2008

Jurisdictional Resequencing and Restraint The Jurisprudence of Justice Ruth Bader Ginsburg

Heather Elliott
University of Alabama - School of Law, helliott@law.ua.edu

JURISDICTIONAL RESEQUENCING AND RESTRAINT

HEATHER ELLIOTT*

Abstract: Justice Ruth Bader Ginsburg is well known for her restrained jurisprudence, and yet one line of her opinions has been criticized as "substantially illegitimate." *Ruhrgas AG v. Marathon Oil Co.* and *Sinochem International Co. v. Malaysia International Shipping Corp.* both involve "jurisdictional resequencing," which in certain circumstances permits a federal court to decide a threshold jurisdictional question, such as forum non conveniens, before it resolves the question of subject-matter jurisdiction. Because jurisdictional resequencing allows courts to decide questions when they may in fact lack subject-matter jurisdiction, at least one critic has said this doctrine is "close to the line that separates valid authority from unprincipled usurpation." In this Article, I argue that, contrary to this criticism, both Ruhrgas and Sinochem demonstrate Justice Ginsburg's restrained decisionmaking. In particular, both decisions reflect her view that the federal courts, as the undemocratic institutions in our government, should be careful to exercise their power when it might trench on the powers of the elected branches. By avoiding complex questions of subject-matter jurisdiction—control of which, apart from constitutional constraints, is given to Congress—the courts avoid questions about the margins of their power, precisely the kinds of questions that might involve judicial overreaching.

* Assistant Professor, the University of Alabama School of Law. Law clerk, the Honorable Ruth Bader Ginsburg, October Term 2001. I would like to thank the *New England Law Review* for inviting me to participate in this celebration of the Justice's invaluable contributions to the law.

INTRODUCTION

Ruth Bader Ginsburg pursues a jurisprudence characterized by restraint: as she has written, such restraint is essential for an undemocratic branch in a democratic republic.[1] It is surprising, then, to find that one line of opinions written by Justice Ginsburg has been criticized as "substantially illegitimate."[2]

---

1. Upon Justice Ginsburg's nomination to the Supreme Court, *New York Times* reporter Linda Greenhouse referred to her as a "'judicial-restraint liberal[,]' [b]y [which, Greenhouse] meant that she has a liberal vision of a muscular and broadly inclusive Constitution coupled with a pragmatist's sense that the most efficacious way of achieving the Constitution's highest potential as an engine of social progress is not necessarily through the exercise of judicial supremacy." Linda Greenhouse, *Learning to Listen to Ruth Bader Ginsburg*, 7 N.Y. CITY L. REV. 213, 218 (2004) (quoting Linda Greenhouse, *The Supreme Court: A Sense of Judicial Limits*, N.Y. TIMES, July 22, 1994, at A1). Justice Ginsburg's restraint famously extends to her views on judicial writing: Cases should be decided narrowly for the most part; concurrences are written, not to trumpet one's own views, but to clarify and enhance understanding; dissents are written only when necessary and only in reasoned tones. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1191-93 (1992) [hereinafter *Judicial Voice*]; Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 134 (1990) [hereinafter *Writing Separately*]; *see also generally* David L. Shapiro, *Justice Ginsburg's First Decade: Some Thoughts About Her Contributions in the Fields of Procedure and Jurisdiction*, 104 COLUM. L. REV. 21, 30-31 (2004); *see generally* Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 BROOK. L. REV. 629 (2003).

2. Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 3-4 (2001).

Ruhrgas AG v. Marathon Oil Co.[3] and *Sinochem International Co. v. Malaysia International Shipping Corp.*[4] both involve what has been labeled "jurisdictional resequencing."[5] Both permit a federal court to decide a threshold jurisdictional question, such as personal jurisdiction or forum non conveniens, before resolving the question of subject-matter jurisdiction when the subject-matter jurisdiction question is complex and the other threshold question is more easily resolved.[6]

A plurality of the Court had flatly rejected a similar approach when the easier question involved the merits of the case in *Steel Co. v. Citizens for a Better Environment.*[7] There, the plurality stated that a complicated subject-matter jurisdiction question (in that case, standing) could not be ignored even when the same party would win under the simpler merits question—in other words, a court could not assume "hypothetical jurisdiction" to reach the merits.[8]

Some critics have contended that the jurisdictional-resequencing cases partake of the same flaw as did the hypothetical-jurisdiction cases. They involve a court making a decision when it lacks the power to do so. Thus, Professor Shapiro has described his reaction to *Ruhrgas* as one of "puzzlement[]"[9] and Scott Idleman has written a lengthy article denouncing the *Ruhrgas* decision.[10] *Sinochem* is presumably subject to similar criticism, although few explicit criticisms have yet been made.

---

3. 526 U.S. 574 (1999).

4. 127 S. Ct. 1184 (2007).

5. Idleman, *supra* note 2, at 3. Idleman coined this term based on the language in *Ruhrgas*. *See id.* at 3 n.5 ("The Court described the practice as the 'sequencing of jurisdictional issues.'" (quoting *Ruhrgas*, 526 U.S. at 584)).

6. *See Sinochem*, 127 S. Ct. at 1188; *Ruhrgas*, 526 U.S. at 578. *Sinochem* specifically involved a situation where the lower courts concluded they had subject-matter jurisdiction, were unsure of personal jurisdiction, and dismissed on forum non conveniens grounds; the Supreme Court nevertheless clearly held that a forum non conveniens dismissal could occur prior to a finding of jurisdiction under either head. *See Sinochem*, 127 S. Ct. at 1188.

7. *See* 523 U.S. 83, 91-93, 101 (1998).

8. *Id.* at 101. As I discuss in more detail below, *infra* notes 28-34, an absolute ban on "hypothetical jurisdiction" received only plurality support. As the Court acknowledged in *Ruhrgas*, Justices O'Connor and Kennedy joined on the predicate that there had been exceptions to the rule and might be others in the future. *See* 526 U.S. at 577. The *Steel Co.* case thus stands for the proposition that a court "generally" must resolve subject matter jurisdiction before addressing the merits. *See id.*

9. Shapiro, *supra* note 1, at 30-31.

10. Idleman, *supra* note 2, at 3-5; *see also* Jack H. Friedenthal, *The Crack in the* Steel *Case*, 68 GEO. WASH. L. REV. 258, 259-60, 268 (2000) (arguing that the reasoning of the *Ruhrgas* decision is flawed).

How is this possible? How could someone like Justice Ginsburg, known for her restrained decisionmaking, write opinions that are alleged to permit outrageous and *ultra vires* action by the federal courts?

In this Article, I suggest that her critics have misunderstood the purpose of this line of cases. Both *Ruhrgas* and *Sinochem* demonstrate Justice Ginsburg's restrained decisionmaking. In particular, both decisions reflect her view that the federal courts, as the undemocratic institutions in our government, should be careful to exercise their power when it might trench on the powers of the elected branches.[11] By avoiding complex questions of subject-matter jurisdiction—control of which, apart from constitutional constraints, is given to Congress—the courts avoid questions about the margins of their power, precisely the kinds of questions that might involve judicial overreaching.

A similar respect for the democratic branches lies behind other opinions by Justice Ginsburg, including *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*[12] *Ruhrgas* and *Sinochem* are thus not departures from Justice Ginsburg's jurisprudence of restraint, but wholly consistent with it.

