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Hypothetical Jurisdiction and Interjurisdictional Preclusion: A "Comity" of Errors

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Hypothetical Jurisdiction and Interjurisdictional Preclusion: A "Comity" of Errors[1]

I. INTRODUCTION

When people hear the term "federal subject matter jurisdiction," they do not usually come running enthusiastically toward the conversation. Many find the subject boring, complicated, or confusing.[2] For whatever reason, they just do not want to deal with it. This perception is not limited to cocktail party conversation topics; it is manifest even in the federal courts themselves. The doctrine of "hypothetical jurisdiction"[3] is a product of the tendency to avoid the topic: when there is a difficult issue of subject matter jurisdiction, the courts will simply move right past it to other, more interesting–or at least easier–issues.[4] Despite the fact that the prerequisite of subject matter jurisdiction is a constitutional mandate,[5] the exercise of hypothetical jurisdiction has recently become widespread through the federal court system.[6] In 1998, the Supreme Court in *Steel Co. v. Citizens for a*

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1. The term "comity" is synonymous with "civility," *see* 15 C.J.S. *Comity* (1967), and refers to the voluntary, mutual respect with which states treat the laws of other states, *see* 16 AM. JUR. 2D *Conflicts of Laws* § 17 (1998). This part of the title derives from one of William Shakespeare's earliest plays, *The Comedy of Errors*. *See* WILLIAM SHAKESPEARE, COMPLETE POEMS AND PLAYS 1 (William Allan Neilson & Charles Jarvis Hill eds., Houghton Mifflin Co. 1970).

2. *See* JOSEPH W. GLANNON, CIVIL PROCEDURE, EXAMPLES AND EXPLANATIONS 120 (3d ed. 1997) ("[T]he potential for confusing [personal jurisdiction, subject matter jurisdiction, and venue] is great.").

3. Although different courts refer to the doctrine by other names, such as "assumed appellate jurisdiction" and "the *Norton* Doctrine," the Supreme Court accepted and used the term "hypothetical jurisdiction" in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). The Court purported to derive the denomination from the Ninth Circuit, but the phrase apparently originated from a student written law review article, Comment, *Assuming Jurisdiction Arguendo: The Rationale and Limits of Hypothetical Jurisdiction*, 127 U. PA. L. REV. 712, 713 (1979). *See* Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 237 n.4 (1999).

4. *See* Idleman, *supra* note 3, at 237.

5. U.S. CONST. art. III, § 2, cl. 1. This clause defines the limits of the federal judicial power:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States;–between Citizens of the same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

6. *See* Idleman, *supra* note 3, at 237.

Better Environment recognized the impropriety of federal courts adjudicating the merits of a claim without resolving the issue of whether the court lacks power to hear the case or controversy under Article III of the Constitution.[7] However, the Court soon qualified this holding as one which prevents only adjudication on the merits, and not on other procedural issues, before establishing subject matter jurisdiction.[8] Some courts failed altogether to recognize the repudiation and continued to rely on the traditional doctrine of hypothetical jurisdiction.[9] This avoidance among federal courts of the basic holding in *Steel Co.* illustrates just how elusive the issue of federal subject matter jurisdiction can be and, therefore, how attractive and persistent the practice of hypothetical jurisdiction can be.[10]

The problem with federal courts assuming jurisdiction while ruling on other issues appears in the form of another cocktail party faux pas: interjurisdictional preclusion.[11] Under this doctrine, once a federal court rules on an issue, the state courts are bound to afford full faith and credit to that ruling.[12] If the federal court did not have proper jurisdiction over the controversy in the first place, the preclusive effect of its judgement would be offensive to the various states' sovereignty.[13]

This Comment will focus on the competing interests of the Third and Fourth Articles of the Constitution: state autonomy and limitation of federal power on the one hand, judicial economy on the other, respectively. Part II will trace the historical origins and development of hypothetical jurisdiction and interjurisdictional preclusion.[14] Part III will outline the current state of the law regarding these concepts as they have surfaced in several recent Supreme Court decisions.[15] Part IV will suggest a solution to the problem,[16] while Part V will

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7. *Steel Co.*, 523 U.S. at 92.

8. *See* Ruhrgas A.G. v. Marathon Oil Co., 526 U.S. 594, 577-78 (1999) (holding that an issue of personal jurisdiction may be decided before establishing jurisdiction over the subject matter); Ortiz v. Fibreboard Corp., 527 U.S. 815, 837 (1999) (holding that the issue of class certification may be decided before a determination of subject matter jurisdiction).

9. *See* Idleman, *supra* note 3, at 314-15 nn.337-38.

10. *See id.* at 314.

11. *See* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit, and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 734 (1986) ("Fashioning a law of preclusion . . . is considerably more difficult in an interjurisdictional context."); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 946 (1998) ("Res Judicata is hard enough already. Consider it at the interjurisdictional level, and we are asking for headaches."). These sentiments illustrate the complex nature of interjurisdictional preclusion. Considering that this concept is only half of the equation involved in an exercise of hypothetical jurisdiction, it is easy to see why courts would rather not grapple with such a difficult subject. However, as the cases examined later in this Comment will show, the importance of the constitutional boundaries from which these complicated subjects grew is such that the courts have repeatedly been confronted with these issues. *See infra* Part III.

12. *See* Burbank, *supra* note 11, at 741-43 (quoting Embry v. Palmer, 107 U.S. 3 (1983)).

13. *See* Marathon Oil Co. v. Ruhrgas, A.G., 145 F.3d 211, 216 (5th Cir. 1998), *rev'd*, Ruhrgas A.G. v. Marathon Oil Co., 526 U.S. 574 (1999). These cases will be discussed in depth infra Part III.B..

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

briefly conclude.[17]

The exercise of hypothetical jurisdiction–passing over the issue of Article III standing–on the part of the federal courts is a problem mainly because of the effect of interjurisdictional preclusion.[18] The federal judiciary has made an understandable, if not noble, attempt to dispose of cases in the most efficient manner by assuming jurisdiction of the subject matter. However, the preclusive effect of this practice threatens both the judicial autonomy of the states and the very notion of the separation of powers that is essential to the maintenance of a democratic government.[19] To reconcile these two important concerns, this Comment will suggest that to which the Supreme Court has only eluded: in certain circumstances, federal courts should overlook questions of subject matter jurisdiction and rule on other issues, without the ruling necessarily carrying a preclusive effect in the courts of other jurisdictions.[20] The state courts would still have the opportunity to give effect to the judgements–and likely would, under the principles of comity–while federal courts would have the opportunity to dispose of their cases efficiently.

II. THE HISTORICAL ORIGINS OF HYPOTHETICAL JURISDICTION AND INTERJURISDICTIONAL PRECLUSION

The root of the controversy lies in the Constitution. The authors drafted Article III, section 2[21] to limit the power of the federal judiciary.[22] The framers specifically enumerated the types of controversies that could be brought in federal, "Article III," courts.[23] The purpose of this provision was to provide an impartial national forum for litigants who might be subject to prejudice in a state court.[24]

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17. *See infra* Part V.

18. *See* Burbank, *supra* note 11 and accompanying text.

19. *See* CHARLES DE MONTESQUIEU, THE SPIRIT OF LAWS (1748), *reprinted in* DOUGLAS W. KMIEC & STEPHEN B. PRESSER, THE AMERICAN CONSTITUTIONAL ORDER, HISTORY, CASES, AND PHILOSOPHY, 333-34 (1998).

20. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998) ("A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.").

21. U.S. CONST. art. III, § 2, cl. 1.

22. *See, e.g.*, Glidden Co. v. Zdanok, 370 U.S. 530, 537-38 (1962). Justice Harlan pointed out that Article III granted federal courts the power to decide questions of state law only based on diversity of citizenship. *Id.*

23. *See* U.S. CONST. art. III, § 2, cl. 1.

24. *See* Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 289 (1888) (discussing the limited circumstances in which federal jurisdiction exists).

As a corollary to Article III's limited grant of federal power, the framers sought to preserve the state courts' power of general jurisdiction over unenumerated subject matter.[25] The retention of this power among the states guaranteed the autonomy and dignity of the various states, and such limitation of federal power was essential to the ratification of the Constitution itself.[26]

Congress restated and codified Article III's second section in Title 28 of the United States Code.[27] Section 1331 addresses the federal question aspect of Article III,[28] while section 1332 outlines the requirement of diversity of citizenship.[29] The fulfilment of either of these requirements allows a federal court to hear a case or controversy.

