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JURISDICTION AND MERITS

Howard M. Wasserman*

Abstract: Federal courts frequently err by treating factual elements of substantive federal causes of action as going to the jurisdiction of the federal court. This arises most frequently as to elements in three federal causes of action: the quantum-of-employees element in employment discrimination claims, the "affecting commerce" element under the Sherman Act, and the state action requirement in constitutional actions. Courts treat the failure of one of these elements as a basis for dismissing an action for lack of subject-matter jurisdiction, rather than for failure to state a claim on the merits. The error in this characterization affects the time and manner in which issues are adjudicated and resolved within the litigation process, as well as the positivist imperative of treating distinct legal conceptions in a distinct manner. This Article argues for a plain-language, positive-law approach to the separation of jurisdiction and merits. A court determines its subject-matter jurisdiction by examining the language of the jurisdiction-granting statute, the statute enacted pursuant to Congress's structural power and empowering the court to hear and resolve civil actions. All facts that may come into play in the case are relevant solely to the underlying substantive cause of action and to whether the plaintiff has established a violation of rights entitling her to judicial relief. These facts, if disputed, await resolution at trial on the merits.

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INTRODUCTION

An African-American woman files a civil action in federal district court alleging that she was fired because of her race and sex, in violation of Title VII of the Civil Rights Act of 1964.[1] The defendant files a motion to dismiss the action, arguing that it is not an employer within the meaning of Title VII. The statute defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day" over a particular period of time.[2] The defendant's motion creates a factual dispute: the complaint includes an allegation that the defendant has at least fifteen employees and thus is an employer within the meaning of Title VII, while the defendant now asserts the opposite.

This is where courts risk conflating the distinct concepts of jurisdiction and merits. In order to resolve the defendant's motion, the court must characterize the motion and the underlying issue of fact. The motion could be one to dismiss for lack of subject-matter jurisdiction[3] and the fact characterized as jurisdictional, in that the failure of the fact deprives the court of the basic power or authority to entertain the action or to resolve the dispute between the parties.[4] Alternatively, the motion

1. *See* 42 U.S.C. § 2000e-2(a) (2000) (making it unlawful employment practice to fire, fail to hire, or discriminate with respect to terms and conditions of employment against individual because of race, color, religion, sex, or national origin).

2. *Id.* § 2000e(b). Congress originally set the threshold that qualified a company as an employer at twenty-five, then lowered it in the 1972 amendments. *See* Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 82 (3d Cir. 2003). *Compare* H.R. REP. NO. 88-914, at 26 (1963), *reprinted in* EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2095, 2108 (1964) (Separate Minority Views of Hon. Richard H. Poff and Hon. William Cramer) (criticizing 1964 bill for setting "magic number" of employees at twenty-five), *with* STAFF OF SUBCOMM. ON LABOR OF THE S. COMM. ON LABOR & PUBLIC WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1283 (Comm. Print 1972) (statement of Sen. Cotton) (criticizing effort to lower employee-number requirement further).

3. *See* FED. R. CIV. P. 12(b)(1).

4. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, ___, 124 S. Ct. 2739, 2755 (2004) (defining jurisdiction as "the power of the courts to entertain cases concerned with a certain subject"); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) ("Jurisdiction is power to declare the law,

could be one to dismiss for failure to state a claim upon which relief can be granted,[5] in that the fact goes to the substantive merits of the plaintiff's claim and the failure to plead and prove this fact means the plaintiff has failed to establish a violation of federal law.[6]

Defining a fact issue as going to jurisdiction or merits carries primarily practical consequences for the time and manner in which that issue will be adjudicated and resolved within the litigation process.[7] It also has formalist[8] consequences based in the inherent value of treating distinct legal concepts in a distinct manner.[9] Unfortunately, courts often fail to maintain what should be a clear line between the concepts.

The result is confusion and incoherence among lower courts as to whether to treat the quantum-of-employees element in federal employment discrimination actions[10] as going to jurisdiction or to substantive merits.[11] And the problem is not confined to employment discrimination. Courts mischaracterize factual elements under several federal causes of action, notably the requirement of an agreement in

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and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868))); Davis v. Passman, 442 U.S. 228, 239 n.18 (1979) ("*[J]urisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case . . . .") (emphasis in original); *see also* Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1620 (2003) (arguing that jurisdiction is matter of "something like legitimate authority").

5. *See* FED. R. CIV. P. 12(b)(6).

6. *See Davis*, 442 U.S. at 237 (defining cause of action "to refer roughly to the alleged invasion of 'recognized legal rights' upon which a litigant based his claim for relief") (footnote and citations omitted).

7. *See infra* Part III.A.

8. I use "formalism" in the ordinary sense of an "excessive adherence to prescribed forms." CONCISE OXFORD DICTIONARY OF THE ENGLISH LANGUAGE 532 (9th ed. 1995). For our purposes, this means the prescribed form of a grant of jurisdiction or a law establishing or addressing substantive merits.

9. *See infra* Part III.B.

10. Confusion arises not only with respect to Title VII, but also the major federal employment anti-discrimination statutes that are modeled on Title VII and that similarly reach only companies with a minimum number of employees. *See* Papa v. Katy Indus., Inc., 166 F.3d 937, 939 (7th Cir. 1999). These include the Americans with Disabilities Act (ADA), 42 U.S.C. § 12111(a)(5)(A) (2000) (fifteen employees); the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 630(b) (2000) (twenty employees); and the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2611(4)(A)(i) (2000) (fifty employees). The FMLA, which requires employers to provide unpaid leave so employees can care for ill family members, was enacted to combat sex discrimination in employment. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003).

11. *See infra* Part II.

restraint of trade affecting commerce under the Sherman Antitrust Act[12] and the requirement of action under color of state law in constitutional claims under 42 U.S.C. § 1983.[13]

The primary justification for treating these facts as going to the court's jurisdiction is the conclusion that they are "jurisdictional elements"—elemental facts that link the statute to congressional constitutional power to enact a particular federal law.[14] In fact, quantum of employees, properly understood, is not a jurisdictional element of Title VII.[15] More importantly, even if it were (and other identifiable elements in these and other federal causes of action surely are), true "jurisdictional elements" establish legislative power to create a cause of action, but have nothing to do with judicial authority to adjudicate that cause of action.[16]

The analytical touchstone of the distinction between jurisdiction and merits is a proper conception of congressional power. That power divides into two categories: (1) structural powers, through which Congress enacts statutes establishing judicial jurisdiction over classes of cases; and (2) substantive powers, through which Congress enacts a different set of statutes creating causes of action for relief.[17] Because jurisdictional and substantive statutes are drafted as exercises of these distinct powers,[18] judicial analysis of both subject-matter jurisdiction and

12. *See* 15 U.S.C. § 1 (2000).

13. *See* 42 U.S.C. § 1983 (2000); *infra* notes 67–78 and accompanying text.

14. *See* Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 81 (3d Cir. 2003); *see also* Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1153 (2003) ("Congress sometimes chooses to include in its statutes a 'jurisdictional nexus'—that is, a requirement that the government prove that the acts to which a statute is applied in a given case themselves affect interstate commerce.").

15. *See Nesbit*, 347 F.3d at 81; *infra* Part IV.A.1.

16. *See infra* Part IV.A.2.

17. *See* Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1214 (2001) (describing "clear analytical distinction" between jurisdiction and cognizable cause of action); John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2514 (1998); *infra* notes 148–76 and accompanying text.

18. Evan Tsen Lee argues that there is no essential difference between jurisdiction and merits. *See* Lee, *supra* note 4, at 1614; *infra* notes 125–28 and accompanying text. Congress thus has greater discretion to mix its powers and to mix jurisdiction and merits, as by declaring that federal courts have original jurisdiction over all federal law claims on which the plaintiff states a claim upon which relief can be granted or on which the plaintiff ultimately prevails. Lee, *supra* note 4, at 1627 (arguing that nothing prevents legislature from tying jurisdictional inquiry to equities, just as nothing prevents legislature from divorcing liability rule from equities). *But see* Kevin M. Clermont, *Jurisdictional Fact* 4 (Cornell Legal Studies Research Paper No. 05-013, 2005) ("[W]e also know

the ultimate merits of the action must focus only on the appropriate positive-law[19] provision at the appropriate point in the litigation process.

A court measures its subject-matter jurisdiction by examining the language of the jurisdiction-granting statute.[20] If it finds the statutory terms satisfied, the court must conclude that it has subject-matter jurisdiction and the power to address and resolve the merits of the claims in favor of one or the other party.[21] In determining jurisdiction, the court need not and should not engage in any further factual inquiries tied to the cause of action, such as whether our Title VII defendant has fifteen employees. As a matter of positive law, that fact has "substantive relevance" to the plaintiff's claim.[22] It therefore goes only to the merits of that claim, to whether the plaintiff has stated and proven a remediable violation of her substantive federal rights.[23]

Part I of this Article describes litigation as a three-stage process, in which particular issues are decided by particular decision-makers at particular stages. Parts II and III demonstrate how courts and commentators err in characterizing as jurisdictional particular facts that, properly understood, go to the merits of a plaintiff's federal constitutional or statutory claim, and consider the consequences of that

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that the plaintiff should not have to *prove* her cause of action in order to establish jurisdiction . . . .") (emphasis in original), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=694341; Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 166 (1953) (arguing that "power of the court to hear and decide a case could hardly be made to depend upon the jury's verdict").

I provide preliminary responses to Lee below. *See infra* notes 129–47 and accompanying text. I leave a fuller response, and a broader analysis of the limitations on Congress' power to merge jurisdiction and merits (grounded in the jury right and procedural clarity), for a later article.

19. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) ("[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it." (quoting Black & White Taxicab Co. & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))); H.L.A. HART, THE CONCEPT OF LAW 253 (1961) (recognizing one element of positivism as understanding that laws are commands of human beings); 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, 116 (1993) ("The positivist conception of law . . . defined law as a command of a sovereign.").

20. *See, e.g.*, 28 U.S.C. § 1331 (2000) (granting district courts original jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States"); *see infra* notes 238–68 and accompanying text.

21. *See* Fitzgerald, *supra* note 17, at 1216; Mishkin, *supra* note 18, at 166.

22. *See* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 82 [hereinafter Brilmayer, *Due Process*].

23. *See infra* Part V.

muddied analysis in light of the three-stage process. Part IV examines, and rejects, possible explanations for the confused analysis. Finally, Part V proposes a proper approach for characterizing facts and distinguishing between jurisdiction and merits, an approach that respects and maintains a clean line between necessarily distinct concepts.

I. JURISDICTION, MERITS, AND THE ADJUDICATIVE PROCESS

Adjudication is a highly formal method of public decision-making. It is well known that the overwhelming majority of cases do not go to trial for final resolution of real-world legal and factual disputes by judge or jury.[24] But adjudication, properly understood, is broader than trial.[25] In Lon Fuller's classic description:

> [A]djudication is a form of decision that defines the affected party's participation as that of offering proofs and reasoned arguments. It is not so much that adjudicators decide only issues presented by claims of right or accusations. The point is rather that *whatever* they decide, or *whatever* is submitted to them for decision, tends to be converted into a claim of right or an accusation of fault or guilt.[26]

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24. *See* Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 706 (2004) (citing statistics showing that percentage of civil cases terminated by bench or jury trial was 1.8% in 2002); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 767 (1993) [hereinafter Marcus, *Bathwater*] (describing attitude among federal judges that trial represents judicial failure); Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 157 [hereinafter Resnik, *Litigant Preferences*] (citing 2000 statistics showing that trial was begun in only three of 100 civil cases); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 925–26 (2000) [hereinafter Resnik, *Trial as Error*] (repeating comment of federal trial judge that even small number of trials reflected attorney failure); *see also* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) [hereinafter Fiss, *Against Settlement*] (criticizing preference for negotiated resolution in lieu of judicial determination, in light of broader purpose of public-law adjudication to not merely resolve public disputes, but "to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them").

25. *See* Hadfield, *supra* note 24, at 706–07 (arguing that cases can be disposed of in many other ways besides poles of trial and settlement); Resnik, *Trial as Error*, *supra* note 24, at 928 (emphasizing that one should not "equate the frequency of adjudication (decisionmaking by a judge) with the frequency of trials (by either judge or jury)").

26. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369 (1978)

Adjudication means that whatever is in dispute between the parties and must be decided by the adjudicator, the process of deciding "grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments."[27]

We should conceive of litigation under the Federal Rules of Civil Procedure as a three-phase process. The phases need not occur sequentially and often overlap in time. Adjudication—decision-making via Fuller's unique participatory and reasoned approach—occurs at all three phases; at each, the court iterates constitutional and statutory texts and values.[28] The difference among the phases lies in the issues adjudicated, the identity of the adjudicator, and the manner of adjudication.

At the first phase, a court adjudicates preliminary procedural issues going to whether the dispute over real-world facts and obligations can be resolved in this particular court between these particular parties at this particular time.[29] Of these, a federal court's determination that it has

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(emphasis in original). Owen Fiss rejects Fuller's emphasis on individual participation as rooted in the paradigm of private-law contracts litigation and thus no longer reflecting the reality of public law litigation. *See* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 44 (1979) [hereinafter Fiss, *Forms of Justice*]. Even accepting that point, Fiss nevertheless recognizes that adjudication entails reason and arguments of interested parties to the dispute before the court, although speaking through a singular representative rather than each individually. *See id.* at 42 ("[R]eason enters the process, not through the arguments of each and every individual affected, but through the arguments of the spokesmen for all the interests represented and through the decision of the judge. Reason is used to give meaning to our constitutional values.").

27. Fuller, *supra* note 26, at 369; *see* H. Jefferson Powell, *The Three Independences*, 38 U. RICH. L. REV. 603, 611 (2004) (arguing that adjudication involves judgment that proceeds from different premises and operates within different constraints). Fiss describes those constraints as including rules requiring that courts listen to a broad range of persons, speak back and respond to the issues or grievances presented, and justify their decisions. *See* Fiss, *Forms of Justice*, *supra* note 26, at 13.

28. *See* Fiss, *Forms of Justice*, *supra* note 26, at 44 ("The function of adjudication is to give meaning to public values, not merely to resolve disputes."); *see also* Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1897 (1998) (arguing that most federal jurisprudence is made at summary judgment).

29. *See* HART, *supra* note 19, at 92 (calling these "secondary rules" which "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined"); Clermont, *supra* note 18, at 12–13 (describing process for raising such "forum-authority defenses"); Lee, *supra* note 4, at 1622 n.30 (stating that jurisdiction "undoubtedly also serves an important choice-of-forum function"); Michael Wells, *Positivism and Antipositivism in Federal Courts Law*, 29 GA. L. REV. 655, 684 (1995) (arguing that secondary rules "merely determine the forums in which conflicting claims regarding rights and obligations defined by other bodies of law may be adjudicated").

These preliminaries include jurisdiction over the subject matter of the dispute, *see* FED. R. CIV. P. 12(b)(1); *see also* U.S. CONST. art. III, § 2, 28 U.S.C. § 1331 (2000), jurisdiction over the parties to

jurisdiction over the subject matter in dispute should be most critical.[30] In general, subject-matter jurisdiction is a court's constitutional and statutory[31] power or authority to entertain, hear, decide, and resolve a legal or factual dispute in favor of one party or the other.[32] Any doubts

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the dispute, *see* FED. R. CIV. P. 12(b)(2); *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980), and proper venue within the federal system, *see* FED. R. CIV. P. 12(b)(3); *see also* 28 U.S.C. § 1391 (2000). The case-or-controversy requirement of Article III imposes additional requirements. *See* Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 807 (2003) (stating that ripeness is justiciability doctrine that enables courts to avoid premature adjudication of merely abstract disagreements); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998) ("Standing to sue is part of the common understanding of what it takes to make a justiciable case."); United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968) ("A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.").

30. *See* Fitzgerald, *supra* note 17, at 1273–74 ("For the Court . . . this principle of *limited* federal power operates primarily through the formal threshold requirement of federal subject matter jurisdiction.") (emphasis in original); Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 241 (1999) [hereinafter Idleman, *Hypothetical Jurisdiction*] ("For both constitutional and institutional reasons, the subject-matter jurisdiction of the federal courts is jealously guarded by its Article III keepers."); *id.* at 251 ("Congress—let alone the separation of powers—might be doubly offended by the unauthorized exercise of judicial power."); *see also Steel Co.*, 523 U.S. at 101 (describing subject-matter jurisdiction as "an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects").

31. *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 83 (2d ed. 1990) (stating that federal courts can hear cases only if Constitution has authorized courts to hear such cases and Congress has vested that power in federal courts); Idleman, *Hypothetical Jurisdiction*, *supra* note 30, at 250–51 ("After all, the jurisdiction of the lower federal courts does not flow directly from Article III; rather, the jurisdictional grants of Article III must be first affirmed by statute."); James Leonard, Ubi Remedium Ibi Jus, *or, Where There's a Remedy, There's a Right: A Skeptic's Critique of* Ex Parte Young, 54 SYRACUSE L. REV. 215, 277 (2004) ("[T]he jurisdiction of the lower courts is a matter of legislative discretion and not of 'need' defined from Article III."); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 25 (1980) ("Courts and commentators agree that Congress' discretion in granting jurisdiction to the lower federal courts implies that those courts take jurisdiction from Congress and not from article III."); *see also Steel Co.*, 523 U.S. at 89 (referring to subject-matter jurisdiction as "the courts' statutory or constitutional *power* to adjudicate the case") (emphasis in original).

32. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, ___, 124 S. Ct. 2739, 2755 (2004) (defining statute as "jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject"); *Steel Co.*, 523 U.S. at 94 ("'Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868))); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (defining subject-matter jurisdiction as "power to adjudicate"); Davis v. Passman, 442 U.S. 228, 239 n.18 (1979) ("[*J*]*urisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case . . . .") (emphasis in original); Hagans v. Lavine, 415

about subject-matter jurisdiction should be raised and resolved at the threshold of litigation; a federal court should not reach the merits of a claim unless and until it has satisfied itself that it is the proper forum and that it has the structural authority to resolve the legal and factual issues presented by the dispute between the present parties.[33]

The significant aspect of first-phase adjudication is that the court resolves issues as to any facts on which subject-matter jurisdiction (and other preliminaries) turns.[34] The court (trial or appellate) must raise

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U.S. 528, 538 (1974) ("Jurisdiction is essentially the authority conferred by Congress to decide a given type of case one way or the other.") (citations omitted); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 718 (1838) ("Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them . . . ."); *see also* Lee, *supra* note 4, at 1620 (arguing that jurisdiction is not matter of power, but of "something like legitimate authority"); Sager, *supra* note 31, at 22 ("[S]ubject-matter jurisdiction in our legal system refers to the motive force of a court, the root power to adjudicate a specified set of controversies. Ultimately, jurisdiction is an essential part of what makes a court a court . . . .").

