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Cover Page Footnote

J.D. Candidate, 2007, Fordham University School of Law. I would like to thank Professor Thomas H. Lee for his invaluable guidance and Eileen for her unyielding patience and support.

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THE FORUM NON CONVENIENS DISMISSAL IN THE ABSENCE OF SUBJECT-MATTER JURISDICTION

*David W. Feder**

INTRODUCTION

This Note addresses whether a federal court may dismiss an action on the ground of forum non conveniens without resolving a difficult challenge to its subject-matter jurisdiction. This scenario requires the resolution of two important questions. First, to what extent may a federal court bypass a question of subject-matter jurisdiction in order to dismiss a case on other grounds? Second, is subject-matter jurisdiction a prerequisite for the court's power to dismiss under the doctrine of forum non conveniens? These questions implicate the sometimes competing concerns of maintaining the structural integrity of the federal courts as courts of limited jurisdiction and maximizing judicial flexibility to most effectively dismiss a case on discretionary or procedural grounds.[1]

The first question speaks to the extent to which federal courts are bound by an order of operations in evaluating the jurisdictional and procedural attributes of an action. In *Steel Co. v. Citizens for a Better Environment*,[2] the U.S. Supreme Court reaffirmed the long-standing principle that a federal court must confirm the existence of its jurisdiction over the subject matter of a dispute before resolving the merits.[3] Just one Term later,

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1. Generally, considerations of judicial efficiency and economy may not outweigh the requirement that a federal court must operate within the contours of its subject-matter jurisdiction. *See, e.g.*, V.I. Hous. Auth. v. Coastal Gen. Constr. Servs. Corp., 27 F.3d 911, 916 (3d Cir. 1994) ("The allocation of judicial business to the courts is a matter of constitutional and legislative mandates that must be honored by the courts regardless of considerations of efficiency."). It is not clear, however, to what extent this mandate operates to foreclose a federal court's consideration of jurisdictional and procedural grounds while holding subject-matter jurisdiction analysis in abeyance. *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 586 (1999) (authorizing the dismissal of a case for want of personal jurisdiction when "the district court . . . find[s] that concerns of judicial economy and restraint are overriding").

2. 523 U.S. 83 (1998).

3. *See id.* at 101-02 ("For a court to pronounce upon the [merits] when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."). In *Steel Co.*, the U.S. Supreme Court repudiated the doctrine of "hypothetical jurisdiction," holding that a federal court may not set aside a subject-matter jurisdiction determination in favor of an

however, in *Ruhrgas AG v. Marathon Oil Co.*,[4] the Supreme Court emphasized that this principle does not apply to issues that do not go to the merits of a suit.[5] In *Ruhrgas*, the Supreme Court held that, in certain situations, a federal court may dismiss a case for want of personal jurisdiction before, and ultimately without, deciding whether it has subject-matter jurisdiction over the dispute.[6] This Note posits that the *Ruhrgas* holding may be read broadly to countenance the pragmatic application of an array of non-merits issues[7] in order to dismiss a dispute without full resolution of a jurisdictional question.[8] Moreover, *Ruhrgas* suggests a method of analysis by which a court may determine whether such a dismissal is proper.[9] This Note will examine the extent to which federal courts have disagreed as to whether forum non conveniens falls within this range of non-merits issues.[10]

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easier resolution on the merits, even if the prevailing party on the merits would be the prevailing party if jurisdiction were denied. *See id.* at 93. Justice Antonin Scalia "decline[d] to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.* at 94. For a more complete analysis of the Court's denunciation of hypothetical jurisdiction in *Steel Co.*, see Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 Vand. L. Rev. 235 (1999); *see also infra* Part I.B.1.

4. 526 U.S. 574.

5. *See id.* at 584-85 ("'[A] court that dismisses on . . . non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles underlying . . . *Steel Company*.'" (quoting *In re* Papandreou, 139 F.3d 247, 255 (D.C. Cir. 1998) (first two omissions in original))).

6. *Id.* at 588. In so ruling, the Supreme Court overruled the holding of the U.S. Court of Appeals for the Fifth Circuit that *Steel Co.* mandated initial verification of subject-matter jurisdiction before ordering a dismissal for lack of personal jurisdiction. *See id.* at 583.

7. This Note uses the distinction between "merits" and "non-merits" issues for analytical purposes that do not necessarily coincide with doctrinal constructs. According to *Ruhrgas*, the essential distinguishing feature of non-merits issues is that their invocation denies the resolution of the claim underlying a suit. *See id.* at 585 ("It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits.").

8. *See infra* Part I.B. A number of recent Supreme Court and lower federal court opinions suggest that *Ruhrgas* should be read to apply to issues other than personal jurisdiction. *See infra* Part I.C.

9. *See Ruhrgas*, 526 U.S. at 588 ("Where . . . a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction."). Because *Ruhrgas* provides a framework by which a federal court may determine the propriety of a dismissal of a suit on non-merits grounds in the absence of subject-matter jurisdiction, this Note uses the shorthand "*Ruhrgas* dismissal" for this class of dismissals. One commentator has suggested the term "resequencing" to describe the action taken by a federal court in choosing to sidestep subject-matter jurisdiction in favor of a dismissal on alternative grounds. *See* Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 Cornell L. Rev. 1, 3 (2001). The doctrine of "jurisdictional resequencing" takes its name from a passage in *Ruhrgas*, where the Court noted that *Steel Co.*'s jurisdiction-before-merits mandate did not dictate a "'sequencing of jurisdictional issues.'" *See id.* at 3 n.5 (quoting *Ruhrgas*, 526 U.S. at 584).

10. *Compare* Malay. Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349, 360-61 (3d Cir. 2006) (classifying forum non conveniens as a non-merits procedural issue),

The second question focuses more fundamentally on the elements of forum non conveniens itself. The federal common law doctrine of forum non conveniens gives federal courts discretionary authority to decline the exercise of otherwise sound jurisdiction where, on balance, the case is more appropriately tried in another forum.[11] It is a matter of debate among federal courts, however, as to whether the common law analysis that guides the consideration of a motion to dismiss under forum non conveniens requires antecedent resolution of subject-matter jurisdiction.[12] Thus, while, pending resolution of the first question, forum non conveniens may be among those issues that preclude a court's resolution of the merits, subject-matter jurisdiction may be an essential component of the court's power to dismiss on such grounds.

This Note posits that forum non conveniens is a non-merits inquiry on which a court may dismiss without formal confirmation of subject-matter jurisdiction. This interpretation recognizes both the flexibility inherent in the forum non conveniens test[13] and the federal courts' competence to sensitively balance the need for strict adherence to jurisdictional requirements with considerations of judicial efficiency and economy.[14] It does not follow, however, that the federal courts should wield undue discretion in deciding difficult questions of this sort. Haphazard choices based upon attractive considerations of convenience may undermine the structural bounds that constrain the reach of the federal courts. Rather, this Note proposes a method of analysis, built upon the Supreme Court's holding in *Ruhrgas*, that will limit the ability of the courts to bypass a question of subject-matter jurisdiction in favor of a dismissal under forum non conveniens.

Part I discusses the criteria by which federal courts may determine whether dismissal is proper without full resolution of a difficult subject-matter jurisdiction question. Part II introduces the doctrine of forum non

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Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz, 311 F.3d 488, 498 (2d Cir. 2002) (determining that a dismissal for forum non conveniens without resolution of a subject-matter jurisdiction challenge does not constitute an exercise of impermissible hypothetical jurisdiction), *and Papandreou*, 139 F.3d at 255 (same), *with* Dominguez-Cota v. Cooper Tire & Rubber Co., 396 F.3d 650, 653 (5th Cir. 2005) (classifying forum non conveniens as a merits-related issue that may not forestall resolution of a subject-matter jurisdiction question).

11. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250 (1981); Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 530 (1947); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

12. *Compare Monde Re*, 311 F.3d at 498 (suggesting that a federal court may dismiss under forum non conveniens without antecedent resolution of statutory subject-matter jurisdiction), *and Papandreou*, 139 F.3d at 255-56 (same), *with Sinochem*, 436 F.3d at 363-64 (requiring confirmation of subject-matter jurisdiction before dismissal under forum non conveniens).

13. *See Piper*, 454 U.S. at 249-50 (noting that the Supreme Court has "repeatedly emphasized the need to retain flexibility" in the application of forum non conveniens).

14. *See Ruhrgas*, 526 U.S. at 586-87 (permitting the dismissal for want of personal jurisdiction in the absence of subject-matter jurisdiction, in part, on the ability of the federal courts to make "sensitive judgments of this sort").

conveniens and addresses the circuit split on whether subject-matter jurisdiction is a necessary antecedent to a court's dismissal of an action under forum non conveniens. Finally, Part III argues that such a dismissal is appropriate under certain circumstances and suggests a formula for determining whether those circumstances exist in a given case.

I. ISSUE HIERARCHY AND JUDICIAL PRAGMATISM

This part examines the extent to which federal courts are foreclosed from dismissing or resolving a case on grounds other than jurisdictional defect when questions pertaining to the courts' subject-matter jurisdiction are unresolved. Part I.A discusses the critical structural limitations embodied in the subject-matter jurisdiction inquiry. Part I.B focuses on two recent Supreme Court opinions that attempt to define the extent to which the federal courts may justify the pragmatic resolution of cases on non-Article III grounds when their jurisdiction over the dispute is in doubt. Part I.C introduces a number of federal court opinions that construe the Supreme Court's holding in *Ruhrgas* to enhance judicial flexibility to address non-merits issues in order to bypass resolution of subject-matter jurisdiction questions.

A. *Structural Limits: The Role of Subject-Matter Jurisdiction*

Two structural limitations on federal judicial power were essential to the framers' design of the federal judiciary. The first embodies the idea that state courts should possess exclusive original jurisdiction over cases implicating both federal and state law except where Congress has granted the federal courts original jurisdiction within the limits set forth in Article III.[15] Generally understood as "federalism," this principle of vertical restraint serves to protect independent state adjudicatory interests from encroachment by the federal judiciary.[16] The second limitation represents

15. The lower federal courts are considered courts of limited jurisdiction. *See* Exxon Mobil Corp. v. Allapattah Servs., 125 S. Ct. 2611, 2616 (2005) ("The district courts of the United States, as we have said many times, are 'courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.'" (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994))); *see also* 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3522 (2d ed. 1984). They are empowered to hear only those cases that fall within the judicial power of the federal government as outlined in the Constitution, and that Congress has entrusted to the federal courts by operation of statute. *See* U.S. Const. art. III, § 2, cl. 1; Kontrick v. Ryan, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction.").

16. *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 18 (2003) (Scalia, J., dissenting) ("'[D]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the [congressional] statute has defined.'" (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934))). Most state courts are courts of general, not limited, subject-matter jurisdiction and are not bound by the choices made by the framers and Congress that limit the jurisdictional reach of the federal courts. *See* Nevada v. Hicks, 533 U.S. 353, 366 (2001) (describing state courts of general jurisdiction); Aldinger v. Howard, 427 U.S. 1, 15 (1976)

the idea that the work of the federal government should be apportioned among three branches so as to prevent the agglomeration of power by one branch. Thus, this horizontal "separation of powers" design conscripts each of the three branches as a check against the other two. Of particular relevance to this Note is the framers' allocation to the legislative branch through Article III of the power to define the bounds of federal adjudicatory jurisdiction within Article III limits.[17] Subject-matter jurisdiction has been described as the essential ingredient for the resolution of disputes in the Article III courts because it polices both the vertical and horizontal boundaries of the federal judicial power to adjudicate and resolve disputes.[18]

Federal courts must scrupulously monitor their jurisdiction over the subject matter of any dispute because an absence of such jurisdiction signifies that resolution of that matter falls outside the permissible bounds of federal adjudicatory action. As a result, subject-matter jurisdiction has unique procedural attributes. For instance, it may not be waived simply by consent of the parties.[19] A federal court must take notice, on its own motion if necessary, if its jurisdiction over a particular matter appears

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(noting "the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress"); *see also* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 728 (1996) (discussing the state court adjudicatory interest in resolving local problems locally).

17. Congress need not extend the jurisdiction of the lower federal courts to the full extent possible under Article III. *See* Sheldon v. Sill, 49 U.S. (8 How.) 440, 448-49 (1850). For example, while Article III stipulates no minimum amount in controversy to establish jurisdiction over a controversy "between Citizens of different States," U.S. Const. art. III, § 2, cl. 1, Congress has limited federal jurisdiction to those diversity controversies "where the matter in controversy exceeds the sum or value of $75,000." 28 U.S.C. § 1332 (2000). The exception to the requirement of congressional vesting is the original jurisdiction of the U.S. Supreme Court which is self-executing. *See* U.S. Const. art. III, § 2, cl. 2; California v. Arizona, 440 U.S. 59, 65 (1979) ("The original jurisdiction of the Supreme Court is conferred not by the Congress but by the Constitution itself. This jurisdiction is self-executing, and needs no legislative implementation."). *See generally* Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 Colum. L. Rev. 1765 (2004).

18. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869); *see also* McDonald v. Mabee, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power . . . ."); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 718 (1838) ("Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them . . . ."); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 22 (1980) ("[S]ubject-matter jurisdiction in our legal system refers to the motive force of a court, the root power to adjudicate a specified set of controversies. Ultimately, jurisdiction is an essential part of what makes a court a court . . . .").

19. *See, e.g.*, Clinton v. New York, 524 U.S. 417, 428 (1998) (noting that parties may not waive jurisdictional questions of either constitutional or statutory construction); People's Bank v. Calhoun, 102 U.S. 256, 260-61 (1880) ("[T]he mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case."); Capron v. Van Noorden, 6 U.S. (2 Cranch) 125, 126 (1804) ("[I]t was the duty of the court to see that they had jurisdiction, for the consent of parties could not give it.").

wanting, regardless of whether the court is exercising original jurisdiction over a claim or reviewing a lower court decision on appeal.[20] Moreover, the Federal Rules of Civil Procedure underscore the primacy of the subject-matter jurisdiction inquiry. While the right to object on the various grounds of procedural defect is waived if such an objection is not raised within a time stipulated in the rules, Rule 12(h)(3) provides that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."[21]

B. *The* Steel Co./Ruhrgas *Two-Step*

Two recent Supreme Court decisions demonstrate the delicate balance between adherence to structural limits on the reach of federal adjudicatory authority and the desire for judicial pragmatism and flexibility. In *Steel Co. v. Citizens for a Better Environment*,[22] the Supreme Court reaffirmed the sequential priority of the subject-matter jurisdiction inquiry and foreclosed the resolution of the underlying dispute on the merits without full resolution of a potential jurisdictional infirmity, despite the potentially damaging blow such a rigid stance may deal to considerations of judicial economy.[23] The holding was a stern warning to the lower federal courts that, in the majority's view, had strayed too far from core structural principles.[24] Just one Term later in *Ruhrgas AG v. Marathon Oil Co.*,[25] the Supreme Court provided a powerful pragmatic counterpoint by granting the lower federal courts some modicum of discretion to dismiss an action on non-merits, threshold grounds, specifically, personal jurisdiction.[26] This section will consider these decisions and explore the justifications for treating merits decisions differently from non-merits-based dismissals.

