The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes

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Title VII of the Civil Rights Act of 19641 provides federal relief to victims of employment discrimination on the basis of race, color, religion, sex, and national origin.2 This federal relief neither obviates nor mitigates state discrimination remedies.3 Under federal supplementary jurisdiction, Title VII plaintiffs may pursue state and federal claims simultaneously in federal court.4 Since 1980, when Congress amended the federal question jurisdiction statute to remove the amount in controversy requirement,5 the federal question doctrine has governed Title VII jurisdiction, despite Congress's express grant of federal jurisdiction in Title VII.6

Title VII contains a number of definitional requirements, such as "employer" and "employee."7 This Comment focuses on the definition of "employer" and how it affects the federal courts' jurisdiction over cases under Title VII and other similarly structured federal antidiscrimination laws. It is universally acknowledged that plaintiffs must prove that their defendant-employers employed, at the time of the alleged discrimination, fifteen or more employees to make out a successful Title VII claim. But appellate courts disagree as to whether this

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3 See 42 USC § 2000e-7. See also Andrea Catania, State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts, 32 Am U L Rev 777, 783–85 (1983) (arguing that the preservation of a state law cause of action is important because state laws may be substantively more expansive, allow for money damages, have longer statutes of limitations, or require fewer procedural formalities).
4 28 USC § 1367 (2000). This practice is commonly accepted now, but that was not always the case. See generally Catania, 32 Am U L Rev at 788–838 (cited in note 3).
7 42 USC § 2000e(b) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.").
8 42 USC § 2000e(f).
minimum employee threshold is a jurisdictional question,9 a question on the merits,10 or some hybrid of the two.11 Although the Supreme Court has heard three cases based upon Title VII’s definition of “employer,”12 it has not reached the question of whether dismissal for lack of subject matter jurisdiction is appropriate when the defendant does not meet the minimum employee threshold.13

The circuits’ divergences in approach to the minimum employee threshold may seem minor given that the immediate consequences for the plaintiff’s federal claims are identical. A plaintiff may not care

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9 See Arbaugh v Y&H Corp, 380 F3d 219 (5th Cir 2004), cert granted, 125 S Ct 2246 (2005); Childs v Local 18, International Brotherhood of Electrical Workers, 719 F2d 1379 (9th Cir 1983); Armbruster v Quinn, 711 F2d 1332 (6th Cir 1983). The Fourth Circuit reached a similar decision in Hukill v Auto Care, Inc, 192 F3d 437 (4th Cir 1999), involving the definition of “employer” in the Family and Medical Leave Act (FMLA), 29 USC § 630(b) (2000). The Tenth Circuit’s opinion in Ferroni v Teamsters, Chauffeurs & Warehousemen Local No 222, 297 F3d 1146 (10th Cir 2002), adopted the jurisdictional approach. A subsequent opinion, Trainor v Apollo Metal Specialties, Inc, 318 F3d 976, 978 n 2 (10th Cir 2002), claimed to be in accord with Ferroni, but actually applied the hybrid approach discussed in Part I.A.3; in so doing, Trainor affirmed Wheeler v Hurdman, 825 F2d 257 (10th Cir 1987), which applied the hybrid approach in the context of the Age Discrimination in Employment Act (ADEA). As Trainor is the most recent Tenth Circuit holding on this issue, this Comment will proceed on the understanding that it accurately reflects the law in the Tenth Circuit.

Dismissal for lack of subject matter jurisdiction can be effected under either Rule 12(b)(1) or Rule 12(h)(3) of the Federal Rules of Civil Procedure. Courts have applied the jurisdictional approach under both the express jurisdictional grant of Title VII and the federal question jurisdiction grant of § 1331.

10 See Nesbit v Gears Unlimited, Inc, 347 F3d 72, 83 (3d Cir 2003); Da Silva v Kinsho International Corp, 229 F3d 358, 366 (2d Cir 2000); Sharpe v Jefferson Distributing Co, 148 F3d 676, 677–78 (7th Cir 1998). See also EEOC v Saint Francis Xavier Parochial School, 117 F3d 621, 624 (DC Cir 1997) (addressing the minimum employee threshold in the context of an Americans with Disabilities Act (ADA) claim and finding that the “employer” status question is a question on the merits).

11 See Morrison v Amway Corp, 323 F3d 920, 928 (11th Cir 2003) (addressing the minimum employee threshold in the context of an FMLA claim); Garcia v Copenhagen, Bell & Associates, 104 F3d 1256, 1264 (11th Cir 1997) (addressing the minimum employee threshold in the context of a claim under the ADEA). The Tenth Circuit’s decision in Trainor, see 318 F3d at 978 (addressing the minimum employee threshold in the context of a claim under the ADA), follows this same model. See note 9.

12 See Walters v Metropolitan Educational Enterprises, Inc, 519 US 202 (1997) (considering the necessary elements of an employer-employee relationship under the Civil Rights Act’s definition of employer); EEOC v Arabian American Oil Co, 499 US 244 (1991) ("Aramco") (holding that Title VII does not apply extraterritorially); Hishon v King & Spalding, 467 US 69 (1984) (holding that Title VII applies to partnerships and governs their decisions of whom to include as partners). While only Walters grappled with the minimum employee threshold, all three cases provide useful windows on the Court’s approach to Title VII’s definitional provisions. In addition, in EEOC v Commercial Office Products Co, 486 US 107 (1988), the Court interpreted the minimum employee threshold as a limitation on EEOC jurisdiction. For a more complete discussion of this case and its implications, see notes 64–67 and accompanying text.

13 See Hishon, 467 US at 73 n 2 (expressly declining to consider the basis for dismissal).
whether a court dismisses her claim under Rule 12(b)(1) or 12(b)(6) of the Federal Rules of Civil Procedure, or on summary judgment—her federal claim founders regardless. But the court’s choice of procedural rule has substantial consequences. The choice implicates the parties’ evidentiary burdens in the dismissal debate, the court’s freedom to raise \textit{sua sponte} the defendant’s noncompliance with the minimum employee threshold, the court’s delegation of factfinding responsibilities, the court’s discretion to hear related state-law causes of action, and the verdict’s res judicata effects.

In analyzing the role of the minimum employee threshold, courts consider cases involving Title VII, the Age Discrimination in Employment Act\textsuperscript{14} (ADEA), the Americans with Disabilities Act\textsuperscript{15} (ADA), and the Family and Medical Leave Act\textsuperscript{16} (FMLA) interchangeably, as all four statutes include similar thresholds.\textsuperscript{17} This Comment argues that the minimum employee thresholds in Title VII and these other federal antidiscrimination statutes should be considered limitations on the subject matter jurisdiction of the federal courts rather than elements of the federal antidiscrimination claim. This Comment advances an affirmative argument in favor of the jurisdictional approach to the minimum employee threshold; while numerous courts have adopted the jurisdictional approach, none has articulated a clear rationale for doing so.

Part I outlines the three approaches courts have adopted, as well as the implications of each for federal antidiscrimination lawsuits. Part II analyzes the arguments for each approach, including statutory construction, existing case law, and public policy concerns. Part III evaluates the three approaches in light of the arguments outlined in Part II. Finally, Part IV concludes that interpreting the minimum employee threshold in Title VII and other federal antidiscrimination statutes as jurisdictional is the superior approach. This conclusion rests upon constitutional, precedential, and legislative history arguments, most of which the courts have explored incompletely, if at all.

\section{I. The Three-Way Circuit Split}

Four circuits have held the minimum employee threshold to be a jurisdictional question, four have held it to be a substantive element of the antidiscrimination claim, and two have held it to be a hybrid question implicating both jurisdiction and the merits. Part I.A outlines in turn

\begin{itemize}
\item \textsuperscript{14} Pub L No 90-202, 81 Stat 602 (1967), codified as amended at 29 USC § 621 et seq (2000).
\item \textsuperscript{15} Pub L No 101-336, 104 Stat 327 (1990), codified as amended at 42 USC § 12101 et seq (2000).
\item \textsuperscript{16} Pub L No 103-3, 107 Stat 6 (1993), codified at 29 USC § 2601 et seq (2000).
\item \textsuperscript{17} See, for example, \textit{Nebit}, 347 F3d at 77 (Title VII), citing \textit{Saint Francis Xavier}, 117 F3d at 623–25 (ADA); \textit{Amway}, 323 F3d at 925–27 (FMLA), citing \textit{Garcia}, 104 F3d at 1258–64 (ADEA).
\end{itemize}
each of the three approaches in the split; Part I.B explores the consequences that follow from the various approaches to this question.