33. *See Steel Co.*, 523 U.S. at 88–89 (stating that jurisdiction "would normally be considered a threshold question that must be resolved . . . before proceeding to the merits"); *id.* at 101–02 ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."); *id.* at 111 (Breyer, J., concurring in part and concurring in judgment) ("That order of decision (first jurisdiction then the merits) helps better to restrict the use of the federal courts to those adversarial disputes that Article III defines as the federal judiciary's business."); Idleman, *Hypothetical Jurisdiction*, *supra* note 30, at 318 ("Narrowly viewed, the basic principle . . . is that an Article III court cannot decide the merits of a dispute without first verifying that the Article III case-or-controversy requirements have been satisfied."); *see also* Jack H. Friedenthal, *The Crack in the* Steel *Case*, 68 GEO. WASH. L. REV. 258, 259 (2000) ("[F]ederal courts have generally assumed that unless a federal court has subject-matter jurisdiction, it cannot determine any other issue in a case."); Idleman, *Hypothetical Jurisdiction*, *supra* note 30, at 243 ("If a court finds subject-matter jurisdiction, it may then proceed. If, however, the court determines that it lacks subject matter jurisdiction, it cannot decide the case on the merits. It has no authority to do so.") (internal quotation marks, footnotes, and citations omitted); Joan Steinman, *After* Steel Co.*: "Hypothetical Jurisdiction" in the Federal Appellate Courts*, 58 WASH. & LEE L. REV. 855, 860–61 (2001) ("[L]ower federal courts will not reach merits questions without first determining that an Article III case or controversy is present.").

Note that all procedural preliminaries are part of the phase-one analysis because the Supreme Court, while insistent that courts resolve jurisdiction before merits, does not similarly insist that a court resolve subject-matter jurisdiction before personal jurisdiction or venue. *See* Ruhrgas A.G. v. Marathon Oil Co., 526 U.S. 574, 578 (1999) ("[T]here is no unyielding jurisdictional hierarchy.").

34. *See* Clermont, *supra* note 18, at 13–14 & n.38; Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 60–61 (2001) [hereinafter Idleman, *Resequencing*] ("[A] court has the power to resolve any factual dispute regarding the existence of subject matter jurisdiction and may hold an evidentiary hearing . . . necessary to evaluate its jurisdiction.") (alteration in original; footnotes, citations, and internal quotation marks omitted); Wald, *supra* note 28, at 1931–32 (describing court's power to resolve factual issues when necessary to determine subject-matter jurisdiction); Louise Weinberg,

subject-matter jurisdiction sua sponte at any time in the process if the court's independent analysis suggests that jurisdiction is lacking[35]—such as when the court believes that some fact on which jurisdiction turns is absent. The parties similarly can raise jurisdictional defects, and the facts on which those defects may rest, at any time.[36]

The second and third phases of the process both focus on the merits of the plaintiff's cause of action, but in distinct manners. The second phase entails a merits preview.[37] The point at this phase is not to resolve disputes of historical fact between the parties, but merely to determine whether there are any disputes of historical fact to be resolved at trial.[38] Courts examine and weed-out what Paul Carrington calls "manifestly unfounded contentions"—those claims and defenses that are "so meritless that it is unjust to an adversary to accord them plenary consideration."[39] The question is whether there is some legal (as opposed

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Our Marbury, 89 VA. L. REV. 1235, 1317 (2003) ("[T]he plaintiff must not only plead jurisdiction, but be prepared to argue it, and if necessary, prove it."); *see also* Morrison v. Amway Corp., 323 F.3d 920, 925 (11th Cir. 2003) (stating that jurisdictional challenges "lie within the exclusive province of the trial court" and that court may independently weigh facts); United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 958 (7th Cir. 2003) (en banc) (Wood, D., J., dissenting) ("[D]istrict courts resolve whatever jurisdictional facts are contested in advance of the trial."). Clermont suggests that, in the main run of cases, the applicable standard of proof is preponderance of the evidence. Clermont, *supra* note 18, at 1.

35. *See* 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."); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

36. *See* Arbaugh v. Y&H Corp., 380 F.3d 219, 222 (5th Cir. 2004) (addressing motion to dismiss for lack of subject-matter jurisdiction brought by defendant after jury returned verdict for plaintiff), *cert. granted*, ___ U.S. ___ (May 16, 2005), 125 S. Ct. 2246 (2005).

37. *See* Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1851 (2004) (describing use of dispositive motions for merits review to dismiss before trial any "'untriable' or otherwise legally untenable" claims); Resnik, *Trial as Error*, *supra* note 24, at 937 ("Today the unhyphenated 'pretrial' is a stage unto itself, no longer a prelude to trial but rather assumed to be the way to end a case without-trial.").

38. *See* Richard L. Marcus, *The Revival of Fact Pleading under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 455 (1986) [hereinafter Marcus, *Fact Pleading*] ("[G]iven the impossibility of actually trying all civil cases, logic seems to favor pretrial disposition."); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1063 (2003) (arguing that procedures at this stage are designed to screen out cases not worthy of trial).

39. Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2087 (1989); *see also* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,

to factual) defect in the plaintiff's claim that makes trial by a finder of fact unnecessary and the action one that can be resolved by the court pre-trial.[40]

Second-phase preview entails two inquiries.[41] First, the court reviews the four corners of the plaintiff's pleading to determine whether the allegations state a claim on which relief can be granted[42] by satisfying federal notice-pleading requirements of a "short and plain statement of the claim showing that the pleader is entitled to relief . . . ."[43] The district court should grant a 12(b)(6) motion and dismiss a claim only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[44]

Second, the parties and the court move beyond pleadings and preliminarily consider evidence revealed during discovery and what that evidence indicates about the validity of the plaintiff's claim.[45] During or following discovery, the court may consider a motion for summary judgment under Rule 56(c).[46] Summary judgment entails a review of the

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507 U.S. 163, 168–69 (1993) (stating that courts and litigants should rely on pretrial dispositive motions and control of discovery to "weed out unmeritorious claims sooner rather than later").

40. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 405 (1982) (arguing that large number of federal civil suits are dismissed because of legal defects); Wald, *supra* note 28, at 1926 ("As a general matter, many of our judges seem determined to get rid of dubious-looking cases at the early stages . . . .").

41. *See* Wald, *supra* note 28, at 1918 (describing "structural theory of the Rules," under which court should look first to pleading alone, then to any outside material offered, after reasonable opportunity for discovery).

42. *See* FED. R. CIV. P. 12(b)(6).

43. *Id.* 8(a)(2); *see* Conley v. Gibson, 355 U.S. 41, 47 (1957) ("[A]ll the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 561 (2002) [hereinafter Fairman, *Heightened Pleading*] (arguing that Rule 8 requires that "a claim be stated with brevity, conciseness, and clarity").

44. *Conley*, 355 U.S. at 45–46.

45. *See* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 993 (2003) [hereinafter Fairman, *Myth*] ("The modern discovery tools enable every party to obtain disclosure of all relevant, unprivileged information in the possession of another . . . . [T]hey continue to serve the vital function of factual development . . . ."); Marcus, *Fact Pleading*, *supra* note 38, at 440 ("Rather than dwell on pleading niceties, under the new system litigants were to use the expanded discovery mechanisms provided by the Federal Rules to get to the merits of the case.").

46. *See* FED. R. CIV. P. 56(c) ("The judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."); *see also* Miller, *supra* note 38, at 1048–49 (describing increased use of summary judgment motions); Wald, *supra* note 28, at 1897 ("Federal jurisprudence is largely the product of summary judgment in civil cases.").

factual story about real-world events as suggested by the evidence, to determine whether there is a genuine dispute of material (i.e., outcome-determinative[47]) fact that can be resolved only at trial by the trier of fact.[48] In its theoretically pure form, summary judgment is proper only if there are no such disputes of material fact and no reasonable fact finder could find in favor of the nonmoving party.[49] As one commentator put it, on summary judgment "the court cannot try issues of fact; it only determines if there are issues to be tried."[50]

To the extent that there are genuine factual disputes, the case must proceed to the third phase—trial on the merits. Cases rarely reach this point; most either settle or are resolved at one of the first two phases.[51] If the case is one of the few that does go to trial, factual issues are

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The Rules permit a plaintiff to move for summary judgment at any time after twenty days from the commencement of the action, *see* FED. R. CIV. P. 56(a), and a defendant to move for summary judgment at any time, *see* FED. R. CIV. P. 56(b). But summary judgment contemplates a focus on evidence, rather than pleadings; thus the motion should be ruled upon only after the parties have had an opportunity to conduct discovery. *See* FED. R. CIV. P. 56(f) (permitting court to delay ruling on motion to permit parties to engage in discovery); FED. R. CIV. P. 12(b) (permitting court to convert 12(b)(6) motion to dismiss into motion for summary judgment, but requiring that parties be given "reasonable opportunity" to present pertinent evidentiary material); *see also* Wald, *supra* note 28, at 1918 ("The plaintiff had better be prepared to put her best case forward, fast, to stay in court at all."). *But see id.* at 1926 (criticizing reluctance of judges to allow discovery before awarding summary judgment).

47. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (stating that summary judgment is appropriate after adequate time for discovery "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").

48. *See* Marcus, *Fact Pleading*, *supra* note 38, at 484 ("[T]he intermediate step of summary judgment exists precisely to enable courts to examine the factual conclusions of the pleader and determine whether they are supported by sufficient evidence to warrant the time and effort of a trial.").

49. *See Anderson*, 477 U.S. at 250–51 (agreeing that standard on summary judgment is whether "under the governing law, there can be but one reasonable conclusion as to the verdict" and that summary judgment is improper if "reasonable minds could differ as to the import of the evidence").

50. Fairman, *Myth*, *supra* note 45, at 993; *see* Wald, *supra* note 28, at 1897 (arguing that purpose of summary judgment is to "weed out frivolous and sham cases, and cases for which the law had a quick and definitive answer").

51. *See supra* notes 29–50 and accompanying text. Randy Kozel and David Rosenberg recently proposed a solution to the problem of nuisance-value lawsuits designed to coerce the defendant into settling, by requiring the filing of a second-phase dispositive motion before the parties may enter into an enforceable settlement agreement. *See* Kozel & Rosenberg, *supra* note 37, at 1860.

resolved, inferences from facts are drawn, and controlling substantive law is applied to those facts to determine whether the defendant's conduct abridged the plaintiff's rights.[52] Responsibility for resolving factual disputes often (although not always) rests with the unique American institution[53] of the civil jury.[54]

A defendant may assert in a single motion to dismiss both a phase-one issue such as lack of subject matter jurisdiction and the phase-two issue of failure to state a claim on the merits.[55] And the increasing use of settlement and alternative dispute resolution devices, such as arbitration and mediation,[56] may (depending on how one views it) either add new options to second-phase merits analysis or pull the case off the three-phase track and into a private, non-judicial, and perhaps non-adjudicative mode of resolution.

Unfortunately, courts tend to depart from this formal structure. For

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52. *Cf.* Fitzgerald, *supra* note 17, at 1216 ("[A] party who cleared the jurisdictional hurdle would fin[d] a court clothed with entire power to do justice according to law, or according to equity, whichever he appeals to.") (alterations in original) (citations and internal quotation marks omitted).

53. *See* Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 33 ("For two centuries, we Americans have nurtured our faith in the civil jury."); Miller, *supra* note 38, at 1077 ("Jury trial is both unique and central to the American legal system. It has been revered as a method of establishing the truth and as a safeguard against both the imposition of a morality by the elite and a tyranny of the state."); Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 183 (2000) (describing one view of civil jury as "a cornerstone of democratic government, a protection against incompetent or oppressive judges, and a way for the people to have an active role in the process of justice").

54. *See* U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."); Marcus, *Fact Pleading*, *supra* note 38, at 440 (arguing that proper method for resolving disputed merits was trial by jury); Miller, *supra* note 38, at 1083 ("'When there is a dispute as to what acts or events have actually occurred, or what conditions have actually existed, the jury has the task of resolving the conflict. Its role is to evaluate the evidence and to reconstruct what took place, as it would have appeared to an objective on-the-scene observer.'" (quoting Stephen Weiner, *Civil Jury Trial*, 54 CAL. L. REV. 1867, 1869–70 (1966))); Moses, *supra* note 53, at 202 (describing "fundamental role of the jury to find facts").

55. *See* FED. R. CIV. P. 12(g) (providing that party making Rule 12(b) motion to dismiss "may join with it any other motions herein provided for and then available to the party").

56. *See id.* 16(c)(9) (enumerating subjects for consideration at pretrial conference, including "settlement and the use of special procedures to assist in resolving the dispute"); Fiss, *Against Settlement*, *supra* note 24, at 1083 ("The allure of settlement in large part derives from the fact that it avoids the need for a trial."); Resnik, *Trial as Error*, *supra* note 24, at 926 ("Found in rules and policy statements of the federal judiciary are increasing obligations of judges to press parties toward settlement."); Resnik, *Litigant Preferences*, *supra* note 24, at 157 (describing development of mandates for judges to raise issues of settlement and alternative dispute resolution).

example, commentators criticize courts for an increasing willingness to resolve disputed facts at summary judgment.[57] For our purposes, courts also depart from this three-phase structure when they fail properly to characterize issues and thus to recognize the place and manner for their adjudication within the formal three-phase process. On the one hand are factual and legal issues that go to the court's subject-matter jurisdiction, adjudicated at the first phase of litigation with the court as fact finder; on the other are factual and legal issues that go to whether the plaintiff has pleaded and established a violation of her protected substantive federal rights, adjudicated at the second or third phases, depending on the existence of material factual disputes.[58] When courts confuse jurisdictional facts and law with merits facts and law, issues are adjudicated and resolved at the wrong time and in the wrong manner by the wrong fact finder within the adjudicative process.

II. ILLUSTRATING CONFUSION

Trial courts most often are called upon to define an issue as going to merits or jurisdiction in the situation described in our primary example: The plaintiff files a claim, the defendant moves to dismiss—either for lack of subject-matter jurisdiction or for failure to state a claim (or both, in the alternative)[59]—and the court must properly characterize the motion and determine when and how to resolve it.[60] The issue could come before the court in two other contexts. First, whether a fact issue

57. *See* Wald, *supra* note 28, at 1917 (arguing that summary judgment frequently is converted into "something more like a gestalt verdict based on an early snapshot of the case"); *see also* Miller, *supra* note 38, at 1092 (arguing that when facts are undisputed but different inferences may be drawn from those undisputed facts, there is dispute of fact to be settled by jury); Wald, *supra* note 28, at 1938 (describing willingness of courts to refuse to draw factual inferences in favor of nonmovant and to grant summary judgment on ground that no reasonable fact finder could come out any other way).

58. *See* Clermont, *supra* note 18, at 20 ("[T]he court should avoid treating a jurisdictional motion like a demurrer.").

59. *See* FED. R. CIV. P. 12(b)(1), (b)(6); *see, e.g.*, Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 76 (3d Cir. 2003) (involving defendant moving to dismiss for lack of subject-matter jurisdiction); Papa v. Katy Indus., Inc., 166 F.3d 937, 939 (7th Cir. 1999) (involving district court agreeing that defendant was not employer and dismissing for lack of subject-matter jurisdiction); Wascura v. Carver, 169 F.3d 683, 684 (11th Cir. 1999) (involving defendant moving to dismiss for failure to state claim, appellate court converting motion to one to dismiss for lack of subject-matter jurisdiction).

60. *See supra* Part I.

goes to jurisdiction or to merits dictates whether the court must raise sua sponte the absence of that fact in a given case, which it must if that fact is jurisdictional.[61] Second, a court may need to characterize a fact in order to determine whether it has been conclusively determined in a prior action and whether prior determination precludes relitigation of the issue.[62]

Quantum of employees under Title VII and the major federal employment discrimination statutes modeled on it[63] illustrates the entanglement of jurisdiction and merits. These statutes apply only to employers, defined as entities with a minimum number of employees that are engaged in an industry affecting interstate commerce.[64] That is, the statutes control the conduct of, and subject to possible liability, only entities that meet the statutory definition of employer. There is a deep circuit split, and a tremendous amount of confusion, as to how to characterize and address quantum of employees.[65] The Supreme Court

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61. *See supra* notes 30–36 and accompanying text.

62. *See infra* notes 105–20 and accompanying text.

63. *See supra* note 10.

64. *See* 42 U.S.C. § 2000e(b) (2000) (Title VII) (defining employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks"); 29 U.S.C. § 630(b) (2000) (ADEA) (defining employer as "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"); 29 U.S.C. § 2611(4)(A)(i) (2000) (FMLA) (defining employer as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks").

65. *Compare* Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 83 (3d Cir. 2003) (holding that fifteen-employee threshold is substantive element of Title VII and not jurisdictional), *and* Da Silva v. Kinsho Int'l Corp., 229 F.3d 358, 366 (2d Cir. 2000) (same), *and* Papa v. Katy Indus., Inc., 166 F.3d 937, 943 (7th Cir. 1999) (citing Sharpe v. Jefferson Distrib. Co., 148 F.3d 676, 678 (7th Cir. 1998)) ("[T]he issue is not jurisdictional."), *and* EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 622 (D.C. Cir. 1997) ("[C]overage under the ADA forms an element of the plaintiff's cause of action rather than a prerequisite to the district court's jurisdiction . . . ."), *with* Arbaugh v. Y&H Corp., 380 F.3d 219, 225 (5th Cir. 2004) ("[T]he employee census finding is determinative of subject matter jurisdiction."), *cert. granted* ___ U.S. ___ (May 16, 2005), 125 S. Ct. 2246 (2005), *and* Hukill v. Auto Care, Inc., 192 F.3d 437, 441 (4th Cir. 1999) ("A district court lacks subject matter jurisdiction over an FMLA claim if the defendant is not an employer as that term is defined in the FMLA."), *and* Scarfo v. Ginsberg, 175 F.3d 957, 961 (11th Cir. 1999) ("Whether the appellees constitute an 'employer' within the definition of Title VII is a threshold jurisdictional issue."), *and* Wascura v. Carver, 169 F.3d 683, 685 (11th Cir. 1999) ("[W]here a defendant in an FMLA suit does not meet the statutory definition of 'employer,' there is no federal subject matter jurisdiction over the claim against that defendant."), *and* Greenlees v. Eidenmuller Enter., Inc., 32 F.3d 197, 198 (5th Cir. 1994) (holding that district court lacked jurisdiction where it found that defendant employed fewer than fifteen employees). *Cf.* Armbruster v. Quinn, 711 F.2d 1332, 1341–

granted certiorari to resolve that split in the October 2005 term, in a Title VII case in which the lower courts characterized employer status as a jurisdictional fact.[66]

But the confusion is not limited to employment discrimination laws; the problem arises in a number of federal causes of action. For example, constitutional claims against state and local officials can be brought only against persons acting "under color of" state or local law, a requirement that overlaps with the state action requirement of the Fourteenth Amendment (and incorporated Bill of Rights provisions).[67] In the only detailed judicial analysis, the Third Circuit concluded that state action, or action under color of law, is not a question of jurisdiction; rather, it is a phase-two merits issue, and the only question is whether the complaint alleges sufficient facts, taken as true, from which state action would be found.[68] On the other hand, the Second Circuit more recently noted, although without explanation, that courts have divided in their conclusions.[69]

Another example is federal antitrust claims, in which the plaintiff must show conduct constituting a restraint of "trade or commerce among

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42 (6th Cir. 1983) (treating question of whether defendant was employer as jurisdictional, but subject to summary judgment standard).

66. *Arbaugh*, 380 F.3d at 225.

67. *See* U.S. CONST. amend. XIV, § 1 ([N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); 42 U.S.C. § 1983 (2000) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ."); Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) ("As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments . . . .'" (quoting Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 156 (1978))).