In Part I of this Article, I sketch the contours of the jurisdictional-resequencing cases and summarize the criticisms made of *Ruhrgas* and *Sinochem*. In Part II, I offer an alternative view of these cases, one that rejects the possibility that Justice Ginsburg authorized court action *ultra vires*; I explain that these cases instead reflect her insistence that courts recognize their proper role in our republic. I then, in Part III, demonstrate the consistency of *Ruhrgas* and *Sinochem* with Justice Ginsburg's larger jurisprudence. Far from being the puzzling or even lawless decisions that critics fear, both cases demonstrate her "admirable willingness to exercise judicial restraint."[13]

I. Jurisdictional Resequencing and Its Critics

Ruhrgas and *Sinochem* both involve the following question: "must subject-matter jurisdiction precede [other threshold jurisdiction questions] on the decisional line? Or, do federal district courts have discretion to avoid a difficult question of subject-matter jurisdiction when the absence of

---

11. *See* ROY M. MERSKY ET AL., THE SUPREME COURT OF THE UNITED STATES 18 HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOTMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1993: RUTH BADER GINSBURG 260 (1995). "My approach, I believe, is neither 'liberal' nor 'conservative.' Rather, it is rooted in the place of the judiciary—of judges—in our democratic society." *Id.*

12. 528 U.S. 167, 174, 180 (2000) (addressing the issues of standing and mootness).

13. *See* Shapiro, *supra* note 1, at 22.

[jurisdiction on another theory] is the surer ground?"[14] Both cases arise against the "backdrop"[15] of the *Steel Co.* decision, where four justices ruled that a federal court could never address a merits question before resolving subject-matter jurisdiction,[16] and three additional justices joined on the condition that there might be some exceptions to that rule.[17]

The jurisdictional-resequencing cases—and the critics thereof—are best understood against the *Steel Co.* backdrop. In this Part, I therefore describe the *Steel Co.* case in some detail before turning to *Ruhrgas*, *Sinochem*, and their critics.

A. The Jurisdiction-Merits Sequence: *Steel Co.*

Steel Co. is better known as a standing case,[18] but its importance here lies in the analysis that preceded the standing decision. In that analysis, the Court rejected a doctrine, hypothetical jurisdiction, that had been followed widely in the lower courts.[19] Courts had assumed jurisdiction by hypothesis in order to resolve cases by reaching simple merits questions. The logic was one of efficiency: if you know the party is going to lose on the merits regardless, why waste time with a complicated jurisdiction question?[20] The Supreme Court, however, rejected that efficiency argument in *Steel Co.*

---

14. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577-78 (1999); *see also* Sinochem Int'l Co. v. Malay. Int'l Shipping Co., 127 S. Ct. 1184, 1190 (2007).

15. *Ruhrgas*, 526 U.S. at 577.

16. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-02 (1998).

17. *See id.* at 110-11 (O'Connor, J., concurring, joined by Kennedy, J.; Breyer, J., concurring in part).

18. *See, e.g.*, Heather Elliott, Comment, Steel Company v. Citizens for a Better Environment, 26 ECOLOGY L.Q. 709, 709 n.3 (1999) (stating that "*Steel Company* is viewed as the new statement of standing law, replacing *Lujan* as the standard reference for standing doctrine in recent cases involving standing" and collecting cases). *See also generally* Michael J. Wray, *Still Standing? Citizen Suits, Justice Scalia's New Theory of Standing and the Decision in* Steel Company v. Citizens for a Better Environment, 8 S.C. ENVTL. L.J. 207 (2000); Aaron Roblan & Samuel H. Sage, Steel Company v. Citizens for a Better Environment*: The Evisceration of Citizen Suits Under the Veil of Article III*, 12 TUL. ENVTL. L.J. 59 (1998).

19. *See, e.g.*, Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 237 & n.5 (1999) (identifying cases from every circuit using hypothetical jurisdiction).

20. To put the matter colloquially, a court asserting hypothetical jurisdiction is saying something like this to the plaintiff: "If there is no jurisdiction, you lose. The jurisdiction question is hard, though, and so there might be jurisdiction; but assuming there is, you obviously lose on the merits. So either way, you lose." Addressing the straightforward question first thus makes the court's work easier.

The facts of the case are simple. In 1995, Citizens for a Better Environment (CBE) gave notice of hazardous chemical inventory violations to The Steel Company under the Emergency Planning and Community Right to Know Act (EPCRA).[21] The company corrected its violations within the 60-day notice period, but CBE nevertheless filed suit in federal district court, seeking civil penalties for the past violations.[22] The district court ultimately dismissed for failure to state a claim,[23] holding that EPCRA did not permit suit for past violations.[24] Interpreting EPCRA to the contrary, the Seventh Circuit reversed.[25] This created a split with the Sixth Circuit on the meaning of EPCRA,[26] and the Supreme Court granted certiorari.[27]

The Court did not, in the end, resolve that split.[28] To interpret the statute would involve reaching the merits of the case, but The Steel Company had challenged CBE's standing for the first time in its petition for certiorari. Was it possible to reach the merits without first deciding the jurisdictional question? In other words, was hypothetical jurisdiction a permissible practice? The Court gave a slightly qualified "no."

A plurality of the Court concluded that a federal court can *never* reach the merits until it has ascertained that subject-matter jurisdiction is present.[29] This opinion imposed a strict "order of operations"[30] on the federal courts: Subject-matter jurisdiction must always be assured before any merits inquiry may proceed. The doctrine of "hypothetical jurisdiction" that had been followed in the lower courts was illegitimate: "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."[31]

---

21. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 87-88 (1998).

22. *See* Citizens for a Better Env't v. Steel Co., No. 95-C-4534, 1995 WL 758122, at *1-2 (N.D. Ill. Dec. 21, 1995).

23. *Id.* at *2; FED. R. CIV. P. 12(b)(6).

24. *See Steel Co.*, 1995 WL 758122, at *4.

25. *See* Citizens for a Better Env't v. Steel Co., 90 F.3d 1237, 1242, 1245 (7th Cir. 1996), *vacated*, 523 U.S. 83 (1998).

26. *Compare* Atl. States Legal Found., Inc. v. United Musical Instruments, U.S.A., Inc., 61 F.3d 473, 475 (6th Cir. 1995) (holding EPCRA did not permit suit for past violations), *with Steel Co.*, 90 F.3d at 1244-45.

27. *See* Steel Co. v. Citizens for a Better Env't, 519 U.S. 1147, 1147 (1997).

28. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95, 109-10 (1998).

29. *Id.* at 93-94.

30. Justice Breyer uses this term in his concurrence. *Id.* at 111 (Breyer, J., concurring).

31. *Id.* at 101-02 (majority opinion). Nor could the EPCRA question be viewed as a jurisdictional question equivalent to the Article III standing question: "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only

Six justices, however, expressed disagreement with an absolute rejection of hypothetical jurisdiction. Justice O'Connor (joined by Justice Kennedy) noted that exceptions to the general jurisdiction-merits sequence had been made in the past and could possibly be justified in the future.[32] Justice Breyer concurred similarly.[33] Justice Stevens, joined by Justice Ginsburg, would have avoided the standing question under the *Ashwander* doctrine: because the statutory question resulted in the same outcome—dismissal of the plaintiff's suit—the plurality had no reason to elaborate on the requirements of Article III.[34]

Steel Co. thus provides the backdrop for the jurisdictional-resequencing cases: while only four justices voted for a mandatory order of operations under which subject-matter jurisdiction questions would always precede merits questions, a majority ruled that federal courts should, absent strong justifications to the contrary, decide subject-matter jurisdiction before reaching any merits questions.

