

# JURISDICTIONAL AVOIDANCE: RECTIFYING THE LOWER COURTS' MISAPPLICATION OF *STEEL CO.*

## INTRODUCTION

It is well established that the federal judicial power extends only to “Cases” and “Controversies.”<sup>1</sup> And that “[f]ederal courts are courts of limited jurisdiction,’ possessing ‘only that power authorized by Constitution and statute.”<sup>2</sup> Therefore, as the Supreme Court explained in *Steel Co. v. Citizens for a Better Environment*,<sup>3</sup> “[t]he requirement that jurisdiction be established as a threshold matter ‘spring[s] from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’”<sup>4</sup> “Without jurisdiction the court cannot proceed at all in *any* cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”<sup>5</sup>

The majority in *Steel Co.* thus set forth a simple rule: In “every” case, “the first and fundamental question is that of jurisdiction.”<sup>6</sup> This is consistent with a long and venerable line of Supreme Court

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1. U.S. CONST. art. III, § 2; *see, e.g.*, *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016).

2. *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

3. 523 U.S. 83 (1998).

4. *Id.* at 94–95 (second alteration in original) (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

5. *Id.* at 94 (emphasis added) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)).

6. *Id.* (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)).

precedent,<sup>7</sup> and the rule also makes eminent sense. “The statutory and (especially) constitutional elements of jurisdiction are 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.”<sup>8</sup> Simply put, “[f]or a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.”<sup>9</sup>

At the same time, *Steel Co.* rejected the concept of “hypothetical jurisdiction,” “the practice of deciding the cause of action before resolving Article III jurisdiction.”<sup>10</sup> Some lower courts had previously embraced such an approach when: “(1) the merits question [was] more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied.”<sup>11</sup> But writing for the Court, Justice Scalia denounced this method of leapfrogging over the “threshold jurisdictional question.”<sup>12</sup> A federal court could no longer—nor could it ever—decide “an ‘easy’ merits question . . . on the assumption of jurisdiction.”<sup>13</sup> And this holding is more than just a matter of good judicial practice. It is constitutionally compelled by Article III’s case or controversy requirement.<sup>14</sup> “Hypothetical jurisdiction produces nothing more

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7. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 94–95 (1968); *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934); *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Great Southern Fire Proof Hotel*, 177 U.S. at 453; *McCardle*, 74 U.S. at 514; *Rhode Island v. Massachusetts*, 37 U.S. (12 Peters) 657, 718 (1838); *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410 n.2 (1792);

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

9. *Id.* at 101–02.

10. *Id.* at 98.

11. *Id.* at 93–94 (collecting cases); see also Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 260–64 (1999) (detailing the doctrine’s overuse prior to *Steel Co.*).

12. *Steel Co.*, 523 U.S. at 102.

13. *Id.* at 99.

14. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (“According to express provision of Article III, the judicial power of the United States is limited to ‘Cases’ and

than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by [the Supreme] Court from the beginning.”<sup>15</sup>

As the sweeping language above shows, *Steel Co.*'s prohibition on hypothetical jurisdiction is absolute.<sup>16</sup> It is not subject to exception. The wrinkle—which spawned the problem that this Note addresses—is that the Court did acknowledge that two cases which it declined to overrule seemed to “dilute[] the absolute purity of the rule that Article III jurisdiction is always an antecedent question.”<sup>17</sup> As a consequence, the lower courts have misread those cases to continue practicing the hypothetical jurisdiction that *Steel Co.* explicitly forbade. But, as the *Steel Co.* Court's explanation makes clear, neither case (nor any other) grants a federal court license to assume jurisdiction.<sup>18</sup> Such a transgression of jurisdictional boundaries is antithetical to the “proper—and properly limited—role of the courts in a democratic society.”<sup>19</sup>

Part I of this Note argues that the cases *Steel Co.* declined to overrule fail to support even a limited departure from the inflexible rule that jurisdiction is the first and fundamental question in every dis-

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‘Controversies.’ In implementing this limited grant of power, we have refused to issue advisory opinions or to resolve disputes that are not justiciable.” (citation omitted)).

15. *Steel Co.*, 523 U.S. at 101 (citing *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.2 (1792)); see *Flast v. Cohen*, 392 U.S. 83, 97 (1968) (“Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.”).

16. See, e.g., *Steel Co.*, 523 U.S. at 94–95 (“The requirement that jurisdiction be established as a threshold matter . . . is ‘inflexible and without exception.’” (quoting *Mansfield, C & L.M. Ry. Co.*, 111 U.S. 379, 382 (1884))).

17. *Id.* at 101.

18. See *id.* But cf. *Idleman*, *supra* note 11, at 285 (“For all its merit, the *Steel Co.* Court's repudiation of hypothetical jurisdiction is, when viewed as a whole, not an exemplar of clarity, which itself is perhaps one more ironic feature of the decision.”).

19. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

pute. Part II then explains how and why the lower courts have misinterpreted those cases to revive one particular hypothetical jurisdiction practice which runs afoul of *Steel Co.*—one the appellate courts have deemed the “foreordained” exception.<sup>20</sup> Finally, Part III closes by recommending that the lower courts must themselves rectify their own mistake going forward.

#### I. AN OSTENSIBLE EXCEPTION TO THE JURISDICTIONAL RULE

The wrinkle alluded to above can be ironed out by a close examination of the “extraordinary procedural postures” of the two enigmatic cases *Steel Co.* retained as good law<sup>21</sup>—*Secretary of Navy v. Avrech*<sup>22</sup> and *Norton v. Mathews*.<sup>23</sup> When read correctly and in light of *Steel Co.*, neither authorizes the circuit courts to “bypass [a] jurisdictional question and proceed directly to the [merits]”<sup>24</sup> as they have continued to do.

First, prior to the Court’s ruling in *Avrech*, the merits issue in the case had been conclusively resolved by a companion case argued the same day.<sup>25</sup> Following oral argument, the Court noticed a potential issue that it (erroneously) characterized as “jurisdictional” and ordered that the parties submit supplemental briefing.<sup>26</sup> But because the merits issue had been definitively resolved by a companion case, the *Avrech* Court concluded that “[w]ithout the benefit of

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20. See, e.g., *Starkey ex rel. A.B. v. Boulder Cty. Soc. Servs.*, 569 F.3d 1244, 1260 (10th Cir. 2009).

21. *Steel Co.*, 523 U.S. at 98.

22. 418 U.S. 676 (1974) (per curiam).

23. 427 U.S. 524 (1976).

24. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 144 (1st Cir. 2007).

25. *Avrech*, 418 U.S. at 677–78 (citing *Parker v. Levy*, 417 U.S. 733 (1974)); see also *Steel Co.*, 523 U.S. at 99.