If the plaintiff shows that the defendant was a state actor who could, as a matter of substantive constitutional law, violate the First or Fourteenth Amendment, she simultaneously shows that the defendant acted under color of state law so as to fall within the grasp of § 1983. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletics Ass'n, 531 U.S. 288, 295 n.2 (2001) ("If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes." (quoting *Lugar*, 457 U.S. at 935)); *Lugar*, 457 U.S. at 929 ("Having found state action under the Constitution, there was no further inquiry into whether the action of the political associations also met the statutory requirement of action 'under color of state law.'").

68. Kulick v. Pocono Downs Racing Ass'n, 816 F.2d 895, 899 (3d Cir. 1987).

69. *See* Monsky v. Moraghan, 127 F.3d 243, 245 (2d Cir. 1997) (noting circuit split); Idleman, *Hypothetical Jurisdiction*, *supra* note 30, at 323–24 n.365.

the several States, or with foreign nations . . . ."[70] The Supreme Court has made contradictory suggestions as to how to characterize the fact of whether the defendant's conduct affected interstate commerce. In *Hospital Building Co. v. Trustees of Rex Hospital*,[71] the Court reversed the Rule 12(b)(6) dismissal of a Sherman Act claim that had been based on the plaintiff's failure to allege facts to establish effect on interstate commerce, concluding that the complaint stated a claim upon which relief could be granted.[72] The Court noted, however, that the analysis and outcome would be the same even if it viewed the dismissal as one for want of jurisdiction.[73] The Court sent similar mixed signals in *McLain v. Real Estate Board of New Orleans*.[74] On the one hand, the Court said that plaintiffs must show a not-insubstantial effect on interstate commerce to "establish federal jurisdiction."[75] On the other, the Court held that the notice pleading standard of Rule 8(a)(2) and *Conley v. Gibson*,[76] which controls second-phase analysis, "applies with no less force to a Sherman Act claim, where one of the requisites of a cause of action is the existence of a demonstrable nexus between the defendants' activity and interstate commerce."[77] Commentators are similarly divided on whether the requirement of an interstate commerce nexus is or should be jurisdictional or substantive.[78]

It is noteworthy—and logically problematic for courts that treat any

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70. 15 U.S.C. § 1 (2000) ("Every 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.").

71. 425 U.S. 738 (1976).

72. *Id.* at 746–47; *id.* at 742 n.1 ("We, too, will treat the dismissal as having been based on Rule 12(b)(6).").

73. *See id.* at 742 n.1.

74. 444 U.S. 232 (1980).

75. *Id.* at 246.

76. 355 U.S. 41 (1957).

77. *McLain*, 444 U.S. at 246.

78. *Compare* Stephen Calkins, *The 1990–91 Supreme Court Term and Antitrust: Toward Greater Certainty*, 60 ANTITRUST L.J. 603, 632 (1991) ("The Sherman Act sought to rely on the commerce clause's authority by outlawing agreements 'in restraint of trade or commerce,' so this statutory language limits what Congress *did* prohibit (which is probably not the same thing as what it could prohibit today). Neither of these concerns limits the power of federal courts to hear cases initiated by nonfrivolous complaints . . . .") (emphasis in original), *with* Roxane C. Busey & Peter B. Freeman, *The View From the* Summit*: Jurisdiction and Beyond*, 60 ANTITRUST L.J. 725, 726 n.9 (1991) ("[T]he Supreme Court has consistently referred to the issue as a question of jurisdiction . . . .").

of these facts as jurisdictional—that they mix jurisdiction and merits only as to one fact under each of these statutes. Courts are uniform in treating all other elements in the statutes as going to the merits—to whether the plaintiff has stated or proven a remediable violation of federal law. It is unquestionably a merits issue in an employment discrimination action whether the plaintiff is an employee as opposed to an independent contractor,[79] whether the plaintiff is a member of the statutorily protected class,[80] or whether the defendant engaged in the type of employment practices made unlawful by the statute.[81] Courts are similarly clear that it is a merits question whether a public official's conduct in fact deprived the plaintiff of a protected constitutional right[82]

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79. *See* 42 U.S.C. § 2000e(f) (2000) ("The term 'employee' means an individual employed by an employer . . . ."); 29 U.S.C. § 630(f) (2000) ("The term 'employee' means an individual employed by any employer . . . ."); *see also, e.g.*, EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 698 (7th Cir. 2002) (holding that, in order to show ADEA violation, adversely affected individuals must establish that they were employees); Farlow v. Wachovia Bank of N.C., N.A., 259 F.3d 309, 316 (4th Cir. 2001) (affirming grant of summary judgment based on determination that plaintiff in Title VII action was independent contractor, not employee); Garcia v. Copenhaver, Bell & Assocs., 104 F.3d 1256, 1267 (11th Cir. 1997) (holding that there was genuine issue of material fact precluding summary judgment as to whether plaintiff was employee or independent contractor).

80. *See* 42 U.S.C. § 12102(2)(A) (2000) (defining "disability" as "physical or mental impairment that substantially limits one or more of the major life activities of such individual"); *id.* § 12111(8) (defining "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires"); *see also, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002) ("[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term."); *id.* at 187 (reversing summary judgment determination on this point); Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 766 (3d Cir. 2004) (Scirica, C.J., concurring) (arguing that plaintiff who described himself as "Confederate Southern-American" had not established himself as member of protected legitimate national original classification for Title VII purposes); Marinelli v. City of Erie, 216 F.3d 354, 359 (3d Cir. 2000) (stating that plaintiff must establish that she is qualified person with disability in order to state cognizable cause of action under ADA).

81. *See* 42 U.S.C. § 2000e-2(a)(1) (defining unlawful employment practice as discrimination "because of such individual's race, color, religion, sex, or national origin"); *see also, e.g.*, Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001) ("Because the evidence produced by [the plaintiff]—and indeed, his very claim—indicated only that he was being harassed on the basis of his sexual orientation, rather than because of his sex, the District Court properly determined that there was no cause of action under Title VII."); Davoll v. Webb, 194 F.3d 1116, 1130 (10th Cir. 1999) (holding that it is merits issue whether provision of ADA prohibiting discrimination by public entities encompasses employment discrimination by that public entity).

82. *See, e.g.*, Chavez v. Martinez, 538 U.S. 760, 766 (2003) (plurality opinion) (holding that plaintiff cannot prove violation of Fifth Amendment when his statements were not used against him in court); DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 202 (1989) (holding

or whether a Sherman Act defendant entered into a contract, conspiracy, or agreement that was, in fact, in restraint of trade.[83]

Given that confusion of jurisdiction and merits most frequently occurs in employment discrimination and constitutional claims, one could characterize this as another example of federal courts misapplying (or narrowly applying) procedures in a way that disadvantages civil rights claimants.[84] At the very least, it could be seen as federal courts misapplying procedures in a way that disparately disadvantages plaintiffs availing themselves of far-reaching federal laws. After all, federal courts arguably are no more solicitous of antitrust plaintiffs than of civil rights plaintiffs.[85]

Two points cut against this view. First, it seems incoherent to disadvantage plaintiffs with regard to one element but not other elements of the same statutory cause of action.[86] If the purpose is to make it easier for courts to dispose of Title VII cases when the defendant is not an employer, why not also make it easier for courts to dispose of cases when the plaintiff is not an employee?[87] Second, resolving the merits/jurisdiction confusion and addressing each in the procedurally appropriate time and manner will not necessarily alter the outcome of the case. If a defendant does not have fifteen employees, the Title VII

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that plaintiff could not state claim for violation of substantive due process where state had no constitutional obligation to protect plaintiff from private harm); Daniels v. Williams, 474 U.S. 327, 329–30 (1986) (holding that plaintiff's § 1983 claim could succeed only if he could prove violation of underlying constitutional right, including scienter requirement inherent in constitutional right).

83. *See, e.g.*, Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) (holding that to survive 12(b)(6) motion to dismiss antitrust plaintiff must plead contract, combination, or conspiracy in restraint of trade).

84. *See, e.g.*, Fairman, *Myth*, *supra* note 45, at 1027–28 (arguing that "the oak of judicially-imposed heightened pleading" sprang up to "thwart would-be fears of meritless claims and harassed defendants" in civil rights action); Fairman, *Heightened Pleading*, *supra* note 43, at 574 (arguing that judicially imposed heightened pleading in civil rights cases "arose out of the twin rationales of presumption of frivolousness and protection of the defendant"); Marcus, *Bathwater*, *supra* note 24, at 775–76 (describing concern for particular impact of procedural rules on identifiable groups); Howard M. Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure*, 25 CARDOZO L. REV. 793, 805–06 & n.60 (2003).

85. *See* Fairman, *Myth*, *supra* note 45, at 1059 (arguing that heightened pleading requirements generally derive from judicial concern for protecting defendants); Marcus, *Fact Pleading*, *supra* note 38, at 445–46 (describing how courts have adopted stricter pleading rules as antidote to pro-plaintiff biases in system of lax pleading).

86. *See infra* Part IV.

87. The merits question of whether the plaintiff is a proper party under a statute often gets confused with the question of whether the plaintiff has standing, a separate Article III concern.

claim will fail; if the defendant is not a state actor, the constitutional claim will fail. That will be true whether the court resolves the fact issue as part of its jurisdictional analysis or the jury (or court) does so at trial on the merits. The former permits earlier disposition of the issue and, potentially, the entire action if the judge resolves factual disputes without need for trial.[88] However, because the goal is to ensure that the issue is decided by the correct decision-maker at the correct point in the process, such expediency goals should not enter the calculus.

III. CONSEQUENCES OF CONFUSION

Two consequences flow from the characterization of a particular fact as jurisdictional or merits-related. The first is procedural—the time and manner in which that fact is resolved in the adjudicative process. The second is formalist[89]—Congress treats jurisdiction and merits differently in its various statutory enactments and, in a formalist framework, distinct concepts should be addressed in a distinct manner.[90]

A. Procedural Consequences

The primary consequence will be the time and manner of adjudicating a factual dispute within the litigation process. Confusing whether a fact issue goes to jurisdiction or merits produces uncertainty as to when the issue should be resolved, by whom, and under what standard, along with confusion as to the meaning of that resolution.

If a fact goes to the court's jurisdiction, it is adjudicated in the first phase. The court examines evidence, makes findings, and resolves disputes as to those facts on which the existence of subject-matter jurisdiction turns.[91] Those facts, having been found by the trial court, will be subject to somewhat deferential review for clear error on appeal.[92] And a 12(b)(1) dismissal will be without prejudice, meaning

88. *See* Wald, *supra* note 28, at 1931–32.

89. *See supra* note 8.

90. *Cf.* Owens v. Union Pac. R.R. Co., 319 U.S. 715, 721 (1943) (stating that distinct concepts having distinct consequences should be treated in distinct manner).

91. *See supra* notes 35–36 and accompanying text; *infra* Part V.B.

92. *See* FED. R. CIV. P. 52(a) ("Findings of fact [made by the district court], whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."); Scarfo v. Ginsberg, 175 F.3d 957, 960 (11th Cir. 1999) ("We review the district court's findings of

the plaintiff will have an opportunity to refile her claims in an appropriate forum, most likely state court.[93]

On the other hand, if a particular fact goes to the merits of the claim, it should be resolved according to the processes of the second and third phases of litigation. The court cannot make findings on this fact. In a Title VII action, the plaintiff's allegation in the complaint that the defendant has fifteen employees must be taken as true on a Rule 12(b)(6) motion.[94] On summary judgment, the court only should consider whether there is a dispute as to quantum of employees based on evidence gathered in discovery, denying summary judgment if there is such a factual dispute.[95]

To the extent there is a dispute as to the factual elements of the plaintiff's claim, summary judgment is inappropriate. The dispute must be resolved at the third phase, trial on the merits by the finder of fact, usually a jury.[96] The jury's findings will be subject to more deferential

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jurisdictional facts for clear error."). This is less deferential than review of merits facts found by a jury, but more deferential than review of other pretrial issues. *See* United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 958–59 (7th Cir. 2003) (en banc) (arguing that appellate courts will be unable to give plenary consideration to sensitive issues that can arise in some cases). *But see* Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1438 (2000) ("[T]he judges' determinations of fact are for all practical purposes unappealable.").

93. *See* Idleman, *Resequencing*, *supra* note 34, at 83 n.449; Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L REV. 602, 695–96 n.650 (2003) (stating that plaintiff will be able to pursue second action on same cause of action when "'[t]he plaintiff was unable to rely on a certain theory of case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts'" (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1980))).

94. *See* Haddle v. Garrison, 525 U.S. 121, 125 (1998). Should the plaintiff fail to allege in her complaint that the defendant is an employer, a court ruling on a 12(b)(6) motion may find the complaint factually (as opposed to legally) deficient and dismiss. But the motion likely will be granted without prejudice and the plaintiff given leave to replead the necessary additional facts. *See* Miller, *supra* note 38, at 1016 ("[A] Rule 12(b)(6) grant typically is with leave to replead . . . ."); *see also, e.g.*, United States v. Union Corp., 194 F.R.D. 223, 236 (E.D. Pa. 2000) ("[A] district court abuses its discretion when it dismisses a claim for want of sufficient factual allegations without granting leave to amend and replead and without giving the pleading party an opportunity to cure the factual deficiencies of the original pleading.").

95. *See, e.g.*, Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976, 982–83 (10th Cir. 2002) (reversing grant of summary judgment where evidence created factual dispute on issue of whether defendant in ADA case had fifteen employees); *see supra* notes 45–50 and accompanying text.

96. *See supra* notes 52–54 and accompanying text; *see also, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709 (1999) (holding that § 1983 action seeking to vindicate constitutional rights is action at law, to which jury right attaches, within meaning of Seventh Amendment); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504 (1959) (holding that right to

review on post-judgment motions and on appeal.[97] Of course, to the

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trial by jury applies to suits for treble damages under antitrust laws).

The jury right in Title VII claims for compensatory and punitive damages derives from statute, not the Seventh Amendment. *See* 42 U.S.C. § 1981a(c) (2000) (providing jury trial on claims for compensatory or punitive damages under Title VII). The statutory jury right was created by the Civil Rights Act of 1991, in the face of lower-court decisions refusing to find a constitutional jury right in Title VII claims seeking back pay or front pay. *See, e.g.*, Fortino v. Quasar Co., 950 F.2d 389, 398 (7th Cir. 1991) (holding that remedy of front pay, being in lieu of reinstatement, is equitable, and therefore does not carry with it jury trial right); Ramos v. Roche Prods., Inc., 936 F.2d 43, 49 (1st Cir. 1991) (citing Olin v. Prudential Ins. Co. of Am., 798 F.2d 1, 7 (1st Cir. 1986)) (holding that Title VII is "essentially equitable" in nature and does not carry with it right to trial by jury); *see also* Curtis v. Loether, 415 U.S. 189, 196–97 (1974) (holding that jury trial right applies to claims for compensatory damages under Title VIII of the Civil Rights Act of 1964, comparing that statutory remedy to the more equitable remedy of Title VII).

The contours of the statutory jury right are the same as the constitutional jury right. Thus, in Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1202 (9th Cir. 2002), the Ninth Circuit rejected the argument that the cap on compensatory damages in § 1981a violated the statutory jury right; because a damages cap would be constitutional under the Seventh Amendment, it was permissible as to the statutory right. For our purposes, this means that a plaintiff who seeks compensatory damages alone, or in addition to equitable remedies available under Title VII, *see* 42 U.S.C. § 2000e-5(g)(1) (enumerating available remedies, including injunctions, back pay, reinstatement, "or any other equitable relief as the court deems appropriate"), may have a jury resolve issues of whether the defendant is an employer under Title VII—that is, a person having fifteen or more employees.

Although the jury right does not attach to claims for equitable relief, where a cause of action includes both legal and equitable claims, common factual issues must be tried to and resolved by the jury first. *See* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 473 & n.8 (1962) (holding that "any legal issues for which a trial by jury is timely and properly demanded [must] be submitted to a jury" and "[a]s long as any legal cause is involved the jury rights it creates control"); *Beacon Theatres*, 359 U.S. at 510–11 ("[O]nly under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims."); Moses, *supra* note 53, at 208–10. The question whether the defendant is an employer subject to the restrictions of Title VII obviously is a common issue to a plaintiff's claims for both legal and equitable relief under the statute—she cannot recover any remedy of any kind if the defendant is not subject to the statute. Any disputes on the quantum-of-employees issue thus would be resolved by the jury as part of the trial of the legal issues that comes first.

97. *See* U.S. CONST. art. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 (1996) ("The Seventh Amendment . . . bears not only on the allocation of trial functions between judge and jury . . . it also controls the allocation of authority to review verdicts."); Honda Motor Co. v. Oberg, 512 U.S. 415, 432 n.10 (1994) (describing some verbal formulations of deferential review of jury verdicts, including whether verdict was governed by "passion and prejudice," "gross excessiveness," and "against the great weight of the evidence"); Reynolds v. City of Chicago, 296 F.3d 524, 526–27 (7th Cir. 2002) (citing cases for proposition that "in a federal civil case, by virtue of the Seventh Amendment, reviewing courts owe more deference to a jury's findings than to findings by a judge"); Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 108 (2d Cir. 2001) (holding that jury verdict can be overturned "[o]nly if there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of

extent judges have become freer in resolving factual disputes, both in granting summary judgment and in reviewing jury findings, the procedural consequences of the jurisdiction/merits confusion may become less practically significant.[98]

Nevertheless, because different decision-makers often reach different results on the same legal doctrine or on the same facts, the identity of the decision-maker on an issue remains significant.[99] *Arbaugh v. Y&H Corp.*,[100] the vehicle the Supreme Court should use in the October 2005 term to resolve Title VII's merits/jurisdiction confusion, illustrates the point. The parties already had taken that sexual harassment case to trial, where a jury awarded the plaintiff $40,000 in back pay and compensatory and punitive damages.[101] After judgment was entered on the verdict, defendants for the first time raised, and the court granted, a motion to dismiss for lack of subject-matter jurisdiction on the ground that the defendant, by not having fifteen or more employees, was exempt from Title VII's coverage.[102]

Of course, this occurred after the jury had concluded that the defendant's real-world conduct violated Title VII. That conclusion necessarily means the jury found that the defendant's conduct was inconsistent with a duty imposed on it by Title VII. [103] This implicitly means a finding that the defendant was an employer, otherwise it could not have been subject to that statutory duty. The defendant raising the fact after the eleventh hour, and the court resolving the dispute as a

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sheer surmise and conjecture"); *see also* Debra Lyn Bassett, *"I Lost at Trial—in the Court of Appeals!": The Expanding Power of the Federal Appellate Courts to Reexamine Facts*, 38 HOUS. L. REV. 1129, 1136 (2001) ("The Seventh Amendment's Reexamination Clause provides an express constitutional guarantee against federal appellate court reexamination of jury findings."); Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 583 (2003) (stating that Seventh Amendment only protects jury's fact-finding authority from review by courts).

98. *See supra* notes 57, 96–97 and accompanying text. They remain significant as a formalist matter, however. *See infra* Part III.B.

99. *See* LoPucki & Weyrauch, *supra* note 92, at 1463.

100. 380 F.3d 219 (5th Cir. 2004), *cert. granted*, ___ U.S. ___ (May 16, 2005) 125 S. Ct. 2246 (2005).