Once a case is heard in federal court, the ruling of that court will preclude a state court (or other federal court) from ruling on the same issue.[30] This preclusion principle is, like the requirement of subject matter jurisdiction,[31] rooted in the Constitution.[32] The Full Faith and Credit Clause contained within section one of Article IV essentially mandated that each state's courts give full faith and credit to a ruling in any other state's courts.[33] Because this provision was silent on the effect that a federal court's ruling would have on the states' courts, Congress enacted 28 U.S.C. § 1738.[34] This legislation expanded the Full Faith and Credit

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25. *See Glidden*, 370 U.S. at 537; United States Parole Comm'n v. Geraghty, 445 U.S. 388, 395-96 (1980) (noting the role Article III plays in limiting and defining federal court jurisdiction).

26. *See* THE FEDERALIST NOS. 80-82 (Alexander Hamilton); *cf.* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 22-23 (1981), *reprinted in* DOUGLAS W. KMIEC & STEPHEN B. PRESSER, THE AMERICAN CONSTITUTIONAL ORDER, HISTORY, CASES, AND PHILOSOPHY 177-78 (1998). Storing chronicled the struggle between the Federalists and the Anti-Federalists that occurred during the drafting of the Constitution. Ironically, the Federalists took the position that the people and the individual states should retain more power, while the Anti-Federalists were for a more powerful federal government. *See* 1 Annals of Cong., 729-31 (1789), *reprinted in* DOUGLAS W. KMIEC & STEPHEN B. PRESSER, THE AMERICAN CONSTITUTIONAL ORDER, HISTORY, CASES, AND PHILOSOPHY 177 (1998) (indicating that the Anti-Federalists were in favor of a stronger federal government and more specific enumeration of rights, which eventually became the Bill of Rights).

27. 28 U.S.C. §§ 1331, 1332 (1994).

28. 28 U.S.C. § 1331 (1994) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

29. *See* 28 U.S.C. § 1332 (1994).

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between–

(1) citizens of different States;

(2) citizens of a State, and citizens or subjects of a foreign state;

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties;

(4) a foreign State, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States . . . .

28 U.S.C. § 1332(a) (1994 & Supp. IV 1998).

30. *See* 28 U.S.C. § 1738 (1994).

31. *See supra* note 5 and accompanying text.

32. *See* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

33. *See id.*

34. *See* 28 U.S.C. § 1738 (1994).

Clause to apply to rulings in federal courts as well.[35] The original purpose of the Clause, and Congress' extension thereof, was to prevent relitigation of issues already adjudicated in a proper forum.[36]

A. The Constitutional Framework

1. Article III

The framers of the United States Constitution borrowed heavily from Montesquieu's notion of the separation of powers.[37] Montesquieu warned that too much power in the hands of one branch of government– judicial, executive, or legislative–can upset the balance of power necessary to maintain a democratic government.[38] This concept of a limitation of power lies in the text of Article III of the Constitution.[39]

Article III, section 2 provides the federal court system with several jurisdictional hurdles.[40] The first limitation is that courts can only hear justiciable "cases" or "controversies."[41] Barriers to justiciability within this requirement are the doctrines of standing, ripeness, and mootness.[42] For a litigant to have standing to sue, she must "allege that she has suffered or will imminently suffer an injury,

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35. *See id.* The modern full faith and credit statute provides, in pertinent part: "judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken." *Id.* This clause has been interpreted to require State courts to give full faith and credit to judgments within federal courts. *See* Hazen Research, Inc. v. Omega Minerals, Inc., 497 F.2d 151, 153 (5th Cir. 1974) (citing Stoll v. Gottlieb, 305 U.S. 165 (1938)); Thompson v. D'Angelo, 320 A.2d 729, 734 (Del. 1974) (citing Hancock Nat'l Bank v. Farnum, 179 U.S. 640 (1900)).

36. *See* Robart Wood & Wire Prods. Corp. v. Namaco Indus., Inc., 797 F.2d 176, 178 (4th Cir. 1986) (citing Milwaukee County v. White Co., 296 U.S. 268 (1935), which suggested that 28 U.S.C. § 1738 was enacted to codify the common law tradition that once a judgement is rendered in one court, "that judgement shall be as conclusive of the rights of the parties in every other court as in the court in which the judgement was rendered"). In addition to this purpose of judicial economy, the congressional intent of the full faith and credit statute was to unify the courts within the American system of government. *See* Americana of Puerto Rico, Inc. v. Kaplus, 368 F.2d 431, 438 (3d Cir. 1966); 28 U.S.C. § 1738 (1994).

37. *See* MONTESQUIEU, *supra* note 19, at 334.

38. *See* DOUGLAS W. KMIEC & STEPHEN B. PRESSER, THE AMERICAN CONSTITUTIONAL ORDER 334-37 (1998).

39. *See* U.S. CONST. art. III, § 2, cl. 1.

40. *See id.*

41. *Id.* We need not draw a distinction between "cases" and "controversies" for the purposes of this comment, although some fine distinctions may exist. *See* Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, Missouri, 300 U.S. 227, 239-41 (1937) (noting that controversies are only suits of a civil nature).

42. KMIEC & PRESSER, *supra* note 38, at 347.

that the injury is fairly traceable to the defendant's conduct, and that a favorable court decision is likely to redress the injury."[43] Courts determine the ripeness of a case based on the hardship to the parties that a denial of judicial review will cause and the fitness of the case for judicial review.[44] Finally, a case may be dismissed as moot if the personal interest of the plaintiff ceases to exist.[45]

Congress codified certain aspects of Article III with the enactments of 28 U.S.C. §§ 1331 and 1332.[46] Section 1331, governing "Federal Question Jurisdiction," grants to the federal district courts jurisdiction of civil actions arising under the Constitution, laws, or treaties of the United States.[47] Section 1332, governing "Diversity of Citizenship Jurisdiction," gives the district courts jurisdiction to hear cases between citizens of different states.[48] In the name of judicial economy, Congress also enacted 28 U.S.C. § 1367, governing "Supplemental Jurisdiction," which gives federal courts jurisdiction to hear purely state claims that arise from the same common nucleus of operative facts as a legitimate federal claim.[49] This body of law illustrates the rather narrow jurisdictional parameters within which the framers and Congress defined the limits of federal judicial power.

2. Article IV

In drafting the Full Faith and Credit Clause of Article IV, the framers sought to establish the common law principle that a judgment rendered in one court shall be conclusive of the rights of the litigants in every other court.[50] This clause had both an economical effect on the federal judiciary, by preventing the relitigation of issues already decided in court,[51] and a unifying effect on the nation, by mandating respect of judgments between the individual sister states.[52]

The Full Faith and Credit Clause in the Constitution speaks only to the respect that courts of each state must afford each other.[53] The Clause is silent on how much faith and credit the states should afford federal tribunals and how much

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43. *Id.*
44. *Id.*
45. *Id.*
46. 28 U.S.C. §§ 1331, 1332 (1994).
47. 28 U.S.C. § 1331 (1994).
48. 28 U.S.C. § 1332(a) (1986).
49. 28 U.S.C. § 1367 (1994) ("[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."). There are some important exceptions within 28 U.S.C. § 1367 that need not be discussed in this Comment. *See* 28 U.S.C. § 1367(a) (1994).
50. *See* Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943).
51. *See infra* Part II.C.
52. *See* Johnson v. Muelberger, 340 U.S. 581, 584-85 (1951).
53. *See* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the . . . judicial proceedings of every other State.").

the federal courts should afford the states.[54] Congress therefore enacted 28 U.S.C. § 1738–the "Full Faith and Credit statute"–in order to extend this salutary rule to reach the federal judiciary as well.[55]

The principle of full faith and credit is distinguishable from the doctrine of comity. While the full faith and credit referred to in Article IV and 28 U.S.C. § 1738 are, respectively, constitutional and congressional mandates imposed upon the national court system,[56] comity is the voluntary regard that the courts of one jurisdiction afford to the judgments of others.[57] Although the exercise of comity is said to be a matter of the forum court's discretion, certain established rules of comity constrain tribunals within that forum in their individual discretion.[58]

3. Personal Jurisdiction

One final jurisdictional hurdle is useful to examine in the context of this Comment: personal jurisdiction. Before any court, state or federal, can compel a litigant to appear, the court must establish jurisdiction over the person (in personam jurisdiction).[59] In personam jurisdiction exists where a person has "minimum contacts" with the forum state.[60]

The requirement of personal jurisdiction derives from the Due Process Clause of the Fourteenth Amendment[61] and is based on principles of fundamental fairness.[62] Unlike subject matter jurisdiction, however, parties to the suit can waive the requirement of personal jurisdiction.[63]