B. Jurisdictional Resequencing: *Rurhgas* and *Sinochem*

Steel Co. focused on the logical hierarchy between jurisdiction and merits questions; the Court in *Ruhrgas* and *Sinochem* faced the question whether a similar hierarchy existed between different jurisdictional questions—specifically, subject-matter jurisdiction and personal jurisdiction in *Ruhrgas*, and subject-matter jurisdiction, personal jurisdiction, and forum non conveniens in *Sinochem*.[35] The Court—unanimous in both cases—declined to impose a strict order of operations among such threshold questions.[36]

---

when the claim is so insubstantial . . . or otherwise completely devoid of merit as not to involve a federal controversy," an argument not plausible in this case. *Id.* at 89 (internal quotation marks and citations omitted).

32. *See id.* at 110-11 (O'Connor, J., concurring) ("[I]n 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 . . . .'" (quoting Norton v. Mathews, 427 U.S. 524, 532 (1976))).

33. *See id.* at 111 ("The Constitution does not impose a rigid judicial 'order of operations,' when doing so would cause serious practical problems." (citations omitted)).

34. *See Steel Co.*, 523 U.S. at 123-24 (Stevens, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.") (citing Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring))).

35. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 127 S. Ct. 1184, 1188 (2007); Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577-78 (1999).

36. *Sinochem*, 127 S. Ct. at 1188; *Ruhrgas*, 526 U.S. at 577-78.

1. *Ruhrgas AG v. Marathon Oil Co.*

In *Ruhrgas*, a group of related oil companies (two American and one Norwegian) sued a German purchaser for a variety of torts, including fraud, over a deal involving gas produced in the Norwegian North Sea.[37] The oil companies (collectively, Marathon) brought suit in Texas state court; the purchaser (Ruhrgas) removed to federal court and then sought dismissal for lack of personal jurisdiction.[38]

Ruhrgas claimed three possible bases for federal jurisdiction in justifying its removal. All were complicated: Ruhrgas contended that diversity jurisdiction existed because the Norwegian plaintiff had been fraudulently joined to defeat diversity; that federal question jurisdiction existed under the federal common law of foreign and international relations; and that 9 U.S.C. § 205, permitting removal of cases relating to international arbitration agreements, authorized jurisdiction.[39] The personal jurisdiction question, by contrast, was ordinary: Marathon had asserted jurisdiction over Ruhrgas on the basis of only three meetings in Houston and certain correspondence between Ruhrgas and Marathon; Ruhrgas had no other contacts with Texas.[40] The district court thus dismissed for lack of personal jurisdiction without addressing the subject-matter jurisdiction question.[41]

The Fifth Circuit reversed: in a removed case, the court said, it was particularly crucial that the court address subject-matter jurisdiction first; otherwise, a determination of facts by the federal court might infringe on the prerogatives of the state court in later litigation. The panel then found that none of Ruhrgas's claimed bases for subject-matter jurisdiction survived scrutiny and ordered the case remanded to Texas state court.[42] On rehearing en banc, the Fifth Circuit agreed that the question of subject-matter jurisdiction was logically prior to that of personal jurisdiction in a removed case, but vacated the panel's decision, remanding to the district

37. 526 U.S. at 578-79.

38. *Id.* at 579-80.

39. *Id.* The argument under 9 U.S.C. § 205 arose because the contract between the parties provided for arbitration in Sweden. *Id.* at 579.

40. *Id.* at 579.

41. *Id.* at 580.

42. Marathon Oil Co. v. Ruhrgas, 115 F.3d 315, 318-21 (5th Cir. 1997).

court for further inquiries into the subject-matter jurisdiction arguments.[43] Because the Second Circuit had *rejected* a rigid hierarchy of jurisdictional questions, the Supreme Court granted certiorari to resolve the split.[44]

The Court found that subject-matter jurisdiction and personal jurisdiction were threshold questions that could be addressed in either order.[45] Justice Ginsburg, writing the majority opinion, acknowledged that "[t]he character of the two jurisdictional bedrocks unquestionably differs": one limits the power of the courts within the constitutional structure, while the other protects individuals from arbitrary exercise of power; the latter is a waivable defect, while the former is nonwaivable.[46]

Nevertheless, she wrote, subject-matter jurisdiction is not "ever and always the more 'fundamental.'"[47] While ultimately linked to constitutional requirements, many such questions are statutory rather than constitutional. The question of whether Marathon had fraudulently defeated diversity, for example, involved no constitutional principle: Article III itself does not mandate complete diversity, even if 28 U.S.C. § 1332 does.[48] Personal jurisdiction, on the other hand, always derives from the Due Process Clause.[49] Because a court will lack jurisdiction regardless of the path it chooses to follow to resolve the case, the *Steel Co.* "principle does not dictate a sequencing of jurisdictional issues."[50]

This is true, Justice Ginsburg wrote, even when the case is removed from a state court. A personal jurisdiction ruling may well be preclusive in subsequent state-court litigation, but so may be aspects of a federal court's

---

43. Marathon Oil Co. v. Ruhrgas, 145 F.3d 211, 220, 225 & n.23 (5th Cir. 1998) (en banc). Holding that:

> Because of the novelty of some of the subject-matter jurisdiction claims, and because our court has been understandably pre-occupied in reconciling the confused state of our precedent concerning a district court's obligations, we remand the issue of whether there exists federal subject-matter jurisdiction to the able district court for its determination in the first instance.

Id. at 225. The Court added in a footnote that "[a]lthough the district court may consider the panel opinion persuasive on the question of subject-matter jurisdiction, that opinion has been vacated and thus is no longer binding precedent, and we express no opinion on that issue." *Id.* at 225 n.23 (citations omitted).

44. Ruhrgas AG v. Marathon Oil Co., 525 U.S. 1039 (1998).

45. *Ruhrgas*, 526 U.S. at 583.

46. *See id.* at 583-84.

47. *Id.* at 584.

48. *Id.* (citing State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31 (1967)).

49. *Id.* (citing Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982)).

50. *Id.*

subject-matter jurisdiction determinations.[51] Moreover, courts can consider federalism issues in deciding which threshold jurisdictional question to answer first: "A State's dignitary interest bears consideration when a district court exercises discretion in a case of this order."[52]

Permitting the federal courts to determine the sequence in which to address threshold questions allows those courts to address "concerns of judicial economy and restraint."[53] Thus, whatever *Steel Co.* said about the jurisdiction-merits ordering, *Ruhrgas AG* held that "there is no unyielding jurisdictional hierarchy."[54]

2. *Sinochem International Co. v. Malaysia International Shipping Corp.*

Sinochem reached the same conclusion. In that case, a Chinese importer sued a Malaysian shipping company in Chinese court, alleging fraud related to a bill of lading.[55] The Malaysian company (MISC) in turn sued in the federal District Court for the Eastern District of Pennsylvania, contending that Sinochem had made misrepresentations to the Chinese court, causing seizure of MISC's vessel and consequent financial loss.[56] Sinochem sought dismissal on the grounds of lack of subject matter jurisdiction, lack of personal jurisdiction, and forum non conveniens.[57]

The district court concluded that it had subject matter jurisdiction in admiralty and that further discovery might permit it to find personal jurisdiction.[58] Rather than resolve the personal jurisdiction question however, it went on to dismiss on grounds of forum non conveniens.[59] The Third Circuit held that the district court had improperly reached that

---

51. *Ruhrgas*, 526 U.S. at 585.

52. *Id.* at 586.

53. *Id.*

54. *Id.* at 578.

55. *See* Sinochem Int'l Co., Ltd. v. Malay. Int'l Shipping Corp., 127 S. Ct. 1184, 1188 (2007).

