JURISDICTIONAL SEQUENCING

Alan M. Trammell[*]

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[*] Visiting Assistant Professor of Law, Brooklyn Law School. I am grateful to the Honorable Stephen F. Williams, Robin Effron, Maria Glover, Fred Bloom, Pamela Bookman, Y.K. Brony–Lee, Dave Martin, Jeremy Marwell, and the participants in workshops at Brooklyn Law School for their helpful comments, suggestions, and insights. I also thank Benjamin Rhodes Lee for invaluable research assistance. Finally, this project benefited from the generous support of Interim Dean Michael Gerber, Dean Nick Allard, and the Dean's Summer Research Fund.

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I. INTRODUCTION

The received wisdom is that a federal court must ensure that it has subject matter jurisdiction before it may "proceed at all in any cause."[1] Such a stark vision of jurisdiction never has been literally true.[2] But in recent years the Supreme Court has pushed the envelope and endorsed a potentially sweeping doctrine of jurisdictional sequencing—the decision of certain issues, and even the dismissal of cases, before a federal court has verified that it has subject matter jurisdiction.[3]

Jurisdictional sequencing taps into fundamental questions about the nature and role of subject matter jurisdiction and what, if anything, a court may do before it has established jurisdiction. Because the Supreme Court has not rooted the doctrine in a clear theory, jurisdictional sequencing has engendered confusion among judges and scholars, who have been at a loss to explain it. Although a number of courts have embraced the leeway that the doctrine offers[4]—the ability to dismiss a case on easier grounds before taking up harder jurisdictional questions—most scholars have criticized it as illegitimate or incoherent.[5] This Article is the

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[1] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) [hereinafter *Steel Co.*] (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869)); *see* Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 32 (2001) (describing subject matter jurisdiction as a "limitation on a court's power to act at all").

[2] *See infra* notes 74–77 and accompanying text.

[3] The first scholar to discuss the idea at length dubbed the practice "jurisdictional resequencing." *See* Idleman, *supra* note 1, at 3. Other scholars and commentators similarly have adopted that nomenclature. *E.g.*, Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1455–56 (2011); Joshua Schwartz, Note, *Limiting* Steel Co.*: Recapturing a Broader "Arising Under" Jurisdictional Question*, 104 COLUM. L. REV. 2255, 2275–76 (2004). To my mind, describing the doctrine as "jurisdictional *re*sequencing" assumes that subject matter jurisdiction always has enjoyed absolute priority when, in fact, it has not. Therefore, in accordance with the Supreme Court's language, I refer to the doctrine as "jurisdictional sequencing." *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999) [hereinafter *Ruhrgas*] (noting that the Court's case law "does not dictate a sequencing of jurisdictional issues").

[4] *See infra* Part II.B (discussing lower courts' use of flexible sequencing).

[5] *See, e.g.*, Idleman, *supra* note 1, at 4 (calling the doctrine "substantially illegitimate"); 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) (criticizing

first to offer a theory that both explains the case law and grounds jurisdictional sequencing in a novel vision of subject matter jurisdiction's precise role. Specifically, I develop a theory of jurisdiction as a surprisingly narrow structural limitation on courts' power to declare substantive law. According to this view, subject matter jurisdiction protects only institutional values, including separation of powers and federalism, but not personal liberty interests.

Scholars have begun to explore the consequences of sequencing rules generally and have demonstrated that such rules are more than an order of operations that leads inexorably to a particular result.[6] Instead, sequencing rules can affect the outcome of cases and the development of both procedural and substantive law.[7] Jurisdictional sequencing most acutely affects judicial economy, allowing district courts to resolve cases more expeditiously and appellate courts to avoid costly remands on jurisdictional questions that have no bearing on a case's outcome.[8]

Any theory of jurisdictional sequencing ultimately must turn on the nature of subject matter jurisdiction—what specifically does it protect and what exactly is a federal court prohibited from doing in its absence? Answering those questions is the only way to develop a robust theoretical understanding of jurisdictional sequencing. Although the doctrine has received more scholarly attention of late,[9] the literature has failed to articulate a theory that both

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Ruhrgas); Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 127–29 (2006) (examining the tension in the Court's jurisdictional-sequencing cases); *see also* Jack H. Friedenthal, *The Crack in the* Steel *Case*, 68 GEO. WASH. L. REV. 258, 259 (2000) (arguing that *Ruhrgas* departed from the traditional view of subject matter jurisdiction); Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 317–32 (1999) (anticipating and criticizing certain grounds on which courts might limit the holding of *Steel Co.*).

[6] *E.g.*, Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 301 (2011); Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1, 7 (2010).

[7] Rutledge, *supra* note 6, at 7, 20–24.

[8] Idleman, *supra* note 5, at 252–53; Joan Steinman, *After* Steel Co.*: "Hypothetical Jurisdiction" in the Federal Appellate Courts*, 58 WASH. & LEE L. REV. 855, 910–11 (2001).

[9] *See supra* notes 5–6; *see also* Heather Elliott, *Jurisdictional Resequencing and Restraint*, 43 NEW ENG. L. REV. 725, 737–46 (2009); Michael J. Edney, Comment, *Preclusive Abstention: Issue Preclusion and Jurisdictional Dismissals After* Ruhrgas, 68 U. CHI. L.

explains the jurisprudence and offers a coherent normative justification for jurisdictional sequencing.

Most approaches have focused only on the low-level question of how to understand the jurisdictional sequencing cases and discern a rule that can guide lower courts in applying the doctrine. As most scholars candidly admit, the results are internally inconsistent or fail to explain the case law fully. The biggest problem, though, is that the most important antecedent question remains largely unaddressed—what is subject matter jurisdiction's precise role? The theory of jurisdictional sequencing that I develop fully resolves the low-level problem of explaining the case law. But it goes further, advancing a vision of subject matter jurisdiction's unique importance in protecting the power of states and the political branches to create substantive law.

Part II offers a brief overview of what I call the Supreme Court's jurisdictional-sequencing trilogy. The first case in the trilogy appeared to announce a virtually ironclad rule: a federal court must decide whether it has subject matter jurisdiction before it takes up any other issue.[10] But the second and third cases pulled back from that absolutism, authorizing the dismissal of cases on any "non-merits threshold" ground at the outset.[11] I then demonstrate the confusion that those cases have wreaked in the lower courts and the necessity of a theory to help courts discern which issues may (and may not) precede a determination of subject matter jurisdiction.

In Part III, I create a taxonomy of the jurisdictional-sequencing theories that scholars and courts have advanced. I demonstrate that none of the theories can explain the case law or offer a satisfying normative explanation of subject matter jurisdiction's precise role.

In Part IV, I develop a theory of jurisdictional sequencing based on the dichotomy between *conduct* rules and *allocative* rules. Conduct rules govern primary obligations, rights, and prohibitions.

REV. 193, 214–16 (2001).

[10] *Steel Co.*, 523 U.S. 83, 98, 101–02 (1998).

[11] Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 432–33 (2007) [hereinafter *Sinochem*]; *accord Ruhrgas*, 526 U.S. 574, 584–85 (1999).

They usually are rules of decision—the elements of a cause of action and defenses that respond directly to those elements. From a conceptual perspective, conduct rules typically affect how people understand rights and obligations *ex ante* and thus influence how people plan their lives. By contrast, allocative rules govern access to courts, regulate procedural and administrative matters, and thus do not create conduct rules. They govern two essential litigation questions: *who* decides, and *how*? The first question—who decides—encompasses rules that allocate decision-making authority among particular institutions and individuals. Those rules often are jurisdictional or quasi-jurisdictional. The second question that allocative rules answer—how to decide an issue—usually involves administrative or procedural rules that pertain to the ways that decisionmakers interpret and apply conduct rules. Although the distinction bears similarities to the substance–procedure dichotomy, I locate the dividing line in a slightly different place. Moreover, in the criminal law literature, Meir Dan–Cohen has explored similar concepts that are especially salient to my analysis.[12]

Part IV makes two methodological moves. First, based on a close reading of the jurisdictional-sequencing trilogy, it identifies a principle—the dichotomy between conduct rules and allocative rules—that explains and reconciles the jurisprudence. Courts may dismiss a case based on an allocative rule even before they resolve subject matter jurisdiction. On the other hand, a court may not interpret, announce, or apply a conduct rule until it has verified jurisdiction.

The second move engages the conceptual and normative questions surrounding the difference between conduct rules and allocative rules. I argue that the dichotomy actually is grounded in a coherent vision of subject matter jurisdiction and is the best way to conceptualize jurisdictional sequencing.

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[12] *See generally* Meir Dan–Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (exploring the difference between "conduct rules" aimed at the general public and "decision rules" aimed at officials who enforce conduct rules).

Subject matter jurisdiction is not principally concerned with a federal court's ability to affect the parties before it but rather the power to craft conduct rules that, from an *ex ante* perspective, likely will affect individuals' *future* conduct. It is a narrow structural constraint—rather than a personal privilege—that protects federalism and separation of powers concerns. Consequently, subject matter jurisdiction prohibits federal courts only from trenching on the preeminent power of the federal and state governments—the authority to craft conduct rules.

When a court adjudicates a conduct rule, it creates law at the margins by clarifying and giving greater content to that rule. Because shaping conduct rules takes a court, however tangentially, into the preserve of the states and political branches, a court must ensure that it has subject matter jurisdiction before it weighs in on such rules. On the other hand, the dismissal of a case based on an allocative rule carries no such risk. Precisely because such dismissals do not implicate relevant federalism or separation of powers concerns, they do not necessarily require subject matter jurisdiction.

The vision of subject matter jurisdiction that I develop here, though unorthodox, has purchase beyond the sequencing context. It dovetails with scholarly and doctrinal developments in other areas of the law. Furthermore, it offers a systematic way to account for the nuanced interplay of jurisdictional, threshold, and merits questions that courts and scholars recently have begun to explore.

II. JURISDICTIONAL SEQUENCING IN THE FEDERAL COURTS

This Part briefly outlines the jurisdictional-sequencing trilogy in which the Supreme Court at first appeared to embrace the absolute priority of subject matter jurisdiction but then laid the groundwork for a much more expansive doctrine of jurisdictional sequencing. It then explores the confusion that has characterized lower courts' attempts to apply those precedents and the need for a coherent theory to explain the parameters of jurisdictional sequencing.

A. THE JURISDICTIONAL SEQUENCING TRILOGY

1. Steel Co. In *Steel Co. v. Citizens for a Better Environment*, the first case in the jurisdictional-sequencing trilogy, the Supreme Court seemed poised to determine the circumstances under which the Emergency Planning and Community Right-To-Know Act of 1986 conferred a private right of action.[13] Six Justices concluded that regardless of what the statute allowed, the plaintiffs lacked standing, an element of subject matter jurisdiction, to bring their lawsuit.[14] Three Justices believed that they did not need to reach the standing question and would have held that the statute itself did not authorize the lawsuit.[15] The case thus teed up the sequencing question of whether a court could resolve the statutory interpretation issue before a potential jurisdictional problem.

Justice Scalia, writing for the majority, concluded that subject matter jurisdiction was paramount and assailed what he regarded as Justice Stevens's indulgence in "hypothetical jurisdiction,"[16] a doctrine that every circuit court of appeals had adopted in at least some fashion.[17] Hypothetical jurisdiction had allowed a court, confronted with a difficult question of subject matter jurisdiction, to assume jurisdiction and dismiss a case on an easy merits ground, provided that the same party would have prevailed if the court had dismissed the case for lack of jurisdiction.[18] In other words, it allowed a court to select the easiest route to the same destination.

Notwithstanding the allure and ubiquity of hypothetical jurisdiction, the Court held that it could not "endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles

[13] *See* 523 U.S. at 86; *see also id.* at 112 (Stevens, J., concurring in the judgment).
[14] *See id.* at 109–10 (majority opinion); *id.* at 110 (O'Connor, J., concurring); *id.* at 111 (Breyer, J., concurring in part, concurring in the judgment).
[15] *See id.* at 131–34 (Stevens, J., concurring in the judgment); *id.* at 134 (Ginsburg, J., concurring in the judgment).
[16] *See id.* at 93–94 (majority opinion).
[17] Idleman, *supra* note 5, at 237.
[18] *See Steel Co.*, 523 U.S. at 93–94.

of separation of powers."[19] Citing venerable case law, the Court then announced a seemingly absolute rule that a federal court must establish the propriety of subject matter jurisdiction before it takes up any other issue:

> "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." . . . The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception."[20]

Notwithstanding concerns that those observations were not part of the majority's holding,[21] lower courts overwhelmingly treated the prohibition against hypothetical jurisdiction as binding[22] (or, at the very least, as well-considered dicta[23]).

2. Ruhrgas. Just one year after *Steel Co.*, the Supreme Court decided the second case in the jurisdictional-sequencing trilogy, *Ruhrgas AG v. Marathon Oil Co.*,[24] in which the Court retreated from (or at least strongly qualified) the language in *Steel Co.* that

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[19] *Id.*

[20] *Id.* at 94–95 (second alteration in original) (quoting, respectively, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868), and Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884)).

[21] *See id.* at 109–10; *id.* at 121 (Stevens, J., concurring in the judgment); *see also* Friedenthal, *supra* note 5, at 262; Steinman, *supra* note 8, at 933.

[22] *See, e.g.*, United States v. Tex. Tech Univ., 171 F.3d 279, 287 (5th Cir. 1999) (noting that the Supreme Court "recently, and flatly, rejected" hypothetical jurisdiction); Seaborn v. Fla. Dep't of Corr., 143 F.3d 1405, 1407 n.2 (11th Cir. 1998) (noting that the "Supreme Court squarely rejected the doctrine of hypothetical jurisdiction"); Broad v. DKP Corp., No. 97 Civ.2029(LAP), 1998 WL 516113, at *4 (S.D.N.Y. Aug. 19, 1998) (noting that "the broader teachings of *Steel Co.* counsel against" use of hypothetical jurisdiction).

[23] *See, e.g.*, Hardemon v. City of Boston, 144 F.3d 24, 26 (1st Cir. 1998) (observing that only a plurality of Justices in *Steel Co.* conclusively rejected hypothetical jurisdiction but addressing the jurisdictional issue so as not "to test the outer limits of the Court's tolerance").

[24] 526 U.S. 574 (1999).

had articulated the absolute priority of subject matter jurisdiction. *Ruhrgas* held that a federal court, at least under certain circumstances, could dismiss a case for lack of personal jurisdiction before it had ruled on subject matter jurisdiction.[25] Perhaps most striking was *Ruhrgas*'s unanimity just one year after the Court had divided, at times rancorously, over the question of subject matter jurisdiction's priority.

The case presented two possible grounds for dismissal—lack of subject matter jurisdiction and lack of personal jurisdiction over Ruhrgas, a German corporation.[26] As the appellate courts involved in the *Ruhrgas* litigation all recognized,[27] the question of subject matter jurisdiction presented "difficult and novel" issues.[28] By contrast, the various courts had little trouble concluding that Ruhrgas's contacts with Texas were so insignificant that personal jurisdiction clearly was lacking.[29]

In an opinion by Justice Ginsburg, the Court held that "there is no unyielding *jurisdictional* hierarchy."[30] It rejected the notion that "subject-matter jurisdiction is ever and always the more 'fundamental' " jurisdictional inquiry and held that the rule from *Steel Co.* "does not dictate a sequencing of jurisdictional issues."[31]

While at first blush *Ruhrgas* seemed confined to the fairly narrow proposition that federal courts are not required to decide

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[25] *Id.* at 578.

[26] *See id.* at 580.

[27] *See id.* at 588; Marathon Oil Co. v. A.G. Ruhrgas, 145 F.3d 211, 225 (5th Cir. 1998) (en banc), *rev'd and remanded by Ruhrgas*, 526 U.S. 574; *id.* at 232–33 (Higginbotham, J., dissenting).

[28] *Ruhrgas*, 526 U.S. at 588. Ruhrgas asserted that diversity existed because one plaintiff had been joined fraudulently. *See id.* at 579–80. The federal court's subject matter jurisdiction thus turned on the vexing question whether the joinder, in fact, was proper. *See id.* at 581 n.5.

[29] *See* Marathon Oil Co. v. A.G. Ruhrgas, 182 F.3d 291, 295 (5th Cir. 1999) (finding no personal jurisdiction), *on remand from Ruhrgas*, 526 U.S. 574; *Ruhrgas*, 526 U.S. at 580–82 (noting that every court to consider personal jurisdiction found it lacking).

[30] *Ruhrgas*, 526 U.S. at 578 (emphasis added).