B. The Rise of Hypothetical Jurisdiction

"The first question necessarily is that of jurisdiction."[64] In the 1868 case of *Ex parte McCardle*, the Supreme Court stated that without first resolving the

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54. *See supra* notes 24-29 and accompanying text.
55. *See* 28 U.S.C. § 1738 (1994).
56. *See* U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1994).
57. *See* 16 AM. JUR. 2D *Conflict of Laws* §§ 14-17 (1998).
58. *See id.* § 17; Brown v. Perry, 156 A. 910, 913 (Vt. 1931).
59. GLANNON, *supra* note 2, at 3.
60. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
61. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").
62. *See id.*; *Int'l Shoe Co.*, 326 U.S. at 316.
63. *See* GLANNON, *supra* note 2, at 5-6; *see also* FED. R. CIV. P. 12(b)(1) (stating that failure to raise a defense of lack of personal jurisdiction waives any objection to the court's jurisdiction).
64. *Ex parte* McCardle, 74 U.S. 506, 512 (1868).

question of proper jurisdiction over the subject matter, "it is useless, if not improper, to enter into any discussion of other questions."[65] In *McCardle*, the Court dismissed an appeal from a prisoner under a writ of habeas corpus because Congress previously repealed the Act under which the prisoner sought the writ.[66] The Court concluded that when Congress repealed the Act which formed the basis of the Court's jurisdiction to hear the appeal, the court no longer had the authority to do anything but dismiss the case.[67]

More recently, other courts declined to make such a broad concession, succumbing to the temptation to rule on issues they deem easily resolved. The lower federal courts seriously eroded the principle asserted in *McCardle,* that subject matter jurisdiction necessarily represents the first hurdle to confront.[68] In 1981, the Ninth Circuit in *Nance v. EPA* confronted a case that involved merits less complicated than the issue of subject matter jurisdiction.[69] The court concluded that the claim was "so patently without merit that the standing question can be left for another day."[70] By the middle of the 1990's, every federal court of appeals adopted this procedure of skipping over difficult issues of subject matter jurisdiction in favor of more easily resolved issues.[71]

To justify the practice of hypothetical jurisdiction, the circuit courts relied primarily on two Supreme Court cases.[72] The first was *Secretary of Navy v. Avrech.*[73] In *Avrech*, the Court raised the issue of subject matter jurisdiction sua sponte.[74] However, before the Court reached the jurisdictional issue, it conclusively decided the merits of *Avrech* in the companion case of *Parker v. Levy.*[75] The Court subsequently disposed of *Avrech* on the merits, citing the futility of arguing the jurisdictional issue where the merits had already been decided in another case.[76]

The second and more widely discussed case[77] principally relied upon in the exercise of hypothetical jurisdiction is *Norton v. Matthews.*[78] In *Norton*, the Court

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65. *Id.* at 512.

66. *Id.* at 515.

67. *Id.* ("[T]his court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.").

68. *See* Idleman, *supra* note 3, at 236-37, 245-47.

69. 645 F.2d 701 (9th Cir. 1981).

70. *Id.* at 716.

71. *See* Idleman, *supra* note 3, at 235.

72. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 98-99 (1998).

73. 418 U.S. 676 (1974).

74. *See id.* at 677.

75. 417 U.S. 733 (1974). *See Steel Co.*, 523 U.S. at 98.

76. *Avrech*, 418 U.S. at 678 ("[E]ven the most diligent and zealous advocate could find his ardor somewhat dampened in arguing a jurisdictional issue where the decision on the merits is... foreordained.").

77. *See, e.g.*, Idleman, *supra* note 3, at 299. Professor Idleman refers, in section III.B. of his article, to the "Norton Doctrine," suggesting the doctrinal proportions of this landmark case.

78. 427 U.S. 524 (1976).

faced the jurisdictional issue of whether a case was properly before a three-judge panel or whether it should have been heard by an ordinary district court.[79] The Court, like the Court in *Avrech*, decided the merits question in a companion case. That case was *Matthews v. Lucas*, the disposal of which rendered the jurisdictional issue in *Norton* moot.[80] A determination in that case of the jurisdictional issue had no effect on the ultimate outcome of the case.[81]

Drawing from this line of cases, the doctrine of hypothetical jurisdiction evolved to contain specific, identifiable elements. In order to bypass the issue of subject matter jurisdiction and proceed directly to the merits of a case, five conditions must be met: 1) the merits must be substantially easier to resolve than the jurisdictional issue; 2) the resolution of the merits must be against the party alleging jurisdiction; 3) the jurisdictional issue must be particularly complex; 4) the implications of deciding the jurisdictional issue must be far-reaching; and 5) the record or briefing must be inadequate to decide the jurisdictional issue.[82] Each of these requirements, except for the fourth, seems to stem from a desire to foster judicial economy. The fourth requirement, that the implications of deciding the jurisdictional issue be far-reaching, has the paradoxical objective of judicial restraint. If a decision on the issue will have far-reaching implications in terms of the impact it will have on similar cases brought in other courts, the court exercises judicial restraint by passing on that issue. However, there is little restraint in foregoing one far-reaching issue in favor of another. The infectious effect of the exercise of hypothetical jurisdiction in itself proves to be far reaching, as every federal circuit eventually applied the doctrine.[83]

The federal courts' interest in resolving cases based on their most easily resolved issues was not without reason. From the standpoint of judicial economy, the effort was noble. Congress promulgated its own remedy for the inefficiencies of allowing cases to be divided among different fora with the enactment of 28 U.S.C. § 1367.[84] This supplemental jurisdiction provision allows claims that could normally be brought only in state court to be heard by the federal court if they arise from the same common nucleus of operative facts as a claim that is properly before the federal court.[85] However, judicial economy is not the sole end of the federal

79. *See id.* at 528-29.
80. *See* 427 U.S. 495, 531 (1976).
81. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 98 (1998).
82. Idleman, *supra* note 3, at 252; Cross-Sound Ferry Servs., Inc. v. ICC, 934 F.2d 327, 333 (D.C. Cir. 1991), *abrogated by* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).
83. See Idleman, *supra* note 3, at 237.
84. *See* 28 U.S.C. § 1367 (1994).
85. *See supra* note 49 and accompanying text.

judiciary.[86] The effect of hypothetical jurisdiction has been to deny state courts the autonomy that Congress, as well as the framers of the Constitution, sought to preserve. In addition, litigants who otherwise would be entitled to have their cases heard in their particular state's court have had this right pulled away from them. The exercise of hypothetical jurisdiction, as tempting as it may be for federal judges, has caused more problems than it has solved.[87]

C. The Effect of Interjurisdictional Preclusion

There are two main types of preclusion that occur in our system of jurisprudence: claim preclusion (res judicata) and issue preclusion (collateral estoppel).[88] In addition, there are two directions that the preclusion can travel: horizontally (from one state court to another) and vertically (between state and federal courts).[89] A brief examination of these terms will allow the narrowing and focusing of the concepts for the purposes of this Comment.

Claim preclusion, or res judicata, is a doctrine whereby a ruling on a claim in court forever bars relitigation of the same claim.[90] The parties will be precluded from relitigating an entire claim when the subsequent action involves: 1) the same claim, arising out of the same transaction or occurrence;[91] 2) a trial on the merits;[92] and 3) the same parties.[93] The operative element for the purposes of this Comment is the second requirement: a claim will not be precluded unless there has been a trial on the merits. Before 1998, the scope of hypothetical jurisdiction as applied in the federal courts allowed the preclusion of a claim decided on the merits by a court that did not establish its Article III jurisdiction over the subject matter.

In 1998, the Supreme Court purported to repudiate the practice of hypothetical jurisdiction with its decision in *Steel Co. v. Citizens for a Better Environment.*[94] In *Steel Co.*, the Court explicitly stated that courts must first resolve challenges to subject matter jurisdiction before moving onto the merits of the case.[95] This ruling effectively eradicated the possibility of claim preclusion resulting from an exercise of hypothetical jurisdiction. The Court also explicitly stated that a trial on the

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86. *See* Immigration and Naturalization Serv. v. Chada, 462 U.S. 919, 944 (1983). ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.").

87. *See infra* Part IV.

88. GLANNON, *supra* note 2, at 429-76.

89. Erichson, *supra* note 11, at 946.

90. GLANNON, *supra* note 2, at 430.

91. *Id.* at 431-32.

92. *Id.* at 432-33.

93. *Id.* at 433-34.

94. 523 U.S. 83 (1998) (stating that "hypothetical jurisdiction produces nothing more than hypothetical judgement"). *See id.* at 101. For a more in-depth discussion of the Court's decision in *Steel Co.*, see infra Part III.A.

