UNDERMINING AND UNINTWINING: THE RIGHT TO A JURY TRIAL AND RULE 12(b)(1)

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INTRODUCTION

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure,[1] federal district courts have the discretion to decide "jurisdictional facts."[2] Jurisdictional facts are facts that are alleged and ultimately proven to establish subject matter jurisdiction in federal court.[3] Although jurisdictional facts are relevant in both § 1331 and § 1332 determinations, the most typical jurisdictional facts involve diversity of citizenship which gives federal courts subject matter jurisdiction under United States Code § 1332.[4] Thus, in a case where jurisdiction is based upon § 1332, the citizenship of the parties is a jurisdictional

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[1] FED. R. CIV. P. 12(b)(1) ("Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . . ."); *see also* FED. R. CIV. P. 12(d) ("The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion . . . shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.").

[2] 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.30 [1], at 12-36 (3d ed. 1997).

[3] *Id.*

[4] *See* 28 U.S.C. § 1331 (2001) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); *see also* § 1332(a) (2001) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . (1) citizens of different States . . . .").

Although a jurisdictional prerequisite, the amount in controversy requirement of § 1332 is generally treated as a merits-related determination because deciding whether the amount claimed exceeds the $75,000 threshold often requires reaching the merits of the case. *See* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350, at 231 (2d ed. 1990); *see also infra* notes 140-43 and accompanying text; *infra* Part IV.

fact.[5] Such a fact is not subject to a jury trial so courts often hold preliminary hearings to determine if the jurisdictional facts establish jurisdiction.[6]

There is, however, an important exception to Rule 12(b)(1) that often arises when the jurisdiction is *not* based upon § 1332, but rather, upon § 1331:[7] courts may not decide jurisdictional facts if such facts are intertwined with the merits of the case.[8] This may seem like a straightforward proposition, but the exception is more complicated than might first appear. Although jurisdictional facts alleging the diversity of citizenship requirement under § 1332 are easily separated from the merits of the claim, it is often harder to determine whether facts alleged in federal question cases are purely jurisdictional or intertwined with the merits.[9] Further, the interplay between the rule and the exception has important implications for determining who, the court or the finder of fact, decides a number of critical questions under a variety of federal statutes.[10]

A recent example of the complexity of the interplay between the rule and the exception is the decision by the United States Court of Appeals for the Eleventh Circuit in *Scarfo v. Ginsburg*,[11] a case with

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[5] 28 U.S.C. § 1332(a)(1) (2001). For example, diversity requires that if one party is a citizen of New York the other cannot be a citizen of New York. *Id.*

[6] 2 MOORE ET AL., *supra* note 2, at 12-36.

[7] 28 U.S.C. § 1331 (2001) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); *see also* 2 MOORE ET AL., *supra* note 2, at 12-36 ("Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief—a merits-related determination.").

While § 1331 is a major source of federal subject matter jurisdiction, it is possible that some statutes have their own specialized jurisdictional grants which may apply instead of or in addition to § 1331. The analysis of jurisdictional facts and the "intertwined with merits" exception, however, does not change. *See infra* notes 144-48, 155 and accompanying text; *see also infra* Part IV.

[8] 5A WRIGHT & MILLER, *supra* note 4, § 1350, at 235 ("If, however, a decision of the jurisdictional issue requires a ruling on the merits of the case, the decision should await a determination of the merits either by the court on a summary judgment motion or by the fact finder at trial.").

[9] 2 MOORE ET AL., *supra* note 2, at 12-36.

[10] *See, e.g.*, Americans with Disabilities Act (ADA), 42 U.S.C. § 12101(2002); Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621(2002); Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601(2002); Fair Labor Standards Act (FLSA), 29 U.S.C. § 215 (2002); Employee Retirement Income Securities Act (ERISA), 29 U.S.C. § 1002 (2002); Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 (2002); Emergency Medical Treatment and Women in Active Labor Act (EMTALA), 42 U.S.C. § 1395 (2002); Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e(b) (2002).

[11] 175 F.3d 957 (11th Cir. 1999).

potentially great implications for both employment discrimination and § 1331 jurisprudence. In *Scarfo*, the defendants moved for summary judgment arguing that there was no federal subject matter jurisdiction over Scarfo's Title VII claims because none of the defendants were "employers" as defined by the statutory language.[12] Scarfo responded that whether the defendants were "employers" as defined by Title VII was not a purely jurisdictional fact for the court to decide, but rather, was a jurisdictional fact intertwined with the merits of the case and, thus, was for the jury to decide.[13] In support of her argument, Scarfo cited to *Garcia v. Copenhaver*,[14] in which the Eleventh Circuit held that, for purposes of determining subject matter jurisdiction, whether a plaintiff was an "employer" or an "independent contractor" under the ADEA was intertwined with the merits of the plaintiff's claim.[15] The majority in *Scarfo*, however, did not apply the "intertwined with the merits" exception as *Garcia* had; instead, it dismissed Scarfo's claims for lack of subject matter jurisdiction.[16]

Scarfo and *Garcia* illustrate the courts' lack of uniformity in applying the "intertwined with the merits" test. Given the general availability of jury trials under the antidiscrimination statutes,[17] the threshold question of whether a defendant is an "employer" is often

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[12] *Id.* at 959.

[13] *Id.*

[14] 104 F.3d 1256 (11th Cir. 1997).

[15] *Scarfo*, 175 F.3d at 961 n.1 (citing *Garcia*, 104 F.3d at 1267).

[16] *Id.* at 961.

Also illustrating the complexities of Rule 12(b)(1) and the "intertwined with the merits" exception, the Eleventh Circuit recently decided *Morrison v. Amway Corp.*, 323 F.3d 920, 929-30 (11th Cir. 2003), holding a Rule 12(b)(1) dismissal inappropriate because the question of eligible-employee status "implicated both jurisdiction and the underlying merits of Appellant's FMLA claim." *Id.* at 930. The court noted that an intra-circuit split existed on the issue of whether eligible-employee status was jurisdictional or whether it implicated the merits of the case. *Id.* at 929 (citing to *Scarfo*, 175 F.3d 957 (holding that the issue was jurisdictional) and Garcia v. Copenhaver, 104 F.3d 1256 (11th Cir. 1997) (holding the issue to be merits-related)). Although the court followed the appropriate procedure in such a situation—the "earliest case rule"—and applied *Garcia*, the court also stated that it believed *Garcia*, and not *Scarfo*, to "correctly state the law . . . ." *Id.* at 929.

[17] *Lorillard v. Pons*, 434 U.S. 575 (1978), first established the right to a jury trial under the ADEA. *Id.* It was generally believed that there was no right to a jury trial under Title VII until the Civil Rights Act of 1991 was adopted. *See* Curtis v. Loether, 415 U.S. 189, 196-97 (1974) (stating that "jury trial is not required in an action for reinstatement and backpay"); Robinson v. Lorillard Corp., 444 F.2d 791, 802 (5th Cir. 1971) (stating that the demand for backpay under Title VII is to be determined through the exercise of the court's discretion). The Civil Rights Act of 1991 recognized the right to a jury trial in both Title VII and the ADA cases. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(c), 105 Stat. 1071 (1991).

critical.[18] Whether judge or jury decides the facts in question will frequently determine the outcome of the case.[19] For example, a jury might be expected to be more sympathetic to the plaintiff on close calls, especially with facts as egregious as those in *Scarfo*.[20]

This Comment analyzes the application of Rule 12(b)(1) to the jurisdictional fact question and the appropriateness and limitation of the "intertwined with the merits" exception. Part I of this Comment reviews the Eleventh Circuit's opinion in *Scarfo* and sketches its broad implications.[21] Part II then discusses the rule and its exception, with II.A summarizing the general application of Rule 12(b)(1), II.B. examining the development of the "intertwined with the merits" exception, and II.C. analyzing the application of the exception. Part III of this Comment introduces the right to a jury trial by explaining the significance of the constitutional right to a jury trial, and examining that right in the context of Title VII. In addition, Part III discusses the problems associated with the application of Rule 12(b)(1) as they emerge in *Scarfo*.[22] Finally, Part IV proposes a solution which would create uniformity and fairness to plaintiffs in the application of the "intertwined with the merits" exception. This solution asks courts to consider whether the fact allegedly establishing federal subject matter jurisdiction would also apply if the case were filed in state court.

