View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Western New England University School of Law

Western New England Law Review

Volume 30 30 (2007-2008)
Issue 2

Article 5

1-1-2008

AN OBSCURED EXPANSION OF THE COMMERCE POWER

Jason Wojciechowski

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation

Jason Wojciechowski, *AN OBSCURED EXPANSION OF THE COMMERCE POWER*, 30 W. New Eng. L. Rev. 477 (2008), http://digitalcommons.law.wne.edu/lawreview/vol30/iss2/5

This Article is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

AN OBSCURED EXPANSION OF THE COMMERCE POWER

JASON WOJCIECHOWSKI*

INTRODUCTION

The so-called "federalism revolution" of the Rehnquist Supreme Court[1] struck fear in the hearts of some scholars. They worried that long-standing federal antidiscrimination laws, such as Title VII of the Civil Rights Act of 1964 (Title VII),[2] might be held unconstitutional because of the revolution's new levels of judicial scrutiny of Congress's attempts to exercise its legislative power,[3]

---

* JD candidate, 2008, Benjamin N. Cardozo School of Law (Yeshiva University). Thanks to Professors Michelle Adams, Margaret Lemos, and Julie Suk, as well as Austen Rachlis, for their guidance and comments.

1. The phrase "federalism revolution" refers to the perceived program of the Supreme Court under Chief Justice William Rehnquist to place limitations on the exercise of federal power, particularly federal legislative power. *See, e.g.*, Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1051 (2001) ("[*Bush v. Gore*] occurred against the background of a veritable revolution in constitutional doctrine that has been going on for some fifteen years."); Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1 (2004); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 138 (2001) ("The real revolution began in 1995, when for the first time in six decades the Court struck down a federal statute as exceeding the limits of the Commerce Clause."). *But see* Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 477 (2001) (describing the "recent federalism cases" as "not quite amounting to a revolution").

2. 42 U.S.C. § 2000e (2000).

3. *See* Paul Boudreaux, *Federalism and the Contrivances of Public Law*, 77 ST. JOHN'S L. REV. 523, 566-70 (2003) (discussing the Rehnquist Court's likely approach to the question of Title VII's constitutionality and concluding that overturning the statute "would be a logical result of the . . . Court's new federalism"); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 385 (2002) ("[T]he Court's decision in *Garrett* strongly suggests that federal legislative protection of civil rights and liberties will no longer be tolerated by the Supreme Court majority."); James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91 (2000); James M. Oleske, Jr., *Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation*, 6 U. PA. J. CONST. L. 525, 526 (2004) ("Could Title VII be the next victim of the states' rights revolution?"); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1143-44 (2002) (arguing that federalism concerns were merely a "stalking-horse" for the Court's actions against the national antidiscrimination program); Louis J. Virelli III &

particularly under the Commerce Clause.[4] Because Title VII's enactment was at least partially based on the Commerce Clause,[5] the Court's willingness to scale back Congress's ability to regulate pursuant to its commerce power created this anxiety of judicial cancellation of the national antidiscrimination scheme.[6] The Supreme Court cases of *United States v. Lopez*[7] and *United States v. Morrison*[8] are the main sources of this concern. Both cases struck down congressional action as transcending the boundaries of the Commerce Clause. *Morrison* is particularly worrisome for those favoring broad congressional authority in the antidiscrimination realm because the statute at issue concerned gender-motivated violence. More recently, the Court decided *Raich v. Gonzalez*,[9] which held that a statute regulating, *inter alia*, intrastate growth of marijuana was a proper exercise of the commerce power.[10] These potentially

---

David S. Leibowitz, *"Federalism Whether They Want It or Not": The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation After* United States v. Morrison, 3 U. PA. J. CONST. L. 926, 926 (2001) ("[T]he interpretive preferences of the *Morrison* Court squarely threaten future congressional attempts to address civil rights violations, as they have proven unable to provide principled and intelligible judicial standards for Congress to follow in drafting such legislation."); *see also* Samuel R. Bagenstos, *The Supreme Court, the Americans with Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923, 944 (2004) (noting the possibility that the Court might be "beginning a general retreat from the prohibition of rational discrimination it previously staked out").

4. *See* U.S. CONST. art. 1, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce . . . among the several States"); *see also* Kramer, *supra* note 1, at 1376 ("[T]he Rehnquist Court has repudiated the New Deal's judicial presumption of constitutionality and restored heightened scrutiny [of Congress's exercise of Article I powers]."); *infra* Part I.B (discussing *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000)).

5. The other source of power relied upon by Congress in enacting Title VII was Section 5 of the Fourteenth Amendment. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 367 (1978) (Brennan, J., concurring in part and dissenting in part) ("Title VII was enacted pursuant to Congress' power under the Commerce Clause and [Section] 5 of the Fourteenth Amendment."); *see also infra* Part I.C (describing limitations on the power of Congress to enact legislation using Section 5 and reconciling the statement in *Bakke* with the current Section 5 jurisprudence).

6. Because of their similar structure and purported constitutional bases, statutes cast into doubt alongside Title VII include the Americans with Disabilities Act, 42 U.S.C. §§ 12,101-12,213 (2000); the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2000); and the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654. *See infra* note 22 (discussing the structural similarities between the federal antidiscrimination statutes).

7. *Lopez*, 514 U.S. 549.

8. *Morrison*, 529 U.S. 598. *Lopez* and *Morrison* are discussed in more depth *infra* Part I.B.

9. Raich v. Gonzalez, 545 U.S. 1 (2005).

10. *Id.* at 12-33.

contradictory rulings have generated confusion as to the scope of Congress's commerce power.

While Title VII may not actually be in danger, any hint from the Court regarding the scope of Congress's commerce power remains welcome, particularly in light of the confusion raised by *Raich*. The recent case of *Arbaugh v. Y & H Corp.*[11] appears on the surface to have scant relevance to these federalism concerns. While the case involved Title VII, neither party challenged the constitutionality of the statute. Rather, the question before the Court was whether the requirement that an employer have fifteen or more employees in order to be governed by the statute describes a limitation on the subject-matter jurisdiction of the federal courts.[12] The

11. Arbaugh v. Y & H Corp., 546 U.S. 500 (2006).

12. *Id.* at 503 ("The question . . . is whether the numerical qualification contained in Title VII's definition of 'employer' affects federal-court subject-matter jurisdiction . . . ."). The other alternative is that the fifteen-employee requirement is an element of the plaintiff's cause of action. *Id.* (describing the other possible classification of the "numerical qualification" as "delineat[ing] a substantive ingredient of a Title VII claim for relief").

The distinction at stake in *Arbaugh* between a jurisdiction- or claim-oriented interpretation has a variety of consequences. Even beyond putting aside the constitutional impact argued by this Article, these consequences make it important that courts have a clear idea of whether they are dealing with a jurisdiction or merit issue.

First, if an element is part of the plaintiff's cause of action, and not a matter of subject-matter jurisdiction, then the defendant might waive the right to raise a failure to satisfy that element. *See* FED. R. CIV. P. 12(h). In the Title VII context, this means that an employer with fewer than fifteen employees who does not raise that issue in a timely manner may be deemed to have waived the right to do so. Because the Supreme Court in *Arbaugh* held that the employee-numerosity requirement is, in fact, a part of the plaintiff's cause of action, *Arbaugh*, 546 U.S. at 516, the defendant employer's failure to make a motion for dismissal on the grounds that it did not have fifteen employees before judgment had been rendered precluded its ability to do so at all. Thus, the judgment against it, pursuant to Title VII, will stand despite the fact that it does not actually fall within the regulatory confines of that statute.

While the waiver issue seems likely to come up only in this context, it is conceivable that an employer might intentionally waive a defense that it had fewer than fifteen employees in order to stay in federal court if it had a reasonable certainty of prevailing on the merits in that court. A situation where this could arise is where an employee brings not only a Title VII action, but also supplemental claims, *see* 28 U.S.C. § 1367 (2000) (granting the federal courts "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy"), based on state antidiscrimination law, where the state law defines "employer" less restrictively than Title VII. *See, e.g.*, N.Y. EXEC. LAW § 292(5) (McKinney 2006) ("The term 'employer' does not include any employer with fewer than *four* persons in his employ." (emphasis added)). If the employer in such situation feels confident that it will prevail on the merits of these claims in federal court but will lose on the merits of the state law claim in state court, then it may prefer to avoid having the Title VII claim dismissed and, instead, remain mum about its number of employees.

Court answered that question in the negative,[13] eliminating a split among the circuits[14] and putting to rest a non-earth-shattering, but nonetheless important, question.[15] Part I of this Article sets out these background materials. First, the employee-numerosity requirement and jurisdictional element of Title VII are described and their relation to *Arbaugh* is elucidated. Next, the Supreme Court's recent Commerce Clause cases are explored in some depth. Finally, this Part discusses the line of cases establishing that Section 5 of the Fourteenth Amendment (Section 5) does not give Congress the power to regulate private activity.

This Article will argue in Parts II and III that *Arbaugh* can be read as standing for more than a simple clarification of the scope of federal court jurisdiction with respect to Title VII. Instead,

---

Second, if an element goes to the subject-matter jurisdiction of the federal courts, then those courts have a duty to raise the issue *sua sponte* if it appears that the element might not be satisfied. FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). In the above situation, then, where the employer with less than fifteen employees wants to remain in federal court, and if the employee-numerosity requirement was jurisdictional, the judge could dismiss the case on her own initiative. Because of *Arbaugh*, however, this is not the case. The judge would be forced to let the case remain in her courtroom unless the defendant made a motion to dismiss.

Finally, the same illustration also shows the impact on supplemental jurisdiction. If a plaintiff brings state law claims in federal court pursuant to the federal courts' supplemental jurisdiction and the federal claims are dismissed, the outcome with regard to the state claims is partially determined by the manner in which the federal claims were dismissed. If the federal claims were dismissed for lack of subject-matter jurisdiction, then the court has no authority to hear the state law claims. *See* 28 U.S.C. § 1367(a). The district courts are permitted to exercise supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." *Id.* Thus, if there is no claim in the action over which the district court has original jurisdiction, no supplemental jurisdiction can be exercised. If, however, the federal claims were dismissed on the merits, then the court is permitted to exercise its discretion as to whether it should retain the remaining state law claims. *See id.* § 1367(c)(3) ("The district courts *may* decline to exercise supplemental jurisdiction over a [supplemental] claim . . . if the district court has dismissed all claims over which it has original jurisdiction . . . ." (emphasis added)).

13. *Arbaugh*, 546 U.S. at 504 ("[T]he employee-numerosity requirement relates to the substantive adequacy of [the plaintiff's] Title VII claim . . . .").

14. *See* Jeffrey A. Mandell, Comment, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. CHI. L. REV. 1047, 1049-54 (2005) (describing the circuit split on this issue). The First, Fourth, Fifth, Sixth, and Ninth Circuits all held the employee-numerosity requirement to limit the jurisdiction of the federal courts. *Id.* at 1050. The Third and Seventh Circuits held the requirement to go to the merits of the plaintiff's case. *Id.* at 1050-52. Finally, the Tenth and Eleventh Circuits use a "hybrid" approach. *Id.* at 1052-53. However, this approach turns out in the end to really be a disguised "merits" approach. *Id.* at 1053-54.

