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# Decisional Sequencing

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# DECISIONAL SEQUENCING

*Peter B. Rutledge*[*]

"[T]he definition of the alternatives is the supreme instrument of power. . . ."[1]

ABSTRACT

Judicial decision-making consists of two sets of choices—(1) how to resolve the issues in a case and (2) how to decide the order in which those issues will be resolved. Much legal scholarship focuses on the first question; too little focuses on the second. This Article aims to fill that gap. Drawing across disciplines—philosophy, economics, and political science—this Article articulates a theory of "decisional sequencing." Decisional sequencing concerns the extent to which legal rules constrain—and do not constrain—the order in which judges and other quasi-judicial actors (like arbitrators) decide matters before them. To what extent do the decision-makers enjoy unfettered discretion? To what extent can the parties manipulate the decisional sequence? The Article first considers a simple model of sequencing rules that classifies decisional sequences into three forms—horizontal sequencing rules that govern the decisional order for a

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1. E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE 68 (1960) (emphasis omitted).

single decision-maker, vertical sequencing rules that govern when a decision-maker's rulings can be appealed to a reviewing body such as an appellate court, and transjurisdictional sequencing rules that govern the extent to which decision-makers will defer to each other in parallel proceedings. It draws on examples from both civil litigation and arbitration to demonstrate how sequencing rules vary across these two "forms" of dispute resolution. After flushing out the contours of the simple model, the Article then considers the extent to which sequencing rules operate as mandatory rules (from which parties cannot derogate) and the extent to which they operate as default rules (around which the parties can contract). The Article concludes by considering how the model developed here can be used to help solve several decisional sequencing dilemmas currently bedeviling courts and arbitrators.

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Any judge faces two sets of choices in a case. First, she must decide *how* to resolve each of the issues before her. Second, she must also decide *the order* in which she will resolve these issues. This Article concerns the second set of choices—the "decisional sequence." Consider the following example inspired by an actual case:

> After a major terrorist attack on the United States, victims' families sue members of the Saudi Royal Family, some of whom are

> government officials, and allege that these individuals aided and abetted the attack. Saudi Arabia, a major political and economic ally of the United States, lodges formal protests about the lawsuit with the Department of State. Thereafter, the United States Government files a statement of interest urging the district court to dismiss the case under the political question and comity doctrines. The members of the Saudi royal family move to dismiss the case for lack of subject matter jurisdiction (due to sovereign immunity), lack of personal jurisdiction (for those nongovernmental members of the royal family), forum non conveniens, and the act of state doctrine.[2]

The judge confronts at least six potential grounds for dismissal—lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, the political question doctrine, the comity doctrine, and the act of state doctrine.

Suppose that the judge determines the case is a clear candidate for dismissal on political question grounds but a much closer call on the other grounds. She might dispose of the case through one of several opinions. In one opinion, she could simply dismiss the case on political question grounds. In another opinion, she might reject the first five defenses and, only thereafter, address the political question issue.

While both opinions achieve the same outcome, the decisional sequence is critical in several respects. For one thing, it involves different investment of resources by the court—the first opinion involves a far lower investment than the second. For another thing, the decisional sequence has a different impact on the parties. The first opinion amounts to a clear victory for the defendants, while the second might be a terrible defeat if, for example, the judge concluded that the Saudi defendants were in fact subject to the personal jurisdiction of U.S. courts before dismissing the case. Finally, the decisional sequence has an impact on development of the law. The first opinion simply adds a precedent to one field—political question; the second (potentially) adds a precedent to six (depending on whether the ruling on the other defenses could be deemed dicta).[3]

These are not the only choices available to the judge. The plaintiffs might request jurisdictional discovery before the judge rules on the defendants' motion. In that case, the judge might conclude that she needs fur-

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2. This fact pattern draws on the many civil complaints filed after the September 11 attacks. *See, e.g.*, Burnett v. Al Baraka Inv. and Dev. Corp., 292 F. Supp. 2d 9 (D.D.C. 2003).

3. The latter opinion risks sowing great confusion if it fails to make clear which findings are "holdings" and which are dicta. On the dangers of dicta, see Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249 (2006). Special thanks to Andrea Bjorkland for her thoughts on this point.

ther information before ruling and order discovery.[4] If she did so, such an order would have very different consequences compared to the two above-described outcomes. It would entail a lower investment of resources by the judge and have a more limited impact on the development of legal doctrine. As to the parties' interests, however, an order of jurisdictional discovery would increase the burden on the defendants and might even compel the disclosure of information that the defendants prefer to keep confidential. Collectively, these two effects could increase pressure on the defendants to settle—even before the judge rules on the defendants' meritorious motion to dismiss. Moreover, any order of jurisdictional discovery likely would be unreviewable (unless somehow the defendant requested an appellate court to issue an extraordinary writ of mandamus).[5] In this respect, the decisional sequence can influence the very outcome of a case.

Despite the importance of decisional sequences to the parties' behavior, legal development, and outcomes, they have received remarkably little attention in the legal literature.[6] With rare exception, most literature in this field merely has offered normative arguments for or against particular doctrinal rules (such as in the fields of federal civil rights claims, constitutional doubt, or civil rights claims).[7] Almost no scholarship has considered decisional sequencing in law more systematically (or the unique issues presented in the context of international dispute resolution).[8]

This ignorance is surprising. In recent years, courts and lawmakers have paid increased attention to issues of decisional sequencing, particularly in the context of international dispute resolution. They have developed a

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4. For an excellent discussion of jurisdictional discovery and its broader implications for federal practice, see S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489 (2010).

5. *See* Strong, *supra* note 72, at 503–05.

6. Some prior scholarship has considered aspects of this issue such as specific areas of sequencing (like the *Steel Company-Rurhgas* line) or sequencing in a particular context (like Supreme Court voting behavior). *See* Heather Elliott, *Jurisdictional Resequencing and Restraint*, 43 NEW ENG. L. REV. 725 (2009); Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1 (2001); Maxwell L. Stearns, *Should Justices Ever Switch Votes?:* Miller v. Albright *in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87 (1999). Another stream of literature has focused on the Court's sometimes arbitrary classification of rules of "jurisdictional" vs "nonjurisdictional" and the ramifications of that classification, including on the order of decision. *See* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1 (2008).

7. *See, e.g.*, John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115 (2009); Stephen I. Vladeck, *AEDPA,* Saucier*, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595 (2009); Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847 (2005); John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions,* 74 NOTRE DAME L. REV. 403 (1999); Sam Kamin, *An Article III Defense of Merits-First Decision-making in Civil Rights Litigation: The Continued Viability of* Saucier v. Katz, 16 GEO. MASON L. REV. 53 (2008); Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation,* 60 SMU L. REV. 1539 (2007).

8. For a rare exception, see Idleman, *supra* note 6.

series of rules—"sequencing rules"—that, to a degree, guide the order in which judges, and judge-like actors such as arbitrators, decide issues.

Those rules vary greatly. Sometimes, they constrain the order of judicial decision-making. *Steel Co. v. Citizens for a Better Environment*—which rejected the doctrine of hypothetical jurisdiction (under which courts could assume jurisdiction and then dismiss a case on 12(b)(6) grounds)—supplies one example.[9] In other instances, sequencing rules accord courts great discretion to determine the order in which they decide matters. *Ruhrgas v. Marathon Oil, Co.*—which allows district courts to dismiss a case on personal jurisdiction grounds before deciding whether they have subject matter jurisdiction—supplies an example.[10] *Sinochem International v. Malaysia International Shipping Co.*—which allows district courts to dismiss a case on forum non conveniens grounds before deciding any jurisdictional objections—also exemplifies an approach granting a great deal of discretion to district courts.[11]

Applying those rules to the hypothetical case given at the front of the paper, the judge could not resolve the case on the ground that the complaint failed to state a claim before she had determined whether jurisdiction existed. She could, however, resolve the case on certain "non-merits" grounds (like lack of personal jurisdiction or forum non conveniens) before addressing the thorny issue of subject matter jurisdiction under the Foreign Sovereign Immunities Act. As we shall see later in this paper, the judge inclined to resolve the case on political question or comity grounds will confront substantial uncertainty over whether she may do so before ruling on the jurisdictional defenses.

Recent jurisprudence in the area of federal civil rights litigation reveals that the Court is uncertain over the extent to which sequencing rules should constrain, as opposed to expand, trial court discretion.[12] When a public official asserts a defense of qualified immunity, a court undertakes a three-part analysis: (1) did the public official violate a constitutional right, (2) was the right clearly established, and (3) was the official conduct reasonable.[13] For a period of time following the creation of this test, lower federal courts often elided the first step and held that the officer was entitled to qualified immunity on the ground that, even if the right were violated, it was not clearly established.[14] In *Saucier v. Katz*, the Supreme

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9. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).
10. *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999).
11. *See* Sinochem Int'l Co. v. Malay. Int'l Shipping Co., 549 U.S. 422 (2007).
12. *See* Michael L. Wells and Alice Snedeker, *State-Created Property and Due Process of Law: Filling the Void Left by* Engquist v. Oregon Department of Agriculture, 44 GA. L. REV. 161 (2009).
13. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982).
14. *See, e.g.*, Wilson v. Layne, 141 F.3d 111 (4th Cir. 1998) (en banc), *aff'd*, 526 U.S. 603 (1999); Jean v. Collins, 155 F.3d 701, 708 (4th Cir. 1998) (en banc), *rev'd and remanded*, 526 U.S. 1142 (1999).

Court sought to halt this jurisprudential move and imposed a strict order on the qualified immunity analysis.[15] The *Saucier* rule added to the workload of lower federal courts but also helped to facilitate the creation of a more detailed constitutional jurisprudence governing federal civil rights claims.

Yet less than two decades later, in *Pearson v. Callahan*, the Court reversed itself and reinstated the pre-*Saucier* regime under which lower federal courts did not have to observe a particular sequence in deciding an officer's entitlement to qualified immunity.[16] The differences between the *Saucier* and *Pearson* regimes illustrate the importance of decisional sequencing on both the law and outcomes. The *Saucier* rule was likely to lead to the greater production of constitutional law (since courts had to address the first issue).[17] It also could have a greater impact on future cases, since each decision addressing the first step of the *Saucier* analysis could lay the groundwork for a right to be "clearly established" in a later case.[18] By contrast, under the *Pearson* rule, courts could resolve cases without elaborating on the scope of constitutional rights and, instead, dismiss the case on the ground that the right was not clearly established.[19] This obviously reduced the production of constitutional law and also affected future cases by making it more difficult, if not impossible, to demonstrate that a right was "clearly established" at the time of official conduct.

The sequencing rules discussed so far—ones that regulate decisions by a single judicial actor—are not the only ones operating in a judicial system. Sequencing rules also influence action *across different strata* of a single judicial system. Suppose that the judge in the initial hypothetical enters an order rejecting *all* of the proposed grounds for dismissal. Is any of them immediately appealable? The final judgment rule generally bars appellate courts from exercising jurisdiction over a case until the district court has entered final judgment.[20] Of course, that rule is subject to important exceptions, whether congressionally created, arising under the collateral order doctrine or through extraordinary actions such as writs of mandamus.[21] The coexistence of these regimes—final judgment and interlocutory review—has similar implications to the coexistence of the *Steel Company-Ruhrgas-Sinochem* rules described above. To the extent a district

15. 533 U.S. 194 (2001).
16. Pearson v. Callahan, 129 S. Ct. 808, 813 (2009).
17. *Saucier*, 553 U.S. at 200 (requiring the first inquiry to be whether a constitutional right would have been violated).
18. *Id.* at 199.
19. *Pearson*, 129 S. Ct. at 813.
20. 28 U.S.C. § 1291 (2006).
21. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 547 (1949); 28 U.S.C. § 1651 (2006).

court's order is immediately appealable, that decisional sequence requires an up-front investment of resources by appellate courts (and reduces the corresponding investment of resources by district courts). It further influences law development by allowing the creation of appellate opinions on the appealable issues. Finally, it affects the parties' settlement incentives (immediate appealability of an adverse order enhances the settlement position of the losing party in the district court's order; a bar on immediate appeal has the opposite effect).

Sequencing rules also influence outcomes *between different judicial systems*. Suppose, for example, that some of the victims in the above-cited hypothetical were citizens of a foreign country, and their survivors and estates bring an action in that foreign country. Or suppose that a foreign government commences criminal proceedings against the suspected terrorists. Must the United States district judge stay her proceedings pending the outcome of that case? If she's not required to issue the stay, does she have the discretionary power to do so? Alternatively, can she issue an antisuit injunction against the foreign civil proceeding? Again, like the other sorts of sequencing rules described above, the answers to these questions have important effects on the investment of judicial resources, development of the law, and the parties' settlement incentives.

This Article provides a coherent theory about these and other sequencing rules. At bottom, I argue that the order in which courts decide issues has a significant and underappreciated impact on the law. First, it influences the parties' litigation behavior, including their settlement incentives. A sequencing rule which forces district judges to address dismissal grounds in a particular order generally favors plaintiffs, who can use the leverage of a favorable ruling on an early issue to drive their opponents to settle. By contrast, a sequencing rule that accords judges more latitude to decide issues in a particular order generally favors defendants, who can thereby advance several defenses simultaneously and thereby avoid adverse rulings on a particular issue.

Second, decisional sequencing influences the development of the law. A sequencing rule that requires district courts to resolve questions in a particular order generally ensures a greater production of law on questions that the judges must decide first. By contrast, a sequencing rule that accords district courts greater discretion to resolve issues in any particular order facilitates the creation of law in a wider array of areas.

Third, decisional sequencing rules influence the investment of judicial resources. Strict sequencing rules (like *Steel Company*) can increase the required investment by forcing judges to work through potentially trickier doctrinal issues before resolving a case on a relatively easier one. By contrast, relaxed sequencing rules (like *Ruhrgas* and *Sinochem*) reduce the required investment of judicial resources to resolve a case.

The Article unfolds in four parts. Part I develops a model of decisional sequencing rules. It categorizes sequencing rules into three clusters: horizontal sequencing rules, vertical sequencing rules, and transjurisdictional sequencing rules. Horizontal sequencing rules determine the order in which *a single decision-maker* considers issues. Vertical sequencing rules determine the order in which issues are decided *between first-order decision-makers* (such as district judges or arbitrators) *and reviewing decision-makers* (such as appellate courts or, in the case of arbitrators, district courts). "Transjurisdictional sequencing rules" determine the order in which issues are decided by two *decision-makers in different jurisdictions*, often in the course of parallel proceedings. [22]

After introducing the categories, Part I then places these ideas in the existing literature on decision theory. This literature review draws on other disciplines, including philosophy, economics, political science, and psychology. The concept finds roots in Condorcet's seminal work on majority preferences, which taught how the order in which a decision-maker is presented a set of preferences can influence the outcome along a decision tree. Economists like Kenneth Arrow drew on these insights to demonstrate the importance of a decisional sequence to voting outcomes. Likewise, political scientists like John Kingdon drew on these insights to demonstrate how sequencing rules in Congress influenced legislative outcomes. Part I concludes by translating the relevant lessons from these literature streams into the theory of decisional sequencing.

