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Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion

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SEQUENCING THE ISSUES FOR JUDICIAL DECISIONMAKING: 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, although the parties can control which issues they put before a judge, the judge gets to choose the decisional sequence in light of those various interests.

The law sees fit to put few limits on the judge's power to sequence. The few limits are, in fact, quite narrow in application, and even narrower if properly understood. The *Steel Co.-Ruhrgas* 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 first giving to the jury a factual issue common to the merits of both law and equity claims for relief joined in the same case. The impact of these two narrow limits might seem mundane, but much turns on their scope. The sequence of jurisdictional defenses can result in dismissing a claim when the court lacked authority to hear the case and may lock a litigant out of both federal and state courts. And, while a jury's decision on damages would restrain a judge's decision on final injunctive relief, the judge remains free to decide jurisdictional defenses, class certification, or evidentiary issues without worry of affecting the jury's later consideration of common issues.

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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.[2] "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."[3]

1. 552 F.3d 305, 318 (3d Cir. 2008) (involving antitrust conspiracy action brought by purchasers of hydrogen peroxide and related chemical products against chemical manufacturers); *see* Linda S. Mullenix, *Complex Litigation: 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*, 552 F.3d at 307.

3. *Id.* at 316. The quoted views conform to today's usual approach to preclusion. *See infra* notes 191–92 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. But whether to get into the merits at the certification phase remains controversial. *See* Archdiocese of Milwaukee

In other words, after electing to pose a difficult threshold question, the legal system advises the trial court just to plow ahead by deciding that difficult question, even though the judge will encounter during a trial on the merits the same issue under the same formulation and 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," in 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."[4] Where did the court get that idea? When is a judge really free to decide the order of decision without worry of untoward preclusion or jury displacement?

I. Decisional Sequencing

In deciding a case, a court must confront a series of issues that may be sequenced in 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 a judge, the judge generally decides the sequence of decisions.[5]

Of course, I am talking here of formal legal reasoning, not intuitive decisionmaking. One common situation, useful for exploring the sequencing decision, is where a 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 example is where a defendant has raised a number of defenses so that the court might decide in favor of the defendant because of lack of jurisdiction, improper venue, the plaintiff's failure to state a claim, or the defendant's affirmative defense. As a result of the chosen sequence, the court reaches some issues and fails to 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 that dictates the order in which the

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Supporting Fund, Inc. v. Halliburton Co., 597 F.3d 330, 337–38 (5th Cir. 2010), *cert. granted sub nom.* Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 856 (2011); 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, 935–36 (2009); *see also* Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. EN BANC 149, 149–50 (2010), http://www.vanderbiltlaw review.org/content/articles/2010/11/Nagareda-Common-Answers-for-Class-Certification-63-Vand.-L.-Rev.-En-Banc-149-2010.pdf (discussing the Wal-Mart class action).

4. *In re Hydrogen Peroxide*, 552 F.3d at 318. The "rigorous analysis" requirement comes from *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982) (interpreting the requirements of FED. R. CIV. P. 23(a)).

5. *See* Peter B. Rutledge, *Decisional Sequencing* 20 (Univ. of Ga. Sch. of Law, Working Paper No. 10-004, 2010), *available at* http://ssrn.com/abstract=1572709 (providing a general treatment of sequencing and the interests at stake, in an article considering only the alternative-grounds-of-dismissal scenario but widening the focus to include sequencing between trial and appellate courts and between courts in different jurisdictions).

court must decide the defenses, or the law could leave it 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. However, my interest is more general than that example. The order in which the court confronts nondispositive issues also matters. The sequence of these issues affects the course of a case's progress. Parties should care because an early victory on a certain issue, or even the threatened intrusiveness of early attention to a certain issue, can shift parties' settlement leverage dramatically. Moreover, parties' stakes will increase to the extent that deciding an issue now might foreclose the same issue arising later in the case. That latter concern prompted the dictum in the *Hydrogen Peroxide* case, in which 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 in any setting could conceivably dictate a sequencing rule.

A. *Discretion*

A judge in fact has a lot of freedom to sequence issues. In the wide realm of freedom that judges enjoy in deciding the order of decision, what factors guide them? As suggested by the pioneering work of Professor Peter Rutledge, three general categories of factors predominate.[6]

First, *judicial economy* plays a major role. A court's freedom 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 a case tends to lessen the judicial workload. A court could thereby avoid shaky decisions on difficult issues. Ease of disposition reflects a variety of considerations that go beyond a limited need for research and deliberation, including the ease of evaluating objective matters rather than subjective matters. Sureness of disposition pays the various premiums of clarity of outcome in the trial court and 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 iterative readjustment of conclusions) 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. Also, more toward the substantive side of things, the law might provide an

6. *See id.* at 19–27.

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"if-then" relationship that appears to dictate a sequence. That is, the law might say that some issue needs to be decided affirmatively before a desirable procedure or remedy can be followed or pursued (although such prerequisites are not as common as one would suppose). The best example is the rule that the plaintiff must show an inadequate remedy at law in order to make an equitable remedy available.[7] 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 is usually 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[8] or 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 trial courts' discretion by identifying particularly weighty factors. Moreover, there are certain issues marked as threshold issues, like class certification,[9] 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. Sequencing will impact parties' interests in outcome. It may affect parties' litigation behavior, such as in choosing which issues to raise in the hope of constraining a judge's sequencing. Even more clearly, it may affect parties'

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

8. *See* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847 (2005) (lamenting the many exceptions to that presumption); *see also* Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 425 (2007). *Compare* Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (discussing the Supreme Court's avoidance of constitutional adjudication on the merits), *with* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 1 (1964) (criticizing Bickel's thesis as "vulnerable and dangerous").

9. *See* 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.").

settlement leverage; for example, a defendant may be disadvantaged when a court skips over some jurisdictional issues to allow a plaintiff to pursue discovery and a decision on the merits.[10] A trial judge may take the appropriate aims 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 usually choose not to impose mandatory sequencing rules on judges. This Article will try to delineate the wide extent of judges' freedom to sequence.

B. *Rules*

The suggestive discussion above of the factors relevant to sequencing shows the picture to be so complicatingly multifactored that, presumptively, lawmakers should stay out and leave it to judicial discretion. However, given the reasonable assumption that judges tend to act in their self-interest, judges may too heavily weigh the first factor of minimizing workload.[11] Thus, lawmakers may need to resort to regulation to protect the other public and private interests at stake, at least when neglect of those interests 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 a trial judge's freedom to sequence. The legislative branch has been wholly inactive. Perhaps interest groups have formulated insufficient concern over the subtleties of sequencing and so have 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, only two sequencing rules are of significance, given the above-described narrow definition of what constitutes such a rule. Both rules derive from judicial interpretations of the Constitution, and they are

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10. *See* Rutledge, *supra* note 5, at 27. Rutledge explains:

> 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.

Id.

11. *See* Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 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 as plausible that "judicial effort has a diminishing effect on the satisfactions from judicial voting").

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heavily dependent on concerns linked to federal courts. Interestingly, both rules embroil the commentator so quickly and thoroughly in matters of res judicata that these sequencing rules will remain ever mysterious without careful attention to preclusion. 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.

