

8-15-2010

Decisional Sequencing: Limitations from Jurisdictional Primacy and Intrasuit Preclusion

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Decisional Sequencing: Limitations from Jurisdictional Primacy and Intrasuit Preclusion

Kevin M. Clermont^{*}

This Article treats the order of decision on multiple issues in a single case. That order can be very important, with a lot at stake for the court, society, and parties. Generally speaking, by weighing those various interests, the judge gets to choose the decisional sequence, although the parties can control which issues they put before the judge.

The law sees fit to put few limits on the judge's power, and properly so. The few limits are in fact quite narrow in application, and even narrower if properly understood. The *Steel Co.-Ruhrigas* rule generally requires a federal court to decide Article III justiciability and subject-matter jurisdiction before ruling on the merits. The *Beacon Theatres-Dairy Queen* rule requires a federal trial judge to avoid preclusion by giving first to the jury a factual issue common to the merits of both law and equity claims for relief joined in the same case.

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INTRODUCTION

“The evidence and arguments a district court considers in the class certification decision call for rigorous analysis,” warned the appellate court in the celebrated class action called *In re Hydrogen Peroxide Antitrust Litigation*.¹ For certification, the court explained, the class representative must show by a preponderance of the evidence that the case satisfies the requirements for class treatment. “An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met.”²

In other words, after electing to pose a threshold question, the legal system advises the trial court just to plow ahead, even though the judge will encounter an issue that may arise for decision on the merits at trial in the same formulation and under the same standard of proof. To alleviate any discomfort generated by such a view, the Third Circuit resorted to unsupported pronouncement perhaps without the requisite “rigorous analysis,” mustering this dictum: “Although the district court’s findings for the purpose of class certification are conclusive on that topic, they do not bind the fact-finder on the merits.”³ Where did the court get that idea? When is a judge really free to decide the order of decision, even without worry of untoward preclusion?

I. DECISIONAL SEQUENCING

Before deciding a case and uttering the necessary legal pronouncements, the court must confront a series of issues, a series that may be sequenced in any of numerous ways. Deciding the order of decision is among the law’s most basic decisions. Who decides the order of decision? Although parties generally control the issues put before the judge, the judge generally decides the sequence of decision.⁴

¹552 F.3d 305, 318 (3d Cir. 2008) (involving antitrust conspiracy action by purchasers of hydrogen peroxide and related chemical products against chemical manufacturers); see Linda S. Mullenix, *Class Certification*, NAT’L L.J., Jan. 26, 2009, at 9, 9 (describing *Hydrogen Peroxide* as potentially “the most influential decision relating to class certification” of the decade).

²*In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 (3d Cir. 2008). The quoted views conform to today’s usual approach. See *infra* note 164 and accompanying text. It is the ever more important approach as more courts are getting into the merits to screen out class actions at the certification stage. See Steig D. Olson, “*Chipping Away*”: *The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935 (2009).

³*In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2008).

⁴See Peter B. Rutledge, *Decisional Sequencing*, available at <http://ssrn.com/abstract=1572709> (Mar. 1, 2010) (providing the only general treatment of sequencing and the interests at stake in an excellent article, which considers only the alternative-

Of course, I am talking here of formal legal reasoning, not intuitive decisionmaking. One significant setting in legal reasoning for exploring the sequencing decision is where the court faces alternative grounds for disposition, that is, an array of open routes to disposing of the claim, one way or the other. The best specific example is where a defendant has raised a number of defenses, so that the court might decide for the defendant because of lack of jurisdiction or improper venue or the plaintiff's failure to state a claim or the defendant's affirmative defense. The sequence obviously matters, because the consequence is that the court reaches some issues and does not reach other issues. Among much else, the amount of effort by the court, the kind of law made, and the parties' discovery needs all turn on the sequence of decision. The law could impose a sequencing rule, dictating the order in which the court must decide the defenses. Or the law could leave it up to the judge's discretion.

This example of alternative grounds of dismissal gives a useful sense of what a sequencing rule is: a binding direction that the court face this issue before that issue. My interest is more general than that example, however. The order in which the court confronts nondispositive issues also matters. It affects the course of a case's progress. Parties care about it mostly because an early victory on some issue, or even the threatened intrusiveness of early attention to certain issues, can shift their settlement leverage dramatically. Moreover, what is at stake for them will increase to the extent that foreclosure of a decided issue is possible later in the case. That latter concern prompted the dictum in the *Hydrogen Peroxide* case, whereby the appellate court assured readers that the judge's class certification decision would not bind a jury on common issues intertwined in the merits. Therefore, because the decisional sequence can always have effects, the law could conceivably dictate sequencing in any setting.

A. Discretion

It turns out that the judges have a lot of freedom to sequence issues as the judges wish. In the wide realm of freedom that judges enjoy in deciding the order of decision, what factors guide them? Three general categories of factors predominate, as suggested by the pioneering work of Professor Rutledge.⁵

First, and obviously, *judicial economy* plays a major role. The court's being free to pick and choose which issue to address first will affect the total amount of effort required. Most notably, among alternative grounds for disposition, proceeding immediately to the easiest and surest ground that ends the

grounds-of-dismissal scenario but widens the focus to explore that sequencing problem as it exists between trial and appellate courts and between courts in different jurisdictions).

⁵See *id.* at 19-27.

case would tend to lessen judicial workload. The court could thereby avoid shaky decisions of difficult issues. Ease of disposition reflects a variety of factors that go beyond a limited need for research and deliberation, such as the ease of considering objective matters rather than subjective matters. Sureness of disposition pays the various premiums of clarity of outcome in the trial court, as well as minimization of costs on appeal.

In the sequencing of nondispositive issues, choosing a certain path also might decrease judicial effort. Awareness that most cases end in settlement might counsel a particular sequence of least effort. Even legal logic (such as liability should come before remedy, or elements of the claim come before affirmative defenses) or pure logic (deductive logic prompts a certain order, or reflective equilibrium imposes an iteration) might suggest a path of decision that reduces mental effort.

Additionally, there is often a practicality in following a certain order (preliminary relief comes before final relief, or factual issues need to be tried toward the end), but these are not strictly binding rules of sequencing. More toward the substantive side of things, the law might provide an “if-then” relationship that appears to dictate a sequence. That is, although not as commonly as one would suppose, the law might say that some issue needs to be decided a certain way before a desirable procedure or remedy can be followed or pursued. The best example is the rule that the plaintiff must show an inadequate remedy at law in order to make an equitable remedy available.⁶ But really these propositions too are matters of practicality rather than mandated sequencing. The proof lies in thinking of these propositions in the alternative-grounds-of-dismissal scenario: the court can then sequence as it wishes, so that the court could first decide that no equitable remedy exists and hence avoid deciding inadequacy of the legal remedy. Even when applying these propositions to nondispositive issues, the court could actually decide in any order it wishes, even though it usually is more economic to decide the “if” before the “then.”

Second, *other institutional factors* may suggest a certain sequence. A trial judge may very well choose to foster institutional interests by adopting a certain sequence; for example, the judge might take into account that the sequence will affect the output of precedent and thus the development of the law. There are also prudential doctrines, like the passive virtue of avoiding constitutional issues,⁷ or

⁶See HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY §§ 22, 43 (2d ed. 1948).

⁷See Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847 (2005) (lamenting the many exceptions to that presumption). Compare Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961), with Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

considerations of judicial restraint and federalism that counsel avoiding certain issues when possible. These factors too are not strictly binding rules of sequencing even if hierarchically announced, but instead they act as a way of informing the trial courts' discretion by identifying particularly weighty factors. Moreover, there are certain issues marked as threshold issues, like class certification,⁸ that require early attention as a gatekeeping mechanism. But these are more timing guidelines than sequencing rules.

Third, the sequence can affect the *substantive goals* of law. It surely impacts the parties' interests. It affects the parties' litigation behavior, such as in choosing which issues to raise in the hope of constraining the judge's sequencing. Even more clearly, it affects their settlement leverage; for example, the court's ability to skip over some jurisdictional issues and allow the plaintiff to pursue discovery and decision on the merits will often work to the disadvantage of defendants.⁹ A trial judge may take the goals of law into account in setting a sequence, although presumably maintenance of neutrality between the parties should be the judge's strongest motive here.

Even with so much at stake in the sequencing decision, lawmakers choose usually not to impose mandatory sequencing rules on judges. This Article will try to delineate the wide extent of the judges' freedom to sequence.

B. Rules

The suggestive discussion above of the factors relevant to sequencing shows the picture to be so complicated that, presumptively, lawmakers should stay out and just leave it up to the judges' discretion. However, given the reasonable assumption that judges tend to act in self-interest, judges may too heavily weigh the first factor of minimizing workload.¹⁰ Thus, lawmakers may

⁸See FED. R. CIV. P. 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action."); 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1785.3, at 453 (3d ed. 2005) ("The time at which the court finds it appropriate to make its class-action determination may vary with the circumstances of the particular case.").

⁹See Rutledge, *supra* note 4, at 27:

Flexible sequencing rules strengthen a defendant's position in settlement because the defendant has more avenues available to it for immediate dismissal with a lower risk of an adverse ruling. By contrast, rigid sequencing rules strengthen a plaintiff's position in settlement because the mandatory sequence enables the plaintiff to obtain a favorable ruling on an early issue and, depending on the availability of jurisdictional discovery, drive up the defendant's costs early in the dispute.

¹⁰See Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994) (arguing that judicial response to various legal rules is often the result of judges' self-interest); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 39 (1993) (stating

need to regulate in order to protect the other public and private interests at stake, at least when their neglect would come at an especially high cost. But still, intervention should be the exception.

Conforming to that conservative view on the normative question, the descriptive fact is that, on the civil side, there are remarkably few external limitations on the trial judges' freedom to sequence. The legislative branch has been wholly inactive. Perhaps interest groups have formulated insufficient concern over the subtleties of sequencing and so exerted no pressure. The judiciary has intervened seldom. Perhaps institutional worries are usually too small to generate higher courts' concern over trial judges' sequencing performance.

In current law I see only two sequencing rules of significance, given the above-described narrow definition of what constitutes such a rule. They both derive from judicial interpretations of the Constitution, and they are very heavily dependent on concerns linked to federal courts. Interestingly, they both embroil the commentator quickly and thoroughly in matters of *res judicata*—without careful attention to preclusion these two sequencing rules will ever remain mysterious. The first of the rules arises from the scenario of alternative grounds for disposition that the defendant chose to put before the court, while the second involves the more general scenario of multiple issues.

The major limitation extant is that of the *Steel Co.*¹¹ and *Ruhrigas*¹² line, which says that a federal court must decide a challenge to its jurisdiction over the case before dismissing on the merits. As this Article will explain, this rule boils down to a fairly modest constraint: one big exception is that the court still may pick among jurisdictional and other threshold defenses, with a dismissal on any one enjoying some preclusive effect.¹³

Another rule, deriving from the *Beacon Theatres*¹⁴ and *Dairy Queen*¹⁵ cases, dictates that when a common factual issue is to come before both judge and jury, the jury must decide it first to avoid the preclusive effect of a judicial decision subverting the constitutional jury right in federal court. As this Article will also explain, this rule is very narrow too: it applies only to trial of factual

as plausible that “judicial effort has a diminishing effect on the satisfactions from judicial voting”).

¹¹*Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

¹²*Ruhrigas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999).

¹³*See infra* Part II.

¹⁴*Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

¹⁵*Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).

issues common to the merits of both law and equity claims for relief joined in the same case.¹⁶

C. Fog

Although lawmakers impose little constraint on the judges' freedom to sequence, the prevailing lack of clarity about the existence and scope of the sequencing rules works to constrain judges more broadly. The court might be very unsure of when it can skip over jurisdiction. Or it may worry that an early decision will bind its subsequent decision of overlapping matters. Consider, for example, this district court's concerned musings about deciding a typical issue of personal jurisdiction that involved issues in common with the merits:

If the [threshold-decision] course were undertaken, the court might be deciding key fact issues that, if the doctrine of estoppel were not applied, would be resubmitted for jury determination at trial, thus making wasteful use of scarce judicial resources and also creating a possibility of inconsistent findings by the court on motion and the jury at trial. If estoppel were applied on the basis of the court's resolution of the issues, thereby precluding waste and inconsistency, then either the court must impanel a jury just to try those issues for disposition of the motion—a dubious procedure at best—or else the parties would effectively be denied jury trial on those issues because the court's findings on them when determining the motion would preclude their resubmission at jury trial.¹⁷

To the extent that such confusion creates a broader constraint than the lawmaker intended, the constraint is undesirable. Hence, bringing clarity should be beneficial. Clarification of the rules of sequencing, then, is another aim of this Article.

II. JURISDICTIONAL PRIMACY

Our law's foremost sequencing rule says that a federal court's decision on a challenge to its jurisdiction must come before decision on the merits.¹⁸ To understand that rule, which as already mentioned stems from the *Steel Co.*¹⁹ and

¹⁶See *infra* Part III.