Part II then develops a simple model of how sequencing rules operate. All sequencing rules—whether horizontal, vertical or transjurisdictional—exert profound effects on judicial behavior, parties' settlement incentives, and law development. Despite the commonality of these values to all three types of sequencing rules, they promote (and hinder) those values in different ways. For example, as Part II explains, a horizontal sequencing rule like *Sinochem* (that allows a court to resolve a case on forum non conveniens grounds before turning to jurisdiction) reduces a district court's investment of resources, improves a defendant's settlement leverage, and can lead to an increased production of law on forum non conveniens (while reducing production of law in another area, like jurisdiction). Yet other rules (such as the bar on the immediate appealability of orders denying motions to dismiss on grounds of forum non conveniens) undercut these values—they increase the workload of district courts, enhance the plaintiffs' settlement leverage, and reduce the production of appellate precedent on the issue. Other examples of these conflicts and tensions ab-

22. *See* Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869, 1871 (2008).

ound in various sequencing rules. Part II tries to reconcile the ways in which sequencing rules appear to work at cross purposes.

Part III explores the extent to which parties can contractually manipulate decisional sequencing rules. Forum selection clauses and arbitration clauses represent two familiar examples of how parties can influence contractually the sequence by which decisions are rendered. While the law generally promotes these contractual modifications of sequencing rules, important limits exist. This enables a meaty discussion about the extent to which decisional sequencing rules can (and should be) default rules (as opposed to mandatory rules). As with the simple model developed in Part II, the law on sequencing rules is replete with seemingly contradictory results. Consider two vertical sequencing rules: (1) denials of motions to dismiss for improper venue due to a forum selection clause are not immediately appealable and (2) denials of motions to compel arbitration due to an arbitration clause are immediately appealable. In both cases, the party bringing the motion is attempting to accomplish exactly the same result—prevent a party from attempting to shirk on a preexisting contractual obligation to resolve all disputes in an agreed-upon forum. Yet, in one instance sequencing rules facilitate that objective; in another, they do not. This Part again attempts to explain some of those seemingly contradictory outcomes.

Part IV applies the model to several current sequencing problems bedeviling courts and policymakers. As to horizontal sequencing rules, I address the limits of the *Steel Co.-Sinochem* line of cases—specifically whether defenses like the act of state doctrine should represent "nonmerits" defenses that can be resolved at the district court's discretion or, instead, are more akin to merits defenses that must await resolution of jurisdictional objections. As to vertical sequencing rules, I take up the immediate appealability of denials of motions to dismiss under the political question and comity doctrines, a topic of special importance in the area of international civil litigation. As to transjurisdictional sequencing rules, I address the thorny issues of antisuit injunctions and lis pendens stays in transnational litigation.

Before turning to the argument, I should make plain two biases that influence the methodology employed in the paper. First, the paper draws heavily on international matters. Due to the choice of examples, it is worth stressing that the ideas developed herein are not unique to international cases but apply equally to purely domestic ones. Nonetheless, international cases trigger a unique set of considerations such as comity which would be absent in a paper limited to purely domestic examples. Second, the paper highlights the relevance of arbitration to the theoretical inquiry. This emphasis brings more starkly into relief the parallels between international

arbitration and international civil litigation as related "forms" of dispute resolution.[23] As I hope to show, the two fields, though often regrettably discussed in isolation from each other, present powerfully overlapping issues when analyzed with regard to decisional sequencing.

## I. PRELIMINARY OBSERVATIONS

This Part does three things.[24] Subpart A articulates a three-part typology of sequencing rules. It argues that decisional sequencing rules come in three forms: (1) horizontal rules, which constrain a single actor's decision-making; (2) vertical sequencing rules, which control appellate review across a single jurisdictional system; and (3) transjurisdictional rules, which constrain an actor's decision-making in cases that touch upon more than one jurisdiction. Subpart B identifies the various lenses through which we might view decisional sequencing rules. These lenses include economics, political science and path dependence theory. It shows how each of those lenses supplies some relevant guidance on decisional sequencing rules, but none of them, standing alone, suffices. Finally, employing the guidance from the preexisting lenses, Subpart C articulates a novel theory for conceptualizing decisional sequencing rules.

### *A. Typology*

A preliminary typology helps to frame a discussion about decisional sequencing rules. To that end, I believe it is appropriate to divide decisional sequencing rules into three types—horizontal, vertical, and transjurisdictional.

Horizontal rules determine the sequence in which a single decision-maker—a judge, an appellate court, or an arbitrator—determines issues. An exemplary line of recent precedent is the *Steel Co.-Ruhrgas-Sinochem* line of cases discussed above. This trio of cases sets forth certain decisional sequencing rules for district courts about how they should resolve merits and non-merits defenses. Specifically, under *Steel Co.*, a court may not assume the existence of jurisdiction (where the jurisdictional questions are difficult) in order to decide cases on easier "merits based" grounds.[25] *Ruhrgas* and *Sinochem* tempered the reach of *Steel Co.*'s rule by providing that courts need not resolve subject matter jurisdiction before turning to personal jurisdiction (*Ruhrgas*), and that courts can also dismiss cases on

23. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).
24. Special thanks to Ingrid Wuerth for her structural suggestions here.
25. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 84 (1998).

grounds of forum non conveniens without resolving either subject matter or personal jurisdiction (*Sinochem*).[26]

Vertical sequencing rules determine when reviewing bodies can resolve decisions of inferior tribunals. For students of civil procedure, the final judgment rule (and its well known exceptions) provide a familiar example.[27] Generally speaking, appellate courts only review final judgments of district courts; under narrow exceptions, they can review certain orders before final judgment, such as under statutory exceptions, the *Cohen* doctrine, a Rule 54(b) certification, or on a writ of mandamus.[28] Arbitration has similar doctrines. While practices vary radically across countries, most national arbitration laws regulate the timing of when courts can review an arbitrator's decisions.[29]

Transjurisdictional sequencing rules channel disputes in parallel litigation. By parallel litigation, I mean the common phenomenon in dispute resolution, particularly international dispute resolution, where parties have claims against each other, and each party files its claims in its preferred forum.[30] Examples of transjurisdictional sequencing rules from domestic litigation include *Pullman* abstention, *Burford* abstention, *Colorado River* abstention, *Younger* abstention, the Tax Injunction Act, and the Anti-Injunction Act.[31] Examples of transjurisdictional sequencing rules from international dispute resolution include exhaustion requirements, forum non conveniens dismissals, stays *lis alibi pendens*, and antisuit injunctions. Blocking statutes and clawback statutes also serve as types of transjurisdictional sequencing rules.[32] As with horizontal and vertical sequencing rules, such transjurisdictional sequencing rules influence law development, judicial behavior, and the parties' incentives.[33]

A typology along these lines facilitates richer comparisons than have occurred in much of the literature to date. While scholars have considered many of these issues in isolation from each other, there has been virtually no systematic attempt to consider them collectively.[34] These isolated de-

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26. Sinochem Int'l Co. Ltd. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 423 (2007); Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 579 (1999).

27. 28 U.S.C. § 1291 (2006).

28. 28 U.S.C. § 1651 (2006); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

29. *See infra* note 70.

30. *See* GARY BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 521–62 (4th ed. 2006).

31. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941); Burford v. Sun Oil Co., 319 U.S. 315, 332–33 (1943); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976); Younger v. Harris, 401 U.S. 37 (1971). *See also* 26 U.S.C. § 7421 (2006); 28 U.S.C. § 2283 (2006).

32. BORN & RUTLEDGE, *supra* note 30, at 648–50.

33. *See* Nash, *supra* note 22, at n. 63.

34. *See, e.g.*, Joan Steinman, *After* Steel Co.*: "Hypothetical Jurisdiction" in the Federal Appellate Courts*, 58 WASH. & LEE L. REV. 855 (2001); Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237 (2007); Mathew D. Staver, *The Abstention Doctrines: Balancing Comity with Federal Court Intervention*, 28 SETON HALL L. REV. 1102 (1998).

bates are unfortunate. They cause scholars to overlook important parallels between different sorts of rules. I elaborate on these in greater detail, but supply a simple example here just to whet the reader's appetite.

Consider the *Sinochem* rule (which allows district judges to consider non-merits defenses in any particular order) and the collateral order rule (which allows appellate courts to review certain district court orders before final judgment). At one level, these two doctrines have little to do with one another—one concerns entirely the behavior of district courts; the other concerns the scope of an appellate court's jurisdiction. This typifies the scholarly inquiry that I describe above in which these doctrines are considered in isolation. At another level, however, the two doctrines have a great deal in common. For example, both exert a tremendous effect on the parties' settlement incentives. A relatively flexible *Sinochem* rule aids defendants by allowing district courts to resolve cases on one ground without first having to render an opinion adverse to the defendant on another ground. Similarly, a flexible collateral order doctrine aids defendants by allowing them to obtain immediate correction of an adverse district court ruling without having to await final judgment before being able to appeal the ruling. Conversely, if *Sinochem* had come out the other way (precluding a non-merits dismissal before the court had resolved subject-matter and personal jurisdiction) or if the collateral order doctrine did not exist, plaintiffs would be in a relatively stronger settlement position, for they could leverage the decisional sequences in those cases to their advantage.[35]

The rules also influence a district court's investment of time and resources. A relatively inflexible sequencing rule (as some interpreted *Steel Co.*) increases the burden on district courts; it requires them to resolve issues in a particular order without regard for whether there might be an "easy" ground upon which to resolve a case. Similarly, a relatively strict final judgment rule (and a relatively crabbed collateral order rule) also increases the burden on district courts by requiring them to invest time and resources in a case—investments that might be avoided if, for example, an appellate court were to intervene immediately and reverse a district court's refusal to dismiss a case. Due to these and other parallels, it is appropriate to consider these two types of rules together in the analysis.

At the same time, classifying sequencing rules (rather than treating them as a single undifferentiated mass) helps sharpen focus on the distinct ways in which the rules operate. For example, consider the effect of the *Sinochem* rule and the collateral order rule on the production of legal doctrine. Here, the effects are quite different. The *Sinochem* rule influences the quantity, but not quality, of legal opinion on an area of law. If a dis-

35. This assumes the parties are otherwise in equal bargaining positions at settlement.

trict judge can resolve a case on any non-merits ground of her own choosing, the net effect (assuming the judge does not voluntarily choose to over-invest resources and resolve all issues) is a reduction in the quantity of opinion; whereas, if the judge had to resolve issues in a particular order, she presumably would create a greater quantity of opinions on the first-stage issues. By contrast, the collateral order rule influences the quality of precedent in an area. A more flexible collateral order rule makes it easier to obtain an immediate appellate ruling on certain issues and, thereby, create circuit precedent on those issues; whereas, under a decisional regime with a strict final judgment rule, far less appellate opinion would be produced and, to the extent it was, the production would come far later (only after the case had run its course in the district court and to the extent it was not settled in the meantime).

While the foregoing discussion justifies a comparison of (and differentiation between) horizontal, vertical, and transjurisdictional sequencing rules, it also suggests that further differentiation is appropriate. To capture the degree of discretion accorded to the judge (or quasi-judicial decision-maker), it becomes necessary to distinguish between those rules that constrict that discretion (rigid sequencing rules) and those that confer some discretion on the decision-maker (flexible sequencing rules). This further differentiation enables richer comparison. For example, a flexible horizontal sequencing rule (like *Sinochem*) and a flexible vertical sequencing rule (like the collateral order exception) both potentially reduce the investment of resources by the first-order decision-maker (i.e., the district court). Conversely, more rigid rules—whether a horizontal rule, like *Steel Co.*, or a vertical one, like the final judgment rule—require a greater investment of resources.

Combining the two classificatory variables developed here, it becomes possible to classify decisional sequencing rules as follows:

| Type of Rule | Rigid | Flexible |
|---|---|---|
| Horizontal | *Steel Company*—a district court may not consider jurisdictional defenses before considering merits | *Sinochem*—a district court may resolve a case on any non-merits ground, including forum non conveniens |
| Vertical | Final judgment—appellate courts generally can only review final judgments of district courts | Collateral orders—appellate courts can review a small set of final orders provided they satisfy certain criteria |
| Transjurisdictional | Foreign statutes like Ecuadoran Ley 55 that bar subject-matter jurisdiction of cases filed elsewhere; treaty provisions that bar forum non conveniens dismissals; first-to-file and first-to-judgment rules in parallel litigation | Forum non conveniens dismissals; abstention doctrines |

I return to these and other qualities of decisional sequencing rules later in the paper. For now, they simplify and justify the conceptual move to treat them within the same analytic framework. The next subpart considers the possible theories that allow us to conceptualize sequencing rules.

### *B. Literature Review*

Decisional sequencing is not a novel concept. For centuries, philosophers, economists, political scientists, and other scholars have pondered how the order in which decisions are presented influences an outcome. It is appropriate, therefore, to consider whether those prior efforts supply a theoretical construct in which we might analyze the sorts of sequencing rules described above. This Subpart considers three such theoretical constructs: Condorcet's work on electoral structures, Kingdon's work on

agenda setting, and Paul David's work on path dependence theory. Each theory offers some help in conceptualizing decisional sequencing rules, but none supplies a fully satisfactory account of sequencing rules.

*1. Electoral Structures*

The celebrated Marquis de Condorcet posited in his *Essai sur l'Application de l'Analyse a la Probabilite des Decisions Rendues a la Pluralite des Voix* that the order in which an electorate is presented a set of choices will influence the outcome.[36] The noted economist Kenneth Arrow later built on Condorcet's insights through his theory of cycling majorities.[37] Arrow's theories have been the subject of extensive commentary elsewhere, which does not require repetition here.[38] Suffice it to say, for present purposes, Arrow demonstrated how, under certain conditions, majorities could be produced for any choice depending on how the choice was structured.[39]

Assume, for example, that in a race among three candidates (A, B, and C) the majority preferences would align as follows:

A > B
B > C
C > A

In case of such a voting alignment, the order of the election (or slightly more abstractly to track the ideas developed in this paper, the order of "decision") has a critical influence on the outcome. In a two-stage voting game where A is pitted against B first (with the winner facing C), C will prevail. By contrast, if the first stage pitted B against C (with the winner

36. MARIE JEAN ANTOINE NICOLAS DE CARITAT, MARQUIS DE CONDORCET, ESSAI SUR L'APPLICATION DE L'ANALYSE Á LA PROBABILITÉ DES DÉCISIONS RENDUES Á LA PLURALITÉ DES VOIX [An Essay on the Application of Probability Theory to Plurality Decision-Making] (1785), *reprinted in* IAIN MCLEAN & FIONA HEWITT, CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY 129 (Iain McLean & Fiona Hewitt eds., trans., 1994). For literature on Condorcet and some implications of his work on majority preferences, see WILLIAM V. GEHRLEIN, CONDORCET'S PARADOX (2006); Peter Kurrild-Klitgaard, *An Empirical Example of the Condorcet Paradox of Voting in a Large Electorate*, 107 PUB. CHOICE 135, 135–37 (2001); William H. Riker, *The Paradox of Voting and Congressional Rules for Voting on Amendments*, 52 AM. POL. SCI. REV. 349 (1958).

37. Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. OF POL. ECON. 328 (1950).

38. *See, e.g.*, Duncan Black, *On Arrow's Impossibility Theorem*, 12 J.L. & ECON. 227 (1969); Allan Gibbard, *Manipulation of Voting Schemes: A General Result*, 41 ECONOMETRICA 587 (1973); William H. Riker, *Voting and the Summation of Preferences: An Interpretive Bibliographical Review of Selected Developments During the Last Decade*, 55 AM. POL. SCI. REV. 900 (1961).