Part II of the Article addresses the first rule, which treats which jurisdictional defenses a court must decide first. Although a seemingly mundane matter, this sequence can result in dismissing a claim when the court lacked authority to hear the case and maybe in locking a litigant out of both federal and state courts. The *Steel Co. v. Citizens for a Better Environment*[12] and *Ruhrgas AG v. Marathon Oil Co.*[13] line of cases tried to introduce control by requiring that a federal court decide a challenge to its jurisdiction over the case before dismissing on the merits. But as this Article will explain, this rule boils down to a fairly modest constraint because it has a big limitation: the court still may pick among jurisdictional and other threshold defenses, with a dismissal on any one of them enjoying some preclusive effect.

Part III of the Article addresses the other sequencing rule, derived from the *Beacon Theatres, Inc. v. Westover*[14] and *Dairy Queen, Inc. v. Wood*[15] cases. It dictates that when a common factual issue will come before both judge and jury within the same federal case, the jury must decide it first to avoid the preclusive effect of a judicial decision subverting the constitutional jury right. But as this Article will also explain, this rule is very narrow too: it applies only to trial of factual issues common to the merits of both law and equity claims for relief joined in the same case. Thus, while a jury's decision on damages would restrain a judge's decision on final injunctive relief, the judge remains free to decide jurisdictional defenses, class certification, or evidentiary issues without fear of affecting the jury's later consideration of common issues.

C. *Fog*

Although lawmakers impose little constraint on judges' freedom to sequence, the prevailing lack of clarity about the existence and scope of the sequencing rules works to constrain judges more broadly. A court might be unsure of when it can skip over jurisdiction, or concerned that an early decision will preclude 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

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12. 523 U.S. 83, 94 (1998).
13. 526 U.S. 574, 577 (1999).
14. 359 U.S. 500, 510–11 (1959) (citing Scott v. Neely, 140 U.S. 106, 109–10 (1891)).
15. 369 U.S. 469, 472–73 (1962) (citing *Beacon Theatres*, 359 U.S. at 510–11).

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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.[16]

This reasoning is seriously flawed, as this Article will demonstrate. To the extent that such confusion creates a broader constraint than lawmakers intended, the constraint is undesirable. Hence, bringing clarity to the rules of sequencing should be beneficial and so 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.[17] To understand that rule, which, as already mentioned, stems from the *Steel Co*.[18] and *Ruhrgas*[19] cases, one must first draw the subtle distinction between "nonbypassability" and "resequencing."[20]

Nonbypassability, or the requirement to decide first things first, rests mainly on the *Steel Co.* case.[21] 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

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16. N. Am. Video Corp. v. Leon, 480 F. Supp. 213, 216 (D. Mass. 1979); *see also* Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 978–80, 988 (2006) (calming this particular worry by establishing that the standard of proof for jurisdiction is less demanding than the standard applicable to the merits).

17. *See 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). On application of this doctrine to appellate courts, see Joan Steinman, *After* Steel Co.*: "Hypothetical Jurisdiction" in the Federal Appellate Courts*, 58 WASH. & LEE L. REV. 855, 857 (2001).

18. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998).

19. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583–85 (1999) (citing *Steel Co.*, 523 U.S. at 101–02).

20. *See* 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).

23. *Steel Co.*, 523 U.S. at 101; *see also* Idleman, *supra* note 20, at 92.

a victory for the defendant. So, when a defense is "nonbypassable," this Article means 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*, mitigates 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, which could preclude that threshold issue.[22] A court can skip over challenged subject-matter jurisdiction to dismiss for, say, lack of personal jurisdiction.[23] So, when this Article refers to a defense as "resequenceable," it means that a court can choose to dismiss on that defense without first facing a nonbypassable defense such as subject-matter jurisdiction.

A. *Nonbypassability, or Deciding First Things First*

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

1. Rule

Drawing on a long line of precedent,[24] the *Steel Co*. Court held that a lower federal court could not dismiss for failure to state a claim without first deciding a challenge to Article III standing,[25] which the Supreme Court determined was lacking in the case but which posed a harder question to resolve.[26] Even though the result was the same—judgment for the defendant—a federal court could not give a judgment on the merits without first ascertaining that it had jurisdiction.

The Court rested its decision on separation of powers and the Article III requirement of a "[c]ase" or "[c]ontrovers[y]."[27] In order for a court to stay within its proper limits, it cannot go about rendering a decision on the merits without making sure that the case falls within the court's

22. *See* Idleman, *supra* note 20, at 94.

23. *See Ruhrgas*, 526 U.S. at 583, 588.

24. *Steel Co.*, 523 U.S. 83, 93–100 (1998) (citing historical cases, including Capron v. Van Noorden, 6 U.S. (2 Cranch) 126 (1804) (allowing the plaintiff to raise original subject-matter jurisdiction on appeal)).

25. *See generally* 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531, at 9–16 (3d ed. 2008) (discussing requirements for Article III standing and a court's powers when requirements are not met).

26. *Steel Co.*, 523 U.S. at 93–102, 109–10.

27. U.S. CONST. art. III, § 2; *Steel Co.*, 523 U.S. at 102.

jurisdictional bounds.[28] Based on the Court's reasoning and wording, by "jurisdiction," the Court meant Article III justiciability[29] as well as ordinary subject-matter jurisdiction.[30] The Court has never added to that short list of nonbypassable defenses.

2. Exception

Steel Co. represented the high-water mark for the nonbypassability doctrine; however, the Court's opinion was far from definitive on whether jurisdiction must be decided before everything else. The majority admitted that precedent had "diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question."[31] The separate opinions of six of the Justices went further in underlining that qualification.[32]

The Court has since cut back on *Steel Co.*'s seeming thrust, first by drawing a line between nonmerits and merits, then by ruling that a federal court can dismiss on nonmerits grounds without reaching Article III justiciability or subject-matter jurisdiction.[33] In the fountainhead case of *Ruhrgas*, a unanimous opinion written by Justice Ruth Bader Ginsburg one year after *Steel Co.*, the Court held that a court may resequence nonmerits defenses so that the court can face a personal jurisdiction defense before deciding a subject-matter jurisdiction defense.[34]

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

29. *See generally* 13 WRIGHT ET AL., *supra* note 25, § 3529 (discussing the concept of justiciability and the limits on judicial power created by Article III).

30. *See Steel Co.*, 523 U.S. at 101–02 (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.").

31. *Id.* at 101; *see infra* note 118 (collecting cases).

32. For a summary of the concurring opinion of Justice Sandra Day O'Connor, the opinion of Justice Stephen Breyer concurring in part and in the judgment, and the opinions of Justices John Paul Stevens and Ruth Bader Ginsburg concurring in the judgment, see Jack H. Friedenthal, *The Crack in the* Steel *Case*, 68 GEO. WASH. L. REV. 258, 265–66 (2000).

> Justices [William] Rehnquist and [Clarence] Thomas join the more traditional view espoused by Justice [Antonin] 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 [Anthony] 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 [David] 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*.

Id.

33. *See infra* note 120 (collecting cases).

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

As discussed below,[35] one might argue that the list of nonmerits defenses eligible for resequencing 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 standing[36] 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.[37] But that is just one example. A court can also bypass prudential standing[38] and a host of other resequenceable threshold issues.[39]

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 District of Columbia Circuit put it, "'a less than pure jurisdictional question, need not be decided before a merits question.'"[40]

Again, 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.[41] So, can a court pass over personal jurisdiction in order to dismiss on the merits?

Although the cases decided before *Steel Co.* were split on this question,[42] courts have since leaned more toward no.[43] Most significantly,

35. *See infra* text accompanying notes 116–47.