56. *Id.* at 1189.

57. *Id.*

58. Malay. Int'l Shipping Corp. Berhad v. Sinochem Int'l Co. Ltd., No. 03-3771, 2004 WL 503541, at *2 (E.D. Pa. Feb. 27, 2004). The court found that the seizure of the vessel occurred in navigable waters (albeit non-U.S. waters), and the dispute had a sufficient connection to maritime activities, thus satisfying the requirements of admiralty jurisdiction. *Id.* at *3.

59. *See id.* at *12.

question and should first have determined whether personal jurisdiction was present.[60] The Supreme Court granted certiorari because of a split among the circuit courts of appeal on this sequencing issue.[61]

Because "[a] *forum non conveniens* dismissal 'den[ies] audience to a case on the merits,'"[62] Justice Ginsburg wrote for the Court, it is a threshold question like subject matter jurisdiction and personal jurisdiction. Thus, just as in *Ruhrgas*, a court may address these threshold questions in any order: "[a] district court may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant."[63] In this case, in particular, further proceedings on personal jurisdiction "would have burdened Sinochem with expense and delay[, a]nd all to scant purpose."[64]

Under both *Ruhrgas* and *Sinochem*, then, there is no mandatory order of operations when answering threshold jurisdictional questions. While subject-matter jurisdiction should be addressed first in "the mine run of cases," the federal courts have the discretion to answer other jurisdictional questions first when circumstances justify that departure.

C. Criticism of Jurisdictional Resequencing

Professor Shapiro identifies Justice Ginsburg's opinion in *Ruhrgas* as one of few "puzzlements"[65] in a jurisprudence that is otherwise "characterized by qualities that evince judging at its best."[66] The problem, he contends, is that, if the federal court decides the personal jurisdiction question, that decision is preclusive in further litigation.[67] For a court to

---

60. Malay. Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349 (3d Cir. 2006), *rev'd*, 127 S. Ct. 1184 (2007).

61. Sinochem Int'l. Co., Ltd. v. Malay. Int'l. Shipping Corp. 548 U.S. 942 (2006).

62. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 127 S. Ct. 1184, 1192 (2007) (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999)).

63. *Id.* at 1192.

64. *Id.* at 1194.

65. Shapiro, *supra* note 1, at 30-31.

66. *Id.* at 21.

67. *See id.* at 30 ("If the federal court did lack subject-matter jurisdiction (perhaps in terms of its power under Article III), is it appropriate for that court—given the limited, nonwaivable subject-matter authority of the judicial branch in our federal system—nevertheless to be deciding an issue that, under accepted notions of issue preclusion, may well bar a state court that does have subject matter jurisdiction from considering whether it has personal jurisdiction over the defendant? Does *Ruhrgas*, in other words, carry pragmatism a step too far?"). *But see* Idleman, *supra* note 2, at 29-30 n.172 (questioning applicability of preclusion to such a decision).

reach such a decision without first ascertaining its subject-matter jurisdiction raises the specter of preclusion without power. When this happens in a removed case, as it did in *Ruhrgas*, the problem is not simply a federal court acting in excess of its power: It is the federal court taking power away from a state court, in violation of federalism.[68] Shapiro's criticism is restrained, however, for he notes that he is not entirely sure himself that the case should have been decided differently.[69]

Not so for Professor Idleman. He contends that the jurisdictional resequencing contemplated by the *Ruhrgas* decision is "substantially illegitimate in relation to virtually all measures of doctrinal validity,"[70] and despite some virtues, "manifests little more than a desire for expediency, obtained at the expense of actual legitimacy."[71] More specifically, Professor Idleman accuses the Court of ignoring applicable precedent,[72] creating an incongruity with general theories of jurisdiction[73] and a nonconformity with historical concepts of judicial power,[74] all making *Ruhrgas* "close to the line that separates valid authority from unprincipled usurpation."[75]

For example, Idleman argues, *Ruhrgas* notes but "inexplicably deem[s] irrelevant" "the respective constitutional source of each jurisdictional requirement."[76] Subject-matter jurisdiction, because its source is Article III, "is properly characterized as an internal limitation on the existence of federal judicial power,"[77] while personal jurisdiction, rooted in the Due Process Clause, "is best characterized as an external limitation" that does not forbid the Court to act but instead makes any such action in the absence of personal jurisdiction not binding on the defendant.[78] Subject-matter jurisdiction is logically more fundamental, for without it the

68. *See* Idleman, *supra* note 2, at 29-30.

69. *See* Shapiro, *supra* note 1, at 31 ("These few doubts . . . are described as puzzlements because . . . I am not that sure of my own ground, because the time and space to delve into the cases in these brief remarks are too limited, and because my own thoughts may well have been affected by inappropriate influences, for example, in . . . *Ruhrgas* . . . I represented the losing party.").

70. Idleman, *supra* note 2, at 4.

71. *Id.*

72. *Id.* at 20-30.

73. *Id.* at 30-39.

74. *Id.* at 39-72.

75. *Id.* at 98.

76. Idleman, *supra* note 2, at 33, 35.

77. *Id.* at 33 (emphasis omitted).

78. *Id.* (emphasis omitted).

Court lacks power to act; moreover, violation of the subject-matter restriction harms "the people as a whole—the very source of federal sovereignty."[79]

If Professor Shapiro is correct, *Ruhrgas* is a puzzlement—albeit a "flyspeck[] in a judicial record that represents the best qualities a judge can have."[80] If Professor Idleman is right, *Ruhrgas* (and presumably *Sinochem*) are considerably worse than flyspecks and embody poor judging. These accusations are serious and, what is most surprising, are leveled against opinions written by a Justice recognized as one of our most careful jurists.[81] What explains this incongruity? That explanation is my task in the next Part.

II. Resequencing and Restraint

In this Part, I explain that the criticisms made of *Ruhrgas* and *Sinochem* overlook crucial justifications for the jurisdictional resequencing doctrine. When those opinions are properly understood, they make sense on their own terms and they square with Justice Ginsburg's view of the judiciary in our government's structure. It is necessary first to sketch a picture of that view, before returning to *Ruhrgas* and *Sinochem*.

A. Justice Ginsburg's View of the Third Branch

As I have already noted, Justice Ginsburg is known for her restrained approach to judging, and she has written about this in the context of day-to-day judicial work. Cases are normally to be resolved on the narrowest ground possible (although sometimes broader decisions are necessary).[82] Separate opinions should be used sparingly; concurrences should emphasize shared views and questions left open; dissents should be cordial.[83]

---

79. *Id.* at 36-37.

80. Shapiro, *supra* note 1, at 31.

81. *See* sources cited *supra* note 1.

82. *See generally* Ray, *supra* note 1, at 680 (noting that Justice Ginsburg's general policy of seeking a narrow decision sometimes gives way on issues where forward-looking guidance from the Court is necessary).

83. *See Judicial Voice*, *supra* note 1, at 1191; *see also* Shapiro, *supra* note 1, at 27-28.

> One of the Justice's admirable qualities as a judge is her willingness to write a concurrence (often a brief one, and, if possible, joining in the Court's opinion as well as its judgment) pointing out what the Court has not decided (or in some instances need not have decided). In my view, this judicial strategy is far more effective in its implications for the future than the well-known and overused "parade of horribles" in an overblown dissent.