15. *See Arbaugh*, 546 U.S. 514-16 (describing some of the consequences of labeling a restricting element as "jurisdictional" or "merits").

Arbaugh is consistent with the Court's suggestion in *Raich* that the federalism revolution did not take away as much of Congress's power as may have been believed after *Lopez* and *Morrison*. Further, an examination of all of the consequences of *Arbaugh*'s rule reveals that it is more than merely consistent with *Raich*; rather, it demonstrates that Congress has power under the Commerce Clause to regulate any activity that it can reasonably construe as economic, even though that power was seemingly restricted by *Lopez* and *Morrison*. This reading of *Arbaugh* is driven by the connection between the federal courts' jurisdiction to hear a case and Congress's power to grant such jurisdiction. That is, in order for federal courts to have legitimate subject-matter jurisdiction over a federal statutory cause of action, Congress must have the constitutional power to create that cause of action.[16] Part IV goes on to explore what this argument means for our understanding of the balance of power between Congress and the Supreme Court, concluding that Congress may have broader commerce power than previously thought.

I. BACKGROUND

A. Arbaugh *and Title VII*

Arbaugh involved a Title VII claim against a private employer.[17] Title VII bars discrimination by employers on the basis of "race, color, religion, sex, or national origin."[18] The employee was a waitress and bartender at a small New Orleans restaurant who alleged that her employer sexually harassed her, which led to her constructive discharge.[19] While the issue did not arise at first, the small size of the defendant restaurant would later become the key point in the case because Title VII does not cover every employer in the country. Rather, to be subject to the statute, an employer must meet the statutory definition of "employer." That definition contains two restrictions that are relevant here: the "employee-numerosity requirement" and the "jurisdictional element."[20] The

16. This connection is fleshed out and justified *infra* Part II.

17. *Arbaugh*, 546 U.S. at 503-04.

18. 42 U.S.C. § 2000e-2(a) (2000).

19. *Arbaugh*, 546 U.S. at 507. As to "constructive discharge," see *Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004) ("[T]o establish 'constructive discharge,' the plaintiff . . . must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response.").

20. *See* 42 U.S.C. § 2000e(b). The "jurisdictional element" is sometimes referred to as the "jurisdictional hook." *See* Tara M. Stuckey, Note, *Jurisdictional Hooks in the Wake of* Raich*: On Properly Interpreting Federal Regulations of Interstate Commerce*, 81 NOTRE DAME L. REV. 2101, 2101 (2006). Other portions of the statutory definition

employee-numerosity requirement is that an employer must have fifteen or more employees to fall within the confines of the statute.[21] The jurisdictional element states that the employer must be "engaged in an industry affecting commerce."[22] The purpose of this

---

include exceptions for, *inter alia*, the United States and private clubs. 42 U.S.C. § 2000e(b)(1)-(2).

21. 42 U.S.C. § 2000e(b).

22. *Id.* The employee-numerosity requirement and jurisdictional element in Title VII are structurally the same as the analogous requirements in other federal antidiscrimination legislation, including the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and the Age Discrimination in Employment Act (ADEA).

The ADA outlaws employment discrimination on the basis of disability. *Id.* § 12,112(a) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."). It wholly incorporates a variety of sections from Title VII, including the provision granting jurisdiction to the federal courts. *Id.* § 12,117(a) ("The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter . . . ."). The incorporation of the jurisdiction-granting provision is a true redundancy because the federal question jurisdiction statute had been amended in 1980, ten years before the passage of the ADA, to eliminate the amount-in-controversy requirement. *See* Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (amending 28 U.S.C. § 1331 to remove the amount in controversy requirement). As in Title VII, the ADA's definitions are in a separate section. *See* 42 U.S.C. § 12,111. Further definitions are included in yet another section. *See id.* § 12102 (providing the definition for the ADA); 42 U.S.C. § 12,102(1) (defining the terms "auxiliary aids and services"); *id.* § 12,102(2), (defining the term "disability"); *id.* § 12,102(3) (defining "State"). "Employer" is defined, as in Title VII, to mean a person with fifteen or more employees. *Id.* § 12,111(5)(A). This was the original limitation when the statute was first enacted in 1990. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 101(5)(A), 104 Stat. 327, 330. The jurisdictional hook, in the same section, uses the same wording as Title VII. 42 U.S.C. § 12,111(5)(A) ("The term 'employer' means a person engaged in an industry affecting commerce . . . ."). Thus, the ADA is identical to Title VII in the portions of the statute at issue in *Arbaugh*.

The ADEA bars discrimination in employment on the basis of age. 29 U.S.C. § 623(a) (making it unlawful to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age"). The Act does not explicitly grant jurisdiction to the federal courts, but it does create a private right of action. *Id.* § 626(c)(1) ("Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . . ."). This right of action combines with 28 U.S.C. § 1331, granting jurisdiction to the federal courts over "civil actions arising under the . . . laws . . . of the United States," to give the federal courts the power to hear ADEA cases. The statute, as contrasted with Title VII, *see supra* text accompanying notes 18-20, does not appear to have granted jurisdiction over *all* ADEA cases until 28 U.S.C. § 1331 was amended to eliminate the amount-in-controversy requirement. The definition of "employer," as in the other statutes, is in a separate section. *See* 29 U.S.C. § 630(b). ADEA defines an "employer" as a person having twenty or more employees

latter element is to provide a nexus to interstate commerce so as to ensure that the statute is only applied in cases over which Congress has legitimate constitutional regulatory power under the Commerce Clause.[23]

Weighty issues of constitutionality and the scope of federal legislative power were not explicitly raised by the parties to the litigation. The question presented to the Court, on which the circuits had previously split,[24] was seemingly a minor technical issue: Is Title VII's employee-numerosity requirement a limitation on federal subject-matter jurisdiction or is it a part of the plaintiff's cause of action?[25] Referring to the question presented as "minor" is not to denigrate the importance of the decision in this case. The answer to the question posed in the litigation has numerous consequences for,

---

and the jurisdictional element again uses the same language as that found in Title VII. *Id.* ("'[E]mployer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."). As with Title VII, the ADEA's original employee-numerosity requirement was twenty-five. Age Discrimination in Employment Act, Pub. L. No. 90-202, § 11(b), 81 Stat. 602, 605. This was amended to the current number in 1974. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(1), 88 Stat. 55, 74.

Finally, the FMLA entitles employees to take medical leave without loss of their jobs or benefits. 29 U.S.C. § 2614(a)(1) ("[A]ny eligible employee who takes leave under [the FMLA] shall be entitled, on return from such leave—(A) to be restored . . . to the position of employment held . . . when the leave commenced; or (B) . . . an equivalent position with equivalent employment benefits"); *id.* § 2614(a)(2) ("The taking of leave under [the FMLA] shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced."). As in the ADEA, the FMLA does not have an explicit jurisdiction-granting provision, instead it relies on 28 U.S.C. § 1331 combined with a statutory private right of action. *Id.* § 2617(a)(2) ("An action to recover . . . damages or equitable relief . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction."). The definition of "employer" is again found in a separate section. *Id.* § 2611(4)(A). An "employer" for FMLA purposes is one that has at least fifty employees. *Id.* § 2611(4)(A)(i). This number is the same as when the statute was originally passed. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 101(4)(A)(i), 107 Stat. 6, 8. In the FMLA, however, the jurisdictional hook is slightly different from that found in the other three statutes. Here, it states that the employer must be "engaged in commerce or in any industry or activity affecting commerce." 29 U.S.C. § 2611(4)(A)(i). This jurisdictional element appears slightly broader than that of the other statutes as a result of the "or activity" language not found in the ADA, ADEA, and Title VII hooks. This difference will not play a role in the analysis to follow, however.

23. United States v. Lopez, 514 U.S. 549, 561 (1995) ("[A] jurisdictional element . . . would ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce."); *see also* Stuckey, *supra* note 20, at 2102 ("A jurisdictional hook is a statutory clause requiring that the regulated activity have a connection with interstate commerce.").

24. *See supra* note 14.

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

at the very least, antidiscrimination litigation.[26] This is particularly true because of shared attributes of a variety of federal antidiscrimination statutes that make the *Arbaugh* decision applicable beyond the Title VII context.[27]

The issue of whether the employee-numerosity requirement is jurisdictional arose because of the confusion regarding the number of employees who worked at the restaurant.[28] After judgment was rendered for the plaintiff, the employer raised, for the first time, the fact that it had fewer than fifteen employees and thus could not properly be found liable under Title VII.[29] The employer claimed that because it did not employ the requisite number of employees, the district court never had subject-matter jurisdiction over the case, and thus that the judgment had to be vacated.[30] The defendant's post-judgment motion for dismissal relied on Rule 12 of the Federal Rules of Civil Procedure, which defines the defenses that a party can raise to a claim, along with when and how those defenses may be made.[31] The Rule 12(b)(1) defense of "lack of jurisdiction over the subject matter"[32] relied on by the employer can be raised at any time, by a party or by the court, even after judgment has been entered.[33]

The employee's argument in response was that the employee-numerosity requirement does not affect the jurisdiction of the federal district courts,[34] but rather it is an element of the plaintiff's cause of action. Thus, a dismissal for failure to satisfy that element would be for "failure to state a claim upon which relief can be

26. *See supra* note 12 (discussing the concrete consequences of the "jurisdiction or merits" dichotomy).

27. *See supra* note 22 (discussing relevant similarities between Title VII and other antidiscrimination legislation).

28. The statutory definition of "employee" is hardly free from ambiguity, as it defines an employee merely as "an individual employed by an employer," 42 U.S.C. § 2000e(f) (2000), which begs the question, among others, of what it means for someone to be employed. In this case, the dispute was over whether delivery drivers, the owner-managers, and the spouses of the owners were employees within the meaning of the statute. *See* Arbaugh v. Y & H Corp., No. Civ. A. 01-3376, 2003 WL 1797893, at *2 (E.D. La. Apr. 3, 2003), *aff'd*, 380 F.3d 219 (5th Cir. 2004), *rev'd*, 546 U.S. 500 (2006).

29. Arbaugh v. Y & H Corp., 546 U.S. 500, 504 (2006).

30. *See generally* Memorandum in Support of Rule 12(h)(3) Motion to Dismiss for Lack of Subject Matter Jurisdiction, Arbaugh v. Y & H Corp., No. Civ. A. 01-3376, 2002 WL 33000724 (E.D. La. Nov. 19, 2002); Rule 12(h)(3) Motion to Dismiss for Lack of Subject Matter Jurisdiction, *Arbaugh*, No. Civ. A. 01-3376, 2002 WL 33000724.

31. *See* FED. R. CIV. P. 12.

32. *Id.* at 12(b)(1).

33. *Id.* at 12(h)(3).