26. *Avrech*, 418 U.S. at 677.

further oral argument, [it was] unwilling to decide the difficult jurisdictional issue which the parties ha[d] briefed.”<sup>27</sup> It did so on the “belie[f] that even the most diligent and zealous advocate could find his ardor somewhat dampened in arguing a jurisdictional issue where the decision on the merits [was] thus foreordained.”<sup>28</sup>

This language notwithstanding, and as *Steel Co.* noted, “[t]he first thing to be observed about *Avrech* is that the supposed jurisdictional issue was technically not that.”<sup>29</sup> Although *Avrech* “characterized [the] question as jurisdictional,” the Supreme Court “later held squarely that it was not.”<sup>30</sup> That means that *Avrech* never involved a question of hypothetical jurisdiction in the first place. And that explains why *Steel Co.* declined to overrule the case. Bypassing a *non-jurisdictional* question was not an error.<sup>31</sup>

The second (and far more complex) case seeming to support hypothetical jurisdiction was *Norton*. There, the dispute came to the Supreme Court on direct appeal from a three-judge district court.<sup>32</sup> Once again, a companion case had squarely resolved the merits issue,<sup>33</sup> and the unique procedural posture was critical to the result. At the time, a now-repealed statute had required a three-judge district court to convene for any request for an “injunction restraining

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27. *Id.*

28. *Id.* at 678. This is a reason for voluntary dismissal by the parties, not jurisdictional neglect by the Court.

29. *Steel Co.*, 523 U.S. at 99.

30. *Id.* (citing *Schlesinger v. Councilman*, 420 U.S. 738, 753 (1975)) (“The issue was whether a court-martial judgment could be attacked collaterally by a suit for back-pay.”).

31. *See id.* (“To the contrary, the fact that the [*Avrech*] Court ordered briefing on the jurisdictional question *sua sponte* demonstrates its adherence to traditional and constitutionally dictated requirements.”).

32. *Norton v. Mathews*, 427 U.S. 524, 528–29 (1976).

33. *Id.* at 530 (citing *Mathews v. Lucas*, 427 U.S. 495 (1976)); *see also Steel Co.*, 523 U.S. at 98 (“We declined to decide that jurisdictional question, because the merits question was decided *in a companion case*, with the consequence that the jurisdictional question could have no effect on the outcome . . . .” (citation omitted)).

the enforcement, operation, or execution of any Act of Congress for repugnance to the Constitution.”<sup>34</sup> *Norton* presented a subtle issue as to whether an injunction was available at all.

Petitioner Gregory Norton, Jr., was born out of wedlock and, after his father died in Vietnam, his grandmother filed an application for a surviving child’s benefit under the Social Security Act (SSA).<sup>35</sup> Norton lost in an administrative hearing and then again on appeal “because his father, at the time of his death, was neither living with [him] nor contributing to [his] support.”<sup>36</sup> Norton then sought judicial review against the Secretary of Health, Education, and Welfare on both statutory and constitutional grounds. Setting aside the statutory issue, Norton argued that the SSA discriminated against illegitimate children by denying them the “presumption of dependency,” allegedly in violation of the Constitution’s guarantee of equal protection.<sup>37</sup>

This is where the subtle jurisdictional issue comes in. The SSA provided that after a final decision by the Secretary, “[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of title 28 to recover on any claim arising under [the SSA].”<sup>38</sup> Accordingly, the Solicitor General argued that a district court lacked the authority to issue an injunction in Norton’s case, “because § 205(h) [of the Social Security Act] specifically exclude[d] any other source of review,” and § 205(g) “specifie[d] that a district court may enter a judgment only

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34. 28 U.S.C. § 2282 (1970), *repealed by* Pub. L. No. 94-381, §§ 1, 2, 90 Stat. 1119 (1976).

35. *Norton*, 427 U.S. at 525-26.

36. *Id.* at 526-27.

37. *Id.* at 527.

38. 42 U.S.C. § 405(h) (1970). When the statute was enacted, “prior to the 1948 recodification of Title 28, § 41 contained all of that title’s grants of jurisdiction to United States district courts, save for several special-purpose jurisdictional grants of no relevance to the constitutionality of Social Security statutes.” *Weinberger v. Salfi*, 422 U.S. 749, 756 n.3 (1975).

'affirming, modifying, or reversing the decision of the Secretary.'"<sup>39</sup> As *Norton* explained, "[i]f the court was not empowered to enjoin the operation of a federal statute, then three judges were not required to hear the case," and in turn, the Supreme Court would lack jurisdiction to entertain the direct appeal.<sup>40</sup>

Writing for the Court, Justice Blackmun "did not use the pretermission of the jurisdictional question as a device for reaching a question of law that otherwise would have gone unaddressed,"<sup>41</sup> as some courts have erroneously suggested.<sup>42</sup> "Rather, the Court held that it did not need to decide *the particular jurisdictional question at issue* in *Norton* in order to affirm on the merits because under either possible answer to that question, the outcome would be the same."<sup>43</sup> It explained:

Assuming that the three-judge court was correctly convened, and that we have jurisdiction over the appeal, the appropriate disposition, in the light of [the companion case], plainly would be to affirm the judgment entered in this case in favor of the Secretary. Assuming, on the other hand, that we lack jurisdiction because the three-judge court was needlessly convened, the appropriate disposition would be to dismiss the appeal. When an appeal to this Court is sought from an erroneously convened three-judge district court, we retain the power "to make such corrective order as may be appropriate to the enforcement of the limitations" which 28 U.S.C. § 1253 imposes. What we have done recently, and in most such cases where the jurisdictional issue was previously

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39. *Norton*, 427 U.S. at 530 n.7 (quoting 42 U.S.C. § 405(g) (1970)).

40. *Id.* at 529.

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

42. *See, e.g., Clow v. United States Dep't of Hous. & Urban Dev.*, 948 F.2d 614, 616 (9th Cir. 1991) (per curiam).

43. *Id.* at 626 (O'Scannlain, J., dissenting) (cited approvingly by the *Steel Co.* majority in its discussion of *Norton*. 523 U.S. at 98).

unsettled . . . has been to vacate the district court judgment and remand the case for the entry of a fresh decree from which an appeal may be taken to the appropriate court of appeals. . . . In the present case, however, the decision in *Lucas* has rendered the constitutional issues insubstantial and so much so as not even to support the jurisdiction of a three-judge district court to consider their merits on remand. Thus, there is no point in remanding to enable the merits to be considered by a court of appeals.<sup>44</sup>

As the latter two sentences reveal—and as Justice Scalia observed—*Norton* “seems to have regarded the merits judgment that it entered on the basis of *Lucas* as equivalent to a jurisdictional dismissal for failure to present a substantial federal question.”<sup>45</sup> Such a disposition on (perhaps tenuous) jurisdictional grounds would be consistent with the “two centuries of jurisprudence affirming the necessity of determining jurisdiction before proceeding to the merits.”<sup>46</sup> And indeed this type of dismissal for direct appeals was commonplace at the time, when the Supreme Court routinely heard more than 150 cases per year—more than double its current caseload.<sup>47</sup> Calling a federal question “insubstantial” essentially provided a mechanism for the overworked Court to dismiss cases that it was statutorily required to hear.<sup>48</sup>

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44. *Norton*, 427 U.S. at 531–32 (citations omitted) (quoting *Bailey v. Patterson*, 369 U.S. 31, 34 (1962)).

