Federalism Limits on Article III Jurisdiction

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I. INTRODUCTION

The Supreme Court has paid a significant amount of attention to federal subject matter jurisdiction in the last few terms.¹ Commentators have followed the Court's lead with a flood of articles discussing the merits of the Court's jurisdictional rulings and extending the law

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to areas the Court has not (yet) reached. The debate has touched on fairness, history, and the institutional roles of the courts and the legislature.

Oddly missing from the entire discussion has been the Constitution. This is understandable because jurisdictional issues are usually presented as statutory questions: Congress has the power to determine how much jurisdiction to actually grant to the federal courts, up to the jurisdictional ceiling created by Article III. So whether a federal court has jurisdiction is often a question of whether Congress has granted jurisdiction, rather than whether the Constitution permits Congress to do so. The constitutional ceiling lurks in the background of jurisdictional questions, yet it has been ignored in the recent debates about subject-matter jurisdiction.

This Article aims to fill this gap in the debate by re-examining the constitutional constraints. I argue that structural limitations on the extent of congressional power should be treated as limitations on the scope of the federal courts’ jurisdiction under the clause of Article III that grants courts the power to hear cases “arising under... the Laws of the United States.” In other words, I show that the powers exercised by these coequal branches of government are coextensive. While this thesis may sound quite natural, the federal courts have apparently not thought it to be true.

An instructive case is United States v. Reasor. The defendant was accused of forging securities in violation of 18 U.S.C. § 513(a). That

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3. The clause of Article III at issue in these cases (though often implicitly) is that giving the federal courts power to hear “all Cases, in Law and Equity, arising under... the Constitution” of the United States: U.S. CONST., art. III, § 2. “Arising under” (or “federal question”) jurisdiction is where most of the action takes place in the federal courts. From September 30, 2006, to September 30, 2007, 139,424 federal question cases were filed, out of 257,507, or 54.1%. James C. Duff, Judicial Business of the United States Courts: 2007 Annual Report of the Director, available at http://uscourts.gov/judbus2007/appendices/C02Sep07.pdf. “Arising under” jurisdiction is also where courts and commentators have gone off the rails, failing to recognize the background constitutional issues.


5. 418 F.3d 466 (5th Cir. 2005).

6. Id. at 468.
statute contains a requirement that the forged security be of “a legal entity . . . which operates in or the activities of which affect interstate or foreign commerce.” The defendant urged that because the commerce requirement was not met in her case, the district court did not have subject matter jurisdiction. The United States Court of Appeals for the Fifth Circuit rejected this argument, stating that jurisdiction was granted by 18 U.S.C. § 3231—the general federal criminal jurisdiction statute—and thus the court had jurisdiction. The court of appeals then made what I argue here was a key misstep: “[T]he Commerce Clause, found in Article I of the United States Constitution, implies limits on the power of Congress to regulate, not on the Article III federal courts’ power to adjudicate.”

This understanding of the Constitution’s federalism limitations on Congress is incorrect. Article I and Article III are intimately related, in particular through the statutory portion of the “arising under” power mentioned above; the federal courts’ power under this clause is parasitic on Congress’s power. That is, the courts cannot act under this grant of jurisdiction where Congress has not legislated. Further, Erie Railroad Co. v. Tompkins says that courts cannot act where Congress cannot legislate. Erie relied on an understanding of federalism that belies the Reasor court’s statement that federalism limits do not apply to the federal courts. Part II of this Article is the main argument: Erie was, and still is, based on federalism concerns and that those concerns apply to rein in the power of not just Congress but also the federal courts.

Having established that federalism limits apply to the federal courts, the Article turns to practicalities: what real effect on the legal system should this understanding have? I argue in Part III that to best effectuate federalism limits on the federal courts, issues raising federalism questions must be treated as jurisdictional. That is, courts should treat these challenges as limits on their subject matter jurisdiction, and thus accord those challenges the treatment given other jurisdictional issues: challenges to jurisdiction cannot be waived, they can be raised at any time in the judicial process, and the federal courts themselves can and must raise jurisdictional issues sua sponte.

8. Reasor, 418 F.3d at 468–69.
9. Id. at 469.
10. Id.
11. This is true as applied to the statutory portion of the “arising under” grant, not the constitutional portion. Courts of course can and do hear cases arising under the Constitution without any congressional legislation.
12. 304 U.S. 64 (1938).
13. Erie was a diversity jurisdiction case, not one involving the “arising under” grant, but I argue in section II.B infra that the same rule applies in statutory cases as in common-law cases.
Finally, Part IV disposes of what seem to be the most likely counterarguments to this position.

II. FEDERALISM LIMITS APPLY TO THE FEDERAL COURTS

The basic contention in this Part is that federalism-based limitations on congressional power also act as limitations on the power of the federal courts. In other words, Article I of the Constitution is coextensive with Article III's "arising under" power. If Congress can regulate in an area, then it can give the courts the power to decide cases in that area; but if Congress cannot regulate in that area, then the courts cannot exercise jurisdiction over those cases.

The first section will show how *Erie* demands that the federal courts respect the Constitution's federalism constraints. Of course, *Erie* was a case about federal common law. The paradigmatic case for the issues addressed here, however, is one based on a federal statutory cause of action.14 Thus, section II.B explicitly shows why relying on *Erie* is valid even in this statutory context.

Finally, section II.C gives three additional reasons why my thesis holds: the Supreme Court's holistic reading of the admiralty power; the lack of political safeguards of federalism in the judiciary; and the implausibility of obviating congressional overrides of federal court lawmaking.

A. *Erie*

The Supreme Court's decision in *Erie* provides the main support for my argument. The case involved a tort suit in federal court because of diversity of the parties.15 The plaintiff had been injured by a passing train while walking alongside a railroad right of way.16 Whether the plaintiff could recover depended on whether he was determined to be a trespasser or a licensee.17 This classification, in turn, depended on which law applied: Pennsylvania court-created law18 or the "general law" of torts as understood by the federal courts.19 The Rules of Decision Act20 called for federal courts to apply

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14. Particularly troublesome cases are those in which a court is faced with a jurisdictional element attached to a federal civil cause of action, and the court decides to treat that element as nonjurisdictional. For discussion of jurisdictional elements, see infra Part III.
16. *Id.*
17. *Id.* at 69–70.
18. Note, though, that Tompkins, in addition to his other arguments, also claimed that no rule "had been established by the decisions of the Pennsylvania courts." *Id.* at 70.
19. *Id.*
20. 1 Stat. 73, § 34 (1789) (now codified in slightly different form at 28 U.S.C. § 1652 (1948)).
the laws of the states in diversity cases, but *Swift v. Tyson*\(^{21}\) had interpreted “laws” in the Act to mean only statutes, not decisions of state courts.\(^{22}\)

Justice Brandeis, writing for the Court, overruled *Swift*, writing “[t]here is no federal general common law.”\(^{23}\) The *Erie* Court (relying on the research of “a competent scholar” to determine that the Rules of Decision Act had been misread by the *Swift* Court)\(^{24}\) seemed to feel uncomfortable overruling a nearly hundred-year-old precedent on this basis alone. The holding in *Erie* thus expressly relies on the Constitution, though the Court’s language on this point does not specify exactly what part of the Constitution to which it was referring.\(^{25}\) Commentators have struggled ever since with the exact constitutional basis for *Erie*’s holding, but some consensus seems to have emerged that general principles of federalism underlie the case.\(^{26}\)