34. *See* Arbaugh v. Y & H Corp., 380 F.3d 219, 223 (5th Cir. 2004).

granted."[35] This defense, unlike the subject-matter jurisdiction defense, can be raised only before or during the trial.[36] Thus if the defense is not raised at that time, it is considered waived.[37]

The trial court, bound by the precedent in the Fifth Circuit,[38] found that the employee-numerosity requirement did in fact describe a limitation on its subject-matter jurisdiction, and accordingly found that the defense was not waived.[39] It ordered discovery on the issue of the number of employees.[40] Upon finding that the employer actually did not have the requisite number of employees, the judge vacated the judgment and dismissed the case.[41]

The Supreme Court reversed, deciding that the employee-numerosity requirement is an element of the plaintiff's cause of action, not a limitation on the subject-matter jurisdiction of the federal courts.[42] In so holding, it made much of the fact that Title VII's jurisdiction-granting provision and employee-numerosity minimum were contained in separate sections of the statute.[43] The Court also pointed to "'unfair[ness]' and 'waste of judicial resources'" without further explanation.[44] This is likely a reference to the idea that the employer should have raised this issue before or at the trial instead of waiting until later. This resulted in the "unfairness" that the employee had her judgment taken away and a "waste of judicial resources" in having a full trial on the merits when none was actually necessary.[45]

35. FED. R. CIV. P. 12(b)(6).

36. *Id.* at 12(h)(2) ("A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.").

37. *E.g.*, Eberhardt v. Integrated Design & Constr., Inc., 167 F.3d 861, 870 (4th Cir. 1999) ("Essentially, [defendant] asserts a Rule 12(b)(6) motion for failure to state a claim. But there is no authority for such a motion to be brought after trial.").

38. *See Arbaugh*, 380 F.3d at 223-25 (discussing Fifth Circuit precedent and affirming the trial court's decision that the employee-numerosity requirement is jurisdictional).

39. Arbaugh v. Y & H Corp., No. Civ. A. 01-3376, 2003 WL 1797893, at *10, (E.D. La. Apr. 3, 2003), *aff'd*, 380 F.3d 219 (5th Cir. 2004), *rev'd*, 546 U.S. 500 (2006).

40. *Id.* at *1.

41. *Id.* at *10.

42. Arbaugh v. Y & H Corp., 546 U.S. 500, 513-14 (2006).

43. *Id.* at 515 ("[T]he [fifteen]-employee threshold appears in a separate provision that 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982))).

44. *Id.* (quoting Petition for a Writ of Certiorari app. at 47, *Arbaugh*, 546 U.S. 500 (No. 04-944)).

45. *See id.*

Finally, with no further reasoning than a statement that "the ball" should be left "in Congress' court,"[46] the Court laid down a bright-line rule.[47] The Court stated that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."[48] The Court did not give reasons for this broad holding beyond those already given for its narrower decision that the employee-numerosity requirement is not jurisdictional. Furthermore, it decided not to explain what it meant by the phrase "rank a statutory limitation on coverage as jurisdictional."[49] Nothing in the Court's statement of the rule, therefore, prevents the applicability of the same rule to the other limiting provision in Title VII's definition of "employer," the jurisdictional element permitting application of Title VII only to employers who are "engaged in an industry affecting commerce."[50] This application of the bright-line rule will prove to have far-reaching consequences for the extent of Congress's power to regulate under the Commerce Clause.[51]

B. *The Commerce Clause Jurisprudence*

The Commerce Clause gives Congress the power to regulate interstate commerce.[52] Although the entire history of the Supreme Court's Commerce Clause jurisprudence is far beyond the scope of this Article,[53] this Part briefly discusses three recent, relevant cases

---

46. *Id.*

47. *Id.* at 516.

48. *Id.*

49. *Id.*

50. 42 U.S.C. § 2000e(b) (2000). See *infra* Part III for a discussion of the importance of the application of the *Arbaugh* bright-line rule to the jurisdictional element of Title VII.

51. *See infra* Part III. Indeed, in the aftermath of *Arbaugh*, the lower federal courts have applied the bright-line rule in a variety of contexts. *See* Minard v. ITC Deltacom Commc'n, Inc., 447 F.3d 352 (5th Cir. 2006) (applying the rule to the FMLA); Partington v. Am. Int'l Specialty Lines Ins. Co., 443 F.3d 334 (4th Cir. 2006) (applying the rule to the Securities Act of 1933); Sanders v. United States, No. 06-354, 2006 WL 2735248, at *1 (D.D.C. Sept. 25, 2006) (applying the rule to the Taxpayer Bill of Rights).

52. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States.").

53. Any number of sources might provide the relevant background material. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 807-17 (3d ed. 2000) (describing interpretations of the Commerce Clause through three major epochs: pre-1887, 1887-1937, and 1937-1995).

that interpret the Commerce Clause and set out the boundaries within which Congress can regulate.[54]

In 1995, the Court in *United States v. Lopez* declared a federal statute unconstitutional on Commerce Clause grounds for the first time since 1936,[55] thus signaling to Congress an end of judicial permissiveness of legislative action under the Commerce Clause that had developed since the New Deal.[56] The case concerned a statute criminalizing gun possession near schools.[57] The Court drew a distinction between economic and noneconomic activity: economic activity that substantially affected interstate commerce was within Congress's commerce power, while noneconomic activity was not.[58] The Court then decided that gun possession, the activity regulated in the statute, is noneconomic, and thus could not be constitutionally regulated by Congress.[59]

Because the activity was noneconomic, the Court looked for other bases on which Congress might be found to have legitimately regulated gun possession, but found none.[60] The Court faulted Congress for two failures in its drafting of the provision. First, the statute did not contain a jurisdictional element that would allow a court to decide as each case arose whether the firearm possession at issue actually had an effect on interstate commerce.[61] Second, Congress had made no legislative findings that the type of gun possession regulated by the statute had a substantial effect on interstate

---

54. *See* Gonzales v. Raich, 545 U.S. 1 (2005); United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

55. Joseph D. Grano, *Teaching the Commerce Clause*, 78 B.U. L. REV. 1163, 1164 n.3 (1998) ("[F]or the first time in sixty years, the Supreme Court invalidated a law as exceeding Congress's commerce clause power."); Kramer, *supra* note 1, at 138 ("[F]or the first time in six decades the Court struck down a federal statute as exceeding the limits of the Commerce Clause."); *see also* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

56. Again, a full discussion of the depth and breadth of this permissiveness is beyond the scope of this Article. The interested reader might consult TRIBE, *supra* note 53, at 811-17 (discussing the major Commerce Clause cases from *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), until just before *Lopez*).

57. *Lopez*, 514 U.S. at 551 ("In the Gun-Free School Zones Act of 1990, Congress made it a federal offense 'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'" (quoting 18 U.S.C. § 922(q)(1)(A) (Supp. V 1988))).

58. *Id.* at 559-61. The Court stated that this distinction between economic and noneconomic activity was not new, but arose through an analysis of its prior cases, which established a "pattern" that was "clear." *Id.* at 560.

59. *Id.* at 567.

60. *Id.* at 564-68.

61. *Id.* at 561; *see also supra* note 23 and accompanying text (discussing jurisdictional elements).

commerce.[62] Thus, a noneconomic activity, without either evidence that it affects interstate commerce or a jurisdictional element ensuring that the only cases over which federal power will be exercised will be those involving interstate commerce, could not be validly regulated under the Commerce Clause.

United States v. Morrison involved a provision in the Violence Against Women Act (VAWA),[63] which established a federal cause of action for victims of gender-motivated violence.[64] The case reaffirmed and extended the principles espoused in *Lopez*. Although Congress passed the VAWA before the Court decided *Lopez*,[65] the Act was accompanied by findings that specifically established Congress's view that gender-motivated violence affects interstate commerce.[66] This evidence did not appease the Court, however. It again found that the activity Congress attempted to regulate was not economic in nature.[67] The Court also rejected the validity of Congress's findings because the reasoning employed could be used to show that nearly *any* activity has an effect on interstate commerce, thus putting every aspect of citizens' lives within the reach of congressional regulation.[68] Furthermore, the Court noted, as in *Lo-*

---

62. *Lopez*, 514 U.S. at 563 ("[T]o the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.").

63. 42 U.S.C. § 13,981 (2000), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

64. *Id.* § 13,981(c) ("A person . . . who commits a crime of violence motivated by gender and thus deprives another of the right [to be free from crimes of violence motivated by gender] shall be liable to the party injured . . . .").

65. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40,302, 108 Stat. 1796, 1941-42.

66. *Morrison*, 529 U.S. at 614 ("In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families."); *see, e.g.*, H.R. REP. NO. 103-711, at 385 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 1839, 1853 ("Congress has found that . . . crimes of violence motivated by gender have a substantial adverse effect on interstate commerce[ ] by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce[ ] by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products . . . .").

67. *Morrison*, 529 U.S. at 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.").

68. *Id.* at 615 ("Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. . . . Given these findings . . . the concern that we expressed in *Lopez* that Congress might use the Com-

pez, that there was no jurisdictional element to save the constitutionality of the statute.[69]

The Court's new Commerce Clause jurisprudence continued on this course for just five years. In 2005, the Court decided *Raich v. Gonzales* with a result contrary to those in *Lopez* and *Morrison*: The federal statute under attack was *not* struck down as representing an overreaching of the Commerce Clause power.[70] *Raich* dealt with the question of whether application of the Controlled Substances Act (CSA)[71] was a valid exercise of the commerce power.[72] Federal agents acting pursuant to the CSA seized and destroyed a California resident's marijuana plants.[73] The plants were grown for personal medical use, which was permitted by California state law.[74]

Despite the contrary outcome, *Raich* neither overruled the results reached nor repudiated the approach employed in *Morrison* and *Lopez*.[75] The decision relied first on the fact that there is an interstate market for marijuana, and thus growing the plants, even for personal use, was an economic activity. Second, it rested on the fact that the CSA was a comprehensive statute, regulating in-state possession as a mere incident of its larger regulation of controlled substances.[76] The majority opinion therefore did not subject the CSA to the kind of scrutiny employed by the Court in the earlier two cases. First, the concept of a "jurisdictional element" is not mentioned in the majority opinion. Second, discussion of Con-

---

merce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded."). The Court quoted VAWA's legislative history to show the objectionable reasoning. *Id.* (quoting H.R. REP. NO. 103-711, at 385).

69. *Morrison*, 529 U.S. at 613 (stating that VAWA "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce").

70. Gonzales v. Raich, 545 U.S. 1, 9 (2005).

71. 21 U.S.C. §§ 801-971 (2000).

72. *Raich*, 545 U.S. at 5 ("The question presented in this case is whether the [commerce] power . . . includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.").

73. *Id.* at 7.

74. *Id.*

75. *See* Alex Kreit, *Rights, Rules, and* Raich, 108 W. VA. L. REV. 705, 719 (2006) ("Although the *Raich* majority did not apply or mention *Lopez*'s test, it treated *Lopez* as established law and did not claim to overrule either *Lopez* or *Morrison*.").