¹⁷North Am. Video Corp. v. Leon, 480 F. Supp. 213, 216 (D. Mass. 1979); see Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 978-1000 (2006) (calming this particular worry by establishing that the standard of proof for jurisdiction is less demanding than the standard applicable to the merits).

¹⁸See generally RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1411-17 (6th ed. 2009).

¹⁹Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93-102 (1998).

*Ruhrgas*²⁰ cases, one must first draw the subtle distinction between “nonbypassability” and “resequencing.”²¹

Nonbypassability, or the requirement to decide first things first, rests mainly on the *Steel Co.* case. A court cannot skip over a challenge to subject-matter jurisdiction in order to dismiss on the merits, even though finding a lack of subject-matter jurisdiction would likewise have produced a victory for the defendant. So, when I say a defense is “nonbypassable,” I mean that a court cannot skip over it and instead dismiss on the merits. The sequencing rule is subject-matter jurisdiction first.

Resequencing, which received its blessing in *Ruhrgas*, avoids this sequencing rule. It allows courts to avoid decision on subject-matter jurisdiction by hypothesizing its existence in order to dismiss on other threshold grounds with a binding effect. A court can skip over challenged subject-matter jurisdiction to dismiss, say, for lack of personal jurisdiction. So, when I say a defense is “resequenceable,” I mean that a court can choose to dismiss on it without first facing a nonbypassable defense like subject-matter jurisdiction.

A. Nonbypassability, or Deciding First Things First

Nonbypassability has obvious sequencing implications for judicial decisionmaking. Courts must decide in a certain order if a nonbypassability rule is in place. To the extent that courts are uncertain about the reach of that rule, but wish to avoid reversal, they will follow it even when it does not apply. Thus, some attention to the rule’s precise meaning is in order.

1. Rule

Drawing on a line of precedent stretching way back,²² *Steel Co.* held that the lower federal court could not dismiss for failure to state a claim without first deciding a challenge to Article III standing²³ (which, according to the Court, was lacking in the case but posed a harder question to resolve).²⁴ Even though the result was the same—judgment for defendant—the federal court could not give a judgment on the merits without first ascertaining it had jurisdiction.

²⁰*Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-88 (1999).

²¹See Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 92-94 (2001) (providing the best treatment of this doctrine).

²²See *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804) (allowing the plaintiff to raise original subject-matter jurisdiction on appeal).

²³See generally 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531, at 9-16, §§ 3531.4-3531.6 (3d ed. 2008).

²⁴*Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93-102 (1998).

The Court rested its decision on separation of powers and the requirement of a case or controversy. In order for courts to stay within their proper limits, they cannot go about rendering a decision on the merits without making sure that the case fell within the courts' jurisdictional bounds. Based on its reasoning and wording, by "jurisdiction" the Court meant Article III justiciability²⁵ as well as more ordinary subject-matter jurisdiction.²⁶ The Court itself has never added anything to that short list of nonbypassable defenses.

2. Exception

Steel Co. represented the high water mark for the nonbypassability doctrine. The Court's opinion itself was far from definitive on whether jurisdiction must come before everything else. The majority itself admitted that precedent had "diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question."²⁷ And the separate opinions of six of the Justices went further in underlining that qualification.²⁸

The Court's subsequent cases have indeed cut back on *Steel Co.*'s seeming thrust by drawing a line between nonmerits and merits and by then ruling that a federal court can dismiss on nonmerits grounds without reaching Article III justiciability or subject-matter jurisdiction.²⁹ The fountainhead case of *Ruhrgas*, in a unanimous opinion by Justice Ginsburg one year after *Steel Co.*, held that a court may resequence nonmerits defenses in a way such that the court faces a

²⁵See generally 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3529 (3d ed. 2008).

²⁶See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998) (referring to the "statutory and (especially) constitutional elements of jurisdiction," the Court ruled: "For a court to pronounce upon the [merits] when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.").

²⁷*Id.* at 101; see *infra* note 98 (collecting cases).

²⁸Jack H. Friedenthal, *The Crack in the Steel Case*, 68 GEO. WASH. L. REV. 258, 265-66 (2000) (footnotes omitted), described the concurring opinion of Justice O'Connor, the opinion of Justice Breyer concurring in part and in the judgment, and the opinions of Justices Stevens and Ginsburg concurring in the judgment:

To summarize the positions of the various Justices: Justices Rehnquist and Thomas join the more traditional view espoused by Justice Scalia and denounce "hypothetical jurisdiction" but do not completely shut the door . . . Justice Breyer clearly approves of "hypothetical jurisdiction" in some circumstances and both Justices O'Connor and Kennedy leave open the question of if and when "hypothetical jurisdiction" should be permitted, but indicate that the doctrine has some validity. Justice Stevens, with whom Justice Souter concurred, at the very least leaves open the question of "hypothetical jurisdiction" or approves of it, depending upon which portion of the opinion one relies upon. Only Justice Ginsburg refused to be drawn into the discussion, and it was she who wrote the unanimous opinion in *Ruhrgas*.

²⁹See *infra* note 100 (collecting cases).

personal jurisdiction defense before deciding a subject-matter jurisdiction defense.³⁰

As discussed below,³¹ one might argue that the list of nonmerits defenses eligible for resequenceing remains especially unclear. Nevertheless, it is absolutely clear that this list of resequenceable threshold matters is not the same as, and is in fact much longer than, the list of fundamental matters that a federal court cannot bypass in favor of the merits. The *Steel Co.* case used the example of statutory standing³² as a resequenceable defense that could precede subject-matter jurisdiction, as well as a defense that the court could bypass in order to dismiss on the merits.³³ But that is just one example. A court can also bypass prudential standing³⁴ and a host of other resequenceable threshold issues.³⁵

3. Nonbypassable Grounds

So, more precisely, which defenses can a court not bypass in order to get to the merits? To appear on the list of nonbypassable defenses, a ground must involve a pretty basic matter in the nature of subject-matter jurisdiction. As the D.C. Circuit put it, “ ‘a less than pure jurisdictional question, need not be decided before a merits question.’ ”³⁶

To repeat, most entries on the longer list of resequenceable threshold matters are bypassable. The prime, and largely determinative, question in relating the two lists is whether a court can bypass the resequenceable defense of personal jurisdiction.³⁷ So, can a court pass over personal jurisdiction in order to dismiss on the merits?

³⁰*Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-88 (1999) (treating personal jurisdiction as resequenceable).

³¹*See infra* text accompanying notes 96-126.

³²*See generally* 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.13 (3d ed. 2008).

³³*See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998) (detailing expressly that a court can bypass a statutory standing question and go to the merits, but a court can resequence that question before an Article III justiciability or subject-matter jurisdiction defense).

³⁴*See generally* 13A WRIGHT ET AL., *supra* note 23, § 3531, at 9-16.

³⁵*See Idleman, supra* note 21, at 93, 95-97. *Compare In re Sealed Case No. 99-3091*, 192 F.3d 995, 1000 (D.C. Cir. 1999) (per curiam) (holding a court can bypass federal sovereign immunity for the merits), *with Galvan v. Federal Prison Indus., Inc.*, 199 F.3d 461, 463 (D.C. Cir. 1999) (holding a court can resequence federal sovereign immunity).

³⁶*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)).

³⁷*See Idleman, supra* note 21, at 95.

Although the cases before *Steel Co.* were split on this question,³⁸ since then they are perhaps leaning more toward no.³⁹ Most disturbingly, the Supreme Court seems to have assumed no. In its latest case in this line, *Sinochem*, the Court implied that personal jurisdiction and subject-matter jurisdiction are equivalents for the purpose of the nonbypassability doctrine.⁴⁰ In that case, the district court had held that it possessed admiralty subject-matter jurisdiction, but declined to decide personal jurisdiction and instead dismissed on forum non conveniens grounds. The court of appeals agreed on subject-matter jurisdiction, but held that the court could not skip over personal jurisdiction. The Supreme Court reversed, allowing dismissal on forum non conveniens grounds without decision on personal jurisdiction. The course of decision had removed from the Court's holding anything regarding bypassability of personal jurisdiction: its holding is perfectly consistent with a view that either forum non conveniens or the merits can precede personal jurisdiction. Also, because the lower courts had decided that subject-matter jurisdiction existed, the Court clarified little about resequenceability: its stated view that forum non conveniens is resequenceable before subject-matter jurisdiction is dictum. Indeed, the Court, in another unanimous opinion by Justice Ginsburg, taught little besides the fact that this doctrine has become too complicated for the Court itself. It most pointedly proved this by declaring that *Steel Co.*, which in fact did not involve or discuss personal jurisdiction, "clarified that a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)."⁴¹ That erroneous dictum will surely influence the lower courts in the future.⁴²

I nevertheless think yes, a court can pass over personal jurisdiction in order to dismiss on the merits—in other words, personal jurisdiction is a resequenceable but bypassable defense. One reason is that *Steel Co.*'s concerns of separation of powers and the requirement of a case or controversy do not extend

³⁸See *id.* at 95 nn.524-25.

³⁹Compare *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 46 (1st Cir. 1999), and *Guidry v. United States Tobacco Co.*, 188 F.3d 619, 623 n.2 (5th Cir. 1999), with *Pace v. Bureau of Prisons*, No. 98-5025, 1998 WL 545414, at *1 (D.C. Cir. July 17, 1998) (per curiam), and *United States v. Vazquez*, 145 F.3d 74, 80 & n.3 (2d Cir. 1998) (bypassing service of process for the merits).

⁴⁰*Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422 (2007); see Nathan Viavant, Recent Development, *Sinochem International Co. v. Malaysia International Shipping Corp.: The United States Supreme Court Puts Forum Non Conveniens First*, 16 TUL. J. INT'L & COMP. L. 557, 571-72 (2008) (viewing *Sinochem* to be so unclear as to sow the seeds for the demise of the nonbypassability rule).

⁴¹*Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007).

⁴²See *Dan v. Douglas County Dep't of Corrections*, No. 8:06CV714, 2009 WL 483837, at *3 (D. Neb. Feb. 25, 2009); *Ashton v. Floral Memorial Hosp.*, No. CIV.A. 206CV226-ID, 2007 WL 1526837, at *1 n.1 (M.D. Ala. May 24, 2007). But see *Di Loreto v. Costigan*, 351 F. App'x 747 (3d Cir. 2009) (bypassing personal jurisdiction for the merits).

to personal jurisdiction. Likewise, any concern of intruding on the states' authority does not extend beyond subject-matter jurisdiction. The D.C. Circuit again provided a good explanation: "The district court was not required to resolve the issue of personal jurisdiction prior to ruling on the motion to dismiss for failure to state a claim because personal jurisdiction exists to protect the liberty interests of defendants, unlike subject-matter jurisdiction, which serves as a limitation on judicial competence."⁴³

Moreover, the defendant, like the system, has no real grounds for complaining about the initial court bypassing personal jurisdiction. A victory on the merits, with its broad *res judicata* effects, is worth more to the defendant than a jurisdictional dismissal. The defendant has put multiple defenses before the court, and so has consented somewhat to any sort of sequencing.

However, the key difference between Article III justiciability and subject-matter jurisdiction, on the one hand, and personal jurisdiction, on the other hand, is that a judgment that skips over the former might be a valid judgment under the doctrine of jurisdiction to determine jurisdiction as elaborated in the famed *Chicot* case.⁴⁴ This doctrine means that a judgment that has intruded on other branches or imperiled federalism can nonetheless stand safe from challenge. Notwithstanding all the slogans about subject-matter jurisdiction's fundamental importance, the offense to the systemic interests at stake is not great enough always to warrant relief from judgment—unlike the more individual interests wrapped up in the often constitutionally based intricacies of personal jurisdiction. A defendant who has not waived an undecided personal jurisdiction defense should be able to raise it to obtain relief from judgment.⁴⁵ After a court bypassed personal jurisdiction and dismissed the case on other grounds, the defendant could get relief from the judgment if the defendant, who is the only concerned party, were ever to need such relief.

Therein lies the key to understanding nonbypassability. The list of nonbypassable items should not turn solely on the relative importance of defenses, which would open fruitless debate on the stature of subject-matter jurisdiction

⁴³*Pace v. Bureau of Prisons*, No. 98-5025, 1998 WL 545414, at *1 (D.C. Cir. July 17, 1998) (per curiam) (distinguishing *Steel Co.*).

⁴⁴*Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940) (precluding a defaulted defendant from collateral attack on subject-matter jurisdiction grounds, after other defendants had appeared and litigated the case without raising subject-matter jurisdiction and after the prior court had canceled the defendants' bonds); *see infra* text accompanying notes 55-62. A related assumed-jurisdiction mechanism, for foreclosing attack on challenged but skipped subject-matter jurisdiction, entails the extension of hypothetical jurisdiction. *See infra* text accompanying notes 81-95.

⁴⁵*See* KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* § 4.4(C) (2d ed. 2009) (explaining that waiver equates to jurisdiction by consent, but that a defaulting defendant can later challenge territorial jurisdiction or notice).

versus that of personal jurisdiction.⁴⁶ The actual concern instead derives from the asymmetry between subject-matter jurisdiction and personal jurisdiction under preclusion doctrine: unlitigated subject-matter jurisdiction can preclude. The fear is that a court will bypass some such prerequisite for adjudicating and then give a dismissal on the merits that is later unassailable. To avoid that result, the Court declares the preclusive prerequisite to be nonbypassable.

