and third alterations in original) (quoting Allen v. Ferguson, 791 F.2d 611, 616 (7th Cir. 1986)). For an application of these considerations, see *Foslip Pharmaceuticals, Inc. v. Metabolife International, Inc.*, 92 F. Supp. 2d 891, 899 (N.D. Iowa 2000).

104 *See, e.g.*, Thompson v. Gillen, 491 F. Supp. 24, 26–27 (E.D. Va. 1980).

can be particularly offensive to the relationship and equilibrium of power between federal and state courts. The Court's answer, as noted, was essentially two-fold. First, such preclusion is no different than the preclusion that may attend an adverse ruling on subject-matter jurisdiction when, for example, it turns in part on state law.[105] Second, such preclusion is precisely the kind of factor that a district court, in its discretionary balancing of institutional interests, should consider.[106]

II
THE LEGITIMACY OF THE DOCTRINE

This Part assesses the resequencing doctrine using the traditional criteria by which doctrinal legitimacy is measured. These criteria include consistency with precedent, congruence with underlying theory, conformity to the powers of the institution charged with its invocation, and adherence to methodological norms such as intelligibility, coherence, and predictability. In general, this critique focuses on the doctrine's formulation in *Ruhrgas*, although it also considers subsequent lower court efforts to apply that formulation.

A. Precedential Fidelity

Fidelity to precedent, embodied in the principle of stare decisis, entails judicial adherence to authoritative and relevant prior case law absent some overriding circumstance.[107] So formulated, precedential fidelity can confer a significant if not necessary measure of legitimacy upon judicial decisions. The appearance of consistency over time and among parties, and the perception that judges are bound by more than their immediate preferences, are powerful components of the judicial process and reinforce other basic rule-of-law concepts that foster public confidence in the legal system as a whole.[108] Conversely,

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105 *See Ruhrgas*, 526 U.S. at 585–86. Despite what the Court may have suggested, the fact that rulings on subject-matter jurisdiction may be preclusive says nothing, of course, about the propriety of resequencing personal and subject-matter jurisdiction. Federal courts are obligated to determine their subject-matter jurisdiction, and any preclusion resulting from assimilated state law determinations is a necessary collateral consequence of this obligation. Only if one has already decided beforehand that there is an equivalent power to determine personal jurisdiction at the outset would one find this comparison between the preclusive effects of these two jurisdictional rulings relevant, and then only for confirmation of their similarity.

106 *See id.* at 586–87.

107 *See* Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991); Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 688, 690–91 (1999).

108 *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970); THE FEDERALIST No. 78, at 471 (Alexander Hamilton); Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Deci-*

the misuse of precedent can, if discovered, have exactly the opposite effect.[109] Legal principles may seem less coherent and determinate—and their application less consistent and predictable—and judicial decisions become vulnerable to the criticism that courts and judges are simply fabricating law on an ad hoc basis according to their idiosyncratic senses of propriety.[110]

Without doubt, precedential fidelity poses one of the most serious challenges to the legitimacy of the resequencing doctrine. This is true in at least three respects. For one thing, prior to *Ruhrgas* there was little or no support for such a doctrine, including the cases that the Court cites as supposed precedent. For another thing, there was in fact case law to the contrary, which the Court not only failed to distinguish, but simply omitted altogether. Lastly, at least one element of the *Ruhrgas* doctrine (the constitutionality aspect of equivalence) rests on a premise that directly contradicts one of the Court's most established jurisprudential rules.[111]

Perhaps the starkest of these problems is the omission of contrary precedent. Specifically, the *Ruhrgas* Court declined to quote or even to mention *Leroy v. Great Western United Corp.*,[112] which held that courts

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sions Pose a Greater Threat?, 44 AM. U. L. REV. 757, 777, 780–81 (1995); Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1109–20 (1995).

109 *Cf.* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (stating, in the context of a discussion on whether judges must always state their actual reasons for their decisions, that "lack of judicial candor seldom goes undetected for long, and its detection only serves to increase the level of cynicism about the nature of judging and of judges"). Precedential infidelity can take several forms. A court can simply omit relevant but adverse prior cases, thereby obviating the need to distinguish or overrule the precedent and potentially leading readers to believe that the ruling at hand is consistent, or at least not inconsistent, with existing case law. *See, e.g.*, Rodney J. Blackman, *Spinning, Squirreling, Shelling, Stiletting and Other Strategems of the Supremes*, 35 ARIZ. L. REV. 503, 507 n.17 (1993). Likewise, a court can distort the holdings or reasoning of otherwise unhelpful or even adverse prior cases, thereby neutralizing the impediments, and even providing support, to an otherwise questionable ruling or position of law. *See, e.g., id.* at 504–07. *See generally* David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857 (1986) (suggesting that First Amendment jurisprudence has been shaped by a history of following strong dissents and deliberate misreadings of precedent). Alternatively, a court can categorize and thus marginalize as dicta select elements of adverse prior cases, thereby "enabl[ing] courts to avoid the normal requirements of stare decisis." Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2004 (1994).

110 *See, e.g.*, Dorf, *supra* note 109, at 2040; Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1392–94 (1995); J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 798 (1989). This is not to deny the role of intuition in judicial decisionmaking. *See* JOSEPH C. HUTCHESON, JR., JUDGMENT INTUITIVE 14–34 (1938). But without support in precedent or other authority, judicial decisionmaking will appear as nothing but intuition, an appearance that seems difficult to defend. *See generally* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973) (criticizing the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), on the grounds that it appears to be result oriented and insufficiently grounded in precedent).

111 *See supra* note 99.

112 443 U.S. 173 (1979).

in certain circumstances may decide venue prior to personal jurisdiction.[113] In a passage of remarkable relevance, the *Leroy* Court observed that "neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties."[114] According to *Leroy*, in fact, it was precisely because of this rationale—personal jurisdiction not being so "fundamentally preliminary"—that the court could determine the issue of venue prior to personal jurisdiction.[115]

This omission is particularly troubling given that the passage from *Leroy* was prominently quoted in the respondents' brief[116] (hence the Court cannot plead ignorance).[117] It was also not merely a dictum (hence the Court cannot avoid its precedential effect), but instead was an integral component of the relevant holding of *Leroy*, as the sequencing of personal jurisdiction and venue necessarily turned on their similarly subordinate relationship to subject-matter jurisdiction. Indeed, it is difficult to avoid the inference that the Court deliberately ignored the passage *precisely because of* its precedential significance. Most obviously there is *Leroy*'s declaration that "personal jurisdiction . . . is [not] fundamentally preliminary in the sense that subject-matter jurisdiction is."[118] Even standing alone, this language strongly implies that a court ought to decide subject-matter jurisdiction first. Moreover, because the difference is expressed as one of kind, and not one of degree—the Court did not say that personal jurisdiction is "less" or "not as" fundamentally preliminary—a court presumably should *always* decide subject-matter jurisdiction at the outset. Second, there is *Leroy*'s holding that a court can sometimes decide venue before personal jurisdiction. When combined with the extant rule that courts cannot resolve motions relating to venue before subject-matter jurisdiction is determined,[119] this holding appears to cre-

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113 *Id.* at 180.

114 *Id.*

115 *See id.*

116 *See* Respondent's Brief at 20, *Ruhrgas* (No. 98-470), *available at* 1999 WL 95400; *see also* Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093, 2101 n.3 (2001) (chastising a court of appeals for not citing a certain Supreme Court decision "despite its obvious relevance to the case" and exclaiming that "this oversight is particularly incredible because the majority's attention was directed to it at every turn").

117 And, in any event, "Article III judges are presumed to know the law." United States v. Kezerle, 99 F.3d 867, 870 (7th Cir. 1996).

118 *Leroy*, 443 U.S. at 180.

119 This is clearly the established rule as to the judicial treatment of motions to *transfer* venue under 28 U.S.C. §§ 1404(a) and 1406(a) (or one of the specialized venue provisions), including presumably a § 1406(a) transfer following a defendant's allegation of improper venue under FED. R. CIV. P. 12(b)(3). 28 U.S.C. § 1404(a), 1406(a) (1994); *e.g.*, Sanderson v. Spectrum Labs, Inc., No. 00-1872, 2000 WL 1909678, at *1 n.1 (7th Cir. Dec. 29, 2000); Barber v. Simpson, No. 95-4210, 1996 WL 477005, at *2 (8th Cir. Aug. 23, 1996)

ate a virtually insurmountable obstacle. For if a court cannot decide venue before subject-matter jurisdiction, but can decide venue before personal jurisdiction, then how, as *Ruhrgas* holds, can a court ever decide personal jurisdiction before subject-matter jurisdiction? The answer according to *Leroy* is that it cannot. Consider again the syllogism that *Leroy* produces: (1) subject-matter jurisdiction must always be decided before venue; (2) in relation to subject-matter jurisdiction, venue and personal jurisdiction are materially equivalent; (3) therefore, subject-matter jurisdiction must always be decided before personal jurisdiction. In short, *Leroy* strongly indicates—if not dictates—that courts may not decide personal jurisdiction before subject-matter jurisdiction.[120]

(per curiam); United States *ex rel.* Rudick v. Laird, 412 F.2d 16, 20 (2d Cir. 1969); Bookout v. Beck, 354 F.2d 823, 825 (9th Cir. 1965); Atl. Ship Rigging Co. v. McLellan, 288 F.2d 589, 590–91 (3d Cir. 1961). Consistent with this rule, courts frequently obviate the need to address the venue issue by first addressing, and ultimately finding a lack of, subject-matter jurisdiction. *E.g.*, H20 Houseboat Vacations, Inc. v. Hernandez, 103 F.3d 914, 916 n.2 (9th Cir. 1996).

As for transfers of venue, this rule makes sense not simply because subject-matter jurisdiction is, as *Leroy* says, fundamentally preliminary, but also because §§ 1404(a) and 1406(a) appear textually to contemplate the existence of subject-matter jurisdiction as a precondition. As for cases that seemingly contradict the rule, *e.g.*, Tosco Corp. v. Sun Co., No. C94-4190 FMS, 1995 WL 165888, at *2 (N.D. Cal. Apr. 5, 1995); Cone Corp. v. Fla. Dep't of Transp., 744 F. Supp. 269, 270 (M.D. Fla. 1990); Green v. Creative Equity Corp. (*In re* Hoffman Adver. Group, Inc.), 62 B.R. 823, 828–29 (Bankr. S.D.N.Y. 1986), they uniformly cite authorities such as *Leroy* that do not support the notion that venue may precede subject-matter jurisdiction, but merely that it may precede personal jurisdiction.

As for the judicial treatment of a Rule 12(b)(3) motion to dismiss entirely—*e.g.*, for failure to satisfy the principal venue provisions, 28 U.S.C. § 1391(a)–(b) (1994 & Supp. V 1999)—the state of the law is less certain, although there is no obvious reason why the same rule (*i.e.*, that the venue motion cannot be resolved prior to determining subject-matter jurisdiction) should not apply. The uncertainty likely stems from the rarity today of viable Rule 12(b)(3) motions. One notable exception is the defensive interposition of a forum-selection clause that designates a nonfederal forum, insofar as some courts treat such interpositions as motions for improper venue under Rule 12(b)(3). *See* Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1289–90 (11th Cir. 1998); 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1352 (2d ed. 1990 & Supp. 2001). If enforced, a forum-selection clause designating a nonfederal forum would logically result in a dismissal rather than a transfer, *cf.* Licensed Practical Nurses, Technicians & Health Care Workers of N.Y., Inc. v. Ulysses Cruises, Inc., 131 F. Supp. 2d 393, 407 (S.D.N.Y. 2000) (considering the issue in dictum), akin to a dismissal under forum non conveniens.

120 Needless to say, *Ruhrgas* undermines this syllogism, and the consequences of so doing may extend beyond the relationship between subject-matter and personal jurisdiction. If personal jurisdiction can now sometimes be decided before subject-matter jurisdiction (as *Ruhrgas* holds), and venue can sometimes be decided before personal jurisdiction (as *Leroy* holds), then why—despite extant case law to the contrary—cannot venue now sometimes be decided before subject-matter jurisdiction? *Ruhrgas* itself may attempt to answer this question by requiring the elements of essentiality and constitutionality. While venue is arguably essential, *see, e.g.*, Kellogg Co. v. First Nat'l Bank of Louisville, 512 F. Supp. 56, 58 (W.D. Mich. 1981), it is generally not considered to be of a constitutional nature.

Lower federal court decisions further confirm this reading of *Leroy*. In one case, for instance, a district court straightforwardly read *Leroy* for the rule that "the issue of subject matter jurisdiction is 'fundamentally preliminary' to the issue of personal jurisdiction and, thus, must be decided first."[121] Another court similarly observed that pursuant to *Leroy* "[a] court considers challenges to subject matter jurisdiction before determining whether personal jurisdiction exists or venue is proper."[122] Yet another relied on *Leroy* for the principle that "[s]ubject matter jurisdiction is 'fundamentally preliminary' to both the issues of personal jurisdiction and venue."[123] To be sure, when lower courts have held that personal jurisdiction may be decided before subject-matter jurisdiction,[124] they, like the *Ruhrgas* Court, simply did not address the relevant language or holding of *Leroy*.

What is more, *Leroy* is not the only Supreme Court case stressing the fundamentally and uniquely preliminary nature of subject-matter jurisdiction. In the 1884 case of *Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan*,[125] the Court declared emphatically that subject-matter jurisdiction is "the first and fundamental question" that the Court must ask.[126] Likewise, in *Warth v. Seldin*,[127] it stated that "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III"—that is, whether subject-matter jurisdiction exists—"is *the* threshold question in every federal case."[128] *Warth* did not say that subject-matter jurisdiction is simply one type of threshold question, or the threshold question in some types of cases, but instead that it is *the* threshold question in *every* federal case.[129] Relying on these and related Supreme Court declarations, lower courts accordingly have echoed the principle that subject-matter jurisdiction is not merely one of many threshold issues, but that it must be "*[t]he initial inquiry* in any suit filed in federal court."[130]

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121 Dominican Energy Ltd. v. Dominican Republic, 903 F. Supp. 1507, 1511 (M.D. Fla. 1995) (quoting *Leroy*, 443 U.S. at 180).

122 Ren-Dan Farms, Inc. v. Monsanto Co., 952 F. Supp. 370, 373 (W.D. La. 1997) (citing *Leroy*, 443 U.S. at 180).

123 Tifa Ltd. v. Republic of Ghana, 692 F. Supp. 393, 398 (D.N.J. 1988) (quoting *Leroy*, 443 U.S. at 180).

124 *E.g.*, Cantor Fitzgerald, L.P. v. Peaslee, 88 F.3d 152, 155 (2d Cir. 1996); Rose v. Granite City Police Dep't, 813 F. Supp. 319, 321 (E.D. Pa. 1993).

125 111 U.S. 379 (1884).

126 *Id.* at 382; *accord* Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 453 (1900).

127 422 U.S. 490 (1975).

128 *Id.* at 498 (emphasis added).

129 *Id.*; *accord* Rock Island Millwork Co. v. Hedges-Gough Lumber Co., 337 F.2d 24, 26–27 (8th Cir. 1964).

130 Rice v. Rice Found., 610 F.2d 471, 474 (7th Cir. 1979) (emphasis added); *accord* Tuck v. Pan Am. Health Org., 668 F.2d 547, 549 (D.C. Cir. 1981). In the words of one district judge, "[a] Federal Court . . . has a primordial duty, in every case before it, to

The omission of contrary precedent is not the only way in which the resequencing doctrine defies precedential fidelity. In addition, there is little or no *affirmative* support for the doctrine in the Court's case law, a fact that could be inferred merely by noting the Fifth Circuit's nine-to-seven *Ruhrgas* decision and several other lower court cases holding against the resequencing of personal and subject-matter jurisdiction.[131] For its part, the Court in *Ruhrgas* invoked three of its cases, *Moor v. County of Alameda*,[132] *Ellis v. Dyson*,[133] and *Arizonans for Official English v. Arizona*,[134] for the claim that "[i]t is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits."[135] In actuality, however, not one of these cases supports the holding that courts may reach personal jurisdiction before subject-matter jurisdiction,[136] and one of them basically refutes that holding.

The Court first cites *Moor* for the proposition that "district courts do not overstep Article III limits when they decline jurisdiction of state-law claims on discretionary grounds without determining whether those claims fall within their pendent jurisdiction."[137] However true this proposition might be, it does not obviously support the holding of *Ruhrgas*. In *Moor*, after all, subject-matter jurisdiction already existed based on a foundational federal claim,[138] while in *Ruhrgas*, the issue was essentially a federal court's power in the total absence of verified subject-matter jurisdiction. *Moor*, in other words, merely stands for the principle that a court, with its subject-matter jurisdiction already verified, may decline to extend this subject-matter jurisdiction over supplemental state law claims without first determining whether it could have done so.[139] There is no mention of personal jurisdiction and no indication that subject-matter jurisdiction is less fundamentally preliminary. Indeed, the *Steel Co.* Court also cited *Moor*, not for the proposition that a court could decide a non-subject-matter jurisdiction issue prior to subject-matter jurisdiction, but

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inquire whether the vital prerequisite of subject matter jurisdiction has been satisfied." Hoeffner v. Univ. of Minn., 948 F. Supp. 1380, 1383 (D. Minn. 1996); *accord* Slycord v. Chater, 921 F. Supp. 631, 634 (N.D. Iowa 1996); Broadway v. San Antonio Shoe, Inc., 643 F. Supp. 584, 585 n.1 (S.D. Tex. 1986).

131 In this regard, see Friedenthal, *supra* note 7, at 259 (noting that the Court's decision "was somewhat of a surprise" given the general and longstanding assumption that "unless a federal court has subject-matter jurisdiction, it cannot determine any other issue").

132 411 U.S. 693 (1973).

133 421 U.S. 426 (1975).

134 520 U.S. 43 (1997).

135 526 U.S. at 585; *see supra* notes 43–49 and accompanying text.

136 *See* Friedenthal, *supra* note 7, at 267.

137 *Ruhrgas*, 526 U.S. at 585 (citing *Moor*, 411 U.S. at 715–16).

138 *See Moor*, 411 U.S. at 695, 712.

139 *Id.* at 712–17.

rather for the principle that a court could decide "a discretionary [subject-matter] jurisdictional question before a nondiscretionary [subject-matter] jurisdictional question."[140] In short, *Moor* is a case about the power of courts to decide issues *within* the category of subject-matter jurisdiction, not about the power of courts to bypass that category altogether and dismiss suits on some alternative basis.

Even more problematic is the Court's reliance on *Ellis*. Put bluntly, the Court's rendition of *Ellis* is simply erroneous. In *Ruhrgas*, the Court states that *Ellis* stands for the principle that a court may "abstain under *Younger* . . . without deciding whether the parties present a case or controversy."[141] But this is not correct. Initially, the district court in *Ellis* abstained under *Younger* without verifying subject-matter jurisdiction.[142] As it turned out, however, the Supreme Court abrogated the basis for abstention in a separate case.[143] Accordingly, the Court in *Ellis* reversed the court of appeals, which had affirmed the district court, and remanded to the district court.[144] But it did so with express instructions to assess the question of subject-matter jurisdiction in light of the Court's "reservations . . . as to whether a case or controversy exists."[145] Indeed, the Court admonished that "[t]he District Court *must* determine that the litigation meets the threshold requirements of a case or controversy *before* there can be resolution . . . of the potential consideration[ ], in the context of this case, of the *Younger* doctrine."[146] Thus, not only does *Ellis* fail to support the *Ruhrgas* Court's claim, it supports quite the opposite claim—namely, that a court *cannot* invoke *Younger* abstention without first verifying its subject-matter jurisdiction.

The final case that the Court cited, *Arizonans for Official English*,[147] is simply not germane to resequencing. The Court invoked the case for the rule that a court may "pretermit[ ] [a] challenge to . . . standing" and instead "dismiss[ ] on mootness grounds."[148] As with *Moor*,[149] this rule is correct but beside the point. Standing and mootness are but two doctrines within the case or controversy requirement

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140 Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 100 n.3 (1998).

141 *Ruhrgas*, 526 U.S. at 585 (internal citation omitted) (citing *Ellis*, 421 U.S. at 433–34).

142 *Ellis*, 421 U.S. at 430.

143 *Id.* at 431 (stating that the Court granted certiorari in this case because it had "unanimously reversed the . . . decision on which the District Court had relied").

144 *Id.* at 435.

145 *Id.* at 434.

146 *Id.* at 435 (emphasis added).

147 520 U.S. 43 (1997).

148 Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999) (citing *Arizonans for Official English*, 520 U.S. at 66–67).

149 *See supra* notes 138–40 and accompanying text.

of Article III.[150] That a court may choose between them is entirely unremarkable, for they are both inquiries into the existence of constitutional subject-matter jurisdiction.[151] The rule, accordingly, says nothing about the sequencing of inquiries apart from subject-matter jurisdiction, and adds no support whatsoever to the holding of *Ruhrgas*.[152]

The Court's invocation of these cases is even more problematic given the analysis actually employed in *Ruhrgas* to determine the equivalence of personal and subject-matter jurisdiction. Although, as noted, this analysis turned on the two criteria of essentiality and constitutionality,[153] it is quite clear that neither *Moor* nor *Ellis* mentioned, let alone employed, these criteria in their own analyses. Indeed, the *Ruhrgas* analysis does not even appear logically applicable to the issues in these cases, and, to the extent it can be applied, does not particularly appear to support their holdings. *Moor* essentially involved an issue of subject-matter jurisdiction (pendent jurisdiction over state law claims), thus rendering nonsensical the comparative inquiry utilized in *Ruhrgas*, while *Ellis*, which dealt with *Younger* abstention, is equally inapposite given that *Younger* abstention is simply not jurisdictional, let alone an "essential element" of a court's jurisdiction.[154]

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150 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (explaining that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III"); Tex. Office of Pub. Util. Counsel v. FCC, 183 F.3d 393, 413 n.16 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000), and *cert. granted*, 530 U.S. 1213 (2000), *and cert. denied*, 530 U.S. 1223 (2000), *and cert. dismissed*, 531 U.S. 975 (2000).

151 *See, e.g.*, Sierra Club v. Glickman, 156 F.3d 606, 619–20 (5th Cir. 1998); *see also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 n.5 (1974) (noting that there is a "lack of a fixed rule as to the proper sequence of judicial analysis of contentions involving more than one facet of the concept of justiciability").

152 That the Court prefaced its reliance on the case with a "*cf.*" signal is presumably a recognition of this fact. *Cf.* Hohri v. United States, 793 F.2d 304, 312 n.4 (D.C. Cir. 1986) (Bork, J., joined by Scalia, Starr, Silberman, and Buckley, JJ., dissenting from denial of rehearing en banc) ("As the majority presumably recognized, since it cited [the case in question] with a *cf.*, the case is probably inapposite."), *vacated*, 482 U.S. 64 (1987); Ira P. Robbins, *Semiotics, Analogical Legal Reasoning, and the* Cf. *Citation: Getting Our Signals Uncrossed*, 48 DUKE L.J. 1043 (1999). Yet even this introductory signal does not explain why the case was cited at all.

153 *See supra* Part I.B.1.

154 *See supra* notes 141–46 and accompanying text; *see also* Kingston v. Utah County, No. 97-4000, 1998 WL 614462, at *3 (10th Cir. Sept. 8, 1998) (noting that "abstention is not jurisdictional"); Benavidez v. Eu, 34 F.3d 825, 829 (9th Cir. 1994) ("*Younger* abstention is *not* jurisdictional, but reflects a court's prudential decision not to exercise jurisdiction which it in fact possesses."); Universal Amusement Co. v. Vance, 587 F.2d 159, 163 n.6 (5th Cir. 1978) (stating that *Younger* abstention is "nonjurisdictional"), *aff'd*, 445 U.S. 308 (1980); Schachter v. Whalen, 581 F.2d 35, 36 n.1 (2d Cir. 1978) (per curiam) ("*Younger* abstention goes to the exercise of equity jurisdiction, not to the jurisdiction of the federal district court as such to hear the case."). It does, however, reflect a constitutional concern for federal-state relations. *See* Younger v. Harris, 401 U.S. 37, 44 (1971). Abstention under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), known as *Pullman* abstention, also reflects this concern. *See* Waldron v. McAtee, 723 F.2d 1348, 1351 (7th Cir.

Finally, the resequencing doctrine formulated in *Ruhrgas* includes at least one element that directly contradicts one of the Court's most well-established jurisprudential rules. This is the element of constitutionality: the notion that a Court can deem a threshold issue such as personal jurisdictional equivalent to subject-matter jurisdiction not only because it is essential to adjudication, but because it possesses a constitutional dimension.[155] In other words, a court can reach the threshold issue first in part because of its constitutional character. It is, however, "[a] fundamental and longstanding principle of judicial restraint . . . that courts *avoid* reaching constitutional questions in advance of the necessity of deciding them,"[156] and correspondingly that courts should resolve matters on nonconstitutional grounds if possible[157] and on the narrower constitutional ground if necessary.[158] By allowing personal jurisdiction to be addressed first precisely because it is constitutional in nature, the Court thus defies this established rule—a rule, incidentally, that itself has important constitutional dimensions[159] and that some contend should apply with heightened rigor to jurisdictional matters.[160]

Ironically, fidelity to this rule might very well have strengthened the case for addressing certain personal jurisdiction issues prior to a

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1983). *See generally* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716–17 (1996) (discussing various abstention doctrines).

155 *See supra* Part I.B.1.

156 Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988) (emphasis added); *accord* Clinton v. Jones, 520 U.S. 681, 690 & n.11 (1997); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944). *See generally* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994) (examining this doctrine in depth); Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85 (1995) (same).

157 *See, e.g.*, Jean v. Nelson, 472 U.S. 846, 854 (1985); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Interestingly, it is precisely the constitutional dimension of personal jurisdiction that has led some courts to deviate from the general rule of *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979), and decide venue before personal jurisdiction. *See, e.g.*, Prime Leasing, Inc. v. CMC Lease, Inc., No. 99 C 0449, 1999 WL 965688, at *4 n.2 (N.D. Ill. Oct. 15, 1999). *Leroy* itself, for that matter, addressed venue without addressing personal jurisdiction because "resolution of th[e] [personal jurisdiction] question would require the Court to decide a question of constitutional law that it has not heretofore decided" and "[a]s a prudential matter it is [the Court's] practice to avoid the unnecessary decision of novel constitutional questions." *Leroy*, 443 U.S. at 181.

158 *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 217 (1995).

159 *See* Flast v. Cohen, 392 U.S. 83, 97 (1968). Interestingly, both the First and Seventh Circuits, post–*Steel Co.*, held that it was proper to bypass Eleventh Amendment immunity precisely because doing so obviated the need to address a constitutional question. *See* Parella v. Ret. Bd. of the R.I. Employees' Ret. Sys., 173 F.3d 46, 56–57 (1st Cir. 1999); Kennedy v. Nat'l Juvenile Det. Ass'n, 187 F.3d 690, 696 (7th Cir. 1999), *cert. denied*, 528 U.S. 1159 (2000).

160 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment); United States v. Jenkins, 734 F.2d 1322, 1325 (9th Cir. 1983).

question of Article III jurisdiction, such as constitutional standing, for the very reason that some personal jurisdiction issues have *lesser* (or at least no greater) a constitutional dimension than certain subject-matter jurisdictional issues.[161] But to countenance the reaching of an issue first precisely because it is constitutional—and because the issue avoided is not—seems difficult to reconcile with decades of precedent, not to mention the conventional norms of judicial restraint to which the federal courts are otherwise bound.

This does not appear, moreover, to be the only doctrinal error that the *Ruhrgas* Court committed in its defense of resequencing. At another point, for example, the Court concludes that the resequencing of personal and subject-matter jurisdiction in a removal case does not unduly offend federalism, even though a personal jurisdiction–based dismissal, in contrast to a subject-matter jurisdiction–based remand, could preclude further state court action.[162] The reason, according to the Court, is that preclusion may also attend subject-matter jurisdictional rulings, such as a federal court's determination that the state law of damages would not permit recovery sufficient to satisfy the amount-in-controversy requirement.[163] This, however, does not appear to be correct. The Court *is* correct that a federal determination on the absence of personal jurisdiction can be preclusive,[164] at least where the federal and state courts' jurisdictional power over the same defendant is coterminous and the lack of jurisdiction does not result from defective service of process.[165] But it is not necessarily correct that a federal determination on the absence of subject-matter jurisdiction, particularly when based purely on an interpretation of state law, would be similarly binding.[166] Because the Court's example involves a

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161 *See, e.g.*, Transcript of Oral Argument at 26–27, *Ruhrgas* (No. 98-470) (chronicling Justice Stevens's apparent concern that a prohibition on resequencing would mean that a court faced with both a subject-matter jurisdictional issue posing a difficult constitutional question and a personal jurisdictional issue must nevertheless decide the former, notwithstanding the rule against unnecessarily addressing constitutional questions), *available at* 1999 WL 183813. To be sure, the avoidance of constitutional questions was one of the rationales that courts invoked when engaging in hypothetical jurisdiction, reasoning (erroneously, as it turns out) that it was a greater act of judicial restraint to reach the merits of a nonconstitutional question without addressing jurisdiction, where the jurisdictional question was constitutional, than to confront the jurisdictional question at the outset. *See* Idleman, *supra* note 14, at 248 & nn.38–39, 255 & n.72.

162 *Ruhrgas*, 526 U.S. at 585–87.

163 *Id.* at 585–86.

164 *See, e.g.*, ASARCO, Inc. v. Glenara, Ltd., 912 F.2d 784, 787 n.2 (5th Cir. 1990).

165 Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284, 292 n.4 (1st Cir. 1999); Eaton v. Weaver Mfg. Co., 582 F.2d 1250, 1255–56 (10th Cir. 1978). *But see* Falcon v. Transportes Aeros de Coahuila, 169 F.3d 309, 311–13 (5th Cir. 1999) (explaining that a federal court determination that personal jurisdiction was lacking would *not* bind a state court on remand).

166 Anusbigian v. Trugreen/Chemlawn, Inc., 72 F.3d 1253, 1257 (6th Cir. 1996). Of course, federal courts do have the power to make such imbedded state law determinations.

case removed from state court to federal court, the law of the case doctrine, and not principles of issue or claim preclusion, would govern the preclusive effect of the federal court's state law determination. Whether the state courts should, in turn, recognize that determination would therefore be discretionary, not obligatory.[167] Indeed, the doctrine itself counsels against application where the prior determination was either not subject to appellate review or issued by a coordinate as opposed to a hierarchically superior tribunal.[168]

Needless to say, the Court's example implicates both factors. First, because the remand would rest on the federal district court's lack of jurisdiction, a federal appellate court could not review it.[169] Second, because they exercise the powers of separate sovereigns, "state courts and lower federal courts stand in a coordinate, rather than a hierarchical, relationship,"[170] and the law of the case doctrine only imposes an obligation "to honor the rulings of a court that stands higher in the hierarchical judicial structure."[171] In short, in an attempt to justify resequencing, the *Ruhrgas* Court appears to have stated at best a novel legal theory and at worst a basic legal error.[172]

B. Theoretical Congruence

There is more to doctrinal legitimacy, of course, than just fidelity to precedent and prior doctrine. At some level there must also be congruence with underlying theory, particularly where, as with resequencing, the case law and doctrine are by themselves underdeterminate. Not only is such congruence necessary to ensure, for their own sake, that judicial decisions are truly grounded in law and generated by reason,[173] but it is also necessary to maintain confidence in the competence and integrity of the Court as an institution.[174]

See, e.g., Pratt Cent. Park Ltd. P'ship v. Dames & Moore, Inc., 60 F.3d 350, 353 (7th Cir. 1995).