76. *Raich*, 545 U.S. at 18 ("[R]espondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market."). The *Lopez* and *Morrison* opinions, by contrast, had found that gun possession near schools and gender-motivated violence were not economic activities. *See* United States v. Morrison, 529 U.S. 598, 613 (2000); United States v. Lopez, 514 U.S. 549, 561 (1995).

gress's findings regarding the effects of drug manufacturing and distribution were confined to a footnote[77] and deemed valid in just one sentence,[78] in sharp contrast to *Morrison*'s scrutiny of the mode of analysis of the congressional record.[79] Further, in response to the complaint that Congress did not make specific findings regarding intrastate activities involving marijuana, the Court stated that particularized findings were not necessary.[80]

The final outcome, in terms of being able to predict what will happen in the next Commerce Clause case to arise, is uncertain. The decisive factor in the recent cases appears to be the economic nature of the activity Congress seeks to regulate. However, while *Lopez*, *Morrison*, and *Raich* taken as a whole support this view, it has remained unclear whether this distinction will hold up, in no small part because of the apparent ideological divisions of the Court that decided these three cases. *Lopez* and *Morrison* were both decided by five-to-four vote, with the same arrangement of votes in each.[81] The majority in *Raich*, though, consisted of the four *Lopez* and *Morrison* dissenters along with one member of the majority from those cases.[82] It would thus be easy to characterize these decisions as the product of two groups of ideologues, or even political partisans,[83] with one group voting consistently to uphold

---

77. *See Raich*, 545 U.S. at 12-13 n.20.

78. *See id.* at 20 ("Findings in the introductory sections of the CSA explain why Congress deemed it appropriate to encompass local activities within the scope of the CSA.").

79. *See supra* notes 66-68 and accompanying text.

80. *Raich*, 545 U.S. at 21.

81. *See Morrison*, 529 U.S. at 600; *Lopez*, 514 U.S. at 550. The majority in each case was formed by Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia, and Thomas. Justices Souter, Breyer, Stevens, and Ginsburg dissented. This split of votes, furthermore, is the same as that displayed in a variety of important cases in recent years. *See, e.g.*, Rumsfeld v. Padilla, 542 U.S. 426, 429 (2004) ("enemy combatant" case); NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706 (2001) (definition of "supervisor" in the National Labor Relations Act); Texas v. Cobb, 532 U.S. 162 (2001) (right to counsel); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 358 (2001) (Section 5 and the Americans with Disabilities Act); Bush v. Gore, 531 U.S. 98 (2000) (presidential election of 2000).

82. *See Raich*, 545 U.S. at 3-4. Justice Kennedy switched sides. Justice Scalia also voted to uphold the statute, but concurred only in the judgment. *Id.* at 33 (Scalia, J., concurring) ("I agree with the Court's holding that the Controlled Substances Act (CSA) may validly be applied to respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use.").

83. For some, *Bush v. Gore* illustrated the partisan nature of that Court's members. *See, e.g.*, Christopher P. Banks, *The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment*, 36 AKRON L. REV. 425, 471 (2003) ("Therein lies the significance of *Bush* [*v. Gore*] as well, because the Court's selection of a Republican candidate insures that the controlling coalition will remain intact for years to come.");

congressional exercise of Commerce Clause power and the other group voting, wherever reasonably feasible, to restrict such exercise.[84] The question of where the Commerce Clause jurisprudence is going, particularly with the departure of two members of the Court that decided these three cases,[85] is thus very much up in the air.[86] Gleaning hints about the Court's stance on the commerce power from sources such as *Arbaugh*[87] may help clear the picture.

C. *Section 5 of the Fourteenth Amendment*

Congressional power to regulate small intrastate employers to promote its antidiscrimination ideals might not depend solely on the Commerce Clause. The Fourteenth Amendment guarantees "equal protection of the laws"[88] to all citizens and, in Section 5, gives Congress the "power to enforce, by appropriate legislation, the provisions" of the Amendment.[89] Thus, it is possible that Congress could act to prevent discrimination regardless of the effect on interstate commerce through the Section 5 power. This is particularly true because the Section 5 power is broader than the ability to simply restate the Amendment. That is, Congress may employ the Section 5 power to pass legislation prohibiting conduct that is not

---

David A. Strauss, Bush v. Gore*: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 737-38 (2001) ("The conclusion that emerges, in my view, is that several members of the Court—perhaps a majority—were determined to overturn any ruling of the Florida Supreme Court that was favorable to Vice President Gore, at least if that ruling significantly enhanced the Vice President's chances of winning the election.").

84. *See, e.g.*, David J. Barron, *Fighting Federalism with Federalism: If It's Not Just a Battle Between Federalists and Nationalists, What Is It?*, 74 FORDHAM L. REV. 2081, 2081 (2006) ("The four moderate-to-liberal Justices on what was the Rehnquist Court have countered the federalism revival at every turn. They even have indicated a desire to overturn aspects of it if they obtain a fifth vote."); Nelson Lund, *Fig Leaf Federalism and Tenth Amendment Exceptionalism*, 22 CONST. COMMENT. 11, 15 (2005) ("[J]ust as the federalist dissenters in *Garcia* refused to accept defeat, so the nationalist dissenters in these cases have vowed to continue a fight in which they expect eventually to prevail.").

85. Chief Justice Rehnquist passed away in September 2005 and Justice O'Connor retired in January 2006. Linda Greenhouse, *Chief Justice Rehnquist Dies at 80*, N.Y. TIMES, Sept. 4, 2005, at 1, *available at* 2005 WLNR 13934870 (Westlaw).

86. *See, e.g.*, Randy E. Barnett, *Restoring the Lost Constitution, Not the Constitution in Exile*, 75 FORDHAM L. REV. 669, 670 (2006) ("Until *United States v. Lopez* you could not argue the Commerce Clause; after *Gonzales v. Raich*, it is not clear you can argue the Commerce Clause anymore." (citation omitted)); Lund, *supra* note 84, at 15 ("The reach of *Lopez* and *Morrison may* turn out to be extremely narrow. That at least *appears to be* the implication of the 6-3 decision in *Gonzales v. Raich*, which *seems to* limit *Lopez* and *Morrison* . . . ." (emphases added) (citation omitted)).

87. Arbaugh v. Y & H Corp., 546 U.S. 500 (2000).

88. U.S. CONST. amend. XIV, § 1.

89. *Id.* § 5.

itself unconstitutional.[90] However, the Court has never permitted an interpretation of the Section 5 power that reaches private actors, and thus any power Congress has to regulate the private actors made subject to Title VII must come from the Commerce Clause.

While the intent of the drafters of the Fourteenth Amendment may have been to allow regulation of all activity, public or private, that violated the civil liberties of citizens,[91] the Supreme Court quickly established that such a broad reading of the Amendment would not carry the day. Seven years after the ratification of the Fourteenth Amendment, the Court held in *United States v. Cruikshank*[92] that the Amendment "adds nothing to the rights of one citizen as against another."[93] Rather, it protects individuals against violations of individual rights by the states only.[94] Four years later, the Court reiterated this view in *Virginia v. Rives*,[95] writing, "The provisions of the Fourteenth Amendment of the Constitution . . . have reference to State action exclusively, and not to any action of private individuals."[96]

While *Cruikshank* and *Rives* did not discuss Section 5 explicitly, two 1883 cases showed that the state-action principle applied to that section as well. First was *United States v. Harris*,[97] in which Justice Woods quoted extensively from *Cruikshank* and also cited *Rives* favorably.[98] The Court in *Harris* firmly stated that the statute could not be supported "by *any* clause in the Fourteenth Amendment," because it was directed solely at private activity.[99]

Finally came the *Civil Rights Cases*.[100] At stake was the first section of the Civil Rights Act of 1875, which mandated that citizens be given the same treatment at places like inns and theaters,

90. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 619 (2000) ("Section 5 is 'a positive grant of legislative power' that includes authority to 'prohibi[t] conduct which is not itself unconstitutional and [to] intrud[e] into "legislative spheres of autonomy previously reserved to the States."'" (citations omitted) (quoting first Katzenbach v. Morgan, 384 U.S. 641, 651 (1966); quoting second City of Boerne v. Flores, 521 U.S. 507, 518 (1997))).

91. *See* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1329-33 (1952).

92. United States v. Cruikshank, 92 U.S. 542 (1875).

93. *Id.* at 554.

94. *Id.*

95. Virginia v. Rives, 100 U.S. 313 (1879).

96. *Id.* at 318.

97. United States v. Harris, 106 U.S. 629 (1882).

98. *Id.* at 638-39.

99. *Id.* at 640 (emphasis added).

100. Civil Rights Cases, 109 U.S. 3 (1883).

regardless of race.[101] Congress had relied on the Fourteenth Amendment in passing this statute.[102] The Court, however, reiterated that the Fourteenth Amendment was effective only against state action.[103] Section 5 was dismissed as a possible ground on which Congress might rely to justify the constitutionality of the Civil Rights Act because Section 5 merely grants Congress the right "[t]o adopt appropriate legislation for correcting the effects of such prohibited *State law and State acts*, and thus to render them effectually null, void, and innocuous."[104] Thus Congress could not regulate the private owners of the inns and theaters under the Fourteenth Amendment.

In 1966, there was some hope that the Court might move to a broader reading of Section 5 after the Court decided *United States v. Guest*.[105] *Guest* discussed 18 U.S.C. § 241, which makes it illegal to conspire to "injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."[106] In deciding the case, the Court noticeably said nothing about Section 5.[107] However, a majority of the Justices did, in separate opinions, express their views as to the breadth of Section 5. Justice Clark, joined by two other Justices, wrote in his concurrence that "the specific language of [Section] 5 empowers the Congress to enact laws punishing all conspiracies—*with or without state action*—that interfere with Fourteenth Amendment rights."[108] Justice Brennan, also joined by two other Justices, used similar though slightly less bald language in his concurring and dissenting opinion.[109] Be-

---

101. *Id.* at 8-9.

102. *Id.* at 10. The Commerce Clause jurisprudence of that time had not yet developed to the pro-federal power heights it reached after the New Deal. *See* TRIBE, *supra* note 53, at 811-17.

103. *Civil Rights Cases*, 109 U.S. at 11 ("It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.").

104. *Id.* (emphasis added).

105. United States v. Guest, 383 U.S. 745 (1966).

106. 18 U.S.C. § 241 (2000).

107. *Guest*, 383 U.S. at 755 ("[N]othing said in this opinion goes to the question of what kinds of other and broader legislation Congress might constitutionally enact under [Section] 5 of the Fourteenth Amendment to implement that Clause . . . .").

108. *Id.* at 762 (Clark, J., concurring) (emphasis added).

109. *Id.* at 782 (Brennan, J., concurring in part and dissenting in part) ("[Section] 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that *punishment of private conspiracies* interfering with the exercise of such a right is necessary to its full protection." (emphasis added)).

cause there was no overlap in the Justices joining the Clark and Brennan opinions, six Justices appeared to support the idea that Section 5 could be used to regulate private activity.[110]

However, neither that Court nor any future Court had declared those views to be law by 2000, when *Morrison* was decided. The five-Justice majority in *Morrison* favorably cited *Harris* and the *Civil Rights Cases*[111] while dismissing the opinions of the six Justices in *Guest* as mere dicta, stating, with an air of hauteur, that "[t]his is simply not the way that reasoned constitutional adjudication proceeds."[112] Thus, the majority not only held that the civil rights remedy of VAWA was not a proper exercise of the Commerce Clause, but also that it could not be upheld under Section 5[113] because it aimed to regulate private activity only, and in so doing, punished only private actors.[114] Thus, Section 5 power can only be used to reach state actors.