36. *See generally* 13B WRIGHT ET AL., *supra* note 25, § 3531.13 (discussing examples of congressional enactments on standing).

37. 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 may resequence that statutory standing question before an Article III justiciability or subject-matter jurisdiction defense).

38. *See generally* 13A WRIGHT ET AL., *supra* note 25, § 3531, at 9–16 ("[S]tanding may be denied if as a matter of judicial self-restraint it seems wise not to entertain the case.").

39. *See, e.g.*, Idleman, *supra* note 20, at 93, 95–97. *Compare In re* Sealed Case No. 99-3091, 192 F.3d 995, 1000–01 (D.C. Cir. 1999) (per curiam) (holding a court can bypass federal sovereign immunity for the merits), *with* Galvan v. Fed. Prison Indus., Inc., 199 F.3d 461, 463 (D.C. Cir. 1999) (holding a court can resequence federal sovereign immunity).

40. *In re Sealed Case*, 192 F.3d at 1000 (quoting United States *ex rel.* Long v. SCS Bus. & Technical Inst., Inc., 173 F.3d 890, 894 (D.C. Cir. 1999)).

41. *See* Idleman, *supra* note 20, at 95 ("The natural starting point for this task is with personal jurisdiction . . . .").

42. *Id.* at 95 & nn.524–25.

43. *Compare* Guidry v. U.S. Tobacco Co., 188 F.3d 619, 623 n.2 (5th Cir. 1999) ("A court must find jurisdiction, both subject matter and personal, before determining the validity of a claim."), *and* United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 46 (1st Cir. 1999) ("The Supreme Court's recent exhortations to decide issues of jurisdiction—both personal and subject

the Supreme Court, in another unanimous opinion written by Justice Ginsburg, seems to have assumed no in its most recent decision in this line of cases, *Sinochem International Co. v. Malaysia International Shipping Corp.*[44]

In that case, the district court held that it possessed admiralty subject-matter jurisdiction, but it declined to decide personal jurisdiction and instead dismissed on forum non conveniens grounds; the court of appeals agreed on subject-matter jurisdiction, but it held that a court could not skip over personal jurisdiction.[45] The Supreme Court reversed, allowing dismissal on forum non conveniens grounds without decision on personal jurisdiction.[46] But 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.[47] Indeed, the Court 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)."[48] That erroneous dictum, implying that subject-matter jurisdiction and personal jurisdiction are equivalents for the purpose of the nonbypassability doctrine, will surely influence lower courts in the future.[49]

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matter—before reaching the merits of a case suggest to us that consideration of [the defendant's] summary judgment motion should await a determination of the district court's jurisdiction over [the defendant]."), *with* Pace v. Bureau of Prisons, No. 98-5025, 1998 WL 545414, at *1 (D.C. Cir. July 17, 1998) (per curiam) ("The district court was not required to resolve the issue of personal jurisdiction prior to ruling on the motion to dismiss for failure to state a claim . . . ."), *and* United States v. Vazquez, 145 F.3d 74, 80 & n.3 (2d Cir. 1998) (bypassing service of process for the merits).

44. 549 U.S. 422, 425 (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, 571–73 (2008) (viewing sequencing for forum non conveniens to be now so unclear as to sow the seeds for the demise of the nonbypassability rule).

45. *Sinochem*, 549 U.S. at 427–28.

46. *Id.* at 425.

47. *Id.*

48. *Id.* at 430–31.

49. *See, e.g.*, Dan v. Douglas Cnty. Dep't of Corrs., No. 8:06CV714, 2009 WL 483837, at *3 (D. Neb. Feb. 25, 2009) (quoting *Sinochem* that lack of personal jurisdiction prevents the court from ruling on the merits); Ashton v. Florala Mem'l Hosp., No. 2:06cv226-ID, 2007 WL 1526837, at *1 & n.1 (M.D. Ala. May 24, 2007) (relying on *Sinochem* that the court must first decide the issue of personal jurisdiction). *But see* Di Loreto v. Costigan, 351 F. App'x 747, 751 (3d Cir. 2009)

Nevertheless, I think 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. So, a court may consider personal jurisdiction without deciding subject-matter jurisdiction; alternatively, if it finds subject-matter jurisdiction, the court may bypass personal jurisdiction and dismiss on the merits. One reason is that *Steel Co.*'s concerns of separation of powers and the requirement of a case or controversy do not extend to personal jurisdiction. Likewise, any concern of intruding on states' authority does not extend beyond subject-matter jurisdiction. The District of Columbia 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."[50]

Moreover, the plaintiff cannot complain if the court accepts the assertion that personal jurisdiction exists. Meanwhile, the defendant has put multiple defenses before the court and so has consented somewhat to some sort of sequencing. In any event, a successful defendant 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.

Yet, the truly 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 *Chicot County Drainage District v. Baxter State Bank*.[51] That doctrine says that a judgment resting on assumed subject-matter jurisdiction 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

(bypassing personal jurisdiction for the merits).

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

51. 308 U.S. 371, 376–78 (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 65–75. A related assumed-jurisdiction mechanism, the one that forecloses attack on challenged but skipped subject-matter jurisdiction, entails the extension of hypothetical jurisdiction. *See infra* text accompanying notes 98–115.

judgment.[52] After a court bypasses personal jurisdiction and dismisses the case on other grounds, the defendant could get relief from the judgment if the defendant, who would be the only party entitled to raise the point, were ever to need such relief.

Therein lies the key to understanding nonbypassability. The list of nonbypassable grounds should not turn solely on the relative importance of defenses, which would open fruitless debate on the stature of subject-matter jurisdiction versus that of personal jurisdiction.[53] The actual concern instead derives from the asymmetry between subject-matter jurisdiction and personal jurisdiction under the preclusion doctrine. Because unlitigated subject-matter jurisdiction can preclude,[54] the fear arises that a court will bypass this prerequisite for adjudicating and give a dismissal on the merits that is later unassailable. To avoid that result, the Court declares the preclusive prerequisite to be nonbypassable.[55]

It thus 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. Although no relief from the judgment will lie simply for violation of the nonbypassability rule, because that would be mere error and not a void judgment, the judgment will fall if subject-matter jurisdiction was actually absent.[56]

Therefore, the list of nonbypassable grounds 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 against the judgment*. Accordingly, that list of nonbypassable prerequisites should include subject-matter jurisdiction but not territorial jurisdiction or notice. However, the authorities are lax in defining the precise scope of "subject-matter jurisdiction" as a requirement for validity.[57] First, a lack of

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52. *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 and therefore nonwaiving defendant can later challenge territorial jurisdiction or notice).

53. *See* Idleman, *supra* note 20, at 31–39.

54. *Chicot*, 308 U.S. at 377–78.

55. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101–02 (1998).

56. *See* CLERMONT, *supra* note 52, § 5.1(B)(1) (explaining the concept of validity).

57. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 11 & cmt. a (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).

jurisdiction under Article III will result in relief from judgment,[58] but the lesser aspects of justiciability will not.[59] Second, courts need to keep jurisdiction and the merits separate for the purpose of validity, so that the attacker of the judgment cannot litigate the merits anew.[60]

In sum, no significant reason exists to require a court to decide the existence of personal jurisdiction before deciding the merits in the defendant's favor. With personal jurisdiction taken off the nonbypassability list, and given an understanding of why the Court created that list, it becomes clearer that the *Steel Co.* line of cases places only Article III justiciability and subject-matter jurisdiction on the list of nonbypassable grounds.