45. *Steel Co.*, 523 U.S. at 98; cf. *Bell v. Hood*, 327 U.S. 678, 682–83 (1946) (holding that a suit which is “wholly insubstantial and frivolous” or “patently without merit” does not create federal question jurisdiction).

46. *Steel Co.*, 523 U.S. at 98.

47. See *FAQs—General Information: How many cases are appealed to the Court each year . . . ?*, SUPREME COURT OF THE UNITED STATES, [https://www.supremecourt.gov/about/faq\\_general.aspx](https://www.supremecourt.gov/about/faq_general.aspx) [<https://perma.cc/TBN2-GSDF>] (last visited Dec. 3, 2020) (noting the Court grants an oral argument for approximately eighty cases a year).

48. The “accuracy of calling these dismissals jurisdictional has been questioned.” *Bell*, 327 U.S. at 683. And the Court has repeatedly conceded that this type of jurisdictional handwaving is “more ancient than analytically sound.” *Hagens v. Lavine*, 415 U.S.



But even if it did not so view the case, there is an alternative explanation as to why *Norton* does not violate the *Steel Co.* rule. In particular, Justice Blackmun implicitly recognized the *certainty* of the district court's jurisdiction on remand. After all, "a determination that the three-judge district court was improperly convened in *Norton* would not have meant the absence of district court jurisdiction *altogether*; it would only have meant that there was no jurisdiction for a *three-judge* district court" in the first instance.<sup>49</sup> The question thus became which of two jurisdictional schemes were to be exercised on remand. And regardless of the answer, "the same party would prevail and would do so *on the merits*" in light of *Lucas*.<sup>50</sup> Indeed, this on-the-merits decision would inevitably be rendered in a district court—and this is critical—of competent jurisdiction. There was, in other words, no lurking problem of jurisdiction *vel non*.<sup>51</sup>

The point is, *Steel Co.*'s decision left both *Norton* and *Avrech* intact because neither case affected its central holding: The federal courts can never exercise hypothetical jurisdiction.<sup>52</sup> *Avrech* did not involve a jurisdictional issue at all. And in the "peculiar case" of *Norton*,<sup>53</sup> the Court still recognized the certainty of the district court's

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528, 538 (1974) (quoting *Rosado v. Wyman*, 397 U.S. 397, 404 (1970)). The Court has therefore retreated somewhat to acknowledge that "[a]bsent . . . frivolity, 'the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.'" *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015) (quoting *Bell*, 327 U.S. at 682). It would be odd indeed to deem the merits issue in *Norton* "frivolous," given that three Justices dissented on that very issue in *Mathews v. Lucas*, 427 U.S. 495 (1976).

49. *Clow v. United States Dep't of Hous. & Urban Dev.*, 948 F.2d 614, 626 (9th Cir. 1991) (O'Scannlain, J., dissenting).

50. *Id.* at 627.

51. *See id.*

52. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–94 (1998) ("declin[ing] to endorse" the "bold[] point" made by Justice Stevens and several Courts of Appeals "that jurisdiction need not be addressed first").

53. *Id.* at 98.

jurisdiction in one form or another. At bottom, “nothing depended upon a resolution of the precise *nature* of that jurisdiction,”<sup>54</sup> and “the consequence [was] that the jurisdictional question could have no effect on the outcome.”<sup>55</sup>

## II. THE APPELLATE COURTS HAVE MISREAD *STEEL CO.*

Since *Steel Co.* was decided in 1998, many of the appellate courts have failed to heed its admonition. Most notably, in an opinion written by then-Judge Sotomayor, the Second Circuit in *Center for Reproductive Law and Policy v. Bush*<sup>56</sup> carved out an exception to the prohibition against hypothetical jurisdiction. It latched on to *Steel Co.*'s statement that it “must be acknowledged [that previous decisions by the Court] have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question.”<sup>57</sup> From this statement, and from the fact that the Court declined to overrule either *Norton* or *Avrech*, the Second Circuit mistakenly concluded that *Steel Co.* left the door open to hypothetical jurisdiction in certain circumstances. Specifically, then-Judge Sotomayor suggested that:

[T]he majority opinion in *Steel Co.* appears to allow an exception to the rule against assuming the existence of standing in those “peculiar circumstances” where the outcome on the merits has been “foreordained” by

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54. *Clow*, 948 F.2d at 627 (O’Scannlain, J., dissenting) (emphasis added).

55. *Steel Co.*, 523 U.S. at 98.

56. 304 F.3d 183 (2d Cir. 2002) [hereinafter *Bush*].

57. *Id.* at 193 (quoting *Steel Co.*, 523 U.S. at 101). Note that *Steel Co.* readily distinguished three other cases in addition to *Avrech* and *Norton*. See *Steel Co.*, 523 U.S. at 99–100 (citing *United States v. Augenblick*, 393 U.S. 348 (1969) (same issue as *Norton*); *Philbrook v. Glodgett*, 421 U.S. 707, 721–22 (1975) (substantive issue would have been decided in the same case even if District Court concluded that the Secretary was not properly a party); *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 86–88 (1970) (Court’s decision on exhaustion grounds was itself jurisdictional).

another case such that “the jurisdictional question could have no effect on the outcome,” provided the court “d[oes] not use the pretermission of the jurisdictional question as a device for reaching a question of law that otherwise would have gone unaddressed.”<sup>58</sup>

The circuit court then held that whenever “a governmental provision is challenged as unconstitutional, and a controlling decision of [the same Circuit] Court has already entertained and rejected the same constitutional challenge to the same provision, the Court may dispose of the case on the merits without addressing a novel question of jurisdiction.”<sup>59</sup> It went so far as to proclaim that in such a situation, “it is the adjudication of the *standing* issue that resembles an advisory opinion.”<sup>60</sup>

Not so. This perceived “foreordained” exception is wholly inconsistent with *Steel Co.*, and the analysis in *Bush* suffers from three fundamental flaws. First, the *Bush* court drew a mistaken analogy to *Norton* and *Avrech*. Second, it neglected the inherent differences between a circuit court and the Supreme Court. And third, it mistakenly suggested that the adjudication of a jurisdictional issue in a live case or controversy would somehow produce an advisory opinion by the lower court. These three shortcomings are discussed below in turn.