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[18] In order to establish a cause of action under the antidiscrimination statutes, the plaintiff must prove that the defendant meets the requisite definition of an "employer" under the statute. *See* Walters v. Metro. Educ. Enters., 519 U.S. 202 (1997) (noting that hourly and part-time employees count for purposes of determining whether entity is an "employer" under Title VII); Ost v. West Suburban Travelers Limousine, Inc., 88 F.3d 435 (7th Cir. 1996) (stating that independent contractors do not count for purposes of determining whether entity is an "employer" under the statute). This is a fact-sensitive and merits-related determination that the jury, as the trier of fact, should decide. *See infra* notes 29-34 and accompanying text.

[19] *See* Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992) (comparing the outcomes of jury trials and judge trials).

[20] *See infra* Part I. *Compare* Romano v. U-Haul Int'l, 233 F.3d 655 (1st Cir. 2000) (upholding jury verdict for plaintiff on her sex discrimination claim; the jury, using the integrated-enterprise test to determine whether two entities could be sued as a "single-employer" under Title VII, held that parent corporation was plaintiff's employer for purposes of the statute), *with* Scarfo v. Ginsburg, 175 F.3d 957 (11th Cir. 1999) (holding that plaintiff's claim should be dismissed for lack of subject matter jurisdiction because defendant did not meet the requisite definition of "employer" for purposes of Title VII; case did not get to a jury because the court summarily decided the issue).

[21] *See infra* Part I.

[22] *See infra* Part III.

I. *SCARFO* AND ITS IMPLICATIONS

As discussed earlier, *Scarfo v. Ginsburg*[23] is a recent example of the complex nature of Rule 12(b)(1) and the "intertwined with the merits" exception.[24] Victor Ginsburg owned several corporations, three of which allegedly employed plaintiff Elaine Scarfo as a secretary and receptionist.[25] Scarfo filed a complaint alleging sexual harassment and employment discrimination against Ginsburg and the three corporations.[26] She alleged that Ginsburg subjected her to unwanted sexually offensive conduct during the time she was employed and then terminated her after she complained.[27] All of the defendants moved for summary judgment, arguing that the district court lacked subject matter jurisdiction over Scarfo's Title VII claims because none of the defendants was an employer within the meaning of Title VII.[28]

An employer under Title VII, is "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 . . . ."[29] While none of Ginsburg's corporations separately employed fifteen or more employees for the requisite time, Scarfo alleged that "two or more of the above corporations combined constituted her employer for Title VII purposes."[30] Even though Title VII permits aggregation of entities to determine coverage,[31] the district court concluded, after an evidentiary hearing held by the magistrate judge, that the three defendant corporations could not be aggregated.[32] According to the

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[23] 175 F.3d 957 (11th Cir. 1999).

[24] *See* 2 MOORE ET AL., *supra* note 2, at 12-37-12-38 (stating that a Rule 12(b)(1) dismissal is improper where "the jurisdictional facts are too intertwined with the merits to permit the determination [of subject matter jurisdiction] to be made independently [of the merits of the case].").

[25] *Scarfo*, 175 F.3d at 958-59.

[26] *Id.* at 959.

[27] *Id.*

[28] *Id.*

[29] 42 U.S.C. § 2000e(b) (2002).

[30] *Scarfo*, 175 F.3d at 958-59.

[31] *See* EEOC v. McLemore Food Stores, Inc., No. C-77-2148, 1977 U.S. Dist. LEXIS 13741, at *8 (W.D. Tenn. Sept. 29, 1977) (holding that three defendant corporations were to be regarded as a single employer for purposes of Title VII) (citing Williams v. New Orleans S.S. Ass'n, 341 F. Supp. 613 (E.D. La. 1972) (finding that the single employer theory that had been applied under the National Labor Relations Act could be applied in EEOC cases as well), and EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974) (noting a close relationship between the National Labor Relations Act and Title VII)).

[32] *Scarfo*, 175 F.3d at 959.

district court, one of the corporations was not sufficiently integrated in its operations with the others for all three to be treated as a single employer.[33] As a result, the court applied a summary judgment standard and dismissed Scarfo's Title VII claims after determining that no genuine issue of material fact existed.[34]

On appeal to the Eleventh Circuit, Scarfo argued that, because the determination of whether an entity constituted an "employer" under Title VII was an element of her cause of action, the district court erred in dismissing the case.[35] She claimed that the determination of "employer" status should have been made by the jury, which would have heard the rest of her case.[36] Thus, without classifying it as such, Scarfo was arguing the "intertwined with the merits" exception to the jurisdictional fact doctrine.[37]

Scarfo argued that under controlling circuit court authority, the jury, not the court, should act as fact-finder in determining the "single employer" issue for Title VII purposes.[38] In *Garcia v. Copenhaver*,[39] the Eleventh Circuit had held that, for purposes of determining subject matter jurisdiction, whether a plaintiff was an "employee" or an "independent contractor" under the ADEA was an element of the plaintiff's claim; as such, any facts material to that determination were for the jury, not the court, to decide.[40] The *Scarfo* majority disagreed holding that whether a defendant constituted an "employer" was a jurisdictional fact not intertwined with the merits.[41] In distinguishing the two cases, the *Scarfo* court noted that in *Garcia* it was clear that the employer was subject to Title VII while in *Scarfo*, the question was whether the employer was subject to Title VII.[42] Any issues of material fact in *Garcia*, therefore, had to go to the jury.[43] In

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[33] *Id.*

[34] *Id.*

[35] *Scarfo*, 175 F.3d at 958.

[36] *Id.* at 961.

[37] *See* 5A WRIGHT & MILLER, *supra* note 4, § 1350.

[38] *Scarfo*, 175 F.3d at 961.

[39] 104 F.3d 1256 (11th Cir. 1997).

[40] *Id.* at 1265 n.9.

[41] *Scarfo*, 175 F.3d at 961.

[42] *Id.* The *Scarfo* court essentially argued that in *Garcia*, the employer was subject to the ADEA no matter what—the issue was whether an individual was an employee or an independent contractor. *Id.* In contrast, the very issue to be decided in *Scarfo* was whether the employer was subject to Title VII at all. *Id.* This distinction is unpersuasive, however, because the question of who is an "employer" necessarily requires a determination of who is an "employee." *See, e.g.*, 42 U.S.C. § 2000e(b) (2002). Thus, the questions being asked in both cases should be treated in the same manner—as elements of the plaintiff's claim.

[43] *Scarfo*, 175 F.3d at 961 (citing *Garcia*, 104 F.3d at 1265 n.9).

contrast, the *Scarfo* court held that the defendants' "status as 'employers' [did not] implicate an element of the Title VII cause of action."[44] Whether the appellees met the statutory definition of "employer" for Title VII purposes was a "threshold jurisdictional issue" because, if the employer did not meet the requirements set forth in the statute, "Title VII [was] inapplicable, and the district court lack[ed] subject matter jurisdiction over Scarfo's claims."[45] In *Scarfo*, the question was whether certain entities could be aggregated to form a single "employer" under Title VII.[46] The court saw this as a purely jurisdictional question to be decided solely by the court because Title VII is "inapplicable" if there is not an "employer" as defined by the statute.[47] Accordingly, the case was dismissed for lack of subject matter jurisdiction after the court found no Title VII "employer."[48]

At first blush, *Scarfo* appears to be a narrow opinion; indeed, if it is applied only to "aggregation of employer" claims, perhaps it is narrow. But any question of fact relating to who is an "employer" under a myriad of federal statutes may fall within the *Scarfo* court's view of jurisdictional facts.[49] For example, in order to be covered under Title I of the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and the Family and Medical Leave Act (FMLA), the defendant must be an "employer."[50] The plaintiff has the burden of establishing this as part of her cause of action.[51] In addition to these statutes, plaintiffs filing claims under the Fair Labor Standards Act (FLSA), Employee Retirement Income Securities Act (ERISA), and Occupational Safety and Health Act

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[44] *Id.*

[45] *Id.* Since the district court had applied the Federal Rules of Civil Procedure's standard for summary judgment in its finding that there was not sufficient integration, the jury would never have reached the question even if it was not a purely jurisdictional fact. *Id.* at 960. Therefore, the Court of Appeals could have simply affirmed the decision of the district court had the summary judgment standard been correctly applied by the trial court. *Id.* The Court of Appeals, however, reached out to decide the case and proceeded to incorrectly apply the "intertwined with the merits" exception to Rule 12(b)(1). *See, e.g.*, *Scarfo*, 175 F.3d 957.

[46] *Scarfo*, 175 F.3d at 959-60.

[47] *Id.* at 961.

[48] *Id.* at 959.

[49] *See infra* Part II.C.

[50] ADA, 42 U.S.C. § 12111(5) (2002); ADEA, 29 U.S.C. § 630(b) (2002); FMLA, 29 U.S.C. § 2611(4)(A) (2002).