1. *Steel Co.*

In *Steel Co.*, the Supreme Court repudiated the doctrine of hypothetical jurisdiction, a pragmatic doctrine devised by the lower federal courts for the swift resolution of cases without messy and time-consuming jurisdictional analysis.[27] A court invoking the doctrine assumed the existence of subject-

20. *See* Arbaugh v. Y & H Corp., 126 S. Ct. 1235, 1237 (2006) ("[C]ourts, including [the Supreme] Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party."); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977) ("[W]e are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction.").

21. Fed. R. Civ. P. 12(h)(3).

22. 523 U.S. 83 (1998).

23. *See id.* at 93-102.

24. *See* Idleman, *supra* note 9, at 2-4 (describing the Supreme Court's recent efforts to reinforce structural limitations on the reach of the federal government and its branches and the role *Steel Co.* played in furthering this agenda).

25. 526 U.S. 574 (1999).

26. *See id.* at 583-88.

27. *See* RNR Enters. v. SEC, 122 F.3d 93, 96 (2d Cir. 1997) (citing "judicial efficiency and restraint" to justify hypothetical jurisdiction); *see also* United States v. Stoller, 78 F.3d

matter jurisdiction in order to decide the action on less complicated merits grounds.[28] In *Steel Co.*, the Supreme Court identified two general prerequisites for the application of hypothetical jurisdiction from relevant circuit court decisions: "(1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied."[29] For Justice Antonin Scalia, writing for the majority, this pragmatic approach to the resolution of the merits exceeded the limited authority of the federal judiciary.[30]

The Supreme Court determined that the exercise of hypothetical jurisdiction violated the framers' intent to limit federal judicial power.[31] It cast subject-matter jurisdiction as "an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects."[32] When the federal courts operate outside the bounds of their allocated power, they assume a share of the authority that is vested elsewhere, thereby infringing upon the powers of the Congress to vest federal adjudicatory authority and the plenary powers reserved to the states.[33] Therefore, by assuming jurisdiction in order to definitively settle the merits of a suit, a court also assumes the risk that it will issue a decision

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710, 715 (1st Cir. 1996); Isby v. Bayh, 75 F.3d 1191, 1196 (7th Cir. 1996). For reflection on the policy justifications underlying hypothetical jurisdiction, see Idleman, *supra* note 3, at 247-52; Comment, *Assuming Jurisdiction Arguendo: The Rationale and Limits of Hypothetical Jurisdiction*, 127 U. Pa. L. Rev. 712 (1979). No matter the benefits accrued to both the litigants and the courts, Judge Richard A. Posner considered hypothetical jurisdiction "illogical" because

> [j]urisdiction is the power to decide the merits of a claim; so a decision on the merits presupposes jurisdiction. The pragmatic justification for occasionally putting the merits cart before the jurisdictional horse begins by asking *why* federal courts have a limited jurisdiction and have made rather a fetish of keeping within its bounds. The answer is that these are extraordinarily powerful courts, and the concept of limited jurisdiction enables them both to limit the occasions for the exercise of power and to demonstrate self-restraint.

Richard A. Posner, The Problematics of Moral and Legal Theory 243 (1999).

28. *See, e.g.*, SEC v. Am. Capital Invs., 98 F.3d 1133, 1139 (9th Cir. 1996) ("We have applied 'hypothetical jurisdiction' where jurisdiction is disputed to assume, without deciding, the existence of subject matter jurisdiction in order to reach the merits of an appeal.").

29. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93-94 (1998).

30. Judge Posner describes Justice Scalia's opinion as "notably unpragmatic." *See* Posner, *supra* note 27, at 243.

31. *See Steel Co.*, 523 U.S. at 94 ("[Hypothetical jurisdiction] carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers."); *see also* Ugo Colella & Adam Bain, *The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation*, 67 Fordham L. Rev. 2859, 2876 (1999) (discussing why hypothetical jurisdiction infringes upon the principle of limited jurisdiction); *supra* notes 15-18 and accompanying text.

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

33. *See* Anderson v. H&R Block, Inc., 287 F.3d 1038, 1041 (11th Cir. 2002) ("When a federal court acts outside its jurisdiction, it violates principles of separation of powers and federalism, interfering with Congress's authority to demarcate the jurisdiction of lower federal courts, and with the states' authority to resolve disputes in their own courts.").

that it has no power to make and enforce.[34] Justice Scalia chose to reinforce the formal jurisdiction-before-merits requirement in order to avoid the consequences of such a risk.[35]

Steel Co. may be more notable for what it excepts than what it repudiates. In order to preserve the precedential value of prior cases where the Court appeared to have countenanced some form of hypothetical jurisdiction, Justice Scalia carved out a number of "exceptions" to the general repudiation of hypothetical jurisdiction.[36] Two of the cases that compelled Justice Scalia to point to the conclusion that non-merits jurisdictional questions may precede subject-matter jurisdiction questions on the decisional line.[37] First, Justice Scalia distinguished the declination of a federal court's pendant jurisdiction[38] from a dismissal on the merits.[39] As

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34. In a sense, the argument is tautological: "[F]or a court to act beyond its power is for a court to act beyond its power." Posner, *supra* note 27, at 244.

35. *See supra* note 31. Justice Stephen G. Breyer, who concurred with the majority's determination that the *Steel Co.* plaintiffs lacked sufficient Article III standing to invoke the authority of the court, found such an outcome unnecessarily rigid because, in certain situations, the rule of hypothetical jurisdiction "makes enormous practical sense." *Steel Co.*, 523 U.S. at 111 (Breyer, J., concurring in part and concurring in the judgment). He argued that it hurt both the court and the parties "to have appellate judges spend their time and energy puzzling over the correct answer to an intractable jurisdictional matter, when (assuming an easy answer on the substantive merits) the same party would win or lose regardless." *Id.* In addition, according to Justice Breyer, the majority's formal holding generated "a rigid 'order of operations'" that would tax already overburdened federal courts. *Id.* Thus, for Justice Breyer, the risk-reward assessment was not so impermissibly skewed so as to make mandatory the "more cumbersome system" required by Justice Scalia. *Id.* at 112.

36. *See* Idleman, *supra* note 3, at 288-304 (analyzing the *Steel Co.* exceptions); Joshua Schwartz, Note, *Limiting* Steel Co.*: Recapturing a Broader "Arising Under" Jurisdictional Question*, 104 Colum. L. Rev. 2255, 2268-72 (2004) (arguing that, on the whole, the *Steel Co.* exceptions are incompatible with the Supreme Court's classification of cause of action questions as merits-related and, therefore, unreachable without subject-matter jurisdiction).

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

38. Pendant jurisdiction now exists by operation of 28 U.S.C. § 1367 and, together with the doctrine formerly known as antecedent jurisdiction, is a component of supplemental jurisdiction. *See* Munson v. Milwaukee Bd. of Sch. Dirs., 969 F.2d 266, 268 n.1 (7th Cir. 1992) ("When a federal district court exercises jurisdiction over state law claims which are so related to a claim over which the court has original jurisdiction that the federal and state claims form part of the same case or controversy under Article III of the United States Constitution, the court is now said to be exercising 'supplemental' jurisdiction over the state claim, pursuant to 28 U.S.C. § 1367."). The classic formulation of pendant jurisdiction comes from *United Mine Workers v. Gibbs*:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

383 U.S. 715, 725 (1966) (citations and internal quotations omitted).

the Court has explained, a district court should decline an exercise of pendant jurisdiction, in part, because of the federalist notion that "needless decisions of state law should be avoided . . . as a matter of comity."[40] The case distinguished by Justice Scalia did not violate the precepts of *Steel Co.* because "the case decided, not a merits question before a jurisdictional question, but a discretionary jurisdictional question before a nondiscretionary jurisdictional question."[41]

In the previous "exception," the discretionary power of the district court to decline an exercise of pendant jurisdiction was vested by operation of a statutory grant and, thus, it may be argued that the declination was simply a congressionally authorized exercise of statutory subject-matter jurisdiction.[42] Justice Scalia, however, went further when he approved the preemptive discretionary declination of jurisdiction on grounds of *Younger* abstention,[43] a doctrine that the Supreme Court has elaborated apart from any statute.[44] In the distinguished case, the Court invoked *Younger* and dismissed upon such grounds "in lieu of determining whether there was a case or controversy," thereby setting aside the Article III jurisdictional question.[45] Like pendent jurisdiction, this doctrine of discretion is predicated, in part, on federalist notions of comity and the respect for the appropriate balance between state and federal interests.[46]

These exceptions suggest that, in order to protect the dignity of state courts, a court may apply wholly discretionary and prudential doctrines of jurisdiction to refuse audience to the merits of an action even in the absence of subject-matter jurisdiction.[47] In fact, Justice Scalia admitted that these cases "must be acknowledged to have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question."[48] *Steel Co.*,

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39. *Steel Co.*, 523 U.S. at 100 n.3 (distinguishing Moor v. County of Alameda, 411 U.S. 693 (1973)).

40. *Moor*, 411 U.S. at 712 (citation and internal quotation omitted).

41. *Steel Co.*, 523 U.S. at 100 n.3. In *Gibbs*, the Supreme Court announced that pendant jurisdiction "is a doctrine of discretion, not of plaintiff's right." *Gibbs*, 383 U.S. at 726. The modern supplemental jurisdiction statute preserves this measure of discretion. 28 U.S.C. § 1367(c) (2000) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . ."). The statute also lists factors relevant to the court's determination. *Id.*

42. *See* 28 U.S.C. § 1367.

43. *Steel Co.*, 523 U.S. at 100 n.3 (distinguishing Ellis v. Dyson, 421 U.S. 426, 436 (1975)). In *Younger v. Harris*, the Supreme Court held that federal relief was barred in cases where a state criminal prosecution is pending because of "the fundamental policy against federal interference with state criminal prosecutions" and "the absence of the factors necessary under equitable principles to justify federal intervention." 401 U.S. 37, 46, 54 (1971).

44. *See* Larry W. Yackle, Federal Courts 460 (2d ed. 2003).

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

46. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 733-34 (1996).

47. *See* Idleman, *supra* note 3, at 302-04 ("This doctrine is not obviously inconsistent with *Steel Co.*, which holds only that a court cannot reach the merits of the suit prior to verifying jurisdiction and does not necessarily speak to the niceties of verification itself."). The Second Circuit has addressed a *Younger* question before subject-matter jurisdiction. *See* Spargo v. N.Y. State Comm'n on Judicial Conduct, 351 F.3d 65, 74 (2d Cir. 2003).

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

therefore, appears to preserve district court flexibility to consider threshold jurisdictional questions, even those vested in the discretion of the federal court.[49] Moreover, in cases where the open question of subject-matter jurisdiction is based on the Constitution, this flexible policy is congruent with the notion of judicial restraint, which encourages the determination of nonconstitutional questions before constitutional questions.[50]

It is not clear, moreover, just how far *Steel Co.* goes in its repudiation of hypothetical jurisdiction. For instance, two of the five Justices in the majority wrote separately to express their view that federal courts, under certain circumstances, might still possess some discretion to "'reserv[e] difficult questions of . . . jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.'"[51] On this basis, some courts have interpreted *Steel Co.* as a plurality opinion that lacks the votes to completely eliminate court flexibility to assume, rather than settle, jurisdiction before deciding a merits question.[52] In addition, a number of courts read *Steel Co.* to foreclose only those exercises in hypothetical jurisdiction where the postulated lack of subject-matter jurisdiction implicates constitutional limits, such as Article III standing.[53] On this reading, a federal court may bypass statute-based subject-matter jurisdiction

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49. *See* Idleman, *supra* note 3, at 302-04 (discussing the alternative jurisdictional grounds doctrine).

50. *See id.* at 303-04. The doctrine of constitutional avoidance is invoked as a measure of judicial restraint from intrusion into the legislative or administrative domain. *See* Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them."). Federal courts will construe statutes so as to avoid serious constitutional defects "unless such construction is plainly contrary to the intent of Congress." Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

51. *Steel Co.*, 523 U.S. at 110-11 (O'Connor, J., concurring) (quoting Norton v. Matthews, 427 U.S. 524, 532 (1976)). Justice Sandra Day O'Connor was joined in this concurrence by Justice Anthony Kennedy. *See id.* at 110.

52. *See, e.g.*, Penobscot Nation v. Ga.-Pac. Corp., 254 F.3d 317, 324 (1st Cir. 2001); *cf.* United States *ex rel.* Foulds v. Tex. Tech Univ., 171 F.3d 279, 287 n.11 (5th Cir. 1999) (noting the confusion as to the support for the repudiation of hypothetical jurisdiction).