95. *Id.* at 110 (O'Connor, J., concurring) (opining that "federal courts should be certain of their jurisdiction before reaching the merits of a case").

merits may not take place without a prior establishment of proper subject matter jurisdiction.[96] Therefore, since 1998, claim preclusion is no longer a concern in the courts' exercise of hypothetical jurisdiction.[97]

Issue preclusion, or collateral estoppel, on the other hand, calls for a separate examination because its elements differ. Issue preclusion is a doctrine which prevents litigants from revisiting, whether within the same claim or a different claim: 1) an issue of fact or law;[98] 2) actually litigated and determined by;[99]3) a valid and final judgement;[100] 4) the determination of which is essential to the judgement.[101] The economic purpose of this doctrine is similar to that of res judicata in barring issues from relitigation.[102] However, collateral estoppel is applied with more precision than the broader doctrine of res judicata.[103] Because the "merits" requirement is lacking in the elements of collateral estoppel, there is still a chance that an exercise of hypothetical jurisdiction on any issue other than the "merits" will cause the subsequent preclusion of that issue in the future. In *Steel Co.*, the Supreme Court alluded to the possibility that there could still be issues appropriately decided by a federal court before the issue of subject matter jurisdiction.[104] This possibility became a reality in several recent cases.[105] While hypothetical jurisdiction is not as prevalent as it was before 1998, the doctrine still lives on in attenuated form.

III. AN ANALYSIS OF RECENT HYPOTHETICAL JURISDICTION CASES

This part will offer analyses of several recent Supreme Court cases that addressed various hypothetical jurisdiction issues. The first case this part will examine is *Steel Co. v. Citizens for a Better Environment*, in which the Court held that courts must first resolve issues of subject matter jurisdiction before proceeding

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96. *See* Idelman, *supra* note 3, at 349.

97. *Cf. id.* at 314-37. Professor Idleman indicated that federal judges have found several ways around *Steel Co.* to continue to reach the merits without establishing subject matter jurisdiction. *See id.*

98. GLANNON, *supra* note 2, at 463.

99. *Id.* at 463-64.

100. *Id.* at 464.

101. *Id.* at 464-65.

102. *See id.* at 461.

103. *See id.* at 462.

104. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 98-99 (1998) (citing Norton v. Matthews, 427 U.S. 524 (1976) and Sec't of the Navy v. Avrech, 418 U.S. 676 (1974) for examples of cases in which the issues of law had already been clearly decided authoritatively and the jurisdictional issue was therefore moot).

105. *See infra* Part III.

to the merits of the case.[106] The second case is *Ruhrgas A.G. v. Marathon Oil Co.*, where the Court clarified that while courts must establish subject matter jurisdiction before reaching the merits, courts may properly decide an issue of personal jurisdiction before an issue of subject matter jurisdiction.[107] Finally, this part will discuss *Ortiz v. Fibreboard Corp.*, in which the Court held that parties may litigate the issue of class certification in federal court before establishing proper Article III jurisdiction.[108]

A. *Steel Co. v. Citizens for a Better Environment*[109]

In 1998, the Supreme Court sought to put an end to the widespread practice of hypothetical jurisdiction.[110] In *Steel Co.*, an environmental group brought an action against a steel manufacturer for alleged past failure to comply with the reporting requirements of a federal law–the Emergency Planning and Community Right to Know Act of 1986 (EPCRA).[111] The district court held that because the EPCRA did not authorize a citizen suit for past violations and there was no allegation made that the steel manufacturer was presently in violation of the Act, the environmental group lacked standing to bring the case before a federal court.[112] The Seventh Circuit reversed, holding that citizen suits may be brought under EPCRA against violators who filed after the statutory deadline.[113] In so ruling, the court of appeals effectively addressed a substantive issue of the case: whether a citizen cause of action against an EPCRA violator has merit with regard to past violations.[114]

Justice Scalia, writing for the majority in *Steel Co.*, stated that the need to establish subject matter jurisdiction as a threshold matter was "inflexible and without exception."[115] (However, even Justice Scalia conceded that there are times when a claim is so "completely devoid of merit" that a court may properly dismiss

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106. 523 U.S. 83, 101 (1998). *See infra* Part III.A.

107. *See infra* Part III.B.

108. *See infra* Part III.C.

109. 523 U.S. 83 (1998).

110. *See id.* at 101 (declaring that "hypothetical jurisdiction produces nothing more than a hypothetical judgement"). The Court said that this type of judgement amounted to an advisory opinion. *Id.* Advisory opinions, those devoid of true authority, were disapproved of by the Court in *Muskrat v. United States*, 219 U.S. 346, 362 (1911). *See id.*

111. *Id.* at 86-88.

112. *Id.* at 83.

113. *Id.*

114. *Cf. infra* notes 130-35 and accompanying text. Justice Stevens interpreted the issue as one of procedure rather than merit, and merely concurred in the judgment. *See Steel Co.*, 523 U.S. at 112-34 (detailing Justice Stevens' concurring opinion).

115. *Id.* at 95 (quoting Mansfield, Coldwater & Lake Mich. Ry. v. Swan, 111 U.S. 379, 382 (1884)). The Court also cited *Ex Parte McCardle*, 7 U.S. 506 (1868) and *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900) for similar propositions of the primary nature of the jurisdictional issue. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the lower court. Courts must ask and answer this question for themselves, even when not otherwise suggested.

the claim on that basis.[116]) The majority opinion, after rejecting Justice Stevens' proposition that the EPCRA provision at issue was itself jurisdictional, restated the elements of Article III standing which confer the right to bring a case or controversy before a federal court.[117]

In order to have standing there must be an injury in fact to the plaintiff asserting the claim, the harm suffered must be neither hypothetical nor conjectural, there must be sufficient causal relationship between the defendant's conduct and the plaintiff's injury, and there must be a likelihood that the relief requested will redress the alleged injury.[118] The Court in *Steel Co.* concluded that the plaintiff did not have standing.[119] It reasoned that the relief sought, mainly declaratory, would not redress the injury caused by the defendant. Declaratory relief was not warranted because the defendant did not dispute its failure to report violations of the EPCRA.[120] Further, the Court rejected the plaintiff's circular argument that the recovery of the cost of bringing suit was enough to confer standing to bring suit.[121] Justice Scalia stressed the importance of dismissing such a suit for failure to pass this threshold test.[122] When a plaintiff lacks standing to sue, the court lacks jurisdiction to review the merits of the case, no matter how favorable a resolution might seem.[123]

Justice O'Connor, in a concurring opinion, highlighted the majority's concession that there are cases in which the merits are so clear that courts may dispose of them before establishing jurisdiction. Justice O'Connor urged against construing the majority's list of limited circumstances under which federal courts could reserve judgment on a difficult question of jurisdiction as exhaustive.[124] The concurring opinion adhered to the idea in *Norton* that gave rise to the doctrine of hypothetical jurisdiction itself: when a court may resolve alternatively in favor of the same party on the merits, the court may reserve judgement on the jurisdictional

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116. *Steel Co.*, 523 U.S. at 89 (quoting Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 666 (1974)). The Court in *Oneida* characterized the exception as existing when the claim before the court is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy . . . ." *Oneida*, 414 U.S. at 666.

117. *Steel Co.*, 523 U.S. at 102-03.

118. *Id.* at 103.

119. *Id.* at 109 ("Having found that none of the relief sought by respondent would likely remedy its alleged injury in fact, we must conclude that respondent lacks standing to maintain this suit . . . .").

120. *Id.* at 106.

121. *Id.* at 107-08 (quoting Lewis v. Cont'l Bank Corp., 494 U.S. 472, 480 (1990), "An interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.").

122. *See id.* at 103-04.

123. *See id.* at 109-10 (refusing to ignore the constitutional limits of separation of powers in favor of resolving the case on its merits).

124. *See id.* at 110-11.

issue.[125]

Justice Breyer also concurred in the judgement, admitting that courts should decide Article III standing before the merits of a case.[126] However, Justice Breyer cited a rise in the caseloads of federal judges as justification for allowing the practice of hypothetical jurisdiction.[127] Similar to Justice O'Connor, Justice Breyer took a more judicially active view of the role of federal judges. For Justice Breyer, the Constitution does not impose a "rigid" order in which courts must hear issues.[128] Justice Breyer's empirical evidence of an alarming rise in federal judicial caseloads failed, however, to address or identify the cause of the increase. In fact, the doctrine of hypothetical jurisdiction seemed to arise shortly after 1971, suggesting–in light of the rise in federal court caseloads since then–that its application was not an adequate cure for judicial overload.[129] This contradictory evidence suggests a cause–other than laboring over difficult issues of subject matter jurisdiction–for the perceived delay in the administration of justice by the federal judiciary.