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58. *See, 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).

59. *See, e.g.*, Mendell *ex rel.* Viacom, Inc. 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." (quoting Lubben v. Selective Serv. Sys., 453 F.2d 645, 649 (1st Cir. 1972))).

60. The *Restatement* 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." RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e (1982). 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.

Id.; *see* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010); Carr v. Tillery, 591 F.3d 909, 917, 919 (7th Cir. 2010); Clermont, *supra* note 16, at 1017–20; Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547, 1547–52 (2008).

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

Ruhrgas AG v. Marathon Oil Co. represents another aspect of jurisdictional primacy that is different in operation from nonbypassability: it allows resequencing of nonmerits defenses.[61] *Ruhrgas* held that a lower federal court could dismiss for lack of personal jurisdiction without first deciding subject-matter jurisdiction.[62] Subsequent cases have expanded the resequencing exception. For example, 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 under forum non conveniens.[63] Authorized to dismiss for a nonjurisdictional threshold defense, a court becomes freer to pursue judicial economy by deciding along an easier and surer path, as long as the outcome is the same party prevailing as if jurisdiction were denied.[64]

To understand the effect of resequencing, one must consider some related doctrines, beginning with the doctrine of jurisdiction-to-determine-jurisdiction. This doctrine relates to res judicata, and res judicata is where resequencing irresistibly takes us. There follows a general description as a 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."[65] That is to say, an affirmative ruling on subject-matter jurisdiction, territorial jurisdiction, or adequate notice can foreclose relitigation of that prior determination and thus preclude the parties from attacking the resultant judgment by raising that ground in subsequent litigation.[66]

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

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61. Ruhrgas AG v. Marathon Oil Co, 526 U.S. 574, 588 (1999).

62. *Id.* at 583–88.

63. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 432 (2007) (dictum).

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

65. CLERMONT, *supra* note 52, § 4.4(B)(2), at 294. *See generally* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 16, at 95–97 (6th ed. 2002) (discussing the doctrine of jurisdiction-to-determine-jurisdiction).

66. CLERMONT, *supra* note 52, § 5.1(A)(3).

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 some court to question the authority of the court that rendered the earlier judgment.[67]

Instead, the defendant may choose to raise the jurisdiction or notice issue in the initial action before the challenged court itself. Then, the 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 day in court on the question of the forum's authority.

Our law, in fact, accepts this so-called bootstrap principle,[68] and so allows a court lacking fundamental authority to issue a judgment that will nevertheless be immune from later attack.[69] Because the essential 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.[70]

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.[71] Strangely, the most important 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 preclusive consequences of an actually litigated determination, insofar as foreclosing attack on the judgment goes.[72] On the other hand, sometimes the interests inherent in subject-matter jurisdiction

67. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 65–66 (1982).

68. *See* Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491, 494–99 (1967).

69. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 10–12 (1982).

70. *See* Durfee v. Duke, 375 U.S. 106, 116 (1963) (quasi in rem jurisdiction); Johnson v. Muelberger, 340 U.S. 581, 589 (1951) (jurisdiction over status); Chicot Cnty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 375 (1940) (subject-matter jurisdiction); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 524–25 (1931) (personal jurisdiction).

71. Indeed, upon a challenge to the existence of either territorial jurisdiction or adequate notice, an affirmative ruling precludes the defendant from attacking the resultant judgment on either ground in subsequent litigation. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 10 cmt. d (1982).

72. *See id.* § 12 cmt. d; *supra* text accompanying note 51 (introducing the *Chicot* doctrine).

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.[73]

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 a body of law standing separate from res judicata. It is obviously similar to issue preclusion, but it differs in several respects.[74] The reason for the differences is that the policies that shape the doctrine of jurisdiction-to-determine-jurisdiction are unique, and they produce a unique set of rules. For related reasons tied to the notion that the doctrine defines the judgment even more intimately than does usual res judicata, the federal common law of jurisdiction-to-determine-jurisdiction applies to a prior federal judgment.[75]

2. Jurisdiction-to-Determine-No-Jurisdiction

"Passing beyond the [preclusive] effects of affirmative rulings on forum-authority, what if the initial court decides that it lacks jurisdiction or

73. *See, e.g.*, Kalb v. Feuerstein, 308 U.S. 433, 438–39 (1940) (holding that a state court proceeding could not preclude a bankruptcy proceeding); *see also* 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, 560–61 (1981).

74. *See* CLERMONT, *supra* note 52, § 5.1(A)(3). Issue preclusion differs in five respects:

> 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 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.

Id. § 5.1(A)(3), at 307.

75. *See* Harper Macleod Solicitors v. Keaty & Keaty, 260 F.3d 389, 397–98 (5th Cir. 2001) (distinguishing *Semtek*). On the governing law for ordinary res judicata, see Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 502 (2001); Patrick Woolley, *The Sources of Federal Preclusion Law After* Semtek, 72 U. CIN. L. REV. 527, 535–44 (2003).

failed to give notice" and so dismisses?[76] "That is, can a court, which is admittedly without authority to enter a valid judgment, make any rulings that have preclusive effect?"[77] Yes, a doctrine of jurisdiction-to-determine-no-jurisdiction exists.[78] 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 own 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.[79] More to the point, common sense supports preclusion on the threshold issue in order to prevent a party—who chose a court that ruled against its own authority—from litigating the same point repetitively. So, for such limited purpose, the prior judgment is a valid one.

Naturally, there should be limits to the preclusive effects.[80] After all, the court was supposed to be exercising only its jurisdiction for determining jurisdiction.[81] The dismissal of the initial action on a jurisdictional defense does not generate a bar to a second action in an appropriate court that presents different jurisdictional issues.[82] Further, 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.[83] 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

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76. CLERMONT, *supra* note 52, § 4.4(B)(3), at 297.

77. *Id.*

78. *Id.*

79. 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).

80. *Id.* at 206–22.

81. *See* Idleman, *supra* note 20, at 57–63.

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

83. *See* 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) ("[A]lthough 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 109 and accompanying text.

effects[84] and that the truncated procedure for deciding jurisdiction counsels against carrying jurisdictional determinations over to affect the merits.[85]

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.[86] It will defeat jurisdiction in any attempt to sue again in a second court where the same jurisdictional issue arises,[87] even when one court is state and the other federal.[88] But a finding of no jurisdiction does not produce a generally valid judgment and thus will not otherwise be binding in any other action.

Going beyond these basics, a determination of no jurisdiction probably should not provide nonmutual preclusion, preventing a nonparty from basing preclusion on the prior determination.[89] Nor should it work to establish, rather than defeat, the jurisdiction of the other court.[90] 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.[91] Even though this

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84. *See* Edney, *supra* note 79, at 206–14.

85. *See id.* at 220–22.

86. *See* Idleman, *supra* note 20, at 29–30; Edney, *supra* note 79, at 217–18. It is true that *Federal Practice and Procedure* sounds more expansive in its explanation that "[a]lthough 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." 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4436, at 154 (rev. ed. 2002). But, in fact, some of 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 (Supp. 2010) ("'Though a jurisdictional determination is not usually binding on future proceedings, it is binding as to issues that are addressed by the Court in determining the jurisdictional question.'" (quoting Gavilan-Cuate v. Yetter, 276 F.3d 418, 420 (8th Cir. 2002))).

