ARTICLE III AND ALTERNATIVE HOLDINGS

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ABSTRACT

Often federal courts, especially district courts, will provide both a central reason for why one party loses and an additional reason, too. So-called "alternative holdings" are thought to "reverse-proof" a judgment by providing a reviewing court with multiple reasons to affirm the decision. There is no question that when alternative holdings concern solely non-jurisdictional issues, they can serve as valuable tools of judicial administration. Problems arise, however, when a federal court concludes that it lacks Article III jurisdiction yet holds in the alternative that, even if it possessed Article III jurisdiction, the plaintiff's claim would still fail on the merits.

Article III of the federal Constitution permits federal courts to decide only "Cases" and "Controversies." Without Article III jurisdiction, a federal court has a singular duty to dismiss the action. Defying that duty may result in the court issuing a prohibited advisory opinion—adjudicating the merits of a claim where the court lacks jurisdiction to entertain the claim in the first place. Despite the constitutional prohibition on issuing advisory opinions, federal courts have seen fit to provide an alternative non-jurisdictional holding warranting dismissal even after concluding that no Article III jurisdiction exists. Indeed, as this Article demonstrates, federal district courts engage in this practice with frequency.

In response to this frequent practice, this Article contends that federal courts overstep their constitutional bounds when they conclude that no Article III jurisdiction exists but then provide an alternative non-jurisdictional holding. A federal court, in other words, issues a prohibited advisory opinion when it concludes that it lacks Article III jurisdiction but then provides in the alternative that the plaintiff loses for a non-jurisdictional reason, too. This Article argues that a federal court should halt all discussion of non-jurisdictional matters as soon as the court concludes that it lacks Article III jurisdiction. Formalistic as this rule may seem, failure to respect it can result in courts exercising judicial power not granted by Article III.

I. INTRODUCTION

In 2018, Todd Bank filed a lawsuit in federal court, challenging the constitutionality of a New York law.[1] The New York law prohibited "the sale or display of symbols of hate on the grounds of the New York State Fair and any other fairs that receive government funding."[2] In Bank's view, the state law violated the Free Speech Clause of the First Amendment because the law chilled his right to free expression.[3] New York disagreed, moving to dismiss Bank's challenge.[4] From the state's perspective, Bank never alleged that he "wishe[d] to affix hate symbols to state buildings and/or property during the State Fair," meaning that the state law never harmed him in a concrete way.[5] The state argued, as a result, that the court had to dismiss the case because Bank failed to satisfy Article III's standing requirement.[6]

The federal district court agreed with New York that the court lacked Article III jurisdiction to entertain Bank's First Amendment challenge because he did not suffer any concrete harm.[7] Rather than just dismiss the case for lack of Article III jurisdiction, though, the court proceeded to drop a curious footnote. In footnote two, the court concluded, *in the alternative*, that even if Bank "had standing" to pursue his constitutional claim, his claim "would still be subject to dismissal on the merits because the Hate-Symbol Act's prohibition on attaching or affixing hate symbols to state property during the New York State Fair constitutes government speech not subject to First Amendment protection."[8] The court, in other words, issued an "alternative holding." It dismissed Bank's claim for two independent yet sufficient reasons: first, the court lacked Article III jurisdiction to entertain the claim, and second, Bank's claim failed on the merits.[9] To put it differently, the court sequenced its adjudication of Bank's First Amendment

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* University of Virginia School of Law, J.D. 2020; University of Virginia, M.A. (History) 2020. I wish to extend special thanks to Christian Talley and all participants of University of Louisville Law Review's 2022 Symposium for helpful comments as well as Kate Duke, Colby Birkes, and the rest of the University of Louisville Law Review for their editorial assistance. I am solely responsible for any errors.

[1] Bank v. New York State Dep't of Agric. & Markets, No. 521CV642MADATB, 2022 WL 293812, at *1 (N.D.N.Y. Feb. 1, 2022), *reconsideration denied*, No. 521CV642MADATB, 2022 WL 1224327 (N.D.N.Y. Apr. 26, 2022).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* at *3.

[6] *Id.*

[7] *Id.*

[8] *Id.* at *5.

[9] *See id.*

claim to be rid of it for a jurisdictional reason and then alternatively for a merits-based reason.[10]

Bank moved a week later for reconsideration of the court's ruling, arguing in part that the court had "to remove its discussion of the merits of his claim contained in footnote number two."[11] From Bank's perspective, "the court should not have discussed the merits of his case in a footnote because it amounts to an impermissible advisory opinion after the court had already determined that he lacked Article III standing."[12]The court disagreed. In the court's view, "the footnote at issue merely alerted Bank to the fact that, even if he [possessed Article III standing], [his claim] would almost certainly fail on the merits."[13] From the court's vantage point, the alternative merits analysis did not pose a constitutional problem because nothing in the Constitution, particularly Article III, prohibited the alternative non-jurisdictional holding.[14]

This Article contends that—although many federal district courts have engaged in a similar practice—the district court's alternative non-jurisdictional holding in the *Bank*'s matter amounted to an impermissible exercise of judicial power. Article III of the federal Constitution permits federal courts to exercise "judicial Power" only in 'Cases' and 'Controversies.'"[15] Without Article III jurisdiction, a federal court may do nothing but declare that fact and dismiss the lawsuit.[16] Otherwise, a federal

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[10] Decisional sequencing appears all the time in judicial opinions and in the law more generally. Consider the "law's foremost sequencing rule," which "says that a federal court's decision on a challenge to its jurisdiction must come before decision on the merits." Kevin M. Clermont, SEQUENCING THE ISSUES FOR JUDICIAL DECISIONMAKING: LIMITATIONS FROM JURISDICTIONAL PRIMACY AND INTRASUIT PRECLUSION 308 (2011); *see also* Joan E. Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1536 (2012) ("An example of a horizontal sequencing rule that operates at the appellate level is the rule that the appellate court should decide its appellate jurisdiction over a case and the district court's subject-matter jurisdiction over a case, and confirm both, before proceeding to merits questions.").

[11] Bank v. New York State Dep't of Agric. & Markets, No. 521CV642MADATB, 2022 WL 1224327 at *1 (N.D.N.Y. Apr. 26, 2022).

[12] *Id* at *3.

[13] *Id.*

[14] *Id.*

[15] U.S. CONST. art. 3.

[16] A federal court "must dismiss the action" if at any time it determines it lacks Article III jurisdiction. Fed. R. Civ. P. 12(h)(3); *see also* Daimler Chrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (noting that, if a court lacks Article III jurisdiction because the dispute is not a proper case or controversy, that court has no business ruling on the merits, "or expounding the law in the course of doing so"); *Ex parte* McCardle, 74 U.S. 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."); Whitmore v. Arkansas, 495 U.S. 149, 154 (1990) ("[B]efore a federal court can consider the merits of a legal claim, the person seeking to invoke the

court runs the risk of issuing a constitutionally prohibited advisory opinion—adjudicating the merits of a claim when the court lacks the legal authority necessary to provide such an opinion.[17] Though the Constitution contains no express textual prohibition on federal courts advising government or private actors on legal questions in the abstract, this Article posits that Article III's reference to "judicial Power" has been "liquidated" to prohibit federal judges from issuing advisory opinions.[18] The theory of constitutional liquidation permits historical practice to fix or settle the meaning of ambiguous constitutional provisions. In this context, historical and deliberate practice—starting with the *Correspondence of the Justices* of 1793—has fixed the meaning of the "judicial Power" to encompass a prohibition on federal courts issuing an opinion on the merits of a claim where the court lacks Article III jurisdiction to entertain the claim in the first place.[19]

Despite the now-liquidated constitutional prohibition on advisory opinions, numerous federal courts have seen fit to provide an alternative non-jurisdictional holding warranting dismissal even after concluding that no Article III jurisdiction exists. Courts that engage in this practice exceed the power granted to them under Article III. Federal courts, this Article contends, that conclude that no Article III jurisdiction exists but then proceed to provide an alternative non-jurisdictional holding overstep their constitutional authority.[20] In response to this persistent and frequent practice, this Article

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jurisdiction of the court must establish the requisite standing to sue.").