167 *See, e.g.*, United States v. United States Smelting Ref. & Mining Co., 339 U.S. 186, 198–99 (1950); S. Ry. Co. v. Clift, 260 U.S. 316, 319 (1922); Birgel v. Bd. of Comm'rs, 125 F.3d 948, 950 (6th Cir. 1997); Avitia v. Metro. Club of Chi., Inc., 49 F.3d 1219, 1227 (7th Cir. 1995).

168 *United States Smelting*, 339 U.S. at 198 (appellate review); *Avitia*, 49 F.3d at 1227 (hierarchical relationship).

169 28 U.S.C. § 1447(d) (1994); *Anusbigian*, 72 F.3d at 1255–57.

170 Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 853–54 (1991).

171 Mason v. Texaco, Inc., 948 F.2d 1546, 1553 (10th Cir. 1991).

172 *See* WILLIAM W. SCHWARZER ET AL., CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL ¶ 2:1123 (2001) (questioning *Ruhrgas*'s suggestion that federal court determinations should be preclusive on remand to state court and proposing that "[a] remand decision should not be preclusive because it is neither final nor reviewable" and that "[t]he state court is free to revisit factual or legal issues determined by the district court on the remand motion").

173 *See, e.g.*, Quinn, *supra* note 107, at 688–89.

174 *See, e.g.*, Hart, *supra* note 94, at 99.

With regard to the resequencing doctrine announced in *Ruhrgas*, this congruence unfortunately is neither evident from the Court's opinion nor self-evident from the doctrine's content. In fact, as this subpart demonstrates, the doctrine is substantially at odds with conventional jurisdictional theory.

As noted, one of the most critical premises in *Ruhrgas* is that personal jurisdiction is materially as *essential* as subject-matter jurisdiction to a court's power to decide cases. Yet the Court arrives at this premise—and the conclusion that personal jurisdiction can be decided first—not by unearthing and comparing the theoretical elements of each type of jurisdiction, but simply by proclaiming it to be true.[175] The Court acknowledges, as it must, that subject-matter and personal jurisdiction serve different interests and are governed by different constraints. Subject-matter jurisdiction requirements are structural in nature, "serve institutional interests" by "keep[ing] the federal courts within the bounds the Constitution and Congress have prescribed,"[176] are not subject to waiver or consent, and (with one possible exception) must be examined sua sponte by the courts themselves.[177] The requirements of personal jurisdiction, by contrast, safeguard a nonstructural guarantee of individual liberty,[178] can be waived or defaulted by the defendant's action or inaction,[179] and (with one

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175 The Latin legalism, of course, is an *ipse dixit*, "a statement that lacks reasoning to support its conclusion but, nevertheless, must be taken as true simply because the court says so." Dorf, *supra* note 109, at 2022 & n.98. As Professor Hart noted, "ipse dixits are futile as instruments for the exercise of 'the judicial Power of the United States.' As such, they settle little or nothing more than the case in hand, and attempted rationalizations of them serve more often to create than to relieve doubts in other cases." Hart, *supra* note 94, at 98–99 (footnote omitted).

176 Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999).

177 *See id.* The possible exception is when an issue of subject-matter jurisdiction is introduced or noted in the course of an interlocutory appeal, such as under the collateral order doctrine, but would not have been independently appealable. In such situations, the appellate court apparently need not address the subject-matter jurisdictional issue, although, if certain conditions are satisfied, it may possibly do so under the doctrine of pendent appellate jurisdiction. Summit Med. Assocs. v. Pryor, 180 F.3d 1326, 1334–35 (11th Cir. 1999). In addition, a court's obligation to address at any time a possible lack of subject-matter jurisdiction does not necessarily create a corollary obligation to address at any time the possible existence of subject-matter jurisdiction once it is called into question. Franklin Sav. Corp. v. United States, 180 F.3d 1124, 1129 (10th Cir.), *cert. denied*, 528 U.S. 964 (1999).

178 *Ruhrgas*, 526 U.S. at 584. To the extent that one conceptualizes personal jurisdiction as a function of state sovereignty, as the nineteenth century cases in particular appeared to do, the nonstructural label is not entirely accurate. *See, e.g.*, Michael M. O'Hear, Note, *"Some of the Most Embarrassing Questions": Extraterritorial Divorces and the Problem of Jurisdiction Before* Pennoyer, 104 YALE L.J. 1507, 1510 (1995) (concluding that pre–Civil War cases involving the recognition of out-of-state divorces were "primarily concerned with protecting state territorial sovereignty").

179 *Ruhrgas*, 526 U.S. at 584.

exception) may not be examined sua sponte.[180] In the Court's view, however, such distinctions "do not mean that subject-matter jurisdiction is ever and always the more 'fundamental'"[181] and, in fact, are entirely immaterial to the categorical question of jurisdictional triage.

Consider again, however, the starkness of these distinctions between subject-matter and personal jurisdiction. The former is a nonwaivable, structural limitation on a court's power to act at all;[182] the latter, a waivable, personal liberty interest that merely limits a court's ability to bind a particular defendant with the otherwise valid exercise of judicial power.[183] Indeed, personal jurisdiction does not actually have to exist in any absolute sense: "[u]nlike subject-matter jurisdiction, personal jurisdiction is not an 'absolute stricture' on a district court, but is instead a 'personal privilege' that may be waived by a defendant."[184] Thus, while "[a] judge has no power to decide a case over which he lacks subject-matter jurisdiction, . . . he *can* decide a case though he lacks personal jurisdiction over the defendant, if the defendant waives the issue of personal jurisdiction."[185] To be sure, courts regularly describe their relationship to subject-matter jurisdiction in hortatory terms—noting "their nondelegable duty to police the limits of federal jurisdiction with meticulous care,"[186] their "independent, constitutional obligation to protect the jurisdictional limits of the federal courts,"[187] and "the duty of the federal courts to assure themselves that their jurisdiction is not being exceeded"[188]—while characterizing the requirements of personal jurisdiction as "merely

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180 The exception is "that a district court must determine whether it has jurisdiction over the defendant before entering judgment by default against a party who has not appeared in the case." Dennis Garberg & Assocs. v. Pack-Tech Int'l Corp., 115 F.3d 767, 772 (10th Cir. 1997); *accord* Tuli v. Republic of Iraq (*In re* Tuli), 172 F.3d 707, 712 (9th Cir. 1999).

181 *Ruhrgas*, 526 U.S. at 584.

182 *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750 (1984); Davis v. Passman, 442 U.S. 228, 239 n.18 (1979); Rubin v. Belo Broad. Corp. (*In re* Rubin), 769 F.2d 611, 614 (9th Cir. 1985).

183 Driscoll v. New Orleans Steamboat Co., 633 F.2d 1158, 1161 (5th Cir. 1981); *accord* Great Prize, S.A. v. Mariner Shipping Party, Ltd., 967 F.2d 157, 159 (5th Cir. 1992); Donatelli v. Nat'l Hockey League, 893 F.2d 459, 467 n.6 (1st Cir. 1990).

184 Roscoe v. Hansen, No. 96-2250, 1997 WL 116992, at *1 (10th Cir. Mar. 17, 1997) (per curiam) (quoting Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979)).

185 Stauffacher v. Bennett, 969 F.2d 455, 459–60 (7th Cir. 1992) (emphasis added); *accord* Rauch v. Day & Night Mfg. Corp., 576 F.2d 697, 699–700 (6th Cir. 1978); Goldstone v. Payne, 94 F.2d 855, 857 (2d Cir. 1938); Toledo, St. L. & W.R. Co. v. Perenchio, 205 F. 472, 474–75 (7th Cir. 1913).

186 Mkt. St. Assocs. v. Frey, 941 F.2d 588, 590 (7th Cir. 1991).

187 Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am., 933 F. Supp. 246, 249 (S.D.N.Y. 1996).

188 Csibi v. Fustos, 670 F.2d 134, 136 n.3 (9th Cir. 1982); *accord* Ceres Gulf v. Cooper, 957 F.2d 1199, 1207 n.16 (5th Cir. 1992); AK Steel Corp. v. Chamberlain, 974 F. Supp. 1120, 1122 (S.D. Ohio 1997).

the[ ] personal privileges" of the parties,[189] or collectively as "an individual right,"[190] or as "procedural requirements"[191] or "affirmative defenses"[192] akin to the interposition of a statute of limitations.[193] In turn, one would think that the Court might be interested in *why* each type of jurisdiction bears different characteristics and whether these reasons indicate anything about their respective importance.

Perhaps the most significant consideration in this regard, which the *Ruhrgas* Court neither noted nor explored, is the respective constitutional source of each jurisdictional requirement. Subject-matter jurisdiction ultimately derives from Article III, although its affirmation, particularly in the lower courts, is typically by statute. As such, subject-matter jurisdiction is properly characterized as an *internal* limitation on the existence of federal judicial power and thus the sovereignty of the federal government. In turn, without subject-matter jurisdiction, a federal court is entirely without power to adjudicate a dispute, irrespective of the parties' wishes.[194] Personal jurisdiction, by comparison, is essentially the exercise of jurisdiction over a particular defendant as long as such exercise complies with the Fifth Amendment Due Process Clause.[195] Personal jurisdiction, accordingly, is best characterized as an *external* limitation on the exercise of federal judicial power, without which a court is simply precluded from binding the defendant absent some form of consent. Personal jurisdiction, in other words, "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[196]

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189 *Perenchio*, 205 F. at 475; *accord* Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979).

190 *E.g.*, Parsons v. Plotkin (*In re* Pac. Land Sales, Inc.), 187 B.R. 302, 309 (B.A.P. 9th Cir. 1995).

191 *E.g.*, Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1003 & n.15 (11th Cir. 1982). To the extent that a court is merely referring to service of process, which is normally a prerequisite to the exercise of personal jurisdiction, the "procedural requirement" description is less problematic. *See* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987).

192 *E.g.*, Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 239 (2d Cir. 1999); Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1090 (D.C. Cir. 1998); Jenkins v. City of Topeka, 136 F.3d 1274, 1275 (10th Cir. 1998).

193 *E.g.*, Santana v. Holiday Inns, Inc., 686 F.2d 736, 739 (9th Cir. 1982).

194 *E.g.*, Indus. Addition Ass'n v. Comm'r, 323 U.S. 310, 313 (1945); Fitzgerald v. Seaboard Sys. R.R., 760 F.2d 1249, 1251 (11th Cir. 1985) (per curiam).

195 *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

196 *Id.*; *see also* Dan B. Dobbs, *The Validation of Void Judgments: The Bootstrap Principle* (pt. 1), 53 VA. L. REV. 1003, 1003 (1967) (stating that "[t]he parties may consent to a court's jurisdiction over their persons, . . . and thus validate a judgment that, but for the consent, would be void" but that "[t]his is not true if the court lacks jurisdiction of the subject matter, for the sovereign has limited the power of the court to render a judgment, and the parties may not confer jurisdiction that has been denied by the sovereign" (footnotes omitted)); Nora Pomerantz, Note, *In re* United States Catholic Conference, *824 F.2d 156 (2d Cir.)*, cert. granted, *108 S. Ct. 484 (1987)*, 61 TEMP. L. REV. 213, 236 (1988) ("The policy

This distinction is important in at least two respects, one of judicial practice, the other of constitutional theory. First, as a matter of standard judicial practice, challenges premised on the internal limits on federal power ought, analytically, to precede challenges premised on the external limits on the same,[197] assuming that the parties have presented both and that the court must address at least one.[198] The more fundamental question, after all, is whether the federal government has the power to act in the first place, not whether its exercise of this alleged power, if it even exists, happens to transgress an external limitation. Second, this respective sequencing of internal and external power issues reflects the more basic principle that maintaining the limited nature of federal authority is, along with federalism and the separation of powers, more theoretically central to American constitutionalism than the imposition of external limits, such as due process, on the exercise of federal power otherwise delegated.[199] In the day-to-

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behind personal jurisdictional requirements is the protection of individual rights. Subject matter jurisdiction, however, arises out of concern for the appropriate scope of judicial power, not the protection of specific individual rights." (footnote omitted)). As the Court recently stated in *Miller v. French*, 530 U.S. 327 (2000), "[i]n contrast to due process, which principally serves to protect the personal rights of litigants to a full and fair hearing, separation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the constitutional design." *Id.* at 350.

197 *Cf.* Fullilove v. Klutznick, 448 U.S. 448, 473 (1980) (confronted with a challenge to a federal minority contracting scheme, and explaining that "[a]t the outset, we must inquire whether the *objectives* of this legislation are within the power of Congress" and "[i]f so, we must go on to decide whether the limited use of racial and ethnic criteria . . . violate[s] the equal protection component of the Due Process Clause of the Fifth Amendment"), *overruled on other grounds by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995); Am. Life League, Inc. v. Reno, 47 F.3d 642, 647 (4th Cir. 1995) (confronted with a challenge to the Freedom of Access to Clinic Entrances Act, addressing first—"[a]s a threshold matter"—whether Congress has the power to enact the statute, and then whether the statute's application violates the First and Fifth Amendments and the Religious Freedom Restoration Act). Courts analyzing challenges to administrative power follow a similar pattern. *See, e.g.*, Balelo v. Baldrige, 724 F.2d 753, 758 (9th Cir. 1984) (en banc) (noting the practice that a claim alleging that an agency exceeded its congressionally delegated rulemaking power should be addressed prior to a claim alleging that a specific agency regulation violates an external limitation, in this case the Fourth Amendment).

198 Where a nonconstitutional question is also presented, the court should presumably examine it first. *See* Richard Anderson Photography v. Brown, 852 F.2d 114, 117 (4th Cir. 1988) (faced with the question of whether Congress has the power to abrogate state sovereign immunity, and whether Congress intended to abrogate this immunity, addressing the latter first "because resolving that issue may avoid the need to address any more fundamental issues of Congress' constitutional power to abrogate"). *But see* Charter Oak Fed. Sav. Bank v. Ohio, 666 F. Supp. 1040, 1043 (S.D. Ohio 1987) (faced with the same question, and concluding that "[t]he first question to be addressed is whether Congress, pursuant to Article I, section 8, the 'commerce clause,' even has the power to abrogate the states' eleventh amendment immunity"). This is particularly true if resolving the nonconstitutional question might eliminate the challenge to federal power. *See* United States v. Five Gambling Devices, 346 U.S. 441, 448–49 (1953).

199 *See, e.g.*, THE FEDERALIST No. 51 (James Madison); Marci A. Hamilton, City of Boerne v. Flores*: A Landmark for Structural Analysis*, 39 WM. & MARY L. REV. 699, 710 (1998);

day existence of citizens, of course, the latter is no less important and often may seem to be the Constitution's *raison d'être*. By their office and tenure, however, judges are obligated to view the Constitution in its architectural totality, drawing upon the historical events and philosophical understandings that gave rise to it and that have sustained its integrity over time.[200] This is particularly true where, as in *Ruhrgas*, the ultimate question is not one of individual liberty as such, but rather of federal judicial power. And from this architectural perspective, it is clear not only that structural features—such as the principles of internally limited federal power, the separation of powers, and federalism—are at the core of American constitutionalism,[201] but that the protection of liberty is, in the first instance, very much tied to their maintenance.[202]

To be sure, it is primarily the different constitutional sources underlying the two jurisdictional forms that explain the distinctive characteristics of each form, characteristics which the Court itself noted but inexplicably deemed irrelevant. Subject-matter jurisdiction is not waivable and must be addressed precisely because it concerns the sovereignty—the baseline of internal power—of the federal govern-

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Merrill, *supra* note 98, at 9, 13. Even the Bill of Rights can be understood as limitations on federal power imposed largely for structural reasons. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

200 *See, e.g.*, United States v. Morrison, 529 U.S. 598, 618 n.8 (2000) (rejecting an argument of the dissent because it "is belied by the entire structure of the Constitution," and gauging the nature of congressional power in light of the Constitution's "careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved"); *cf.* Knowlton v. Moore, 178 U.S. 41, 95 (1900) (explaining that in order to properly interpret the Constitution, one must take into account "[t]he necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption"); CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 3–32 (1969). For a discussion specifically addressing the judicial role in the enforcement of federalism, see *United States v. Lopez*, 514 U.S. 549, 577–78 (1995) (Kennedy, J., concurring).

201 *See Lopez*, 514 U.S. at 552; O'Donoghue v. United States, 289 U.S. 516, 530 (1933); Utah v. Babbitt, 137 F.3d 1193, 1202 (10th Cir. 1998); Baker, *Catalogue*, *supra* note 100, at 842–44.

202 *See, e.g.*, *Morrison*, 529 U.S. at 616 n.7; Gregory v. Ashcroft, 501 U.S. 452, 458–59 (1991); Baker, *Catalogue*, *supra* note 100, at 843; Lewis F. Powell, Jr., *Our Bill of Rights*, 25 IND. L. REV. 937, 940 (1992); Wallace, *supra* note 95, at 2–3. Likewise, the Court has remarked:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.

New York v. United States, 505 U.S. 144, 181 (1992). *See generally* Thomas B. McAffee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17 (1998) (discussing modern interpretations of the Bill of Rights in light of the Founders' original understandings of its purpose).

ment.[203] What cannot be conferred, in other words, is not "judicial power" in some generic sense, but rather the sovereignty that subject-matter jurisdiction specifically represents. In contrast, personal jurisdiction is waivable and need not be addressed precisely because it does not concern sovereignty and, thus, encompasses a lesser or less fundamental form of judicial power.[204] In short, an objection to personal jurisdiction is waivable and the defendant must raise it because it is essentially an affirmative defense, a personal privilege, not a structural broadside on the power of the federal tribunal. As the Court itself has observed:

> The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from . . . the excessive use of judicial power.[205]

This relative constitutional importance of subject-matter jurisdiction flows not only from its relation to sovereignty, but also from the type and magnitude of injury that is occasioned by its transgression. When a court acts in the absence of personal jurisdiction, without the defendant's consent or acquiescence, it is primarily the defendant who is offended, his or her liberty having been deprived without due process of law. In such cases, the relevant interest is one of individual

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203 *See, e.g.*, Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 316 (1870). This point is not contradicted by the *Ruhrgas* petitioner's argument that "[w]aiver does not apply in the context of subject-matter jurisdiction because Article III limitations 'serve institutional interests that the parties cannot be expected to protect.'" Petitioner's Brief at 17, Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) (No. 98-470) (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)), *available at* 1999 WL 23658. For it must ultimately be the different interests served by subject-matter and personal jurisdiction, and not the parties' expected behavior itself, that renders the behavior significant. An inadvertent failure to object to personal jurisdiction is still a waiver, not because parties can always be expected to protect their interest in not submitting to a court without personal jurisdiction (they cannot), but because a lack of personal jurisdiction is simply less critical than a lack of subject-matter jurisdiction to a court's exercise of sovereign authority. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) (explaining that "no action of the parties can confer subject-matter jurisdiction upon a federal court" because subject-matter jurisdiction is "a restriction on federal power, and contributes to the characterization of the federal sovereign," but that "[n]one of this is true with respect to personal jurisdiction," the requirement of which "flows not from Art. III, but from the Due Process Clause" and which "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty").

204 *See, e.g.*, Prou v. United States, 199 F.3d 37, 45 (1st Cir. 1999); Ruggieri v. Gen. Well Serv., Inc., 535 F. Supp. 525, 528 n.2 (D. Colo. 1982). This, to be sure, is one reason that the Court has backed away from grounding the requirement of personal jurisdiction in the constitutional value of federalism. *See Compagnie des Bauxites de Guinee*, 456 U.S. at 702 n.10. Of course, personal jurisdiction is not totally unrelated to sovereignty, as the exercise of the former implies the existence of the latter.

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

liberty, the violation is largely personal to the defendant, and it is normally the defendant alone who is entitled to vindicate or overlook the offense.[206] When a court acts without subject-matter jurisdiction, however, it is the people as a whole—the very source of federal sovereignty—that suffers offense. The harm, though possibly the result of a single judge, is nationwide in scope, for the fundamental charter has been violated as to all citizens, not simply the defendant.[207] In the words of the Tenth Amendment, when a federal court exercises "powers not delegated to the United States by the Constitution," it usurps powers "reserved to the States . . . or to the people."[208] True, the deprivation of due process visited upon a particular defendant may also indirectly offend the people, but the constitutional system simply does not accord the same level of gravity to such indirect offenses.[209]

The differential significance of subject-matter and personal jurisdiction is not simply an abstract point of theory, but is manifest in a number of judicial and legislative practices. This Article has already noted the Court's own decision in *Leroy* as well as several lower court cases recognizing the fundamentally preliminary nature of subject-matter jurisdiction in relation to personal jurisdiction.[210] In addition, as Part III discusses, several courts both before and after *Steel Co.* have held that it is permissible to adjudicate the merits of a suit without first verifying personal jurisdiction, even though the same practice as to subject-matter jurisdiction is, following *Steel Co.*, clearly forbidden.[211] As the D.C. Circuit Court of Appeals explained, a "district court [is] not required to resolve the issue of personal jurisdiction prior to ruling on the motion to dismiss for failure to state a claim because personal jurisdiction exists to protect the liberty interests of defendants, unlike subject-matter jurisdiction, which serves as a limitation on judicial competence."[212]

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206 Williams v. Life Sav. & Loan, 802 F.2d 1200, 1202 (10th Cir. 1986) (per curiam).

207 *See In re* Pac. Ry. Comm'n, 32 F. 241, 254–55 (C.C.N.D. Cal. 1887); Hamilton, *supra* note 199, at 709. In the debate over the meaning of the Ninth Amendment, scholars have labeled this position the "residual rights" thesis. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 326–27 (1993).

208 U.S. CONST. amend. X; *see* Healy v. Ratta, 292 U.S. 263, 270 (1934); Baker, *Catalogue*, *supra* note 100, at 844; Bradley S. Clanton, Note, *Inherent Powers and Settlement Agreements: Limiting Federal Enforcement Jurisdiction*, 15 MISS. C. L. REV. 453, 468–69 (1995).

209 Were this not so, such doctrines as the Fourth Amendment exclusionary rule and the third-party standing exception for First Amendment facial challenges—premised on the importance of preventing constitutional injury to others not before the court—would not be so distinctive.

210 *See supra* notes 112–23 and accompanying text.

211 The courts are in fact divided on this issue. *See infra* notes 524–25 and accompanying text.

212 Pace v. Bureau of Prisons, No. 98-5025, 1998 WL 545414, at *1 (D.C. Cir. July 17, 1998) (per curiam).

Other instances of the differential treatment of subject-matter and personal jurisdiction are readily available. Congress, for example, confers subject-matter jurisdiction exclusively by statute, but allows the Court to define personal jurisdiction using its rulemaking authority,[213] arguably indicating an understanding that subject-matter jurisdiction is the constitutionally more important power. A telling distinction is also drawn between the two jurisdictional forms within the doctrine of judicial immunity, which shields judges "from civil liability for any normal and routine judicial act" unless the act is undertaken "in the clear absence of all jurisdiction."[214] Although the immunity requires a colorable showing of subject-matter jurisdiction, it requires no showing whatsoever of personal jurisdiction.[215] While the pragmatic rationale for this rule may be the potential difficulty of verifying the factual basis of personal jurisdiction,[216] the mere fact that personal jurisdiction is deemed dispensable (in a way that subject-matter jurisdiction is not) is indicative of its relative perception by the federal courts.

A final example is from the law governing transfers between federal district courts under §§ 1404(a) and 1406(a).[217] Although both provisions require subject-matter jurisdiction, it is generally accepted that neither the transferor court nor the transferee court need have personal jurisdiction.[218] And again, while the rationale of this con-

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213 *See* 28 U.S.C. § 2072(a) (1994); FED. R. CIV. P. 4(k)(2). Indeed, Rule 82 itself provides that the Federal Rules of Civil Procedure "shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." FED. R. CIV. P. 82; *see also* Dery v. Wyer, 265 F.2d 804, 808 (2d Cir. 1959) ("A rule of procedure, . . . however convenient and salutary it may be, is without efficacy to extend the jurisdiction of a court."). Importantly, "[t]he reference to 'jurisdiction' in Rule 82 refers only to jurisdiction over the subject matter, not to jurisdiction over the person." Paxton v. S. Pa. Bank, 93 F.R.D. 503, 505 (D. Md. 1982); *accord* United States v. Montreal Trust Co., 35 F.R.D. 216, 219 (S.D.N.Y. 1964).

214 Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir. 1989) (per curiam); *accord* Stump v. Sparkman, 435 U.S. 349, 356–57 (1978); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351–52 (1871).

215 *See* Ashelman v. Pope, 793 F.2d 1072, 1076 (9th Cir. 1986) (en banc); Dykes v. Hosemann, 776 F.2d 942, 947–50 (11th Cir. 1985) (per curiam).

216 *See, e.g.*, *Dykes*, 776 F.2d at 949–50.

217 *See* 28 U.S.C. § 1404(a) (1994) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."); *id.* § 1406(a) ("The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.").

218 Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962); Sanderson v. Spectrum Labs, Inc., No. 00-1872, 2000 WL 1909678, at *1 n.1 (7th Cir. Dec. 29, 2000) (per curiam); Naegler v. Nissan Motor Co., 835 F. Supp. 1152, 1156–57 (W.D. Mo. 1993); Bradford Nilsson, Comment, *Which Way to the Right Court? The Use of Federal Transfer Statutes When a Court Is a Proper Venue but Lacks Personal Jurisdiction*, 30 SANTA CLARA L. REV. 569, 574, 578, 589–94 (1990).

struction may not be directly related to the issue of resequencing as such, what is ultimately important is that personal and subject-matter jurisdiction are conceptualized differently and that the former, for at least some purposes, is understood simply to be less essential than the latter.[219] In short, personal and subject-matter jurisdiction, from the perspective of jurisdictional theory, are most assuredly *not* equivalent legal requirements, *Ruhrgas*'s assumption to the contrary notwithstanding.

C. Jurisdictional Conformity

Federal courts, and in turn doctrines of federal jurisdiction, function within a limited realm that is bounded not merely by notions of precedential fidelity and theoretical congruence, but ultimately by the very real parameters established by constitutional and statutory command. As a consequence, one cannot truly consider a jurisdictional doctrine legitimate if its articulation or application would entail the exercise of judicial power beyond that which is constitutionally or statutorily authorized. There must, in other words, be jurisdictional conformity in both the origination and the implementation of the doctrine. It is, in fact, this criterion of jurisdictional conformity which poses the most serious obstacle for the doctrine of resequencing. For the power at issue—ultimately an inherent power to address a threshold issue, and dismiss on that basis, in the absence of verified subject-matter jurisdiction—appears largely to be without authority in light of the present understanding of federal judicial power.

To reach this conclusion, it is necessary to demonstrate and combine no fewer than four antecedent premises: *first*, that resequencing is indeed an exercise of power, applied against a background presumption, drawn from precedent and theory, that subject-matter jurisdiction should be addressed at the outset; *second*, that the power to resequence is neither an express nor an implied power, neither directly nor indirectly authorized by constitutional or statutory text, and is therefore an inherent power, a categorization that several of its characteristics confirm; *third*, that this power appears specifically to be an extension of the inherent power of courts to determine their own

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219 That said, at least one court *has* explained the different treatment of personal and subject-matter jurisdiction within the transfer context by reference to *Leroy*'s teaching that "'neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived.'" Garrel v. NYLCare Health Plans, Inc., No. 98 Civ. 9077 (BSJ), 1999 WL 459925, at *8 (S.D.N.Y. June 29, 1999) (quoting Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979)). Viewed in this light, §§ 1404(a) and 1406(a) must be contrasted with 28 U.S.C. § 1631, which expressly authorizes curative transfers between federal courts precisely in cases where jurisdiction—paradigmatically subject-matter jurisdiction—is deficient. 28 U.S.C. § 1631 (1994).

jurisdiction; *but fourth*, that this extension of power appears unjustified in terms of both the general jurisprudence of inherent power and the specific jurisprudence of the inherent power to determine jurisdiction. The remainder of this section will develop each of these premises and then assess their collective significance.

1. *Resequencing and Judicial Power*

At the outset, it is important to establish that the prerogative of a court to resequence threshold inquiries is indeed a form of power, particularly when exercised against a background understanding, rooted in both precedent and theory, that courts should address subject-matter jurisdiction first. This clarification is necessary largely because the *Ruhrgas* Court itself refuses to use the term "power" to describe the prerogative,[220] instead repeatedly describing it as an exercise of "discretion."[221] As the Seventh Circuit has observed, however, "[d]iscretion *is* power, a commodity that judges, like other people, prize."[222] Even the dissenters to the Fifth Circuit's en banc *Ruhrgas* opinion, though seeming to favor the term "discretion,"[223] nevertheless recognized (at least when dealing with the majority opinion) that the prerogative of a district court to dismiss for lack of personal jurisdiction, absent verified subject-matter jurisdiction, is invariably a kind of power.[224] True, power can be obligatory or discretionary, and in this sense the Court's terminology is not inaccurate. In the final analysis, however, resequencing should properly be understood as an exercise of judicial power.[225]

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220 The Court uses the term "power" several times in its opinion, *see* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577, 583, 584 (1999), but not once to describe the prerogative of jurisdictional sequencing.

221 *See, e.g.*, *id.* at 577–78, 586, 588; *cf. id.* at 583 n.7.

222 D'Amico v. Schweiker, 698 F.2d 903, 905 (7th Cir. 1983) (emphasis added); *see also* Thomas K. Landry, *Certainty and Discretion in Patent Law: The On Sale Bar, the Doctrine of Equivalents, and Judicial Power in the Federal Circuit*, 67 S. CAL. L. REV. 1151, 1206 (1994) (noting the "content[ion] that the competition between certainty and discretion is best understood as a struggle for political power" and that "[j]udges gain power to the extent that they can exercise discretion"). Accordingly, "[a] court must have jurisdiction *as a prerequisite* to the exercise of discretion. The question whether a court has abused its discretion necessarily involves the question whether a court has any discretion to abuse." Eighth Reg'l War Labor Bd. v. Humble Oil & Ref. Co., 145 F.2d 462, 464 (5th Cir. 1944) (emphasis added).