101. *Id.* at 222.

102. *Id.* Assuming quantum of employees is jurisdictional, as the Fifth Circuit held, the motion was timely, even after judgment had been entered, because lack of subject-matter jurisdiction can be raised at any time in the process. *See* FED. R. CIV. P. 12(h)(3); *supra* notes 35–36.

103. *See* Harrison, *supra* note 17, at 2520 (defining wrongful conduct as that which is inconsistent with duty resting on defendant); *supra* notes 64–88; *infra* Part II.B.

jurisdictional issue, together deprived the plaintiff of her right to a jury determination (and a more favorable conclusion) on that fact.[104]

Entanglement of jurisdiction and merits generates other procedural anomalies. Consider, for example, the preclusive effect of a factual finding. The jurisdictional dismissal in *Arbaugh* should be without prejudice to the plaintiff's right to bring her Title VII claim in state court.[105] Under basic principles of claim preclusion,[106] a plaintiff can refile in a proper forum, since the first judgment was based on the absence of jurisdiction and was not on the merits.[107] However, the defendant's status as an employer remains an essential element of the plaintiff's claim; she can recover under Title VII in state court only if she can show that an employer engaged in an unlawful employment practice that caused her harm.[108] And the federal court just found that this particular defendant is not an employer within the meaning of the statute.

This raises the related question of what issue-preclusive effect to give to that finding.[109] Issue preclusion[110] prohibits a party from relitigating a factual issue actually found and necessary to an earlier judgment, where the party had a "full and fair opportunity to litigate" the issue.[111] That

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104. *See supra* notes 96–97.

105. *See* Idleman, *Hypothetical Jurisdiction*, *supra* note 30, at 291–92; *see also* Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 821 (1990) (holding that state courts have concurrent jurisdiction to adjudicate Title VII claims).

106. Claim preclusion formerly was called res judicata, which also is the broad generic term used for preclusion doctrine as a whole. *See* Allen v. McCurry, 449 U.S. 90, 94 n.5 (1980).

107. Preclusive effect attaches only to a judgment on the merits of a claim; if an action is dismissed for lack of jurisdiction, the plaintiff remains able to refile her claims in an appropriate judicial forum. *See* FED. R. CIV. P. 41(b) (providing that dismissal, other than for lack of jurisdiction, operates as adjudication on merits); Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 382 (1985); Idleman, *Hypothetical Jurisdiction*, *supra* note 30, at 291–92; Sisk, *supra* note 93, at 695–96 n.650; *see also* Michael J. Edney, *Preclusive Abstention: Issue Preclusion and Jurisdictional Dismissals after* Ruhrgas, 68 U. CHI. L. REV. 193, 222 (2001) ("The court is aware that a denial of jurisdiction still permits the litigants to find a proper forum."). Moreover, the judgment has preclusive effect only if the rendering court had jurisdiction; the plaintiff in a second lawsuit may rebut a claim-preclusion defense by collaterally challenging the jurisdiction of the first court.

108. *See* 42 U.S.C. § 2000e-2(a) (2000); Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 763–64 & n.11 (3d Cir. 2004).

109. *See* Mishkin, *supra* note 18, at 166 (arguing that even if jurisdictional dismissal was not res judicata, relitigation of fact would be barred by stare decisis effect of initial finding of fact).

110. Collateral estoppel under the old nomenclature. *See Allen*, 449 U.S. at 94 n.5.

111. *See id.* at 95; *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 (1979)

basic principle would preclude the plaintiff in our scenario—who tried and failed in federal court to establish that the defendant had fifteen employees, an issue necessary to the earlier judgment of no federal jurisdiction—from getting a second opportunity to prove that fact as part of the merits of the same claim brought in state court.[112]

Michael Edney correctly argues that applying issue preclusion in this case would deny the plaintiff any opportunity to gain a full merits determination on her federal claim in any court.[113] The same judicial factual finding (the defendant has only twelve employees and thus is not an employer under Title VII) defeats subject-matter jurisdiction in federal court first, then defeats the merits in state court second. Such a result upends the ordinary presumption that state courts should be

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(emphasizing "obvious difference in position between a party who has never litigated an issue and one who has fully litigated and lost").

112. Two cases appear to cut in the other direction. First, the Sixth Circuit expressly held that the fact that a court took evidence for the purpose of deciding its jurisdiction does not mean its factual findings are binding in future proceedings. *See* United States v. Ritchie, 15 F.3d 592, 598 (6th Cir. 1994). But the court supported its conclusion with cases and treatises asserting the basic proposition that an actual determination of subject-matter jurisdiction has res judicata (in the sense of claim preclusion) effect only on subject-matter jurisdiction, but does not preclude later litigation on the merits of the same claim in an appropriate forum. *See id.* (citing Ohio Nat'l Life Ins. Co. v. United States, 922 F.3d 320, 325 (6th Cir. 1990); Shaw v. Merritt-Chapman & Scott Corp., 554 F.2d 786, 789 (6th Cir. 1977); CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350, at 225 (1990)). In other words, the court relied on authority that only establishes the uncontested proposition that if the first court actually decides whether or not it has subject-matter jurisdiction, then the decision cannot be collaterally attacked in successive litigation. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982) ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal.") (citations omitted); Da Silva v. Kinsho Int'l Corp., 229 F.3d 358, 362 (2d Cir. 2000) ("[A] party that has unsuccessfully litigated a court's subject matter jurisdiction is normally collaterally estopped from such a subsequent challenge."). But this is a distinct point that in no way supports the Sixth Circuit's broader conclusion that one fact actually litigated and found, applicable both to jurisdiction and merits in different courts, can be relitigated.

In a second example, the Supreme Court held that a district court's denial of preliminary injunctive relief under the National Labor Relations Act (NLRA) based on its determination that it lacked NLRA statutory jurisdiction because the actions complained of did not affect interstate commerce did not foreclose a plenary proceeding on the merits under the statute. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 681–82 (1951). But that case did not involve successive distinct litigation. The Court explicitly emphasized that the initial determination of no effect on interstate commerce occurred in a preliminary proceeding for interlocutory relief authorized by the statute, not intended to preclude a fuller opportunity to litigate the same claims in detail in the same litigation. *See id.* at 682.

113. *See* Edney, *supra* note 107, at 216.

available to adjudicate the merits of federal claims even when federal courts are not.[114] Edney's solution is special federal preclusion rules that decline to accord preclusive effect to facts or law found in jurisdictional dismissals.[115]

Edney argues that jurisdiction generally is decided in proceedings short of a full trial on the merits, a sufficiently different procedure that may give parties less incentive to vigorously litigate the factual dispute in federal court, knowing state court is available even after a loss.[116] Of course, some federal jurisdiction is exclusive, such as over antitrust claims.[117] A plaintiff must know that a jurisdictional dismissal will deprive her of any opportunity to recover under the Sherman Act, providing all the incentive she needs to vigorously contest jurisdiction.

Issue preclusion ordinarily does not distinguish between a finding made at trial and one made at a lesser pre-trial hearing. The analysis begins and ends with whether the first proceeding provided a full and fair opportunity to raise and litigate the issue and whether the issue was found and necessary to the first judgment. For example, the Supreme Court in *Allen v. McCurry*[118] held that the trial judge's rejection of a Fourth Amendment defense on a pre-trial motion to suppress evidence in a state criminal case had issue-preclusive effect on a subsequent federal § 1983 claim seeking damages for the same alleged Fourth Amendment violation.[119]

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114. *See* Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823 (1990) ("Under our 'system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.'" (quoting Tafflin v. Levitt, 493 U.S. 455, 458 (1990))).

115. *See* Edney, *supra* note 107, at 195. Edney argues that

> the preclusive effect of jurisdictional dismissals—where a federal court has either found a lack of subject matter jurisdiction or explicitly deferred the question of its subject matter jurisdiction—should be confined to the precise question of the federal court's jurisdiction. So limiting the preclusive effect would prevent federal courts from precluding litigation on the merits . . . in state courts . . . .

Id. See also Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507 (2001) (holding that preclusive effect of federal court judgments is question of federal law, content of which is dictated by Court).

116. *See* Edney, *supra* note 107, at 221–22.

117. *See* Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 379 (1985) ("[F]ederal antitrust claims are within the exclusive jurisdiction of the federal courts."); Johnson v. Nyack Hosp., 964 F.2d 116, 122 (2d Cir. 1992) ("[F]ederal courts have exclusive jurisdiction over federal antitrust lawsuits.").

118. 449 U.S. 90 (1980).

119. *See id.* at 91–92, 105.

A genuine procedural problem does flow from treating the same finding of fact as jurisdictional in federal court and merits-related in state court. The solution, however, is to better identify which facts genuinely go to subject-matter jurisdiction and which genuinely are elements of the substantive merits of a claim and to recognize them as mutually exclusive categories. Courts thereby avoid any possible preclusive effect. If quantum of employees in a federal employment discrimination claim goes to the merits in state court, it also goes to merits, not to subject-matter jurisdiction, in federal court and should be adjudicated accordingly.[120]

B. Formalist Consequences

The second problem with mixing jurisdictional facts and merits facts is the resulting disregard for the formalist command to treat distinct legal concepts in a distinct fashion. The "Court has largely maintained a clear analytic distinction between jurisdiction, on the one hand, and two other necessary components of a federal-court lawsuit: a cognizable *cause of action* and the availability of an appropriate judicial *remedy*."[121] As the Court stated in *Davis v. Passman*,[122] jurisdiction is a question of whether a federal court has the constitutional or statutory power to hear a case,[123] while a substantive cause of action is a question of the "alleged invasion of 'recognized legal rights' upon which a litigant bases his claim for relief."[124] Jurisdiction is constitutional or congressional empowerment to take cognizance of a cause of action—to examine whether some legal

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120. *See infra* notes 285–88 and accompanying text.

121. Fitzgerald, *supra* note 17, at 1214 (emphasis in original); Edward Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2252 n.64 (1999) ("If a plaintiff fails to state a cause of action (or, under the Federal Rules of Civil Procedure, a claim upon which relief can be granted), the dismissal is on the merits, not for lack of jurisdiction."); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, ___, 124 S. Ct. 2739, 2754 (2004) (recognizing statute as jurisdictional, empowering courts to hear limited category of substantive claims); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.") (emphasis in original).

122. 442 U.S. 228 (1979).

123. *See id.* at 239 n.18.

124. *Id.* at 237 (citations omitted); *id.* at 239 n.18 ("[*C*]*ause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court . . . .") (emphasis in original).

norm authorizes the bringing of that civil action and whether that legal norm has been violated by events in the real world. Merits focus on whether, in fact, that norm has been violated.

Evan Tsen Lee criticizes the formalist position by arguing that there is no necessary difference between jurisdiction and merits, nothing that categorically distinguishes jurisdiction questions from merits questions.[125] According to Lee, both jurisdiction and merits "ultimately have the same function—to tell us about the legitimacy of the resulting judgment."[126] The presence of judicial jurisdiction and the presence of a strong claim on the merits both create a presumption that a resulting judgment is legitimate and should be obeyed.[127] Lee concludes that the fact that jurisdiction and merits serve the same function explains why courts have so much trouble identifying whether a question goes to one or the other.[128]

Lee's position generates several preliminary responses. First, the divide between jurisdiction and merits corresponds to H.L.A. Hart's divide between primary legal rules of obligation that control real-world conduct and secondary legal rules that control the process of identifying those primary rules and determining whether they have been violated.[129] Hart argued that a complex legal society (as opposed to a small, closely knit pre-legal society) cannot function on primary rules alone, but demands the introduction of secondary rules through which primary rules are identified, discovered, and applied.[130] For Hart, it is the

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125. *See* Lee, *supra* note 4, at 1627; *id.* at 1614 ("[T]here is no hard conceptual difference between jurisdiction and the merits . . . . [T]he line between jurisdictional issues and merits issues is always at some level arbitrary.").

126. *Id.* at 1624–25; *id.* at 1625 ("Jurisdiction and the merits both ultimately speak to the resulting legitimacy of judgments . . . .").

127. *See id.* at 1620–21. Lee describes it as a question of the pedigree of the judgment and of tracing that judgment back to some legitimate authorization. In his view, however, it does not matter whether the pedigree derives from some event or fact establishing the court's competence over the parties or subject matter or whether the pedigree derives from the source of law truly creating a cause of action. *See id.* at 1626.

128. *See id.* at 1625 ("[T]here is no bright line dividing these inquiries from one another, nor could there be.").

129. *See* HART, *supra* note 19, at 91–92. Thanks to Lawrence Solum, and his Legal Theory Blog, for this line of analysis. *See* Legal Theory Blog, http://www.lsolum.blogspot.com (Mar. 19, 2004, 05:21).

130. *See* HART, *supra* note 19, at 89–90 (arguing that only small, closely knit community could live successfully by regime of primary rules alone, which instead must be supplemented in some way); *id.* at 92 (describing "secondary rules" which "specify the ways in which the primary rules

combination of primary and secondary rules that produces the "heart of a legal system."[131] Of particular import are secondary "rules of adjudication," which identify the individuals who will adjudicate, articulate the rules to be followed in adjudicating, and confer status on the declaration of breaches of primary-rule obligations.[132] Jurisdictional standards are examples of secondary rules of adjudication.[133] If both sets of rules together form a fully functioning complex legal system, there must be an analytic distinction between them.

Second, even if the ultimate purpose of merits and jurisdiction is the same, the two concepts indisputably ask different questions.[134] As such, we need different nomenclature simply to avoid confusion.[135] Jonathan Siegel examines similar confusion created by judicial application of the political question doctrine[136] in two distinct and unrelated situations. Siegel argues that courts properly utilize the doctrine in cases in which they stay their hand even though the defendant's actions were unlawful, but courts improperly refer to the doctrine in the distinct case in which a plaintiff should lose simply because she has not stated reasons why the defendant's challenged actions are unlawful.[137]

The line between merits and jurisdiction can be drawn in a similar manner.[138] Merits ask whether the defendant's conduct was legally

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may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined").

131. *Id.* at 95.

132. *See id.* at 94–95.

133. *See* Wells, *supra* note 29, at 684 (arguing that secondary rules "merely determine the forums in which conflicting claims regarding rights and obligations defined by other bodies of law may be adjudicated").

134. *See* Lee, *supra* note 4, at 1626 ("[T]here is obviously a difference between asking whether all plaintiffs are diverse from all defendants and asking whether the defendant was negligent.") (footnotes omitted).

135. *See* Jonathan R. Siegel, *Political Questions and Political Remedies* 15 (George Washington Univ. Law School, Public Law Research Paper No. 93, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=527264.

136. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

137. *See* Siegel, *supra* note 135, at 15; *see also id.* at 5 ("To the extent the [political question] doctrine calls for dismissal of cases *because* defendants' actions are legally unconstrained, it does no work at all.") (emphasis in original); *id.* at 6–8 (criticizing lower courts for invoking political question doctrine where complaint was obviously frivolous because plaintiffs had not alleged that federal government had done anything wrong).

138. Particularly because a court invoking what Siegel calls the "real political question doctrine" will dismiss the case for lack of Article III jurisdiction. *See* Siegel, *supra* note 135, at 5.

constrained (by the Constitution or by act of Congress); jurisdiction asks whether a federal court has the power to enforce that legal constraint on the defendant's conduct. We do not need jurisdictional rules to tell us that when a plaintiff challenges conduct that is not legally constrained, the plaintiff loses: "[c]ommon sense and Rule 12(b)(6) tell us that."[139] Jurisdictional doctrines "must do more than merely duplicate the concept of dismissal for failure to state a claim."[140] Otherwise, every action brought under federal law would turn into a question of jurisdiction; all dismissals would be jurisdictional and no federal claims ever would be dismissed or defeated on the merits.[141]

Most importantly, even if there is no inherent or essential difference between the concepts, Lee acknowledges that we must recognize jurisdiction as a creation of positive law:

> To put it crudely, if the legislature says there is such a thing as jurisdiction, then judges and lawyers are to act as if there is such a thing as jurisdiction. If the legislature says that questions of subject matter jurisdiction must be resolved before any other issue in the litigation, then judges and lawyers should comply as a simple matter of legislative supremacy.[142]

For Lee, jurisdiction and merits are distinct only to the extent that the legislature and good public policy make them worth treating distinctly.

For our purposes, Congress has made them distinct and courts must respect that distinction.[143] Relevant positive law establishes that there is a cause of action, there is jurisdiction, and the two must be handled differently.[144] The Federal Rules of Civil Procedure codify differences, creating different motions to dismiss and establishing different waiver rules for each.[145] The Supreme Court has, at least in the abstract, sought

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139. *Id.*

140. *Id.*; *see also* Lee, *supra* note 4, at 1627 n.48 (describing argument that "jurisdictional questions ask only 'should the court proceed?' whereas merits questions ask 'who should win?'").

141. *See* Clermont, *supra* note 18, at 4 ("Yet we also know that the plaintiff should not have to *prove* her cause of action in order to establish jurisdiction . . . .") (emphasis in original); Mishkin, *supra* note 18, at 166.

142. Lee, *supra* note 4, at 1629; *see id.* at 1627 (arguing that nothing prevents legislature from tying jurisdictional inquiry to equities, just as nothing prevents legislature from divorcing liability rule from equities); Steinman, *supra* note 31, at 873 (emphasizing overlap that often exists between procedural questions and merits).

143. *See supra* Part III.A.

144. *See supra* Part I.

145. *Compare* FED. R. CIV. P. 12(b)(1), *with id.* 12(b)(6); *compare id.* 12(h)(2) ("A defense of

to maintain a line between them, recognizing that "failure to state a proper cause of action calls for a judgment on the merits . . . not for dismissal for want of jurisdiction."[146] And a court should conclusively establish the existence of Article III jurisdiction at the first phase before considering whether the plaintiff has a claim or who should win at the second and third.[147]

The touchstone of the formalist analysis is a proper conception of Congress's constitutional powers and the positive law created by the exercise of those powers. John Harrison proffers a model under which Congress possesses four legislative powers falling in two broad categories. There are structural powers to determine the jurisdiction of the federal courts by deciding what lawsuits Article III courts can hear,[148] and to determine what kinds of decrees courts can issue in lawsuits within that jurisdiction.[149] And there are substantive powers with which Congress "can create, decline to create, or limit causes of action"; pithily, this is the power to "determine who is entitled to sue

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failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted . . . or by motion for judgment on the pleadings, or at the trial on the merits."), *with id.* 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."). *See also* Da Silva v. Kinsho Int'l Corp., 229 F.3d 358, 365 (2d Cir. 2000) ("These consequences suggest that the institutional requirements of a judicial system weigh in favor of narrowing the number of facts or circumstances that determine subject matter jurisdiction.").

146. Bell v. Hood, 327 U.S. 678, 682 (1946); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 96 (1998) ("[T]he nonexistence of a cause of action was no proper basis for a jurisdictional dismissal."); *id.* at 89 (holding that jurisdiction "is not defeated . . . by the possibility that the averments might fail to state a cause of action" (quoting *Bell*, 327 U.S. at 682)); Idleman, *Hypothetical Jurisdiction*, *supra* note 30, at 295 ("[W]hether a cause of action exists is not a jurisdictional issue as such.").