39. Arrow, *supra* note 37, at 329.

facing A), then A will prevail. The majority's preferences remain static, yet the outcome is critically influenced by the order of the decision.[40]

Condorcet's and Arrow's insights help partly to conceptualize sequencing rules. Much like election rules influence the choice of a candidate, so too can decisional sequencing rules influence the judge's choice of opinion. Consider again *Sinochem* in this context. A flexible rule like *Sinochem* presents a one-shot decisional set for the judge where the judge can choose from among many possible "candidates" that are grounds upon which she can resolve the case. By contrast, a less flexible rule like *Steel Company*, much like an A vs. B ballot, effectively takes certain "candidates" (here, opinions that resolve the grounds on the merits) out of the voting sequence.

While Condorcet's theory is thus helpful, it does not allow a complete account of decisional sequencing rules. It suffers from two fundamental limitations. First, the nature of the preferences fundamentally differs. In Condorcet's model, the decisional agent's preferences directly influence the "outcome" (i.e., the winner of the election). By contrast, in the context of decisional sequencing, the judicial actor's preferences do not necessarily influence the outcome, but rather simply the manner in which the judge reaches that outcome. The judge may ultimately dismiss the case, and the decisional sequencing rule simply influences either the type of opinion the judge writes, or alternatively, the antecedent issues that the judge must decide before reaching the ground upon which she can dismiss the case.

Second, Condorcet's and Arrow's respective works do not supply much guidance on how to optimally construct a set of decisional sequencing rules. Put another way, as a normative matter, are we better off in a system where judges (and other quasi-judicial actors) are largely constrained by the order in which they resolve issues? Alternatively, are they better off in a system under which they enjoy largely unbridled discretion? Neither Condorcet nor Arrow sheds much light on the answer to that question.

### *2. Agenda Setting*

Scholars such as John Kingdon have explored the "predecisional process"—how issues came to be "on the governmental agenda in the first place, how the alternatives from which decision-makers chose were generated, and why some potential issues and some likely alternatives never came to be the focus of serious attention."[41] This involves consideration of

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40. *Id.*

41. JOHN W. KINGDON, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES 1 (2d. ed. 1985). *See also* Michael E. Levine & Charles R. Plott, *Agenda Influence and its Implications*, 63 VA. L. REV.

two distinct concepts. The first is the agenda—understood to mean "the list of subjects or problems to which governmental officials, and people outside of government closely associated with those officials, are paying some serious attention at any given time."[42] The second is "alternatives"—understood to mean the options available to the decision-maker to resolve the matter on the decision-maker's agenda. Kingdon's theory explains how different "participants" wield different degrees of influence at various stages of the policy-making process—agenda setting and alternative selection.[43] Rules which require legislation first to be referred to the relevant legislative committee, followed by a floor vote, comparable action in the other house, conference committee work, and ultimately a vote on the conference report, ensure a degree of constituent-specific earmarking in legislation.[44]

Kingdon's work on the relationship agenda setting and alternative specification provides a useful bridge between decision theory and its application to legal cases. Translated into the judicial (or, more generally, dispute resolution) context, the agenda consists of the issues that the parties put before a judge (or other judicial decision-maker). The alternatives consist of the possible grounds upon which the judicial decision-maker can resolve the case before it.

The parties play a critical role in shaping the agenda. At the simplest level, if parties fail to bring a case, there is nothing for a court to decide, and the "case or controversy" requirement, as well as the general aversion to advisory opinions, precludes judges from opining on a matter.[45] Even when a case or controversy has commenced, parties still enjoy a fair bit of control over the setting of the decisional agenda. They do so both through the arguments they raise and those they do not. For example, if I am injured in an accident, I may frame the claim either as a negligence claim or a strict liability claim. If I opt for the strict liability theory, then I effectively deprive the court of the ability to opine on negligence law in the context of my case. Conversely, the defendant in my case may shape the issues through the defenses that she raises. By challenging personal jurisdiction, she creates the opportunity for the court to opine on the matter. If she declines to do so, waiver rules may preclude the court from addressing the issue.

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561, 590 (1977) (explaining how, under a "closed rule" in the House, bill amendments could "be profoundly affected by the order in which amendments are presented and by the order in which the legislation in question is taken up relative to other matters to be considered by the House").

42. *See* KINGDON, *supra* note 41, at 3.

43. *See generally id.*

44. *See* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 16–17 (1991).

45. *See* U.S. CONST. art. III, § 2; Muskrat v. United States, 219 U.S. 346, 356 (1911); Case of Hayburn, 2 U.S. 408, 410 (1792).

Yet party control over a court's decision agenda is not absolute. Sometimes, doctrines constrain the agenda despite the party's choice. Ripeness and mootness rules, as well as the general bar against advisory opinions, preclude courts from addressing issues even when the parties mutually desire for them to do so.[46] Other times, doctrines can put issues on the agenda even where the parties would prefer otherwise. The most obvious example is the requirement of subject-matter jurisdiction, which a court may raise at any time.[47] More broadly, any doctrine that a court may raise sua sponte creates the potential for issues to enter the agenda regardless of the parties' preferences or whether they have waived the issue.[48]

While parties may control what goes on the agenda, courts enjoy greater control over the choice of alternatives. Consider again the example given at the front of this paper. A defendant may move to dismiss a case on multiple grounds—lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, improper service, comity, and political question. Yet once the defendant has filed the motion, he is generally powerless to influence the order in which the court addresses those grounds. Sometimes that matter will be left entirely to the court's discretion (flexible sequencing rules). Other times, legal rules—whether judicially created or legislatively created—will constrain the court's exercise of that discretion (rigid sequencing rules).

Though judicial decision-making bears some of the features of Kingdon's legislative model, it is important to emphasize some critical differences. For one thing, in contrast to lawmakers' legislative decision-making, the decision-makers in judicial decision-making (the court or the arbitrator) have virtually no power to set the agenda—whereas lawmakers can decide what bills to introduce, courts depend on parties to bring cases or controversies invoking their jurisdiction.[49] For another thing, in judicial

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46. Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964) (mootness); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (mootness); Abbott Lab. v. Gardner, 387 U.S. 136, 148–49 (1967) (ripeness); *Muskrat*, 219 U.S. at 356–60 (advisory opinions).

47. *See* FED. R. CIV. P. 12(h); Arbaugh v. Y&H Corp., 546 U.S. 500, 506–07 (2006).

48. Contrary to some readers' expectations, subject-matter jurisdiction is not the only issue that a court may raise sua sponte. Judicial practice is replete with examples of judges raising a host of other issues on their own initiative. *See, e.g.*, Link v. Wabash R.R. Co., 370 U.S. 626, 629–33 (1962) (permitting sua sponte dismissal for failure to prosecute under Federal Rule of Civil Procedure 41(b)). *See generally* Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 SAN DIEGO L. REV. 1253, 1279–81 (2002).

49. KINGDON, *supra* note 41, at 20, 37. I include the slight qualifier because in at least two respects courts can influence the agenda, at least indirectly. First, judges sometimes expressly encourage parties to file a certain kind of case or make a certain kind of argument. Examples include dissents from denials of certiorari and separate opinions in which the judge notes that no party raised a certain argument but indicating how the judge would rule if the party did. Second, courts sometimes indirectly signal that interest through noting how they might reach a different result in a case presenting a different set of facts. The specification of that set of facts indirectly at least invites parties to present that second case.

decision-making, the "participants"[50] most responsible for setting the judge's agenda (i.e., the parties) have the least influence in how a court chooses among the alternatives. By contrast, in legislative decision-making, at least some of the entities responsible for setting the agenda also can influence selection among the alternatives.[51] Finally, whereas in legislative decision-making the rules that influence choices among alternatives (e.g., committee structures, supermajority requirements, etc.) are always subject to revision by the decision-maker—Congress can always change the rule—the same property does not hold true for judicial decision-making. To the extent statutes constrain judicial choices, courts will be bound to observe them. To the extent caselaw supplies a doctrine constraining judicial discretion, stare decisis principles may bind courts to apply that doctrine.[52]

### *3. Path Dependence*

Path dependence theory, pioneered by Paul David,[53] rests on the notion that current circumstances are contingent on historical decisions, sometimes quite accidentally.[54] In the classic example, explorers come to an uncharted forest. They cut a particular path through the forest. That decision, which may have been the product of deliberate reflection or a complete accident, will then influence the route that future travelers will follow. For efficiency, cost-saving, and other reasons, they naturally will be inclined to follow the path cleared by their predecessors. This dependence on the preexisting path will endure even after it might be demonstrated that a different route through the forest would be more efficient. Another familiar example is the QWERTY keyboard.[55] Those of us who know how to type learned how to do so on such a keyboard (or, decreasingly so, typewriter). Even if it could be shown that other keyboard

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50. KINGDON, *supra* note 41, at 16, 20, 23–24.

51. Here, one might draw a slightly more sophisticated parallel to Kingdon's treatment of agenda setting and alternative selection. Kingdon notes that while the President represents the single most influential force in agenda setting, he has far less clout in influencing congressional choice among alternatives, that prerogative belonging more closely to Congress. *See* KINGDON, *supra* note 41, at 26–27.

52. *See, e.g.*, Hutto v. Davis, 454 U.S. 370, 375 (1982).

53. *See* Paul A. David, *Clio and the economics of QWERTY*, 75 AM. ECON. REV. (PAPERS & PROC.) 332 (1985).

54. For exemplary literature, see Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 434 nn. 22–23 (2002); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641 (1996); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001); Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315 (2008); S.J. Liebowitz, *Path Dependence, Lock-in and History*, 11 J.L. ECON. & ORG. 205 (1995); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 817–21 (1982).

55. *See id.*

layouts would be more efficient (or less destructive on one's joints), society may be slow to accept any new keyboard layout, trained as we are by the keyboard on which we learned.

Can path dependence theory illuminate how we should think about the design of sequencing rules? To a point. Path dependence theory teaches us to be cognizant of the impact of the first time a court makes a discretionary choice about the order in which to resolve the issues before her. The analysis may cut two ways. On the one hand, a flexible sequencing rule (such as *Sinochem*) might reduce path-dependent behavior by reducing the costs to the judge of following different paths depending on the complexity of the issues before her. On the other hand, a flexible sequencing rule might actually encourage path-dependent behavior to the extent it encourages judges to develop explicit or implicit biases about the order in which they resolve cases that present multiple dispositive issues. Whichever account is correct, path dependence theory teaches us about the consequences of our choice architecture for efficient outcomes.

Yet path dependence theory, like the others discussed above, does not tell a complete story. It does not fully help us determine how best to design the choice architecture in order to achieve the most efficient outcome (or at least to reduce embedded inefficiencies). Nor does path dependence theory supply an adequate account of how other values beyond efficiency—like the parties' settlement incentives or the development of precedent—should factor into the choice architecture.

Summing up, so far I have shown that the order in which courts resolve matters—both as individual courts and across layers of the judiciary—has significant and underappreciated outcomes on party behavior and development of the law. Decisional sequencing supplies a lens that helps us to think systematically about those issues. At a conceptual level, the theory underpinning decisional sequencing is informed by other theories that focus on choice—cycling majorities, agenda setting, and path dependence. None of these analogies, however, is airtight, so it becomes important to build on the lessons of those preexisting theories. The next Subpart turns to that task.

### *C. Integrating the Theories, With Thanks to Sonja West*[56]

If none of the foregoing theories supplies sufficient tools to think systematically about decisional sequencing, where should we turn? To begin to construct a fully functioning model, it is worth noting a potentially important distinction between decisional sequencing and matters that the

56. During an early presentation of these ideas at the University of Georgia Law School's "half-baked lunch" colloquium series, my colleague Sonja West raised the good question that I seek to address here.

prior theories touched upon—a perspicacious insight that a colleague raised during an earlier presentation on this project. Issues like voting cycles and legislative decision-making involve expressions of preference. By contrast, judicial decision-making (in theory at least) does not. Instead, it only involves (or should only involve) the derivation and application of fixed rules to a particular factual setting. Such decision-making does not (or at least should not) entail expression of the judge's preferences or alter the outcomes of cases. While this distinction is valid, decisional sequencing rules are important in at least four different ways.

First, decisional sequencing rules can influence a judge's preference over *how* to resolve a case.[57] Consider the example of a constitutional challenge to a municipal ordinance on the ground that the ordinance violates the First, Fourth, and Fourteenth Amendments. If the judge concludes that the ordinance violates the First Amendment (but not the other two), she might write a narrow opinion that simply addresses the First Amendment issues (relegating the others to a footnote), or she might write a broader opinion explicitly rejecting the two grounds of challenge but accepting the third.[58] Presently, no doctrine constrains the judge's discretion to choose between these two types of opinions. Yet one could easily imagine another rule under which judges would be obligated *only* to address the dispositive issue in a case (and not others).[59] That latter sequencing rule would constrain the judge's preference to write a sweeping opinion instead of a narrow one.

Second, decisional sequencing rules can influence the parties' settlement incentives. Consider, for example, a case where a defendant seeks to dismiss a case on grounds of both lack of personal jurisdiction and forum non conveniens. If a court must decide the jurisdictional defense before deciding the nonjurisdictional one, that rule might be unfavorable to defendants.[60] Even if the defendants have an airtight case on forum non conveniens, they might settle rather than risk an adverse finding on personal

57. *See* Michael E. Levine & Charles R. Plott, *Agenda Influence and its Implications*, 63 VA. L. REV. 561, 565 (1977) (noting that the "agenda determines the set of strategies available to the individual").

58. *See, e.g.*, Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (1999) (dismissing case on six independent grounds). The judge's choice of approach might depend on protecting her judgment from reversal on appeal.

59. Although not a strict requirement, the interpretive doctrine of constitutional avoidance is one such rule in that it favors deciding a case without reaching constitutional issues. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

60. The district court in *Sinochem* recognized precisely these stakes in the case. By dismissing the case on forum non conveniens grounds, it deprived the plaintiffs of the opportunity to take jurisdictional discovery (and spared the defendants the attendant costs). *See* Malay. Int'l Shipping Corp. Berhad v. Sinochem Int'l Co., No. Civ.A. 03-3771, 2004 WL 503541 at *2 (E.D. Pa. Feb. 27, 2004).

jurisdiction that could be used against them in subsequent litigation.[61] By contrast, if a court can dismiss the case on forum non conveniens grounds without having to address the jurisdictional issue, that rule is far more favorable to defendants—they can get rid of the case without first facing an adverse decision on the jurisdictional issue.[62]

Third, decisional sequencing rules influence the outcome of the case currently before the court (or arbitrator). Consider, for example, a case in which a defendant has substantial contacts with a forum, yet those contacts are unknown to the plaintiff. The outcome of the case may depend critically on whether some amount of jurisdictional discovery can precede a determination of whether to dismiss the case for lack of jurisdiction.[63] If jurisdictional discovery is allowed, the plaintiff can learn of the defendant's contacts and, thereby, can strengthen its case for personal jurisdiction. If, however, the converse rule applied—that *no* discovery could precede a finding of jurisdiction—then plaintiffs would be less likely to prevail. Suits likely would be dismissed more often—it would complicate plaintiffs' abilities to establish personal jurisdiction. In this respect, a sequencing rule directly influences the outcome of the case before the court.[64]

Fourth, decisional sequencing rules can influence the outcomes of future cases. Consider again the evolution of the sequencing rules governing qualified immunity determinations. If a court must first decide whether a constitutional right exists, its opinion will influence decisions in later cases about whether a right was "clearly established." By contrast, if a court can resolve the case on grounds of whether the right was "clearly established" (without having to determine whether the right exists at all), then it will be

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61. While the first opinion probably cannot be used under principles of offensive, nonmutual collateral estoppel, *see, e.g.*, Davis v. Metro Prod., Inc., 885 F.2d 515, 519 (9th Cir. 1989), the defendants' contacts with the forum are still the subject of a potentially publishable opinion. To the extent the court utilizes a nationwide contacts test envisioned under Federal Rule of Civil Procedure 4(k)(1)(D) or 4(k)(2), this could subject the defendant to personal jurisdiction in any federal court throughout the United States.