87. *See, 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. Mich. 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).

88. *See, e.g.*, ASARCO, Inc. v. Glenara, Ltd., 912 F.2d 784, 787 (5th Cir. 1990) ("[T]he Louisiana courts would be bound by our ruling that defendants had insufficient contacts 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.").

89. 18A WRIGHT ET AL., *supra* note 86, § 4436, at 156, 171.

90. *See* 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).

91. *See* Kircher v. Putnam Funds Trust, 547 U.S. 633, 647 (2006) (saying that "[w]hile the state court cannot review the decision to remand in an appellate way, it is perfectly free to reject the remanding court's reasoning," but basing the refusal to establish jurisdiction by preclusion on the

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limitation on preclusion might lead to awkward situations,[92] an extension of binding effect to the unempowered federal court's dismissal appears unnecessary and, hence, improper. Additional arguments for this limitation on preclusion might be (1) 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,[93] and (2) that establishing jurisdiction would usually work to the detriment of the defendant, and issue preclusion normally does not bind the victorious party.[94] These additional arguments are not determinative, however, because the rules of jurisdiction-to-determine-no-jurisdiction might be specially tailored and need not conform to those of issue preclusion.[95]

The jurisdiction-to-determine-no-jurisdiction doctrine, however, is 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,[96] even though an inability to obtain appellate review usually defeats issue preclusion.[97]

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 jurisdiction-to-determine-jurisdiction doctrine, if the court acted 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 dismissed 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.[98] As long as something has not gone

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inability to obtain federal appellate review of the remand).

92. *See* 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, 1033–34 (2010) (describing cases that bounce between removal and remand).

93. RESTATEMENT (SECOND) OF JUDGMENTS § 28(4) (1982).

94. LaBuhn v. Bulkmatic Transp. Co., 865 F.2d 119, 122 (7th Cir. 1988) (dictum) ("[A] finding which a party had no incentive (other than fear of collateral estoppel) to appeal, because he won, *has* no collateral estoppel effect.").

95. *See supra* note 74 and accompanying text.

96. *See* 18A WRIGHT ET AL., *supra* note 86, § 4436, at 155–56, 164.

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

98. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583–88 (1999).

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,[99] this hypothetical jurisdiction will supply subject-matter jurisdiction to produce a valid judgment for the very limited purpose of jurisdiction-to-determine-no-jurisdiction with respect to the ground for threshold dismissal.

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.[100] 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.[101] *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.[102]

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99. *See supra* text accompanying note 73 (explaining that assumed-jurisdiction preclusion does not extend to every exercise of subject-matter jurisdiction).

100. *See* 18A WRIGHT ET AL., *supra* note 86, § 4436, at 171–79.

101. Hypothetical jurisdiction supplies only subject-matter jurisdiction. Thus, relief from the dismissal for improper venue should lie on the ground of lack of territorial jurisdiction or adequate notice. *See supra* note 52 and accompanying text (explaining that assumed-jurisdiction preclusion does not extend to territorial jurisdiction or notice).

102. Bear 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 denial of a forum-authority defense by a demonstrably 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, the 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, 590 (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

One could counterargue that *Ruhrgas*'s holding does not strictly require the existence of 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 court but not necessarily giving the personal jurisdiction decision any binding effect. Yet no one takes that position.[103] The preclusion of hypothetical jurisdiction is necessary because otherwise the judgment will mean almost nothing. 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.

In fact, those wary of overbroad preclusion counterargue that preclusion at the least should not broaden from intrasystem necessity to intersystem bindingness, so that the plaintiff who cannot sue again in federal court should be able to sue without preclusion in state court.[104] This counterargument would be at its strongest when the federal court dismissed on the basis of state law and arguably was wrong as to the state law. The rejoinder here is that the parties and the Justices during oral argument in *Ruhrgas* certainly assumed that intersystem preclusion was at stake:[105] as Justice Ginsburg declared, "The Federal court would be accomplishing nothing [if it did not] bind the State court."[106] The Court itself clearly envisaged intersystem preclusion: as Justice Ginsburg suggested in her opinion for the unanimous Court, "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."[107]

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 court's decision on personal jurisdiction would undercut the Court's decision. Reconsideration of subject-matter

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hypothetical jurisdiction.

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

104. *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 79, at 215 n.116, 218, 222 (arguing that there should be no such preclusion of personal jurisdiction in state court, not merely that there should be no preclusion if the state court were to find on collateral attack that federal subject-matter jurisdiction was lacking).

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

106. *Id.* at 9; *see supra* text accompanying note 87.

107. *Ruhrgas*, 526 U.S. at 585 (citing Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 524–27 (1931), with the parenthetical to *Baldwin* that "personal jurisdiction ruling has issue-preclusive effect").

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.[108]

The counterarguments against preclusion will not prevail. In fact, the danger is that courts will give too much preclusive effect.[109] 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) ("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.").[110]

Professor and attorney Charles Alan Wright offered this diversity hypothetical during his oral argument for the petitioner; Justice Ginsburg

108. *See* 18A WRIGHT ET AL., *supra* note 86, § 4436, at 168 & n.33; Idleman, *supra* note 20, at 29; *see also* 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).

109. *See, 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 (quoting Matosantos Commercial Corp. v. Applebee's Int'l, Inc., 64 F. Supp. 2d 1105, 1109 (D. Kan. 1999), *aff'd*, 245 F.3d 1203 (10th Cir. 2001))).

110. *Ruhrgas*, 526 U.S. at 585–86 (some citations omitted).

just swallowed this example whole.[111] She provided completely irrelevant support in citing to *Chicot* and the *Restatement*, as both deal only with jurisdiction-to-determine-jurisdiction cutting off collateral attack and not with collateral estoppel.[112] Not surprisingly then, her result, even if hedged, is wrong.[113]

No reason exists to give decisions based on hypothetical jurisdiction more preclusive effect than what is appropriate under jurisdiction-to-determine-no-jurisdiction.[114] 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.[115] Therefore, the preclusive effect in this context should work only to defeat any attempt to relitigate 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: Which grounds for dismissal 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.[116] That movement generated the reaction of the Supreme Court's *Steel Co.* case.[117] But a certain amount of resequencing had in fact been popular even in the Supreme Court,[118] as *Steel Co.* acknowledged.[119] After *Steel Co.*, the Supreme Court even expanded its list of resequenceable grounds.[120] Meanwhile, the lower

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

112. *See* Moore, *supra* note 73, at 541–46.

113. *See supra* note 83 (collecting cases); Idleman, *supra* note 20, at 29–30 (arguing also that Ginsburg's example invokes law of the case rather than res judicata); Edney, *supra* note 79, at 201–02.

114. *See supra* text accompanying notes 80–95.

115. *See* Edney, *supra* note 79, at 206–14, 220–22.

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

117. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93–94 (1998).

118. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612 (1997) (treating class certification as resequenceable); Arizonans for Official English v. Arizona, 520 U.S. 43, 66–67 (1997) (mootness); Ellis v. Dyson, 421 U.S. 426, 435 (1975) (abstention); Moor v. Cnty. of Alameda, 411 U.S. 693, 716–17 (1973) (discretionary supplemental jurisdiction); Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 86–88 (1970) (exhaustion).

119. *See Steel Co.*, 523 U.S. at 100 n.3.

120. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 432 (2007) (dictum) (treating forum non conveniens as resequenceable); Tenet v. Doe, 544 U.S. 1, 3 (2005) (applying *Totten* doctrine, which prohibits actions against the government based on covert espionage agreements); Kowalski v. Tesmer, 543 U.S. 125, 129 (2004) (third-party standing); Elk Grove

courts resumed expanding that list too, to reach many relatively low-level inquiries.[121]

"There is an array of non-merits questions" that federal courts may resequence today, as the District of Columbia Circuit summed up nicely once again.[122] 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."[123]

Then, in *Sinochem*, the Court more clearly drew the outer line as lying between "nonmerits" and "merits" grounds by explaining: "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.'"[124] Thus, "when considerations of convenience, fairness, and judicial economy so warrant,"[125] a court can decide "a threshold, nonmerits issue"[126] 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 as to a conditional dismissal: "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."[127] What *Sinochem* ultimately means, then, is that there is still plenty of room for arguing about the extent of the list of resequenceable grounds.

Matters of sovereign immunity generate hot dispute in this respect.[128]

Unified Sch. Dist. v. Newdow, 542 U.S. 1, 18–19 (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, 577–78 (1999) (personal jurisdiction).

121. *See, e.g.*, *In re* LimitNone, LLC, 551 F.3d 572, 576 (7th Cir. 2008) (transfer of venue); *In re* Papandreou, 139 F.3d 247, 255–56 (D.C. Cir. 1998) (forum non conveniens).

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

123. 544 U.S. 1, 6 n.4 (2005) (dismissing on the basis of a rule prohibiting actions against the government based on covert espionage agreements).

124. *Sinochem*, 549 U.S. at 431 (quoting Intec USA, LLC v. Engle, 467 F.3d 1038, 1041 (7th Cir. 2006)).

125. *Id.* at 432.

126. *Id.* at 433.

127. *Id.* at 435.

128. *See* Idleman, *supra* note 20, at 81–89 (discussing both the Eleventh Amendment and federal sovereign immunity); *cf. id.* at 95–97 (discussing their bypassability); Hien Ngoc Nguyen, Comment, *Under Construction: Fairness, Waiver, and Hypothetical Eleventh Amendment Jurisdiction*, 93 CAL. L. REV. 587, 590–91 (2005) (discussing Eleventh Amendment immunity). The defense of domestic sovereign immunity is tricky because some see it in various contexts as jurisdictional, while others see it as quasi-jurisdictional. But 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. Fed. Prison Indus., Inc., 199 F.3d 461, 463 (D.C. Cir. 1999) (treating federal sovereign immunity as resequenceable), *with*

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Does the act-of-state defense come within the fold of threshold, nonmerits defenses?[129] Is qualified immunity a resequenceable matter?[130] 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.[131] 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.[132]

In other words, if *Steel Co.* calls for an ever-expanding list, then *Steel Co.* carries the seeds of its own destruction,[133] much like the fate of other

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Calderon v. Ashmus, 523 U.S. 740, 745 (1998) (suggesting that subject matter-jurisdiction must come before an Eleventh Amendment immunity determination).

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, 917–18 (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.

129. *See* Rutledge, *supra* note 5, at 44–46 (arguing that the law should change to bring the act-of-state 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).

130. *See* ARTHUR D. HELLMAN, LAUREN K. ROBEL & DAVID R. STRAS, FEDERAL COURTS 540–41 (2d ed. 2009) (posing the question for qualified immunity).

131. *See* 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, 2260 (2004) (arguing that dismissal for lack of a federal cause of action should be deemed quasi-jurisdictional and hence resequenceable).

132. *See supra* note 102 (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 73, at 549, 562; Note, *supra* note 57, at 164–65, 222–23.

133. *See* Friedenthal, *supra* note 32, 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 44, 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).

sequencing rules.[134] Therefore, a line must be drawn. As long as the Court wants to allow federal courts to purposefully skip subject-matter jurisdiction for easier and surer decisions 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 an objection to subject-matter jurisdiction.[135] But as *Steel Co.* necessarily said, a court cannot purposefully skip subject-matter jurisdiction to dismiss on the merits.[136] In that sense, the case's nonbypassability rule represents a limit on *Chicot*, just as it was the price for approving hypothetical jurisdiction.[137] 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 as to validity.[138] 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 disposition on nonmerits grounds, giving that decision 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, 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, 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 defensible policy sense. Assuming one has decided that the first step down the *Ruhrgas* path is a sound step, the compromise gives the judge a reasonable 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 first has to make sure that the jurisdictional

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134. *See, e.g.*, Pearson v. Callahan, 129 S. Ct. 808, 820–21 (2009) (undercutting the former sequencing rule of Saucier v. Katz, 533 U.S. 194, 197 (2001) (treating qualified immunity)).

135. *See supra* text accompanying notes 51 & 72 (explaining the *Chicot* doctrine).

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

137. *See supra* text accompanying notes 51–59 (explaining the rationale of the nonbypassability list).

138. *See supra* text accompanying note 103 (explaining the unsatisfactoriness of this route).

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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 exposed, 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" of the grounds to the judicial process.[139] 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. The court should not be able to bypass and dismiss when the effect is to kill the cause of action, but only when the plaintiff has a chance to avoid or correct the defect. 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."[140] Thus, the list of resequenceable grounds should include *only those defenses that could result in decisions not on the merits, in the claim-preclusive sense*.[141]

On the one hand, the settled *Steel Co.-Ruhrgas* line of precedent—

139. *See* Idleman, *supra* note 20, at 12–13, 74–75 (criticizing an essentiality test arguably suggested by *Ruhrgas*).

140. *See* ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 98–99 (2001). As Professor Robert Casad and I explain:

> *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 the 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.

Id.

141. A 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. *See* Willy v. Coastal Corp., 503 U.S. 131, 134, 139 (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 disciplinary dismissal, which then will have normal claim-preclusive effects because subject-matter jurisdiction for discipline exists.

which lists justiciability, jurisdiction, abstention, exhaustion, class certification, and venue as resequenceable grounds—conforms to this test. Dispositions on such grounds do not create a bar to a new action when the plaintiff avoids or corrects the defect.[142]

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.[143] Likewise, the intuition that other defenses are not resequenceable seems sound: res judicata[144] and even the statute of limitations[145] 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.[146] Although there may be very good policy reasons to reach some of these issues early,[147] 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:

Nonbypassable Defenses	Resequenceable Defenses
i.e., defenses the court cannot skip over to dismiss on the merits	*i.e.*, defenses on which the court can decide without first deciding nonbypassable defenses

142. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 20 (1982).

143. *See id.* §§ 19–20.

144. *See* Hartmann v. Time, Inc., 166 F.2d 127, 138–40 (3d Cir. 1947); Bronstein v. Kalcheim, 467 N.E.2d 979, 982–83 (Ill. App. Ct. 1984).

145. *See* CASAD & CLERMONT, *supra* note 140, at 93–96.

146. *See supra* note 60 (discussing the jurisdiction/merits divider in the similar, but not necessarily identical, context of validity).

147. *See, e.g.*, *supra* note 129 (discussing act of state).

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 resequenceable, 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 it serves other institutional interests.[148] But that discretion is not my concern in this Part. Here, I am interested in a rule that forbids discretionary sequencing and, incidentally, how uncertainty about the scope of the rule might affect the court's 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 sustain any nonmerits defense with preclusive effect as to that defense. In other words, the court should normally decide a defense of subject-matter jurisdiction at the outset of the case. Such a fundamental ground 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 decide 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 the exception of resequenceability quite broad. Thus, this foremost sequencing limitation turns out not to be a major constraint, except perhaps as it lacks 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.