147. *See Steel Co.*, 523 U.S. at 92; Idleman, *Hypothetical Jurisdiction*, *supra* note 30, at 243 (describing principle that "a court should first confirm the existence of . . . jurisdiction . . . before tackling the merits of a controverted case." (quoting Berner v. Delahanty, 129 F.3d 20, 23 (1st Cir. 1997))).

148. Harrison, *supra* note 17, at 2514.

149. *See id.* Harrison limits the second structural power to defining remedies that will be available in cases that do not involve causes of action created by Congress, namely constitutional claims. *See id. Compare* John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation After* Chavez v. Martinez, 39 GA. L. REV. 733, 788 (2005) ("Congress can modify the remedies available for violations of constitutional rights."), *with* Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 703 (2001) (arguing that derivative theory of Congress's power to establish remedies "does not justify the legislating of remedies for constitutional violations for which Congress does not have power over the definitional guarantee").

whom, for what, and for what remedy."[150] Congress has substantive power to enforce constitutional rules both against States and state actors and to prohibit the conduct of private individuals.[151]

Harrison illustrates the point about congressional power by showing the distinct laws enacted pursuant to the exercise of distinct powers:

> Congress exercises a structural power when it describes the circumstances under which injunctions will be available in diversity cases not involving federal substantive law. In contrast, Congress exercises a substantive power when it creates a cause of action under the Post Office Clause and entitles the plaintiff to double damages.[152]

James Leonard offers a different illustration of the same point:

> Congress might execute a treaty with France forbidding cargo inspections in American ports by a statute that authorizes the federal district courts to hear claims relating to the treaty and specifically permitting private citizens to seek injunctive relief against state harbor officials. Such a statute would meet the criteria of enabling the lower courts to hear a species of "arising under" cases and of providing a claim against a state official.[153]

Congress exercises substantive power in creating a cause of action, recognizable by language directed to individuals and dictating the terms of their primary conduct. A cause of action is framed in terms of the rights and obligations of real-world actors, setting forth the circumstances in which one individual will be deemed to have ignored or contradicted her obligations or in which her conduct will be deemed to have violated the rights of another.[154] According to Anthony Bellia,

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150. Harrison, *supra* note 17, at 2515; *see also* Leonard, *supra* note 31, at 280 ("Congress' substantive authority to legislate within its constitutional ambit entails the power to create or to refuse to create causes of action. It may therefore choose who is entitled to enforce a claim in court, and, equally important, who may not."); Thomas, *supra* note 149, at 704 ("Congress, therefore, does have authority to dictate remedies for statutory rights. This remedial power derives from the legislature's authority to define the substantive statutory guarantee."); *id.* at 696 (describing "non-shocking conclusion that where Congress has created the statutory right it may also create the statutory remedy").

151. *See* Harrison, *supra* note 17, at 2513.

152. *Id.* at 2514.

153. Leonard, *supra* note 31, at 289; *see also id.* at 280 ("Legislative power over claims is most obvious when dealing with statutory rights.").

154. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (arguing that questions of substantive law turn on whether, in enacting statute, Congress asserted regulatory power over challenged conduct); Leonard, *supra* note 31, at 280.

the conception of cause of action reflected in the Federal Rules is that of Judge Charles Clark, the Rules' primary drafter:

> Clark argued that a cause of action consisted simply of "an aggregate of operative facts, a series of acts or events, which gives rise to one or more legal relations of right-duty enforceable in the courts." In Clark's view, one had a cause of action if one was entitled to *some* remedy generally, rather than to the particular remedy available through a form of action.[155]

This conception of cause of action demands allegations and proof that "the defendant's conduct was wrongful (inconsistent with a duty resting on the defendant) and that the plaintiff is within the category of persons entitled to judicial relief because of the wrongful conduct."[156] For example, Congress created a cause of action in enacting Title VII, asserting regulatory authority over employee relations of private employers of a certain size engaged in certain businesses. The statute details the conduct prohibited,[157] the real-world actors protected,[158] the real-world actors obligated to act (or to refrain from acting) in certain ways,[159] and the consequences of the failure to adhere to the terms of the law, including the remedies available to the aggrieved party.[160] Similarly, Congress created a cause of action in § 1983 through which a plaintiff can plead, prove, and recover on constitutional claims against state and local governments and government officials.[161] The statute incorporates the underlying constitutional right, privilege, or immunity secured;[162] together they detail the conduct prohibited, the real-world actors protected, the real-world actors subject to obligations, and what a

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155. Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 796 (2004) (emphasis in original) (citations omitted).

156. Harrison, *supra* note 17, at 2520–21.

157. *See* 42 U.S.C. § 2000e-2(a) (2000) (defining "unlawful employment practice").

158. *See id.* § 2000e(f) (defining employee).

159. *See id.* § 2000e(a)–(e).

160. *See id.* § 2000e-5(g); 42 U.S.C. § 1981a (2000).

161. *See* 42 U.S.C. § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable . . . for redress . . . .

Id.

162. *See* Chavez v. Martinez, 538 U.S. 760, 766 (2003) (plurality opinion) ("[W]e must first determine whether the officer's alleged conduct violated a constitutional right.").

plaintiff must prove to recover a remedy.[163]

On the other hand, Congress exercises its structural powers, for our purposes, through jurisdiction-granting statutes. A jurisdictional grant speaks in explicitly jurisdictional terms or refers explicitly to the jurisdiction of the courts.[164] The statutory language addresses federal courts, rather than the individuals whose primary conduct is regulated.[165]

The two categories of enactments are linked. Jurisdictional grants empower courts to hear and resolve cases brought before them by parties; substantive causes of action grant parties permission to bring those cases before the court. The substantive cause of action is a ticket permitting individuals to enter the federal judicial process; jurisdiction empowers the court to punch the ticket. Both are necessary for a civil action to be litigated.

Congress exercises its structural powers to establish jurisdiction on an

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163. *See, e.g., id.* (holding that plaintiff could not allege violation of Fifth Amendment right against self-incrimination when he never was prosecuted for crime nor compelled to be witness against himself in criminal case); County of Sacramento v. Lewis, 523 U.S. 833, 855 (1998) (holding that, where defendants' conduct did not violate Fourteenth Amendment because it did not "shock the conscience," defendants could not be called upon to answer for that conduct under § 1983); Daniels v. Williams, 474 U.S. 327, 329–30 (1986) (stating that § 1983 plaintiff must prove that defendant had requisite state of mind where underlying procedural due process right contains state-of-mind requirement).

Harrison argues that the Fourteenth Amendment is not judicially self-enforcing; instead, the amendment was drafted on the assumption that it would be for Congress to decide when state-level majorities had defied the national consensus and how much additional enforcement was necessary. *See* Harrison, *supra* note 17, at 2522–23. Daniel Meltzer suggests that this argument means "if Congress had never enacted § 1983 or other federal civil rights statutes, *Brown v. Board of Education* might well have been dismissed on a *Rule 12(b)(6) motion*: no federal remedy would have existed." Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2551 (1998) (emphasis added). Meltzer takes the view, in other words, that absence of § 1983 would have defeated the *Brown* plaintiffs' claims on the merits, not because federal courts would have lacked jurisdiction.

164. *See* Zipes v. Trans World Airways, Inc., 455 U.S. 385, 394 (1982) (holding that exhaustion of administrative remedies requirement is not jurisdictional, where provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts"); United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 955 (7th Cir. 2003) (en banc) (Wood, D., J., dissenting); Idleman, *Hypothetical Jurisdiction*, *supra* note 30, at 324 n.366.

165. *See, e.g.*, 28 U.S.C. § 1331 (2000) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); 42 U.S.C. § 2000e-5(f)(3) ("Each United States district court . . . shall have jurisdiction of actions brought under" Title VII); *see also* Lindh v. Murphy, 521 U.S. 320, 344 (1997) (Rehnquist, C.J., dissenting) (calling jurisdictional language "most salient characteristic of jurisdictional statutes"); Idleman, *Hypothetical Jurisdiction*, *supra* note 30, at 324 n.366. (discussing import of jurisdictional language in characterizing a statute).

understanding that extant or future statutes enacted under its substantive powers or extant or future common law rules provide a cause of action that federal courts now are empowered to hear. The Supreme Court adopted this understanding in *Sosa v. Alvarez-Machain*.[166] The *Sosa* Court interpreted the Alien Tort Statute[167] as a jurisdictional grant to federal courts.[168] In response to the argument that this interpretation meant that the statute was "stillborn" when enacted because it did not also establish a cause of action,[169] the Court stated that federal Common Law in existence in 1789, incorporating principles of international law and the law of nations, provided the applicable substantive law for the actions that federal courts had been empowered to adjudicate.[170]

Conversely, when Congress exercises its substantive power by creating a statutory cause of action, it should be understood as exercising its concomitant structural power to grant jurisdiction to federal courts (whether exclusively[171] or concurrently with state courts[172]) to hear and resolve claims arising under that statute, absent a clear statutory declaration to the contrary.[173] The significance of statutory general

166. 542 U.S. 692, 124 S. Ct. 2739 (2004).

167. 28 U.S.C. § 1350 (2000) ("[D]istrict courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations.").

168. *Sosa*, 542 U.S. at ___, 124 S. Ct. at 2755; William S. Dodge, *Bridging* Erie*: Customary International Law in the U.S. Legal System After* Sosa v. Alvarez-Machain, 12 TULSA J. COMP. & INT'L LAW 87, 93 (2005). *But see* Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 167 (describing Court's approach as "jurisdictional-but-not-jurisdictional interpretation of the [Alien Tort Statute]").

169. *See Sosa*, 542 U.S. at ___, 124 S. Ct. at 2755.

170. *See id.* at ___, 124 S. Ct. at 2761; Dodge, *supra* note 168, at 98. *But see* Ku & Yoo, *supra* note 168, at 199 (arguing for functional analysis, under which ATS would be read "as a jurisdictional statute that does not authorize federal courts to engage in the development and enforcement of any kind of [customary international law] as part of their common lawmaking powers").

171. *See* Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 379 (1985) ("[F]ederal antitrust claims are within the exclusive jurisdiction of the federal courts."); Johnson v. Nyack Hosp., 964 F.2d 116, 122 (2d Cir. 1992) ("[F]ederal courts have exclusive jurisdiction over federal antitrust lawsuits.").

172. *See* Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 249 (1995) ("Much of federal jurisdiction is concurrent with that of the state courts and has been since the inception of the country."); *see also* Howlett v. Rose, 496 U.S. 356, 367 (1990) (emphasizing different but concurrent jurisdiction of state and federal courts).

173. *See* Mishkin, *supra* note 18, at 159 ("[I]t is desirable that Congress be competent to bring to an initial national forum all cases in which the vindication of federal policy may be at stake."); *see also* United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 955 (7th Cir. 2003) (en banc)

federal question jurisdiction[174] is that when Congress enacts a substantive law, federal district courts immediately and necessarily attain jurisdiction to hear claims under that statute, without Congress having to do anything more. The authority lasts unless and until Congress affirmatively divests that jurisdiction.

Further, Congress's substantive powers are broader and more discretionary than its structural powers.[175] The default therefore should be that Congress has exercised its broader, more frequently utilized substantive power, unless the clear statutory language shows that it is structural, notably by speaking in terms to the federal courts about their subject-matter jurisdiction.[176]

IV. JURISDICTIONAL FACTS AND MERITS FACTS: EXPLAINING CONFUSION

Whether courts should treat particular factual elements as jurisdictional, and whether differential treatment of some facts under the same statute is justified, may turn on the purpose of particular statutory elements. The question, then, is why Congress chooses to narrow particular statutory causes of action. Why are Title VII and other employment discrimination statutes limited to businesses with a minimum number of employees? Why does § 1983 reach only defendants who act under color of state law? Why does the Sherman Act reach only restraints of trade affecting interstate commerce? We can review several explanations, but none justifies treating some elements differently from other elements in the same federal statute. And none justifies treating any of these facts as going to federal subject-matter

(Wood, D., J., dissenting) (emphasizing need for "clear congressional statement that it is intended to restrict the subject matter jurisdiction of the federal courts").

174. *See* 28 U.S.C. § 1331 (2000) (granting district courts original jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States"); Leonard, *supra* note 31, at 277 (arguing that § 1331 supplies jurisdictional basis for large number of federal statutory and constitutional cases); *infra* Part V.A.

175. *See* Harrison, *supra* note 17, at 2514 ("Congress has considerably more discretion when exercising substantive rather than structural power.").

176. *See United Phosphorus*, 322 F.3d at 955, 964 (Wood, D., J., dissenting) (arguing that because statute does not contain clear congressional statement that it is aimed at jurisdiction and does not even mention word "jurisdiction," enactment is substantive and not jurisdictional); Da Silva v. Kinsho Int'l Corp., 229 F.3d 358, 365 (2d Cir. 2000) ("[T]he institutional requirements of a judicial system weigh in favor of narrowing the number of facts or circumstances that determine subject matter jurisdiction.").

jurisdiction.

A. Jurisdictional Elements

One explanation is that a particular issue is a "jurisdictional element"—a fact included in a statute that must be pled and proven by the plaintiff in each case, serving as a nexus between a particular piece of legislation and Congress's constitutional power to enact that legislation and to regulate the conduct at issue.[177] Title VII and other federal anti-discrimination statutes have been enacted and upheld as exercises of Congress's power under the Commerce Clause.[178] The business regulated must have an effect on interstate commerce,[179] a requirement usually satisfied where the defendant's conduct can be characterized as part of a class of commercial or economic activity.[180]

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177. *See* United States v. Morrison, 529 U.S. 598, 613 (2000) (striking down Violence Against Women Act because it "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) (describing need for jurisdictional elements that "would ensure, through case-by-case inquiry, that the [conduct] in question affects interstate commerce"); Da Silva v. Kinsho Int'l. Corp., 229 F.3d 358, 363 (2d Cir. 2000) (describing "disputes as to the existence of a fact that is essential to a constitutional exercise of Congress's power to regulate"); *see also* Adler & Dorf, *supra* note 14, at 1153 ("Congress sometimes chooses to include in its statutes a 'jurisdictional nexus'—that is, a requirement that the government prove that the acts to which a statute is applied in a given case themselves affect interstate commerce.").

178. U.S. CONST. art. I, § 8, cl. 3. Congress debated whether the Civil Rights Act of 1964 was an exercise of the commerce power or the enforcement power of Section 5 of the Fourteenth Amendment and expressly relied on both as its source of power. *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 YALE L.J. 441, 494 (2000). It was the Court that looked almost exclusively to the former power, in part to avoid the sticky problem of whether to recognize congressional power to enforce the Fourteenth Amendment against private actors. *Id.* at 494–95; *see* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) ("[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.") (citations and internal quotation marks omitted).

179. *See* Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 81 (3d Cir. 2003) ("Because Congress enacted Title VII under its Commerce Clause power, . . . the requirement that an employer be 'in an industry affecting commerce' is the statute's constitutional basis."); *see also Morrison*, 529 U.S. at 614 (stating that whether "particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court" (quoting *Lopez*, 514 U.S. at 557 n.2 (quoting *Heart of Atlanta Motel*, 379 U.S. at 273 (Black, J., concurring)))). In addition to the quantum-of-employee threshold, the employment discrimination statutes all define employer as an entity engaged in a business affecting interstate commerce. *See* 42 U.S.C. § 2000e(b) (2000) (Title VII); 29 U.S.C. § 630(b) (2000) (ADEA); 29 U.S.C. § 2611(4)(A)(i) (2000) (FMLA).

180. *See* Gonzalez v. Raich, ___ U.S. ___, ___ (June 6, 2005), 125 S. Ct. 2195, 2205 (2005)

Similarly, the Sherman Act by its terms reaches only contracts or agreements in restraint of commerce among the several states, linking the prohibited conduct to congressional authority over interstate commerce.[181] The under-color-of-law element in § 1983 serves a similar nexus function by linking the statute to Congress's power under Section 5 to enforce the substantive provisions of the Fourteenth Amendment and the incorporated provisions of the Bill of Rights, which by their terms only prohibit action by states.[182]

1. Recognizing Jurisdictional Elements

The jurisdictional-element argument as to employment discrimination statutes is that quantum of employees functions as a proxy for effect on interstate commerce. Companies with fifteen or more employees are

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(describing "Congress' power to regulate purely local activities that are part of an economic 'class of activities'"); *Lopez*, 514 U.S. at 561 (striking down statute that "by its terms has nothing to do with 'commerce' or any sort of economic enterprise"); *see also* Adler & Dorf, *supra* note 14, at 1152 ("Whether Congress has acted within the scope of the Commerce Clause depends upon whether *the law* Congress enacted regulates either the channels or instrumentalities of interstate commerce or *classes* of economic activities that, taken in the aggregate, substantially affect interstate commerce.") (emphasis in original); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations But Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 107 (1999) ("[T]he Commerce Clause establishes two distinct requirements: Congress must (1) regulate "commerce" (2) that implicates commerce in more than one state.").

181. *See* 15 U.S.C. § 1 (2000); McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 242 (1980) ("To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity."); *see also* Adler & Dorf, *supra* note 14, at 1153.

182. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *id.* § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) ("As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments.'" (quoting Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 156 (1978))); Kulick v. Pocono Downs Racing Ass'n, 816 F.2d 895, 898 (3d Cir. 1987) ("[T]he state action requirement of a § 1983 claim constitutes a basis for Congress to regulate conduct pursuant to § 5 of the Fourteenth Amendment."); *see also Morrison*, 529 U.S. at 621 ("Foremost among these limitations [on Section 5 power] is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."); Post & Siegel, *supra* note 178, at 455 (arguing that limitations on Commerce Clause have reemphasized importance of congressional Section 5 power, which in turn has been limited by recent decisions demanding state action); Wasserman, *supra* note 84, at 837–38 n.213 (arguing that § 1983 as used in constitutional claims enforces what Constitution already prohibits).

large enough that their business activities presumptively affect interstate commerce, while smaller companies with fewer than fifteen employees presumptively do not.[183] On this understanding, Congress limited Title VII only to larger companies because it lacked constitutional power to regulate the employment practices of smaller companies because such companies' conduct inherently did not affect commerce. But this argument fails.

No one who supported the Civil Rights Act of 1964 asserted this proxy theory as the basis of congressional power to enact the statute. The only mention appears in the Separate Minority Report from the House Judiciary Committee, prepared by Representatives Poff and Cramer. They sharply criticized, and argued against the constitutionality of, Title VII for proceeding upon a theory "that the quantum of employees is a rational yardstick by which the interstate commerce concept can be measured."[184] Worse, they argued, "[o]ut of thin air, the bill pulls a figure and determines that 25 employees is the magic number—not 26 or 24 but 25."[185] But it is not clear that this was, in fact, the theory of federal substantive power on which supporters of the bill relied.[186]

Moreover, the language and evolution of Title VII destroys the jurisdictional-element argument, as the Third Circuit demonstrated in the most thorough and detailed analysis of this issue. First, Title VII defines "employer" as a company that is both "engaged in an industry affecting commerce" and "has fifteen or more employees."[187] If quantum of employees truly is a proxy for effect on commerce, the second part of

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183. *See Nesbit*, 347 F.3d at 81 ("[O]ne might read the fifteen-employee threshold as reflecting Congress's determination that only those companies with fifteen or more employees have the requisite substantial effect on interstate commerce to permit Congress to enact the statute.").