[31] *Id.* at 584. The Court also put to rest any lingering doubts about whether *Steel Co.*'s rejection of hypothetical jurisdiction was merely dicta on behalf of a plurality. The Court described *Steel Co.* as having "*adhered* to the rule that a federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits." *Id.* at 577 (emphasis added).

subject matter jurisdiction ahead of other jurisdictional rules,[32] the Court's logic suggested a much more capacious power to engage in jurisdictional sequencing. Specifically, *Ruhrgas* posited that the heart of the *Steel Co.* rule lies in the critical distinction between "merits" and "non-merits" grounds for dismissal: " '[A] court that dismisses on . . . non-merits grounds . . . , before finding subject-matter jurisdiction, makes no assumption of law-declaring power . . . .' It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits."[33] Since *Ruhrgas*, that distinction has colored the Supreme Court's jurisdictional-sequencing jurisprudence and influenced most lower courts' interpretation of the *Steel Co.* rule.[34]

3. Sinochem. The final case in the jurisdictional-sequencing trilogy, *Sinochem International Co. v. Malaysia International Shipping Corp.*,[35] illustrates the expansiveness of the sequencing doctrine. Whereas *Ruhrgas* had dealt with the order in which a court must address different jurisdictional issues, *Sinochem* involved an unambiguously *non*jurisdictional question, forum non conveniens, a common law doctrine that allows a court to dismiss a case when another court (usually in a foreign country) offers a clearly superior forum.[36]

Once again, the Supreme Court spoke unanimously through Justice Ginsburg. The opinion relied heavily on the notion that a federal court must verify subject matter jurisdiction only when it

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[32] *See id.* at 585 (citing cases and arguing that the decision of jurisdictional-abstention questions may precede Article III questions).

[33] *Id.* at 584–85 (some alterations in original) (quoting *In re* Papandreou, 139 F.3d 247, 255 (D.C. Cir. 1998)). The germ of this idea was present in *Steel Co*. *See* 523 U.S. 83, 101–02 (1998) ("For a court to pronounce upon *the meaning or the constitutionality of a state or federal law* when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." (emphasis added)); *see also Ruhrgas*, 526 U.S. at 583 (quoting the previous passage from *Steel Co.* and abbreviating the italicized phrase as "the merits"). But the concept did not gain significant traction until *Ruhrgas*.

[34] At least one court has argued that the merits–nonmerits distinction came in dictum. Intec USA, LLC v. Engle, 467 F.3d 1038, 1041 (7th Cir. 2006).

[35] 549 U.S. 422 (2007).

[36] *See id.* at 426–29. The parties in *Sinochem*, both foreign corporations, were contesting certain aspects of a lawsuit already pending in a Chinese court. *See id.* at 426–27. Sinochem moved for a forum non conveniens dismissal, which the district court granted. *Id.* at 427–28.

reaches a case's underlying *merits*: "Dismissal short of reaching the merits means that the court will not 'proceed at all' to an adjudication of the cause."[37] Consequently, a federal court may dismiss a case under the doctrine of forum non conveniens before it verifies subject matter jurisdiction precisely because such a dismissal allows "the merits [to] be adjudicated elsewhere"[38] and "does not entail any assumption by the court of substantive 'law-declaring power.' "[39] *Sinochem* thus affirmed the notion that a federal court may dismiss a case based on a "nonmerits threshold" issue,[40] even one that is not jurisdictional, before it takes up truly jurisdictional questions.

B. JURISDICTIONAL SEQUENCING IN THE LOWER COURTS

Although the outcomes of the Supreme Court's jurisdictional-sequencing cases are reconcilable, they created a moving target for lower courts. Some courts have embraced what they view as a wide berth to dismiss cases on nonmerits grounds before they ensure the existence of subject matter jurisdiction. Others have focused on what they regard as *Steel Co.*'s announcement of the near-absolute priority of subject matter jurisdiction. Indeed, one court has confessed candidly that "it is not always easy to determine whether a particular issue is the type of 'threshold' matter which, if decided adversely to the plaintiff, obviates the need to address other threshold questions."[41] Although the Supreme Court has articulated a distinction between merits and nonmerits issues, lower courts have struggled to apply that distinction because it is not grounded in a readily discernible vision of subject matter jurisdiction.

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[37] *Id.* at 431 (quoting *Ruhrgas*, 526 U.S. at 577); *see also id.* ("Both *Steel Co.* and *Ruhrgas* recognized that a federal court has 'leeway to choose among threshold grounds for denying audience to a case on the merits.' " (quoting *Ruhrgas*, 526 U.S. at 585)).

[38] *Id.* at 432.

[39] *Id.* at 433 (quoting *Ruhrgas*, 526 U.S. at 584–85).

[40] *Id.*

[41] Wilbur v. Locke, 423 F.3d 1101, 1106 (9th Cir. 2005), *abrogated by* Levin v. Commerce Energy, Inc., 130 S. Ct. 2323 (2010).

1. Jurisdictional and Quasi-Jurisdictional Questions. After *Steel Co.* and *Ruhrgas*, lower courts knew that they could prioritize all aspects of subject matter jurisdiction, including both Article III and statutory limitations,[42] as well as personal jurisdiction. They have been more divided, though, with respect to quasi-jurisdictional questions—matters that have a jurisdictional flavor but are not in the strictest sense part of a federal court's subject matter jurisdiction.[43]

One such quasi-jurisdictional issue is the political question doctrine. In its modern formulation, the doctrine renders a case nonjusticiable in federal court when it presents a question that the political branches, rather than the judiciary, are most competent to resolve.[44] After *Steel Co.* and *Ruhrgas*, some courts viewed the doctrine as a nonmerits threshold issue that "prevent[ed] the power of the federal judiciary from being invoked" and thus could precede truly jurisdictional questions.[45] Other courts, though,

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[42] *See, e.g.*, *id.* at 1106–07 (holding that *Steel Co.* required the court to assess constitutional and statutory aspects of jurisdiction at the outset); Sierra Club v. Glickman, 156 F.3d 606, 619 (5th Cir. 1998) ("[W]e do not read [*Steel Co.*] as making standing *the* threshold issue that a court must address; rather, we read that case as making Article III jurisdiction, of which standing, mootness, and ripeness are equally important parts, *the* threshold issue that a court must address."); *see also* Gardynski–Leschuck v. Ford Motor Co., 142 F.3d 955, 959 (7th Cir. 1998) (dismissing for failure to satisfy the statutory amount-in-controversy requirement).

[43] Whether justiciability doctrines are truly part of Article III jurisdiction has been a subject of debate. *Compare* Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring) ("All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."), *with* Oryszak v. Sullivan, 576 F.3d 522, 527 (D.C. Cir. 2009) (Ginsburg, J., concurring) (noting that justiciability is not a jurisdictional issue). The Supreme Court in *Steel Co.* treated one justiciability doctrine—standing—as truly jurisdictional. *See* 523 U.S. 83, 95–97 (1998).

[44] *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (articulating six factors for determining whether a case presents a nonjudiciable political question); *see also* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 264–65 (2002) (arguing that the *Baker* factors capture both the "classical" and "prudential" strands of the political question doctrine).

[45] Hwang Geum Joo v. Japan, 413 F.3d 45, 48 (D.C. Cir. 2005) (quoting Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208, 215 (1974)); *see also* Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57, 73 n.18 (2d Cir. 2005).

interpreted the Supreme Court's jurisdictional-sequencing cases to forbid such a course.[46]

Even greater confusion has arisen with respect to the defense of sovereign immunity under the Eleventh Amendment, which prevents a state from being sued without its consent.[47] The Eleventh Amendment defense has some, but not all, of the attributes of a truly jurisdictional rule.[48] Some courts have held that because the Eleventh Amendment is not an essential part of subject matter jurisdiction, courts need not resolve sovereign immunity questions before they reach a case's merits.[49] By contrast, other courts have found that the Eleventh Amendment does enjoy priority over merits questions.[50] And some circuits have been either divided[51] or candidly agnostic.[52]

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[46] *E.g.*, Doe v. Exxon Mobil Corp., 473 F.3d 345, 348 (D.C. Cir. 2007); Anderman v. Fed. Republic of Austria, 256 F. Supp. 2d 1098, 1103–05 (C.D. Cal. 2003); *see also* Whiteman v. Fed. Republic of Austria, No. 00 Civ. 8006(SWK), 2002 WL 31368236, at *2 (S.D.N.Y. Oct. 21, 2002) (noting that jurisdictional matters must precede the political question issue).

[47] U.S. CONST. amend. XI.

[48] *See* Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 394–95 (1998) (Kennedy, J., concurring) (noting the "hybrid nature" of the Eleventh Amendment); Calderon v. Ashmus, 523 U.S. 740, 745 n.2 (1998) (noting that "the Eleventh Amendment . . . is not coextensive with the limitations on judicial power in Article III"); *see also* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997) (noting that sovereign immunity is waivable); Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 516 n.19 (1982) (noting that a court need not raise a sovereign immunity defense sua sponte).

[49] *See, e.g.*, Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev., 639 F.3d 1078, 1084–85 (D.C. Cir. 2011) (citing Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 780 (2000)) (observing "considerable uncertainty about sequencing in the Eleventh Amendment context"); *In re* Hechinger Inv. Co. of Del., 335 F.3d 243, 250 (3d Cir. 2003); Strawser v. Atkins, 290 F.3d 720, 730 (4th Cir. 2002); Gordon v. City of Kansas City, Mo., 241 F.3d 997, 1005 n.7 (8th Cir. 2001); Floyd v. Thompson, 227 F.3d 1029, 1035 (7th Cir. 2000); United States *ex rel.* Long v. S.C.S. Bus. & Technical Inst., Inc., 173 F.3d 890, 898 (D.C. Cir. 1999); Parella v. Ret. Bd. of the R.I. Emp's.' Ret. Sys., 173 F.3d 46, 53–57 (1st Cir. 1999).

[50] *See, e.g.*, Martin v. Kansas, 190 F.3d 1120, 1126 (10th Cir. 1999); *In re* Jackson, 184 F.3d 1046, 1048 (9th Cir. 1999); United States v. Tex. Tech Univ., 171 F.3d 279, 285–86 (5th Cir. 1999); Seaborn v. Fla. Dep't of Corr., 143 F.3d 1405, 1407 (11th Cir. 1998).

[51] *Compare* Tyler v. Douglas, 280 F.3d 116, 121 (2d Cir. 2001) (resolving the case on the merits rather than sovereign immunity), *with* Hale v. Mann, 219 F.3d 61, 66–67 (2d Cir. 2000) (determining that immunity must be addressed before the merits).

[52] *See* Nair v. Oakland Cnty. Cmty. Mental Health Auth., 443 F.3d 469, 476 (6th Cir. 2006) (stating "we need not decide the [sequencing] point because there is a narrower ground for decision"). In the Eleventh Amendment context, most courts confronted the flip-side of the jurisdictional-sequencing question—which issues *must* a court resolve before

2. Nonjurisdictional Questions. The division among lower courts has been even more pronounced with respect to clearly nonjurisdictional issues. Some courts long had found within the inherent logic of *Steel Co.* an ability to dismiss a case on a variety of threshold grounds before addressing jurisdiction. One of the iconic expositions of the point came from the D.C. Circuit in the brief interval between *Steel Co.* and *Ruhrgas*. It attempted to give content to what qualifies as a nonmerits dismissal.

> What is beyond the power of courts lacking jurisdiction is adjudication on the merits, the act of deciding the case. . . .
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> . . . .
>
> Forum non conveniens does not raise a jurisdictional bar but instead involves a deliberate abstention from the exercise of jurisdiction. While such abstention may appear logically to rest on an assumption of jurisdiction, it is as merits-free as a finding of no jurisdiction.[53]

Although the Second Circuit agreed with that approach,[54] the Fifth Circuit held that granting a forum non conveniens dismissal before establishing subject matter jurisdiction would indulge in the forbidden practice of "hypothetical jurisdiction."[55]

Courts have reached similarly disparate conclusions regarding other nonjurisdictional issues. For instance, some courts have resolved questions about the propriety of venue before addressing subject matter jurisdiction;[56] others have held that such an

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reaching the merits. Some scholars have begun to grapple with that question. *See, e.g.*, Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1 (2008). But the circuit split regarding the nature of the Eleventh Amendment applies equally to the jurisdictional-sequencing context.

[53] *In re* Papandreou, 139 F.3d 247, 255 (D.C. Cir. 1998) (citations omitted).

[54] *See* Arbitration Between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr., 311 F.3d 488, 498 (2d Cir. 2002).

[55] *See* Dominguez–Cota v. Cooper Tire & Rubber Co., 396 F.3d 650, 653 (5th Cir. 2005), *abrogated by Sinochem*, 549 U.S. 422 (2007).

[56] *E.g.*, *In re* LimitNone, LLC, 551 F.3d 572, 577–78 (7th Cir. 2008); Buchanan v. Manley, 145 F.3d 386, 389 n.5 (D.C. Cir. 1998); *see also* Stewart v. May Dep't Store Co., No. Civ.A.

approach is impermissible.[57] Some courts have treated a party's failure to satisfy the requirements of a Federal Rule of Civil Procedure as a nonmerits threshold ground for dismissal,[58] while other courts have held that dismissals on the basis of certain Federal Rules may not leapfrog a determination of subject matter jurisdiction.[59]

Other threshold issues that some courts have reached at the outset of a case include ripeness,[60] failure to preserve a claim,[61] failure to satisfy a prerequisite for equitable relief,[62] preclusion,[63] failure to raise a claim,[64] and certain forms of exhaustion.[65] Furthermore, the D.C. Circuit has held that a rule designed to "preclude judicial inquiry" is a "non-merits threshold ground for dismissal" that may precede a determination of subject matter jurisdiction.[66] By contrast, other courts have held, or at least

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02-2772, 2002 WL 31844906, at *2 n.1 (E.D. La. Dec. 12, 2002) (granting motion to transfer before deciding subject matter jurisdiction).

[57] *See, e.g.*, Simmang v. Tex. Bd. of Law Exam'rs, No. Civ. 3:03-CV-0740-H, 2003 WL 22119511, at *1 (N.D. Tex. Sept. 10, 2003); Nwanze v. Philip Morris Inc., No. 97 CIV. 7344(LBS), 1999 WL 292620, at *2 (S.D.N.Y. May 10, 1999).

[58] *See, e.g.*, Potter v. Hughes, 546 F.3d 1051, 1055 (9th Cir. 2008) (demand requirement of FED. R. CIV. P. 23.1); Kelley v. City of Albuquerque, 542 F.3d 802, 818 n.15 (10th Cir. 2008) (renewed motion for judgment as a matter of law under FED. R. CIV. P. 50(b)); Kramer v. Gates, 481 F.3d 788, 791 (D.C. Cir. 2007) (relief from judgment under FED. R. CIV. P. 60(b)(6)); Payton v. Cnty. of Kane, 308 F.3d 673, 680 (7th Cir. 2002) (class certification under FED. R. CIV. P. 23).

[59] *See, e.g.*, Wilbur v. Locke, 423 F.3d 1101, 1106–07 (9th Cir. 2005) (indispensable party under FED. R. CIV. P. 19), *abrogated by* Levin v. Commerce Energy, Inc., 130 S. Ct. 2323 (2010); Rivera v. Wyeth–Ayerst Labs., 283 F.3d 315, 319 n.6 (5th Cir. 2002) (class certification under FED. R. CIV. P. 23).

[60] *See, e.g.*, Toca Producers v. FERC, 411 F.3d 262, 265 (D.C. Cir. 2005); Presitex USA Inc. v. United States, 674 F. Supp. 2d 1371, 1378 (Ct. Int'l Trade 2010).

[61] *See, e.g.*, Pub. Serv. Elec. & Gas Co. v. FERC, 485 F.3d 1164, 1171 (D.C. Cir. 2007).

[62] *See, e.g.*, Hodgers–Durgin v. de la Vina, 199 F.3d 1037, 1042 & n.3 (9th Cir. 1999) (finding that plaintiff could not demonstrate irreparable injury).

[63] *See, e.g.*, Davis Int'l, LLC v. New Start Grp. Corp., 488 F.3d 597, 604 (3d Cir. 2007) (direct estoppel).

[64] *See, e.g.*, Cruz v. Am. Airlines, Inc., 356 F.3d 320, 330–31 (D.C. Cir. 2004).

[65] *See, e.g.*, Sarei v. Rio Tinto, PLC, 550 F.3d 822, 824 n.1 (9th Cir. 2008) (prudential exhaustion); Long Term Care Partners, LLC v. United States, 516 F.3d 225, 232–33 (4th Cir. 2008) (inapplicability of a nonstatutory exception to the Administrative Procedure Act's requirement of final agency action).