148. *See* Idleman, *supra* note 20, at 14–20.

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 reduced 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 in 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.[149] In the process, the Court created a sequencing rule under which a federal court[150] 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 those special conditions, to say nothing of the rarity of trial,[151] this rule has only occasional application.

1. Cases

Beacon Theatres, Inc. v. Westover[152] was the first of those cases. It involved a dispute between movie theaters over the exclusive right to show movies 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 they were more than ten

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149. *See 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).

150. Although 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, 92 (1876); Melancon v. McKeithen, 345 F. Supp. 1025, 1027 (E.D. La. 1972), *aff'd mem. sub nom.* Davis v. Edwards, 409 U.S. 1098 (1973), *and* Hill v. McKeithen, 409 U.S. 943 (1972), *and* Mayes v. Ellis, 409 U.S. 943 (1972). 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, 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 149, at 1510–11.

151. *See* 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).

152. 359 U.S. 500 (1959).

miles apart. Beacon wanted a jury trial.[153] 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.[154] Accordingly, the district court chose to decide the equity claim first, without a jury, and the court of appeals assented.[155] The Supreme Court, in an opinion written by Justice Hugo Black, reversed.[156]

First, the Court's all-important premise was that whichever determination on the common issue of law and equity came first—be it by judge or by jury—would preclude the second determination.[157] Here is that premise:

> 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."[158]

The Court, in fact, neglected to cite anything for this res judicata point. But as to preclusion between law and equity, the Court was right.[159] Because the old courts administered law and equity in separate suits, preclusion still applied between them according to the ordinary rules of res judicata.

Second, the Court reasoned that to circumvent preclusion, the trial

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153. *Id.* at 502–04.

154. *See* Am. Life Ins. Co. v. Stewart, 300 U.S. 203, 215–16 (1937); FIELD ET AL., *supra* note 149, at 1493–95.

155. *Beacon Theatres*, 359 U.S. at 503–05.

156. *Id.* at 511.

157. *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).

158. *Beacon Theatres*, 359 U.S. at 504 (quoting Beacon Theatres, Inc. v. Westover, 252 F.2d 864, 874 (9th Cir. 1958)). 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, 252 F.2d at 874. The court of appeals cited *Bruckman v. Hollzer* for this proposition but, nevertheless, held that the district judge could discretionarily try the equitable claim first. *Id.* at 874–75 (citing Bruckman v. Hollzer, 152 F.2d 730, 732 (9th Cir. 1946)).

159. *See Parklane Hosiery*, 439 U.S. at 334; Brady v. Daly, 175 U.S. 148, 161 (1899); RESTATEMENT OF JUDGMENTS § 68 cmt. j (1942). Such preclusion prevailed not only in 1959 but also in 1791. *See* Shapiro & Coquillette, *supra* note 157, at 450–54.

judge could invoke his or her sequencing discretion.[160] 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."[161] 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.[162] 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 choose to 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 to modern minds. It bears repeating that the Court saw its task as *preserving* 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, a prior jury determination would bind the judge, just as a prior 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 circumstances, circumstances which in view of the flexible procedures of the

160. *Beacon Theatres*, 359 U.S. at 510–11.

161. *Id.* at 507.

162. *See id.* at 510–11 (prohibiting that "the right to a jury trial of legal issues be lost through prior determination").

> Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.[163]

These hesitancies evaporated three years later when the Court, in another opinion written by Justice Black, decided *Dairy Queen, Inc. v. Wood*.[164] In that case, the plaintiff had joined equitable and legal claims for relief. The defendant wanted a jury trial.[165] 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.[166] Accordingly, the district court denied the request for a jury, and the court of appeals assented.[167] But again, the Supreme Court reversed.[168]

With a strong pro-jury bias, the Court simply lifted the bare 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."[169] It 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.[170]

With *Beacon Theatres* cut free of its moorings in reason, virtually no subsequent cases have found imperative circumstances to avoid applying its rule.[171] The rule applies without regard to historical restrictions or

163. *Id.* at 510–11; *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, 4–5 (1967).

164. 369 U.S. 469, 470 (1962).

165. *Id.* at 475–76.

166. *See generally* FIELD ET AL., *supra* note 149, at 1490; FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 515–20 (5th ed. 2001).

167. *Dairy Queen*, 369 U.S. at 470.

168. *Id.* at 479–80.

169. *Id.* at 473.

170. *Id.* at 479.

171. *See* 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 149, § 2338, at 370 (concluding that it is "highly doubtful that there are any circumstances that would qualify"). *But see* W. 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).

current circumstances. Even if the trial court dismisses the legal claim for relief joined by the plaintiff with an equitable claim for relief, and then the court tries the equitable claim without the jury requested by the plaintiff, the same rule applies: when the appellate court finds the dismissal to have been in error, the trial court must retry the common issues to a jury first.[172]

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*.[173] The joinder might be by the plaintiff joining multiple claims for relief, or it might result from the defendant asserting a defense or counterclaim that, in the old days, could have stood as a separate claim. As another consequence, a preclusion rule provides that the jury's decision will bind the judge on the common issue.[174]

Where does this preclusion rule come from? It does not come from res judicata, which, as all the hornbooks say,[175] applies only between separate suits.[176] It rests solely on the Seventh Amendment's historical approach:[177]

172. Lytle v. Household Mfg., Inc., 494 U.S. 545, 551–54 (1990).

173. *See* Shum v. Intel Corp., 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 149, §§ 2305, at 125 & n.21, 2338, at 368 & n.10.

174. Int'l 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.) ("[T]he jury's finding on an issue common to both claims is in any event conclusive . . . ."), *vacated on other grounds*, 525 U.S. 802, 802 (1998); Kolstad v. Am. Dental Ass'n, 108 F.3d 1431, 1440 (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."), *modified on reh'g*, 139 F.3d 958 (D.C. Cir. 1998), *vacated on other grounds*, 527 U.S. 526, 546 (1999); JAMES ET AL., *supra* note 166, at 528.

175. *See, e.g.*, CASAD & CLERMONT, *supra* note 140, at 7–8; JAMES ET AL., *supra* note 166, at 677; TEPLY & WHITTEN, *supra* note 173, at 944–45; *see also* RESTATEMENT (SECOND) OF JUDGMENTS ch. 1, at 1 (1982).

176. *See* FIELD ET AL., *supra* note 149, at 688.

> 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.

Id.

177. Such 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. 1986) (involving FED. R. CIV. P. 60(b)). The special doctrine of jurisdiction-to-determine-jurisdiction springs from sources different from those

because in 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 Seventh Amendment's special preclusion rule, aimed at protecting the jury right. 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.[178] *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 the restraints inherent therein.