53. At several points, *Steel Co.* appears to distinguish between Article III jurisdiction and statutory subject-matter jurisdiction. *See, e.g.*, *Steel Co.*, 523 U.S. at 95 (refuting Justice John Paul Stevens's assertion "that a court *may* decide the cause of action before resolving Article III jurisdiction"); *id.* at 97 n.2 ("The reasons for allowing merits questions to be decided before statutory standing questions do not support allowing merits questions to be decided before Article III questions."); *id.* at 98 (considering "the practice of deciding the cause of action before resolving Article III jurisdiction" as hypothetical jurisdiction); *id.* at 101 (acknowledging that some precedent appears to "dilute[] the absolute purity of the rule that Article III jurisdiction is always an antecedent question"). For a more detailed analysis of this open question, see Jack H. Friedenthal, *The Crack in the* Steel *Case*, 68 Geo. Wash. L. Rev. 258, 264-65 (2000) ("It is possible to read [*Steel Co.*] as concerning only those jurisdictional limitations regarding the need for a case or controversy and not concerning constitutional limits on jurisdictions, such as the need for at least minimal diversity of citizenship."); Idleman, *supra* note 3, at 322 (noting the "disagreement over the extent to which the *Steel Co.* mandate applies to non-Article III jurisdictional questions."); Joan Steinman, *After* Steel Co.*: "Hypothetical Jurisdiction" in the Federal Appellate Courts*, 58 Wash. & Lee L. Rev. 855, 860-62 (2001).

issues en route to the merits.[54] This interpretation is not clear. Other language in the opinion appears to contemplate a more comprehensive ban on the bypassing of all subject-matter jurisdiction questions.[55]

Federal courts thought *Steel Co.* was a sea change, insofar as it elevated structural concerns over judicial pragmatism for the purposes of rendering a decision. Some courts read *Steel Co.* broadly to ordain a strict sequencing of judicial business whereby subject-matter jurisdiction is always and ever the antecedent inquiry.[56] On this reading, the primacy of subject-matter jurisdiction relegates even those issues that do not implicate the underlying merits of an action to a secondary position on the decisional line.[57] In reality, however, *Steel Co.* was simply a warning for federal courts to take notice and adhere to constitutionally mandated structural limits before adjudication of the merits, and it was followed a year later by a decision of greater significance and consequence.

2. *Ruhrgas*

It took the Supreme Court just one Term to provide the pragmatic counterpoint to *Steel Co.* In *Ruhrgas,* the Court clarified the scope of *Steel Co.* by recognizing that federal courts may dismiss an action on straightforward grounds of personal jurisdiction when the subject-matter jurisdiction question is unusually novel or complex.[58] The Court, however,

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54. *See, e.g.*, Restoration Pres. Masonry Inc. v. Grove Eur. Ltd., 325 F.3d 54, 60 (1st Cir. 2003) (bypassing the subject-matter jurisdiction issue because "the question invokes statutory jurisdiction"); Fama v. Comm'r of Corr. Servs., 235 F.3d 804, 816 n.11 (2d Cir. 2000) ("[T]he Supreme Court has barred the assumption of 'hypothetical jurisdiction' only where the potential lack of jurisdiction is a constitutional question.").

55. *See, e.g.*, *Steel Co.*, 523 U.S. at 101 ("The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers."). In 2005, the Supreme Court appeared to have adopted a reading of *Steel Co.* that foreclosed hypothetical jurisdiction when either statutory or constitutional subject-matter jurisdiction is implicated. *See* Tenet v. Doe, 125 S. Ct. 1230, 1235 n.4 (2005) (acknowledging that a question of statutory subject-matter jurisdiction predicated on the Tucker Act "is the kind of jurisdictional issue that *Steel Co.* directs must be resolved before addressing the merits of a claim.").

56. *See, e.g.*, Marathon Oil Co. v. Ruhrgas, 145 F.3d 211, 218 (5th Cir. 1998) (en banc) (holding that, per *Steel Co.*, personal jurisdiction does not constitute a permissible basis for dismissal in the absence of subject-matter jurisdiction), *rev'd*, 526 U.S. 574 (1999).

57. *See* Idleman, *supra* note 9, at 7-8 (positing that the range of possible non-merits issues includes personal or in rem jurisdiction, Eleventh Amendment immunity, and administrative exhaustion). Professor Scott C. Idleman notes that such issues are difficult to categorize because

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

Id. at 8.

58. *See Ruhrgas*, 526 U.S. at 588.

was careful to preserve the notion, articulated in *Steel Co.*, that, in the majority of cases, a federal court should turn first to subject-matter jurisdiction before dismissing on other grounds.[59] The Court's primary concern in this regard was that an overeager district court, hearing a case on removal, might infringe upon the dignity of the state court by issuing preclusive holdings on the matter of personal jurisdiction.[60] The basic effect of the *Ruhrgas* holding, however, was to preserve the federal courts' flexibility to order jurisdictional questions for practical purposes of efficiency and expedience.[61]

Justice Ruth Bader Ginsburg, writing for a unanimous Court, began her analysis in *Ruhrgas* by disclaiming the theory of the U.S. Court of Appeals for the Fifth Circuit. That court relegated personal jurisdiction to a sequential position behind subject-matter jurisdiction on the basis of the different constitutional functions served by the two inquiries and the codified procedural requirements that underscore these differences.[62] The Court noted that subject-matter jurisdiction serves institutional interests by delimiting federal courts and recited the now-familiar manifestations of this importance: non-waivability by the parties and self-monitoring by the courts.[63] Personal jurisdiction requirements, by contrast, serve as an external check on the court's power, protecting the individual liberty interests of defendants from an overextension of judicial power in accordance with the Due Process Clause.[64] As the Court observed, this requirement is waivable[65] and is not policed by the courts sua sponte.[66] Partly on the basis of these procedural distinctions, the Fifth Circuit prioritized subject-matter jurisdiction over the personal jurisdiction inquiry.[67]

While it acknowledged different functions served by the two doctrines, the Supreme Court rejected the idea that "subject-matter jurisdiction is ever and always the more 'fundamental.'"[68] Personal jurisdiction, according to the Court, is "'an essential element of the jurisdiction of a district . . . court,'" because a court is "'powerless to proceed to an adjudication'" in its absence.[69] Thus, the Supreme Court reasoned, relegation of the personal jurisdiction inquiry to a secondary position on the decisional line would

59. *See id.* at 587-88.
60. *See id.* at 585-88.
61. *See id.* at 586-88.
62. *Id.* at 583.
63. *Id.*; *see supra* notes 19-21 and accompanying text.
64. *Ruhrgas*, 526 U.S. at 584.
65. *See* Fed. R. Civ. P. 12(h)(1) (stating that a lack of personal jurisdiction defense may be waived); *see also* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.").
66. *Ruhrgas*, 526 U.S. at 584.
67. *Id.* at 583.
68. *Id.* at 584.
69. *Id.* (quoting Employers Reinsurance Corp. v. Bryant, 299 U.S. 374, 382 (1937)).

serve to frustrate the purposes of the Fifth and Fourteenth Amendments.[70] Furthermore, the Court noted that there are circumstances where the alleged basis for asserting a lack of subject-matter jurisdiction is purely statutory and not dictated by constitutional command, while the personal jurisdiction inquiry hinges "on the constitutional safeguard of due process to stop the court from proceeding to the merits of the case."[71] *Ruhrgas* presented exactly this scenario: Marathon's basis for arguing the lack of subject-matter jurisdiction was predicated on the lack of complete diversity required by 28 U.S.C. § 1332, but not required by Article III.[72]

Yet, the Court was careful not to go too far in authorizing a jurisdictional free-for-all whereby a federal court might enjoy unlimited discretion to reach the personal jurisdiction issue first.[73] Justice Ginsburg limited the discretion of federal courts in this regard to circumstances where the personal jurisdiction issue is "straightforward" and presents "no complex question of state law" and "the alleged defect in subject-matter jurisdiction raises a difficult and novel question."[74] When these circumstances are not met, the federal court enjoys no discretion to order the issues, and a decision to reach the personal jurisdiction question first is inappropriate. This requirement is grounded on two concerns. First, the Court noted that "in most instances subject-matter jurisdiction will involve no arduous inquiry," suggesting that resolution of that question first is the more efficient course of action.[75] Second, federalism concerns come to light when the personal jurisdiction issue poses a difficult state law issue.[76] A

70. As a member of the Court intimated during the oral argument in *Ruhrgas*, the protections provided by the Fifth and Fourteenth Amendments are ill-served by a policy that requires even a foreign defendant like Ruhrgas with no connection to a judicial forum to vigorously litigate a complex issue of subject-matter jurisdiction at great cost. *See* Transcript of Oral Argument at 25, *Ruhrgas*, 526 U.S. 574 (No. 98-470), *available at* 1999 WL 183813.

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

72. *Id.*

73. *See id.* at 587-88.

74. *Id.* at 588; *see also* Foslip Pharms., Inc. v. Metabolife Int'l, Inc., 92 F. Supp. 2d 891, 899 (N.D. Iowa 2000) (reaching personal jurisdiction first where the subject-matter jurisdiction inquiry is a complex question of fraudulent joinder).

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

76. Federal courts may exercise personal jurisdiction when the defendant "could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." Fed. R. Civ. P. 4(k)(1)(A). Therefore, the question of personal jurisdiction faced by the district court is identical to that of the state courts: whether the long-arm statute of the state and the Due Process Clause of the Fourteenth Amendment confer jurisdiction over the defendant. For easy questions, a district court determination poses no problem. The state court judges would arrive at the same conclusion, regardless of preclusion. Justice Ruth Bader Ginsburg determined that *Ruhrgas* posed an easy case because the Texas long-arm statute is coextensive with the Due Process Clause. *Cf. Ruhrgas*, 526 U.S. at 584. Therefore, resolution of personal jurisdiction entailed no searching inquiry into the Texas state requirements. Where, however, a state long-arm statute is more restrictive than the federal Due Process Clause, there is a greater chance that the federal court may reach a different conclusion as to personal jurisdiction than the state court. As one commentator has noted, personal jurisdiction determinations may vary from judge to judge and, thus, "what appears to be a clear lack of personal jurisdiction to a federal judge may appear more complex to a state judge who might be more aggressive in her exercise of personal

dismissal for lack of personal jurisdiction carries issue preclusive effect against relitigation of that issue in state court.[77] Accordingly, courts should not undertake analysis of state laws "in a context that the state's courts have not yet examined or that clearly involves significant policy choices not yet made by the forum's courts."[78] Justice Ginsburg sought to assuage fears that the federalism concerns take precedence even in those instances where personal jurisdiction is more straightforward and more readily resolved than subject-matter jurisdiction. The Court explained that the intrusion into state court business for purposes of judicial economy is not overly problematic because the "federal and state courts are complimentary systems for administering justice in our Nation."[79] Accordingly, Justice Ginsburg trusts the district courts to make "sensitive judgments" in this regard that comply with the principles of "cooperation and comity" that are so "essential to the federal design."[80]

Taken together, *Steel Co.* and *Ruhrgas* explore the bounds of judicial pragmatism in the face of strict structural requirements. It is important to note, however, that the holdings speak to different classes of judicial action. *Steel Co.* is the restrictive reaction to the impermissible circumvention of external limits to federal court authority. It stands for the principles of separation of powers and federalism as against the pragmatism of hypothetical jurisdiction. *Ruhrgas* is the fairer acknowledgment of the true balance between core jurisdictional requirements and judicial pragmatism: a federal court possesses the flexibility to dismiss cases in a way that maximizes efficiency so long as the court does not settle the merits of the dispute. *Ruhrgas*'s limitation of federal court discretion to cases where subject-matter jurisdiction is the more complex question is a sensible policy choice. Where limits imposed by Article III are not implicated, the courts should turn first to the easier question. Thus, subject-matter jurisdiction is

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jurisdiction." Michael J. Edney, Comment, *Preclusive Abstention: Issue Preclusion and Jurisdictional Dismissals After* Ruhrgas, 68 U. Chi. L. Rev. 193, 200 (2001). This, then, is the basis for the Court's concern for the dignity interest of the state: the ability to fully articulate the true reach of its own long-arm statute.

77. *Ruhrgas*, 526 U.S. at 585 (citing Baldwin v. Iowa State Traveling Men's Ass'n., 283 U.S. 522, 524-27 (1931)). Issue preclusion operates to attach finality to a court's judgment on a particular issue that has been "actually and necessarily determined." *See* Montana v. United States, 440 U.S. 147, 153 (1979). Therefore, relitigation of the personal jurisdiction issue in state court would be barred by this determination. By issuing a *Ruhrgas* dismissal on personal jurisdiction, the district court sidesteps the possibility that the case suffers for want of subject-matter jurisdiction, a judgment that does not generally implicate relitigation in state court. *But see Ruhrgas*, 526 U.S. at 585-86 (discussing the preclusive effect of federal court dismissals for lack of subject-matter jurisdiction and supplemental jurisdiction on subsequent state court relitigation).

78. 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1063.1 (3d ed. 2002). In *Ruhrgas*, the plaintiff argued that, especially in cases on removal, a district court's personal jurisdiction decision may infringe upon the responsibility of state courts to formulate their own rulings on personal jurisdiction. *Ruhrgas*, 526 U.S. at 585; *see supra* note 77.

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

80. *Id.* at 586-87.

not at the top of a non-merits hierarchy. Instead, courts should first turn to it when efficiency and comity concerns so dictate.

C. *Federal Court Decisions Construing* Ruhrgas *to Promote Judicial Flexibility*

While *Ruhrgas* may be read narrowly to implicate the single issue of whether a court may dismiss an action for want of personal jurisdiction without confirmation of subject-matter jurisdiction,[81] this Note argues that the analysis in *Ruhrgas* suggests a general approach to handling a variety of non-merits issues.[82] This view is supported by recent federal court opinions that construe *Ruhrgas* broadly so as to preserve and enhance judicial flexibility to choose among myriad threshold grounds for denying audience to a case on the merits.[83] By and large, opinions that cite to *Ruhrgas* do so to justify dismissal on grounds of personal jurisdiction where the court has avoided a difficult question of subject-matter jurisdiction.[84] However, the courts have validated *Ruhrgas* dismissals on a range of non-merits issues.

As a preliminary matter, it is essential that the courts properly classify the basis for their dismissal. One commentator has suggested that three categories of issues may be identified after *Steel Co.*[85] The first is comprised of those core subject-matter jurisdictional issues that cannot be

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81. The Fifth Circuit held that *Ruhrgas* excepts only personal jurisdiction from the general requirement that subject-matter jurisdiction must be settled first. *See* Dominguez-Cota v. Cooper Tire & Rubber Co., 396 F.3d 650, 652 (5th Cir. 2005) ("We disagree with Appellee that the Supreme Court's holding [in *Ruhrgas*] can be stretched to encompass 'non-merits' issues, other than jurisdiction, such as forum non conveniens."); *cf. id.* at 653 ("In *Ruhrgas*, the Court reinforced *Steel Co.*'s holding, but relaxed it with respect to personal jurisdiction."). This case is discussed at *supra* Part II.B.2.

