HEARING CONGRESS'S JURISDICTIONAL SPEECH: GIVING MEANING TO THE "CLEARLY-STATES" TEST IN *ARBAUGH V. Y & H CORP.*

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I. INTRODUCTION

Article III, Section 2 of the United States Constitution extends the federal judicial power to, among other things, "Cases . . . arising under this Constitution, [and] the Laws of the United States . . . [and] to Controversies . . . between Citizens of different States."[1] Article III, Section 1 gives Congress the authority the "ordain and establish" "inferior Courts" to exercise this judicial power.[2] This section has traditionally been understood as empowering Congress to limit and define the jurisdiction of lower federal courts.[3]

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1. U.S. CONST. art. III, § 2.

2. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

3. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978) ("It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded."); Bowles v. Russell, 551 U.S. 205, 212 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider."); Kontrick v. Ryan, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction."). This characterization of Congress's jurisdiction-defining powers as plenary is not, however, universal. In *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1885 (2008), Peter J. Smith describes a tension between "the traditional view that Congress has virtually plenary power over the jurisdiction of the federal courts against proponents of various theories of mandatory jurisdiction, which, if nothing else, impose substantial limits on Congress's power to deprive federal courts of jurisdiction over certain matters."

Absent a congressional exercise of this jurisdiction-defining power, the federal courts are presumed to be closed[4] to a particular case.[5] Determining when Congress is exercising this jurisdiction-defining power—when Congress speaks to the jurisdiction of the district courts—is sometimes an easy inquiry. In 28 U.S.C. § 1332, for example, Congress states that "[t]he district courts shall have original jurisdiction . . . where the matter in controversy exceeds . . . $75,000 . . . and is between[] citizens of different States."[6] There is no question that here Congress was speaking to jurisdiction and exercising its jurisdiction-defining power.

But, as made clear by two recent Supreme Court cases, *Arbaugh v. Y & H Corp.*[7] and *Bowles v. Russell*,[8] and by a case the Supreme Court will hear in the October 2009 term, *Reed Elsevier, Inc. v. Muchnick*,[9] determining when Congress intended a statute to speak to jurisdiction may be difficult.

This determination is complicated by Congress's exercise of its separate, substantive powers.[10] Congress, under its other enumerated powers, such as the power to regulate commerce,[11] has the ability to

4. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) ("It is to be presumed that a cause lies outside [of federal courts'] limited jurisdiction." (citing Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 11 (1799))).

5. State courts, on the other hand, are courts of plenary jurisdiction, and can even generally adjudicate federal claims. *See* Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823 (1990) ("Under our 'system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.'" (quoting Tafflin v. Levitt, 493 U.S. 455, 458 (1990))). But Congress has chosen to keep certain federal causes of action out of the reach of state court jurisdiction. *See Tafflin*, 493 U.S. at 471 (Scalia, J., concurring) (collecting statutes of federal court exclusive jurisdiction).

6. 28 U.S.C. § 1332(a) (2006).

7. 546 U.S. 500 (2006).

8. 551 U.S. 205 (2007).

9. *In re* Literary Works in Elec. Databases Copyright Litig., 509 F.3d 116 (2d Cir. 2007), *cert. granted sub. nom* Reed Elsevier, Inc. v. Muchnik, 129 S. Ct. 1523 (2009).

10. These separate powers have been called Congress's structural powers and Congress's substantive powers. *See* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH L. REV. 643, 646 (2005).

> The analytical touchstone of the distinction between jurisdiction and merits is a proper conception of congressional power. That power divides into two categories: (1) structural powers, through which Congress enacts statutes establishing judicial jurisdiction over classes of cases; and (2) substantive powers, through which Congress enacts a different set of statutes creating causes of action for relief.

Id.

11. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.").

create and define substantive rights about which there may be cases or controversies. Congress can create and define essential elements of a litigant's claim to relief and can limit the scope of those claims, sometimes in ways that seem like limits on jurisdiction. For example, Title VII makes it unlawful for an employer to discriminate on the basis of sex,[12] but separately says that employers with less than fifteen employees are outside the scope of the statute.[13] Is being outside the scope of the statute the same as being outside of the jurisdiction of federal district courts for a Title VII claim? The Supreme Court has acknowledged recently that this is "'sometimes a close question.'"[14]

An example of the use of this power is Congress's making discrimination unlawful in certain areas of private employment.

> It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(b) (2006). *See also* 42 U.S.C. § 2000e (defining multiple terms for the purposes of Title VII as only those "affecting commerce").

12. *Arbaugh*, 546 U.S. at 503 (citing 42 U.S.C. § 2000e-2(a)(1)).

13. 42 U.S.C. § 2000e(b).

> The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

Id.

14. *Arbaugh*, 546 U.S. at 516 (quoting Da Silva v. Kinsho Int'l Corp., 229 F.3d 358, 361 (2d Cir. 2000)); *see also* Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 249 (1951) ("As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action.").

> The Supreme Court had previously tried to explain the difference between the merits and jurisdiction in *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979).
>
> Thus it may be said that *jurisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case[;] . . . *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court.

Id. (citations omitted).

The question (and its answer), however, are important because a court's decision to classify statutory language as jurisdictional—what has been called a "jurisdictional characterization"[15]—has a profound effect on litigation. If statutory language is jurisdictional, (1) a court can raise the requirement sua sponte; a party or the court can raise the requirement at any time—even after a jury trial or for the first time on appeal;[16] (2) a court can weigh and resolve disputed facts that underlie the requirement (without affording the protections of Federal Rules of Civil Procedure 12(b)(6) and 56 to the nonmoving party);[17] and (3) the requirement is not subject to principles of estoppel.[18] The Supreme Court has said that these consequences can lead to "unfair[ness] and waste of judicial resources."[19] The inability of courts and litigants to determine whether Congress intended language to be jurisdictional exacerbates these problems.[20]

In light of the important consequences that attend a jurisdictional characterization, in a 2006 case, *Arbaugh v. Y & H Corp.*,[21] the Supreme Court established a new test for courts to apply in deciding whether the requirements set out in a statute are jurisdictional. Under the new test, unless Congress "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional[,] . . . courts should treat the restriction as nonjurisdictional in character."[22] Under this test, "courts and litigants will be duly instructed and will not be left to wrestle with the issue."[23]

Although the creation of this new "clearly-states" test was, on its own, jurisprudentially significant, the *Arbaugh* Court also cast doubt

15. *See* Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 56 (2008) [hereinafter Dodson, *Removal Jurisdiction*] ("The classification of statutes as jurisdictional or procedural—what this Article calls 'jurisdictional characterization' . . . .").

16. This may "permit[] a litigant two bites at the apple by rolling the dice—if she loses on the merits, she can then point out the jurisdictional defect." Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 NW. U. L. REV. COLLOQUY 64, 65–66 (2007).

17. FED R. CIV. P. 12(b)(6); FED. R. CIV. P. 56.

18. *Arbaugh*, 546 U.S. 500; *see also* Wasserman, *supra* note 10, at 662 ("Confusing whether a fact issue goes to jurisdiction or merits produces uncertainty as to when the issue should be resolved, by whom, and under what standard, along with confusion as to the meaning of that resolution.").

19. *Arbaugh*, 546 U.S. at 515 (quotations and citations omitted).

20. *Cf. id.* at 515–16 ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, *then courts and litigants will be duly instructed and will not be left to wrestle with the issue*.") (emphasis added).

21. *Id.*

22. *Id.* at 515–16.

23. *Id.*

on the precedential value of any previous holding—from the Supreme Court down—that characterized a statutory requirement as jurisdictional. In *Arbaugh*, the Court noted that it had itself sometimes been "profligate in its use of the term [jurisdiction],"[24] and had been "less than meticulous"[25] in distinguishing between a statute that speaks to jurisdiction and a statute that defines substantive rights. With this language, the Supreme Court signaled to lower federal courts a potential tectonic shift in the jurisdictional landscape. Although a leading treatise has suggested that "[i]t remains to be seen how broadly lower courts will apply this decision,"[26] at least two federal courts of appeals have overturned their precedents under *Arbaugh*'s reshaping.[27]

Although the Supreme Court has been fairly active on jurisdiction issues in recent terms,[28] "the Court has yet to develop a principled framework for resolving the issue [of whether a statute is

24. *Id.* at 510.

25. *Id.* at 511.

26. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5B FEDERAL PRACTICE AND PROCEDURE § 1350 (3d ed. 2008).

27. *See Arbaugh*, 546 U.S. at 511 (noting that the Supreme Court had "been less than meticulous in its use of the jurisdictional label" and that cases that blur the line between the jurisdiction and the merits are "unrefined dispositions" and "should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit" (quoting Steel Co. v. Citizens for a Better Env't, 532 U.S. 67, 91 (2001))); Winnett v. Caterpillar, Inc., 553 F.3d 1000, 1005 (6th Cir. 2009) (listing three past decisions interpreting Section 301 of the Labor Management Relations Act, 29 U.S.C. 185(a), and holding that they "do not survive *Arbaugh's* effort to bring clarity to this area"); Thomas v. Miller, 489 F.3d 293, 298 (6th Cir. 2007) (holding that *Arbaugh* had "effectively overruled" a prior decision that had treated a numerical employee requirement as jurisdictional); Aldox v. Teledyne, Inc., 21 F.3d 1381, 1386 (6th Cir. 1994); Heussner v. Nat'l Gypsum Co., 887 F.2d 672, 676 (6th Cir. 1989); Long Term Care Partners, LLC v. United States, 516 F.3d 225, 239 (4th Cir. 2008) (Williams, C.J., concurring) (noting that the Fourth Circuit's treatment of APA § 704's finality requirement as jurisdictional is "no longer defensible" in light of *Arbaugh*).

28. *See* Scott Dodson, *Mandatory Rules*, 61 STAN L. REV. 1, 2 (2008) [hereinafter Dodson, *Mandatory Rules*].

> How does one determine whether a particular rule is jurisdictional or not? Over the last few years, the Court has focused on this question. Since 2004, the Court has determined that Bankruptcy Rule 4004, which gives a Chapter 7 creditor sixty days after the first creditors' meeting to object to debtor discharge, is nonjurisdictional; that Federal Rule of Criminal Procedure 33(b)(2), which sets a time limit to file a motion for a new trial, is nonjurisdictional; that Title VII's 'employee-numerosity requirement' is a nonjurisdictional element of the claim; and that the time limit to extend the filing of a notice of appeal in a civil lawsuit is jurisdictional.