Justice Stevens' concurring opinion, in which Justices Souter and Ginsberg joined, framed the statutory "merits" question in *Steel Co.* as one of jurisdiction: "whether . . . [EPCRA] . . . confers federal jurisdiction over citizen suits for wholly past violations."[130] Justice Stevens argued that this standing issue was also in itself a jurisdictional issue, and the lower court had discretion to treat it first.[131] Justice Stevens contended, however, that the Court would have jurisdiction to hear the statutory question first, even if it were, as the majority saw it, a "cause of action" question.[132] The concurring opinion suggested that the Court, by predicating its Article III standing analysis on the fact that EPCRA allows citizen suits, practiced its own ironic version of hypothetical jurisdiction.[133] Justice Stevens' main argument was that the Court should decide a statutory question of jurisdiction before focusing on the constitutional issue.[134] The reasoning behind this opinion is based on the policy that a court should avoid passing unnecessarily on an undecided constitutional question.[135] Justice Ginsberg agreed with this proposition

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125. *See id.*

126. *Id.* at 111.

127. *Id.* at 111-12 (citing L. MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1996 REPORT OF THE DIRECTOR 16, 18, 23; REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 106, 115, 143 (1971), suggesting more than a twofold increase in the number of cases filed per appellate judgeship).

128. *Id.* at 111.

129. *See id.; supra* Part II.B

130. *See id.*, 523 U.S. at 112 (Stevens, J., concurring).

131. *Id.* at 123-24.

132. *Id.* at 117-18 (Stevens, J., concurring) ("[I]t is also possible to characterize the statutory issue . . . as whether respondent's complaint states a 'cause of action.' Framed this way . . . we have the power to decided the statutory question first.").

133. *See id.* at 123-24.

134. *Id.* at 112 (finding that under proper construction of EPCRA the Court should only determine the jurisdictional issue, thereby leaving the constitutional issue for another day).

135. *See id.* at 124.

in her brief concurring opinion because she preferred to reserve judgment on the constitutional standing issue, instead resolving the case on the statutory standing issue.[136]

Although the opinions in this case were quite divergent regarding the particulars of the statute involved, the Justices agreed upon the central holding in *Steel Co.*: an issue of jurisdiction must be decided before the merits.[137]

B. Ruhrgas A.G. v. Marathon Oil Co.[138]

The Fifth Circuit saw the Supreme Court's holding in *Steel Co.* as a requirement that courts examine the issue of subject matter jurisdiction before any other issue.[139] The Circuit Court therefore held that a federal court may not dismiss a case for lack of personal jurisdiction without establishing proper Article III standing.[140] The Supreme Court unanimously reversed, clarifying that *Steel Co.* taught only that an examination of subject matter jurisdiction must come before that of the merits, rather than before other jurisdictional issues.[141] This section will explore the Fifth Circuit's attempt to absolutely repudiate hypothetical jurisdiction and the Supreme Court's corresponding revival of some aspects of the doctrine. *Ruhrgas* narrowed the Court's holding in *Steel Co.*, and brought some ideas from the concurring opinions in *Steel Co.* into the majority.[142]

The facts of *Ruhrgas* are as follows. In the mid-1970's, Marathon Oil and its affiliates began exploring North Sea gas reserves in the Heimdal gas field.[143] A Marathon affiliate entered into an agreement with Ruhrgas, Germany's primary gas company, whereby Marathon would provide $300 million for drilling and construction in return for Ruhrgas's guarantee of premium prices for Marathon's European gas sales.[144] When it became apparent that Ruhrgas would not honor its promise, Marathon sued in Texas state court for fraud, misrepresentation, civil

136. *Id.* at 134 (Ginsburg, J., concurring) (citing Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987) for the proposition that the Court should "resist expounding or offering advice on the constitutionality of what Congress might have done, but did not do").

137. *Id.* at 109-10.

138. 526 U.S. 574 (1999).

139. Marathon Oil Co. v. Ruhrgas, A.G. 115 F.3d 315, 318 (5th Cir. 1997), *rev'd, Ruhrgas*, 526 U.S. 574 (1999).

140. *See id.* at 318.

141. *Ruhrgas*, 526 U.S. at 575.

142. *See supra* notes 126-37 and accompanying text.

143. The two affiliates of Marathon Oil named as plaintiffs in the present case are Marathon International Oil and Marathon Petroleum Norge. Marathon Petroleum Norway is another affiliate that was involved in the dispute, but was not party to the suit. *See Marathon Oil*, 115 F.3d at 317.

144. The affiliate that was actually a party to the agreement was Marathon Petroleum Norway, which acquired rights to 24% of the Heimdal field. *See id.*

conspiracy, and tortious interference with business relations.[145] Ruhrgas removed to federal court based on diversity of citizenship jurisdiction,[146] federal question jurisdiction,[147] and federal arbitration jurisdiction under 9 U.S.C. § 205.[148] Ruhrgas then moved to stay all court proceedings due to a clause in the "Heimdal Agreement" that claims were subject to binding arbitration in Europe.[149] The district court denied the stay. Ruhrgas then filed a motion to dismiss based on lack of personal jurisdiction and forum non conveniens.[150] The Marathon Plaintiffs moved to remand to state court based on lack of subject matter jurisdiction.[151]

The district court granted Ruhrgas's motion to dismiss for lack of personal jurisdiction; the court therefore dismissed all other motions as moot.[152] Ruhrgas subsequently moved for reconsideration of the stay of proceedings pending European arbitration.[153] The district court denied that motion as well, and both parties appealed.[154]

On appeal, the Fifth Circuit held that a court that lacks subject matter jurisdiction cannot reach the issue of personal jurisdiction.[155] The court claimed that, because one of the plaintiff affiliates was an alien corporation similar to the defendant Ruhrgas, the lack of complete diversity destroyed the court's jurisdiction.[156] The court vacated the judgement of the district court, and instructed that the action be remanded to state court.

After the Supreme Court denied certiorari, the Fifth Circuit granted a rehearing en banc.[157] The court then held that in removed cases, district courts should first decide issues of subject matter jurisdiction. Only upon establishing proper subject matter jurisdiction may courts examine personal jurisdiction issues.[158] The court reasoned that subject matter jurisdiction is a fundamental constitutional limitation[159] on federal judicial power.[160] Personal jurisdiction, on

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145. *Id.* Marathon conducted business primarily in Houston, Texas.
146. *See* 28 U.S.C. § 1332 (1994).
147. *See* 28 U.S.C. § 1331 (1994).
148. *See* 9 U.S.C. § 205 (1994); *Marathon Oil*, 115 F.3d at 317.
149. *Marathon Oil*, 115 F.3d at 317 n.4.
150. *Id.* at 317.
151. *Id.*
152. *Id.*
153. *Id.*
154. Ruhrgas A.G. v. Marathon Oil Co., 526 U.S. 574 (1999).
155. Marathon Oil Co. v. Ruhrgas, A.G., 145 F.3d 211, 214 (5th Cir. 1998).
156. *Marathon Oil*, 115 F.3d at 319 n.14. The court relied upon *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295 (5th Cir. 1985), which held that "[d]iversity does not exist where aliens are on both sides of the litigation." *See id.*
157. *See Marathon Oil*, 145 F.3d at 215.
158. *See id.* at 214.
159. U.S. CONST. art. III § 1.
160. *See Marathon Oil*, 145 F.3d at 216.

the other hand, is a waivable right that protects the individual.[161] The court therefore deemed personal jurisdiction a limitation less fundamental than subject matter jurisdiction.[162] Furthermore, the court reasoned, to allow federal courts to rule on personal jurisdiction without first determining the propriety of jurisdiction over the subject matter would usurp the states' power to adjudicate controversies that might properly belong in state courts.[163] The preclusive effect of a federal ruling would be offensive to the states where the case was not properly before the federal court.[164]

The Supreme Court finally granted certiorari and reversed the Fifth Circuit's decision on May 17, 1999.[165] Justice Ginsberg delivered the opinion for the unanimous Court. The opinion first acknowledged *Steel Co.* as the backdrop for *Ruhrgas*.[166] In *Steel Co.*, the Court held that Article III requires a court to establish jurisdiction over the subject matter of a case before reaching the merits.[167] Justice Ginsberg noted that the Fifth Circuit misinterpreted *Steel Co.* as teaching that courts must establish subject matter jurisdiction before reaching the issue of personal jurisdiction.[168]

The Court then acknowledged and characterized the distinctions between subject matter jurisdiction and personal jurisdiction.[169] The opinion began on the same premise on which the Fifth Circuit based its reasoning: subject matter jurisdiction is necessary to keep the federal courts within constitutional and congressional bounds, while personal jurisdiction is a matter of personal liberty.[170] However, the Court then diverged from the Fifth Circuit by intimating that subject matter jurisdiction is not necessarily more fundamental than personal jurisdiction.[171] Justice Ginsberg pointed out that the defective subject matter jurisdiction–lack of diversity of citizenship–urged by Marathon rested on statutory construction[172] rather than constitutional mandate.[173]

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161. *See* Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704 (1982) (noting that personal jurisdiction, unlike subject matter jurisdiction "may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue").
162. *See Marathon Oil*, 145 F.3d at 217-20.
163. *See id.* at 218.
164. *See id.* at 218-19.
165. *Ruhrgas A.G. v. Marathon Oil*, 526 U.S. 573, 583 (1999).
166. *Id.* at 577.
167. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 99 (1998).
168. *See Ruhrgas*, 526 U.S. at 583.
169. *See id.*
170. *See id.*
171. *Id.*
172. *See* 28 U.S.C. § 1332 (1994); 28 U.S.C. § 1447 (1994).
173. *See Ruhrgas*, 526 U.S. at 584.