223 *See* Marathon Oil Co. v. A.G. Ruhrgas, 145 F.3d 211, 226, 231 & n.7, 232 (5th Cir. 1998) (Higginbotham, J., dissenting), *rev'd*, 526 U.S. 574 (1999).

224 *See, e.g.*, *id.* at 229–30 (Higginbotham, J., dissenting).

225 This characterization is likewise not diminished merely because resequencing may be classified as a matter of procedure. From a practical standpoint, "procedure is power, whether in the hands of lawyers or judges." Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1292–93 (2000); *cf.* Citizens for a Better Env't v. Steel Co., 230 F.3d 923, 927 (7th Cir. 2000) ("[C]ourts possess no more authority to issue advisory opinions (or other-

It is also important to note that merely because each form of jurisdictional dismissal is independently authorized—subject-matter jurisdiction under Rule 12(b)(1), personal jurisdiction under Rule 12(b)(2)[226]—does not mean that the power to choose between them is invariably authorized as well, or that there are no extrinsic, extratextual limitations on the exercise of that power. District courts, after all, are also authorized under Rule 12(b)(3) to entertain defensive allegations of improper venue,[227] but it is well-established that resolution of a 12(b)(3) challenge (at least one resulting in transfer) necessitates a preliminary determination of subject-matter jurisdiction.[228] So also, for that matter, with Rule 12(b)(6) motions to dismiss for failure to state a redressable claim:[229] despite the absence of limiting language in Rule 12(b), *Steel Co.* makes it quite clear that a court cannot resolve a 12(b)(6) motion without first resolving a motion under 12(b)(1).[230] In short, the authority to address any given 12(b) motion in and of itself does not necessarily entail the power to choose the order in which to address 12(b) motions. Rather, one must independently determine the existence and substance of this latter power by resort to considerations extrinsic to the terms of Rule 12(b).[231]

It is particularly significant, in this regard, that the *Ruhrgas* Court was not working against a jurisprudential background indifferent to the sequence in which courts addressed 12(b)(1) and 12(b)(2) motions. If it were, then one could rightly argue that the analysis here is skewed. After all, why should the Court have to justify the resequencing of 12(b)(2) prior to 12(b)(1), but not of 12(b)(1) prior to 12(b)(2), given that neither appears to be dictated by Rule 12(b) itself? As illustrated by the previous two subparts, however, both precedent and theory indicate that the baseline or presumptive norm was, in fact, that courts had to address subject-matter jurisdiction first. Accordingly, the Court should have to justify a resequencing of 12(b)(2) prior to 12(b)(1), if only because such resequencing runs contrary to the doctrine reasonably indicated by its own prior cases, by the prac-

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wise exceed their jurisdiction) in 'procedural matters' than in other matters."), *cert. denied*, 121 S. Ct. 1653 (2001).

226 *See* FED. R. CIV. P. 12(b)(1), 12(b)(2).

227 *See* FED. R. CIV. P. 12(b)(3).

228 *See supra* note 119 and accompanying text.

229 *See* FED R. CIV. P. 12(b)(6).

230 *See supra* note 14 and accompanying text.

231 Interestingly, the Fifth Circuit *Ruhrgas* dissenters decried the en banc majority's decision as "an exercise in unauthorized judicial rulemaking" insofar as it read into Rules 12(b)(1) and 12(b)(2) a sequencing mandate not expressly found in the text. *See* Marathon Oil Co. v. A.G. Ruhrgas, 145 F.3d 211, 233 (5th Cir. 1998) (Higginbotham, J., dissenting), *rev'd*, 526 U.S. 574 (1999). In large measure, the dissenters were absolutely right. Their mistake, however, was not seeing that *either way* the issue is decided—that district courts may choose among grounds for dismissal, or that district courts may not—is a construction of Rule 12(b) and the articulation of a rule based on extratextual considerations.

tice of the lower courts operating pursuant to these cases, and by several of the jurisdictional principles that these cases articulate.

2. *Resequencing and Inherent Judicial Power*

Second, it is necessary to determine the specific category of federal judicial power to which the resequencing power belongs, given that different categories have different norms of legitimacy. Accordingly, a brief overview of these categories, and of federal judicial power in general, may prove useful at this juncture.[232]

The federal judiciary, like the federal government as a whole, "is one of delegated and limited powers."[233] What this means for the federal courts is that they "are not courts of general jurisdiction,"[234] but rather of limited jurisdiction, and "have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto."[235] In turn, not only is there "no presumption of jurisdiction in the federal courts,"[236] to the contrary they are presumed to *lack* jurisdiction or power in any given instance unless and until the existence of lawful jurisdiction is shown.[237] Moreover, because these limitations are intrinsic and structural, they cannot be overcome merely by demonstrating that the parties have consented to a court's exercise of power,[238] or that this exercise would be of manifest utility to society or to the legal system.[239]

With these principles as a backdrop, the federal courts have essentially discerned three categories of power that they may exercise—express, implied, and inherent. *Express powers* are those immediately evident or directly derived from text. In the Constitution, for example, express powers are those that are individually enumerated, such as the judicial grants of Article III, § 2. Although the scope of these powers may necessitate the interpretation of particular terms or

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232 The focus being the judicial powers of Article III courts, not addressed are either the nonjudicial functions of Article III courts, *see, e.g.*, Mistretta v. United States, 488 U.S. 361, 385–90 (1989), or the judicial powers of non–Article III courts, *see, e.g.*, Freytag v. Commissioner, 501 U.S. 868, 888–90 (1991).

233 *Ex parte* Merryman, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9487).

234 Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986).

235 *Id.*; *accord* Northwest Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 95 (1981); Musson Theatrical, Inc. v. Fed. Express Corp., 89 F.3d 1244, 1252 (6th Cir. 1996), *amended on denial of reh'g*, No. 95-5120, 1998 WL 117980 (6th Cir. Jan. 15, 1998).

236 ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 516 (3d Cir. 1998); *see also* JOHN C. ROSE, JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS § 8, at 10 (Byron F. Babbitt ed., Matthew Bender 5th ed. 1938) (1915).

237 *See, e.g.*, Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); Turner v. Bank of N.-Am., 4 U.S. (4 Dall.) 8, 11 (1799); CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 7, at 27–28 (5th ed. 1994).

238 *See, e.g.*, Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17–18 (1951).

239 *See, e.g.*, *In re* Chi., Rock Island & Pac. R.R., 794 F.2d 1182, 1188 (7th Cir. 1986); *accord Musson Theatrical*, 89 F.3d at 1252.

phrases, the powers themselves are clearly conferred by the text. *Implied powers,* by comparison, "are . . . linked to the textually assigned powers and serve as means to the great ends spelled out in the text."[240] They are not outrightly conferred as such, but their existence manifestly corresponds to one or more identifiable enumerated powers. *Inherent powers,* in contrast with both express and implied powers, "do not depend on the existence of *any* textual assignment."[241] Rather than flowing from the text, they flow from the character or needs of—that is, they are inherent to—the governmental institution itself.[242]

a. *Express Power*

As befits a judiciary of limited jurisdiction, and more generally a government of limited and enumerated powers, the overwhelming majority of the federal courts' authority is express in nature. These expressions are located both directly in the Constitution, such as the enumeration of select "Cases" or "Controversies" to which the judicial power shall extend,[243] and derivatively in a host of statutes and rules, provided that such enactments conform to Article III.[244] The logic and lure of express powers inhere not only in the specificity with which the powers may be conferred, but also in the clarity with which they may be limited. Consistent with the American theory of written

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240 PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 39 (4th ed. 2000); *cf.* FELIX F. STUMPF, INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY 5 (1994) ("Implied powers are those that arise out of and are necessary to carry out the authority expressly granted . . . .").

241 BREST ET AL., *supra* note 240, at 39; *see also In re* Two Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig., 994 F.2d 956, 965 n.15 (1st Cir. 1993) (distinguishing "an implied power derived from the Civil Rules" from an analogous "intrinsic" or "inherent" power).

242 *See Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33–34 (1812); Eash v. Riggins Trucking Inc., 757 F.2d 557, 561–64 (3d Cir. 1985) (en banc); STUMPF, *supra* note 240, at 5; Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation,* 73 TEX. L. REV. 1805, 1805 (1995).

243 *See* U.S. CONST. art. III, § 2. This delineation provides not only a subject-matter listing but also a requirement that disputes involving these subjects are sufficiently real and adversarial that they may be called actual cases or controversies. *See* Raines v. Byrd, 521 U.S. 811, 818–19 (1997); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 395–96 (1980).

244 *See* Kline v. Burke Constr. Co., 260 U.S. 226, 233–34 (1922). The nonnegotiability of such compliance is the holding, though clearly not the singular importance, of *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). *See also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 65 (1996) (noting the Court's "'unvarying approach to Article III as setting forth the *exclusive* catalog of permissible federal-court jurisdiction'" (quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 39 (1989) (Scalia, J., concurring in part and dissenting in part))); Flast v. Cohen, 392 U.S. 83, 94 (1968) ("The jurisdiction of federal courts is defined and limited by Article III of the Constitution.").

constitutionalism,[245] the text both empowers *and* circumscribes,[246] leading to a regime in which the intrinsic limitations on the power of the judiciary generally derive from the constitutional or statutory authorizations themselves.[247]

Statutory law, it turns out, is the principal medium by which federal judicial power is delineated. Such delineations include not only the general and specific codifications of the Constitution's jurisdictional grants,[248] but also, through the Necessary and Proper Clause,[249] a variety of statutory schemes that facilitate or actuate the federal courts' exercise of their Article III powers.[250] Most prominent are select powers and duties relating to the administration of the judicial branch and the creation of both general and court-specific federal rules.[251] Under § 2072(a) of the Judicial Code, for example, Congress has empowered the Supreme Court "to prescribe general rules of practice and procedure and rules of evidence for cases in the United

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245 *See Marbury*, 5 U.S. (1 Cranch) at 176.

246 *See* ARMISTEAD M. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE § 14 (1928). Of course, the limitations on federal judicial power are only partly intrinsic. As with the other branches, there also exist extrinsic constraints, including most prominently the separation of powers (the prohibition on exercising or impeding legislative or executive power), *see* Springer v. Gov't of the Philippine Islands, 277 U.S. 189, 201–02 (1928); Massachusetts v. Mellon, 262 U.S. 447, 488 (1923); the principle of federalism as reflected in the Tenth and Eleventh Amendments, *see* Healy v. Ratta, 292 U.S. 263, 270 (1934); and the guarantees in the Bill of Rights, most notably the Fifth Amendment Due Process Clause. Thus, even where a judicial power is constitutionally or statutorily conferred, its exercise is ultimately bounded by these extrinsic constraints.

247 David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 80.

248 *See, e.g.*, 28 U.S.C. §§ 1251, 1253–1254, 1257–1259 (1994) (Supreme Court); *id.* §§ 1291–1292, 1294–1296 (1994 & Supp. V 1999) (Courts of Appeals); *id.* §§ 1330–1368 (District Courts). As for lower federal courts, such codification (or affirmation) is required. *See Kline*, 260 U.S. at 233–34; Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1867). The conventional rationale for this requirement is that the lesser power to allocate jurisdiction falls within Congress's greater power "[t]o constitute Tribunals inferior to the supreme Court." U.S. CONST. art. I, § 8, cl. 9; *see also id.* art. III, § 1 (vesting "[t]he judicial Power of the United States . . . in such inferior Courts as the Congress may from time to time ordain and establish"); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers."). Indeed, "Congress has complete power to determine the jurisdiction of the inferior federal courts and to grant, withhold, restrict or withdraw jurisdiction in its discretion." Taylor v. Brown, 137 F.2d 654, 660 (Emer. Ct. App. 1943). This dynamic contrasts starkly with that governing the Supreme Court's original jurisdiction, which is "susceptible to neither congressional expansion nor congressional diminishment [and] is operative even absent statutory affirmation. Whether the Court's appellate jurisdiction is similarly self-executing is a matter of some debate." Idleman, *supra* note 14, at 250 n.50 (citation omitted).

249 U.S. CONST. art. I, § 8, cl. 18.

250 *See, e.g.*, Willy v. Coastal Corp., 503 U.S. 131, 136 (1992); Hanna v. Plumer, 380 U.S. 460, 472–73 (1965); Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41, 48 (1988).

251 *See* Mistretta v. United States, 488 U.S. 361, 388–89 (1989); Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941).

States district courts . . . and courts of appeals"[252] while under § 2071(a) Congress has empowered all federal courts to "prescribe rules for the conduct of their business" if "consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072."[253] In turn, Rule 83 of the Federal Rules of Civil Procedure empowers each district court to "make and amend rules governing its practice" (so-called local rules) if "consistent with . . . Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075,"[254] and further provides that, even absent a controlling statute or rule, "[a] judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district."[255]

b. *Implied Power*

Despite the logic of a textualist regime, it has long been understood that textual expression does not exhaust the federal judicial power and that this power may also be nonexpress.[256] Of the two principal categories of nonexpress powers—implied and inherent—the less problematic are implied powers, as there remains for them at least some textual nexus. Implied powers are those which are not immediately apparent from, but which are nevertheless conferred by, statutory or constitutional text.[257] Their implication is virtually always based on the inferred intent of the drafters, manifested by the law's overall structure, apparent purposes, and (perhaps) legislative or documentary history.[258] Thus, where Congress has granted to the federal courts exclusive jurisdiction over a particular area, it has been judicially inferred that Congress has also given to the federal courts "the

252 28 U.S.C. § 2072(a) (1994). These include, among others, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the Federal Rules of Appellate Procedure.

253 *Id.* § 2071(a).

254 FED. R. CIV. P. 83(a)(1); *see also* FED. R. CRIM. P. 57(a)(1) ("Each district court . . . may . . . make and amend rules governing its practice. A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. § 2072.").

255 FED. R. CIV. P. 83(b); *see also* FED. R. CRIM. P. 57(b) ("A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district."). On the rulemaking authority of the district courts, see *Stern v. United States District Court for the District of Massachusetts*, 214 F.3d 4, 13 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 1077 (2001); Franquez v. United States, 604 F.2d 1239, 1244–45 (9th Cir. 1979); 12 WRIGHT ET AL., *supra* note 119, § 3155 (2d ed. 1997).

256 It has been said, however, that nonexpress powers are generally disfavored. *See, e.g.*, Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 225 (1821).

257 *See supra* note 240 and accompanying text.

258 *See, e.g.*, United States v. Freeman, 44 U.S. (3 How.) 556, 565 (1845); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407–08 (1819); Steinberg v. Mellon Bank (*In re* Grabill Corp.), 132 B.R. 725, 726 (Bankr. N.D. Ill. 1991).

implied power to protect that grant."[259] Among the more distinctive implied powers are judicial review and federal common law–making. As Professor Paulsen has noted, for instance, "[t]he courts' power of 'judicial review'—the power to refuse to apply as law statutes that the courts find unconstitutional—is simply a special instance of the implied judicial power to interpret. (The text of the Constitution, of course, nowhere mentions the power of judicial review.)"[260] Likewise, the power to fashion rules of federal common law,[261] when invoked pursuant to perceived but nonexpress statutory or constitutional authorization, is also a species of implied judicial power.[262] After all, "[f]ederal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision."[263]

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259 Gonzales v. Parks, 830 F.2d 1033, 1036 (9th Cir. 1987).

260 Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 241 (1994); *see also* J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 455–56 (1990) (describing judicial review as one of the "great implicit power[s] in the Constitution"); Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561, 1566 (1998) (book review) ("[T]he power of judicial review is not specified, but the Framers likely assumed it as implicit in a Constitution of limited powers with an Article III judiciary."). According to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), this power is implicit in Article III's grant of power to the federal courts to hear "Cases . . . arising under th[e] Constitution," U.S. CONST. art. III, § 2, cl. 1, when interpreted in light of the written nature of the Constitution, the limited nature of federal governmental power, and the traditional interpretive function of the judiciary. *See Marbury*, 5 U.S. (1 Cranch) at 176–79.

261 "'[F]ederal common law' in the strictest sense . . . [is] a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision." Atherton v. FDIC, 519 U.S. 213, 218 (1997).

262 *See, e.g.*, Musson Theatrical, Inc. v. Fed. Express Corp., 89 F.3d 1244, 1249 (6th Cir. 1996), *amended on denial of reh'g*, No. 95-5120, 1998 WL 117980 (6th Cir. Jan. 15, 1998).

263 City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981); *accord* Resolution Trust Corp. v. Miramon, 22 F.3d 1357, 1360 (5th Cir. 1994). Not all federal common law–making relies upon textual authorization (the lack of which, as discussed later, points to inherent power); that which does, however, may properly be deemed an exercise of implied power. *See, e.g.*, Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 267 (1992). To the extent, moreover, that implied power to fashion federal common law is statutorily based, Congress may freely modify or abrogate it. United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 958 (9th Cir. 1995); FDIC v. Bates, 42 F.3d 369, 371 (6th Cir. 1994); *Miramon*, 22 F.3d at 1360. *See generally Milwaukee*, 451 U.S. at 314–32 (discussing Congress's supplantation of federal courts' common law–making power through the Federal Water Pollution Control Act Amendments of 1972). Constitutionally implied judicial powers, by comparison, vary in the extent that Congress is able to regulate them. For example, while Congress cannot meddle with the power of judicial review in and of itself, *see* Dickerson v. United States, 530 U.S. 428, 437 (2000), there may be circumstances under which it can be congressionally foreclosed, *compare* Maldonado v. Fasano, 67 F. Supp. 2d 1170, 1174 (S.D. Cal. 1999) (stating that "the presumption favoring judicial review may be overcome 'by specific language or specific legislative history that is a reliable indicator of congressional intent,' or 'by specific inferences of intent drawn from the statutory scheme as a whole'" but also that, "whenever 'fairly possible,' courts will narrowly construe jurisdiction-limiting statutes to avoid constitutional questions and to preserve judicial review over

c. *Inherent Power*

The remaining category of power, also nonexpress, is inherent power. In contrast to implied powers, which derive from text through the medium of authorial intent, inherent powers derive from the nature or necessities of the institution invoking them. They are, in other words, *inherent* to the institution itself. Needless to say, this is a rather abstract notion—inherent powers have been described as a "formless . . . concept"[264]—and courts often blur the distinctions among various inherent powers and even between inherent and implied powers.[265] Nevertheless, the basic framework of inherent judicial powers may generally be summarized as follows. Although not textual per se, inherent powers are embodied in the very concept of "judicial Power" mentioned in the first two sections of Article III. More than a mere synonym for jurisdiction,[266] the "judicial Power" encompasses those prerogatives and obligations that have customarily attended the judicial function,[267] particularly the Anglo-American common law courts

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constitutional issues" (quoting Block v. Cmty. Nutrition Inst., 467 U.S. 340, 349 (1984))), *with* Bartlett v. Bowen, 816 F.2d 695, 703 (D.C. Cir.) ("In our view, a statutory provision precluding *all* judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right."), *opinion reinstated*, 824 F.2d 1240 (D.C. Cir. 1987) (en banc) (per curiam). By contrast, Congress can freely override the implied judicial power to fashion doctrine under the dormant Commerce Clause. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 154–55 (1982).

264 McCall-Bey v. Franzen, 777 F.2d 1178, 1187 (7th Cir. 1985); *see also In re* Tutu Wells Contamination Litig., 120 F.3d 368, 383 (3d Cir. 1997) ("The permissible scope of inherent powers is somewhat unclear; we have earlier observed that 'the notion of inherent power has been described as nebulous, and its bounds "shadowy."'" (quoting Eash v. Riggins Trucking Inc., 757 F.2d 557, 561 (3d Cir. 1985) (en banc))); NASCO, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696, 703 (5th Cir. 1990) (noting the "uncertainty in the very idea of inherent power"), *aff'd sub nom.* Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

265 *See Eash*, 757 F.2d at 562; William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 775 (1997); Michael E. Solimine, *Enforcement and Interpretation of Settlements of Federal Civil Rights Actions*, 19 RUTGERS L.J. 295, 315 (1988). For an outstanding recent article on the forms, rationales, and limiting principles of inherent judicial power (substantially congruent with the analysis presented here), see Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001).

266 *See, e.g.*, James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 708 (1998).

267 *See* Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1406 (5th Cir. 1993); *Eash*, 757 F.2d at 562; Dukes v. Smith, 34 M.J. 803, 805 (N-M. C.M.R. 1991); Engdahl, *supra* note 247, at 84–85; Ryan, *supra* note 265, at 783–84; Solimine, *supra* note 265, at 315. "In contrast, Articles I and II not only vest legislative and executive power in the Congress and the President, respectively, but also proceed to enumerate what those powers are." Ryan, *supra* note 265, at 783 n.103. Article III also does not provide "procedural signals to identify when this power is being exercised. . . . This silence contrasts appreciably with how the Constitution treats the other great constitutional powers—the *political* powers—of the government." Brian F. Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. REV. 257, 299 (2000).

at the time of the framing,[268] whether or not such attributes are elsewhere expressly conferred by the Constitution[269] or affirmed by statute.[270]

The most obvious such attribute is the power to adjudicate and decide disputes—the "power to render judgment"[271]—by the interpretation and application of existing law or legal principles.[272] As one

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268 George D. Brown, *Of Activism and* Erie*—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617, 623 (1984); *cf.* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774–78 (2000) (looking to the legal traditions in England and the American Colonies to define contemporary federal jurisdiction because "Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process'" (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998))); Tyrrell Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U. L.Q. 459, 492–93 (1937) (noting that "the American Revolution was not a fight against the common law of England" and that "[t]he attitude of the late colonial and early republican judges was one of extreme loyalty, not to say servility, toward the English judicial system as it existed for the benefit of Englishmen in England"). *But cf.* Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845) ("The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law.").

269 *But cf.* Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1394–95 (1994) (arguing that, while Article III, § 1 seems to create "potentially enormous" judicial power vested with several implied powers, § 2 undermines this potential by clarifying that "the federal courts are meant to be courts of constitutionally limited jurisdiction").

270 While this "judicial Power" theory may resolve the issue of the need for a constitutional grant, it does not automatically resolve the issue of the need for congressional affirmation (at least as to the lower federal courts), unless one also assumes that these powers, by their nature, need not be statutorily affirmed. The statutory affirmation issue is particularly problematic insofar as Congress, in the All Writs Act, has specifically recognized the power of the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," 28 U.S.C. § 1651(a) (1994), the implication being that federal courts are not otherwise free to advert to "the usages and principles of law" in determining their powers. Moreover, this unique phrasing is not a recent congressional innovation; it can be traced to the original writs provision of the Judiciary Act of 1789. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (providing for federal judicial power to issue "all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, *and agreeable to the principles and usages of law*" (emphasis added)), *quoted in* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 433–34 (1793) (Iredell, J., dissenting).

271 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22 (1825) (Marshall, C.J.).

272 *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995); United States v. O'Grady, 89 U.S. (22 Wall.) 641, 647 (1874); Ryan, *supra* note 265, at 786. This power is so obviously included within the "judicial Power" that one could just as easily deem it implied rather than inherent. It is, after all, the quintessential judicial function and often viewed as the essence of subject-matter jurisdiction. *See, e.g.*, Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167 (1939), *superseded by statute as stated in* Maybelline Co. v. Noxell Corp., 813 F.2d 901, 905 (8th Cir. 1987); Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913); Elliott v. Peirsol's Lessee, 26 U.S. (1 Pet.) 328, 340 (1828); *In re* Chi., Rock Island & Pac. R.R., 794 F.2d 1182, 1188 (7th Cir. 1986) ("[J]urisdiction is the *power* to decide."). At the same time, the recognition of the Article III "judicial Power" as the power to interpret the law within an adjudicatory context also serves to circumscribe and protect the authority of the federal courts by distinguishing the nature of their power from the Article I "legislative Powers" (to make law) and the Article II "executive Power" (to execute the law). N.

moves away from this core power, however, the "inherency" of any given power can become increasingly less evident.[273] A moderately conservative reading of the case law indicates that there are essentially two benchmarks—history and necessity—by which one can measure the legitimate recognition of inherent powers. Congruent with the traditional attribute theory, the first criterion is whether a given power is one that courts, within the Anglo-American judicial tradition, have historically possessed. Thus, it has been recognized that "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."[274] As one might imagine, the richest historical source of inherent powers is found in the concept and tradition of equity.[275] The Supreme Court has stated, for example, that the power "to award attorney's fees to a party whose litigation efforts directly benefit others"—the "common fund exception" to the American rule against fee shifting—"derives not from a court's power to control litigants, but from its historic equity jurisdiction."[276] In turn, consistent with the nature of equity, exercises of inherent power are generally discretionary with the court and subject to abuse-of-discretion appellate review.[277]

The other and arguably more prominent criterion for recognizing inherent powers is that of institutional necessity, described in one

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Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58–59 (1982) (plurality opinion); Kilbourn v. Thompson, 103 U.S. 168, 190–93 (1880); *supra* note 246 (citing cases discussing this separation of powers principle). Regarding the difficulty attending "[t]he distinction between *making* law and *applying or interpreting* law," but also the necessity of retaining the distinction, see Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573, 577 n.17.

273 *See* NASCO, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696, 702–03 (5th Cir. 1990) (noting the difficulty of defining the limits on inherent powers), *aff'd sub nom.* Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

274 Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821); *accord Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824). In turn, the Court has held that the judiciary possesses inherent power "to control admission to its bar and to discipline attorneys who appear before it," *Chambers*, 501 U.S. at 43; to punish contempt of court, *id.* at 44; "to conduct an independent investigation in order to determine whether it has been the victim of fraud," *id.*; and "to vacate its own judgment upon proof that a fraud has been perpetrated upon the court," *id. Chambers* further noted that its prior cases had also recognized inherent power to "bar from the courtroom a criminal defendant who disrupts a trial[,] . . . [to] dismiss an action on grounds of *forum non conveniens*, . . . [to] act *sua sponte* to dismiss a suit for failure to prosecute," *id.* (citations omitted), and to shift or assess attorney's fees, *see id.* at 45–46.

275 *See* Eash v. Riggins Trucking Inc., 757 F.2d 557, 563 (3d Cir. 1985) (en banc). *See generally* Meador, *supra* note 242, at 1805–06 (discussing English origins of inherent authority).

276 *Chambers*, 501 U.S. at 45.

277 *See id.* at 44–45, 55; Link v. Wabash R.R., 370 U.S. 626, 633 (1962); Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 86 F.3d 464, 467 (5th Cir. 1996); United States v. Shaffer Equip. Co., 11 F.3d 450, 462 (4th Cir. 1993); *In re* Stone, 986 F.2d 898, 902 (5th Cir. 1993); Meador, *supra* note 242, at 1805.

case as "[t]he ultimate touchstone of inherent powers."[278] According to the Court:

> It has long been understood that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." . . . These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[279]

For example, the Court has recognized that "[t]here is inherent in every court a power to supervise the conduct of its officers, and the execution of its judgments and process," for "[w]ithout this power, courts would be wholly impotent and useless."[280] Likewise, it has stated that "[c]ourts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties,"[281] such as the appointment of an auditor in aid of a jury trial "when deemed by [the district court to be] essential."[282] Not surprisingly, many historical equity powers also happen to satisfy the criterion of necessity.[283] But this satisfaction is not essential, and some courts in the equity area have employed necessity in a modified and less rigorous manner, denoting "that such power is necessary only in the sense of being highly useful in the pursuit of a just result."[284]

In addition to those inherent powers justified purely by history or necessity are certain specialized inherent powers—nonimplied federal common law–making and supervisory powers—which have somewhat

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278 Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1412 (5th Cir. 1993); *accord* Ray v. Eyster (*In re* Orthopedic "Bone Screw" Prods. Liab. Litig.), 132 F.3d 152, 156 (3d Cir. 1997).

279 *Chambers*, 501 U.S. at 43 (quoting United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812); *Link*, 370 U.S. at 630–31).

280 Griffin v. Thompson, 43 U.S. (2 How.) 244, 257 (1844).

281 *Ex parte* Peterson, 253 U.S. 300, 312 (1920).

282 *Id.*; *see also id.* at 313–14 (stating that "without the [auditor's] aid . . . , the trial judge would be unable to perform his duty"). The Court has recognized other inherent powers. *See In re* Tutu Wells Contamination Litig., 120 F.3d 368, 383 (3d Cir. 1997) (identifying as inherent powers the power to fine, to disqualify counsel, to preclude claims or defenses, and to limit a litigant's future access to the court); Timothy G. Pepper, Case Comment, *Beyond Inherent Powers: A Constitutional Basis for In re* Tutu Wells Contamination Litigation, 59 OHIO ST. L.J. 1777, 1784–85 (1998). For a list of inherent powers recognized by lower federal courts, see *id.* at 1785.

283 *See, e.g.*, *Link*, 370 U.S. at 629–30 (dismissal for failure to prosecute); Gumbel v. Pitkin, 124 U.S. 131, 145–46 (1888) (technical legal standing); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873) (contempt power); Griffith v. Oles (*In re* Hipp, Inc.), 895 F.2d 1503, 1512 & n.17 (5th Cir. 1990) (offering historical origins of the contempt power); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 276–79 (D.C. Cir. 1971) (recall mandate to prevent injustice).

284 Eash v. Riggins Trucking Inc., 757 F.2d 557, 563 (3d Cir. 1985) (en banc).

tailored modes of justification. The first of these is the creation of federal common law in the absence of discernible textual authorization, as distinguished from its counterpart under the doctrine of implied powers.[285] As the Court has explained, "[w]hen Congress has not spoken to a particular issue, . . . and when there exists a 'significant conflict between some federal policy or interest and the use of state law,' the Court has found it necessary, in a 'few and restricted' instances, to develop federal common law."[286] Because of this nontextual basis, however, "[w]hen a federal court creates a federal common law rule, it risks violating *both* of the two fundamental limits on the judicial branch: federalism and the separation of powers."[287] Accordingly, such a rule can only be employed when "necessary to 'protect a uniquely federal interest.'"[288]

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285 For an effort to link federal common law–making to the vestiture of "judicial Power" in Article III, which is the principal source of authority for inherent judicial powers generally, see Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1515–16 (1969).

286 City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) (citations and footnote omitted) (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966); Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)).

287 Musson Theatrical, Inc. v. Fed. Express Corp., 89 F.3d 1244, 1250 (6th Cir. 1996), *amended on denial of reh'g*, No. 95-5120, 1998 WL 117980 (6th Cir. Jan. 15, 1998).

288 *Id.* at 1249 (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)). As the Sixth Circuit has stated:

> [T]he authority to create a federal common law rule without reference to a statute or the Constitution exists only "in such narrow areas as those concerned with the rights and obligations of the United States, interstate or international disputes implicating the conflicting rights of the States or relations with foreign nations, and admiralty cases."