Now, it appears that when the law says a defense is “nonbypassable,” it means that if a court nevertheless purposefully skips the defense in order to give dismissal on the merits, no brand of assumed jurisdiction will protect the judgment from attack. When the law says that a court “cannot” bypass subject-matter jurisdiction, it means that if the court violates the rule, a person can get relief from the judgment upon showing a lack of subject-matter jurisdiction, whether or not that person appealed the judgment. But that person cannot attack the judgment simply for violation of the nonbypassability rule, because that would be mere error and not a void judgment.⁴⁷

Thus, the list of nonbypassable items should include *only those requirements for a valid judgment that, if skipped over by the court, could otherwise be cut off as a ground for attack*. Accordingly, that list of nonbypassable prerequisites should include subject-matter jurisdiction, but not territorial jurisdiction or notice. The authorities are lax in defining the precise scope of “subject-matter jurisdiction” as a requirement for validity.⁴⁸ A lack of jurisdiction under Article III will result in relief from judgment.⁴⁹ But the lesser aspects of justiciability will not.⁵⁰ And courts need to keep jurisdiction and the

⁴⁶But see Idleman, *supra* note 21, at 31-39.

⁴⁷See CLERMONT, *supra* note 45, § 5.1(B)(1) (explaining the concept of validity).

⁴⁸See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 11 (1982) (defining subject-matter jurisdiction as the court’s “authority to adjudicate the type of controversy involved in the action” and acknowledging that the authority may derive from constitutional or statutory provisions); Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164, 164 n.1 (1977).

⁴⁹See, e.g., *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 305 F. Supp. 2d 939, 954-55 (E.D. Wis. 2004) (“Because there was no case or controversy, this court lacked constitutional power to enter judgment against defendants.”), *rev’d on other grounds*, 402 F.3d 1198 (Fed. Cir. 2005).

⁵⁰See, e.g., *Mendell v. Gollust*, 909 F.2d 724, 731-32 (2d Cir. 1990) (“Plaintiff’s acquisition of a note following an adverse ruling on his claim to standing as a shareholder did not present the kind of ‘extraordinary’ circumstance that mandates relief to avoid an ‘extreme and undue hardship.’”) (quoting *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986)), *aff’d on other grounds*, 501 U.S. 115 (1991); *Sarin v. Ochsner*, 721 N.E.2d 932, 935 (Mass. App. Ct. 2000) (“More important, even if the plaintiff had no such direct interest, the defendants may not raise the issue of standing in a rule 60(b) motion. Whether the facts of a given case meet the standard for exercising jurisdiction—here whether the plaintiff has standing—has been termed a ‘quasi-jurisdictional’ determination.”).

merits separate for the purpose of validity, so that the attacker of the judgment cannot litigate the merits anew.⁵¹

In sum, there is no significant reason that a court must decide the existence or not of personal jurisdiction before deciding the merits in the defendant's favor. And with personal jurisdiction off the nonbypassability list, and with finally an understanding of the Court's reason for creating the nonbypassability list, I become comfortable in asserting that the *Steel Co.* line of cases puts only Article III justiciability and subject-matter jurisdiction on the list of nonbypassable grounds.

B. Resequencing, or Using Hypothetical Jurisdiction to Produce a "Valid" Invalid Judgment

Ruhrgas represents another aspect of jurisdictional primacy that is different in operation from nonbypassability. It allows resequencing of nonmerits defenses. *Ruhrgas* held that the lower federal court could dismiss for lack of personal jurisdiction without first deciding subject-matter jurisdiction.⁵² Subsequent cases have expanded the resequencing exception. Although a court cannot bypass subject-matter jurisdiction in favor of a disposition on the merits, it can skip over subject-matter jurisdiction to dismiss on, say, forum non conveniens.⁵³ By being authorized to dismiss on some such nonjurisdictional threshold defense, a court becomes freer to pursue economically an easier and

⁵¹RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e (1982) acknowledges that the definition of jurisdiction is "particularly difficult when the issue determining subject matter jurisdiction parallels an issue going to the merits" but the modern tendency "is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction." It concludes:

In all such situations, the matter in question can plausibly be characterized either as going to subject matter jurisdiction or as being one of merits or procedure. The line between the categories is not established through refinement of terminology but through the cumulation of categorizing decisions into a pattern. The establishment of pattern is complicated by the fact that the distinction between subject matter jurisdiction and merits or procedure has significance in contexts other than that concerning the vulnerability of a judgment to delayed attack. . . .

Whatever the context, the underlying question is how far to go in the direction of policing the boundaries of a court's subject matter jurisdiction, when the cost of intensive policing is to enlarge the vulnerability of the proceeding to interruption through extraordinary writ or the like and to belated attack after it has gone to judgment.

See Morrison v. National Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010); *Carr v. Tillery*, 591 F.3d 909, 917, 919 (7th Cir. 2010); Clermont, *supra* note 17, at 1017-20; Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547 (2008).

⁵²*Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-88 (1999).

⁵³*See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422 (2007) (dictum).

surer path, as long as the result is the same party prevailing as would if jurisdiction were denied.⁵⁴

To understand the effect of resequencing, though, one must back up and consider some related doctrines. The place to begin is the doctrine of jurisdiction to determine jurisdiction. The reason to turn to it is that this doctrine relates to *res judicata*, and *res judicata* is where resequencing will ultimately take us. There follows a general description as means of orientation.

1. Jurisdiction to Determine Jurisdiction

The doctrine of jurisdiction to determine jurisdiction treats a kind of question different from the normal application of *res judicata*: it does not involve preclusive use of determinations embedded in a valid judgment, but instead involves preclusive use of prior determinations underlying a judgment in order to establish its validity.⁵⁵ That is to say, an affirmative ruling on subject-matter jurisdiction, territorial jurisdiction, or adequate notice can foreclose relitigation of that prior determination and so preclude the parties from attacking the resultant judgment by raising that ground in subsequent litigation.

It is true that if a defendant faces suit in a court that lacks jurisdiction or fails to give notice, the defendant ordinarily does not have to respond in any way. If the defendant takes no action of any kind in response to the suit, the court may enter a default judgment, but the judgment will be invalid. If the plaintiff should attempt to assert rights based on that judgment in a later suit involving the same defendant, the defendant ordinarily can avoid the effects of the judgment by showing that its entry was without jurisdiction or notice. The defendant has the right to a day in court on the question of the authority of the court that rendered the earlier judgment.⁵⁶

However, the defendant may instead choose to raise the jurisdiction or notice issue in the initial action before the challenged court itself. Then, a court that otherwise lacks authority could conceivably have jurisdiction to determine whether it has jurisdiction and whether its notice was good, and its affirmative rulings on such questions could be binding on the defendant so as to preclude relitigation of the same questions. The defendant's appearance in the challenged court would then be the defendant's only day in court on the question of the forum's authority.

⁵⁴See Heather Elliott, *Jurisdictional Resequencing and Restraint*, 43 NEW ENG. L. REV. 725, 742-46 (2009) (trying to characterize the doctrine as also serving judicial restraint).

⁵⁵See generally CLERMONT, *supra* note 45, §§ 4.4, 5.1(A)(3); CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 16, at 95-97 (6th ed. 2002) .

⁵⁶See RESTATEMENT (SECOND) OF JUDGMENTS §§ 65-66 (1982).

Our law in fact accepts this so-called bootstrap principle,⁵⁷ and so allows a court lacking fundamental authority to issue a judgment that will nevertheless be immune from later attack. Because the issue of jurisdiction or notice was actually litigated and determined, even if erroneously, the defendant cannot relitigate the same issue in subsequent litigation. The defendant can obtain appellate review of the erroneous ruling, of course, but cannot challenge it upon seeking relief from judgment. Here the desire for finality outweighs the concern for validity.⁵⁸

Indeed, our law accepts the bootstrap principle's value of finality with true enthusiasm, despite its conflict with the intuitive value of validity. Our law applies the principle even more broadly than the foregoing illustration of actually litigated and determined forum-authority defenses. Strangely, this extension comes in connection with subject-matter jurisdiction, in spite of the traditional lore about subject-matter jurisdiction's fundamental importance. On the one hand, as to unchallenged subject-matter jurisdiction in any action litigated to judgment by contesting parties, the implicit determination of the existence of subject-matter jurisdiction has the *res judicata* consequences of an actually litigated determination, insofar as foreclosing attack on the judgment goes.⁵⁹ On the other hand, sometimes the interests inherent in subject-matter jurisdiction are just too important to ignore: even an express finding of the existence of subject-matter jurisdiction will not preclude the parties from attacking the resultant judgment on that ground in special circumstances, such as where the court *plainly* lacked subject-matter jurisdiction or where the judgment *substantially* infringes on the authority of another court or agency.⁶⁰

This doctrine of jurisdiction to determine jurisdiction thus ends up being a bit peculiar. It constitutes a third body of *res judicata* law, distinguishable from claim and issue preclusion, or perhaps standing separate from *res judicata*. It is obviously similar to issue preclusion, but it differs in several respects.⁶¹ The

⁵⁷See Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491 (1967).

⁵⁸See *Durfee v. Duke*, 375 U.S. 106 (1963) (quasi in rem jurisdiction); *Johnson v. Muelberger*, 340 U.S. 581 (1951) (jurisdiction over status); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940) (subject-matter jurisdiction); *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931) (personal jurisdiction); RESTATEMENT (SECOND) OF JUDGMENTS §§ 10-12 (1982).

⁵⁹See RESTATEMENT (SECOND) OF JUDGMENTS § 12 (1982); *supra* text accompanying note 44 (introducing the *Chicot* doctrine).

⁶⁰See *Kalb v. Feuerstein*, 308 U.S. 433 (1940) (holding that a state-court proceeding could not preclude a bankruptcy proceeding); RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmts. c, e (1982); Karen Nelson Moore, *Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 534 (1981).

⁶¹See CLERMONT, *supra* note 45, § 5.1(A)(3), at 307 (footnotes omitted):

First, issue preclusion requires a valid prior judgment. Jurisdiction to determine jurisdiction does not require validity, but instead works to make invulnerable what could otherwise be an invalid judgment. Second, issue preclusion applies only in a subsequent

reason for difference is that the policies that shape the doctrine of jurisdiction to determine jurisdiction are unique, and so they produce a unique set of rules. For related reasons tied to the notion that the doctrine most intimately defines the judgment, federal common law covers the doctrine of jurisdiction to determine jurisdiction as it relates to a prior federal judgment.⁶²

2. Jurisdiction to Determine No Jurisdiction

Passing beyond the *res judicata* effects of affirmative rulings on forum-authority, what if the initial court decides that it lacks jurisdiction or failed to give notice and so dismisses? That is, can a court, which is admittedly without authority to enter a valid judgment, make any rulings that have preclusive effect? Yes, there exists a doctrine of jurisdiction to determine no jurisdiction.⁶³ Courts and scholars have elaborated this doctrine less thoroughly than the jurisdiction-to-determine-jurisdiction doctrine, and thus its reach remains more controversial.

A court should have authority to determine its lack of authority. The initial court's ruling that it lacks authority should prevent a second try that presents exactly the same issue. One argument for giving it at least this minimal preclusive effect is that giving it no preclusive effect might raise the constitutional problem associated with advisory opinions.⁶⁴ More to the point, common sense supports preclusion on the threshold issue, in order to prevent the plaintiff from suing repetitively. So, for such limited purpose, the prior judgment is a valid one.

action, and so does not apply on a motion for relief from judgment, which is technically a continuation of the initial action. Jurisdiction to determine jurisdiction, however, does apply to preclude a validity attack by such a motion, as well as by the other methods for relief from judgment. Third, issue preclusion usually does not work to bind the party prevailing on the issue. Jurisdiction to determine jurisdiction will preclude the successful plaintiff if the unsuccessful defendant would be precluded on the jurisdiction or notice issue. Fourth, issue preclusion applies only to issues actually litigated and determined. Jurisdiction to determine jurisdiction sometimes applies to issues of subject-matter jurisdiction that were not litigated at all, and even against a defaulting party. Fifth, and most importantly, special policies and concerns are at work with respect to the jurisdiction and notice defenses, so the law needs to develop special rules and exceptions for jurisdiction to determine jurisdiction.

⁶²See *Harper Macleod Solicitors v. Keaty & Keaty*, 260 F.3d 389, 396-98 (5th Cir. 2001).

On the governing law for ordinary *res judicata*, see *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001); Patrick Woolley, *The Sources of Federal Preclusion Law After Semtek*, 72 U. CIN. L. REV. 527 (2003).

⁶³See generally CLERMONT, *supra* note 45, § 4.4(B)(3).