[51] *See* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE 337 (John William Strong ed., 4th ed. 1992).

(OSHA) must also prove that they are suing an "employer."[52] Each of these federal statutes defines "employer" in terms similar or identical to Title VII,[53] and, applying the rationale of *Scarfo*, any questions surrounding those definitions are jurisdictional ones for the court to decide. If questions of fact concerning whether the entity meets the requisite definition of "employer" under any of these statutes fall within *Scarfo's* definition of jurisdictional facts, then the issue of who is covered by the law will almost always be decided by the court, not the jury.[54]

Moreover, although the parties in *Scarfo* litigated the question of whether entities could be aggregated to constitute an "employer" under Title VII,[55] the statutory definition of "employer" under Title VII and the other antidiscrimination statutes more often turns on who counts as an "employee."[56] Since an "employer" employs "employees," if individuals who work for the defendant are not "employees," or if there are an insufficient number of "employees," the defendant will not be an "employer." Further, even if a defendant *does* employ the requisite number of "employees," the plaintiff herself must still be an "employee" in order to sue.[57] Under

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[52] *See* FLSA, 29 U.S.C. § 215 (2002); ERISA, 29 U.S.C. § 1002 (2002); OSHA, 29 U.S.C. § 651 (2002).

[53] The ADA defines "employer" as "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 years, and any agent of such person . . . ." 42 U.S.C. § 12111(5) (2002). The ADEA defines "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 in the current or preceding calendar year . . . ." 29 U.S.C. § 630(b) (2002). Under the FMLA, "employer" is defined as "any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year . . . ." 29 U.S.C. § 2611(4)(A) (2002). Title VII defines "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 in the current or preceding calendar year, and any agent of such a person . . . ." 42 U.S.C. § 2000e(b) (2002).

[54] *See infra* notes 87-89 and accompanying text.

[55] *See Scarfo*, 175 F.3d 957.

[56] *See, e.g.*, Simpson v. Ernst & Young, 100 F.3d 436 (6th Cir. 1996) (concluding that plaintiff was an "employee," not a "partner," for purposes of the ADEA); EEOC v. North Knox Sch. Corp., 154 F.3d 744 (7th Cir. 1998) (noting that "independent contractors" are not employees and therefore not protected by the ADEA).

[57] Note that whether the defendant is an "employer" and whether the plaintiff is an "employee" under Title VII are treated as two different questions even though perhaps they should not be. *See, e.g.*, 42 U.S.C. § 2000e(b) (2002). Whether a cause of action exists is a different question from whether the cause of action will succeed.

Over the years, the Supreme Court has had the opportunity to decide who

Scarfo, whether the plaintiff is an employee, as opposed, say, to an independent contractor or a partner, would seem to also go to the jurisdiction of the court.

Additionally, beyond the question of whether the defendant is an "employer" in terms of the number of "employees," the antidiscrimination statutes also impose a commerce requirement for employers.[58] With the Supreme Court's new-found restrictions on Congress's power under the Commerce Clause, there may be problems with whether a particular entity is engaged "in an industry affecting commerce,"[59] which all the statutes include in the definition of an employer.[60] While the courts obviously decide the legal issues involved in such situations, *Scarfo* raises new questions about who decides the facts when disputes related to an "employer" are concerned. For instance, if courts were to follow *Scarfo*, any questions of fact surrounding whether an industry or activity affects commerce would be for the judge to decide.[61] Under *Scarfo*, courts would not

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counts as an employee in various contexts. *See, e.g.*, Hishon v. King & Spalding, 467 U.S. 69 (1984) (holding that plaintiff, an associate at the firm, was an employee; it followed that the opportunity for partnership was also part of her employment); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992) (holding that independent contractors are not employees under ERISA). The Court has also decided disputes about computing the number of employees. *See, e.g.*, *Walters*, 519 U.S. 202 (holding that if employees were "on the payroll" during any given period, they could be counted for purposes of the antidiscrimination statutes, regardless of whether or not they were actually at work on any given day).

[58] ADA, 42 U.S.C. § 12111(5) (2002); ADEA, 29 U.S.C. § 630(b) (2002); FMLA, 29 U.S.C. § 2611(4)(A) (2002); Title VII, 42 U.S.C. § 2000e(b) (2002).

[59] For a particular entity to engage "in an industry affecting commerce," the entity must have a substantial effect on interstate commerce. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); *see also* Katzenbach v. Morgan, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942). *Compare* Johnson v. Alternatives, Inc., 2002 WL 1949738, *3 (N.D. Ill. Aug. 22, 2002) (holding that the purchase of a computer and $519 in long-distance telephone calls were not enough to qualify as a substantial effect on interstate commerce); Graves v. Methodist Youth Servs., 624 F. Supp. 429 (N.D. Ill. 1985) (holding that long-distance phone charges of $175 and the purchase of office supplies from nationally recognized entities were insubstantial and did not amount to a substantial effect on interstate commerce), *and* Vasquez v. Visions, Inc., 2002 WL 91905, *4 (N.D. Ill. Jan. 24, 2002) (holding that long-distance phone charges and the purchase of membership for out-of-state organizations amounting to $7,256 were not substantial enough to effect interstate commerce), *with* EEOC v. Rinella & Rinella, 401 F. Supp. 175 (N.D. Ill. 1975) (noting that extensive out-of-state expenses totaling more than $10,000 have a substantial effect on interstate commerce).

[60] ADA, 42 U.S.C. § 12111(5) (2002); ADEA, 29 U.S.C. § 630(b) (2002); FMLA, 29 U.S.C. § 2611(4)(A) (2002); Title VII, 42 U.S.C. § 2000e(b) (2002).

[61] *See Scarfo*, 175 F.3d 957. Note that should we go down this road, the doctrine of "constitutional facts" may apply. *See, e.g.*, Bose Corp. v. Consumers Union, 466 U.S. 485 (1984).

treat such questions of fact as being "intertwined with the merits" of the claim because, if the definition of "employer" is not met, the federal statute is inapplicable.[62] Thus, the court would say such questions are merely jurisdictional and will leave them for the judge to decide.[63] The result of this reasoning is that any plaintiff who sues under a federal statute will be subject to the court's determination of jurisidictional facts as purely jurisdictional, regardless of whether such facts also go to the merits of the cause of action.

Furthermore, while the determination of who constitutes an "employer" under the relevant statutes is subject to the logic of *Scarfo*, that logic is not limited to the employment realm. Federal statutes creating private causes of action in a broad panoply of situations can be brought within *Scarfo's* reach.[64] Even more important, whether Rule 12(b)(1) permits a trial court to decide whether a defendant is an entity engaged in commerce could have implications for a wide variety of federal statutes beyond the employment context. The application of a variety of federal laws could be recast in terms of federal jurisdiction. To take an extreme example, the Emergency Medical Treatment and Women in Active Labor Act (EMTALA)[65] requires hospitals to provide "an appropriate medical screening examination" to those coming to the emergency room to determine if they have an "emergency medical condition."[66] If the screening reveals such a condition, the hospital must then stabilize the patient's condition before she can be transferred or discharged.[67] Any disputed facts surrounding whether a plaintiff was appropriately screened in the emergency room or whether she was released before being stabilized are not purely jurisdictional but are merits-related because they require an examination of the plaintiff's case.[68] Under the logic of *Scarfo*, however, such facts will be treated as jurisdictional facts for the judge alone to decide.

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[62] *Scarfo*, 175 F.3d at 961.

[63] *Id.*

[64] *See infra* notes 65-68 and accompanying text.

[65] 42 U.S.C. § 1395 (2002).

[66] 42 U.S.C. § 1395dd (a).

[67] *Id.*

[68] *See* Bloomer v. Norman Reg'l Hosp., No. 99-6074, 2000 U.S. App. LEXIS 16099, *5-7 (10th Cir. July 12, 2000) (noting that the district court should not have decided the case on a Rule 12(b)(1) motion, but rather, the court should have used a merits-based motion because the facts relating to whether the patient was appropriately screened and whether the patient's condition was properly stabilized were not purely jurisdictional but merits-related).