Id. (quoting Smith v. Dearborn Fin. Servs., Inc., 982 F.2d 976, 981 (6th Cir. 1993)). The "federal common law" designation has also been periodically employed to characterize doctrines or practices of inherent power seemingly outside of these narrow areas. One judge, for example, has described the inherent power to award punitive attorney's fees as "federal common law" even though this sanction, which is otherwise well-recognized as a form of inherent power, does not appear necessary to protect a uniquely federal interest. *See* Reitz v. Dieter, 840 F. Supp. 353, 355 n.2 (E.D. Pa. 1993). The Seventh Circuit, moreover, has stated that "'[i]nherent authority' . . . is just another name for the power of courts to make common law when statutes and rules do not address a particular topic." *See* Soo Line R.R. v. Escanaba & Lake Superior R.R., 840 F.2d 546, 551 (7th Cir. 1988). Arguably, however, this conceptualization is overbroad and not sufficiently sensitive to the limited nature of federal judicial power. Finally, "a few commentators have persuasively argued that several federal court doctrines limiting jurisdiction (such as abstention, independent and adequate state grounds, and forum non conveniens) are independent of any specific constitutional or statutory source, and are examples of a procedural or jurisdictional common law" that can be "defended on the ground that it fills a gap in the enacted law, a function demanded by the institutional needs of the federal courts." Solimine, *supra* note 265, at 315; *see also* Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 MISS. C. L. REV. 211, 238–44 (1994) (arguing that the federal courts must draw on their own powers to preserve federalism and quality adjudication); Ryan, *supra* note 265, at 775 (describing a weak strand of inherent power that allows judges to adopt practices where existing statutes and rules are insufficient). The Supreme Court itself has certainly described abstention doctrines in a manner consistent with inherent power rooted in historic notions of equity. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 717 (1996).

The other of these specialized inherent powers are the "supervisory powers."[289] Ordinarily associated with the Court's decision in *McNabb v. United States*,[290] these powers authorize the creation of corrective or prophylactic rules of criminal procedure or appellate criminal review that are constitutionally inspired but not constitutionally or statutorily required.[291] Using these powers, the federal courts may devise "reasonable" rules—that is, "rules [which] represent reasoned exercises of the courts' authority."[292] Alternatively, the supervisory powers can refer more generally to the authority of the appellate courts to delineate hierarchically the practices of the courts below them, whether criminal or civil,[293] although the exercise of supervisory powers in the civil context is less common.[294]

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289 Unfortunately, this term is sometimes used interchangeably with the term "inherent power." United States v. Horn, 29 F.3d 754, 759 (1st Cir. 1994); *supra* note 265. The term may even denote not an inherent power, but rather an express or implied power. *See* 7A FEDERAL PROCEDURE: LAWYERS EDITION § 20:272 (1992 & Supp. 2000). At least one scholar has argued that "[t]he supervisory power label has been used to describe the exercise of several different forms of judicial power," that "[u]se of the term supervisory power has diverted attention from the nature, source, and limits of the authority being exercised in each case," and that "the term supervisory power should be abandoned." Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1520 (1984).

290 318 U.S. 332 (1943), *superseded by statute as stated in* United States v. Duncan, 857 F. Supp. 852 (D. Utah 1994). On the association with *McNabb*, see *Horn*, 29 F.3d at 759; United States v. Gatto, 763 F.2d 1040, 1045 (9th Cir. 1985); Emily Wheeler, Note, *The Constitutional Right to a Trial Before a Neutral Judge: Federalism Tips the Balance Against State Habeas Petitioners*, 51 BROOK. L. REV. 841, 878 (1985).

291 *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 437 (2000); Thomas v. Arn, 474 U.S. 140, 146–47 (1985) ("This power rests on the firmest ground when used to establish rules of judicial procedure."). For discussions of the sources and applications of the supervisory power, see Beale, *supra* note 289; John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423 (1997); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985); Alfred Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969); Matthew E. Brady, Note, *A Separation of Powers Approach to the Supervisory Power of the Federal Courts*, 34 STAN. L. REV. 427 (1982); L. Douglas Harris, Note, *Supervisory Power in the United States Courts of Appeals*, 63 CORNELL L. REV. 642 (1978); Joan Malmud, Comment, *Defending a Sentence: The Judicial Establishment of Sentencing Entrapment and Sentencing Manipulation Defenses*, 145 U. PA. L. REV. 1359, 1383–85 (1997); Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050 (1965); Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963); Wheeler, *supra* note 290, at 876–84.

292 Ortega-Rodriguez v. United States, 507 U.S. 234, 244 (1993). The federal appellate courts, in turn, have invoked their supervisory powers "to remedy police misconduct and to safeguard their own integrity by excluding illegally obtained evidence from trial," Wheeler, *supra* note 290, at 879 n.192, "to order new trials to correct jury selection procedures, . . . to prohibit certain jury charges . . . and to examine claims of prosecutorial and judicial misconduct," *id.* at 879 (footnotes omitted). *See also Thomas*, 474 U.S. at 147 n.5 (citing other uses).

293 *See, e.g.*, McCarthy v. United States, 394 U.S. 459, 464 (1969), *superseded by rule on other grounds as stated in* United States v. Odedo, 154 F.3d 937, 940 (9th Cir. 1998); Shaw v. Gwatney, 795 F.2d 1351, 1353 n.2 (8th Cir. 1986); Wheeler, *supra* note 290, at 876–77.

294 *See* Furlong v. Havee (*In re* Furlong), 885 F.2d 815, 818–19 (11th Cir. 1989); Gary H. v. Hegstrom, 831 F.2d 1430, 1440 n.6 (9th Cir. 1987) (Ferguson, J., concurring in the

In light of the foregoing synopsis, it should now be evident why the categorization of a given power, as express, implied, or inherent, is significant. Each category has its own rules of recognition and limitation, and, generally speaking, these rules can be seen as progressively more demanding for each category: textual conferral for express powers, actual intent for implied powers, and proof of tradition or necessity for inherent powers. Based on this framework, the threshold question at this juncture is whether the resequencing power fits within either of the first two categories, or whether, as the evidence seems to suggest, it is ultimately an inherent power. This Article will explore three alternatives: that *Ruhrgas* simply recognized a discretionary power expressly or impliedly permitted by Rule 83; that *Ruhrgas* involved nothing more than a construction of Rule 12(b); and that the resequencing power is an implied power under Article III or the jurisdictional statutes, perhaps as an instance of federal common law.

One possibility is that the resequencing rule of *Ruhrgas* is simply an application of, and therefore is expressly or impliedly permitted by, Rule 83 of the Federal Rules of Civil Procedure. Rule 83 provides not only that "[e]ach district court . . . may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice,"[295] but also that when there is no controlling law, "[a] judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district."[296] Initially, it bears mentioning that whether the resequencing of threshold inquiries is even a "regulat[ion] [of]

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result); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1478 (1994). Under this broader rubric, supervisory powers have been invoked to vacate lower court judgments and remand for dismissal when mootness arises on appeal, *see* ASARCO Inc. v. Kadish, 490 U.S. 605, 621 n.1 (1989); "to ensure that [a district court's] local rules are consistent with 'the principles of right and justice,'" Frazier v. Heebe, 482 U.S. 641, 645 (1987) (quoting *In re* Ruffalo, 390 U.S. 544, 554 (1968) (White, J., concurring in the result)); to require that "each district court in this circuit entering a directed verdict in a case before it set forth 'an explanation sufficient to permit this court to understand the legal premise for the court's order,'" Sowell v. Butcher & Singer, Inc., 926 F.2d 289, 295 (3d Cir. 1991) (quoting Vadino v. A. Valey Eng'rs, 903 F.2d 253, 259 (3d Cir. 1990)); and to "direct that before commencing the actual trial of any civil case in which a magistrate is to preside . . . , he shall inquire on the record of each party whether he has filed consent to the magistrate's presiding and shall receive an affirmative answer from each on the record before proceeding further," Archie v. Christian, 808 F.2d 1132, 1137 (5th Cir. 1987). *See generally* 7A FEDERAL PROCEDURE: LAWYERS EDITION, *supra* note 289, § 20:13 (discussing the supervisory power).

295 FED. R. CIV. P. 83(a)(1).

296 FED. R. CIV. P. 83(b); *see also* FED. R. APP. P. 47(b) ("A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit.").

practice" within the meaning of Rule 83 is debatable.[297] There is, however, a more serious defect in the argument. To the extent that the power to address personal jurisdiction or other threshold inquiries absent verified subject-matter jurisdiction is itself a form of jurisdiction—it is, after all, the power of a court effectively to dispose of the suit and to preclude relitigation of decided issues—Rule 83 cannot possibly authorize it. For Rule 82 states quite clearly that the Federal Rules of Civil Procedure, Rule 83 included, "shall not be construed to extend or limit the jurisdiction of the United States district courts."[298] In short, neither the authority expressly delineated in Rule 83 nor any form of authority that might be implied from Rule 83 can support the power recognized in *Ruhrgas*.[299]

Another possibility is that resequencing rests on a construction of Rule 12(b), especially since *Ruhrgas* itself specifically deals with the relationship between Rules 12(b)(1) and 12(b)(2). Superficially, of course, this characterization is difficult to support. The Court made no pretense of construing Rule 12—an obvious contrast to a case such as *McCarthy v. United States*,[300] in which the Court explicitly stated that "[t]his decision is based solely upon our construction of Rule 11 and is made pursuant to our supervisory power over the lower federal courts."[301] In addition, there are no outward indicia of construction—no assessment of textual determinacy, no invocation of canons, and no examination of advisory committee notes, for example—let alone any actual consideration of interpretive issues, such as whether there is significance to the Rule's order of enumerated motions (subject-matter jurisdiction in 12(b)(1), before personal jurisdiction in 12(b)(2), before venue in 12(b)(3), and so forth),[302] or whether Rule 12(h)(3) might indicate that a 12(b)(1) challenge, once made, should be accorded priority.[303] In fact, *Ruhrgas* does arguably involve

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297 *Cf.* Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts*, 8 GEO. J. LEGAL ETHICS 473, 526–27 (1995) (noting disagreement over the meaning of the phrase "rules governing its practice" under the prior version of Rule 83).

298 FED. R. CIV. P. 82; *see* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978); Dery v. Wyer, 265 F.2d 804, 808 (2d Cir. 1959). *But cf.* Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 444–45 (1946) (indicating that Rule 82 refers only to subject-matter jurisdiction).

299 Lower courts can also make rules pursuant to 28 U.S.C. § 2071, but this rulemaking is formal and requires "giving appropriate public notice and an opportunity to comment." 28 U.S.C. § 2071(b) (1994).

300 394 U.S. 459 (1969).

301 *Id.* at 464.

302 *See, e.g.*, Transcript of Oral Argument at 19–20, Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) (No. 98-470) (chronicling an exchange between the Court and Clifton Hutchinson, arguing for the respondent, over whether the numerical ordering of motions under Rule 12(b) indicates an analytical hierarchy), *available at* 1999 WL 183813.

303 *Cf.* Barnett v. Brown, 83 F.3d 1380, 1383 (Fed. Cir. 1996) ("[A]ny statutory tribunal must ensure that it has jurisdiction over each case *before* adjudicating the merits, [and] a

a construction of Rule 12(b) if confined to the precise issue of resequencing personal jurisdiction, and it is curious that the Court did not conceptualize the issue in this manner. Nevertheless, such a conceptualization still would not answer the question of power, especially in light of Rule 82. In addition, there is no indication that the *Ruhrgas* analysis is limited to challenges under 12(b), let alone under only 12(b)(2). Other threshold inquiries may also qualify for resequencing, and not all such inquiries are decided by means of a 12(b) motion.[304] Accordingly, it would be inappropriate, even if it were otherwise legitimate or meaningful, to characterize *Ruhrgas* exclusively as a construction of Rule 12(b).

Putting the Federal Rules to one side, the final possibility is that resequencing actually involves the exercise of implied power under Article III or the jurisdictional statutes. This reading would presumably cure the Rule 82 problem, and it would potentially excuse the Court's silence regarding the construction of Rule 12(b). However, this possibility also seems difficult to defend in light of the earlier overview of implied powers. After all, implied powers, though by definition not express, are still manifestly grounded in text, especially in textual grants of power, and there is little if anything in Article III or the jurisdictional statutes from which courts can readily derive the power to resequence threshold inquiries. More fundamentally, the

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potential jurisdictional defect may be raised by the court . . . *sua sponte* or by any party, at any stage in the proceedings, and, *once apparent, must be adjudicated.*" (last emphasis added)); Allen v. Ferguson, 791 F.2d 611, 615 (7th Cir. 1986) (citing Rule 12(h)(3) as indirect authority for the proposition that "when a suit is removed on the basis of diversity of citizenship, the district court should verify the existence of subject-matter jurisdiction at the outset of the litigation if it appears that complete diversity is lacking"). Rule 12(h)(3) provides that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." FED. R. CIV. P. 12(h)(3).

304 *See* Gordon v. Nat'l Youth Work Alliance, 675 F.2d 356, 362 (D.C. Cir. 1982) (Robinson, C.J., concurring) (observing that a 12(b)(1) motion is "by no means . . . the only method" of challenging subject-matter jurisdiction). Illustrative is 28 U.S.C. § 1367(c) (1994). It authorizes a district court to:

> decline to exercise supplemental jurisdiction over a claim under [28 U.S.C. § 1367(a)] if . . . (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, . . . or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Id. Although failure to satisfy the criteria of § 1367(a) should lead to a Rule 12(b)(1) dismissal, discretionary declination of jurisdiction—even before a determination of Article III subject-matter jurisdiction—can apparently proceed directly under § 1367(c). *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999). This must, in fact, be the case. As long as the criteria of § 1367(a) are satisfied, a discretionary declination of jurisdiction is not a 12(b)(1) lack of subject-matter jurisdiction. Moreover, classifying a discretionary declination of jurisdiction under 12(b)(6) would be improper because it is not necessarily related to the merits and, more importantly, would presumably but unjustifiably be prejudicial.

implication of powers is ordinarily based on the inferred intent of the drafters, and there is no evidence, whether intratextually or extratextually, of any specific intent to confer a power of this sort.[305] Needless to say, characterizing the power to resequence as an interstitial rule of federal common law would not alter this implied power calculus because federal common law of the implied power variety necessitates a demonstration of congressional or authorial intent that is equally if not more demanding than that required for any other form of implied powers.[306]

By elimination, then, the power to resequence threshold inquiries would appear to be an inherent power, neither expressly nor impliedly conferred by any constitutional provision, statute, or rule, though necessarily implemented within the framework of Rule 12(b). One need not resort to elimination to draw this conclusion, however, for there are several attributes of this power, four of which will be highlighted here, that arguably confirm its status as inherent. First, it appears to be nontextual, and inherent powers are by definition nontextual.[307] Second, it is a judicially crafted, prospective rule of procedure, which is a mode in which inherent powers are paradigmatically formulated.[308] Third, its exercise is discretionary with the trial court and subject to abuse-of-discretion appellate review, again a traditional characteristic of inherent powers.[309] Fourth and finally, it is designed to operate in the absence of verified subject-matter jurisdiction, and judicial actions undertaken in the absence of verified subject-matter jurisdiction, except when congressionally authorized,[310] tend to be classified as exercises of inherent or supervisory power necessary for the basic functioning of the courts.[311]

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305 This is particularly problematic given that Congress has elsewhere carefully conferred to the federal courts discretionary power over jurisdictional matters. *See, e.g.*, 28 U.S.C. §§ 1292(b), 1367(c), 2201(a) (1994). This includes, most famously, the Supreme Court's own certiorari jurisdiction. *See id.* §§ 1254(1), 1257(a), 1258, 1259.

306 *See* Jeffrey A. Brauch, *The Federal Common Law of ERISA*, 21 HARV. J.L. & PUB. POL'Y 541, 557–58 (1998).

307 *See supra* notes 266–70 and accompanying text.

308 *Cf.* Thomas v. Arn, 474 U.S. 140, 145 (1985) (concluding that the court of appeals had indeed promulgated a procedural rule in exercise of its supervisory powers, because of "[t]he nature of the rule and its prospective application."); Whitten, *supra* note 250, at 57 (noting that "[a]djudication is essentially retrospective, while rulemaking, like legislation, is prospective").

309 *See supra* note 277 and accompanying text.

310 *See* U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 21–22 (1994); *see also* W.G. v. Senatore, 18 F.3d 60, 64 n.1 (2d Cir. 1994) (citing 28 U.S.C. §§ 1919, 1447(c) and FED. R. CIV. P. 11 as exceptions to the rule that a district court without jurisdiction has power only to dismiss the suit).

311 *See, e.g.*, Willy v. Coastal Corp., 503 U.S. 131, 137–39 (1992) (power to impose Rule 11 sanctions); United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 79 (1988) (power to issue orders necessary to determine jurisdiction); United States v. Munsingwear, Inc., 340 U.S. 36, 40–41 (1950) (power to vacate a lower court

3. *Resequencing and Inherent Judicial Power to Determine Jurisdiction*

In order to fully assess the legitimacy of the resequencing doctrine, it is further necessary to determine the specific subcategory of inherent power in which the doctrine belongs, given that the criteria of legitimate recognition differ even among the various forms of inherent power. The contention here is that resequencing, at least when it implicates jurisdictional inquiries, is actually a facet of the inherent power of federal courts to determine their own jurisdiction.[312] Often called "jurisdiction to determine jurisdiction," this power enables a tribunal to determine whether the elements of its own jurisdiction are sufficiently present to permit the lawful and authoritative adjudication of the merits.[313] Within the world of Article III courts, this protojurisdictional form of jurisdiction is ordinarily conceptualized as an inherent power, and rightly so given the absence of an empowering constitutional or statutory provision.[314] And while much of the case law and commentary on this doctrine tends to dwell on its more technical dimensions, especially the binding and preclusive effects of its exercise,[315] the focus here is necessarily on its more rudimentary characteristics, such as the extent of its recognition by the

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judgment where mootness arises on appeal); Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1091 (D.C. Cir. 1998) ("power to dismiss with prejudice (as a sanction for misconduct) even a case over which [a court] lacks jurisdiction"); Terket v. Lund, 623 F.2d 29, 33 (7th Cir. 1980) ("supervisory power[ ] . . . to consider the propriety of the procedure followed by the district court . . . in awarding attorneys' fees under [42 U.S.C.] § 1988"); *see also infra* note 321 (citing cases claiming inherent power to determine jurisdiction).

312 Interestingly, this was the view of the petitioner in *Ruhrgas*, whose position otherwise prevailed. *See* Petitioner's Brief at 12–16, Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) (No. 98-470), *available at* 1999 WL 23658.

313 *See, e.g.*, Tex. & Pac. Ry. Co. v. Gulf, Colo. & Santa Fe Ry. Co., 270 U.S. 266, 274 (1926) ("Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist."). Consider the use of the word "essential" in *Texas & Pacific Railway* in light of *Ruhrgas*'s conclusion that personal jurisdiction could be resequenced with subject-matter jurisdiction because "[p]ersonal jurisdiction, too, is 'an *essential* element of the jurisdiction of a district . . . court,' without which the court is 'powerless to proceed to an adjudication.'" *Ruhrgas*, 526 U.S. at 584 (emphasis added) (omission in original) (quoting Employers Reinsurance Corp. v. Bryant, 299 U.S. 374, 382 (1937)). Reading *Ruhrgas* and *Texas & Pacific Railway* together, it is clear that the power to address personal jurisdiction prior to subject-matter jurisdiction is simply a facet of a court's power to determine its own jurisdiction.

314 *Cf.* Dobbs, *supra* note 196, at 1010 (noting that the sovereign, through legislature or constitution, confers on the courts jurisdiction to determine their own jurisdiction, but "[n]either statutes nor constitutions actually speak in such terms").

315 *See* WRIGHT, *supra* note 237, § 16; 13A WRIGHT & MILLER, *supra* note 119, § 3536 (2d ed. 1984 & Supp. 2001); Dobbs, *supra* note 196, at 1027; Dan B. Dobbs, *The Validation of Void Judgments: The Bootstrap Principle* (pt. 2), 53 VA. L. REV. 1241, 1241–43 (1967); Richard F. Watt, *The Divine Right of Government by Judiciary*, 14 U. CHI. L. REV. 409, 436–48 (1947); Note, *Res Judicata and Jurisdiction: The Bootstrap Doctrine*, 53 HARV. L. REV. 652, 654–60 (1940); John Michael Webb, Case Note, Durfee v. Duke, 18 SW. L.J. 500, 502–07 (1964).

federal courts, the basis of this recognition, and the scope of its application.

a. *Subject-Matter Jurisdiction*

Because the power of a court to determine its own jurisdiction ordinarily refers to the power to determine *subject-matter* jurisdiction, the overview will begin with that focus. A survey of the case law reveals that the power specifically to determine subject-matter jurisdiction is defined by several fundamental characteristics. First, it is a power that is widely recognized by Article III courts. All or virtually all such courts acknowledge its existence,[316] variously characterizing it as "axiomatic,"[317] as a "truism,"[318] and as a "primordial element of our jurisprudence."[319] Moreover, appellate courts recognize this power as encompassing jurisdiction to determine not only their own subject-matter jurisdiction, but also, within the context of a direct appeal, that of the lower court.[320] Second, when courts describe in any meaningful detail either the source or the nature of this jurisdiction, they most often categorize it as an inherent power or as an inherent form of jurisdiction.[321]

Third, and in keeping with the logic of inherent power, the stated rationale for the recognition of the power is virtually always that of

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316 *See* Rosado v. Wyman, 397 U.S. 397, 403 n.3 (1970); Harmon v. Brucker, 355 U.S. 579, 582 (1958); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940); Des Moines Navigation & R.R. v. Iowa Homestead Co., 123 U.S. 552, 559 (1887); Scherbatskoy v. Halliburton Co., 125 F.3d 288, 290 (5th Cir. 1997); Shannon v. Shannon, 965 F.2d 542, 545 (7th Cir. 1992); Home Sav. Bank, F.S.B. v. Gillam, 952 F.2d 1152, 1157 (9th Cir. 1991); Gaines v. Nelson (*In re* Gaines), 932 F.2d 729, 731 (8th Cir. 1991); Sierra Club v. Yeutter, 911 F.2d 1405, 1421 (10th Cir. 1990); Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 451 (6th Cir. 1988); Williams v. Sec'y of Navy, 787 F.2d 552, 557 (Fed. Cir. 1986); Lane v. United States, 727 F.2d 18, 21 (1st Cir. 1984); Ilan-Gat Eng'rs, Ltd. v. Antigua Int'l Bank, 659 F.2d 234, 239 (D.C. Cir. 1981); Roth v. McAllister Bros., Inc., 316 F.2d 143, 145 (2d Cir. 1963).

317 Lopez v. Sullivan, 780 F. Supp. 496, 498 (N.D. Ill. 1991).

318 *Rosado*, 397 U.S. at 403 n.3.

319 *Shannon*, 965 F.2d at 545. It is also recognized internationally. *See* Prosecutor v. Tadic, No. IT-94-1-AR72, ¶¶ 16–20 (International Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (deciding appeal challenging the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia), *reprinted in* 35 I.L.M. 32, 40 (1996), *available at* http://www.un.org/icty/ind_e.htm (last visited Sept. 28, 2001).

320 *See, e.g.*, Ligurotis v. Whyte, 951 F.2d 818, 819 n.1 (7th Cir. 1992); Screven County v. Brier Creek Hunting & Fishing Club, Inc., 202 F.2d 369, 371 (5th Cir. 1953). Should it turn out that a district court erroneously rules in favor of jurisdiction, the court of appeals, exercising its inherent power to determine jurisdiction, is thus limited to correcting the jurisdictional error. *See* Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986); Boyd v. Homes of Legend, Inc., 188 F.3d 1294, 1298 (11th Cir. 1999).

321 *See, e.g.*, *Scherbatskoy*, 125 F.3d at 290; Haines v. Merit Sys. Prot. Bd., 44 F.3d 998, 999 (Fed. Cir. 1995); *Gaines*, 932 F.2d at 731; *Lane*, 727 F.2d at 21; Lykins v. DOJ, 725 F.2d 1455, 1461 n.7 (D.C. Cir. 1984); McGowen v. Harris, 666 F.2d 60, 66 (4th Cir. 1981).

necessity.[322] This necessity can be conceptualized in terms of either the adjudicatory function of federal courts or the limited nature of their power. The adjudicatory-function rationale turns on the judiciary's charge to adjudicate select cases and controversies and on the understanding that, in order to fulfill this charge, it must have the power to assess whether a particular dispute is, among other things, a justiciable case or controversy involving proper subject matter.[323] The limited-power rationale, by comparison, focuses not on the power that the federal courts may have, but rather on the power that they do not. Viewed from this perspective, the power to determine subject-matter jurisdiction, corresponding as it does with the obligation to make such determinations,[324] is a necessary means of ensuring that federal courts act within their limited and enumerated powers, as constitutionally

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322 *See, e.g.*, Stoll v. Gottlieb, 305 U.S. 165, 172 (1938); *Scherbatskoy*, 125 F.3d at 290; Greylock Glen Corp. v. Cmty. Sav. Bank, 656 F.2d 1, 3 (1st Cir. 1981). Correspondingly, the power to determine subject-matter jurisdiction, like all inherent powers, is ultimately a limited one. Thus, while "the district court has considerable discretion in devising the procedure to inquire into the existence of jurisdiction," Gould, Inc. v. Dechiney Ugine Kuhlmann, 853 F.2d 445, 451 (6th Cir. 1988); *accord* Biase v. Kaplan, 852 F. Supp. 268, 277 (D.N.J. 1994), and relative latitude in deciding issues of jurisdictional fact, *see Gould*, 853 F.2d at 451; Hatteras of Lauderdale, Inc. v. Gemini Lady, 662 F. Supp. 1525, 1526–27 (S.D. Fla. 1987), *aff'd*, 853 F.2d 848 (11th Cir. 1988), it must use procedures that are "necessary to evaluate its jurisdiction," Sierra Club v. Yeutter, 911 F.2d 1405, 1421 (10th Cir. 1990); *accord* United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 79 (1988). In addition, while "[e]ach court has jurisdiction to determine its own jurisdiction," it generally does not have jurisdiction to determine "the jurisdiction of others." Chiron Corp. v. Advanced ChemTech, Inc., 869 F. Supp. 800, 801 (N.D. Cal. 1994). Many of the exceptions to the rule of preclusiveness, moreover, are really just another way of expressing limits on the original court's authority. Thus, a jurisdictional determination may be nonpreclusive if the original court plainly usurped jurisdiction, *see* Cantor Fitzgerald, L.P. v. Peaslee, 88 F.3d 152, 155 n.2 (2d Cir. 1996); Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 649 (1st Cir. 1972); Carter v. United States, 135 F.2d 858, 861 (5th Cir. 1943); if there was no opportunity to litigate jurisdiction, *see* Sherrer v. Sherrer, 334 U.S. 343, 350 (1948); Republic Supply Co. v. Shoaf, 815 F.2d 1046, 1052–53 (5th Cir. 1987); or if there is "an allegation of fraud in obtaining the judgment," *Stoll*, 305 U.S. at 172.

323 The Supreme Court has frequently noted "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976), and early in its history proclaimed that it has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution," Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). In turn, courts have recognized that they have both an obligation and substantial power to ascertain so-called jurisdictional facts. *See* LeBlanc v. Cleveland, 198 F.3d 353, 356 (2d Cir. 1999); Gordon v. Nat'l Youth Work Alliance, 675 F.2d 356, 362–63 (D.C. Cir. 1982) (Robinson, C.J., concurring); Fireman's Fund Ins. Co. v. Ry. Express Agency, Inc., 253 F.2d 780, 784 (6th Cir. 1958); Shaffer v. Coty, Inc., 183 F. Supp. 662, 665 (S.D. Cal. 1960).

324 *See, e.g.*, Sonoda v. Cabrera, 189 F.3d 1047, 1050 (9th Cir. 1999); Fitzgerald v. Seaboard Sys. R.R., 760 F.2d 1249, 1251 (11th Cir. 1985). Regarding the basis of this obligation, see *Carlsberg Resources Corp. v. Cambria Savings and Loan Ass'n*, 554 F.2d 1254, 1256 (3d Cir. 1977).

granted and statutorily affirmed.[325] The assumption of this inherent power thus effectively (if paradoxically) serves to limit courts to their express powers, essentially by preventing the unauthorized adjudication of disputes and the unconstitutional issuance of advisory opinions. Without this inherent power, in other words, the constitutional limitations on the federal courts would be at constant risk of transgression.[326]

Another characteristic of the power to determine subject-matter jurisdiction is that it is multifaceted, embodying not only jurisdiction to determine jurisdiction per se, but also a number of ancillary inquiries or powers related to the existence or nonexistence of jurisdiction. The Court has noted, for instance, that a court possesses "the inherent and legitimate authority . . . to issue process and other binding orders, including orders of discovery directed to nonparty witnesses, as necessary for the court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter."[327] Likewise, a court "has the power to resolve any factual dispute regarding the existence of subject matter jurisdiction"[328] and "may hold an evidentiary hear-

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325 The existence and obligatory exercise of this power provide not only the means to ensure that courts are acting within constitutional and statutory parameters, but also the means to ensure that the statutory prescriptions are themselves within constitutional limits. *See* 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, 26–27 (1981).

326 *See* Robert J. Faris, Comment, Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee: *Justifying Establishment of Jurisdiction as a Discovery Sanction,* 70 CAL. L. REV. 1446, 1456 (1982). As stated by Judge Keeton:

> Inherent in the authoritative prescription of limited jurisdiction . . . is the necessity that the court . . . be empowered to turn away those litigants who seek to use its processes for the adjudication of claims beyond its limited jurisdiction. Absent such jurisdiction to determine whether it has jurisdiction over a particular claim, the purpose of limiting the scope of its judicial activities would be frustrated. It would function in an anomalous aura of uncertainty, either pronouncing judgments almost certain to be overturned by authoritative determinations in other courts that the matters purportedly determined were beyond its jurisdiction, or else declining to act . . . until directed by another court to accept jurisdiction. Indeed, the underlying reasons for recognizing jurisdiction to determine jurisdiction are so compelling that it is the duty of a court of limited jurisdiction to notice its lack of jurisdiction, even when no party raises the issue.

Armor Elevator Co. v. Phoenix Urban Corp., 493 F. Supp. 876, 881 (D. Mass. 1980) (footnote omitted), *aff'd,* 655 F.2d 19 (1st Cir. 1981).

327 *United States Catholic Conference,* 487 U.S. at 79; *see also* United States v. Shipp, 203 U.S. 563, 573 (1906) (authority to make orders to preserve the existing conditions and the subject of the position); *Sierra Club,* 911 F.2d at 1421 (power to require agency to supplement administrative record and prepare statement of reasons for its action); Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1078 (7th Cir. 1987) (power to "supervise discovery, hold a trial, and order the payment of costs"); Ilan-Gat Eng'rs, Ltd. v. Antigua Int'l Bank, 659 F.2d 234, 239 (D.C. Cir. 1981) (power to compel discovery).