62. The effects here are especially profound in federal cases against foreign defendants. Under Federal Rule of Civil Procedure 4(k)(1)(b) and 4(k)(2), a court may in some instances apply a nationwide contacts test to determine whether the exercise of personal jurisdiction comports with the Constitution. A finding that the defendant satisfies this test under a general jurisdiction theory thereby could render it potentially subject to suit anywhere in the United States (provided that the case involves a federal cause of action). *See* Adams v. Unione Mediterranea Di Sicurta, 364 F.3d 646, 650–51 (5th Cir. 2004).

63. BORN & RUTLEDGE, *supra* note 30, at 992–93.

64. Transjurisdictional sequencing rules also influence outcomes. Suppose that parties to a contract have competing claims. The buyer claims that the seller has supplied nonconforming goods; the seller claims that buyer has failed to pay the purchase price. Each party has its preferred forum (buyer in buyers' country, seller in seller's country). Under those circumstances, a rule under which a court in one country would stay its action pending a decision in the other forum could easily affect the outcome, whether due to the added costs to one party of litigating in the foreign forum or differences in procedural or substantive rules of the preferred forum that favor one party.

relatively harder for plaintiffs in subsequent cases to establish that a defendant is not entitled to qualified immunity.[65]

Taking into account the unique features of decisional sequencing and its overlap with the broader literature on decisional theory, we can begin to discern several values that should animate a theoretical construct of decisional sequencing rules. One critical value that cuts across all forms of decisional sequencing rules is the investment of judicial resources. By this, I mean the amount of time that a judicial actor must invest mastering the facts and law in a case. Rigid sequencing rules increase the required investment by first-order decision-makers. For example, a rule like *Steel Co.* requires district judges to undertake potentially difficult jurisdictional inquiries even when an easier merits-based ground exists for dismissing a case. Similarly, the final judgment rule requires district judges to invest more heavily in a case even when immediate correction of a legal error (such as reversal of an order denying a motion to dismiss) might reduce that investment.

By contrast, flexible sequencing rules can reduce these demands on the first-order decision-maker, sometimes reallocating it to others. For example, the *Cohen* doctrine entails the opposite effect of the final judgment rule. It enables a first-order decision-maker to suspend her investment of resources in a case (for example, following a denial of qualified immunity); meanwhile, a reviewing court must undertake a greater investment of resources to review the decision (an investment that would be unnecessary under an exceptionless final judgment rule). Similarly, a flexible transjurisdictional rule (such as a discretionary rule regarding the issuance of lis pendens stays) allows a court in one jurisdiction to reduce its investment in a case by allowing a decision-maker in another jurisdiction to resolve the case first.

A second value, cutting across all forms of decisional sequencing rules, is the effect of such rules on the parties' settlement incentives. Generally, it would appear that rigid sequencing rules tend to favor plaintiffs. In the context of horizontal sequencing, rigid rules may force defendants to endure losses on particular grounds where their defense may be weak, even if a stronger ground may exist further down the decisional pathway. In the vertical and transjurisdicitonal context, rigid rules prevent defendants from seeking immediate relief in alternative forums (whether appellate or entirely different jurisdictions) that might be more sympathetic to their position. In essence, rigid rules help to entrench the plaintiff's first-mover advantage.[66] More flexible sequencing rules (such as immediate

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65. *See supra* note 14. For a good example of how the sequencing influences the qualified immunity inquiry, see Jean v. Collins, 155 F.3d 701 (4th Cir. 1998), *vacated*, 526 U.S. 1142 (1999).

66. For a survey on the first-mover advantage, see generally Marvin B. Lieberman & David B. Montgomery, *First-Mover Advantages*, 9 STRATEGIC MGMT. J. 41 (1988).

appealability or a more relaxed standard on lis pendens stays) offset these advantages and favor defendants in the settlement bargain.

A third critical value is the development of precedent. Rigid sequencing rules distort precedent development. They favor the development of precedent in certain areas (namely those that come first on the decisional agenda) while reducing the production of precedent on topics further down the decisional agenda. Likewise, flexible vertical sequencing rules—such as those that permit immediate appealability of certain orders—facilitate the development of appellate precedent on those appealable issues; by contrast, issues that must await final judgment before an appellate tribunal can consider them are less likely to generate as much appellate precedent.

Synthesizing the foregoing discussion, we can observe that decisional sequencing rules have a meaningful effect on outcomes, both in terms of the actual matter before the court and on future matters. Sequencing rules, whether horizontal, vertical, or transjurisdictional, also implicate a common set of values—the investment of judicial resources, the parties' settlement incentives, and the production of precedent. Recognizing these values enables both positive and normative analysis. On the positive level, these metrics enable us to assess how a particular rule affects the values and how it balances them to the extent the values may cut in opposite directions—Part II and Part III address this. On a normative level, these metrics facilitate a critical discussion about the desirable sequencing rule in a given context—Part IV addresses this.

## II. SIMPLE MODEL

This section systematizes the ideas developed in Part I. Using the typology developed in Part I.A, it explains as a positive matter how different sorts of sequencing rules—horizontal, vertical, and transjurisdictional—map out along the values described in Part I.C.

### *A. Horizontal Rules*

Recall that horizontal sequencing rules (such as the *Steel Company-Ruhrgas-Sinochem* trilogy) determine the order in which a single decision-maker—a judge, an appellate court, or an arbitrator—resolves issues. Viewed against the matrix developed in Part I.C, horizontal rules exert moderate influences on both the investment of resources by courts and on the development of precedent. Their most profound effect, however, is on the parties' settlement incentives.

*1. Resource Investment*

Horizontal sequencing rules can impose greater search costs on courts, requiring them to invest more time and resources to resolve a case. *Steel Co.* provides the most obvious example—by requiring courts to determine jurisdiction before considering merits-based defenses, the *Steel Co.* rule forces courts to work through thorny jurisdictional issues before turning to merits issues that may be potentially quite easier. One might argue that this search cost is justified on the ground that it imposes a restraining effect on courts—allowing them to opine on the meaning of the law only when they have cleared any jurisdictional hurdles.[67] Yet other horizontal sequencing rules work the same drain on resources without the same apparently comparable effect.

*2. Law Development*

Horizontal sequencing rules affect the *content* of the law.[68] By forcing courts to resolve certain questions before others, horizontal sequencing rules enhance the likelihood that courts will render more decisions in the former area than the latter. Consequently, such rules effectively "make" more law in those areas that are given priority under any decisional sequence while retarding the development of law in those areas on which courts can render opinions only after deciding the "prior" matters. Of course, this does not necessarily mean that a world with decisional sequencing rules is more likely to skew the development of the law than a world without them. A more flexible sequencing rule might likewise skew the development of the law. For example, if certain inquiries were particularly straightforward, a court inclined to preserve scarce resources of time might otherwise drift toward resolving cases on those "straightforward" grounds (such as some jurisdictional hook) while consistently avoiding others (such as whether a complaint states a claim).

While horizontal sequencing rules skew the production of the law, it does not necessarily follow that they *reduce* the total amount of law production.[69] A judge willing to invest more resources might well conclude

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67. *See* 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, 29–31 (2004).

68. *See* John C. Jeffries, *Reversing the Order of Battle in Constitutional Torts*, 2010 SUP. CT. REV. 115, 120 (2010); Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667 (2009); Paul W. Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401 (2009); Bruce Chapman, *Law, Incommensurability, and Conceptually Sequenced Argument*, 146 U. PA. L. REV. 1487, 1506 (1998).

69. Heather Elliott has observed that horizontal sequencing rules like *Ruhrgas* and *Sinochem* are best understood to reflect a philosophy of judicial restraint insofar as it "permits a court . . . to avoid treading on the bounadary of its power, when it would lack juruisdiction for another threshold rea-

that he or she should dismiss a case on jurisdictional grounds and then go on and offer an alternative ground for dismissal.[70] As a consequence of a sequencing rule like *Steel Company*, though, the judge cannot begin to articulate a view on the latter, alternative issue before resolving the former. Consequently, with respect to law production, horizontal sequencing rules at bottom have the effect of leading to overproduction of laws in the area that enjoys priority in the sequencing scheme and may, depending on the judge's preferences, lead to underproduction in areas of law that are further down the decisional scheme.

*3. Parties' Behavior*

Perhaps the most powerful effect of a sequencing rule is on the defendant's behavior. Specifically, sequencing rules influence a defendant's choices over what defenses to raise in a dispositive motion. In light of the strict waiver provisions of Federal Rule 12(h),[71] a sequencing rule requiring district courts to resolve jurisdictional objections before turning to non-jurisdictional ones might create a conundrum for defendants. If they raise a jurisdictional objection and a venue objection, they run the risk that a court will have to reject a weak jurisdictional defense before ultimately dismissing the case on the venue ground (thereby resulting in a finding that jurisdiction exists). By contrast, under a more discretionary sequencing system (such as that created by *Sinochem*), defendants can include more defenses in their dispositive motions without fear that a judge will rule adversely as to one before ultimately resolving the case in the defendant's favor on other grounds.

Of course, even under a more flexible rule, such as that permitted by *Sinochem*, the defendant raising multiple defenses still runs risks. *Sinochem* does not preclude the judge from resolving any non-merits defenses in whatever order she chooses. Consequently, a judge, particularly one disposed against a defendant and willing to invest the intellectual resources to resolve multiple issues, might well reject several of the defendant's defenses in a reported opinion before ultimately resolving the case in the defendant's favor.

There is, however, an important difference between the two cases. In a rigid sequencing world, the judge's adverse decision on the jurisdictional matter is technically a holding—since it was a logically necessary anterior premise to reaching the non-jurisdictional ground. By contrast, under a

son." Elliott *supra* note 6, at 743. While I agree with Elliott that flexible sequencing rules have that restraining effect, the flipside consequence is that they encourage law production in *more* areas of law than if a court were forced to a follow a strict horizontal sequencing order (which might result in dismissal of the case on a different ground).

70. *See* Sequihua v. Texaco, Inc., 847 F. Supp. 61, 63–65 (S.D. Tex. 1994).

71. FED. R. CIV. P. 12 (h).

flexible sequencing rule, any adverse rulings on issues—prior to the favorable ruling on the issue that results in dismissal of the case—is arguably dicta, since it was not essential to the court's judgment. Thus, the more discretionary the sequencing rule, the greater the flexibility accorded to the defendant to argue away adverse rulings, and thus the greater options afforded the defendant to raise multiple defenses in a dispositive motion without risking an adverse ruling.[72]

Sequencing rules exert a powerful effect on plaintiffs' behavior as well. To the extent the judge must rule on issues in a particular order, a mandatory sequencing rule might work to the plaintiffs' advantage. Jurisdictional discovery provides a good example.[73] Under a system where the judge must determine jurisdiction before considering any other defense, a plaintiff has a stronger claim for obtaining jurisdictional discovery (since the judge lacks an alternative ground upon which to dismiss the case and which preterit might thereby obviate jurisdictional discovery). Once so ordered (and the frequency of such orders seems to be rising), this discovery can help the plaintiff obtain valuable information about the defendant.[74] Such information can help plaintiffs in various ways. It obviously will strengthen the plaintiff's case on jurisdiction; depending on the nature of the case (such as cases against foreign sovereigns where subject-matter jurisdiction is tied to discovery), it also might strengthen the case on the merits. Finally, such discovery can be of assistance in future cases to the

72. The effects of sequencing rules in international civil litigation stand in marked contrast to the analogous (and more flexible) rules in international commercial arbitration. While I deal with arbitration primarily in Part III, a brief comparison here illuminates the point. Unlike civil litigation, arbitration—due to its greater procedural flexibility—allows arbitrators to pretermit questions on jurisdiction pending the submission of pleadings—and a potential hearing—on the merits. Consequently, the parties may be required to invest more front-end resources before obtaining a favorable decision on jurisdiction, increasing the settlement leverage on the less well capitalized party. *See generally infra* Part III. Other aspects of arbitration can, however, offset the effect of this settlement leverage. For example, in contrast to judges, arbitrators generally enjoy far greater flexibility in their decisions whether to award attorneys' fees to the prevailing party. Consequently, even if the party must invest more upfront resources in order to obtain a favorable ruling, the procedural flexibility afforded to arbitrators enhances the likelihood that the party can recoup some of those costs. The greater restrictions on fee awards, at least under the American rule, increases the likelihood that increased costs caused by sequencing rules will be unrecoverable.

73. For an excellent discussion of jurisdictional discovery and its broader implications for federal practice, see S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489 (2010).

74. The Supreme Court has never squarely addressed issues of jurisdictional discovery, apart from approving a sanction for a party's failure to comply with a jurisdictional discovery order. *See* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1984). This lack of guidance has sparked a nasty disagreement among the federal courts of appeals over the availability of jurisdictional discovery. *Compare In re* Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 301–305 (3d. Cir. 2004) (summarizing disagreement about whether jurisdictional discovery must proceed under the Hague Evidence Convention and declining to require resort to the Convention for jurisdictional discovery), *with* Geo-Culture, Inc. v. Siam Inv. Mgmt. S.A., 936 P.2d 1063, 1067 (Or. App. 1997) (requiring resort to Convention for jurisdictional discovery where plaintiff did not make prima facie showing of personal jurisdiction). For commentary, see BORN & RUTLEDGE, *supra* note 30, at 992–93.

extent it reveals information about a defendant's activities that might help in those cases.

The effect of horizontal sequencing rules such as jurisdictional discovery can be especially significant in certain cases where the jurisdictional discovery closely overlaps with the merits of the dispute.[75] Consider, for example, cases against foreign states. The FSIA, which governs the immunity of foreign states, sets forth a presumption of immunity followed by a series of exceptions.[76] Several of the exceptions, though technically functioning as exceptions to the general rule of immunity, turn on issues that touch upon issues of substantive liability.[77] These include, for example, the nature of an expropriation, the nature of a tort, or whether a foreign official was acting within the scope of employment. Consequently, plaintiffs seeking jurisdictional discovery from a foreign sovereign can potentially frame those discovery requests in a manner designed to gain information helpful to their proof on the substance of their claims—even before the Court has ruled on whether it has jurisdiction.[78] To the extent a jurisdiction permits jurisdictional discovery before deciding whether to dismiss a case on the pleadings, such discovery becomes a powerful weapon in the plaintiff's arsenal.