The language of *Regents of the University of California v. Bakke* stating that Title VII was passed pursuant to both Section 5 and the Commerce Clause[115] is not to the contrary. The definition of "employer" does not exclude state governments from Title VII coverage. The states, however, have sovereign immunity unless that immunity is validly abrogated by Congress. While Congress cannot validly abrogate the states' sovereign immunity through legislation under the Commerce Clause, it can do so through its Section 5 power.[116] Thus, both the commerce power and Section 5 were needed to pass Title VII: the commerce power was needed because the Section 5 power cannot reach private conduct, and the Section 5 power was needed because the commerce power cannot be used to abrogate state sovereign immunity.

---

110. *See also id.* at 782 & n.6 (pointing out that a majority is of the opinion that the Section 5 power is not limited to state action).

111. United States v. Morrison, 529 U.S. 598, 621-22 (2000).

112. *Id.* at 624.

113. *Id.* at 626 ("[VAWA] is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.").

114. *Id.* at 627 ("Congress' power under [Section] 5 does not extend to the enactment of [VAWA].").

115. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 367 (1978) ("Title VII was enacted pursuant to Congress' power under the Commerce Clause and [Section] 5 of the Fourteenth Amendment.").

116. *E.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001) ("Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I. . . . Congress may[, however,] subject nonconsenting States to suit in federal court when it does so pursuant to a valid exercise of its [Section] 5 power." (citations omitted)).

While the Court has divided over Section 5 since *Morrison*, the passel of later cases have involved only the question of whether Congress could properly abrogate states' sovereign immunity with Section 5 antidiscrimination legislation.[117] These cases have not involved private employers and, thus, even the decisions that upheld the use of Section 5 as a basis for civil rights legislation[118] did not affect the holding of *Morrison* and the earlier cases that the Court in *Morrison* relied on. *Morrison*, then, appears to have the last word as to whether Section 5 can be used to regulate private activity; with the answer being—as demonstrated above—no.[119]

II. Congress Has the Power to Regulate Small Employers

This Part argues that the Court's decision in *Arbaugh* assumes that Congress has the power to regulate employers regardless of how many employees they have. This conclusion proceeds as a logical conclusion of principles of American government regarding judicial power to entertain cases and congressional power to legislate. The key to the argument will be demonstrating the link between Congress's substantive legislative jurisdiction and the federal courts' judicial jurisdiction.[120]

117. *See id.* (holding that Title I of the ADA did not validly abrogate state sovereign immunity); *see also* Tennessee v. Lane, 541 U.S. 509, 533-34 (2004) (stating that Title II of the ADA validly abrogated state sovereign immunity); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 734 (2003) (stating that the FMLA validly abrogated state sovereign immunity).

118. *See Lane*, 541 U.S. 509; *Hibbs*, 538 U.S. 721.

119. *See supra* notes 111-114 and accompanying text.

120. The link between the power of these two bodies has been noted by courts before, though in less express terms than proposed here. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996) ("[T]he Indian Commerce Clause does not grant Congress [the power in question], and therefore [the statute] cannot grant jurisdiction . . . ."); Lujan v. Defenders of Wildlife, 504 U.S. 555, 571-78 (1992) (dismissing a suit on congressionally created generalized grievance for lack of Article III standing); Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 491-97 (1983) (holding that because Congress passed valid legislation pursuant to its foreign commerce power, it could grant jurisdiction over those cases); Muskrat v. United States, 219 U.S. 346, 351 (1911) ("[T]he jurisdiction of the court to entertain the proceeding . . . depends upon whether the jurisdiction conferred is within the power of Congress . . . ."); Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 823 (1824) ("[W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause . . . .").

Congress is a body of limited legislative jurisdiction, its power to pass laws being constrained by Article I of the Constitution.[121] Most relevant here is Congress's power to create the lower federal courts.[122] Also explicit is Congress's right to determine the subject-matter jurisdiction of the lower federal courts by granting jurisdiction over certain classes of cases.[123] However, Congress cannot exercise the power to grant jurisdiction over a class of cases unless it does so pursuant to one of its enumerated powers, such as the Commerce Clause.[124] In other words, if Congress has no constitutional

121. *See* U.S. CONST. art. I, § 8. Congress's power has been expanded beyond its original bounds by some of the amendments to the Constitution, notably Section 5 of the Fourteenth Amendment.

122. *Id.* art. I, § 8, cl. 9.

123. *E.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441, 448 (1850) ("Congress, having the power to establish the courts, must define their respective jurisdictions.").

124. This is not an uncontroversial assertion. There seems, in fact, to be some understanding that it is not true at all. For instance, a number of courts have held that jurisdictional elements do not impact the subject-matter jurisdiction of the federal courts. *See, e.g.*, United States v. Martin, 147 F.3d 529, 531-32 (7th Cir. 1998) ("[T]he 'jurisdictional element' of the statute . . . is 'jurisdictional' only in the shorthand sense that without that nexus, there can be no federal crime under the bombing statute. It is not jurisdictional in the sense that it affects a court's subject matter jurisdiction." (citation omitted)). Further, it might be argued that supplemental jurisdiction, see 28 U.S.C. § 1367 (2000), cuts against my position on the link between federal jurisdiction and legislative power because it permits federal courts to hear state cases over which Congress would have no power so long as they are sufficiently related to the federal claims at issue.

Without attempting to fully resolve the argument here, I note that it seems rather inconsistent to impose federalism limitations on Congress alone. If the brand of federalism created in the Constitution is meant to preserve the power of the states as the primary sources of power and authority over Americans, then permitting federal courts to exercise power where Congress cannot would seem to undercut those federalism ideals. Professor Laura Fitzgerald criticized a similar problem in the Supreme Court's jurisprudence: its tendency to give lip service to the idea that jurisdictional issues must be resolved before merits questions while actually putting the merits issues first. This is problematic because the Constitution grants only limited powers to the federal government. Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1273 (2001) ("The Court's merits-first jurisdictional tradition . . . collides with some of the Constitution's most basic separation of powers values. At the heart of these is the principle that all federal power is profoundly limited: that the Constitution's three governing institutions may use power only if and when affirmatively authorized to do so by that power's *source*."). *Erie Railroad, Co. v. Tompkins* might also provide support for this understanding. *See* Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79, 117 (1993) (noting that the Supreme Court justified *Erie* constitutionally by "importing into Article III the Article I limits on congressional authority" (citing Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938))).

There has apparently been little judicial or scholarly attention paid to this particular area of federal governmental structure. Judith Resnik has noted that, while commentary has focused on the issue of whether Congress can act as a "predator"

power to regulate in a certain area, then it has no constitutional power to grant the federal courts jurisdiction over cases in that area.

Further, just as Congress has limited legislative jurisdiction, it is a commonplace of the American judicial system that the federal courts have only limited subject-matter jurisdiction.[125] Article III of the Constitution lays out the only matters over which the federal courts may exercise jurisdiction.[126] However, Article III is a ceiling on federal court jurisdiction, not a floor. That is, it sets the maximum power that Congress can grant to the courts.[127] Thus, if Congress has not granted jurisdiction over a class of cases, then the federal courts have no right to exercise jurisdiction over those cases. This conclusion can be restated in terms similar to the conclusion reached above: If Congress has no power to grant jurisdiction over a class of cases,[128] then the federal courts have no power to exercise jurisdiction over those cases.

To recap, if the Constitution does not grant Congress the power to regulate in a certain area, then Congress cannot grant jurisdiction to the federal courts over cases in that area. Further, if Congress cannot grant jurisdiction over cases in a certain area, then the federal courts have no power to exercise jurisdiction over cases in that area. Combining these two statements results in the following proposition: If Congress has no power to regulate in an area, then the courts will not be able to exercise judicial jurisdiction over cases in that area. This conclusion can also be expressed in a positive fashion. That is, if the federal courts *did* have the power to

---

(jurisdiction-stripping), recent Supreme Court cases have focused on whether Congress had conveyed too much authority to the federal courts. Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2592-93 (1998). The cases Resnik cites, furthermore, are cases in which the Court held that Congress had violated Article III, not Article I. *See* Raines v. Byrd, 521 U.S. 811 (1997) (Article III standing); Plaut v. Spendthrift Farm, 514 U.S. 211 (1995) (holding that courts cannot be forced to reopen final judgments); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (Article III standing).

125. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994).

126. U.S. CONST. art. III, § 2, cl. 1.

127. *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 823 (1824) ("[W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause . . . .").

128. This is essentially equivalent to "if Congress has not granted jurisdiction." After all, if Congress has no power to grant jurisdiction, then it cannot legitimately grant jurisdiction. Rephrased in the same terms as used in the text, Congress cannot put itself in a situation where it *has granted* jurisdiction.

exercise jurisdiction over cases in some area, then Congress must have the power to regulate cases in that area.[129]

Now recall *Arbaugh*'s holding that the employee-numerosity requirement of Title VII does not limit the jurisdiction of the federal courts.[130] In other words, the federal courts have the power to exercise jurisdiction over Title VII cases involving employers with fewer than fifteen employees.[131] Thus, applying the (positive) conclusion reached above, because the *federal courts* have the power to exercise jurisdiction over those cases,[132] *Congress* must have the power to regulate employers with fewer than fifteen employees.[133]

---

129. This statement is logically equivalent to the one established immediately above. That is, if one statement is true, then so is the other; and if one statement is false, then so is the other. If the equivalence of the two statements is not immediately obvious, consider the following nonlegal example: the statement, "If it is *raining*, then it is *cloudy*" is logically equivalent to the statement, "If it is *not cloudy*, then it is *not raining*." If the first statement is true (that is, if it only rains when there are clouds), then so is the second statement (for there can be no rain without clouds). If the first statement is false (if there can be rain without clouds), then the second is similarly false (because we cannot deduce a lack of rain from the absence of clouds).

130. Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006); *see supra* text accompanying notes 42-50.

131. Note that this does *not* mean that a federal court has the discretion not to dismiss a case against a small employer once it is presented with evidence that the requirements of Title VII are not met. The statute still states that a small employer cannot be held liable, and courts are bound to apply that statute faithfully. *See Arbaugh*, 546 U.S. at 501 (discussing the distinction between merits and jurisdiction).

132. *See infra* text accompanying note 135.

133. Deriving this conclusion about Congress's constitutional power to legislate from a case in which no constitutional issue is raised might seem to offend the doctrine of constitutional avoidance, that if the Court could decide the question without reference to the Constitution, then it would. However, this objection misunderstands the nature of the doctrine of constitutional avoidance. The doctrine speaks not to a court addressing constitutional issues in general, but merely to the question of choosing between multiple interpretations of a statute, some of which raise issues of constitutionality. Justice Frankfurter described the doctrine as "the principle of constitutional adjudication which makes it decisive in the choice of fair alternatives that one construction may raise serious constitutional questions avoided by another." United States v. Rumely, 345 U.S. 41, 45 (1953); *see also* Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an act of . . . Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). In other words, if a court has two possible interpretations of a statute before it and one would raise questions about the constitutionality of the statute while the other would not, then the court should choose the interpretation that does not raise the constitutional issue. The *Arbaugh* Court had no such choice in front of it. *Arbaugh*, 546 U.S. at 516. It could either decide that the employee-numerosity requirement was jurisdictional or was not. *Id.* The Court did not consider whether either interpretation would raise issues of the constitutionality of the statute. *Id.* at 510-16.