[17] Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*, 74 VAND. L. REV. 621, 626 (2021); *see also* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 644 (1992) ("Over the years, the Court has been extremely sloppy in its use of the phrase 'advisory opinions.'"); California v. Texas, 141 S. Ct. 2104, 2108 (2021) ("To find standing to attack an unenforceable statutory provision would allow a federal court to issue what would amount to an advisory opinion without the possibility of an Article III remedy. Article III guards against federal courts assuming this kind of jurisdiction."); Hewitt v. Helms, 482 U.S. 755, 761 (1987) ("The real value of the judicial pronouncement—what makes it a proper judicial resolution of a case or controversy rather than an advisory opinion—is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff.").

[18] Gamble v. United States, 139 S. Ct. 1960, 1982 (2019) (Thomas, J., concurring) (discussing both the "judicial Power" and the theory of liquidation).

[19] E. Garrett West, *Revisiting Contempt of Congress*, 2019 WIS. L. REV. 1419, 1469–70 (2019) (exploring the liquidation theory).

[20] This Article uses with intention the term "non-jurisdictional holding." It seems that the Supreme Court has signed off on federal courts assuming Article III jurisdiction to dispose of a lawsuit on a non-Article III jurisdictional basis. *See* Kowalski v. Tesmer, 543 U.S. 125, 129 (2004) ("[W]e shall assume the attorneys have satisfied Article III and address the alternative threshold question whether they have standing to raise the rights of others."); Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999) (permitting courts to address personal jurisdiction before subject-matter jurisdiction). *But see* Butcher v. Wendt, 975 F.3d 236, 248 (2d Cir. 2020) (Menashi, J., concurring in part) (contending that courts have misconstrued the Supreme Court's holdings in this area). Indeed, some courts have interpreted Supreme Court case law to bar hypothetical jurisdiction only with respect to constitutional requirements. *See*

argues that a federal court should halt all discussion of non-jurisdictional matters as soon as the court concludes that it lacks Article III jurisdiction. Formalistic as this rule may seem, failure to respect it can result in courts exercising power not granted under Article III.

To make its case, this Article proceeds as follows. Part II discusses "alternative holdings" and the practical justifications underpinning the widespread use of alternative holdings. Surprising as it may seem, little if any scholarship has provided an in-depth discussion of the extensive use of alternative holdings by federal courts and the reasons for the prevalent practice. Indeed, the few scholars who have mentioned alternative holdings have identified the jurisprudence surrounding the practice as an understudied and muddled area of law.[21] Part II fills that void. Part III unpacks Article III jurisdiction generally and the constitutional prohibition on advisory opinions in particular. This Article contributes to the burgeoning scholarship on the theory of constitutional liquidation by explaining why Article III prohibits federal courts from issuing advisory opinions despite no language in the Constitution expressly setting forth that bar. In Part IV, this Article offers examples of federal courts providing alternative non-jurisdictional holdings warranting dismissal even after concluding that no Article III jurisdiction exists. These examples demonstrate the prevalence of the practice and the creation of a vast amount of "shadow authority" (*i.e.*, a judicial opinion on the substance of a legal claim where the court lacked Article III jurisdiction over the claim). The need for immediate course correction will become apparent. In addition, Part IV emphasizes that district courts may very well be harboring false hope about the judicial efficiency of rendering alternative non-jurisdictional holdings after concluding that Article III does not exist. A short conclusion follows.

McBee v. Delica Co., 417 F.3d 107, 127 (1st Cir. 2005) ("Although the Supreme Court in [*Steel Co.*] generally barred the practice of hypothetical jurisdiction, we have noted that the rule does not appear to be an absolute one, and we have consistently interpreted the rule as applying in its strict form only to issues going to Article III's requirements."); Fama v. Comm'r of Corr. Servs., 235 F.3d 804, 816 (2d Cir. 2000) (reading *Steel Co.* to "bar . . . the assumption of 'hypothetical jurisdiction' only where the potential lack of jurisdiction is a constitutional question"). Not all circuits, however, have endorsed this approach. *See* Edwards v. City of Jonesboro, 645 F.3d 1014, 1017 (8th Cir. 2011) (noting that "[w]hether [the *Steel Co.*] rule also applies to statutory jurisdiction . . . is a matter of some dispute"). Part III unpacks *Steel Co.* in further detail.

[21] Justin M. Kadoura, *A Constitution Without a Remedy: Forfeitures and Alternative Holdings Under AEDPA*, 89 TEMPLE L. REV. 401, 415 (2017) ("[T]he jurisprudence surrounding alternative holdings generally is unclear."); *see also id.* at 420 ("alternative holding jurisprudence is muddled, and many of the decisions that give wholesale deference to alternative holdings do so with little explanation"); E.E. Keenan, *Collectively Bargained Employment Arbitration:* 14 Penn Plaza LLC v. Pyett, 15 HARV. NEGOT. L. REV. 261, 269 (2010) (referring to "alternative holdings" as a "less-well-defined category" compared to precedent and dicta).

II. ALTERNATIVE HOLDINGS

In 2020, President Trump's reelection campaign filed a federal lawsuit, "alleging federal and state constitutional violations stemming from Pennsylvania's implementation of a mail-in voting plan for the upcoming general election."[22] The core of the lawsuit targeted a number of state voting procedures that, if implemented, would allegedly cause "vote dilution."[23] Pennsylvania's Secretary of State moved to dismiss the lawsuit on two grounds, arguing first that President Trump's reelection campaign lacked Article III standing to bring the challenge, and second that even assuming the plaintiff possessed standing, it would make no difference because the claims lacked merit.[24] The case, according to the Secretary, was thus susceptible to "being decided on several different grounds."[25] The court assigned the matter did just that. It concluded that President Trump's reelection campaign lacked standing to bring the lawsuit because the alleged harm of "vote dilution" was too speculative.[26] It also ruled that even if President Trump's reelection campaign possessed standing, the "claims fail on the merits."[27] To put it in the court's own words, "because of the novelty . . . of the claims and theories, a potential appeal in this case, and the short time before the general election, out of an abundance of caution, the court will, in the alternative, proceed to examine the claims on the merits" even though the lack of Article III standing alone requires "dismiss[al of] all claims."[28] The court thus rendered an "alternative holding:"[29] It "dispose[d] of one issue," but provided multiple "reasons for that disposition."[30]

Federal courts often engage in this form of decisional sequencing, providing alternative holdings to support the disposition of a single claim, even though a lone rationale "on its own would be sufficient to resolve the

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[22] Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 341–42 (W.D. Pa. 2020).

[23] *Id.*

[24] *Id.*

[25] Aaron-Andrew P. Bruhl, *The Remand Power and the Supreme Court's Role*, 96 NOTRE DAME L. REV. 171, 234 (2020).

[26] *Id.*

[27] *Id.* at 381–82.

[28] *Id.*

[29] Adam N. Steinman, *Case Law*, 97 B.U. L. REV. 1947, 2008–09 (2017) (defining alternative holding as a situation "where a court decides multiple issues, either one of which would compel the court's ultimate decision"); Justin M. Kadoura, *A Constitution Without a Remedy: Forfeitures and Alternative Holdings Under AEDPA*, 89 TEMPLE L. REV. 401, 414 (2017) ("Alternative holdings occur when a court offers multiple grounds or rationales that are each sufficient to support its disposition.").

[30] James W. Dobbins, *Applying* Wainwright v. Sykes *to State Alternative Holdings and Summary Affirmances*, 53 FORDHAM L. REV. 1357, 1382 (1985).

case."[31] As one scholar put it, the use of alternative holdings represents a "prevalent and widely accepted" practice among federal courts.[32] A journey through Westlaw along with a perusal of Part IV of this Article reveals the commonness of alternative holdings.[33] Alternative holdings come in all shapes and sizes. Courts often provide multiple non-jurisdictional reasons for why a single claim fails.[34] And as just illustrated—and contrary to the dictates of the Constitution as Part IV will demonstrate—courts also often provide a jurisdictional reason and a non-jurisdictional reason for why a single claim fails. Despite the prevalence of the practice, limited scholarship has provided an in-depth discussion of the reasons for the widespread use of alternative holdings.