⁶⁴See Michael J. Edney, Comment, *Preclusive Abstention: Issue Preclusion and Jurisdictional Dismissals After Ruhrgas*, 68 U. CHI. L. REV. 193, 212-13 (2001) (addressing the preclusive effect of a federal court's dismissal for lack of jurisdiction).

Naturally, there should be limits to the res judicata effects.⁶⁵ After all, the court is supposed to be deciding only its jurisdiction to determine jurisdiction.⁶⁶ The dismissal of the initial action on a jurisdictional defense does not generate a bar to a second action in an appropriate court.⁶⁷ Indeed, the initial court's negative ruling on the jurisdictional issue should not have normal issue-preclusive effects in a later action, and so should not preclude an issue on the merits of the same or any other claim.⁶⁸ For such purposes, the prior judgment is an invalid one. Many good reasons support such limits, including the notions that limited jurisdiction should yield limited effects⁶⁹ and that the truncated procedure for deciding jurisdiction counsels against carrying jurisdictional determinations over to affect the merits.⁷⁰

The driving idea is that because the prior court lacked jurisdiction, it should be able to preclude little more than is absolutely necessary. Therefore, the basic rule is that the preclusive effect of jurisdiction to determine no jurisdiction reaches no further than the precise issue of jurisdiction itself.⁷¹ It will defeat jurisdiction in any attempt to sue again in a second court where the same jurisdictional issue arises,⁷² even when one court is state and the other federal.⁷³

⁶⁵See *id.* at 206-22.

⁶⁶See Idleman, *supra* note 21, at 57-63.

⁶⁷See *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866).

⁶⁸See *Anusbigian v. Trugreen/Chemlawn, Inc.*, 72 F.3d 1253, 1257 (6th Cir. 1996) (“Thus, contrary to the plaintiff’s fear, expressed in his brief, that he might be foreclosed from seeking damages in state court under the doctrines of res judicata or ‘law of the case,’ the remand order forecloses nothing except further litigation of his claim in federal court.”); *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994) (“although Ritchie’s clients were barred (after Judge Jarvis’s ruling) from relitigating whether their motion to quash could be heard before the IRS brought an enforcement action, Judge Hull was not bound by any factual findings made by Judge Jarvis for the limited purpose of considering the jurisdictional challenge”); *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956, 962 (7th Cir. 1982) (“Armen-Berry can sue By-Prod and Schiff under Article 14 of the Illinois Criminal Code in an Illinois court, and that court will not be bound by our reading of the Illinois law of punitive damages.”). *But see infra* note 91 and accompanying text.

⁶⁹See Edney, *supra* note 64, at 206-14.

⁷⁰See *id.* at 220-22.

⁷¹See Idleman, *supra* note 21, at 29; Edney, *supra* note 64, at 217-18. It is true that 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4436, at 154 (2d ed. 2002), sounds more expansive: “Although a dismissal for lack of jurisdiction does not bar a second action as a matter of claim preclusion, it does preclude relitigation of the issues determined in ruling on the jurisdiction question.” But in fact the specific discussion and the cases cited conform to the idea that preclusion extends only to “the same issue of jurisdiction.” *Id.* at 150 n.3, 168. *But see id.* at 158 n.16.

⁷²See, e.g., *Coors Brewing Co. v. Méndez-Torres*, 562 F.3d 3, 8-9 (1st Cir. 2009), *abrogated on other grounds*, *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323 (2010); *Hill v. Potter*, 352 F.3d 1142, 1146-47 (7th Cir. 2003); *Bromwell v. Michigan Mut. Ins. Co.*, 115 F.3d 208, 212-13 (3d Cir. 1997); *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1191 (D.C. Cir. 1983).

⁷³See, e.g., *ASARCO, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 (5th Cir. 1990) (holding that “the Louisiana courts would be bound by our ruling that defendants had insufficient contacts

But a finding of no jurisdiction does not produce a generally valid judgment and so will not otherwise be binding in any other action.

Going beyond the basic, a determination of no jurisdiction probably should not provide nonmutual preclusion.⁷⁴ Nor should it work to establish, rather than defeat, the jurisdiction of the other court.⁷⁵ For example, a finding that a federal court lacks subject-matter jurisdiction because of the nonexistence of some fact critical to exclusive jurisdiction should not force a state court to accept jurisdiction. Even though this limitation on preclusion might lead to awkward situations,⁷⁶ an extension of binding effect to the unempowered federal court's dismissal appears unnecessary and hence improper. Additionally, against preclusion one could argue that the burden of proof for defeating jurisdiction is often lighter than the burden of proof for establishing jurisdiction, and issue preclusion does not apply when the burden increases.⁷⁷ This additional argument is not determinative, however, because the rules of jurisdiction to determine no jurisdiction can be specially tailored and need not conform to those of issue preclusion.⁷⁸

The jurisdiction-to-determine-no-jurisdiction doctrine is, however, not in all respects narrower than issue preclusion. The law's capability to shape this special preclusion doctrine can broaden it. For example, by virtue of jurisdiction to determine no jurisdiction, an unreviewable remand for lack of removal jurisdiction might preclude a subsequent federal action on the same cause,⁷⁹ even though an inability to obtain appellate review usually defeats issue preclusion.⁸⁰

3. Hypothetical Subject-Matter Jurisdiction

Finally arriving at the workings of *Ruhrgas*, we find that most of the work is already done. The unchallenged and undecided issue of subject-matter jurisdiction turns out to be entitled to the insulation from attack afforded by the

with Louisiana to satisfy the federal due process clause requisites for personal jurisdiction”); *Eaton v. Weaver Mfg. Co.*, 582 F.2d 1250, 1255 (10th Cir. 1978) (“We must agree that the merits of the issue of personal jurisdiction over Volkswagen South was decided by the unappealed state court judgments and that they bar relitigation of the jurisdictional issue in the instant cases.”).

⁷⁴See 18A WRIGHT ET AL., *supra* note 71, § 4436, at 156, 171.

⁷⁵See *R.G. Barry Corp. v. Mushroom Makers, Inc.*, 612 F.2d 651, 657 n.10 (2d Cir. 1979), *abrogated on other grounds*, *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010). *But see* *Roth v. McAllister Bros.*, 316 F.2d 143, 145 (2d Cir. 1963).

⁷⁶See Julie Fukes Stewart, Note, “*Litigation Is Not Ping-Pong, Except When It Is: Resolving the Westfall Act’s Circularity Problem*,” 95 CORNELL L. REV. 1021 (2010) (describing cases that bounce between removal and remand).

⁷⁷See RESTATEMENT (SECOND) OF JUDGMENTS § 28(4) (1982).

⁷⁸See *supra* note 61 and accompanying text.

⁷⁹See 18A WRIGHT ET AL., *supra* note 71, § 4436, at 155-56, 164.

⁸⁰See RESTATEMENT (SECOND) OF JUDGMENTS § 28(1) (1982).

jurisdiction-to-determine-jurisdiction doctrine, if the court acts as if subject-matter jurisdiction exists. A decided threshold defense turns out to be entitled to the preclusive effect afforded by the jurisdiction-to-determine-no-jurisdiction doctrine, if the court dismisses on that defense. Now, *Ruhrgas*'s resequencing allows the court to "hypothesize" the existence of subject-matter jurisdiction (including Article III justiciability) in order to dismiss on a threshold defense, even though someone has challenged subject-matter jurisdiction. As long as no other available ground for showing invalidity exists, such as lack of territorial jurisdiction or notice,⁸¹ and as long as something has not gone haywire, such as the prior court plainly lacking subject-matter jurisdiction or the prior judgment substantially infringing on the authority of another court or agency,⁸² this hypothetical jurisdiction will supply subject-matter jurisdiction to produce a valid judgment for the very limited purpose of jurisdiction to determine no jurisdiction.

Admittedly, not everything about *Ruhrgas* follows without a wisp of oddity. By combining two purposefully restricted doctrines—the jurisdiction-to-determine-jurisdiction doctrine and the jurisdiction-to-determine-no-jurisdiction doctrine—*Ruhrgas* expands them. Although it does not produce a generally valid and binding judgment, it produces a judgment that will defeat a second court's jurisdiction if the same jurisdictional issue arises there. That is to say, a judgment that decided that some facet of authority was lacking will have this preclusive effect—even though subject-matter jurisdiction might have been lacking too. That is odd. Yet that oddity was precisely the intended effect of *Ruhrgas*'s blessing of hypothetical jurisdiction.

Moreover, the resulting doctrine is broader than the name "jurisdiction to determine no *jurisdiction*" implies. It extends beyond jurisdiction to quasi-jurisdictional decisions and other dismissals for lack of authority, including on venue and forum non conveniens grounds.⁸³ For example, if a court faces defenses of lack of subject-matter jurisdiction and of improper venue, it can skip over the former to give a decision that the venue was wrong, which will be binding on that narrow point thanks to hypothetical jurisdiction. *Ruhrgas* thereby yields a judgment valid for the very limited purpose of defeating jurisdiction, or authority more generally, in any attempt to sue again in a court where the same jurisdictional or authority issue arises.

One could counterargue that *Ruhrgas*'s holding does not strictly require hypothetical jurisdiction. The idea would be that all the *Ruhrgas* Court did was allow dismissal for personal jurisdiction, thus getting the case out of the federal

⁸¹See *supra* text accompanying note 45 (explaining that assumed-jurisdiction preclusion does not extend to territorial jurisdiction or notice).

⁸²See *supra* text accompanying note 60 (explaining that assumed-jurisdiction preclusion does not extend to every exercise of subject-matter jurisdiction).

⁸³See 18A WRIGHT ET AL., *supra* note 71, § 4436, at 171-79.

court but not necessarily giving the personal jurisdiction decision any binding effect.⁸⁴ Yet, no one takes that position.⁸⁵ The preclusion of hypothetical jurisdiction is necessary because otherwise the judgment will mean almost nothing: as Justice Ginsburg declared during oral argument, “The Federal court would be accomplishing nothing [if it did not] bind the State court.”⁸⁶ Additionally, there is the argument that preclusion on the threshold issue is required practically to prevent the plaintiff from suing repetitively. Finally, the system does not want to discourage the defendant from putting an array of threshold defenses before the court, which can then decide the optimal course of proceeding.

Those wary of overbroad preclusion do counterargue that preclusion at the least should not broaden from intrasystem necessity to intersystem bindingness, so that the plaintiff who cannot sue again in the federal court should be able to sue without preclusion in state court.⁸⁷ The rejoinder here is that the parties and the Justices on oral argument in *Ruhrgas* certainly assumed that intersystem preclusion was at stake.⁸⁸ The Court clearly envisaged intersystem preclusion, just as Justice Ginsburg suggested in her opinion for the unanimous Court:

⁸⁴Bear in mind that a valid judgment—one that can survive an attack for relief from judgment on fundamental grounds such as lack of jurisdiction or notice—enjoys normal res judicata effects. Thus, after determination of a forum-authority defense by a valid judgment, the normal rules of res judicata apply. For example, if the question of a party’s domicile is actually litigated and determined to uphold jurisdiction, and if that question of domicile arises as part of the merits of another claim, the prior finding could have issue-preclusive effect. For a quite different example, if a defendant loses a post-judgment attack made on the ground of inadequate notice, that loss will preclude further attacks on that ground, under the normal doctrine of issue preclusion. *See, e.g.,* *Arecibo Radio Corp. v. Puerto Rico*, 825 F.2d 589 (1st Cir. 1987). Therefore, if a federal court bypassed all threshold issues to dismiss for lack of venue, and a collateral attack on the judgment later failed because the second court found that the first court had jurisdiction and gave notice, the venue determination would be issue preclusive—without resort to the jurisdiction-to-determine-jurisdiction doctrine, the jurisdiction-to-determine-no-jurisdiction doctrine, or hypothetical jurisdiction discussed herein.

⁸⁵Even the earliest paper, which coined the term “hypothetical jurisdiction,” concluded that the resulting judgment must have res judicata effect. *See* Comment, *Assuming Jurisdiction Arguendo: The Rationale and Limits of Hypothetical Jurisdiction*, 127 U. PA. L. REV. 712, 730 n.110 (1979).

⁸⁶Transcript of Oral Argument at 9, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) (No. 98-470); *see supra* text accompanying note 64.

⁸⁷*See* Ely Todd Chayet, Comment, *Hypothetical Jurisdiction and Interjurisdictional Preclusion: A “Comity” of Errors*, 28 PEPP. L. REV. 75, 99-101 (2000) (suggesting that a federal decision based on hypothetical jurisdiction should not preclude state courts); Edney, *supra* note 64, at 218, 222 (same). Their argument is that there be no preclusion in state court, not merely that there be no preclusion if the state court were to find on collateral attack that federal subject-matter was lacking. *See id.* at 215 n.116.

⁸⁸Transcript of Oral Argument at 4, 8-9, 13, 30-31, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) (No. 98-470).