Furthermore, the idea that the Court is reluctant to speak on constitutional issues may actually support my argument. The core idea presented here is that the Court

III. Congress's Power to Regulate Any Activity

This Part extends the conclusion reached in Part II to the jurisdictional element of Title VII. It concludes, using the same reasoning that was applied in Part II, that as a logical consequence of the rule in *Arbaugh*, Congress has the power to regulate employers even if they have no link to interstate commerce. This conclusion, after *Lopez* and *Morrison* (and even after *Raich*), should be rather surprising. Part IV will go on to explore potential explanations rooted in the existing Commerce Clause precedent for this apparent broad understanding of Congress's commerce power.

A. *Is Congress's Power to Regulate Small Employers Surprising?*

The conclusion reached in Part II, that the decision in *Arbaugh* implicitly stated that Congress has the power to regulate employers regardless of their size, begs the question: Has anything new been said about the scope of federal legislative power? Perhaps it was always understood that Congress could regulate regardless of the size of the employer. After all, it is likely that the employee-numerosity requirement was never intended to express Congress's *inability* to regulate smaller employers, but rather Congress's lack of *willingness* to do so. Only two members of Congress are on record as supporting the view that the employee-numerosity requirement is in place to establish the constitutionality of Title VII, and neither of those members supported the statute.[134] Further, if Congress cannot regulate employers smaller than a certain size, then there

---

decided a significant constitutional issue without explicitly mentioning it. If it is accepted that the Court has an institutional norm of avoiding mentioning constitutional issues, then perhaps the idea that the Court decided a constitutional issue without saying so becomes more palatable. The argument, however, does not depend on whether the Court knew or did not know what it was doing. If one believes that the Court understood the implications of the decision pointed out here, then *Arbaugh* can be read as illustrating the Court's conscious understanding of the nature of employment and the breadth of the Commerce Clause. If one believes, on the other hand, that the Court did not realize the implications explained here, then *Arbaugh* can be read as illustrating the Court's unconscious understanding of the Commerce Clause. That is, perhaps the Court has such a deep, innate understanding of employment as an economic activity and Congress's very broad power to regulate economic activity that the issues raised here do not even occur to the Justices.

134. H.R. Rep. No. 88-914, at 108 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2475 (statements of the separate minority views of the Honorable Richard H. Poff and the Honorable William Cramer) ("[The] theory is that the quantum of employees is a rational yardstick by which the interstate commerce concept can be measured. Out of thin air, the bill pulls a figure and determines that 25 employees is the magic number—not 26 or 24 but 25.").

appears to be no justification for lowering that limit, as Congress did in 1972, when it changed the requirement from twenty-five employees to its current fifteen.[135] Finally, if the employee-numerosity requirement exists for constitutional purposes, then the purpose of the jurisdictional element, limiting the coverage of the statute to employers "engaged in an industry affecting commerce,"[136] is not clear. If the size of the employer is meant to serve as a proxy for the effect on interstate commerce, then there is no reason to make the affecting-commerce requirement explicit as well.

All of that said, after *Morrison* and *Lopez*, a reasonable fear that Title VII might be found unconstitutional did in fact exist.[137] This would indicate that Congress's power to regulate even employers who satisfied both the employee-numerosity requirement *and* the jurisdictional element was in doubt. Thus, the revelation that the Court implicitly understands that Congress can regulate employers irrespective of their size may have significance in and of itself.

More momentous, however, is that the same argument used to show that the employee-numerosity requirement is not part of a constitutional limitation on Congress can be applied to the jurisdictional element of Title VII. The result will be analogous: Congress can regulate employers even if those employers have *no effect* on interstate commerce. A major task will then be to reconcile this broader and likely more surprising conclusion with the Court's still-controlling[138] position on the Commerce Clause taken in *Lopez* and *Morrison*.

B. *The Jurisdictional Element*

To reach the ultimate result that Congress can regulate employers even without a connection to interstate commerce, a potential explanation for Part II's conclusion that Congress can regulate small employers must be fleshed out.

135. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(2), 86 Stat. 103, 103. It might be argued that the lower limit is consistent with the idea of the employee-numerosity requirement as a proxy for an effect on interstate commerce. However, this argument will become less viable as shipping and cross-border communication become cheaper and more efficient. It is no longer true that only the biggest businesses have an effect on interstate commerce.

136. 42 U.S.C. § 2000e(b) (2000).

137. *See* Bagenstos, *supra* note 3; Boudreaux, *supra* note 3; Law, *supra* note 3; Leonard, *supra* note 3; Oleske, *supra* note 3; Rubenfeld, *supra* note 3; Virelli & Leibowitz, *supra* note 3.

138. *See, e.g.*, Kreit, *supra* note 75.

Congress relied on two powers to enact its civil rights legislation: Section 5 of the Fourteenth Amendment and the Commerce Clause.[139] It is rather easy, however, to dismiss the Section 5 power as a possible source of congressional regulation of small employers. *Morrison* makes clear that Congress can only regulate *state* action under the Fourteenth Amendment, including Section 5.[140] Thus, it is highly unlikely that private employers, regardless of size or connection to interstate commerce, can be regulated under Section 5.[141]

This leaves the Commerce Clause as the only source of power under which Congress can be said to have regulatory authority over small employers. After *Lopez* and *Morrison*, however, with their nondeferential scrutiny of congressional action under the Commerce Clause, it may be surprising to find that Congress retains the power to regulate very small local businesses that may not have an obvious connection to interstate commerce.

The jurisdictional element of Title VII may provide reconciliation of Congress's ability to regulate small employers with the Court's stance in *Lopez* and *Morrison*. Recall that the definition of "employer" contains not just the employee-numerosity requirement,[142] but also demands that the putative employer be "engaged in an industry affecting commerce."[143] This appears to be precisely the type of jurisdictional element that the *Lopez* and *Morrison* opinions decried the absence of in the statutes challenged in those cases.[144] The presence of the jurisdictional element in Title VII indicates that perhaps the Court would not be concerned about the number of employees an employer has in a potential constitutional

---

139. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 367 (1978) ("Title VII was enacted pursuant to Congress' power under the Commerce Clause and [Section] 5 of the Fourteenth Amendment."). Recall that the Section 5 power serves to justify regulating state government employers. *See supra* text accompanying notes 115-116.

140. *See supra* text accompanying notes 111-119.

141. *See supra* Part I.C (describing the Supreme Court's Section 5 jurisprudence with respect to Congress's ability to regulate private activity under the Fourteenth Amendment).

142. *See* 42 U.S.C. § 2000e(a) (2000) ("The term 'employer' means a person . . . who has fifteen or more employees . . . .").

143. *Id.*

144. United States v. Morrison, 529 U.S. 598, 613 (2000) ("Like the [statute] at issue in *Lopez*, [VAWA] contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce."); United States v. Lopez, 514 U.S. 549, 561 (1995) ("[The statute] contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.").

challenge to the statute.[145] So long as that employer has the required nexus to interstate commerce, it will fall in *Lopez* and *Morrison*'s third category of realms Congress can validly regulate under the Commerce Clause: "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."[146] In other words, the jurisdictional element would serve precisely the purpose such elements are supposed to serve: It would ensure that any adjudication made by a federal court in a Title VII case has the requisite connection to interstate commerce such that exercise of federal power is legitimate under the Constitution.[147]

The problem with using the jurisdictional element of Title VII to square Congress's power to regulate small employers with *Lopez* and *Morrison* finds its foundation in the *Arbaugh* opinion. The Court used *Arbaugh* not merely to declare that the employee-numerosity requirement in Title VII did not describe a limitation on the subject-matter jurisdiction of the federal courts, but also as a vehicle to proclaim a broad bright-line rule:[148] "[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."[149] Taking this rule at face value, the jurisdictional element of Title VII, limiting the statute's effect to businesses "engaged in an industry affecting commerce,"[150] cannot be said to limit the jurisdiction of the federal courts.[151] Nowhere does Title VII say that the federal courts shall only have jurisdiction over cases in which the employer is engaged in an industry affecting commerce. Rather, it merely states that an employer is someone who, among other requirements, has the requisite effect on interstate commerce. The jurisdictional element modifies only who is affected by the statute, not the courts' power to adjudicate. Thus, the jurisdictional element in Title VII does not satisfy the bright-line rule set out in

145. *See also* text accompanying notes 134-136.

146. *Lopez*, 514 U.S. at 558-59; *see also Morrison*, 529 U.S. at 609 (quoting *Lopez*, 514 U.S. at 558-59).

147. *See also supra* note 23.

148. Arbaugh v. Y & H Corp., 546 U.S. 500, 502 (2006).

149. *Id.*

150. 42 U.S.C. § 2000e(a) (2000).

151. That a jurisdictional element might not limit the jurisdiction of a court seems counterintuitive, but it must be remembered that there are two separate institutions in play, each with its own set of jurisdictional issues. Jurisdictional elements ensure that statutes are validly applied only to those parties who are within *Congress's* legislative jurisdiction. The judicial jurisdiction of the federal courts is not necessarily affected by these jurisdictional elements, as *Arbaugh* made clear.

Arbaugh and therefore does not limit the jurisdiction of the federal courts.[152]

Even if straightforward application of *Arbaugh*'s bright-line rule did not settle the matter, the Court's reasoning in *Arbaugh* can also be applied to the jurisdictional element. Indeed, each of the two arguments the Court made in favor of declaring the employee-numerosity requirement to be nonjurisdictional can be made with the same force for the jurisdictional element. First, the jurisdictional element and the jurisdiction-granting provision appear in separate sections of the statute, just as the employee-numerosity requirement is separate from the jurisdiction-granting provision.[153] This would imply that Congress did not intend the jurisdictional element to limit the jurisdiction of the courts. If Congress did so intend, why would it not draft the statute so that the jurisdictional grant itself contained the limitation? Second, if the jurisdictional element did limit the federal courts' jurisdiction, a defendant might raise the issue that it was not engaged in an industry affecting commerce until sometime *after* entry of judgment for the plaintiff, thus effecting the same "unfairness" and "waste of judicial resources" cited by the Court with respect to the employee-numerosity requirement.[154] Thus, whether the bright-line rule is applied directly to the jurisdictional element or whether the reasoning of the Court in *Arbaugh* is invoked, the same result is reached: The jurisdictional element, requiring that employers be "engaged in an industry affecting commerce,"[155] does not actually limit the jurisdiction of the federal courts.

---

152. Here the terminology may begin to get a little confusing. After all, how could a "jurisdictional element" not limit the *jurisdiction* of the federal courts? One must recall that we are speaking of the jurisdiction of two separate bodies: the legislative jurisdiction of Congress and the judicial jurisdiction (or subject-matter jurisdiction) of the federal courts. Congress includes a jurisdictional element in a statute to ensure that the only subjects of that statute are those that Congress may validly regulate. In other words, the word "jurisdictional" in "jurisdictional element" refers to *Congress's* legislative jurisdiction, its power to regulate, not to the courts' judicial jurisdiction.