328 Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 451 (6th Cir. 1988).

ing . . . necessary to evaluate its jurisdiction."[329] Indeed, "[i]n the absence of statutory direction, the district court has considerable discretion"[330] in this regard and "may consider affidavits, allow discovery, hear oral testimony, order an evidentiary hearing, or even postpone its determination if the question of jurisdiction is intertwined with the merits."[331] Nor are these ancillary powers confined to the initial stages of litigation, where disputes over subject-matter jurisdiction are most likely to arise. Accordingly, a court "may, as an incident to its jurisdiction to decide jurisdiction," assess costs and attorney's fees against a defendant who erroneously admits diversity of citizenship and only later, by correcting the error, effectuates a dismissal for lack of subject-matter jurisdiction.[332] Even the power of a court to raise sua sponte a question about its subject-matter jurisdiction, not only preliminarily but at any stage of the proceedings, has been characterized as part of the inherent power to determine jurisdiction.[333]

b. *Personal Jurisdiction*

The power to determine jurisdiction can also extend to the ascertainment of personal jurisdiction, which is obviously significant for a discussion of *Ruhrgas*. Although the basic power recognized in *Ruhrgas* may be described generally as a facet of jurisdiction to determine jurisdiction, the power actually applied in *Ruhrgas* is best described as a facet of jurisdiction to determine personal jurisdiction, and, even more precisely, as the power to determine personal jurisdiction in the absence of verified subject-matter jurisdiction. As it turns out, the power of courts to determine personal jurisdiction is neither as developed nor as expansive as their power to determine subject-matter jurisdiction. In particular, it would not be inaccurate to say that, at the time of *Ruhrgas*'s issuance, the power of a federal court to determine

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329 *Sierra Club*, 911 F.2d at 1421.

330 *Gould*, 853 F.2d at 451.

331 *Id.*

332 Eisler v. Stritzler, 535 F.2d 148, 152 (1st Cir. 1976).

333 *See, e.g.*, Neal v. Brown, 980 F.2d 747, 749 n.1 (D.C. Cir. 1992) (per curiam); Midway Mfg. Co. v. Kruckenberg, 720 F.2d 653, 654 (11th Cir. 1983) (per curiam). "Even after a case becomes moot, . . . courts of appeals always have jurisdiction to determine mootness and recall their mandates." IAL Aircraft Holding, Inc. v. FAA, 216 F.3d 1304, 1306 n.2 (11th Cir. 2000). There is also support for the notion that a court's allowance of a party to amend its jurisdictional pleadings, even to change its theory of subject-matter jurisdiction, is an inherent power. *See, e.g.*, Corporacion Venezolana de Fomento v. Vintero Sales Corp., 477 F. Supp. 615, 618 (S.D.N.Y. 1979). However, to the extent that this authority is recognized in 28 U.S.C. § 1653 (1994) ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.") and FED. R. CIV. P. 15(a) (authorizing the amendment of pleadings, by right if timely and by leave of court if untimely), its possible status as an inherent power is somewhat diminished. Then again, the Supreme Court has held that § 1653 "addresses only incorrect statements about jurisdiction that actually exists, and not defects in the jurisdictional facts themselves." Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830–31 (1989).

personal jurisdiction in the absence of verified subject-matter jurisdiction was not well-established at all, especially in relation to other facets of the power to determine jurisdiction.[334] In fact, despite the unanimity and brevity of the Court's decision in *Ruhrgas*, the lower courts predictably manifested hesitation about the notion of resequencing subject-matter and personal jurisdiction, and the Fifth Circuit, in *Ruhrgas* itself, divided nine-to-seven prior to being reversed by the Supreme Court.

What the case law does reveal is that federal courts recognized, *in general*, their own power to determine personal jurisdiction, often coupled with the power to determine subject-matter jurisdiction.[335] One court even described its availability as "well settled."[336] The case law also reveals that courts periodically employed the language of necessity to describe or justify this power although, again, often coupling it with the power to determine subject-matter jurisdiction.[337] Moreover, as with the power to determine subject-matter jurisdiction, it was also established that the power to determine personal jurisdiction includes the attendant authority to maintain the status quo during the pendency of the jurisdictional determination,[338] to order necessary dis-

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334 By contrast, it was well-established that a determination of personal jurisdiction, like subject-matter jurisdiction, can be preclusive even if erroneous. *See* Stoll v. Gottlieb, 305 U.S. 165, 172 (1938); United States v. Van Cauwenberghe, 934 F.2d 1048, 1057–59 (9th Cir. 1991). This doctrine is sometimes referred to as jurisdictional bootstrapping. *See* Page v. Schweiker, 786 F.2d 150, 154 (3d Cir. 1986); *supra* note 315.

335 *See, e.g.*, *Stoll*, 305 U.S. at 171; Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1019 (2d Cir. 1993); Stevedoring Servs. of Am. v. Ancora Transp., N.V., 941 F.2d 1378, 1380 (9th Cir. 1991), *vacated on other grounds*, 506 U.S. 1043 (1993); City of Long Beach v. Exxon Corp. (*In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.), 830 F.2d 198, 202 (Temp. Emer. Ct. App. 1987); Waffenschmidt v. MacKay, 763 F.2d 711, 716 (5th Cir. 1985); Atl. Las Olas, Inc. v. Joyner, 466 F.2d 496, 498 (5th Cir. 1972); LeBlanc v. Cleveland, 979 F. Supp. 142, 146 (N.D.N.Y. 1997), *aff'd*, 198 F.3d 353 (2d Cir. 1999); Lyng Motors & Serv., Inc. v. United States, 923 F. Supp. 356, 358 (N.D.N.Y. 1996); Rose v. Granite City Police Dep't, 813 F. Supp. 319, 321 (E.D. Pa. 1993); Beckman Instruments, Inc. v. LKB Produkter AB, No. R-85-3133, 1986 WL 5354 (D. Md. Jan. 10, 1986); Westinghouse Elec. Corp. v. Rio Algom Ltd. (*In re* Uranium Antitrust Litig.), 480 F. Supp. 1138, 1151 (N.D. Ill. 1979).

336 *Waffenschmidt*, 763 F.2d at 716.

337 *See, e.g.*, *Stoll*, 305 U.S. at 171; *Petroleum Prods.*, 830 F.2d at 202.

338 *See, e.g.*, Star Creations Inv. Co. v. Alan Amron Dev., Inc., No. CIV. A. 95-4328, 1995 WL 495126, at *16 (E.D. Pa. Aug. 18, 1995), *aff'd sub nom.* Larami Corp. v. Amron, No. 95-1317, 1996 WL 192966 (Fed. Cir. Apr. 19, 1996).

covery of jurisdictional facts,[339] and to sanction those who defy this jurisdictional discovery process.[340]

That federal courts have the power to determine personal jurisdiction, and that at some level they must have this power, is not, therefore, in dispute. When a defendant challenges personal jurisdiction and the challenge cannot be avoided or deferred, the court, in order to ensure compliance with the Constitution, the Federal Rules, and by incorporation the state territorial jurisdiction statutes, must have the power and procedural resources to resolve the challenge. Moreover, as Professor Dobbs has observed, even the defendant implicitly recognizes this power:

> [W]hen a defendant appears . . . and moves to dismiss for want of jurisdiction of his person, he is surely conceding the court's jurisdiction to determine the issue he has raised. He is not conceding that there is complete jurisdiction over his person if he makes a special appearance; but he is conceding that there is jurisdiction to determine the issue of jurisdiction over his person by his request that the court act on that issue.[341]

4. *Is Resequencing a Legitimate Extension of Inherent Judicial Power?*

In light of the foregoing three analyses, it is now possible to undertake a more refined and conclusive assessment of whether resequencing conforms to the jurisdiction of the federal courts. This assessment can be reduced to the following question: Is the power to resequence threshold inquiries, in the absence of verified subject-matter jurisdiction, justifiable either within the specific jurisprudence of the inherent power to determine jurisdiction or within the more general jurisprudence of inherent judicial power? This, of course, is a question that the Court in *Ruhrgas* should have explicitly addressed (as the petitioner did at the outset), for, as Professor Dobbs has also noted, "[a] court does not have power to determine its own jurisdiction merely because the Supreme Court wishes it to be so; it has that power only if the legislature or constitution 'wishes' it to be so."[342]

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339 *See, e.g.*, Dennis Garberg & Assocs., Inc. v. Pack-Tech Int'l Corp., 115 F.3d 767, 773 n.4 (10th Cir. 1997); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 430 n.24 (9th Cir. 1977); Noonan v. Winston Co., 902 F. Supp. 298, 306 (D. Mass. 1995), *aff'd*, 135 F.3d 85 (1st Cir. 1998); *Beckman Instruments*, 1986 WL 5354; *Uranium Antitrust Litig.*, 480 F. Supp. at 1151.

340 *See generally* Note, *Sanctions to Enforce Jurisdictional Discovery: Constitutional and Prudential Limitations*, 68 VA. L. REV. 921, 926–33 (1982) (describing circuit court approaches to sanctioning in this situation).

341 Dobbs, *supra* note 196, at 1007.

342 Dobbs, *supra* note 315, at 1247.

In terms of the power specifically to determine jurisdiction, the assessment must ultimately be a negative one. As for nonjurisdictional threshold inquiries, this power is obviously of no relevance at all. Rather than assisting courts in determining their own jurisdiction, the resolution of these inquiries, particularly in lieu of jurisdictional questions, would effectively preclude courts from making such determinations altogether. As for personal jurisdiction, the answer is slightly less clear, but the cases are not favorable. The case law reveals that courts do possess, in general, an inherent power to determine personal jurisdiction.[343] The case law does *not* reveal, however, any meaningful understanding of this power as a freestanding inherent power deployable in the total absence of verified subject-matter jurisdiction. In fact, virtually all of the decisions containing language that could be construed to support such an understanding ultimately fall short of the mark.

In several of these decisions, personal jurisdiction was not actually in dispute, thus rendering any references to the power to determine personal jurisdiction dicta.[344] In others in which personal jurisdiction was in dispute, subject-matter jurisdiction was not, thus making it unlikely that these courts were implying anything about the power to determine personal jurisdiction in the absence of subject-matter jurisdiction, and likewise rendering such statements dicta insofar as that may have been their intent.[345] Furthermore, and not unrelatedly, those few cases that appear to state a holding genuinely comparable to *Ruhrgas* do so without meaningful precedential support. The authority that they cite either relates only to the power to determine subject-matter jurisdiction, not personal jurisdiction,[346] or relates only to the power to determine personal jurisdiction where subject-matter juris-

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343 *See supra* note 335 and accompanying text.

344 *See, e.g.*, Stoll v. Gottlieb, 305 U.S. 165, 171 (1938); Stevedoring Servs. of Am. v. Ancora Transp., N.V., 941 F.2d 1378, 1380 (9th Cir. 1991); City of Long Beach v. Exxon Corp. (*In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.), 830 F.2d 198, 202 (Temp. Emer. Ct. App. 1987); Atl. Las Olas, Inc. v. Joyner, 466 F.2d 496, 498 (5th Cir. 1972); LeBlanc v. Cleveland, 979 F. Supp. 142, 146 (N.D.N.Y. 1997), *aff'd*, 198 F.3d 353 (2d Cir. 1999); Lyng Motors & Serv., Inc. v. United States, 923 F. Supp. 356, 358 (N.D.N.Y. 1996).

345 *See, e.g.*, Dennis Garberg & Assocs., Inc. v. Pack-Tech Int'l Corp., 115 F.3d 767, 773 (10th Cir. 1997); Waffenschmidt v. MacKay, 763 F.2d 711, 716 (5th Cir. 1995); Familia de Boom v. Arosa Mercantil, S.A., 629 F.2d 1134, 1137 (5th Cir. 1980); Ripperger v. A.C. Allyn & Co., 113 F.2d 332, 333 (2d Cir. 1940); Noonan v. Winston Co., 902 F. Supp. 298, 306 (D. Mass. 1995); Beckman Instruments, Inc. v. LKB Produkter AB, No. R-85-3133, 1986 WL 5354 (D. Md. Jan. 10, 1986); *In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1151 (N.D. Ill. 1979); Bruce v. Fairchild Indus., Inc., 413 F. Supp. 914, 916 (W.D. Okla. 1974).

346 *See, e.g.*, Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 430 n.24 (9th Cir. 1977).

diction was not at issue[347] or was otherwise verified.[348] What is not evident from the case law, in other words, is any kind of substantial or unbroken pattern of precedent supporting the notion that a court possesses the inherent power to determine personal jurisdiction in the absence of verified subject-matter jurisdiction, which further explains why so many courts, prior to *Ruhrgas* and in reliance on *Leroy*, were under the impression that subject-matter jurisdiction must be determined first.[349]

What this means is that resequencing, if it is to be justified at all, must independently satisfy one of the criteria for recognizing inherent powers, namely, historical possession or demonstrable necessity.[350] In gauging whether resequencing actually satisfies either criterion, the primary emphasis is the resequencing of personal and subject-matter jurisdiction, if only because that combination presumably presents the strongest case for resequencing. The question of historical possession, or possession within the tradition of equity, appears at best to yield an indeterminate answer. Federal case law itself offers little or no affirmative support for the specific proposition that the power to resequence personal jurisdiction before subject-matter jurisdiction, or to resequence threshold inquiries at all, is a time-honored component of the judiciary's equitable powers.[351] Indeed, one supposes that such a line of cases, if it existed, would have figured promi-

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347 *See, e.g.*, Rose v. Granite City Police Dep't, 813 F. Supp. 319, 321 (E.D. Pa. 1993).

348 *See, e.g.*, Scherman v. Kan. City Aviation Ctr., Inc., Civ. A. No. 92-2211-GTV, 1993 WL 191369 (D. Kan. May 14, 1993).

349 *Gibbs v. Buck*, 307 U.S. 66 (1939), which stated that when "there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court," is not to the contrary. *Id.* at 71–72; *see also* Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491, 520 (1967) ("[S]ince the Constitution did not prescribe any particular method by which jurisdictional issues would be determined, the drafters no doubt intended that courts would pass on the issues of jurisdiction and . . . would do so by ordinary procedures."). Far from having anything to do with the sequencing of jurisdictional issues, let alone countenancing the determination of personal before subject-matter jurisdiction, *Gibbs* addresses nothing more than the mode of evidentiary proof of jurisdictional facts for any given contested jurisdictional issue. Accordingly, even when lower courts have invoked the *Gibbs* rule in the personal jurisdiction context, their invocations have concerned only the means of determining personal jurisdiction in and of itself, without regard to subject-matter jurisdiction and, more importantly, when subject-matter jurisdiction was not simultaneously in dispute. *See, e.g.*, Serras v. First Tenn. Bank Nat'l Ass'n, 875 F.2d 1212, 1213–14 (6th Cir. 1989); Data Disc, Inc. v. Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1284–85 (9th Cir. 1977); Schramm v. Oakes, 352 F.2d 143, 149 (10th Cir. 1965); Chandler v. Roy, 985 F. Supp. 1205, 1209 (D. Ariz. 1997), *aff'd*, No. 98-15139, 1998 U.S. App. LEXIS 29785 (9th Cir. Nov. 19, 1998); Peabody Holding Co. v. Costain Group PLC, 808 F. Supp. 1425, 1431 (E.D. Mo. 1992).

350 *See supra* notes 274–84 and accompanying text.

351 This includes not only decisions under FED. R. CIV. P. 12(b), which permits the assertion and consideration of multiple threshold motions within a system premised on the merger of law and equity, *see* FED. R. CIV. P. 1–2, but also decisions under former Equity Rule 29, which similarly permitted the assertion and consideration of multiple threshold

nently in the *Ruhrgas* petitioner's brief or in the Court's opinion. Alternatively, to attempt to analyze the issue at any broader level of historical generality seems simply to underscore the indeterminacy of its resolution. This is so for several reasons. For one thing, the historical record concerning the original understanding of federal judicial power is itself rather complicated and, in turn, proportionately contested.[352] For another thing, the nature of jurisdiction and jurisdictional pleading as conceptualized and formulated today often differs substantially from that of earlier Anglo-American jurisprudence, and it is difficult to draw precise or meaningful comparisons between earlier and later practices. Finally, the modern codification of comprehensive rules of practice or procedure has, as a practical matter, marginalized the federal judiciary's inherent powers and thereby obscured their potential scope and function, in some instances making it difficult to assemble a convincing genealogy of historical or equitable possession.[353]

Because history offers no obvious support, the focus perforce shifts to institutional necessity. Three considerations give structure to this undertaking. First, the criterion of necessity is not, and ought not to be, easily satisfied. Indeed, it would not be excessive to require that any particular extratextual judicial power be presumed *not* to exist and that a court seeking to recognize and exercise it must persuasively explain why it should.[354] Far from a prohibition on inherent powers,

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motions for suits in equity. *See* Prudential Ins. Co. of Am. v. McKee, 81 F.2d 508, 509–10 (4th Cir. 1936).

352 *Compare* William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS., Spring 1976, at 102, 116–20 (embracing a relatively restrictive view of inherent or incidental federal judicial power absent congressional authorization), *with* Grano, *supra* note 291, at 137–47 (challenging Van Alstyne's position and embracing a less restrictive view of inherent federal judicial power, at least in regard to supervisory rulemaking authority); *and compare* Ryan, *supra* note 265 (finding a broad role for congressional regulation of judicial practice and procedure), *with* Engdahl, *supra* note 247 (finding a narrow role for congressional regulation of judicial practice and procedure).

353 *See, e.g.*, Bernard W. Bell, *Mademocratic Interpretation and Separation of Powers*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 28 n.113 (1998–99).

354 *See, e.g.*, United States v. Sumner, 226 F.3d 1005, 1010–15 (9th Cir. 2000). As the Seventh Circuit has remarked, "'[i]nherent authority' is not a substitute for good reason," and "[a] court needs a good reason to create a new rule . . . and given the rule, there must be a good reason for the exercise of the power in a particular case." Soo Line R.R. v. Escanaba & Lake Superior R.R., 840 F.2d 546, 551 (7th Cir. 1988); *cf.* Chambers v. NASCO, Inc., 501 U.S. 32, 64 (1991) (Kennedy, J., dissenting) ("Inherent powers are the exception, not the rule, and their assertion requires special justification in each case."). Properly understood, this principle does not conflict with *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (en banc), in which the Seventh Circuit also stated:

> Because the rules form and shape certain aspects of a court's inherent powers, yet allow the continued exercise of that power where discretion should be available, the mere absence of language in the federal rules specifically

such a requirement merely acknowledges that inherent powers, particularly nonequitable powers, are essentially a means of last resort that courts cannot recognize or invoke without some affirmative and persuasive justification, if only the observation that the governing positive law is inadequate.[355] In large part this principle flows naturally from the concept of necessity itself.[356] As the Fifth Circuit has stated, "inherent authority 'is not a broad reservoir of power, ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function.' In short, the inherent power springs from the well of necessity, and sparingly so."[357] This requirement also reflects the limited and electorally unaccountable nature of federal judicial power[358] and correlates at a structural level with the normal case-by-case "presumption against subject matter jurisdiction

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> authorizing or describing a particular judicial procedure should not, and does not, give rise to a negative implication of prohibition.

Id. at 651–52 (citing Link v. Wabash R.R., 370 U.S. 626, 629–30 (1962); FED. R. CIV. P. 83). Whether there is an inherent power at all, and whether an already-recognized inherent power is affected by positive law (either its absence or presence), are different inquiries. Furthermore, it would be improper to construe the Seventh Circuit as stating a broader rule, e.g., that in the absence of prohibitory language courts have inherent power to devise *any* procedure they find useful, as opposed to necessary or historically possessed, because the authorities that the court invokes do not support such a rule. *Link* merely recognizes that the absence of a governing rule does not foreclose the recognition of an interstitial role for inherent power, especially where, as in that case, there was no indication that the relevant positive law (Rule 41(b)) was designed to abrogate inherent power, *see Link*, 370 U.S. at 630–32, and the inherent power in question was both "necessary" and "of ancient origin," *id.* at 629–30. And Rule 83, subsequently amended, appears to be an *express* delineation of district court authority to regulate procedure. *See supra* note 254 and accompanying text. This broader reading of *G. Heileman Brewing* would, in fact, appear to render the relevant portion of Rule 83 superfluous.

355 *See Chambers*, 501 U.S. at 50; Allen v. Wright, 468 U.S. 737, 752 (1984) (discussing "the Art. III notion that federal courts may exercise power only 'in the last resort, and as a necessity'" (quoting Chi. & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892))). In regard to the supervisory power, in particular, federal appellate courts have cautioned that it "should not be invoked lightly," Sowell v. Butcher & Singer, Inc., 926 F.2d 289, 295 (3d Cir. 1991), and that they should "exercise this power sparingly, . . . depending on the specific circumstances at hand," Furlong v. Havee (*In re* Furlong), 885 F.2d 815, 819 (11th Cir. 1989).

356 Recall the Court's own reasoning that inherent powers are those "powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" *Chambers*, 501 U.S. at 43 (quoting United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812)). This restrictive definition of "necessary" for purposes of inherent judicial power, effectively equating it with "[in]dispens[able]," contrasts sharply with the Court's expansive definition of "necessary" for purposes of Congress's power under the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, where it means "appropriate," McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415, 421 (1819), and specifically does not mean "indispensable," *see id.* at 413, 418–19.

357 Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1406–07 (5th Cir. 1993) (quoting NASCO, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696, 702 (5th Cir. 1990)).

358 *See* Wis. Knife Works v. Nat'l Metal Crafters, 781 F.2d 1280, 1282 (7th Cir. 1986); Ryan, *supra* note 265, at 781–82; Pepper, *supra* note 282, at 1784.

that must be rebutted by the party bringing an action to federal court."[359] Just as Congress cannot expand its own power,[360] a federal court "does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators."[361] Rather, "[f]ederal courts are courts of limited jurisdiction" that "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree"[362] and must be "carefully guarded against expansion by judicial interpretation."[363]

Second, the criterion of necessity governs not only the recognition of inherent powers, but also their doctrinal formulation and implementation. Indeed, "[t]o the extent that inherent power is seen as a product of necessity, it contains its own limits."[364] At the stage of formulation, adherence to the principle of necessity is particularly important. As the Court has acknowledged, "[t]he extent of these powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority."[365] In addition, federal courts, especially in jurisdictional matters,[366] should "never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,"[367] and the inherent power to determine jurisdictional questions is at some level almost certainly a rule of constitutional law, presumably an interpretation of the "judicial Power" enumerated in Article III.[368] At the same time, to the extent that "statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction,"[369] one would think that judicial assumptions of

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359 Coury v. Prot, 85 F.3d 244, 248 (5th Cir. 1996).

360 *See* United States v. Reese, 92 U.S. 214, 221 (1875).

361 Stoll v. Gottlieb, 305 U.S. 165, 171 (1938).

362 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (citations omitted).

363 Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17 (1951); *see also In re* Pickett, 842 F.2d 993, 995 (8th Cir. 1988) ("[Courts] may not create jurisdiction where it does not exist."); Williams v. Conseco, Inc., 57 F. Supp. 2d 1311, 1313 (S.D. Ala. 1999) ("The contours of [Article III] jurisdiction must not, and may not, be expanded by judicial usurpation.").

364 NASCO, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696, 702 (5th Cir. 1990), *aff'd sub nom.* Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

365 Degen v. United States, 517 U.S. 820, 823 (1996).

366 *See* United States v. Jenkins, 734 F.2d 1322, 1325 (9th Cir. 1983).

367 Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885); *see also* Clinton v. Jones, 520 U.S. 681, 690 n.11 (1997) (affirming the rule); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501 (1985) (describing this as one "of the cardinal rules governing the federal courts"); Ala. State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945) (citing *Liverpool*).

368 U.S. CONST. art. III, §§ 1–2; *supra* notes 266–70 and accompanying text.

369 F & S Constr. Co. v. Jensen, 337 F.2d 160, 161 (10th Cir. 1964).

inherent power ought to be equally, if not more, confined.[370] Necessity also governs the stage of implementation. Even after an inherent power has been carefully delimited, "[a] court must . . . exercise caution in invoking [it],"[371] "must . . . exercise[ ] [it] with restraint and discretion,"[372] "and then only to the extent necessary."[373] As the Eleventh Circuit has stated, "[r]ecognition *and application* of such power is 'grounded first and foremost upon necessity.' Thus, a federal court may only invoke its inherent power when *necessary* to protect its ability to function."[374] More generally, rigor of application reflects the fact that inherent powers are extratextual[375] and, at least in the first instance, are "not regulated by Congress or the people."[376]

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370 As Professor Pushaw notes, "the scope of implicit powers must be narrow, or else the whole idea of a written Constitution that specifies and limits governmental authority would be destroyed." Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473, 483 n.53 (1998) (book review).

371 Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991).

372 *Id.* at 44; *accord* Degen v. United States, 517 U.S. 820, 823–24 (1996); *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824); Corley v. Rosewood Care Ctr., Inc. of Peoria, 142 F.3d 1041, 1059 (7th Cir. 1998).

373 United States v. Shaffer Equip. Co., 11 F.3d 450, 461 (4th Cir. 1993); *see also* United States v. Horn, 29 F.3d 754, 760 (1st Cir. 1994) (emphasizing that "it is inappropriate for courts to attempt to use the supervisory power . . . when, short of such heroic measures, the means are at hand to construct a satisfactory anodyne more narrowly tailored to the objective"). Several courts of appeals, for example, have held that they possess the inherent power to recall their mandates apart from the temporal or procedural framework established by rule, but that this power is "reserved for special circumstances and 'sparingly exercised.'" Powers v. Bethlehem Steel Corp., 483 F.2d 963, 964 (1st Cir. 1973) (citing Greater Boston Television Corp. v. FCC, 463 F.2d 268, 276–77 (D.C. Cir. 1971)); *see also* Patterson v. Crabb, 904 F.2d 1179, 1180 (7th Cir. 1990) (citing cases applying the supervisory power in "exceptional circumstances"). Congruent with this reasoning, "[w]hile power to act on its mandate after the term expires survives to protect the integrity of the court's own processes, it has not been held to survive for the convenience of litigants." Briggs v. Pa. R.R., 334 U.S. 304, 306 (1948) (citation omitted).

374 *In re* Novak, 932 F.2d 1397, 1406 (11th Cir. 1991) (first emphasis added) (citation omitted) (quoting United States v. Providence Journal Co., 485 U.S. 693, 701 (1988)). Needless to say, adherence to this principle is especially important in terms of the inherent power to impose sanctions, given that such power can be "very poten[t]," *Chambers*, 501 U.S. at 44, and is typically punitive in nature, *see id.* at 50; Crowe v. Smith, 151 F.3d 217, 242 (5th Cir. 1998) (Garza, J., concurring in part and dissenting in part); *Shaffer Equip.*, 11 F.3d at 462. In the sanctions context, for example, "[t]he threshold for the use of the inherent power . . . is high. Such powers may be exercised only if essential to preserve the authority of the court and the sanction chosen must employ '"the least possible power adequate to the end proposed."'" Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 86 F.3d 464, 467 (5th Cir. 1996) (footnote omitted) (quoting Spallone v. United States, 493 U.S. 265, 280 (1990) (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821))); *see also Corley*, 142 F.3d at 1058–59 (stating that when possible, courts should rely on the Federal Rules of Civil Procedure, rather than on the inherent power, when sanctioning attorneys).

375 *See In re* Kliegl Bros. Universal Elec. Stage Lighting Co., 238 B.R. 531, 554 (Bankr. E.D.N.Y. 1999).

376 *Shaffer Equip.*, 11 F.3d at 461; *accord In re* Tutu Wells Contamination Litig., 120 F.3d 368, 383 (3d Cir. 1997). Of course under no circumstances can inherent power be exer-

Third and finally, it is important, when gauging necessity, to define the power in question at the proper level of specificity. No one disputes that the federal courts, as a matter of necessity, possess the inherent power to determine personal jurisdiction in a broad sense. The question here is whether they need to possess the power to determine personal jurisdiction, or any other threshold inquiry, in the absence of verified subject-matter jurisdiction. Defined at this level of specificity, the answer appears to be that they do not.[377]

There is little doubt that allowing district courts to resequence threshold inquiries such as personal jurisdiction prior to subject-matter jurisdiction, and to avoid difficult subject-matter jurisdictional questions, may in some instances promote efficiency. Indeed, judicial economy is one of the explicit discretionary factors that a district court should consider in its resequencing analysis. But institutional efficiency is not the same thing as institutional necessity, and there clearly is no basis for arguing that a resequencing power—to borrow from the inherent power cases—"cannot be dispensed with . . . because [it is] necessary to the exercise of all others";[378] or that "its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice";[379] or that it will "protect the[ ] [federal courts'] proceedings and judgments in the course of discharging their traditional responsibilities"[380] or "protect their jurisdiction from conduct which impairs their ability to carry out Article III functions."[381]

In fact, the federal judiciary will most certainly *not* be impaired—as it most certainly was not before *Ruhrgas*—if its district courts are required to address subject-matter jurisdiction prior to other threshold inquiries, including personal jurisdiction. The rule could even be a narrow one, requiring only that lower courts address the core Article III requirements first, leaving to their discretion the potential resequencing of other jurisdictional issues. This narrow rule would argua-

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cised in violation of the Bill of Rights or comparable constitutional guarantees. *See Chambers*, 501 U.S. at 50; Meador, *supra* note 242, at 1816.

377 In this regard, consider the phrasing of the power to determine personal jurisdiction in *City of Long Beach v. Exxon Corp.* (*In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*), 830 F.2d 198 (Temp. Emer. Ct. App. 1987): "[A] court created under Article III of the United States Constitution always has the necessary jurisdiction to determine whether it has jurisdiction over the parties to and the subject matter of a case or controversy." *Id.* at 202. This language suggests that not all power to determine personal jurisdiction is necessary, and that courts do not always have that which is not.

378 United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1813).

379 *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873).

380 Degen v. United States, 517 U.S. 820, 823 (1996).

381 Martin-Trigona v. Lavien (*In re* Martin-Trigona), 737 F.2d 1254, 1261 (2d Cir. 1984).

bly be more consistent with the *Ruhrgas* Court's own reasoning that courts may at the outset address personal jurisdiction because subject-matter jurisdiction does not always directly involve a constitutional (Article III) question. Furthermore, such a formulation would presumably have permitted the Court to reach the same outcome in *Ruhrgas* without "formulat[ing] a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[382]

It is true, of course, that within some precincts of inherent judicial power, the standard for recognition is less than strict necessity. Informal rules of practice or procedure in the criminal justice context, for example, devised pursuant to supervisory powers, need only be "reasonable,"[383] while informal rules of practice and procedure in the civil context based on the judiciary's traditional equitable powers need only be "useful."[384] However, the resequencing authority announced in *Ruhrgas* fits within neither of these subclassifications. It is also true that the supervisory power has periodically been exercised in the civil context, and when so exercised has sometimes rested in part on the "efficient allocation of judicial resources."[385] But the "objective behind . . . [the] use" of supervisory powers is the "fashioning [of] procedures and remedies that ensure that the judicial process remains a fair one,"[386] and there is no indication that procedural fairness, or the preservation of "the institutional integrity of the federal judicial system,"[387] is either the underlying objective or the likely consequence of the resequencing rule.

