URISDICTIONAL SPEECH: GIVING MEANING TO TH - 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 thin
under this Constitution, [and] the Laws of the United States . . . [and]
[1] Article

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Absent a congressional exercise of this jurisdiction-defining power, the federal courts are presumed to be closed[4] to a particular case.[5]

create and define substantive rights about which there may be cases or controversies. Congress can create and define essential elements of a

sometimes i

The question (and its answer), however, are important because a what [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

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 [24] and [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.

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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
original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between .[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, factu
judge is free to look at a wide range of evidence relevant to the [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]
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* -31
rule on the merits of a case without fi0457 Tc1 0 0 1410(o)7(f)-4( )-270(a)-6( )-.5

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pleaded complaint rule.[54] Jurisdiction will not be supported merely

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Although § 1331 and § 1332 provide broad grants of jurisdiction,

amount-in-
United States, any agency thereof, or any officer or employee thereof [60] In 1980, Congress finally eliminated the amount-in-controversy requirement for all cases.[61] Some of the special jurisdic

[70] 42 U.S.C. § 2000e-5(f)(3), Congress gave itle VII.[71]

This special jurisdictional provision was enacted before Congress had -in-controversy requirement.[72] The main

that the amount-in-controversy limitation would not impede an employment-

[73]

definition of an employer. As noted above, Title VII only makes it

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]

jurisdic [78]
to dismiss for lack of subject-matter jurisdiction. The Fifth Circuit af [79] But the Supreme

B. Examples of Statutory Limitations in 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

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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

[98]

enacted a separate provision that expressly restricts application of a jurisdiction-[99] In 42 U.S.C. § 405(h), Congress

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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-

[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 /F1 37 0057 2 0048 3 0056 1 0 0 1 ba[(Be)-3(0(w)3(,)-155h)1

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 ding, however, with its presumption against jurisdictionality, makes it less likely that courts will see statutory requirements as limitations on jurisdiction. This result will implicate

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

extend the time for filing a notice of appeal in 28 U.S.C. § 2107(c) *Bowles* undercut the broad sweep of *Arbaugh*. In 28 U.S.C. § 2107, Congress stated that ppeal shall bring any judgment . . . before a court of appeals for review unless notice of appeal is filed[] within thirty days after the [114] The Court stated that the thirty-day time limit was a limitation on 72.93 631.54 Tm[( )] TJE-on ((23a)-c[(T)-3(he)-3 Ca)-5BT1E7irt1C33(i)-

In 28 U.S.C. § 2501, Congress imposed a time limitation on

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

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 - [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

126. For example, in *Nulankeyutmonen Nkihtaqmikon v. Impson*, the First Circuit, when nguage, isdictional, courts should treat the restriction as nonjurisdic equirement was not jurisdictional in nature. 503 F.3d 18, 33 (1st Cir. 2007) (quoting Arbaugh v. Y &

compel factual admissions on all elements of claims *except* an

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301(a).[141]

limits our jurisdiction over a case, that would mean [that] every other prima facie element of [a] Section 301(a) claim . . . would have simi [142] jurisdictional consequences.

Second, after considering the statutory language, the court stated *Arbaugh*

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 characteriza(e)-3(d)-322(5(a)-3(l)7( )-53 11.52 Tf1 0 0 1 167.06 6287.2 Tm[(s)] TJ0 0

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

jurisdiction of civil actions on claims again

employee of the Government while acting within the scope of his office or em [148] Specifically, the court adjudicated whether the within-the-scope-of-employment requirement was jurisdictional. The court said that,

> 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

does not speak in jurisdictional terms or refer to the jurisdiction of the

designed jurisdicti [152]

If a statutory requirement is jurisdictional only when the re

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 [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

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*

[158] rule.

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

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 jurisdiction
or receives mention in the jurisdictional provision of a given

jurisdictional withdrawals.[163] I will first answer how to define what

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 s

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 *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, Chf1o/F6 11.5Tm 0(w)3(i)-hiÉB,NBr5he

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jurisdic [167] Additionally, according to the Sixth Circuit, this [] impose new bar [168] Courts, however, including the Supreme Court, 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 the same sense as § 1331 and § 1332. In a line of cases that preceded the jurisdictionality issue, the *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 ddress - [172]

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

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

168. *Id.*

169. Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aero , 523 U.S. 653, 656 (1998) -matter jurisdic ting 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.*

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 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

United States, or by an agency thereof expressly authorized to sue by [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

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) observ 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

con tes 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

provision under the above-described method, however, § 301 allows a type of case in to federal court that otherwise could not have been

labor organization . . . may be brought in any district court . . . without respect to the amount in controversy or without regard to the citi

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 expressly restricts application of a jurisdiction-conferring stat [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*
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

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Title 28 [191] In the relevant statute in *Rockwell*, Congress clearly stated its intent to mod
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.

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

[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

civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copy [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 en

[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.* (

VI. CONCLUSION

To understand the clearly-states test, courts must understand 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