One might pursue a restrained judicial path simply because collegiality is essential to the kind of group decisions made by judicial panels.[84] But Justice Ginsburg has made clear that her restraint arises more fundamentally from an institutional perspective: the knowledge that courts maintain their power when they perform their appointed role in a way that maintains the faith of the people in the institution.[85] When multiple opinions present a splintered resolution of a case, or when dissents undermine the credibility of the majority, the faith of the people in that judgment is threatened.[86] When a court issues a decision that seems to go beyond what is required to resolve the parties' dispute, it flirts with accusations of illegitimacy.[87] At the same time, separate opinions can serve an important role in our polity. For example, when a majority has given a problematic interpretation of a statute, writing separately may well be appropriate: "Rather than simply let sleeping dogs lie, a separate opinion may serve as a call for rectification by nonjudicial hands, by Congress or an executive agency. It may be important for future policy-making and projected legislation that the political branches should know the strength of a minority view."[88]

Id.

84. *See, e.g.*, Ruth Bader Ginsburg, *Indiana University School of Law – Indianapolis James P. White Lecture on Legal Education*, 40 IND. L. REV. 479, 481 (2007) ("Collegiality is key to the effective operation of a multi-member bench."); *see also An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1033-35 (2004) (describing Court customs that foster collegiality).

85. *See Judicial Voice*, *supra* note 1, at 1186 ("The judiciary, Hamilton wrote, from the very nature of its functions, will always be 'the least dangerous' branch of government, for judges hold neither the sword nor the purse of the community; ultimately, they must depend upon the political branches to effectuate their judgments." (quoting THE FEDERALIST No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

86. *See id.* at 1191.

> But overindulgence in separate opinion writing may undermine both the reputation of the judiciary for judgment and the respect accorded court dispositions. Rule of law virtues of consistency, predictability, clarity, and stability may be slighted when a court routinely fails to act as a collegial body. Dangers to the system are posed by two tendencies: too frequent resort to separate opinions and the immoderate tone of statements diverging from the position of the court's majority.

Id. (footnote omitted); *Writing Separately*, *supra* note 1, at 142 ("Concern for the well-being of the court on which one serves, for the authority and respect its pronouncements command, may be the most powerful deterrent to writing separately.").

87. *See Judicial Voice*, *supra* note 1, at 1191.

88. *Writing Separately*, *supra* note 1, at 145 (internal quotation marks omitted).

Thus, as then-Judge Ginsburg stated in her Supreme Court confirmation hearings, "[m]y approach, I believe, is neither 'liberal' nor 'conservative.' Rather, it is rooted in the place of the judiciary—of judges—in our democratic society."[89] She has emphasized that "judges play an interdependent part in our democracy. They do not alone shape legal doctrine but . . . participate in a dialogue with other organs of government, and with the people as well."[90] A court approaching its job properly will not reach out to rule definitively on controversial issues, thus blocking the elected branches, but will instead toss "[t]he ball . . . back into the legislators' court, where the political forces of the day [can] operate."[91] As Linda Greenhouse has put it, Justice Ginsburg has "a pragmatist's sense that the most efficacious way of achieving the Constitution's highest potential as an engine of social progress is not necessarily through the exercise of judicial supremacy."[92]

---

89. MERSKY ET. AL, *supra* note 11, at 260.

90. *Judicial Voice*, *supra* note 1, at 1198.

91. *Id.* at 1204-05. The duty to respect the other branches is reciprocal: then-Judge Ginsburg wrote of a mechanism that would permit Congress to participate more effectively in saving the courts from imprecise and ambiguous statutes. *See* Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 996, 1011-13 (1987) [hereinafter *Legislative Review*]. Such statutes pose a threat to the courts, because they "prompt 'disagreement among different judges and panels,' yielding 'inconsistency and unpredictability in the interpretation of the law.'" *Id.* at 996 (quoting Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 425-26 (1983-84)). Judge Ginsburg suggested a standing committee in Congress that would clarify and revise those statutes that courts identified as problematic. *Id.* at 1011-17. While her 1987 article focused on the efficiency that would be fostered by such attention from Congress, she has elsewhere noted the institutional costs to courts from Congress's failures. *See id.* at 1017; *see also* Ruth Bader Ginsburg, *Inviting Judicial Activism: A 'Liberal' or 'Conservative' Technique?*, 15 GA. L. REV. 539, 548 (1981) ("Courts are vulnerable to criticism for overreaching when Congress is too busy or too divided politically to speak with precision." (footnote omitted)); *see also id.* at 551 (criticizing a proposal to increase judicial review of agency action, describing it as "an avoidance device, a proposal to assign to the courts the responsibility that Congress should assume in the form of closer oversight of agency output and more precise standard-setting in statutes delegating authority to agencies").

92. Linda Greenhouse, *Learning to Listen to Ruth Bader Ginsburg*, 7 N.Y. CITY L. REV. 213, 218 (2004).

Then-Judge Ginsburg suggested, for example, that *Roe v. Wade* had gone too far,[93] not because women lacked the right established there[94] but because *Roe* cut short national- and state-level political debate on abortion and thus became "a storm center" that led to "the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures."[95] In *Roe*, "[h]eavy handed judicial intervention . . . appear[ed] to have provoked, not resolved, conflict."[96]

The Court's sex-based employment discrimination cases, by contrast, "proceeded cautiously [and took] no giant step."[97] Because these cases "largely trailed and mirrored changing patterns in society . . . [they] provoked no outraged opposition in legislative chambers."[98] Moreover, in those cases, "the Court . . . opened a dialogue with the political branches of government."[99]

Then-Judge Ginsburg noted that courts may sometimes need to "step ahead of the political branches," citing specifically *Brown v. Board of Education*.[100] But even there, her focus is on the functioning of our republic: "prospects in 1954 for state legislation dismantling racially segregated schools were bleak," and because Jim Crow's purpose and

93. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 376, 381-82, 385-86 (1985) [hereinafter *Autonomy and Equality*]; *see also Judicial Voice*, *supra* note 1, at 1198-1208.

94. *See, e.g.*, Gonzales v. Carhart, 127 S. Ct. 1610, 1640 (2007) (Ginsburg, J., dissenting) (dissenting from judgment upholding ban on intact dilation and evacuation abortions and noting that prior cases had "described the centrality of the decision whether to bear a child to a woman's dignity and autonomy, her personhood and destiny, her conception of her place in society" (internal quotation marks and citations omitted)).

95. *Autonomy and Equality*, *supra* note 93, at 376, 381.

96. *Id.* at 385-86.

97. *Id.* at 378 (noting that, while the Court's race discrimination cases took up (albeit one hundred years later) the promise of equality made by the Reconstruction Congress, the sex discrimination cases had "[n]o similar foundation, set deliberately by actors in the political arena").

98. *Id.*

99. *Judicial Voice*, *supra* note 1, at 1204.

100. *Id.* at 1206.

effect was to prevent any dialogue between the races, there was "no . . . prospect for educating the white majority."[101] Thus, court action was necessary to remedy a failure in the political system.[102]

But courts are, as they should be, reluctant to take on such battles: Such litigation "is business the courts do not like, and will undertake, when pressed by litigants, only in the last resort, when the political branches—the legislature and the executive—have failed to carry out their constitutional responsibilities, despite notice, and ample opportunity to address the problem."[103] Nor are courts the only protectors of human liberty: "the legislature is sometimes more sensitive to individual rights and the winds

---

101. *Id.* (contrasting race discrimination with sex discrimination, where "education of others—of fathers, husbands, sons as well as daughters—could begin, or be reinforced, at home").