II. JURISDICTIONAL FACTS

A Rule 12(b)(1) motion to dismiss challenges the federal court's subject matter jurisdiction.[69] Because a federal court typically decides questions of subject matter jurisdiction before reaching the merits of the case, the court "may hear evidence and make findings of fact necessary to rule on the subject matter jurisdiction question before trial . . . ."[70] These facts, which establish the subject matter jurisdiction of the federal court, are known as jurisdictional facts.[71] It is well established that the court may decide jurisdictional facts if they are *not* intertwined with the merits of the case.[72]

A. The Application of Rule 12(b)(1)

Rule 12(b)(1) challenges to subject matter jurisdiction come in two forms: facial and factual attacks.[73] In a facial attack, it is the sufficiency of the pleading which is questioned, not the jurisdictional fact itself.[74] Thus, the court accepts all allegations as true.[75] In a factual attack, however, the court does *not* presume the allegations to be true because the jurisdictional facts themselves are challenged.[76] The court is thus free to consider evidence outside of the pleadings in an effort to satisfy itself as to the existence of subject matter jurisdiction because such a challenge involves the court's actual power to hear the case.[77]

There is little controversy over the general rule that, when faced with a factual attack upon subject matter jurisdiction, courts can decide jurisdictional facts.[78] Rule 12(b)(1), read in conjunction with Rule 12(d), explicitly so provides[79] and the federal courts of appeals

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[69] 5A WRIGHT & MILLER, *supra* note 4, § 1350, at 194.

[70] 2 MOORE ET AL., *supra* note 2, at 12-37.

[71] *Id.*

[72] *Id.*

[73] 2 MOORE ET AL., *supra* note 2, at 12-39.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 12-41 (citing Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990), and Daniel v. Ferguson, 839 F.2d 1124, 1127 n.5 (5th Cir. 1988)); *see, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-62 (1992) (noting that jurisdictional facts need to be treated differently at different stages of the proceedings: plead them to meet a Rule 12(b)(6) motion, provide evidence from which the fact could be found to meet a Rule 56 motion, and prove them at trial).

[78] 2 MOORE ET AL., *supra* note 2, at 12-36.

[79] *See* FED. R. CIV. P. 12(b)(1); FED. R. CIV. P. 12(d) ("The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion . . . shall be heard and determined before trial on application of any party,

have unanimously so held.[80] In *Williamson v. Tucker*,[81] the United States Court of Appeals for the Fifth Circuit made clear that the district court's power to decide whether it has jurisdiction over a case is greater than the power it has when the merits of that same case are finally reached.[82] The district court's unique power to decide jurisdictional facts allows the court to hear conflicting evidence and decide for itself whether the requirements for jurisdiction are satisfied.[83] More recently, in *Valentin v. Hospital Bella Vista*,[84] the Fifth Circuit expressly stated that in resolving jurisdictional fact disputes, "the court enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to

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unless the court orders that the hearing and determination thereof be deferred until the trial.").

[80] *See, e.g.*, Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186 (1974); Valentin v. Hosp. Bella Vista, 254 F.3d 358 (1st Cir. 2001); Lovern v. Edwards, 190 F.3d 648 (4th Cir. 1999); *Lawrence*, 919 F.2d 1525; *Daniel*, 839 F.2d 1124; Rosales v. United States, 824 F.2d 799 (9th Cir. 1987); Thigpen v. United States, 800 F.2d 393 (4th Cir. 1986); Augustine v. United States, 704 F.2d 1074 (9th Cir. 1983); Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981); Menchaca v. Chrysler Credit Corp., 613 F.2d 507 (5th Cir. 1980); Thornhill Publ'g Co., Inc. v. General Tel. & Elects Corp., 594 F.2d 730 (9th Cir. 1979); Berardinelli v. Castle & Cooke, Inc., 587 F.2d 37 (9th Cir. 1978); McLain v. Real Estate Bd. of New Orleans, Inc., 583 F.2d 1315 (5th Cir. 1978), *vacated on other grounds*, 444 U.S. 232 (1980); Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884 (3d Cir. 1977); Exchange Nat'l Bank of Chicago v. Touche Ross & Co., 544 F.2d 1126 (2d Cir. 1976); State of Alabama ex rel. Baxley v. Woody, 473 F.2d 10 (5th Cir. 1973); Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co., 469 F.2d 416 (5th Cir. 1972).

[81] *Williamson*, 645 F.2d 404. In *Williamson*, the issue was whether joint venture interests were "securities" within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934. *Id.* at 406. The United States Court of Appeals for the Fifth Circuit held that even though the district court enjoys a broad power to decide jurisdictional facts, that power does not extend to situations in which such facts are intertwined with the merits of the federal cause of action. *Id.* at 416. According to the Court of Appeals, the claim that the joint venture interests were "securities" within the meaning of the federal securities acts was not "so immaterial or insubstantial as to warrant dismissal . . . for lack of subject matter jurisdiction." *Id.* Rather, the claim was one in which the merits of the case were decidedly implicated; thus, the district court was not justified in dismissing the claim for lack of subject matter jurisdiction. *Id.*

[82] *Id.* at 413.

[83] *Id.*

[84] *Valentin*, 254 F.3d 358. In *Valentin*, a patient sued several Puerto Rican healthcare providers for medical malpractice. *Id.* at 361. She claimed that she was a citizen of Florida for purposes of diversity jurisdiction. *Id.* The United States District Court for the District of Puerto Rico dismissed the suit for lack of subject matter jurisdiction. *Id.* at 362. The patient appealed, and the First Circuit held that the district court was justified in its dismissal of the plaintiff's claims because, where the jurisdictional fact is not intertwined with the merits of the case, the court is able to consider conflicting evidence and decide the fact in question. *Id.* at 363.

determine its own jurisdiction."[85] The court explained:

> A court's authority to hear a particular case is a necessary precondition to the proper performance of the judicial function. Thus, when a factbound jurisdictional question looms, a court must be allowed considerable leeway in weighing the proof, drawing reasonable inferences, and satisfying itself that subject-matter jurisdiction has attached.[86]

Courts, therefore, can decide jurisdictional facts because the very power of the court to issue a judgment depends on whether the court has jurisdiction over the matter.[87]

Although there is not much disagreement over the general rule that courts can decide jurisdictional facts, there are many situations where the court must look to the merits of the case in order to decide the jurisdictional fact question.[88] In such situations, the right to decide jurisdictional facts comes squarely into conflict with another time-honored principle—the right of the plaintiff to a jury trial on the merits of his claim. Accordingly, courts have fashioned an exception to the general rule that courts can decide jurisdictional facts: when jurisdictional facts are "intertwined with the merits" of the cause of action, the general rule no longer applies.[89]

B. The Development of the "Intertwined With the Merits" Exception to Rule 12(b)(1)

The exception at issue in *Scarfo*, that jurisdictional facts cannot be decided by the court when they are "intertwined with the merits," can be traced back to the late 1800s.[90] Two early Supreme Court cases, decided well before the adoption of the federal rules, suggested that a court could not usurp the role of the jury and decide the merits of a case under the rubric of determining jurisdiction.[91] After the adoption of the federal rules, the Supreme Court, in *Land v. Dollar*,[92] reinforced its earlier decisions implying that a court, under the guise of determining jurisdiction, cannot assume the function of the jury.[93] In a fourth case, *Bell v. Hood*,[94] the Supreme Court

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[85] *Id.*

[86] *Id.* at 364.

[87] 2 MOORE ET AL., *supra* note 2, at 12-36.

[88] 5A WRIGHT & MILLER, *supra* note 4, § 1350, at 235.

[89] *Id.*

[90] *See infra* notes 91-95.

[91] *See* Smithers v. Smith, 204 U.S. 632, 645 (1907); Barry v. Edmunds, 116 U.S. 550, 565 (1886).

[92] 330 U.S. 731 (1947).

[93] *Id.* at 735, 739.

discussed the scope of the subject matter jurisdiction of the federal courts in terms broad enough to suggest that the courts should be mindful of their use of Rule 12(b)(1) in federal question cases.[95] These four Supreme Court decisions form the basis of the federal courts of appeals' later development of the "intertwined with the merits" exception.

Prior to the adoption of the Federal Rules of Civil Procedure in 1938,[96] the Court decided *Barry v. Edmunds*[97] and *Smithers v. Smith*.[98] *Barry*, the earliest Supreme Court opinion, stated that "[i]n no case is it permissible for the court to substitute itself for the jury . . . ."[99] *Barry* was a tort action where the amount of recoverable damages was not fixed by law; one question, therefore, was whether the complaint met the jurisdictional amount in controversy requirement.[100] The Court recognized the important role played by the jury.[101] Emphasizing that it is the jury's role to decide such issues of fact, the Court held that the jury's verdict will stand unless tainted by gross error.[102] The Court also stated that the jury cannot be compelled to comply with a court's view of facts in evidence.[103]

Smithers expanded on *Barry's* holding, making clear that a trial court's authority to dismiss an action is "not unlimited."[104] Specifically, the court's "limits ought to be ascertained and observed, lest under the guise of determining jurisdiction the merits of the controversy between the parties be summarily decided without the ordinary incidents of trial, including the right to a jury."[105] In *Smithers*, plaintiff landowner brought an action against defendants claiming that defendants took his land from him.[106] Plaintiff alleged that jurisdiction existed based on diversity of citizenship and amount in controversy.[107] The court of appeals, however, determined that the

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[94] 327 U.S. 678 (1946).