A. The Contours of the Circuit Split

1. The jurisdictional approach.

The jurisdictional approach to Title VII's minimum employee threshold dates back to the earliest Title VII cases. In the 1972 case of *Hassell v Harmon Foods, Inc.*, the Sixth Circuit upheld dismissal of a Title VII claim on the basis that the defendant did not have the requisite number of employees for exposure to liability under the statute. The court “conceded” that the aggregate number of employees required by the statute “is a jurisdictional prerequisite to an action under the Civil Rights Act of 1964.” The Fifth and Tenth Circuits followed suit in 1980. The First Circuit adopted this approach by implication. In *Thurber v Jack Reilly's, Inc*, the court reviewed a district court's refusal to dismiss a Title VII case upon finding that the minimum employee threshold was satisfied. While the question at hand was the correct method of enumerating employees, the First Circuit presumably would have been explicit if it disagreed with the trial court's jurisdictional conclusion. In the years since these early cases, the Fifth and Sixth Circuits have reaffirmed their jurisdictional conclusions, and the Fourth and Ninth Circuits have reached similar conclusions. To date, none has engaged in an extended discussion or analysis of the reasoning underlying the jurisdictional holding. The Fifth Circuit briefly considered the question but relied on precedent, rather than an analysis of the arguments, in reaching its conclusion.

2. The merits-based approach.

Recently, some courts have opposed the jurisdictional approach. Two of three circuits confronting the minimum employee threshold as

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18 454 F2d 199 (6th Cir 1972).
19 Id at 199.
20 See *Dumas v Town of Mount Vernon*, 612 F2d 974, 976–77 (5th Cir 1980) (upholding the lower court's dismissal of the case “[a]fter a hearing on the jurisdictional question of whether the remaining defendants . . . were 'employers' within the meaning of Title VII”); *Owens v Rush*, 636 F2d 283, 285–86 (10th Cir 1980) (upholding the trial court's dismissal for lack of subject matter jurisdiction).
21 717 F2d 633 (1st Cir 1983).
22 Id at 635.
23 See *Arbaugh v Y&H Corp*, 380 F3d 219, 225 (5th Cir 2004); *Armbruster v Quinn*, 711 F2d 1332, 1335 (6th Cir 1983).
24 See *Hukill v Auto Care, Inc*, 192 F3d 437, 441 (4th Cir 1999); *Childs v Local 18, International Brotherhood of Electrical Workers*, 719 F2d 1379, 1382 (9th Cir 1983).
an issue of first impression in the past decade have adopted the merits-based approach. In addition, the Seventh Circuit has abandoned the jurisdictional approach for the merits-based analysis. The Third Circuit was the first to break with the orthodoxy that the minimum employee threshold cabined the federal courts' subject matter jurisdiction. In Martin v United Way of Erie County, the court affirmed the trial court's refusal to dismiss a case on jurisdictional grounds where there was a question as to whether the defendant satisfied the minimum employee threshold. The district court held an evidentiary hearing to allow both sides to present facts relevant to whether the local United Way met the ADEA's statutory threshold for an employer. Instead of reaching its judgment as a matter of law, the Martin court directed the defendant to submit a summary judgment motion in place of its initial motion for dismissal on jurisdictional grounds. By choosing summary judgment as its procedural avenue, the district court signaled that the question was not one of jurisdiction; in the absence of subject matter jurisdiction, the court would lack the power to reach summary judgment. The Third Circuit affirmed this reasoning but reversed the outcome, holding that the case presented a factual dispute as to whether the United Way satisfied the minimum employee threshold.

Subsequent decisions endorsing the merits-based approach have been more explicit in their reasoning. Yet, even these courts have

26 See Da Silva v Kinsho International Corp, 229 F3d 358, 366 (2d Cir 2000); EEOC v Saint Francis Xavier Parochial School, 117 F3d 621, 624 (DC Cir 1997). By contrast, Hukill was a question of first impression in which the Fourth Circuit chose the jurisdictional approach. 192 F3d at 441-42.


28 829 F2d 445 (3d Cir 1987).

29 Id at 447.

30 The ADEA's minimum employee threshold requires twenty employees. 29 USC § 630(b).

31 829 F2d at 446.

32 See Bell v Hood, 327 US 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.").

33 Martin, 829 F2d at 447.

34 Id at 451-52.

35 See Nesbit v Gears Unlimited, 347 F3d 72, 76-83 (3d Cir 2003) (rejecting Commerce Clause and common law arguments for the jurisdictional interpretation in favor of a judicial economy justification for the merits-based interpretation); Da Silva, 229 F3d at 361-66 (discussing the theoretical distinction between merits and jurisdictional questions); Saint Francis Xavier, 117 F3d at 622-25 (discussing the elements necessary to prove lack of subject matter jurisdiction and failure to state a claim).
reiterated the caveat that "the matter is not free from doubt." Under-scoring the difficulty of the question, a D.C. Circuit judge who sided with the merits-based perspective when a related question first arose changed his mind and endorsed the jurisdictional approach to the minimum employee threshold.

3. The hybrid approach.

The Eleventh Circuit appears to disagree with both the jurisdictional and the merits-based approaches. In two cases, *Garcia v Copenhaver, Bell & Associates* and *Morrison v Amway Corp*, it has ruled that the minimum employee threshold implicates both federal jurisdiction and the merits of the federal claim. The court's hybrid approach grows out of intense adherence to both the theory of limited jurisdiction and the jury's role in factual determinations. A federal court has "substantial authority" to seek and weigh evidence as it determines "its very power to hear the case." At the same time, "the jury, rather than the judge, should decide the disputed question" of whether or not the defendant meets the minimum employee threshold. Thus, the Eleventh Circuit's hybrid approach acknowledges the jurisdictional relevance of its inquiry while treating the minimum employee threshold as an element of the plaintiff's federal antidiscrimination claim. The Tenth Circuit has adopted the same approach.

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36 *Nesbit*, 347 F3d at 83. See also *Da Silva*, 229 F3d at 362, quoting Restatement (Second) of Judgments § 11 comment e ("[Frequently] the matter in question can plausibly be characterized either as going to subject matter jurisdiction or as being one of merits or procedure."). 37 Compare *Haddon v Walters*, 43 F3d 1488, 1490 (DC Cir 1995) (per curiam) (holding that another definitional provision of Title VII was not met and dismissing under Rule 12(b)(6)), with *Saint Francis Xavier*, 117 F3d at 626 (Sentelle concurring) ("Although I served on the panel in *Haddon*, I have become increasingly convinced that *Haddon* was incorrectly decided."). 38 104 F3d 1256 (11th Cir 1997). 39 323 F3d 920 (11th Cir 2003). 40 Id at 928 ("The question of 'eligible employee' status implicates both jurisdiction and the merits"); *Garcia*, 104 F3d at 1264 ("[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."). 41 *Amway*, 323 F3d at 925, quoting *Lawrence v Dunbar*, 919 F2d 1525, 1529 (11th Cir 1990). 42 *Amway*, 323 F3d at 926, quoting *Garcia*, 104 F3d at 1263. 43 See, for example, *Amway*, 323 F3d at 926, quoting *Garcia*, 104 F3d at 1262–63: *The elements of an ADEA claim under [29 USC] § 623(a)(1) can be summarized as follow[s], a plaintiff must prove: 1) an employer, 2) failed or refused to hire or to discharge, 3) any individual, 4) with respect to his compensation, terms, conditions, or privileges of employment, 5) because of such individual's age.*

The minimum employee threshold falls within the first element; if the defendant does not meet this threshold, the defendant is not an employer for the purposes of the federal antidiscrimination statute.

44 See *Trainor v Apollo Metal Specialties, Inc*, 318 F3d 976, 978 (10th Cir 2002), upholding *Wheeler v Hurdman*, 825 F2d 257, 259 (10th Cir 1987) (stating, regarding an ADEA claim, that
This approach has not gone unchallenged. In the interim between Garcia and Amway, an Eleventh Circuit panel followed the jurisdictional approach in a Title VII case, Scarfo v Ginsberg. The Amway court later reasserted the hybrid approach, rejecting the analysis under which the Scarfo court had distinguished its case. This express repudiation is the crux of the Amway opinion, which otherwise hews closely to the outline of Garcia.

Under closer examination, however, the hybrid approach unravels. Despite the appearance of combining the strongest arguments from each of the “pure” approaches, the hybrid approach ultimately treats the minimum employee threshold as a substantive element of a federal antidiscrimination claim: under the hybrid approach, while openly discussing the fact that the minimum employee threshold implicates federal jurisdiction, courts resolve disputes about the defendant’s status vis-à-vis the minimum employee threshold under Rule 12(b)(6) or on summary judgment under Rule 56, not under Rule 12(b)(1) or Rule 12(h)(3). The hybrid approach nods in the direction of jurisdiction, but essentially follows the path of the merits-based approach. This comes as no surprise, given that the Tenth and Eleventh Circuits do not recognize their approach as diverging from the larger debate. The Amway court summarized the circuit split as dividing courts between those

“[w]hen subject matter jurisdiction is dependent upon the same statute which provides the substantive claim in the case, the jurisdictional claim and the merits are considered to be intertwined”).
45 175 F3d 957, 961 (11th Cir 1999). In reaching the jurisdictional holding, the court looked to another Eleventh Circuit precedent, Virgo v Riviera Beach Associates, Ltd, 30 F3d 1350, 1359 (11th Cir 1994) (“Before a district court may entertain a sexual harassment Title VII claim, the harassing actor must be an ‘employer.’”). The Garcia court, 104 F3d at 1264, distinguished Virgo because it preceded the Civil Rights Act of 1991, Pub L No 102-66, 105 Stat 1071, codified at 42 USC § 1981 et seq (2000), which granted Title VII plaintiffs the right to jury. However, Virgo held that the minimum employee threshold is a jurisdictional prerequisite and therefore not a question for the finder of fact, whether judge or jury. The Amway court never mentioned Virgo.