The role of the judicial branch as a check on the majority's excesses was outlined in footnote four of *Carolene Products*, where the Court asked (without deciding) "whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). The Court specifically noted that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.*

102. *See id.*; *see also* Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 303 (1979). In that article, then-Professor Ginsburg addressed the problem of remedy in equal protection cases—should courts be able to extend government benefits to embrace a class of people unconstitutionally excluded, or is judicial power limited to striking down the unconstitutional statute? Critics had suggested that a plaintiff lacked standing to challenge a statute that gave benefits to one group but not to his: "'[P]laintiff does not complain about what Congress enacted . . . [but] about what Congress has not enacted. Plaintiff therefore has chosen the wrong forum to obtain the relief he seeks. He should take his complaint to Congress.'" *Id.* (quoting Memorandum in Support of Motion to Dismiss, at 20, Wiesenfeld v. Sec'y of HEW, 367 F. Supp. 981 (D.N.J. 1973), *aff'd sub nom.* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)). Professor Ginsburg responded to those critics by pointing out that their argument "would immunize from judicial review statutes that confer benefits unevenly. The legislature would have power, unchecked by the judiciary, to contract the equal protection principle in a significant class of cases." *Id.* Moreover, she pointed out, to limit the remedies available might create a worse institutional problem: "The courts act legitimately, I am convinced, when they employ common sense and sound judgment to preserve a law by moderate extension [of its benefits to an otherwise excluded class] where tearing it down would be far more destructive of the legislature's will." *Id.* at 324.

103. Ruth Bader Ginsburg, *An Overview of Court Review for Constitutionality in the United States*, 57 LA. L. REV. 1019, 1026 (1997) (referring specifically to structural reform litigation).

of change than the Court is,"[104] and the courts themselves can be guilty of "dreadful mistakes."[105] Thus, while the power of judicial review is essential to our constitutional balance of powers,[106] it—and the other powers granted to the judiciary by Article III—should be exercised circumspectly.

B. Resequencing as a Limit on Judicial Power

Ruhrgas and *Sinochem* reflect this consistent attention to institutional balance in our republic. To be sure, most comments on the jurisdictional resequencing cases have focused on the efficiency justification: courts should be able to decide the easiest jurisdictional question first, because otherwise the resources of the judicial branch are wasted.[107] This reason is certainly foremost in the cases. In *Sinochem*, for example, the Court holds that a district court may choose to answer a forum non conveniens question before a subject-matter or personal jurisdiction question "when considerations of convenience, fairness, and judicial economy so warrant."[108] Similarly, in *Ruhrgas*, resequencing is permissible given "concerns of judicial economy."[109]

Justice Ginsburg's opinion for the Court in *Ruhrgas* also, however, notes that resequencing is permissible given "concerns of . . . restraint."[110] What is "restrained" about a decision that may, in a removed case such as *Ruhrgas*, trample on state-court prerogatives;[111] or a decision that may, as in *Sinochem*, involve a court in addressing questions of international

---

104. *Remarks of Ruth Bader Ginsburg, March 11, 2004, CUNY School of Law*, 7 N.Y. CITY L. REV. 221, 230 (2004) (recounting the story of Belva Lockwood, who was denied admission to the Supreme Court bar until Congress ordered her admission, at which point she became the first woman admitted to that bar).

105. Ginsburg, *supra* note 103, at 1024 (citing as an example "the infamous 1857 *Dred Scott* decision," 60 U.S. 393 (1856 Term)).

106. *See id.* at 1021-22 (noting that the power of judicial review is not an ineluctable command of the Constitution and asserting that "[t]he additional check of court review may be explained on several grounds").

107. *See, e.g.* J. Stanton Hill, *Towards Global Convenience, Fairness, and Judicial Economy: An Argument in Support of Conditional Forum Non Conveniens Dismissals Before Determining Jurisdiction in United States Federal District Courts*, 41 VAND. J. TRANSNAT'L L. 1177, 1181 (2008) (arguing that courts should be allowed to conditionally dismiss under forum non conveniens before establishing jurisdiction for reasons of convenience, fairness, and judicial economy).

108. 127 S. Ct. 1184, 1192 (2007).

109. 526 U.S. 574, 586 (1999).

110. *Id.*

111. *See* Shapiro, *supra* note 1, at 30.

comity before it has determined its own jurisdiction? The answer lies in Justice Ginsburg's long-standing focus on the role of the federal courts within the constitutional structure.

Remember that both *Ruhrgas* and *Sinochem* permit resequencing only when the subject-matter jurisdiction question is appreciably more complicated than the other threshold question.[112] A complicated subject-matter jurisdiction question may be constitutional or, as in *Ruhrgas*, statutory. In either case, a court is being asked to determine the limits of its own power within our tripartite system of government, precisely the situation in which we have most reason to be concerned about a court's error.[113] Resequencing permits a court—which should be alive to the possibility that it might decide wrongly—to avoid treading on the boundary of its power, when it would lack jurisdiction for another threshold reason.

I note that, in *Ruhrgas*, the Court had jurisdiction as a matter of Article III power, because minimal diversity existed between the parties; in other words, the possibly fraudulent joinder of the Norwegian company did not defeat constitutional jurisdiction but merely the complete diversity required by 28 U.S.C. § 1332.[114] Even Professor Idleman seems to acknowledge that statutory subject-matter jurisdiction questions may be resequenced, so long as there is no underlying problem of Article III jurisdiction.[115] But even if the court faces a complicated *constitutional* question of jurisdiction, and if the result under any question is that the court lacks jurisdiction, there is a good argument that permitting the court to answer the simpler question—and by so doing to avoid entangling itself in

---

112. *See Ruhrgas*, 526 U.S. at 588 ("Where, as here, however, a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction."); *see also Sinochem*, 127 S. Ct. at 1192.

113. Indeed, some cases in the context of administrative law suggest that we should be more suspicious of an entity when it issues a decision assessing its own power. *See, e.g.*, N. Ill. Steel Supply Co. v. Sec'y of Labor, 294 F.3d 844, 847 (7th Cir. 2002) (refusing to apply *Chevron* deference to an agency's interpretation of its own jurisdiction). *But see, e.g.*, E.E.O.C. v. Seafarers Int'l. Union, 394 F.3d 197, 201 (4th Cir. 2005) (giving *Chevron* deference to agency's interpretation of its own jurisdiction).

114. *See Ruhrgas*, 526 U.S. at 584 ("In this case, . . . the impediment to subject-matter jurisdiction on which Marathon relies—lack of complete diversity—rests on statutory interpretation, not constitutional command. Marathon joined an alien plaintiff (Norge) as well as an alien defendant (Ruhrgas). If the joinder of Norge is legitimate, the complete diversity required by 28 U.S.C. § 1332 . . . but not by Article III, . . . is absent." (citation omitted)).

115. *See* Idleman, *supra* note 2, at 70 ("The rule [against resequencing] could even be a narrow one, requiring only that lower courts address the core Article III requirements first, leaving to their discretion the potential resequencing of other jurisdictional issues.").

the intricacies of a question it might get wrong—is the better course. It was for this reason that four Justices, including Justice Ginsburg, wrote separately in *Steel Co.*[116]

In any event, the fact that a particular subject-matter jurisdiction question is statutory, as in *Ruhrgas*,[117] does not mean that an answer to that question is devoid of constitutional import. Article III commits to Congress the power to create the lower courts.[118] Congress exercises that power by statute. If a jurisdictional statute raises a complicated question of interpretation, a court will necessarily risk making a mistake in divining Congress's intent. Lurking behind any such statutory question is always a constitutional separation-of-powers question: whether the court should venture to engage directly with the actions of a coordinate branch of government.[119]

By contrast, a determination of personal jurisdiction or forum non conveniens has little institutional import and creates fewer incentives for abuse. Especially when such a question is easily resolved, there is little reason to worry that the court is overstepping its bounds. Even if the court exercises power that might, for a purist, be considered *ultra vires*, that decision allows the court to avoid what could be a troubling subject-matter jurisdiction question—one that may well involve serious questions of institutional power—at virtually no cost. After all, if the answer to a personal jurisdiction question is obvious, any other state or federal court sitting in that state should have dismissed for lack of personal jurisdiction.