Justice Ginsburg then addressed the concern that a federal court's dismissal of a removed case for lack of personal jurisdiction may preclude the state courts from reaching the same issue. Marathon argued that because of this preclusive effect, the determination of personal jurisdiction in a removed case was more offensive to the dignity of the states.[174] The Court resolved this concern by demonstrating that a remand for lack of subject matter jurisdiction could carry with it a similarly preclusive effect to the state courts.[175] The Court adopted the reasoning of Judge Higginbotham's dissent in the Fifth Circuit case.[176] Judge Higginbotham pointed out that the "dualistic" nature of our state and federal court systems allows the federal courts to make decisions that preclude adjudication of issues in the exercise of supplemental jurisdiction under 28 U.S.C. § 1367.[177]

Justice Ginsburg balanced federalism concerns with state interests. She suggested that "cooperation and comity" are essential to the federal system.[178] The Court admitted that when questions of personal jurisdiction and subject matter jurisdiction can be resolved with equal clarity, courts should first establish the propriety of jurisdiction over the subject matter.[179] The Court held, however, that there was no "unyielding jurisdictional hierarchy."[180] When a federal court faces a removed case in which there is a clear issue of personal jurisdiction and a more complex question of subject matter jurisdiction, the court may properly dismiss the case based solely on a lack of personal jurisdiction.[181]

C. *Ortiz v. Fibreboard Corp.*[182]

The Supreme Court had occasion to clarify its holding in *Steel Co.* with another 1999 case: *Ortiz v. Fibreboard Corp.*[183] In *Ortiz*, the Court granted certiorari to another case from the Fifth Circuit.[184] At issue in this case was the question of whether to certify a class of plaintiffs in ongoing litigation against a manufacturer of asbestos-containing products.[185] Of the several subclasses of plaintiffs in this complex case, the "exposure only" group was the most controversial. The Fifth Circuit certified the plaintiff class under Rule

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174. *See id.* at 585.
175. *See id.* at 585-86.
176. *See id.* at 586.
177. *See* Marathon Oil v. Ruhrgas, A.G., 145 F.3d 211, 232 n.7 (5th Cir. 1998).
178. *Ruhrgas*, 526 U.S. 586 ("Cooperation and comity, not competition and conflict, are essential to the federal design.").
179. *See id.* at 587-88.
180. *Id.* at 578.
181. *Id.* at 588.
182. 527 U.S. 815 (1999).
183. *Id.*
184. *In re* Asbestos Litig., 134 F.3d 668 (1998), *rev'd sub nom.* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).
185. *Ortiz*, 527 U.S., at 821.

23(b)(1)(B).[186]

Judge Smith, who delivered the majority opinion in *Marathon Oil*, dissented from the decision upholding certification. Judge Smith cited the Rules Enabling Act (REA) for the proposition that rules of civil procedure "shall not abridge, enlarge, or modify any substantive right."[187] The dissent believed that certification of the class in this case would abridge the substantive rights of plaintiffs who did not opt into the class.[188] Perhaps more important for the dissent in the Fifth Circuit case was the argument that the "exposure only" plaintiffs had no Article III standing to come before the federal court.[189] According to the dissent, this group of plaintiffs suffered no "injury in fact," but rather a "conjectural" injury, and therefore, there was no case or controversy before the court.[190] For Judge Smith, this disregard of the Article III standing requirements and the Rules Enabling Act limitations amounted to an unlawful expansion of the power of federal courts.[191]

In a brief to the Supreme Court in *Ortiz*, Professor Lawrence H. Tribe expressed similar concerns.[192] Professor Tribe argued that the class action was a feigned proceeding initiated by Fibreboard and several cooperative plaintiffs' lawyers in order to bar future claimants from bringing suits under various state laws.[193] Professor Tribe cited *Steel Co.* for the proposition that "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court."[194] Professor Tribe echoed Judge Smith's dissenting opinion that the "exposure only" plaintiffs had no injury in fact; therefore, lacking Article III standing, the federal court had no jurisdiction to certify the class under Rule 23 of the Federal Rules of Civil Procedure.[195] Additionally, argued Professor Tribe, the application of Rule 23 in this case acted as an abridgement of the plaintiffs rights in violation of the Rules Enabling Act.[196]

While the Supreme Court reversed the Fifth Circuit and ordered the

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186. *In re* Asbestos Litig., 134 F.3d at 670; *see also* FED. R. CIV. P. 23(b)(1)(B) (1998) ("An action may be maintained as a class action if . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest . . . .").

187. *See* 28 U.S.C. § 2072(b) (1994); *In re* Asbestos Litig., 134 F.3d at 676.

188. *See In re Asbestos Litig.*, 134 F.3d at 674.

189. *Id.* at 675

190. *Id.*

191. *Id.*

192. *See* Brief for Petitioners at 44-50, Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (No. 97-1704).

193. *Id.* at 44.

194. *Id.* at 47; Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998).

195. *See* Brief for Petitioners at 48-49, *Ortiz* (No. 97-1704).

196. *Id.* at 31-36.

decertification of the class, the Court expressly rejected these arguments set forth by Judge Smith and Professor Tribe.[197] The Court held instead that, while it was proper for a federal court to examine the issue of class certification before finding Article III standing, the class failed to meet the criteria within Rule 23.[198] The Court also found that certification of the class would not violate the Rules Enabling Act.[199] The majority reasoned that the issue of class certification was purely procedural and therefore did not implicate any substantive right protected by the Act.[200] The Court characterized class certification as an issue of statutory standing, which, as in *Steel Co.*, courts may properly examine before Article III standing.[201]

Justice Souter delivered the majority opinion in *Ortiz*.[202] The argument advanced by Justice Souter regarding the propriety of a federal court treating an issue of class certification before addressing Article III concerns seems somewhat conclusory. The justification offered in the majority opinion is simple: "[A] Rule 23 question should be treated first because class certification issues are 'logically antecedent' to Article III concerns."[203] Justice Souter did not explain how or why class certification is "logically antecedent" to the constitutional standing requirement, but rather merely cited *Amchem Products v. Windsor*[204] for this proposition.[205]

The reference to *Amchem*, however, reveals little about what logic justifies the subordination of Article III to the issue of class certification. *Amchem*, decided two years before *Ortiz*, involved similar asbestos related class certification issues.[206] An examination of the *Amchem* passage cited in *Ortiz* reveals that the Court in *Amchem* was equally conclusory in its reasoning: "[B]ecause their resolution here is logically antecedent to the existence of any Article III issues, it is appropriate to reach them first."[207] The *Amchem* Court suggested that because

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197. *Ortiz*, 527 U.S. at 815, 831 (1999).
198. *Id.*
199. *Id.* at 845.
200. *Id.* at 848.
201. *Id.* at 831.
202. *See id.* at 821.
203. *Id.* at 816 (citing Amchem Prods. v. Windsor, 521 U.S. 591, 612 (1997)).
204. 521 U.S. 591 (1997).
205. *See Ortiz*, 527 U.S. at 816.
206. *See Amchem*, 521 U.S. at 597; *Ortiz*, 527 U.S. at 821. In both *Amchem* and *Ortiz*, the Supreme Court held that a federal court may decide the issue of whether to certify a class under Rule 23 of the Federal Rules of Civil Procedure before that court determines whether it has proper jurisdiction to hear the subject matter of a case. *Ortiz*, 527 U.S. at 831; *Amchem*, 521 U.S. at 612-13. In both cases, the Court dismissed the class actions because they failed to meet the criteria of Rule 23 under which such an action may be brought. *Ortiz*, 527 U.S. at 848-63; *Amchem*, 521 U.S. at 613-29. Though *Amchem*, a 1997 case, came before *Steel Co.*, the Court in *Steel Co.* was mysteriously silent on this aspect of the holding in *Amchem*. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998). The Court in *Ortiz*, conversely, distinguished the class action certification issue from the merits in *Steel Co.* *See Ortiz*, 527 U.S. at 831. The Court stated that the issue of class certification is purely procedural, and therefore a court may rule on the certification issue before deciding the issue of Article III standing. *See Ortiz*, 527 U.S. at 831.
207. *See Amchem*, 521 U.S. at 612 (citations omitted).

the Article III standing issue "would not exist but for the [class-action] certification," and "the class certification issues are dispositive" of the case, the class certification should be dealt with first.[208] That explanation sounds "logical," but it fails to address the concern which forms the root of the controversy: federal courts adjudicating the rights of litigants whose cases do not belong in federal court.