Id. (citations omitted).

jurisdictional or not]."[29] The same can be said for the federal courts of appeals.[30]

The goal of this article is to provide that principled framework. To reach this goal, the article must start with some general concepts of jurisdiction to provide background. After this background, the article will describe the *Arbaugh* case and the problems identified by the Court that provided the impetus for the "clearly-states" test. Following the examination of *Arbaugh*, the article will track efforts to address the jurisdictional-characterization issue in the Supreme Court, the federal courts of appeals, and in academic literature, and will suggest that none of these approaches has been adequate.

This inadequacy is the result of a failure to understand Congress's jurisdictional language—how Congress speaks in jurisdictional terms. After explaining this misunderstanding, this article will then propose a method of adjudicating the jurisdictionality of a statute. To illustrate how this approach will provide consistent (from case to case) and correct (i.e., consistent with the policies behind the *Arbaugh* holding) results, the article will examine and apply this approach to some select jurisdictional statutes, including the statute at issue in next term's *Reed Elsevier v. Muchnick*[31] case. Finally, the article will conclude by highlighting the importance of adopting the approach defined below, as this approach will provide notice to litigants and courts when statutory language will be treated as jurisdictional. This will, in turn, allow parties to structure litigation to avoid the harsh consequences of a jurisdictional characterization.[32]

II. BACKGROUND JURISDICTION CONCEPTS

The Supreme Court has defined jurisdiction as "the power to declare the law,"[33] and as "the power of the courts to entertain cases concerned with a certain subject."[34] Although recently there has been

29. *Id.* at 2.

30. *See* discussion *infra* Part III.B.

31. *In re* Literary Works in Elec. Databases Copyright Litig., 509 F.3d 116 (2d Cir. 2007), *cert. granted sub. nom* Reed Elsevier, Inc. v. Muchnick, 129 S. Ct. 1523 (2009).

32. *See supra* notes 17–19 and accompanying text.

33. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) ("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." (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868))).

34. Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004); Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) ("Jurisdiction is authority to decide the case either way.

some dispute regarding whether jurisdiction is a fixed, distinct concept,[35] the article will assume that it is a fixed concept, or at least that courts can develop a rational approach to congressional statutes speaking to jurisdiction.

Federal courts do not have the power to declare the law on any type of case unless Congress explicitly grants that authority.[36] The two broadest (and most often invoked) congressional grants of this authority are in 28 U.S.C. § 1332 (diversity-of-citizenship jurisdiction) and 28 U.S.C. § 1331 (federal-question jurisdiction).[37] Although these two grants of jurisdiction are statutory in nature, both have their roots in, and even derive their language from, the Constitution.[38] Below, this article will explain the structure of and procedure under these statutes to inform the later discussion on congressional grants of jurisdiction. This short examination of these statutes that courts have universally characterized as jurisdictional

Unsuccessful as well as successful suits may be brought."); *see also* Wasserman, *supra* note 10, at 650 ("In general, subject-matter jurisdiction is a court's constitutional and statutory power or authority to entertain, hear, decide, and resolve a legal or factual dispute in favor of one party or the other.").

35. Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1614 (2003) ("[T]here is no hard conceptual difference between jurisdiction and the merits. Put another way, the line between jurisdictional issues and merits issues is always at some level arbitrary."). *But see* Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1458 (("It is a basic axiom of American jurisprudence that legal issues are classified as either 'jurisdictional' or 'nonjurisdictional.' If a rule or requirement is classified as jurisdictional, then 'courts will interpret and apply it rigidly, literally, and mercilessly.'"); Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN L. REV. 971 (2009); Wasserman, *supra* note 10, at 661 ("Given that confusion of jurisdiction and the merits most frequently occurs in employment discrimination and constitutional claims, one could characterize this as another example of federal courts misapplying (or narrowly applying) procedures in a way that disadvantages civil rights claimants.").

36. *See* Bowles v. Russell, 551 U.S. 205, 212 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.")

37. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."); 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases . . . between Citizens of different States."); 28 U.S.C. § 1332 ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different states."). Congress has exercised its jurisdiction-conferring power by granting federal courts subject-matter jurisdiction over many class of cases or individuals. Arbaugh v. Y & H Corp., 546 U.S. 500, 515 n.11 (2006) (providing statutory examples aside from § 1331 and § 1332). This article will focus on these examples below in Part II.B.

38. *See supra* note 37.

will be drawn upon in the later discussion of a jurisdictional framework for those statutes whose jurisdictionality is less certain.

A. Diversity of Citizenship

In 28 U.S.C. § 1332, Congress provided "district courts [with] original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between . . . citizens of different States." [39]

Courts have treated the citizenship of the parties and the amount in controversy as congressionally imposed prerequisites to jurisdiction. Before a court can rule on the merits of a claim, the court must satisfy itself that these jurisdictional prerequisites have been met.[40] If a party makes a factual attack on jurisdiction—i.e., says that, factually, another party's citizenship is not diverse—"the judge is free to look at a wide range of evidence relevant to the question drawn from outside the pleadings."[41] A court can even conduct an evidentiary hearing on the citizenship issue.[42]

Courts, however, treat the amount in controversy slightly differently than the citizenship of the parties—a litigant is generally not required to prove the amount in controversy at the outset of litigation to the same certainty as she is required to prove diversity of citizenship.[43] Practical considerations (i.e., "[t]he court either would need to hold a mini-trial at the start of the litigation to determine the probable damages, or the court would be left to make an

39. The original statute conferring diversity-of-citizenship jurisdiction on lower federal courts set the amount in controversy requirement at five hundred dollars. *See* Judiciary Act of 1789, 1 Stat. 73, 78, ch.20, § 11 (codified as amended at 28 U.S.C. § 1332 (2006)). For a criticism of the continued doctrinal necessity of diversity jurisdiction, see Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 510 (1928). For a lengthy and lucid discussion of diversity jurisdiction generally, see ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3 (5th ed. 2007).

40. *See* Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430-31 (2007) ("[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) . . . .") (citations omitted); *Arbaugh*, 546 U.S. at 514 ("[C]ourts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from a party." (citing Ruhrgas AG v. Marathon Oil Co., 535 U.S. 625, 630 (2002))).

41. 13E FEDERAL PRACTICE AND PROCEDURE, *supra* note 26, at § 3602.1.

42. *Id.*

43. 14B FEDERAL PRACTICE AND PROCEDURE, *supra* note 26, at § 3702.

impressionistic guess about the plaintiff's likely damages"[44]) necessitate a different standard.

There are different rules under which courts determine the amount in controversy for different types of actions. For example, courts treat the amount in controversy differently for certain class actions and for actions removed from state courts. But, generally, for actions initially filed in federal court, courts have developed a "universal" legal-certainty test.[45]

In describing the legal-certainty test, the Supreme Court has stated that "[t]he rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith."[46] Before a court will dismiss a claim for lack of subject matter jurisdiction for failure to meet the amount-in-controversy requirement, it "must appear to a legal certainty that the claim is really for less than the jurisdictional amount."[47]

Although courts treat the amount-in-controversy requirement somewhat differently than the citizenship of the parties, a court will require that a case have these two particular characteristics at the start of the litigation before it finds itself competent to hear the case.

B. Federal-Question Jurisdiction

Although the "Founders clearly envisioned that federal question jurisdiction would provide plaintiffs with a sympathetic forum for the vindication of federal rights[,] it was not until 1875 that Congress gave federal courts general original jurisdiction over federal question cases."[48]

Much has been written on when a case arises under federal law,[49] but for the purposes of this article,

44. CHEMERINSKY, *supra* note 39, at § 5.3.4.

45. 14B FEDERAL PRACTICE AND PROCEDURE, *supra* note 26, at § 3702.

46. *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938).

47. *Id.* at 289. In making this determination, courts can examine matters outside of the pleadings. *See* 14B FEDERAL PRACTICE AND PROCEDURE, *supra* note 26, at § 3702 n.32 and accompanying citations. But, if "jurisdiction issues are tied closely to the merits of the dispute between the parties, as in tort claims for unliquidated damages, considerable disagreement can be found in the caselaw" on how much fact-finding a district court can conduct to determine the issue. *See id.* n.36 and accompanying text.

48. 13D FEDERAL PRACTICE AND PROCEDURE, *supra* note 26, at § 3561.

49. *See generally* Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667 (2008).

> A case arises under federal law if it is apparent from the face of the plaintiff's complaint either that the plaintiff's cause of action was created by federal law; or, if the plaintiff's cause of action is based on state law, a federal law that creates a cause of action or that reflects and important national interest is an essential component of the plaintiff's claim.[50]

But, "[n]ot every claim 'arising under' federal law will invoke federal question jurisdiction."[51] Courts require that the federal claim form a substantial part of the litigation. This substantiality requirement determines "whether there is any legal substance to the position the plaintiff is presenting."[52] The Supreme Court has stated this test in different ways, but recently stated the substantiality test as follows: "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'"[53]

In making the arising-under determination, the plaintiff's complaint must establish the federal question. This is called the well-

50. CHEMERINSKY, *supra* note 39, at § 5.3.2; *see also* Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 112 (1936).

> To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element and an essential one, of the plaintiff's cause of action . . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect and defeated if they receive another.

Id. Justice Holmes had a narrower view of arising-under jurisdiction and conceived of the test as follows: "A suit arises under the law that creates the cause of action." *See* Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916).

51. 13D FEDERAL PRACTICE AND PROCEDURE, *supra* note 26, at § 3564 nn.1–2.

52. *Id.* at § 3564 n.5.

53. Steel Co. v. Citizens For a Better Env't, 523 U.S. 83, 89 (1998) (quoting Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 666 (1974)); *see also* Arbaugh v. Y & H Corp., 546 U.S. 500, 501 (2006) ("A plaintiff properly invokes § 1331 jurisdiction when she pleads a colorable claim 'arising under' the Federal Constitution or laws." (citing Bell v. Hood, 327 U.S. 678, 681-85 (1946))).

pleaded complaint rule.[54] Jurisdiction will not be supported merely because of a "federal defense the defendant may raise."[55]

Although § 1331 and § 1332 provide broad grants of jurisdiction, Congress has separately provided special jurisdictional statutes governing particular types of claims. Below, this article will provide an introduction to these special jurisdictional statutes.