Two main rationales justify the use of alternative holdings. The conservation of judicial resources represents the principal reason courts issue alternative holdings, as alternative holdings are thought to "prevent the overconsumption of adjudicative resources."[35] Most agree that alternative holdings present "valuable tools of judicial administration" because they can, in certain instances, reverse proof a disposition.[36] Alternative holdings reverse proof a disposition because each rationale supporting the disposition of a single claim carries the force of law.[37] As the Supreme Court put it decades ago, "where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum."[38] Therefore, a litigant appealing

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[31] Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 918 (2005).

[32] *Id.* at 919.

[33] *See* Part IV.

[34] Providing multiple non-jurisdictional reasons for why a single claim fails represents an appropriate form of decisional sequencing because, where the court possesses Article III jurisdiction to entertain the claim, the Constitution does not halt a federal court from providing multiple non-jurisdictional reasons to dispose of it. *See infra* note 133.

[35] Container Stevedoring Co. v. Dir., Off. of Workers Comp. Programs, 935 F.2d 1544, 1549 (9th Cir. 1991).

[36] Phelps v. Alameda, 366 F.3d 722, 729 (9th Cir. 2004), *disapproved in later appeal sub nom.*, Phelps v. Alameida, 569 F.3d 1120 (9th Cir. 2009).

[37] *Id.* Most, if not all, jurisdictions treat alternative holdings as binding. *See* Judith M. Stinson, *Why Dicta Becomes Holding and Why it Matters*, 76 BROOK. L. REV. 220, 225 (2010) ("[M]ost courts recognize alternative rulings as binding holdings, not dicta, in the first place."); Bravo v. United States, 532 F.3d 1154, 1162 (11th Cir. 2008) ("[I]n this circuit additional or alternative holdings are not dicta, but instead are as binding as solitary holdings."); United States v. Wright, 496 F.3d 371, 375 (5th Cir. 2007) (declaring it is "well-settled that alternative holdings are binding, they are not dicta"); Best Life Assur. Co. of California v. Comm'r, 281 F.3d 828, 834 (9th Cir. 2002); Freed v. Thomas, 976 F.3d 729, 738 (6th Cir. 2020); United States v. Shakir, 616 F.3d 315, 319 (3d Cir. 2010); Judith M. Stinson, *Preemptive Dicta: The Problem Created by Judicial Efficiency*, 54 LOY. L.A. L. REV. 587, 592 (2021) ("[A]lternative holdings should be treated as holdings as long as the outcome of each alternative holding is the same.").

[38] Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949); Union Pac. R. Co. v. Mason City & Ft. D.R. Co., 199 U.S. 160, 166 (1905) ("[W]here there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but

a claim must convince the reviewing court that each of the lower court's non-jurisdictional rationales were made in error. If it turns out that the lower court erred on one of the rationales but not on the other, the reviewing court "can affirm the judgment on the alternative [non-jurisdictional] ground."[39] By contrast, where the lower court declines to issue an alternative holding, and the reviewing court reverses the sole rationale for the disposition, the reviewing court will likely "remand the case to the lower court" to take a fresh look, which no doubt is "a time-consuming procedure."[40] In sum, a court's alternative holding grants "a reviewing court the opportunity to address each of the [alternative non-jurisdictional rationales] at once," facilitating judicial economy and conserving judicial resources.[41]

The ability of alternative holdings to "contribute to the development of the jurisdiction's precedents and law, thus providing maximum guidance" to other courts, litigants, and lawyers alike provides a second justification.[42] A court, disposing of a single claim for a single reason, provides just one explanation for why the claim fails. That single explanation will no doubt provide the parties, future litigants, and other judges with a view of the law and an explanation for the disposition. But a court providing an alternative holding has opted to discuss a second area of law and provide an additional explanation for the disposition of the sole claim. That additional discussion may clear up ambiguity in the law and facilitate further refinement.[43] The alternative holding may even end up "being understandable, useful, and persuasive."[44] In a similar vein, alternative holdings offer some cold comfort to the losing party, as the additional reason clarifies that something more than "a technicality" resulted in dismissal.[45]

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each is the judgment of the court, and of equal validity with the other."); Isley v. Comm'r, 141 T.C. 349, 370 (2013) ("[I]t is a long-established principle of law that each alternative rationale for the result in a case has precedential value."). Some circuits have even concluded that "where a district court grants a motion to dismiss on the basis of two, alternative holdings, an appellant who challenges only one of the holdings waives both issues on appeal." Calvey v. Vill. of Walton Hills, Ohio, 841 F. App'x 880, 885 (6th Cir. 2021); Davit v. Davit, 173 F. App'x 515, 517 (7th Cir. 2006) ("And we have repeatedly held that, in the case of alternative holdings, failure to address one of the holdings results in waiver of any claim of error with respect to the court's decision on that issue.").

[39] James W. Dobbins, *Applying* Wainwright v. Sykes *to State Alternative Holdings and Summary Affirmances*, 53 FORDHAM L. REV. 1357, 1373 (1985).

[40] *Id.* Part IV of this Article explores this process in more detail.

[41] Karsten v. Kaiser Found. Health Plan of Mid-Atl. States, Inc., 36 F.3d 8, 11 (4th Cir. 1994).

[42] *Id.*; *see also* Justin Kadoura, *A Constitution Without A Remedy: Forfeitures and Alternative Holdings Under Aedpa*, 89 TEMP. L. REV. 401, 417 (2017) (noting the efficiency benefits stemming from alternative holdings).

[43] Cross v. Harris, 418 F.2d 1095, 1105 (D.C. Cir. 1969); Richard M. Re, *Should Chevron Have Two Steps?*, 89 IND. L.J. 605, 624 (2014) (Alterative holdings may "clarify the law sooner rather than later.").

[44] Phillip M. Kannan, *Advisory Opinions By Federal Courts*, 32 U. RICH. L. REV. 769, 791 (1998).

[45] Justin Kadoura, *A Constitution Without A Remedy: Forfeitures and Alternative Holdings Under*

Despite the praise courts and commentators have heaped upon the utility of alternative holdings, not all agree about the wisdom of providing multiple reasons to dispose of a single claim. Judge Pierre Leval, for example, has argued that courts "often give less careful attention to propositions uttered in support of unnecessary alternative holdings."[46] Others have suggested that the ability of alternative holdings to contribute to the development of the law presents a negative rather than a positive. In those commentators' views, a court's decision to wrestle with unnecessary yet alternative legal questions could "create confusion" and plunge "lawyers and judges into a blackness in which no one can discern the law."[47] Indeed, courts and litigants will treat the alternative holdings as authoritative in later cases, which may be a good or bad thing depending on the rigor with which the court came to its alternative conclusions. Though the arguments against alternative holdings should be taken seriously, alternative holdings remain prevalent and widespread. And there is little reason to believe that their prevalence will wane in the coming years.

III. ARTICLE III AND ADVISORY OPINIONS

Article III of the federal Constitution establishes that federal courts may exercise "judicial Power" only in "Cases" and "Controversies."[48] Federal courts are courts of limited jurisdiction, meaning that a federal court presumes a case lies outside of its jurisdiction.[49] As a result, a plaintiff shoulders the burden of establishing a federal court's Article III jurisdiction to entertain a claim.[50] To carry that burden, a plaintiff must, among other things, possess "standing" to satisfy the "irreducible constitutional minimum" necessary to have a case or controversy within the meaning of Article III.[51] To establish Article III standing, a plaintiff must show that he

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Aedpa, 89 TEMP. L. REV. 401, 418 (2017).

[46] Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1258 (2006).

[47] Gustavus A. Puryear IV, *The Truth About Polygraph Evidence in Criminal Trials: The Implications of State v. Mitchell*, 70 N.C. L. REV. 2042, 2057 (1992).

[48] U.S. CONST. art. III, § 2; *see also* Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217, 1222 (2013) (noting that these "amorphous words begot a slew of overlapping doctrines").

[49] *See* Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994).

[50] Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016).