The language of the decision strongly suggests that federalism is in fact the constitutional basis of the opinion. Justice Brandeis identified the key problem created by the regime of *Swift v. Tyson* as follows: “The federal courts assumed . . . power to declare rules of decision which Congress was confessedly without power to enact as statutes.”\(^{27}\) This points quite clearly to federalism as the constitutional rationale

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22. Id. at 18.
24. *Erie*, 304 U.S. at 77-78 (“[T]he unconstitutionality of the course pursued has now been made clear . . . .”).
25. See *Erie*, 304 U.S. 77-78 (“[T]he unconstitutionality of the course pursued has now been made clear . . . .”).
26. Other propositions for the basis of *Erie* include (1) the Supreme Court's adoption of positivism over the idea of “a transcendental body of law outside of any particular State but obligatory within it.” Id. at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (Holmes, J., dissenting)); (2) an equal protection limit on the ability of federal courts to apply “general common law” to diversity suits; and (3) the understanding that horizontal separation of powers prevents the federal courts from making law.

The first of these meanings, relating to positivism, of course does not provide a constitutional foundation. It is well and good that the *Erie* Court moved away from mystical understandings of the law, but the decision cannot be said to actually rely on this reasoning.

Second, Justice Brandeis’ “equal protection” language in the opinion must be taken as a rhetorical device. The Fifth Amendment, on which courts today rest equal protection claims against the federal government, at the time was not considered to include an equal protection component. Bradford R. Clark, *Erie's Constitutional Source*, 95 CAL. L. REV. 1289, 1299-1300 (2007).

Separation of powers is a newer rationale for *Erie*. It is, however, a revisionist theory lacking support in the text of the decision itself. *See* Craig Green, *Repressing Erie's Myth*, 96 CAL. L. REV. 595, 615-18 (2008).

for the decision. That is, Brandeis's point here was not that federal courts had enacted laws instead of Congress doing so. Rather, it was that federal courts were entering jurisdictional territory that Congress had no ability to enter. The reason that Congress had no such ability was, of course, the federalism restraints of the Constitution.28

Brandeis also quoted Justice Field's argument in *Baltimore & Ohio R. Co. v. Baugh* that "[s]upervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States."29 Finally, in the last line of the third section of the majority opinion, Brandeis wrote, "We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states."30 It thus seems rather clear that federalism was the constitutional basis the Court had in mind in 1938.

Later courts and commentators have generally agreed that federalism forms the constitutional basis for *Erie*. In 1947, the Supreme Court wrote that *Erie*’s "object and effect were thus to bring federal judicial power under subjection to state authority in matters essentially of local interest and state control."31 Judge Dolores Sloviter of the Third Circuit has written about her concern that federal judges’ prediction-based diversity decisions "verge[ 
] on the lawmaking function of th[e] state court."32 John Hart Ely argued that, while *Erie* was "really about several things," its constitutional holding was federalism-based.33

The federalism rationale for *Erie* limits federal courts from making law where Congress cannot reach. A variety of commentators have made precisely this argument and thus seem to support, if less directly than Sloviter and Ely, the idea that federalism concerns form

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28. One could imagine a complaint, consistent with Brandeis’ language, that the courts were making common law in areas that Congress could not reach because of individual-rights-based limitations as well. This, however, is not what was happening; the courts were making local contract and property law, not abridging the freedoms of speech and religion.


30. *Id.* at 80.


33. John Hart Ely, *The Irrepressible Myth of *Erie*, 87 HARV. L. REV. 693, 700, 703 (1974) ("[Erie] was unconstitutional because nothing in the Constitution provided the central government with a general lawmaking authority of the sort the Court had been exercising under *Swift*.").
the constitutional basis for *Erie.* Judge Friendly stated in his famous article on *Erie* and federal common law that it "would be . . . unreasonable to suppose that the federal courts have a lawmaking power which the federal legislature does not." George Rutherglen takes this point further, referring to *Erie*'s argument as having "the rhetorical force of a *reductio ad absurdum.* Of course the power of the federal courts to make law could not exceed the power of Congress." Larry Kramer has argued that federal judicial lawmaking power should be limited even further than Friendly and Rutherglen propose: law creation must be constrained by statutes already passed by Congress. Kramer's rationale for this limit is the key point: "the lawmaking power of the federal courts cannot exceed that of the federal government itself."

Finally, Edward Purcell makes an historical argument supporting this point. He identifies in *Erie* a specific repudiation of the Supreme Court's penchant for making law in areas that Congress could not: insurance contracts had been ruled to be part of the general federal common law, and thus within reach of the federal courts, but had also been ruled to be outside Congress's interstate commerce power. Thus, "[t]he federal judiciary stood as the only branch of the national government empowered to make law covering insurance contracts." *Erie,* then, may be read as remediying this "disjunction of power."

While *Erie* established the absence of a general federal common law, the Court quickly clarified that there was still room for federal judicial lawmaking in certain domains. One way federal courts make law is by construing and applying intentionally vague statutes in

34. Indeed, the Supreme Court has itself hinted at this conclusion. Then-Justice Rehnquist, quoting Justice Holmes, stated for the Court in *Milwaukee v. Illinois,* 451 U.S. 304 (1981), that the Court has "always recognized that federal common law is 'subject to the paramount authority of Congress.'" *Id.* at 313 (quoting *New Jersey v. New York,* 283 U.S. 336, 348 (1931)). While that case concerned whether Congress had preempted the federal common law in the area, this statement by the Court seems to exclude the possibility that the federal courts could make federal law outside an area that Congress could constitutionally reach. If a federal court made such irreversible law, that law could hardly be said to be "subject to the paramount authority of Congress." *Id.*


39. *Id.*
which Congress has given the courts the power to effectively make law. The antitrust statutes are perhaps the clearest example of this.40

However, federal courts have also created law despite the lack of a statute in areas of particular federal importance. The test that the Supreme Court has articulated to determine when such law should be created provides further support for the proposition that federalism is the true basis for the decision in *Erie*. The first prong in the test for determining whether federal common law ought to be created to govern a case is whether there is a substantial federal interest in the subject matter at issue in the suit.41 In *Clearfield Trust Co. v. United States*,42 the seminal case on this issue, the Court was faced with a dispute over how much notice the United States had to give to a payee bank that a check drawn on the U.S. Treasury had been fraudulently endorsed and cashed.43 The district court applied state law to the case, following *Erie*, and thus held that the United States had unreasonably delayed in giving notice to the bank.44 The bank, therefore, was not required to reimburse the United States. The court of appeals reversed, and the Supreme Court agreed with the appellate court, holding that *Erie* did not apply because “[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law.”45 The “substantial federal interest” test supports a federalism rationale for *Erie* because it shows that the concern of the Court in *Erie* itself was a lack of a substantial federal interest. That is, the question in *Erie* was a matter for the state to decide.

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40. See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S.Ct. 2705, 2720 (2007) (“From the beginning the Court has treated the Sherman Act as a common-law statute.”); Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO, 451 U.S. 77, 98 n.42 (1981) (“In antitrust, the federal courts enjoy more flexibility and act more as common-law courts than in other areas governed by federal statute.”).


42. 318 U.S. 363 (1943).