C. Special Jurisdictional Statutes

In addition to § 1331 and § 1332, "there are many jurisdictional statutes allowing federal court adjudication in particular situations."[56] For example, in 28 U.S.C. § 1345, Congress gave district courts jurisdiction over any "civil action . . . commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."[57]

Some of these special jurisdictional statutes, however, must be placed in the historical context of § 1331 jurisdiction. Like the current iteration of the diversity-of-citizenship statute, the first federal-question statute contained an amount-in-controversy requirement.[58] Congress initially set the amount at $500 and as late as 1958 required that $10,000 be in controversy for any federal-question case.[59] In 1976, Congress amended the statute to eliminate the

54. Taylor v. Anderson, 234 U.S. 74, 75–76 (1914).

> [W]hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.

Id.

55. Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 10 (1983) (citing Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894)). There is a narrow exception to this rule for cases that involve preemption, but a discussion of this exception is outside of the scope of this article.

56. CHEMERINSKY, *supra* note 39, at § 5.1 (citing 28 U.S.C. §§ 1330–1364); *see also In re* Literary Works in Elec. Databases Copyright Litig., 509 F.3d 116, 121 (2d Cir. 2007) (quoting Barnhart v. Peabody Coal Co., 537 U.S. 149, 159–60 n.6 (2003)).

> There are other statutes, many of them in Chapter 85 of Title 28, but some scattered through many titles of the United States Code, that grant jurisdiction of particular classes of federal question cases. . . . Congress may supplement or limit these basic provisions with additional requirements 'expressed in a separate statutory section from jurisdictional grants.

Id.; 13D FEDERAL PRACTICE AND PROCEDURE , *supra* note 26, at § 3561.

57. 28 U.S.C. § 1345 (2006).

58. *See* Judiciary Act of March 3, 1875, 18 Stat. 470, § 1.

59. 13D FEDERAL PRACTICE AND PROCEDURE , *supra* note 26, at § 3561.1.

amount-in-controversy requirement for cases "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity."[60] In 1980, Congress finally eliminated the amount-in-controversy requirement for all cases.[61] Some of the special jurisdictional statutes scattered throughout the United States Code were enacted before Congress eliminated the § 1331 amount-in-controversy requirement. For example, in 42 U.S.C. § 2000e-5(f)(3), Congress allowed federal courts to adjudicate "actions brought under [Title VII]," and required no minimum amount-in-controversy, because of the then extant amount-in-controversy requirement in § 1331. After Congress eliminated § 1331's amount-in-controversy in 1980, however, the importance of some of these statutes diminished.[62]

But these statutes are still relevant,[63] and sometimes are the only way a case can be filed in federal court.[64] The *Arbaugh* case,

60. Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (1976).

61. Act of Dec. 1, 1980, Pub.L. No. 96-486, 94 Stat. 2369 (1980).

62. 13D FEDERAL PRACTICE AND PROCEDURE, *supra* note 26, at § 3561; CHEMERINSKY, *supra* note 39, at § 5.1 (noting that the "expansive language" of § 1331 "makes many of the specific grants of jurisdiction superfluous"). Chemerinsky notes, for example, the jurisdiction-conferring provision for civil rights cases, 28 U.S.C. § 1343, which "was important because of the difficulty in ascertaining the monetary value of civil rights and liberties." *Id.* at 267 n.5. Judge Posner colorfully characterized the interplay between § 1331 and the special jurisdictional statutes enacted as a way around § 1331's amount in controversy requirement as follows:

> [T]he elimination of the minimum amount in controversy from section 1331 made of the numerous special federal jurisdictional statutes that required no minimum amount in controversy (28 U.S.C. §§ 1337, 1340, and 1343 and many others) so many beached whales, yet no one thought to repeal those now-redundant statutes.

Winstead v. J.C. Penney Co., Inc., 933 F.2d 576, 580 (7th Cir. 1991).

63. *See* Thomas E. Baker, *Thinking About Federal Jurisdiction—of Serpents and Swallows*, 17 ST. MARY'S L.J. 239, 267–69 (1986).

> First, the special statutes have been viewed as primary exercises of congressional power to create docket priorities, while the general statute is more correctly viewed as residual, a delegation to the courts to deal with those matters Congress neglected. Second, some special federal question statutes impose an amount requirement which still applies after the repeal of the amount requirement for general federal questions. Third, lawyers and judges have formed the habit of invoking the particular statute which, logic impels, should control over the general. Fourth, while the "arising under" test is analytically the same in the two categories, I cannot help but believe that when a court is asked to consider a case under a particular statutory grant there is somewhat more hydraulic pressure toward finding jurisdiction than there is under the general provision. Fifth, some special federal question jurisdictions go further, upon some research, than might be thought possible upon first reading. They thus provide a broader access to federal court.

Id. At least one author has suggested that

addressed immediately below, involved the interplay between § 1331 and Title VII's special jurisdictional statute.

III. *ARBAUGH V. Y & H CORP.*

This section will first describe the facts, the pertinent lower court procedure, and the holding of the *Arbaugh* case. Following this short introduction, to provide a better sense of jurisdictional prerequisites, this article will look at the examples of statutory limitations on jurisdiction that the *Arbaugh* Court mentioned. This article will then take a closer look at the policy goals animating the *Arbaugh* holding to inform the later discussion of the need for a new approach to the jurisdictionality issue.

A. Background Summary of Arbaugh

Jennifer Arbaugh sued her former employer, Y & H, alleging that she was sexually harassed.[65] Her claim proceeded through the pretrial and trial phases, and she was successful: she won a jury verdict against Y & H in an amount of $40,000.[66] After the jury had returned its verdict, Y & H sought to avoid this judgment by asserting, for the first time, that the district court lacked jurisdiction to hear the case.[67] Confronted with the motion to dismiss for lack of subject-matter jurisdiction, the district court recognized that granting the motion would be "unfair and a waste of judicial resources."[68]

Title VII generally makes it unlawful for an "employer" to discriminate on the basis of sex.[69] In Title VII's special

> [s]ection 1331 is largely a residual grant intended to cover those matters not falling within the specific grants . . . . That such is Congress' current view of the function of section 1331 was confirmed in the recent amendment to that provision, Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369, which finally abolished the jurisdictional amount requirement.

William V. Luneburg, *Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction*, 58 IND. L. J. 211, 228 (Spring, 1982/1983).

64. *See* CNA v. United States, 535 F.3d 132, 140 (3d Cir. 2008) ("We start by observing that the District Court's jurisdiction—if it exists—would *not* come from the general grant of federal-question jurisdiction of 28 U.S.C. § 1331.").

65. Arbaugh v. Y & H Corp., 546 U.S. 500, 503–04 (2006).

66. *Id.* at 504.

67. *Id.* at 503–04.

68. *Id.* at 504.

69. 42 U.S.C. § 2000e-2(a) (2006).

> It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

"jurisdictional provision,"[70] 42 U.S.C. § 2000e-5(f)(3), Congress gave federal courts jurisdiction over cases "brought under" Title VII.[71] This special jurisdictional provision was enacted before Congress had eliminated § 1331's amount-in-controversy requirement.[72] The main effect of this special jurisdictional provision, then, was to "assure[] that the amount-in-controversy limitation would not impede an employment-discrimination complainant's access to a federal forum."[73]

Defendant Y & H's argument for dismissal relied on Title VII's definition of an employer. As noted above, Title VII only makes it unlawful for "employers" to discriminate on the basis of sex, not any other entities. Separate from Title VII's special jurisdictional provision, in 42 U.S.C. § 2000e(b), Congress defined those entities that would be considered employers (and therefore would be potentially liable) under Title VII. [74] Congress limited the definition of employer to only those entities that had fifteen or more employees.[75] Y & H, in arguing that the district court lacked jurisdiction, contended that this employer definition was jurisdictional

> individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

70. 42 U.S.C. § 2000e-5(f)(3) (2006).

71. *Id.* Unlike some other federal statutes granting district courts jurisdiction, this provision was short and limited. Compare this provision to 29 U.S.C. § 1132(e)(1), which is ERISA's special jurisdiction provision. There, Congress provided that "district courts . . . shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title." 29 U.S.C. § 1132(e)(1) (2006). The *Arbaugh* Court provides additional examples in footnote 11, such as 28 U.S.C. § 1347, when Congress gave district courts "original jurisdiction of any civil action commenced by any tenant in common or joint tenant for the partition of lands where the United States is one of the tenants in common or joint tenants." 28 U.S.C. § 1347 (2006). As noted by the *Arbaugh* Court, statutes such as these can also be "relevant to the merits of a case." *Arbaugh*, 546 U.S. at 515 n.11.

72. *Arbaugh*, 546 U.S. at 505 ("In 1964 . . . when Title VII was enacted, § 1331's umbrella provision for federal-question jurisdiction contained an amount-in-controversy limitation: Claims could not be brought under § 1331 unless the amount in controversy exceeded $10,000." (citing 28 U.S.C. § 1331(a) (1964))).

73. *Id.*

74. 42 U.S.C. § 2000e(b) (2006). Section 2000e is a definitions section of this statute and separately defines 12 other terms.

75. *Id.*

and asserted that it had less than fifteen employees.[76] Y & H could only succeed in having the case dismissed if the employee-numerosity requirement was jurisdictional because, otherwise, its late assertion of the argument would have waived it.

Before *Arbaugh* was decided, at least the Fourth, Fifth, Sixth, Ninth, and Tenth Circuits had all agreed that the fifteen-employee requirement was a prerequisite to jurisdiction.[77]

Despite § 1331, and despite Title VII's broad special jurisdictional provision, the district court "considered itself obliged"[78] to dismiss for lack of subject-matter jurisdiction. The Fifth Circuit affirmed the district court's dismissal on appeal.[79] But the Supreme Court held that this employee-numerosity requirement was not jurisdictional. In reversing the dismissal for lack of subject matter jurisdiction, the Court began by noting that it had been "less than meticulous" in its past usage of the jurisdictional label.[80]

The Court then outlined the "consequences" of classifying the employee-numerosity requirement as jurisdictional: (1) parties "'can never []forfeit[] or waive[]'" a jurisdictional issue;[81] (2) "courts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party";[82] (3) courts can, in some cases, review and resolve the evidence of disputed jurisdictional facts, which undercuts the jury's role as "the proper trier of contested facts";[83] and (4) courts must dismiss even those meritorious pendent state-law claims after a jurisdiction-based dismissal.[84]

76. *See Arbaugh*, 546 U.S. at 504.