82. At least one commentator has argued that the Supreme Court's analysis of personal jurisdiction in *Ruhrgas* may be applied to a range of issues. *See, e.g.*, Idleman, *supra* note 9, at 11. The *Ruhrgas* holding itself appears to indicate that there are issues, in addition to personal jurisdiction, that may serve to pretermit a decision as to subject-matter jurisdiction. *See Ruhrgas*, 526 U.S. at 584 (classifying personal jurisdiction among multiple "non-merits grounds"); *id.* at 585 ("It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits.").

83. *See, e.g.*, McBee v. Delica Co., 417 F.3d 107, 127 n.17 (1st Cir. 2005) ("The thrust of *Ruhrgas* was to increase judicial flexibility, not to decrease it."); N.J. TV Corp. v. FCC, 393 F.3d 219, 221 (D.C. Cir. 2004) ("The priority for jurisdictional issues, however, doesn't control the sequence in which we resolve non-merits issues that prevent us from reaching the merits."); Spargo v. N.Y. State Comm'n on Judicial Conduct, 351 F.3d 65, 74 (2d Cir. 2003) ("*Ruhrgas* reaffirms the inherent flexibility that federal courts exercise 'to choose among threshold grounds' for disposing of a case without reaching the merits.").

84. *See, e.g.*, Lolavar v. De Santibanes, 430 F.3d 221, 227-28 (4th Cir. 2005); Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp., 230 F.3d 934, 939 n.2 (7th Cir. 2000); Alpine View Co. Ltd. v. Atlas Copco AB, 205 F.3d 208, 213-14 (5th Cir. 2000); *In re* Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539, 574-75 (S.D.N.Y. 2005); Maranga v. Vira, 386 F. Supp. 2d 299, 302 n.1 (S.D.N.Y. 2005); Nahigian v. Leonard, 233 F. Supp. 2d 151, 171 (D. Mass. 2002); Foslip Pharms., Inc. v. Metabolife Int'l, Inc., 92 F. Supp. 2d 891, 899 (N.D. Iowa 2000).

85. *See* Idleman, *supra* note 3, at 321-25. The Third Circuit adopted this basic categorical scheme in order to properly classify forum non conveniens. *See* Malay. Int'l Shipping Corp. v. Sinochem Int'l Co. Ltd., 436 F.3d 349, 359 (3d Cir. 2006).

bypassed en route to the merits.[86] The second category contains merits-related issues, including cause of action questions, that cannot be addressed before subject-matter jurisdiction as they could have been under hypothetical jurisdiction.[87] A federal court may issue a decision on the merits at a number of stages in the pleading process.[88] Merits-based decisions include a dismissal for failure to state a claim,[89] a dismissal on summary judgment,[90] and, of course, resolution of the underlying factual dispute at trial.[91] In addition, according to *Steel Co.*, a court's determination that the plaintiff has failed to state a "valid (as opposed to arguable) cause of action" is a decision on the merits.[92] Finally, the third category is comprised of issues that fall somewhere between the first two.[93] This includes those non-Article III jurisdictional issues that *Steel Co.* did not intend to include in its repudiation of subject-matter jurisdiction.[94] It also includes an array of "procedural, remedial, or evidentiary" issues that are neither jurisdictional nor merits related.[95] If an issue falls within this amorphous third category, the Supreme Court has indicated that the issue is at least a candidate for a *Ruhrgas* dismissal.[96]

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86. *See* Idleman, *supra* note 3, at 321. There is some disagreement as to whether this category is comprised solely of constitution-based subject-matter jurisdiction issues, such as Article III standing, or if all subject-matter jurisdiction elements, both constitutional and statutory, are implicated. *See id.* at 322; *see also supra* notes 51-55 and accompanying text (discussing the different interpretations as to the scope of the *Steel Co.* holding with respect to different sources of subject-matter jurisdiction).

87. *See* Idleman, *supra* note 3, at 321.

88. *See* Howard M. Wasserman, *Jurisdiction and Merits*, 80 Wash. L. Rev. 643, 652-55 (2005).

89. Fed. R. Civ. P. 12(b)(6). A dismissal for failure to state a claim is not considered a merits-based decision if the claim is not even an arguable one. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) ("Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" (quoting Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 666 (1974))); *cf.* Bell v. Hood, 327 U.S. 678, 682-83 (1946) ("[A] suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.").

90. Fed. R. Civ. P. 56(c).

91. *See* Wasserman, *supra* note 88 (describing these decisions and distinguishing them from earlier non-merits-based decisions).

92. *See Steel Co.*, 523 U.S. at 89. A dismissal based on a court's determination that "the claim is 'so insubstantial, implausible, foreclosed by prior decisions of [the] Court, or otherwise completely devoid of merit as not to involve a federal controversy'" is not a merits-based decision but, rather, a dismissal for lack of subject-matter jurisdiction. *Id.* (quoting *Oneida Indian Nation*, 414 U.S. at 666).

93. *See* Idleman, *supra* note 3, at 321-22.

94. *See id.* Again, however, the inclusion of nonconstitutional subject-matter jurisdiction issues is subject to some dispute. *See supra* notes 51-55, 86 and accompanying text.

95. *See* Idleman, *supra* note 3, at 322 n.364.

96. *But see* Malay. Int'l Shipping Corp. v. Sinochem Int'l Co. Ltd., 436 F.3d 349, 358, 363-64 (3d. Cir. 2006) (determining that forum non conveniens is a third category non-

The Supreme Court has interpreted *Ruhrgas* to extend beyond personal jurisdiction. For instance, in 2004, the Court explicitly bypassed an Article III standing determination in order to dismiss an action on judge-made grounds of insufficient third-party standing.[97] In that case, two attorneys invoked the rights of hypothetical indigents in order to challenge a Michigan law that denied the appointment of appellate counsel to trial court defendants who pled guilty.[98] The Court operated under an assumption that plaintiffs had satisfied the requirements for Article III standing and set aside that issue.[99] It then dismissed the action for the attorney-plaintiffs' failure to demonstrate third-party standing,[100] a judicially self-imposed standing principle.[101] The case demonstrates the Court's approval of a *Ruhrgas* dismissal on non-merits grounds that exist independently of either constitutional or statutory authorization.[102]

The Supreme Court also identified the common law *Totten v. United States* rule of dismissal, which requires the dismissal of cases based on the plaintiffs' secret espionage relationship with the government,[103] as the "sort of 'threshold question'" on which a court may order a *Ruhrgas* dismissal.[104] In *Tenet v. Doe*, the Supreme Court briefly considered whether *Steel Co.* required it to evaluate the Government-defendant's motion to dismiss for

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merits issue but finding nevertheless that a court must have subject-matter jurisdiction in order to dismiss on such grounds).

97. *See* Kowalski v. Tesmer, 543 U.S. 125, 127-28 (2004). The third-party standing doctrine permits an association to bring a suit on behalf of its injured members. *See* Warth v. Seldin, 422 U.S. 490, 511 (1975). So long as the association demonstrates that its members would have sufficient Article III standing had the members themselves brought the suit, "and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." *Id.*

98. *See Kowalski*, 543 U.S. at 127-28.

99. *See id.* at 129. Notice that by "assuming" proper Article III subject-matter jurisdiction, *id.*, the Supreme Court suggested that it was exercising a permissible form of "hypothetical jurisdiction," which enabled the assumption of jurisdiction in order to reach the merits. *See supra* Part I.B.1.

100. *See Kowalski*, 543 U.S. at 134.

101. *See* United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 557 (1996) ("'[T]he general prohibition on a litigant's raising another person's legal rights' is a 'judicially self-imposed limi[t] on the exercise of federal jurisdiction,' not a constitutional mandate." (quoting Allen v. Wright, 468 U.S. 737, 751 (1984))).

102. In this sense, *Kowalski* fits nicely into the Supreme Court's exception of another judge-made limitation on federal judicial power, *Younger* abstention, from its jurisdiction-first mandate in *Steel Co. See supra* notes 43-46 and accompanying text. *Kowalski* also demonstrates how a *Ruhrgas* dismissal can facilitate constitutional avoidance. *See supra* note 50. Rather than analyze whether the hypothetical indigent defendants would have sufficient constitutional standing to challenge the constitutionality of the state statute, *see Warth*, 422 U.S. at 511 (requiring, inter alia, confirmation of member standing to permit third-party representation), the Court disposed of the case on far less problematic prudential grounds. *See Kowalski*, 543 U.S. at 134.

103. Totten v. United States, 92 U.S. 105 (1876).

104. Tenet v. Doe, 125 S. Ct. 1230, 1235 n.4 (2005).

lack of statutory subject-matter jurisdiction.[105] Though it recognized that the statutory subject-matter question was the kind of jurisdictional issue that *Steel Co.* requires courts to resolve before the merits, the Court concluded that its issuance of an order of dismissal on *Totten* grounds was consistent with *Ruhrgas*.[106] The Court noted that the *Totten* rule was uniquely designed to prevent judicial inquiry into the merits.[107] Thus, pursuant to *Ruhrgas*, the Court identified an important interest, the preservation of government secrets, and made a discretionary choice to dismiss on the more straightforward, non-merits *Totten* grounds rather than engage in invasive discovery or other proceedings.[108]

Taking cue from *Ruhrgas*, the lower federal courts have shuffled jurisdictional issues so as to reach dismissal on more easily resolved threshold grounds where subject-matter jurisdiction is complicated. Among those grounds are Eleventh Amendment immunity,[109] the absence of an indispensable party pursuant to Rule 19,[110] prudential standing,[111] mootness,[112] the political question doctrine,[113] and forum non conveniens, to which this Note will now turn.

105. *See id.* The Government claimed that, pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1) (2000), the plaintiff could bring its claim only in the Court of Federal Claims. *See Tenet*, 125 S. Ct. at 1235 n.4.

106. *See Tenet*, 125 S. Ct. at 1235 n.4.

107. *See id.*; *see also id.* at 1238 (Scalia, J., concurring) (distinguishing the *Totten* bar from a "nonthreshold *merits* question").

108. *See id.* at 1235 n.4.

109. *See In re* Hechinger Inv. Co., 335 F.3d 243, 250-51 (3d Cir. 2003) ("[F]ederal courts are not generally obligated to address 'jurisdictional issues' in any particular order.").

110. *See* Wilbur v. Locke, 423 F.3d 1101, 1106-07 (9th Cir. 2005) (suggesting that the Rule 19 issue may be addressed ahead of subject-matter jurisdiction though ultimately deciding subject-matter jurisdiction issues first). Rule 19 instructs a district court to determine whether an action should be dismissed in the absence of a party deemed "indispensable." *See* Fed. R. Civ. P. 19(b).

111. *See* Grand Council of the Crees v. FERC, 198 F.3d 950, 954 (D.C. Cir. 2000) ("[I]t is entirely proper to consider whether there is prudential standing while leaving the question of constitutional standing in doubt, as there is no mandated 'sequencing of jurisdictional issues.'" (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999)).

112. *See* Kaw Nation v. Norton, 405 F.3d 1317, 1323 (Fed. Cir. 2005) ("[G]enerally, we may address jurisdictional issues in any order.").

113. *See* Hwang Geum Joo v. Japan, 413 F.3d 45, 48 (D.C. Cir. 2005) ("[W]e need not resolve the question of the district court's [statutory] subject-matter jurisdiction . . . before considering whether the complaint presents a nonjusticiable political question.").

II. THE MULTI-FACETED CIRCUIT-SPLIT: WEIGHING THE PROPRIETY OF A DISMISSAL UNDER FORUM NON CONVENIENS WITHOUT RESOLUTION OF SUBJECT-MATTER JURISDICTION CHALLENGES

A. *Determining the Appropriate Forum: The Federal Doctrine of Forum Non Conveniens*

Forum non conveniens is a common law doctrine[114] that permits a federal court to dismiss a cause of action even though the forum may constitutionally assert jurisdiction. The doctrine allows a court to abstain from otherwise sanctioned jurisdiction over a suit where it appears on balance that the convenience of the parties and witnesses, and the interests of justice, would be better served by adjudication in a different forum.[115] The abstention from the exercise of technically sound jurisdiction is an operation of the inherent power of the federal courts.[116] The courts' authority in this regard is an expression of the "judicial Power" articulated in Article III of the Constitution[117] that encompasses the range of unenumerated powers that flow from the special character or needs of a court.[118] This section will focus on the modern development and

114. While the federal doctrine of forum non conveniens is a creature of case law, some states have codified the doctrine in statute. *See, e.g.*, Mass. Gen. Laws ch. 223A, § 5 (2005) ("When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just.").

115. *In re* Air Crash Disaster Near New Orleans, 821 F.2d 1147, 1154 (5th Cir. 1987); *see also* Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 528 (1947) ("[T]he doctrine of *forum non conveniens* . . . resists formalization and looks to the realities that make for doing justice.").

116. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-08 (1947)); Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1218 (11th Cir. 1985) ("The doctrine derives from the court's inherent power, under article III of the Constitution, to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice and oppression."). One circuit court of appeals classified the power to dismiss under forum non conveniens among those inherent powers that are "necessary only in the sense of being highly useful in the pursuit of a just result" and that "courts may exercise this kind of inherent power only in the absence of contrary legislative direction." Eash v. Riggins Trucking, Inc., 757 F.2d 557, 563-64 (3d Cir. 1985) (en banc). This explanation comports with the displacement of the common law doctrine by congressional statute to allow transfers between federal district courts under 28 U.S.C. § 1404(a) (2000). *See infra* notes 143-47 and accompanying text.

117. *See* U.S. Const., art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *id.* § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . .").

118. *See* Idleman, *supra* note 9, at 48-50 (describing inherent powers as arising from both historical application and institutional necessity). Inherent powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962); *see also Eash*, 757 F.2d at 561 ("That courts have inherent powers—powers vested in the courts upon their creation and not derived from any statute—is not disputed.").

application of the doctrine in federal courts, with particular attention paid to the doctrine's flexibility.