184. H.R. REP. NO. 88-914, at 26 (1963), *reprinted in* EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2095, 2108 (1964) (Separate Minority Views of Hon. Richard H. Poff and Hon. William Cramer).

185. *Id.*

186. *See* Post & Siegel, *supra* note 178, at 494–95.

> On the level of formal constitutional discourse, however, the constitutional debates surrounding the enactment of the Civil Rights Act of 1964 revolved around the question of whether the statute should be enacted as an exercise of Congress's power to regulate interstate commerce or instead of its Section 5 power to enforce the Fourteenth Amendment. Eventually Congress split the difference and drafted the statute to rely upon both the Commerce Clause and upon Section 5.

Id.

187. 42 U.S.C. § 2000e(b) (2000); *see Nesbit*, 347 F.3d at 82.

the definition renders the first superfluous: a company that meets the employee threshold necessarily affects commerce. But that is not how Title VII is understood; a putative employer with twenty employees still is not bound by Title VII if not operating in an industry affecting commerce.[188] The use of two prongs to define employer suggests that Congress intended Title VII to reach only a subset of potential employers that it could have regulated—those whose businesses affect commerce, but only if of a certain size.[189]

Second, the Third Circuit points out that the evolution of the quantum-of-employee element defeats its constitutional significance. Congress lowered the threshold from twenty-five to fifteen in the 1972 amendments to Title VII.[190] It is illogical that the number of employees that substantially affect commerce should drop in only eight years.[191] Also, the 1972 amendment as originally proposed in both the House and Senate sought to lower the threshold all the way to eight employees; fifteen was a political compromise with those who wanted to maintain the threshold at twenty-five.[192] The fluctuation of the threshold suggests that Congress was not linking it to Commerce Clause considerations, but to policy concerns regarding the extent of federal law.[193]

Finally, the suggestion that quantum of employees is a jurisdictional element of an employment discrimination claim—that Congress was constitutionally limited to regulating only employers of a particular size—fails as a matter of substantive Commerce Clause jurisprudence. At the time of the Civil Rights Act of 1964, *Wickard v. Filburn*,[194] a New Deal-era Commerce Clause case, was at its zenith in empowering

188. *See Nesbit*, 347 F.3d at 82.

189. *See* 110 CONG. REC. S. 6548 (1964) (statement of Sen. Humphrey) (arguing that Title VII is constitutional because coverage is limited to businesses and organizations affecting commerce).

190. *See Nesbit*, 347 F.3d at 82.

191. *See id.*

192. *See id.*; Armbruster v. Quinn, 711 F.2d 1332, 1336–37 & n.4 (6th Cir. 1983); *see also* STAFF OF SUBCOMM. ON LABOR OF THE S. COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1283 (Comm. Print 1972) (statement of Sen. Cotton) (criticizing effort to lower employee-number requirement).

193. *See Nesbit*, 347 F.3d at 82; *infra* notes 226–31 and accompanying text.

194. 317 U.S. 111 (1942). *Filburn* upheld the application of federal crop quotas against an individual farmer who grew wheat largely for use on his farm and not for sale in the interstate market. *See id.* at 114, 129; Jim Chen, *The Story of* Wickard v. Filburn*: Agriculture, Aggregation, and Congressional Power over Commerce*, *in* CONSTITUTIONAL LAW STORIES 83 (Michael C. Dorf ed., 2004).

Congress to regulate an individual actor whose conduct, aggregated with the conduct of other actors similarly situated, had a substantial enough effect on interstate commerce.[195] As Jim Chen argues, "[t]hanks to *Filburn*, Congress may reach any economic actor 'trivial by itself' as long as its 'contribution' to the national economy, 'taken together with that of many other[]' actors 'similarly situated, is far from trivial.'"[196] Congress has acted on that understanding of its commerce power since 1964.[197] And any recent narrowing of the Commerce Clause[198] has not changed this understanding. The aggregation model would support federal prohibitions on employment discrimination by small companies, even companies with one employee, whose business, together with other similar businesses, involve economic activities that substantially affect commerce.[199]

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195. *See* Chen, *supra* note 194, at 94–95 ("The decisions upholding the Civil Rights Act of 1964 as a proper exercise of Congress's commerce power . . . did little more than reaffirm the New Deal's Commerce Clause sequence."); Post & Siegel, *supra* note 178, at 447 ("[W]hen the Supreme Court came to determine the Act's constitutionality . . . it . . . chose instead to build on the case law of the New Deal settlement, which ceded very broad powers to Congress to legislate under the Commerce Clause.").

196. Chen, *supra* note 194, at 97–98 (quoting *Filburn*, 317 U.S. at 127–28); *see also* United States v. Morrison, 529 U.S. 598, 637 (2000) (Souter, J., dissenting) (describing period after *Filburn* as "a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause . . . extended to all activity that, when aggregated, has a substantial effect on interstate commerce").

197. *See Morrison*, 529 U.S. at 637 (Souter, J., dissenting) (arguing that understanding that aggregation of local activities was permissible "was secure even against the turmoil at the passage of the Civil Rights Act of 1964"); Post & Siegel, *supra* note 178, at 451 ("In the past thirty years, Congress has exercised its commerce authority to develop a rich and complex jurisprudence of federal antidiscrimination legislation, which is in many of its particulars in tension with judicial enforcement of Section 1 of the Fourteenth Amendment."); *see also* Katzenbach v. McClung, 379 U.S. 294, 301 (1964) ("[W]e must conclude that while the focus of the legislation was on the individual restaurant's relation to interstate commerce, Congress appropriately considered the importance of that connection with the knowledge that the discrimination was but 'representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce.'" (quoting Polish Nat'l Alliance of U.S. v. NLRB, 322 U.S. 643, 648 (1944))).

198. *See Morrison*, 529 U.S. at 613; United States v. Lopez, 514 U.S. 549, 567–68 (1995). *But see* Gonzales v. Raich, ___ U.S. ___, ___ (June 6, 2005), 125 S. Ct. 2195, 2211, 2215 (2005) (distinguishing *Morrison* and *Lopez* and upholding federal statute prohibiting possession and use of even intrastate noncommercially cultivated marijuana).

199. *See* Calvin Massey, *Congressional Power to Regulate Sex Discrimination: The Effect of the Supreme Court's "New Federalism,"* 55 ME. L. REV. 63, 66 (2003) (arguing that *Morrison* and *Lopez* "have little impact on congressional power to regulate workplace sex discrimination"); Nelson & Pushaw, *supra* note 180, at 125 (arguing that virtually all federal labor and employment

2. *Understanding the Effects of True Jurisdictional Elements*

To the extent confusion of jurisdiction and merits derives from misapprehension of the meaning and effect of jurisdictional elements, concluding that the quantum-of-employee threshold in Title VII is not a jurisdictional element does not alone eliminate the confusion. Statutes contain true jurisdictional elements ("affecting commerce" under Title VII or the Sherman Act or "action under color" of state law under § 1983) linking the regulated conduct to the appropriate substantive congressional power.[200] Courts avoid the confusion of jurisdiction and merits only by understanding the real purpose and effect of jurisdictional elements.

Jurisdictional elements are about congressional jurisdiction—substantive congressional constitutional power or authority—to regulate particular real-world conduct through legislation. Jurisdictional elements have nothing to do with judicial jurisdiction—judicial power or authority—to adjudicate a case or controversy between parties under that statute.[201] For example, in striking down the Violence Against Women Act (VAWA) in *United States v. Morrison*,[202] the Supreme Court emphasized Congress's failure to include jurisdictional elements in the

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regulations remain valid because "so long as Congress is regulating a commercial transaction, it is immaterial whether there is some other legislative purpose (even an overriding one)"); Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1211 (2003) (arguing that federal statutes addressing employment regulate "the compensated rendering of services"); Post & Siegel, *supra* note 178, at 449 ("[T]he present Court does not seem inclined to attack *Heart of Atlanta* by holding that federal regulation of discrimination in . . . employment involves matters that are 'noneconomic' or 'truly local.'"); *see also Raich*, ___ U.S. at ___, 125 S. Ct. at 2211 (defining economics as relating to production, distribution, and consumption of commodities).

200. *See* Adler & Dorf, *supra* note 14, at 1153.

201. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (arguing that "'legislative jurisdiction' . . . refers to 'the authority of a state to make its law applicable to persons or activities,' and is quite a separate matter from 'jurisdiction to adjudicate'") (citations omitted); United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 953 (7th Cir. 2003) (en banc) (Wood, D., J., dissenting) (criticizing majority for failing to "distinguish[] carefully between judicial and legislative jurisdiction—or, to put it differently, between jurisdiction to decide a case and jurisdiction to prescribe a rule of law"); Kulick v. Pocono Downs Racing Ass'n, 816 F.2d 895, 898 (3d Cir. 1987) ("[I]t is important to distinguish elements of a claim that relate to Congress's jurisdiction, i.e., its constitutional authority to act, from issues that relate to the jurisdiction of the courts."); Calkins, *supra* note 78, at 633 ("[S]ome courts clearly err, seemingly using the term [jurisdiction] accurately and yet treating interstate commerce issues as normally jurisdictional.").

202. 529 U.S. 598 (2000).

statute. Private acts of non-employment-related gender-motivated violence are not regulable under the Commerce Clause because they are non-economic[203] and they do not implicate a state or state actor as required for an exercise of Section 5 power.[204] The basic point underlying *Morrison* was that Congress lacked substantive power to enact VAWA—to create a federal right to be free from private acts of non-commercial gender-motivated violence or to impose a federal obligation to refrain from such acts.

Congress's substantive power-granting provisions operate as what Matthew Adler and Michael Dorf label "constitutional existence conditions"—a federal right actually exists and becomes enforceable as law only if it falls within the scope of some substantive regulatory power.[205] After *Morrison*, suing in federal court to enforce the rights created by VAWA against a private individual would be no different than suing to enforce a right that Congress never enacted into law.[206]

Adler and Dorf argue that the

> constitutional (existence) question is whether the *statute* contains a jurisdictional nexus. Whether the nexus is satisfied in particular circumstances is a distinct question about the statute's scope to be decided only once the statute's existence has been established.[207]

In other words, whether the plaintiff pleads and proves the jurisdictional element in a given case is a subconstitutional question of statutory interpretation—a question of the reach, scope, and application of a constitutionally valid statute to a particular set of facts. Of course,

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203. *See id.* at 613–14 (criticizing lack of ties between VAWA and regulation of interstate commerce).

204. *See id.* at 625–26. *But see id.* at 664 (Breyer, J., dissenting) (arguing that Congress could act to provide federal remedy where states have failed, through discriminatory conduct, to provide adequate remedies in certain areas); Post & Siegel, *supra* note 178, at 501 (arguing that Court's 1960s anti-discrimination decisions "decisively freed federal antidiscrimination legislation from the state action requirement it preserved for its own Section 1 cases"); *id.* at 501–02 ("By the end of [the 1960s], Congress, the Court, and the American people all expected the federal government to lead the fight against discrimination in the public and private sectors. This is the momentous fact that *Morrison* ignores . . . .").

205. *See* Adler & Dorf, *supra* note 14, at 1119.

206. *See id.* at 1129 (describing requirements of Article I, Section 7 for enacting legislation—bicameralism and presentment to the President—as obvious examples of provisions that constitute "the difference between law and nonlaw").

207. *Id.* at 1153 (emphasis in original).

whether the plaintiff pleads and proves any element of a claim is a sub-constitutional question of the reach, scope, and application of a constitutionally valid statute to a particular set of facts. Statutory elements determine whether the defendant's conduct was inconsistent with a statutorily imposed duty and whether the plaintiff is within the category of persons entitled to relief because of that conduct.[208]

For example, an employment-discrimination plaintiff's failure to establish a true jurisdictional element—that the defendant is engaged in a business affecting interstate commerce—means only that the statute by its terms does not reach the real-world actors and conduct at issue in that case.[209] But in the same way, the plaintiff's failure to prove any element—that she is an employee (as opposed to an independent contractor[210]), that she is a member of the statutorily protected class,[211]

208. *See* Harrison, *supra* note 17, at 2520–21.

209. *See* Johnson v. Apna Ghar, Inc., 330 F.3d 999, 1001–02 (7th Cir. 2003).

210. *See* 42 U.S.C. § 2000e(f) (2000) ("The term 'employee' means an individual employed by an employer . . . ."); 29 U.S.C. § 630(f) (2000) (ADEA) (same); EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 698 (7th Cir. 2002) (holding that, in order to show ADEA violation, plaintiff must establish that adversely affected individuals were employees); Farlow v. Wachovia Bank of N.C., N.A., 259 F.3d 309, 316 (4th Cir. 2001) (affirming grant of summary judgment based on determination that plaintiff in Title VII action was independent contractor, not employee); Garcia v. Copenhaver, Bell & Assocs., 104 F.3d 1256, 1267 (11th Cir. 1997) (holding that there was genuine issue of material fact precluding summary judgment as to whether plaintiff is employee or independent contractor).

Independent contractors can bring race discrimination claims under 42 U.S.C. § 1981 (2000), which prohibits discrimination in the "making and enforcing" of contracts, including contracts of employment or contracts for personal services. *See* Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 13–14 (1st Cir. 1999) (holding that § 1981 permits claims by employees and corporate independent contractors against another corporation, provided there is contractual relationship between plaintiff and defendant). But § 1981 does not allow for claims based on discrimination or harassment because of sex or other characteristics.

211. *See* 42 U.S.C. § 12102(2)(A) (2000) (defining "disability" as "physical or mental impairment that substantially limits one or more of the major life activities of such individual"); *id.* § 12111(8) (defining "qualified person with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires"); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002) ("[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term."); *id.* at 187 (reversing summary judgment on this point); Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 766 (3d Cir. 2004) (Scirica, C.J., concurring) (arguing that plaintiff who described himself as "Confederate Southern-American" had not established himself as member of protected legitimate national-original classification for Title VII purposes); Marinelli v. City of Erie, 216 F.3d 354, 359 (3d Cir. 2000) (stating that plaintiff must establish that she is qualified person with disability in order to state cognizable cause of action under ADA).

that she actually suffered an adverse employment action,[212] or that the adverse employment action was because of some prohibited reason rather than for cause[213]—means only that the statute by its terms does not reach (or subject to sanction) the real-world actors and conduct at issue. Similarly, a Sherman Act plaintiff's failure to plead and prove the jurisdictional element of a substantial effect on non-foreign interstate commerce yields the same result as failure to prove the ordinary statutory element that the contract unlawfully restrained trade. The Act does not reach (or subject to sanction) the real-world actors or the conduct at issue.[214]

Perhaps Congress limited the statutes to persons affecting interstate commerce for different reasons than it limited the statutes only to certain employment practices or certain restraints of trade. Congress demands an effect on commerce to ensure the constitutionality of the statute, while it narrows the range of actionable restraints on trade simply as a policy choice.[215]

But the effects of non-satisfaction of any element are identical: the plaintiff has failed to establish a violation of the statute's terms on these facts. The procedural treatment of each statutory element, whether a jurisdictional element or otherwise, should be identical. The judgment in all cases is that the statute was not violated in the conduct, transaction, or occurrence at issue and the defendant prevails on the statutory merits—on 12(b)(6), summary judgment, or following trial, depending on whether the fact had been in genuine issue.[216]

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212. *See, e.g.*, *Storey*, 390 F. 3d at 764 (affirming dismissal of claim in which plaintiff failed to plead that he suffered adverse employment action).

213. 42 U.S.C. § 2000e-2(a) (defining unlawful employment practices as adverse job action because of protected characteristic); 29 U.S.C. § 623(a) (defining unlawful employment practices as adverse job action because of individual's age).

214. *See* McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 242 (1980) (describing how Sherman Act plaintiff could prove jurisdictional element of effect on commerce); United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 955 (7th Cir. 2003) (en banc) (Wood, D., J., dissenting) ("[T]he plaintiffs will have a right to recover if defendant's activities have the requisite effect on either U.S. domestic or import commerce (and they can prove the remainder of their federal antitrust claim) . . . .").

215. *See infra* Part IV.B.

216. *See supra* notes 37–54 and accompanying text. To the extent it would be unconstitutional for Congress to regulate the conduct of an entity not engaged in interstate commerce, Congress obviated that problem by expressly limiting the reach of the statute through the jurisdictional element. It will not be possible for the statute, and thus federal substantive power, to be applied beyond constitutional limits because the statute does not extend that far. Moreover, to the extent the

Failure to distinguish judicial and legislative jurisdiction led a deeply divided en banc Seventh Circuit astray in *United Phosphorus Ltd. v. Angus Chemical Co.*[217] That case dealt with the Foreign Trade Antitrust Improvement Act (FTAIA) limitation of the Sherman Act in foreign-commerce cases to restraints of trade having a direct, substantial, and reasonably foreseeable effect on domestic trade or commerce, that is trade or commerce other than solely with foreign nations.[218] The legislative history showed that Congress adopted the FTAIA to reduce the number of foreign antitrust cases brought in federal court. Working from this history, the majority defined the statute as a measure stripping federal courts of jurisdiction, making the key limiting provision—effect on domestic interstate (rather than purely foreign) commerce—a jurisdictional fact going to the court's authority to decide the case.[219] Judge Diane Wood responded in dissent that there was no "hint that the Congress was attempting to strip jurisdiction"; rather "[l]anguage like that of the FTAIA, stating that a law does not 'apply' in certain circumstances, cannot be equated to language stating that the courts do not have fundamental competence to consider defined categories of cases."[220] Judge Wood demanded a clear textual statement from Congress that a particular statute targeted the courts' jurisdiction; finding none, she concluded that the requirement went to the contours of the law and the limits of the plaintiff's substantive claim.[221]

The language of the FTAIA suggests that Judge Wood was correct. The statute expressly limits the real-world circumstances to which the Sherman Act "shall apply," but says nothing about the jurisdiction of the

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failure of a jurisdictional element means Congress could not constitutionally regulate the real-world conduct at issue, it is a problem of Congress's substantive cause-of-action enacting power, not its structural jurisdiction-granting power. *See supra* notes 149–64.

217. 322 F.3d 942 (7th Cir. 2003) (en banc).

218. *See* 15 U.S.C. § 6a(1)(A)–(B) (2000); *United Phosphorus*, 322 F.3d at 945–46.

219. *See United Phosphorus*, 322 F.3d at 951 ("[T]he legislative history shows that jurisdiction stripping is what Congress had in mind in enacting FTAIA."); *id.* at 946–47 (tracing adoption of FTAIA as congressional response to ongoing debate about extraterritorial reach of federal antitrust laws); *id.* at 951 (relying on Supreme Court and lower court cases using jurisdictional terms to describe affecting-commerce element in foreign antitrust claims).

220. *Id.* at 954–55 (Wood, D., J., dissenting).