If a federal court dismisses a removed case for want of personal jurisdiction, that determination may preclude the parties from relitigating the very same personal jurisdiction issue in state court. See *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 524-527 (1931) (personal jurisdiction ruling has issue-preclusive effect).⁸⁹

Moreover, intersystem preclusion is implicit in *Ruhrgas's* holding, because allowing the Texas state court to reconsider either federal subject-matter jurisdiction or the federal courts' decision on personal jurisdiction would undercut the Court's decision. Reconsideration of subject-matter jurisdiction would forfeit the effort saved in skipping a tough question, and the reconsideration would come in a state court distant from and unfamiliar with the issue's intricacies. The state's reconsideration of personal jurisdiction would directly disregard the federal court's determination. Accordingly, under the federal *res judicata* law applicable to a federal judgment, the federal judgment in *Ruhrgas's* favor would preclude later suit in a Texas state court for lack of personal jurisdiction.⁹⁰

The counterarguments will not prevail. In fact, the danger is that courts will give too much preclusive effect.⁹¹ That danger will only grow in the light of Justice Ginsburg's dicta:

Issue preclusion in subsequent state-court litigation, however, may also attend a federal court's subject-matter determination. *Ruhrgas* hypothesizes, for example, a defendant who removes on diversity grounds a state-court suit seeking \$50,000 in compensatory and \$1 million in punitive damages for breach of contract. . . . If the district court determines that state law does not allow punitive damages for breach of contract and therefore remands the removed action for failure to satisfy the amount in controversy, . . . the federal court's conclusion will travel back with the case. Assuming a fair airing of the issue in federal court, that court's ruling on permissible state-law damages may bind the parties in state court, although it will set no precedent otherwise governing state-court adjudications. See *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940) (“[Federal courts’] determinations of [whether they have jurisdiction to entertain a case] may not be assailed collaterally.”); Restatement (Second) of Judgments § 12, p. 115 (1980)

⁸⁹*Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999).

⁹⁰See 18A WRIGHT ET AL., *supra* note 71, § 4436, at 168 & n.33; Idleman, *supra* note 21, at 29; David L. Shapiro, *Justice Ginsburg's First Decade: Some Thoughts About Her Contributions in the Fields of Procedure and Jurisdiction*, 104 COLUM. L. REV. 21, 30 (2004).

⁹¹See, e.g., *Matosantos Commercial Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1206 (10th Cir. 2001) (holding that an issue decided in a personal jurisdiction dismissal—“whether Applebee's assumed or represented that it would assume Casual Dining's purchase agreement with Matosantos”—was preclusive on the merits in a second suit).

(“When a court has rendered a judgment in a contested action, the judgment [ordinarily] precludes the parties from litigating the question of the court’s subject matter jurisdiction in subsequent litigation.”).⁹²

But Justice Ginsburg had just swallowed this example whole, when offered it by Charles Alan Wright during his oral argument for the petitioner.⁹³ The support she offers is completely irrelevant, as *Chicot* and the *Restatement* deal only with jurisdiction to determine jurisdiction cutting off collateral attack and not with collateral estoppel. Not surprisingly, then, her result, even if hedged, is wrong.⁹⁴

No reason exists to give decisions based on hypothetical jurisdiction more preclusive effect than what is appropriate under jurisdiction to determine no jurisdiction.⁹⁵ Again, the many good reasons for strictly limiting *res judicata* effects include the idea that limited jurisdiction should yield limited effects, especially when the court has skipped over decision on subject-matter jurisdiction. The truncated procedure for deciding forum-authority issues counsels against carrying such determinations over to affect the merits. Therefore, the preclusive effect in this context should work only to defeat any attempt to resue in a second court where the same authority issue arises, thus not extending beyond the precise issue of authority that the first court decided.

4. Resequenceable Grounds

The question remains of which grounds can leapfrog ahead of subject-matter jurisdiction. Resequencing even of the merits, although presumably without the interplay of hypothetical jurisdiction, had become popular in the lower courts by the 1990s.⁹⁶ That movement generated the reaction that was the *Steel Co.* case.⁹⁷ But a certain amount of resequencing had in fact been popular even in Supreme Court,⁹⁸ as *Steel Co.* acknowledged.⁹⁹ After *Steel Co.*, the

⁹²Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585-86 (1999).

⁹³Transcript of Oral Argument at 8-9, Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) (No. 98-470).

⁹⁴See *supra* note 68 (collecting cases); Idleman, *supra* note 21, at 29-30 (arguing also that Ginsburg’s example invokes law of the case rather than *res judicata*); Edney, *supra* note 64, at 201-02.

⁹⁵See *supra* text accompanying notes 65-78.

⁹⁶See, e.g., United States v. Eyer, 113 F.3d 470, 474 (3d Cir. 1997) (calling hypothetical jurisdiction to reach the merits a “settled principle”).

⁹⁷See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93-94 (1998).

⁹⁸See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612 (1997) (treating class certification as resequeceable); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66-67 (1997) (mootness); *Ellis v. Dyson*, 421 U.S. 426 (1975) (abstention), *discussed in* Idleman, *supra* note 21, at 91 & n.512; *Moor v. County of Alameda*, 411 U.S. 693 (1973) (discretionary supplemental jurisdiction); *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74 (1970) (exhaustion).

⁹⁹See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 100 n.3 (1998).

Supreme Court expanded the list of resequenceable grounds.¹⁰⁰ Meanwhile, the lower courts resumed expanding that list too, to reach many relatively low-level inquiries.¹⁰¹

“There is an array of non-merits questions” that federal courts may resequence today, as the D.C. Circuit summed it up nicely once again.¹⁰² In *Tenet v. Doe*, the Supreme Court tried to generalize when it allowed resequencing of a ground “designed not merely to defeat the asserted claims, but to preclude judicial inquiry.”¹⁰³

Then in *Sinochem*, the Court more clearly drew the outer line as lying between “nonmerits” and “merits” grounds:

Dismissal short of reaching the merits means that the court will not “proceed at all” to an adjudication of the cause. . . . The principle underlying these decisions was well stated by the Seventh Circuit: “[J]urisdiction is vital only if the court proposes to issue a judgment on the merits.”¹⁰⁴

Thus, “when considerations of convenience, fairness, and judicial economy so warrant,”¹⁰⁵ a court can decide “a threshold, nonmerits issue”¹⁰⁶ like forum non conveniens before subject-matter jurisdiction. But then, almost as if to demonstrate the lack of clarity of the Court’s chosen dividing line, Justice Ginsburg qualified: “We therefore need not decide whether a court conditioning a forum non conveniens dismissal on the waiver of jurisdictional or limitations defenses in the foreign forum must first determine its own authority to adjudicate the case.”¹⁰⁷ What *Sinochem* ultimately means, then, is that there is still plenty of room for arguing about the extent of the list of resequenceable grounds.

¹⁰⁰*Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422 (2007) (dictum) (treating forum non conveniens as resequenceable); *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (third-party standing); *Tenet v. Doe*, 544 U.S. 1 (2005) (*Totten* doctrine, which prohibits actions against the government based on covert espionage agreements); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (prudential standing); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (class certification, viewed as a matter of statutory standing); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) (personal jurisdiction).

¹⁰¹*See, e.g., In re LimitNone, LLC*, 551 F.3d 572 (7th Cir. 2008) (transfer of venue); *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998) (forum non conveniens).

¹⁰²*Galvan v. Federal Prison Indus., Inc.*, 199 F.3d 461, 463 (D.C. Cir. 1999) (treating federal sovereign immunity as resequenceable).

¹⁰³544 U.S. 1, 6 n.4 (2005) (dismissing on the basis of a rule prohibiting actions against the government based on covert espionage agreements).

¹⁰⁴*Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006)).

¹⁰⁵*Id.* at 432.

¹⁰⁶*Id.* at 433.

¹⁰⁷*Id.* at 435.

Matters of sovereign immunity generate hot dispute in this respect.¹⁰⁸ Does the act-of-state defense come within the fold of threshold, nonmerits defenses?¹⁰⁹ Is qualified immunity a resequenceable matter?¹¹⁰ One is tempted to say at least that defenses like *res judicata* or the statute of limitations are too much on the merits to resequence. But then one confronts the argument that even the merits should be resequenceable if the merits and jurisdiction intertwine.¹¹¹ Where is the line, if one exists at all?

One might think that no line will ever hold, that there is no logical stopping point in the expansion of the list of resequenceable grounds since the *Steel Co.* decision. But if the list were to expand into the merits, the *Steel Co.* rule would promptly unravel. We would be back where we started: a court could decide issues in any sequence, although the resulting judgment would be exposed to the normal avenues for relief from judgment, including collateral attack on subject-matter jurisdiction grounds. The nonbypassability rule would disappear, and hypothetical jurisdiction would no longer operate.¹¹²

¹⁰⁸See Idleman, *supra* note 21, at 81-89 (discussing both the Eleventh Amendment and federal sovereign immunity); *cf. id.* at 95-97 (discussing bypassability); Hien Ngoc Nguyen, Comment, *Under Construction: Fairness, Waiver, and Hypothetical Eleventh Amendment Jurisdiction*, 93 CAL. L. REV. 587 (2005) (same). The defense of domestic sovereign immunity is tricky because some see it as jurisdictional, while others see it as quasi-judicial, in various contexts. But as I shall argue, the key question is whether a decision on such a ground will bar a new action, not some other question like whether the defendant can get relief from a default judgment on such a ground. Compare *Galvan v. Federal Prison Indus., Inc.*, 199 F.3d 461, 463 (D.C. Cir. 1999) (treating federal sovereign immunity as resequenceable), with *Calderon v. Ashmus*, 523 U.S. 740 (1998) (suggesting that subject matter-jurisdiction must come before Eleventh Amendment).

Foreign sovereign immunity may be different, because more people see it in more contexts as partly a matter of subject-matter jurisdiction. See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 66-72 (4th ed. 2007); *cf. Kao Hwa Shipping Co. v. China Steel Corp.*, 816 F. Supp. 910 (S.D.N.Y. 1993) (allowing relief from default judgment on the ground of foreign sovereign immunity). Thus, it could be nonbypassable and yet not resequenceable.

¹⁰⁹See Rutledge, *supra* note 4, at 44-46 (arguing, against precedent, that the law should change to bring this defense into the resequenceable group, because not doing so gives settlement leverage to plaintiffs, increases judicial investment of resources, and retards development of legal glosses on the defense).

¹¹⁰See ARTHUR D. HELLMAN, LAUREN K. ROBEL & DAVID R. STRAS, *FEDERAL COURTS* 540-41 (2d ed. 2009) (posing the question).

¹¹¹See *Long Term Care Partners, LLC v. United States.*, 516 F.3d 225, 232-33 (4th Cir. 2008); Joshua Schwartz, Note, *Limiting Steel Co.: Recapturing a Broader "Arising Under" Jurisdictional Question*, 104 COLUM. L. REV. 2255 (2004) (arguing that dismissal for lack of a federal cause of action should be deemed quasi-judicial and hence resequenceable).

¹¹²See *supra* note 84 (explaining how validity works in the absence of hypothetical jurisdiction). Of course, the system could alternatively take the radical step of removing subject-matter jurisdiction as a requirement for a valid judgment. See Moore, *supra* note 60; Note, *supra* note 48.

In other words, if *Steel Co.* calls for an ever-expanding list, then *Steel Co.* carries the seeds of its own destruction,¹¹³ much like the fate of other sequencing rules.¹¹⁴ Therefore, a line must be drawn: as long as the Court wants to allow federal courts to skip subject-matter jurisdiction purposefully for easier and surer decision with binding effect on certain threshold matters, it must not extend the permission to decisions on the merits.

True, *Chicot* stands for the proposition that a court without subject-matter jurisdiction can give a binding decision on the merits, as long as the court thought it had subject-matter jurisdiction or the parties failed to raise subject-matter jurisdiction.¹¹⁵ But, as *Steel Co.* necessarily said, a court cannot purposefully skip subject-matter jurisdiction to dismiss on the merits. In that sense, the case's nonbypassability rule represents a limit on *Chicot*, just as it was the price for approving hypothetical jurisdiction.¹¹⁶ Moreover, *Steel Co.* was a rejection of the alternative route of allowing the court to dismiss on the merits but giving the decision no preclusive effect at all.¹¹⁷ In effect, *Steel Co.*, as elaborated by *Ruhrgas*, was a compromise between those two views: making hypothetical jurisdiction too widely available in support of preclusion after the judge discretionarily sequences the defenses *or* prohibiting hypothetical jurisdiction altogether.

Therein lies the key to understanding resequenceability. The compromise allows hypothetical jurisdiction only for dismissal on nonmerits grounds, giving that dismissal the strictly circumscribed preclusive effect prescribed for the jurisdiction-to-determine-no-jurisdiction doctrine. To get rid of the case at the threshold in a way that precludes only the threshold issue, so allowing the plaintiff to correct the threshold defect in a second suit, is desirable. By contrast, there is no reason to allow exercise of hypothetical jurisdiction in a way that precludes the merits, especially in the possible absence of subject-matter jurisdiction. Moreover,

¹¹³See Friedenthal, *supra* note 28, at 270-75; Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1614, 1631 (2003) (arguing that “there is no hard conceptual difference between jurisdiction and the merits” and “when faced with the truly extraordinary case, the lower federal court judge knows that he or she can rule on the merits in the absence of jurisdiction”); Viavant, *supra* note 40, at 571-72; cf. Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971 (2009) (detailing other difficulties of the “jurisdiction” term); Jay Tidmarsh, *Resolving Cases “On the Merits,”* 87 DENV. U. L. REV. 407, 409-13 (2010) (detailing other difficulties of the “merits” term).