[95] *Id.* at 680-83.

[96] 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1004, at 28 (3d ed. 2002) (noting that the Federal Rules of Civil Procedure became effective on September 16, 1938).

[97] *Barry*, 116 U.S. 550.

[98] *Smithers*, 204 U.S. 632.

[99] *Barry*, 116 U.S. at 565.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Smithers*, 204 U.S. at 645.

[105] *Id.*

[106] *Id.* at 639-40.

[107] *Id.*

land taken and held by each defendant was worth less than $2,000 and dismissed the case.[108] This, the Court held, addressed an element of the merits rather than merely a jurisdictional fact.[109] Accordingly, the Court reversed the dismissal and remanded for further proceedings presumably including a jury trial on the issue of the worth of the land.[110] While *Barry* and *Smithers* are not clear in their discussion of jurisdictional facts that might be intertwined with the merits of the case, they establish that, even before the Federal Rules of Civil Procedure and Rule 12(b)(1), the Court was concerned about the possibility of infringing upon a plaintiff's right to a trial by jury under the guise of deciding "jurisdictional" questions.[111]

After the adoption of the Federal Rules of Civil Procedure,[112] the Court decided *Land*[113] and *Bell*.[114] These ensuing decisions are important as they illustrate that the earlier cases are consistent with the later adopted Federal Rules of Civil Procedure. The petitioners in *Land* were members of the United States Maritime Commission.[115] The respondents, stockholders of Dollar Steamship Lines, Inc., Ltd., had entered into a contract with the petitioners whereby they delivered "their common stock in Dollar . . . to the Commission."[116] In return, the petitioners released the respondents from certain obligations and made a loan to the respondents' corporation.[117] After repaying the loans, respondents asked for the return of their shares, claiming they had been pledged only as collateral.[118] When the petitioners refused to return the shares, the respondents sued them.[119] The trial court held that the suit was against the United States and dismissed the complaint.[120] The court of appeals reversed, holding that "the trial court erred in dismissing the complaint on jurisdictional grounds because the question of whether the doctrine of sovereign immunity applied raised controversial questions of law

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[108] *Id.* at 645-46.
[109] *Id.*
[110] *Smithers*, 204 U.S. at 645-46.
[111] *See Barry*, 116 U.S. 550; *see also Smithers*, 204 U.S. 632.
[112] 4 WRIGHT & MILLER, *supra* note 98.
[113] 330 U.S. 731 (1947).
[114] 327 U.S. 678 (1946).
[115] *Land*, 330 U.S. at 733.
[116] *Id.*
[117] *Id.*
[118] *Id.* at 734.
[119] *Id.*
[120] *Id.*

and fact proper for presentation to a trial court."[121] The petitioners sought a *writ of certiorari*.[122] The Court granted the petition and affirmed the decision of the court of appeals, holding that the allegations of the complaint, if proven, would illustrate that the petitioners were unlawfully withholding the respondents' property by claiming it belonged to the United States.[123] Thus, the Court distinguished the "type of case where the question of jurisdiction is dependent on a decision of the merits" from a case in which the jurisdictional issue stands on its own.[124] The Court, however, went no further than to state this difference between the two types of cases.

In *Bell*, the Court did not directly address whether a jurisdictional fact could be decided by the court without regard to whether it was part of the merits.[125] The Court, however, wrote broadly about the appropriate approach to jurisdiction in federal question cases: "where the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions . . . must entertain the suit . . . ."[126] The two exceptions referred to are: 1) when a claim appears to be "immaterial and made solely for the purpose of obtaining jurisdiction," and 2) when a claim "is wholly insubstantial or frivolous."[127] If either of these exceptions applies, the court may dismiss for lack of jurisdiction.[128] Under *Bell*, if a claim does *not* fit into either of these two exceptions, then the court has jurisdiction over the case, and the case may not be dismissed.[129] Under this formulation, any case involving a non-frivolous, non-pretextual claim in which the jurisdictional question is intertwined with the merits

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[121] Land v. Dollar, 154 F.2d 307 (D.C. Cir.), *cert. granted*, 329 U.S. 700 (1946).

[122] *Land*, 329 U.S. 700.

[123] *Land*, 330 U.S. at 734-35.

[124] *Id.*

[125] *Bell*, 327 U.S. 678. The petitioners in *Bell* sued agents of the Federal Bureau of Investigations in federal district court. *Id.* at 679. The petitioners alleged that their rights under Amendments IV and V of the United States Constitution had been violated. *Id.* The district court dismissed the petitioner's suit and the court of appeals affirmed the dismissal. *Id.* at 680. The Supreme Court, however, reversed the dismissal of the petitioner's suit. *Id.* at 684-85. The Court noted that the petitioner's complaint sought recovery directly under the United States Constitution and was neither frivolous nor wholly insubstantial. *Id.* at 683. Thus, the district court was required to entertain the suit: "Whether petitioners could recover monetary judgments against respondents for alleged constitutional violations was an issue of law that the district court had jurisdiction to consider." *Id.* at 678.

[126] *Id.* at 681-82.

[127] *Id.* at 682-83.

[128] *Id.* at 682.

[129] *Id.* at 682-83.

would not be subject to dismissal under Rule 12(b)(1). Indeed, following the logic of *Bell*, the courts should generally take a very narrow approach to Rule 12(b)(1) in federal question cases.

These Supreme Court cases only hinted to what we now identify as the "intertwined with the merits" exception. The courts of appeals were left to interpret the early decisions of the Supreme Court and frame their own understanding of what we now denominate this exception. Two early court of appeals cases, *Schramm v. Oakes*[130] and *Fireman's Fund Insurance Co. v. Railway Express Agency, Inc.*,[131] suggested that district courts could not always decide the jurisdictional issue separate from the merits.[132] In *Schramm*, the United States Court of Appeals for the Tenth Circuit stated that "where the issue of jurisdiction is dependant upon a decision on the merits . . . the trial court should determine jurisdiction by proceeding to a decision on the merits."[133] This, the court stated, would "prevent a summary decision on the merits without the ordinary incidents of a trial, including the right to a jury."[134] *Schramm* was a diversity action arising out of an automobile collision, and the Tenth Circuit held that the district court improperly dismissed the plaintiffs' action.[135] The action arose under the New Mexico Nonresident Motorist Statute and involved a vehicle driven by an employee of nonresidents who had an interest in the automobile.[136] The question was whether the statute reached the nonresidents in this situation, and the court held that the plaintiffs should have been given the opportunity during a trial on the merits to prove the jurisdiction of the nonresidents under the statute.[137] Since jurisdiction was tied to the merits of the cause of action, the court found it was appropriate to postpone a determination of jurisdiction and allow the case to be decided on the

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[130] 352 F.2d 143 (10th Cir. 1965).

[131] 253 F.2d 780 (6th Cir. 1958).

[132] *Schramm*, 352 F.2d 143; *Fireman's Fund Ins. Co.*, 253 F.2d 780.

[133] *Schramm*, 352 F.2d at 149.

[134] *Id.*

[135] *Id.* at 150 (*Schramm* involved personal, not subject matter, jurisdiction). The same rules, however, apply in both situations and they are (and should be) treated the same.

[136] *Id.*

[137] *Id.* If the appellants could establish a master-servant or agency relationship, liability might be established. *Id.* at 150. Additionally, the court noted that because a permit was required to take the car through the State of New Mexico, it was possible "that the owner would be liable for acts even of an independent contractor where the independent contractor operates a vehicle under a highway permit or franchise granted the owner." *Id.*

merits.[138] The plaintiffs should not have been denied the opportunity to move past the preliminary hearing, the court stated, because the possibility existed for proving the jurisdiction of the nonresidents.[139]

Fireman's Fund Ins. Co.,[140] a diversity proceeding commenced by the plaintiff to recover money for the loss of goods in an intrastate shipment, was initially dismissed by the district court for not meeting § 1332's amount in controversy requirement.[141] On appeal, the Sixth Circuit held that because it "did not appear to a legal certainty" from the face of the pleadings that the plaintiff could not recover the sum which it claimed, it was error to dismiss the plaintiff's claim.[142] The court declared that "where the jurisdictional issue as to amount in controversy can not be decided without the ruling constituting at the same time a ruling on the merits of the case, the case should be heard and determined on its merits through regular trial procedure."[143]

Schramm and *Fireman's Fund Ins. Co.* both alluded to an "intertwined with the merits" exception, but the exception was first clearly expressed in a Fifth Circuit opinion, *McBeath v. Inter-American Citizens for Decency Committee*.[144] The Fifth Circuit opined that:

> Undoubtedly, under Rule 12(d) of the Federal Rules of Civil Procedure a court may determine the prerequisites to jurisdiction in advance of a trial on the merits. However, where the factual and jurisdictional issues are completely intermeshed the

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[138] *Schramm*, 352 F.2d at 149.