The *Amchem* Court justified this position through a comparison with *Arizonans for Official English v. Arizona*.[209] *Arizonans* presented the Court with an amendment to the Arizona constitution which mandated that English be the "language of . . . all government functions and actions."[210] A government employee sued in federal court, challenging the amendment as contradictory to the United States Constitution.[211] In the course of litigation, the employee quit her government job.[212] The Court held that once the employee stopped working for the government, the amendment had no effect on her, and the Court was therefore obligated to dismiss her claim as moot under the Article III justiciable controversy requirement.[213] The problem with *Amchem's* comparison to this case is that *Arizonans* stood for respecting the boundaries of Article III,[214] while *Amchem* sought to step around Article III requirement by holding statutory considerations higher.[215]

Arizonans preserved the integrity of the federal system in that it merely resolved the issue of whether a cause of action amounted to a justiciable case under the United States Constitution.[216] Such a ruling does not offend the state courts' authority, as the power of a federal court to decide whether there is a case or controversy derives from the Constitution.[217] *Amchem*, on the other hand, opened a dangerous window through which federal courts may reach statutory issues in lieu of following constitutional guidelines.[218] *Ortiz* followed *Amchem*. Even though the issues in *Amchem* and *Ortiz* might be purely procedural, these rulings still have a preclusive effect on the litigants.[219] While these purely procedural

208. *Id.* (citing Georgine v. Amchem Prods. Inc., 83 F.3d 610, 623 (3d Cir. 1996).
209. 520 U.S. 43 (1997).
210. *See id.* at 48 (citing ARIZ. CONST. art. XXVIII, §§ 1(1), 1(2)).
211. *Id.*
212. *Id.*
213. *See id.*
214. *See id.* at 67.
215. *Cf.* Amchem Prods. v. Windsor, 521 U.S. at 591, 612-13 (1997).
216. *See Arizonans*, 520 U.S. at 48-49.
217. *See* U.S. CONST. art III, § 2.
218. *See Amchem*, 521 U.S. at 591.
219. *See* Idleman, *supra* note 3, at 306 n.305 (noting that various state courts have policies in place to take judicial notice of decisions in federal courts).

rights are not protected by the Rules Enabling Act, some may view the adjudication of cases which are improperly before the federal court as encroachments on the states' jurisdiction.[220]

IV. THE PROBLEM AND ITS SOLUTION

Steel Co., *Ruhrgas*, and *Ortiz* each represent the Supreme Court's attempt to resolve the persistent problems that arise when federal courts dismiss cases on other issues without establishing jurisdiction.[221] One might think that the decisions in these cases, along with *Arizonans* and *Amchem*, would be enough to sufficiently clarify the Court's position on the issue of federal subject matter jurisdiction. However, the recent case of *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[222] highlights the jurisdictional problems that persist after this line of cases.

Laidlaw illustrates how the Court's pendulous position (on the issue of when it may be acceptable to assume jurisdiction) has created an uncertainty that is counter-productive to the end of judicial economy. *Laidlaw*, like *Arizonans* and *Steel Co.*, dealt with the issue of what happens when courts decide statutory standing before Article III standing.[223] In *Laidlaw*, the Fourth Circuit held that the plaintiff's request for declaratory relief under the Clean Water Act became moot when Laidlaw discontinued discharging mercury into the North Tyger River.[224] The court, relying on *Arizonans*, therefore dismissed the case on the issue of mootness without determining whether the plaintiff had standing under Article III.[225] The Supreme Court reversed, holding a claim for declaratory or injunctive relief was not moot where the activity could theoretically recur.[226]

Because the Fourth Circuit thought the claim was moot, the court dismissed it without examining whether the claimant had standing under Article III.[227] The court was wrong. Because of this oversight, the Supreme Court felt obliged to spend five pages of its decision in *Laidlaw* examining the issue of Article III standing.[228] Although the Court has discretion to examine issues sua sponte, it would have been easier to review a decision of the Fourth Circuit on the Article III issue than to examine the question de novo. In this particular case, the effect of the lower court passing on a jurisdictional issue was to leave the question entirely for the Supreme Court to decide. The reliance on this proposition that constitutional standing can be bypassed in the name of judicial economy caused

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220. *See supra* Part III.B.
221. *See supra* Part III.
222. 120 S. Ct. 693 (2000).
223. *See id.* at 700.
224. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 149 F.3d 303, 306-07 (4th Cir. 1998).
225. *Id.*
226. *See Laidlaw*, 120 S. Ct. at 711.
227. *See id.*
228. *See id.* at 703-08.

an uneconomical effect in this case.

This problem in *Laidlaw* is analogous to the larger problem of hypothetical jurisdiction. Even *Steel Co.*, the case that supposedly put an end to hypothetical jurisdiction, allowed federal courts to decide issues that are so easy or patently without merit that a court may reach them while ignoring the constitutional boundaries of Article III.[229] *Laidlaw* illustrates the problem: maybe the court is wrong on what it thinks is an easy issue.[230] The Supreme Court has left to the federal courts the power to make these determinations, knowing that the courts could occasionally be mistaken in their interpretations of the law.[231]

Other evidence of the inefficiency of the Court's position on hypothetical jurisdiction can be seen empirically in the number of times the Court felt compelled to review the Article III issues in just the past few years.[232] An absolute requirement of establishing subject matter jurisdiction first–closer to *McCardle* and the Fifth Circuit–may be responsible for a decreased amount of litigation on this issue.[233] A rule that would force federal judges to decide the issue of subject matter jurisdiction before reaching any other matter would be the simplest rule for the lower courts to interpret.

The simplicity of such a rule, as that in *McCardle*, would likely reduce the amount of litigation on complicated issues that arise when judges assume jurisdiction. The assumption of jurisdiction was at issue in each of the cases discussed in this Comment, many of which have been decided since just 1997.[234] The Fifth Circuit's interpretation of *Steel Co.* was perhaps the most efficient, after all.

Another risk of hypothetical jurisdiction is the tendency of litigants to engage

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229. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998).

230. *See Laidlaw*, 120 S. Ct. at 693.

231. *See Steel Co.*, 523 U.S. at 89.

232. *E.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) (holding that courts must respect boundaries of Article III jurisdiction); Amchem Prods. v. Windsor, 521 U.S. 591 (1997) (stating that class certification issues were logically antecedent to the existence of Article III jurisdiction and thus could be dealt with first); *Steel Co.*, 523 U.S. 83 (1998) (declining to endorse the doctrine of hypothetical jurisdiction); Ruhrgas, A.G. v. Marathon Oil Co., 526 U.S. 574 (1999) (holding that no jurisdictional hierarchy requires adjudication of subject matter jurisdiction issues prior to a personal jurisdiction challenge); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (concluding that courts can determine Rule 23 questions prior to Article III considerations); *Laidlaw*, 120 S. Ct. 693 (2000) (holding that a claim for declaratory or injunctive relief is not moot where the activity could theoretically recur).

233. *Ex Parte* McCardle, 74 U.S. 506, 511 (1868) ("The first question necessarily is that of jurisdiction.").