[51] Sierra v. City of Hallandale Beach, Fla., 996 F.3d 1110, 1126 (11th Cir. 2021) (Newsom, J., concurring) (challenging current doctrine on the grounds "an Article III 'Case' exists whenever the plaintiff has a cause of action"); Raines v. Byrd, 117 S. Ct. 2312, 2317 (1997) ("One element of the case-or-controversy requirement is that appellees, based on their complaint, must establish that they have standing to sue."); Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1067 (1997) ("Standing to sue or defend is an aspect of the case or controversy requirement.").

has suffered "(1) an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[52] Where the plaintiff lacks Article III standing for any reason—say because the federal court cannot provide the plaintiff with redress—a court has the singular duty of pronouncing that fact and dismissing the lawsuit.[53]

Determining whether a plaintiff has satisfied the Article III standing requirement will sometimes pose difficult and tricky questions.[54] The recent challenge to the Affordable Care Act and the Supreme Court's disposition of that matter on complicated Article III standing grounds illustrates the fact.[55] It should come as no surprise, then, that federal courts have tried to innovate around having to decide whether a plaintiff possesses Article III standing. Consider the Supreme Court's discussion and rejection of "hypothetical jurisdiction" in *Steel Co. v. Citizens for a Better Environment*.[56]

In *Steel Co.*, a private organization filed a lawsuit to force a steel company to pay civil penalties to the government for failing to file environmental reports with the appropriate government agency.[57] The lawsuit presented two questions: (1) whether the federal environmental statute at issue authorized suits for past violations, and (2) whether the private organization's requested relief would remedy the injury it allegedly suffered from the steel company's past noncompliance.[58] The Article III standing question proved complicated. And in *Steel Co.*, the litigants suggested to the Supreme Court that it simply assume that the private organization suffered injury from the steel company's past violations so that the Court could proceed to address the question whether the federal environmental statute at

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[52] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). The "injury in fact" requirement further divides into several subtests. A "plaintiff's injury must be (1) concrete, not abstract, (2) particularized, not generalized, and (3) actual or imminent, not conjectural or hypothetical." Sierra v. City of Hallandale Beach, Fla., 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring) (quotation omitted). What's more, the "injury in fact" requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217, 1223 (2013) ("[A] plaintiff with an injury supplies specific facts (even if hotly disputed) on which the court can apply the law. Dueling advocates ensure that the issues before the court are fully explored, and an injured plaintiff is believed to be better motivated to advance all relevant arguments than an uninterested one.").

[53] *See* Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 SAN DIEGO L. REV. 125, 152 (2013).

[54] California v. Texas, 141 S. Ct. 2104, 2112 (2021).

[55] *Id.*

[56] Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998).

[57] *Id.* at 87.

[58] *Id.* at 88.

issue authorized suits for past violations.[59] In other words, the litigants leaned on a then-burgeoning doctrine known as "hypothetical jurisdiction," which enabled federal courts to resolve the merits question rather than decide difficult Article III jurisdictional questions.[60] Indeed, prior to *Steel Co*., "lower courts routinely exercised hypothetical jurisdiction—dismissing cases on their merits without first confirming jurisdiction over them—as a means of circumventing knotty jurisdictional questions tied to meritless requests for relief."[61]

In his majority opinion for the Court, Justice Scalia rejected hypothetical jurisdiction "because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers."[62] Hypothetical jurisdiction, in Justice Scalia's view, conflicted with a "long and venerable line of . . . cases" declaring that when a federal court lacks Article III jurisdiction "the only function remaining to the court is that of announcing the fact and dismissing the cause."[63] Justice Scalia continued by pronouncing that "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment" which amounts to an impermissible "advisory opinion."[64] As Justice Scalia saw it, opining on the merits of a claim without Article III jurisdiction took the Court beyond its constitutional authority.[65]

Though the Court in *Steel Co.* put an end to Article III courts hypothesizing Article III jurisdiction to dismiss a claim on a non-

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[59] The doctrine of "hypothetical jurisdiction" had enabled federal courts to bypass difficult jurisdictional questions and instead to dismiss cases on seemingly easier merit questions. *See* Joshua S. Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power*, 68 ALA. L. REV. 493, 504 (2016).

[60] Joan Steinman, *After Steel Co.: Hypothetical Jurisdiction in the Federal Appellate Courts*, 58 WASH. & LEE L. REV. 855, 856 (2001) (exploring the doctrine of hypothetical jurisdiction). It is important to note that Article III's requirements do not apply to state courts. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2224 (2021) (Thomas, J., dissenting). Consequently, state courts can hear disputes that fail to satisfy Article III's requirements. *Id.*

[61] Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 708 (2013).

[62] Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998).

[63] *Id.*

[64] *Id.* at 101. An important note: federal courts have read *Steel Co.* as applying "only to Article III standing, and 'it arguably does not prohibit… hypothetical [statutory] jurisdiction.'" Joshua S. Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power*, 68 ALA. L. REV. 493, 510–11 (2016). Some have even argued that assuming statutory jurisdiction lies to instead resolve merits questions conflicts with the dictates of Article III. *See* Joshua S. Stillman, *The Dangers of Hypothetical Statutory Jurisdiction (Even When Jurisdiction Exists)*, 4 SAVANNAH L. REV. 129 (2017) ("I argue that hypothetical statutory jurisdiction is contrary to Article III of the Constitution, and that constitutional-avoidance and efficiency arguments for the doctrine do not justify retaining it.").

[65] *See Steel Co.*, 523 U.S. at 101. One academic has suggested that *Steel Co.* "presaged a kind of 'jurisdictional formalism,'" in which lower federal courts would have "to demonstrate far greater care in distinguishing jurisdictional holdings from decisions on the merits." Stephen I. Vladeck, *The Problem of Jurisdictional Non-Precedent*, 44 TULSA L. REV. 587, 590 (2013).

jurisdictional basis, the Court declined to address what makes an opinion an impermissible advisory one.[66] Case law on that question is muddy, explaining why scholars and judges alike have offered a variety of definitions.[67] That the Constitution itself does not include a clause prohibiting federal courts from advising "other government actors or private individuals on abstract legal questions" may best explain the lack of a consensus definition.[68] The historical record leading up to the ratification of the Constitution also does not uniformly condemn the practice of judges providing legal advice on abstract legal questions.[69] To the contrary, judicial actors provided legal advice to individuals other than the litigants before them on numerous occasions and on all sorts of questions.[70] Colonial-American jurists "inherited the classical understanding of extrajudicial advice," recognizing "its legitimacy and utility" and providing advisory opinions in a broad range of scenarios.[71] Consider, too, that on the eve of the ratification of the federal Constitution, Chief Justice Lord Mansfield of King's Bench, along with his colleagues, continued to weigh in on, among other things, "the validity of treason indictments, opined on the king's power to control the marriages of his grandchildren, and offered counsel regarding the legality of a death sentence imposed by a court-martial."[72]

Though the practice of judges issuing advisory opinions remained a common practice in the late eighteenth-century, the first batch of Article III judges tacked a different direction. In American law, the prohibition on

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[66] *Steel Co.*, 523 U.S. at 94.

[67] Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*, 74 VAND. L. REV. 621, 626 (2021) ("This Article defines advisory opinion as a legal opinion delivered by one or more judges in their official capacities but outside of the ordinary process of litigation."); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605, 643 (1992) ("This objection defines an advisory opinion as a judicial decision incapable of changing anything in the real world."); *Id.* at 645 ("Any decision on the merits of a case that is moot or unripe or in which one of the parties lacks standing."); George N. Stevens, *Advisory Opinions—Present Status and an Evaluation*, 34 WASH. L. REV. & ST. B.J. 1, 2–3 (1959) ("As the term is used in the United States today, an advisory opinion is a formal opinion by a judge or judges of a supreme court, or by a supreme court, in answer to a question of law, submitted by a legislative body or a governor, a council, or a governor and council, of a state, which question is not related to nor concerned with a case or controversy in actual litigation at the time, and which does not involve private rights.").

[68] Note, *Advisory Opinions and the Influence of the Supreme Court over American Policymaking*, 124 HARV. L. REV. 2064, 2064 (2011).

[69] Burset, *supra* note 67, at 631; Van Vechten Veeder, *Advisory Opinions of the Judges of England*, 13 HARV. L. REV. 358 (1900).

[70] Burset, *supra* note 67, at 631 ("Medieval and early modern judges routinely gave legal advice to Monarchs.").

[71] *Id*. at 650.