[139] *Id.* at 150.

[140] 253 F.2d 780 (6th Cir. 1958).

[141] *Id.* at 781.

[142] *Id.* at 784.

The "legal certainty" test referred to in *Fireman's Fund Ins. Co.* has long been recognized as the standard used in amount in controversy cases. *See, e.g.*, Zacharia v. Harbor Island Spa, Inc., 684 F.2d 199 (2d Cir. 1984); United States v. S. Pac. Transp. Co., 543 F.2d 676 (9th Cir. 1976); Fehling v. Cantonwine, 522 F.2d 604 (10th Cir. 1975); Gill v. Allstate Ins. Co., 458 F.2d 577 (6th Cir. 1972). When a plaintiff brings a case under § 1332, his claim that the amount in controversy exceeds the requisite jurisdictional amount is "deemed to be made in good faith so long as it is not clear to a legal certainty that the claimant could not recover a judgment exceeding the jurisdictional amount." 5A WRIGHT & MILLER, *supra* note 4, § 1350, at 231. Essentially, this seems to be a version or application of the "intertwined with the merits" exception. Since the amount in controversy is rather clearly intertwined with the merits, courts should not dismiss a case for an insufficient amount in controversy unless they can say, to a legal certainty, that the requisite amount could not be recovered. Absent that legal certainty, for a court to dismiss a case as having an insufficient amount in controversy would be to decide a crucial part of the merits in the guise of deciding a jurisdictional fact.

[143] *Fireman's Fund Ins. Co.*, 253 F.2d at 784.

[144] 374 F.2d 359 (5th Cir. 1967).

> jurisdictional issues should be referred to the merits, for it is impossible to decide the one without the other.[145]

In *McBeath*, the plaintiff, a newspaper publisher, sued the defendants for injuring him in violation of the Sherman Act by conspiring to restrain interstate and foreign trade.[146] The defendants moved to dismiss for lack of subject matter jurisdiction, but the court held that "the question of jurisdiction here, including the existence of a conspiracy and a boycott or secondary boycott and their significant effect on interstate commerce, is . . . inextricably connected with the merits of the case . . . ."[147] Therefore, these issues should be resolved at trial together with the merits of the case.[148]

The earlier Supreme Court cases, especially *Land* and *Bell*, had an instrumental role in *McBeath's* clear articulation of the "intertwined with the merits" exception to Rule 12(b)(1).[149] In *McBeath*, the court stated that "where the factual and jurisdictional issues are completely intermeshed the jurisdictional issues should be referred to the merits . . . ."[150] This is consistent with the Supreme Court cases, which make clear that a court's power to dismiss a case for lack of subject matter jurisdiction is limited when a jurisdictional issue cannot be decided without also ruling on the merits of the plaintiff's claim.[151] *McBeath* is also consistent with *Bell* because, when jurisdictional facts are "intermeshed" with the merits of the cause of action, the federal court must exercise jurisdiction over the case and rule on the merits.[152] In so doing, *McBeath* does not narrow or broaden the scope of subject matter jurisdiction as set forth in *Bell*. Further, *McBeath* is generally representative of the courts of appeals' decisions on the general question of the exercise of Rule 12(b)(1) power.[153]

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[145] *Id.* at 362-63.

[146] *Id.* at 360. Plaintiff here invoked jurisdiction "under 28 U.S.C. § 1337 which confers jurisdiction on district courts of any civil action arising under any Act of Congress protecting trade and commerce against restraints, and under the Clayton Act, 15 U.S.C. § 15, which also authorizes such a suit and provides for treble damages sustained by reason of injury resulting from violations of antitrust laws." *Id.* In situations such as this, where jurisdiction is based on a specialized jurisdictional grant instead of on § 1331, the analysis in terms of jurisdictional facts and the "intertwined with the merits" exception is the same. *Id.*

[147] *Id.* at 363.

[148] *Id.*

[149] *See McBeath*, 374 F.2d 359.

[150] *Id.* at 363.

[151] *See supra* notes 91-129 and accompanying text.

[152] *McBeath*, 374 F.2d at 362-63.

[153] *See, e.g.*, Valentin v. Hosp. Bella Vista, 254 F.3d 358 (1st Cir. 2001) (stating that

The question remains, however, whether *McBeath* and related cases are required by either Supreme Court authority. Entangled with this question, not surprisingly, is the extent to which the Supreme Court's precedents are rooted in the constitutional right to a jury trial under the Seventh Amendment. The Supreme Court authority makes it clear that the jury plays an important role in determining issues of fact.[154] The function of the "intertwined with the merits" exception, to the extent that it departs from the plain language of Rule 12(b)(1), is to ensure that issues of fact normally decided by the jury are not decided by the court under the rubric of "jurisdictional facts." In short, the exception polices the application of Rule 12(b)(1) to ensure that the right to a jury trial is preserved. To the extent that the exception to Rule 12(b)(1) must be applied consistently and uniformly in order to preserve the essential role played by the jury, a clear articulation of the "intertwined with the merits" exception is necessary.

C. The Application of the "Intertwined With the Merits" Exception to Rule 12(b)(1)

While the courts of appeals generally agree on how Rule 12(b)(1) and the "intertwined with the merits" exception are *supposed* to be applied, it is evident that the actual application of Rule 12(b)(1) and the exception has not been consistent.[155] Not only are the courts of appeals inconsistent with each other,[156] but, what is most

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when jurisdictional facts are intertwined with the merits of the case, the court can assume jurisdiction and defer deciding on such issue until trial); United States v. North Carolina, 180 F.3d 574 (4th Cir. 1999) (stating that, because the jurisdictional issue requires proof of what is also needed to win on the merits, the jurisdictional issues in the Title VII suit are not suited for resolution by a Rule 12(b)(1) motion); Bell v. United States, 127 F.3d 1226 (10th Cir. 1997) (stating that whether the government's actions are within the limited waiver provided by the FTCA is an example of a jurisdictional fact intertwined with the merits of the case); Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990) (stating that when jurisdictional facts are intertwined with the merits of the claim, any jurisdictional issues should not be decided on a Rule 12(b)(1) motion but should rather be held for a determination on the merits); Barrett v. United States, 853 F.2d 124 (2d Cir. 1988).

[154] *See Barry*, 116 U.S. at 565 (stating that "[i]n no case is it permissible for the court to substitute itself for the jury"); *Smithers*, 204 U.S. at 645 (stating that the court's "limits ought to be ascertained" in order to prevent the court from usurping the role of the jury and denying the plaintiff his right to a jury trial).

[155] *See infra* Part II.C. Note that although it is unclear in many of these cases whether the jurisdictional grant relied upon is § 1331 or another specialized grant of jurisdiction, the analysis of jurisdictional facts and the "intertwined with merits" exception does not change. *See supra* notes 7, 144-48 and accompanying text; *see also infra* Part IV.

[156] While the Second, Seventh, and District of Columbia Circuits have held that

alarming are the inconsistencies within each circuit.[157]

The United States Court of Appeals for the Fourth Circuit provides a good example of the inconsistent application of Rule 12(b)(1) and the "intertwined with the merits" exception. *Hukill v. Auto Care, Inc.*,[158] and *United States v. North Carolina*,[159] both decided in 1999, differ in their approach to jurisdictional facts. In *Hukill*, the court, in analyzing a claim under the FMLA, held that, if the defendant is not an "employer" as defined by the statute, the district court has no subject matter jurisdiction.[160] In contrast, in *North Carolina*, the court decided that the language of Title VII requiring a pattern or practice of discrimination is not jurisdictional but is merits-related because, in order to prevail on the merits, the United States must prove a pattern or practice of discrimination.[161] While the two

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the fifteen-employee requirements of Title VII and the ADA, are not jurisdictional, many of the other circuits, as will be further examined, have inconsistent rulings on this or similar issues. *See* Da Silva v. Kinsho Int'l Corp., 229 F.3d 358 (2d Cir. 2000) (stating that the threshold number of employees in a Title VII case is *not* purely jurisdictional where the claim is non-frivolous); Sharpe v. Jefferson Distrib. Co., 148 F.3d 676, 677 (7th Cir. 1998) (holding that the "plaintiff's inability to demonstrate that the defendant has 15 employees is just like any other failure to meet a statutory requirement," thus the issue is not purely jurisdictional); EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621 (D.C. Cir. 1997) (holding that the employee requirement under the ADA is not purely jurisdictional but implicates the merits of the case so Rule 12(b)(1) should not be applied).