Amway, 323 F3d at 928–29 (arguing that Scarfo misinterpreted the hybrid approach as requiring an intertwining of the terms “employer” and “employee” instead of an intertwining of the merits and subject matter jurisdiction).

In addition to the Tenth and Eleventh Circuits, one other circuit has flirted with the hybrid approach. A Fifth Circuit panel applied this approach, Clark v Tarrant County, Texas, 798 F2d 736, 748 (5th Cir 1986) (overturning the lower court’s dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction on the ground that such dismissal is inappropriate when “the jurisdictional issue is so closely intertwined with the merits that they cannot be separated”), only to be chastised by a subsequent panel for failing to follow binding circuit precedent in favor of the jurisdictional approach. Arbaugh, 380 F3d at 224–25 (holding that Dumas, which analyzed the minimum employee threshold purely as a matter of jurisdiction, should have bound the Clark court, and applying the Dumas “pure jurisdiction” analysis).

See Amway, 323 F3d at 927 (“Like employer status under the ADEA, eligible employee status under the FMLA is a threshold jurisdictional question that also appears to be a prima facie element for recovery in a civil action.”) (internal citations omitted).
that conceive of the minimum employee threshold as "strictly jurisdictional" and those that consider it "intertwined with the merits."

Given the procedural congruence of the merits-based and hybrid approaches, this Comment proceeds on the understanding that the implications of both are the same, but that the hybrid rhetoric merely serves to confuse an already complicated issue. Thus, the hybrid approach constitutes a merits-based approach with the harm of additional confusion. Since this Comment finds the jurisdictional approach to be the proper one, there is no need to analyze the hybrid approach further except to note that it is even less desirable than the merits-based approach.

B. The Consequences of the Circuit Split

The procedural posture under which a court construes the minimum employee threshold has substantial consequences. These consequences affect the obligation of the court to raise the issue *sua sponte*, the scope of a federal court’s jurisdiction to hear supplemental claims for employment discrimination under state law, the evidentiary burdens on each party, and the res judicata effects of the court’s verdict. This Part briefly outlines these consequences.

Questions of subject matter jurisdiction are nonwaivable. At all stages of litigation, courts have an obligation to raise, *sua sponte*, subject matter jurisdictional questions. Thus, if the courts regard the minimum employee threshold as jurisdictional, a court may revisit the threshold issue at any point in the litigation process.

In addition, if the threshold is not satisfied, federal courts cannot exercise supplemental jurisdiction to hear state claims brought in conjunction with the federal claim. Under 28 USC § 1367, federal courts have discretion to exercise supplemental jurisdiction over state claims arising from the same case or controversy as another claim over which they have jurisdiction. When a federal court concludes that it lacks jurisdiction to hear a Title VII claim, therefore, it necessarily surrenders its power to exercise supplemental jurisdiction over related state

49 Id at 928 n 11 (including all the merits-based proponents as supporters of the intertwined, or hybrid, approach).
50 See FRCP 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 Ruhrgas AG v Marathon Oil Co, 526 US 574, 583 (1999).
51 See Nesbit, 347 F3d at 77 ("[If] the fifteen-employee requirement is not jurisdictional, a Title VII claim for which the number of employees is in doubt nonetheless will support supplemental jurisdiction under 28 U.S.C. § 1367 over state claims"); Da Silva, 229 F3d at 362 (noting that a federal court only has supplemental jurisdiction if the state law claims join "claims that properly invoke the court's subject matter jurisdiction").
claims. In cases where the federal court disclaims jurisdiction, the plaintiff will always have an opportunity to refile in state court because federal law prevents the statute of limitations from tolling while the plaintiff's claims wend their way through the federal judiciary.

In addition to the procedural ramifications, there are evidentiary consequences. The light in which the court views the evidence is the primary difference between a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and a Rule 12(b)(6) motion to dismiss for failure to state a claim. When a defendant files a Rule 12(b)(6) motion, the court considers all allegations in the pleadings to be true. By contrast, when the defense seeks dismissal for lack of jurisdiction, "a court may inquire into the jurisdictional facts without viewing the evidence in a light favorable to either party." Based on this distinction, the Eleventh Circuit reasoned that the minimum employee threshold should not be jurisdictional because refusing to treat it as jurisdictional "provides [ ] a greater level of protection for the plaintiff who in truth is facing a challenge to the validity of his claim."

Just as the court's approach dictates the light in which the court views the evidence, it also allocates the burden of production. When considering a Rule 12(b)(1) motion, a court may hold evidentiary hearings or seek information beyond that contained in the pleadings. Undertaking such judicial investigations on a Rule 12(b)(6) motion converts the motion to one of summary judgment. Holding the minimum employee threshold to be jurisdictional imposes greater initial procedural burdens on the court because the court bears the burden of identifying the evidence necessary to make a jurisdictional determination. If the number of employees is a substantive element of the claim, however, the burden lies with the parties.

52 See, for example, Sharpe v Jefferson Distributing Co, 1996 US Dist LEXIS 733, *20 (ND Ill) ("Because this court has found that it lacks jurisdiction over plaintiff's Title VII claims, this court does not have supplemental jurisdiction over plaintiff's state law claims, pursuant to 28 U.S.C. § 1367.").
53 See 28 USC § 1367(d).
54 Nesbit, 347 F3d at 77.
56 If the pleadings do not provide adequate information for the court to pass judgment on a Rule 12(b)(6) motion, the court may consider other evidence, but the motion to dismiss is then converted to a motion for summary judgment under Rule 56. See FRCP 12(b). Like the Rule 12(b)(6) motion, the summary judgment motion carries an evidentiary presumption in favor of the nonmoving party.
57 See Sharpe, 148 F3d at 678, where the court appears to base the holding that the fifteen-employee threshold is not jurisdictional largely on the fact that the alternative conclusion would require judges to raise the issue of the number of employees sua sponte, thereby placing an evidentiary burden on judges: "Surely the number of employees is not the sort of question a
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The determination that the minimum employee threshold is an element of the claim also has potential effects under the doctrine of collateral estoppel. If a federal court reaches a verdict in a case that it lacks subject matter jurisdiction to hear, then that judgment lacks the protection customarily accorded final judgments by the doctrine of res judicata.\(^5^8\) Thus, if a plaintiff did not recover on a Title VII claim and related state claims heard by the federal court, that plaintiff could conceivably refile in state court and argue that the federal verdict did not collaterally estop a state trial because the federal court lacked jurisdiction.

Ultimately, while the consequences attendant upon characterizing the threshold as jurisdictional or merits-based impact employment discrimination litigation, none forecloses an injured plaintiff from seeking redress; nor does any unreasonably aid or hinder either party in the adversarial process. Thus, the consequences offer no compelling argument in favor of one particular approach to the minimum employee threshold.

II. THE UNDERPINNINGS OF EACH APPROACH TO THE MINIMUM EMPLOYEE THRESHOLD

In attempting to construe a statute, courts traditionally look to a number of sources: the language of the statute, legislative materials that might illuminate congressional intent and understanding, how other courts have interpreted analogous questions under the same or similar statutes, and the public policy consequences of various statutory interpretations. This Part discusses each of these analyses, beginning in Part II.A with the statute itself. Part II.B examines relevant Supreme Court decisions regarding Title VII, and Part II.C explores the public policy consequences of the jurisdictional and merits-based approaches.

A. Statutory Construction and Legislative History

The primary confusion underlying the circuit split over the minimum employee threshold grows out of the language of the statute. What does the minimum employee threshold mean, and how, if at all, does it affect federal subject matter jurisdiction? The fact that the controlling statute for jurisdictional purposes has changed—from the internal provision of Title VII to the general federal question jurisdiction—must raise on its own, which a 'jurisdictional' characterization would entail." Id.

\(^5^8\) See Da Silva, 229 F3d at 365 (pointing out that finding a lack of subject matter jurisdiction renders "all actions of a federal court [ ] void").
tion statute—has furthered this confusion. Even today, when § 1331 confers upon federal courts subject matter jurisdiction over all causes of action arising under federal law, some courts still look to the jurisdictional provision within Title VII. When questions arise about the meaning of a statute, the statute itself, including both its language and its structure, is the first recourse. Additionally, the legislative history of the statute and other analogous federal statutes may shed light on the question of how to interpret Title VII. This Part grapples with the statutory language and how different provisions of Title VII interact, considers the constitutional dimensions of the minimum employee threshold, evaluates the claim that Congress included the minimum employee threshold for public policy reasons distinct from a constitutional rationale, and finally draws conclusions from the ADA, an analogous federal antidiscrimination statute.