1. The Available Alternative Forum

The Supreme Court ushered in the modern era of forum non conveniens in *Gulf Oil Corp. v. Gilbert*,[119] where it held that "a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."[120] In affirming the dismissal of a case properly brought in New York but more appropriately adjudicated in Virginia,[121] the Court formulated a basic test that, with some alteration, continues to guide the federal courts' evaluation of a motion to dismiss under forum non conveniens to this day. As a threshold matter, a federal court must first determine the existence of an adequate alternative forum.[122] The doctrine of forum non conveniens operates to provide federal courts with a choice of two forums in which the defendant is amenable to process: the home forum, in which the suit is filed, and the alternative forum.[123] Accordingly, the question of dismissal should proceed no further if the court has failed to identify an alternative forum where the defendant is amendable to suit and which permits litigation of the subject matter of the dispute.[124]

2. The Balancing of Private and Public Interest Factors

If a court finds that an adequate alternative forum exists, it then must determine, by balancing the private interests of the parties and the public interest concerns of the court, whether adjudication of the substantive claim in the original, chosen forum would be inconvenient and unjust.[125] In *Gilbert*, the Supreme Court for the first time enunciated a set of factors to guide the federal courts in making this determination.[126] Evaluation of these factors might indicate the "exceptional circumstance[]" when a court should exercise its power to decline jurisdiction by dismissing under forum non conveniens.[127] The Court, however, imbued the doctrine with considerable flexibility and noted that it did not attempt to establish an exhaustive list of potentially dispositive circumstances.[128] Instead, the Supreme Court left decisions as to the weight and importance of the various

119. 330 U.S. 501 (1947).

120. *Id.* at 507.

121. Note that this function, the dismissal of an action in favor of a more suitable forum in another federal district court, is no longer within the operation of forum non conveniens after the enactment of 28 U.S.C. § 1404(a). *See infra* text accompanying notes 143-47.

122. *See Gilbert*, 330 U.S. at 506-07.

123. *Id.* at 507.

124. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981); *Gilbert*, 330 U.S. at 506-07.

125. *See Gilbert*, 330 U.S. at 508-09.

126. *See id.*

127. *Id.* at 504.

128. *Id.* at 508.

factors to the discretion of the court to which a plaintiff resorts.[129] The *Gilbert* Court, however, did impose one important limit on the power of the courts to dismiss on grounds of forum non conveniens when it mandated that, "unless the balance [of the articulated factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[130] Thus, defendants usually have the burden of overcoming a strong presumption in favor of a plaintiff's choice of forum.[131]

The first set of considerations outlined by the Supreme Court in *Gilbert* speaks to the private interest of the litigants.[132] The Court found that

> [i]mportant considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.[133]

The Court then turned to the "public interest" factors, which include administrative difficulties relating to court congestion, the imposition of local jury duty on citizens of the forum, the interest in settling local disputes locally, and the avoidance of complex problems associated with the application of foreign law.[134]

3. Later Refinements to Forum Non Conveniens

While the *Gilbert* Court placed a heavy burden on the defendant in overcoming the plaintiff's initial choice of forum, the Supreme Court later determined that a foreign plaintiff's choice of forum is entitled to less deference.[135] The *Piper Aircraft Co. v. Reyno* Court emphasized that this rule is not intended to disadvantage foreign plaintiffs that pursue remedies in United States courts.[136] Rather, the modification reflects a logical prediction of the ultimate convenience of the forum.[137] Relying on the underlying consideration of relative convenience in the forum non conveniens inquiry, the Court noted that "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient," but "this

129. *Id.*
130. *Id.*
131. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981).
132. *See Gilbert*, 330 U.S. at 508.
133. *Id.*
134. *See id.* at 508-09.
135. *Piper*, 454 U.S. at 255-56.
136. *See id.*
137. *See id.*

assumption is much less reasonable" when the plaintiff is foreign to the forum.[138] The Court also held that, ordinarily, courts should not give substantive weight to the possibility that adjudication in the alternative forum might expose a plaintiff's claim to an unfavorable change in law.[139] This reflects sensible policy. If the plaintiff had a choice of forums, it is reasonable to assume that she filed suit in the forum with law most favorable to her claim.[140] This also avoids the messy comparative law analysis that the forum non conveniens doctrine was designed to avoid.[141] These modifications were intended to make forum non conveniens a more valuable weapon to combat forum shopping by foreign plaintiffs.[142]

The decision in *Piper* reflects the practical constraints of the more limited application of the forum non conveniens dismissal, which applies only "in cases where the alternative forum is abroad."[143] The restriction of the common law doctrine is the work of Congress, which only a year after the *Gilbert* decision enacted 28 U.S.C. § 1404(a).[144] This statute permits a federal court to transfer a civil action to another federal district court "[f]or the convenience of parties and witnesses, in the interest of justice."[145] While the early use of the doctrine in federal courts contemplated the dismissal of an action in favor of any forum, including transfer to another federal court,[146] Congress superseded the intra-district function of forum non conveniens by investing the courts with the statutory power to effect transfer of venue.[147]

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138. *Id.*

139. *See id.* at 247.

140. *See id.* at 250.

141. *See id.* at 251 ("The doctrine of *forum non conveniens*, however, is designed in part to help courts avoid conducting complex exercises in comparative law. As we stated in *Gilbert*, the public interest factors point towards dismissal where the court would be required to 'untangle problems in conflict of laws, and in law foreign to itself.'" (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947))).

142. For a more comprehensive review of *Piper* and the fight against forum-shopping, see Megan Waples, Note, *The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 Conn. L. Rev. 1475 (2004).

143. Am. Dredging Co. v. Miller, 510 U.S. 443, 449 n.2 (1994).

144. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 722 (1996) ("The dispute in *Gulf Oil* was over venue, not jurisdiction, and the expectation was that after dismissal of the suit in New York the parties would refile in federal court, not the state courts of Virginia. This transfer of venue function of the *forum non conveniens* doctrine has been superseded by statute."); Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955) ("The harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action, was eliminated by the provision in § 1404(a) for transfer . . . .").

145. 28 U.S.C. § 1404(a) (2000).

146. Indeed, *Gilbert* involved the dismissal of an action in New York where that action was more properly adjudicated in Virginia. *See Gilbert*, 330 U.S. at 511-12.

147. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981). While some modern courts refer to a dismissal of an action pursuant to forum non conveniens as a "transfer," *see, e.g.*, Rivendell Forest Prods. v. Can. Pac. Ltd., 2 F.3d 990, 994 n.7 (10th Cir. 1993), a court cannot actually transfer a case to the courts of another country. *See* David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 Tex. Int'l L.J. 353, 370 (1994). Courts, however, have developed the

Since *Piper*, the lower federal courts have generally followed the same procedure in addressing forum non conveniens motions: (1) assess the level of deference due the plaintiff's choice of forum, with a lesser degree of deference paid to foreign plaintiffs; (2) determine the existence of an available, alternative forum; and (3) weigh the private and public interest factors as originally outlined in *Gilbert* and modified by *Piper*.[148] Courts have also developed the practice of issuing forum non conveniens dismissals that are contingent on various factors,[149] including the submission of the defendant to the jurisdiction of the alternative forum[150] or defendant's waiver of a statute of limitation defense, if the cause of action is no longer timely in the alternative forum.[151] Despite the deferential adjustments made by the *Piper* Court, the essential attribute of modern forum non conveniens, at least from the bench's perspective, is flexibility, for it affords courts an array of tools for comparative analysis without a rigid structural framework.

B. *Forum Non Conveniens: Merits or Not (and Does It Even Matter?)*

This section will introduce the complicated split among the circuit courts of appeals as to the propriety of dismissing a case under forum non conveniens without confirmation of the court's jurisdiction over the subject matter of the dispute. There are two general fault lines running through these decisions. The first speaks to the categorization of forum non conveniens as a merits or non-merits issue. As this Note examined in Part I, this determination is crucial, for the federal courts generally are forbidden from issuing a decision on the merits in the absence of subject-matter jurisdiction. Thus, the pragmatic benefits conferred by forum non conveniens, including not insignificant savings for the litigants in terms of jurisdictional discovery costs and for the courts in terms of docket management, do not outweigh the structural bounds that limit the reach of the federal courts so long as the doctrine is classified as a merits-based issue. This split implicates subject-matter jurisdiction's role as a structural

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technique of "conditional dismissal," which makes the forum non conveniens dismissal contingent on various factors. *See infra* notes 149-51 and accompanying text.

148. *See supra* notes 132-34 and accompanying text.

149. *See Piper*, 454 U.S. at 257 n.25 ("[D]istrict courts might dismiss subject to the condition that defendant corporations agree to provide the records relevant to the plaintiff's claims."); Baris v. Sulpicio Lines, Inc., 932 F.2d 1540, 1551 (5th Cir. 1991) ("[C]ourts must take measures, as part of the their dismissals in *forum non conveniens* cases, to ensure that defendants will not attempt to evade the jurisdiction of the foreign courts."). *See also* Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of* Forum Non Conveniens *in the United States, the United Kingdom, and Germany*, 16 Loy. L.A. Int'l & Comp. L.J. 455, 473-74 (1994) (noting that conditional dismissals have been used as justification for a more liberal application of the doctrine despite evidence that such dismissals remain outcome determinative).

150. *See, e.g.*, Zermeno v. McDonnell Douglas Corp., 246 F. Supp. 2d 646, 659 (S.D. Tex. 2003).

151. *See, e.g.*, Usha (India), Ltd. v. Honeywell Int'l, Inc., 421 F.3d 129, 136 (2d Cir. 2005).

requirement. The second fault line was introduced, at least in the sequencing context, by the Third Circuit in 2006.[152] This concern focuses more fundamentally on whether a court may properly evaluate the merits of a motion to dismiss under forum non conveniens without antecedent confirmation of the court's jurisdiction. Phrased another way, is a court capable of weighing the appropriateness of the two forums if it is not certain that, if it declined to abstain, it could even render a final judgment at all? This aspect of the split concerns the court's elemental requirements for the application of the forum non conveniens doctrine.[153]

1. *Papandreou* and *Monde Re*: Casting Forum Non Conveniens as a Non-merits Issue

In *In re Minister Papandreou*,[154] the D.C. Circuit considered the defendants' petition for a writ of mandamus requesting vacatur of a district court's discovery order.[155] The discovery was designed to enable the court's evaluation of the defendants' assertion that the Foreign Sovereign Immunities Act of 1976 ("FSIA")[156] barred jurisdiction over the dispute.[157] The defendants argued on appeal that the district court should have considered defendants' motions to dismiss on less onerous grounds, including forum non conveniens.[158] The D.C. Circuit agreed with the defendant and issued the writ because the district court's evaluation of these defenses, each of which it considered "jurisdictional or hav[ing] jurisdictional overtones," might have resulted in considerable cost and time savings for the foreign defendants.[159] The court noted that its classification of these grounds as at least quasi-jurisdictional was essential given the Supreme Court's mandate that merits issues may not be settled while subject-matter jurisdiction is in doubt.[160] Because the FSIA question implicated the court's statutory authority to resolve the dispute,[161] the district court was permitted to address only non-merits issues, and dismiss thereupon, without settling the FSIA controversy.[162] The D.C. Circuit

152. *See infra* Part II.B.3.b.

153. If the Third Circuit is correct that subject-matter jurisdiction is a prerequisite for the exercise of a court's inherent power to dismiss under forum non conveniens, then the federal court's procedure might change. *See supra* text accompanying note 148. Before assessing the level of deference paid to the plaintiff's choice of forum or the availability of the alternative forum, the court must satisfy itself of its jurisdiction over the dispute.

154. 139 F.3d 247 (D.C. Cir. 1998).

155. *Id.* at 249-50.

156. 28 U.S.C. §§ 1330, 1602-1611 (2000).

157. *See Papandreou*, 139 F.3d at 249-50.

158. *See id.* at 249, 254.

159. *Id.* at 254.

160. *See id.* at 254-55 (citing, inter alia, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998)).

161. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433-34 (1989) (discussing the impact of the Foreign Sovereign Immunities Act ("FSIA") on the jurisdiction of the federal courts).

162. *See Papandreou*, 139 F.3d at 255.

determined that a dismissal under forum non conveniens does not constitute a decision on the merits.[163] It noted that forum non conveniens "instead involves a deliberate abstention from the exercise of jurisdiction."[164] The court considered such a dismissal "as merits-free as a finding of no jurisdiction."[165] The D.C. Circuit did inject some measure of limitation into the equation when it held that a district court's order dismissing under forum non conveniens without resolution of subject-matter jurisdiction could not be subject to conditions, "for exaction of such a condition would appear inescapably to constitute an exercise of jurisdiction."[166]

The D.C. Circuit's classification of the doctrine was borrowed four years later by the Second Circuit when it approved the dismissal under forum non conveniens of an action brought to enforce a foreign arbitral award in *Monegasque de Reassurances (Monde Re) v. Naz Naftogaz*.[167] In *Monde Re*, the district court considered, inter alia, the merits of a sovereign defendant's motion to dismiss for lack of statutory subject-matter jurisdiction pursuant to immunities located in the FSIA and its motion to dismiss under forum non conveniens.[168] After considering the adequacy of Ukraine as an alternative forum and finding that both the private and public interest factors weighed heavily in favor of dismissal, the court granted Ukraine's motion to dismiss on grounds of forum non conveniens without settling the FSIA immunity question.[169] The Second Circuit affirmed the dismissal on forum non conveniens grounds, despite the plaintiff's argument that the district court was required to address the subject-matter jurisdiction issue raised by the defendant's motion.[170] While the Second Circuit conceded that "the first question for an appellate court ordinarily is that of its jurisdiction,"[171] it relied on *Papandreou*[172] for its holding that "neither [it] nor the district court are barred from passing over the question

163. *See id.* at 255. The D.C. Circuit stated, "[A] court that dismisses on other non-merits grounds such as *forum non conveniens* and personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles . . . ." *Id.* The Supreme Court quoted this language, absent the reference to forum non conveniens, from *Papandreou* to support its holding that personal jurisdiction may be addressed before a difficult question of subject-matter jurisdiction. *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584-85 (1999).

164. *Papandreou*, 139 F.3d at 255. The D.C. Circuit drew a comparison to a similar abstention from a potentially nonexistent jurisdiction that the Supreme Court had expressly approved: the discretionary declination of pendent jurisdiction that may not have otherwise existed. *See id.* at 255-56 (citing *Steel Co.*, 523 U.S. at 100 n.3).

165. *Id.* at 255.

166. *Id.* at 256 n.6. For more on conditional dismissals on the ground of forum non conveniens, see *supra* notes 149-51 and accompanying text.

167. 311 F.3d 488, 497-98 (2d Cir. 2002).

168. *See id.* at 493.

169. *See id.*

170. *Id.* at 497.