221. *See id.* at 955 (Wood, D., J., dissenting) ("The fact that the FTAIA does not contain a clear congressional statement that it is intended to restrict the subject matter jurisdiction of the federal courts (or for that matter even a brief mention of the term 'jurisdiction') should be enough to resolve the question before us."); *infra* Part V.

federal courts.[222] The FTAIA resulted in fewer antitrust cases in federal court only because Congress made a prior, unrelated structural decision to grant exclusive federal jurisdiction over Sherman Act claims.[223] Limiting the reach of the act reduced the number of all possible antitrust claims, which necessarily reduced the number of actions in the only forum in which they could be brought. But that jurisdictional consequence was incidental to a substantive limit on the range of actors and conduct to which the Sherman Act applied. Where there is concurrent state court jurisdiction over claims under a federal statute, limiting the reach of that statute also will reduce the number of claims brought in state court, showing that the limitation affects the substance of the statutory claim, not just federal jurisdiction.[224]

Perhaps the FTAIA's additional requirement of an effect on domestic interstate commerce does function as a statutory jurisdictional nexus, a nod to substantive limits on the extraterritorial reach of congressional power. But extraterritorial reach concerns congressional authority to make substantive law applicable to primary conduct beyond United States territory. Justice Scalia made the point most insistently:

> [T]he extraterritorial reach of the Sherman Act . . . has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct.[225]

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222. F. Hoffman-La Roche v. Empagran S.A., 542 U.S. 155, ___ , 124 S. Ct. 2359, 2365 (2004) (stating that FTAIA excludes foreign cases from reach of Sherman Act, then creates exceptions to that exclusion); *id.* at ___, 124 S. Ct. at 2366 (addressing question implicitly as one going to whether foreign plaintiffs stated claim on merits for antitrust violation). *Hoffman-LaRoche* abrogates, at least implicitly, *United Phosphorus*; the Supreme Court (and the lower courts) applied the FTAIA and spoke not in terms of federal subject-matter jurisdiction, but in terms of whether plaintiffs residing in Ecuador could bring claims under federal law. *See F. Hoffman-LaRoche*, 542 U.S. at ___, 124 S. Ct. at 2363; *id.* at ___ 124 S. Ct. at 2366 (concluding that "the Sherman Act does not apply").

223. *See* Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 379 (1985) ("[F]ederal antitrust claims are within the exclusive jurisdiction of the federal courts."); Johnson v. Nyack Hosp., 964 F.2d 116, 122 (2d Cir. 1992) ("[F]ederal courts have exclusive jurisdiction over federal antitrust lawsuits.").

224. *See supra* notes 105–20 and accompanying text.

225. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting).

B. *Policy Choices*

If quantum of employees is not a jurisdictional element of federal anti-discrimination laws, then it must reflect a simple congressional policy choice to limit the laws' reach to employers of a certain size. The limitation initially was grounded in a desire to keep the federal government and federal law away from mom-and-pop operations in small communities—businesses less able to bear the costs of compliance with new federal obligations.[226] One Senator argued that Congress should avoid regulating the employee-employer relationship in small businesses because that relationship was closer and more intimate, akin to a businessman selecting a wife.[227] The limitation may have been part of a larger legislative compromise to garner support of western-state Republicans and moderate Democrats, who did not necessarily oppose anti-discrimination laws in principle (many western states had such laws), but who did oppose increases in federal power.[228]

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226. *See* Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 82 (3d Cir. 2003) ("[T]he fifteen-employee threshold appears motivated by policy—to spare small companies the expense of complying with Title VII . . . ."); Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995) ("In discussions over a proposed change to the minimum employee threshold, the burdens placed upon a small business forced to comply with federal regulations and defend against a Title VII suit were explicitly addressed."); *see also, e.g.*, 110 CONG. REC. 13092 (1964) (statement of Sen. Cotton) ("If we desire violence, bitterness, and hatred among the races in this country, I suggest that we put the Federal Government with a club into the livelihood of every small businessman . . . ."); *id.* ("Title VII is the most dangerous part of it, because it would lead the Federal Government with all of its power, majesty and bureaucracy into the way of dealing with a small businessman who can ill afford to protect himself."); *id.* at 13088 (statement of Sen. Humphrey) (supporting bill by noting that, with twenty-five-employee size limit, 92% of employers nationwide "would not be touched by the Federal statute."). *But see id.* at 13092 (statement of Sen. Morse) ("I know of no reason why we should set small businessmen aside and say, 'You can continue discrimination with immunity.'"); *but cf.* Alfred W. Blumrosen, *Introduction to Labor and Employment Law Symposium*, 11 MISS. C. L. REV. 195, 195 (1991) ("The assumption that 'the employer' is a small business person struggling in a 'mom and pop' environment is . . . often so unrealistic as to distort the interpretation of the law.").

227. 110 CONG. REC. 13085 (1964) (statement of Sen. Cotton); *see also* Jacqueline Louise Williams, Comment, *The Flimsy Yardstick: How Many Employees Does it Take to Defeat a Title VII Discrimination Claim?*, 18 CARDOZO L. REV. 221, 233 n.41 (1996) ("The statement does not reflect well on small businesses or wives.").

228. *See* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 18 (3d ed. 2001) (describing need for support from conservative Republicans and moderate Democrats from Western and border states for Civil Rights Act of 1964); *id.* at 21 (describing arguments made to Senators from western states, many of which already had anti-discrimination laws, that federal legislation would have only incremental effect in their states); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History:*

Of course, every statutory element reflects a discretionary substantive policy choice by the enacting legislature as to the scope, reach, and application of its enactment—a choice as to who can sue whom for what conduct.[229] Congress's decision not to reach businesses with fewer than fifteen, twenty-five, or fifty employees reflects such a policy choice. But so do its decisions not to extend Title VII protections to independent contractors[230] or not to expand the prohibition on discrimination because of race, sex, ethnicity, nationality, and religion to discrimination because of sexual orientation.[231]

If every statutory element reflects legislative choice, there is no justification for treating one choice (the limitation on who may be a liable defendant) as jurisdictional while treating all other choices (limitations on who will be protected from what conduct) as merits-based. There is no basis for resolving different policy choices reflected in a single statute at different phases of the litigation process. If the latter factual elements are uniformly treated as going to the merits of the cause of action and having nothing to do with subject-matter jurisdiction, so should the former.

V. DETERMINING JURISDICTION UNDER POSITIVE LAW

The analytical cornerstone for separating jurisdiction and merits lies in John Harrison's model of congressional power—the distinction

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New Perspectives on the 1964 Civil Rights Act and its Interpretation, 151 U. PA. L. REV. 1417, 1454 (2003) (stating that many Republicans opposed increasing role of federal government in regulating private economic and social affairs); *id.* at 1472–73 (arguing that need to make bill more palatable to pivotal moderate Republicans lead to amendments that would ameliorate impact of Title VII on American business).

The policy grounding also may explain why different employment-discrimination statutes have different quantum-of-employee thresholds. *Compare* 42 U.S.C. § 2000e(b) (2000) (fifteen employees in Title VII), *and* 42 U.S.C. § 12111(5)(A) (2000) (same in ADA), *with* 29 U.S.C. § 2611(4)(A)(i) (2000) (fifty employees in FMLA).

229. *See* Harrison, *supra* note 17, at 2515.

230. *See supra* note 210.

231. *See* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001) ("Because the evidence produced by [the plaintiff]—and indeed, his very claim—indicated only that he was being harassed on the basis of his sexual orientation, rather than because of his sex, the District Court properly determined that there was no cause of action under Title VII."). *But see* Andrew Koppelman, *Why Discrimination against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 203 (1994) (arguing that stigmatization of gays functions as part of larger system of social control based on gender).

between Congress's substantive powers to create statutory causes of action (to determine who can sue whom for what and for what remedy) and its structural powers to grant, deny, or limit the jurisdiction of the federal courts to hear and resolve those claims.[232] The exercise of distinct powers produces distinct statutory enactments (or at least distinct provisions of the same statute[233]) that serve distinct functions.[234] The legal and factual issues whose resolution control application of distinct statutes are adjudicated in distinct phases and in a distinct manner within the judicial process.[235]

Some lower courts have reserved the quantum-of-employee issue for the trier of fact not because it is purely a merits fact, but on the view that the definition of employer implicates both merits and jurisdiction.[236] But, at least as most jurisdictional statutes presently are drafted, there should be no circumstances in which substantive factual issues overlap with or implicate subject-matter jurisdiction.[237]

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232. *See* Harrison, *supra* note 17, at 2513–14; *see also* Leonard, *supra* note 31, at 280.

233. A single statute often contains one provision creating the cause of action and a separate provision granting federal jurisdiction over that cause of action. *See* William Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 905–06 & n.65 (1967) (stating that Congress generally creates cause of action and simultaneously provides special grant of jurisdiction and that most cases arise under these special grants rather than § 1331 alone); Leonard, *supra* note 31, at 289. *Compare* 42 U.S.C. § 2000e-5(f)(1) (providing that "person aggrieved" may bring civil action for unlawful employment practice), *with* 42 U.S.C. § 2000e-5(f)(3) (granting district courts jurisdiction "of actions brought under" Title VII). This does not mean, however, that the same statutory provision creates both jurisdiction and the cause of action. The Tenth Circuit erroneously concluded that the ADA both grants jurisdiction and establishes the cause of action, thus justifying treating quantum of employees as jurisdictional, *see* Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976, 978 (10th Cir. 2002). In fact, there are two distinct provisions of the ADA serving distinct purposes and only one, the substantive provision, involves a quantum-of-employees inquiry.

234. *See supra* notes 148–76 and accompanying text.

235. *See supra* Part I.

236. *See* Morrison v. Amway Corp., 323 F.3d 920, 927–28 (11th Cir. 2003); *Trainor*, 318 F.3d at 978 (holding that merits and jurisdiction are intertwined when same statute grants subject-matter jurisdiction and provides substantive claim); Garcia v. Copenhaver, Bell & Assocs., 104 F.3d 1256, 1264 (11th Cir. 1997) ("[T]he question of whether or not a defendant is an 'employer' is a substantive element of an ADEA claim and intertwined with the question of jurisdiction."). For a discussion of cases in which courts have viewed jurisdiction and merits as intertwined, see Stefania A. Di Trolio, Comment, *Undermining and Unintwining: The Right to a Jury Trial and Rule 12(b)(1)*, 33 SETON HALL L. REV. 1247, 1259–71 (2003).

237. *See* Clermont, *supra* note 18, at 19 (arguing that jurisdictional statutes should avoid using terms that connote merits-related legal outcome); Idleman, *Hypothetical Jurisdiction*, *supra* note 30, at 323 (emphasizing importance of initial categorization of issue as either Article III jurisdictional or as merits-related). Clermont points to one arguable exception: the Federal Tort Claims Act, 28

A federal court should look to the appropriate positive-law provision at the appropriate phase of the litigation process. That means resolving jurisdiction first, according to the jurisdiction-granting statutory language, before even peeking at the factual specifics of the plaintiff's federal cause of action.[238] Having found jurisdiction, the court has authority to entertain the case and to grant judgment on the merits in favor of or against either party.[239] The elements of the underlying statutory claim then provide the exclusive focus of that merits analysis.

Statutes enacted via Congress's structural powers necessarily speak in express jurisdictional terms of judicial power to entertain and consider a defined category of cases.[240] Most importantly, Congress granted federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[241] It also granted federal district courts original jurisdiction in specific classes of civil actions,[242] such as those "brought under" the substantive provisions of Title VII[243] and "arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and

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U.S.C. §§ 1346, 2679–2680 (2000), which grants district courts original jurisdiction over tort claims in which a government employee committed the alleged tort while "acting within the scope of his office or employment." *Id.* § 1346(b). Clermont suggests that the factual issue of action in scope of employment overlaps with the ultimate merits question of whether the defendant in fact committed the tortious act alleged. Clermont, *supra* note 18, at 21–22.

238. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998); Da Silva v. Kinsho Int'l. Corp., 229 F.3d 358, 365 (2d Cir. 2000) (describing rule that any merits decisions made in absence of jurisdiction must be disregarded).

239. *See* Fitzgerald, *supra* note 17, at 1216; Mishkin, *supra* note 18, at 166.

240. *See* United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 954 (7th Cir. 2003) (en banc) (Wood, D., J., dissenting) (emphasizing difference between Congress phrasing issue in terms of scope or application of statute and Congress using jurisdictional language); *id.* at 954–55 (Wood, D., J., dissenting) (arguing that statute is not jurisdictional grant when it does not speak in jurisdictional terms or even mention jurisdiction); Idleman, *Hypothetical Jurisdiction*, *supra* note 30, at 324 n.366. The en banc Seventh Circuit majority in *United Phosphorus* recognized the "purity" of this argument, but insisted, without explanation, that "nothing is quite that simple." *United Phosphorus*, 322 F.3d at 950.

241. 28 U.S.C. § 1331.

242. *See* Cohen, *supra* note 233, at 905–06 & n.65. *But see* Leonard, *supra* note 31, at 277 (arguing that § 1331 supplies jurisdictional basis for large number of federal statutory and constitutional cases).

243. 42 U.S.C. § 2000e-5(f)(3) (2000). That jurisdictional grant is incorporated by reference in the modeled employment discrimination statutes. *See, e.g.*, 42 U.S.C. § 12117(a) (ADA) (providing that the "powers, remedies, and procedures" set forth in § 2000e-5 "shall be the powers, remedies, and procedures" provided to any person alleging discrimination based on disability).

monopolies."[244] As for constitutional claims under § 1983, Congress granted district courts "original jurisdiction of any civil action authorized by law to be commenced by any person . . . to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States."[245]

These jurisdiction-granting statutes stand alone as the focus of 12(b)(1) analysis. The court must understand, interpret, and apply the appropriate statutory jurisdictional grant to determine whether it has jurisdiction—the basic power or authority to entertain, consider, and resolve the legal and factual issues in the case.[246]

A. Defining "Arising Under"

In order to apply these jurisdictional statutes, courts must determine the meaning of the statutory phrase "arising under."[247] Doctrine and

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244. 28 U.S.C. § 1337; *see United Phosphorus*, 322 F.3d at 953 (Wood, D., J., dissenting) (describing federal courts' "acknowledged subject matter jurisdiction" over FTAIA claim under both 28 U.S.C. §§ 1331 and 1337).

245. 28 U.S.C. § 1343(a)(3); *see* Kulick v. Pocono Downs Racing Ass'n, 816 F.2d 895, 898 (3d Cir. 1987) (describing §§ 1331 and 1343 as statutes which actually vest federal courts with power over constitutional claims).

One could argue this provides the closest example of a fact serving double duty between jurisdiction and merits. Both the § 1983 cause of action and the § 1343(a)(3) jurisdictional grant require a person acting "under color" of state law, making that a fact that must be resolved both to find jurisdiction and to determine whether the defendant is liable on the merits. In fact, however, the better reading of § 1343(a)(3) is as a more detailed way of granting federal jurisdiction "of any civil action authorized . . . to be commenced by any person" under 42 U.S.C. § 1983 and underlying constitutional rights. Congress could have granted jurisdiction by cross-referencing the substantive cause of action (as Title VII does in its jurisdictional grant, *see* 42 U.S.C. § 2000e-5(f)(3)). Instead, § 1343(a)(3) grants jurisdiction by repeating much of the language of the substantive provision (§ 1983) over which jurisdiction has been granted.

The effect is the same, however. Congress granted district courts original jurisdiction of civil actions commenced to redress deprivations of constitutional or statutory rights brought pursuant to the § 1983 cause of action. The under-color-of-law element is part of the cause of action only, not the jurisdictional grant.

246. *See supra* notes 30–33 and accompanying text.

247. "Arising under" appears to have the same meaning as "brought under" and "commenced . . . to redress a deprivation of." *See* EEOC v. Liberty Trucking Co., 528 F. Supp. 610, 614–15 (D. Wis. 1981) (stating there is "no reason" to assign terms different meanings), *rev'd on other grounds*, 695 F.2d 1038 (7th Cir. 1982); Charles R. Calleros, *Reconciling the Goals of Federalism with the Policy of Title VII: Subject-Matter Jurisdiction in Judicial Enforcement of EEOC Conciliation Agreements*, 13 HOFSTRA L. REV. 257, 288–89 (1985). "Arising under" also has a different meaning in Article III than it does in § 1331 or any of the other jurisdiction-granting

commentary suggest several possible ways to define that term. When applied to the federal statutory actions with which we are concerned, all the possible definitions function the same, both linguistically and in outcome.

Justice Holmes proffered the "most familiar"[248] definition of "arising under," arguing that a "suit arises under the law that creates the cause of action."[249] For a case to arise under, federal law "must create at least a part of the cause of action by its own force."[250] Paul Mishkin described this as a requirement that the plaintiff's claim be "founded 'directly' upon national law," meaning the plaintiff contends that a federally ordained rule specifically creates her cause of action and establishes her

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statutes. *See* REDISH, *supra* note 31, at 84; Cohen, *supra* note 233, at 891 ("[T]he statutory grant has been conceded to vest in the federal courts less than the scope of federal question jurisdiction which Congress might vest."); Donald L. Doernberg, *There's No Reason for it; it's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 598 (1987) ("Regrettably (at least from the standpoint of simplicity), the Court has not interpreted the two provisions in the same manner . . . ."). The phrase in its constitutional incarnation has been given a broad reading by the Court. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824) ("We think, then, that when 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 . . . jurisdiction of that cause . . . ."); Mishkin, *supra* note 18, at 160 (arguing that *Osborn* "quite properly attributed a broad scope to that language"). *But see* Bellia, *supra* note 155, at 854 ("We do better today when we read *Osborn* not as occupying the field of federal question jurisdiction, but as defining a species of Article III federal question jurisdiction . . . ."). Meanwhile, the phrase has been given a much narrower statutory scope. *See* REDISH, *supra* note 31, at 96; Doernberg, *supra*, at 599; Mishkin, *supra* note 18, at 160. Our concern is only with the meaning in present statutory contexts, rather than what it could mean if Congress decided to exercise the full scope of its Article III structural powers in granting district courts statutory federal question jurisdiction. *See* REDISH, *supra* note 31, at 95 ("But the fact that Congress has power to vest jurisdiction does not mean that it has, in fact, exercised that power . . . .").

248. Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 377 (2004); *see also* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986) (stating that "vast majority" of cases brought under § 1331 satisfy Justice Holmes's test); Cohen, *supra* note 233, at 897 (stating that Justice Holmes sought to create an all-purpose test).

249. Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916); Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 214 (1921) (Holmes, J., dissenting) ("[A] suit cannot be said to arise under any other law than that which creates the cause of action."); *see also* REDISH, *supra* note 31, at 97 ("Holmes' reasoning has a certain practical appeal."); Doernberg, *supra* note 247, at 627.

250. *Smith*, 255 U.S. at 215 (Holmes, J., dissenting); *see* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., ___ U.S. ___, ___ (June 13, 2005), 125 S. Ct. 2363, 2366 (2005) (stating that § 1331 "is invoked by and large by plaintiffs pleading a cause of action created by federal law"); *see also* Bellia, *supra* note 155, at 854 (describing "federal question jurisdiction . . . in which federal law creates the right to relief").

substantive right to a remedy for a violation of that rule.[251] And the Supreme Court recently refined the definition to look to whether the plaintiff's claim against the defendant was "made possible" by an applicable federal statute.[252] Although derived from a slightly different context,[253] this refined test translates to jurisdictional statutes, focusing on whether the plaintiff seeks relief under a substantive federal statute that "creates a . . . right to maintain an action."[254]

In *Gully v. First National Bank*,[255] Justice Cardozo suggested a second, seemingly related standard for "arising under":

> To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.[256]

From these related approaches, particularly the second part of Justice Cardozo's, several commentators have fashioned an "outcome-determinative test," that looks to whether there are present in the action federal issues "whose decision one way will necessarily cause a result in the case, and whose decision the other way will tend to prevent it" or to bring about a different result.[257] The inquiry focuses on whether the

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251. Mishkin, *supra* note 18, at 165; *see also* Cohen, *supra* note 233, at 896.