#### A. *A Mistaken Analogy*

When read in their proper context, neither *Norton* nor *Avrech* lend any support to the *Bush* decision. On the one hand, *Bush* presented a garden-variety case wherein the Second Circuit had previously

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58. *Bush*, 304 F.3d at 194 (second alteration in original) (quoting *Steel Co.*, 523 U.S. at 98).

59. *Id.* at 195.

60. *Id.* (emphasis added).

ruled on a very similar merits question. In the Second Circuit's view, then:

We find ourselves in largely the same situation as the Supreme Court found itself in *Norton* and *Avrech*: plaintiffs in this case challenge a governmental provision (the use of the Standard Clause) as unconstitutional, and there is a controlling case in which this Court entertained and rejected the same constitutional challenge to the same provision.<sup>61</sup>

But this similarity to *Norton* and *Avrech* is immaterial. As discussed above, what mattered to the Supreme Court were the “extraordinary procedural postures” which compelled the outcome on the merits, regardless of the answer to the particular jurisdictional question.<sup>62</sup> For instance, in *Norton*, Supreme Court precedent would have bound either a one-judge or three-judge district court on remand—both in the exact same way—and the district court *would have had* jurisdiction.

The same cannot be said in *Bush*, which did not even involve a set of simultaneous companion cases like *Avrech* or *Norton*. Instead, the decision bypassed the threshold question of Article III standing to hold that a Second Circuit opinion from more than a decade earlier—in fact, a pre-*Steel Co.* case which *itself* exercised hypothetical jurisdiction—controlled the outcome.<sup>63</sup> And, to make matters worse, it did so even though the plaintiffs argued that both factual distinctions

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61. *Id.*

62. *Steel Co.*, 523 U.S. at 98–99. One could argue that *Avrech* still treated the issue as jurisdictional, even if it did so erroneously. But given the absence of any constitutional misstep, there was no reason for *Steel Co.* to overrule *Avrech*.

63. See *Planned Parenthood Fed. of Am., Inc. v. Agency for Int'l Dev.*, 915 F.2d 59, 66 (2d Cir. 1990) (“Having found no constitutional rights implicated here, we do not address the government's arguments concerning standing.”).

and intervening precedent cast doubt on the applicability of the previous decision.<sup>64</sup>

In any event, despite its recognition of a potential jurisdictional infirmity,<sup>65</sup> and despite the district court's recognition that it had to address standing first,<sup>66</sup> the Second Circuit improperly then went on to profess on substantive law. It considered the weight of the "somewhat different context" as "a legal matter," and ultimately deemed the factual distinctions and the plaintiffs' legal arguments "unavailing."<sup>67</sup> This plainly violated the rule that "[f]ederal courts *must* determine that they have jurisdiction before proceeding to the merits."<sup>68</sup> For if the court lacked jurisdiction, its unnecessary pronouncements on the law "produce[d] nothing but an impermissible advisory opinion."<sup>69</sup> Quite the opposite of what the Second Circuit suggested.

#### B. *Inherent Differences Between the Supreme Court and Circuit Courts*

In addition to the faulty analogy to *Norton* and *Avrech*, invoking the "foreordained" exception in the inferior courts is a particularly problematic transgression of judicial authority. For even if *Bush* were correct that *Norton* licenses the Supreme Court to assume its way into the merits in certain cases, that does not justify the same practice in the lower courts. This is because in the lower courts, a

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64. See *Bush*, 304 F.3d at 191; Reply Brief for Plaintiffs-Appellants at 17–20, Ctr. for Reprod. Law & Policy v. Bush (No. 01–6168), 304 F.3d 183 (2d Cir. 2002), 2001 WL 34366665.

65. See *Bush*, 304 F.3d at 191–93.

66. Ctr. for Reprod. Law & Policy v. Bush, 01 Civ. 4986 (LAP), 2001 U.S. Dist. LEXIS 10903, at \*20 (S.D.N.Y. July 31, 2001) ("Here, were I to ignore defendants' 12(b)(1) motion and instead turn to an analysis of the merits of the case, I would be engaging in a form of hypothetical jurisdiction."); see *id.* at \*38 (dismissing for lack of standing).

67. *Bush*, 304 F.3d at 190–91, 193.

68. *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (emphasis added).

69. *McCullen v. Coakley*, 573 U.S. 464, 500 (2014) (Scalia, J., concurring).

ruling on a dispositive issue like jurisdiction or the merits is not necessarily the end of the road. A losing party can still petition for certiorari or an en banc rehearing, and that may be the precise reason the claim is initially brought. After all, why would a party press a claim if the result were truly “foreordained” in the opposition’s favor? The question begs the answer—that the ultimate result is usually not so certain.

Indeed, the answer to the jurisdictional question in *Bush* certainly could have had an “effect on the outcome.”<sup>70</sup> To illustrate, consider a scenario wherein *Bush* is appealed to the Supreme Court and certiorari is granted. If jurisdiction were then found to be lacking, the Court would plainly be restricted to “announcing the fact and dismissing the cause.”<sup>71</sup> But if it were instead satisfied, the Court could have held either way on the merits, as there would be no binding precedent on point. Thus, as this example shows, a prior *circuit court* opinion does not “foreordain” the result like a Supreme Court opinion might.<sup>72</sup> And it is simply wrong for an intermediate court to suggest that a case “cannot go forward” just because there is a previous panel precedent on point.<sup>73</sup> In the same vein, even if one accepts that a “wholly insubstantial and frivolous” claim renders a federal court without jurisdiction,<sup>74</sup> it defies reason to characterize a claim as such just because a three-judge panel in a lower court has addressed the matter in the wake of Supreme Court silence. All of

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70. *Bush*, 304 F.3d at 194 (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 98 (1998)).

71. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869); *Steel Co.*, 523 U.S. at 94.

72. *Steel Co.* implicitly recognized as much. See *Steel Co.*, 523 U.S. at 98–99 (explaining that *Norton* and *Avrech* both “involved an instance in which an intervening *Supreme Court* decision definitively answered the merits question” (emphasis added)).

73. *Bakalian v. Cent. Bank of the Republic of Turk.*, 932 F.3d 1229, 1236 (9th Cir. 2019).

74. *Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015) (quoting *Bell v. Hood*, 327 U.S. 678, 682–83 (1946)).

these institutional factors serve to fundamentally distinguish *Bush* and its misguided progeny from *Norton*.