[66] Pub. Citizen v. U.S. Dist. Court for D.C., 486 F.3d 1342, 1343, 1347–49 (D.C. Cir. 2007) (quoting Tenet v. Doe, 544 U.S. 1, 6 n.4 (2005)) (dismissing a case under the *Marshall Field*

intimated, that they may not decide preclusion questions[67] or the propriety of a forum non conveniens dismissal (when federal jurisdiction is based on removal)[68] before they verify subject matter jurisdiction. And the status of class certification rulings, for purposes of jurisdictional sequencing, remains particularly thorny.[69]

As a general matter, the D.C.,[70] First,[71] and Second[72] Circuits have tended to take the most expansive view of the nonmerits threshold issues that courts may decide before they reach subject matter jurisdiction. On the other hand, the Fifth Circuit typically has adhered to what it regards as the virtually ironclad presumption that federal courts should decide subject matter jurisdiction ahead of all else.[73]

The division outlined above suggests pervasive confusion about which issues qualify as nonmerits threshold grounds for dismissal.

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doctrine, which provides that attestations of presiding officers of the House and Senate are conclusive of what Congress passed, thus foreclosing further judicial inquiry on that point).

[67] *See, e.g.*, Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519, 525 (5th Cir. 2008).

[68] *See, e.g.*, Provincial Gov't of Marinduque v. Placer Dome, Inc., 582 F.3d 1083, 1087–88 (9th Cir. 2009).

[69] *See, e.g.*, Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 632 F.3d 762, 768–71 (1st Cir. 2011) (noting tension in Supreme Court and lower court cases as to the priority of Article III vis-à-vis Rule 23's requirements).

[70] In addition to *Papandreou*, *Cruz*, *Hwang Geum Joo*, and *Kramer*, *see supra* notes 53, 64, 45, and 58 respectively, see also *Galvan v. Federal Prison Industries, Inc.*, 199 F.3d 461, 463 (D.C. Cir. 1999).

[71] *See, e.g.*, Restoration Pres. Masonry, Inc. v. Grove Eur., Ltd., 325 F.3d 54, 59–60 (1st Cir. 2003); Seale v. INS, 323 F.3d 150, 155–57 (1st Cir. 2003); Davignon v. Clemmey, 322 F.3d 1, 11 (1st Cir. 2003); United States v. Woods, 210 F.3d 70, 74 n.2 (1st Cir. 2000); Kelly v. Marcantonio, 187 F.3d 192, 197 (1st Cir. 1999); Parella v. Ret. Bd. of R.I. Emp's.' Ret. Sys., 173 F.3d 46, 54–55 (1st Cir. 1999).

[72] *See, e.g.*, Alliance for Envtl. Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82, 87 (2d Cir. 2006); United States v. Canova, 412 F.3d 331, 348 (2d Cir. 2005); Fama v. Comm'r of Corr. Servs., 235 F.3d 804, 816 n.11 (2d Cir. 2000); Boos v. Runyon, 201 F.3d 178, 182 (2d Cir. 2000); *In re* O'Brien, 184 F.3d 140, 142 (2d Cir. 1999).

[73] In addition to *Dominguez–Cota* and *Rivera*, *see supra* notes 55 and 59 respectively, see also *United States v. Texas Tech University*, 171 F.3d 279, 286–88 (5th Cir. 1999), and the *Ruhrgas* en banc opinion, *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 225 (5th Cir. 1998) (en banc), *rev'd and remanded by Ruhrgas*, 526 U.S. 574 (1999). *But see* Carey v. Sub Sea Int'l, Inc., No. 99-40793, 2000 WL 329367, at *3 (5th Cir. Mar. 23, 2000) (finding that the district court did not abuse its discretion by resolving personal jurisdiction before subject matter jurisdiction).

That confusion has resulted from the failure to root jurisdictional sequencing in a coherent vision of subject matter jurisdiction.

III. THEORIES OF JURISDICTIONAL SEQUENCING

Having surveyed the Supreme Court's jurisdictional-sequencing trilogy and lower courts' often fitful attempts to apply those decisions, I turn in this Part to the various theories of jurisdictional sequencing that scholars and judges have advanced. A viable theory is necessary as a practical guide for lower courts that continue to struggle to discern which issues may precede subject matter jurisdiction in the decisional hierarchy. Moreover, from a conceptual perspective, a coherent theory of jurisdictional sequencing is essential to justify the doctrine's very existence and refute suggestions that it is an unprincipled shortcut or, even worse, an illegitimate exercise of judicial power.

Such a theory must be grounded in a well-defined notion of what subject matter jurisdiction protects and, just as important, what it does *not* protect. Too often courts and scholars fall back on the trope that without jurisdiction a court has no "power to act at all."[74] But a literal prohibition against doing anything in the absence of subject matter jurisdiction makes no sense and never has been true.[75] Surely a court always can perform routine docket-management functions—assigning a docket number to a case, scheduling a hearing, etc.—before inquiring into subject matter jurisdiction. Courts also have some inherent authority over cases, extending perhaps to entering discovery and pleading orders (and sanctioning lawyers for failure to comply with them).[76] Moreover,

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[74] Idleman, *supra* note 1, at 32; *see also Steel Co.*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause." (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869)) (internal quotation mark omitted)); Davis v. Passman, 442 U.S. 228, 239 n.18 (1979) ("Thus it may be said that jurisdiction is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case . . . ." (emphasis omitted)).

[75] For instance, even before ascertaining subject matter jurisdiction, courts may impose sanctions, Willy v. Coastal Corp., 503 U.S. 131, 136–39 (1992), and hold parties in contempt, United States v. United Mine Workers, 330 U.S. 258, 289–95 (1947).

[76] *See* Steinman, *supra* note 8, at 872; Idleman, *supra* note 1, at 47–56 (describing inherent powers that are "designed to operate in the absence of verified subject-matter

courts always have metajurisdictional power—jurisdiction to determine their own jurisdiction.[77] The question, then, is not *whether* courts may exercise certain judicial authority before they verify jurisdiction, but what *kind* of actions are inappropriate. That inquiry must inform any theory of jurisdictional sequencing.

In this Part, I organize scholarly and judicial treatments into a taxonomy of four theories. These theories do not accurately describe the Supreme Court's jurisdictional-sequencing trilogy. More importantly, they don't offer a satisfying normative vision of subject matter jurisdiction's precise role, which I argue is exclusively structural. The taxonomy thus demonstrates the need for a new theory, which I develop in Part IV based on the dichotomy of conduct rules and allocative rules.

A. PRAGMATIC THEORY

Some scholars and judges regard subject matter jurisdiction largely as a pragmatic concept that helps ensure the adjudication of actual controversies, the decision of only necessary questions, and minimization of the risk of judicial error. According to this theory, a jurisdiction-first rule is a way to effectuate certain judicial values, such as efficiency and judicial restraint. On the other hand, pragmatists assert, courts should not slavishly adhere to the rule when doing so would compromise those values.

Efficiency always has been among pragmatism's chief concerns. Deciding jurisdictional questions first usually fosters efficiency because a jurisdictional dismissal at the outset prevents courts from devoting time and resources to other aspects of the case. But occasionally a difficult jurisdictional question might consume more resources than an alternative route to dismissal.[78] Those efficiency concerns are particularly acute when a jurisdictional problem comes to light for the first time on appeal but the

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jurisdiction"); *see also* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1078 (7th Cir. 1987) ("[A] court . . . may engage in all the usual judicial acts, even though it has not power to decide the case on the merits.").

[77] *See infra* notes 144–45 and accompanying text.

[78] *See* Elliott, *supra* note 9, at 729 (discussing the efficiency rationale of hypothetical jurisdiction); *Steel Co.*, 523 U.S. at 111 (Breyer, J., concurring in the judgment) (same).

appellate court recognizes an alternative ground for dismissal. Either way, the lawsuit is destined for dismissal, but the nonjurisdictional course spares a potentially expensive, though ultimately irrelevant, remand.[79]

Justice Breyer argued in *Steel Co.* that taking a flexible approach to jurisdiction "makes enormous practical sense," especially when a court confronts an "intractable" jurisdictional question and "(assuming an easy answer on the substantive merits) the same party would win or lose regardless."[80] Similarly, scholars also have noted that policing an unyielding jurisdictional hierarchy is an "expensive habit"[81] and have extolled the efficiency gains of a more pragmatic approach to jurisdiction.[82]

Beyond efficiency gains, scholars have argued that pragmatism fosters judicial restraint.[83] In most circumstances, addressing subject matter jurisdiction first is the restrained approach because it ensures that a court will venture into substantive law—and render precedential decisions on such law—only when it has legitimate authority to do so. But in some cases restraint might require a court to address the merits first.[84] Circumventing

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[79] *See, e.g.*, Decker & Co. v. West, 76 F.3d 1573, 1584 (Fed. Cir. 1996) (noting the futility of remand on the jurisdictional question); Mitchell v. W. Feliciana Parish Sch. Bd., 507 F.2d 662, 666–67 (5th Cir. 1975) (same); *see also* Forster v. Cnty. of Santa Barbara, 896 F.2d 1146, 1147 n.2 (9th Cir. 1990) (noting the practical irrelevance of a potential jurisdictional defect discovered on appeal).

[80] *Steel Co.*, 523 U.S. at 111 (Breyer, J., concurring).

[81] David P. Currie, *The Federal Courts and the American Law Institute: Part II*, 36 U. CHI. L. REV. 268, 298 (1969); *see also* Idleman, *supra* note 1, at 71–72 (arguing that while jurisdictional hierarchies may be costly, such costs are justified).

[82] *See, e.g.*, Friedenthal, *supra* note 5, at 270 (arguing that when deciding the jurisdictional question would be a "colossal waste of time and there are no serious concerns about compromising state courts' powers regarding the substantive law involved, a belated dismissal makes little sense" and that "[t]here will be no violence to the separation of powers if in an occasional case justice triumphs over rigidly applied rules of procedure"); Sherry, *supra* note 5, at 127 (arguing that requiring courts to decide "difficult—but ultimately irrelevant—issues" compromises efficiency).

[83] *E.g.*, Elliott, *supra* note 9, at 742–46; Sherry, *supra* note 5, at 128; Steinman, *supra* note 8, at 912–13. *But see* Idleman, *supra* note 5, at 248–49 (criticizing the restraint rationale as "questionable").

[84] *See, e.g.*, Browning–Ferris Indus. of S. Jersey, Inc. v. Muszynski, 899 F.2d 151, 152 (2d Cir. 1990) ("In the interests of judicial restraint . . . , we prefer to assume colorable jurisdiction for the purposes of this appeal only, without deciding the jurisdictional questions.").

difficult jurisdictional questions that ultimately have no bearing on the outcome of a case arguably promotes restraint as courts are able "to avoid complex questions about the margins of their power."[85]

From a purely explanatory perspective, though, pragmatism fails to describe the jurisdictional-sequencing cases. Admittedly, a robust jurisdiction-first principle never has been inviolate,[86] and the Court's adherence to such a rule has been "inconsistent."[87] The majority in *Steel Co.* acknowledged as much.[88] But proponents of a strong view of pragmatism note that their vision would allow courts to go even further and pass over difficult jurisdictional questions to reach other straightforward issues, including the merits of the case.[89] The jurisdictional-sequencing trilogy has rejected that idea explicitly and prohibited a "rul[ing] on the *merits* of a case without first determining . . . subject-matter jurisdiction."[90]

The pragmatic theory is also normatively problematic. If the ultimate question is what a court should refrain from doing before it has established subject matter jurisdiction, pragmatism offers little guidance. Essentially, a strong theory of pragmatism tells courts to pick the surest ground of decision, regardless of whether it is jurisdictional, procedural, or merits-based. While such an approach might effectuate notions of judicial restraint, it does little to clarify what subject matter jurisdiction specifically protects.

The pragmatic approach seems to treat judicial restraint and efficiency as the highest values and jurisdictional rules simply as a means to that end. Even its proponents intuit that this can't be

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[85] Elliott, *supra* note 9, at 746.

[86] *See* Norton v. Mathews, 427 U.S. 524, 532 (1976) (noting the occasional practice of departing from a jurisdiction-first rule); *see also Steel Co.*, 523 U.S. 83, 110–11 (O'Connor, J., concurring); *id.* at 111 (Breyer, J., concurring in the judgment).

[87] Sherry, *supra* note 5, at 128.

[88] *Steel Co.*, 523 U.S. at 101 (majority opinion); *id.* at 110–11 (O'Connor, J., concurring).

[89] *See id.*at 111–12 (Breyer, J., concurring in the judgment); Friedenthal, *supra* note 5, at 269–70.

[90] *Sinochem*, 549 U.S. 422, 430–31 (2007) (emphasis added); *see also Ruhrgas*, 526 U.S. 574, 583 (1999).

quite right. Justice Breyer's concurrence in *Steel Co.* illustrates the dilemma. He agreed that "federal courts often, and typically should, decide standing questions at the outset of a case"[91] but then made clear that, in his view, the Constitution does not require courts to resolve subject matter jurisdiction questions first "when doing so would cause serious practical problems."[92] If the usual jurisdiction-first rule derives from the Constitution, what justifies exceptions besides "practical problems"? Alternatively, if the jurisdiction-first rule is not a constitutional imperative, why insist that courts "typically should" resolve jurisdictional questions first?

The strong view of pragmatism advanced by Justice Breyer cannot elucidate why jurisdiction is unique vis-à-vis procedural or merits questions, even though he says that it is. A weaker view of pragmatism accepts the Court's prohibition against deciding *merits* questions before jurisdiction but otherwise permits a court to choose the easiest "threshold" ground for dismissal. It also acknowledges, but cannot explain, the usual presumption in favor of deciding jurisdiction first.[93]

As most courts and scholars recognize, though, there is something inherently special about subject matter jurisdiction, however ethereal that "something" might be.[94] Courts that have taken an expansive approach to jurisdictional sequencing still acknowledge that subject matter jurisdiction is a unique, constitutional prerequisite for the exercise of certain powers.[95] Indeed, federal courts have an independent obligation to police subject matter jurisdiction.[96] Even scholars who have argued that

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[91] *Steel Co.*, 523 U.S. at 111 (Breyer, J., concurring in the judgment).

[92] *Id.*

[93] *See* Elliott, *supra* note 9, at 743 (arguing that a court should decide a jurisdictional question first unless it is "appreciably more complicated than [another] threshold question").

[94] *See infra* Part III.B–D.

[95] *See In re* Papandreou, 139 F.3d 247, 255–56 (D.C. Cir. 1998) (noting that subject matter jurisdiction protects separation of powers and is a prerequisite to the exercise of certain judicial power); *see also* Kramer v. Gates, 481 F.3d 788, 791 (D.C. Cir. 2007); Cruz v. Am. Airlines, Inc., 356 F.3d 320, 330–31 (D.C. Cir. 2004).

[96] *See* FED. R. CIV. P. 12(h)(3) ("If the Court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

subject matter jurisdiction is more malleable than judicial rhetoric suggests nonetheless argue that jurisdiction performs both "a structural role" and "an expressive role in affirming that certain limitations are important or fundamental."[97] Consequently, clarity about the structural nature of subject matter jurisdiction is important, especially its role in restraining courts from intruding on the law-making realm that the political branches normally occupy. That more robust and concrete understanding of jurisdiction's structural role gives content to pragmatists' inchoate, but correct, intuition that subject matter jurisdiction is unique. It also lays the groundwork for a better conceptualization of jurisdictional sequencing.

B. EQUIVALENCE THEORY

The second theory of jurisdictional sequencing is the equivalence theory, according to which courts may prioritize an issue that is sufficiently equivalent to subject matter jurisdiction. Scott Idleman developed the contours of the equivalence theory based on a parsing of *Ruhrgas*.[98] Although the theory represents Idleman's good faith interpretation of *Ruhrgas*, Idleman makes clear that he finds the theory specious.[99]

According to Idleman's reading of *Ruhrgas*, two overarching questions must guide a court's assessment of whether it may consider an issue ahead of subject matter jurisdiction. First, is the issue "equivalent" to subject matter and personal jurisdiction?[100] That question turns principally on whether an issue is "essential" to a court's legitimate authority to adjudicate a case.[101] Second,

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[97] Dodson, *supra* note 3, at 1482; *see also* Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 1022–26 (2009) (discussing values promoted by jurisdiction).

[98] *See* Idleman, *supra* note 1, at 11; *see also Ruhrgas*, 526 U.S. 574, 584 (1999) (noting that "[p]ersonal jurisdiction," like subject matter jurisdiction, "is 'an essential element of the jurisdiction of a district . . . court,' without which the court is 'powerless to proceed to an adjudication.' " (alteration in original) (quoting Emp'rs Reinsurance Corp. v. Bryant, 299 U.S. 374, 382 (1937))).