43. Id. at 364–65.

44. Id. at 366.

45. Id. While the Court’s reasoning on this point is a tad scanty, Paul Mishkin has argued that the key idea of the doctrine established (thought not elaborated to the extent it would be in later cases) in *Clearfield Trust* is that “established federal operation[s]” must be governed by federal law. Paul J. Mishkin, *The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 799 (1957). Where Congress, for whatever reason, did not create that federal law, the courts must step in. On this reading the key point is that the law being made in this area is demonstrably within federalism bounds because Congress has created some institution or regime but simply failed to address some aspect of that regime. There is thus no problem with the federal courts acting in that same area.
Craig Green has argued that the federalism rationale was invalid either at the time of the case or now (or both) because of Congress’ near-plenary commerce power. This argument is unpersuasive. Federalism principles do create some limits on the power of Congress to pass laws effective in the states. The exact location of the line where Congress’ enumerated powers stop remains in flux, but the existence of a line cannot be doubted. That no real line exists seems to form the basis of Green’s attack on the federalism rationale for Erie. He argues that because diversity cases like Erie almost always involve an effect on interstate commerce, Congress can, in fact, regulate; thus the premise of the Court’s federalism argument is flawed. This argument has some force because we ought to keep in mind the practical effects of whatever constitutional theory we endorse. However, Green’s argument does not go the entire way to discrediting Erie’s federalism rationale because he only argues (indeed, can only argue) that “large numbers” of diversity cases would actually fall within Congress’ commerce power. Thus, he must concede that there are cases to which Erie’s rationale is fully valid. Unfortunately, Erie itself may not be one of those cases, given that it involves an interstate railroad. Even so, the point is that there are some things Congress cannot reach, and to those things, Erie applies fully: the courts cannot create law to regulate those cases because Congress cannot.

Federalism, then, provides a sensible constitutional basis for Erie, and is consistent with the later jurisprudence arising out of that case. The federalism rationale for Erie leads, in the next section, to the next step: federal courts should not be permitted to act where Congress must refrain from acting because of federalism limitations.

B. Statutory Interpretation

Because Erie is about federal common law, we tend not to think about that case’s lessons when faced with a question of statutory application. This section shows that this is a mistake. It is not merely the case that the federal courts cannot “make law” where Congress cannot, but rather that the courts cannot act at all, whether that ac-

46. Green, supra note 26, at 611–14.
47. Id. at 612.
48. Id. at 613.
49. While this may not be fully satisfying, it is as far as I need to go to prove my case here. Recall the main argument: the jurisdiction of the federal courts is limited by the federalism limits the Constitution places on Congress. I am arguing in this section that Erie supports this thesis because it points out that where Congress is limited by the Constitution from acting, the federal courts have no power, i.e. that federalism plays a role in limiting the courts’ power just as well as it does Congress’. Thus, the question of how large or small Congress’ power is has no bearing on my thesis, so long as Congress’ power is not literally all-encompassing.
tion takes the form of "making law" or "statutory application."\(^\text{50}\) A violation of state sovereignty by a federal court is such a violation whether undertaken in the context of statutory interpretation or the making of common law.

To see that *Erie*‘s federalism concerns apply equally as well to statutory application as they do to pure lawmaking, consider first a naked jurisdictional grant that purports to give the federal courts the power to hear cases that Congress could not regulate (and thus has not regulated) consistent with its enumerated powers. For instance, take a statute that purports to grant jurisdiction over cases involving "a crime of violence motivated by gender."\(^\text{51}\)

Can there be any serious doubt that this grant of jurisdiction would be unconstitutional? Congress has clearly engaged in an end-run around Article I’s limits. The Court held that Congress could not substantively regulate in the area, so to permit Congress to respond by granting jurisdiction to the federal courts to create law would effectively render *Morrison* nugatory. Further, this statute would create a situation that runs head-on into *Erie*: the federal courts would be left making law in an area that Congress could not validly reach under *Morrison*.\(^\text{52}\) This kind of naked jurisdictional grant of power to the courts to regulate an area Congress cannot itself reach is clearly not allowed.\(^\text{53}\)

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50. The argument here puts to one side the voluminous literature on whether statutory interpretation is or is not lawmaking, or under what circumstances it might be. See, e.g., Green, supra note 26, at 629 ("As a formal matter, if 'common law' means anything, it means 'not statutory interpretation.'"); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1, 25 (1995) ("When the meaning of a statute is in dispute, there remains at the core the same common-law process of discerning and applying the purpose of the law."). The location (or even existence) of a line between these two actions is irrelevant to the argument here. Because my precise point is that *Erie* applies whether a court is "making law" or "applying a statute," we need not concern ourselves with what a court is actually doing in a given situation. All that matters is that the court is somehow acting.

51. This language is, of course, drawn directly from the statute at issue in *United States v. Morrison*, which had created a cause of action and granted a right of recovery to victims of such crimes. 529 U.S. 598 (2000). The Supreme Court held that this substantive regulation went beyond Congress' commerce power. *Id.* at 617.

52. This situation is not *exactly* like *Erie* because that case involved the federal courts' diversity jurisdiction, while here the courts would presumably be exercising their "arising under" jurisdiction. This is a distinction without a difference, however. In either case, the federal court is quite clearly making federal law applicable in the states in an area Congress cannot constitutionally reach.

53. This is so even if I accept the theory of protective jurisdiction. While the precise contours of protective jurisdiction theory are not fully agreed on, one reasonable definition is given by Eric Segall: "Congress is allowed to 'protect' legitimate Article I concerns by granting jurisdiction to the federal courts even if the law governing the case is nonfederal." Eric J. Segall, *Article III as a Grant of Power*:
Suppose now, at the other pole, that Congress passes a highly detailed, fully specified statute that manages to cover every possible contingency, and suppose further that a federal court applies that law to a situation Congress could not validly reach. Does the fact that the federal courts will only be “applying” the law to the states rather than “making law” in the states abrogate the federalism problems with this scenario? The federal courts would be intruding on the states whether that intrusion is labeled “making law” or merely “applying law”; the federal courts would undertake a task that the Constitution entrusted to the states (by virtue of not entrusting that task to the federal government). This situation violates Erie just as surely as the naked jurisdictional grant situation does. The only distinction between the two cases is in the court exercising a “creative” function under the naked jurisdictional grant, while its job under the fully specified statute is mere mechanical application. This distinction makes no difference in terms of the Erie analysis, however, because as discussed above, Erie is about federalism, not separation of powers. Were Erie about the latter, we might care that the federal courts were acting in a creative capacity that is reserved to the legislature; but because of Erie’s federalism rationale, our analysis should focus on whether the federal government is acting beyond its constitutionally granted powers.54

The clear unconstitutionality of naked jurisdictional grants to courts to hear cases outside of Congress’ Article I powers is thus equally as clear as the unconstitutionality of courts acting outside of Congress’ enumerated powers even when applying statutory law. In sum then, the Erie rationale, that federalism prevents courts from making common law effective inside the states where Congress could not have done so, applies equivalently to this other extreme—a fully specified statute.

If the Erie rationale applies to both extremes, then it certainly must apply to situations in the middle, where federal statutes actually fall. In short, the point is that the federal courts’ “arising under” jurisdiction piggy-backs on Congress’ power. Where Congress can act, Congress can permit the courts to exercise their “arising under” power. Where Congress cannot substantively act, it cannot grant such power. Chief Justice Marshall’s opinion in Osborn v. Bank of the

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54. Separation of powers, in other words, concerns the character of the action engaged in by the actor. Federalism, by contrast, deals with the subject of that action.
United States supports this understanding of federal power: “The executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature the power of construing every such law.”