This is not to deny categorically a role for judicial efficiency or other pragmatic concerns in determining the precise contours of federal judicial power. Such considerations do from time to time explicitly inform the construction of jurisdictional grants or the interpretation of jurisdictional doctrines,[388] and may even reinforce prior determinations of inherent power that have already been

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382 Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885).

383 *See supra* note 292 and accompanying text.

384 *See supra* note 284 and accompanying text.

385 Sowell v. Butcher & Singer, Inc., 926 F.2d 289, 295 (3d Cir. 1991); *see also* Thomas v. Arn, 474 U.S. 140, 147–48 (1985) (noting that an appellate filing-of-objections rule was "supported by sound considerations of judicial economy").

386 Piambino v. Bailey, 757 F.2d 1112, 1146 (11th Cir. 1985).

387 Gary H. v. Hegstrom, 831 F.2d 1430, 1440 n.6 (9th Cir. 1987) (Ferguson, J., concurring in the result).

388 *See, e.g.*, Ankenbrandt v. Richards, 504 U.S. 689, 703–04 (1992); Corlew v. Denny's Rest., Inc., 983 F. Supp. 878, 879 (E.D. Mo. 1997); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.1, at 45 (3d ed. 1999). *But see* Salei v. Boardwalk Regency Corp., 913 F. Supp. 993, 1009 (E.D. Mich. 1996) (noting that "[s]uch salutary effects as judicial economy or convenience cannot save a statutory provision that defies the jurisdictional limits set forth in Article III, § 2" and that "courts are not free to ignore the restraints imposed upon them by the Constitution simply because a statute serves judicial efficiency").

made.[389] More generally, the Court has counseled that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."[390] At issue here, however, is no ordinary exercise of federal judicial power, but rather of inherent judicial power, and the fact remains that "[a] federal court . . . may not take action under the guise of its inherent power when that action . . . *unnecessarily* enlarges the court's authority."[391] Within the limited and somewhat anomalous realm of inherent power, and especially when contemplating a power to be exercised in the absence of verified subject-matter jurisdiction,[392] an expectation of efficiency cannot compensate for a lack of actual necessity, lest this realm would be dispossessed of any meaningful limits.[393] And a federal power—whether judicial, legislative, or executive—that lacks an identifiable and enforceable line of demarcation is by definition a power inconsistent with the Constitution.[394]

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389 *See, e.g.*, Fitzgerald v. First E. Seventh St. Tenants Corp., 221 F.3d 362, 363–64 (2d Cir. 2000) (per curiam).

390 Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587 (1985).

391 *In re* Novak, 932 F.2d 1397, 1406 n.17 (11th Cir. 1991) (emphasis added).

392 *See, e.g.*, Chemiakin v. Yefimov, 932 F.2d 124, 126–28 (2d Cir. 1991) (upholding Rule 11 sanctions despite a lack of subject-matter jurisdiction, but only after thoroughly addressing the issue).

393 As one author has observed, "an appeal in general terms to such interests as cost and time savings to the proponent, and especially to concerns for judicial economy and avoidance of inconsistent results, . . . can be made in virtually any case." Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485, 1501 (1974).

394 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 564–68 (1995). As Chief Justice Marshall asked: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

Not only does the power to resequence threshold inquiries appear unjustified by the jurisprudence of inherent powers, but its articulation by the Court (or by any federal court, for that matter) may run afoul of the congressionally established scheme for the promulgation of procedural rules for the judicial branch. After all, the powers of the lower federal courts are presumptively a matter of congressional authority in the first instance, *see* Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845); Livingston v. Story, 34 U.S. (9 Pet.) 632, 656 (1835), insofar as "Congress has the power to prescribe rules of procedure for the federal courts, and has from the earliest days exercised that power," Palermo v. United States, 360 U.S. 343, 353 n.11 (1959). Even as to inherent powers, the general rule is that legislative authority is paramount and the separation of powers imposes limits, not on Congress, but on the courts. *See* United States v. Gatto, 763 F.2d 1040, 1046 (9th Cir. 1985); Eash v. Riggins Trucking, Inc., 757 F.2d 557, 563 (3d Cir. 1985) (en banc). The possible exception concerns those powers genuinely necessary to the adjudicative task, in which case the separation of powers might very well limit Congress. *See* Michaelson v. United States *ex rel.* Chi., St. Paul, Minneapolis & Omaha Ry. Co., 266 U.S. 42, 65–66 (1924); *Eash*, 757 F.2d at 562–63; Martin-Trigona v. Lavien (*In re* Martin-Trigona), 737 F.2d 1254, 1261 (2d Cir. 1984). Apart from these core inherent powers, however, there appears to be little dispute that Congress, relative to the judiciary, possesses anterior and superior authority to dictate federal judicial procedure or, alternatively, to dictate the framework in which the judiciary by delegation may establish its own procedure. *See Gatto*, 763 F.2d at 1046; Robel, *supra* note 294, at 1480; Linda J. Rusch, *Separation of Powers Analysis as a Method for Determining the Validity of Federal District Courts' Exercise of Local Rulemaking Power: Application to Local Rules*

D. Methodological Adherence

The final measure of doctrinal legitimacy is the extent of adherence to various norms of methodology that govern the judicial formulation of doctrine. Rooted in the rule of law and mutually reinforcing, such norms include overall intelligibility, internal coherence, and predictability of application and scope.[395] Doctrines formulated in adherence to these norms generally foster the values of certainty and stability,[396] thereby facilitating and justifying legal compliance[397] while

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Mandating Alternative Dispute Resolution, 23 CONN. L. REV. 483, 488–89 (1991); Ryan, *supra* note 265, at 765–67.

This congressional superiority is not merely a constitutional abstraction, but rather yields a number of definite, albeit qualified, constraints on the judiciary's exercise of its non-core inherent powers. It is widely accepted, for example, that "[i]n many instances the inherent powers of the courts may be controlled or overridden by statute or rule." Degen v. United States, 517 U.S. 820, 823 (1996); *accord* Dickerson v. United States, 530 U.S. 428, 437 (2000); Carlisle v. United States, 517 U.S. 416, 434 (1996) (Souter, J., concurring). In particular, "the exercise of the inherent power of lower federal courts can be limited by statute and rule, for '[t]hese courts were created by act of Congress.'" Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991) (quoting *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 511 (1874)). Similarly, it is well-established that the courts cannot exercise their inherent powers in a manner that directly conflicts with a federal statute or rule, let alone a constitutional provision, or that indirectly conflicts with a statute or rule when Congress has otherwise manifested its intent to displace the exercise of inherent power. *See Carlisle*, 517 U.S. at 425–26; Thomas v. Arn, 474 U.S. 140, 148 (1985); Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1407–08 (5th Cir. 1993); *Novak*, 932 F.2d at 1406 n.17; G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 652 (7th Cir. 1989) (en banc); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey?, 109 YALE L.J. 1535, 1565 n.90 (2000).

Of particular relevance is the simple fact that Congress has delegated to the Court "the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts," 28 U.S.C. § 2072(a) (1994), but that this delegation is expressly accompanied by a detailed and obligatory mode of promulgation, *see id.* §§ 2073–2074. To the extent that the resequencing rule is more than just a recognition of a necessary or longstanding discretionary prerogative and instead is effectively a modification of practice or procedure under Rule 12(b), if not an expansion of jurisdictional authority, its articulation should arguably have been by formal promulgation within this congressionally established framework, not by unaccountable judicial declaration in the context of adjudication.

395 *See* Quinn, *supra* note 107, at 689; Robert S. Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1693 (1999); William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723, 725–26. Such norms may have particular force with regard to the delineation of jurisdictional doctrines. *See* Long v. Sasser, 91 F.3d 645, 647 (4th Cir. 1996).

396 *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989). It is generally accepted that a doctrine's proper scope should be discerned not only by examining the formulation itself and the holding of the decision that announced it, but also by the reasoning behind that formulation and holding. *See* County of Allegheny v. ACLU, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); Walker v. Georgia, 417 F.2d 5, 8 (5th Cir. 1969); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 758–59, 764–65 (1988). In turn, doctrinal formulations that are ambiguous and that lack meaningful reasoning cannot very well serve the values of certainty and stability.

397 *See, e.g.*, Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970); Bldg. Officials & Code Adm. v. Code Tech., Inc., 628 F.2d 730, 734 (1st Cir. 1980); Joseph E. Murphy, *The Duty of the Government to Make the Law Known*, 51 FORDHAM L. REV. 255, 262–65 (1982). When clarity and coherence are so lacking that persons cannot reasonably assess

reducing the likelihood of arbitrary governmental conduct,[398] including the decisionmaking of judges in later cases.[399] Conversely, doctrines that employ ill-conceived or ill-defined elements, or that have an unpredictable scope of application, are likely to be castigated if not deemed illegitimate by the legal community that must abide by them.

The focus here is largely on the resequencing doctrine's initial inquiry into equivalence, consisting of the two elements of essentiality and constitutionality. As noted, and as is discussed in Part III, the applicability of the equivalence analysis to threshold issues other than personal jurisdiction remains substantially uncertain. However, this uncertainty is neither random nor unavoidable, but rather a natural consequence of the doctrine's ad hoc formulation.

Consider again the element of essentiality. Because personal jurisdiction itself is not truly as essential as subject-matter jurisdiction,[400] a threshold issue's essentiality must inhere in neither its nonwaivability, its absolute necessity, nor its internally delimiting character, but rather (and somewhat redundantly) in its status as a threshold issue—that is, as an issue which must be demonstrated before a federal court can adjudicate a dispute. Under so broad a standard, however, there arguably exist many jurisdictional or quasi-jurisdictional matters that are necessary for or "essential" to adjudication,[401] including the prudential standing and ripeness requirements, exhaustion of administrative remedies,[402] waiver of sovereign immunity,[403] or proof of idiosyncratic statutory elements such as interstate com-

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the legality of their conduct, especially when constitutional liberties are at stake, the law may be deemed void for vagueness. *See* Karlin v. Foust, 188 F.3d 446, 458–59 (7th Cir. 1999); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 197 (6th Cir. 1997).

398 *See* Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984); Summers, *supra* note 395, at 1706.

399 *See, e.g.*, Scalia, *supra* note 396, at 1179–80.

400 *See supra* Part II.B.

401 *Cf.* Noble v. Union River Logging R.R., 147 U.S. 165, 173–74 (1893) (offering lengthy list of examples, including diversity of citizenship and amount in controversy, among others); United States v. Lawuary, 211 F.3d 372, 378–79 (7th Cir. 2000) (Easterbrook, J., concurring in part and concurring in the judgment) (noting that "'[j]urisdictional' problems" have "many shadings"), *cert. denied*, 531 U.S. 907 (2000).

402 *See, e.g.*, Gass v. United States Dep't of Treasury, Nos. 99-1179, 98-B-75, 2000 WL 743671, at *2 n.1 (10th Cir. June 9, 2000) (noting that several courts consider the exhaustion requirement of 26 U.S.C. § 7433(b) to be jurisdictional and treating it as such for purposes of *Steel Co.* and *Ruhrgas*); Sanders v. United States, 760 F.2d 869, 872 (8th Cir. 1985) (addressing exhaustion under the Federal Tort Claims Act). The treatment of administrative exhaustion as a jurisdictional prerequisite appears frequently in the Social Security context. *See, e.g.*, Crayton v. Callahan, 120 F.3d 1217, 1220 (11th Cir. 1997); Paul v. Shalala, 29 F.3d 208, 210 (5th Cir. 1994), *overruled by* Sims v. Apfel, 530 U.S. 103 (2000); Pohlmeyer v. Sec'y of Health & Human Servs., 939 F.2d 318, 320 (6th Cir. 1991). However, such an exhaustion requirement would only be jurisdictional when mandated by statute. *Sims*, 530 U.S. at 106 n.1; Weinberger v. Salfi, 422 U.S. 749, 766 (1975).

403 *See, e.g.*, Lawrence v. Dunbar, 919 F.2d 1525, 1528 (11th Cir. 1990) (per curiam).

merciality,[404] the presence of state action,[405] the existence of federal securities,[406] or the sufficiency of allegations of unlawful conduct.[407] Even the most procedural or minor elements of personal jurisdiction would seem, for that matter, to qualify for resequencing under such a generous standard. As the Third Circuit has noted, "[t]he issuance of a summons signed by the Clerk, with the seal of the Court, and the time designated within which defendant is required to appear and attend, are *essential* elements of the court's personal jurisdiction over the defendant."[408]

Even more problematic is the element of constitutionality. It is not clear, first of all, whether this element was truly necessary to the conclusion that personal jurisdiction is equivalent to subject-matter jurisdiction, or was simply a supplemental consideration, possibly included to accommodate those in the *Steel Co.* majority.[409] Would the *Ruhrgas* Court, in other words, have reached the same conclusion had the dispute over personal jurisdiction been of a nonconstitutional, or a lesser constitutional, magnitude? In turn, it is not clear whether future courts performing an equivalence analysis should deem this element necessary. Likewise, it is not clear whether the subject-matter jurisdictional issue must be nonconstitutional, or whether that, too, was simply a convenient contrast drawn by the Court in that case.[410] As with essentiality, moreover, there is necessarily a concern about breadth or unwieldiness given that many if not all jurisdictional or quasi-jurisdictional questions, at some level, implicate constitutional considerations. By nature of the judiciary's limited jurisdiction, and

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404 *See, e.g.*, United States v. Nippon Paper Indus. Co., 62 F. Supp. 2d 173, 192 (D. Mass. 1999).

405 *See, e.g.*, Finkelstein v. Yablick, No. 00-15825, 2000 WL 1881448, at *1 (9th Cir. Dec. 4, 2000) (per curiam); Yeo v. Town of Lexington, 131 F.3d 241, 248 n.3 (1st Cir. 1997); *cf.* Higgins v. Mississippi, 217 F.3d 951, 953 (7th Cir. 2000) (characterizing as potentially jurisdictional the dismissal of a 42 U.S.C. § 1983 action against a state because "states are not 'persons' within the meaning of [the statute]").

406 *See, e.g.*, SEC v. Infinity Group Co., 212 F.3d 180, 186–87 & n.7 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 1228 (2001).

407 *See, e.g.*, McNamara v. Bre-X Minerals, Ltd., 68 F. Supp. 2d 759, 762 (E.D. Tex. 1999).

408 Ayres v. Jacobs & Crumplar, P.A., 99 F.3d 565, 568 (3d Cir. 1996) (emphasis added).

409 *See* Friedenthal, *supra* note 7, at 266.

410 After all, it is normally of no functional significance that a subject-matter jurisdictional requirement is imposed by constitutional or statutory command. The amount-in-controversy requirement, for one, is plainly statutory, *see* Smith v. GTE Corp., 236 F.3d 1292, 1299 (11th Cir. 2001), but that quality alone does not render it any less a threshold jurisdictional issue than, say, constitutional standing or ripeness, *see, e.g.*, Iglesias v. Mut. Life Ins. Co. of N.Y., 156 F.3d 237, 242–43 (1st Cir. 1998); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998) (noting that both "[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").

especially in light of Congress's undisputed authority over lower court jurisdiction, every potential exercise or nonexercise of federal judicial power manifests a constitutional dimension. This would include not only doctrines such as state or federal sovereign immunity, but also certain nonjurisdictional doctrines such as abstention.[411] Even the prevailing party in *Ruhrgas* acknowledged that the subject-matter jurisdiction questions in that case "raised issues largely statutory in nature, though perhaps with constitutional overtones"[412] and, in particular, although the federal common law question related "in the first instance to the meaning of 28 U.S.C. § 1331, . . . the scope of the constitutional grant of 'arising under' jurisdiction would be in the background."[413]

This last concern also raises the more fundamental question of whether the element of constitutionality is even logically relevant to the task of resequencing, especially given that the constitutional dimension (as with due process and personal jurisdiction) need not be structural in nature. It was, after all, exclusively for structural constitutional reasons, and no others, that *Steel Co.* reaffirmed the necessity of addressing subject-matter jurisdiction prior to the merits,[414] and it seems rather odd that this primacy should now be displaced or diluted for reasons having little or nothing to do with constitutional structure. Indeed, regardless of whether *Steel Co.*'s bar on hypothetical jurisdiction is limited to Article III questions or whether it also extends to statutory questions (a matter of some disagreement at present),[415] it is undisputed that the rationale for the bar is fundamentally structural, most notably the separation of powers.[416] Yet *Ruhrgas* basically ignores the special nature of structural considerations and appears to treat all constitutional dimensions alike, initially by declining to recognize subject-matter jurisdiction as special because of its structural constitutional dimension, and then by equating personal to subject-matter jurisdiction because of the former's nonstructural constitutional dimension.

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411 The abstention doctrines frequently incorporate norms of constitutional interpretation, *see* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996), are traditionally conceived as devices of constitutional federalism, *see* Waldron v. McAtee, 723 F.2d 1348, 1351 (7th Cir. 1983), and certainly raise constitutional separation of powers questions, *see* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

412 Petitioner's Reply Brief at 6, Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) (No. 98-470), *available at* 1999 WL 133932.

413 *Id.* at 6 n.2.

414 *See supra* notes 16–22 and accompanying text.

415 *See supra* note 23 and accompanying text.

416 *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101–02 (1998); 4 WRIGHT & MILLER, *supra* note 119, § 1063 (2d ed. 1987 & Supp. 2001).

In so doing, not only does the Court open a potentially wide door, it also prompts one to ask why it should even matter whether a particular threshold issue, for purposes of equivalence and in turn resequencing, does or does not have a constitutional dimension. Is constitutionality an indicator that the issue is somehow fundamental or fundamentally preliminary, or is it a proxy for the issue's institutional or societal importance? If so, then why not simply use a criterion of fundamentality or importance? Alternatively, does the Court employ constitutionality as a formalistic means of distinguishing personal jurisdiction from, say, venue or other threshold questions that it does not want to be deemed equivalent? If so, then why not simply state in the opinion that personal jurisdiction, and only personal jurisdiction, can satisfy the test of equivalence? Why even purport to devise a neutral means of determining equivalence if one's true objective is to foreclose the subsequent equation of other threshold issues?

Unfortunately, the consequences of substandard doctrinal formulation—of not adhering to methodological norms—can extend well beyond inconsistency of application. In the jurisdictional realm, in particular, poor doctrinal formulation can have grave conceptual consequences for the judiciary as an institution. Without a coherent doctrinal basis, for example, the judicial power to resequence other threshold inquiries before subject-matter jurisdiction carries with it a risk of diluting or diminishing the perceived importance of subject-matter jurisdiction. One can certainly imagine, several years from now, a court, seeking for whatever reason to diminish the importance of subject-matter jurisdiction, readily invoking *Ruhrgas* and its progeny for the "well-established" notion that subject-matter jurisdiction is actually *not* a fundamental, nonnegotiable delimitation of federal judicial power, but is simply one of several threshold inquiries.[417] Already there has emerged in the lower courts the position that, for resequencing purposes, subject-matter jurisdiction may potentially be exchanged with "an array of non-merits questions."[418] This is a trajectory that *Ruhrgas* clearly does not mandate, but, as will be discussed shortly, is also one that by the same token it clearly does not disaffirm.

III
THE IMPLICATIONS OF THE DOCTRINE

Questions of legitimacy notwithstanding, there remains the very real task of discerning the potential implications and reach of the resequencing power. Addressing that task, accordingly, is the objec-

417 *See* Friedenthal, *supra* note 7, at 269–75 (exploring this latent potential).
418 Galvan v. Fed. Prison Indus., Inc., 199 F.3d 461, 463 (D.C. Cir. 1999).

tive of this final Part of the Article. Subpart A considers in depth the doctrine's application not only to personal jurisdiction, but also to state and federal sovereign immunity and, more cursorily, to a variety of other jurisdictional or quasi-jurisdictional issues. Subpart B then considers the interplay between the resequencing power announced in *Ruhrgas* and the related prohibition on hypothetical jurisdiction announced in *Steel Co.*

A. The Future Application of Resequencing

To summarize briefly, the full *Ruhrgas* analysis consists of two stages. The first stage asks whether a particular threshold inquiry is an essential and constitutional component of a court's power to adjudicate, such that it can be deemed equivalent to subject-matter jurisdiction.[419] If not, then the court can never reach it prior to subject-matter jurisdiction.[420] If so, then, circumstances permitting, it can be resequenced and addressed before subject-matter jurisdiction.[421] The second stage asks whether the circumstances do, in fact, permit resequencing.[422] The district court must assess both the relative difficulty of each inquiry and the institutional interests of judicial economy, judicial restraint, and judicial federalism.[423] If the assessment favors resequencing, then the court in its discretion may reach the other inquiry prior to subject-matter jurisdiction.[424] If the assessment is unfavorable, however, then the court should address subject-matter jurisdiction first, and its failure to do so may be reversed on appeal for abuse of discretion.[425]

Given this analysis, the next step is to forecast the application of the resequencing doctrine to various threshold inquiries. The operative premise, of course, is that there *are* other such inquiries (besides personal jurisdiction) that may be deemed equivalent and thus qualify for resequencing. This premise is defensible, and is invoked here, for two reasons. The first, noted earlier, is that the elements comprising the equivalence formula, essentiality and constitutionality, are not especially unique, and the consequent breadth of the formula would seem to permit the equation of additional inquiries, at least those of a jurisdictional nature.[426] The second is that several courts to date have

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419 *See* discussion *supra* Part I.B.1.

420 *See* discussion *supra* Part I.B.

421 *See* discussion *supra* Part I.B.

422 *See* discussion *supra* Part I.B.2.

423 *See* discussion *supra* Part I.B.2(b).

424 *See* discussion *supra* Part I.B.2(b).

425 *See supra* note 71 and accompanying text.

426 If the resequencing power is truly a facet of the inherent power to determine jurisdiction, *see supra* Part II.C.3, then it must be limited to the determination of jurisdictional inquiries.

described the holding of *Ruhrgas* in a manner that seems to contemplate the resequencing of inquiries other than personal jurisdiction.[427] The D.C. Circuit, for one, has gone so far as to propose that "implicit in *Steel Co.*" and clarified by later cases such as *Ruhrgas* is the notion that "[t]here is an array of non-merits questions that [federal courts] may decide in any order."[428]

Accordingly, this subpart examines the application of the *Ruhrgas* analysis not only to personal jurisdiction, but also to Eleventh Amendment and federal sovereign immunity, although the focus necessarily varies between these two areas of inquiry. In addressing personal jurisdiction, the analysis focuses on the discretionary question of resequencing, given that the first stage, the equivalence of personal and subject-matter jurisdiction, is addressed by *Ruhrgas* itself. With regard to state and federal sovereign immunity, by contrast, it is the first stage of the analysis that merits greater attention, given that the relevance of the second stage is wholly contingent on whether resequencing is permissible under any circumstances.

1. *Personal Jurisdiction*

Forecasting the application of the discretionary resequencing analysis to personal jurisdiction requires consideration of both the parameters of the analysis, as defined in *Ruhrgas*, and the manner in which lower courts have applied it to date. According to *Ruhrgas*, this analysis requires a district court faced with subject-matter and personal jurisdiction challenges to address the subject-matter jurisdiction issue first, unless the 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

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427 *See* United States v. Scarfo, 263 F.3d 80, 87–90 & n.4 (3d Cir. 2001); Young v. Ill. State Bd. of Elections, No. 00-3713, 2000 WL 1611115, at *1 (7th Cir. Oct. 25, 2000) (per curiam); Galvan v. Fed. Prison Indus., Inc., 199 F.3d 461, 463 (D.C. Cir. 1999); O'Brien v. Vermont (*In re* O'Brien), 184 F.3d 140, 142 (2d Cir. 1999) (per curiam); Faulk v. Owens-Corning Fiberglass Corp., 48 F. Supp. 2d 653, 659 n.5 (E.D. Tex. 1999); *see also* Perez v. Wis. Dep't of Corr., 182 F.3d 532, 536 (7th Cir. 1999) (citing *Ruhrgas*—albeit with a "*cf.*"—for the principle that "[w]hen there are multiple grounds for dismissing a suit (as opposed to deciding it on the merits) courts may select from among them"). *But see* Fujitsu-ICL Sys., Inc. v. Efmark Serv. Co. of Ill., No. 00-CV-0777 W(LSP), 2000 WL 1409760, at *7 n.4 (S.D. Cal. June 29, 2000) (interpreting *Ruhrgas* as "holding that [a] determination of [a] court's personal or subject matter jurisdiction should precede other inquiries").

428 *Galvan*, 199 F.3d at 463; *accord* United States v. Johnson, 254 F.3d 279, 287 n.11 (D.C. Cir. 2001) (citing *Ruhrgas* for the proposition that the court "may . . . resolve issues that are 'jurisdictional or have jurisdictional overtones' in any order" (quoting *In re* Papandreou, 139 F.3d 247, 254 (D.C. Cir. 1998))); *Young*, 2000 WL 1611115, at *1 (citing *Ruhrgas* for the proposition that "there is no necessary priority among reasons for dismissing a federal suit without decision on the merits").

question."[429] Although the court's discretion clearly attaches to the decisional portion of the analysis (whether, in light of the empirical factors, personal jurisdiction should be addressed and subject-matter jurisdiction should be deferred or ignored), it is not clear whether it also attaches to the antecedent determination of these empirical elements (whether personal jurisdiction is "straightforward," whether subject-matter jurisdiction "raises a difficult and novel question," and whether economy, restraint, and federalism favor or disfavor resequencing). If not, then presumably this determination, like factual determinations generally, would be subject to appellate review not for abuse of discretion, but rather for clear error.[430]

To date, both the interpretation and the application of *Ruhrgas* to the resequencing of personal and subject-matter jurisdiction have been somewhat disuniform. On the positive side, several district courts appear to have correctly stated and applied the analysis, either reaching the personal jurisdiction issue first[431] or, finding the empirical elements unsatisfied, declining to do so.[432] Likewise, the Tenth Circuit implicitly found an abuse of discretion in one case when it vacated a lower court dismissal that rested on statute-of-limitations and personal jurisdiction grounds, and ordered dismissal instead for lack of subject-matter jurisdiction, because "the issue of subject matter jurisdiction [wa]s not unusually difficult" and therefore did not warrant resequencing under *Ruhrgas*.[433] At least one court has also correctly noted that *Ruhrgas* effectively embraces a presumption in favor of addressing subject-matter jurisdiction first, and that this presumption may very well influence the interpretation of prior cases. In particular, when a prior decision addresses both subject-matter and personal jurisdiction, and finds both lacking, the personal jurisdiction analysis may presumptively be considered dictum.[434]

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429 Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 588 (1999); *accord* Gadlin v. Sybron Int'l Corp., 222 F.3d 797, 799 (10th Cir. 2000).

430 *See* FED. R. CIV. P. 52(a); United States v. Hughes Aircraft Co., 162 F.3d 1027, 1030 (9th Cir. 1998); McCarthy v. Navistar Fin. Corp. (*In re* Vogel Van & Storage, Inc.), 59 F.3d 9, 11 (2d Cir. 1995); United States *ex rel.* Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 551 n.1 (10th Cir. 1992).

431 *See, e.g.*, Foslip Pharm., Inc. v. Metabolife Int'l, Inc., 92 F. Supp. 2d 891, 898–99 (N.D. Iowa 2000); Union Pac. R.R. v. Pratt & Tobin, P.C., No. CIV. A. 99-2030-KHV, 1999 WL 760417, at *2 (D. Kan. Sept. 21, 1999). The *Foslip* case is discussed *supra* at notes 81–82 and accompanying text.

432 *See, e.g.*, Re-Con Bldg. Prods., Inc. v. Guardian Ins. Co. of Can., No. C-00-0327-VRW, 2000 WL 432830, at *1 (N.D. Cal. Apr. 13, 2000); A.O. Smith Corp. v. Am. Alternative Ins. Corp., No. Civ. A. 99-3347, 2000 WL 28177, at *2 (E.D. La. Jan. 12, 2000); *cf.* Morris v. Brandeis Univ., No. CIV.A. 99-2642, 1999 WL 817723, at *1 (E.D. Pa. Oct. 8, 1999) (correctly stating one formulation of the rule).

433 *See Gadlin*, 222 F.3d at 799.

434 *See* Hall v. Babcock & Wilcox Co., No. Civ. 94-951, 1999 WL 956311, at *7 (W.D. Pa. July 16, 1999) (citing *Ruhrgas*, 526 U.S. at 587–88).

On the less positive side, some courts appear to be either misconstruing or misapplying the analysis. One circuit court, for example, described *Ruhrgas* as "holding that there is *no* hierarchy in the order of decision of issues of personal and subject matter jurisdiction."[435] *Ruhrgas*, however, stated that "there is no *unyielding* jurisdictional hierarchy" and that "[c]ustomarily, a federal court first resolves doubts about its jurisdiction over the subject matter."[436] Another circuit court went even further, proposing that "later cases [such as *Ruhrgas*] make clear what was implicit in *Steel Co.*: There is an array of non-merits questions that [federal courts] may decide in any order."[437]

In fact, *Steel Co.* and *Ruhrgas* are at best ambiguous about the number or types of non-merits questions that might qualify for resequencing, and they certainly do not hold that any non-merits question may be decided "in any order." Such overstatements would not be so troubling were it not for the fact that at least one lower court, apparently operating on this type of misinterpretation, simply invoked *Ruhrgas* and reached the issue of personal jurisdiction without even noting, let alone applying, the required analysis.[438] Similarly, as discussed earlier, the Fifth Circuit found no abuse of discretion in a district court's resequencing decision even though that court's analysis apparently included no assessment of relative difficulty and no consideration of either judicial restraint or judicial federalism.[439]

2. *Eleventh Amendment Immunity*

Resequencing may also apply to threshold issues of Eleventh Amendment immunity, which in general shields a state against private damages actions in federal court absent the state's consent or waiver

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435 United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 46 (1st Cir. 1999) (emphasis added); *see also* Agapov v. Negodaeva, 93 F. Supp. 2d 481, 483 (S.D.N.Y. 2000) (describing *Ruhrgas* as "holding that consideration of jurisdictional issues need not be 'sequenc[ed],' and that a federal court may therefore 'choose among threshold grounds for denying audience to a case'" (alteration in original) (quoting *Ruhrgas*, 526 U.S. at 584–85)).