¹¹⁴See, e.g., *Pearson v. Callahan*, 129 S. Ct. 808 (2009) (undercutting the former sequencing rule of *Saucier v. Katz*, 533 U.S. 194 (2001) (treating qualified immunity)).

¹¹⁵See *supra* text accompanying notes 44 & 59 (explaining the *Chicot* doctrine).

¹¹⁶See *supra* text accompanying notes 44-50 (explaining the rationale of the nonbypassability list).

¹¹⁷See *supra* text accompanying notes 84-86 (explaining the unsatisfactoriness of this route).

it would not be feasible to give a strictly circumscribed preclusive effect to a decision on the merits, because if it gets any preclusive effect it will kill the cause of action.

The rule that emerges is not a compromise made only for the sake of compromise. It is a rule that makes good policy sense. It gives the judge a zone of freedom of action at the threshold. Yet it tells the judge that to dispose of a claim in a preclusive way on the merits, the judge has first to make sure that the jurisdictional ducks are in a row. Otherwise, hypothetical subject-matter jurisdiction will be unavailable to insulate the judgment from later attack.

With the contours of that *Steel Co.-Ruhrgas* compromise finally understood, the decisional grounds for which a court may purposefully skip over a challenge to subject-matter jurisdiction become apparent. The length of the list should not turn on some abstract notion like “essentiality” to the judicial process.¹¹⁸ Instead, the law should draw the line in practical terms, by looking to when a court possibly lacking subject-matter jurisdiction should be able to give a binding decision on a defense. It should not be able to act when the effect is to kill the cause of action, but only when the plaintiff has a chance to avoid or correct the defect. Well, the law already specifies when a plaintiff normally can start over after a contested dismissal. Accordingly, resequenceability should look to the line that res judicata already draws, with fair clarity, when it declines to create a bar to reassertion of the claim after an adjudication “not on the merits.”¹¹⁹ Thus, the list of resequenceable items should include *only those defenses that would result in dismissals not on the merits in the claim-preclusive sense.*¹²⁰

¹¹⁸But see Idleman, *supra* note 21, at 12-13.

¹¹⁹ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 98-99 (2001):

Certain dismissals not on the merits remain exceptions to the rule of bar, namely: (1) dismissals for lack of subject-matter jurisdiction or territorial jurisdiction, improper venue, inadequate notice, or nonjoinder or misjoinder of parties; (2) most dismissals for prematurity of suit or failure to satisfy a precondition to suit; and (3) most voluntary dismissals. Moreover, unless prohibited by statute or rule, the court in the first action can specify that its dismissal is not to act as a bar; and the court in the second action will defer to that specification.

Other dismissals and judgments, which are perhaps not in any real sense on the merits but which were preceded by an ample opportunity for plaintiff to litigate the claim, have of late come within the rule of bar, at least in the view of many courts and legislatures. Examples include: (1) a dismissal for failure to state a claim; (2) a summary judgment, judgment on partial findings, or judgment as a matter of law and other decisions squarely on the merits; and (3) a dismissal for failure to prosecute or to obey a court order or rule, even though it is not in any real sense on the merits.

¹²⁰A dismissal for failure to prosecute or to obey a court order or rule might have presented a special problem for this formulation, had not the Court already solved it in *Willy v. Coastal Corp.*, 503 U.S. 131 (1992) (upholding imposition of FED. R. CIV. P. 11 sanctions even in a case dismissed for lack of subject-matter jurisdiction). Thus, a court can proceed directly to a

On the one hand, the settled *Steel Co.-Ruhrgas* line of precedent—which lists justiciability, jurisdiction, abstention, exhaustion, class certification, and venue as resequenceable grounds—conforms to this test. Dismissals on such grounds do not create a bar to a new action when the plaintiff avoids or corrects the defect.¹²¹

On the other hand, the disputed matters of sovereign immunity, act of state, and qualified immunity should not be resequenceable: to bypass subject-matter jurisdiction and give a preclusive decision on such a defense kills the cause of action on the merits, as opposed to merely deciding some threshold issue that normally does not create a bar.¹²² Likewise, the intuition that the other defenses are not resequenceable seems sound: *res judicata*¹²³ and even the statute of limitations¹²⁴ are sufficiently on the merits in a claim-preclusive sense. Finally, the jurisdiction/merits divider persists in the law of claim preclusion: a dismissal for lack of jurisdiction is not treated as being on the merits, no matter how intertwined with the merits it might be, while a dismissal for failure to state a claim is now treated as being on the merits.¹²⁵ Although there may be very good policy reasons to reach some of these issues early,¹²⁶ there is no reason to extend hypothetical subject-matter jurisdiction to them. An important insight is that one should not compose the list with the policies of efficient sequencing in mind, but instead with a focus on when we wish to extend a preclusive effect to the decided defense even in the possible absence of federal subject-matter jurisdiction.

In sum, and as suggested at the outset, the list of resequenceable threshold matters is not the same as, and is in fact much longer than, the list of fundamental matters that a federal court cannot bypass. With the logic behind resequencing exposed, I am much more comfortable in specifying the two lists:

disciplinary dismissal, which then will have normal *res judicata* effects because subject-matter jurisdiction for discipline exists.

¹²¹See RESTATEMENT (SECOND) OF JUDGMENTS § 20 (1982).

¹²²See *id.* § 19.

¹²³See *Hartmann v. Time, Inc.*, 166 F.2d 127, 138-40 (3d Cir. 1947); *Bronstein v. Kalcheim*, 467 N.E.2d 979 (Ill. App. 1984).

¹²⁴See *CASAD & CLERMONT*, *supra* note 119, at 93-96.

¹²⁵See *supra* note 51 (discussing the jurisdiction/merits divider in the similar, but not necessarily identical, context of validity).

¹²⁶See, e.g., *supra* note 109 (discussing act of state).

<u>Nonbypassable Defenses</u> <i>i.e.</i> , defenses the court cannot skip over to dismiss on the merits	<u>Resequenceable Defenses</u> <i>i.e.</i> , defenses on which the court can dismiss without first deciding nonbypassable defenses
Article III justiciability; subject-matter jurisdiction	other justiciability and jurisdiction; abstention; exhaustion; class certification; venue; anything else not on the merits in the claim-preclusive sense

5. Discretion to Resequence

Once the court decides that an asserted defense is resequeable, then the court must decide whether to decide it first. Normally, the court will still decide subject-matter jurisdiction first in light of *Steel Co.*, but *Ruhrgas* frees the court to decide the other defense if that path is easier or surer or if that path serves other institutional interests.¹²⁷ But that discretion is not my concern in this Part. Here I am interested in a rule that forbids sequencing in the court's discretion, and incidentally how uncertainty about the scope of the rule might affect the exercise of that discretion.

C. Summary

Today, upon a challenge to Article III justiciability or subject-matter jurisdiction, a federal court cannot avoid the challenge by dismissing on the merits, but the court may invoke hypothetical jurisdiction to dismiss on any nonmerits defense with preclusive effect as to that defense. In other words, the court should normally decide defenses of subject-matter jurisdiction at the outset of the case. Such a fundamental matters is nonbypassable. But if the defendant challenges the existence of some other threshold jurisdiction-like requirement, the court has discretion to act as if it has subject-matter jurisdiction and dismiss on the basis of that other defect. Thus, relying on hypothetical jurisdiction over the subject matter, the court can resequence to render a binding determination on the lack of, say, personal jurisdiction or forum non conveniens.

Nonbypassability has obvious sequencing implications for judicial decisionmaking, because courts must decide in a certain order under that regime. It is indeed the law's foremost limitation on the courts' power to sequence. But upon close examination, the nonbypassability rule proves to be quite narrow, and

¹²⁷See Idleman, *supra* note 21, at 14-20.

the exception of resequenceability quite broad. Thus, this foremost sequencing limitation turns out not to be a major constraint, except perhaps by its lack of clarity.

To the extent that courts are uncertain of the reach of the nonbypassability rule, but wish to avoid reversal, they will follow it even when it does not apply. Likewise, courts might be uncertain as to the list of resequenceable grounds or as to the workings of hypothetical jurisdiction. The result will be an unwillingness to avoid jurisdictional questions.

Steel Co.-Ruhrgas is a good doctrine, when properly limited. To the extent that confusion creates a broader constraint, the constraint is undesirable. The above-given attention to the precise meaning of the doctrine worked well to reduce the current fog. Ideally, the doctrine should prove, in future actual practice, to be a fairly minimal constraint on courts' sequencing power.

III. INTRASUIT PRECLUSION

A. Jury-Judge Sequencing

The middle of the last century saw a series of famous cases by which the Supreme Court reconciled the merger of law and equity with the Seventh Amendment, and through which the Court greatly expanded the scope of the jury right.¹²⁸ In the process, the Court created a sequencing rule under which a federal court¹²⁹ must give first to the jury a factual issue common to the merits of a law claim and an equity claim joined in the same case. Given all those conditions, to say nothing of the rarity of trial,¹³⁰ this rule has only occasional application.

1. Cases

¹²⁸See generally RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 1495-527 (10th ed. 2010); 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2302.1 (3d ed. 2008).

¹²⁹Although the Supreme Court has held most of the rights in the Bill of Rights to be fundamental enough for the Fourteenth Amendment to guarantee against invasion by the states, the Seventh Amendment right to a civil jury has not been one of those. See, e.g., *Walker v. Sauvinet*, 92 U.S. 90 (1876); *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La.), *aff'd mem. sub nom.* *Mayes v. Ellis*, 409 U.S. 943 (1972), *Davis v. Edwards*, 409 U.S. 1098 (1973). That is to say, the Seventh Amendment applies to actions in the federal courts, but not to state-court actions. *But cf.* *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3035 n.13 (2010) (throwing the old cases into doubt and opening the door slightly to incorporating the Seventh Amendment). Moreover, the Supreme Court's interpretation of the Seventh Amendment has had little persuasive influence on state courts. See FIELD ET AL., *supra* note 128, at 1510-11.

¹³⁰See Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1956-61 (2009) (showing that the trial rate has dropped nearly to 1% of filed federal cases).

*Beacon Theatres*¹³¹ was the first of those cases. It involved a dispute between movie theaters over the right to show movies exclusively in the competitive area, for a time period specified in a contractual “clearance.” In essence, Fox sued Beacon in equity for an injunction, and Beacon counterclaimed at law for treble damages under the antitrust laws. The two claims had a common issue concerning whether the Fox and Beacon theaters were in competition even though more than ten miles apart. Beacon wanted a jury trial. As a historical matter, an equity court had discretion whether to proceed in these circumstances or to defer to the later-commenced law action on the thought that the legal remedy was adequate.¹³² Accordingly, the district court chose to decide the equity claim first, without a jury, and the court of appeals assented. The Supreme Court reversed.

First, the Court’s all-important premise¹³³ was that whichever determination on the common issue came first—be it by judge or by jury—would preclude the second determination:

Thus the effect of the action of the District Court could be, as the Court of Appeals believed, “to limit the petitioner’s opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit,” for determination of the issue of clearances by the judge might “operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim.”¹³⁴

The Court in fact cited nothing for its res judicata point. But as to preclusion between law and equity, the Court was right, as to now¹³⁵ and 1791.¹³⁶ Because the old courts administered law and equity in separate suits, they applied preclusion between them according to the ordinary rules of res judicata.

¹³¹*Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

¹³²*See American Life Ins. Co. v. Stewart*, 300 U.S. 203 (1937); FIELD ET AL., *supra* note 128, at 1493-95.

¹³³*See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 334 (1979); David L. Shapiro & Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442, 446 (1971).

¹³⁴*Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959). The Supreme Court was quoting the court of appeals, which actually had said: “Petitioner is correct in saying that if this issue be first tried and determined by the court in its proposed first trial the determination of that issue by the court will operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim.” *Beacon Theatres, Inc. v. Westover*, 252 F.2d 864, 874 (9th Cir. 1958). The court of appeals had cited *Bruckman v. Hollzer*, 152 F.2d 730, 732 (9th Cir. 1946), for this proposition, but nevertheless held that the district judge could discretionarily try the equitable claim first.

¹³⁵*See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 334 (1979); *Brady v. Daly*, 175 U.S. 148 (1899); RESTATEMENT OF JUDGMENTS § 68 cmt. j (1942).

¹³⁶*See Shapiro & Coquillette, supra* note 133, at 450-54.

Second, the Court reasoned that to circumvent preclusion, the trial judge could invoke his or her sequencing discretion. The judge should exercise such discretion in the light of current procedural realities—“not by precedents decided under discarded procedures, but in the light of the remedies now made available.”¹³⁷ In a merged system, the legal remedy, because it no longer required a separate action, had become an adequate remedy. Equity could await the trial of the common law claim. The judge could try the issue first to the jury without any disadvantage to the parties.