C. Additional Support

While Erie provides the clearest, most direct support for the idea that the courts are limited by federalism just as Congress is, additional support can be found in three areas of constitutional structure: the holistic reading of the admiralty power; the political safeguards of federalism; and the idea of Congress being able to override federal judicial lawmaking.

1. Admiralty

The foregoing analysis posits reading federalism limits on Congress’ powers into Article III, despite those limits not residing there textually. This holistic reading of the Constitution’s limits on federal powers—matching one branch’s powers in an area to another branch’s despite the relevant constitutional articles not containing explicit text directing such matching—is not unprecedented, as the Court has held that Congress has power in the maritime arena despite there being no admiralty provision in Article I.

Article III contains a provision granting the federal courts jurisdiction over admiralty cases. The Supreme Court, despite the lack of an Article I provision granting Congress power in the area, has read Article III not only as the jurisdictional grant expressed directly in the text, but also as an implied grant of substantive power to Congress. In Panama Railroad Co. v. Johnson, the Supreme Court discussed the Article III grant of admiralty jurisdiction to the federal courts:

Although containing no express grant of legislative power over the substantive law, the provision [of Article III] was regarded from the beginning as implicitly investing such power in the United States. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded or as being only the law of the several states, but as having become the law of the United States—subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion.

55. 22 U.S. (9 Wheat.) 738 (1824).
56. Id. at 818 (emphasis added).
57. U.S. Const., art. III, § 2 (“The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . .”).
58. 264 U.S. 375 (1924).
59. Id. at 386.
The Court, in other words, engaged in what I called a holistic reading of the Constitution, choosing not to view Articles I and III as creating an asymmetry of power in admiralty. My argument here is essentially a contrapositive of Panama Railroad. Where the Court decided in Panama Railroad that an express grant of power to the courts implied a grant of power to Congress, I argue here that a limitation on Congress's power implies the same limitation on the courts' power.

The Court's understanding of the maritime provision in Article III is not inevitable. The text of the Constitution is consistent with an understanding that the existing body of maritime law was to be applied by the federal courts and could not be altered by Congress. In more modern terms, we might understand that the federal courts would have the power to create a common law of admiralty over which Congress had no power. Thus, that the Court held that the Article III power implies a congressional power is significant. It seems to imply that the Court believed that the federal courts' power, their jurisdiction, could not extend beyond the regulatory power of Congress. Where the Constitution seemed to create such an extension, the Court remedied it by divining an implied grant of power to Congress.

This may bring to mind diversity jurisdiction. Article III grants the federal courts the power to hear cases arising between citizens of different states, but Article I declines to grant Congress the power to regulate those cases. The Supreme Court has not treated diversity like admiralty, so an apparent disjunction of power remains: the federal courts have the power to decide cases (to exercise power) beyond the limits placed on Congress. While this might, at first blush, appear to be a nice counterargument to my thesis, closer examination of my precise argument should dispel this concern. The federal courts can act in diversity even where Congress cannot precisely because the Constitution gives them the power to do so in that arena. The argument I have made here is that the Constitution has not granted the Courts the power to act outside of Congress's power when they exercise their "arising under . . . the Laws of the United States" power. The key is that, as mentioned before, under this head of jurisdiction, and only under this head of jurisdiction, the federal courts' power is parasitic on the power of Congress.

2. Political Safeguards

Herbert Wechsler pointed out in his canonical 1954 article that the legislative and executive branches, by constitutional design, are com-

60. U.S. Const., art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising . . . between Citizens of different States . . . ").
posed of and answerable to the states. As a result, the political branches of the federal government will inherently resist nationalism, "necessitating the widest support before intrusive measures... can receive significant consideration." Court enforcement of federalism limits against Congress, then, need not be a high priority. To the extent that the states feel that certain federal measures will encroach on their sovereignty, Congress, composed of representatives of the states, will simply not pass that measure. Further, the executive, which is elected by the states and thus answerable thereto, can veto bills and, if such veto is overridden, decline to enforce such laws to their full (sovereignty-violating) extent. Hence, Wechsler wrote, "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states..." 

By contrast to the political branches, the federal judiciary is almost completely insulated from state pressures. Once a judge is appointed and confirmed, the states can exert no more power over her. This lack of political control points to the desirability, or even necessity, of legal (as distinct from political) measures for keeping the federal courts within the bounds of federal power set out in the Constitution. That is, the courts must have some understanding of their limitations pursuant to their own reading of the Constitution because the States do not have direct control over the courts in the way that they do over Congress.

If we are worried about the courts intruding on state sovereignty, then it may strike some as strange that the solution is a legal rule, enforceable only by the courts. After all, if the courts are treading on state toes now, what would stop them from treading on state toes even after they have been told that federalism limits apply to cut back their subject matter jurisdiction? The answer is that judicial self-policing has worked in other contexts. Erwin Chemerinsky has pointed out the various areas in which "the Court has used federalism to limit federal judicial power." Examples include using the Eleventh Amendment to bar suits against the states in the federal courts, restricting federal habeas corpus, and limiting the federal courts' power to hear abuse

62. Id. at 558.
63. Id. at 559.
64. Of course, the President chooses the nominees to the federal bench, and confirmation is done by the Senate, so the states have input about who gets onto the federal bench. However, once those judges have been placed there, they are insulated.
cases against the police. Further, Calvin Massey has argued that the Supreme Court's abstention doctrines, while ostensibly prudential, are really constitutionally based. That is, these doctrines are part of the Court's ongoing task of "monitoring the limits of the federal judicial power."

In other words, Massey and Chemerinsky see the courts as being perfectly capable of creating and applying doctrines to ensure that federal judicial power is not exercised beyond the realm in which it is constitutionally permitted. There seems to be no reason, then, why the courts could not enforce federalism-based jurisdictional limitations as well as they do the abstention doctrines. Further, even if the courts have never enforced federalism-based limits on themselves, there is no reason why they should refrain from doing so if such self limitation furthers the constitutional plan.

3. Congressional Override

The federal courts' nonconstitutional decisions are always subject to legislative override. If Congress believes that the courts have misconstrued a federal statute, it can amend the statute to clarify the matter. If state courts or legislatures believe that federal courts sitting in diversity have misunderstood state law, they can issue decisions or create or amend laws to rectify the situation. However, this override would be impossible in certain situations if the federal courts' jurisdiction is not limited by the structural limitations the Constitution explicitly places on Congress.