436 *Ruhrgas*, 526 U.S. at 578 (emphasis added).

437 Galvan v. Fed. Prison Indus., Inc., 199 F.3d 461, 463 (D.C. Cir. 1999); *see also* United States v. Scarfo, 263 F.3d 80, 87–90 & n.4 (3d Cir. 2001) (addressing a variety of threshold inquiries—including the collateral order doctrine, timeliness of the appeal, a dispute over "the contents of the record," and constitutional mootness—and commenting that, "[t]here being no 'unyielding jurisdictional hierarchy,' we approach these preliminary and jurisdictional inquiries in no particular order" (citation omitted) (quoting *Ruhrgas*, 526 U.S. at 577)).

438 *See* Lehigh Coal & Navigation Co. v. Geko-Mayo, GmbH, 56 F. Supp. 2d 559, 562 (E.D. Pa. 1999); *cf.* Doney v. CMI Corp., No. 99-1124-CV-W-6-ECF, 2000 WL 554125, at *2 (W.D. Mo. May 4, 2000) (seemingly permitting the consideration of service of process issues prior to subject-matter jurisdiction, without attendant consideration of relative difficulty or institutional interests, so long as subject-matter jurisdiction is not superficially absent).

439 *See supra* notes 85–90 and accompanying text.

or absent a valid abrogation of the immunity by Congress.[440] The key question, of course, is whether such issues can satisfy the elements of essentiality and constitutionality (and hence the criterion of equivalence), a question that is somewhat complicated by the fact that currently there are at least two competing judicial views of the nature and function of state sovereign immunity.[441] These views, which as rendered here are essentially composite sketches, can be labeled the *jurisdictional conception* and the *quasi-jurisdictional conception.*[442]

Under the jurisdictional conception, Eleventh Amendment immunity is seen as a bona fide subject-matter jurisdictional doctrine.[443] Accordingly, even though it is subject to waiver,[444] like subject-matter jurisdiction it "can be raised at any stage of the proceedings";[445] may

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440 *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit 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."); CHEMERINSKY, *supra* note 388, §§ 7.4–7.7, at 402–46 (summarizing current doctrine).

441 "The Supreme Court . . . has explicitly recognized that it has not yet decided whether Eleventh Amendment immunity is a matter of subject matter jurisdiction." United States *ex rel.* Foulds v. Tex. Tech Univ., 171 F.3d 279, 285 n.9 (5th Cir. 1999), *cert. denied*, 530 U.S. 1202 (2000); *see also* New Jersey v. Chen (*In re* Chen), 227 B.R. 614, 621 (Bankr. D.N.J. 1998) ("The Supreme Court has not addressed, and the lower federal courts cannot agree, whether sovereign immunity is a question of subject matter jurisdiction."). There also is a division within the Supreme Court over the categorical reach of the immunity. *See* CHEMERINSKY, *supra* note 388, § 7.3, at 396. Chemerinsky states:

> One theory—supported by a majority comprised of Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy, and Thomas—sees the Eleventh Amendment as a restriction on the subject matter jurisdiction of the federal courts that bars all suits against state governments. The competing theory—supported by Justices Stevens, Souter, Ginsburg, and Breyer—views the Eleventh Amendment as restricting the federal courts' subject matter jurisdiction only in precluding cases brought against states that are founded sole[l]y on diversity jurisdiction.

Id. In short, "[t]he body of jurisprudence which has developed analyzing the sovereign immunity conferred upon the States by the Eleventh Amendment is a shifting morass of confusion." *Chen*, 227 B.R. at 621.

442 The composites reflect doctrines drawn from several cases, and cases from several courts, and are not the comprehensive or internally consistent conceptions employed by any particular court. That said, there clearly are judicial tendencies towards one composite or the other.

443 *See, e.g.*, *Foulds*, 171 F.3d at 285 & n.9; Smith v. Wis. Dep't of Agric., Trade & Consumer Prot., 23 F.3d 1134, 1139–40 (7th Cir. 1994); *see also* Calderon v. Ashmus, 523 U.S. 740, 745 n.2 (1998) (describing the Eleventh Amendment as "jurisdictional in the sense that it is a limitation on the federal court's judicial power"); Sims v. Univ. of Cincinnati, 219 F.3d 559, 561 (6th Cir. 2000).

444 *See, e.g.*, Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 267 (1997); Litman v. George Mason Univ., 186 F.3d 544, 550 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000); Parella v. Ret. Bd. of the R.I. Employees' Ret. Sys., 173 F.3d 46, 55 (1st Cir. 1999); *Smith*, 23 F.3d at 1140.

445 *Calderon*, 523 U.S. at 745 n.2; *accord* Patsy v. Bd. of Regents, 457 U.S. 496, 515 n.19 (1982); Fromm v. Comm'n of Veterans Affairs, 220 F.3d 887, 890 (8th Cir. 2000); Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 683 n.12 (4th Cir. 2000); J.B. *ex rel.* Hart v. Valdez,

be addressed by a court sua sponte[446] (and perhaps must be addressed sua sponte);[447] may need to be addressed before proceeding to the merits;[448] and, if successfully interposed, should result in a dismissal under Rule 12(b)(1) rather than Rule 12(b)(6).[449] Under the quasi-jurisdictional conception, by contrast, Eleventh Amendment immunity "does not implicate a federal court's subject matter jurisdiction in any ordinary sense"[450] and "is not a true limitation upon the court's subject matter jurisdiction, but rather a personal privilege"[451] or a "common law immunity."[452] Accordingly, it must be demonstrated by the party opposing jurisdiction, rather than the party asserting jurisdiction;[453] can be waived if not timely asserted;[454] need not be addressed by a court sua sponte[455] (and perhaps should not be addressed sua sponte); can be congressionally abrogated;[456] can, if

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186 F.3d 1280, 1285 (10th Cir. 1999); *Parella*, 173 F.3d at 54; Seaborn v. Fla. Dep't of Corr., 143 F.3d 1405, 1407 (11th Cir. 1998).

446 *See, e.g.*, Long v. Area Manager, Bureau of Reclamation, 236 F.3d 910, 916 (8th Cir. 2001); Reese v. Michigan, No. 99-1173, 2000 WL 1647923, at *2 (6th Cir. Oct. 24, 2000) (per curiam); Higgins v. Mississippi, 217 F.3d 951, 954 (7th Cir. 2000); *Parella*, 173 F.3d at 54; Sullivan v. Barnett, 139 F.3d 158, 179 (3d Cir. 1998), *rev'd on other grounds sub nom.* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999); V-1 Oil Co. v. Utah State Dep't of Pub. Safety, 131 F.3d 1415, 1419–20 (10th Cir. 1997); Atl. Healthcare Benefits Trust v. Googins, 2 F.3d 1, 4 (2d Cir. 1993); Whiting v. Jackson State Univ., 616 F.2d 116, 127 n.8 (5th Cir. 1980).

447 *See, e.g.*, Suarez Corp. Indus. v. McGraw, 125 F.3d 222, 227 (4th Cir. 1997); Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc., 810 F.2d 869, 873 n.2 (9th Cir. 1987); Morris v. Wash. Metro. Area Transit Auth., 702 F.2d 1037, 1040–41 (D.C. Cir. 1983); *see* Michelle Lawner, Comment, *Why Federal Courts Should Be Required to Consider State Sovereign Immunity Sua Sponte*, 66 U. CHI. L. REV. 1261, 1282–88 (1999).

448 *See infra* notes 526, 528, 530 and accompanying text.

449 *See, e.g.*, Warnock v. Pecos County, 88 F.3d 341, 343 (5th Cir. 1996); Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 693 n.2 (3d Cir. 1996); Union Pac. R.R. v. Burton, 949 F. Supp. 1546, 1550–52 (D. Wyo. 1996); Radeschi v. Pennsylvania, 846 F. Supp. 416, 418 (W.D. Pa. 1993). In turn, the dismissal should be without prejudice. *See* Freeman v. Oakland Unified Sch. Dist., 179 F.3d 846, 847 (9th Cir. 1999).

450 ITSI TV Prods., Inc. v. Agric. Ass'ns, 3 F.3d 1289, 1291 (9th Cir. 1993); *see also* Litman v. George Mason Univ., 186 F.3d 544, 550 (4th Cir. 1999) ("[S]overeign immunity is an element of state sovereignty, not a categorical limitation on the federal judicial power."), *cert. denied*, 528 U.S. 1181 (2000); Mitchell v. Comm'n on Adult Entm't Establishments, 12 F.3d 406, 409 (3d Cir. 1993) (stating that "[t]he eleventh amendment is quasi-jurisdictional").

451 Hill v. Blind Indus. & Servs., 179 F.3d 754, 760 (9th Cir. 1999), *amended on denial of reh'g by* 201 F.3d 1186 (9th Cir. 2000).

452 Smith v. Wis. Dep't of Agric., Trade & Consumer Prot., 23 F.3d 1134, 1139 (7th Cir. 1994); *accord* Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 389 (1998); Parella v. Ret. Bd. of R.I. Employees' Ret. Sys., 173 F.3d 46, 55 (1st Cir. 1999).

453 *See, e.g.*, Carter v. City of Philadelphia, 181 F.3d 339, 347 (3d Cir.), *cert. denied*, 528 U.S. 1005 (1999); *ITSI TV Prods.*, 3 F.3d at 1291.

454 *See, e.g.*, *Hill*, 179 F.3d at 756–58, 760–63.

455 *See, e.g.*, *Schacht*, 524 U.S. at 389; Floyd v. Thompson, 227 F.3d 1029, 1035 (7th Cir. 2000); United States *ex rel.* Long v. SCS Bus. & Technical Inst., Inc., 173 F.3d 890, 893 (D.C. Cir. 1999), *cert. denied*, 530 U.S. 1202 (2000); *Parella*, 173 F.3d at 55.

456 *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999).

found to be lacking, give rise to an immediate appeal under the collateral order doctrine;[457] can potentially be bypassed en route to the merits[458] (let alone in favor of other substantive defenses);[459] and, if successfully interposed, should result in a dismissal under Rule 12(b)(6) rather than Rule 12(b)(1).[460]

Whether or not Eleventh Amendment immunity can be resequenced with subject-matter jurisdiction may depend, therefore, on which conception is embraced. The jurisdictional conception, of course, presents the stronger case. To the extent that courts already have the power to address non–Article III subject-matter jurisdictional questions before Article III jurisdictional questions,[461] let alone before other non–Article III subject-matter jurisdictional questions,[462] then there is arguably no need to subject Eleventh Amendment immunity to the equivalence analysis at all.[463] To the extent that one does undertake this analysis, moreover, the elements of essentiality and constitutionality appear to be satisfied. Insofar as Eleventh Amendment immunity is a restriction on a court's subject-matter jurisdiction, a valid waiver or abrogation of it is arguably an essential element of, and certainly a prerequisite to, the court's adjudicatory power.[464] Likewise, while the Eleventh Amendment is "not co-extensive with the lim-

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457 *See, e.g.*, P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144–47 (1993); Summit Med. Assocs., P.C. v. Pryor, 180 F.3d 1326, 1334 (11th Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000); *Smith*, 23 F.3d at 1140.

458 *See infra* notes 527, 529–30 and accompanying text.

459 *See, e.g.*, Brindley v. Best, 192 F.3d 525, 531 (6th Cir. 1999); Benning v. Bd. of Regents of Regency Univs., 928 F.2d 775, 777–78 & n.2 (7th Cir. 1991).

460 *See, e.g.*, Scott v. O'Grady, 975 F.2d 366, 369–72 (7th Cir. 1992); *see also* Andrews v. Daw, 201 F.3d 521, 524 n.2 (4th Cir. 2000) (professing that case law is unclear as to whether 12(b)(1) or 12(b)(6) is the proper ground for dismissal).

461 *Compare* Ortiz v. Fibreboard Corp., 527 U.S. 815, 831 (1999) (noting that "statutory standing . . . may properly be treated before Article III standing"), *and* Norfolk S. Ry. Co. v. Guthrie, 233 F.3d 532, 534 (7th Cir. 2000) (same), *and* Grand Council of the Crees v. FERC, 198 F.3d 950, 954 (D.C. Cir. 2000) (same), *with* Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 225 (3d Cir. 1998) (interpreting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91–93 (1998), as holding that a "question of Art. III standing is [a] threshold issue that should be addressed before issues of prudential and statutory standing").

462 *See, e.g.*, Republic of Paraguay v. Allen, 134 F.3d 622, 626 n.4 (4th Cir. 1998).

463 *Compare* Pederson v. La. State Univ., 213 F.3d 858, 866 (5th Cir. 2000) (addressing "the jurisdictional issues of standing, mootness, state sovereign immunity, and class certification . . . in no particular order"), *and* Snoeck v. Brussa, 153 F.3d 984, 988 (9th Cir. 1998) (effectively resequencing Eleventh Amendment immunity before standing), *with* Cox v. City of Dallas, Tex., 256 F.3d 281, 303–04 (5th Cir. 2001) (holding categorically that "standing must be examined before the Eleventh Amendment").

464 Under this conception, the Eleventh Amendment is a "withdrawal of jurisdiction [that] effectively confers an immunity from suit." P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993). In turn, its waiver or abrogation can be seen as a reinstatement of this jurisdiction.

itations on judicial power in Article III,"[465] it is clearly a constitutional doctrine in every other respect[466] and, for purposes of issue sequencing, is treated as such by the courts.[467]

As for the quasi-jurisdictional conception, the two-element analysis is basically the same, although the prima facie case for essentiality may appear weaker. After all, Eleventh Amendment immunity, especially under this latter conception, "is in many ways unlike a jurisdictional bar."[468] As noted, the burden of its demonstration falls on the defendant, it can be waived or abandoned, it need not be raised sua sponte, it can be congressionally abrogated, it can (according to some courts) be bypassed en route to the merits, and its denial can be immediately appealed.[469] However, while there may be significance to the sum of these characteristics, it cannot be said that any of them alone is legally or logically sufficient to render an inquiry nonresequencible. That the defendant should carry the burden of demonstration, for example, also characterizes mootness, a core Article III subject-matter jurisdiction doctrine,[470] and in any event does not obviously render an inquiry "nonessential." Waivability and abandonability are common to personal jurisdiction,[471] the very inquiry held resequencible in *Ruhrgas*, and may also describe the prudential counterparts to the case-or-controversy requirements.[472] Similarly, the principle that it need not or should not be raised by a court sua sponte is found as well, if not more strongly, in the jurisprudence of personal jurisdiction, and is simply a logical corollary to the doctrine of voluntary waiver.[473] Congressional abrogability also characterizes the prudential and statutory requirements of subject-matter

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465 Calderon v. Ashmus, 523 U.S. 740, 745 n.2 (1998). *But cf.* Parella v. Ret. Bd. of the R.I. Employees' Ret. Sys., 173 F.3d 46, 54 (1st Cir. 1999) (noting that "Eleventh Amendment issues are clearly linked to the question of Article III jurisdiction"); United States *ex rel.* Foulds v. Tex. Tech Univ., 171 F.3d 279, 285 n.9 (5th Cir. 1999) (same), *cert. denied*, 530 U.S. 1202–03 (2000).

466 *See* Alden v. Maine, 527 U.S. 706, 713 (1999).

467 *See, e.g.*, Kennedy v. Nat'l Juvenile Det. Ass'n, 187 F.3d 690, 696 (7th Cir. 1999), *cert. denied*, 528 U.S. 1159 (2000); *Parella*, 173 F.3d at 56.

468 Smith v. Wis. Dep't of Agric., Trade & Consumer Prot., 23 F.3d 1134, 1140 (7th Cir. 1994); *accord* United States *ex rel.* Long v. SCS Bus. & Technical Inst., Inc., 173 F.3d 890, 892 (D.C. Cir. 1999), *cert. denied*, 530 U.S. 1202 (2000); *Parella*, 173 F.3d at 54–55.

469 *See supra* notes 453–60 and accompanying text.

470 *See, e.g.*, Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 98 (1993); Motor & Equip. Mfrs. Ass'n v. Nichols, 142 F.3d 449, 459 (D.C. Cir. 1998).

471 *See* Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring).

472 *See, e.g.*, Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co., 219 F.3d 895, 899 (9th Cir. 2000); Bd. of Educ. v. Kelly E., 207 F.3d 931, 934 (7th Cir.), *cert. denied*, 531 U.S. 824 (2000).

473 *See, e.g.*, Dillon v. Frank, No. 90-2290, 1992 WL 5436, at *3 (6th Cir. Jan. 15, 1992); Pilgrim Badge & Label Corp. v. Barrios, 857 F.2d 1, 3–4 (1st Cir. 1988) (per curiam); Anger v. Revco Drug Co., 791 F.2d 956, 958 (D.C. Cir. 1986) (per curiam).

jurisdiction,[474] and, like the placement of the evidentiary burden, bears no obvious relation to the issue of essentiality.

As for the final two characteristics—bypassability en route to the merits, and immediate appealability under the collateral order doctrine—the challenge to essentiality is possibly stronger. As is discussed in subpart B, some cases have held that a court, consistent with *Steel Co.*, can bypass an assertion of Eleventh Amendment immunity and dispose of a suit on the merits, something it clearly could not do with regard to Article III jurisdiction. The relevance of this is that bypassability and resequencibility may be inversely correlated, such that bypassability indicates nonessentiality, which in turn indicates nonequivalence, which in turn indicates nonresequencibility.[475] However, there is currently a split over whether such bypassability is truly consistent with *Steel Co.*[476] Because this split might be resolved against bypassability, further analysis at this point, which would effectively entail assuming the correctness of bypassability, is arguably neither appropriate nor necessary.

Immediate appealability, by contrast, merits closer examination. As the Seventh Circuit has noted, interlocutory orders denying a motion to dismiss for lack of subject-matter or personal jurisdiction are not immediately appealable under the collateral order doctrine, while interlocutory orders denying a motion to dismiss for Eleventh Amendment immunity are.[477] From this doctrinal difference, one could infer, as does the Seventh Circuit, that Eleventh Amendment immunity ought not to be treated like subject-matter or personal jurisdiction, which if transposed to the *Ruhrgas* context could indicate that Eleventh Amendment immunity ought not to be resequencible with these jurisdictional inquiries.

Although this is an interesting line of reasoning, it arguably reads too much into the collateral order doctrine and the law of immediate appealability. The collateral order doctrine is designed to permit immediate appeals from a select class of orders that, being interlocutory, would otherwise not qualify as "final decisions" under the principal appellate jurisdictional statute.[478] To qualify as immediately appealable, an order "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the

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474 *See, e.g.*, Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 227 (3d Cir. 1998).

475 *See infra* note 521 and accompanying text.

476 *See infra* notes 528-30 and accompanying text.

477 *See* Smith v. Wis. Dep't of Agric., Trade & Consumer Prot., 23 F.3d 1134, 1140 (7th Cir. 1994); *accord* Summit Med. Assocs., P.C. v. Pryor, 180 F.3d 1326, 1334 (11th Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000).

478 28 U.S.C. § 1291 (1994).

action, and be effectively unreviewable on appeal from a final judgment."[479]

To employ immediate appealability as a gauge of equivalence or resequencibility, however, one must assume that these requirements are designed or able to function outside of the collateral order context, and specifically that they are designed or able to serve double duty in the alternative context of resequencing. But there is no basis for this assumption. A more defensible approach is simply to conclude that interlocutory rulings on Eleventh Amendment immunity are immediately appealable because they satisfy the collateral order requirements,[480] and involve uniquely important federalism interests,[481] while interlocutory rulings on core jurisdictional doctrines such as standing are not immediately appealable because they do not.[482] In other words, that Eleventh Amendment immunity is immediately appealable, while subject-matter and personal jurisdiction are not, is not a statement about its nonequivalence to subject-matter or personal jurisdiction for resequencing purposes, any more than the lack of immediate appealability of all sorts of other orders is a statement about their *equivalence* to subject-matter or personal jurisdiction for resequencing purposes (which it clearly is not).[483]

3. *Federal Sovereign Immunity*

Analytically, the resequencibility of federal sovereign immunity appears to be similar to that of Eleventh Amendment immunity, including a debate over whether or to what degree they are true jurisdictional doctrines. The predominant view is that federal sovereign immunity poses a genuine restriction on subject-matter jurisdiction,[484] pursuant to which jurisdiction is effectively withheld or withdrawn and

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479 Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

480 *See* P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993).

481 *See id.* at 146.

482 *See, e.g.*, Van Cauwenberghe v. Biard, 486 U.S. 517, 527 (1988) (right not to be subject to a binding judgment); *Summit Med. Assocs.*, 180 F.3d at 1334 (justiciability); Children's Healthcare Is a Legal Duty, Inc. v. Deiers, 92 F.3d 1412, 1417–18 (6th Cir. 1996) (Batchelder, J., concurring) (standing).

483 Indeed, many orders having little or no bearing on jurisdiction have been denied immediate appealability. *See, e.g.*, Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 884 (1994) (a "refusal to enforce a settlement agreement claimed to shelter a party from suit altogether"); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375–79 (1981) (an order refusing to disqualify counsel); *Coopers & Lybrand*, 437 U.S. at 468–70 (an order denying class certification); Pub. Serv. Co. of N.H. v. Patch, 136 F.3d 197, 210 (1st Cir. 1998) (a "district court's refusal to abstain under doctrines like *Pullman* or *Burford*"); Holt v. Ford, 862 F.2d 850, 853–54 (11th Cir. 1989) (en banc) (an order denying a motion for appointed counsel); Howard v. Parisian, Inc., 807 F.2d 1560, 1566 (11th Cir. 1987) (an order denying a civil jury trial).

484 *See, e.g.*, Medina v. United States, 259 F.3d 220, 223 (4th Cir. 2001); Harmon Indus., Inc. v. Browner, 191 F.3d 894, 903 (8th Cir. 1999); Blue v. Widnall, 162 F.3d 541, 544 (9th Cir. 1998); 14 WRIGHT ET AL., *supra* note 119, § 3654 (3d ed. 1998 & Supp. 2001).

may be instituted or reinstituted only by the immunity's consensual and unequivocal waiver.[485] Accordingly, federal sovereign immunity can be invoked at any time,[486] should be raised sua sponte by a court,[487] is presumed to exist and must be overcome by the party asserting jurisdiction,[488] and, if not overcome, will lead to a dismissal under Rule 12(b)(1).[489] The competing view, by contrast, is that federal sovereign immunity is "'a less than pure jurisdictional question'"[490] or a "non-merits decision[ ]"[491] possessing a "'quasi-jurisdictional or "hybrid" status,'"[492] which essentially is treated like an affirmative defense.[493]

To the extent that federal sovereign immunity is truly a subject-matter jurisdictional inquiry, and further that subject-matter jurisdictional inquiries are inherently resequencible, then its resequencibility ought to be available even apart from the strictures of *Ruhrgas*.[494] However, to the extent that this immunity is not truly a doctrine of subject-matter jurisdiction—either because it is only quasi-jurisdictional or because its waiver "is a prerequisite to . . . but . . . nonetheless 'wholly distinct[ ]'"[495] from subject-matter jurisdiction—then resequencibility must be determined by the equivalence analysis.

As with Eleventh Amendment immunity, federal sovereign immunity appears to have little difficulty satisfying the elements of essentiality and constitutionality. First, even when courts have analytically severed the federal sovereign immunity question from the question of subject-matter jurisdiction, they have nevertheless made clear that a

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485 *See, e.g.*, FDIC v. Meyer, 510 U.S. 471, 475 (1994); United States v. Mottaz, 476 U.S. 834, 841 (1986); United States v. Mitchell, 463 U.S. 206, 212 (1983).

486 *See, e.g.*, *Harmon Indus.*, 191 F.3d at 903; Bank One, Tex., N.A. v. Taylor, 970 F.2d 16, 34 (5th Cir. 1992); United States v. Johnson, 853 F.2d 619, 622 n.7 (8th Cir. 1988); 14 WRIGHT ET AL., *supra* note 119, § 3654 (3d ed. 1998 & Supp. 2001).

487 *See, e.g.*, Hogan v. United States, No. Civ.A. 99-868, 1999 WL 1138529, at *2 (E.D. La. Dec. 7, 1999).

488 *See, e.g.*, *Blue*, 162 F.3d at 544; Warminster Township Mun. Auth. v. United States, 903 F. Supp. 847, 849 (E.D. Pa. 1995).

489 *See, e.g.*, Brown v. United States, 151 F.3d 800, 803–04 (8th Cir. 1998) (discussing FED. R. CIV. P. 12(b)(1)); P.R. Pub. Hous. Admin. v. HUD, 59 F. Supp. 2d 310, 320 (D.P.R. 1999).

490 *In re* Sealed Case No. 99-3091, 192 F.3d 995, 1000 (D.C. Cir. 1999) (per curiam) (quoting United States *ex rel.* Long v. SCS Bus. & Technical Inst., Inc., 173 F.3d 890, 894 (D.C. Cir. 1999)).

491 Galvan v. Fed. Prison Indus., Inc., 199 F.3d 461, 463 (D.C. Cir. 1999).

492 *Sealed Case*, 192 F.3d at 1000 (quoting *Long*, 173 F.3d at 893).

493 *See* Burlington Motor Carriers, Inc. v. Ind. Dep't of Revenue (*In re* Burlington Motor Holdings, Inc.), 242 B.R. 156, 160–61 (Bankr. D. Del. 1999).

494 *Cf., e.g.*, Can v. United States, 14 F.3d 160, 162 & n.1 (2d Cir. 1994) (bypassing federal sovereign immunity and holding that the suit was barred by the political question doctrine).

495 Presidential Gardens Assocs. v. United States *ex rel.* Sec'y of HUD, 175 F.3d 132, 139 (2d Cir. 1999) (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 786–87 n.4 (1991)).

demonstrated waiver of federal sovereign immunity is essential to the exercise of that jurisdiction,[496] without which "there may be no consideration of the subject matter."[497] Indeed, the Supreme Court has described the importance of waiver in terms that capture the very idea of essentiality: "Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void."[498] Regarding constitutionality, there is greater latitude for debate,[499] but most courts and commentators hold that its basis is ultimately constitutional,[500] a position that is arguably reinforced by the Court's recent recognition of state sovereign immunity as a constitutional doctrine entirely apart from its expression through the Eleventh Amendment.[501]

4. *Additional Threshold Inquiries*

Eleventh Amendment and federal sovereign immunity are not the only potential candidates for jurisdictional resequencing, although they are two of the most likely. There are, after all, several other threshold inquiries that either are sufficiently related to subject-matter jurisdiction that they may be resequenced on that basis alone or are sufficiently essential and constitutional components of a court's adjudicatory power that they satisfy *Ruhrgas*'s equivalence standard. To the extent that subject-matter jurisdictional inquiries are categorically resequencible, this would presumably include the political question doctrine;[502] the prudential doctrines of standing, ripeness, and

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496 *See, e.g., id.*; J.C. Driskill, Inc. v. Abdnor, 901 F.2d 383, 385 n.4 (4th Cir. 1990).

497 *J.C. Driskill*, 901 F.2d at 385 n.4.

498 United States v. United States Fid. & Guar. Co., 309 U.S. 506, 514 (1940).

499 *See In re* Sealed Case No. 99-3091, 192 F.3d 995, 1000 n.7 (D.C. Cir. 1999) (per curiam).

500 *Compare* Pullman Constr. Indus., Inc. v. United States, 23 F.3d 1166, 1168 (7th Cir. 1994) (referencing U.S. CONST. art. I, § 9, cl. 7), *and* Bartlett *ex rel.* Neuman v. Bowen, 824 F.2d 1240, 1248 (D.C. Cir. 1987) (en banc) (per curiam) (referencing U.S. CONST. art. III, § 2), *and* Jaffee v. United States, 663 F.2d 1226, 1251 (3d Cir. 1981) (en banc) (Gibbons, J., dissenting) (referencing U.S. CONST. art. I, § 9, cl. 7), *and* Daniel E. O'Toole, *Regulation of Navy Ship Discharges Under the Clean Water Act: Have Too Many Chefs Spoiled the Broth?*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 1, 25 & n.136 (1994) (referencing U.S. CONST. art. VI, cl. 2), *with* Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to Be the "Seabird," 19 F.3d 1136, 1142 (7th Cir. 1994) (describing federal sovereign immunity as a common law doctrine), *and* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 343 (1995) (describing it as "purely a creature of common law, with no statutory or constitutional basis"). *See also* Alaska v. United States, 64 F.3d 1352, 1354 n.3 (9th Cir. 1995) (stating that federal sovereign immunity "derives from public law, but it is not explicit in either the Constitution or statutes").

501 *See* Alden v. Maine, 527 U.S. 706, 712–30 (1999).

502 *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1, 5 (1973); Can v. United States, 14 F.3d 160, 162 n.1 (2d Cir. 1994); O'Hair v. White, 675 F.2d 680, 684 n.5 (5th Cir. 1982); Kurtz v. Baker, 644 F. Supp. 613, 620 (D.D.C. 1986).

mootness;[503] and the *Rooker-Feldman* doctrine.[504] Sufficiently related threshold inquiries may also include certain statutory limits such as administrative exhaustion[505] or preclusion of judicial review,[506] and even certain appellate procedural requirements such as timeliness[507] or the proper designation of issues or parties.[508] Likewise, and espe-

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503 *Compare* Grand Council of the Crees v. FERC, 198 F.3d 950, 954 (D.C. Cir. 2000) (interpreting *Ruhrgas* as holding that "it is entirely proper to consider whether there is prudential standing while leaving the question of constitutional standing in doubt, as there is no mandated 'sequencing of jurisdictional issues'" (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999))), *with* Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 225 (3d Cir. 1998) (interpreting *Steel Co.* as holding that a "question of Art. III standing is [a] threshold issue that should be addressed before issues of prudential and statutory standing").

504 *See, e.g.*, Young v. Ill. State Bd. of Elections, No. 00-3713, 2000 WL 1611115, at *1 (7th Cir. Oct. 25, 2000) (per curiam). *Compare* Nationscredit Home Equity Servs. Corp. v. City of Chicago, 135 F. Supp. 2d 905, 908–09 (N.D. Ill. 2001) (applying *Steel Co.* to the *Rooker-Feldman* doctrine), *and* Newell v. Rolling Hills Apartments, 134 F. Supp. 2d 1026, 1031–33 (N.D. Iowa 2001) (same), *and* Nollet v. Justices of the Trial Court of Mass., 83 F. Supp. 2d 204, 208 (D. Mass. 2000) (same), *aff'd*, No. 00-1242, 2000 WL 1803320 (1st Cir. Dec. 7, 2000) (per curiam), *with* Lefebvre v. Barnsley, No. 97-297-B, 1999 WL 813923, at *5 (D.N.H. Sept. 22, 1999) (bypassing a jurisdictional challenge under *Rooker-Feldman* because it is merely a statutory limitation, not subject to *Steel Co.*).