[99] *See* Idleman, *supra* note 1, at 4–5.

[100] *Id*. at 11.

[101] *Id*. at 12–13. Idleman also noted *Ruhrgas*'s reference to the fact that personal and subject matter jurisdiction are both rooted in the Constitution but doubted whether "the

should a court "resequence" the issue ahead of subject matter jurisdiction?[102] The second question depends on the relative difficulty of the issues as well as other institutional interests, such as judicial economy and judicial restraint.[103]

The equivalence theory lacks explanatory power, however, because the first prong never has had much purchase. The Supreme Court has signaled that federal courts may prioritize a host of threshold questions that, even under the most capacious definition, are not equivalent to subject matter jurisdiction. For example, a forum non conveniens decision, which *Sinochem* permits, is not essential to a court's adjudicatory authority. Unlike subject matter and personal jurisdiction, forum non conveniens is not jurisdictional (or even quasi-jurisdictional) but is purely discretionary. Similarly, lower courts have approved dismissals based on preclusion principles,[104] failure to raise a claim,[105] and failure to preserve a claim,[106] none of which is an "essential element" of a court's adjudicatory power.[107] At most, an issue's equivalence to subject matter jurisdiction might be a sufficient condition for a court to decide that issue at the outset, but by no means is it a necessary condition.

The relevance of the second prong—weighing the difficulty of the issues—is doubtful. Although *Ruhrgas* and several lower court decisions have focused on the relative difficulty of the subject matter jurisdiction question as a precondition for deciding another issue first,[108] the Supreme Court does not always treat such

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element of constitutionality" was "truly necessary" to the *Ruhrgas* decision or just a makeweight argument. *Id.* at 75–77.

[102] *Id.* at 11.

[103] *Id.* at 14, 17.

[104] *E.g.*, Davis Int'l, LLC v. New Start Grp. Corp., 488 F.3d 597, 604 (3d Cir. 2007).

[105] *E.g.*, Cruz v. Am. Airlines, Inc., 356 F.3d 320, 330–31 (D.C. Cir. 2004).

[106] *E.g.*, Pub. Serv. Elec. & Gas Co. v. FERC, 485 F.3d 1164, 1171 (D.C. Cir. 2007).

[107] *Ruhrgas*, 526 U.S. 574, 584 (1999).

[108] *See id.* at 588; *see also* Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519, 525 (5th Cir. 2008) (holding that mootness should be addressed first because a res judicata analysis was "no less burdensome"); Lolavar v. de Santibanes, 430 F.3d 221, 227 (4th Cir. 2005) (noting that jurisdictional sequencing is permitted only when subject matter jurisdiction is "complex and perhaps difficult"); Gadlin v. Sybron Int'l Corp., 222 F.3d 797, 799 (10th Cir. 2000) (interpreting *Ruhrgas* to require that a relatively straightforward question of subject matter jurisdiction be addressed first).

balancing as integral to the sequencing analysis. In 2010, the Court dismissed a case on the ground of comity and observed in passing that it did not need to resolve the issue of subject matter jurisdiction.[109] Justice Thomas objected to that approach, arguing that the jurisdictional inquiry was not difficult and that the Court should not circumvent it.[110] His view commanded only two votes, though, suggesting that the relative difficulty of the jurisdictional inquiry might not be a hard-and-fast prerequisite for jurisdictional sequencing.

From a normative perspective, the theory is even more fraught with problems, many of which Idleman identifies. For starters, it is not clear that personal jurisdiction is meaningfully equivalent to subject matter jurisdiction. The Court in *Ruhrgas* acknowledged that subject matter and personal jurisdiction evince significant differences in their underlying purposes, origins, and character.[111] Subject matter jurisdiction is an institutional constraint that derives from Article III of the Constitution and restricts judicial power as a matter of sovereignty; consequently, subject matter jurisdiction (at least in its constitutional dimension) is a nonwaivable constraint that both the parties and the court may raise at any time before final judgment.[112] By contrast, personal jurisdiction derives from the Due Process Clauses of the Fifth and Fourteenth Amendments and protects a person's liberty interests.[113] Thus, unlike a lack of subject matter jurisdiction, a defect in personal jurisdiction is waivable and forfeitable.[114] Precisely because personal jurisdiction is not an absolute prerequisite to the exercise of judicial power, it is not on par with subject matter jurisdiction.[115]

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[109] *See* Levin v. Commerce Energy, Inc., 130 S. Ct. 2323, 2336–37 (2010) (citing *Sinochem*, 549 U.S. 422, 431 (2007)).

[110] *See id.* at 2337–39 (Thomas, J., concurring).

[111] *Ruhrgas*, 526 U.S. at 583–84.

[112] *See id.*; Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982); *see also* Idleman, *supra* note 1, at 31–33.

[113] *See Ins. Corp. of Ir.*, 456 U.S. at 702–03 & n.10; *see also* Idleman, *supra* note 1, at 33.

[114] *See Ruhrgas*, 526 U.S. at 584; *Ins. Corp. of Ir.*, 456 U.S. at 702–03; Idleman, *supra* note 1, at 36.

[115] *See* Idleman, *supra* note 1, at 32–33, 39, 74 (explaining why personal and subject matter jurisdiction "are most assuredly *not* equivalent").

One might try to save the equivalence theory from internal inconsistency by adopting a broader definition of equivalence that includes any issue that "must be demonstrated before a federal court can adjudicate a dispute."[116] That approach effectively would reduce the equivalence theory to the question of "essentiality," but it exposes an even deeper normative difficulty. Leaving aside any uncertainty about whether particular issues qualify as "essential"—for example, comity, exhaustion requirements, and prudential abstention doctrines[117]—some threshold questions probably are not essential because they are discretionary. For instance, in the forum non conveniens context, the lack of a more convenient forum is not a prerequisite for the exercise of judicial power;[118] thus, that threshold issue probably is not essential. Why certain threshold issues that seek to delimit federal judicial power should fall on one side of a blurry line seems arbitrary and does not correspond with any robust theoretical doctrine.[119]

The overarching normative problem associated with any formulation of the equivalence theory is its inability to explain why any of the line-drawing matters. The pertinent question is not whether a particular issue is equivalent to subject matter jurisdiction or otherwise essential to adjudication. Instead, a theory of jurisdictional sequencing should begin by asking what jurisdiction protects. Idleman's criticism of the equivalence theory starts to address that underlying problem by noting that subject matter jurisdiction is a structural limitation on federal courts, but

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[116] *Id.* at 74.

[117] *See, e.g.*, Adkins v. VIM Recycling, Inc., 644 F.3d 483, 497–98 (7th Cir. 2011) (describing *Colorado River* abstention as a "prudential" doctrine); Garcia v. Akwesasne Hous. Auth., 268 F.3d 76, 80 (2d Cir. 2001) (noting that an exhaustion requirement is a "matter of comity" that "does not impair jurisdiction").

[118] *See, e.g.*, Piper Aircraft v. Reyno, 454 U.S. 235, 249-50 (1981) (emphasizing that forum non conveniens is a "flexib[le]" and "discretion[ary]" doctrine that is not governed by "a rigid rule").

[119] One might argue that any discretionary limitation, such as forum non conveniens, is less essential than an objection that, if properly invoked, is nondiscretionary. But such a distinction seems far less important, and thus less relevant to "essentiality," than the distinction between waivable and nonwaivable rules or the distinction between issues that a court may raise sua sponte and those that it may not. The equivalence theory gives no reason for preferring one distinction over another.

when describing what that limitation guards, he makes only vague appeals to federal sovereignty.[120] While his formulation might be correct at a high level of abstraction, it does not advance the discussion very much. As I argue in Part IV, subject matter jurisdiction is a specific limitation on courts' authority to adjudicate conduct rules. With that idea of jurisdiction's role squarely in mind, questions about an issue's equivalence or essentiality become irrelevant. Instead, the focus should remain on whether resolving a particular issue will implicate subject matter jurisdiction's specific concerns.

C. ARTICLE III THEORY

A number of courts have interpreted the jurisdictional-sequencing cases to accord absolute priority to Article III subject matter jurisdiction but not statutory limitations that Congress has imposed.[121] The First Circuit proffered the Article III theory in 1999: "[T]he decision in *Steel Co.* 'distinguishes between Article III jurisdiction questions and statutory jurisdiction questions, holding that the former should ordinarily be decided before the merits, but the latter need not be.' "[122] The First Circuit has adhered to the Article III theory of jurisdictional sequencing since then,[123] as have several other courts.[124]

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[120] *See* Idleman, *supra* note 1, at 32–33.

[121] In the immediate aftermath of *Steel Co.*, Idleman anticipated this development. *See* Idleman, *supra* note 5, at 318–20 (noting the narrow view that *Steel Co.* concerned only the priority of Article III jurisdiction).

[122] Kelly v. Marcantonio, 187 F.3d 192, 197 (1st Cir. 1999) (quoting Parella v. Ret. Bd. of R.I. Emp's.' Ret. Sys., 173 F.3d 46, 54 (1st Cir.1999)).

[123] *E.g.*, Davignon v. Clemmey, 322 F.3d 1, 11 (1st Cir. 2003); United States v. Woods, 210 F.3d 70, 74 n.2 (1st Cir. 2000).

[124] *See, e.g.*, Chalabi v. Hashemite Kingdom of Jordan, 543 F.3d 725, 728 (D.C. Cir. 2008) (holding that jurisdictional sequencing rules apply only to Article III, but not statutory, jurisdictional requirements); Kramer v. Gates, 481 F.3d 788, 791 (D.C. Cir. 2007) (same); United States v. Canova, 412 F.3d 331, 348 (2d Cir. 2005) (same); Perdeaux v. United States, 338 F.3d 137, 139 n.3 (2d Cir. 2003) (same); Fama v. Comm'r of Corr. Servs., 235 F.3d 804, 816 n.11 (2d Cir. 2000) (same); Boos v. Runyon, 201 F.3d 178, 182 n.3 (2d Cir. 2000) (same); *see also* Larsen v. Senate of Pennsylvania, 152 F.3d 240, 245 (3d Cir. 1998) (emphasizing that *Steel Co.* prioritized Article III jurisdiction).

Lower courts have based the Article III theory on several passages from the majority opinion in *Steel Co.*, which rejected "the proposition that the court can reach a merits question when there is no *Article III jurisdiction*."[125] The majority chastised Justice Stevens for failing to cite a case in which the Court had decided whether a cause of action existed "before resolving a dispute concerning the existence of an *Article III case or controversy*."[126] And the Court acknowledged that certain precedents had "diluted the absolute purity of the rule that *Article III jurisdiction* is always an antecedent question."[127]

As with the other theories explored in this Part, the problems with the Article III theory are both descriptive and normative. First, from a purely descriptive viewpoint, *Steel Co.* does not unambiguously lend itself to a reading that differentiates between Article III jurisdiction and other limits on subject matter jurisdiction. At the end of the Court's disquisition on hypothetical jurisdiction, the opinion appeared to articulate the priority of *all* subject matter jurisdiction issues, regardless of their source: "The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers."[128] Scholars have noted this tension within the *Steel Co.* opinion, which seems to distinguish Article III and statutory limitations on jurisdiction and then, in the next breath, eliminate the significance of any such distinction.[129]

Furthermore, *Ruhrgas* suggests that the Article III theory does not represent the best reading of the jurisdictional-sequencing

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[125] *Steel Co.*, 523 U.S. 83, 97 n.2 (1998) (internal quotation marks omitted) (emphasis added); *see also id.* at 100–01 n.3 (observing that Justice Stevens's concurrence cited no case in which the Court had "decid[ed] the merits before a disputed question of *Article III jurisdiction*" (emphasis added)).

[126] *Id.* at 92 (emphasis added); *see also id.* at 95 (arguing that the concurrence erred by "asserting that a court may decide the cause of action before resolving *Article III jurisdiction*" (emphasis added)).

[127] *Id.* at 101 (emphasis added).

[128] *Id.*

[129] *See* Steinman, *supra* note 8, at 860–62 (concluding that "the Court has laid the groundwork for playing *Steel Co.* either way"); Friedenthal, *supra* note 5, at 264–65 (noting "Justice Scalia's apparent wandering" between the priority of all limits on subject matter jurisdiction and only the constitutional limits).

cases. If the Court simply meant to articulate the priority of Article III's case or controversy requirement, *Ruhrgas* would have been a very straightforward case. Recall that the gnarly question of subject matter jurisdiction in *Ruhrgas* was whether the parties were completely diverse. Because one of the plaintiffs (Norge, a Norwegian corporation) and the defendant (Ruhrgas, a German corporation) were both aliens, the plaintiffs argued that complete diversity was not satisfied.[130] But the Supreme Court has made clear that the complete diversity mandate stems only from the diversity jurisdiction *statute*.[131] Article III is more permissive and requires only minimal diversity. As long as any two opposing parties are diverse from one another, that requirement is met.[132] The *Ruhrgas* parties satisfied Article III's minimal diversity requirement because, aside from Norge, the other plaintiffs were domestic corporations and thus were diverse from the foreign defendant.[133] If *Steel Co.* simply had forbidden the decision of any issue ahead of an Article III question, *Ruhrgas* would have been far easier—there was obviously minimal diversity (thus complying with Article III), and the courts could have proceeded directly to the question of personal jurisdiction without any fuss.[134]

The Article III theory also presents normative difficulties. Although the First Circuit has noted that the theory comports with the canon of constitutional avoidance,[135] courts generally have

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[130] *See Ruhrgas*, 526 U.S. 574, 578 n.1, 580 (1999). The dispute concerned whether Norge had been joined fraudulently. *See id.* at 581 n.5. If it had, and if Norge were dismissed from the action, then there would have been complete diversity. *See id.* at 580 n.2.

[131] *See id.* at 584; *see also* 28 U.S.C. § 1332 (2006) (providing for diversity jurisdiction); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806) (interpreting the statute to require complete diversity).

[132] *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530–31 (1967).

[133] *See Ruhrgas*, 526 U.S. at 578 n.1 (noting the parties' citizenship).

[134] Similarly, the issue of subject matter jurisdiction in *Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan*, which *Steel Co.* and *Ruhrgas* both cite for the priority of subject matter jurisdiction, pertained only to the statutory requirement of complete diversity since the constitutional requirement of minimal diversity clearly was satisfied. 111 U.S. 379, 381–82 (1884); *see also* Friedenthal, *supra* note 5, at 264–65.

[135] *See* Kelly v. Marcantonio, 187 F.3d 192, 197 (1st Cir. 1999) ("[T]he relevant maxim outside the Article III context 'is not that federal courts cannot act without first establishing their jurisdiction, but rather that courts should not reach constitutional questions in advance of the necessity of deciding them.' " (quoting Parella v. Ret. Bd. of the R.I. Emp's.'

grounded it only in a close reading of *Steel Co.*, rather than a robust conceptual or theoretical defense. Perhaps the most that can be said for the theory is that constitutional restrictions on subject matter jurisdiction are more fundamental than statutory restrictions to the extent that Congress can alter purely statutory limits. But that argument is strained, precisely because Congress thus far has *not* altered those statutory restrictions or permitted courts to circumvent them.[136] If Congress has imposed a truly jurisdictional requirement, courts have a duty to police that restriction just as rigorously as a constitutional limitation.[137]

The larger conceptual problem, as with the other theories discussed in this Part, is that the Article III theory fails to grapple with the question of what subject matter jurisdiction protects. Despite the pellucid clarity of the line that the theory draws, that line seems arbitrary and untethered to any vision of subject matter jurisdiction's unique structural role. There is no meaningful structural difference between constitutional and statutory restrictions, even though Congress can relax the latter more easily. Instead, the focus should remain on what kind of action a court may not take before it verifies subject matter jurisdiction. Consequently, differentiating between constitutional and statutory restrictions on jurisdiction is an unhelpful distraction from the main issues on which jurisdictional sequencing should turn.

D. PRESENT LITIGANT THEORY

The final theory of jurisdictional sequencing that scholars have put forward posits that a federal court must verify subject matter jurisdiction before it renders a decision that binds the litigants in a case. It rests on the idea that preclusion principles, including both

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Ret. Sys., 173 F.3d 46, 56 (1st Cir. 1999))).

[136] *Cf.* Steinman, *supra* note 8, at 940–41 (noting Congress's power to make certain requirements nonjurisdictional); Dodson, *Mandatory Rules*, *supra* note 52, at 9–11 (noting Congress's power to create truly jurisdictional rules and less rigid mandatory rules).