68. Id. at 813.
69. See, e.g., Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 100 n.3 (1990) (White, J., concurring in part and concurring in the judgment) ("[I]n cases . . . that involve statutory interpretation[,] . . . Congress is in a position to overrule our decision if it so chooses."); Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989) ("[I]n the area of statutory interpretation, . . . unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."); Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) ("[I]n the area of statutory construction, . . . Congress is free to change this Court's interpretation of its legislation.").
71. See, e.g., Sloviter, supra note 32, at 1679 ("[T]he state courts have found fault with a not insignificant number of past 'Erie guesses' made by the Third Circuit and our district courts.").
Take a stylized example. Suppose Congress passes a statute pursuant to its interstate commerce power and includes a clause in the statute limiting its effect to that conduct with a connection to interstate commerce. A federal court hears a case under this statute regarding a party that does not satisfy the jurisdictional element. However, that party fails to raise the lack of jurisdiction and thus the court reaches the merits. Suppose that one particular issue in the larger merits determination could come out with the answer "yes" or "no," and suppose further that this issue is only relevant to those parties that do not satisfy the jurisdictional element. The federal court chooses "no." Congress disagrees. What can Congress do about its disagreement? It cannot write into the statute, "For parties that fall outside of interstate commerce, the outcome of (the relevant issue) should be 'yes,'" for that would explicitly violate the Commerce Clause. Nor can the states control the federal courts in this situation because the entire question is based on a federal statute. The federal courts, then, stand alone. Outside of constitutional interpretation, this situation ought to be intolerable.

Thus, the bilateral reading of Article III's admiralty provision, the lack of political safeguards of federalism on the federal courts, and the potential nonexistence of legislative overrides of court activity all support ensuring that federal judicial power is not intended to reach beyond federal legislative power. Thus, the federalism-based limitations on legislative power must apply equally to federal subject-matter jurisdiction.

III. STRUCTURAL LIMITATIONS ARE JURISDICTIONAL

In the discussion thus far, I have sought to show that federalism limitations on the federal government are also limitations on the jurisdiction of the federal courts. This Part addresses the question of how to best enforce that limitation. This Part turns from a largely theoretical approach to more functional questions—particularly in light of the fact that the constitutional issue discussed in Part II has great practical relevance to the way courts treat commerce-based "jurisdictional elements," an important part of many federal statutes.

72. For more on these "jurisdictional elements," see infra Part II.
73. It must be admitted that it is difficult to think of a real-life situation that satisfies the broad outlines sketched here. The reason, however, lies not in the example I have given, but with the extraordinarily broad reading of the constitutional grants of federal power since the New Deal, even taking into account recent retrenchment.
The phrase "jurisdictional element" has been used by courts to describe links between Congress' power to enact a statute and the reach of that statute. For instance, in *United States v. Lopez,* the Supreme Court faulted Congress for not including such an element in the Guns Free School Zones Act, thus permitting prosecutions under that act to exceed Congress' enumerated powers. Many federal criminal statutes already contain elements of this type. The Hobbs Act, for example, criminalizes "obstruct[ing], delay[ing], or affect[ing] commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspir[acy] so to do." Some civil statutes also contain such elements, including Title VII and the antitrust laws. In the former, the jurisdictional element is contained in the definition of "employer": an employer is not covered by Title VII unless it is "engaged in an industry affecting commerce." The antitrust statute states, *inter alia,* that "[a]ny contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Before I address the question of how to treat these jurisdictional elements, some background on the distinction between jurisdiction and merits is necessary.

A. Jurisdiction and Merits

Subject matter jurisdiction is about the power to decide cases. Because the federal courts are courts of limited jurisdiction, determinations of whether the court has subject matter jurisdiction in a particular case are of the utmost importance. For a court to act without jurisdiction is "to act ultra vires." The result of this structural feature of the federal system is that challenges to a court's jurisdiction are treated differently in a number of respects from merits-based challenges. Subject-matter jurisdiction challenges cannot be waived and thus can be raised at any time. This includes the possibility of challenging jurisdiction for the first time on appeal. Further, even if a party does not raise the issue, federal courts should raise jurisdic-

76. Id. at 561.
80. See *Black’s Law Dictionary* 870 (8th ed. 2004) ("[S]ubject-matter jurisdiction. Jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things.").
82. See, e.g., *U.S. v. Cotton,* 535 U.S. 625, 630 (2002) ("[S]ubject-matter jurisdiction, because it involves a court’s power to hear a case, can never be forfeited or waived.").
Finally, courts must assure themselves that they have subject matter jurisdiction over a case before they address any merits issues. Issues that do not concern subject-matter jurisdiction, which are generally "merits" issues, do not have these features.

The scope of federal subject matter jurisdiction is important because of its great degree of influence on the overall relationship between federal and state power, a core topic of the Constitution. Broader federal jurisdiction results in less room for the exercise of state power, not only in terms of individual cases, but also in terms of the development of law. Cases in state courts often include federal issues, and cases in federal courts often include state issues. To the extent that federal courts exercise more or less jurisdiction, they also exercise more or less control over the development of state common law.

However, individual litigants will generally have no reason to be concerned with this balance of power: their overriding concern is to win their case. This explains why we permit courts to raise a subject matter jurisdiction issue *sua sponte*: the parties may have little incentive to do so because the issue does not in the end concern *them*, but the failure to address the issue at all could result in a misalignment of state and federal power. This also helps explain why we permit parties to raise jurisdictional issues at any time: it maximizes the likelihood that the jurisdictional issues will be raised at some point and resolved correctly. Allowing a party to raise a jurisdictional issue any time interferes with finality, but finality is mostly an individual value: a winning party can rest easy knowing that it cannot be hauled into court on this issue again. As an individual concern then, finality is subjugated to increasing the odds that we get the federal-state balance right.

This subjugation of personal rights to structural concerns results in the different treatment of personal and subject matter jurisdiction. While both issues concern the power of the court to decide a case, the former regards *individual* rights. As such, personal jurisdiction issues can be waived, and we do not permit courts to raise personal ju-

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83. *See, e.g.*, Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (“[C]ourts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.”).
84. *Steel Co.*, 523 U.S. at 93-94.
85. By "common law" I mean both traditional common law and the gloss that courts put on statutes.
86. To the extent that there are any structural issues implicated by personal jurisdiction, they reflect the balance of power between the states, not between the federal government and the states.
risdiction questions on their own.\textsuperscript{87} Further, there is no question about misalignment of incentives when the right is individual: vindicating one's individual rights is perfectly aligned with winning a case.

Thus, there are important differences between issues going to subject matter jurisdiction and merits issues. However, discerning whether a particular issue fits into one category or the other has confounded courts and scholars. The problem comes in distinguishing between a requirement that must be met in order for a court to take jurisdiction of a case, and a requirement that must be met in order for a party to state or win a claim. In \textit{Arbaugh v. Y & H Corp.}, for instance, the Supreme Court considered whether the portion of the definition of "employer" in Title VII that requires the putative employer to have fifteen or more employees\textsuperscript{88} was jurisdictional. The Court decided that it was not, thus holding that it is an element of a plaintiff's substantive claim, not a prerequisite for the exercise of judicial power.\textsuperscript{89} Similarly, \textit{Reasor}, the case discussed in Part I, held that the interstate commerce element of the securities fraud statute was not jurisdictional.\textsuperscript{90} These cases determine whether the relevant issue can be waived by the party that has the burden of raising it, whether the court can raise the issue \textit{sua sponte}, and whether the issue must be addressed before others.

The reason cases like \textit{Reasor} are difficult is because of the obvious relation to limits on power that commerce-based jurisdictional elements bear. Congress has put these elements in the statutes to ensure that federal power is not overreached. In that sense, the elements look "jurisdictional" because they are about the power of the federal government. On the other hand, the elements are contained in substantive statutes, sometimes placed in the definitions of relevant actors, as in Title VII. In this respect, the jurisdictional elements look no different from any other requirement or limitation in any substantive statute: the plaintiff must prove these elements in order to win its case.