These critical distinctions between the circuit courts and the Supreme Court raise a further set of practical concerns. The “foreordained” exception is aimed largely at promoting the virtue of judicial economy.<sup>75</sup> And yet, assuming jurisdiction in a lower court can create its own inefficiencies in subsequent proceedings.<sup>76</sup> Consider again the example wherein *Bush* is appealed. The Supreme Court would of course not be bound as to the merits by the Second Circuit precedent, which had purportedly “foreordained” the decision below. But the Supreme Court could very well have to dismiss on standing grounds instead, which would then render the Second Circuit’s own exposition on the merits a waste of time.<sup>77</sup> Meanwhile, the Supreme Court would have to make this standing determination without the benefit of the lower courts’ views.<sup>78</sup> And that is particularly undesirable when the jurisdictional issue presents a fact-intensive inquiry such as the presence of Article III standing. Further compounding the inefficiency, the Supreme Court might,

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75. See *Lemma v. Hispanic Nat’l Bar Ass’n*, 318 F. Supp. 3d 21, 24–25 (D.D.C. 2018) (noting that “reaching the merits of [a] claim might serve the interests of judicial economy” in some cases “by achieving greater finality in the disposition of the case”).

76. See Joshua S. Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power*, 68 ALA. L. REV. 493, 540–41 (2016). In *Firearms Policy Coalition, Inc. v. Barr*, 419 F. Supp. 3d 118, 123 (D.D.C. 2019), the plaintiff attempted to argue that a prior *district court* opinion foreordained the merits such that a standing inquiry was unnecessary. The district court correctly addressed the standing issue first, noting that a “decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” *Id.* (quoting *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011)).

77. See *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) (“We are obliged to examine standing *sua sponte* where standing has erroneously been assumed below.”).

78. Cf. *United States v. W. Elec. Co., Inc.*, 907 F.2d 1205, 1210 (D.C. Cir. 1990) (articulating the appellate court’s “prefer[ence] not to rule dispositively on [an] issue without the benefit of the district court’s views”).

as it has in the past, have to remand for an initial resolution of the standing issue, precisely because the lower courts are better equipped for the factfinding often needed to address the issue adequately.<sup>79</sup> What's more, if the petitioner did in fact lack standing, the Second Circuit might have "also suffer[ed] serious legitimacy costs by being shown to have acted beyond [its] authority."<sup>80</sup> After all, the institutional legitimacy of America's unelected and politically unaccountable federal judiciary hinges largely on judges' scrupulous adherence to their jurisdictional boundaries.<sup>81</sup> These concerns can be avoided entirely, however, if the lower courts just address any jurisdictional issues that come to their attention in the first place.

### C. *The Advisory Opinion Misnomer*

*Bush* committed a third basic error. It correctly stated that the "concern of the *Steel Co.* majority was that deciding a case on the mere assumption of jurisdiction can lead to the rendering of advisory opinions in violation of Article III."<sup>82</sup> But then ironically citing Justice Stevens' concurrence—one that Justice Scalia's majority opinion flatly rejected<sup>83</sup>—*Bush* flipped the majority's position on its

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79. See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 n.2 (1976); *Rogers v. Paul*, 382 U.S. 198, 200 (1965); cf. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 249 (1990) (Stevens, J., concurring in part and dissenting in part) ("I would remand for an evidentiary hearing on the standing issues.").

80. Stillman, *supra* note 76, at 541; cf. *Lemma*, 318 F. Supp. 3d at 25 ("[T]he economy of [reaching the merits without deciding jurisdiction] is diminished by the uncertainty that exists regarding the Court's authority to resolve even a straightforward motion to dismiss for failure to state a claim before resolving a personal jurisdiction defense.").

81. See Brian Kulp, Note, *Counteracting Marbury: Using the Exceptions Clause to Overrule Supreme Court Precedent*, 43 HARV. J.L. & PUB. POL'Y 279, 299–300 (2020).

82. *Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 195 (2d Cir. 2002).

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



head by characterizing the “adjudication of the standing issue” as itself “resembl[ing] an advisory opinion.”<sup>84</sup>

That is not true. An advisory opinion is one that abstractly opines on the law in the absence of any concrete and adversarial dispute.<sup>85</sup> Such a theoretical legal pronouncement is of course forbidden by Article III’s case-or-controversy requirement.<sup>86</sup> Yet contrary to *Bush*’s suggestion, there is simply nothing advisory about answering a threshold jurisdictional question when a live case or controversy remains, as one did in that case. Indeed, if jurisdiction were proper, the Second Circuit or Supreme Court would still have possessed the judicial power to depart from the past precedent.<sup>87</sup>

Moreover, “it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction.”<sup>88</sup> Accordingly, as *Steel Co.* reiterated, “[e]very federal appellate court has a special *obligation* to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.”<sup>89</sup> Doing so is an absolute prerequisite to any constitutional exercise of the judicial power. And this means that, on a jurisdictional question, it is the federal courts’ “duty to permit argument, and to take the time required for

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84. *Bush*, 304 F.3d at 195.

85. See, e.g., *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); *Aetna Life Ins. Co. v. Hawthorn*, 300 U.S. 227, 241 (1937); *Muskrat v. United States*, 219 U.S. 346, 357 (1911).

86. See *U.S. Nat’l Bank*, 508 U.S. at 446.

87. For a discussion of the prior-panel-precedent rule, see *infra* Part III.B.

88. *United States v. Ruiz*, 536 U.S. 622, 628 (2002); see *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) (“When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.” (alterations adopted) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986))); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869).

89. *Steel Co.*, 523 U.S. at 95 (emphasis added) (quoting *Arizonans for Official English*, 520 U.S. at 73).

such consideration as it might need.”<sup>90</sup> It does not matter whether the parties raise the issue. Nor may a court bypass the threshold subject-matter-jurisdiction inquiry even when the parties stipulate to its existence.<sup>91</sup>

Whenever jurisdiction is lacking, then, “the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III.”<sup>92</sup> In such circumstances, the federal courts must refrain from indulging “the precedent-shattering general proposition that an ‘easy’ merits question may be decided on the assumption of jurisdiction.”<sup>93</sup> The Second Circuit in *Bush* ignored that mandate, misunderstood the nature of an advisory opinion, and improperly assumed its way into the merits. In doing so, it spawned a growing movement in the lower courts that has unconstitutionally restored the exercise of hypothetical jurisdiction.

*D. Other Flawed Justifications for Invoking the “Foreordained” Exception*

Despite *Bush* being wrongly decided, its ill-conceived exception to the absolute prohibition on hypothetical jurisdiction has now gained traction in a number of lower courts, including the First, Second, Third, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits.<sup>94</sup> The

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90. *United States v. United Mine Workers*, 330 U.S. 258, 291 (1947) (quoting *United States v. Shipp*, 203 U.S. 563, 573 (1906)).