[137] *See* Steinman, *supra* note 8, at 939 (arguing that statutory limits "are of sufficient stature, by virtue of their source, and of sufficient importance as a matter of policy, that they too should not be subject to judicial circumvention").

issue preclusion[138] and claim preclusion,[139] should inform jurisdictional sequencing. Unlike the other theories discussed in this Part, the present litigant theory grapples with subject matter jurisdiction's precise role. The theory is predicated on the idea that jurisdiction confers on a court the ability to bind the parties before it and thus that the preclusive consequences of a decision in the absence of verified subject matter jurisdiction should be quite limited. Despite capturing an intuitive and visceral concern about judicial power, that premise is flawed and undercuts the theory.

What I term the present litigant theory derives from scholarship by Michael J. Edney and Kevin Clermont. Edney argues that subject matter jurisdiction, as a protection of federalism, "is the power of federal courts to issue determinations of law and fact *preclusive* in state court."[140] In light of those concerns, Edney calls for special preclusion rules when a federal court, before establishing subject matter jurisdiction, dismisses a case on a threshold issue. He argues that parties should not be precluded from relitigating that issue in state court.[141]

Clermont similarly has suggested that the key to understanding jurisdictional sequencing lies in preclusion rules.[142] But he argues that a dismissal on a threshold ground in the absence of verified subject matter jurisdiction should be entitled to at least some degree of preclusion in state court.[143] The more nuanced approach that he envisions stems from a first principle of subject matter

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[138] Issue preclusion prevents a party from relitigating an issue that was "actually litigated and determined" and was essential to the outcome of the first action. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). Furthermore, the party against whom issue preclusion is sought must have been a party, or in privity with a party, to the earlier litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979).

[139] Claim preclusion prevents a plaintiff from raising *un*litigated matters that were part of the same transaction underlying an earlier lawsuit. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

[140] Edney, *supra* note 9, at 216 (emphasis added); *see also id*. at 208 (arguing that subject matter jurisdiction vindicates "the interests of state courts in autonomous adjudication" of cases).

[141] *See id*. at 221.

[142] Clermont's analysis relies, at different points, on the concepts of both issue preclusion and claim preclusion. Clermont, *supra* note 6, at 316–30.

[143] *Id*. at 323; *see also id*. at 323–24 (arguing that allowing an unfettered right to relitigate in state court undermines efficiency).

jurisdiction (that a federal court always has jurisdiction to determine its own jurisdiction)[144] and a corollary of that principle (that a court also has jurisdiction to determine that it *lacks* jurisdiction).[145] Even a court's determination that it lacks jurisdiction, Clermont maintains, is entitled to some limited preclusive effect; specifically, a party may not relitigate the precise jurisdictional question in another court.[146] Clermont extrapolates that a dismissal on a threshold ground, before a court has established subject matter jurisdiction, should enjoy the same limited issue preclusive effect that attaches to a court's determination that it lacks jurisdiction.[147]

1. Descriptive Deficiencies. Like the other theories considered in this Part, the present litigant theory lacks full explanatory power. Although the theory has the virtue of explaining the outcome of the jurisdictional-sequencing trilogy, it undermines the Supreme Court's more expansive view of the preclusive consequences that attach to threshold dismissals.

Ruhrgas recognized that a dismissal for lack of personal jurisdiction might "preclude the parties from relitigating the very same personal jurisdiction issue in state court."[148] In elucidating that concept, the Court borrowed an example offered at oral argument by the late Charles Alan Wright, Ruhrgas's lawyer, that envisions a much broader preclusive effect for jurisdictional and other threshold dismissals.[149] The Court hypothesized a state-law cause of action that a defendant removes to federal court in which a plaintiff seeks $50,000 in compensatory damages and $1 million in punitive damages.[150] If the federal court determines that

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[144] *See id.* at 316–18 (describing the doctrine); Dodson, *supra* note 3, at 1453–54 (same); *see also* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 367–68 (1993) (same).

[145] Clermont, *supra* note 6, at 318–20.

[146] *See id.* (arguing that the question whether a court has jurisdiction may not be relitigated but any underlying issues decided in the course of assessing jurisdiction may be relitigated).

[147] *Id.* at 325.

[148] *Ruhrgas*, 526 U.S. 574, 585 (1999).

[149] Transcript of Oral Argument at 8–9, *Ruhrgas*, 526 U.S. 574 (No. 98-470), 1999 WL 183813, at *8–9.

[150] *Ruhrgas*, 526 U.S. at 585; *see also* Transcript of Oral Argument, *supra* note 149, at 8–9.

punitive damages are not available under state law and remands the case because it fails to satisfy the amount-in-controversy requirement, the determination about the unavailability of punitive damages under state law could be preclusive.[151] That is, the Court suggested that preclusion might attach to far more than the single fact that jurisdiction was lacking. Rather, all issues decided in the course of a jurisdictional dismissal could be precluded and thus prevent parties from relitigating certain questions that pertain both to the federal court's jurisdiction as well as to the case's underlying merits.[152]

The present litigant theory thus is at odds with the Supreme Court's vision of how preclusion and jurisdictional sequencing interact. Specifically, *Ruhrgas* rejected the theory's asserted parallelism between subject matter jurisdiction and the power to bind litigants in other courts. According to some scholars, the theory's apparent descriptive deficiency is unproblematic because the *Ruhrgas* dictum on preclusion is simply a misstatement of the law. Clermont, for example, chastises the Court for "just swallow[ing Professor Wright's] example whole" and "provid[ing] completely irrelevant support" for its assertions about the preclusive effects of threshold dismissals.[153] He and Idleman insist that jurisdictional dismissals do not enjoy the wide preclusive effects that Wright and the Court posited.[154]

Contrary to the arguments by Clermont and Idleman, the Court might have been right. Although the law is not settled on exactly what preclusive consequences attach to jurisdictional dismissals, federal courts frequently have given preclusive effect to underlying issues decided in the course of such dismissals. Those decisions

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[151] *Ruhrgas*, 526 U.S. at 585–86.

[152] The point is not just a theoretical nicety. Federal courts tend to take a somewhat more restrictive view of personal jurisdiction questions than do state courts. Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 51–53 (1998). Consequently, an opportunity to relitigate the issue in state court might yield a different outcome.

[153] Clermont, *supra* note 6, at 324–25.

[154] *See id.* ("[Justice Ginsburg's] result . . . is wrong."); Idleman, *supra* note 1, at 29–30 (arguing that law of the case, not preclusion, governs a federal court's jurisdictional dismissal and that *Ruhrgas* "appears to have stated at best a novel legal theory and at worst a basic legal error").

both postdate[155] and predate[156] the *Ruhrgas* decision, thus belying Clermont's suggestion that *Ruhrgas* itself spawned an unwarranted expansion of issue preclusion.[157] The broader vision of preclusion that Wright advocated at oral argument in *Ruhrgas*, and that the Court accepted, is one to which his treatise on federal jurisdiction long had adhered.[158] Moreover, the Supreme Court itself has the power to craft preclusion principles for federal judgments,[159] thus lending credence to the appropriateness of the *Ruhrgas* dictum.

In short, there are good reasons to believe that the Court's more expansive view of preclusion, decoupled from subject matter jurisdiction, correctly articulates the law. If that is so, then the present litigant theory cannot fully explain an underlying tenet of the jurisdictional-sequencing case law. This conclusion is more tentative than the conspicuous normative criticisms of the present litigant theory, discussed immediately below. But it suggests that, despite a certain intuitive attractiveness, the present litigant theory fails both descriptively and normatively.

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[155] *See, e.g.*, Grudzinski v. Staren, 87 F. App'x 508, 510–12 (6th Cir. 2004) (holding that the state court's jurisdictional dismissal decided that plaintiff's contract was for one year and that issue preclusion prevented relitigation of the contract's duration); Matosantos Comm. Corp. v. Applebee's Int'l, Inc., 64 F. Supp. 2d 1105, 1109–10 (D. Kan. 1999) (holding that issue preclusion attached to another federal court's determination, in dismissing for lack of jurisdiction, that defendant assumed a purchase agreement with plaintiff), *aff'd by* 245 F.3d 1203, 1210 (10th Cir. 2001) (holding that "[a]lthough uncommon, it is not legally significant that the issue foreclosed in the present case goes to the merits of [plaintiff's] claim rather than the jurisdiction of the . . . district court").

[156] *See, e.g.*, Unity House, Inc. v. First Comm. Fin. Grp., No. 98-1060, 1999 WL 164924, at *1–2 (7th Cir. Mar. 17, 1999) (holding that issue preclusion attached to a determination of agency made by another court in the course of a jurisdictional ruling); Oglala Sioux Tribe of Pine Ridge Indian Reservation v. Homestake Mining Co., 722 F.2d 1407, 1412 (8th Cir. 1983) (holding that the constitutionality of a statute had been determined in an earlier proceeding that dismissed the case for lack of subject matter jurisdiction and could not be relitigated); Roth v. McAllister Bros., 316 F.2d 143, 145 (2d Cir. 1963) (holding that defendant was precluded from relitigating a question of employment that another tribunal had decided when dismissing for lack of jurisdiction).

[157] *See* Clermont, *supra* note 6, at 324 (arguing that the *Ruhrgas* dictum had created "the danger . . . that courts will give too much preclusive effect").

[158] *See* 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4436, at 154 (2d ed. 2002) (noting that "a dismissal for lack of jurisdiction . . . does preclude relitigation of the issues determined in ruling on the jurisdiction question").

[159] Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507 (2001).

2. Normative Deficiencies. At first blush, there is an appealing symmetry to viewing jurisdictional sequencing through the lens of preclusion principles. After all, the Supreme Court in *Ruhrgas* and *Sinochem* made clear that subject matter jurisdiction is essential only if a court presumes to reach the *merits* of a case.[160] By the same token, the claim preclusive effect of a dismissal in federal court largely turns on whether there has been, in the language of the Federal Rules, "an adjudication on the *merits*."[161] Along those lines, Clermont argues that jurisdictional sequencing should mirror "the line that [claim preclusion] already draws—with fair clarity—when it declines to create a bar to reassertion of the claim after an adjudication 'not on the merits.' "[162]

The normative difficulty with the present litigant theory is that it conflates two conceptually distinct ideas—the substance of a lawsuit and preclusion—and thereby treats subject matter jurisdiction as a personal right or privilege rather than a structural limitation on judicial power.[163] As scholars and courts have recognized, the apparent symmetry between the substantive merits and preclusion is a siren song. The merits–nonmerits line, for purposes of the jurisdictional-sequencing cases, relates to the conduct rules that are at the heart of a cause of action.[164] By contrast, the term "on the merits," as used to describe when preclusion attaches to certain dismissals, "is an unfortunate phrase"[165] that has a vastly different meaning and "has become so

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[160] *Sinochem*, 549 U.S. 422, 431–33 (2007); *Ruhrgas*, 526 U.S. 574, 584–85 (1999).

[161] FED. R. CIV. P. 41(a)(1)(B), (b) (emphasis added).

[162] Clermont, *supra* note 6, at 329.

[163] This portion of Clermont's theory rests more on notions of claim preclusion rather than issue preclusion. His analysis elides the distinction between the two, even though they operate differently. Because the preclusion analogy fails for other reasons, I don't discuss whether this imprecision is problematic for his theory.

[164] *See Steel Co.*, 523 U.S. 83, 101–02 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."); *Ruhrgas*, 526 U.S. at 583 (similarly recognizing subject matter jurisdiction as essential for an adjudication of the substantive merits); *cf.* 18A WRIGHT ET AL., *supra* note 158, § 4435, at 134 (noting that preclusion may attach to a "judgment that does not rest on any examination whatever of the substantive rights asserted").

[165] 18A WRIGHT ET AL., *supra* note 158, § 4435, at 132–33 (internal quotation marks omitted).

misleading as to be less than worthless."[166] "The characteristics that determine the extent of preclusion may have little to do with actual resolution of the merits . . . ."[167] In a similar vein, the Supreme Court has observed that the phrase "on the merits" might "appl[y] to some judgments . . . that do *not* pass upon the substantive merits of a claim."[168] And even Clermont acknowledges that certain dismissals to which preclusion attaches "are perhaps not in any real sense on the merits."[169]

This is not a situation in which one legal doctrine can borrow concepts developed in another context,[170] precisely because subject matter jurisdiction and preclusion rules are based on, and protect, different policies. The bounds of jurisdictional sequencing derive from a proper understanding of subject matter jurisdiction as a structural limitation on courts rather than a personal right or privilege. Subject matter jurisdiction protects separation of powers and federalism concerns, particularly the power of the political branches and states to create conduct rules. Individual litigants may raise an objection to a defect in subject matter jurisdiction in order to assist courts in policing that structural boundary, but litigants have no personal liberty interest in subject matter jurisdiction. By contrast, preclusion rests mainly on

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[166] DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 34 (2001).

[167] 18A WRIGHT ET AL., *supra* note 158, § 4435, at 133–34; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. a (1982) (noting that the Restatement avoids the phrase "on the merits" in order to avoid "possibly misleading connotations" since "judgments not passing directly on the substance of the claim" often have preclusive effects).

[168] Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 502 (2001). *Semtek* narrowed the phrase even further, holding that an "adjudication on the merits" simply denotes a dismissal with prejudice and does not necessarily have claim preclusive effects. *Id.* at 505–06.

[169] Clermont, *supra* note 6, at 329 n.140 (quoting ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 98–99 (2001)). Some of the dismissals that he includes in that description are dismissals for failure to state a claim and on summary judgment. *See id.* Arguably those dismissals implicate the underlying merits of a case. By contrast, dismissals for failure to prosecute or obey a court order, though preclusive, have nothing to do with the substance of the claim. Clermont's attempt to distinguish such dismissals is unclear. *See id.* at 329 n.141.

[170] *Cf.* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 469 (2010) (endorsing borrowing generally but cautioning that "[n]ot every legal idea is compatible with another—the relationships may not be intuitive, the union may seem forced, and the result may be a jumble").

policies of preserving individuals' personal interests in having a full and fair opportunity to litigate (and in repose once litigation has concluded).[171]

The present litigant theory blurs the critical distinction between structural limitations and personal liberty interests, as Clermont's examples make clear. He envisions that jurisdictional sequencing should permit courts to dismiss cases based on lack of jurisdiction, improper venue, certain voluntary dismissals, and certain problems with party joinder.[172] Indeed, many courts have recognized that such dismissals may precede a determination of subject matter jurisdiction.[173] But Clermont argues that dismissals based on sovereign immunity, which some courts have permitted even before they decide subject matter jurisdiction,[174] are impermissible.[175] Thus, according to his theory, jurisdictional sequencing should permit only those dismissals that "allow[ ] the plaintiff to correct the threshold defect in a second suit."[176]

In short, the present litigant theory treats subject matter jurisdiction as a matter of personal liberty and views jurisdictional sequencing through that lens. That premise is fundamentally flawed, though, because subject matter jurisdiction is exclusively a structural limitation on courts' power vis-à-vis the political branches and states.

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[171] Preclusion also implicates courts' institutional interest in efficiency because it prevents the relitigation of certain questions. But that institutional interest in conserving resources is quite different than the structural interests in separation of powers and federalism that undergird subject matter jurisdiction.

[172] *See* Clermont, *supra* note 6, at 329 n.140. That list largely tracks the dismissals that the Federal Rules regard as not being "on the merits" and to which no preclusive effect attaches. FED. R. CIV. P. 41(a), (b); *see also* CASAD & CLERMONT, *supra* note 169, at 98–99; 18A WRIGHT ET AL., *supra* note 158, § 4435, at 135–38 (discussing voluntary dismissals).

[173] *See, e.g.*, *supra* note 56 (venue); *Ruhrgas*, 526 U.S. 574, 578 (1999) (personal jurisdiction).

[174] *E.g.*, Galvan v. Fed. Prison Indus., Inc., 199 F.3d 461, 463 (D.C. Cir. 1999); *In re* Papandreou, 139 F.3d 247, 255 (D.C. Cir. 1998).

[175] *See* Clermont, *supra* note 6, at 330 ("[D]isputed matters of sovereign immunity . . . should not be resquenscеable . . . .").

[176] Clermont, *supra* note 6, at 328–30; *see also* Hernandez v. Conriv Realty Assocs., 182 F.3d 121, 123 (2d Cir. 1999) (holding that "where a court lacks subject matter jurisdiction, it also lacks the power to dismiss with prejudice").