\textit{Arbaugh} proposed a remarkably simple solution to this complicated problem. The \textit{Arbaugh} Court created a bright-line rule based on clear congressional statements:

\begin{quote}
If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress
\end{quote}

\textsuperscript{87} See, \textit{e.g.}, Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived."). \textsuperscript{88} \textit{Arbaugh}, 546 U.S. at 510. See 42 U.S.C. § 2000e(b) (2006) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . ."). \textsuperscript{89} \textit{Arbaugh}, 546 U.S. at 515. \textsuperscript{90} United States v. Reasor, 418 F.3d 466, 469 (5th Cir. 2005).
does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.\textsuperscript{91}

This is a sensible rule for statutory elements that are unrelated to the limits on federal power. The remainder of this Part, however, shows that a different approach is required by "true" jurisdictional elements, those that exist to keep a statute within the bounds of Congress's powers under the Constitution.\textsuperscript{92}

\textsuperscript{91} Arbaugh, 546 U.S. at 515–16 (footnote and citation omitted). The actual force of this bright-line rule remains unclear. Little more than a year after Arbaugh, a five-justice majority proceeded to completely ignore it. In Bowles v. Russell, 551 U.S. 205 (2007), Justice Thomas wrote for the Court that the time limit for filing an appeal was jurisdictional. Id. at 214 ("Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement."). The case concerned 28 U.S.C. § 2107(c), which permits a district court, on certain conditions and within certain time limits, to "reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal." This fourteen-day period is what the Court held to be jurisdictional despite no language in the statute indicating Congress' intent to label it as such, as would seem to be required by the Arbaugh test. Justice Thomas dismissed Arbaugh with a single sentence, however, writing, "In Arbaugh, the statutory limitation was an employee-numerosity requirement, not a time limit." Id. at 211. Justice Ginsburg, the author of Arbaugh, joined Justice Souter's dissent, which relied on that case. Id. at 215 (Souter, J., dissenting).

\textsuperscript{92} Despite the attention paid to them, the issue here neither begins nor ends with jurisdictional elements. First, a jurisdictional element may or may not actually be a constitutionally imposed limit on the federal courts' jurisdiction. To the extent that the element is not such a limit, the argument presented here does not apply. Second, challenges based on jurisdictional elements are not the only ones that can be raised.

As to the first point, Congress has a great variety of language to choose from in creating a jurisdictional element. The statutes discussed above illustrate some of this variety. Title VII covers employers "engaged in an industry affecting commerce," while the portion of the antitrust statute cited above covers contracts, combinations, and conspiracies "in restraint of trade or commerce." Some of these jurisdictional elements will indicate that Congress intended to reach every possible behavior that it could under the Commerce Clause, while others could possibly represent a policy choice on Congress' part to not reach as far as its commerce power would permit. If a party raises an issue based on a jurisdictional element that fits into the latter category, the challenge is not (necessarily) properly called jurisdictional because it has nothing to do with the legitimate reach of Congress and the courts.

The second point is that challenges based on jurisdictional elements are not the only type contemplated by my argument in this Article. Any time a party raises a federalism-based issue going to Congress' power to regulate, whether a facial challenge or as-applied to that party's situation, the courts should treat the issue as jurisdictional. The point here, remember, is that federalism limits on Congress' power are also limits on the courts' power. Thus, if a party argues that Congress has gone beyond its authority in creating a statute based on Section 5 of the Fourteenth Amendment, that party is simultaneously (implicitly) arguing that for the federal court to exercise jurisdiction over the case would also violate the Constitution. It is thus a challenge to the court's jurisdiction, and must be accorded the treatment discussed in section III.A. Namely, it cannot be regarded
B. The Prevailing Opinion on Jurisdictional Elements

In recent years, the courts of appeals have generally treated jurisdictional elements in federal criminal statutes as nonjurisdictional.\textsuperscript{93} Unfortunately, these courts have generally opted for mere assertions of the result in place of actual reasoning or examination of the problem. The Seventh Circuit, for instance, held that the jurisdictional element of 18 U.S.C. § 844(i) is not jurisdictional, with no further argument than a citation to the \textit{Steel Co.} case.\textsuperscript{94} The portion of \textit{Steel Co.} to which the Seventh Circuit refers, however, merely sets out the background of the law of jurisdiction and merits, including the fact that failure to state a cause of action does not deprive the court of jurisdiction.\textsuperscript{95} With only a little critical analysis, one should realize that this statement does not answer the question of whether the jurisdictional element of the federal crime in question goes to the "cause of action" (really, in this situation, the crime) or the jurisdiction of the court. \textit{Steel Co.} merely says that there is a difference between jurisdiction and merits, which is unobjectionable. It provides little information on where to draw the line.

Other opinions have moved from this relatively harmless lack of reasoning to full-blown incomprehensibility. In \textit{United States v. Rea}, the Eighth Circuit "point[ed] out that [the statute's] 'interstate commerce' requirement, while jurisdictional in nature, is merely an element of the offense, not a prerequisite to subject matter jurisdiction."\textsuperscript{96} The Supreme Court's decision in \textit{Arbaugh} undercuts the idea that anything could be "jurisdictional in nature" by tying jurisdiction to congressional intent.\textsuperscript{97} An element could not be "jurisdictional in nature" if Congress can either make that element jurisdictional or not. The only reason we might call a statutory element "jurisdictional in nature" is that the element is jurisdictional \textit{regardless} of what Congress intended. Because the Constitution provides the only sensible basis for overriding congressional intent in this way, if the interstate commerce element really is "jurisdictional in

\begin{itemize}
\item as waived at any time and it must be addressed by the court even if the parties do not raise it.
\item \textsuperscript{93} See, e.g., United States v. Reasor, 418 F.3d 466 (5th Cir. 2005); United States v. Ratigan, 351 F.3d 957 (9th Cir. 2003); United States v. Johnson, 194 F.3d 657 (5th Cir. 1999); United States v. Rea, 169 F.3d 1111 (8th Cir. 1999); Hugi v. United States, 164 F.3d 378 (7th Cir. 1999); United States v. Martin, 147 F.3d 529 (7th Cir. 1998); United States v. Nukida, 8 F.3d 665 (9th Cir. 1993).
\item \textsuperscript{94} \textit{Martin}, 147 F.3d at 532.
\item \textsuperscript{96} \textit{Rea}, 169 F.3d at 1113.
\item \textsuperscript{97} \textit{Arbaugh v. Y & H Corp.}, 546 U.S. 500, 515–16 (2006); see also Evan Tsen Lee, \textit{The Dubious Concept of Jurisdiction}, 54 \textsc{Hastings L.J.} 1613 (2003) (arguing that there is no "true concept" of jurisdiction).
\end{itemize}
nature,” then that necessarily means that the interstate commerce element also is “a prerequisite to subject matter jurisdiction.”

Although the Fifth Circuit has failed to engage in a rigorous analysis, it has gone so far as to state that “the Commerce Clause, found in Article I of the United States Constitution, implies limits on the power of Congress to regulate, not on the Article III federal courts’ power to adjudicate.” This, of course, is precisely the opposite of what I am arguing here: federalism limits, such as the Commerce Clause, do, in fact, limit the federal courts’ power. As support for its proposition, the court wrote a footnote, the entire text of which reads: “It is the courts that have the power to determine whether Congress has exceeded the powers granted it under the Commerce Clause. ‘It is emphatically the province and duty of the judicial department to say what the law is.’ Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).” It seems as if the Fifth Circuit is worried that if the courts do not have jurisdiction to hear cases falling outside of the commerce power, then they will never be able to validly rule that Congress has acted outside that power. The solution to this puzzle lies in the courts’ jurisdiction to determine their jurisdiction, which courts always have.