91. *Sosna v. Iowa*, 419 U.S. 393, 398 (1975). Of course, *personal* jurisdiction may still be waived because it provides an “individual right.” See, e.g., *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 (1982).

92. *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

93. *Steel Co.*, 523 U.S. at 99 (emphasis omitted).

94. See, e.g., *Seale v. INS*, 323 F.3d 150, 155 (1st Cir. 2003); *Sinapi v. R.I. Bd. of Bar Exam’rs*, 910 F.3d 544, 550 (1st Cir. 2018); *Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 195 (2d Cir. 2002); *United States v. Skeffery*, 283 F. App’x 75, 77 (3d Cir. 2008); *United States v. King*, 123 F. App’x 144, 146 n.1 (5th Cir. 2004); *United States v. Blewett*, 746 F.3d 647, 650 (6th Cir. 2013) (en banc); *id.* at 661–62 (Moore, J., concurring); *Bakalian*

result has been a snarled morass of self-affirming jurisprudence, with the circuits relying on one another's mistakes.

In these attempts to circumvent thorny jurisdictional issues, some courts have offered an additional justification for the exception. Namely, some have urged that a "court does not exercise its 'power to declare the law,' and thus need not resolve difficult questions of its jurisdiction, when a prior judgment of the court forecloses the merits issue."<sup>95</sup> But this too is unavailing. Every time a court reaffirms its precedent, it is declaring what the law is, it is declaring that the law has not changed, and it is proclaiming that the prior precedent squarely applies to the particular circumstances.<sup>96</sup> By doing so, a court moreover acts to clarify the rights of the parties and thus unconstitutionally injects itself into an issue that it has no authority to resolve.<sup>97</sup>

Not only that, but this additional proffered rationale exposes another shortcoming in the exception. That is, the merits are not truly "foreordained" just because the same court has previously ruled on an issue. "*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'"<sup>98</sup> In other words, while faithfulness to precedent is wise as a matter of judicial custom, it is not a constitutional

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v. Cent. Bank of the Republic of Turk., 932 F.3d 1229 (9th Cir. 2019); *Starkey v. Boulder Cty. Soc. Servs.*, 569 F.3d 1244, 1260–61 (10th Cir. 2009); *All. of Artists & Recording Cos. v. DENSO Int'l Am., Inc.*, 947 F.3d 849, 860–61 (D.C. Cir. 2020); *Sherrod v. Breitbart*, 720 F.3d 932, 937 (D.C. Cir. 2013); *Emory v. United Air Lines, Inc.*, 720 F.3d 915, 920 (D.C. Cir. 2013).

95. *Sherrod*, 720 F.3d at 937 (quoting *Steel Co.*, 523 U.S. at 94) (citation omitted).

96. *Cf. Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 190 (2d Cir. 2002) (holding that "no intervening Supreme Court case law alter[ed the] precedential value" of the case decided twelve years earlier).

97. *See Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005) ("[A]bsence of jurisdiction altogether deprives a federal court of the power to adjudicate the rights of the parties.").

98. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

compulsion. By contrast, rigid adherence to the jurisdictional limitations of the federal courts is a “traditional and constitutionally dictated requirement[.]”<sup>99</sup> The latter must therefore prevail.

Alternatively, other circuit courts have reasoned that, even if it is impermissible to exercise hypothetical jurisdiction when Article III questions are at stake, a court may assume jurisdiction when the question is “a matter of statutory, not constitutional, dimension.”<sup>100</sup> This “is ultimately based on the premise that statutory subject-matter jurisdiction limitations are not as important, fundamental, and deserving of respect as Article III limitations, and therefore may be bypassed even though their constitutional counterparts may not be.”<sup>101</sup>

But that premise is simply untenable. In granting Congress the power to “ordain and establish” the inferior courts as it saw fit,<sup>102</sup> the Framers afforded Congress the concomitant, “plenary” authority to sculpt the lower courts’ jurisdiction within constitutional bounds.<sup>103</sup> Consistent with Article III, *Steel Co.* hence recognized that the “statutory” elements of jurisdiction are “an essential ingredient of separation and equilibration of powers” just the same.<sup>104</sup> Such subject-matter limitations “keep the federal courts within the bounds the Constitution and Congress have prescribed,” meaning

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99. *Steel Co.*, 523 U.S. at 99; *see also* *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (“Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level.”).

100. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 144 (1st Cir. 2007).

101. *Stillman*, *supra* note 76, at 513.

102. U.S. CONST. art. III, § 1.

103. *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (plurality opinion) (“These provisions reflect the so-called Madisonian Compromise, which resolved the Framers’ disagreement about creating lower federal courts by leaving that decision to Congress.”); *see also* *Bowles v. Russell*, 551 U.S. 205, 212 (2007) (“Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.”).

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

both constitutional and statutory subject-matter delineations alike “must be policed by the courts on their own initiative” at all levels.<sup>105</sup> Lest the courts act in contravention of the separation-of-powers and federalism principles embodied in Article III, they cannot dispense with the statutory elements of jurisdiction any more than the constitutional ones just because there is circuit precedent on point.<sup>106</sup>

In sum, the *Bush* doctrine has resuscitated the unconstitutional practice of hypothetical jurisdiction that *Steel Co.* repudiated two decades ago. But as reaffirmed by the Supreme Court in an unbroken line of cases following *Steel Co.*,<sup>107</sup> a federal court simply “may not assume jurisdiction for the purpose of deciding the merits of the case.”<sup>108</sup> It must always first “satisfy itself of its jurisdiction, no

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

106. *See Stillman*, *supra* note 76, at 516–20 (arguing that “Article III itself dictates that statutory limits on jurisdiction are no less inviolable than their constitutional counterparts”).

107. The Supreme Court’s repeated acceptance of the *Steel Co.* majority’s position refutes a view which initially percolated in some lower courts—that Justice O’Connor’s concurrence relegated Justice Scalia’s opinion to plurality status. *See Idleman*, *supra* note 11, at 286–87; *Steel Co.*, 523 U.S. at 110–11 (O’Connor, J., concurring) (“I also agree with the Court’s statement that federal courts should be certain of their jurisdiction before reaching the merits of a case. . . . I write separately to note that, in my view, the Court’s opinion should not be read as cataloging an exhaustive list of circumstances under which federal courts may exercise judgment in ‘reserv[ing] difficult questions of . . . jurisdiction when the case alternatively could be resolved on the merits in favor of the same party[.]’” (alteration in original) (quoting *Norton v. Mathews*, 427 U.S. 524, 532 (1976))).