77. Jeffery A. Mandell, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. CHI. L. REV. 1047, 1050 (2005) (citing Hukill v. Auto Care, Inc., 192 F.3d 437, 441 (4th Cir. 1999); Arbaugh v. Y & H Corp., 380 F.3d 219, 225 (5th Cir. 2004); Armbruster v. Quinn, 711 F.2d 1332, 1335 (6th Cir. 1983); Childs v. Local 18, Int'l Bhd. of Elec. Workers, 719 F.2d 1379, 1382 (9th Cir. 1983); Owens v. Rush, 636 F.2d 283, 285–86 (10th Cir. 1980)).

78. *Arbaugh*, 546 U.S. at 504.

79. *See* Arbaugh v. Y & H Corp., 380 F.3d 219 (5th Cir. 2004).

80. *Arbaugh*, 546 U.S. at 510 ("This Court, no less than other courts, has sometimes been profligate in its use of the term . . . . On the subject-matter jurisdiction/ingredient-of-a-claim-for-relief dichotomy, this Court and others have been less than meticulous.") (citations omitted).

81. *Id.* at 514 (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)).

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

83. *Id.* (citing Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150–51 (2000)).

84. *Id.* (citation omitted).

"[M]indful of the[se] consequences,"[85] the Court then announced its "readily administrable bright line" "clearly-states" test:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.[86]

In holding that the employee-numerosity requirement was not jurisdictional under this test, the Court found several things important: (1) the employee-numerosity provision was not a "threshold ingredient akin to 28 U.S.C. § 1332's monetary floor";[87] (2) the employee-numerosity requirement "'d[id] not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts'";[88] and (3) the employee-numerosity requirement's text had "[n]othing [to] indicate[] that Congress intended courts, on their own motion, to assure that the [] requirement [wa]s met."[89]

Throughout the opinion, the Court relied on both § 1331 and Title VII's special jurisdictional provision. At the outset, the Court stated that § 1331, on its own, would support a claim under Title VII.[90]

In the process of describing why the employee-numerosity requirement was not jurisdictional, the Court noted, in footnote 11, that Congress "ha[d] exercised its prerogative to restrict the subject-matter jurisdiction of federal district courts on a wide variety of factors, some of them also relevant to the merits of a case."[91] The statutory examples in this footnote will be used below to further illustrate the contours of this "clearly-states" test and to give examples of when Congress intends statutory language as a limitation on jurisdiction.

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85. *Id.* at 513.

86. *Id.* at 515–16 (citations and footnotes omitted).

87. *Id.* at 515.

88. *Id.* (citing Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982)).

89. *Id.* at 514.

> [Title VII's] jurisdictional provision empowers federal courts to adjudicate civil actions "brought under" Title VII. Covering a broader field, the Judicial Code gives federal courts subject-matter jurisdiction over all civil actions "arising under" the laws of the United States. Title VII actions fit that description.

Id. at 503 (citations omitted).

90. *Id.* at 503.

91. *Id.* at 515 n.11.

B. Examples of Statutory Limitations in Arbaugh's *Footnote 11*

In providing examples of statutory restrictions on jurisdiction, the Court first noted those cases where Congress granted jurisdiction over any case that had a particular party as a participant—the United States as a plaintiff,[92] Amtrak as a plaintiff,[93] a national banking association as a defendant.[94] Other times, the Court pointed out, Congress had limited jurisdiction based on the amount in controversy—over $3,000,[95] or under $10,000.[96] The Court then noted that Congress had sometimes limited jurisdiction based on the type of claim, such as a "civil action arising under any Act of Congress relating to the postal service,"[97] or a "civil action commenced by any tenant in common or joint tenant for the partition of lands where the United States is one of the tenants in common or joint tenants."[98]

The Court then stated that, "[i]n a few instances, Congress has enacted a separate provision that expressly restricts application of a jurisdiction-conferring statute."[99] In 42 U.S.C. § 405(h), Congress

92. 28 U.S.C. § 1345 (2006) ("Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.").

93. 49 U.S.C. §24301(l)(2) (2006) ("The district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable or declaratory relief requested by Amtrak.").

94. 28 U.S.C. § 1348 (2006).

> The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

Id.

95. 16 U.S.C. § 814 (2006) ("That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.").

96. 22 U.S.C. § 6713(a)(1)(B) (2006) ("The district courts of the United States shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of any civil action or claim described in subparagraph (A) that does not exceed $10,000.").

97. 28 U.S.C. § 1339 (2006) ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.").

98. 28 U.S.C. § 1347 (2006) ("The district courts shall have original jurisdiction of any civil action commenced by any tenant in common or joint tenant for the partition of lands where the United States is one of the tenants in common or joint tenants.").

99. Arbaugh v. Y & H Corp., 546 U.S. 500, 515 n.11.

withdrew claims to recover Social Security benefits from the scope of § 1331 jurisdiction.[100]

Before proceeding further, it is important to note that, all of these limitations, save 42 U.S.C. § 405(h), are contained in a jurisdiction-conferring provision, and some of the prerequisites are "also relevant to the merits of a case."[101] The following will make more explicit the policies behind the *Arbaugh* holding.

C. The Goals of the Arbaugh *Holding*

To give context to the various approaches to *Arbaugh* that this article will provide below, it is helpful to examine the language of *Arbaugh* to determine what goals any interpretative approach to *Arbaugh* should accomplish.

As background, clear-statement rules were "developed principally as a method for courts to ensure that Congress adequately deliberated before abrogating the states' Eleventh Amendment immunity from suit in federal court."[102] The Supreme Court has since established clear-statement rules to a variety of contexts: "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."[103]

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100. *See* 42 U.S.C. § 405(h) (2006).

> The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

Id.; *see also* Weinberger v. Salfi, 422 U.S. 749, 756–61 (1975) (42 U.S.C. § 405(h) bars 28 U.S.C. § 1331 jurisdiction for recovery of Social Security benefits).

101. *Arbaugh*, 546 U.S. at 515 n.11.

102. Michael P. Lee, *How Clear is "Clear"?: A Lenient Interpretation of the* Gregory v. Ashcroft *Clear Statement Rule*, 65 U. CHI. L. REV. 255, 255 (1998); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (contrasting the older constitutional presumptions "that can be rebutted by statutory language, legislative history, and overall purpose," with clear-statement rules "that can only be rebutted by clear statutory text").

103. United States v. Bass, 404 U.S. 336, 349 (1971); *see also* Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985))).

Despite the focus on clarity, what constitutes a clear statement is sometimes a difficult question.[104] While generally clear statement rules are directed at sensitive constitutional areas (e.g., the relationship between the states and the federal government or the relationship among the several branches of the federal government), the *Arbaugh* opinion did not appear to focus on these traditionally sensitive areas.

Arbaugh's holding, however, with its presumption against jurisdictionality, makes it less likely that courts will see statutory requirements as limitations on jurisdiction. This result will implicate two traditionally sensitive relationships: (1) the relative jurisdictional spheres of state and federal courts, and (2) Congress's power to create and define jurisdiction and the courts' power to interpret their own jurisdiction. One would expect that, based on these traditionally sensitive areas, the Court would have imposed a clear statement rule, but would have applied the presumption the opposite way.[105] Instead of requiring a party to show a clear congressional statement to enter federal court, the Court required Congress to clearly state when it was attempting to limit jurisdiction.

This article suggests that, instead of any traditional power relationship, the Court's clear-statement rule was driven by two goals: (1) minimizing unfairness and waste of judicial resources, and (2) providing notice to courts and litigants. The Court spent much of the decision outlining the consequences of characterizing statutory language as jurisdictional. All of these consequences, described above, lead to "unfairness and waste of judicial resources."[106]

But notice helps to ameliorate these consequences. Because of this potential waste and unfairness, the Court wanted to ensure that litigants would have notice of Congress's intent to limit jurisdiction: "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, the *courts and litigants will be duly instructed and will not be left to wrestle with those issues*."[107] With this notice, litigants could structure a federal claim to

104. *See* Eskridge & Frickey, *supra* note 102, at 597 (calling the emergence of "super-strong clear statement rules" "remarkable"); Lee, *supra* note 102, at 256 (attempting to clear up the uncertainty as to "what statutory language will suffice as a 'clear statement'").

105. *Cf.* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (citing Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 11 (1799)).

106. *Arbaugh*, 546 U.S. at 502.

107. *Id.* at 515–16 (emphasis added).

avoid the harsh consequences of a jurisdictional characterization to avoid any unfairness.

Additionally, the notice to courts (a "readily administrable bright line"[108] rule) was important to reduce the waste of judicial resources. If the jurisdictionality issue can be resolved with a simple test, this will decrease the likelihood of a court of appeals dismissing a case that has been fully adjudicated before the district court because the district court made an incorrect decision on the jurisdictionality issue.

The Court acknowledged Congress's power to "restrict the subject-matter jurisdiction of federal district courts,"[109] but this relative power of Congress to define jurisdiction was not the focus of the opinion.[110]

With this understanding of the test's purpose, this article will describe some of the approaches to *Arbaugh* that have been developed and describe how each is deficient.

IV. APPROACHES TO THE JURISDICTIONAL-CHARACTERIZATION ISSUE

Before reaching the description of the approaches, this article will first examine how the Supreme Court got to *Arbaugh* and what it has said on jurisdictionality since. The article will then outline two approaches that have emerged in the federal courts of appeals and two of the more notable approaches to jurisdictionality developed in the academic literature.

A. Supreme Court Precedent

Aside from the *Arbaugh* case, the Supreme Court has been very active over the last few years on the question of jurisdictionality—in most of the cases declining to characterize statutory language as jurisdictional.

In two recent cases decided before *Arbaugh*, the Court held that firm but non-statutory language of procedural rules was not jurisdictional. First, the Supreme Court held that the time prescription for filing a complaint objecting to a bankruptcy case contained in Federal Rule of Bankruptcy Procedure 4004(a) was not

108. *Id.* at 516.