1. The intersection of Title VII's definitional section and its jurisdictional provisions.

The crucial question for understanding the circuit split is what effect the definitional provisions of Title VII, including the minimum employee threshold, have on the statute's implementation. As codified, Title VII's definitional section appears at the beginning of the statute, and all subsequent sections are numbered as subsections of the definitional provision. A natural reading of the codification would

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59 See notes 5-6 and accompanying text.
60 See, for example, *Nesbit v Gears Unlimited, Inc*, 347 F3d 72, 81 (3d Cir 2003) (reasoning that the minimum employee threshold must not be jurisdictional since § 2000e-5(f)(3) does not mention the threshold as a jurisdictional prerequisite); *Da Silva v Kinsho International Corp*, 229 F3d 358, 365 (2d Cir 2000) (concluding that the use of "brought under" in § 2000e-5(f)(3) is less exacting than the § 1331 counterpart "arising under," and that a claim is "brought under" Title VII even if it is brought against an employer that doesn't meet the minimum employee threshold).
61 The definitional section of Title VII is codified at 42 USC § 2000e. The subsequent provisions of Title VII appear as subunits of § 2000e, including § 2000e-2 (unlawful employment practices), § 2000e-4 (the EEOC), § 2000e-5 (enforcement mechanisms), etc., ending with § 2000e-17.

There is nothing odd about the definitions appearing at the beginning of a statute; indeed, it makes perfect sense. It is unusual, however, for the subsequent sections to be numbered as subsections of those definitions, as in Title VII, rather than as separate sections following the definitions. See, for comparison, the ADA, in which 42 USC § 12101 encapsulates congressional findings, § 12102 includes necessary definitions, and subsequent sections lay out the substantive provisions of the law; note that each of these subsequent provisions begins with a section offering necessary definitions before subsequently numbered provisions lay out the substantive law. See 42 USC §§ 12111, 12131, 12141, 12161, 12181.

The difference between the numbering of Title VII and other similarly structured statutes is noticeable and potentially significant. This is true despite the facts that Congress does not explicitly oversee the numbering of statutes at codification (that task falls to the Office of Law Revision Counsel) and that Congress did not write Title VII with the structure adopted in the codification; the statute, as passed, featured definitions in the first section, followed by substantive provisions in stand-alone sections subsequently numbered. See Title VII, 78 Stat 253–66. Despite
thus incorporate the definitions into every subsequent provision, including the jurisdictional provision. On the other hand, as the D.C. Circuit noted, "[n]othing in Title VII . . . expressly limits the district court's subject matter jurisdiction." With greater specificity, the Third Circuit found "no congressional intent to make the [fifteen-employee] requirement jurisdictional . . . . If Congress had so intended, we believe its intention would be clearer. Notably, § 2000e(b) does not even contain the word 'jurisdiction.'" Yet, the fact that discussion of Title VII's jurisdictional component is infrequent is unsurprising given that Title VII is not a jurisdictional statute but one that sets out an entire area of substantive federal law. That said, these courts have a point: even if the structure militates in favor of reading the jurisdictional provision in light of the definitions, the statute does not patently require that reading.

There is, however, an analogous case that cuts strongly in favor of incorporating the minimum employee threshold into the Title VII federal jurisdiction provision. In *EEOC v Commercial Office Products Co.*, the Supreme Court read the minimum employee threshold in Title VII as a limit on the jurisdiction of the Equal Employment Opportunity Commission. Congress created the EEOC "to prevent any person from engaging in any unlawful employment practice." The Court read the fifteen-employee threshold of § 2000e(b) into this grant of jurisdiction. Thus, the definitional section of Title VII applies to jurisdictional grants that appear in later provisions of the statute. This reasoning would suggest that the provision expressly granting federal courts jurisdiction similarly incorporates the statute's earlier definitional requirements.

The Third Circuit attacked this analogy by attempting to distinguish the federal courts from the EEOC, claiming that "Title VII's jurisdictional grant to the federal courts is broader." Yet, if the minimum employee threshold applies to the EEOC's jurisdictional grant under § 2000e-5, why should it not apply to the federal courts' jurisdic-

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63 *Nesbit*, 347 F3d at 81.
64 *486 US 107* (1988) (considering the statutory timing limitations on filing claims under Title VII).
65 Id at 119 n 5 (noting in dicta that the jurisdictional interpretation of the minimum employee threshold accords with courts' preferences for interpretations of Title VII that allow reactivation of state proceedings after federal consideration).
67 *Commercial Office Products*, 486 US at 119 n 5.
68 *Nesbit*, 347 F3d at 83.
tional grant under the same section? Admittedly, the jurisdictional grant to the courts is made in sweeping language,69 but so too is the grant to the EEOC.70 Moreover, in the jurisdictional grant to the federal courts, the reference to "this subchapter" incorporates the definitions laid out earlier in the subchapter just as clearly as the use of "person," which is defined in § 2000e(a), triggers the incorporation of the definitional section into the grant of EEOC jurisdiction.

Even if the jurisdictional provision within Title VII did incorporate the minimum employee threshold, that provision became superfluous and inoperative when Congress amended the federal question jurisdiction statute.71 The Seventh Circuit has repeatedly held that district courts have jurisdiction over all Title VII claims, whether or not those claims are sustainable under the definition of "employer" laid out in 42 USC § 2000e(b), because federal subject matter jurisdiction extends to all cases that meet the § 1331 federal question standard.72 By comparison, the previously operative jurisdictional provision in Title VII granted federal district courts jurisdiction over "actions brought under this subchapter."73 One might think that the Title VII provision, which specifically references "this subchapter," is more likely than the § 1331 "arising under federal law" standard to incorporate the minimum employee threshold near the top of the subchapter. Nevertheless, the federal law implicated in a Title VII claim is the same subchapter that the Title VII jurisdictional provision references.

The courts have found little agreement in solving this puzzle. The Second Circuit's conclusion that Title VII's jurisdictional standard is "arguably less exacting" than the § 1331 standard" suggests that Title VII plaintiffs have had diminished access to federal courts since § 1331 became controlling. This understanding conflicts with the Seventh Circuit’s approach, which posits federal jurisdiction over all Title VII claims

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69 See 42 USC § 2000e-5(f)(3) ("Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter.").
70 See 42 USC § 2000e-5(a) ("The Commission is empowered . . . to prevent any person from engaging in any unlawful employment practice as set forth in . . . this title.").
71 See note 6.
72 See Johnson v Apna Ghar, Inc, 330 F3d 999, 1002 (7th Cir 2003) ("Because Johnson's claim arises under the laws of the United States and is neither 'immaterial and made solely for the purpose of obtaining jurisdiction' nor 'wholly insubstantial and frivolous,' . . . the district court has federal-question jurisdiction pursuant to 28 U.S.C. § 1331."); Papa v Katy Industries, Inc, 166 F3d 937, 943 (7th Cir 1999); Komorowski v Townline Mini-Mart and Restaurant, 162 F3d 962, 964 (7th Cir 1998); Sharpe v Jefferson Distributing Co, 148 F3d 676, 677 (7th Cir 1998); Ost v West Suburban Travelers Limousine, Inc, 88 F3d 435, 438 n 1 (7th Cir 1996); EEOC v The Chicago Club, 86 F3d 1423, 1428-29 (7th Cir 1996).
74 Da Silva, 229 F3d at 365.
that "present[] a non-frivolous claim under federal law." The Seventh Circuit sees only the most minimal barrier to federal jurisdiction over Title VII claims, which means that § 1331 cannot be more exacting than the Title VII jurisdictional provision. It remains unclear whether a claim can "arise under" a federal law without meeting that law's definitional requirements. The statute itself, however, seems to support the reading of the minimum employee threshold as a jurisdictional prerequisite.

2. The minimum employee threshold as a proxy for constitutional limits.

Under the Constitution, Congress has authority to legislate only within its enumerated powers. Like most federal regulations, congressional authority for antidiscrimination statutes is found within the Commerce Clause power. The same provision of the statute that sets out the minimum employee threshold also requires a defendant be "in an industry affecting commerce." One reading of the statute is that the minimum employee threshold is Congress's attempt to ensure that it is not exceeding its commerce power in regulating employers. Under this view, when an employer has fewer than fifteen employees, Title VII cannot apply because Congress used the number of employees as a proxy for when an employer affects commerce. If this reading is accurate, Congress has, within Title VII, disclaimed authority over employers with fewer than fifteen workers.