[72] Justin W. Aimonetti & Jackson A. Myers, *The Founders' Multi-Purpose Chief Justice: The English Origins of the American Chief Justiceship*, 124 W. Va. L. Rev. 203, 223 (2021).

advisory opinions dates back to "a four-sentence letter from 1793 in which the Jay Court rejected the Washington Administration's request for advice on questions of international law."[73] Throughout the 1790s, British and French forces warred across the globe.[74] The global conflict forced the Washington Administration to make a tough decision: pick a side or sit it out.[75] The appropriate course of action for the fledging nation proved far from clear. Uncertainty about how to proceed led Washington's Cabinet to "prepare . . . a list of twenty-nine very specific questions about America's obligations to the warring powers under its treaties and international law."[76] Thomas Jefferson, then-Secretary of State, sent the list of questions to Chief Justice John Jay and his fellow Justices, requesting "their opinion, whether the public may, with propriety, be availed of their advice on these questions?"[77] Jefferson's request seemed appropriate given that the "prevalent view under the new constitution was that the President had the right to seek advice from the Supreme Court."[78]

The Jay Court responded with a letter of its own, which has become known as the *Correspondence of the Justices*.[79] In the Court's correspondence, the "Justices reasoned that it would be improper for them to answer legal questions 'extrajudicially' in light of 'the Lines of Separation' between the branches and 'their being in certain Respects checks on each other.'"[80] As the Court saw things, "neither the legislative nor the executive branches can constitutionally assign to the judicial branch any duties but such as are properly judicial, to be performed in a judicial manner."[81] The Correspondence suggested that Article II's grant of power to the President to require the opinions of executive officers implied that "the President lacked the same power with respect to judicial officers."[82] Still, the Constitution's

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[73] *Burset*, *supra* note 67, at 622.

[74] John Yoo, *Jefferson and Executive Power*, 88 B.U. L. Rev. 421, 424 (2008).

[75] William R. Casto, *The Early Supreme Court Justices' Most Significant Opinion*, 29 Ohio N. U. L. Rev. 173, 174 (2002).

[76] *Advisory Opinions and the Influence of the Supreme Court Over American Policymaking*, *supra* note 68, at 2066.

[77] *Id.*; Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 ROG. WILLIAMS UNIV. L. REV. 207, 210 (1997) ("In 1793, Secretary of State Thomas Jefferson wrote the Justices requesting advice regarding relations with France during France's Revolutionary wars.").

[78] *Id*.

[79] Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 442 (1996); Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 186 (2012).

[80] *Advisory Opinions and the Influence of the Supreme Court over American Policymaking*, *supra* note 68, at 2067.

[81] Phillip M. Kannan, *Advisory Opinions By Federal Courts*, 32 U. RICH. L. REV. 769, 769 (1998).

[82] *Advisory Opinions and the Influence of the Supreme Court over American Policymaking*, *supra* note 68, at 2067.

text remained silent on the question whether Article III judges could provide advisory opinions. Regardless of that silence, the Court declined to advise the Executive on the list of questions on important issues of law. The decision to turn down the President's request established, at a minimum, the principle that the "President lack[ed the] power to compel the Court to issue advisory opinions."[83]

Some scholars, including most recently Christian R. Burset, have argued that the Jay Court's construction of the Constitution as prohibiting advisory opinions was anything but inevitable.[84] As alluded to already, historical practice prior to the ratification of the Constitution did not foreclose judicial actors from rendering advice outside of judicial proceedings.[85] And even though the practice of issuing advisory opinions may have waned during the second half of the eighteenth century, the practice persisted on the eve of the Constitution's ratification.[86] The long-established practice may best explain why the Constitution contains no clause expressly prohibiting advisory opinions.[87] In fact, the Incompatibility Clause of Article I, Section 6 forbids any "person holding any Office under the United States" from being "a Member of either House [of Congress] during his Continuance in Office."[88] That Clause does not apply to Article III judges—a deliberate choice made by the framers.[89] That "deliberate omission suggests a tacit expectation that judicial officers . . . would fulfill extra-judicial functions," such as advising on abstract legal questions.[90] In light of the historical record and the Constitution's text (or absence thereof), it seems fair to conclude that the "Jay Court's refusal to provide the requested opinions reflected prudential or political concerns, not [necessarily] constitutional ones."[91]

Notwithstanding the Constitution being devoid of a textual provision expressly prohibiting advisory opinions, this Article contends that the Constitution's meaning has been "liquidated" to prohibit federal judges from

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[83] *Id.* at 2068 (noting that "the Court has since made clear that it lacks discretion to do so under any circumstances").

[84] *Burset*, *supra* note 67.

[85] Aimonetti & Myers, *supra* note 72. Indeed, as a historical matter, "English judges had a longstanding practice of issuing advisory opinions upon the monarch's request." *Advisory Opinions and the Influence of the Supreme Court over American Policymaking*, *supra* note 68, at 2067.

[86] *See generally* Burset, *supra* note 67.

[87] *See* STEWART JAY, MOST HUMBLE SERVANTS (1997).

[88] U.S. CONST. art. I, § 6, cl. 2.

[89] Justin W. Aimonetti & Jackson A. Myers, *The Founders' Multi-Purpose Chief Justice: The English Origins of the American Chief Justiceship*, 124 W. VA. L. REV. 220, 236 (2021).

[90] *Id.*

[91] Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*, 74 VAND. L. REV. 621, 623 (2021).

issuing them.[92] Under the liquidation theory as broadly understood, historical practice can settle the meaning of ambiguous provisions found within the Constitution.[93] Put differently, "a regular course of practice can liquidate [and] settle the meaning of disputed or indeterminate terms [and] phrases in the Constitution."[94] As Professor Caleb Nelson has documented, James Madison, along with many of his contemporaries, believed that "post-enactment interpretations" and practice could "fix" the meaning of ambiguous constitutional provisions.[95] Building upon Professor Nelson's scholarship, Professor William Baude has argued that for historical practice to settle the meaning of an ambiguous constitutional provision, three requirements must be satisfied: (1) textual indeterminacy, (2) a deliberate

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[92] Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1773–74 (2015) ("Although the Justices' letter was not technically an opinion of the Court with stare decisis effect, *The Correspondence of the Justices* is almost universally regarded as having liquidated the meaning of Article III as flatly forbidding the federal judiciary from issuing advisory opinions."); *Burset*, *supra* note 67, at 625 ("Although they would have been permitted at the Founding, they were always optional; and courts' consistent practice of rejecting them merits respect."); Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 547 (2016) ("The constitutional text says little about the judicial power."); Robert H. Kennedy, *Advisory Opinions: Cautions About Non-Judicial Undertakings*, 23 U. RICH. L. REV. 173, 173 (1989) (arguing that the "federal prohibitions against advisory opinions result from evolution of the 'cases or controversy' limitation of article III § 2 of the United States Constitution"); Phillip M. Kannan, *Advisory Opinions By Federal Courts*, 32 U. RICH. L. REV. 769, 771 (1998) ("[I]f a federal court purports to rule on an issue that is not a case or controversy, it is performing a duty that is not 'properly judicial,' and hence, its opinion would be merely advisory. Thus, the meaning of advisory opinion can be understood by considering its antithesis, namely, case or controversy.").

[93] E. Garrett West, *Revisiting Contempt of Congress*, 2019 WIS. L. REV. 1419, 1469–70 (2019). The scope of historical practice relevant to constitutional liquidation is a divisive question of both degree and kind and a question beyond the scope of this Article. *See* Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 77 (2013) ("The diversity of possible historical practices that touch on a given constitutional dispute requires a practitioner of this mode of analysis to state very clearly what counts, and what does not, as relevant practice."); *see id.* at 85 ("Many types of historical practice matter for constitutional law, but without an account of which practice and whose practice is most authoritative, appeals to the gloss of history risk becoming hopelessly open-ended or distressingly cynical."); John F. Stinneford, *Experimental Punishments*, 95 NOTRE DAME L. REV. 39, 86 (2019) ("Liquidation is the idea, largely associated with James Madison, that if a constitutional provision is vague or ambiguous, early interpreters (whether they be courts or the political branches of government) could settle its meaning over time, so long as they stayed within the range of possible meaning."); *see also* Greg Reilly, *Power Over the Patent Right*, 95 TUL. L. REV. 211, 271 (2021) (noting that "unlike theories that early practice can fix constitutional meaning, historical gloss theories "do . . .not insist on permanent fixation through practice," but rather allow gloss to appear, disappear, and change over time and "do . . .not privilege early practice when it conflicts with longstanding subsequent practice").