109. *Id.* at 515 n.11.

110. *Id.* at 506 (noting that a litigant can and a court must raise the issue of jurisdiction on its own at all stages of the litigation, even for the first time on appeal, and that courts must dismiss even meritorious state law claims if it dismisses federal claims for lack of subject-matter jurisdiction).

jurisdictional.[111] Similarly, in a second case, the Supreme Court held that the time limit for filing a motion for a new trial set out in Federal Rule of Criminal Procedure 33(b)(2) was not jurisdictional.[112]

In a third case, *Bowles v. Russell*,[113] decided after *Arbaugh*, the Court held that the time limitation on the district court's ability to extend the time for filing a notice of appeal in 28 U.S.C. § 2107(c) was "jurisdictional." It appeared initially that *Bowles* undercut the broad sweep of *Arbaugh*. In 28 U.S.C. § 2107, Congress stated that "no appeal shall bring any judgment . . . before a court of appeals for review unless notice of appeal is filed[] within thirty days after the entry of judgment."[114] The Court stated that the thirty-day time limit was a limitation on jurisdiction.[115] Additionally, the Court dismissively distinguished *Arbaugh* as inapplicable because it dealt with "an employee-numerosity requirement, not a time limit."[116]

The Supreme Court, though, limited the scope of the *Bowles* case in *John R. Sand & Gravel Co. v. United States*.[117] In *John R. Sand & Gravel*, the Court reviewed the Federal Circuit's decision dismissing a plaintiff's complaint as untimely, even though the Government, as a defendant, had waived the timeliness defense before the trial court.[118]

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111. Kontrick v. Ryan, 540 U.S. 443, 452–56 (2004); *see also* FED. R. BANKR. P. 4004(a).

> In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). In a chapter 11 reorganization case, the complaint shall be filed no later than the first date set for the hearing on confirmation. At least 28 days' notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the trustee's attorney.

Id.

112. Eberhart v. United States, 546 U.S. 12, 15–20 (2005); *see also* FED. R. CRIM. P. 33(b)(2) ("Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.").

113. Bowles v. Russell, 551 U.S. 205, 206–07, 214 (2007) ("Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement."); *see also* 28 U.S.C. § 2107(c) (2006).

> [T]he district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Id.

114. 21 U.S.C. § 2107(a).

115. *Bowles*, 551 U.S. at 213.

116. *Id.* at 211.

117. 552 U.S. 130, 128 S. Ct. 750 (2008).

118. *Id.* at 752–53.

In 28 U.S.C. § 2501, Congress imposed a time limitation on claims against the Government: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."[119] Weighing against the Federal Circuit's decision to dismiss, the Court noted that most time limitations, unlike jurisdictional limitations, are "subject to the rules of forfeiture and waiver."[120] But, the Court noted that it had, however, read "[s]ome statutes of limitations" as "more absolute."[121]

Congress generally imposes these "more absolute" time limitations to "achieve a broad system-related goal."[122] The Court then stated that, "*[a]s a convenient shorthand*, this Court has sometimes referred to the time limits in such statutes as 'jurisdictional.'"[123] As an example of such a "convenient shorthand," the Court cited to its holding in *Bowles*.[124] This recharacterization of the *Bowles* holding just one term later limits the predecential scope of the holding on the issue of subject-matter jurisdiction. [125] *John R. Sand & Gravel* clarifies that the time limitation in *Bowles* was not jurisdictional, but was "jurisdictional"—a convenient shorthand. Because of this clarification, *Arbaugh* is still the leading precedent on the jurisdictionality issue. Accordingly, below, this article will examine some of the leading approaches to *Arbaugh*.

119. 28 U.S.C. § 2501 (2006).

120. *John R. Sand & Gravel Co.*, 128 S. Ct. at 753.

121. *Id.*

122. *Id.* The Court provided several examples of these broader goals: "facilitating the administration of claims," *id.* (citing United States v. Brockamp, 519 U.S. 347, 352–353 (1997)); "limiting the scope of a governmental waiver of sovereign immunity," *id.* (citing United States v. Dalm, 494 U.S. 596, 609–10, (1990));, "or promoting judicial efficiency," *id.* (citing Bowles v. Russell, 551 U.S. 205, 211–13 (2007)).

123. *Id.* (citing *Bowles*, 551 U.S. at 210) (emphasis added).

124. *Id.* (citing *Bowles*, 551 U.S. at 210).

125. *Cf. In re* Ross-Tousey, 549 F.3d 1148, 1155 (7th Cir. 2008).

> Thus, although Bowles implies that all statutory time limits may have jurisdictional significance, the Supreme Court's later discussion of statutes of limitations in *John R. Sand & Gravel Co.* appears to soften Bowles's implications, at least for run-of-the-mill statutes of limitations and statutory time limits like the one at issue here.

Id.

B. The Courts of Appeals Approaches to Jurisdictionality after Arbaugh

Almost all of the circuit courts of appeals have cited to *Arbaugh* in adjudicating the jurisdictionality of a statute in at least one case. Most, however, have done so in a perfunctory manner,[126] with little more analysis than a simple repetition of the clearly-states language.[127]

The courts that have provided a more in-depth review of *Arbaugh* have generally developed two separate approaches. First are the courts that apply what this article will call the pragmatic approach. These courts focus on the statutory language, but additionally will analyze the consequences of characterizing statutory language as jurisdictional. Second are those courts that apply what this article will call the statutory-phrase approach. These courts will not characterize statutory language as jurisdictional unless the language appears in a statute's jurisdictional provision. Both will be described below.

1. The Pragmatic Approach after Arbaugh

The Sixth Circuit has developed a pragmatic approach that proceeds in two steps: (1) the court will closely examine the words and placement of the statutory language, and then (2) will examine the "real-world considerations"[128] of characterizing statutory language as jurisdictional. The Sixth Circuit has developed this approach in several cases.

In *Thomas v. Miller*,[129] the Sixth Circuit examined whether the employee-numerosity requirement of the Consolidated Omnibus Reconciliation Act (COBRA) was jurisdictional in nature. In 29 U.S.C. § 1161(b), Congress stated that COBRA's extension of health

126. For example, in *Nulankeyutmonen Nkihtaqmikon v. Impson*, the First Circuit, when reviewing whether the APA's finality requirement was jurisdictional, quoted the language, "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character," as support for reaffirming its prior holding that the APA's finality requirement was not jurisdictional in nature. 503 F.3d 18, 33 (1st Cir. 2007) (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, at 516).

127. Although it is unsurprising for courts to deal with this in a perfunctory manner if the parties have not expressly litigated the issue, "courts, including th[e Supreme] Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh*, 546 U.S. at 514 (citing Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999)).

128. Winnet v. Caterpillar, Inc., 553 F.3d 1000, 1006 (6th Cir. 2009).

129. 489 F.3d 293 (6th Cir. 2007).

plan provision did not apply to employers that "normally employed fewer than 20 employees on a typical business day during the preceding calendar year."[130]

After *Arbaugh*, *Thomas* was an easy case—the court needed to decide whether COBRA's employee-numerosity requirement, similarly separate from ERISA's jurisdiction-conferring provision, was jurisdictional. The court's holding—that the requirement was not jurisdictional—is not as important as how the court got there.

In *Thomas*, the plaintiff had conceded that the defendant employer did not have the requisite number of employees but argued that the defendant should have been estopped from raising the requirement as a defense.[131] In holding that it had authority to estop the defendant-employer from asserting the employee-numerosity requirement as a defense, the court noted that: "We cannot accept the general proposition that courts could enter default judgments and

130. 29 U.S.C. § 1161(b). COBRA's continuation of coverage is covered in 29 U.S.C. §§ 1161–1169. The Supreme Court has summarized COBRA's effect as follows: "The Employee Retirement Income Security Act of 1974 (ERISA), as amended by the [COBRA], authorizes a qualified beneficiary of an employer's group health plan to obtain continued coverage under the plan when he might otherwise lose that benefit for certain reasons, such as the termination of employment." Geissal v. Moore Med. Corp., 524 U.S. 74, 76 (1998). Because, however, COBRA was an amendment to ERISA, it does not have its own jurisdiction-conferring provision. That provision is contained in 29 U.S.C. § 1132(e) and (f), which state that:

> (e) Jurisdiction
>
> (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.
>
> (2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.
>
> (f) Amount in controversy; citizenship of parties
>
> The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

Id.

131. The plaintiff-employee had argued, however, that the employer should be estopped from arguing that COBRA did not apply because it had made promises in a benefits manual that COBRA would apply, and it had provided COBRA benefits to previous employees that had qualified. *Thomas*, 489 F.3d at 296–97. ERISA, on its own, does not have an employee-numerosity requirement but instead limits coverage to "any employer engaged in commerce or in any industry or activity affecting commerce." 29 U.S.C. § 1003(a)(1).

compel factual admissions on all elements of claims *except* an employer's number of employees. Doing so would separate one element of a claim from another without any statutory or logical reason."[132]

If the court treated this requirement as jurisdictional, it noted that "a court could never compel a defendant to concede an element or admit a fact that the legislature determined a prerequisite to liability."[133] The primary concern here appeared to be the consequences of holding that the employee-numerosity requirement was jurisdictional: no party could concede, and no court could force, the admission of any jurisdictional element of a claim for relief.

The Sixth Circuit took this pragmatic approach further in *Winnett v. Caterpillar*.[134] In *Winnett*, the court was required to decide whether to characterize Section 301 of the Labor Management Relations Act (LMRA)[135] as jurisdictional. Section 301 states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[136]

More specifically, the court was required to decide the jurisdictionality of the "contract[]" requirement.[137] In doing so, the court made explicit the two-step approach.[138]

First, in its examination of the statutory language, the court noted that § 301 did not mention the word "jurisdiction" at all, aside from a reference to personal jurisdiction.[139] Additionally, this mention of personal jurisdiction was meant to "ease access to the federal courts[and] not to impose new barriers."[140] Also, all of the prima facie elements for a labor contract violation were contained in Section

132. *Thomas*, 489 F.3d at 299 (citing *Arbaugh*, 546 U.S. at 515–16).

133. *Id.* at 300.

134. 553 F.3d 1000 (6th Cir. 2009).