505 *See, e.g.*, Gass v. United States Dep't of Treasury, Nos. 99-1179, 98-B-75, 2000 WL 743671, at *2 n.1 (10th Cir. June 9, 2000) (holding that the administrative exhaustion requirement of 26 U.S.C. § 7433(b) is jurisdictional and, as such, under *Steel Co.* must be decided before the merits but under *Ruhrgas* could be resequenced with any other jurisdictional issue); *see also supra* note 402 (listing cases describing exhaustion requirements as jurisdictional). *But cf.* Boos v. Runyon, 201 F.3d 178, 181–83 (2d Cir. 2000) (holding that the exhaustion requirement under the Rehabilitation Act's implementing regulations is not jurisdictional and can be bypassed, and so doing "*nostra sponte*, in the interest of judicial economy"); Perez v. Wis. Dep't of Corr., 182 F.3d 532, 534–35 (7th Cir. 1999) (holding that a court cannot hear a suit, let alone decide the merits, where the exhaustion-of-administrative-remedies requirement of 42 U.S.C. § 1997e(a) has not been satisfied, but stating that while § 1997e(a) "affects the subject-matter jurisdiction of the federal courts" its nonsatisfaction "does not deprive a court of jurisdiction").

506 *See, e.g.*, Oil, Chem. & Atomic Workers Int'l Union v. Richardson, 214 F.3d 1379, 1381 (D.C. Cir. 2000) (holding that a claim under § 3161 of the National Defense Authorization Act for Fiscal Year 1993, 42 U.S.C. § 7274h, "is barred by [5 U.S.C.] § 701(a)(2) of the Administrative Procedure Act"; that this "preclusion is jurisdictional"; and that consequently, under *Ruhrgas*, the court "may affirm dismissal of the claim without reaching the other jurisdictional defenses—such as [the defendant's] mootness contention"); *see also* Block v. Cmty. Nutrition Inst., 467 U.S. 340, 353 n.4 (1984) ("Since congressional preclusion of judicial review is in effect jurisdictional, we need not address the standing issues . . . .").

507 *See, e.g.*, Budinich v. Becton Dickinson & Co., 486 U.S. 196, 203 (1988) (stating that "the taking of an appeal within the prescribed time is mandatory and jurisdictional"); Arnold v. Wood, 238 F.3d 992, 994–95 (8th Cir. 2001) (applying *Steel Co.* to the timeliness requirement of FED. R. APP. P. 4(a)(1)(A) because it "is jurisdictional in character"); United States v. Phillips, 225 F.3d 1198, 1199–1200 (11th Cir. 2000) (same); Oliver v. Oklahoma, No. 99-6141, 2000 WL 531661, at *2 (10th Cir. May 3, 2000) (same); United States v. Rapoport, 159 F.3d 1, 2–3 (1st Cir. 1998) (same). *But cf.* Carlisle v. United States, 517 U.S. 416, 434 (1996) (Ginsburg, J., concurring) ("It is anomalous to classify time prescriptions . . . under the heading 'subject matter jurisdiction.'").

508 *See, e.g.*, United States v. Universal Mgmt. Servs., Inc., 191 F.3d 750, 756–57 (6th Cir. 1999) (holding that FED. R. APP. P. 3(c)(1)(B), which "requires the designation of the

cially in light of the foregoing analyses of Eleventh Amendment and federal sovereign immunity, there may also be an argument for the resequencibility of tribal sovereign immunity[509] and perhaps even absolute immunity.[510] Finally, there are the issues that the Court itself has indicated are resequencible. In *Ruhrgas*, for example, it cited the discretionary dismissal of a potential supplemental claim[511] as well as the dismissal of a claim under *Younger* abstention,[512] even though the latter seems neither to pose a subject-matter jurisdictional question

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judgment or order from which an appeal is taken[,] . . . is jurisdictional and may not be 'waived' by this court" and, under *Steel Co.*, must be "consider[ed] . . . first"), *cert. denied*, 530 U.S. 1274 (2000); Persyn v. United States, 935 F.2d 69, 71 (5th Cir. 1991) (holding that compliance with FED. R. APP. P. 3 is a jurisdictional matter which the court "ha[s] an independent duty to determine" and that, under *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988), a court "lack[s] appellate jurisdiction over parties other than those properly identified in the notice of appeal"). However, the Supreme Court recently held that the failure to sign a notice of appeal, required by FED. R. CIV. P. 11(a) as incorporated through FED. R. APP. P. 3–4, is not jurisdictional and does not divest the appellate court of jurisdiction. *See* Becker v. Montgomery, 121 S. Ct. 1801, 1806–08 (2001).

509 *Compare* Florida v. Seminole Tribe, 181 F.3d 1237, 1240 n.4 (11th Cir. 1999) (noting "the fundamentally jurisdictional nature of a claim of sovereign immunity" and holding that, "[b]ecause of its jurisdictional nature, we must consider the Tribe's claim of sovereign immunity before reaching the issue of failure to state a claim"), *and* Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d 1040, 1043 (8th Cir. 2000) (treating tribal sovereign immunity as jurisdictional), *with* Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 28 (1st Cir. 2000) ("[A]lthough tribal sovereign immunity is jurisdictional in nature, consideration of that issue always must await resolution of the antecedent issue of federal subject-matter jurisdiction."), *and* Kreig v. Prairie Island Dakota Sioux (*In re* Prairie Island Dakota Sioux), 21 F.3d 302, 304–05 (8th Cir. 1994) (per curiam) (observing that, while "sovereign immunity is jurisdictional in nature" it "is not of the same character as subject matter jurisdiction" and holding that "the district court did not abuse its discretion in first determining it lacked federal question jurisdiction and then remanding this action").

510 *Compare* Nollet v. Justices of the Trial Courts, 83 F. Supp. 2d 204, 208–10 (D. Mass. 2000) (treating an assertion of statutory judicial immunity under 42 U.S.C. § 1983 as a subject-matter jurisdictional challenge that, under *Steel Co.*, must be addressed "[b]efore deciding any other issue," and ultimately dismissing on the basis of this challenge for lack of jurisdiction), *aff'd*, No. 00-1242, 2000 WL 1803320 (1st Cir. Dec. 7, 2000) (per curiam), *with* Jordan v. Brazil, No. 00-3024, 2000 WL 1479835, at *1–*2 (10th Cir. Oct. 6, 2000) (holding pursuant to *Steel Co.* that a lack of subject-matter jurisdiction under the *Rooker-Feldman* doctrine precluded consideration of absolute immunity), *cert. denied*, 121 S. Ct. 1971 (2001).

511 *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999); *cf.* Gold v. Local 7 United Food & Commercial Workers Union, 159 F.3d 1307, 1309–11 (10th Cir. 1998) (holding that under *Steel Co.* a court must verify its supplemental jurisdiction before assessing the merits of supplemental state law claims).

512 *See Ruhrgas*, 526 U.S. at 585; *accord* Zaharia v. Cross, No. 99-1515, 2000 WL 702405, at *1 n.1 (10th Cir. May 26, 2000); A.G. Edwards & Sons, Inc. v. Pub. Bldg. Comm'n, Ill., 921 F.2d 118, 120 n.2 (7th Cir. 1990); *cf. Nollet*, 83 F. Supp. 2d at 208–09 (treating an assertion of the *Younger* abstention doctrine as a subject-matter jurisdictional challenge that must be addressed before any other issue). *But see supra* notes 141–46 and accompanying text (explaining that *Ruhrgas* misreads the *Ellis* case in support of the resequencibility of *Younger* abstention).

nor to satisfy the element of essentiality.[513] Finally, in *Ortiz v. Fibreboard Corp.*,[514] decided the same term as *Ruhrgas*, the Court explicitly countenanced the resequencing of Rule 23 class certification issues before Article III standing.[515]

B. The Convergence of Resequencing and the Prohibition on Hypothetical Jurisdiction

As noted in Part I, *Ruhrgas* does not stand in isolation, but is the second of two decisions (the first being *Steel Co.*) concerning the analytical placement of jurisdictional inquiries. Accordingly, not only must the *Ruhrgas* analysis be resolved on its own terms, it must also be interpreted in combination with the doctrinal framework etched out in *Steel Co.*, a task that is hampered by the fact that *Steel Co.*, like *Ruhrgas*, also articulated a doctrine of uncertain scope. The central question posed by the combination of these cases is whether there is a relationship between, on the one hand, a determination under *Ruhrgas* that a given inquiry is resequencible with subject-matter jurisdiction and, on the other hand, the holding of *Steel Co.* that subject-matter jurisdiction generally must first be verified before the merits can be addressed.[516] More precisely, does a finding of resequencibility—which itself rests on a finding that an inquiry, being an essential and constitutional component of adjudicatory power, is equivalent to subject-matter jurisdiction—indicate that the inquiry, like subject-matter jurisdiction, must also be verified before the merits are addressed? Alternatively, to conceptualize the matter from the op-

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513 *See supra* note 154 and accompanying text. *Cf.* Falanga v. State Bar, 150 F.3d 1333, 1335 n.2 (11th Cir. 1998) (holding that *Younger* abstention is bypassable—i.e., "assum[ing] without deciding" that the district court's abstention decision was proper—"[b]ecause it appears that '*Younger* abstention is *not* jurisdictional'" (quoting Benavidez v. Eu, 34 F.3d 825, 829 (9th Cir. 1994))); Carter v. Doyle, 95 F. Supp. 2d 851, 855 n.8 (N.D. Ill. 2000) (noting that "a motion to dismiss for lack of subject matter jurisdiction based on abstention does not fit neatly into either of the two types of jurisdictional attacks generally raised under Rule 12(b)(1)" and that, as a result, "courts have allowed a *Younger* abstention challenge to be raised in a 12(b)(6) motion, or a 12(b)(1) motion, or both" (citations omitted)).

514 527 U.S. 815 (1999).

515 *See id.* at 831.

516 This is stated as a general rule because subject-matter jurisdiction is occasionally tied to the merits, in which case a court may hold the jurisdictional issue in abeyance and proceed to the merits. *See* Crawford v. United States, 796 F.2d 924, 929 (7th Cir. 1986); Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 734 (9th Cir. 1979); Schramm v. Oakes, 352 F.2d 143, 149 (10th Cir. 1965); *see also* FED. R. CIV. P. 12(d) (providing for deferred determination of 12(b) motions). For examples, see *United States v. Story*, 891 F.2d 988, 990–91 (2d Cir. 1989) (jurisdiction linked to timing of events under a recently enacted statute); *Maczko v. Joyce*, 814 F.2d 308, 310 (6th Cir. 1987) (mandamus action); *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (jurisdiction linked to merits issue of timing); and *Beuré-Co. v. United States*, 16 Cl. Ct. 42, 52–53 (Cl. Ct. 1988) (ripeness linked to just compensation).

posite direction, does a finding that an inquiry must be so verified (that it is not bypassable) indicate that it, like personal jurisdiction, can also be resequenced before subject-matter jurisdiction?

Whether the *Ruhrgas* and *Steel Co.* analyses can or should be doctrinally linked in this fashion is itself a question that the Court did not answer. It is also a question that is greatly complicated by many of the deficiencies noted earlier, including the lack of clarity and completeness in the articulation of doctrines in both *Ruhrgas* and *Steel Co.*, the absence of a meaningful precedential basis from which to extrapolate, and the corresponding lack of theoretical grounding to which one might consequently refer. As for *Ruhrgas*, perhaps the most obvious doctrinal problems concern the two criteria of equivalence, essentiality and constitutionality—the former because its imprecise formulation leaves unanswered whether it should encompass many or simply a few threshold issues, and the latter because its equally imprecise formulation coupled with the lack of obvious basis for its inclusion may lead some courts to apply it strictly while leading others to ignore it altogether. As for *Steel Co.*, the doctrinal ambiguity likewise concerns questions of definition and breadth. If, as some courts have held, the bar on hypothetical jurisdiction mandates only that core Article III subject-matter jurisdictional requirements be verified prior to reaching the merits, and that non–Article III requirements such as prudential or statutory standing can be bypassed,[517] then all other jurisdictional or quasi-jurisdictional questions, including personal jurisdiction or Eleventh Amendment immunity, are presumably bypassable as well. If, by comparison, *Steel Co.*'s prohibition is interpreted more broadly, reflecting larger concerns about the separation of powers, then many of these other jurisdictional or quasi-jurisdictional inquiries may also need to be verified prior to reaching the merits.[518] But the breadth of the prohibition is only one problem. Even if courts could settle on the broader reading, for example, they may still encounter difficulty to the extent that they have long struggled generally with the definition of jurisdiction[519] and specifically with whether certain issues warrant a jurisdictional label.[520]

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517 *See, e.g.*, United States v. Woods, 210 F.3d 70, 74 n.2 (1st Cir. 2000); Boos v. Runyon, 201 F.3d 178, 182 n.3 (2d Cir. 2000); Cablevision of Boston, Inc. v. Pub. Improvement Comm'n, 184 F.3d 88, 100 n.9 (1st Cir. 1999); Am. Iron & Steel Inst. v. OSHA, 182 F.3d 1261, 1274 n.10 (11th Cir. 1999).

518 *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998); Jones v. Am. Postal Workers Union, 192 F.3d 417, 422 (4th Cir. 1999); United States v. Universal Mgmt. Servs., Inc., 191 F.3d 750, 756–57 (6th Cir. 1999), *cert. denied*, 530 U.S. 1274 (2000); McCarty Farms, Inc. v. Surface Transp. Bd., 158 F.3d 1294, 1298–1300 (D.C. Cir. 1998).

519 *See, e.g.*, *Steel Co.*, 523 U.S. at 90; Prou v. United States, 199 F.3d 37, 45 (1st Cir. 1999); Collins v. Merit Sys. Prot. Bd., 978 F.2d 675, 686 (Fed. Cir. 1992).

520 *See, e.g.*, *Steel Co.*, 523 U.S. at 90; United States v. Cepero, 224 F.3d 256, 259–62 (3d Cir. 2000) (en banc), *cert. denied*, 121 S. Ct. 861 (2001); *Prou*, 199 F.3d at 45; United States

Notwithstanding these potential interpretive variations, the reality is that there is an unavoidable logical relationship between the notion of resequencibility under *Ruhrgas* and the notion of nonbypassability under *Steel Co.* Resequencibility, after all, indicates that an inquiry is essential to a court's adjudicatory power, while nonbypassability indicates that an inquiry is indispensable to the exercise of this power over the merits. The challenge, then, is to discern the nature and strength of this relationship. In terms of likely positive correlations, there are, in fact, four different variations on the relationship. The first two begin with *Ruhrgas* and end with *Steel Co.*—(1) does resequencibility indicate nonbypassability?, and (2) does nonresequencibility indicate bypassability?—while the second two begin with *Steel Co.* and end with *Ruhrgas*—(3) does nonbypassability indicate resequencibility?, and (4) does bypassability indicate nonresequencibility?

Of these variations, the first arguably presents the most determinate, if not also the strongest, correlation. If a given inquiry is as essential as subject-matter jurisdiction to a court's adjudicatory power that it can be resequenced prior to subject-matter jurisdiction, then it is almost certainly as indispensable (nonbypassable) as subject-matter jurisdiction when the court exercises this adjudicatory power in reaching the merits.[521] As for the other three variations, the nature and strength of their correlations are largely contingent on the reach of *Steel Co.*'s bar on hypothetical jurisdiction. If the bar exclusively prohibits bypassing Article III requirements, then the second and fourth variations become meaningless, because bypassability is neither determined by, nor indicative of, nonresequencibility, while the third variation becomes unnecessary because Article III requirements are inherently resequencible. By comparison, if the *Steel Co.* bar reaches other jurisdictional or quasi-jurisdictional inquiries, from Eleventh Amendment immunity to (conceivably) any non-merits issue, then

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v. Martin, 147 F.3d 529, 531–33 (7th Cir. 1998); *In re* Papandreou, 139 F.3d 247, 254 (D.C. Cir. 1998); EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 623–24 (D.C. Cir. 1997); Hogan v. United States, Dep't of Veterans Affairs, No. Civ. A. 99-868, 1999 WL 1138529, at *3–*4 (E.D. La. Dec. 7, 1999).

521 United States v. Saro, 252 F.3d 449, 452–53 (D.C. Cir. 2001) (suggesting in regard to the certificate-of-appealability (COA) requirement of 28 U.S.C. § 2253(c) that (1) under *Steel Co.*, "[i]f a COA is required, it is a prerequisite to our consideration of [the movant's] appeal" and "we may not simply assume that a COA is *not* required and proceed to the merits of [the movant's] claim," but that (2) under *Ruhrgas*, a determination of whether the movant satisfies the requirements for issuance of a COA is a threshold inquiry that can be resequenced, at least with other components of § 2253(c) (citing *Ruhrgas*, 526 U.S. at 584–85; *Steel Co.*, 523 U.S. at 93–94)); *see, e.g.*, Gass v. United States Dep't of Treasury, Nos. 99-1179, 98-B-75, 2000 WL 743671, at *2 n.1 (10th Cir. June 9, 2000) (holding that the administrative exhaustion requirement of 26 U.S.C. § 7433(b), being jurisdictional, must under *Steel Co.* be addressed before the merits but can, under *Ruhrgas*, be resequenced with any other jurisdictional issue).

these variations would acquire a greater correlative, if not predictive, quality.

Given this contingency, the most sensible task at this juncture may simply be to proceed through the case law of bypassability as it currently stands. The natural starting point for this task is with personal jurisdiction, the issue that *Ruhrgas* itself addressed. Does *Steel Co.*'s holding that a court cannot bypass subject-matter jurisdiction, combined with *Ruhrgas*'s holding that personal and subject-matter jurisdiction are equivalent, mean that the court must similarly verify personal jurisdiction before it can address the merits?[522] According to those courts that have addressed this question since *Ruhrgas*, the answer should be in the affirmative: personal jurisdiction must be verified, and cannot be bypassed, if a court is to reach the merits.[523] Following *Steel Co.* and *Ruhrgas*, in other words, there is no "hypothetical personal jurisdiction." Unfortunately, the case law prior to *Ruhrgas* is less uniform. In fact, a circuit split apparently developed over the permissibility of bypassing personal jurisdiction, thereby rendering it lawful within some circuits[524] and unlawful within others.[525] Given the silence of the Court in *Ruhrgas* and *Steel Co.* on the issue, this split presumably still remains.

Even more uncertain is the permissibility of bypassing an issue of Eleventh Amendment immunity. As with personal jurisdiction, the courts were divided prior to *Steel Co.*, with some holding that it could not be bypassed[526] and others holding that it could.[527] Unlike per-

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522 As with subject-matter jurisdiction, *see supra* note 516, this too is stated as a general rule because personal jurisdiction may also be tied to the merits, *see* Data Disc, Inc. v. Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1285 n.2 (9th Cir. 1977); Schramm v. Oakes, 352 F.2d 143, 149 (10th Cir. 1965), leading some courts to use intermediate standards of scrutiny to evaluate 12(b)(2) motions, *see, e.g.*, Foster-Miller, Inc. v. Babcock & Wilcox Can., 46 F.3d 138, 147–49 (1st Cir. 1995); Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 677 (1st Cir. 1992).

523 *See* United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 46 (1st Cir. 1999); Guidry v. United States Tobacco Co., 188 F.3d 619, 623 n.2 (5th Cir.), *reh'g en banc denied*, 199 F.3d 441 (5th Cir. 1999). *But cf.* Sanderson v. Spectrum Labs, Inc., No. 00-1872, 2000 WL 1909678, at *3 n.3 (7th Cir. Dec. 29, 2000) (per curiam) (implying the contrary).

524 *See, e.g.*, Simpkins v. District of Columbia Gov't, 108 F.3d 366, 370 (D.C. Cir. 1997); Lee v. City of Beaumont, 12 F.3d 933, 937 (9th Cir. 1993); Feinstein v. Resolution Trust Corp., 942 F.2d 34, 40 (1st Cir. 1991); *see also* United States v. Vazquez, 145 F.3d 74, 80 & n.3 (2d Cir. 1998) (bypassing the issue of whether or not a party is proper when service of process is not effectuated, deeming the failure "excusable" and "not an exercise of hypothetical jurisdiction of the sort disapproved of by the Supreme Court in *Steel Co.*").

525 *See, e.g.*, OMI Holdings, Inc. v. Royal Ins. Co. of Can., 149 F.3d 1086, 1090 (10th Cir. 1998); Madara v. Hall, 916 F.2d 1510, 1513–14 (11th Cir. 1990); Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369, 372 (8th Cir. 1990); Northwestern Nat'l Cas. Co. v. Global Moving & Storage, Inc., 533 F.2d 320, 323 (6th Cir. 1976); Arrowsmith v. United Press Int'l, 320 F.2d 219, 221 (2d Cir. 1963) (en banc).

526 *See* United States *ex rel.* Foulds v. Tex. Tech Univ., 171 F.3d 279, 285 n.9 (5th Cir. 1999) (citing pre–*Steel Co.* circuit cases), *cert. denied*, 530 U.S. 1202–03 (2000).

527 *See, e.g.*, Parella v. Ret. Bd. of the R.I. Employees' Ret. Sys., 173 F.3d 46, 53 (1st Cir. 1999); Hindes v. FDIC, 137 F.3d 148, 166 (3d Cir. 1998); Aves v. Shah, No. 96-3063, 1997

sonal jurisdiction, however, this split has only intensified in the wake of *Steel Co.*, with the Fifth, Ninth, and Eleventh Circuits ruling that Eleventh Amendment immunity cannot be bypassed en route to the merits,[528] the First, Sixth, Seventh, and D.C. Circuits ruling that it can,[529] and the Second and Tenth Circuits apparently ruling both ways.[530] For those holding against bypassability, the analysis is straightforward and formalistic (assuming certain premises): *Steel Co.* prohibits reaching the merits without first addressing subject-matter jurisdiction (the broader reading of *Steel Co.*), Eleventh Amendment immunity is a limit on subject-matter jurisdiction (the jurisdictional conception), therefore *Steel Co.* prohibits reaching the merits without first addressing Eleventh Amendment immunity.[531] For those holding in favor of bypassability, the analysis tends to be more complicated and pragmatic. It is more complicated, because it attempts to categorize the immunity as only quasi-jurisdictional[532] or, relatedly, to emphasize the potential overlap between the immunity and other issues, particularly the existence of a cause of action.[533] It is pragmatic, as bypassability holdings tend to be, because it invokes the values of judi-

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WL 589177, at *1 (10th Cir. Sept. 24, 1997); Sioux Falls Cable Television v. South Dakota, 838 F.2d 249, 252 n.3 (8th Cir. 1988); *see also* United States *ex rel.* Long v. SCS Bus. & Technical Inst., Inc., 173 F.3d 890, 896–97 (D.C. Cir. 1999) (noting Supreme Court cases implying both positions), *cert. denied*, 530 U.S. 1202 (2000).

528 *See, e.g.*, Cal. Franchise Tax Bd. v. Jackson (*In re* Jackson), 184 F.3d 1046, 1048 (9th Cir. 1999); *Foulds*, 171 F.3d at 285–88; Seaborn v. Fla., Dep't of Corr., 143 F.3d 1405, 1407 & n.2 (11th Cir. 1998). *But cf.* McClendon v. Ga. Dep't of Cmty. Health, 261 F.3d 1252, 1258–59 (11th Cir. 2001) (distinguishing *Seaborn* and holding that Eleventh Amendment immunity can be bypassed if the government requests that the merits be addressed first).

529 *See, e.g.*, Brindley v. Best, 192 F.3d 525, 531 (6th Cir. 1999); Kennedy v. Nat'l Juvenile Det. Ass'n, 187 F.3d 690, 696 (7th Cir. 1999), *cert. denied*, 528 U.S. 1159 (2000); *Long*, 173 F.3d at 896–97; *Parella*, 173 F.3d at 53–57.

530 *Compare* Hale v. Mann, 219 F.3d 61, 66–67 (2d Cir. 2000) (holding against bypassability of Eleventh Amendment immunity), *with* Sanghvi v. Frendel, No. 00-7538, 2000 WL 1804506, at *2 (2d Cir. Dec. 7, 2000) (per curiam) (bypassing an Eleventh Amendment issue and affirming on a procedural, merits-related ground), *cert. denied*, 121 S. Ct. 2523 (2001); *and compare* Thompson v. Colorado, 258 F.3d 1241, 1245 (10th Cir. 2001) (holding against bypassability of Eleventh Amendment immunity), *and* Frazier v. Simmons, 254 F.3d 1247, 1252 (10th Cir. 2001) (same), *and* Martin v. Kansas, 190 F.3d 1120, 1126 (10th Cir. 1999) (same), *with* Johnson v. Oklahoma *ex rel.* Univ. of Okla. Bd. of Regents, Nos. 99-6322, 99-6427, 2000 WL 1114194, at *1 n.1 (10th Cir. Aug. 7, 2000) (bypassing Eleventh Amendment immunity), *and* Grimes v. Boone, No. 98-7182, 1999 WL 454361, at *1 (10th Cir. July 6, 1999) (same).

531 *See, e.g.*, *Long*, 173 F.3d at 891 (summarizing the logic of *Foulds*, 171 F.3d at 286).

532 *See, e.g.*, *id.* at 893; *see also* Bowers v. NCAA, 9 F. Supp. 2d 460, 498 n.15 (D.N.J. 1998) (dismissing "for failure to state a claim without reaching the [Eleventh Amendment] immunity question").

533 *See, e.g.*, *Long*, 173 F.3d at 894–96. The Supreme Court recently ratified the view of the D.C. Circuit in *Long*. *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 (2000). Still left open, however, is whether a merits issue can precede Eleventh Amendment immunity when coincidence in scope and logical antecedence are lacking.

cial restraint ("avoiding a difficult constitutional question"),[534] judicial economy ("permit[ting] courts to avoid squandering judicial resources"),[535] and even litigant economy ("avoid[ing] forcing defendants to expend their resources on Eleventh Amendment questions in situations in which they would rather not do so").[536]

Lastly, there is the issue of bypassing federal sovereign immunity, the analysis of which resembles that of Eleventh Amendment immunity, as is the case with resequencing in general. If *Steel Co.* is limited to core Article III inquiries, then federal sovereign immunity is obviously beyond its reach and may be bypassed. If, by contrast, *Steel Co.* applies to other jurisdictional inquiries, or even just to other constitutional jurisdictional inquiries, then the bypassability of federal sovereign immunity becomes more contested.[537] Prior to *Steel Co.*, courts appeared to consider it bypassable.[538] Following *Steel Co.*, courts have been more divided, or more cognizant of their division, a pattern similar to the treatment of Eleventh Amendment immunity. Since *Steel Co.*, in fact, most courts have held that federal sovereign immunity *cannot* be bypassed.[539] At the same time, the D.C. Circuit has held not only that it *can* be bypassed, because it is "'a less than pure jurisdictional question,'"[540] but also that it can be resequenced because it is a "jurisdictional" "non-merits question[ ]"[541]—two holdings which, if not irreconcilable, certainly seem to push *Steel Co.* and *Ruhrgas* to the limits of their doctrinal and theoretical integrity.

CONCLUSION

The emerging power of federal courts to resequence threshold inquiries equips these tribunals with a relatively novel and potentially useful means of dispatching ill-fated lawsuits without becoming entangled in difficult jurisdictional questions, thereby promising a facilitated and more efficient use of judicial resources. In theory, the

534 *Long*, 173 F.3d at 898; *accord Parella*, 173 F.3d at 56.

535 *Parella*, 173 F.3d at 56.

536 *Id.*

537 *See, e.g.*, Boos v. Runyon, 201 F.3d 178, 182 n.3 (2d Cir. 2000).

538 *See, e.g.*, Clow v. HUD, 948 F.2d 614, 616 & n.2 (9th Cir. 1991) (per curiam), *abrogated by* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998); Scheidegg v. Dep't of Air Force, No. 90-1127, 1990 WL 151390, at *2 (1st Cir. Sept. 28, 1990) (per curiam).

539 *See, e.g.*, Humane Soc'y of the United States v. Clinton, 236 F.3d 1320, 1326 (Fed. Cir. 2001); Treglowne v. United States, No. 99-CV-70323, 2000 WL 264677, at *1–*2 (E.D. Mich. Jan. 21, 2000); Hogan v. United States, Dep't of Veterans Affairs, No. Civ.A. 99-868, 1999 WL 1138529, at *2 (E.D. La. Dec. 7, 1999); Jones v. Newman, No. 98 Civ. 7460(MBM), 1999 WL 493429, at *7 (S.D.N.Y. June 30, 1999).

540 *In re* Sealed Case No. 99-3091, 192 F.3d 995, 1000 (D.C. Cir. 1999) (per curiam) (citation omitted). Like its pre–*Steel Co.* predecessors (as well as those justifying the bypassability of Eleventh Amendment immunity post–*Steel Co.*), the D.C. Circuit buttressed its holding of bypassability by adverting to the principle of judicial restraint. *See id.* at 1001.

541 *See* Galvan v. Fed. Prison Indus., Inc., 199 F.3d 461, 462–63 (D.C. Cir. 1999).

resequencing option may apply to any threshold inquiry that satisfies the initial condition of equivalence with subject-matter jurisdiction, based on a finding that the inquiry is both an essential and a constitutional prerequisite to the exercise of judicial power. If a court finds equivalence, then the final resequencing decision is largely within its discretion, contingent on the relative difficulty of the resequencible issues and informed by the values of economy, restraint, and federalism.

To embrace this doctrine at face value, however, would be to ignore the fact that the resequencing power itself raises many serious questions about the sources, nature, and limits of federal jurisdictional authority. To litigants embroiled in the heat of actual litigation, of course, the significance of these questions will likely be measured by the practical consequences of their resolution, largely detached from underlying issues of structure and legitimacy. To judges and scholars, however, their significance is very much tied to these issues, and their resolution must ultimately arise from the forum of reasoned analysis and legal principle. But the demands of this forum are not easily satisfied, particularly when an effective expansion of the judiciary's inherent powers apparently hangs in the balance.

If the resequencing power is to be considered legitimate in anything but the most positivistic sense, therefore, its proponents and expositors must confront the contention, advanced in this Article, that it fails virtually every traditional criterion of doctrinal validity, including precedential fidelity, theoretical congruence, jurisdictional conformity, and methodological adherence. Correspondingly, if the resequencing power is to be considered functionally adequate in anything but the most expedient sense, its proponents and expositors must forthrightly discern with greater precision its parameters and reach, and constrain its use accordingly. At the present time, with courts omitting its requirements and forecasting its application to all manner of threshold issues—and doing so on the basis of a decision that itself lacks the force of legitimate persuasion—the resequencing power comes perilously close to the line that separates valid authority from unprincipled usurpation. The irony, of course, is that these developments come at a time when the courts have been vigorously instructing the other branches to stay within their constitutional limits and to speak with greater clarity so that these limits may better be preserved. These are worthy endeavors indeed, but they are endeavors that must begin, and not end, with the judicial branch.