171. *Id.*

172. *Id.* at 498 (citing *In re* Papandreou, 139 F.3d 247, 255-56 (D.C. Cir. 1998)). The Second Circuit was not alone in relying on *Papandreou*. The First Circuit also drew upon the D.C. Circuit's holding to classify forum non conveniens among a set of "non-merits-based defenses." Ungar v. Palestine Liberation Org., 402 F.3d 274, 294 (1st Cir. 2005).

of jurisdiction and going directly to the forum non convenien[s] issue raised by Ukraine."[173]

2. *Dominguez-Cota*: Forum Non Conveniens and the Entanglement with the Merits

At this time, only the Fifth Circuit has characterized forum non conveniens as a merits issue in the present context.[174] In *Dominguez-Cota v. Cooper Tire & Rubber Co.*,[175] the defendants removed a state tort action to the United States District Court for the Northern District of Mississippi on diversity grounds, apparently arguing that the joinder of one of the defendants was improper, and immediately moved for dismissal under forum non conveniens.[176] Before addressing the plaintiffs' motion for remand on the basis that subject-matter jurisdiction was defective for lack of complete diversity, the district court granted the defendants' motion for dismissal.[177] On appeal, the Fifth Circuit vacated the district court's dismissal and held, inter alia, that forum non conveniens does not qualify as a threshold issue and, instead, is an inquiry into the merits that must await resolution of the plaintiffs' challenge to the court's jurisdiction.[178]

In *Dominguez-Cota*, the Fifth Circuit concluded that a forum non conveniens analysis entails review of the particular facts of the case, and, therefore, the court must reach the merits.[179] The Fifth Circuit based its holding on *Van Cauwenberghe v. Biard*, where the Supreme Court considered whether forum non conveniens falls within the collateral-order doctrine.[180] The collateral-order doctrine requires, inter alia, that the issue

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173. *Monde Re*, 311 F.3d at 497-98.

174. At least one district court has suggested, by parenthetical reference to *Steel Co.*, that forum non conveniens is a merits inquiry and, therefore, may not be addressed before subject-matter jurisdiction due to the Supreme Court's repudiation of hypothetical jurisdiction. *See* O'Neill v. St. Jude Med., Inc., No. Civ. 04-1211, 2004 WL 1765335, at *1 n.4 (D. Minn. Aug. 5, 2004).

175. 396 F.3d 650 (5th Cir. 2005).

176. *Id.* at 651-52.

177. *See id.* at 652.

178. *Id.* at 653-54.

179. *See id.* at 654 ("For example, the court, in evaluating the 'private factors' must review the evidence in order to determine whether or not it will be accessible in the respective forums and consider the fairness of litigating in the respective forums and evaluate the difficulty of litigating the case in a forum which has few contacts with the litigants or with the accident.").

180. Van Cauwenberghe v. Biard, 486 U.S. 517, 527 (1988). As a general rule, a party may not take an appeal to a federal appellate court under 28 U.S.C. § 1291 (2000) until the district court has rendered a final decision that ends litigation on the merits. *Biard*, 486 U.S. at 521. However, in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Supreme Court "recognized a 'small class' of decisions that are immediately appealable under § 1291 even though the decision has not terminated the proceedings in the district court." *Biard*, 486 U.S. at 522. The collateral-order doctrine

> emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays

on which the district court's decision rests is separate from the underlying merits of the dispute.[181] In *Biard*, the Supreme Court held that, when determining the second prong of the forum non conveniens test—evaluation of the private and public interest factors—a court "becomes entangled in the merits of the underlying dispute."[182] As a result, an order denying a motion to dismiss for forum non conveniens is not a collateral order pursuant to 28 U.S.C. § 1291.[183] The Fifth Circuit borrowed the classification of forum non conveniens under the collateral-order doctrine in order to characterize the doctrine for purposes of issue sequencing.[184] As a result, the court was "unable to characterize forum non conveniens as a 'non-merits' issue" and remanded to the district court for evaluation of the plaintiffs' challenge to that court's subject-matter jurisdiction.[185]

The primary distinction between the holding of the Fifth Circuit and those of the D.C. and Second Circuits is the basis for the categorization of an issue as "on the merits." The Fifth Circuit concentrated on a court's means of evaluating a forum non conveniens motion.[186] Because the merits are embodied in the facts of a dispute and the consideration of a forum non conveniens motion necessitates consideration of these facts, the court "'becomes entangled in the merits.'"[187] The D.C. Circuit took a more result-oriented tack in analyzing the issue, comparing an abstention on grounds of forum non conveniens to a finding of no jurisdiction.[188] The court implied that, because the mere evaluation of the facts of a dispute does not entail resolving that dispute, the consideration of the facts relevant to a forum non conveniens motion does not render that evaluation a merits-based inquiry.[189] At the time of the Fifth Circuit's ruling in 2005, it appeared that the classification issue was the only major dispute among the circuit courts as to the propriety of a *Ruhrgas* dismissal for forum non

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> in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (quoting Cobbledick v. United States, 309 U.S. 323, 325 (1940)) (alteration in original).

181. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

182. *Biard*, 486 U.S. at 528; *see also id.* at 529 ("We believe that in the main, the issues that arise in *forum non conveniens* determinations will substantially overlap factual and legal issues of the underlying dispute, making such determinations unsuited for immediate appeal as of right under § 1291.").

183. *Id.* at 530. This result is not as harsh as it appears. The Supreme Court noted that, under 28 U.S.C. § 1292(b), a district court may certify a nonfinal order for interlocutory review for reasons of judicial economy. *Id.* at 529-30. Thus, a district court may certify the denial of a motion to dismiss for forum non conveniens and a court of appeals, pursuant to its discretion, may review the order. *Id.* at 530.

184. Dominguez-Cota v. Cooper Tire & Rubber Co., 396 F.3d 650, 654 (5th Cir. 2005).

185. *Id.*

186. *Id.* at 654.

187. *Id.* (quoting *Biard*, 486 U.S. at 528).

188. *In re* Minister Papandreou, 139 F.3d 247, 255 (D.C. Cir. 1998).

189. *Id.*

conveniens. As Part II.B.3 explains, however, the Third Circuit injected a new wrinkle into the debate in 2006.

3. *Sinochem*: Non-merits? Yes . . . but Subject-Matter Jurisdiction is Required Nevertheless

In *Malaysia International Shipping Corp. v. Sinochem International Co.*,[190] the Third Circuit assessed the propriety of the district court's decision to dismiss on forum non conveniens grounds without resolution of a personal jurisdiction challenge as opposed to a subject-matter jurisdiction question.[191] This distinction does not fundamentally change the analysis. The Third Circuit groups both personal jurisdiction and subject-matter jurisdiction under the heading of "jurisdictional issues" and refers to the dispute encapsulated in the holdings in *Papandreou* and *Monde Re* and the holding in *Dominguez-Cota* as the circuit split "on the issue."[192] Moreover, the fundamental question is the same in all four circuits—whether a federal district court must establish a jurisdictional prerequisite before dismissing on grounds of forum non conveniens.[193]

a. *Forum Non Conveniens Is a Non-merits Issue*

At the outset, the Third Circuit's analysis parsed the holdings of the prevailing circuit split. It concluded that the Fifth Circuit's "entanglement theory" did not suffice to render forum non conveniens a merits-related issue.[194] The court drew primary support for this reasoning from federal court opinions that assessed the character of the forum non conveniens inquiry in a context other than the collateral-order doctrine.[195] Initially, the Third Circuit discussed the non-preclusive effect of a dismissal for forum non conveniens on the relitigation of the same underlying claim in another court and the impact of this distinction upon the classification of the doctrine as merits related. A dismissal under forum non conveniens establishes neither claim nor issue preclusion because the convenience issues, as embodied by the private and public interest factors,[196] are intrinsically different in other courts.[197] To illustrate this principle, the

190. 436 F.3d 349 (3d Cir. 2006).

191. *Id.* at 358.

192. *Id.*; *see also id.* at 361 (consolidating subject-matter and personal jurisdiction under the term "jurisdiction").

193. *Id.* at 361.

194. *See id.* at 360; *see also* Lacey v. Cessna Aircraft Co., 932 F.2d 170, 181 (3d Cir. 1991) (holding that, although "the district court must immerse itself to a certain degree in the facts of the case[,] . . . [it] must do no more than delineate the likely contours of the case by ascertaining, among other things, the nature of the plaintiff's action, the existence of any potential defenses, and the essential sources of proof").

195. *Sinochem*, 436 F.3d at 359-60.

196. *See supra* notes 132-34 and accompanying text.

197. *See* Parsons v. Chesapeake & Ohio Ry. Co., 375 U.S. 71, 73 (1963) (holding that, because "the material facts underlying the application of [forum non conveniens] criteria in each forum were different in several respects, principles of *res judicata*" are not transferable

Third Circuit examined a case where the Supreme Court discussed the Anti-Injunction Act,[198] which, absent specific circumstances, prevents federal courts from issuing injunctions to stay proceedings in state courts.[199] There, the Supreme Court determined that a federal court could not enjoin a subsequent proceeding brought in state court to enforce its dismissal under federal forum non conveniens because its dismissal was not a resolution of the merits.[200] In this context, not only was the dismissal not res judicata for the relitigation of the underlying claim, but, because the issue of whether the state court was an inappropriate forum was not "actually litigated" at the federal level, the plaintiff was not barred from re-airing his claim in the courts of the state in which the federal court sat.[201] Thus, the defendant could not rely on the federal forum non conveniens dismissal to preclude relitigation of the same claim in state court. Because forum non conveniens permits a court to deliberately abstain from deciding the substantive issues presented,[202] a federal court that dismisses on such grounds has no discretion to preclude a second action on the same claim in another court.[203]

Next, the Third Circuit looked to a Supreme Court opinion that again classified forum non conveniens as a non-merits inquiry. There, the

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from state to federal court); Baris v. Sulpicio Lines, Inc., 74 F.3d 567, 572 (5th Cir. 1996) ("While f.n.c. is not a 'jurisdictional' concept, an f.n.c. dismissal follows 'the same rules' as a dismissal for lack of jurisdiction or improper venue. Moreover, such an f.n.c. dismissal, like a dismissal for lack of jurisdiction or improper venue, 'does not establish claim preclusion'; it can work to preclude the relitigation only of the f.n.c. issue in that court." (citations omitted)). The same basic principle applies to relitigation of the same claim in another federal court. *See* Mizokami Bros. of Ariz. v. Mobay Chem. Corp., 660 F.2d 712, 715-17 (8th Cir. 1981) (holding that a determination by the district court in Arizona that litigation in that forum was not convenient was not preclusive because convenience factors relevant to litigation in Arizona were not comparable to those relevant to litigation in Missouri).

198. 28 U.S.C. § 2283 (2000).

199. *See* Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988) ("Congress . . . has permitted injunctions in certain, specific circumstances, namely, when expressly authorized by statute, necessary in aid of the court's jurisdiction, or necessary to protect or effectuate the court's judgment.").

200. *Id.* at 148. The Third Circuit also cited a Fifth Circuit opinion discussing the Anti-Injunction Act that "held that an 'f.n.c. [forum non conveniens] dismissal . . . does not resolve the substantive merits." *Sinochem*, 436 F.3d at 360 (quoting Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 667 (5th Cir. 2003)) (alterations in original).

201. *See Chick Kam Choo*, 486 U.S. at 148 ("[T]he only issue decided by the District Court was that petitioner's claims should be dismissed under the federal *forum non conveniens* doctrine. Federal *forum non conveniens* principles simply cannot determine whether [state] courts, which operate under a broad 'open-courts' mandate, would consider themselves an appropriate forum for petitioner's lawsuit."); *id.* at 149 ("[T]he [state] courts would apply a significantly different *forum non conveniens* analysis. Thus, whether the . . . *state* courts are an appropriate forum for petitioner's [foreign] law claims has not yet been litigated, and an injunction to foreclose consideration of that issue is not within the relitigation exception.").

202. *See Vasquez*, 325 F.3d at 678-79 (noting that, because forum non conveniens "contemplates resolving the merits in another forum . . . it cannot forever bar the controversy from all American courts").

203. *See* 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4436 (2002).

Supreme Court termed forum non conveniens "procedural rather than substantive."[204] It equated forum non conveniens to a venue provision "that goes to process rather than substantive rights—determining which among various competent courts will decide the case."[205] Later, the Court distinguished the doctrine from issues like "burden of proof . . . and affirmative defenses such as contributory negligence . . . [because it] does not bear upon the substantive right to recover."[206] By casting forum non conveniens as a procedural issue,[207] the Third Circuit grouped the doctrine among the myriad candidate non-merits grounds for preemptive dismissal.[208]

b. *Subject-Matter Jurisdiction Is Essential for Balancing Purposes*

Based on the extent of the circuit split that existed prior to *Sinochem*, one might have expected the Third Circuit's determination that forum non conveniens is a non-merits issue to place it squarely among those circuits, namely the D.C. and Second, that countenanced the *Ruhrgas* dismissal on such grounds. However, the court moved on to analyze whether there was something fundamental in the forum non conveniens analysis itself that required antecedent confirmation of subject-matter jurisdiction.[209] In 1947, the Supreme Court held that "*forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue" in the original forum.[210] The implication is that, if either subject-matter or personal jurisdiction is absent, then the court should dismiss on those grounds without reaching the forum non conveniens question.[211] Casting jurisdiction as a prerequisite to the exercise of forum non conveniens conflicts squarely with the Third Circuit's determination that forum non conveniens is a non-merits inquiry. The Third Circuit proceeded to analyze this discrepancy.[212]

Initially, the Third Circuit pointed out the seeming anomaly of a court abstaining from an exercise of jurisdiction that it does not yet possess.[213] Because forum non conveniens entails a comparative analysis of two

204. Am. Dredging Co. v. Miller, 510 U.S. 443, 453 (1994); *see also id.* at 454 n.4 ("[*F*]*orum non conveniens* is not a substantive right of the parties, but a procedural rule of the forum.").

205. *Id.* at 453.

206. *Id.* at 454.

207. Procedural issues are characterized by their effect on the court's "power or authority to entertain, hear, decide, and resolve a legal or factual dispute in favor of one party or the other." *See* Wasserman, *supra* note 88, at 650.

208. *See supra* notes 95-96 and accompanying text.

209. *See* Malay. Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349, 361-64 (2006).

210. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947).