IV. CONDUCT RULES AND ALLOCATIVE RULES

In this Part, I develop a theory of jurisdictional sequencing predicated on the distinction between conduct rules and allocative rules. According to this theory, threshold dismissals that are based on allocative rules are permissible even before a federal court has verified its subject matter jurisdiction. The theory is the first to resolve the low-level problem of reconciling the case law. Unlike the theories discussed in Part III, it also addresses the overarching normative question about what precisely subject matter jurisdiction protects and grounds jurisdictional sequencing in the answer to that question.

On a more conceptual level, this Part offers a reimagining of subject matter jurisdiction. While unconventional, it finds support in historical notions of jurisdiction as a structural constraint that only recently has acquired the patina of absoluteness. I explore the ways that this new vision of subject matter jurisdiction provides a robust way to understand broader problems that scholars and courts have identified and only recently have begun to systematize. In particular, the theory developed here suggests a way to understand jurisdiction's malleability as well as the fluidity of jurisdictional, threshold, and merits concepts. Such fluidity has become increasingly salient, especially in the class action context.

A. A NEW THEORY OF JURISDICTIONAL SEQUENCING

The key to understanding the Supreme Court's jurisdictional sequencing jurisprudence lies in differentiating between conduct rules and allocative rules. A conduct rule refers to a rule that governs primary obligations, rights, and prohibitions. Most often it is an element of a cause of action or a defense that responds directly to one of those elements. As I elaborate later, the inquiry is not whether a particular rule has an *impact* on rights and obligations; virtually any rule will.[177] Rather, the question usually

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[177] *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965) (noting that "*every* procedural variation" can affect a case's outcome); Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 69 (1998) ("[E]ven the

is whether a rule, judged from an *ex ante* perspective, will tend to affect how individuals understand their rights and obligations and, accordingly, whether that rule affects how individuals shape their primary conduct.[178]

By contrast, allocative rules govern the allocation of decision-making authority. They answer two questions: *who* decides, and *how*? Allocative rules concern the jurisdictional rules that confer and withhold decisional authority. They also include rules that are administrative or procedural in nature, the mechanisms by which decisionmakers interpret and apply conduct rules.

According to this view, a federal court has an absolute obligation to verify its subject matter jurisdiction only when it adjudicates (and thus creates) a conduct rule. Such adjudication includes interpreting a conduct rule—whether from a constitutional, statutory, or regulatory source—and also applying that rule to the specific facts of a case. In elucidating a conduct rule, through purely legal interpretations or application of law to fact, a court exercises its substantive "law-declaring" authority and makes law, at least at the margins, by refining, clarifying, and giving greater content to conduct rules.[179] That is true regardless of whether a court declares law in the formal sense by creating binding precedent or in a more informal fashion.[180] Either way, a court's exposition of a conduct rule, from an *ex ante* perspective, informs individuals about the nature of their rights and obligations and thereby influences decisions about their primary

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most ostensibly innocuous rule . . . will have some impact on substantive rights. . . .").

[178] *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1128 (1982) (describing rules that "affect out-of-court conduct"); *Hanna*, 380 U.S. at 474–76 (Harlan, J., concurring) (noting the preeminence of rules that govern primary activity); Kramer v. Gates, 481 F.3d 788, 791 (D.C. Cir. 2007) (arguing that law-declaring power concerns rules with an "effect on primary conduct"). This formulation for assessing a conduct rule is a rule of thumb and, at the margins, probably is overinclusive. Certain rules that I regard as allocative rules, such as immunity, might have an impact on primary conduct from an *ex ante* perspective. *See infra* Part IV.D.

[179] *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 883 (2006) (noting the Holmesian precept that common law adjudication involves the creation of law).

[180] *Cf.* Richard D. Freer, *Observations on the Scope of the Supreme Court's Rejection of "Hypothetical Jurisdiction,"* 8 FED. LITIG. GUIDE RPTR. 247, 250 (Oct. 1999) (noting the possibility of reading the jurisdictional-sequencing cases to permit any adjudication that "does not require a *precedential* holding" (emphasis added)).

conduct.[181] In that meaningful but limited way a court makes law, and the ability to make law through the adjudication of conduct rules is at the heart of what subject matter jurisdiction protects. That view of subject matter jurisdiction is not concerned with a court's ability to bind the litigants in a pending case. Instead, it focuses on a court's authority to create conduct rules that will affect individuals' *future* conduct and provide rules of decision for *future* cases.[182]

While subject matter jurisdiction does enjoy pride of place in the sequencing hierarchy when a federal court adjudicates a conduct rule, the converse also is true: a court does not have to verify subject matter jurisdiction when it dismisses a case based on an allocative rule. This understanding best captures the dichotomy in the jurisdictional-sequencing cases of "merits" dismissals, for which subject matter jurisdiction is required, versus "nonmerits threshold" dismissals, for which jurisdiction is not essential. An allocative rule governs access to courts, typically implicates procedural and administrative concerns, and thus does not risk creating conduct rules. While any dismissal creates law in some sense (for instance, a dismissal for lack of standing yields another data point in the law of standing), a dismissal based on an allocative rule does not define rights or obligations, nor from an *ex*

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[181] A district court, for instance, never creates binding precedent, but someone trying to understand how courts will interpret certain provisions of law will heed a district court's pronouncements. Similarly, a federal court's interpretation of state substantive law, though not binding, is a relevant data point for anyone interested in figuring out how a court might apply that law.

[182] What some might regard as an insensitivity to the actual litigants before a court is actually at the core of how courts usually understand judicial lawmaking. Even when courts change the rules of the game in a given case, such as by overruling precedents, the new rule usually applies to the pending case rather than on a prospective basis only. *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("[J]udges in a real sense 'make' law. But they make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be. Of course this mode of action poses 'difficulties of a . . . practical sort' when courts decide to overrule prior precedent. But those difficulties are one of the understood checks upon judicial law making; to eliminate them is to render courts substantially more free to 'make new law,' and thus to alter in a fundamental way the assigned balance of responsibility and power among the three branches." (citation omitted)).

ante perspective does it alter how individuals understand such rights and obligations under the law.[183]

The dichotomy that I suggest might be redolent of the classic distinction between substance and procedure and, indeed, certain comparisons are conceptually helpful. For instance, the *Erie*[184] doctrine generally requires federal courts sitting in diversity to apply state substantive law and federal procedural law.[185] Most modern constitutional defenses of *Erie* rest on a separation of powers notion that is consonant with my analysis here. Specifically, many scholars defend *Erie* on the ground that Congress has a unique ability to create truly substantive law—conduct rules—and that courts may not exercise such power without congressional authorization.[186]

Despite these parallels, I don't rely on the substance–procedure nomenclature for several reasons. First, the distinction between substance and procedure does not capture a single, inherent legal idea. Instead, what brands a rule as substantive or procedural often depends on context and the specific policy goals that the differentiation seeks to effectuate.[187] Second, within the *Erie* line

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[183] Defining a conduct rule in terms of its regulation of primary conduct is not a resort to the modified "outcome-determinative" test of *Hanna v. Plumer*, 380 U.S. 460 (1965). A conduct rule governs the ordering of one's daily activities and decisions, whereas the modified "outcome-determinative" test turns specifically on whether a rule likely will induce forum-shopping. *See id.* at 468–69. Moreover, even though Justice Harlan's concurrence invoked "primary activity" as a means of drawing the substance–procedure distinction, *see id.* at 474 (Harlan, J., concurring), it actually relied on a state enclave theory of federal power that has fallen into disrepute. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 700–06 (1974) ("[T]he enclave theory does not accurately reflect the Constitution's plan for allocating power between the federal and state governments.").

[184] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[185] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996).

[186] *See, e.g.*, Paul J. Mishkin, *Some Further Last Words On* Erie*—The Thread*, 87 HARV. L. REV. 1682, 1683 (1974); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 11–12 (1975); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 766–67, 801 (1989).

[187] *See generally* Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333 (1933); *see also* Kelleher, *supra* note 177, at 109 ("The phrase 'substantive rights,' as used in the [Rules Enabling Act], does not have the same meaning as in other areas of legal discourse. Some matters that in ordinary legal parlance are considered 'procedural,' such as venue or subject matter jurisdiction, are 'substantive' for purposes of the REA.").

of cases, the substance–procedure distinction has acquired unique, even idiosyncratic, meanings that are unhelpful for present purposes. Leaving aside pervasive scholarly debates about the correctness and foundations of *Erie*,[188] John Hart Ely has observed that the *Erie* doctrine is not actually a unified doctrine but instead a conglomeration of cases that courts decide on the basis of very different governing principles.[189] Consequently, the outcome of an *Erie* case often has little bearing on whether a particular question of law actually regulates substantive rights and obligations.[190] Third, I define an allocative rule as far broader than almost any working definition of a procedural rule. Finally, in the context of criminal law, Meier Dan–Cohen has explored a concept that is similar to the dichotomy between conduct rules and allocative rules. His conceptualization is particularly apt for the present analysis, and I rely in part on his terminology.[191]

B. SUBJECT MATTER JURISDICTION AS A STRUCTURAL CONSTRAINT

The search for a coherent theory of jurisdictional sequencing ultimately is rooted in the endeavor to understand what exactly subject matter jurisdiction protects and what courts may not do in its absence. Meaningful answers to those questions should drive the conceptualization of jurisdictional sequencing. Unfortunately, most scholarly and judicial treatments of jurisdictional sequencing have not engaged those questions at all or, at most, have offered imprecise appeals to separation of powers and federalism. The

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[188] *See generally* Bradford R. Clark, Erie*'s Constitutional Source*, 95 CALIF. L. REV. 1289 (2007); Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595 (2008); Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPP. L. REV. 129 (2012).

[189] *See* Ely, *supra* note 183, at 697–700 (arguing that three different rules of decision govern the choice of federal versus state law in diversity cases—the Constitution, the Rules of Decision Act, and the Rules Enabling Act).

[190] For instance, in *Ragan v. Merchants Transfer & Warehouse Co.*, the Supreme Court determined that state tolling rules should govern (and thus in a sense were "substantive" for *Erie* purposes). *See* 333 U.S. 530, 533–34 (1949). But it would strain credulity to say that such rules are "substantive" in any typical use of that word.

[191] *See* Dan–Cohen, *supra* note 12. I borrow his term "conduct rules" but refer to the other part of the dichotomy as "allocative rules" in order to convey better how these concepts apply in the civil realm, particularly to antecedent jurisdictional questions.

better and more complete understanding of subject matter jurisdiction is that it serves as a limited institutional restraint.

Subject matter jurisdiction is not a talisman without which courts literally have no power to act, nor is it a personal right or privilege. Instead, it is a narrow structural constraint that prevents courts from impinging on the preeminent power of the political branches and states—the power to create and define primary rights and obligations. For that reason, subject matter jurisdiction is vital only when a federal court adjudicates a conduct rule and thereby creates law that might affect individuals' *future* behavior. Grounding jurisdictional sequencing in that specific vision of subject matter jurisdiction's unique, but limited, role vindicates important constitutional values. At the same time, such an approach does not unnecessarily prevent courts from resolving cases more efficiently when those structural values are not at stake.

Courts and scholars consistently have recognized that subject matter jurisdiction is a structural limitation that protects institutional interests and "keep[s] the federal courts within the bounds the Constitution and Congress have prescribed."[192] Subject matter jurisdiction primarily serves separation of powers interests,[193] and it also vindicates certain federalism principles.[194] As a structural constraint, it protects particular interests of the political branches and states, but those interests are not necessarily implicated whenever a federal court acts. To take a pedestrian example mentioned earlier, a court that performs

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[192] *Ruhrgas*, 529 U.S. 574, 583 (1999); *see also id.* (noting that "[s]ubject-matter limitations on federal jurisdiction serve institutional interests"); Idleman, *supra* note 1, at 31–32 (noting that "[s]ubject-matter jurisdiction requirements are structural in nature"); Jason Wojciechowski, *Federalism Limits on Article III Jurisdiction*, 88 NEB. L. REV. 288, 305–06 (2009) (noting the "subjugation of personal rights to structural concerns" in the subject matter jurisdiction context); Stephen I. Vladeck, *Deconstructing* Hirota: *Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497, 1541–43 (2007) (discussing subject matter jurisdiction as a structural limitation rather than an individual right).

[193] *E.g.*, *Steel Co.*, 523 U.S. 83, 94–95 (1998); *see Ex parte* McCardle, 74 U.S. 506, 512–14 (1868) (noting the necessity of respecting congressional withdrawal of subject matter jurisdiction).

[194] *See, e.g.*, Edney, *supra* note 9, at 208–11 (discussing the federalism implications of "federal courts of *limited* subject matter jurisdiction").

routine docket-management functions, such as assigning a docket number and scheduling a hearing, has not usurped any cognizable power or interest. Instead, a proper understanding of subject matter jurisdiction should focus on what kinds of judicial actions are most likely to compromise institutional interests.

Courts and Congress have embraced the proposition that crafting conduct rules is the preeminent power and the one that deserves the most rigorous protection. That idea, while often inchoate and ill-defined, has animated some of the most significant conceptions of federal–state relations. For instance, the *Erie* doctrine concerns the fundamental question of which sovereign has the power to declare substantive law (and when that law applies).[195] Relatedly, when Congress empowered the Supreme Court to promulgate rules of procedure for federal courts, it emphasized that "[s]uch rules shall not abridge, enlarge or modify any *substantive right*."[196] Navigating the often hazy line between substance and procedure can be difficult[197] and yield inconsistent (and even incoherent) results.[198] For that reason, the theory that I develop here does not necessarily track current conceptions of the substance–procedure dichotomy. Nonetheless, Congress's distinction of substantive and procedural rules expresses the conviction that the line, however elusive, captures an important separation of powers notion. In particular, Congress sought to protect its ability to create positive law. Furthermore, cabining federal courts' authority to intrude upon that congressional power had the salutary effect of protecting federalism interests.[199] Conspicuously absent from these notions of institutional power,

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[195] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Despite persistent criticism of *Erie*, the fact remains that *Erie* and its critics still recognize that determining conduct rules is the preeminent power. *See generally* Green, *supra* note 188; Sherry, *supra* note 188.

[196] 28 U.S.C. § 2072(b) (2006) (emphasis added).

[197] *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551–52 (2011) (discussing the potential overlap of merits and class certification questions).

[198] *See generally* Alan M. Trammell, *Toil and Trouble: How the* Erie *Doctrine Became Structurally Incoherent (and How Congress Can Fix It)*, 82 FORDHAM L. REV. (forthcoming 2014) (on file with author).

[199] *See* Burbank, *supra* note 178, at 1106–14 (noting that "the protection of state law was deemed a probable effect" of the Rules Enabling Act's allocation of "lawmaking power between federal institutions").

though, is any indication that individual litigants have a personal liberty interest in Congress's allocation of law-making authority.

The conclusion that subject matter jurisdiction is a narrow structural limitation on federal courts' power to craft conduct rules provides a theoretical framework for understanding jurisdictional sequencing. When a court dismisses a case based on an allocative rule and declines to adjudicate a conduct rule, even to a party's chagrin, the institutional interests in separation of powers and, to a lesser extent, federalism are not implicated.[200] Dismissals on the basis of an allocative rule do not arrogate new powers to the federal courts. To the contrary, those rules are an attempt to confine federal courts' exercise of judicial authority to the bounds established by the Constitution and Congress. Thus, they do not run afoul of the underlying structural purposes of subject matter jurisdiction.

A traditionalist undoubtedly would object to this vision of subject matter jurisdiction on the ground that a court acts illegitimately and has no authority to affect or bind the litigants in any way unless it has concluded that it has jurisdiction.[201] Although I have offered a reimagining of subject matter jurisdiction's precise structural role, that conceptualization, while unorthodox, is not revolutionary. The basic tenets of the narrow structural view that I propose have animated the jurisdictional discourse for more than a century, even if most courts have not explicitly embraced the conclusions that I draw.

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[200] *See Ruhrgas*, 526 U.S. 574, 584–85 (1999) (noting that a "court that dismisses on . . . non-merits grounds . . . makes no assumption of law-declaring power that violates the separation of powers principles underlying *Mansfield* and *Steel Company*" (quoting *In re* Papandreou, 139 F.3d 247, 255 (D.C. Cir. 1998)) (first alteration in original) (internal quotation mark omitted)).

[201] *See, e.g.*, Idleman, *supra* note 1, at 32–33; Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 22 (1981); *see also* Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547, 1547–48 (2008) (describing subject matter jurisdiction as a "court's raw, baseline power and legitimate authority to hear and resolve the legal and factual issues in a class of cases"); *cf.* Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1613–15 (2003) (articulating but criticizing the traditional concept of subject matter jurisdiction).