153. *See Arbaugh*, 546 U.S. at 515 ("[T]he 15-employee threshold appears in a separate provision that 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982))).

154. *Id.*

155. 42 U.S.C. § 2000e(b).

C. *Congress Can Regulate Employers with No Effect on Interstate Commerce*

The jurisdictional element of Title VII has thus been shown to be analogous to the employee-numerosity requirement in that neither can be said to limit the jurisdiction of the federal courts. Therefore, the jurisdictional element is susceptible to the same argument as that made regarding the employee-numerosity requirement in Part II. That is, it can be shown that just as Congress can regulate employers regardless of whether they meet the fifteen-employee threshold, so Congress can regulate employers regardless of whether they meet the "affecting commerce" standard. The argument proceeds, in much briefer form than was used in Part II, in the following way.

First, if Congress has no power to regulate employers not engaged in an industry with an effect on interstate commerce, then it has no power to grant the federal courts jurisdiction over cases involving such employers.[156] Second, if Congress has no power to grant jurisdiction over cases involving employers not engaged in an industry with an effect on interstate commerce, then the federal courts have no power to exercise jurisdiction over those cases.[157]

Thus, combining those two statements, if Congress has no power to regulate employers not engaged in an industry with an effect on interstate commerce, then the federal courts have no power to exercise jurisdiction over such cases.[158] But, as before, this is equivalent to the positive statement that if the federal courts *do* have the power to exercise jurisdiction over cases involving employers not engaged in an industry with an effect on interstate commerce, then Congress *must have* the power to regulate such employers.[159]

Finally, the Court in *Arbaugh* said that a limiting element in a statute must be clearly labeled as jurisdictional in order to limit the jurisdiction of the federal courts.[160] The jurisdictional element in Title VII is not expressly labeled as jurisdictional. Therefore, the jurisdictional element does not pass the bright-line test, and thus does not limit the jurisdiction of the federal courts. The denouement is that since federal courts do have power over these purely

---

156. *See also supra* notes 121-128 and accompanying text.
157. *See also supra* notes 130-133 and accompanying text.
158. *See also supra* text accompanying notes 134-135.
159. *See also supra* notes 135-140 and accompanying text.
160. Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006).

intrastate employers, Congress must have constitutional authority to regulate them.

To reiterate, the argument presented above is *precisely* the same as the argument presented in Part II. The only difference is the subject of the argument: in Part II, the subject was the employee-numerosity requirement; here, the subject was the jurisdictional element. Thus, Congress has the power to regulate employers even if they are not engaged in an industry with an effect on interstate commerce.

IV. Explanations for the Broad Understanding of Congressional Power

Having established that *Arbaugh*'s bright-line rule implies that Congress can regulate employers regardless of their connection to interstate commerce, the task is to square that with the existing Commerce Clause precedent; specifically, *Lopez*, *Morrison*, and *Raich*. I first argue in this Part that the distinctions used by Justice Stevens in *Raich* to show why the CSA should not fall victim to the same reasoning as the Gun-Free School Zone Act (in *Lopez*) or VAWA's civil remedy (in *Morrison*) do not apply to Title VII. I then argue that the understanding of *Arbaugh* is really less about broad federal power to regulate than it is a separation of powers question: Which branch is to determine what is economic and what is not?[161] If *Arbaugh* means what it logically implies, then the Court has essentially ceded the authority to determine what activities are economic back to Congress.

A. *Using* Raich *to Explain Congress's Power to Regulate Purely Intrastate Employers*

A surprising conclusion has been reached regarding Congress's power to regulate. The earlier attempt to reconcile the conclusion that Congress can regulate small employers by relying on the jurisdictional element ran into the problem that the phrasing of the ju-

161. The links between the "federalism revolution" as represented by *Lopez* and *Morrison* and separation of powers questions have been explored by a few writers. *See, e.g.*, Vicki C. Jackson, *Federalism and the Court: Congress as the Audience?*, 574 Annals Am. Acad. Pol. & Soc. Sci. 145 (2001); Melissa Irr, Note, United States v. Morrison*: An Analysis of the Diminished Effect of Congressional Findings in Commerce Clause Jurisprudence and a Criticism of the Abandonment of the Rational Basis Test*, 62 U. Pitt. L. Rev. 815 (2001). *But see* M. Elizabeth Magill, *The Revolution that Wasn't*, 99 Nw. U. L. Rev. 47 (2004) (arguing that there was no separation of powers revolution).

risdictional element combined with the bright-line rule in *Arbaugh* demonstrate that the jurisdictional element is not actually necessary. However, Title VII's constitutionality apparently does not rely on an employer's effect on interstate commerce any more than it relies on the size of the employer. While this outcome seems contrary to *Lopez* and *Morrison*, it might still be reconciled with the recent Commerce Clause cases if the distinctions between *Raich*, on the one hand, and *Morrison* and *Lopez*, on the other, are drawn out.

The first potential explanation regarding how Congress might have the constitutional authority to regulate employers of any size regardless of their lack of nexus to interstate commerce lies in the *Raich* decision. *Raich* distinguished the CSA from the statutes in question in *Lopez* and *Morrison* in two major ways. First, the CSA regulates activity that is "quintessentially economic,"[162] in contrast to the noneconomic activity regulated in *Lopez* and *Morrison*.[163] Second, the CSA was characterized as a comprehensive statute regulating interstate and international commerce, of which only a small but essential portion was challenged; however, *Lopez* and *Morrison* dealt with discrete regulations of specific activity.[164]

The first distinction provides a possible parallel between Title VII and the CSA. It seems very likely that regulation of employment, as undertaken by Title VII, is regulation of an economic activity.[165] After all, even if a firm does not engage in activity that

162. Gonzales v. Raich, 545 U.S. 1, 25 (2005).

163. *See* United States v. Morrison, 529 U.S. 598, 613 (2000) ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."); United States v. Lopez, 514 U.S. 549, 561 (1995) ("[The statute in question] is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.").

164. *Raich*, 545 U.S. at 24-25 ("[T]he CSA . . . was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances.' . . . [The classification of marijuana as a Schedule I drug], unlike the discrete prohibition established by the Gun-Free School Zones Act of 1990, was merely one of many 'essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" (quoting *Lopez*, 514 U.S. at 561) (alteration in original)).

165. Certainly employment would fall under the *Raich* definition of "economic": "'production, distribution, and consumption of commodities.'" *Raich*, 545 U.S. at 25-26 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)); *see also* Adams v. Suozzi, 433 F.3d 220, 226 (2d Cir. 2005) ("[N]o extended discussion is required to show that employment agreements . . . 'evidence[ ] a transaction involving commerce.'" (quoting 9 U.S.C. § 2 (2000)) (citation omitted) (alteration in original)).

While Justice O'Connor takes issue with the majority's definition, stating that "[t]he [majority's] definition of economic activity is breathtaking," *Raich*, 545 U.S. at 49

might be referred to as "economic" or "commercial" (for example, a nonprofit think tank), an employee working at such firm *is* engaged in the production of wages for herself. Even a court committed to closely scrutinizing Congress's determinations of whether an activity is fairly regulable under the Commerce Clause would not be likely to challenge that assertion.[166]

Under the fair assumption that the Court understands employment to be an economic activity, *Arbaugh* may be merely consistent with *Raich*, adding nothing new to the boundaries of Congress's legislative power. That is, it might be said that *Raich* itself already established the principle that legislation under the Commerce Clause may be constitutional even without a jurisdictional element or any other limiting principle, so long as the regulated activity is clearly economic in nature.[167] On this view, *Arbaugh* simply reaffirms the *Raich* principle that Congress does not need limiting elements, such as an employee-numerosity requirement or a jurisdictional element, to regulate under Title VII because employment is an economic activity.

The difficulty with that argument is that *Raich* did not merely rely on the economic nature of growing marijuana for its distinction from *Lopez* and *Morrison*, but it also relied on the comprehensiveness of the CSA.[168] The CSA regulates intrastate activity merely as a necessary consequence of its larger regulation of enormous

---

(O'Connor, J., dissenting), she shies away from actually providing her own definition, just as neither *Lopez* nor *Morrison* provided a definition. The closest Justice O'Connor comes to a definition is the statement that "economic activity usually relates directly to commercial activity." *Id.* at 50. This achieves nothing more than a substitution of the undefined word "commercial" for the undefined word "economic." *See* Carter v. Carter Coal Co., 298 U.S. 238, 297-98 (1936) ("What is commerce? The term, as this court many times has said, is one of extensive import. No all-embracing definition has ever been formulated.").

166. *But see* Allan Ides, *Economic Activity as a Proxy for Federalism: Intuition and Reason in* United States v. Morrison, 18 CONST. COMMENT. 563, 567-74 (2001) (discussing a variety of definitions of "economic activity" that the Court might be using and noting that the Court did not, in either *Morrison* or *Lopez*, define what it meant by "economic activity").

167. *See supra* notes 77-80 and accompanying text (describing the Court's lack of concern with both jurisdictional elements and legislative history in finding an effect on interstate commerce).

168. *Raich*, 545 U.S. at 22 ("Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States.' That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme." (quoting U.S. CONST. art. I, § 8)).

amounts of interstate and international activity.[169] Title VII, however, is arguably not the kind of comprehensive regulation of commerce represented by the CSA.[170] It is, rather, a statute with one aim: to prohibit discrimination in employment based on certain verboten categories.[171] It is thus in that regard more like *Morrison*'s disputed VAWA provision, the only aim of which was to provide a civil rights remedy to victims of gender-motivated violence, and *Lopez*'s Gun-Free School Zones Act, which, in the words of the *Raich* majority, was a "brief, single-subject statute making it a crime for an individual to possess a gun in a school zone,"[172] than it is like the CSA, which the Court in *Raich* described as "a lengthy and detailed statute creating a comprehensive framework for regulating . . . controlled substances."[173]

If Title VII is viewed as a statute with a single aim, then *Arbaugh* is no mere corollary of *Raich*. The *Raich* majority relied

---

169. *See id.* at 23 ("[W]e have often reiterated that '[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class.'" (quoting Perez v. United States, 402 U.S. 146, 154 (1971))).

170. Nor, for that matter, is the ADA, the ADEA, or the FMLA. *See supra* note 22.

171. 42 U.S.C. § 2000e-2(a)(1) (2000) ("It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .").

172. *Raich*, 545 U.S. at 23.