Jurisdictional veil piercing provides another example where plaintiffs can exploit the sequencing created by jurisdictional discovery rules.[79] Jurisdictional veil piercing enables plaintiffs to assert personal jurisdiction over a nonresident defendant based on the contacts of a subsidiary or agent (in the typical scenario, it is a related company).[80] Such jurisdictional veil piercing doctrines may differ in some respects from the more familiar substantive veil piercing rules from corporate law. Yet there is enough overlap between the two inquiries that allows a plaintiff, seeking to impute jurisdictional contacts, to elicit information about the relationship between corporate parties that helps it prove its case on the merits. Such discovery, again, even before the court rules on the pleadings, enhances a plaintiff's settlement leverage, both with respect to the costs of compliance and with respect to influencing the defendant's decision whether it wishes to disclose potentially incriminating information about its intercorporate activities that might be used in later cases.

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75. Other examples include whether a federal officer was under "color of office" under the federal officer removal statute, 28 U.S.C. § 1442 (2006), and the "law of nations" requirement under the Alien Tort Statute, 28 U.S.C. § 1350 (2006).

76. *See* BORN & RUTLEDGE, *supra* note 30, at 222–23.

77. 28 U.S.C. § 1605 (2006).

78. *See* Maureen P. Smith, Jurisdictional Discovery in Cases Under the Foreign Sovereign Immunities Act 11–18 (unpublished manuscript) (2007) (on file with author).

79. *See* BORN & RUTLEDGE, *supra* note 30, at 164–92.

80. In re Telectronics Pacing Sys., Inc., 953 F. Supp. 909, 916 (S.D. Ohio 1997), *rev'd on other grounds*, 221 F.3d 870 (6th Cir. 2000).

Tying together the two preceding ideas, we can see how horizontal sequencing rules exert a profound effect on settlement. Flexible sequencing rules strengthen a defendant's position in settlement because the defendant has more avenues available to it for immediate dismissal with a lower risk of an adverse ruling. By contrast, rigid sequencing rules strengthen a plaintiff's position in settlement because the mandatory sequence enables the plaintiff to obtain a favorable ruling on an early issue, and depending on the availability of jurisdictional discovery, drive up the defendant's costs early in the dispute.

### *B. Vertical Rules*

Recall that vertical sequencing rules (such as the final judgment rule and the collateral order doctrine) determine the timing in which a reviewing authority (such as an appellate court) may consider the decisions of a first-order decision-maker. Viewed against the matrix developed in Part I.C, vertical rules exert significant effects on the investment of judicial resources, precedent development, and the parties' settlement incentives.

#### *1. Resource Investment*

Vertical sequencing rules have several effects on judicial investment of resources. Vertical sequencing rules reduce the investment of judicial resources required by first-order decision-makers and reallocate some of the required investment to appellate bodies. For example, the immediate appealability of a denial of sovereign immunity (or official immunity) can effectively suspend proceedings in the district court while an appellate court considers the issues.[81] In the event that the appellate court concludes that the denial of immunity was erroneous, the immediate appealability of that ruling corrects the district court's error without the need for further investment by the district court. By contrast, if such denials of immunity were only immediately appealable following final judgment, the investment of resources by the district court would be far greater, while the investment by the appellate court far smaller.

Various procedural devices help to moderate these effects on resource allocation. Sometimes, those procedural devices operate as mandatory vertical sequencing rules. These include statutory requirements of immediate appealability (for example in cases of denials of petitions to compel arbitration) or decisional requirements under the *Cohen* rule (such as certain denials of qualified immunity).[82] In other cases, those procedural de-

81. *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982); Mitchell v. Forsyth, 472 U.S. 511 (1985).

82. *See, e.g.*, 9 U.S.C. § 16 (2006); 28 U.S.C. § 1292 (2006); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

vices operate as discretionary vehicles; certification under Federal Rule of Civil Procedure 54(b) provides a good example.[83] Certification to the Supreme Court, a rarely employed but still available tool, provides another.[84]

The allocation of resources wrought by vertical sequencing rules can influence the development of judicial expertise. Consider, for example, the rule barring appellate review of district court remand orders in removal cases.[85] Such a rule naturally encourages specialization in removability determinations by district courts while constricting such specialization among appellate courts. Instead, appellate courts typically only see cases where removal was allowed and later challenged, or less frequently, requests for attorneys' fees and costs. Likewise, the different sequencing rules regarding the immediate appealability of refusals to enforce arbitration clauses and forum selection clauses influence the sorts of cases that appellate courts will encounter. Generally speaking, appellate courts will encounter more cases involving arbitration clauses than forum selection clauses in light of the easier appealability of orders on these issues, and to the extent they encounter forum selection clauses, generally only will do so after a case has reached final judgment.[86]

These reallocations of judicial resources reflect important policy interests of the forum state. Sovereign immunity rules provide a good example. Denials of sovereign immunity, much like denials of official immunity in garden variety constitutional tort cases, are immediately appealable.[87] That result makes sense in light of the purposes of these immunities, namely, not merely to protect the defendant from liability, but additionally to protect the defendant from the hassles of litigation altogether. That additional value is frustrated if a defendant must endure an adverse ruling through the course of a trial even if the adverse ruling ultimately is corrected on appeal.

### *2. Law Development*

Vertical sequencing rules influence the development of precedent in two ways. First, flexible rules permit more immediate access to higher-level tribunals, and thereby increase law production. Allowing unresolved questions of law to reach appellate tribunals more quickly makes it easier for those tribunals to render decisions on those questions. By contrast, rigid rules that make it more difficult to obtain a decision by a higher tri-

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83. FED. R. CIV. P. 54 (b).

84. *See* 28 U.S.C. § 1254(2) (2006); United States v. Seale, 130 S. Ct. 12 (2009) (respecting the dismissal of the certified question).

85. 28 U.S.C. § 1447(d) (2006).

86. 9 U.S.C. § 16 (2006). *See also* Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 498 (1989).

87. *See* 28 U.S.C. §§ 1602–11 (2006) (granting immunity to "Foreign States" unless one of several exceptions applies); *Harlow*, 457 U.S. 800.

bunal increase the risk that the case will be disposed of—either through settlement or resolution on some other ground—before the appellate tribunal can weigh in on the matter.

Second, vertical sequencing rules that provide more immediate access to higher tribunals also, arguably, increase accurate outcomes. Suppose that a district judge is confronted with an issue—such as the enforceability of a forum selection clause—and suppose further that the district judge resolves the matter incorrectly. If the district judge's opinion on the matter is immediately appealable, then the higher authority can fix the error—both to the benefit of the individual litigant and to the benefit of future litigants who will know the correct legal rule. By contrast, if the district judge's erroneous resolution of the matter is not immediately appealable, then there is a greater likelihood, again, that the error will linger—both for the remaining life of the case and for future litigants until an appellate body is given an opportunity to correct the erroneous premise on which the decision rests.

*3. Parties' Behavior*

Immediate appeal of an adverse decision, as a doctrine like the collateral order allows, enables the party adversely affected by that decision to obtain a result more cheaply and more quickly than if the party must await final judgment. Consider forum-selection clauses where the Supreme Court held in *Lauro Lines v. Chasser* that refusals to enforce such clauses are not immediately appealable.[88] If *Chasser* is right that refusals to enforce forum-selection clauses are not immediately appealable, then parties seeking to vindicate those clauses must (absent an escape hatch such as mandamus) either endure the cost of an entire trial or, alternatively, settle the case to avoid such an outcome.[89]

Of course, the cost argument cuts both ways. While vertical sequencing rules that force a dissatisfied party to await final judgment might favor the plaintiff, more liberal vertical sequencing rules (that is, those which facilitate immediate appeal) might well favor the defendant in settlement.[90]

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88. *Lauro Lines*, 490 U.S. at 501.

89. Arbitration again provides a useful contrast. Refusals to enforce arbitration clauses are immediately appealable. 9 U.S.C. § 16 (2006). The opposite sequencing rule regarding the enforceability of arbitration clauses enables parties seeking to enforce those clauses to obtain the desired relief more quickly and reduces the settlement pressures that they might otherwise feel if forced to litigate a case before it can raise the enforceability of the arbitration clause on direct review. I discuss this contrast in greater detail below. *See infra* Part III.

90. Occasionally, rigid vertical sequencing rules can favor defendants. If a district court erroneously denies some, but not all, of a plaintiff's claims, the plaintiff may be forced to continue to litigate the case to judgment before she can obtain review of the adverse (and erroneous) partial dismissal of her claims. Federal Rule of Civil Procedure 54(b) can be understood as a counterweight to that risk.

This is because a defendant can use those liberal sequencing rules to increase the process costs for the plaintiff each time the defendant "takes an issue up." Even if the plaintiff ultimately prevails on those appealed issues, she must absorb the cost of litigating them immediately before the higher tribunal—costs that she can avoid if the defendant must await final judgment before appealing the ruling.

### *C. Transjurisdictional Rules*

Recall that transjurisdictional sequencing rules channel disputes in parallel litigation. By parallel litigation, I mean the common phenomenon in dispute resolution, particularly international dispute resolution, where parties have claims against each other, and each party files its claims in its preferred forum.[91] As with horizontal and vertical sequencing rules, such transjurisdictional sequencing rules influence law development, judicial behavior, and the parties' incentives.[92]

#### *1. Resource Investment*

Transjurisdictional sequencing rules can influence judicial investment of resources. The forum non conveniens doctrine represents a type of flexible transjurisdictional rule that reduces a court's investment of resources. Under that doctrine, a court will dismiss a case in favor of an adequate foreign forum where a mix of public and private interest factors favors dismissal.[93] Dismissal on these grounds reduces the court's investment of resources and reallocates the burden in favor of the foreign forum.

Some rules can offset the allocation effected by the forum non conveniens doctrine and inject rigidity into the jurisdictional sequencing. For example, some countries have enacted statutes that bar their courts from exercising subject-matter jurisdiction over a case previously filed in another country.[94] Statutes of this sort effectively prevent the foreign forum from being considered "adequate" under forum non conveniens doctrine. Thereby, they enhance the likelihood that the original forum will retain the case and consequently invest resources in resolving it. Another example

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91. *See* BORN & RUTLEDGE, *supra* note 30, at 521–60.

92. *See* Nash, *supra* note 22, at 1883.

93. *See* Piper Aircraft v. Reyno Co., 454 U.S. 235 (1981). *See generally* BORN & RUTLEDGE, *supra* note 30, at 347–434.

94. *See, e.g.*, Ley Interpretiva de los artículos 27, 28, 29 y 30 del Código de Procedimiento Civil para los casos de Competencia Concurrente Internacional [Interpretive Law for articles 27, 28, 29 and 30 of the Code of Civil Procedure for cases of Concurrent International Jurisdiction], R.O. No. 247 (Jan. 30, 1998) (Ecuador) [hereinafter Ley 55] (terminating national competency and jurisdiction of Ecuadorian judges over lawsuits filed outside Ecuadorian territory). The Ecuadorian Constitutional Court declared Ley 55 unconstitutional in 2002. Aguinda v. Texaco, 303 F.3d 470, 477 (2d Cir. 2002).

comes from the Hague Choice of Courts Convention which precludes courts designated in forum-selection clauses from dismissing cases under the forum non conveniens doctrine.[95] Both examples operate similar to rigid horizontal sequencing rules like *Steel Company* insofar as they increase the resource investment of the first-instance tribunal.

Clawback statutes have similar effects. Those statutes, enacted by the United Kingdom in response to aggressive assertions of jurisdiction by United States courts, authorized causes of action to recover from United States plaintiffs who had recovered from British defendants under the treble damages provisions of United States antitrust laws.[96] The effect of these statutes is to discourage courts in the first forum, the United States, from exercising jurisdiction—or, put more directly, to discourage parties from invoking the jurisdiction of United States' courts—in order to avoid a subsequent action in a United Kingdom court.

Transjurisdictional sequencing rules also can influence judicial behavior once a court (or arbitral tribunal) has a case. A rule that encourages parallel litigation—such as one that disfavors the issuance of a stay *lis alibi pendens* or an antisuit injunction—encourages a race to judgment. The entire premise of this conservative approach to such forum channeling devices is that courts should tolerate parallel litigation until the first case proceeds to judgment; at that point, the judgment rendered in that forum can be recognized in the other forum under principles of res judicata.[97] This gives each court in parallel litigation an incentive to proceed quickly—particularly as it invests more time and resources in a case. If it fails to render the first judgment, then recognition of the other forum's judgment may mean that its efforts have been for naught. By contrast, courts more willing to issue stays or antisuit injunctions do not operate under the same incentive structure. Since courts employing these devices are more willing to make an early determination about the single proper forum for a dispute, there is a reduced risk that this forum will be competing with another forum in the race to judgment. It can take its time without risk of a judgment from a parallel litigation obviating its efforts.

### *2. Law Development*

Transjurisdictional sequencing rules critically influence law development. Consider, for example, the standards governing the issuance of stays *lis alibi pendens*.[98] A liberal standard for issuance of such stays op-

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95. *See* BORN & RUTLEDGE, *supra* note 30, at 442.
96. *See* BORN & RUTLEDGE, *supra* note 30, at 648–50.
97. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 2881–83 (2009).
98. *See* BORN & RUTLEDGE, *supra* note 30, at 521–40.

erates like a flexible sequencing rule: it enhances the likelihood that a dispute will be heard in a foreign forum. Consequently, the foreign forum is likelier to apply its own law—or at least its own conflicts principles—whereas the dispute is unlikely to generate any substantive law in the abstaining forum, which may ultimately just recognize the foreign judgment, once rendered, under its principles of res judicata. By contrast, a stricter standard for issuance of such stays operates like a rigid sequencing rule: it enhances the likelihood that a dispute will be heard in the plaintiffs' original forum, prompting that forum to apply its own law or conflicts principles to the case and thereby generate more domestic precedent.

*3. Parties' Behavior*

Transjurisdictional sequencing rules have three primary effects on parties' behavior. First, such rules can effectively deprive parties of access to a forum altogether. A foreign statute that precludes subject-matter jurisdiction over a case filed elsewhere, like Ecudorean Ley 55,[99] or a treaty provision that precludes a forum non conveniens dismissal, like the Hague Choice of Courts Convention,[100] helps to lock in the plaintiff's first mover advantage and enhances the plaintiff's settlement leverage.[101]

Second, transjurisdictional rules can increase both parties' settlement incentives. Sequencing rules that favor parallel litigation—such as a conservative approach to the issuance of a lis pendens stay—increase the costs to litigants who now must litigate in multiple forums rather than have their bilateral disputes channeled into a single forum. Such an outcome increases pressure on the financially weaker party to settle the case. By contrast, courts more disposed to issuing these remedies channel bilateral disputes into a single forum more quickly, which reduces dispute resolution costs and thus relieves the more poorly capitalized party of the pressure to settle a case quickly.