211. *See* 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3828 (2d ed. 1986).

212. Notice here again that the jurisdictional issue implicated in *Sinochem* concerned personal, rather than subject-matter, jurisdiction. In a footnote, the Third Circuit concluded that use of the term "jurisdiction" in *Gilbert*, *see supra* note 210, implied both jurisdiction over the dispute and the parties. *See Sinochem*, 436 U.S. at 361 n.20.

213. *Sinochem*, 436 U.S. at 361-62.

jurisdictionally competent forums,[214] the Third Circuit posited that jurisdiction is "a *sine qua non* for *forum non conveniens*."[215] The case law cited by the Third Circuit for this proposition, however, focuses more fundamentally on the availability of the alternative forum to adjudicate the dispute rather than the jurisdictional competence of the original forum.[216] For example, the court cited a Seventh Circuit case where it vacated an order dismissing on forum non conveniens grounds because the district court failed to establish that the proposed alternative forum had adequate personal jurisdiction.[217] However, there is very little explanation, aside from the Third Circuit's *sine qua non* conclusion, as to why the definitive competence of the original forum is so vital.[218] Nevertheless, the court concluded on the basis of this precedent that, because "a court can only abstain from jurisdiction it already has, if it has no jurisdiction *ipso facto* it cannot abstain from the exercise of it."[219]

The Third Circuit then pointed to two decisions where circuit courts vacated forum non conveniens dismissals because the district court lacked subject-matter jurisdiction.[220] It looked again to the Seventh Circuit, here for a holding in which that court severed a dispensable party[221] with expatriate status when otherwise affirming a district court's dismissal on forum non conveniens grounds.[222] Because the expatriate party's inclusion

214. *See Gilbert*, 330 U.S. at 506-07; *see also In re* Bridgestone/Firestone, Inc., 420 F.3d 702, 704 (7th Cir. 2005) (noting that "the present forum . . . by definition has both subject matter jurisdiction and personal jurisdiction over all parties").

215. *Sinochem*, 436 F.3d at 361.

216. For instance, the court cited *In re Bridgestone/Firestone*, 420 F.3d 702, where the court argued that abstention in favor of adjudication in another forum makes little sense unless that other forum can exercise jurisdiction over the dispute and the parties. *Id.* at 704. The Third Circuit also cites a federal court treatise for the premise that a court should never reach a forum non conveniens question when either subject-matter or personal jurisdiction are wanting and instead dismiss on those grounds. 15 Wright, Miller & Cooper, *supra* note 211, § 3828. Notice here, however, that the treatise presupposes, for example, that the court already has determined that it definitively lacks jurisdiction. This is different from the situation the Third Circuit encountered in *Sinochem,* where the district court had never conclusively answered the personal jurisdiction question and, thus, never determined whether such jurisdiction was wanting. *See Sinochem*, 436 F.3d at 364 (remanding the case to the district court to settle the personal jurisdiction question).

217. *See In re Bridgestone/Firestone*, 420 F.3d at 705.

218. This question will be addressed in Part III.B.

219. *Sinochem*, 436 F.3d at 363. On this point, the Third Circuit noted its disagreement with the D.C. Circuit in *Papandreou*, which stressed the non-merits aspect of the forum non conveniens dismissal despite the seeming incongruity of an abstention from indeterminate jurisdiction. *See supra* note 164 and accompanying text. Note, also, that the Third Circuit appears to depart from the Supreme Court's holding in *Steel Co.* that a district court may abstain from the exercise of unconfirmed pendent jurisdiction. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 84, 100 n.3 (1998) (distinguishing the holding in Moor v. County of Alameda, 411 U.S. 693, 715-16 (1973), from an impermissible exercise of hypothetical jurisdiction).

220. *Sinochem*, 436 F.3d at 362-63.

221. The power of a federal court to sever a dispensable party to preserve diversity jurisdiction is articulated in *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 826 (1989).

222. *See* Kamel v. Hill-Rom Co., 108 F.3d 799, 805-06 (7th Cir. 1997).

destroyed complete diversity and, thus, compromised the court's subject-matter jurisdiction, the appellate court determined that the district court "lacked jurisdiction to rule on [the defendant's] *forum non conveniens* motion."[223] Only by dismissing the expatriate party could the Seventh Circuit restore complete diversity and affirm the dismissal under forum non conveniens.[224] Next, the Third Circuit cited the Ninth Circuit's reversal of a dismissal under forum non conveniens because of a want of federal jurisdiction.[225] There, a number of class action cases that had been removed to federal court were dismissed by the district court under forum non conveniens.[226] The Ninth Circuit, however, determined that the district court's subject-matter jurisdiction was defective and, on that basis, vacated the forum non conveniens and ordered a remand to state court.[227] While these cases demonstrate that an obvious defect in subject-matter jurisdiction eliminates all jurisdictional guesswork and, on that basis, pretermits a forum non conveniens dismissal, neither speaks to the circumstance extant in *Sinochem* where jurisdiction poses a question that the district court obviously deems more complex than the forum non conveniens question and the appellate court cannot resolve the jurisdiction question on its own.[228]

The Third Circuit confessed to having some reservations in ruling that district courts "must have jurisdiction before they can rule on which forum, otherwise available, is more convenient to decide the merits."[229] Specifically, the court noted the potentially deleterious effect on judicial economy.[230] However, in so ruling, the court sought to establish a bright-line rule to avoid jurisdictional uncertainties based on "precedent, logic, and the very terms of the *forum non conveniens* doctrine" itself.[231]

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223. *Id.* at 805.

224. *Id.* at 806.

225. *See Sinochem*, 436 F.3d at 362-63 (citing Patrickson v. Dole Food Co., Inc., 251 F.3d 795 (9th Cir. 2001)).

226. *Patrickson*, 251 F.3d at 798.

227. *Id.* at 808-09. The federalism comity principles underlying the court's decision in *Patrickson* are similar to the arguments raised by the respondent in *Ruhrgas*. *See supra* note 78; *see also Sinochem*, 436 F.3d at 369 n.26 (Stapleton, J., dissenting) (discussing comity concerns in *Patrickson*). There, however, the Supreme Court determined that an immediate remand to state court for want of subject-matter jurisdiction was not required because "the district court may find that concerns of judicial economy and restraint are overriding." Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 586 (1999). "The federal design allows leeway for sensitive judgments of this sort." *Id.* at 587. The cases may be distinguishable because, whereas in *Patrickson* the appellate court conclusively established a lack of federal jurisdiction, *Patrickson*, 251 F.3d at 798, the district court in *Ruhrgas* never established, nor undertook to establish, the existence *vel non* of subject-matter jurisdiction, *see Ruhrgas*, 526 U.S. at 580.

228. *See supra* note 216.

229. *Sinochem*, 436 F.3d at 363-64 ("[W]e would like to leave district courts with another arrow in their dismissal quivers.").

230. *Id.* at 364 (noting that the holding could "result in a waste of resources if the case is again dismissed before the substance of [petitioner's] claim is decided").

231. *Id.* This court chose to go a "more certain way" than the D.C. Circuit, which authorized a forum non conveniens dismissal in the absence of jurisdiction but not those

c. *The* Sinochem *Dissent*

The Third Circuit holding was not unanimous. In a dissenting opinion, Judge Walter K. Stapleton emphasized the pragmatic benefits conferred by the forum non conveniens dismissal. The dissent argued that the majority's holding subverted the purpose of the forum non conveniens doctrine by requiring jurisdictional discovery.[232] The dissent was concerned primarily that a defendant, haled into court in an inappropriate forum, would have to "shoulder the burden of substantial and unnecessary effort and expense" in complying with a jurisdictional discovery order that the dissent considered unnecessary.[233] Moreover, the majority's support for the principle that a potentially incompetent forum is foreclosed from forum non conveniens analysis was not sufficiently persuasive for the dissent to dictate a formal sequencing of issues in light of the substantial detriment to judicial economy that it would engender.[234] The dissent also pointed to the lack of precedent for the principle that a court must first satisfy itself of jurisdiction before turning to forum non conveniens, distinguishing the circuit court opinions on which the majority relied.[235] While it conceded that it is important for the court to determine that the alternative forum is jurisdictionally competent, "there is no utility in, and no doctrinal necessity for, insisting that the present forum determine its own jurisdiction before dismissing."[236] Rather, the flexibility accorded the federal courts by the Supreme Court's holdings in *Steel Co.* and *Ruhrgas* should not be curtailed by requiring a district court to "affirmatively determin[e] the boundaries of its jurisdiction" at all costs in order to dismiss under forum non conveniens.[237]

III. AUTHORIZING THE *RUHRGAS* DISMISSAL ON THE GROUND OF FORUM NON CONVENIENS

The Supreme Court's holdings in *Steel Co.* and *Ruhrgas* demonstrate the intersection of two competing concerns.[238] First, the Court is sensitive to the notion that our federal system requires courts of limited jurisdiction.[239] The policy that subject-matter jurisdiction be established prior to the issuance of a ruling on the merits ensures that these courts do not overstep the bounds established by both the Constitution and Congress.[240] Second,

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orders where dismissal is subject to conditions. *Id.* at 363-64; *see supra* note 166 and accompanying text.

232. *Sinochem*, 436 F.3d at 368 (Stapleton, J., dissenting).

233. *Id.*

234. *See id.* at 368-70.

235. *See id.* at 368 & n.25, 369 & n.26; *see supra* notes 220-27 and accompanying text.

236. *Sinochem*, 436 F.3d at 370 (Stapleton, J., dissenting).

237. *Id.* at 369-70.

238. *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).

239. *See* Idleman, *supra* note 9, at 42.

240. *See supra* Part I.A.

the Supreme Court recognizes that, in order to operate efficiently, the federal courts need the flexibility to dispose of cases on an array of threshold grounds.[241] The overly formalist limiting of this flexibility through the imposition of a rigid order of operations impedes the administration of justice and adds to the already substantial cost of litigation.[242] By permitting the courts to dismiss a case for want of personal jurisdiction without first establishing a difficult-to-determine issue of subject-matter jurisdiction, the Court reconciled these two considerations: The Court ceded some measure of flexibility to federal courts to expediently dismiss a case without deciding the underlying substantive claim.[243]

This part argues that courts, subject to the same restrictions outlined in *Ruhrgas*, should have the flexibility to defer difficult subject-matter jurisdiction determinations and dismiss under forum non conveniens. The courts' invocation of the doctrine forestalls a decision on the merits and, accordingly, forum non conveniens is appropriate for a *Ruhrgas* dismissal. While subject-matter jurisdiction may appear a mandatory prerequisite to a court's dismissal on such grounds, this stipulation runs contrary to the flexible benefits derived from forum non conveniens. It is both feasible and worthwhile to outline a set of considerations by which the federal courts may determine the propriety of issuing a forum non conveniens dismissal without antecedent confirmation of subject-matter jurisdiction.

A. *Finding a Middle Road Through the Circuit Split: Forum Non Conveniens as a Non-merits Ground Fit for* Ruhrgas *Dismissal*

This section will address the two fundamental issues on which the various circuit courts have disagreed with regard to the preemptive forum non conveniens dismissal. This section argues that (1) forum non conveniens is a non-merits issue in accordance with the analysis of the Second, Third, and District of Columbia Circuits; and (2) the assumption of jurisdiction, where a litigant's challenge to that jurisdiction requires difficult or complex analysis, does not impair the competence of the district court to properly invoke *Gilbert* and its progeny to render a dismissal under forum non conveniens.

1. Forum Non Conveniens Is a Non-merits Issue

In 2005, the Fifth Circuit determined that a court may not dismiss a case on the ground of forum non conveniens without first establishing jurisdiction over the dispute because forum non conveniens is a merits-based issue.[244] Its argument is predicated, in large part, on a determination by the Supreme Court that the denial of a forum non conveniens motion

241. *See supra* Part I.B.2.
242. *See supra* note 70; *see also Sinochem*, 436 F.3d at 368 (Stapleton, J., dissenting).
243. *See supra* notes 68-72 and accompanying text.
244. *See supra* Part II.B.2.

does not fall within an enumerated exception to the collateral-order doctrine.[245] The Court so held because proper analysis of the public and private interest factors in the forum non conveniens test requires some entanglement in the merits of the underlying dispute.[246] The Fifth Circuit's reliance on the Supreme Court in this instance is misplaced.[247]

The collateral-order doctrine is designed to protect the independence of the district court judge and to prevent time-consuming and duplicative analysis of district court decisions that do not render a suit final.[248] Clearly, the denial of a motion to dismiss under forum non conveniens does not end the underlying dispute. As such, the Supreme Court deemed forum non conveniens analysis "on the merits" only in the sense that the district court has evaluated many of substantive facts that gave rise to the dispute in formulating the basis for the denial of the motion. Later, relying on the same set of underlying facts, the district court may issue an order that ends the dispute on an unrelated ground. Thus, in the normal course of things, it is a waste of judicial resources to allow interlocutory review on a non-determinative ruling.

The concern in *Steel Co.*, however, is that a court may make a ruling that settles the substantive claim underlying the dispute without proper subject-matter jurisdiction.[249] Thus, there is a fundamental difference between a dismissal under forum non conveniens, which ends the dispute for the purposes of the home forum, and a denial of such a motion, which allows the case to proceed in the district court. For the purposes of a dismissal, a simple view of the merits in the course of evaluating the various public and private interest factors is not comparable to the resolution of the substantive claim.[250] If the most basic examination of the facts in the evaluation of a threshold issue rendered that issue one "on the merits," then no inquiry could be considered non-merits, a result patently inconsistent with *Ruhrgas*.[251]

Personal jurisdiction provides an excellent comparison. For instance, for a court to establish specific jurisdiction[252] over a defendant, it must

245. *See supra* notes 180-85 and accompanying text.

246. *See supra* text accompanying note 182.

247. *Cf. Sinochem*, 436 F.3d at 359 (holding that *Van Cuwenberghe v. Biard*, 486 U.S. 517 (1988), is "not dispositive" for the principle that forum non conveniens is a non-merits inquiry pursuant to *Steel Co.* and *Ruhrgas*).

248. *Biard*, 486 U.S. at 527 ("The requirement that the order be completely separate from the merits is a distillation of the principle that there should not be piecemeal review of steps towards final judgment in which they will merge." (internal quotation omitted)).