The legislative history contains evidence substantiating this perspective. A minority report from the House Judiciary Committee questioned Title VII's constitutionality; the report complained that, if "the quantum of employees is a rational yardstick by which the interstate commerce concept can be measured . . . the concept of intrastate commerce is obsolete." This history establishes that at least some members of Congress understood the minimum employee threshold as a proxy for interstate commerce. The Sixth Circuit also understood

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75 Sharpe, 148 F3d at 677.
76 See US Const Art I, § 8, cl 3; Willis v Dean Witter Reynolds, Inc, 948 F2d 305, 311 (6th Cir 1991) (finding that Title VII and the ADEA were both enacted under Congress's Commerce Clause power).
77 42 USC § 2000e(b).
78 See Nesbit, 347 F3d 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.").
the statute this way, finding that Congress determined that "any employer with 15 or more employees necessarily implicates interstate commerce." Under this view, the minimum employee threshold must be jurisdictional because it is part of the statute's constitutional anchor, and, if the statute is applied beyond the bounds of Congress's constitutional authority, it is unconstitutional and cannot confer jurisdiction.81

Yet, some courts have recognized the constitutional connection and still resisted the jurisdictional conclusion. According to 42 USC § 2000e(b), "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." Under the Third Circuit's reading, this statutory diction suggests that the "affecting commerce" requirement and the minimum employee threshold are distinct. The Third Circuit also argued that legislative history works against the fifteen-employee requirement being tied to commerce. Congress initially set the threshold at twenty-five employees, and the current statutory threshold of fifteen employees resulted from a compromise forged between the authors of the Title VII amendments, who wanted the requirement to be only eight employees, and those who sought to set the minimum employee threshold much higher to undercut Title VII's efficacy. According to the Third Circuit, these facts militate against the minimum employee threshold bearing constitutional implications. Yet, the fact that the fifteen-employee threshold is the product of congressional consideration, debate, compromise, and amendment need not undercut its constitutional significance.87

80 Willis, 948 F2d at 311.
81 See, for example, United States v Morrison, 529 US 598, 617 (2000) (striking down a federal statute enacted under the Commerce Clause because it exceeded Congress's constitutional authority); United States v Lopez, 514 US 549, 551 (1995) (same).
82 Nesbit, 347 F3d at 82 (reasoning that "the requirements that an employer be 'in an industry affecting commerce' and have 'fifteen or more employees' are separate and independent, and that it is a mistake to conflate the two").
83 Id.
84 Title VII was amended in 1972 to contain the current threshold of fifteen employees. Equal Employment Opportunity Act of 1972, Pub L No 92-261, 86 Stat 103, amending, inter alia, 42 USC § 2000e(b).
86 Nesbit, 347 F3d at 82 ("[T]he fifteen-employee threshold appears motivated by policy—to spare small companies the expense of complying with Title VII—rather than Commerce Clause considerations.").
87 While the Third Circuit assumed that Congress must have had only one purpose in mind, see id, it could well be that Congress sought to insulate small businesses at least in part because it
A more compelling argument against reading the minimum employee threshold as a constitutional proxy is that Congress expressly chose not to impose strong constitutional restrictions on Title VII. In defining "employer," Congress used the term "affecting commerce." The "affecting commerce" threshold is extremely low, representing the fullest possible extent of congressional power to regulate commerce. At the time of Title VII's adoption, given the Court's jurisprudence on the breadth of congressional authority in statutes utilizing the "affecting commerce" formulation, the argument that the minimum employee threshold was necessary to satisfy the Commerce Clause made little sense. Such an argument posits that Congress chose to adopt the broad "affecting commerce" standard, but then sought to retrench by placing a greater limitation on the statute's scope. Perhaps Congress intended the fifteen-employee threshold and the weak "affecting commerce" standard to work in conjunction as a proxy for the Commerce Clause. Under that view, the minimum employee threshold mitigates the broad jurisdictional grant made by use of the phrase "affecting commerce." However, in the past decade, the Supreme Court has limited congressional power under the Commerce Clause. In United States v Lopez, the Court construed the "affecting commerce" standard as "requir[ing] an analysis of whether the regulated activity 'substantially affects' interstate commerce." Under this more stringent standard, the Court has struck down two federal statutes for insufficient ties to interstate commerce. Thus, even if Congress in 1964 did not intend the Title VII definition of "employer" as a constitutional anchor, such an anchor may be of heightened importance today. Under a more rigorous contemporary Commerce Clause analysis, the minimum employee threshold might be seen as constitutionally significant inasmuch as it bootstraps the statute's claim to regulate only those employers engaged in interstate commerce.

concluded that they are less likely to be engaged in interstate commerce. The political nature of the congressional compromise is neither surprising (Congress being a political body) nor dispositive.

88 See EEOC v Ratliff, 906 F2d 1314, 1316 (9th Cir 1990) ("The 'affects commerce' jurisdictional obstacle is very low indeed. This is particularly so in the context of Title VII cases, where courts have said that the jurisdictional requirements are to be liberally construed to effect the remedial purpose of the statute."). See also NLRB v Reliance Fuel Oil Corp, 371 US 224, 226 (1963) (noting that the Supreme Court has "consistently" construed similar language in the National Labor Relations Act to confer the broadest jurisdictional scope possible under Congress's Commerce Clause powers).


90 Id at 561.

91 See Morrison, 529 US at 617 (holding that the Commerce Clause does not authorize Congress to regulate "noneconomic, violent criminal conduct"); Lopez, 514 US at 567 (finding that Congress cannot regulate possession of a firearm in school zones because it is "in no sense an economic activity").
3. The minimum employee threshold as a protector of small businesses.

Whether or not the Constitution requires the minimum employee threshold as a limit on congressional power, Congress designed the minimum employee threshold with an eye toward reining in federal intervention. In the thousands of pages of committee reports and floor debate, the minimum employee threshold appears only occasionally; the issue of the effect of the threshold—what, if any, jurisdictional consequences it would carry—never arose. Yet, in the limited debate, the number of employees necessary for an employer to be covered under the statute engendered fierce deliberation, which established Congress’s intention that the minimum employee threshold protect small businesses from federal regulation. Congress expressly exempted from Title VII’s strictures employers who do not have at least fifteen employees. These employers are not free to discriminate, but they are free from federal antidiscrimination regulations. Courts have recognized this goal of the minimum employee threshold: “Congress decided to protect small employers ‘in part because Congress did not want to burden small entities with the costs associated with litigating

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92 The Third Circuit’s analysis demonstrates how thin the record is. One remark by one member of Congress comprises the court’s entire legislative history inquiry. The statement, which bolsters the court’s merits-based approach only by implication, was made in 1991, well after the passage of Title VII in 1964 and the major amendments in 1972: “[W]hen a company has less than 15 employees, there are no damages available whatsoever because there is no cause of action under our current antidiscrimination statutes.” Statement of Representative Brooks, 102d Cong, 1st Sess, in 137 Cong Rec H 9505-01 (Nov 7, 1991), quoted in Nesbit, 347 F3d at 81. There is no mention of jurisdiction. Given that, at that time, the vast majority of Title VII cases in which the fifteen-employee threshold had been raised were dismissed—literally every case but one—it is entirely possible the speaker meant that there was no cause of action because courts lack authority to hear cases where the minimum employee threshold is not met. Despite the Nesbit court’s use of the quote to support the merits-based approach, in context it offers just as much support to the jurisdictional approach.

93 Senator Norris H. Cotton introduced an amendment to restrict Title VII regulations to those employers with at least one hundred employees. See Remarks of Senator Cotton, 88th Cong, 2d Sess, in 110 Cong Rec §§ 13085–93 (June 9, 1964). Speaking in opposition, Senator Hubert H. Humphrey, Jr., noted that the consequence of the amendment would be to limit Title VII’s scope to approximately 1.75 percent of American businesses. Id § 13090. The amendment failed. Id § 13093. The twenty-five-employee threshold in the legislation—it was not lowered to fifteen until the Equal Employment Opportunity Act of 1972 amended Title VII—meant that Title VII applied to only 8 percent of employers at the time of its initial implementation. Id § 13090.

94 42 USC § 2000e(b).

95 Employers may still be regulated by state antidiscrimination laws. See Commercial Office Products, 486 US at 119 n 5 (arguing that state antidiscrimination laws often apply when the EEOC lacks jurisdiction); 42 USC § 2000e-7 (reserving state remedies).
discrimination claims." Congress has also reaffirmed this understanding of the provision.

A reading of Congress's intent as the protection of small business from federal regulation is consistent with interpreting the minimum employee threshold as establishing a jurisdictional prerequisite. Construing the minimum employee threshold as an element of the claim subjects the defendant to substantial litigation costs, even if the court ultimately determines that the defendant does not satisfy the minimum employee threshold. In a notice-pleading regime, a well-pleaded complaint under Title VII entitles the plaintiff to at least limited discovery, as the mere allegation that the defendant satisfies the Title VII definition of an employer will defeat a Rule 12(b)(6) motion on these grounds.

The question of whether the minimum employee threshold is satisfied regularly arises in two different ways: the plaintiff worked in a company with fewer employees than the statute requires but believes that the employees of other companies should be counted as well; or the plaintiff and defendant cannot agree on whether certain individuals meet the statutory definition of employee or are instead independent contractors. These questions basically apply the law to facts. Rarely does the determination turn on a typical jury question like the reliability of a certain witness or an actual dispute between two witnesses about the basic facts of whether a certain person was employed or for which dates that person was employed. Even in those rare cases where it does turn upon such issues, the court has the option under Rule 42(b) of holding a separate, brief trial to determine, either on its own or using a jury, the facts necessary for the jurisdictional determination. In other words, factual disputes over whether an employer satisfies the minimum employee threshold do not constitute a substantial reason for granting jurisdiction. Indeed, assuming federal jurisdiction for the
purpose of determining whether the defendant meets the minimum employee threshold as a substantive matter is contrary to Congress’s intent. Federal courts have ample avenues for judicial exploration and determination of the jurisdictional prerequisite.