108. *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007); *see also Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam); *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005); *Haywood v. Drown*, 556 U.S. 729, 755 (2009) (Thomas, J., dissenting) (noting jurisdiction is “a condition precedent to reaching the merits of a legal dispute”); *cf. Ruhrgas*, 526 U.S. at 584 (“*Steel Co.* reasoned that subject-matter jurisdiction necessarily precedes a ruling on the merits . . . .” (emphasis added))).

matter how difficult.”<sup>109</sup> And this means that “[t]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded.”<sup>110</sup> Ever. It is time that the courts stop turning a blind eye to their jurisdictional boundaries.

### III. ELIMINATING THE “FOREORDAINED” EXCEPTION

In his partial concurrence in *Steel Co.*, Justice Breyer characteristically argued in functionalist terms that a federal court assuming jurisdiction in order to reach certain merits issues makes “practical sense” and avoids “cumbersome” proceedings.<sup>111</sup> So, with such judicial economy in mind, “it is not difficult to see how the prospect of preempting nonmeritorious suits could be sufficiently attractive that a court might be willing, from time to time, to bend the jurisdictional rules.”<sup>112</sup> That is precisely what *Bush* and its progeny have done in resurrecting hypothetical jurisdiction as a means for producing hypothetical judgments.

Even from a functional standpoint, however, the efficiency gains of exercising hypothetical jurisdiction are overblown. First, doing so will frequently serve only to perpetuate uncertainty on thorny jurisdictional issues and thereby encourage future litigation over the same. This occurred, for example, in *Hausler v. JP Morgan Chase*

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109. *United States v. Blewett*, 746 F.3d 647, 661 (6th Cir. 2013) (en banc) (Moore, J., concurring in the judgment); see also CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.1 (3d ed. 1999 & Supp. 2007) (“[T]he Supreme Court appears to have ruled that a court may never bypass a difficult and important Article III [justiciability] question in favor of resolving an easy and nonprecedential question on the merits.”).

110. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978).

111. *Steel Co.*, 523 U.S. at 111–12 (Breyer, J., concurring in part and concurring in the judgment).

112. *Idleman*, *supra* note 11, at 310.

*Bank, N.A.*,<sup>113</sup> where the Second Circuit ignored a jurisdictional question despite it being briefed by the parties.<sup>114</sup> The appellate court then overstepped its way into the merits, leaving a wake of uncertainty as to the jurisdictional question that proliferated in the circuit for more than five years. And, lo and behold, this eventually required the Second Circuit to reverse a district court ruling on that very same issue.<sup>115</sup> Properly addressing jurisdiction at the outset in *Hausler*—a case which the Second Circuit had no power to hear—would have definitively resolved the issue in the second case, thereby preventing *both* the district court and appellate court from having to analyze the issue anew. Second, and as noted above,<sup>116</sup> hypothetical jurisdiction creates inefficiencies of its own when employed by the lower courts as the case winds its way through further appeals—proceedings in which an en banc panel or the Supreme Court would not be bound by the circuit precedent. Finally, there is a federalism concern at stake too. Because the hypothetical judgments created by the “foreordained” exception will likely still be given preclusive effect in subsequent litigation,<sup>117</sup> exercising hypothetical jurisdiction can also “threaten[] both the judicial autonomy of the states and the very notion of the separation of powers

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113. 770 F.3d 207 (2d Cir. 2014).

114. See *Vera v. Banco Bilbao Vizcaya Argentaria, S.A.*, 946 F.3d 120, 137 n.22 (2d Cir. 2019).

115. See *id.* at 145.

116. See *supra* notes 75–81 and accompanying text.

117. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999) (“When a court has rendered a judgment in a contested action, the judgment [ordinarily] precludes the parties from litigating the question of the court’s subject matter jurisdiction in subsequent litigation.” (alteration in original) (quoting Restatement (Second) of Judgments § 12 (Am. Law. Inst. 1980))). Even if the judgment is not given preclusive effect, that would create its own inefficiencies by allowing the parties to relitigate seemingly resolved merits issues. See Stillman, *supra* note 76, at 541–44.

that is essential to the maintenance of a democratic government.”<sup>118</sup> It allows the federal courts to overstep their way into cases that Congress or the Constitution have committed to the states.

With these constitutional and prudential concerns in mind, this Part will argue that, although the Supreme Court is unlikely to correct the lower courts’ misapplication of *Steel Co.*, it is incumbent on the lower courts to remedy their own past wrongs.

A. *The Supreme Court is Unlikely to Tackle the Issue*

Although the “foreordained” exception has garnered widespread acceptance amongst the lower courts, the Eleventh Circuit has flatly rejected the concept. In *Friends of the Everglades v. EPA*,<sup>119</sup> Judge William Pryor proclaimed that “[e]ven if the resolution of the merits were foreordained—an issue we do not decide—the Supreme Court has explicitly rejected the theory of ‘hypothetical jurisdiction.’”<sup>120</sup> The Eleventh Circuit recognized that *Steel Co.* “reaffirmed” the inviolable principle “that an inferior court must have both statutory and constitutional jurisdiction before it may decide a case on the merits,”<sup>121</sup> thereby creating a rather lopsided circuit split.

Nevertheless, even in the face of a circuit split, it is unlikely that the Supreme Court will address the propriety of the “foreordained” exception any time soon. For one, there is little incentive for a losing

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118. Ely Todd Chayet, *Hypothetical Jurisdiction and Interjurisdictional Preclusion: A “Comity” of Errors*, 28 PEPP. L. REV. 75, 77 (2000).

119. 699 F.3d 1280 (11th Cir. 2012).

120. *Id.* at 1288.

121. *Id.*; see also *id.* at 1289 (“Because we conclude that section 1369(b)(1) does not grant original subject matter jurisdiction over these petitions, we *may not* address the merits of this controversy.” (emphasis added)); *Amerijet Int’l, Inc. v. NLRB*, 520 F. App’x 795, 798 (11th Cir. 2013) (“*Amerijet* also seems to say that the district court may exercise jurisdiction over the matter anyway because the resolution of the merits is clear. The problem is that we cannot create jurisdiction in the district court in the face of a congressional pronouncement that leaves the power to conduct an initial inquiry solely in the hands of the NLRB’s General Counsel.”).



plaintiff to appeal the issue, as prevailing will only shift dismissal from one on the merits to one on jurisdictional grounds. This could be useful for *res judicata* purposes,<sup>122</sup> as when the plaintiff seeks to press a separate claim otherwise barred by claim preclusion.<sup>123</sup> But short of that, dismissal by the Supreme Court on jurisdictional grounds will definitively extinguish the underlying claim.