249. As Justice Scalia held in *Steel Co.*, the absence of subject-matter jurisdiction renders the resulting decision on the merits impermissibly advisory and in violation of the doctrine of separation of powers. *See supra* notes 31-35 and accompanying text.

250. *See supra* text accompanying notes 132-34.

251. *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999) ("It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits.").

252. Specific jurisdiction over a defendant may be asserted when the defendant's contacts with the forum, though sporadic or isolated, give rise to the plaintiff's claim. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) ("Where a forum seeks to assert specific

consider whether plaintiff's claims arise from the defendant's contacts within the forum.[253] The plaintiff must demonstrate that "but for" defendant's forum-related contacts, the injury would not have occurred.[254] To this extent, the court must examine the defendant's contacts, the relation of those contacts to the plaintiff's injury, and, in so doing, take into account the specific facts that constitute the merits of the action. Similarly, in weighing whether trial in the home forum is fair pursuant to the private interest prong of the forum non conveniens test, the court must undertake an analysis of the "merits."[255] Thus, mere consideration of the factual underpinnings of a case cannot be enough to establish an issue as "on the merits." If it were otherwise, the *Ruhrgas* decision, which authorizes the preemptive dismissal for want of personal jurisdiction, would clearly violate the jurisdiction-before-merits mandate of *Steel Co.*

For the purposes of addressing issues in light of *Steel Co.*, the better view is that taken by the Second, Third, and D.C. Circuits that forum non conveniens is a non-merits issue.[256] This approach is buttressed by the holdings of the Supreme Court in any context other than the collateral-order doctrine.[257] One conventional understanding of the term "on the merits," that any decision so styled carries preclusive effect that bars relitigation of the substantive claim, does not apply to forum non conveniens.[258] A dismissal under forum non conveniens is preclusive only to relitigation of the forum non conveniens issue in the federal courts of the same state, and, to this extent, carries less preclusive effect to the state courts than even personal jurisdiction.[259] In fact, the entire purpose of the doctrine is to divine the existence of an adequate alternative forum wherein the merits are more appropriately resolved. Moreover, the deliberate abstention from the

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jurisdiction over an out-of-state defendant who has not consented to suit there, this fair warning requirement is satisfied if the defendant has purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities." (citations and internal quotation omitted)); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984). General jurisdiction, by contrast, exists when a defendant's contacts with the forum are so continuous, substantial, and systematic as to justify haling the defendant into court to defend a cause of action unrelated to those contacts. *See Helicopteros*, 466 U.S. at 414 n.9.

253. *See, e.g.*, Harlow v. Children's Hosp., 432 F.3d 50, 57 (1st Cir. 2005); Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1123 (9th Cir. 2002); Christian Sci. Bd. of Dirs. of First Church of Christ, Sci. v. Nolan, 259 F.3d 209, 216 (4th Cir. 2001).

254. *See* Myers v. Bennett Law Offices, 238 F.3d 1068, 1075 (9th Cir. 2001).

255. *See supra* text accompanying note 133.

256. *See supra* Part II.B.1, II.B.3.a.

257. *See supra* notes 195-206 and accompanying text.

258. *See supra* notes 196-97 and accompanying text.

259. *See* Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 678 (5th Cir. 2003); Baris v. Sulpicio Lines, Inc., 74 F.3d 567, 573 (5th Cir. 1996). One commentator has suggested that the issue preclusive effect of *Ruhrgas* dismissals should be confined to federal court in order to avoid infringing upon state adjudicatory interests that are typically protected by the limited jurisdiction of the federal courts. *See* Edney, *supra* note 76, at 195. Note, however, that this special protection is unnecessary for a *Ruhrgas* dismissal under forum non conveniens given the doctrine's lack of issue preclusive effect in state court.

exercise of jurisdiction is as non-merits as the discretionary declination of pendant jurisdiction, specifically addressed in *Steel Co.* as an "exception" to the Court's repudiation of hypothetical jurisdiction.[260] Thus, forum non conveniens is a non-merits issue sufficient for a *Ruhrgas* dismissal.

2. Forum Non Conveniens Does Not Require Antecedent Confirmation of Jurisdiction

Courts rely primarily on case law for the principle that, in order to dismiss on the ground of forum non conveniens, both the foreign and home forum must have subject-matter jurisdiction and personal jurisdiction over the dispute.[261] However, it never explains why this must apply to the home forum other than by reference to non-dispositive precedent.[262] Perhaps the rationale for the prerequisite stems from the nature of the evaluative analysis under forum non conveniens.[263] When balancing the public interest factors enunciated in *Gilbert*,[264] the reviewing court's lack of definitive jurisdiction over either the dispute or the parties may be a thumb on the scale in favor of dismissal. According to *Gilbert*, the test weighs the appropriateness of two jurisdictionally competent forums, though the Supreme Court made clear that dismissal is appropriate only in those "exceptional circumstances" when this "balance is strongly in favor of the defendant."[265] In this scenario, the Third Circuit may be concerned that, if the home forum is not definitively competent, it would impermissibly skew the analysis in favor of the competent foreign forum, thereby making dismissal far less "exceptional."

This concern is not enough, however, to warrant the establishment of a rigid order of operations for forum non conveniens. First, the number of cases in which jurisdictional incompetence is a looming factor should be limited.[266] In order to engage in the analysis of whether forum non conveniens is an appropriate ground for preemptive dismissal in the first place, it should at least be feasible that the home court is jurisdictionally competent.[267] If the defect in jurisdiction is blatant, the court should

260. This reasoning was employed in *Papandreou* by the D.C. Circuit. *See supra* notes 164-65 and accompanying text.

261. *See supra* notes 214-15 and accompanying text.

262. The dissent in *Sinochem* argues that the case law on which the majority relies does not require the result that it reaches. *See* Malay. Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349, 368-69 (Stapleton, J., dissenting).

263. *See supra* notes 120-34 and accompanying text.

264. *See supra* note 134 and accompanying text.

265. Gulf Oil Co. v. Gilbert, 330 U.S. 501, 504, 508 (1947); *see supra* notes 127-30 and accompanying text.

266. *See infra* Part III.B.

267. The Ninth Circuit, in a case relied upon by the *Sinochem* majority, vacated an order dismissing an action under forum non conveniens because it made a conclusive determination that the federal court lacked subject-matter jurisdiction. *See* Patrickson v. Dole Food Co., Inc., 251 F.3d 795, 808 (9th Cir. 2001); *supra* note 227. In *Monde Re*, however, the question of whether the court had subject-matter jurisdiction over the dispute was never resolved. *Cf.* Monegasque De Reassurances S.A.M. (Monde Re) v. Nak Naftogaz, 311 F.3d

dismiss on that ground from the outset.[268] Second, where resolving a very close call on jurisdiction might entail considerable and/or burdensome discovery or delay, the court should be able to operate under the assumption that jurisdiction is correct. It is, of course, centrally important according to *Gilbert* that the alternative foreign forum is competent.[269] If, however, the competence of the home forum is plausible, but still not definite, it is well within the capacity of the district court to assign this "defect" no weight in the overall forum non conveniens jurisdiction calculus. The test itself is incredibly pliant, designed for case-by-case analysis,[270] and this variable does not come close to fundamentally altering the *Gilbert* and *Piper* tests.

While it is not clear why the Third Circuit places such great emphasis on a presupposed, though never fully articulated, doctrinal requirement that subject-matter jurisdiction is a mandatory prerequisite, it is obvious that a preemptive dismissal under forum non conveniens may save precious judicial resources and lower litigation costs. As the dissent points out in *Sinochem*, the doctrine is designed, in part, to avoid "unnecessary effort and expense."[271] It makes little sense to apply the doctrine in a manner that will impose a "substantial and unnecessary litigation burden" on both the defendant and the court.[272] This is especially so when the subject-matter jurisdiction question imposes considerable delays, such as expensive and lengthy jurisdictional discovery, and the likely result is for the court to dismiss on the original forum non conveniens grounds anyway once jurisdiction is established. When appropriate, a district court should have the ability to bypass an unnecessary technicality to reach a decision it would have reached anyway.

B. *Devising a Test for Evaluation of the Propriety of a Preemptive Forum Non Conveniens Dismissal*

Towards the end of its opinion in *Sinochem*, the Third Circuit explicitly leaves the final determination of the propriety of the preemptive forum non

488, 497 (2d Cir. 2002) ("The district court in the case at bar failed to address the jurisdictional issue raised by Ukraine's motion, proceeding instead to the forum non convenience issue raised in that same motion."). Thus, it was possible that jurisdiction actually existed in that case.

268. *See* 15 Wright, Miller & Cooper, *supra* note 211, § 3828 ("If the case is wanting in [subject-matter or personal jurisdiction], the action should be dismissed on that ground without reaching questions of *forum non conveniens*."); *cf.* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 587-88 (1999) ("[W]e recognize that in most instances subject-matter jurisdiction will involve no arduous inquiry. In such cases, both expedition and sensitivity to state courts' coequal stature should impel the federal court to dispose of that issue first." (citation and internal quotation omitted)).

269. *See Gilbert*, 330 U.S. at 507.

270. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249-50 (1981) ("If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable."); *see supra* text accompanying note 128.

271. Malay. Int'l Shipping Corp. v. Sinochem Int'l Co. Ltd., 436 F.3d 349, 368 (Stapleton, J., dissenting).

272. *Id.*

conveniens dismissal to the Supreme Court.[273] This section takes up the challenge.

The first step in assessing whether the court should bypass an affirmative determination of subject-matter jurisdiction in favor of a dismissal under forum non conveniens is to examine the extent to which subject-matter jurisdiction is still possible. While *Steel Co.* stands narrowly for the proposition that a federal court may not take up the merits before establishing jurisdiction, it also represents the broader principle that subject-matter jurisdiction is an essential element of the structure of the federal judiciary. To permit a court to dismiss under forum non conveniens when subject-matter jurisdiction is clearly wanting would subvert the very important structural function played by subject-matter jurisdiction. This implicates a number of the cases relied upon by the Third Circuit. In the first, the appellate court made a determination that the presence of a non-diverse party destroyed diversity.[274] Similarly, in the second, the appellate court determined that the district court lacked statutory subject-matter jurisdiction over the suit and vacated the forum non conveniens dismissal.[275] In each case, the court made the correct decision to reverse the dismissal under forum non conveniens because there was a conclusive determination that subject-matter jurisdiction was absent.

The requirement that the subject-matter jurisdiction question remain alive is especially true with regard to cases removed to the federal court. In such cases, the challenge to subject-matter jurisdiction implicates the dignity of the state courts. When subject-matter jurisdiction is found wanting, the case should properly be remanded to and litigated in state court. In *Ruhrgas*, however, the Supreme Court deemed the lower federal courts up to the task of dealing sensitively in such instances. The Court instructed district courts to forcefully apply the statutory rules on removal in order to weed out cases clearly lacking federal jurisdiction. It is only where the "alleged defect in subject-matter jurisdiction raises a difficult and novel question" that the court may turn directly to non-merits issues such as personal jurisdiction and forum non conveniens.[276] The essential feature of these difficult and novel questions, at least at this stage of the analysis, is that they are still being asked and, as such, subject-matter jurisdiction appears feasible.

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273. *See id.* at 364. The Supreme Court will consider a petition for certiorari that presents the question of

> [w]hether [the Supreme] Court should resolve the conflict between the Second, Third and Fifth Circuits regarding the question of whether it is permissible . . . for a federal court to rule on a motion to dismiss based on forum non conveniens without first determining whether the court has subject matter jurisdiction to hear the action?

Petition for Writ of Certiorari at *i, Tyumen Oil Co. v. Norex Petroleum Ltd., 2006 WL 431070 (U.S. Feb. 17, 2006) (No. 05-1070).

274. Kamel v. Hill-Rom Co., 108 F.3d 799 (7th Cir. 1997); *see supra* notes 220-23 and accompanying text.

275. Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001).

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

The courts' sensitivity to the dignity interest of the state courts in removal cases may justify the result reached in *Dominguez-Cota*. Unlike *Monde Re*, where litigation originated in federal court, the plaintiffs in *Dominguez-Cota* chose to litigate the action in state court. When the defendants removed the case to federal court on a fraudulent joinder theory, the district court might have concluded that "sensitivity to state courts' coequal statute should impel"[277] it to dispose of the subject-matter jurisdiction issue first. As such, it may have been the type of removal case in which federalism concerns trumped the efficiency gained by application of forum non conveniens. The Fifth Circuit, however, never articulated this reasoning in vacating the district court's forum non conveniens dismissal.

The comparative analysis of the relative difficulty of the non-merits and subject-matter jurisdiction issues is another concern. The Supreme Court may take up the task of devising a test to measure the relative difficulty of the subject-matter jurisdiction issue against the rather straightforward forum non conveniens analysis.[278] However, the Court has demonstrated in *Ruhrgas* that it is comfortable leaving the relative difficulty decision to the discretion of district courts.[279] The Court has recognized that, "in most instances subject-matter jurisdiction will involve no arduous inquiry,"[280] and indicates that it expects the courts to turn to these issues from the outset.[281] In this sense, the comparison of forum non conveniens to subject-matter jurisdiction would simply be another "sensitive judgment[]" that our federalist court system permits.[282]

CONCLUSION

Forum non conveniens is a doctrine of considerable flexibility vested in the discretion of federal courts. A dismissal on such grounds in the absence of subject-matter jurisdiction is not an impermissible merits decision. It is simply the recognition that, on balance, the case is more appropriately adjudicated in another forum. The Supreme Court has indicated that the federal courts are competent to make exactly this type of threshold procedural decision without formal resolution of a challenge to their subject-matter jurisdiction. Moreover, a strict structuring of non-merits issues would serve to frustrate the very flexibility that makes forum non conveniens such a valuable tool for judicial consideration of internationally tinged disputes. Thus, a *Ruhrgas* dismissal under forum non conveniens is

277. *Id.* at 587-88.

278. *See* Idleman, *supra* note 9, at 14-17 (discussing comparative analysis of issues). One commentator has suggested that, in an ironic twist, the now-defunct doctrine of hypothetical jurisdiction may provide a useful means of analysis. *See id.* at 15.

279. *See Ruhrgas*, 526 U.S. at 588 ("Where . . . a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction.").

280. *Id.* at 587.

281. *See supra* notes 73-80 and accompanying text.

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

proper, under certain circumstances, without antecedent resolution of a difficult subject-matter jurisdiction question.