A federal court will not know at the beginning of a case whether it has jurisdiction. It will have to resolve the constitutional issue in order to determine this question, and it has jurisdiction to do so. Thus, a ruling that Congress has exceeded its commerce power is still a valid exercise of power even if the courts have no jurisdiction over cases outside the commerce power. The Fifth Circuit’s support for its position that the Commerce Clause does not limit the courts is not compelling.

Howard Wasserman has argued, in agreement with the Fifth Circuit, that jurisdictional elements are not about the subject matter jurisdiction of the courts. To Wasserman, “[j]urisdictional elements are about congressional jurisdiction” and “have nothing to do with judicial jurisdiction.” He points out that the Supreme Court struck down the act in question in United States v. Morrison for (in part) its failure to include a jurisdictional element. Wasserman states that “[t]he basic point underlying Morrison was that Congress lacked substantive
power to enact VAWA." He believes that the "failure to establish a true jurisdictional element . . . means only that the statute by its terms does not reach the real-world actors and conduct at issue in that case." This argument is based on the idea that jurisdictional elements may not reflect constitutional limits at all, but rather congressional choice: "If every statutory element reflects legislative choice, there is no justification for treating one choice . . . as jurisdictional while treating all the other choices . . . as merits-based."

Wasserman's argument about *Morrison* is true enough. The *Morrison* Court there was concerned with the lack of a jurisdictional element because jurisdictional elements can establish the facial validity of federal statutes. This, however, only scratches the surface of the purpose of jurisdictional elements. Their existence in a statute prevents conduct falling outside the relevant enumerated power from being caught up in the congressional regulation. To focus only on the facial constitutionality aspect of jurisdictional elements is shortsighted.

The problem with Wasserman's argument about statutory elements being pure legislative choice is that it is not obviously true. Can it really be said that all commerce-based statutory elements reflect simple legislative choice, that the constitutional limits on Congress's power do not drive the decision to include these jurisdictional elements? This seems implausible. Wasserman seems to have been led astray by the employee-numerosity requirement in Title VII. He sets out the case that this element, requiring that an employer have fifteen or more employees in order to be covered by the statute, is not related to Congress's commerce power, and he is indubitably right on this point. The problem is that his argument does not apply to elements that actually invoke commerce, like the portion of Title VII discussed above. These elements simply stand on different ground than the employee-numerosity requirement, and thus require a different analysis.

The prevailing opinion is that jurisdictional elements, despite the name, are not jurisdictional. The import of the argument in

102. *Id.* at 685.
103. *Id.* at 686.
104. *Id.* at 691.
105. Further, my argument is constrained by the notion that jurisdictional elements should be jurisdictional to the extent that they actually reflect constitutional limits on Congress.
106. Judge Easterbrook has referred to the phrase "jurisdictional element" as a "colloquialism." *Hugi v. United States*, 164 F.3d 378, 380 (7th Cir. 1999).
107. There is at least one dissenting opinion on this issue. See Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457 (2006). Lees argues that "if a rule operates to shift authority from one law-speaking institution to another[,] . . . then the rule can justifiably be treated rigidly." *Id.* at 1460.
Part II is that these unreasoned or poorly reasoned cases are wrong: because of the federalism concerns expressed in *Erie*, courts should consider their power to be limited by the structural limitations on Congress. Thus, to the extent that jurisdictional elements are expressive of such structural limitations, they ought to be respected as jurisdictional by the courts and viewed as limiting the power of the courts.

C. Why Jurisdictional Elements Should Be Jurisdictional

The Supreme Court's decision in *Arbaugh* does little to resolve the jurisdiction versus merits difficulty. As previously discussed, the Court was faced with the employee-numerosity requirement of Title VII. This element is not what I would call a "true" jurisdictional element, in that employer size has nothing to do with keeping the statute within the constitutional limits on federal power. The Court's bright-line rule, however, would seem to apply with full force to "true" jurisdictional elements as well as to the kinds of elements the Court actually had before it in the case. For example, because the commerce element in Title VII is not plainly stated by Congress to be jurisdictional, it will not be considered by the federal courts to be a limit on their subject matter jurisdiction.

Suppose that, paralleling the events of *Arbaugh*, a lawyer makes a mistake in the following way: an employee sues her employer for violating Title VII, but the employer is *not* engaged in an industry that affects commerce. Lulled by the last seventy years of commerce jurisprudence into believing that Congress' power to regulate under the commerce clause is plenary, the employer's lawyer does not bother to make a challenge based on the commerce element. There is a trial, the plaintiff-employee wins, and judgment for tens of thousands of dollars of backpay is entered. On appeal, the lawyer, somewhat desperate, decides for the first time to argue the interstate commerce issue. The court of appeals, following the bright-line rule of *Arbaugh*, tells the employer, "Too bad. We would have found for your client because it really is acting entirely outside of interstate commerce, but the commerce element in Title VII is not a limit on the jurisdiction of the federal courts, so you waived the issue by not raising it."

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From the perspective of the argument I have made here, this outcome is untenable. The district court, in entertaining the lawsuit, in forcing the defendant to withstand a trial, in entering a judgment for thousands of dollars, has acted in a realm Congress has no power to touch. The Court has exercised power over the defendant and ultimately sanctioned the defendant for conduct that Congress could not validly outlaw.

This violation of the plan of the Constitution comes about because one lawyer forgot to raise a relevant defense. If the issue at stake were a personal right, there would be no problem: the employer chose its lawyer, and the lawyer, as the employer’s agent, acted carelessly. One lives with the consequences of one’s actions, and the employer thus more or less voluntarily waived its personal right. Federalism and the commerce clause, though, have nothing to do with the employer, but rather concern the large-scale issue of whose right it is to regulate all such purely intrastate employers. This issue does not belong to the employer to waive: rights can be waived, but federalism grants the employer no rights; no one has a positive duty toward the employer vis-à-vis federalism.

Furthermore, through the lens of political safeguards, we can see Title VII’s jurisdictional element as the result of state actors in the federal government desiring to not intrude on the states. Leaving the enforcement of that limit in the hands of the litigants could neuter this exercise of state political power. Individual litigants have no reason to care particularly about federalism—they merely want to win their case.109

There are, then, two options. We can either do what the court of appeals did in this hypothetical and say “too bad” to the idea of enforcing the Constitution, or we can make these limits jurisdictional, which will allow mistakes such as this to be corrected. The choice ought to be clear.