Once these larger separation-of-powers issues are recognized, the formalistic insistence on answering subject-matter jurisdiction questions seems unjustifiable. Even if, as Professor Idleman contends, "the people as a whole—the very source of federal sovereignty" are harmed when a court fails to ascertain its subject-matter jurisdiction before proceeding to any other question,[120] the people as a whole are also harmed when a court unnecessarily confronts a jurisdictional question—whether statutory or constitutional—when no answer to that question is needed to dismiss the case.

---

116. *See supra* notes 18-34 and accompanying text.

117. 526 U.S. at 581-82.

118. U.S. CONST. art. III, § 1.

119. "Detecting the will of the legislature . . . time and again perplexes even the most restrained judicial mind. . . . The will of the national legislature is too often expressed in commands that are unclear, imprecise, or gap-ridden . . . ." *Legislative Review*, *supra* note 91, at 995-96. Professor Idleman notes the separation-of-powers restraint on judicial power in passing, but takes the point no further. *See* Idleman, *supra* note 2, at 44 n.246.

120. Idleman, *supra* note 2, at 36-37.

If the harm to the people is identifiable in either case, then the question becomes which harm is best avoided. As the Court has long suggested, a court does best to avoid constitutional questions that are unnecessary to the resolution of a case.[121] It is perhaps for this reason that the decisions in *Ruhrgas* and *Sinochem* were unanimous.[122]

To be sure, the issue is trickier when the personal jurisdiction question is complex but still more readily answered than the subject-matter jurisdiction question. Here, as Professor Shapiro worries, a court might reach an incorrect decision on the personal jurisdiction question, which through preclusion could impinge on the power of a state court to decide that question if the case is refiled.[123] One might nevertheless believe that answering the personal jurisdiction question has fewer long-term institutional consequences: the determination is on the specific facts of one case regarding jurisdiction over a particular defendant, while a subject-matter jurisdiction question may well involve interpretation of a statute or a constitutional grant of power that would be more broadly influential.[124]

---

121. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

122. *See* Sinochem Int'l. Co. Ltd. v. Malay. Int'l. Shipping Corp., 127 S. Ct. 1184, 1188 (2007); Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577 (1999).

123. As discussed above, the preclusion question may be more complicated than might first appear. *See supra* note 67.

124. It is of course true that all personal-jurisdiction cases, even the influential ones, are at some level merely about a particular defendant, and it is thus also true that a court's answer to a personal-jurisdiction question can have consequences that reach further than the particular case. When, however, a case raises the kind of complex and novel issues of personal jurisdiction that might lead it to have an effect on other cases, it seems unlikely to be the first question addressed by a court that has concerns about its ability to proceed with the case because of multiple jurisdictional issues.

It is also true that that some subject-matter jurisdiction questions turn on banal factual inquiries that have almost no effect beyond the case at bar. For example, an amount-in-controversy question may boil down to whether the plaintiff could, in good faith, have claimed an amount in excess of $75,000. *See, e.g.*, Rosario Ortega v. Star-Kist Foods, Inc., 370 F.3d 124, 126-29 (1st Cir. 2004) (holding that a girl who cut her pinky finger on a tuna-fish can satisfied the amount-in-controversy requirement of 28 U.S.C. § 1332, because given the extent of the resulting injury, "we cannot say to a legal certainty that Beatriz could not recover a jury award larger than $75,000"), *rev'd on other grounds sub nom.* Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546 (2005). It seems unlikely, however, that a court would find this kind of subject-matter jurisdiction question the kind that justifies resequencing. *See Ruhrgas*, 526 U.S. at 587 ("[W]e recognize that in most instances subject-matter jurisdiction will involve no arduous inquiry.").

Thus, resequencing permits courts to avoid complex questions about the margins of their power. When the question is statutory—in other words, when Congress is responsible for defining the margins—resequencing allows courts to pretermit precisely the kinds of questions that might otherwise cause the courts to confront Congress unnecessarily. Even when the question is constitutional, resequencing allows a court to avoid a difficult constitutional question when the result is a jurisdictional dismissal. Properly understood, therefore, neither *Ruhrgas* nor *Sinochem* authorize court action *ultra vires*; instead, they add to the range of tools that courts may use to maintain their proper role in our republic.[125]

---

125. One criticism made of resequencing is that it leads courts to put off difficult jurisdictional questions so that they are never answered. *See* Idleman, *supra* note 2, at 17-18. Resequencing jurisdictional questions to avoid the tough subject-matter jurisdiction question,

> may not be economical to the extent that it merely perpetuates the difficulty for the next court and, indeed, for every court after that. From a system-wide perspective, in other words, resolving difficult jurisdictional issues at the time they are presented, though potentially inefficient for the court at hand, may ultimately be the more judicially economical approach.

Id. (internal quotations and footnotes omitted).

One might contend that this argument echoes that adopted by the Court in *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (noting that in qualified immunity cases, courts should resolve questions of whether a constitutional right was violated, because otherwise "[t]he law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case"). The Court retreated from *Saucier* just this term, on efficiency terms that echo the resequencing cases. *See* Pearson v. Callahan, 129 S. Ct. 808, 818 (2009) ("[T]he rigid *Saucier* procedure comes with a price. The procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case.").

In any event, the resequencing cases do not present the same threat. For resequencing to occur, a court must face at least two threshold questions, each of which is sufficient to resolve the case. It seems to me implausible that, in every question raising a difficult subject-matter jurisdiction issue, there will always also be a personal jurisdiction question, or a forum non conveniens question, or an Eleventh Amendment immunity question, or some other threshold question that will give the court a way to avoid the difficult subject-matter question. For example, the jurisdictional question that took over thirty-two pages for the Court to answer in *Empire HealthChoice Assurance, Inc. v. McVeigh* is surely the kind of question a court would hope to avoid, yet it was answered. 126 S. Ct. 2121 (2006) (finding federal question jurisdiction lacking for a case involving health-care reimbursement and discussing at length theories of federal question jurisdiction under *Clearfield Trust v. United States*, 318 U.S. 363 (1943), *Jackson Transit Authority v. Transit Union*, 457 U.S. 15 (1982), and *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005)).

III. Resequencing in the Larger Picture

A similar concern for the constitutional balance of powers lies behind other, better received opinions by Justice Ginsburg, including *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*[126] *Ruhrgas* and *Sinochem* are thus not departures from Justice Ginsburg's jurisprudence of restraint, but entirely consistent with it.

In her opinion for the Court in *Laidlaw*, for example, Justice Ginsburg wrote an opinion supporting standing in an environmental case that was a striking—and salutary[127]—about-face in what had seemed an unstoppable march[128] toward eradicating most forms of public-interest lawsuits in the guise of Article III restraint. The prior cases had repeatedly denied standing to citizen suitors, in part out of fear that Congress was intruding on the province of the executive by permitting citizen suits: as Justice Scalia wrote for the Court in *Lujan*, a strong doctrine of standing limits Congress's ability to turn the courts into "'virtually continuing monitors of the wisdom and soundness of Executive action.'"[129] Those standing cases were widely criticized for arrogating to the Court vast powers that properly lay with Congress.[130]

In *Laidlaw*, by contrast, the Court through Justice Ginsburg reined in the excesses of the standing doctrine, explicitly in favor of a different conception of separation of powers: it is not the role of the Court to limit Congress's legislative power through increasingly narrow rules of standing (here, by finding that the remedy Congress made available in a citizen suit could not satisfy the standing requirement of redressability).[131] Instead,

---

126. 528 U.S. 167, 171 (2000).