One of the standard citations for subject matter jurisdiction's absolute essentiality, as well as a party's ability to raise an objection to jurisdictional defects whenever a case is pending, is the nineteenth-century case of *Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan*.[202] The defendants in *Mansfield* removed the case to federal court, lost on the merits at trial, and then complained that the federal courts lacked jurisdiction.[203] In almost every other situation, the doctrine of judicial estoppel would prevent a party from making one argument to a trial court and then the exact opposite argument to an appellate court.[204] But subject matter jurisdiction is different. Despite the *Mansfield* defendants' chutzpah in complaining about the jurisdiction of the court to which they removed the case, the Supreme Court noted that the requirement of subject matter jurisdiction was "inflexible and without exception" and vacated the judgment.[205]

The flipside of *Mansfield* is equally instructive. Although a court has an obligation to protect the interests served by subject matter jurisdiction, even in the face of a party's (mis)behavior, there is no reason to allow parties to assert a personal interest in subject matter jurisdiction when institutional interests are not at stake. Otherwise, *Mansfield* would acquire something of a "heads I win, tails you lose" aura. In many instances, parties' interests and those of the court overlap. To the extent that parties are able to assist courts in guarding institutional interests, a liberal policy permits parties to make jurisdictional objections.[206] But subject

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[202] 111 U.S. 379 (1884); *see also Steel Co.*, 523 U.S. 83, 94–95 (1998); Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1868–70 (2007); Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491, 491–92 (1966).

[203] *See* 111 U.S. at 381–82.

[204] *See* 18B WRIGHT ET AL., *supra* note 158, § 4477, at 549 (noting that "judicial estoppel" prevents a party from asserting "[i]nconsistent positions in successive litigation"); *see also* Gray v. City of Valley Park, 567 F.3d 976, 982 (8th Cir. 2009) (noting that "this is *just* the sort of case to which judicial estoppel must apply" but declining to apply estoppel because of the court's independent duty to ensure Article III jurisdiction).

[205] *Mansfield*, 111 U.S. at 382; *accord id.* at 389.

[206] *See id.* at 382 (describing subject matter jurisdiction as implicating only institutional concerns); FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction the court must dismiss the action.").

matter jurisdiction is not a personal right or privilege, as demonstrated by the parties' inability to consent to subject matter jurisdiction and courts' independent obligation to address jurisdictional defects.[207] When institutional interests are not at stake, parties should not be able to convert subject matter jurisdiction into a personal privilege.[208]

At least one court has moved toward a more explicit recognition of the limited structural role that subject matter jurisdiction plays and has done so in the context of jurisdictional sequencing. In *Kramer v. Gates*, the D.C. Circuit pretermitted a decision on a complicated jurisdictional question and dismissed the case for not having met the requirements for relief from final judgment under Federal Rule of Civil Procedure 60(b)(6).[209] The court noted that it did not regard "an interpretation of the limits of Rule 60(b)(6) . . . as an exercise of a court's law-declaring power as *Steel Company* used the concept, as the scope of Rule 60(b)(6) is far removed from any effect on primary conduct."[210] The court thus suggested that subject matter jurisdiction, while necessary to adjudicate a conduct rule that governs primary behavior, is not essential to resolve an allocative rule, such as Rule 60(b)(6). That approach corresponds with the more limited conceptualization of subject matter jurisdiction's precise role in regulating only certain kinds of judicial actions.

Further bolstering the vision of subject matter jurisdiction that I have proffered here is the fact that the traditional view of jurisdiction as a court's legitimate power to act never has been completely true. For starters, the idea of jurisdictional exceptionalism—including federal courts' duty to ensure the actual existence of subject matter jurisdiction and to dismiss jurisdictionally defective cases—is of relatively recent vintage, dating only to the 1930s.[211] For much of American history, parties could consent to subject matter jurisdiction and forfeit

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[207] *Ruhrgas*, 529 U.S. 574, 583 (1999).
[208] *See supra* notes 170–71 and accompanying text.
[209] *See* 481 F.3d 788, 790–91 (D.C. Cir. 2007).
[210] *Id.* at 791.
[211] Collins, *supra* note 202, at 1873.

jurisdictional objections.[212] Moreover, even though courts used to regard a judgment in the absence of subject matter jurisdiction as invalid, such that it was always subject to attack, the modern approach to preclusion has been far less dogmatic. Since at least the 1930s, preclusion principles have placed a greater premium on according finality to judgments.[213] Consequently, once a question of subject matter jurisdiction has been litigated and determined (even incorrectly), a judgment almost always is immune from a jurisdictional attack.[214] The same is true when a jurisdictional defect comes to light belatedly.[215]

Notwithstanding these arguments, some people still might be disturbed that a federal court, before verifying its subject matter jurisdiction, could render a decision that conclusively binds the parties. Efforts to address that concern, though, should not involve tinkering with a proper understanding of jurisdiction. The *Ruhrgas* Court correctly recognized that subject matter jurisdiction, a structural constraint, is conceptually distinct from preclusion principles, which largely protect litigants' personal liberty interests.[216] Any residual concerns about litigants' rights thus pertain to preclusion, not jurisdiction. Indeed, Congress, or the Supreme Court on its own initiative, can create or alter rules of preclusion for federal judicial determinations.[217] As a prudential matter, it is perfectly logical to recognize a broad power

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[212] *See id.* at 1841 (forfeiture); *id.* at 1847–49 (consent).

[213] RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. a (1982); *see also* Stoll v. Gottlieb, 305 U.S. 165, 172 (1938) ("It is just as important that there should be a place to end as that there should be a place to begin litigation."); Bennet Boskey & Robert Braucher, *Jurisdiction and Collateral Attack: October Term, 1939*, 40 COLUM. L. REV. 1006, 1006–12 (1940) (discussing the Supreme Court's evolution toward a principle of finality as to jurisdictional determinations).

[214] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 12 & cmt. b (1982) (articulating the general rule and the few exceptions that allow for relitigating subject matter jurisdiction).

[215] *See* Des Moines Navigation & R.R. v. Iowa Homestead Co., 123 U.S. 522, 559 (1887) (indulging the fiction that jurisdiction had been "impliedly recognized").

[216] *Ruhrgas*, 526 U.S. 574, 585–86 (1999) (noting that a threshold dismissal, even in the absence of verified subject matter jurisdiction, could preclude a party from relitigating issues decided in the course of that dismissal).

[217] Edney, *supra* note 9, at 202–06; *see also* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507 (2001) (intimating that Congress could create preclusion rules for federal courts sitting in diversity).

of jurisdictional sequencing but also to deny preclusive effect to judicial determinations unless a federal court has expressly established its subject matter jurisdiction.[218] The upshot is that courts and scholars should resist the temptation to conflate the structural limitations of subject matter jurisdiction and any additional prudential constraints that might be desirable.

C. ALLOCATIVE RULES AS EXPLANATORY OF JURISDICTIONAL SEQUENCING

Unlike any of the theories considered in Part III, a theory of jurisdictional sequencing based on the notion of allocative rules fully explains and reconciles the Supreme Court's case law on jurisdictional sequencing. Such rules include the jurisdictional and quasi-jurisdictional questions that the Supreme Court has permitted lower courts to consider before addressing subject matter jurisdiction.[219] Allocative rules also encompass discretionary doctrines,[220] which, perhaps counterintuitively, also have the effect of limiting a federal court's power. When a court dismisses a case on the basis of forum non conveniens or comity, it chooses a course that, by definition, prevents it from adjudicating a conduct rule. Such discretionary threshold issues thus fit comfortably within the realm of allocative rules because they allocate decision-making authority to another tribunal.

In contrast with the present litigant theory, which admittedly can explain the outcome of the Supreme Court's jurisdictional sequencing cases, allocative rules also can explain the assumptions underlying those cases. *Ruhrgas* explicitly noted that a dismissal on a threshold ground could have wide-ranging preclusive

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[218] Arguably such an approach could foster the greatest efficiency. If a federal court can establish subject matter jurisdiction with relative ease, it has the incentive to do so in order to ensure that any dismissal will prevent inefficient relitigation of certain issues. By contrast, if a question of subject matter jurisdiction is especially difficult, the more efficient solution might be dismissal on another ground, even if that dismissal does not have preclusive consequences.

[219] *See Ruhrgas*, 526 U.S. at 577–78 (personal jurisdiction); *Steel Co.*, 523 U.S. 83, 100–01 n.3 (1998) (*Younger* abstention).

[220] *See* Levin v. Commerce Energy, Inc., 130 S. Ct. 2323, 2336–37 (2010) (comity); *Sinochem*, 549 U.S. 722, 432–33 (2007) (forum non conveniens).

effects.[221] That assumption is at odds with the present litigant theory, which is predicated on the idea that dismissals on threshold grounds should have narrow preclusive consequences and should not effectively prevent a case from being litigated in another forum.[222] Approaching jurisdictional sequencing from the perspective of allocative rules, on the other hand, is fully consistent with the Court's observations about the preclusive effects of threshold dismissals. As discussed above, whether a court may dismiss a case on a particular ground is independent of what preclusive consequences, if any, should attach to such dismissals. Because a focus on allocative rules keeps those concepts distinct, it better explains and reconciles the various elements of the Court's jurisdictional sequencing cases.

Finally, the theory developed here clears up confusion by some courts and scholars about the Supreme Court's use of the term "nonmerits."[223] The concept of allocative rules captures the sense in which the Court consistently has regarded a "nonmerits" dismissal simply as the opposite of a "merits" dismissal (i.e., a dismissal based on a conduct rule). Indeed, virtually any dismissal might implicate the underlying merits of a case. For example, subject matter jurisdiction might turn on the amount in controversy; at the same time the question of an ultimate monetary remedy surely goes to the merits of a case.[224] Similarly, a question of personal jurisdiction might turn on a defendant's contacts with the forum state, and those contacts likewise could be relevant at the merits stage of litigation. A threshold dismissal based on an allocative rule is a nonmerits dismissal not because it

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[221] *Ruhrgas*, 526 U.S. at 585–86.

[222] *See* Clermont, *supra* note 6, at 329–30 ("[T]he list of resequenceable grounds should include only those defenses that could result in decisions not on the merits, in the claim-preclusive sense." (emphasis omitted)); *cf. Ruhrgas*, 526 U.S. at 585 (not indulging Clermont's argument that different preclusion consequences should attend a court's finding that jurisdiction exists and a finding that it does not exist).

[223] *See, e.g.*, Dominguez–Cota v. Cooper Tire & Rubber Co., 396 F.3d 650, 653 (5th Cir. 2005) (noting that "the question of the convenience of the forum is not completely separate from the merits of the action" (quoting Van Cauwenberghe v. Biard, 486 U.S. 517, 527–28 (1998) (internal quotation marks omitted))); Clermont, *supra* note 6, at 325–28 (noting confusion as to what counts as a nonmerits dismissal).

[224] *See supra* notes 148–52 and accompanying text.

is completely divorced from a case's underlying merits; rather, a nonmerits threshold issue genuinely seeks to resolve a preliminary question about the scope of a court's authority rather than to adjudicate the underlying substance of the case. Consequently, the distinction between conduct rules and allocative rules explains the Court's case law and resolves the ambiguity as to what constitutes a "nonmerits" issue.

By explaining the jurisprudence, the theory presented here can serve as a useful guide for lower courts that have struggled to apply the Supreme Court's jurisdictional-sequencing cases. Lower courts can rely on a predictive model that is faithful to the applicable precedents.

D. OPERATIONALIZING THE THEORY

One of the central goals of this Article has been to provide a coherent theoretical grounding for jurisdictional sequencing and thereby help courts determine what qualifies as an appropriate threshold ground for dismissal. In most cases, the theory presented here offers readily discernible answers.

I cautioned earlier that an allocative rule is not necessarily the same thing as a procedural rule. Despite the allure of linking allocative rules, for purposes of jurisdictional sequencing, with procedural rules, as developed by the *Erie* line of cases, the two doctrines should remain conceptually distinct for a number of reasons. Most important, as Ely has noted, different sources of law govern *Erie* cases,[225] meaning that a particular issue might be procedural in one context but substantive in another. Allocative rules avoid distinctions based on the source of the rule and usually are easier to apply than the various *Erie* inquiries. Whether a rule qualifies as an allocative rule turns on the single question of whether it seeks to allocate decision-making authority,

[225] Ely, *supra* note 183, at 697–700; *see also* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 & n.7 (1996) (noting that the substance–procedure distinction can be "a challenging endeavor" depending on the sources of law involved).

irrespective of any spillover effects on the merits of the underlying claim.[226]

Distinguishing between a conduct rule and an allocative rule usually presents no arduous inquiry. The most obvious examples of appropriate threshold grounds for dismissal are truly jurisdictional rules (including subject matter and personal jurisdiction) as well as quasi-jurisdictional rules (including most abstention doctrines), all of which seek to delimit the scope of a federal court's ability to hear a case. Discretionary dismissals, including under the doctrine of forum non conveniens, also are included. Moreover, many of the issues that lower courts have regarded as appropriate threshold grounds for dismissal fall within the rubric of allocative rules, including venue, ripeness, and whether parties have fulfilled certain procedural requirements before they may seek particular forms of relief.[227] And for the reasons discussed later in this Part, class certification questions, despite their overlap with the merits of a case, concern the threshold issue of whether a particular litigation device is available.

The practical effect of this approach is to approve the more expansive interpretations of "threshold" issues that courts may decide at the outset of litigation. It also suggests that issues such as mandatory party joinder[228] and preclusion,[229] which some courts have refused to decide ahead of subject matter jurisdiction, in fact qualify as allocative rules.

There is, however, one important sense in which the theory developed here would restrict the leeway available under jurisdictional sequencing. The First, Second, and D.C. Circuits, pursuant to the Article III theory, have assumed the ability to hold a question of statutory subject matter jurisdiction in abeyance and

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[226] *Cf.* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1451–53 (2010) (Stevens, J., concurring) (expressing concern, in the Rules Enabling Act context, that procedural rules can affect substantive rights).

[227] *See supra* notes 56–65 and accompanying text.

[228] *See* Wilbur v. Locke, 423 F.3d 1101, 1106 (9th Cir. 2005) (deciding a jurisdictional question before a Rule 19 issue).

[229] *See* Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519, 525 (5th Cir. 2008) (deciding a mootness issue before a preclusion question).

reach any other issue, including merits questions (i.e., conduct rules).[230] That approach no longer appears justified. Instead, the source of a truly jurisdictional limitation is irrelevant, and a court may skip over such limitations only to adjudicate an allocative rule.

Determining whether a rule is an allocative or conduct rule usually will not be difficult for the reasons discussed. Although I do not claim to provide an answer for every conceivable issue that could arise, I offer some thoughts on how to assess a few of the more challenging issues at the margins of the theory presented here. My conclusions regarding the following issues are tentative, precisely because they are among the most difficult questions.

1. Act of State Doctrine. The act of state doctrine, a common law doctrine that prevents federal courts from judging the validity of certain actions by foreign sovereigns,[231] presents a close call. It applies only when (1) there has been an act of a foreign state, including a foreign "statute, decree, order, or resolution"; (2) a federal court necessarily would have to sit in judgment of that act's validity; and (3) the act occurred within the foreign sovereign's own territory.[232] Bo Rutledge has observed that the act of state doctrine does not lend itself to easy classification as a merits or nonmerits ground for dismissal.[233] He has argued persuasively, though, that the doctrine "seems difficult to distinguish from other non-merits defenses" that the Supreme Court has recognized.[234]

Despite the D.C. Circuit's general willingness to recognize a broad array of defenses as nonmerits threshold issues, the court has treated the act of state doctrine as a merits question.[235] Relying on Supreme Court precedent that has referred to the

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[230] *See supra* notes 121–24 and accompanying text.

[231] *See* W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 405 (1990) (describing the act of state doctrine); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964) (same).

[232] Rutledge, *supra* note 6, at 47 (quoting Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695 (1976)).

[233] *Id.* at 48.

[234] *Id.* at 49.