173. *Id.* at 24. It might be fairly argued that Title VII is not a single-subject statute but is rather a piece of the comprehensive Civil Rights Act of 1964 that covers various topics. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. 1, 78 Stat. 241, 241-42 (amending 42 U.S.C. § 1971) (voting rights); Civil Rights Act of 1964 tit. 2, 78 Stat. at 243-46 (codified at 42 U.S.C. §§ 2000a to a-6) (discrimination in places of public accommodation); Civil Rights Act of 1964 tit. 4, 78 Stat. at 246-49 (codified at 42 U.S.C. §§ 2000c to c-9) (desegregation of public education); Civil Rights Act of 1964 tit. 6, 78 Stat. at 252-53 (codified at 42 U.S.C. §§ 2000d to d-4a) (discrimination in federally assisted programs). Justice O'Connor made an analogous argument in her dissent in *Raich*, as she believed that the majority should have focused on the activity actually regulated rather than on the CSA as a whole. *Raich*, 545 U.S. at 48 (O'Connor, J., dissenting) ("To ascertain whether Congress' encroachment is constitutionally justified in this case, then, I would focus here on the personal cultivation, possession, and use of marijuana for medicinal purposes."). If Title VII is in fact seen as more analogous to the CSA than to the statutes in *Morrison* and *Lopez*, then the outcome of *Arbaugh* pointed out in this Article is merely consistent with *Raich*.

That said, the CSA was not merely labeled as comprehensive, but the challenged portion of that statute was also considered essential to the operation of the rest of the statute. It is not clear that the same applies to Title VII when considered as a portion of the larger Civil Rights Act of 1964. It seems unlikely that the voting rights portion of the Civil Rights Act would be undermined by a repeal of Title VII.

on economic activity, in part, and on breadth of regulation to distinguish *Lopez* and *Morrison*. Title VII may only lay claim to the former distinction, and yet *Arbaugh* implies that it is not only constitutional as written, but would be constitutional even upon removal of the employee-numerosity requirement and jurisdictional element. In contrast, a hypothetical Title VII drafted without an employee-numerosity requirement and without a jurisdictional element would not automatically be found constitutional under the *Raich* analysis because of its similarity to VAWA and the Gun-Free School Zones Act as a single-subject statute. Thus, because *Arbaugh* did in fact implicitly provide for the constitutionality of such a statute, a source beyond *Raich* must be sought for the basis of the Court's understanding that neither an employee-numerosity requirement nor a jurisdictional element are necessary to justify the constitutionality of this single-subject statute.

B. *Judicial Permissiveness of Regulation of Economic Activity*

Arbaugh's consequences have been shown to be not only somewhat contrary to *Lopez* and *Morrison*, but also to stretch beyond the Court's decision in *Raich*. By deciding *Arbaugh* the way it did, the Court may be signaling a new level of permissiveness toward congressional regulation of economic activity.

In stating that a holding that may permit Congress to regulate employment regardless of size or effect on interstate commerce, the Court pushed back against the spirit of the limitations it had imposed in *Lopez* and *Morrison*. The driving force behind those cases was that the Commerce Clause power was in danger of being extended too far through aggressive use of aggregation arguments. In *Lopez*, the government argued that violent crime near schools will handicap education, which will in turn have a harmful effect on the American economy.[174] The Court rejected this argument for fear that acceptance would allow Congress to regulate anything it pleased.[175] The Court rejected a very similar argument in *Morrison*, where the legislative history of VAWA stated that gender-motivated violence has a significant effect on interstate commerce.[176] The Court was again concerned with the breadth with which Congress would be allowed to regulate if it permitted this aggregation

174. *See* United States v. Lopez, 514 U.S. 549, 563-64 (1995).

175. *Id.* at 564 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.").

176. *See* United States v. Morrison, 529 U.S. 598, 615 (2000).

argument to succeed.[177] These concerns later came to be known as the "non-infinity principle," referring to the Court's desire to avoid interpretations of the Commerce Clause that would allow Congress to regulate anything (thus "infinity") it pleased.[178]

By allowing for the constitutionality of Title VII even without a jurisdictional element, *Arbaugh* might simply be saying that the Court will not apply the non-infinity principle to economic activity, regardless of whether that activity is regulated in a large, comprehensive statute like the CSA, or in a more confined, single-subject statute like Title VII. Thus, under *Arbaugh*, if an activity is deemed economic, aggregation arguments will be accepted, making Congress's power to regulate that type of activity almost limitless.

C. *Defining "Economic"*

Of course, the question of whether a regulated activity is actually economic lurks in the background of that conclusion. If the view is taken that employment is an indisputably economic activity,[179] then the outcome of *Arbaugh* is merely a somewhat surprising extension of *Raich*: Congress can regulate any economic activity it wants to whatever extent it desires. However, the Court in *Lopez* asserted that, absent other considerations such as jurisdictional elements or congressional findings, the economic nature of the regu-

---

177. *See id.* ("[I]f Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.").

178. The term appears to have been coined by David B. Kopel and Glenn H. Reynolds in their article. David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 69 (1997) ("The second analytic principle that *Lopez* offers is one this Article calls the 'non-infinity principle.' In other words, for a Commerce Clause rationale to be acceptable under *Lopez*, it must not be a rationale that would allow Congress to legislate on everything."); *see also* Craig M. Bradley, *Federalism and the Federal Criminal Law*, 55 HASTINGS L.J. 573, 589 (2004) ("Because of the non-infinity principle, it would not be enough to establish federal jurisdiction to show that a robber, for example, used a gun that had traveled in interstate commerce."); Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1260 (2003) ("[T]he Court indicated that it was serious about enforcing the 'non-infinity principle' in the interpretation of the Commerce Clause by looking with a jaundiced eye on any interpretation that would effectively convert the Commerce Clause into a general police power."); Craig M. Bradley, *What Ever Happened to Federalism?*, TRIAL, Aug. 2005, at 52, 54 ("[I]f I write a note reminding my daughter to take out the garbage, the pencil or the notepad may have traveled from another state, so my using them has an 'effect' on interstate commerce. . . . The non-infinity principle narrows this focus to a reasonable one.").

179. *See supra* text accompanying notes 172-173.

lated activity is the key to the constitutionality of legislation under the Commerce Clause.[180] The Court, both in that case and in *Morrison*, seemed to take the primary place in determining whether an activity was economic. *Raich*, despite quoting a dictionary for a definition of "economic,"[181] does nothing to soften this primary placement, as the Court there explicitly decided that the CSA regulates economic activity.[182]

Somewhat paradoxically, an understanding of this situation allows the conclusions reached so far about Congress's power to regulate to actually be *expanded*. That is, by employing the notion that the economic nature of an activity is a decisive factor in determining the constitutionality of a statute, *Arbaugh* can be read to say that the Court is now conceding to Congress not only the power to regulate any economic activity, but also the power to *define* what activity is economic (thus regulable). This is the separation of powers oriented conclusion referred to above. It can be deduced from *Arbaugh* that Title VII, even without a jurisdictional element, was validly passed by Congress under its commerce power. The justification for this, consistent with *Morrison*, *Lopez*, and *Raich*, is that employment, the activity regulated by Title VII, is economic. But the court has not said that employment is an economic activity. In order for the statute to be constitutional, *someone* must have made a definitive determination that employment is an economic activity. Since the Court has not spoken, that "someone" can only be Congress. Thus, the Court has implicitly stated that it would uphold Title VII absent a jurisdictional element on the grounds that Congress believes employment is an economic activity.

But if that is true of Title VII, there is no principled reason why it would not be true of any other statute Congress might wish to pass. In other words, Congress, under this reading, need simply regulate, and that regulation will serve as a signal to the Court that Congress believes that the regulated activity is economic, and thus

180. *See Lopez*, 514 U.S. at 561 ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise . . . ."). The Court has asserted the same type of authority in other contexts. For example, in deciding whether Congress properly abrogated state sovereign immunity through Section 5 legislation, the Court has examined the history of the statute for evidence that the legislative response to was "congruen[t] and proportional [to] the injury to be prevented or remedied." City of Boerne v. Flores, 521 U.S. 507, 520 (1997). The Court believed that it had "the responsibility . . . , not Congress, to define the substance of constitutional guarantees." Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001).

181. Gonzales v. Raich, 545 U.S. 1, 25 (2005).

182. *Id.* at 25-26.

within the commerce power without a jurisdictional element or any other limiting factor.

That Congress can determine its own jurisdiction under the Commerce Clause by simply legislating and regulating anything it wants to seems somewhat outrageous. The power that the Court is arguably granting to Congress is breathtakingly broad. The strong role of the courts, particularly in the Commerce Clause area, will have been reduced to nothing. Perhaps, then, a qualifier is due. The specter of the innate understanding of employment as an economic activity haunts this entire analysis. The conclusion reached above, that Congress can regulate anything it pleases under the Commerce Clause, has to be tempered by the knowledge that the base upon which it rests is, after all, Title VII, a statute regulating an activity that is, as noted above, almost indisputably economic. Perhaps the Court was comfortable with the consequences of its decision precisely because it had an understanding of employment as an economic activity, despite a lack of definitive adjudication to that effect. In that case, a reexamination of the extreme conclusion reached here is due.[183] Perhaps Congress, instead of having essentially limitless power, can actually regulate anything *that can fairly be said to be economic* under the Commerce Clause.[184] This comports with *Arbaugh* itself because employment certainly can be fairly argued to be economic. It also leaves room for the courts to exercise some control over the scope of Congress's commerce power, which control they are likely extremely reluctant to abdicate completely.

The key understanding arising from *Arbaugh*, though, whether the conclusion is the original broad one or the more tempered one immediately above, remains the same, and is perhaps best expressed by Justice Ginsburg's words for the Court in the *Arbaugh* opinion: "[W]e think it the sounder course . . . to leave the ball in Congress' court."[185]

---

183. The desire for a reexamination based on our understanding of employment as an economic activity, however, does not change the underlying logic of the analysis. That is, whether or not Title VII is the foundation on which the Court built *Arbaugh*, the same chain of reasoning still leads from that decision to the conclusion that Congress can regulate anything under the Commerce Clause. In other words, the argument made here is statute-independent. Everything follows from the Court's statement of its broadly applicable bright-line rule, not from any inherent properties of Title VII or employment.

184. Nothing rides on the precise form of the language chosen to limit the scope of the conclusion. Certainly other phraseology could be equally as appropriate.

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

CONCLUSION

Arbaugh, a seemingly innocuous case about a distinction (jurisdiction versus merits) that is certainly important but hardly world changing, turns out to have enormous consequences if its conclusion is followed to its logical ends. Because of the constitutional limitations on the power of the federal courts to exercise jurisdiction and the power of the Congress to regulate, stating that the federal courts do have jurisdiction to hear a dispute is equivalent to saying that Congress granted those courts that jurisdiction, which is in turn equivalent to saying that Congress has the power to regulate in the area of the dispute.

The Court in *Arbaugh* read Title VII to mean that the federal courts have jurisdiction to hear cases even where the employer has fewer than fifteen employees, and also implicitly decided that federal courts can hear disputes even where the employer has not the slightest relation to interstate commerce. Thus, Congress has the power to regulate small employers, even those without the slightest connection to interstate commerce. Carrying this one step further, there is no principled reason to differentiate between employment and any other activity given employment's status as an activity that has not been adjudicated by the Supreme Court in the post-*Lopez* era to be economic. However, realism and a reminder that employment is almost certainly an economic activity within the understanding of the Supreme Court temper this extreme conclusion, leaving in its stead a slightly more limited one: Congress can, pursuant to the logical consequences of *Arbaugh*, regulate anything that can be fairly argued to be economic under the Commerce Clause.