Creative sequencing rules can influence these pressures. Consider conditional dismissals.[102] Often used in the forum non conveniens context, conditional dismissals provide that a United States court will dismiss or suspend a case but only if the defendant agrees to certain conditions.[103] These conditions range from the mundane, such as waivers of jurisdictional objections, to the severe, such as agreeing to be bound by any judg-

99. *See supra* note 94.
100. *See supra* note 95.
101. Consider too the European Court of Justice's recent ruling in *Allianz SpA & Generali Assicurazioni Generali SpA v. West Tankers Inc.*, which interpreted EC Regulation 44/2001 to prohibit antisuit injunctions even where the parallel litigation violates an arbitration agreement. Case C-185/07, Allianz SpA & Generali Assicurazioni Generali SpA v. W. Tankers Inc., 2009 E.C.R. I-663, ¶ 28.
102. *See, e.g.*, *In re* Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 850 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir. 1987).
103. *Id.*

ment, to the truly intrusive, like agreeing to apply the Federal Rules of Civil Procedure in the foreign forum.[104] While the defendant sometimes volunteers these conditions (in an effort to procure a favorable dismissal), sometimes the court imposes them sua sponte.[105] The net effect of such conditions is to offset some of the procedural or substantive advantages that the defendant obtains through litigation in the foreign forum and, consequently, to increase the plaintiff's settlement leverage.

Third, transjurisdictional sequencing rules affect the parties' behavior within the disputes themselves. Rules that favor the issuance of lis pendens stays or antisuit injunctions encourage a race to the courthouse, for under those regimes the party filing first has an immediate advantage in blocking subsequently filed parallel litigation. By contrast, rules that favor parallel litigation favor a race to judgment. Even under these more relaxed regimes, the prevailing party in the first favorable judgment can then seek recognition of that judgment, thereby precluding further litigation in the parallel proceeding.

Differences across forums regarding the availability of these devices can alter party behavior as well. For example, in the United States, the current rules regarding the availability of lis pendens stays or antisuit injunctions are governed almost entirely by federal common law, generating a nasty inter-circuit split over the proper standard for the issuance of such devices.[106] By contrast, under the American Law Institute's proposed federal statute on jurisdiction and judgments, lis pendens stays would be more easily obtained.[107] To the extent these rules were more favorable than a foreign jurisdiction's rules regarding lis pendens stays, a party favoring litigation abroad would be encouraged to file quickly abroad (thereby triggering the statute's lis pendens rules); by contrast, the party favoring litigation in the United States would be encouraged to file quickly in the United States (in an effort to beat its opponent to the courthouse and, thereby, preclude triggering the lis pendens provisions).

The following table summarizes the analytical lessons from the analysis of the decisional sequencing model in its simple form:

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104. *See generally* Tim A. Thomas, Annotation, *Validity and Propriety of Conditions Imposed Upon Proceeding in Foreign Forum by Federal Court in Dismissing Action Under Forum Non Conveniens*, 89 A.L.R. FED. 238 (1988).

105. *See, e.g.*, Adams v. Merck & Co., 353 F. App'x 960 (5th Cir. 2009) (per curiam).

106. *See* BORN & RUTLEDGE, *supra* note 30, at 521–60.

107. *See* A.L.I., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 11 (2006).

| Type of Rule | Rigid | Flexible |
|---|---|---|
| Horizontal | (1) Increases investment of resources by first-order decision maker<br>(2) Enhances plaintiffs' settlement leverage<br>(3) Results in development of precedent about first-stage issues on decisional agenda | (1) Reduces investment of resources by first-order decision maker<br>(2) Enhances defendants' settlement leverage<br>(3) Spreads development of precedent across more issues |
| Vertical | (1) Increases investment of resources by first-order decision maker<br>(2) Enhances plaintiffs' settlement leverage<br>(3) Reduces development of appellate precedent | (1) Reallocates investment of resources to reviewing body<br>(2) Enhances defendants' settlement leverage<br>(3) Facilitates development of appellate precedent |
| Transjurisdictional | (1) Increases investment of resources by first-order decision maker<br>(2) Enhances plaintiffs' settlement leverage<br>(3) Encourages development of precedent by plaintiffs' chosen forum | (1) Reallocates investment of resources to alternative forum<br>(2) Enhances defendants' settlement leverage<br>(3) Encourages development of precedent in defendants' chosen forum |

## III. REFINED MODEL

To this point, the Article has assumed that decisional sequencing rules are mandatory. That is, states set the rules, and parties must play by them. These sequencing rules are actually default rules around which the parties, within limits, may contract.[108] Continuing the analytic matrix developed above, this Part considers the impact of this "default" quality of certain sequencing rules on the parties' behavior, the courts' behavior, and law development.

Before turning to the analysis, it is helpful to note the various ways in which parties may attempt to manipulate the decisional sequence. Some examples will be quite familiar. For example, both forum-selection clauses and arbitration clauses (to the extent they are exclusive) exemplify efforts to influence contractually transjurisdictional sequencing rules by specifying *ex ante* the forum in which all disputes must be resolved.[109] Others will be more subtle. For example, certain features of arbitration clauses may influence vertical sequencing rules by expanding, or contracting, the timing (and degree) of judicial review.

### *A. Contractual Manipulation of Horizontal Rules*

Interim orders on jurisdiction exemplify how parties can, through arbitration, contractually manipulate sequencing rules that otherwise would prevail in litigation. Recall that, under *Steel Company*, a court cannot dismiss a case on merits-related grounds before considering non-merits defenses such as lack of jurisdiction.[110] This rule defers consideration of the merits of the case until jurisdictional matters are resolved. One effect, among others, is to encourage settlement in cases where the plaintiff has a stronger case on jurisdiction than the merits, for a defendant may prefer to avoid an adverse jurisdictional ruling.

Arbitration presents a much different decisional sequence in these circumstances. In contrast to judges, arbitrators are not subject to strict sequencing rules that require them to resolve jurisdictional matters before turning to the merits. Virtually all arbitral rules are silent on the sequence in which arbitrators must resolve issues; the issue is effectively left to the arbitrator's near-total discretion.[111] As a result of this discretion, arbitra-

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108. *See* Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT'L ARB. 451, 470–71 (2000) (explaining the difference between default and mandatory rules in the context of arbitration); Christopher R. Drahozal, *Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 PEPP. DISP. RESOL. L.J. 419, 420–21 (2003) (same).

109. *See* ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 93–94 (2009).

110. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998).

111. *See, e.g,* Int'l Chamber of Commerce [ICC], *Rules of Arbitration* (Jan. 1, 1998), http:// www.iccwbo.org/ uploadedfiles/ court/ arbitration/ other/ rules_ arb_ english.pdf; Am. Arbitration

tors can pretermit jurisdictional objections pending full briefing on the merits of the case.[112] Under *Steel Company*, such a course would be unavailable to the district judge. This difference can have a powerful effect on resource investment and settlement incentives. It does not, however, exert as extensive an impact on law development.

*1. Parties' Behavior*

The parties' ability to contract around horizontal sequencing rules has a powerful effect on the parties' settlement incentives. The greater discretion accorded to the arbitrator favors the party with superior resources. This is because the option to pretermit a jurisdictional ruling increases the parties' costs during the period of time that they are briefing the merits and awaiting a ruling on jurisdiction.

This rule does not *necessarily* favor plaintiffs (or "claimants" in arbitral lexicon). This is due to the arbitrator's power under most rules (at least international ones) to allocate costs and attorneys' fees upon the conclusion of the arbitration.[113] Consequently, if the arbitrator ultimately decided to enter an award finding that it lacked jurisdiction, it might require the claimant to bear all the costs of the arbitration as well as the defendant's ("respondent's" in arbitral lexicon) attorneys' fees. The prospect of that order could actually encourage claimants to settle, if they feared they had a close case on jurisdiction.

*2. Resource Investment*

Contracting around horizontal sequencing rules can also increase judicial actors' investment of resources. It requires them to learn an increased array of issues on which the case might turn (in contrast to the *Steel Company* rule that can largely relieve the judge of the need to learn the merits of the case). This added investment of resources, likewise, could affect the parties' settlement incentives, at least under arbitral rules where the arbitrators' fees are a function of the investment of time, rather than the amount in controversy.[114]

A party might attempt to counteract the dual effect of this decisional sequence on settlement incentives through regulating the allocation of costs

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Ass'n [AAA], *International Dispute Resolution Procedures* (June 1, 2009), http:// www.adr.org/ sp.asp? id=33994.

112. *See* Vivendi, S.A. v. T-Mobile USA, Inc., No. C06-1524JLR, 2007 WL 1168819, at *2 (W.D. Wash. 2007) (unpublished decision on jurisdictional discovery); *aff'd* 586 F.3d 689 (2009).

113. *See, e.g.*, ICC, *Rules of Arbitration*, art. 31 (Jan. 1, 1998), http:// www.iccwbo.org/ uploadedfiles/ court/ arbitration/ other/rules_arb_english.pdf.

114. *See, e.g.*, London Court of Int'l Arbitration [LCIA], *Arbitration Rules*, art. 28 (Jan. 1, 1998), http:// www.lcia.org/ Dispute_Resolution_Services/ LCIA_Arbitration_Rules .aspx#article28.

and attorneys' fees *ex ante*. Some arbitration clauses specify that parties will bear their own costs and fees, and most arbitral rules respect the parties' choice in this regard (operating as default rules rather than mandatory rules).[115] Provided that the law of the arbitral forum respects this choice, a provision of this sort can alter the settlement dynamics. Specifically, a clause requiring each party to bear its own costs and fees would put greater pressure on the respondent to settle the case, for it might be more difficult for the respondent to recoup those expenses.

*3. Law Development*

While the potentially different decisional sequence influences both the parties' settlement incentives and the arbitrator's investment of resources, it does not have as profound an effect on legal development. For one thing, questions arise over whether arbitral awards represent "precedents" at all.[116] Even if they do, as some scholars have suggested in the context of subsequent arbitral tribunals consulting the awards of prior tribunals, the content of those awards is not likely to change as a result of the award. Even after the hearing on the merits, most arbitrators will ascertain their jurisdiction before opining on the merits of the case in their award. In this respect, the effect of a contract is not to alter the *order* in which issues are decided but, instead, potentially affect the *timing* of that decision. It is this difference in timing between ordinary litigation and arbitration that works the effect seen here.

### *B. Contractual Manipulation of Vertical Rules*

Contractual manipulation of decisional sequencing rules can have a direct effect on courts' behavior. Consider the principles under United States law governing the *kompetenz-kompetenz* principle in arbitration. Generally speaking, according to this principle, arbitral tribunals have jurisdiction to determine their own jurisdiction.[117] As the Supreme Court of the United States has articulated the principle in *First Options of Chicago, Inc. v. Kaplan*, however, courts may decide challenges to the enforceability of the arbitration at the outset of a dispute—subject to an important exception: namely, arbitrators will resolve these issues when the parties have employed clear and unmistakable language expressing that preference.[118]

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115. *See, e.g.*, LCIA, *Arbitration Rules*, art. 28.4 (Jan. 1, 1998), http:// www.lcia.org/ Dispute_ Resolution_ Services/ LCIA_ Arbitration_ Rules.aspx#article28.

116. For an insightful discussion, see W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895 (2010).

117. *See* William W. Park, *The Arbitrability Dicta in* First Options v. Kaplan: *What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 ARB. INT'L. 137 (1996).

118. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943–45 (1995).

Most arbitral rules (incorporated by reference into the parties' arbitration agreements) include language designed to satisfy the *First Options* standard.[119] This manipulation can influence resource investment and settlement incentives.

*1. Resource Investment*

Contractual manipulation of vertical rules can affect the decision-makers' resource investment. *First Options* operates as a sort of default rule that presumptively requires courts to invest resources at the front end of a case (to determine the enforceability of the agreement). The exception embedded in *First Options*, however, enables the parties to contract around that rule, thereby reducing the front-end investment that courts must make and correspondingly increasing the front-end investment by arbitrators to resolve a dispute.

Sometimes, the resource allocation depends on the form of the contractual manipulation. For example, compare the rules governing forum-selection clauses and arbitration clauses. The denial of a motion to dismiss a case on the basis of a forum-selection clause is not immediately appealable.[120] By contrast, the denial of a motion to stay litigation on the basis of an arbitration clause is immediately appealable.[121] Sometimes different vertical sequencing rules operate even as to similar issues. Compare, for example, the treatment of arbitration clauses and forum-selection clauses. Both sorts of clauses try to channel disputes into predetermined forums before any dispute has arisen. Yet decisions about the enforceability of the two sorts of clauses are subject to very different sequencing rules. A court's refusal to enforce an arbitration clause, whether couched in terms of a refusal to grant a petition to compel arbitration or a refusal to stay litigation in favor of arbitration, is immediately appealable.[122] By contrast, a court's refusal to enforce a forum-selection clause, typically in the context of a failure to dismiss a case filed by a party in a forum other than the one specified in the clause, is not.[123]

At first blush, the two outcomes seem paradoxical. Both forum-selection clauses and arbitration clauses represent contractual attempts to regulate *ex ante* the forum in which any dispute will be resolved. Whether

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119. *See, e.g.*, Grynberg v. BP P.L.C., 585 F. Supp. 2d 50, 54–55 (D.C. Cir. 2008) (holding that arbitration agreement's incorporation of Rule R-8(a) of AAA Rules "constitutes clear and unmistakable evidence that the parties intended to submit the arbitrability determination to the arbitrator himself"); FSC Sec. Corp. v. Freel, 14 F.3d 1310, 1312–13 (8th Cir. 1994) (holding that parties' adoption of Section 35 of NASD Code was "'clear and unmistakable' expression of their intent to leave the question of arbitrability to the arbitrators").

120. *See* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 275 (1998).

121. 9 U.S.C. § 16 (2006).

122. *Id.*

123. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989).

an arbitration clause or a choice of forum clause, disputes over the enforceability arise in identical situations—either (a) where one party preferred *ex ante* not to agree to the contractually designated forum but lacked the bargaining power to object; or (b) where one party preferred the contractual forum at the time of the contract's execution but, subsequently, has decided that circumventing the clause advances its interest (or hinders its opponent's interest).[124] Lastly, the party seeking to enforce the clause is enduring an independent cost by being forced to sue (or defend) in a forum other than the contractually specified one (in this respect, the forum-selection or arbitration clause operates as a sort of immunity from suit in other jurisdictions).

Perhaps it is possible to explain the difference by reference to the parties' intentions. When entering into a forum-selection clause, the parties in all events intend to have their dispute heard before a trial court (though they may disagree over the identity of the forum).[125] By contrast, when entering into an arbitration clause, they intend to take their dispute out of court already. Thus, if they use clear and unambiguous language seeking to reverse the default presumption on *kompetenz-kompetenz*, then the need for immediate judicial correction of the error is greater.[126]

### *2. Parties' Behavior*

The *kompetenz-kompetenz* doctrine also illustrates how contractual manipulation of vertical rules influences the parties' settlement incentives. The default rule conceptualized by *First Options* favors the position of the party opposed to arbitration. It grants that party more immediate access to a court and forces the party favoring arbitration to expend more resources in order to obtain its desired (and the contractually agreed-upon) result. The "clear and unmistakable" exception in *First Options* enables the party preferring arbitration to offset this settlement incentive by keeping more issues within the primary jurisdiction of the arbitrator and, thereby, blocking an opponent from seeking immediate judicial recourse in its challenge to the arbitration agreement.

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124. The model assumes, furthermore, that the other party consistently prefers to enforce the forum clause. Otherwise, the right to resolve the dispute in the contractually agreed-upon forum, like any contractual right, would be waived, and the dispute would not arise.

125. By characterizing things this way, I do not mean to make light of the significant procedural differences between forums, particularly in matters of transnational litigation where the choice of forum will determine a party's access to certain, important procedural tools like class actions and discovery.