127. *See, e.g.*, Shapiro, *supra* note 1, at 24 (referring to the opinion as "a drink of clean water").

128. *See, e.g.*, Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 86, 109-10 (1998) (holding that environmental group lacked standing to bring action under the Emergency Planning and Community Right-To-Know Act of 1986); Lujan v. Defenders of Wildlife, 504 U.S. 555, 557-58, 578 (1992) (holding that wildlife conservation groups lacked standing to bring action under the Endangered Species Act of 1973); Allen v. Wright, 468 U.S. 737, 739, 766 (1984) (holding that parents of African-American public school children lacked standing to bring action against the Internal Revenue Service).

129. *Lujan*, 504 U.S. at 577 (quoting *Allen*, 468 U.S. at 760).

130. *See, e.g.*, Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1458 (1988); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221-22 (1988).

131. *See Laidlaw*, 528 U.S. at 187 (deferring to congressional determination of what remedies would achieve congressional goals by deterring undesirable behavior and noting that choice of remedy "'is a matter within the legislature's range of choice. Judgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to

Justice Ginsburg wrote, Congress's choice of remedy deserved deference. For the Court to use standing to interfere with congressional purpose would be to exceed the bounds of the judicial power.[132]

Justice Ginsburg has written other opinions with similar attention to the role of the unelected judiciary in our democratic republic. Professor Shapiro points to her dissent in *Great-West Life & Annuity Ins. Co. v. Knudsen*,[133] where her analysis "goes to the heart of the judicial role in the interpretation of legislation . . . emphasiz[ing] a sophisticated understanding of legislative purpose and the proper role of the Court in promoting that purpose."[134]

Similarly, Justice Ginsburg has used her separate opinions to invite the participation of the democratic branches in resolving disputes. As Professor Guinier has explained, "Justice Ginsburg has . . . offered dissents spurring real world action. She has engaged in an ongoing conversation about the meaning of right and wrong in what Professor Neal Katyal might call 'advicegiving' to Congress or what Professor Joe Sax called a 'legislative remand.'"[135] Thus, Guinier explains, in the recent case of *Ledbetter v. Goodyear Tire & Rubber Co.*,[136] Justice Ginsburg used her dissent to elicit the participation of the democratic branches:

> Witness Justice Ginsburg's oral dissent in *Ledbetter*, after which the House of Representatives responded quickly to her call for a legislative fix to the Court majority's crabbed reading of a congressional statute. Despite the fact that she represented a minority view, Justice Ginsburg's appeal to the political branches gave that view greater traction.[137]

---

scientific basis'" (quoting Tigner v. Texas, 310 U.S. 141, 148 (1940))); *see also* Richard J. Pierce, Jr., Comment, *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1170-71, 1195-201 (1993) (arguing that *Lujan* is aimed at "the evisceration of the principle of legislative supremacy").

132. *See* Shapiro, *supra* note 1, at 24 (describing *Laidlaw* as a welcome change from "decisions in which the requirements [of justiciability] seem to have become insuperable barriers to effective law enforcement"); *see also* Elliott, *supra* note 130 (noting that the view of separation of powers reflected by Justice Scalia's opinion in *Lujan* and later in dissent in *Laidlaw* was "hotly contested").

133. 534 U.S. 204, 224 (2002) (Ginsburg, J., dissenting).

134. Shapiro, *supra* note 1, at 23.

135. Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 40 (2008) (citing Neal Kumar Katyal, *Judges As Advicegivers*, 50 STAN. L. REV. 1709, 1727 (1998); JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 157 (1971)); *see also Judicial Voice*, *supra* note 1, at 1191.

136. 127 S. Ct. 2162 (2007).

137. Guinier, *supra* note 135, at 60-61 (internal quotation marks omitted).

The recent cases regarding detainees at the Guantanamo Bay military prison arise in perhaps the most freighted context of all, demonstrating the careful balance in the exercise of judicial power that Justice Ginsburg demands.[138] In *Hamdi*, Justice Ginsburg joined Justice Souter in avoiding the constitutional challenge raised by the detainees, instead resolving the case on a narrow statutory ground;[139] in *Rasul*, she joined the majority in deciding merely that jurisdiction over the detainees' habeas petitions existed, remanding the petitions for further decision in the lower courts;[140] in *Hamdan*, she joined the majority in holding that Congress had not acted clearly to strip the courts of jurisdiction over the detainees' petitions.[141] In all these decisions, Justice Ginsburg voted to constrain the power of Congress and the Executive. For example, she later described the Court's opinion in *Hamdan* in this way:

> The Court's decision was rooted in the Constitution's division of authority among three branches of government. Concentration of power in the Executive Branch, the Court observed, is antithetical to the Constitution's tripartite scheme. It is the Court's obligation . . . to make certain that if military tribunals are established to classify and try the Guantánamo detainees, the lawmaking branch—Congress—has approved that course.[142]

At the same time, she has decided those questions narrowly, recognizing that sweeping decisions are those most likely to call the legitimacy of courts' power into question.[143]

As these cases and her academic writing show, Justice Ginsburg has consistently been concerned with maintaining the proper role of the federal judge—appointed to life tenure rather than subject to the control of the

---

138. For a discussion of the Guantanamo Bay cases, including the Court's most recent decision, see generally Daniel R. Williams, *Who Got Game?* Boumediene v. Bush *and the Judicial Gamesmanship of Enemy-Combatant Detention*, 43 NEW ENG. L. REV. 1 (2008); Geoffrey S. Corn, *The Role of the Courts in the War on Terror: The Intersection of Hyperbole, Military Necessity, and Judicial Review*, 43 NEW ENG. L. REV. 17 (2008); Douglass Cassel, *Liberty, Judicial Review and the Rule of Law at Guantanamo: A Battle Half Won*, 43 NEW ENG. L. REV. 37 (2008).

139. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

140. *See* Rasul v. Bush, 542 U.S. 466, 484 (2004).

141. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 574-76 (2006).

142. Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 NEB. L. REV. 1, 14 (2006).

143. *See generally id.* (discussing the Guantanamo cases as part of a larger discussion of threats to the independence of federal judges).

ballot box—in our tripartite structure of government. As shown above, that concern for the proper role carries through in the jurisdictional-resequencing decisions.

CONCLUSION

I started this Article by noting that Justice Ginsburg is known for her jurisprudence of restraint,[144] and yet the jurisdictional-resequencing opinions she has written have been described as essentially lawless.[145] It has been my mission here to repudiate that view and to explain that *Ruhrgas* and *Sinochem* are instead consistent with the Justice's larger jurisprudence, particularly her career-long respect for the role of an unelected judiciary in our system of separated powers. Rather than inviting judicial anarchy, both cases reflect the careful attention of one who "display[s] the traits of judicial greatness."[146]

144. *See supra* note 1 and accompanying text.

145. *See supra* Part I.C. (describing in particular Professor Idleman's criticisms).

146. Gerald Gunther, *Ruth Bader Ginsburg: A Personal, Very Fond Tribute*, 20 U. HAW. L. REV. 583, 586 (1998).