The Second, Seventh, and District of Columbia Circuits, unlike many of the other circuits, all reached the conclusion that the threshold number of employees is not purely jurisdictional by reasoning that, if the basis for subject matter jurisdiction is also an element of the plaintiff's federal cause of action, then the court must assume jurisdiction over the case and reserve further inquiry for the trial on the merits unless the claim is frivolous or pre-textual. *Da Silva*, 229 F.3d at 364 (quoting Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1190 (2d Cir. 1996) (noting that "in federal question cases, the very statute that creates the cause of action often confers jurisdiction as well . . . [and that since] jurisdiction is authority to decide the case either way . . . unsuccessful as well as successful suits may be brought upon the act")); *Sharpe*, 148 F.3d at 677; *St. Francis*, 117 F.3d at 624 (citing Bell v. Hood, 327 U.S. 678 (1946)); *see also* Bleiler v. Cristwood Constr. Inc., 72 F.3d 13 (2d Cir. 1995) (stating that "the conclusion that . . . Cristwood . . . [is not] a statutory [employer] merely reflects the lack of a remedy against them under federal law, not the lack of a federal question").

This is consistent with *Bell* because under *Bell*, once the claim is based on a federal statute, the only way the court can dismiss for lack of subject matter jurisdiction is if the claim is so insubstantial that it lacks any merit.

[157] *See infra* Part II.C.

[158] 192 F.3d 437 (4th Cir. 1999).

[159] 180 F.3d 574 (4th Cir. 1999).

[160] *Hukill*, 192 F.3d at 441.

[161] *North Carolina*, 180 F.3d at 580. Arguably, the question of whether there is a "pattern or practice of discrimination" applies only to the proper plaintiff in the suit. *See, e.g.*, 42 U.S.C. § 2000e(b) (2002). Just as this is a merits-related issue, however, so

cases involve different federal statutes, the FMLA and Title VII, the two results are irreconcilable because both cases take an element of the cause of action,[162] which also happens to be the basis for subject matter jurisdiction, and reach different results.[163]

Similar inconsistencies can be found in the Fifth Circuit. In *Greenless v. Eidenmuller Enterprises, Inc.*,[164] the court of appeals held that the defendant's failure to meet the threshold number of employees necessary for Title VII's definition of an employer warrants dismissal of the case for lack of subject matter jurisdiction.[165] In two earlier cases, however, *Clark v. Tarrant County*[166] and *Williamson v. Tucker*,[167] the court held that, when an element of the plaintiff's federal cause of action is also a basis for subject matter jurisdiction, the court should assume jurisdiction and decide the case on the merits.[168] In *Clark*, the federal cause of action was Title VII and the dispute once again focused on the requisite number of employees for a Title VII "employer."[169]

Inconsistencies have plagued the Ninth Circuit as well. Courts

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to is whether or not the defendant meets the requisite number of employees. *Id.*

[162] In *Hukill*, the element referred to is the threshold number of employees necessary to satisfy the definition of an employer under the FMLA. 192 F.3d at 441-42. In *North Carolina*, the court determined that the element of the cause of action is the threshold requirement that there be a pattern or practice of discrimination present. 180 F.3d at 580-81.

[163] Note the results are not only inconsistent within the circuit, but are also inconsistent as applied to *Bell*. Neither case should have been dismissed for lack of subject matter jurisdiction because there was a federal question involved and the claims did not fit into either of the two allowed exceptions noted in *Bell*: the claims were neither frivolous nor pre-textual. *See, e.g.*, *Bell*, 327 U.S. 678.

[164] 32 F.3d 197 (5th Cir. 1994).

[165] *Id.* at 200.

[166] 798 F.2d 736 (5th Cir. 1986).

[167] 645 F.2d 404 (5th Cir. 1981).

[168] *Clark*, 798 F.2d at 742; *Williamson*, 645 F.2d at 415 (noting that "where the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case . . . [because] in that situation no purpose is served by indirectly arguing the merits in the context of federal jurisdiction").

Once the merits are reached, if the federal claim fails, the court should dismiss under Rule 12(b)(6), not Rule 12(b)(1):

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

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

[169] *Clark*, 798 F.2d at 742.

have taken two different approaches to the question of when a jurisdictional fact is intertwined with the merits of the case. According to *Brown v. Atkinson*,[170] *Careau Group v. United Farm Workers of America*,[171] and *Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.*,[172] a jurisdictional fact is intertwined with the merits when the same provision is the basis for both jurisdiction and the plaintiff's substantive federal claims.[173] A case that preceded these three opinions, however, *Childs v. Local 18*,[174] decided that, even though Title VII was both the basis for jurisdiction and the basis for the plaintiff's claims, the case should be dismissed for lack of subject matter jurisdiction where the threshold number of employees was not met.[175]

Finally, the Tenth Circuit has also been inconsistent. In 2002, it decided *Calvert v. Midwest Restoration Services, Inc.*,[176] holding that the number of employees required to make Title VII applicable was a jurisdictional issue that could be decided by the court.[177] This was consistent with a 1980 case, *Owens v. Rush*,[178] in which it also held that

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[170] 1998 U.S. App. LEXIS 24098 (9th Cir. Sept. 24, 1998) (holding that the number of employees required for Title VII to apply is not purely jurisdictional since the same statute that makes up the federal cause of action is also the basis for jurisdiction).

[171] 940 F.2d 1291 (9th Cir. 1990) (holding that the jurisdictional issue was also a merits issue because the proof needed to prevail on the merits was the same proof required to show jurisdiction).

[172] 711 F.2d 138 (9th Cir. 1983) (noting that where the statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claims, the jurisdictional issue and the merits will be considered intertwined) (quoting Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 602 (9th Cir. 1976)).

[173] *Brown*, 1998 U.S. App. LEXIS 24098, at *2; *Careau*, 940 F.2d at 1293; *Sun Valley Gasoline*, 711 F.2d at 139-40.

[174] 719 F.2d 1379 (9th Cir. 1983).

[175] *Id.*

[176] 2002 U.S. App. LEXIS 9747 (10th Cir. May 22, 2002).

[177] *Id.* at *8.

[178] 636 F.2d 283 (10th Cir. 1980). Why, in 1980, the court was deciding whether the fifteen-employee requirement was jurisdictional is perplexing since prior to 1991, there was no right to a jury trial under Title VII. *See Curtis*, 415 U.S. at 196 (stating that "jury trial is not required in an action for reinstatement and backpay"); *Robinson*, 444 F.2d at 802 (stating that the demand for backpay under Title VII is to be determined through the exercise of the court's discretion). Perhaps it was an easy way for the court to dismiss the case because Rule 12(b)(1) existed and not much analysis was needed to support the court's ruling. Arguably, at the time *Owens* was decided, the court enjoyed a broad power to decide such facts in Title VII cases as jurisdictional issues because there was no possibility of infringing upon the plaintiff's right to a jury trial.

the fifteen-employee requirement was jurisdictional.[179] *Calvert*, however, did not mention cases decided after *Owens*, which stated that where subject matter jurisdiction is based upon the same provision that creates the plaintiff's federal cause of action, the court must assume jurisdiction and then decide the case on the merits.[180] The first of these cases to articulate the proposition was *Wheeler v. Hurdman*,[181] which declared that, when jurisdiction and the substantive claim are based upon the same federal statute, the court should assume jurisdiction; this is consistent with *Bell*.[182] The result of *Calvert* and *Owens*, however, is not.[183]

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[179] *Calvert*, 2002 U.S. App. LEXIS 9747, at *8.