135. 29 U.S.C. § 185(a).

136. *Id.*

137. *Winnett*, 553 F.3d at 1006.

138. *Id.*

139. *Id.*

140. *Id.* This conception of jurisdiction is problematic. Every entrance to the federal courts eases access to the federal courts—but Congress imposes its restrictions on entrance at the same time that it eases access.

301(a).[141] "If," the court reasoned, "the existence of a union contract limits our jurisdiction over a case, that would mean [that] every other prima facie element of [a] Section 301(a) claim . . . would have similar"[142] jurisdictional consequences.

Second, after considering the statutory language, the court stated that "*Arbaugh* also tells us not just to look at labels but also pragmatically to consider the consequences of giving a jurisdictional label to an element of a cause of action."[143] In looking at the real-world consequences that would attend a jurisdictional characterization of the contract requirement, the court noted that: (1) a prerequisite to jurisdiction can never be forfeited or waived; (2) when a court finds that it lacks jurisdiction, it must dismiss all pendant state law claims no matter how late in the litigation the finding takes place; and (3) a party can raise a jurisdictional argument for the first time on appeal, unlike merits issues which courts of appeals generally require to be timely presented to the lower court.[144]

A third Sixth Circuit case, *Tackett v. M&G Polymers*, USA, LLC,[145] followed this two-step, pragmatic approach. Following *Winnett*, the *Tackett* court decided whether to characterize the "violation" requirement in § 301 as jurisdictional. The court, citing *Winnett*, looked at the language of the statute and also the "'real-world considerations'" of applying a jurisdictional label to the violation requirement and concluded that the violation requirement was not jurisdictional.[146]

Initially, this approach appears to be consistent with *Arbaugh* and likely to effectuate the goals (avoidance of waste and notice) of that case well. First, by focusing first on the language and placement of the statutory phrase, parties and courts should not be left to wrestle with the issue. Second, by focusing on the real-world consequences of a jurisdictional characterization, a court has a way of deciding those cases when the congressional language does not lead to an obvious answer. *Arbaugh* discussed the consequences of a jurisdictional characterization at length, and when a lower court addresses these consequences, it can hopefully avoid a harsh result.

141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 1006–07.
145. 561 F.3d 478 (6th Cir. 2009).
146. *Id.* at 485.

There are, however, several problems with this approach. First, the examination of the real-world consequences, as the Sixth Circuit has articulated it, does not provide meaningful analysis. These consequences will always be harsh, but they are the same for every jurisdictional characterization—this is why the *Arbaugh* Court required a clear congressional statement before it would characterize a statute as jurisdictional. This can be seen in the *Winnett* court pointing out that, if it were to hold a valid contract as a prerequisite to jurisdiction, that contract requirement could never be waived or forfeited—an unhappy litigant could raise the issue for the first time on appeal. This would be true for any jurisdictional issue.

Because these consequences will always militate against a jurisdictional characterization, a court's examination of the consequences is superfluous. A focus on these real-world considerations undercuts the simplicity (notice to the parties and courts) of the clearly-states test. These real-world considerations add a gray area to the jurisdictional question, which will increase litigation on these issues and may even provide a court with reasons to avoid a clear statement on jurisdiction if the consequences will be too harsh. Allowing courts this backdoor way around the clearly-states language would essentially eviscerate the clearly-states test.

A potential way to give meaning to the examination of the real-world considerations would be to add a qualitative element to the analysis. For example, instead of just examining the consequences of a jurisdictional characterization, a court would look at the *likelihood* of the waste and unfairness that *Arbaugh* described. Examining the real-world consequences in this way, however, would still increase litigation on this likelihood issue and would still allow a court a way to avoid a clear congressional statement.

2. The Statutory-Phrase Approach

Two other federal courts of appeals have adopted a different (and more sound) approach to deciding the jurisdictionality issue. Both the Third and the Fifth Circuits have decided cases applying *Arbaugh* that approach the issue by focusing solely on the statutory language and its placement. As noted above, I will call this the statutory-phrase approach.

The Third Circuit has provided the most succinct statement of this approach. In *CNA v. United States*,[147] the Third Circuit was confronted with the issue of how it should apply *Arbaugh* to the jurisdictional provision of the Federal Tort Claims Act (FTCA). The FTCA states that "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States" for damages "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."[148] Specifically, the court adjudicated whether the within-the-scope-of-employment requirement was jurisdictional. The court said that,

> To evaluate whether Congress "clearly stated" that a requirement should "count as jurisdictional," we ask whether the requirement appears in or receives mention in the jurisdictional provision of a given statute.[149]

In evaluating the FTCA under this standard, the court, because the scope-of-employment requirement was within the jurisdictional provision, held that it was a prerequisite to jurisdiction.[150]

The Fifth Circuit has taken a similar approach to *Arbaugh*, focusing on the location of the jurisdictional language in the statute. In *Minard v. ITC Deltacom Communications, Inc.*,[151] in holding that the employee-numerosity requirement in the Family Medical Leave Act (FMLA) was not jurisdictional, the court noted that the requirement is "separate from [the statute's] jurisdictional section, [] does not speak in jurisdictional terms or refer to the jurisdiction of the federal courts, [and] places no constriction upon the statute's clearly designed jurisdictional provision."[152]

If a statutory requirement is jurisdictional only when the requirement is contained in the statute's jurisdictional provision, then courts and litigants will know when to expect and will accept the harsh consequences of a jurisdictional characterization. As this article will explain below, this conception of the jurisdictionality issue is incomplete. Before proffering an approach that will fill in the gaps of this statutory-phrase approach to give a more full perspective on the

147. CNA v. United States, 535 F.3d 132 (3d Cir. 2008).

148. 28 U.S.C. § 1346(b)(1) (2006).

149. *CNA*, 535 F.3d at 142 (citing Arbaugh v. Y & H Corp., 546 U.S. 500, 515–16 & n.11).

150. *Id.* at 142–43.

151. 447 F.3d 352 (5th Cir. 2006).

152. *Id.* at 357.

issue, this article will provide two of the academic approaches to the jurisdictionality issue.

3. Academic Approaches to the Jurisdictionality Issue

First, Howard Wasserman, writing on the distinction between the merits and jurisdiction before the *Arbaugh* decision, attempted to separate the two using a concept of "'substantive relevance.'"[153] He adopted this concept from Lea Brilmayer, and summarized it as follows:

> The question is whether a particular fact must be plead and proven in order for the plaintiff to prevail in the identical civil action claiming a violation of the identical federal statute brought in state court. If a fact would still be relevant because the applicable substantive federal law makes it meaningful to the outcome of the legal treatment of the dispute, the fact has substantive relevance to the cause of action and therefore goes to the merits in state court. As such, it also goes to the merits in federal court and has nothing to do with federal subject-matter jurisdiction.[154]

Although this approach has its merits, it is not consistent with the Supreme Court's holding in *Arbaugh*. This is because, in *Arbaugh*, the Court acknowledged that "Congress has exercised its prerogative to restrict the subject-matter jurisdiction of federal district courts based on a wide variety of factors, some of them also relevant to the merits of a case."[155] Facts that would be relevant in a state court action can be jurisdictional prerequisites. This test would also unjustifiably undermine Congress's traditional ability to create and define the jurisdiction of the lower federal courts.

A second approach, offered by Scott Dodson and coming after the *Arbaugh* decision, is aimed specifically at removal jurisdiction. Dodson summarizes the approach as follows:

> My framework for resolving characterization issues in removal uses four factors: (1) whether Congress has specifically designated a provision as jurisdictional; (2) whether the function of the particular provision supports a jurisdictional characterization; (3) whether the effects of a jurisdictional characterization are consistent with the purpose and function of the provision; and (4) whether a jurisdictional characterization is doctrinally consistent

153. Wasserman, *supra* note 10, at 702 (quoting Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 82–83 (1980)).

154. *Id.*

155. Arbaugh v. Y & H Corp., 546 U.S. 515, 516 n.11 (2006).

> as a matter of historical treatment and cross-doctrinally consistent with the characterization of similar provisions.[156]

This approach was only intended to apply to removal, and therefore does not rest on the same doctrinal footing as the jurisdictional characterization in a non-removal lawsuit.[157] Additionally, applying this approach outside of removal would inject much complexity that undercuts *Arbaugh*'s goals notice and clarity—this is not a "readily administrable bright line"[158] rule.

Below, this article will describe an approach to jurisdictionality that builds on the statutory-phrase approach and is more consistent with *Arbaugh*'s holding.

V. FINDING A WORKABLE APPROACH TO JURISDICTIONALITY

Finding a workable approach to jurisdictionality after *Arbaugh* is necessary for providing notice to parties and litigants to avoid the unfairness and waste of judicial resources that sometimes attend a jurisdictional characterization.[159] As I noted above, the Fifth Circuit has proffered the most satisfying approach on jurisdictionality and will only characterize language as jurisdictional when it "appears in or receives mention in the jurisdictional provision of a given statute."[160] Although it provides a helpful starting point, this approach (1) does not sufficiently answer how to define the jurisdictional provision of a given statute, and (2) does not adequately account for all types of congressional jurisdictional speech[161]—Congress speaks in jurisdictional prerequisites,[162] but it also speaks in

156. Dodson, *Removal Jurisdiction*, *supra* note 15, at 66.

157. *See id.* at 67–68.

> That a clear statement of jurisdiction presumptively controls does not mean, however, that the converse is true, at least not in the removal context. In other words, the absence of a clear statement of jurisdiction does not raise a presumption that the provision is a nonjurisdictional bar of procedure. Rejecting this converse presumption departs from a number of clear statement rules, including one articulated in the recent Supreme Court case *Arbaugh v. Y & H Corp.*

Id.

158. *Arbaugh*, 546 U.S. at 516.

159. *See id.* at 515.

160. CNA v. United States, 535 F.3d 132, 142 (3d Cir. 2008).

161. In *Minard*, the Third Circuit makes mention of this second type of speech but does not develop a framework to address it. *Cf.* Minard v. ITC Deltacom Communications, Inc., 447 F.3d 352, 357 (noting that other cases have found it important that a statute "places no constriction upon the statute's clearly designated jurisdictional provision").