[94] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2136 (2022); Baldwin v. United States, 140 S. Ct. 690, 693 (2020) (Thomas, J., dissenting from denial of cert) ("This practice is consistent with the more general principle of "liquidation," in which consistent and longstanding interpretations of an ambiguous text could fix its meaning.").

[95] Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 527 (2003).

practice, and (3) constitutional settlement.[96] Taking Professor Baude's test on its own terms, it seems clear that the prohibition against advisory opinions has been constitutionally liquidated.

Start with textual indeterminacy. Article III says: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such Courts as Congress may from time to time ordain and establish."[97] The original public meaning of "judicial Power" has fostered much debate and disagreement among academics. Professor Randy Barnett, for example, has argued that the judicial Power as an original matter "included the power to nullify unconstitutional laws."[98] Professor Alexander Bickle, by contrast, suggested that the judicial Power may not have included the power of judicial review.[99] The exact scope of the judicial Power remains contested.[100] And though a broad consensus agrees that the judicial Power is limited to those practices "rooted in historical Anglo-American practice,"[101] scholars and judges continue to debate the scope of the relevant historical practice.[102] Indeed, as Justice Frankfurter once remarked, in endowing the Court "with 'judicial Power' the Constitution presupposed a historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges."[103]

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[96] William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019); *see also* John F. Stinneford, *Experimental Punishments*, 95 NOTRE DAME L. REV. 39, 86 (2019) ("First, there had to be a textual indeterminacy . . . . Second, there had to be a course of deliberate practice. This required repeated decisions that reflected constitutional reasoning. Third, that course of practice had to result in a constitutional settlement.").

[97] U.S. CONST. art. III.

[98] Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 SUP. CT. ECON. REV. 115, 138 (2004).

[99] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 5 (1962); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 901 (2003) (discussing the meaning of "judicial Power").

[100] Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 406 (2013); *But see* Thomas L. Jipping, *Which Is to Be Master?: The People, Judges, and the Constitution's Meaning*, 2 LIBERTY U.L. REV. 419, 437 (2008).

[101] Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 741 (2001) (stating that the judicial Power is limited to those practices "rooted in historical Anglo-American practice").

[102] Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 699 (2009) ("[I]t is well known that the Framers of the original Constitution understood the phrase "the judicial power" in a narrow and modest way," permitting "judges to look to text and history, but it does not allow them to be turned into engines of social change at the behest of engaged social movements."); Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 554–55 (2016) ("Some of the historical practices that have fleshed out the meaning of the Article III judicial power have hardened into rules that Congress may not override. It seems safe to say, for example, that Congress could not now enact a statute empowering the Supreme Court to issue advisory opinions.").

[103] Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring).

Move next to deliberate practice. Deliberate practice from the *Correspondence of the Justices* onward shows that the American public in general and the federal judiciary in particular have "placed advisory opinions in the category of the constitutionally forbidden."[104] In the wake of the *Correspondence*, the Executive and the Legislature accepted the Court's position on the subject of advisory opinions.[105] Widespread acceptance came even though it would have been plausible for critics of a then unpopular and rather weak Court "to attack it for failing to assist President Washington."[106] Judicial decisions rendered after the *Correspondence* cemented the deliberate practice. Indeed, as the Court held in *Steel Co.*, federal courts must not enter "a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning."[107]

Conclude with constitutional settlement.[108] Though historical practice and the Constitution's text left it "unobvious at the outset whether Article III courts could properly issue advisory opinions, a practical construction of Article III gave rise to a decisive constitutional prohibition against that practice."[109] The people of the United States as well as opponents of the Court's *Correspondence* acquiesced to the Court's construction of the Constitution. Indeed, consider that the Eleventh Amendment was added to the Constitution soon after the Court's decision in *Chisolm*.[110] The public could have, but did not, respond in kind to the *Correspondence of the Justices*. All in all, the deliberate practice of "adverting to the impermissibility of advisory opinions" provides more "evidence of Article III's original public meaning."[111] In sum, the Constitution in general and the

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[104] Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1817 (2015).

[105] *Id.*

[106] *Burset*, *supra* note 67, at 659.

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

[108] *See* William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1 (2019) (claiming that constitutional settlement involves both acquiescence (*i.e.*, the opposing side in some sense gave up), and public sanction (*i.e.*, the public ratified the settled meaning)).

[109] John F. Manning, *The Necessary and Proper Clause and Its Legal Antecedents*, 92 B.U. L. REV. 1349, 1376 (2012) (contending that the prohibition against advisory opinions could be "de-liquidated," in that subsequent practice could disrupt the Constitution's liquidated meaning); *See* E. Garrett West, *Revisiting Contempt of Congress*, 2019 WIS. L. REV. 1419, 1477 (2019) (noting that de-liquidation would require the Supreme Court to undertake a seismic sea change and upset centuries of established practice).

[110] Chisolm v. Georgia, 2 U.S. 419 (1793) (ruling that states could be sued in federal courts by citizens of another state); Christian Talley, *Lawmaking in the Legitimacy Gap: A Short History of the Supreme Court's Interpretive Finality*, 108 VA. L. REV. Online 112, 119 (2022).

[111] Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1817 (2015); Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 ROG. WILLIAMS UNIV. L. REV. 207, 213 (1997) ("The long history of rejection of advisory opinions at the federal level has not prevented the states from following their own courses.").

judicial Power in particular did not expressly prohibit Article III judges from issuing advisory opinions. Historical and deliberate practice, however, has settled the meaning of judicial Power. That settled or liquidated meaning prohibits Article III judges from issuing advisory opinions.

IV. ADVISORY OPINIONS AND ALTERNATIVE HOLDINGS

Part III made clear that a federal court must possess Article III jurisdiction to rule on a claim for relief. Without Article III jurisdiction, a federal court must dismiss the matter, assuming Article III jurisdiction to dismiss a claim on the merits is a no-no, as doing so exceeds a federal court's authority under Article III. Nevertheless, federal courts have time after time disposed of a plaintiff's claim not only because the court lacks Article III jurisdiction, but also because the plaintiff's claim fails on the merits.[112] These so-called alternative holdings arise with frequency, producing illegitimate "shadow authority" that litigants and other courts rely upon in subsequent cases.[113] Consider a few examples, which should make the constitutional problem rather apparent.

Take the case of *Lamar Advertising v. Town of Orchard Park*.[114] Lamar Advertising—a company that "erects outdoor signs for commercial and non-commercial advertising"[115]—submitted an application to the Town of Orchard Park to obtain permits to construct eight billboards on land the company had leased.[116] The town denied the application, reasoning that the proposed billboards, among other things, conflicted with requirements specified within a town ordinance.[117] Displeased, the company filed a lawsuit in federal court, alleging that the entire ordinance conflicted with the First Amendment's Free Speech Clause.[118] The court ruled that the company lacked Article III standing to challenge several provisions of the Town's ordinance because those provisions did not cause the company any actual

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[112] Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 333 (1999) ("Given this premise, one option for courts faced with a difficult jurisdictional question is to find that jurisdiction is lacking (if that is a justifiable finding), but nevertheless in dictum to express its view of the merits.").

[113] *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2394 (1991) ("These superfluous alternative holdings will spawn precedent just as surely as the dispositive ones and may insulate the key issue from appellate review.").

[114] Lamar Advert. of Penn, LLC v. Town of Orchard Park, N.Y., No. 01-CV-556A (M), 2008 WL 781865 (W.D.N.Y. Feb. 25, 2008).

[115] *Id.* at *1.

[116] *Id.*

[117] *Id.*

[118] *Id.*

harm.[119] The court did not stop its analysis there, however. It instead "address[ed] in the alternative the merits of those claims for which [it] conclude[d that] Lamar lack[ed] standing."[120] In doing so, the court determined that Lamar Advertising's claims must be dismissed on the merits as well.[121] The court thus rendered an alternative holding: one jurisdictional and the other non-jurisdictional.