In the alternative, the Court could address the issue in dicta if it concluded that a lower court invoking the “foreordained” exception had jurisdiction but was wrong on the merits.<sup>124</sup> However, this would generally require the coincidence of: (1) a merits issue of sufficient import to attract the Court’s attention; (2) a lower court that despite the import of the issue is willing to skip the jurisdictional inquiry after finding the merits so clear as to be “foreordained” by its own precedent; (3) a “difficult and perhaps close”<sup>125</sup> jurisdictional question which ultimately falls on the side of jurisdiction;

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122. See, e.g., *United States v. Lucchese*, 365 U.S. 290, 291 (1961) (recognizing that a judgment for a defendant based on lack of jurisdiction does not bar a plaintiff from bringing an action on the same cause in a court having jurisdiction); *Griener v. United States*, 900 F.3d 700, 705 (5th Cir. 2018) (“[A] dismissal for want of jurisdiction bars access to federal courts and is *res judicata* only of the lack of a federal court’s power to act. It is otherwise without prejudice to the plaintiff’s claims.’ A decision by a court without subject-matter jurisdiction is not conclusive of the merits of the claim asserted, meaning judgment should be entered without prejudice.” (citations omitted) (quoting *Voisin’s Oyster House, Inc. v. Guidry*, 799 F.2d 183, 188 (5th Cir. 1986)); cf. *FED. R. CIV. P.* 41(b) (“Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.”).

123. See, e.g., *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 8 (1st Cir. 2009).

124. “Carefully considered Supreme Court dicta, though not binding [on lower courts], ‘must be accorded great weight and should be treated as authoritative.’” *Igartúa v. United States*, 626 F.3d 592, 605 n.15 (1st Cir. 2010) (quoting *Crowe v. Bolduc*, 365 F.3d 86, 92 (1st Cir. 2004)).

125. See *Norton v. Mathews*, 427 U.S. 524, 530 (1976). Note that the first and second requirements are in tension. A merits issue worthy of Supreme Court review is unlikely to be so clear cut in the circuit court. And even if it is, the weight of the issue will likely

and (4) a Supreme Court willing to confront an issue unnecessary to the resolution of the case. That combination seems improbable.

*B. The Circuit Courts Should Abandon or Revisit Their Mistaken Precedents*

In light of these considerations, it is up to the lower courts to jettison the “foreordained” exception on their own accord. This can be done in one of two ways. First, and more preferably, the courts can simply abandon the practice. Certainly, “[n]othing in *Steel Co.*” or any other Supreme Court case “bars a court from addressing a thorny threshold jurisdictional question, even if the merits question lends itself to straightforward resolution.”<sup>126</sup> Even those courts that have recognized the exception view it as wholly discretionary.<sup>127</sup> A lower court faced with the “foreordained” exception can therefore correct its mistaken course—without having to overrule any existing precedent—by just declining to follow this constitutionally dubious practice. Indeed, it *must* do so. As Justice Scalia avowed in *Steel Co.*, “[m]uch more than legal niceties are at stake here.”<sup>128</sup> The elements of jurisdiction “are an essential ingredient of separation

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incentivize a lower court to dismiss the case on a jurisdictional ground, rather than on the merits.

126. *Greensprings Baptist Christian Fellowship Tr. v. Cilley*, 629 F.3d 1064, 1066 n.1 (9th Cir. 2010) (emphasis added).

127. See, e.g., *Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 195 (2d Cir. 2002) (“[Where] a governmental provision is challenged as unconstitutional, and a controlling decision of this Court has already entertained and rejected the same constitutional challenge to the same provision, the Court *may* dispose of the case on the merits without addressing a novel question of jurisdiction.” (emphasis added)); *Emory v. United Air Lines, Inc.*, 720 F.3d 915, 920 (D.C. Cir. 2013) (purporting there is a “narrow set of circumstances in which a court *could* ‘decid[e] the cause of action before resolving Article III jurisdiction’” (emphasis added) (alterations in original) (citations omitted) (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 98 (1998))); *Firearms Policy Coal., Inc. v. Barr*, 419 F. Supp. 3d 118, 123 (D.D.C. 2019) (noting the “exception appears to be discretionary”).

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

and equilibration of powers.”<sup>129</sup> And any misguided attempt to operate “beyond the bounds of authorized judicial action” cannot be countenanced—in any circumstances.<sup>130</sup>

Second, the lower courts can formally revisit their mistaken precedents through an en banc rehearing the next time the exception is used to avoid a jurisdictional concern. Yet for the same reasons that the issue will probably not reach the Supreme Court,<sup>131</sup> this too is unlikely. It would take the rare case where the losing party *wants* to lose on jurisdictional grounds—as opposed to on the merits—for the opportunity even to arise.<sup>132</sup> At the same time, an ordinary three-judge panel on a Court of Appeals is practically bound to reject the chance to correct a prior panel’s mistake by itself. Although the panel would still hold the power to reverse course, “every circuit court has prescribed the prudential rule that a later panel may not overrule a decision issued by a prior panel; only the en banc court or the Supreme Court may take that step.”<sup>133</sup>

As matters stand, the courts find themselves in an ironic bind. The “foreordained” exception has revived the unconstitutional practice of hypothetical jurisdiction, but the procedural niceties of those cases triggering the exception do not provide a realistic way to correct the error. Going forward then, the lower courts should exercise forbearance and simply cast aside these mistaken precedents. They must instead follow the Supreme Court’s direction that

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129. *Id.*

130. *See id.* at 94.

131. *See generally* discussion *supra* Part III.A.

132. This did occur in *Firearms Policy Coalition*, where, because of the unique procedural posture of the case, the plaintiff sought dismissal on the merits in order to seek en banc review later; the defendant, however, sought dismissal on standing grounds. *See* 419 F. Supp. 3d at 123.

133. Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 2008 FED. CTS. L. REV. 1, 1 (2008) (collecting cases).

the establishment of jurisdiction is “vital” whenever “the court proposes to issue a judgment on the merits.”<sup>134</sup> They must recognize that there is no place in the constitutional scheme for jurisdiction “to be expanded by judicial decree.”<sup>135</sup>

#### CONCLUSION

“Subject-matter jurisdiction properly comprehended . . . refers to a tribunal’s ‘power to hear a case,’ a matter that ‘can never be forfeited or waived.’”<sup>136</sup> *Steel Co.* reaffirmed this core tenet of constitutional law, and it categorically proscribed the exercise of hypothetical jurisdiction to resolve a case on the merits. However, since then, many federal courts have flouted this principle. They have continued to hear and decide cases where they might lack jurisdiction, at least where a relatively easy merits question is “foreordained” by a prior decision of the appellate court. This practice cannot be squared with Article III. Nor can it be squared with *Steel Co.* Nor is it wise. The lower courts should therefore abandon this exception, heed *Steel Co.*’s admonitions, and return the jurisdictional inquiry to its proper place as “the first and fundamental question” in each and every case.<sup>137</sup>

Brian A. Kulp

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

135. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

136. *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 81 (2009) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)).

137. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (citation omitted).