162. *Cf. Arbaugh*, 546 U.S. at 513; *see also* Winnett v. Caterpillar, Inc., 553 F.3d 1000, 1006.

jurisdictional withdrawals.[163] I will first answer how to define what the "jurisdictional provision" of a particular statute is and then provide an approach to congressional withdrawals of jurisdiction (which the *CNA* framework would not cover).

A. Defining a Jurisdictional Provision

To describe why the *CNA* statement of the test is inadequate, this section will first provide some examples of Congress's (sometimes misleading) references to jurisdiction and then provide an approach to achieve consistent results for these statutes.

1. Examples of Jurisdictional Provisions

For some claims, like the FTCA,[164] which was at issue in the Fifth Circuit's *CNA* case, defining what statutory language is in the jurisdictional provision will be relatively easy. In the *CNA* case, the statute was located within Title 28, Chapter 85, which is also the location of § 1331 and § 1332 and where jurisdictional statutes are generally collected. The statute says that the "district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . ."[165] This "district courts shall" language is the traditional language of jurisdiction—it is used in both § 1331 and § 1332.

Section 301 of the LMRA (the statute at issue in *Winnett* and *Tackett*), however, is less clear on the jurisdictional issue. There, Congress said that

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[166]

This statute is not located within Title 28, Chapter 85 and does not use the familiar, "the district courts shall" language. As the *Winnett* court noted, "[t]he only direct mention of 'jurisdiction' in the statute refers to personal jurisdiction, not subject-matter

163. Rockwell Int'l Corp. v. United States, 549 U.S. 457, 468 (2007).

164. 28 U.S.C. § 1346 (2006).

165. *Id.* at § 1346 (b)(1).

166. 29 U.S.C. § 185(a) (2006).

jurisdiction."[167] Additionally, according to the Sixth Circuit, this statute "ease[s] access to the federal courts [and does] not [] impose new barriers."[168] Courts, however, including the Supreme Court, have long understood this section to be the LMRA's jurisdictional provision.[169] As noted above, however, the Sixth Circuit said, after *Arbaugh*, that this statute was not jurisdictional.[170]

Complicating the issue further are those statutes that mention the "jurisdiction" of the "district courts," but that are not jurisdictional in the same sense as § 1331 and § 1332. In a line of cases that preceded the Supreme Court's recent foray into the jurisdictionality issue, the Court held that statutes describing the "jurisdiction" of the "district courts" were not necessarily jurisdictional. In *Steel Co.*, for example, the Court examined 42 U.S.C. § 11046(c), which reads:

> (c) Relief
>
> The district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement. The district court shall have jurisdiction in actions brought under subsection (a) of this section against the Administrator to order the Administrator to perform the act or duty concerned.171

Although referencing the jurisdiction of the district courts, the Supreme Court held that these "jurisdiction to" statutes do not address "genuine subject-matter jurisdiction."[172]

The problem, then, is finding an approach that will account for statutes that use the "district courts shall" language, statutes that may be jurisdictional but do not use that language, and statutes that are not jurisdictional but mention jurisdiction and the district courts.

167. *Winnett*, 553 F.3d at 1006.

168. *Id.*

169. Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aerospace and Agric. Implement Workers of America, Int'l Union, 523 U.S. 653, 656 (1998) ("By its terms, this provision confers federal subject-matter jurisdiction only over '[s]uits for violation of contracts.'" (quoting 29 U.S.C. § 185(a))).

170. *See Winnett*, 553 F.3d at 1007; Tackett v. M & G Polymers, USA, LLC, 561 F.3d 478, 486 (6th Cir. 2009).

171. 42 U.S.C. § 11046(c) (2006) (emphasis added).

172. *Cf.* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998).

2. Proposing an Approach

To explain how courts should approach this problem, this article will describe a metaphor for jurisdiction, and ask the reader to conceptualize Congress as an architect designing a house that is the federal courts.

Congress, in drawing up the blueprints, will want to keep most things in nature out—bugs, rain, snow, and the cold and heat. But Congress also wants to let certain things in. For example, Congress will draw up the plans to include a front door to allow people in; a garage door to allow cars in; a dog door to allow dogs in; windows to allow sunlight in; pipes to allow water in; and so on.

Although each of these entrances is technically a way in to the house and not really a limitation on entry, each entrance has a specific shape and specific characteristics so as to only allow in certain things. A car cannot get in through the front door, but Congress wants to let a car in and so must design a garage door for the car. Likewise, water cannot get in through the windows, but Congress wants water in the house and must design the pipes. The specific shapes of these entrances are invitations to enter—but also they are specifically designed only to let in particular things. Other than these specific entrances, the house is closed to the rest of nature.

Each of these different entrances that Congress has designed is like a jurisdiction-conferring provision. In its jurisdictional statutes, Congress describes cases with particular qualities that it wants to let in to federal court. A person comes in through the front door and not through the window; sunlight comes in through the windows and not through the pipes. A person and sunlight, obviously, have different intrinsic characteristics—a person can manipulate a door and close it after entering, but sunlight cannot. Sunlight can also enter through a door, but lacks the ability to close the door after entrance—thus, allowing sunlight to enter through the front door would allow too many other things in nature to enter. This is why Congress designed these separate entrances to the federal courts.

In letting in diversity-of-citizenship cases, Congress created a door into federal courts for those cases having the intrinsic qualities of diverse citizenship and a sufficient amount in controversy. In letting in federal-question cases, Congress created a garage door for those cases that have the quality of arising out of federal law. Federal-question cases cannot fit in the diversity-of-citizenship door, and vice versa.

Whenever Congress grants a new entrance into the house, it also defines the shape of that entrance—and thereby limits what can come in through that entrance. So while a jurisdictional grant is a grant, it is inherently also a limitation.

Bearing this metaphor in mind, in deciding the jurisdictionality issue, courts should start by finding the entrance for the case. A statute's jurisdictional provision is the entrance to federal court. Put another way, a jurisdictional provision is the provision that allows a litigant in to federal court when, without the provision, he or she could not enter.

For instance, before Congress enacted 28 U.S.C. § 1345, a case fitting the description of a "suit[] or proceeding[] commenced by the United States, or by an agency thereof expressly authorized to sue by Act of Congress"[173] had no entrance to federal court. The case did not necessarily fit within the § 1331 federal-question entrance. Congress then provided a specific entrance to federal court for this type of case.

Likewise, before Congress drew up the entrance for FTCA cases, a case

> against the United States[] for money damages . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred,[174]

had no entrance to the federal courts. Again, this case would not necessarily fit within § 1331 because it turns, generally, on the interpretation of state law.[175]

Thus, statutory language should be characterized as jurisdictional when the statutory phrase allows a party to enter federal court when he or she would not be able to do so absent the statute. Starting the analysis with a case's entrance to federal court would lead to the

173. 28 U.S.C. § 1345 (2006).

174. 28 U.S.C. § 1346(b)(1) (2006).

175. *See* CNA v. United States, 535 F.3d 132, 140 (3d Cir. 2008) ("We start by observing that the District Court's jurisdiction—if it exists—would *not* come from the general grant of federal-question jurisdiction in 28 U.S.C. § 1331. Instead, the FTCA itself is the source of federal courts' jurisdiction to hear tort claims made against the Government that meet various criteria.").

conclusion that the "jurisdiction to" statutes referenced in *Steel Co.* would not be genuinely jurisdictional.[176]

Under this approach, however, a court should characterize § 301 of the LMRA as jurisdictional. Section 301 shows why the entrance metaphor is helpful. Section 301 does not use the traditional "the district courts shall" language and it is not contained in the United States Code's collection of jurisdictional statutes. Looking at this provision under the above-described method, however, § 301 allows a type of case in to federal court that otherwise could not have been brought: "[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court . . . without respect to the amount in controversy or without regard to the citizenship of the parties."[177] Even the Supreme Court has expressly stated that "this provision confers subject-matter jurisdiction . . . ."[178]

The *Winnett* court noted that "[t]he statute relaxes subject-matter jurisdiction by permitting federal courts to handle such cases without regard to the amount in controversy or the existence of diversity jurisdiction."[179] This is where the court misunderstood congressional speech on jurisdiction. Every jurisdiction-conferring provision eases access to federal courts and relaxes subject-matter jurisdiction because it creates an entrance where there otherwise was none. These entrances, however, contain limitations.

If congressional language is an entrance to federal court, the statute's description of the type of case frames that entrance. Accordingly, Congress clearly-states that statutory language is a prerequisite to jurisdiction when language is within the statutory provision that provides an entrance to federal court—that is, when the

176. *Cf. Steel Co.*, 523 U.S. at 90.

177. 29 U.S.C. § 185(a) (2006). Section 301 is complicated slightly because the Supreme Court has held that the statute is "more than jurisdictional." Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 452, 455 (1957). So, while § 301 "[p]lainly[] supplies the basis upon which the federal district courts may take jurisdiction . . . ," it also "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." *Id.* at 451–52. Because of this body of federal common law that has developed, § 1331 would probably support jurisdiction over a suit for a violation of a labor contract. But the statute is a clear congressional statement of a grant of jurisdiction despite the development of federal common law in this area.

178. Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aerospace and Agric. Implement Workers of Am., Int'l Union, 523 U.S. 653, 655 (1998) ("By its terms, this provision confers federal subject-matter jurisdiction only over '[s]uits for violation of contracts.'" (quoting 29 U.S.C. § 185(a))).

179. Winnett v. Caterpillar, Inc., 553 F.3d 1000, 1006 (6th Cir. 2009).

statute allows an individual to bring a particular type of case in to federal court when he or she could not otherwise.

But, this test will only provide an answer in cases that involve jurisdictional prerequisites in jurisdiction-conferring statutes. Next, this article will describe how courts should adjudicate a congressional withdrawal of jurisdiction.[180]

B. An Express Withdrawal of Jurisdiction

In addition to jurisdiction-conferring provisions, Congress also speaks in jurisdiction-withdrawing provisions. The Supreme Court has recognized this type of congressional speech, stating in *Arbaugh* that, "[i]n a few instances, Congress has enacted a separate provision that expressly restricts application of a jurisdiction-conferring statute."[181]

Under the federal-courts-as-a-house metaphor, an express withdrawal would be a modification to an entrance. For example, Congress could put a special coating on the windows to keep out harmful UV rays. Congress still wants the sunlight to come in, but it also wants to modify the window entrance and place an additional filter on the windows to keep out what it has determined is harmful.