4. The Americans with Disabilities Act as illustrative of congressional understanding.

The ADA provides insight into congressional understandings of the minimum employee threshold to a degree that the original legislative debate over Title VII does not allow. By the time Congress drafted and adopted the ADA in 1990, two landmark federal antidiscrimination statutes, Title VII and the ADEA, had together been in effect for almost fifty years. Congress had ample opportunity to observe how those statutes had worked and how the courts had applied their provisions. Whether in spite of or because of that opportunity, Congress drafted the employment sections of the ADA to mirror Title VII far more closely than do the analogous provisions of the ADEA, which grew out of the debate over Title VII and was passed only three years later. The definitional section of the ADA provides the following definition of “employer”: “The term ‘employer’ means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.” The ADA definition matches that of Title VII identically, including the minimum employee threshold. The ADA’s minimum employee threshold, like that in Title VII, serves in part to protect small businesses. The ADA also incorporates Title VII’s enforcement procedures, including the express grant of federal jurisdiction, verbatim.

101 42 USC § 12111(5)(A).
102 42 USC § 2000e(b). Like Title VII, the ADA threshold began at twenty-five employees but was lowered to fifteen. Unlike Title VII, however, where the threshold was lowered by amendment years after the statute’s adoption, the ADA threshold was reduced by design after a two-year phase-in period. 42 USC § 12111(5)(A).
103 The parallel is inexact inasmuch as the statutes protect small businesses from different consequences. That is, the ADA often imposes substantial costs of physical improvement on entities subject to the statute. One purpose of exempting small businesses, and of giving businesses of between fifteen and twenty-five employees extra time to comply under the phase-in discussed in note 102, was to protect those businesses from immediate, substantial capital expenditures.
Yet, the analogy is still apt. The ADA and Title VII also impose congruent requirements that employers not discriminate in hiring. These requirements impose a social cost that Congress may have felt just as strongly about shielding small businesses from. For example, during the Title VII debate, Senator Cotton famously compared the staff of a small business to a family and suggested that a small business owner’s hiring decisions should be as free from federal regulation
At the time of the congressional debate over the ADA, only one outlying Third Circuit decision had cast the minimum employee threshold as a substantive element of a Title VII claim. The consensus at that point regarded satisfying the minimum employee threshold as a jurisdictional prerequisite to pursuing a Title VII claim in federal court. Had Congress disagreed with that interpretation of the minimum employee threshold, why would it have appropriated the definition of "employer" used in Title VII? The ADA's clear reliance on Title VII at a time when the minimum employee threshold was widely considered a jurisdictional provision is a clear indication of Congress's intent regarding the provision.

Exempting small businesses from federal regulations also protects them from litigation costs. This could be especially relevant for the ADA, which created a broader protection for disabled individuals than most states had then adopted.

The express jurisdictional grant in Title VII is found in 42 USC § 2000e-5(f)(3) and is therefore invoked by the ADA. Given that the jurisdictional provision in Title VII had no effect after the 1980 amendment to 28 USC § 1331, see notes 5-6 and accompanying text, it is unclear why Congress incorporated this provision into the ADA. One possible explanation is to guarantee ADA plaintiffs access to federal courts were Congress to restore the amount in controversy requirement to 28 USC § 1331.

See Martin, 829 F2d at 447.

At the time, in addition to the First, Fifth, Sixth, Ninth, and Tenth Circuits (see Part I.A.1), both the Seventh and Eleventh Circuits also followed the jurisdictional approach. See McKenzie v Davenport-Harris Funeral Home, 834 F2d 930, 932 (11th Cir 1987) ("[Plaintiff-appellant] must bear the burden of proving that subject matter jurisdiction exists."); Zimmerman v North American Signal Co, 704 F2d 347, 350 (7th Cir 1983) (finding, implicitly, that the jurisdictional approach was appropriate under an antidiscrimination statute), rev'd on other grounds, Walters v Metropolitan Educational Enterprises, Inc, 519 US 202 (1997).

See Cannon v University of Chicago, 441 US 677, 694–99 (1979) (concluding that because it may be assumed Congress is aware of the relevant decisional law on Title VI, Title IX, modeled after Title VI, must be "interpreted in conformity" with past Title VI precedents); City of Burlington v Turner, 336 F Supp 594, 603 (SD Iowa 1972) (concluding that "identical statutory language in different statutes should be given much the same meaning, and that if Congress had intended a different standard it would have used different terminology"), aff'd and modified on other grounds, 471 F2d 120 (8th Cir 1973). See also Sarah D. Greenberger, Comment, Enforceable Rights, No Child Left Behind, and Political Patriotism: A Case for Open-Minded Section 1983 Jurisprudence, 153 U Pa L Rev 1011, 1030–31 (2005) (detailing Congress's intent, in revising Title I
Admittedly, most of the representatives and senators who crafted and debated Title VII no longer served in Congress at the time of the ADA debate; the passage of the ADA does not illuminate what the original drafters of Title VII intended, but it is the clearest available window on what a recent Congress understood a similar statute—in language and in purpose—to mean. Congress's wholesale adoption of the language from Title VII conveys approval of—or at the very least acquiescence to—how the courts had thus far construed that language. Had Congress disagreed with the jurisdictional approach dominant in the courts at that time, Congress presumably would have crafted different language for the ADA provision.

B. Supreme Court Precedent

This Part discusses in turn each of the three cases the Supreme Court has decided involving dismissals of Title VII cases for lack of federal jurisdiction. The Court did not, in any of the cases, address head-on whether such a dismissal is proper when the minimum employee threshold is not satisfied. However, the opinions indicate how the Court might approach the question.

The strongest message emanates from the most recent of the three decisions, *Walters v Metropolitan Educational Enterprises, Inc.* When Walters brought a Title VII action against her former employer, the employer sought dismissal for lack of subject matter jurisdiction on the ground that it failed to satisfy the minimum employee threshold. The district court dismissed the case, and the Seventh Circuit affirmed. The Supreme Court granted certiorari to review the method the lower courts had used to count employees. According to the Court, "Metropolitan was subject to Title VII, however, only if, at the time of the alleged retaliation, it met the statutory definition of

of the Elementary and Secondary Education Act, "to preserve the rights" enumerated by decisional law since the Act's original passage); Christopher S. Yoo, Steven G. Calabresi, and Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 Notre Dame L. Rev 1, 56–57 (2004) (noting that Congress's word-for-word adoption of language from Supreme Court precedent in new statutes appears to be "no accident" and strongly evinces Congress's intent that the statutes conform to such precedent); Norman J. Singer, 2A Statutes and Statutory Construction § 48A:01 at 504 (West 6th ed 2000) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.").

In addition to the three cases discussed in this Part, the jurisdictional approach to the minimum employee threshold also gains support from *Commercial Office Products*, 486 US 107. For further discussion of that case and its implications, see notes 64–67 and accompanying text.

109 Id at 204.
110 *EEOC v Metropolitan Educational Enterprises, Inc.*, 864 F Supp 71, 73 (ND Ill 1994).
111 *EEOC v Metropolitan Educational Enterprises, Inc.*, 60 F3d 1225, 1230 (7th Cir 1995).
112 *Walters*, 519 US at 205.
employer.'"114 The Court's formulation prompts the question of what it means to be "subject to" a federal statute. Does this mean that, if the statutory definition is not satisfied, there is no federal subject matter jurisdiction under the statute, or merely that there is no liability? The Court never reached this question, because it concluded that the lower court's method of enumerating employees was incorrect and thus, under its preferred method, found that the respondent met the minimum employee threshold.115

While the language of the Court's opinion conceivably offers support to both the jurisdictional and the merits-based approaches, the case's ultimate disposition suggests a clear, albeit implicit, preference for the jurisdictional approach. The Court concluded its inquiry by counting the number of employees itself.116 If the Court perceived the issue as one of the substantive elements of a Title VII claim, the procedural outcome would be to reverse the dismissal for lack of subject matter jurisdiction and remand the case for further proceedings in keeping with the Court's instructions. By counting the employees itself—a process that included review of payroll receipts and other documents in the record117—the Court established that the question is one for the judge, not the jury, to decide and, therefore, a procedural rather than a substantive inquiry.118 Moreover, the fact that the Supreme Court engaged in enumerating employees essentially rejects, even though it preceded, the Seventh Circuit's argument that counting employees should be outside the scope of judicial obligations.119

The lesson of EEOC v Arabian American Oil Co120 (Aramco) is less direct but also advances the jurisdictional argument. The Court held that federal courts lack subject matter jurisdiction over Title VII claims brought against U.S. employers operating abroad.121 Moreover, the Court declined to revisit the district court's holding that the federal

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114 Id.
115 Id at 212.
116 See id at 211–12.
117 Id.
118 Even in cases where the judge, not a jury, is the finder of fact—for example, an appeal of a summary judgment denial—appellate courts usually make evidentiary rulings and remand for factual determinations by the trial court. See, for example, McMullen v Meijer, Inc, 355 F3d 485, 495–96 (6th Cir 2004) (reversing, inter alia, the district court's denial of summary judgment and remanding with instructions to make factual determinations). The fact that the Supreme Court did the actual counting here, rather than merely laying out a method of enumeration, seems significant.
119 See Sharpe, 148 F3d at 677–78. See also note 57 and accompanying text.
121 Id at 255 ("[W]e are unwilling to . . . impos[e] this country's employment-discrimination regime upon foreign corporations operating in foreign commerce.").
court also lacked supplemental jurisdiction over the state law claims.\textsuperscript{122} While the \textit{Aramco} holding is based more on a canon of construction—"legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States"\textsuperscript{123}—than on the words of Title VII itself, this case provides some guidance for interpretation of the minimum employee threshold. The Court focused on the absence of express evidence of congressional intent to enforce Title VII abroad, and looked substantially at the definitional provisions of Title VII.\textsuperscript{124} In part because the definition of "commerce" in § 2000e(b) does not explicitly encompass foreign commerce, the Court held that Title VII does not confer subject matter jurisdiction on federal courts to hear antidiscrimination claims regarding the behavior of U.S. employers abroad.\textsuperscript{125} Thus, the Supreme Court appeared to reject the merits-based argument that satisfying the definition of employer in § 2000e(b) is a substantive element of the claim. The dismissal of the petitioner's pendent state claims, solely because of the absence of independent federal jurisdiction in which to root supplemental jurisdiction, underscored this conclusion.