Stahl L. Firm v. Judicate West presents a second illustration of the constitutional trouble with alternative holdings. Norbert Stahl and his law firm filed a federal lawsuit against Judicate West and Judge Vincent DiFiglia, asserting claims of unfair competition, fraud, and negligence.[122] West and DiFiglia moved to dismiss Stahl's claims on the grounds that the court lacked Article III jurisdiction over each of them.[123] The court agreed, reasoning that Stahl had failed allege facts to show that "he suffered or will likely suffer the type of injury-in-fact required to establish Article III standing."[124] The court, however, proceeded to rule that even if Stahl "had alleged facts sufficient to establish Article III standing, the Court would dismiss Plaintiff's claim[s] under Rule 12(b)(6) for failure to state a claim on which relief can be granted."[125] The court thus rendered an alternative holding, dismissing Stahl's claims on the grounds that he failed to establish Article III jurisdiction and because he failed on the merits.

Dennis De Jesus v. United States provides a third snapshot.[126] In that case, De Jesus filed a motion to alter the district court's denial of his motion under 28 U.S.C. § 2255, which he filed to set aside his sentence.[127] The court denied De Jesus's § 2255 motion.[128] De Jesus later filed a Rule 59(e) motion, arguing that the court had misunderstood his argument and should reconsider

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[119] *Id.* at *7.

[120] *Id.* at *8; *see also id.* at *1 ("[T]o avoid needless delay in the event that this recommendation is not adopted, I have also addressed Lamar's challenges to the Fifth Ordinance even where I believe that it lacks standing to assert those challenges.").

[121] *Id.*

[122] Stahl L. Firm v. Judicate W., No. C13-1668 TEH, 2013 WL 6200245, at *1 (N.D. Cal. Nov. 27, 2013).

[123] *Id.* at *2.

[124] *Id.* at *6.

[125] *Id.*

[126] De Jesus v. United States, No. 14-CR-60270, 2017 WL 11501751, at *1 (S.D. Fla. Sept. 6, 2017), *report and recommendation adopted*, No. 14-60270-CR, 2018 WL 10436235 (S.D. Fla. Jan. 8, 2018). The Article acknowledges that this case presents a subject-matter jurisdiction deficiency rather than an Article III deficiency. The Articles relies on *De Jesus*, however, to suggest that ruling on the merits after concluding no subject-matter jurisdiction lies may pose similar concerns compared to the Article III context.

[127] *Id.*

[128] *Id.*

the denial.[129] The court "denied" De Jesus's Rule 59(e) motion on the ground that the court lacked jurisdiction, concluding that the motion counted as an unauthorized successive § 2255 motion.[130] The court continued, noting that "even if the court did have jurisdiction, it would still deny the Motion" because De Jesus "rehashes arguments that the Court previously rejected in the Habeas Order."[131] The court thus rendered an alternative holding, ruling that De Jesus's motion failed for a jurisdictional reason and for a non-jurisdictional reason.[132]

The three above examples provide just a smattering of the plethora of cases in which a federal court has concluded that it lacked jurisdiction but went on to conclude in the alternative that the plaintiff's claim fails on the merits (see the footnote for many more examples).[133] This Article contends

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[129] De Jesus v. United States, No. 14-60270-CR, 2018 WL 10436234, at *1 (S.D. Fla. Mar. 2, 2018).

[130] *Id.* at *1–2.

[131] *Id.* at *2.

[132] *Id.* Appellate courts also sometimes issue impermissible alternative holdings, too. Consider the case of *EBI-Detroit v. City of Detroit*. There, construction contractor EBI-Detroit brought a host of claims against the City of Detroit, including an intentional tort claim. *EBI-Detroit, Inc. v. City of Detroit*, 279 F. App'x 340, 342 (6th Cir. 2008). The Sixth Circuit had to determine as a threshold matter whether EBI-Detroit possessed Article III standing to bring the intentional tort claim. *See id.* at 342, 349. The panel noted that courts had divided on the question whether "disappointed bidders have standing to bring intentional tort claims, as opposed to breach of contract or constitutional due process and equal protection claims." *Id.* at 349. The panel suggested that that EBI lacked standing. *Id.* But instead of resolving the question, the panel stated that it "need not definitively answer the standing question now, because even if EBI has standing, its claims fail." *Id.*

[133] Consider the case of *ThermoLife Int'l LLC v. Am. Fitness Wholesalers LLC*. ThermoLife International, LLC, an Arizona company founded in 1998, licenses and sells its patented products to dietary supplement providers like American Fitness Wholesaler (AFW for short). *See* ThermoLife Int'l LLC v. Am. Fitness Wholesalers LLC, No. CV-18-04189-PHX-JAT, 2019 WL 3840988, at *1 (D. Ariz. Aug. 15, 2019). AFW turns around and advertises ThermoLife's product on its website. *Id.* AFW also advertises and sells one of ThermoLife's competitor's products. *Id.* In doing so, AFW's website describes the competitor's product as a "vastly superior patented" supplement. *Id.* Having felt slighted by AFW's description of the competitor's product, ThermoLife filed a lawsuit against AFW in federal court, alleging that AFW engaged "in unfair competition in the dietary supplement market through false advertising of products labeled as dietary supplements." *Id*. AFW moved to dismiss the complaint, arguing that ThermoLife's claims under the Lanham Act, the false marking statute, and the common law doctrine of unfair competition should be dispensed with for two reasons. *Id.* First, AFW argued that the federal court lacked Article III jurisdiction to entertain the claims. *Id.* Second, AFW contended that, even if the federal court possessed Article III jurisdiction, ThermoLife's claims should nonetheless lose on the merits. *Id.* The federal court agreed with AFW that it lacked Article III jurisdiction to entertain ThermoLife's claim. *Id.* at *4. In the court's view, because ThermoLife did "not point to any specific licenses or ingredients for which sales decreased as a result of [the Wholesaler's] alleged misconduct," ThermoLife failed to allege a concrete injury, which deprived the court of Article III jurisdiction to hear the claims. *Id.* Rather than end it at that and dismiss the lawsuit, the court proceeded to address whether ThermoLife stated a viable claim upon which relief could be granted. *Id.* at *5. In the court's own words: It addressed AFW's "[a]lternative" merits arguments so that the court could render an "[a]lternative holding." *Id.* at *4–5. Conducting the alternative merits analysis, the court concluded in the alternative that ThermoLife failed to allege a plausible commercial or competitive injury and that the company also failed to allege facts sufficient to satisfy the claims' causation elements. *Id.* at *8. The court, in other words, determined that ThermoLife's claims failed on the merits. *Id.* As a result, the court ruled that not only did ThermoLife

that the above examples and others like it demonstrate the constitutional trouble that comes with some alternative holdings. It is important to keep in mind that not all alternative holdings conflict with the prohibition against advisory opinions. Alternative holdings serve valuable efficiency ends where a court disposes of a single claim for two non-jurisdictional reasons (*e.g.*, Count I fails because plaintiff cannot satisfy either the first or third elements). But where a federal court lacks Article III jurisdiction but nevertheless disposes of the claim on the merits, that court has violated the prohibition on issuing advisory opinions.[134] Rather than take the extra step, federal courts should halt all discussion of non-jurisdictional matters as soon as the court concludes that it lacks Article III jurisdiction. Some courts do adhere to this proper approach: "In light of the lack of Article III standing, there is no need

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fail to establish "Article III standing," but "alternatively" that the company failed to "allege sufficient facts to bring its specific claims under the Lanham Act, false marking statute, and the common law doctrine of unfair competition." *Id.* at *9. The court, in essence, dismissed ThermoLife's claims because the court lacked Article III jurisdiction to entertain the claims and alternatively because ThermoLife's claims lacked merit. *Id.*