The statute involved in a case mentioned in *Arbaugh*'s footnote 11, *Weinberger v. Salfi*,[182] 42 U.S.C. § 405(h), and the statute in the post-*Arbaugh* case *Rockwell International Corp. v. United States*,[183] 31 U.S.C. § 3730(e)(4)(A), are examples of this different kind of congressional jurisdictional speech.

In the *Weinberger* case, Congress limited § 1331 jurisdiction in cases seeking to recover Social Security benefits in 42 U.S.C. 405(h).[184] Section 1331 provides an entrance for those cases arising out of federal law. A case to recover benefits under the complex federal Social Security scheme would certainly arise under federal law. In 42 U.S.C. § 405(h), however, Congress expressly stated that "[n]o action shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter."[185] Upon

180. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 514 n.11 (2006).

181. *Id.* at 515 n.11.

182. 422 U.S. 749 (1975).

183. 549 U.S. 457 (2007)

184. *Weinberger*, 422 U.S. at 753.

185. *See* 42 U.S.C. § 405(h) (2006).

The findings and decision of the Commissioner of Social Security after a hearing

reviewing this statute, the Court held that no litigant could bring an action in through the § 1331 entrance to recover Social Security benefits.[186]

In 2007, the Supreme Court described a similar congressional statute in *Rockwell*.[187] In 31 U.S.C. § 3730(e)(4)(A), Congress states that:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government . . . Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.[188]

In *Rockwell*, the Court examined whether the "original source" requirement in 31 U.S.C. § 3730(e)(4)(A) should be characterized as jurisdictional. The Court held that Congress "*withdr[ew]*" jurisdiction in this statute and that the original-source requirement was jurisdictional. [189] Although the Court did not apply the approach that I suggested above, i.e., starting with the jurisdictional entrance, using this approach would lead to the same result. Congress provided the entrance to federal court for False Claims Act cases via 31 U.S.C. 3730(b), which opened the courts for "a civil action for a violation of [the False Claims Act]."[190] Once a court decides that the case fits this description, the case is inside the federal courts unless Congress has specifically modified this entrance.

When Congress states that it is modifying an entrance, this modification should be treated as jurisdictional. In both *Weinberger* and *Rockwell*, Congress expressly made clear that it was modifying an entrance. In the statute at issue in *Weinberger*, Congress stated that "[n]o action shall be brought . . . *under section 1331 or 1346 of*

> shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

Id.

186. *Weinberger*, 422 U.S. at 756–61.

187. *Rockwell*, 549 U.S. at 460.

188. 31 U.S.C. § 3730(e)(4)(A) (2006) (footnote citation omitted).

189. *Rockwell*, 549 U.S. at 468–69.

190. 31 U.S.C. § 3730(a) (2006).

Title 28 to recover on any claim arising under this subchapter."[191] In the relevant statute in *Rockwell*, Congress clearly stated its intent to modify the entrance when it stated "[n]o court shall have jurisdiction over an action *under this section*."[192] In both cases, Congress referenced the specific entrance that it was modifying.

Congress exercises this type of jurisdictional speech much less frequently than the speech of jurisdiction-conferring provisions. This is because the federal courts are courts of limited jurisdiction—there is no need for Congress to explicitly limit jurisdiction unless it has already conferred jurisdiction. It would not make sense to treat a limitation on a statute as jurisdictional unless the statute referenced the jurisdiction-conferring provision. Such a limitation would be superfluous—whatever the limitation, it should already be presumed to be outside of federal court jurisdiction. Courts should not assume that Congress is restating this presumption when it limits the scope of a statute.

Courts should assume that Congress is aware of the jurisdictional landscape of the federal courts that it is responsible for creating. Congress, as architect, should remember where it put the entrances to federal court. Congress will note intent to close or narrow one of these entrances unless it states this intention through reference to the entrance.[193] Below, this article will examine how this approach would apply this referential-modification rule in a case that the Supreme Court will hear in the October 2009 term, *Reed Elsevier, Inc. v. Muchnick*.

191. *See* 42 U.S.C. § 405(h) (2006) (emphasis added).

> The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

Id.

192. 31 U.S.C. § 3730(e)(4)(A) (2006) (emphasis added).

193. Although this discussion is beyond the scope of this article, there may be some statutes where Congress decides to limit a particular entrance, but does so without an explicit reference to that jurisdiction-conferring provision. In these cases, courts should require the limitation to "speak in jurisdictional terms or refer . . . to the jurisdiction of the district courts." Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982).

C. Applying the Approach to Reed Elsevier

Congress only speaks jurisdictionally in two ways: jurisdictional prerequisites and jurisdictional withdrawals. When Congress creates an entrance to federal courts for cases having certain characteristics, these characteristics become prerequisites to jurisdiction. When Congress referentially modifies an entrance to federal court for certain cases, Congress withdraws a particular type of case from the federal courts' jurisdiction.

In the October 2009 term, the Supreme Court will hear oral argument in the *Reed Elsevier, Inc. v. Muchnick* case and decide: "Does 17 U.S.C. § 411(a) restrict subject matter jurisdiction of the federal courts over copyright infringement actions?"[194]

Section 411(a) states that:

> [N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.[195]

The Second Circuit, over a dissent, held that 17 U.S.C. § 411(a) was jurisdictional.[196] The court was not alone in this characterization, as it noted that several other circuits had similarly treated the registration requirement as jurisdictional.[197] In holding that registration was a prerequisite to jurisdiction, the court noted that "the last sentence of section 411(a) clarifies that the section speaks in jurisdictional terms, as opposed to addressing mere administrative

194. *In re* Literary Works in Elec. Databases Copyright Litig., 509 F.3d 116 (2d Cir. 2007), *cert. granted sub. nom* Reed Elsevier, Inc. v. Muchnik, 129 S. Ct. 1523 (2009).

195. 17 U.S.C. § 411(a) (2008).

196. In re Literary Works, 509 F.3d at 122–23.

197. *Id.* at 121–22 ("We are far from alone in this regard; there is widespread agreement among the circuits that section 411(a) is jurisdictional.") (citations omitted).

prerequisites."[198] Thus, the statute appears to be a limit on what cases can come in to federal court and mentions jurisdiction in the genuine subject-matter jurisdiction sense.

Under the framework proposed in this article, however, a court should reach the opposite conclusion. In looking at 17 U.S.C. § 411(a), a court should first look to the entrance to district court. Section 411(a) does not provide this entrance—it only says that "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright."[199] As a result, section 411(a) should not be starting place for the jurisdictionality analysis.

Instead, there are two potential entrances into federal court in *Reed Elsevier*. First, in § 1331, Congress allows in claims that have the shape of a federal question. An action for copyright infringement could probably fit within this entrance. But an argument under § 1331 is not necessary because Congress has provided a separate entrance to federal courts in 28 U.S.C. § 1338(a) for "any civil action arising under any Act of Congress relating to . . . copyrights . . . ."[200] This is the entrance to federal court, and a court looking at § 411(a) should presume that Congress was aware of this entrance.

After looking at this entrance, a court should look to see if Congress made any referential modification to this entrance. Nothing in § 411(a) mentions § 1338(a), the entrance that Congress should be presumed to be aware of. Accordingly, Congress did not clearly state an intent to impose the registration requirement as a prerequisite to jurisdiction. If Congress meant to limit the scope of or change the entrance, it surely could have said so. But Congress did not say so, and, absent such a clear statement, courts should therefore characterize this statute as non-jurisdictional. Even though the statute appears to speak to what types of cases federal courts can hear and even though the statute mentions subject-matter jurisdiction, the statute does not contain a clearly stated prerequisite to jurisdiction. [201]

198. *Id.* at 124 n.5 (internal quotations and citations omitted).

199. 17 U.S.C. § 411(a).

200. 28 U.S.C. § 1338(a) (2006).

201. This Article pauses here before concluding to note that this approach would not lead to a result consistent with the *Bowles* case. In *Bowles*, the Court examined whether 28 U.S.C. § 2107(a)'s time limitation was jurisdictional. Under my approach, courts should start with the congressional entrance to federal court. Congress had created an entrance to the courts of appeals in 28 U.S.C. § 1291: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." The final decision

VI. CONCLUSION

To understand the clearly-states test, courts must understand Congress's jurisdictional speech. This article has explained above that Congress speaks with limitations on jurisdiction in two ways: (1) jurisdictional prerequisites contained within grants of jurisdiction, and (2) affirmative withdrawals of these grants through referential modification. This conceptualization of the clearly-states test will apply in all of the questions regarding whether Congress has opened up the traditionally closed federal district courts.[202] In deciding whether to make a jurisdictional characterization of language, courts should first determine the case's entrance into federal court. Once the entrance is established, only a referential modification of that entrance should be a limitation on jurisdiction.

The clearly-states test serves the important functions of: (1) avoiding unfairness and waste of judicial resources, and (2) ensuring that courts and litigants will be on notice of Congress's intent. Applying *Arbaugh* in the way this article has described will serve the important policy goal of notifying the parties of which statutory language is actually jurisdictional. If courts adopt the proposed approach, parties will be able to structure their litigation accordingly—filing in state court, or declining to add state claims to a federal lawsuit when there is uncertainty about the ability to prove a jurisdictional requirement. This will, in turn, help to avoid waste of judicial resources and unfairness to litigants.[203] Additionally, this

language is a prerequisite to jurisdiction, but the time limitation was contained in a separate statute that did not at all reference the jurisdiction of the courts of appeals. But, as noted above, the Court has scaled back the scope of this precedent and it therefore does not undercut the usefulness of the approach I describe above.

202. This Article is aimed at providing a coherent approach to the most common question of jurisdiction—whether the federal district courts have jurisdiction over a particular claim. Determining the jurisdictionality of a statute that alters the structure *among* federal courts may, however, require a different test. *See supra* notes 113–126, 201 and accompanying text (discussing the jurisdictionality of the time requirement for filing a notice of appeal); *see also* 28 U.S.C. § 1500 (2006).

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Id.

203. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006).

approach is "readily administrable"[204] and will therefore decrease the likelihood that the judiciary will suffer the waste of resources that accompany a courts of appeals reversal of a district court decision on the jurisdictionality issue.

204. *Cf. id.* at 516.