\textit{Aramco} is similar to \textit{Hishon v King & Spalding},\textsuperscript{126} where the plaintiff filed a Title VII claim when her law firm did not offer her partnership.\textsuperscript{127} The trial court dismissed the case for lack of subject matter jurisdiction,\textsuperscript{128} holding that Title VII's definition of "employee" did not cover the partners of a law firm.\textsuperscript{129} The district and circuit courts appear to have held that, when a plaintiff fails to state a claim such that the parties satisfy the definitional provisions of Title VII, the federal courts lack subject matter jurisdiction.\textsuperscript{130} The Supreme Court held that law partnerships are covered by Title VII,\textsuperscript{131} and thus never reached the procedural question of whether the district court's dismissal on jurisdictional grounds was proper:

The District Court dismissed under Federal Rule of Civil Procedure 12(b)(1) on the ground that it lacked subject-matter jurisdiction over petitioner's claim. Although limited discovery previously had taken place concerning the manner in which respon-

\textsuperscript{122} See \textit{Boureslan v Aramco}, 653 F Supp 629, 631 (SD Tex 1987).
\textsuperscript{124} See \textit{Aramco}, 499 US at 248–51. See also 42 USC § 2000e.
\textsuperscript{125} \textit{Aramco}, 499 US at 251 ("[W]e have repeatedly held that even statutes that contain broad language in their definitions of 'commerce'... do not apply abroad.").
\textsuperscript{126} 467 US 69 (1984).
\textsuperscript{127} Id at 72.
\textsuperscript{129} Id at *9.
\textsuperscript{130} \textit{Hishon}, 467 US at 73 & n 2.
\textsuperscript{131} Id at 74–79.
dent was organized, the court did not find any "jurisdictional facts" in dispute. Its reasoning makes clear that it dismissed petitioner's complaint on the ground that her allegations did not state a claim cognizable under Title VII. Our disposition makes it unnecessary to consider the wisdom of the District Court's invocation of Rule 12(b)(1), as opposed to Rule 12(b)(6).132

At the very least, the Court did not endorse the lower courts' conclusions that failure to meet Title VII's definitional requirements disallowed federal jurisdiction. As in Aramco, the implications for the minimum employee threshold are only indirectly visible. The two cases part ways, however, inasmuch as Hishon appears to lean toward the merits-based approach while Aramco cuts in favor of the jurisdictional approach. While these two cases appear to convey mixed messages, the overall tenor of recent Supreme Court Title VII jurisprudence weighs in favor of the jurisdictional approach to the minimum employee threshold.

C. Public Policy Concerns

The final rationale for the courts' decisions with regard to the minimum employee threshold rests on an analysis of public policy. After a voluminous discussion of the issues, the Third Circuit found itself relying primarily on a public policy judgment, describing it as "ultimately the gut of our inquiry."133 All of the policy issues raised by the courts—regardless of which approach the particular court adopted—fall within the realm of judicial economy.

The allocation of scarce judicial resources is the primary concern. As the Second Circuit explained: “[T]he institutional requirements of a judicial system weigh in favor of narrowing the number of facts or circumstances that determine subject matter jurisdiction.”134 This reasoning appears to echo the concerns underlying the Seventh Circuit's conclusory statement that an employee census “[s]urely . . . is not the sort of question a court (including [an] appellate court) must raise on its own, which a ‘jurisdictional’ characterization would entail.”135 The Third Circuit also shared this concern, pointing out that because jurisdiction is nonwaivable, federal courts would need to make evidentiary rulings on whether or not the defendant had the necessary number of employees, “even if the parties so stipulated.”136 The Third Circuit went

132 Id at 73 n 2 (internal citation omitted).
133 Nesbit, 347 F3d at 83.
134 Da Silva, 229 F3d at 365.
135 Sharpe, 148 F3d at 678.
136 Nesbit, 347 F3d at 83.
on to paint a picture of a “fact-intensive inquiry . . . which might in some cases require a federal appellate court to dig through an extensive record, including pay stubs and time sheets,” before concluding that this “appears to be a waste of scarce judicial resources, and we doubt that Congress intended such a result.” Like the res judicata argument, this concern seems overblown. If the parties stipulate that the employee threshold is met, the evidentiary inquiry should be quite straightforward, and appellate courts, even those engaging in de novo review of jurisdictional findings, would be able to depend on the trial court’s rulings, as well as the briefs of the parties, as a roadmap through the relevant evidence. Moreover, the greater danger of a substantial research burden seems to come where the plaintiff brings both a Title VII claim and pendent state claims. Under the merits-based approach, if, at the conclusion of the trial, the plaintiff has not satisfied Title VII’s minimum employee threshold, the court is unlikely to dismiss the state claims and require a new trial in state court. Federal courts surely face a greater burden than do state courts in researching and applying state law with which they are less familiar. Regarding the minimum employee threshold as a jurisdictional prerequisite would avoid such cases, because the court would determine whether the defendant meets the threshold before trial, thereby avoiding trials where only state claims were at stake.

The Third Circuit also warned that the jurisdictional approach would require the court to face difficult questions that would otherwise be unnecessary. In the court’s words, “To hold the requirement jurisdictional also implies that a court would need to decide whether an entity employed more than fifteen individuals before reaching a Title VII action’s merits—even if the merits were more easily resolved than the ‘jurisdictional’ question. This result too is undesirable.” However, if the number of employees is not jurisdictional, then it is, by default, an element of the Title VII claim. Thus, the merits cannot be “more easily resolved” by reclassifying the number of employees as a

\[\text{137} \text{ Id.} \]
\[\text{138} \text{ See text accompanying note 58.} \]
\[\text{139} \text{ See Arbaugh, 380 F3d at 222 (“We review dismissals for lack of subject matter jurisdiction de novo, using the same standards as those employed by the lower court.”); Hukill v Auto Care, Inc, 192 F3d 437, 441 (4th Cir 1999) (“We review a district court's subject matter jurisdiction determination de novo.”).} \]
\[\text{140} \text{ Parties cannot stipulate to subject matter jurisdiction, but they can stipulate to certain facts, which the court can then use to determine jurisdiction. See, for example, Ohio National Life Insurance Co v United States, 922 F2d 320, 325 (6th Cir 1990) (noting that it is generally acceptable, when the district court makes determinations as to subject matter jurisdiction, “to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts”).} \]
\[\text{141} \text{ Nesbit, 347 F3d at 83 (internal citation omitted).} \]
nonjurisdictional question, except in a limited number of cases where another substantive element is obviously lacking. If a Title VII claim is to have any chance of success, the number of employees must be determined, whether as a jurisdictional prerequisite or as one of the merits of the claim; this is not a case where the courts can sidestep a difficult decision by reclassifying the inquiry.

III. EVALUATING BOTH APPROACHES TO THE MINIMUM EMPLOYEE THRESHOLD

Popularity, while never determinative of a given approach’s propriety, provides little guidance in choosing between the jurisdictional and merits-based approaches to the minimum employee threshold. Five circuits have adopted the jurisdictional perspective; six have chosen the merits-based avenue; and all too many of the arguments raised by the courts in favor of one approach or the other fall flat upon closer inspection. The Third Circuit admitted as much when it defined its public policy analysis as “the gut of our inquiry.” Yet, even judicial economy—the heart of the Third Circuit’s public policy analysis—does not clearly favor the merits-based approach over the jurisdictional approach. The Supreme Court undermined the view that enumerating employees does not constitute a productive use of judicial resources in *Walters,* where the Court engaged in enumeration itself rather than simply enunciating a standard and remanding to the trial court for further proceedings. The argument that courts can sidestep thorny questions of how many employees a defendant has by pursuing the merits-based approach similarly collapses. Even if the number of employees is an element of the claim, rather than a jurisdictional hurdle, counting those employees is necessary to the outcome unless the claim is patently deficient with respect to another element; courts gain nothing—and potentially squander time on a trial that is superfluous if the defendant has too few employees—by procrastinating the employee census. The language of the statute, the legislative history, the procedural consequences—each of these arguments fails to carry the day on behalf of the merits-based approach.