Throwing out jury verdicts and vacating judgments sounds terrible, of course. Courts waste time and money dealing with issues they never should have dealt with. Further, we might be concerned that difficult jurisdictional issues will clog up the courts, causing additional time and money to be lost when easier, merits-based ways of disposing of cases are available. We have to remember, however, the value that we place on striking the correct structural balance between

109. It might well be the case that defendants’ interests typically line up with state interests because federalism limits will usually limit the application of a statute on which a plaintiff relies to get relief. Even so, as mentioned above, individuals can make mistakes. Further, it may not be the case that a particular group of parties is always aligned with the states’ interests. Because we are speaking about constitutional structural issues, absolute guarantees are more valuable than situations where we get it right most of the time.
the federal government and the states. We have a Constitution that we have chosen to treat not as advisory, or as just another law, but as supreme law, forcing everything in the system to conform. Hypothetical expense at a non-catastrophic level should not prevent us from enforcing the constitutional plan to the utmost.110

In addition, the cost complaints are likely overblown. First, nonwaivability is not the only characteristic of jurisdictional limits. Courts also have the power and the duty to raise jurisdictional issues *sua sponte*. If every court treated the commerce element as jurisdictional in the situation imagined above, the court of appeals never would have become involved; the district court would have investigated the jurisdictional issue before the case ever got as far as jury trial and judgment. Second, while certain jurisdictional issues may look difficult now in comparison to merits issues, the nature of a common law system is that those issues will become easier over time as a body of law is built on which courts can draw.

The federal courts, then, in order to better enforce constitutional limits on federal power, and to better respect the will of the states, ought to treat structural challenges as jurisdictional.

IV. COUNTERARGUMENTS

Having established that the federal courts are limited by federalism limits on Congress's power, and having argued that this limit should be applied by making issues raising federalism questions jurisdictional in the federal courts, this Part addresses three counterarguments that have not been raised in the discussion to this point.

A. *Arbaugh*

*Arbaugh*’s bright-line rule obviously cuts against the argument I have made here. However, the reasons the Court gave for that rule, even if they support the rule as applied to statutory elements of a non-constitutional nature, do not support applying the rule to “true” jurisdictional elements.

The Court’s first concern in *Arbaugh* was with the fact that courts can and must raise jurisdictional issues *sua sponte*: “Nothing in the text of Title VII indicates that Congress intended courts, on their own motion, to assure that the employee-numerosity requirement is met.”111 This is true, and it may well be an excellent reason not to consider the employee-numerosity requirement to be jurisdictional. It

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110. *Steel Co.* supports this idea by holding that jurisdiction must be determined before merits issues, even where those merits issues are easier (and thus less expensive) to resolve. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93–94 (1998).
does not, however, support the broader rule when that rule is applied to issues of constitutional dimension. That is, when it comes to limits on federal power, Congress' intent does not matter if it conflicts with constitutional mandates.

Second, the Court cited "unfairness" and "waste of judicial resources" as reasons for not holding the employee-numerosity requirement to be jurisdictional.\textsuperscript{112} The facts of the case before the Court are key to understanding these rationales. In \textit{Arbaugh}, the plaintiff had sued her employer and won a jury verdict before the employer raised the argument that it did not have fifteen employees.\textsuperscript{113} While one can debate the fairness point,\textsuperscript{114} the "waste of judicial resources" point is closer to the mark: if the judgment is thrown out, then a trial will have been had for nought. However, as I pointed out in section III.C, the cost complaint should not be permitted to override our desire to ensure that the proper structure of our government is maintained.

In sum, while \textit{Arbaugh}'s analytical failings are different from those presented by the courts of appeals in earlier cases,\textsuperscript{115} they are failings nonetheless. \textit{Arbaugh} presents no viable counterargument to the theory presented here.

\section*{B. Floodgates}

One might worry that this argument will open the constitutional floodgates on the courts. Because federal courts must address jurisdictional issues first, before any merits issues,\textsuperscript{116} if constitutional issues are treated as jurisdictional, the courts will be overwhelmed by having to decide issues that they might otherwise avoid.

This argument provides an opportunity to re-emphasize one point: I do not argue here that all constitutional challenges should be jurisdictional. Rather, I argue only that, following \textit{Erie}, federalism-based challenges should be jurisdictional. If the government attempts to prosecute a citizen for engaging in protected speech, the defendant's first amendment argument will \textit{not} be jurisdictional: the first amendment protects an individual right. It has nothing to do with the balance of power between the states and the federal government. By contrast, a commerce clause-based argument would be jurisdictional, as would a question about whether Congress had exceeded its power under Section 5 of the Fourteenth Amendment.\textsuperscript{117}

\begin{footnotes}
\footnote{\textsuperscript{112} Id. at 515.}
\footnote{\textsuperscript{113} Id. at 507–09.}
\footnote{\textsuperscript{114} That is, is it more fair to subject a defendant employer to liability where Congress intended there to be none, or to take away a judgment from the plaintiff?}
\footnote{\textsuperscript{115} See supra section II.B.}
\footnote{\textsuperscript{116} Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 93–94 (1998).}
\footnote{\textsuperscript{117} Section 5 of the Fourteenth Amendment states, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." It grants}
This individual/structural distinction is not new. Recall the discussion above of the difference between subject matter jurisdiction and personal jurisdiction. Federal subject matter jurisdiction is a structural issue, regarding the proper division of power between the states and the federal government, while personal jurisdiction is individual and involves one's right not to be hauled into distant fora. The concept of limited subject matter jurisdiction is one expression of the larger idea of federalism; other expressions of federalism in the Constitution, such as limited congressional power, are structural just as subject matter jurisdiction is. By contrast, other protections in the Constitution, such as freedom of speech or freedom from unreasonable searches, are individual. Thus it makes sense to treat Commerce Clause-based challenges as going to subject matter jurisdiction while still calling free speech challenges, for instance, nonjurisdictional.

C. State Courts vs. Federal Courts

Finally, the specter of federal-claim litigation in state court may worry some: issues treated as jurisdictional in federal court do not demand similar treatment in state court. Only the federal courts are limited by federalism doctrines. This presents an asymmetry that may seem odd.

That asymmetry, though, is completely natural: state courts and federal courts are different beasts. The Constitution affects these courts in different ways. They have different places in our governmental structure. Should we really be surprised that they might treat certain issues differently? Suppose, following Arbaugh, Congress amended Title VII to make the fifteen-employee limitation jurisdictional. Would we also say that this element now limits the jurisdiction of the state courts? This could not be right: Congress has no power over the state courts' jurisdiction. Those courts could, if they wanted, treat this element as a limitation on their jurisdiction, but it would be a pure state decision. Yet the federal courts would have to treat the element as a limit on their jurisdiction. Thus, this differential treatment in state courts of issues that I claim are jurisdictional should not bother us.

V. CONCLUSION

The argument I have presented here, that federalism-related issues should be treated as limits on the subject matter jurisdiction of the federal courts, and, in particular, that commerce-based jurisdictional elements ("true" jurisdictional elements) should be treated as jurisdictional, is not, by some measures, especially radical. The theory

Congress positive power that, prior to the enactment of the amendment, it had not held, and thus affects the federal-state balance.
here arises, I have argued, from *Erie*, one of American law’s most venerable cases. It is consistent with the way the Supreme Court treated constitutional structure in *Steel Co*. There is apparently only one Supreme Court case that flies in the face of my argument: *Arbaugh*. Even in *Arbaugh*, the bright-line rule can be dismissed as dicta because the Court did not have before it a “true” jurisdictional element, but only a policy-based limit on the application of Title VII. Certainly, a passel of lower-court cases have held precisely the opposite of what I argue here, but, as I have shown, those cases present little in the way of coherent argument for their position. In short, the Supreme Court could impose the rule that “true” jurisdictional elements create limits on federal subject matter jurisdiction with little upheaval, but to great gain in the consistent implementation of our federal Constitution.