The restrained view of *Beacon Theatres-Dairy Queen* helps to explain the Court's later decision in *Parklane Hosiery Co. v. Shore*.[179] 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.[180] On the one hand, this result is consistent with the law of res judicata, which allows equity-law preclusion.[181] It is indeed consistent with the view that res judicata adjusts to any procedural changes and so an expanded notion of res judicata can apply in new situations despite old procedural limitations. Just as merged procedure caused claim preclusion to extend to a plaintiff who sues on either the legal or the equitable part of a claim without the other part,[182] nonmutual collateral estoppel could leap the equity/law divide to defeat a defendant's jury right in an action by a new plaintiff. On

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of claim and issue preclusion. *See supra* note 74 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, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 751 (5th Cir. 1996) (citing *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1302–03 (7th Cir. 1995)); Lucas Watkins, *How States Can Protect Their Policies in Federal Class Actions*, 32 CAMPBELL L. REV. 285, 307–08 (2010); *cf.* 7B WRIGHT ET AL., *supra* note 9, § 1801, at 272–73 (discussing the 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. 969, 975, 1019–28 (2010). These courts further conclude that to protect the jury right in the second phase, the issues in the two phases need to be distinct and separable. Cimino v. Raymark Indus., Inc., 151 F.3d 297, 320 (5th Cir. 1998).

178. *See* FIELD ET AL., *supra* note 149, at 1525–27.

179. 439 U.S. 322 (1979).

180. *See id.* at 335.

181. *See supra* note 159 and accompanying text.

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

the other hand, the result is also consistent with the jury-judge sequencing rule. Because that rule rests on the Seventh Amendment's dictate that in a single suit the judge must use existing sequencing power to preserve the jury right, it has no application to the *Parklane* situation of separate lawsuits for which sequencing is not a possibility.[183] 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.

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 both to jurisdiction and to the merits. Although there is no constitutional jury right on jurisdictional issues,[184] courts and commentators equivocate on whether a jury must first determine any common issue.[185] But 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 that foreclosed later consideration of the merits in the same suit.[186] Because there would be no preclusion, there is no need to invert matters by a sequence that would have the jury consider the merits 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

183. *See* Lytle v. Household Mfg., Inc., 494 U.S. 545, 550–54 (1990).

184. *See* Steven Kessler, Note, *The Right to a Jury Trial for Jurisdictional Issues*, 6 CARDOZO L. REV. 149, 149 (1984); 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); *cf.* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1771 (2003) ("[T]he 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.").

185. *See, 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"); Kessler, *supra* note 184, at 165–66; Note, *supra* note 184, at 480–81, 489.

186. Some statutes expressly so provide. *See, e.g.*, 735 ILL. COMP. STAT. 5/2-301(b) (2005); TEX. R. CIV. P. 120a(2); *cf.* Clermont, *supra* note 16, at 990–91 (arguing additionally against preclusion because the standard of proof for jurisdiction is less demanding than the standard applicable to the merits).

sequencing rule 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 because there is no intrasuit res judicata (as opposed to some separate doctrine such as *Beacon Theatres-Dairy Queen*).[187]

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 evidentiary 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 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.[188]

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

In one of the more exotic rulings, *Pavey v. Conley*, 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 to the merits of the case.[189] 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 it had delayed determination of the defense until trial. The court of appeals ruled that the judge should decide on exhaustion and do so at the outset, but the ultimate factfinder could revisit the judge's determination. The court reasoned that, "if there is a jury trial, the jury will

187. *See supra* note 178 and accompanying text.

188. Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 365–66 (2011).

189. 544 F.3d 739, 740–41 (7th Cir. 2008).

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."[190]

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."[191] All the cases on this point seem to say the same on preclusion.[192]

Against all the case law, one could argue that because class actions were equitable in origin, and only equity could entertain a class action even when its merits were all legal,[193] we have fallen back into the context of issues common to joined legal and equitable claims.[194] 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.[195] 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 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

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190. *Id.* at 742.

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

192. *See id.* at 318 n.19 (citing cases); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006) ("[D]etermination as to a Rule 23 requirement is made only for purposes of class certification and is not binding on the trier of facts, even if that trier is the class certification judge." (citing Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004))), *clarified*, 483 F.3d 70 (2d Cir. 2007); Unger v. Amedisys, Inc., 401 F.3d 316, 323 (5th Cir. 2005); Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004); AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.06(b) (2010); Marcus, *supra* note 188; Olson, *supra* note 3, at 964–65.

193. *See* FIELD ET AL., *supra* note 149, at 1493.

194. *See* Davis & Cramer, *supra* note 177, at 1011–12 (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).

195. *See* Ross v. Bernhard, 396 U.S. 531, 540–41 (1970); 7B WRIGHT ET AL., *supra* note 9, § 1801.

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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 route involves resorting to the already applicable doctrine called law of the case.[196]

2. Law of the Case

A doctrine that bears some resemblance both to res judicata and to stare decisis is the law-of-the-case doctrine.[197] Despite its name, it now can apply to rulings on fact as well as on law. It is similar to stare decisis[198] 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.[199] 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.[200] 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 made. These attitudes have been reflected in numerous cases which have involved the "law of the case"

196. Other, 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").

197. *See 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 of law of the case 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).

198. *See generally* Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411 (2010) (examining stare decisis as applied by the Supreme Court).

199. *See* 18B WRIGHT ET AL., *supra* note 197, § 4478.5, at 809–14.

200. *See id.* § 4478, at 637–45.

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doctrine.[201]

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 doctrine, "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."[202]

In summary, the law-of-the-case doctrine, 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 this doctrine 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 the law-of-the-case doctrine expresses only the common sense of "protecting against the agitation of settled issues"[203] or "disciplined self-consistency,"[204] and does some good and little harm.

Consider one last time the *Hydrogen Peroxide* setting of class certification. As to the good the law-of-the-case doctrine accomplishes in that setting, it says that any common 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.

The doctrine's constraint, however, is never really confining. Accordingly, it will not always apply. In fact, the Seventh Amendment as

201. Vestal, *supra* note 197, at 1.

202. Messenger v. Anderson, 225 U.S. 436, 444 (1912).

203. Christianson 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)).

204. 18B WRIGHT ET AL., *supra* note 197, § 4478, at 636.

interpreted in *Beacon Theatres-Dairy Queen* dictates allowing the jury to reconsider any issue on which a constitutional jury trial right exists.[205] More generally, the court retains the power to reconsider. Because of this flexibility, the doctrine necessitates no sequencing rules. But because the flexibility of the doctrine allows for reconsideration sometimes, it also creates the risk of inconsistent decisions. That is the harm the doctrine imposes.

What should be done when a later determination contradicts an earlier determination?[206] Except where the adjudicator has newly found jurisdiction to be lacking,[207] 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.[208]

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.

Thus, this sequencing rule 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 evidentiary 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 from uncertainty about the reach of this sequencing rule. Accordingly, they defer overly to fears of intruding on the jury right. Efforts herein to dissipate the fog should pay dividends in establishing the narrow limits of *Beacon Theatres-Dairy Queen* on courts' sequencing power:

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205. *See supra* text accompanying notes 163 & 170.

206. The 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 §§ 15, 27 cmts. h, m (1982).

207. *See, 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 ordering dismissal for lack of long-arm jurisdiction because defendant had made no contract), *appeal dismissed*, 273 S.E.2d 298, 298 (N.C. 1980).

208. *See generally* Clermont, *supra* note 16, at 978–1000 (establishing that the standard of proof for jurisdiction is less demanding than the standard applicable to the merits).

Sequencing and Preclusion	Law of the Case
in a 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 in a subsequent suit, 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 suit, 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.

In the end, judges' broad power to sequence is probably desirable. At the least, the narrow scope of the few limits on that power, as well as the complexity and dissimilarity of those limits, stands as a challenge to any limit's justification.