252. *Jones*, 541 U.S. at 382.

253. *Jones* dealt with the federal catch-all four-year statute of limitations for "'civil action[s] arising under an Act of Congress enacted after' December 1, 1990." *Id.* at 375 (citations omitted); 28 U.S.C. § 1658 (2000). The Court rejected the argument that "arising under" necessarily means the same thing in § 1658 as in jurisdictional grants such as §§ 1331 or 1337 simply because all are codified in Title 28 of the United States Code. *See Jones*, 541 U.S. at 376 ("We hesitate to place too much significance on the location of a statute in the United States Code."). Nevertheless, the use of the phrase in one structural statute is a good guide for its use in another.

254. *Jones*, 541 U.S. at 382.

255. 299 U.S. 106 (1936).

256. *Id.* at 112; *see* Bell v. Hood, 327 U.S. 678, 685 (1946) (holding that § 1331 is satisfied where "the right of the petitioners to recover under the complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another"); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900) ("'The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved.'" (quoting Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203 (1877))); *see also* REDISH, *supra* note 31, at 105 ("*Gully* probably continues to be valid as a principle of exclusion."); Doernberg, *supra* note 247, at 656 (arguing that Justice Cardozo's approach "is sound and should be retained").

257. Doernberg, *supra* note 247, at 656–57.

outcome will turn on construction of federal law.[258] As Justice Scalia framed it, a claim arises under federal law where the plaintiff wins under one conceivable construction of a federal statute or Constitution and loses under another.[259] The plaintiff establishes jurisdiction by demonstrating the existence of a "dispute based upon federal law that can, if adjudicated, determine the outcome of the case."[260]

Finally, a federal district court's original jurisdiction may be based solely on issues of fact and statutory application. A court has jurisdiction when the plaintiff contends that the defendant's real-world conduct ignored or violated requirements or obligations established in federal constitutional or statutory law, causing some injury.[261] Resolution of issues of fact is central to the vindication of the federal right, and thus to district courts' role as vindicators of federal rights.[262] Mishkin argued that "the general federal question statute would seem to include within it cases in which the interpretation of national law is clear and only the facts alleged to give rise to a federal right are in dispute."[263] A federal court therefore has authority to oversee resolution where the only triable issue between the parties is whether, in the real world, this defendant is an employer, this plaintiff is an employee who suffered adverse employment action, and this defendant acted on an impermissible motive—even when the statutory meanings of those terms are undisputed.

Applying any of these definitions can be difficult at the margins, as when a state law cause of action incorporates federal law as an element.[264] But claims under Title VII, § 1983, or the Sherman Act are

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258. REDISH, *supra* note 31, at 105 ("[F]ederal question jurisdiction should be found if the outcome of the case may turn on construction of federal law.").

259. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998).

260. Doernberg, *supra* note 247, at 656.

261. *See* Bell v. Hood, 327 U.S. 678, 682 (1946) ("[T]he court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.").

262. *See* Mishkin, *supra* note 18, at 170; *see also* Cohen, *supra* note 233, at 892–93.

263. Mishkin, *supra* note 18, at 169; *see* Cohen, *supra* note 233, at 892 ("It is not anomalous that federal courts should exercise jurisdiction to enforce federal rights in cases where only issues of fact are put in issue.").

264. *See* Cohen, *supra* note 233, at 898 (arguing that different tests for arising under break down by failing to "supply an analytical definition which will determine whether plaintiff's claim is a federal cause of action incorporating state law, or a state cause of action incorporating federal law"); *see, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., ___ U.S. ___, ___ (June 13,

not at the margins. They squarely involve purely federal causes of action over which Congress intended to grant federal jurisdiction.[265] The plaintiff's claim is founded directly on a particular federal statute that makes some conduct unlawful. The plaintiff's action and the remedy she seeks are "made possible" because Congress created the statutory cause of action and established the plaintiff's right to hale an appropriate defendant into court to recover for a violation of these federal rights. Interpretation or application of these elements to the real-world actors, facts, and circumstances in one direction yields one outcome and one winner; an interpretation or application in a different direction yields a different outcome and a different winner.

The plaintiff's allegations that the defendant's conduct ignored or violated obligations imposed by federally created law (constitutional or statutory) establish federal jurisdiction. The only jurisdictional issue is whether the action involves some dispute over the meaning or application of federally created law whose determination affects the outcome. Specific questions of how broad or narrow federal law is, how that law applies to the parties, conduct, and events at issue, and what facts the plaintiff must prove to be entitled to relief play no part in the jurisdictional inquiry.[266]

Instead, those facts go solely to the merits of the substantive federal claim. The court possesses authority to resolve those merits and to enter judgment on those merits in favor of either party.[267] That the claim does

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2005), 125 S. Ct. 2363, 2367–68 (2005) (describing analysis of federal jurisdiction where federal issues are "embedded" in state law claims); Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 809–10 (1986) (describing problem of defining jurisdiction where there is federal issue within state cause of action); Moore v. Chesapeake & Ohio Ry. Co., 291 U.S. 205, 214–15 (1934) (finding no statutory "arising under" jurisdiction where federal law defined duty owed under state common law); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 508 (1900) (stating that determination by Congress that right of possession was to be decided by local customs did not involve question under Constitution or laws of United States, but only determination of local rules and customs and state statutes); *see also* REDISH, *supra* note 31, at 97–100 (tracing Supreme Court cases in which state law and federal law elements mixed); Cohen, *supra* note 233, at 906–09 (same); Doernberg, *supra* note 247, at 626–40 (same).

265. *See* Cohen, *supra* note 233, at 905–06 ("The bulk of federal civil litigation in the federal courts presents no jurisdictional problem.").

266. *See* United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 955 (7th Cir. 2003) (en banc) (Wood, D., J., dissenting) ("It is up to Congress to decide how broad or narrow a law it is enacting, and what the plaintiff must prove to be entitled to relief."); Da Silva v. Kinsho Int'l Corp., 229 F.3d 358, 365 (2d Cir. 2000) (stating that plaintiff's ultimate failure to prove defendant's status under law is grounds for defeating her claim on merits).

267. *See* Fitzgerald, *supra* note 17, at 1216 (arguing that party who clears jurisdictional hurdle

not ultimately succeed (or even that it does not get past pleading or summary judgment because there are no material factual issues to try before a fact-finder) means only that the plaintiff has failed to establish a violation of her federal rights; it does not defeat federal jurisdiction.[268]

B. Limited Jurisdictional Facts Doctrine

Courts should understand that under no circumstances will a factual issue enumerated in a substantive federal cause of action implicate judicial jurisdiction. But one reason that courts appear so ready to convert substantive merits facts into jurisdictional facts and to resolve disputes at the 12(b)(1) phase is that jurisdiction frequently turns on questions of discrete real-world historical fact that parties must allege and prove separately and which the court is empowered to find and resolve in measuring its jurisdiction.[269] Courts have become accustomed to jurisdictional fact-finding.

In fact, however, the "jurisdictional facts doctrine" is quite narrow, confined largely to party-based, as opposed to subject-matter-based, grants of federal jurisdiction.[270] For example, district courts have original jurisdiction over civil actions between citizens of different states.[271] Jurisdictional analysis requires courts to make findings

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finds court clothed with entire power to do justice according to law or equity); Mishkin, *supra* note 18, at 166 (arguing that court with jurisdiction has power to enter judgment on merits for defendant as well as plaintiff).

268. *See* Bell v. Hood, 327 U.S. 678, 682 (1946) ("Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which [plaintiffs] could actually recover."); Hartnett, *supra* note 121, at 2252 n.64 ("If a plaintiff fails to state a cause of action (or, under the Federal Rules of Civil Procedure, a claim upon which relief can be granted), the dismissal is on the merits, not for lack of jurisdiction."); Mishkin, *supra* note 18, at 166 ("The power of the court to hear and decide a case could hardly be made to depend upon the jury's verdict.").

269. *See* Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 77 (3d Cir. 2003) ("[W]hen jurisdiction turns on whether a particular fact is true as here . . . a court may inquire into the jurisdictional facts without viewing the evidence in a light favorable to either party."); Morrison v. Amway Corp., 323 F.3d 920, 925 (11th Cir. 2003) ("[W]hen a defendant properly challenges subject matter jurisdiction under Rule 12(b)(1) the district court is free to independently weigh facts, and '. . . there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" (quoting Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990))); Clermont, *supra* note 18, at 13–14 & n.38 (stating that judge decides jurisdictional facts, which are classified as questions of law and not subject to jury resolution).

270. *See* Hartnett, *supra* note 121, at 2250 n.57 (noting that some heads of federal jurisdiction are defined by legal subject and some are defined by party status).

271. 28 U.S.C. § 1332(a)(1) (2000). The statute also requires that the amount in controversy

regarding the nature and identity of the parties: where each party is domiciled,[272] whether all plaintiffs are diverse from all defendants,[273] and which corporate facilities count as the corporation's principal place of business.[274]

Jurisdictional facts also are central to so-called "protective-party jurisdiction," where Congress grants federal jurisdiction over cases based solely on an overriding national interest grounded in the nature, identity, or status of one of the parties to the case, even where substantive principles controlling the case derive from a source other than federal law.[275] Under the Foreign Sovereign Immunities Act,[276] for example, federal jurisdiction turns on the fact question of whether the defendant is a foreign state.[277] Similarly, the Alien Tort Statute grants district courts jurisdiction "of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States,"[278] the relevant jurisdictional fact being whether the plaintiff is,

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exceed $75,000. *Id.*

272. Domicile is a classically fact-based concept, turning on a party's residence and intent to make a particular state her permanent residence, to which she will return. *See* Mas v. Perry, 489 F.2d 1396, 1399 (5th Cir. 1974).

273. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (interpreting § 1332 to require complete diversity of citizenship between all adverse parties).

274. *See* United Phosphorus Ltd. v. Angus Chem. Corp., 322 F.3d 942, 957 (7th Cir. 2003) (en banc) (Wood, D., J., dissenting) ("Inquiries into diversity jurisdiction are often just as straightforward, even though fact-finding might be necessary in the occasional case in which it is unclear where a person is domiciled, or what amount is in controversy, or which of several corporate facilities should count as the corporation's principal place of business."); *see also* 28 U.S.C. § 1332(c)(1) (providing that corporation is citizen of its state of incorporation and state of its principal place of business).

275. *See* REDISH, *supra* note 31, at 90–91; Mishkin, *supra* note 18, at 184–86. *But see* Mesa v. California, 489 U.S. 121, 137 (1989) ("We have, in the past, not found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction . . . and we do not see any need for doing so here . . . ."); Verlinden, B.V. v. Cent. Bank of Nig., 461 U.S. 480, 491 n.17 (1983) (avoiding consideration of existence of protective-party jurisdiction because allowance of actions under Foreign Sovereign Immunities Act fell within Article III "arising under" jurisdiction); *cf.* Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 B.Y.U. L. REV. 731, 804 (arguing that concept of statutory protective-party jurisdiction as exercise of constitutional "arising under" jurisdiction means that statutory diversity jurisdiction also is product of constitutional "arising under" jurisdiction).

276. 28 U.S.C. § 1330(a).

277. *See Verlinden*, 461 U.S. at 493–94. The grant creates several exemptions from immunity, such as where the civil action is based upon commercial activity, *see* 28 U.S.C. § 1605(a)(2) (2000), and where the action is based upon acts of torture or terrorism. *See id.* § 1605(a)(7).

278. 28 U.S.C. § 1350 (2000); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, ___, 124 S. Ct.

in fact, an alien.

These party-based jurisdictional statutes are grounded on issues of fact unrelated to the merits of the claims or the equities of the circumstances giving rise to the action, issues of fact subject to resolution by the court. The jurisdictional facts—party domicile, the defendant's status as a sovereign, or the plaintiff's status as an alien—have nothing to do with the underlying tort or contract claim.[279]

In contrast, the "arising under" (or "brought under" or "commenced to redress a deprivation of") jurisdictional grants do not ask historical factual questions.[280] They ask only for a prediction from the court: Does it appear (based solely on the pleadings[281]) that the plaintiff seeks relief created or made possible by a federal enactment? Does it appear that the outcome of the dispute between the parties will turn on an interpretation, construction, or application of the federal Constitution or federal statute to some set of factual circumstances?[282] If the court predicts an affirmative answer to those questions, it has jurisdiction.

Kevin Clermont argues that the plaintiff must make at least a prima facie showing to establish that her civil action arises under federal law.[283] The prediction I propose involves even less rigorous inquiry. A court applying an "arising under" jurisdictional grant should look no further—indeed may look no further—than the four corners of the pleadings to discern the origin of the plaintiff's cause of action, with no consideration of the potential or ultimate legal or factual validity of that cause of action.[284]

2739, 2755 (2004) (defining statute as jurisdictional); Dodge, *supra* note 168, at 98; *supra* notes 166–70 and accompanying text.

279. Lee, *supra* note 4, at 1626 ("[T]here is obviously a difference between asking whether all plaintiffs are diverse from all defendants and asking whether the defendant was negligent.").

280. *See* Mishkin, *supra* note 18, at 164 (describing use of special jurisdictional allegations in diversity cases but lack of such allegations in federal question cases).

281. *See* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908) (holding that § 1331 is satisfied "only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution."); Doernberg, *supra* note 247, at 599 ("[F]ederal question jurisdiction does not exist unless the federal question appears in the 'right' place, that is, the plaintiff's well-pleaded complaint.").

282. *See supra* notes 246–68 and accompanying text.

283. Clermont, *supra* note 18, at 19.

284. In *Bell v. Hood*, the Supreme Court suggested that a federal claim could be dismissed for want of subject-matter jurisdiction if it is "wholly insubstantial and frivolous." *See* 327 U.S. 678, 682–83 (1946); Clermont, *supra* note 18, at 22–23 (describing this as requirement that claim be "sufficiently meritorious," usually established unless federal claim is "laughably weak"). This

This leaves us with the final problem of identifying when facts enumerated in particular federal statutes are jurisdictional and when they are substantive. That line can be drawn by modifying Lea Brilmayer's concept of "substantive relevance."[285] The question is whether a particular fact must be pled and proven in order for the plaintiff to prevail in the identical civil action claiming a violation of the identical federal statute brought in state court, where federal subject-matter jurisdiction is not in issue.[286] If a fact would still be relevant because the applicable substantive federal law makes it meaningful to the outcome of the legal treatment of the dispute, the fact has substantive relevance to the cause of action and therefore goes to the merits in state court.[287] As such, it also goes to the merits in federal court and has nothing to do with federal subject-matter jurisdiction.

For example, party domicile will not be relevant in a state-law negligence action in state court. Domicile therefore would be a purely jurisdictional fact for purposes of the same negligence claim in federal court on diversity. Conversely, the plaintiff in a § 1983 action must

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inquiry, however limited, still goes beyond the prediction I suggest is appropriate for determining whether a claim is brought under substantive federal law.

Even the limited merits review suggested by *Bell* is too much because it essentially incorporates a 12(b)(6) (i.e., merits) standard into the jurisdictional analysis. *See* REDISH, *supra* note 31, at 106 n.152; Idleman, *Hypothetical Jurisdiction*, *supra* note 30, at 294. *Bell* unavoidably, and impermissibly, morphs into a preliminary inquiry into the merits of the claim in the guise of a jurisdictional inquiry. *See* Idleman, *Hypothetical Jurisdiction*, *supra* note 30, at 290 (describing *Bell* doctrine as "curious"). To the extent *Bell* complicates analysis of "arising under" jurisdictional grants, its vitality and logic as a jurisdictional doctrine is questionable. *See* Hagans v. Lavine, 415 U.S. 528, 538 (1974); REDISH, *supra* note 31, at 106 n.152. In any event, *Bell* does not empower courts to find disputed facts (such as quantum of employees) in making a jurisdictional decision.

285. Brilmayer, *Due Process*, *supra* note 22, at 82. Brilmayer developed this concept in the personal jurisdiction context. She argued that the difference between specific personal jurisdiction (where contacts between a defendant and the forum state are related to or give rise to the controversy) and general personal jurisdiction (where the contacts are not related) turns on whether the contact is the "geographical qualification of a fact relevant to the merits." *Id.* The question is whether the particular fact of a defendant contact with the forum ordinarily would be alleged as part of a comparable complaint in a purely intrastate dispute (where the reach of the court's in personam jurisdiction is not in issue); if it would be alleged, the contact with the forum is related to the controversy. *Id.*

286. *See* Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1455 (1988) [hereinafter Brilmayer, *Related Contacts*] (arguing that applicable rules of law must make fact in question substantively relevant); *cf.* Di Trolio, *supra* note 236, at 1280 (suggesting similar approach to deciding whether jurisdictional fact intertwines with merits).

287. *See* Brilmayer, *Due Process*, *supra* note 22, at 82–83; Brilmayer, *Related Contacts*, *supra* note 286, at 1456.

plead and prove that the defendant acted under color of state law whether she brings her constitutional claim in federal or state court. State action therefore is a substantive merits fact in all § 1983 actions, no matter where brought. A dismissal for lack of subject-matter jurisdiction in federal court never should be based on a court's finding as to action under color of law that could preclude the plaintiff from proving her claim in state court.[288]

CONCLUSION

To end the discussion where we began, return to the core example. A Title VII plaintiff always must plead and prove that the defendant is an employer within the meaning of Title VII; that is, a person with fifteen or more employees engaged in an industry affecting commerce subject to the restrictions of the law. That fact has "substantive relevance" in Brilmayer's sense and goes to the merits of the claim. If the defendant is an employer, the plaintiff may be able to prevail (assuming satisfaction of the other, indisputably merits-based factual elements[289]). If the defendant is not an employer, the plaintiff cannot prevail in any court.

In measuring its subject-matter jurisdiction at the first phase of the process, the federal district court need not—indeed should not—even consider the defendant's status as an employer. The court's only concern is that the action arises under or is brought under Title VII. That is, the plaintiff's claim is made possible by—and seeks to remedy a real-world deprivation of—Title VII, a federally created provision whose interpretation and application to real-world facts (whatever they turn out to be) will determine the outcome and winner of the case.[290]

The federal court has jurisdiction (the basic power or authority to entertain, consider, and resolve the issues) to resolve this action, according to the formal procedural strictures of the litigation framework. As an always-substantive merits fact, quantum of employees can be adjudicated at the second phase of the process only if it is undisputed or if relevant evidence all points toward a showing that the defendant is not an employer. To the extent the fact is in issue, it can be resolved only at

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288. This approach avoids the preclusion problem that comes with double-counting particular facts. *See supra* notes 105–20 and accompanying text.

289. *See supra* notes 79–83, 208–16 and accompanying text.

290. *See supra* notes 247–68 and accompanying text.

the final phase of civil litigation of a full trial on the merits before a finder of fact.[291]

291. *See* Marcus, *Fact Pleading*, *supra* note 38, at 440.