Third, the Court ruled that preclusion of a jury by a prior determination in the same suit would normally violate the Seventh Amendment.¹³⁸ Therefore, the judge now must proceed in the order of jury decision on the common issue coming first. Note that the Court did not fashion a general principle that the jury must go first on common issues. Instead, it ruled that a court cannot conduct a single suit in a way that would defeat the jury right. Accordingly, its holding applies only when intrasuit preclusion is actually in play.

The Court’s three-step reasoning is obscure for modern minds. It bears repeating that the Court saw its task as being to *preserve* the jury right in an altered procedural system. It thought that *res judicata* would apply in a single suit if, and only if, the parties would have brought separate suits in 1791: in those circumstances, an earlier jury determination would bind the judge, just as an earlier judge determination would bind the jury. The Court manipulated history, without disregarding it, by finding equity to have possessed discretion in the old days and merely directing how modern chancellors should exercise it. The Seventh Amendment, because it favored the jury trial right over the judge trial right, requires modern courts to use their new procedural discretion in a way to avoid that preclusion of the jury. However, the Court did hedge a bit:

If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial. . . . This long-standing principle of equity dictates that only under the most imperative

¹³⁷Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 507 (1959).

¹³⁸See *id.* at 511 (prohibiting that “the right to a jury trial of legal issues be lost through prior determination”).

circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.¹³⁹

These hesitations evaporated three years later when the Court, again by Justice Black, decided *Dairy Queen*.¹⁴⁰ There the plaintiff had joined equitable and legal claims for relief. The defendant wanted a jury trial. As a historical matter, an equity court had no discretion as to the common issues, because the plaintiff could have denied the defendant a jury right on them by suing initially in equity only.¹⁴¹ Accordingly, the district court denied the request for a jury, and the court of appeals assented. But again the Supreme Court reversed.

With a strong pro-jury bias, the Court simply lifted the holding of *Beacon Theatres* and applied it without regard to its context. The *Dairy Queen* Court said that “in a case such as this where there cannot even be a contention of such ‘imperative circumstances,’ *Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury.”¹⁴² It therefore closed:

We conclude therefore that the district judge erred in refusing to grant petitioner’s demand for a trial by jury on the factual issues related to the question of whether there has been a breach of contract. Since these issues are common with those upon which respondents’ claim to equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of respondents’ equitable claims.¹⁴³

With *Beacon Theatres* cut free of its moorings in reason, virtually no subsequent cases have found imperative circumstances to avoid applying its rule.¹⁴⁴ The rule applies without regard to historical restrictions or current circumstances. Even if the trial court dismisses the legal claim for relief joined by the plaintiff with an equitable claim for relief and if the court then tries the equitable claim without the jury requested by the plaintiff, the same rule applies:

¹³⁹*Id.* at 510-11 (footnotes omitted); see John C. McCoid, II, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1, 4 (1967).

¹⁴⁰*Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).

¹⁴¹See FIELD ET AL., *supra* note 128, at 1490; FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, *CIVIL PROCEDURE* 515-20 (5th ed. 2001).

¹⁴²*Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473 (1962).

¹⁴³*Id.* at 479.

¹⁴⁴See *Cabinet Vision v. Cabnetware*, 129 F.3d 595, 600 (Fed. Cir. 1997) (“Accordingly, whatever discretion exists to override a jury’s fact finding in such situations, this discretion is reviewed carefully.”); 9 WRIGHT & MILLER, *supra* note 128, § 2338, at 370 (concluding that it is “highly doubtful that there are any circumstances that would qualify”). *But see* *Western Geophysical Co. of Am. v. Bolt Assocs., Inc.*, 440 F.2d 765, 772 (2d Cir. 1971); *Holiday Inns of Am., Inc. v. Lussi*, 42 F.R.D. 27, 32 (N.D.N.Y. 1967).

when the appellate court finds the dismissal to have been in error, the trial court must retry the common issues to a jury first.¹⁴⁵

2. Consequences

As one consequence, today the strict sequencing rule is that *a federal court must, upon request for a jury, first try to the jury any issue common to joined legal and equitable claims for relief.*¹⁴⁶ The joinder could be by the plaintiff joining multiple claims for relief, or by the defendant asserting a defense or counterclaim that could in the old days have stood as a separate claim. As another consequence, the jury's decision will bind the judge on the common issue.¹⁴⁷

Where does this preclusion rule come from? It does not come from *res judicata*, which applies only between separate suits,¹⁴⁸ as all the hornbooks say.¹⁴⁹ It rests solely on the Seventh Amendment's historical approach:¹⁵⁰ because in

¹⁴⁵See *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551-54 (1990).

¹⁴⁶See *Shum v. Intel*, 499 F.3d 1272, 1276-79 (Fed. Cir. 2007); LARRY L. TEPLY & RALPH U. WHITTEN, *CIVIL PROCEDURE* 886-87 (3d ed. 2004); 9 WRIGHT & MILLER, *supra* note 128, § 2305, at 125 & n.21, § 2338, at 368 & n.10.

¹⁴⁷See *International Fin. Servs. Corp. v. Chromas Techs. Can., Inc.*, 356 F.3d 731, 735, 738 n.1 (7th Cir. 2004); *Todd v. Ortho Biotech, Inc.* 138 F.3d 733, 738 (8th Cir.) (“the jury's finding on an issue common to both claims is in any event conclusive”), *vacated on other grounds*, 525 U.S. 802 (1998); *Kolstad v. American Dental Ass'n*, 108 F.3d 1431 (D.C. Cir. 1997) (“As our sister circuits have uniformly held in cases involving allegations of intentional discrimination, the district court must therefore follow the jury's factual findings with respect to a plaintiff's legal claims when later ruling on claims for equitable relief.”), *on rehearing*, 139 F.3d 958 (D.C. Cir. 1998), *vacated on other grounds*, 527 U.S. 526 (1999); JAMES ET AL., *supra* note 141, at 528.

¹⁴⁸See RESTATEMENT (SECOND) OF JUDGMENTS ch. 1, at 1 (1982). FIELD ET AL., *supra* note 128, at 688, explains:

The doctrine of *res judicata* specifies certain binding effects, in subsequent litigation, of a previously rendered judgment. Generally speaking, then, *res judicata* can apply only when an attempt is made in a second action to foreclose relitigation of a matter already adjudicated in a previous action. *Res judicata* therefore has no application to an attempt in the original action at correcting error in the judgment, as by motion for a new trial or by appeal.

¹⁴⁹See CASAD & CLERMONT, *supra* note 119, at 7-8; JAMES ET AL., *supra* note 141, at 677; TEPLY & WHITTEN, *supra* note 146, at 944-45.

¹⁵⁰Such preclusion outside the traditional confines of *res judicata* is not unique. Another special kind of preclusion can apply within the same suit: jurisdiction to determine jurisdiction applies to preclude a direct attack on validity by a motion for relief from judgment. See, e.g., *Nemaizer v. Baker*, 793 F.2d 58, 64-66 (2d Cir. 1992) (involving FED. R. CIV. P. 60(b)). The special doctrine of jurisdiction to determine jurisdiction springs from sources different from those of claim and issue preclusion. See *supra* note 61 and accompanying text.

Other preclusion-related rules might stem from the Seventh Amendment. Some courts have posited that in a bifurcated trial, the second jury cannot reconsider the first jury's finding without violating the Re-examination Clause of the Seventh Amendment. See *Castano v.*

1791 the legal and equitable claims would have been separate suits, we should apply intrasuit preclusion between jury and judge in order to preserve the jury right as it was. Therefore, being an aspect of jury right, and not part of *res judicata*, this special kind of jury-judge preclusion has no broader application than factual issues common to joined legal and equitable claims.

Where does that sequencing rule come from? It follows from the premise of the Seventh Amendment's special preclusion law. Therefore, it too has no broader application than factual issues common to joined legal and equitable claims.

Of course, one could say that the jury precedents will come to apply without any regard to their reasoning, much as *Dairy Queen* extended *Beacon Theatres*. But that outcome is unlikely now that the jury mania of the 1960s has passed.¹⁵¹ *Beacon Theatres-Dairy Queen* was a product of its time, and now the Court would probably not adopt it as a matter of first impression. We accordingly need to excavate the Court's train of reasoning, and respect its inherent restraining force.

This restrained view of *Beacon Theatres-Dairy Queen* helps to explain the later *Parklane Hosiery*.¹⁵² In that case, the Supreme Court held that a prior equitable decree could preclude the defendant in a subsequent law action brought by a new plaintiff. On the one hand, this result is consistent with the law of *res judicata*, which allows equity-law preclusion.¹⁵³ It is indeed consistent with the views that *res judicata* adjusts to any procedural changes and that expanding *res judicata* can apply in new situations despite old procedural limitations. Just as merged procedure caused claim preclusion to extend to plaintiffs who sue on either the legal or the equitable part of a claim without the other part,¹⁵⁴ nonmutual collateral estoppel could leap the equity/law divide to defeat a jury right vis-à-vis a new plaintiff. On the other hand, the result is also consistent with the jury-judge sequencing rule. Because that rule rests on the Seventh Amendment's dictate in a single suit that the judge use existing sequencing power

American Tobacco Co., 84 F.3d 734, 751 (5th Cir. 1996); Lucas Watkins, *How States Can Protect Their Policies in Federal Class Actions*, 32 CAMPBELL L. REV. 285, 307-08 (2010); cf. 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1801, at 272-73 (3d ed. 2005) (discussing analogous partial-certification problem). *But see* Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. (forthcoming 2010) (manuscript at 5, 41-49), available at <http://ssrn.com/abstract=1578459>. These courts conclude that to protect the jury right in the second phase, the issues in the two phases need to be distinct and separable. *See* Cimino v. Raymark Indus., Inc., 151 F.3d 297, 320 (5th Cir. 1998).

¹⁵¹See FIELD ET AL., *supra* note 128, at 1525-27.

¹⁵²*Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

¹⁵³See *supra* note 135 and accompanying text.

¹⁵⁴See RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. i (1982).

to preserve the jury right, it has no application to the *Parklane* situation of separate lawsuits for which sequencing is not a possibility.¹⁵⁵ The Supreme Court could have invented a wholly new rule of res judicata that provided for no preclusion at the expense of the jury right in any setting whatsoever, but the pro-jury motivation to invent had waned.

Nevertheless, this view of *Beacon Theatres-Dairy Queen* is not only restrained but also subtle. Lower courts can misunderstand it and, at least within a single suit, think that the jury-judge sequencing rule applies more broadly than it should.

The prime example of confusion involves issues common to jurisdiction and the merits. Although there is no constitutional jury right on jurisdictional issues,¹⁵⁶ courts and commentators equivocate on whether a jury must first determine any common issue.¹⁵⁷ They are wrong to equivocate. *Beacon Theatres-Dairy Queen* applies only to issues common to joined legal and equitable claims, not to issues common to jurisdiction and the merits. The reason is that the preclusion premise of *Beacon Theatres-Dairy Queen* rested on preclusion between separate law and equity suits. Preclusion never extended to decisions on jurisdiction precluding later consideration of the merits in the same suit.¹⁵⁸ Because there would be no preclusion, there is no need to invert matters by a sequencing that would have the merits considered by a jury before the judge could decide the common issue involved in the dispute over jurisdiction. Therefore, the judge can decide jurisdiction at the outset, and the jury can decide anew the common issue at the regular trial.

B. Foreclosure

Concern about preclusion in violation of the Seventh Amendment generated *Beacon Theatres-Dairy Queen*. But as shown above, its sequencing rule

¹⁵⁵See *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551-54 (1990).

¹⁵⁶See Note, *Trial by Jury of Preliminary Jurisdictional Facts in Federal Courts*, 48 IOWA L. REV. 471 (1963) (arguing that jurisdiction is an issue collateral to the merits, and so no jury right exists); Steven Kessler, Note, *The Right to a Jury Trial for Jurisdictional Issues*, 6 CARDOZO L. REV. 149 (1984); cf. Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1771 (2003) (“the decision to label an issue ‘law’ or ‘fact’ is a functional one based on who should decide it under what standard, and is not based on the nature of the issue”).

¹⁵⁷See, e.g., *Friedman v. Wilson Freight Forwarding Co.*, 181 F. Supp. 327, 329 (W.D. Pa. 1960) (saying there is a jury right “where the jurisdictional question of joint venture is closely tied to the merits”); Note, *supra* note 156, at 480-81, 489; Kessler, *supra* note 156, at 165-66.

¹⁵⁸Some statutes expressly so provide. See ILL. COMP. STAT. ch. 735, § 5/2-301(b) (2005); TEX. R. CIV. P. 120a(2); cf. Clermont, *supra* note 17, at 990-91 (arguing additionally against preclusion because the standard of proof for jurisdiction is less demanding than the standard applicable to the merits).

does not extend beyond the narrow context of factual issues common to joined legal and equitable claims. The question now becomes whether other concerns about foreclosure later in the same suit have generated sequencing rules applicable in other contexts.