[235] *E.g.*, World Wide Minerals, Ltd. v. Republic of Kazakhstan, 296 F.3d 1154, 1161 (D.C. Cir. 2002); *In re* Papandreou, 139 F.3d 247, 256 (D.C. Cir. 1998).

doctrine as a "rule of decision,"[236] the D.C. Circuit classified it as a "substantive rule of law" that a court may not address in the absence of subject matter jurisdiction.[237] Admittedly, the court has not revisited that classification since the Supreme Court's *Sinochem* decision.[238]

In one sense, the act of state doctrine might be akin to a conduct rule insofar as it creates a wider berth for foreign states to exercise their prerogatives. Moreover, a court's application of the act of state doctrine effectively leaves undisturbed the foreign sovereign's actions. For two reasons, though, the doctrine probably fits more comfortably alongside other allocative rules. First, it is a rule designed to "preclude judicial inquiry," a factor that the D.C. Circuit has recognized as a touchstone of many allocative rules.[239] Second, and arguably more significantly, the act of state doctrine expressly prevents a federal court from assessing the validity of certain actions by a foreign sovereign.[240] In other words, when federal courts decide that the doctrine applies, they do so precisely to avoid creating or altering a conduct rule. In that sense, it essentially is a rule of abstention, which is how many courts and scholars have understood the act of state doctrine.[241] From that perspective, it has the trappings of a quintessential allocative rule. Despite the potential overlap between the act of state doctrine's elements and issues that will arise again at the merits stage of litigation, the doctrine appears most readily classifiable as an allocative rule.

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[236] *Kirkpatrick*, 493 U.S. at 406 (quoting Ricaud v. Am. Metal Co., 246 U.S. 304, 310 (1918)).

[237] *Papandreou*, 139 F.3d at 256 (citing *Kirkpatrick*, 493 U.S. at 408–10).

[238] Rutledge, *supra* note 6, at 48.

[239] Pub. Citizen v. U.S. Dist. Court for D.C., 486 F.3d 1342, 1347–48 (D.C. Cir. 2007) (quoting Tenet v. Doe, 544 U.S. 1, 6 n.4 (2005)).

[240] *Kirkpatrick*, 493 U.S. at 405–06.

[241] *E.g.*, Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (citing West v. Multibanco Comermex, S.A., 807 F.2d 820, 827 (9th Cir. 1987)); Bigio v. Coca–Cola Co., 239 F.3d 440, 444 (2d Cir. 2000). Figuring out how to classify the act of state doctrine has been controversial, though. *See* Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 327–28 (1985) (describing the uncertain nature of the doctrine); *see also Kirkpatrick*, 493 U.S. at 406 ("The act of state doctrine is not some vague doctrine of abstention . . . .").

2. Immunity Doctrines. Immunity questions raise particularly thorny problems, especially because immunity comes in various guises, including sovereign immunity,[242] absolute immunity,[243] and qualified immunity.[244] In all instances, it is an affirmative defense that, at least under certain circumstances, the defendant is not amenable to suit, irrespective of whether the plaintiff has stated a valid cause of action.[245]

The D.C. Circuit has held that "[s]overeign immunity questions clearly belong among the non-merits decisions that courts may address even where subject matter jurisdiction is uncertain."[246] The court's explanation was parsimonious,[247] but its intuition captures an important way in which allocative rules work.[248] It cited a Supreme Court decision that recognized that the defense is waivable.[249] Precisely for that reason, sovereign immunity does not define or negate the plaintiff's cause of action. When a plaintiff sues a defendant who has the option of invoking the immunity defense, the underlying conduct rule, which defines rights and obligations, remains fully intact, regardless of whether a defendant has claimed or waived sovereign immunity.[250] In that

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[242] Sovereign immunity, in its various forms, generally prevents litigants from suing federal, state, and foreign governments without their consent.

[243] Absolute immunity prevents an official from being sued for any official act, even if the official has made "grave" mistakes. Stump v. Sparkman, 435 U.S. 349, 359 (1978). Absolute immunity usually applies to legislators, judges, prosecutors, and the President of the United States. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

[244] Qualified immunity generally prevents lower-level executive officials from being sued when they have acted in "good faith." *Harlow*, 457 U.S. at 815–18.

[245] *See, e.g.*, Raygor v. Regents of Univ. of Minn., 534 U.S. 533, 537 (2002) (state sovereign immunity); San Filippo v. U.S. Trust Co. of N.Y., 470 U.S. 1035, 1035–36 (1985) (absolute immunity); Gomez v. Toledo, 446 U.S. 635, 640 (1980) (qualified immunity).

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

[247] *See id.* (citing *In re* Papandreou, 139 F.3d 247, 255 (D.C. Cir. 1998)).

[248] Other courts have discussed whether certain forms of immunity are merits determinations for purposes of preclusion. *See, e.g.*, Bloomquist v. Brady, 894 F. Supp. 108, 116 (W.D.N.Y. 1995) (determining that a decision on sovereign immunity is preclusive). But as I have discussed above, *see supra* notes 170–71 and accompanying text, questions of jurisdictional sequencing and preclusion are, and should remain, conceptually distinct.

[249] *See Galvan*, 199 F.3d at 463 (citing FDIC v. Meyer, 510 U.S. 471, 475 (1994)).

[250] *See, e.g.*, The Siren, 74 U.S. (7 Wall.) 152, 155 (1868) (noting that when a ship seized by the United States committed injury "the claim exists equally as if the vessel belonged to a private citizen" but that such a claim "against the government [is] incapable of enforcement without its consent"). *But see* Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) ("A

regard, such immunity is akin to personal jurisdiction, another allocative rule,[251] to the extent that both rules define the circumstances under which a court may hale a particular defendant into court. In both situations, the defendant may raise the defense or consent to proceeding with the lawsuit. That is true despite the fact that the invocation of the defense will have a tremendous, and often dispositive, effect on the plaintiff's ability to enforce a particular right.

As I have noted before, a rule that *affects* enforcement of a right still qualifies as an allocative rule so long as it does not *define* the underlying right. Therein lies the rub with sovereign immunity. On the one hand, from the sovereign's perspective, the extent of its obligations almost certainly is colored by the knowledge that, under certain circumstances, it cannot be compelled to defend against a lawsuit. That knowledge likely affects its primary conduct.[252] On the other hand, the underlying right remains the same. The elements of the cause of action are unchanged, and the plaintiff has the ability to enforce the right if the sovereign waives immunity. The better view, from my perspective, is that the D.C. Circuit was correct; sovereign immunity rules are allocative rules precisely because they are not an element of the underlying cause of action and thus leave those conduct rules undisturbed.

In contrast to sovereign immunity, qualified immunity looks much more like a conduct rule. Qualified immunity protects lower-level executive officials when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[253] In assessing a qualified immunity defense, a court usually must answer two questions: first, whether a plaintiff has alleged or proved that the defendant

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sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.").

[251] *See generally* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002) (discussing the waivability of sovereign immunity).

[252] The question whether a particular rule affects someone's primary conduct is a good but imperfect rule of thumb to identify a conduct rule. Immunity doctrines might be an instance in which an allocative rule nonetheless shapes primary conduct.

[253] Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)) (internal quotation mark omitted).

violated a constitutional right; and, second, whether the right was clearly established at the time the violation occurred.[254]

Those inquiries do not simply involve an overlap with the underlying merits of a lawsuit; they effectively *are* the merits.[255] Unlike in the sovereign immunity context, a judge assessing qualified immunity must determine the contours of a conduct rule (i.e., the asserted constitutional right), how to apply that conduct rule to the facts of the case, or sometimes both. Although in one sense qualified immunity is a threshold issue that precedes trial and is subject to waiver, it functions as a mechanism for bringing forward the merits of a case and resolving them at an earlier stage of litigation,[256] in some ways akin to dispositive motions under the Federal Rules.[257] By calling for the resolution of merits questions, rather than matters ancillary to the merits, qualified immunity most likely is a conduct rule that courts may resolve only after confirming their subject matter jurisdiction.

E. BROADER SCHOLARLY AND JURISPRUDENTIAL DEVELOPMENTS

The theory of jurisdictional sequencing presented here is part of a broader reconceptualization of jurisdiction. Grounding jurisdictional sequencing in a structural view of subject matter jurisdiction is consistent with scholarly trends that have identified a disconnection between the language and reality of jurisdiction. My approach advances the discussion and proposes a systematic

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[254] *See id.* at 232 (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). *Pearson* held that "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory." *Id.* at 236.

[255] When a court decides that a right is not clearly established, but does not determine whether a defendant actually violated a plaintiff's rights, some scholars have suggested that the court has not reached the case's merits. *E.g.*, John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 115–17; Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 433 (2012). As I use the term "merits," though, a court that decides whether a right is clearly established has indeed decided a merits question (i.e., whether a particular conduct rule clearly exists), albeit without applying that rule to the facts of the case.

[256] *See Pearson*, 555 U.S. at 231–32 (noting that qualified immunity is not merely a defense to liability and serves to weed out insubstantial claims).

[257] *See, e.g.*, FED. R. CIV. P. 12(b)(6) (motion to dismiss); FED. R. CIV. P. 56 (motion for summary judgment).

way to understand the apparent malleability of jurisdiction, particularly when courts confront other threshold issues, including vexing class certification questions.

Over the last generation, scholars have begun to explore the idea that while courts usually speak of crisp lines that demarcate jurisdictional questions, courts actually treat jurisdiction as a much more supple concept.[258] Other scholars have noted, with varying degrees of approval, the extent to which jurisdiction and merits questions can and do become intertwined.[259] Fred Bloom, for example, has called jurisdiction's self-proclaimed rigidity a "noble lie" that often gives way to practical concerns at the margins.[260] On the other hand, Laura Fitzgerald has cautioned against jurisdictional rules that are born of a court's unvarnished desire to reach particular questions on the merits.[261] Regardless of whether they view the intertwining as unprincipled or a useful exercise in pragmatism, scholars generally have treated the entanglement of jurisdictional and merits questions as something that happens in the shadows, without full candor.

The approach that I have proffered draws on much of the sophisticated work in this field and suggests a systematic way to understand some facets of jurisdictional malleability. Scott Dodson, for example, has argued that rules can be "hybridized"—that lawmakers can graft certain nonjurisdictional features (such as waiver and forfeiture) onto jurisdictional rules and vice versa.[262]

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[258] *See, e.g.*, Ann Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L. REV. 1035, 1047–48 (1990) (arguing that Congress may override any judicially created jurisdictional doctrine); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 2–3 (1990) (positing a "dialogic approach" to jurisdiction in which "the contours of federal jurisdiction are resolved as the result of an interactive process between Congress and the Court").

[259] *See, e.g.*, Bloom, *supra* note 97, at 1002–03; Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 36–37 (2011) (noting the difficulty of determining whether certain statutory limitations are jurisdictional); Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1217–20 (2001) (discussing how a concern about remedies can influence jurisdictional determinations); Lee, *supra* note 201, at 1615–27 (arguing that jurisdiction is not conceptually distinct from merits questions).

[260] *See* Bloom, *supra* note 97, at 1021–23.

[261] *See* Fitzgerald, *supra* note 259, at 1273–78.

[262] Dodson, *supra* note 3, at 1457–61; Dodson, *supra* note 52, at 9; *see also* Wasserman, *supra* note 201 (exploring ways to understand and systematize boundaries between

The dichotomy between conduct rules and allocative rules contributes to an understanding of why jurisdiction should apply more or less rigidly. These projects endeavor not only to explain jurisdictional malleability but, more importantly, to elucidate the circumstances under which flexibility is (and is not) justified.

Moreover, the vision of subject matter jurisdiction that I have developed has applications beyond jurisdictional sequencing and resonates with other doctrinal developments that resist a reductionist view of subject matter jurisdiction. The most obvious development is the Supreme Court's effort in recent years to clean up its use of the term "jurisdictional." As the Court in *Steel Co.* observed, jurisdiction "is a word of many, too many, meanings."[263] In *Kontrick v. Ryan*, the Court acknowledged that it and other courts had "been less than meticulous" in using the word "jurisdictional."[264] Too often, the Court said, various rules had been called jurisdictional when in fact they were actually nonjurisdictional "claim-processing rule[s]."[265] The Supreme Court thus has shown greater candor as it has grappled with whether a particular rule is truly "jurisdictional" and what exactly that means.[266] Even more revealingly, for purposes of this Article, the Court has wrestled openly with the sometimes elusive distinction between jurisdictional and merits questions. For example, in *Arbaugh v. Y&H Corp.*, the Court, again noting its sometimes "profligate" use of the term "jurisdictional,"[267] had to determine whether certain questions pertained to a federal court's jurisdiction or simply to the elements of a cause of action.[268]

Perhaps the most instructive parallels to the jurisdictional-sequencing cases, though, are recent developments regarding the

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jurisdiction, merits, and procedure).

[263] *Steel Co.*, 523 U.S. 83, 90 (1998) (quoting United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996) (internal quotation marks omitted)).

[264] 540 U.S. 443, 454 (2004).

[265] *Id.* at 456.

[266] *See id.* (noting that a nonjurisdictional objection can be forfeited); Eberhart v. United States, 546 U.S. 12, 18 (2005) (same); *see also* Bowles v. Russell, 551 U.S. 205, 212–13 (2007) (noting that Congress controls whether a statutory restriction is jurisdictional).

[267] 546 U.S. 500, 510 (2006).

[268] *See id.* 510–11 (resolving "the proper classification of Title VII's statutory limitation of covered employers to those with 15 or more employees").

certification of class actions under Federal Rule of Civil Procedure 23. Questions of class certification most directly challenge the coherence of a firm division between jurisdictional, threshold, and merits questions. In some ways class certification represents the most knotty threshold question that almost invariably touches upon a case's underlying merits. Every class action under Rule 23 has to satisfy the requirements of numerosity, commonality, typicality, and adequacy of representation.[269] Determining whether plaintiffs' claims raise common questions of law or fact and whether the class representatives' claims are typical of other claims in the class often requires a searching examination of the case's underlying merits.

Richard Nagareda has described a "distinctive law of class certification."[270] Most courts of appeals now insist that a "court must affirmatively determine whether the relevant requirements for class certification under Rule 23 have been met . . . , even when the dispute over certification—for example, by way of competing expert reports—overlaps with the parties' ultimate dispute on the merits."[271] Indeed, the Supreme Court has acknowledged that a "rigorous analysis" of Rule 23's requirements "will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped."[272]

The assessment of a threshold question that is inextricably connected to the merits of a case often happens, sometimes of necessity, before a court has established its subject matter jurisdiction. In *Amchem*, a case that predated the jurisdictional-sequencing trilogy, the Supreme Court skipped over the question of subject matter jurisdiction, holding that the "class certification issues [were] dispositive" and "logically antecedent to the existence of any Article III issues."[273] Although courts of appeals have

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[269] FED. R. CIV. P. 23(a).

[270] Richard A. Nagareda, *1938 All Over Again? Pretrial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647, 664 (2011).

[271] *Id.* at 665 (footnote omitted).

[272] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (internal quotation marks omitted).

[273] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612 (1997) (internal quotation marks omitted).

disagreed about the extent to which *Amchem* permits courts to pretermit a jurisdictional question and decide a class certification issue,[274] courts clearly recognize that at least sometimes they may hold subject matter jurisdiction in abeyance and decide a threshold question that nearly always taps into a case's underlying merits.[275]

The class certification context offers the most vivid illustration of the nuanced interplay between jurisdiction, threshold questions, and the merits. As the Supreme Court and lower courts wrestle with those questions, the theory of jurisdictional sequencing advanced here offers a way forward. What Nagareda described as the "distinctive law of class certification" might not be so distinctive after all. As I have demonstrated, the supposedly pat division of jurisdictional versus merits questions breaks down in a number of contexts and requires a sophisticated understanding of how those issues interact as well as how courts should navigate uncertain waters.

V. CONCLUSION

In this Article, I have argued that the Supreme Court's jurisdictional-sequencing cases are not a make-shift doctrine that flouts the strictures of subject matter jurisdiction. Instead, jurisdictional sequencing is consistent with the more nuanced vision of subject matter jurisdiction that I have developed here. According to that vision, subject matter jurisdiction functions as a narrow structural constraint, rather than a personal privilege, that protects the power of Congress and state governments to craft *conduct* rules that regulate primary activity. Subject matter jurisdiction is essential only when federal courts adjudicate, and at

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[274] *See supra* note 69.

[275] The class certification context also reveals tensions that I have discussed above, in particular what preclusive effect should attend a threshold dismissal that necessarily has touched upon merits questions. *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 318 (3d Cir. 2008) (expressly permitting an assessment of merits questions for purposes of class certification and noting that "[a]lthough 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"); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006) ("[T]he determination 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.").

the margins create, conduct rules. By contrast, courts do not necessarily have to verify jurisdiction before they expound upon *allocative* rules that govern procedure and judicial administration.

The distinction between conduct rules and allocative rules is the only theory that fully explains the Supreme Court's jurisdictional-sequencing cases. Consequently, it offers the promise of greater predictability when lower courts confront sequencing questions. More importantly, the theory advanced here helps make sense of the interplay between merits, jurisdictional, and other threshold issues. The reimagining of subject matter jurisdiction thus contributes to an ongoing dialogue about jurisdiction's malleability and offers a framework for understanding why jurisdiction often is more flexible than its rigid rhetoric suggests.