126. A distinct but related issue is the parties' ability to manipulate contractually not simply the order of review but also the substantive standard. While the Supreme Court recently frowned on one such effort, *see* Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 585–86 (2008), opportunities remain through the creative use of choice-of-law clauses. *See* Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 606 n.22 (Cal. 2008). Special thanks to Ingrid Wuerth and Andrea Bjorkland for their insights on this point.

A comparison with other countries' *kompetenz-kompetenz* rules illustrates how the form of rule influences the settlement incentives.[127] Under the UNCITRAL Model Arbitration Law, the arbitral tribunal has the primary authority to resolve jurisdictional challenges subject to an immediate and limited right of judicial review.[128] Compared to the *First Options* default rule, this tilts the settlement leverage slightly in favor of the party favoring arbitration. Under the German version of the same principle, a party opposing arbitration may immediately challenge the enforceability of the agreement without awaiting a ruling by the tribunal, but the tribunal may continue to proceed while the judicial challenge is pending.[129] This tilts the settlement leverage slightly in favor of the party resisting arbitration (particularly if she can convince the tribunal to stay the arbitral proceeding pending the judicial challenge). Finally, under the French version of the doctrine, the party challenging the enforceability of the agreement must wait until the conclusion of the arbitral proceeding before seeking judicial review.[130] This tilts settlement leverage strongly in favor of the party preferring arbitration, for it forces her opponent to invest resources in the entire arbitral proceeding before obtaining judicial review (or, to spare those resources, default on the arbitration entirely, a strategy which carries its own risks).[131]

### *3. Law Development*

The contractual manipulation of vertical sequencing rules also influences law development. For example, the default version of the *kompetenz-kompetenz* doctrine under *First Options* facilitates the development of precedent on the enforceability of arbitral clauses. By contrast, the French version retards it by requiring parties to endure the entire arbitration before they can obtain an opinion on the enforceability of the agreement.

While the preceding example illustrates how parties can contractually manipulate vertical sequencing rules to obtain precedent, other aspects of arbitration can retard it. Consider class actions. In a garden-variety piece

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127. For a comparative analysis of the approaches to *kompetenz-kompetenz* and the underlying effects on the underlying values at stake, see Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 257, 260–61 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).

128. *See* UNITED NATIONS COMM'N ON INT'L TRADE LAW [UNCITRAL], MODEL LAW ON COMMERCIAL ARBITRATION, art. 16 (Jan. 1, 1985), http:// www.uncitral.org/ pdf/ english/ texts/ arbitration/ ml-arb/ 06-54671_Ebook.pdf.

129. *See* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Jan. 30, 1877, REICHSGESETZBLATT [RGBL] 284, § 1032 (Ger.).

130. *See* CHRISTOPHER R. DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS 311 (2d ed. 2006).

131. *See* William W. Park, *The Arbitrability Dicta in* First Options v. Kaplan: *What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 ARB. INT'L. 137 (1996).

of civil litigation, a district court's class certification may be immediately appealable.[132] This does not necessarily occur in arbitration unless, perhaps, the arbitral rules allow this.[133] Where they do not, the parties have to wait until the arbitrator enters a final award on the merits, and the losing party can seek to attack the class certification in a more general vacatur attack on the award. Even then, however, an erroneous class certification would not clearly fall under any of the grounds for attacking an arbitral award under § 10 of the Federal Arbitration Act.[134] Unless the manifest disregard of the law doctrine were expanded—if it survived the Supreme Court's possible interment in *Hall Street Associates v. Mattel, Inc.*[135]—erroneous class certifications by an arbitrator would go uncorrected.[136]

### *C. Contractual Manipulation of Transjurisdictional Rules*

Contractual decisions by the parties can alter the effect of transjurisdictional rules. Consider, for example, the effect of an arbitration agreement on postaward proceedings. In ordinary circumstances, the prevailing party in an arbitration will seek to enforce the award in the country where the award debtor has assets.[137] By contrast, the award debtor will petition to vacate the award, typically in the courts of the arbitral forum and theoretically also in the country supplying the procedural law of the arbitration.[138] Such manipulation of the transjurisdictional rules influences resource investment, settlement incentives, and precedent development.

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132. FED. R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule . . . ."). *See also* Vallario v. Vandehey, 554 F.3d 1259, 1263–64 (10th Cir. 2009); Chamberlan v. Ford Motor Co., 402 F.3d 952, 957–59 (9th Cir. 2005).

133. *See* AAA, *Supplementary Rules for Class Arbitrations*, Rule 5(d) (Oct. 8, 2008), http:// www.adr.org/ sp.asp?id=21936.

134. *See* 9 U.S.C. §10 (2006).

135. Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576 (2008).

136. *See* DRAHOZAL, *supra* note 130, at 574–75; Frazier v. CitiFinancial Corp., 604 F.3d 1313 (11th Cir. 2010) (holding that the manifest disregard of the law doctrine did not survive *Hall Street*); Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 350 (5th Cir. 2009) ("*Hall Street* restricts the grounds for vacatur to those set forth in § 10 of the [FAA], and consequently, manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA."). *But see* Coffee Beanery, Ltd. v. WW, L.L.C., 300 F. App'x 415, 418 (6th Cir. 2008) ("[*Hall Street*] did not foreclose federal courts' review for an arbitrator's manifest disregard of the law."). *See generally* Kevin P. Murphy, Note, *Alive But Not Well: Manifest Disregard After* Hall Street, 44 GA. L. REV. 285 (2009) (discussing viability of manifest disregard after *Hall Street*).

137. Int'l Commercial Disputes Comm. Of the Ass'n of the Bar of N.Y.C., *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards*, 15 AM. REV. INT'L ARB. 407, 432–33 (2004) ("[A]ward creditors ordinarily bring . . . enforcement proceedings in jurisdictions where they believe the award debtors have assets against which the award can be enforced.").

138. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V.1.e., June 10, 1958, *available at* http:// www.uncitral.org/ pdf/ english/ texts/ arbitration/ NY-conv/ 1958_NYC_ CTC-e.pdf [hereinafter New York Convention]; Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir. 2004).

*1. Resource Investment*

The choice of arbitration can operate as a sort of rigid sequencing rule that enhances the investment of resources by the courts of the arbitral forum. The enforcement architecture of international arbitral awards favors proceedings in those forums. Under Article V.1.e of the New York Convention, if the courts in those forums vacate the award, that decision may deprive the award of enforceable value in an enforcement jurisdiction.[139] Yet the prevailing party in the arbitration can attempt to dampen the effects of this rule. Article VI of the New York Convention authorizes courts in the enforcement forum to stay their proceedings pending the outcome of the vacatur proceedings in the arbitral forum.[140] The decision to stay is discretionary, not mandatory. Consequently, a court committed to enforcing an award can do so even in the face of pending vacatur proceedings elsewhere. This injects flexibility back into the transjurisdictional sequencing rules.

Contrast this set of outcomes on resource investment with the transjurisdictional rules governing the enforcement of forum-selection clauses. The Hague Choice of Courts Convention, if ratified, would create further opportunities for parties to manipulate transjurisdictional sequencing rules through forum-selection clauses. Under that Convention, courts generally must suspend or dismiss cases if they are not the court specified in the forum-selection agreement.[141] Conversely, the court specified in the forum-selection agreement generally may not dismiss the case in favor of another forum such as on forum non conveniens grounds. The net effect of these provisions is to override the first-to-file incentive that might exist under current rules that are more tolerant of parallel proceedings.

*2. Parties' Behavior*

Parties can contractually manipulate the effect of transjurisdictional rules in a manner that affects their settlement incentives. Consider, for example, the well-known *Chromalloy* problem in international arbitration.[142] As noted above, the vacatur of the arbitral award by the courts of

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139. There currently is a split on this question. *See* DRAHOZAL, *supra* note 130 at 576–77; Termorio S.A. E.S.P. v. Electranta, S.P., 487 F.3d 928 (D.C. Cir. 2007).

140. *See* New York Convention, *supra* note 138, art. VI.

141. *See* Hague Convention on Choice of Courts Agreements, art. 6, June 30, 2005, *reprinted in* 44 I.L.M. 1294.

142. *See, e.g.*, Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT'L ARB. 451 (2000); Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, ICC INT'L CT. ARB. BULL., at 14 (May 1998); Jan Paulsson, *The Case for Disregarding LSAs (Local Standard Annulments) Under the New York Convention*, 7 AM. REV. INT'L ARB. 99 (1996); Jan Paulsson, *Rediscovering the N.Y. Convention: Further Reflections on* Chromalloy, INT'L ARB. REP., April 1997, at 20; Albert Jan van den Berg,

the arbitral forum can deprive the award of enforceable effect in third-country jurisdictions. Some courts in enforcement jurisdictions, such as the Second Circuit in *Baker Marine (Nigeria) Ltd. v. Chevron (Nigeria) Ltd.*, have held that the act of vacatur requires that they not enforce the award.[143] Other courts, such as the District of Columbia district court in *Chromalloy Aeroservices v. Arab Republic of Egypt*, have held that they have the discretion to enforce the award irrespective of the vacatur by the courts of the arbitral forum.[144]

The outcome on this question critically influences the parties' settlement incentives. The *Baker Marine* view enhances the settlement leverage of the award debtor. If the award debtor can successfully obtain vacatur in the arbitral forum, that outcome can completely cut off the award creditor's right to recovery in the desired enforcement jurisdiction (and thereby induce the award creditor to settle before vacatur proceedings are commenced).[145] By contrast, the *Chromalloy* view enhances the settlement leverage of the award creditor. Even if the award debtor successfully obtains vacatur in the arbitral forum, the award creditor can seek enforcement in those jurisdictions that still will honor the award (and presumably where the award debtor has assets).[146]

### *3. Law Development*

Contractual manipulation of transjurisdictional rules has a more limited effect on law development. The primary area where an impact can be seen is in the area of antisuit injunctions to vindicate forum-selection clauses. As discussed in greater detail in Part IV, federal courts disagree sharply over the general standard governing the availability of antisuit injunctions.[147] Yet they seem united around the idea that an antisuit injunction is entirely proper where necessary to prevent a party from circumventing a forum-selection clause.[148] By entering the antisuit injunction, it ensures that the designated court—and not the court sought by the party seeking to circumvent the forum-selection clause—articulates the substantive rules governing the parties' rights and obligations. Thereby, this en-

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*Enforcement of Annulled Awards?*, ICC INT'L CT. ARB. BULL., at 15 (Nov. 1998).

143. *See* Baker Marine (Nigeria) Ltd. v. Chevron (Nigeria) Ltd., 191 F.3d 194 (2d Cir. 1999).

144. *See* Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996). *See generally* William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L L. 805 (1999).

145. Of course, given the differing views among national courts on the *Baker Marine-Chromalloy* question, award creditors still may be able to enforce the award in the courts of countries that do not categorically preclude enforcement of vacated arbitral awards. *See* BORN, *supra* note 97, at 2815–26.

146. *See Chromalloy*, 939 F. Supp. at 913–14. *See also* van den Berg, *supra* note 142, at 15.

147. *See infra* Part IV.

148. *See* Kaepa, Inc. v. Achilles Corp., 76 F.3d 624 (5th Cir. 1996). I thank Harris Martin for his observations on this point.

hances law production in the designated forum while retarding it in the alternative forum.

In sum, parties' manipulation of decisional sequencing rules reallocates the default investment of resources by the decision-maker, enhances the settlement leverage of the party seeking to designate a particular forum, and can retard the development of precedent. The following table summarizes the effects of contractual manipulation on decisional sequencing rules:

| Type of Rule | Effect of Contractual Manipulation |
|---|---|
| Horizontal | (1) Reallocates investment of resources<br>(2) Enhances settlement leverage of party seeking to designate forum<br>(3) Can retard the development of precedent |
| Vertical | (1) Reallocates investment of resources<br>(2) Enhances settlement leverage of party seeking to designate forum<br>(3) Can retard the development of precedent |
| Transjurisdictional | (1) Reallocates investment of resources<br>(2) Enhances settlement leverage of party seeking to designate forum<br>(3) Can retard the development of precedent |

The final Part of this Article synthesizes the lessons from the preceding Parts and applies them to three thorny problems of decisional sequencing currently bedeviling courts.

## IV. CURRENT PUZZLES

This Part applies the lessons developed in the preceding three parts to current sequencing dilemmas bedeviling courts and policymakers. With respect to horizontal sequencing rules, I consider how the act of state defense should be treated under the *Steel Company-Sinochem* line of cases. With respect to vertical sequencing rules, I consider the immediate appealability of denials of motions to dismiss under the political question and comity doctrines. With respect to transjurisdictional sequencing rules, I consider the availability of antisuit injunctions and lis pendens stays in transnational litigation.

### *A. Horizontal Rules: The Act of State Doctrine*

Under the act of state doctrine, a court shall not sit in judgment of the validity of the act of a foreign state that takes place within the sovereign territory of that state.[149] The doctrine, rooted in substantive federal common law, is traditionally understood as having three elements. First, there must be an act of state, understood to include a "statute, decree, order, or resolution" of a foreign sovereign.[150] Second, the doctrine only applies when the lawsuit requires a court to sit in judgment of the validity of the act; thus, the doctrine does not bar federal jurisdiction where a court merely is required to consider a foreign sovereign's motives for the act.[151] Third, the act must have the required territorial nexus with the foreign state; an act taking place outside the sovereign's territory would not trigger the act of state doctrine.[152] Even where all three elements are satisfied, various defenses may preclude the doctrine's application. These include, potentially, an exception for commercial activities (as opposed to sovereign acts); the *Bernstein v. N.V. Nederlandsche-Amerikaansche* exception (where the Executive Branch informs the court that, in its view, the case does not interfere with the foreign relations of the United States); a treaty exception (where a treaty sets forth clear and precise criteria for evaluating the claim); and various exceptions set forth in specific federal statutes.[153]

Defendants typically advance act of state defenses at the pleading stage of litigation in their motion to dismiss alongside other defenses such as

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149. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964). *See generally* BORN & RUTLEDGE, *supra* note 30, at 753–54.

150. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695 (1976).

151. *See* W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 405 (1990).

152. *See, e.g.*, Braka v. Bancomer, S.N.C., 762 F.2d 222, 224 (2d Cir. 1985).

153. *See, e.g.*, *Dunhill*, 425 U.S. at 706; Bernstein v. N.V. Nederlandsche-Amerikaansche, 173 F.2d 71 (2d Cir. 1949); Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Eth., 729 F.2d 422 (6th Cir. 1984); 22 U.S.C. § 2370 (2006).

lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, and failure to state a claim. The procedural posture of this defense gives rise to a question—are dismissals on act of state grounds more like "non-merits" dismissals, such as on forum non conveniens grounds, whereby a court may resolve them first? Or are they more like merits defenses, such as failure to state a claim, whereby a court must first resolve jurisdictional objections before turning to the act of state defense?

As with other horizontal sequencing rules, the stakes are significant. If the act of state doctrine qualifies as a non-merits defense, that will reduce a judicial investment of resources, enhance a defendant's settlement leverage, and alter the production of law on other non-merits grounds. If the act of state doctrine instead qualifies as a merits defense, that conclusion will potentially increase a judicial investment of resources, reduce the defendant's settlement leverage (particularly where the plaintiff is demanding jurisdictional discovery), and increase the production of law on other non-merits defenses (while potentially retarding the development of law elaborating on the act of state doctrine).