Other examples of federal courts rendering impermissible alternative holdings include: Utah v. U.S. Dep't of Interior, 535 F.3d 1184, 1191 (10th Cir. 2008) (noting that the district court concluded "that SUWA lacked Article III standing, that the settlement did not represent a final agency action, and that the issues presented were not ripe for adjudication . . . . In the alternative, the district court rejected each of SUWA's claims on the merits."); Garcia v. Serv. Emps. Int'l Union, No. 217CV01340APGNJK, 2019 WL 4281625, at *4 (D. Nev. Sept. 10, 2019) ("I therefore grant the defendants' motion for summary judgment on Garcia's claims under § 301 and dismiss those claims for lack of standing. To the extent I am incorrect on standing, that same evidence shows Garcia's § 301 claims fail on the merits."); In re Navy Chaplaincy, 697 F.3d 1171, 1173 (D.C. Cir. 2012) ("The district court denied plaintiffs' motion for a preliminary injunction, concluding that they lacked Article III standing and, alternatively, were unlikely to succeed on the merits of their claims."); California ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of Interior, No. 09CV2233 AJB PCL, 2012 WL 1155831, at *12 (S.D. Cal. Apr. 6, 2012) ("For the reasons set forth above, the Court concludes that Plaintiffs' claims fail for lack of standing, which is sufficient to defeat Plaintiffs' motion for summary judgment in its entirety. The Court also finds that Plaintiffs' NEPA claim fails on the merits."); Joseph v. Experian Info. Sols., Inc., No. 118CV03443WMRRGV, 2019 WL 5458009, at *5 (N.D. Ga. July 3, 2019), *report and recommendation adopted*, No. 1:18-CV-3443-WMR, 2019 WL 5460659 (N.D. Ga. Aug. 13, 2019) ("Thus, the Court concludes that Joseph has failed to establish Article III standing to assert his FCRA claims against defendants. However, in the event Joseph is found to have standing to pursue his claims, the Court will address defendants' alternative argument for dismissal based on the merits of his claims."); Cunningham v. Rapid Response Monitoring Servs., Inc., 251 F. Supp. 3d 1187, 1206–07 (M.D. Tenn. 2017) ("The Court finds that Plaintiff lacks standing to pursue his claims in the instant case. This finding is sufficient to warrant dismissal of the action in its entirety. Nonetheless, the Court briefly addresses some of Defendants' alternative arguments for dismissal given that extensive analysis is not required to show that these arguments have merit."); Advantage Media, LLC v. City of Eden Prairie, 405 F. Supp. 2d 1037, 1046 (D. Minn. 2005), *aff'd sub nom.* Advantage Media, LLC v. City of Eden Prairie, 456 F.3d 793 (8th Cir. 2006) (concluding that "even if constitutional standing were established, summary judgment in favor of defendant on plaintiff's as-applied First Amendment claims is warranted").

[134] *See* Willy v. Coastal Corp., 503 U.S. 131, 138 (1992) (noting the constitutional "issue of a district court adjudicating the merits of a 'case or controversy' over which it lacks jurisdiction"); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981) (holding that "[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction").

to address defendants' alternative arguments to dismiss the claims on the merits."[135] But some is not all.

A practical consideration, in addition to the constitutional one, should stop federal courts from rendering an alternative non-jurisdictional holding after concluding that it lacks Article III jurisdiction over the claim. Many circuits have recognized that where a district court concludes that it lacks jurisdiction, the district court's statements concerning the merits do not qualify as alternative holdings capable of supporting affirmance.[136] These circuits instead remand for adjudication of the merits when a district court erroneously concludes that it lacks jurisdiction—even if the district court also purported to reject the appellant's position on the merits in an alternative holding. Put differently, where an appellate court concludes that the district court erred in deciding that it lacked Article III jurisdiction, the appellate court should reverse that ruling and remand for further consideration of the merits even if the district court issued an alternative holding on the merits. As the DC Circuit put it: "The district court denied plaintiffs' motion for a preliminary injunction, concluding that they lacked Article III standing and, alternatively, were unlikely to succeed on the merits of their claims . . . [W]e reverse the district court's determination that plaintiffs lack Article III standing and remand for further factual findings . . . on the merits."[137] In sum, district courts harbor false hope about the judicial efficiency of

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[135] Sever v. City of Salem, 390 F. Supp. 3d 299, 311 (D. Mass. 2019)*; see* also Daimler Trucks N. Am. LLC v. E.P.A., 745 F.3d 1212, 1215–16 (D.C. Cir. 2013) ("EPA argues, first, that the court is without subject-matter jurisdiction—because Daimler lacks standing under Article III of the United States Constitution and because the challenge is now moot—and, on the merits, that the Certificates remain valid until EPA revokes them pursuant to its regulatory revocation process We conclude Daimler's challenge is moot and therefore do not reach EPA's alternative arguments."); Fleck & Assocs., Inc. v. Phoenix, City of, an Arizona Mun. Corp., 471 F.3d 1100, 1106 (9th Cir. 2006) ("Fleck contends alternatively that even if it lacks formal standing to sue, this court should reach the merits on the theory that the constitutional issue presented is gravely important. Aside from the fact that Fleck cites no authority for this position, it neglects that standing is an aspect of subject matter jurisdiction and that, no matter how important the issue, a court lacking jurisdiction is powerless to reach the merits under Article III of the Constitution."); Diaz v. Loc. No. 241, Transp. Workers Union of Am., Univ. Div., No. 17CV8898, 2021 WL 1063184, at *1 (S.D.N.Y. Mar. 19, 2021) ("Columbia moves to dismiss the action for lack of standing under Article III of the United States Constitution. In the alternative, both Local 241 and Columbia move for summary judgment dismissing all claims on the merits. For the reasons that follow, Plaintiffs' claims are dismissed for lack of standing.").*;*

[136] *See* Leibovitch v. Islamic Republic of Iran, 697 F.3d 561, 572–73 (7th Cir. 2012); Will v. Lumpkin, 978 F.3d 933, 937–40 (5th Cir. 2020); Leal Garcia v. Quarterman, 573 F.3d 214, 216 (5th Cir. 2009); Moore v. Maricopa Cnty. Sheriff's Off., 657 F.3d 890, 895 (9th Cir. 2011); In re Dep't of Energy Stripper Well Litig., 206 F.3d 1345, 1351 (10th Cir. 2000). The Eleventh Circuit and others, however, hold that it may affirm based on a district court's assessment of the merits of a case even where the district court ruled that it lacked jurisdiction to decide the merits of the claim. *See* Rutherford v. McDonough, 466 F.3d 970 (11th Cir. 2006).

[137] *In re* Navy Chaplaincy, 697 F.3d 1171, 1173 (D.C. Cir. 2012).

rendering alternative non-jurisdictional holdings, as those alternative holdings will not always reverse proof a judgment.[138]

V. CONCLUSION

Federal courts, as this Article has demonstrated, often conclude that no Article III jurisdiction exists over a claim but then proceed to dispose of the claim for a second, independent, and sufficient non-jurisdictional reason. Courts justify such alternative holdings on judicial economy grounds, reasoning that alternative holdings ensure one claim has been killed with two stones. But this type of decisional sequencing poses constitutional concerns, as the Constitution outright bars advisory opinions masquerading as alternative holdings. A federal court exceeds its judicial power under Article III when it dismisses a claim for lack of Article III jurisdiction and for a non-jurisdictional reason, too. Rather than issue a prohibited advisory opinion, a federal court should halt all discussion of non-jurisdictional matters as soon as it concludes that it lacks Article III jurisdiction. Formalistic as this rule may seem, failure to respect it can result in courts exercising judicial power not granted by Article III.

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[138] Whether and to what extent alternative holdings have preclusive effect in subsequent actions has proven a divisive question. *See* Phil-Insul Corp. v. Airlite Plastics Co., 854 F.3d 1344, 1356 (Fed. Cir. 2017) (noting that the circuits are split over "whether alternative holdings that are each independently sufficient to support a judgment can be given preclusive effect"). Authority points in different directions. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997, 2042 (1994) ("[W]hen an appellate court bases a decision on two grounds, each of which, standing alone, would support the judgment, preclusive effect will be given to both determinations."); Jean Alexander Cosms., Inc. v. L'Oreal USA, Inc., 458 F.3d 244, 255 (3d Cir. 2006) ("[W]e will follow the traditional view that independently sufficient alternative findings should be given preclusive effect."). Despite the dueling positions, this Article argues that, where a federal court issues an alternative non-jurisdictional holding after concluding that it lacked Article III jurisdiction over the claim, subsequent courts should disregard the non-jurisdictional alternative holding. Indeed, under the jurisdictional exception to the full faith and credit clause, a later court "may inquire into the jurisdictional basis of the foreign court's decree. If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given." Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 705 (1982);s*ee also* W. Union Tel. Co. v. Pennsylvania, 368 U.S. 71, 75 (1961) ("[A] state court judgment need not be given full faith and credit . . . as to parties or property not subject to the jurisdiction of the court that rendered it.").