1. Res Judicata

Here the answer is fairly simple. No further sequencing rules arise from concerns about actual preclusion in the same suit. The reason is that there is no intrasuit res judicata (as opposed to some separate doctrine such as *Beacon Theatres-Dairy Queen*).¹⁵⁹

The cases conform to that view. Besides jurisdiction, judges must decide other preliminary matters that overlap matters destined later to go before the ultimate decisionmaker. For example, some evidential rulings involve issues common with the merits:

Consider the co-conspirator exception to the hearsay rule as it operates in a criminal conspiracy case. To establish that a hearsay exception applies the proponent of evidence must, by a preponderance of the evidence, show that the prerequisites for the exception have been established. . . . But if the substantive charge is conspiracy, that means that the court must in effect find that the defendant is guilty of conspiracy (by a preponderance of the evidence) before admitting this evidence which the jury must evaluate, along with all the other evidence, in determining whether defendant has been proved guilty of conspiracy beyond a reasonable doubt. The judge does not, of course, tell the jury that she has already concluded that defendant is guilty, albeit only by a preponderance of the evidence, and defendant's right to a jury trial is preserved.¹⁶⁰

Therefore, no corrective sequencing rule for evidential rulings is necessary.

More exotic rulings include *Pavey v. Conley*,¹⁶¹ where the Seventh Circuit faced a situation in which the same factual issue, the severity of injury, was germane both to the preliminary inquiry of whether the prisoner had exhausted his administrative remedies and also to the merits of the case. The district court had held that the prisoner possessed a jury trial right on any factual issues relating to whether he had exhausted the administrative remedies, and so delayed determination of the defense until trial. The court of appeals ruled that the judge

¹⁵⁹See *supra* note 150 and accompanying text.

¹⁶⁰See Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 59 GEO. WASH. L. REV. (forthcoming 2010) (manuscript at 61).

¹⁶¹544 F.3d 739 (7th Cir. 2008).

should rule on exhaustion and do so at the outset, but that the ultimate factfinder could revisit the judge's determination: "if there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies."¹⁶²

The most common setting in which courts overtly discuss this problem is class certification. By now it should be clear how the *Hydrogen Peroxide* case could say: "Although the district court's findings for the purpose of class certification are conclusive on that topic, they do not bind the fact-finder on the merits."¹⁶³ All the cases on point seem to say the same.¹⁶⁴

Against all the case law, one could argue that because class actions were equitable in origin, and that only equity could entertain a class action even when its merits were all legal,¹⁶⁵ we have fallen back into the context of issues common to joined legal and equitable claims.¹⁶⁶ But the class-action situation is different from joinder of legal and equitable claims. Although class actions were originally all equitable, the Supreme Court has ruled that the jury right will be determined separately for certification and for the merits: the former remains equitable, with decision by the judge, while the latter might be "legal," with a jury right.¹⁶⁷ The certification and the merits nonetheless have always been part of one case, not to be pursued in separate law and equity suits, and hence with no room for the application of res judicata between the class action's equitable and legal parts. With the *Beacon Theatres-Dairy Queen* premise of preclusion therefore not kicking in, there is no sequencing conclusion. The court can decide the certification issues first, and the ultimate factfinder, be it judge or jury, will be free to reconsider any common issues.

Alternatively, opponents of the case law on class certification could argue that the denial of preclusion is inefficient or even unfair. The idea is that the court should not have to try the same question twice, and the victorious party should not

¹⁶²*Id.* at 742.

¹⁶³*In re Hydrogen Peroxide*, 552 F.3d 305, 318 (3d Cir. 2008).

¹⁶⁴*See id.* at 318 n.19; *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("not binding on the trier of facts, even if that trier is the class certification judge"), *clarified*, 483 F.3d 70 (2d Cir. 2007); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 323 (5th Cir. 2005); *Gariety v. Grant Thornton, L.L.P.*, 368 F.3d 356, 366 (4th Cir. 2004); *Marcus*, *supra* note 160, at 59-62; *Olson*, *supra* note 2, at 964-65.

¹⁶⁵*See* FIELD ET AL., *supra* note 128, at 1493.

¹⁶⁶*See* Davis & Cramer, *supra* note 150, at 34-35, 36 (arguing that a certification ruling would preclude the jury and so violate the Seventh Amendment); Michael J. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. MICH. J.L. REFORM 323, 357-60 (2010) (same).

¹⁶⁷*See* *Ross v. Bernhard*, 396 U.S. 531, 540-41 (1970); 7B WRIGHT ET AL., *supra* note 150, § 1801.

have to undergo that expense and risk. Moreover, retrying an issue creates the risk of inconsistent determinations, which can be thorny when emanating from the same suit. The difficulty this argument runs into, aside from any potential Seventh Amendment concerns, is once again that there simply is no doctrine of *intrasuit res judicata* to do the work. If one wants to pursue such policies relating to efficiency and fairness, the most promising route¹⁶⁸ involves resort to the already applicable doctrine called law of the case.

2. Law of the Case

A doctrine that bears some resemblance both to *res judicata* and to *stare decisis* is law of the case.¹⁶⁹ Despite its name, it now can apply to rulings on fact as well as on law. It is similar to *stare decisis*¹⁷⁰ in that it applies rather flexibly, so that a court may revisit the ruling if convinced there is good reason to do so. It is similar to *res judicata* in that it applies narrowly, albeit in a different range. It does not apply beyond the parties to the case in which the ruling was rendered.¹⁷¹ Indeed, the ruling can be binding as the law of the case only during the later conduct of the very case in which the ruling was made, that is, within the context of the initial action.¹⁷² It will not bind the parties, or anyone else, in later proceedings that are not part of the same case.

Basically, the law-of-the-case doctrine means that a question once actually resolved in the course of litigation will not lightly be reconsidered at later stages in the same action, except by a higher court, even if the point was erroneously decided:

Within a single lawsuit the general principles mentioned [in connection with *stare decisis* and *res judicata*]—desire for consistency, desire to terminate litigation, desire to maintain the prestige of courts—have some meaning. There is a feeling that the various phases of a lawsuit should be consistent one with another; that the same matter should not be the subject of repetitious, time-consuming hearings; that public confidence must be preserved in the judicial system by adhering to a decision once

¹⁶⁸Other, less feasible routes include eliminating the overlapping threshold questions or postponing them until trial. See Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51, 55-59 (2004) (criticizing such “strong-form rules”).

¹⁶⁹See generally 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4478-4478.6 (2d ed. 2002) (stressing the great development of the doctrine in recent times); cf. Allan D. Vestal, *Law of the Case: Single-Suit Preclusion*, 1967 UTAH L. REV. 1 (presenting an older and somewhat narrower view).

¹⁷⁰See generally Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411 (2010).

¹⁷¹See 18B WRIGHT ET AL., *supra* note 169, § 4478.5, at 809-14.

¹⁷²See *id.* § 4478, at 637-45.

made. These attitudes have been reflected in numerous cases which have involved the “law of the case” doctrine.¹⁷³

This does not mean, of course, that the parties may not directly challenge rulings by regular procedures, such as by appeal or by motion for rehearing en banc. But if the ruling has withstood such direct challenges, as for instance when a case has been appealed and remanded, or if the direct challenge that might have been made was not, the ruling is said to have become the law of that particular case and is ordinarily not subject to reexamination.

There are many exceptions to the application of the rule of law of the case. One may well question whether the interests of judicial economy served by the doctrine are generally of such importance as to justify holding parties to erroneous rulings that could still be corrected within the framework of the same case. In view of the lesser justification of the law-of-the-case doctrine, it is not surprising that courts have not applied it with as much rigor and consistency as they have shown in connection with *res judicata*. The “ ‘law of the case,’ as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.”¹⁷⁴

In summary, then, law of the case, intended to foster judicial economy, provides that a court, and any coordinate or lower courts as well, will normally adhere to a ruling it has declared in a particular action when a party later raises the point again in the same action. But it applies very flexibly, so that the rendering court and coordinate courts can revisit the ruling if convinced it was wrong or some other reason counsels reconsideration. If so interpreted as mere maxims that a court will not lightly redo what has been done and that lower courts must obey higher courts, then law of the case expresses only the common sense of “protecting against the agitation of settled issues”¹⁷⁵ or “disciplined self-consistency,”¹⁷⁶ and does some good and little harm.

As to the good it accomplishes, it says that any issue’s first determination will normally stand, obviating the need for reconsideration. This normal application will work to retrieve the efficiency and fairness that reconsideration otherwise would put at risk.

¹⁷³Vestal, *supra* note 169, at 1.

¹⁷⁴Messinger v. Anderson, 225 U.S. 436, 444 (1912).

¹⁷⁵Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988) (quoting 1B JAMES WM. MOORE, JO DESHA LUCAS & THOMAS S. CURRIER, MOORE’S FEDERAL PRACTICE ¶ 0.404[1], at 118 (2d ed. 1984)).

¹⁷⁶18B WRIGHT ET AL., *supra* note 169, § 4478, at 637.

Its constraint is never really confining. Accordingly, it will not always apply. In fact, the Seventh Amendment as interpreted in *Beacon Theatres-Dairy Queen* dictates allowing the jury to reconsider any issue on which a constitutional jury trial right exists.¹⁷⁷ More generally, the court retains the power to reconsider. Because of this flexibility, it necessitates no sequencing rules. But, because its flexibility allows for reconsideration sometimes, it creates the risk of inconsistent decisions. That is the harm it imposes.

When the later determination contradicts the earlier, what to do?¹⁷⁸ Except where the adjudicator has newly found jurisdiction to be lacking,¹⁷⁹ the judge need not go back and correct the earlier decision, unless the judge thinks that undoing the earlier decision is desirable. But clearly it would be best to minimize the occasion for inconsistency, as by regularly relying on the law-of-the-case doctrine. An alternative would be to rationalize away the inconsistency by construing the “common” issues to be different after all or to be governed by different standards or burdens of proof.¹⁸⁰

C. Summary

Upon trial of a factual issue common to the merits of both law and equity claims for relief joined in the same case, a federal court must give the issue first to the jury for decision. The verdict will bind the judge with respect to the equitable claim. These two consequences derive from the Seventh Amendment.

This sequencing rule thus has a very limited range of application. Although it applies if a case for, say, injunction and damages happens to reach trial, it does not reach the situation of a judge deciding a threshold issue like jurisdiction, class certification, or evidential admissibility. The reason is that in these latter situations, there will be no intrasuit preclusion and hence no requirement to go first to the jury.

Once again, however, the courts suffer uncertainty about the reach of this sequencing rule. Accordingly, they defer overly to fears of intruding on the jury

¹⁷⁷See *supra* text accompanying notes 138 & 142.

¹⁷⁸The question of which determination will have res judicata effect is not quite so difficult. It would probably be the later one, either by operation of the essential-to-judgment requirement or perhaps by analogy to the last-in-time rule. See RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmts. h, m (1982).

¹⁷⁹See, e.g., *H.V. Allen Co. v. Quip-Matic, Inc.*, 266 S.E.2d 768, 769 (N.C. Ct. App.) (reversing defendant’s victory on the merits while granting dismissal on overlapping issue of personal jurisdiction), *appeal dismissed*, 273 S.E.2d 298 (N.C. 1980).

¹⁸⁰See *Clermont, supra* note 17, at 978-1000 (establishing that the standard of proof for jurisdiction is less demanding than the standard applicable to the merits).

right. Efforts herein to dissipate the fog should pay dividends in establishing the narrow limits of *Beacon Theatres-Dairy Queen* on courts' sequencing power:

<u>Sequencing and Preclusion</u>	<u>Law of the Case</u>
in case of joinder of legal and equitable claims for relief, the common factual issues go first to the jury and then the verdict binds the judge, both rules being by virtue of the Seventh Amendment	for all other intrasuit common issues, there is no sequencing rule, but then there is neither foreclosure of the jury nor any other foreclosure beyond the flexible law-of-the-case doctrine

CONCLUSION

Courts in federal civil cases can sequence their decision of multiple issues as they wish, except for the narrow *Steel Co.-Ruhrgas* and *Beacon Theatres-Dairy Queen* rules. The former rule generally requires a federal court to decide Article III justiciability and subject-matter jurisdiction before ruling on the merits. The latter rule requires a federal trial judge to give first to the jury a factual issue common to the merits of a law claim for relief and an equity claim for relief joined in the same case.

In conjunction with sequencing, some special preclusion will result. On the one hand, Article III justiciability and subject-matter jurisdiction will most often enjoy preclusive effect, under the jurisdiction-to-determine-jurisdiction doctrine for affirmative decisions or the jurisdiction-to-determine-no-jurisdiction doctrine for negative decisions, or by virtue of hypothetical jurisdiction for purposefully skipped decisions. On the other hand, upon repetitive encounter of overlapping matters in the same lawsuit, the decisionmaker can reconsider its decision without any intrasuit preclusion, except for the jury's Seventh Amendment preclusion of the judge and except for the flexible restraint of the law-of-the-case doctrine.