All of these arguments appear strong in the opinions outlining the merits-based approach, but that is at least in part because there is no opposition; no court has articulated a thorough explanation of the rationale for the jurisdictional approach. Yet, the jurisdictional approach has strong logical foundations. This Part will attempt to fill a gap in the existing case law by advancing the three strongest argu-

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142 *Nesbit v Gears Unlimited, Inc,* 347 F3d 72, 83 (3d Cir 2003).
143 519 US at 211–12.
ments in favor of the jurisdictional approach: the constitutional dimensions of the minimum employee threshold, recent Supreme Court case law, and the ADA as a window on congressional intent.

A. The Constitutional Dimensions of the Minimum Employee Threshold

At the time Title VII was adopted, at least some members of Congress understood the minimum employee threshold as a proxy for the Commerce Clause.144 If Congress included the minimum employee threshold to ensure that Title VII did not attempt to impose federal regulation on any business exempt from federal regulation because it did not engage in interstate commerce, this would suggest that Congress viewed the minimum employee threshold as a jurisdictional prerequisite: absent at least fifteen employees, a business was beyond congressional jurisdiction, and beyond federal court jurisdiction based solely on this statute as well. The notion that the minimum employee threshold served to buffer small business from federal intervention also applies to federal courts. One of the federal interferences from which Congress sought to free small business was the high cost of litigation.145 Limiting federal jurisdiction over Title VII claims to those suits where the defendant satisfies the minimum employee threshold is in keeping with this goal of protecting small businesses.

Recent jurisprudence bolsters this understanding of the minimum employee threshold. In the same basic time period that the merits-based approach has gained traction, the Supreme Court has adopted a more stringent understanding of the necessary nexus between federal regulations and the Commerce Clause. Thus, even if Title VII's constitutional dimensions were a minor concern at the time of passage, the relation between regulated employers and interstate commerce is more central today. The minimum employee threshold anchors Title VII in the Constitution by restricting the scope of federal regulation to those employers that Congress has authority to regulate. Using Title VII to grant federal courts jurisdiction, even when the defendants might not meet the constitutional proxy established by Congress to differentiate between regulated and unregulated employers, runs counter to this notion that the Commerce Clause places meaningful limits on the extent of congressional authority. It is ironic that the trend toward the merits-based approach has temporally coincided with the so-called

144 See Part II.A.2.
145 See notes 96–97 and accompanying text.
federalism revolution; as the Supreme Court has worked to restrain congressional regulation, circuit courts have expanded the number of employers subject to federal trials under antidiscrimination statutes. Since the minimum employee threshold functions in part as a constitutional proxy, the Supreme Court's narrower view of the Commerce Clause is relevant. The jurisdictional approach to the minimum employee threshold accords most closely with that view.

B. The Trend in Recent Supreme Court Title VII Jurisprudence

The Supreme Court itself appears to favor the jurisdictional approach. While the Court's direct treatment of a Title VII claim's dismissal for lack of subject matter jurisdiction is best described as ambivalent, the Court's more recent decisions indicate that the reasoning advanced for the merits-based approach is incorrect. In Aramco, the Court denied jurisdiction where one of Title VII's definitions was not satisfied, characterizing "employer" and "commerce" as "jurisdictional" terms in its reasoning. In Walters, the Court engaged in an employee census itself. And in an analogous case, the Court applied the minimum employee threshold as a jurisdictional limit on the EEOC. Even in the absence of explicit commentary, this strategy suggests that the number of employees, while a factual question, is often straightforward enough that there is no genuine dispute and the outcome can be determined by the court prior to trial. Unlike some other possible threshold questions, the number of employees maintained by the defendant in a federal antidiscrimination action should not be an onerous inquiry.

146 See, for example, Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions, 69 U Chi L Rev 429, 430 (2002) ("Law reviews echo with discussion of whether the Court has yet achieved, or is likely to effect, a federalism 'revolution.'"); Erwin Chemerinsky, The Federalism Revolution, 31 NM L Rev 7, 30 (2001) (characterizing the Rehnquist Court's post-1992 jurisprudence as "truly...a federalism revolution"). Some commentators resist the "revolution" moniker, while acknowledging the striking new course the Supreme Court has charted. See, for example, Keith E. Whittington, Taking What They Give Us: Explaining the Court's Federalism Offensive, 51 Duke L J 477, 477 (2001) ("Although not quite amounting to a revolution in American constitutional law, the recent federalism cases are nonetheless striking.").

147 See Hishon, 467 US at 73 n 2 ("Our disposition makes it unnecessary to consider the wisdom of the District Court's invocation of Rule 12(b)(1), as opposed to Rule 12(b)(6). ").

148 499 US at 251-53.

149 519 US at 211-12.

150 See generally Commercial Office Products, 486 US 107.
C. Legislative Intent and Understanding as Illustrated by the Passage of the Americans with Disabilities Act

The courts advocating the merits-based approach have tried to muster legislative history in their defense, but they have not succeeded. The Third Circuit found only one statement from congressional floor debate that could reasonably be read to substantiate the merits-based approach. However, the statement is not only taken from a debate held more than a quarter century after the passage of Title VII, but is also entirely ambiguous in its implications for the minimum employee threshold. By contrast, clear congressional action from the previous year—the adoption of the most sweeping federal civil rights legislation passed since Title VII—indicates Congress's support of the jurisdictional approach. The ADA expressly incorporates Title VII's minimum employee threshold. In so doing, it strongly suggests that Congress endorsed the understanding of the Title VII provision at the time of the ADA's drafting. At that point, courts were nearly unanimous—the Third Circuit was the outlying exception—that the minimum employee threshold established a prerequisite to federal subject matter jurisdiction over a Title VII claim.

The ADA is also instructive in considering the minimum employee threshold within the context of Title VII as a whole. According to one such argument, Congress passed Title VII because employment discrimination was a substantial problem and state laws were ineffective in redressing the problem; thus Congress, determined to fight employment discrimination, would want federal courts to hear employment discrimination claims whenever possible. This argument posits that Congress cannot have intended the minimum employee threshold as a jurisdictional prerequisite because such an interpretation potentially undermines the goals of the statute as a whole. The ADA sheds light on this debate inasmuch as, like Title VII, it was an instance of Congress leaping significantly ahead of most states' antidiscrimination laws and it includes an identical minimum employee threshold. If, at the time of the ADA's passage, Congress wanted to provide greater federal court access for ADA plaintiffs, this would have provided an-

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151 See note 92.
152 See Part II.A.4.
153 Today, when racism, sexism, and other prejudices are less openly acceptable and employment discrimination has been aggressively attacked for four decades, the argument that state courts are incapable and/or unwilling to redress such claims is far less persuasive. On the other hand, had Congress truly believed that state courts were incapable of handling employment discrimination claims, even at the time of Title VII's passage, we might expect that the jurisdictional provision would grant federal courts exclusive jurisdiction over Title VII claims so as to keep such claims out of state courts entirely.
other reason to alter the Title VII definition of employer. Yet, Congress adopted the Title VII provision in toto. Seen this way, Congress’s decision yields two possible conclusions. According to the first, Congress approved of the jurisdictional approach to the Title VII minimum employee threshold and did not feel that the courts, in holding a firm line on federal subject matter jurisdiction, had retarded Title VII’s goals. The second, which could be either an alternative or a complement to the first, posits that Congress took seriously the role of the minimum employee threshold as a constitutional anchor for federal antidiscrimination statutes. Both conclusions strengthen the case for the jurisdictional approach.

CONCLUSION

Title VII is broadly construed as a remedial statute. However, Congress explicitly limited its scope to employers with at least fifteen employees, knowing that such a requirement exempted the vast majority of employers. Given these two facts, should plaintiffs get an evidentiary thumb on the scale when the defendant seeks dismissal? Or should the courts protect those defendants who Congress explicitly wanted to exempt from regulation by enforcing the minimum employee threshold up front?

The confusion over how courts should handle the minimum employee thresholds in federal antidiscrimination laws is understandable. Of the statutory language, legislative history, precedent, public policy concerns, and consequential analysis, none alone is dispositive. Thus, advocates of both the jurisdictional and merits-based approaches can advance reasonable arguments in favor of their preferred perspective (even if the jurisdictional advocates have as yet failed to do so).

Ultimately, the jurisdictional approach is the best legal outcome. Considered in a larger constitutional framework, the minimum employee threshold must be a jurisdictional prerequisite. Moreover, Supreme Court precedent points, faintly but directly, in the direction of the jurisdictional approach. Perhaps most tellingly, the ADA provides a unique window into congressional understanding that shows a ratification of the jurisdictional approach, without even debate on the floor of Congress. Though no court has articulated a detailed argument in favor of the jurisdictional approach to the minimum employee threshold, the rationale underlying the jurisdictional approach not only exists but also is more compelling than that articulated in favor of the sub-

154 See Thurber, 717 F2d at 634–35 (“Title VII was considered a generally remedial statute, and the prevailing majority in Congress intended to give it broad effect.”).

155 See note 93.
stantive approach. Given the deliberate structural and substantive similarities among the federal antidiscrimination statutes, including Title VII, the ADEA, the ADA, and the FMLA, all of these statutes should be understood as requiring a threshold showing of the minimum number of employees required by the statute in question to establish subject matter jurisdiction in federal court.