234. *See supra* note 232.

in "forum shopping" in order to receive a ruling on an issue from what they might perceive as a more sympathetic judge.[235] Perhaps this tendency motivated the defendants in *Ruhrgas* to remove the case to federal court in order to increase their chances of receiving a favorable ruling on their challenge to personal jurisdiction.[236] This practice abuses the resources of the federal system and takes advantage of a mechanism which is supposed to foster greater fairness to the parties.[237]

The Supreme Court has been reluctant to offer any real comfort for these concerns. Justice Ginsberg's assertion in *Ruhrgas* that "[c]ooperation and comity, not competition and conflict, are essential to the federal design" ignores an important aspect of the American justice system: the autonomy of the individual states.[238] Early Federalists and framers of the Constitution, such as Madison and Hamilton, saw the maintenance of these two "competing" facets of government as essential to a free and autonomous society.[239]

Baker v. General Motors Corp. presents, by analogy, a rule that could resolve the persistent problem of hypothetical jurisdiction.[240] In *Baker*, a Michigan court entered an injunction which prevented a former GM employee from testifying against the company in any litigation.[241] The Supreme Court held that Article IV did not require a Missouri court to give full faith and credit to the Michigan ruling.[242] The Court reasoned that because the ruling was on a purely procedural enforcement measure rather than a final judgement, the Full Faith and Credit Clause did not force another state to recognize the ruling.[243] In dicta, the Court stated that even as to final judgements, full faith and credit applies only if the rendering state established proper jurisdiction over the subject matter.[244]

Both sides of the debate over where to draw the federal subject matter jurisdiction line voice valid concerns.[245] Judicial economy and the dignity of the individual states are both important concepts in American jurisprudence.[246] The Supreme Court in *Steel Co.* firmly stated that courts must resolve challenges to

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235. *See* Van Dusen v. Barrack, 376 U.S. 612, 636-37 (1964) (disfavoring defendants' practice of seeking a change in the law by removing to another forum).

236. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587 (1999) (acknowledging respondent's argument that a discretionary rule which permits courts to rule on the issue of personal jurisdiction prior to establishing subject matter jurisdiction will encourage state court defendants to abuse the federal system with "opportunistic removals").

237. *See Van Dusen*, 376 U.S. at 636-38.

238. *See Ruhrgas*, 526 U.S. at 586. Cooperation and comity are terms that suggest the voluntary nature of interjurisdictional respect. Here Justice Ginsburg seems to mandate this respect. *See id.*

239. *See* MONTESQUIEU, *supra* note 19.

240. 522 U.S. 222 (1998).

241. *Id.* at 228-29.

242. *Id.* at 239-40.

243. *Id.* at 237-41.

244. *See id.* at 233.

245. *See, e.g.*, United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966) ("[T]he weighty policies of judicial economy and fairness to parties were in themselves strong counsel for the adoptions of a rule which would permit federal courts to dispose of the state as well as the federal claims.").

246. *Id.*

subject matter jurisdiction before proceeding to the merits of the case.[247] This line seems clear enough. The problem arises where there are challenges to other issues, such as personal jurisdiction and class certification, which are not considered "merits."[248] Although the Court allows adjudication on these "procedural" issues, the rulings can have effects on the litigants as profound as rulings on the merits.[249]

The Court was correct at least in allowing federal courts to dismiss a case for lack of personal jurisdiction.[250] Case law, judicial doctrine, and the Constitution support this concept.[251] Yet, the Court may have gone too far in allowing rule-based analysis in a class action suit before establishing proper jurisdiction.[252] There were, however, compelling arguments in favor of this practice in *Ortiz*.[253] While the Court has struggled to reach a middle ground in the debate surrounding hypothetical jurisdiction,[254] it could reach a position more accommodating to both sides.

The solution is to continue to allow federal courts to rule on issues before resolving challenges to subject matter jurisdiction, while at the same time carving out an exception to the doctrine of res judicata. If the law allows state courts to litigate issues already determined by a federal court that never had jurisdiction over the subject matter, this practice would preserve the autonomy of the state courts *and* allow federal courts to dispose of cases in the most efficient manner.

This solution is a simple way of resolving the hypothetical jurisdiction

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

248. *See* Ruhrgas A.G. v. Marathon Oil Co., 526 U.S. 574, 588 (1999) (permitting federal courts to address personal jurisdiction challenges before establishing subject matter jurisdiction); Ortiz v. Fibreboard Corp., 527 U.S. 815, 831 (1999) (permitting court determination of an issue of class certification first).

249. *See Ortiz*, 527 U.S. at 831.

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

251. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877) (holding that a personal judgment was invalid against a non-resident of the state who was not personally served within the state); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (holding that in order to subject a defendant to a judgment he must have "minimum contacts" with the forum state); U.S. CONST. amend. XIV.

252. *See supra* notes 182-86 and accompanying text.

253. *See Ortiz*, 527 U.S. at 831.

254. *See supra* notes 221-23 and accompanying text.

problem. Occam's razor teaches that the simplest solution is usually the best.[255] It is useful to apply this principal to the complex area of the law represented by the intersection between hypothetical jurisdiction and interjurisdictional preclusion.[256] It is ironic that, in the name of judicial economy, the modern Supreme Court created such a complicated body of law for federal courts to apply in disposing properly of their cases.[257] The rule suggested by the Fifth Circuit in *Ruhrgas* (subject matter jurisdiction before anything else)[258] is simpler and more consistent with the text of the Constitution[259] than the sometimes difficult test of characterizing an issue as one of merits or procedure.[260] Such a simple, absolute rule requiring that federal courts examine their Article III subject matter jurisdiction before ruling on any other issue (in the spirt of *McCardle*)[261] would eliminate the risks of improper interjurisdictional preclusion.

The Court is right, however, that sometimes the issue of subject matter jurisdiction can be more difficult and time consuming for a court to decide than other issues.[262] The Court's instinct is logical; federal courts should be allowed to dismiss their cases on the simplest procedural issue possible.[263] The remedy for this luxury of dismissing a case on the simplest basis is also simple: if Article III jurisdiction is not established, the state courts should not be precluded from making their own determination of issues that belong in their courts.[264] To carve out such an exception to the doctrine of collateral estoppel is to only be fair to the states, while allowing federal courts to dismiss cases on the simplest procedural issue is only fair to the federal system.[265]

The principle which would make this solution economical is the old concept of comity.[266] If the issues that federal courts decided were truly clear, the state courts would likely decline to re-examine those issues even though they would not be legally precluded from doing so.[267]

The voluntary nature of this acceptance of the ruling of another jurisdiction keeps the dignity of the state courts in tact and the power of the federal courts

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255. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1561 (1986) (defining Occam's razor as "the philosophic rule that entities should not be multiplied unnecessarily").

256. *See* Chauffeurs Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 575 (1996) (Brennan, J., concurring) ("The time has come for us to borrow William of Occam's razor and sever this portion of our analysis.").

257. *See* GLANNON, *supra* note 2 and accompanying text; Burbank, *supra* note 11 and accompanying text.

258. *See* Marathon Oil Co. v. Ruhrgas, A.G., 115 F.3d 315, 318 (5th Cir. 1997).

259. *See Ex Parte* McCardle, 74 U.S. 506, 511 (1868).

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

261. *See Ex Parte* McCardle, 74 U.S. at 511.

262. *See* Ruhrgas A.G. v. Marathon Oil Co., 526 U.S. 574, 588 (1999).

263. *See id.*

264. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998) (stating that only those judgments rendered by courts with adjudicatory authority over the subject matter gain nationwide force).

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

266. *See supra* note 1.

267. *See id.*

checked.

V. CONCLUSION

The Supreme Court's recent struggle to define the boundaries of federal subject matter jurisdiction produced some guidelines for federal courts. The Court held that it is usually preferable to decide subject matter jurisdiction before anything else.[268] However, where other procedural issues arise, the court has discretion to treat them first.[269] Where the merits are extremely obvious, a court may even rule on the merits without proper jurisdiction.[270] The primary goal of the Supreme Court is clear: judicial economy. Concerns of economy and simplicity, however, should not be held higher than the preservation of the Constitution. In addition, this search for economy has sometimes yielded an uneconomical effect.[271]

However, the paradox is close to resolution. When the Court tells the lower courts that they can dismiss cases on the simplest grounds before establishing their jurisdiction without causing a preclusive effect, the arguments of both sides of the debate will quiet. A simple reading of the passage in *Baker,* which stated that full faith and credit shall be given to judgements only "*if* rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgement," should be enough to discourage forum shopping and dispel the idea that federal courts are usurping state power.[272] For the states' part, common sense and logic will surely lead them to accept the decisions reached in federal courts without taking the time to reexamine obvious issues. Respecting the text of the Constitution is of paramount importance; the principle of comity, in regard to hypothetical jurisdiction, will ensure that paying that respect does not compromise

268. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).
269. *See* Ruhrgas A.G. v. Marathon Oil Co., 526 U.S. 574 (1999); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).
270. *See Steel Co.*, 523 U.S. at 89.
271. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 120 S. Ct. 693 (2000).
272. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998) (emphasis added).

the virtue of judicial economy.

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273. J.D. Candidate, 2001.