The D.C. Circuit's jurisprudence provides a particularly good lens through which to analyze this problem. For over a decade, it has consistently adhered to the view that a court cannot consider an act of state defense before first determining whether it has jurisdiction.[154] The effect of this sequencing rule is particularly profound in cases against foreign sovereigns. It forces district courts to consider whether subject matter jurisdiction exists under the Foreign Sovereign Immunities Act[155] (FSIA) before deciding whether it can dismiss the case on other grounds. In doing so, the court must thus consider matters such as whether the sovereign has committed a noncommercial tort or engaged in an illegal expropriation, determinations that have political and doctrinal consequences even if the court ultimately dismisses the case. Moreover, to the extent the subject matter determination requires a highly fact-sensitive determination, the rule can subject foreign sovereigns to jurisdictional discovery. Since the jurisdictional inquiry under the FSIA often overlaps with the merits of the case, this jurisdictional discovery can affirmatively aid the plaintiffs' case. The net effect of the D.C. Circuit's steady rule (which admittedly has not been tested since *Sinochem*) is to give substantial leverage to plaintiffs, to increase the district court's investment of resources, and to retard the development of precedent glossing the act of state doctrine.

Viewed against the model developed here, the D.C. Circuit's view seems difficult to defend. Considered along the same three axes—resource

154. *See In re* Papandreou, 139 F.3d 247, 254 (D.C. Cir. 1998); Marra v. Papandreou, 216 F.3d 1119, 1121 (D.C. Cir. 2000); World Wide Minerals, Ltd. v. Republic of Kaz., 296 F.3d 1154, 1161 (D.C. Cir. 2002).

155. 28 U.S.C. § 1604–1607 (2006).

investment, parties' incentives, and law development—the act of state doctrine seems difficult to distinguish from other non-merits defenses that, under the flexible sequencing rules set forth in *Ruhrgas* and *Sinochem*, a district court has the discretion to select as the grounds for decision. Immediate resolution under the act of state doctrine, much like immediate resolution under the forum non conveniens doctrine, reduces the investment of district court resources and reduces the burdens on defendants, and those considerations are especially compelling in the act of state context where the very maintenance of the lawsuit potentially treads upon the sovereign interests of a foreign government.

In the D.C. Circuit's defense, one might argue that it's eminently appropriate to defer ruling on the act of state issues because they are likelier to tread upon the merits of the case—such as whether an act of state is involved or whether the claim requires the court to "sit in judgment of the case"—issues more appropriately resolved by the district court after it has resolved the non-merits jurisdictional objections. Yet that argument is difficult to square with determinations under the FSIA, where the very jurisdictional determinations necessitate consideration of issues treading upon the merits of the case (such as whether a foreign official was acting within the scope of employment)—determinations that unquestionably occur at the outset of a case. Thus, it is hard to justify treating act of state determinations any differently.

### *B. Vertical Rules: Political Question and Comity Doctrines*

The political question and comity doctrines should be familiar to most readers and require only brief review here. Under the political question doctrine, a federal court will not exercise jurisdiction over an issue textually committed to a coordinate constitutional branch that lacks judicially manageable standards.[156] Separation-of-powers principles underpin this doctrine. The contours of the comity doctrine are slightly less clear.[157] While "comity" influences a variety of subjects, ranging from transjurisdictional discovery disputes to enforcement of foreign judgments, one contour of the doctrine operates as a freestanding defense to a lawsuit.[158] In this latter, freestanding form, the comity doctrine operates as an abstention principle—it provides a basis upon which a federal court declines to exercise jurisdiction over a case. Separation-of-powers principles also underpin this doctrine.

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156. Baker v. Carr, 369 U.S. 186, 217 (1962).

157. *See* William S. Dodge, *International Comity in American Courts*, AM. SOC'Y INT'L L., *available at* http:// www.asil.org/ files/ dodge.pdf.

158. *See* Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court, 482 U.S. 522 (1987); Hilton v. Guyot, 159 U.S. 113 (1895).

While the contours of the doctrines are both familiar, the treatment of these doctrines under appellate jurisdiction rules is perhaps less so. As with the act of state doctrine, defendants often urge courts to dismiss cases under political question and comity doctrines at the pleading stage. Where courts decline those defenses (along with others), vertical sequencing issues arise—namely, whether the disappointed party can obtain immediate appellate review of a district court's order refusing to dismiss a case on either (or both) of these grounds.

Here again, the stakes are significant. If orders denying motions to dismiss on these grounds are immediately appealable, that view will assist defendants' settlement leverage, require a greater investment of appellate resources, and promote the development of appellate caselaw on the topic. By contrast, if those orders are not immediately appealable, that view aids plaintiffs' settlement leverage, requires a greater investment of trial court resources, and retards the development of appellate caselaw on the topic. The appealability of these orders also potentially implicates the separation-of-powers values underpinning both doctrines. Immediate reviewability ensures an opportunity to correct erroneous district court orders denying these decisions. By contrast, deferring review until final judgment enhances the risk that the separation-of-powers values will be damaged for the duration of the lawsuit in the district court.

Recently, the United States Government weighed in on the issue in litigation stemming from corporate activities in South Africa during the Apartheid Era. The details of the underlying litigation have been summarized elsewhere and need not detain us here.[159] For present purposes, it suffices to observe that, in the current iteration of the lawsuit, plaintiffs representing a class of South African citizens sued several multinational companies under the Alien Tort Statute.[160] Their suit was premised on allegations that the companies aided and abetted the South African Government by facilitating certain policies of the apartheid regime.[161] The district court denied in part the defendants' motion to dismiss rejecting, among other things, its comity defense. After defendants sought interlocutory appeal of this decision, the United States Government filed an amicus brief arguing that the Second Circuit lacked appellate jurisdiction.[162] The Government reasoned that a district court's order denying a motion to

159. *See generally* Brief for the United States as Amicus Curiae Supporting Appellees, *In re* S. African Apartheid Litig., 238 F. Supp. 2d 1379 (2d Cir. 2009), *available at* http://www.khulumani.net/ attachments/ 348_SA%20 Litigation%20 -%20US%20 Gov%20Amicus %20Dec%202009.pdf [hereinafter Brief for the United States as Amicus Curiae]. In the interest of full disclosure, I should note that I served as counsel for *amicus curiae* in this matter which supported the Appellant.

160. *In re* S. African Apartheid Litig., 624 F. Supp. 2d. 336 (S.D.N.Y. 2009).

161. *Id.* at 546.

162. *See* Brief for the United States as Amicus Curiae, *supra* note 159.

dismiss on comity grounds is not immediately appealable unless the Government affirmatively certifies that the maintenance of the case interferes with the foreign relations of the United States.[163]

The analysis developed above suggests that the proper answer should turn on which array of factors should predominate. Immediate appealability of denials to dismiss on grounds of the comity doctrine would enhance defendants' bargaining position, promote law development on the issue, and reduce the docket burdens on trial courts. By contrast, requiring a denial on these grounds to await final judgment enhances the plaintiffs' settlement incentives, undermines development of the comity doctrine, and increases the burdens on trial courts (at least to the extent the political question issue is dispositive). These considerations, moreover, may cut in different directions—for example, there may be a need to gloss the meaning of the comity doctrine which plays against an awareness that immediate appellate review (at least absent clear statutory guidance) undermines the final judgment rule.

The difficulty with the United States Government's position is that it arrogates to the Executive Branch a power to balance these factors, a power otherwise enjoyed by Congress and the courts. When Congress crafts an exception to the final judgment rule, it has weighed the underlying values and set forth a prospective categorical determination. Absent clear guidance from Congress, courts undertake a similar balancing under the guise of the *Cohen* doctrine. Yet the Government's approach in the South Africa litigation thwarts this distribution of power among the branches of government. It reallocates to the Executive Branch an ability to make a case-by-case determination on how to weigh those values.

### *C. Transjurisdictional Rules: Antisuit Injunctions*

The standards governing the issuance of antisuit injunctions provide a current dilemma of determining the proper transjurisdictional sequencing rules. Like *lis alibi pendens*, antisuit injunctions serve to control parallel litigation in different forums. While a stay *lis alibi pendens* stops the litigation in one forum in favor of another, and in this respect it is not unlike a doctrine of abstention, an antisuit injunction bars a party subject to a court's jurisdiction from pursuing a parallel action in a foreign forum.[164]

Neither a treaty nor a federal statute authorizes a court to issue these orders (much less guides their discretion when to issue them). Instead, these devices have evolved as part of a residual federal common law power. In the exercise of that power, courts have articulated two very different

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163. *See Id.*

164. *See generally* George Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589 (1990).

standards governing when they will issue. As to antisuit injunctions, some courts hold that such injunctions may issue only where necessary to protect a court's jurisdiction; other courts employ a multifactor balancing test and embody a more liberal approach to the issue.[165] As noted above, while there appears to be consensus that antisuit injunctions are available to vindicate forum-selection clauses, deep divisions exist among the federal circuits over whether to grant them absent such clauses.[166]

As with the preceding examples, the choice of the proper rule is critical. Courts disfavoring stays *lis alibi pendens* and disfavoring antisuit injunctions both effectively encourage parallel litigation. These approaches place settlement pressure on the party less able to finance parallel litigation, particularly in jurisdictions or settings that do not allow fee shifting. They also encourage a "rush to judgment" by the courts in the two forums—a judgment rendered by the first court can then be recognized under res judicata rules of the slower jurisdiction. By contrast, courts favoring stays *lis alibi pendens* and antisuit injunctions have the opposite effect. They disfavor parallel proceedings (and thus aid the less well capitalized party in a dispute); from the courts' perspective, they do not encourage a rush to judgment. They do, however, encourage a "race to the courthouse" by the parties—for the first party to file then is able to argue that it would be "inefficient" for the second court to hear a parallel action in the case. Considerations of comity underpin both doctrines—both a liberal approach to stays and a conservative approach to antisuit injunctions reduce the risk of disrupting foreign relations. By contrast, conservative approaches to stays and liberal approaches to antisuit injunctions entail a greater risk of that disruption.

The First Circuit's decision in *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren* illustrates the stakes.[167] That case involved parallel litigation between a Belgian branch of KPMG (KPMG-B) and a publicly traded company, Lernout & Houspie Speech Products N.V. (L&H), for whom it served as auditor. After L&H collapsed, various interested parties brought massive securities fraud actions against KPMG-B in the United States. In the midst of those proceedings, the plaintiffs sought massive discovery from KPMG-B, which a magistrate court ordered.[168] Meanwhile, KPMG-B sought relief in a Belgian court, requesting penalties against parties who might take steps to comply with the discovery proceedings in the United States litigation. In response, plaintiffs in the United States actions sought an antisuit injunction to bar KPMG-B from pursuing

165. *See* BORN & RUTLEDGE, *supra* note 30, at 529–40.
166. *Id.*
167. 361 F.3d 11 (1st Cir. 2004).
168. *Id.* at 14.

the Belgian action, which the district court granted.[169] Affirming the district court's order, the First Circuit held that the antisuit injunction was proper. It eschewed either of the above-described leading approaches, though it expressed greater sympathy for the conservative approach.[170] Departing from the conservative approach, however, the First Circuit declined to conclude that jurisdiction-protection and protection of important national policies provided the exclusive bases to overcome the presumption against antisuit injunctions (and in favor of parallel proceedings).[171] Instead, the Court reasoned that a wider array of factors, including the nature of the parallel actions, the posture of the proceedings, the conduct of the parties, the importance of the policies at stake, and the effect of the parallel proceeding all were relevant to deciding whether a party seeking an antisuit injunction had overcome the comity-based presumption against its issuance.[172]

Here, the First Circuit probably gets it right, though there is a reasonable argument for the liberal approach favoring antisuit injunctions too. Both approaches undertake the sort of explicit interest balancing that, according to Part II of this Article, underpins most sequencing determinations. By contrast, the conservative approach artificially elevates labels (like jurisdictional protection) over the factors actually guiding the analysis. Between the two approaches that engage in explicit interest balancing, the First Circuit's approach more closely tracks the sorts of factors developed in Part II. In particular, the focus on party conduct and the effect of parallel proceedings tracks the consideration of parties' behavior developed above; the reference to the posture of the proceedings takes into account the investment of resources already made by the trial court; finally, consideration of the policy interests picks up on notions how the choice of transjurisdictional sequencing rules can affect law development in both forums.

Whatever the correct outcome to these doctrinal puzzles, it is worth emphasizing the "default rule" quality of these standards. Parties can enhance the likelihood of an antisuit injunction where they have contractually agreed upon a forum. Careful examination of the available precedent on the issue reveals that courts are more likely to issue antisuit injunctions where a party is bringing parallel litigation in an effort to circumvent a forum-selection clause.[173]

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169. *Id.*
170. *Id.* at 18.
171. *Id.*
172. *Id.* at 19.
173. Likewise, as the recent decision of the European Court of Justice in the *West Tankers* case illustrates, European courts may be more willing to issue antisuit injunctions when parties are bringing parallel litigation in an effort to circumvent an arbitration clause. *See* Case C-185/07, Allianz SpA & Generali Assicurazioni Generali SpA v. W. Tankers Inc., 2009 E.C.R. I-663, ¶ 34.

## CONCLUSION

This Article has filled an important gap in the literature on judicial decision-making and contributed to a growing effort to bridge the chasm that traditionally has divided arbitration scholarship from other legal domains. Drawing on a rich, interdisciplinary array of sources involving the structure of choice, it articulated a systematic approach to decisional sequencing and unified the disparate study of rules governing decisions by single actors, multiple actors within a single decision-making system, and, finally, actors across multiple systems of decision-making. Each of those sequencing rules, whether rigid or flexible, entailed a similar set of considerations, including the investment of judicial resources, the effect on the parties' behavior, and the development of precedent. To a degree, those rules operated simply as default rules that the parties could contract around through choice of forum and arbitration clauses.

Much work remains to be done. Centrally, future work can articulate a crisper normative conception of the extent to which particular common values in sequencing rules should dominate, particularly where the considerations here cut in different directions.[174] Moreover, lurking in the background is a series of institutional considerations, namely, which branch of government appropriately exercises the authority to balance those values and articulate the proper sequence. To date, that role has largely been left to the courts, with periodic intervention by Congress. The Government's litigating position in the South Africa case, however, suggests that the Executive Branch may seek to take a firmer role. Finally, the discussion of transjurisdictional rules—particularly against the backdrop of developments like the Hague Choice of Courts Convention and the proposed ALI statute on foreign judgment enforcement (both of which contain lis pendens provisions)—speak to the importance of a richer comparative study of transjurisdictional rules and the eventual need for a harmonized approach that can accommodate the diverse views of different countries on these questions.

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174. A related point here is how to conceptualize the interests of the various affected constituencies, particularly the parties. Much of the analysis in this paper can be understood as reflecting upon "supply-side" considerations—that is, how should judges, arbitrators or some other institutional actor go about deciding the proper sequencing rule. Of course, an under-developed aspect of this project is the demand-side consideration, namely what do the parties want? Here it might be important to differentiate between one-shot litigants for whom the only interest is victory and repeat player litigants (especially governments) who may have a more significant interest in law development. Special thanks to Richard Nagareda and Andrea Bjorkland for their thoughts on this point.