[180] *See* Sizova v. Nat'l Inst. of Standards & Tech., 282 F.3d 1320 (10th Cir. 2002) (noting that if the resolution of the jurisdictional issue requires a resolution of an aspect of the plaintiff's substantive claim, then the jurisdictional issue is intertwined with the merits and Rule 12 (b)(1) cannot apply); Bloomer v. Norman Reg'l Hosp., No. 99-6074, 2000 U.S. App. LEXIS 16099 (10th Cir. July 12, 2000) (noting that, because the basis for jurisdiction and the plaintiff's substantive claim is the Emergency Medical Treatment and Women in Active Labor Act (EMTALA), the court has to assume jurisdiction unless the claim is frivolous or immaterial); Pringle v. United States, 208 F.3d 1220 (10th Cir. 2000) (stating that the determination of whether the Feres doctrine is applicable to the case calls into question the merits of the plaintiff's Federal Tort Claims Act (FTCA) claim so any dismissal should be for failure to state a claim for which relief could be granted, not for lack of subject matter jurisdiction); Wheeler v. Hurdman, 825 F.2d 257 (10th Cir. 1987) (noting that the determination of whether one is an "employer" under Title VII is not a purely jurisdictional issue but also implicates the merits because the jurisdictional issue is dependant on the same statute which forms the basis of the plaintiff's federal cause of action) (citing Clark v. Tarrant County, 798 F.2d 736, 742 (5th Cir. 1986)); *Sun Valley Gasoline*, 711 F.2d at 139; Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 602 (9th Cir. 1976).

[181] 825 F.2d 257.

[182] *Id.* at 259. *Compare Wheeler*, 825 F.2d 257 (stating that where subject matter jurisdiction is based upon the same provision which creates the plaintiff's federal cause of action, the court must assume jurisdiction and then decide the case on the merits), *with Bell*, 327 U.S. 678 (noting that when a federal statute is the basis for the plaintiff's claim, the court should assume jurisdiction unless the claim is frivolous or wholly insubstantial).

Note that two of the cases decided after *Wheeler*, *Pringle* and *Sizova*, tried to narrow *Wheeler* by stating that it was not enough that the jurisdictional statute and the plaintiff's substantive claim were based upon the same federal statute, but that resolution of the jurisdictional issue had to depend upon resolution of an aspect of the substantive claim. *See Pringle*, 208 F.3d at 1222-23; *Sizova*, 282 F.3d at 1324-25. This is a circular argument, however, because if the jurisdictional statute and the statute providing the basis for the substantive claim are one and the same, then naturally resolution of a jurisdictional element will require resolution of an element of the plaintiff's claim. Therefore, as articulated in *Bell*, it should be enough for subject matter jurisdiction that the plaintiff's cause of action is based upon a federal statute. *See Bell*, 327 U.S. 678.

[183] *Compare Wheeler*, 825 F.2d 257, 259 (stating that where subject matter jurisdiction is based upon the same provision which creates the plaintiff's federal

This analysis of circuit court authority illustrates the extent to which courts have inconsistently applied the "intertwined with the merits" exception. Not only are the circuits themselves inconsistent in their application of the exception, but more importantly, there are inconsistencies within the individual circuits. The scope of this inconsistency exemplifies the confusion surrounding Rule 12(b)(1) and the "intertwined with merits" exception, and also makes clear that, in order to ensure plaintiffs are treated fairly and uniformly throughout the circuits, the law must be clarified.

III. CONSTITUTIONAL RIGHT TO A TRIAL BY JURY

The Seventh Amendment preserves the right to a trial by jury in some civil cases.[184] The language of the amendment preserves the right to a jury trial only for "[s]uits at common law."[185] To determine whether a suit is one which existed at common law, it has generally been accepted that the courts must employ the "so-called historical test" of the Seventh Amendment right to a jury trial; in other words, the court must be "guided by the practice of English courts in 1791."[186] If, in 1791 English practice, the jury would have been

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cause of action, the court must assume jurisdiction and then decide the case on the merits), *and Bell*, 327 U.S. 678, 681-82 (noting that when a federal statute is the basis for the plaintiff's claim, the court should assume jurisdiction unless the claim is frivolous or wholly insubstantial), *with Calvert*, 2002 U.S. App. LEXIS 9747, *8 (holding that the number of employees required to make Title VII applicable is jurisdictional; having a federal statute as the basis for your claim is not enough for subject matter jurisdiction), *and Owens*, 636 F.2d 283, 287 (stating that the fifteen-employee requirement is jurisdictional; Title VII claim is not enough to establish subject matter jurisdiction).

Both *Calvert* and *Owens*, if following *Bell*, would have assumed jurisdiction over the case and then would have decided the case on the merits. *See Bell*, 327 U.S. 678. Then, if the federal claim failed, the case would have been properly dismissed under Rule 12 (b)(6), not Rule 12 (b)(1). *See* FED. R. CIV. P. 12(b)(6).

[184] 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, and no 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.

Id.

[185] *Id.*

[186] *See, e.g.*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998); Wooddell v. Int'l Bhd. of Elec. Workers, Local 71, 502 U.S. 93 (1991); Chauffeurs, Teamsters, & Helpers Local No. 391 v. Terry, 494 U.S. 558 (1990); Tull v. United States, 481 U.S. 412 (1986); Baltimore & Carolina Line Inc. v. Redman, 295 U.S. 654 (1935); Dimick v. Schiedt, 293 U.S. 474 (1935); *see also* Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 187-92 (2000); Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1021-24 (1992);

"impaneled" in the particular type of case, then "generally a jury is required by the [S]eventh [A]mendment."[187]

Once the right to a jury trial has been established, the question remains as to the scope of that right.[188] The Supreme Court has noted that "[t]he [Seventh] Amendment [does] not bind the federal courts to the exact procedural incidents or details of jury trials according to the common law in 1791 any more than it tie[s] them to the common law system of pleading or the specific rules of evidence then prevailing."[189] An important question, therefore, is whether such changes in practice or procedure infringe upon the very substance of the Seventh Amendment—the "jury's role as finder of fact?"[190] The substance of the guarantee preserved by the Seventh Amendment is the jury's role as the ultimate trier of fact. In order to preserve the essence of the Seventh Amendment, a court must be careful not to abuse its power under Rule 12(b)(1).

Rule 12(b)(1) allows a judge to decide jurisdictional facts without a jury trial; the Seventh Amendment preserves the role of the jury as fact-finder.[191] Although seemingly irreconcilable, these two concepts are not necessarily incompatible with each other. In cases decided only by a bench trial—as was true for Title VII before the Civil Rights Act of 1991[192]—there is no constitutional barrier to the application of Rule 12(b)(1) as it is written, and there may be no need for an "intertwined with the merits" exception. In such cases, whether the court decides a question early, by resolving a Rule 12(b)(1) motion,[193] or later, after a full trial, implicates only questions of judicial efficiency. Where, however, the constitutional right to a

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Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 486-87 (1975); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 640 (1973); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 319 (1966).

[187] Wolfram, *supra* note 186, at 640.

[188] Moses, *supra* note 186, at 199.

[189] Galloway v. United States, 319 U.S. 372, 390 (1943); *see also* Colgrove v. Battin, 413 U.S. 149, 156 (1973) (citing the decision in *Galloway* with approval).

[190] Moses, *supra* note 186, at 199-200; *see also* Walker v. New Mexico & Southern Pacific R.R. Co., 165 U.S. 593, 596 (1897) (noting that the substance of the Seventh Amendment is the right to a jury trial; it is the function of the jury and not the court to decide questions of fact).

[191] 2 MOORE ET AL., *supra* note 2, at 12-36; Moses, *supra* note 186, at 199-200.

[192] *See Curtis*, 415 U.S. at 196-97 (stating that "jury trial is not required in an action for reinstatement and backpay"); *Robinson*, 444 F.2d at 802 (stating that the demand for backpay under Title VII is to be determined through the exercise of the court's discretion).

[193] *See* FED. R. CIV. P. 38-39 (authorizing the use of partial trials).

trial by jury attaches to a plaintiff's claim, the only way that Rule 12(b)(1) does not limit the right to a trial by jury is if it is interpreted to apply only to *purely* jurisdictional facts—that is, those facts that are *not* intertwined with the merits of the claim.[194] Thus, the "intertwined with the merits" exception to Rule 12(b)(1) is necessary to preserve the plaintiff's right to a jury trial on any issue involving the merits of the case. Allowing a judge to decide issues that are intertwined with the merits of a plaintiff's case infringes upon the plaintiff's right to a trial by jury.[195]

A. Significance of the Right to a Trial By Jury

The significance of a plaintiff's right to a jury trial is evidenced by *Beacon Theaters, Inc. v. Westover*.[196] Beacon Theaters, Inc., sought

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[194] Although Title VII now clearly provides a statutory right to a jury trial, whether there is also a constitutional right to a jury trial under Title VII is still unresolved. If there is no constitutional right to a jury trial, then Congress can restrict it; consequently, there would no longer be any question regarding whether Rule 12(b)(1) and the inconsistent application of the "intertwined with the merits" exception infringes upon the constitutional right to a jury trial. The problem with this argument, however, is that Title VII now provides both compensatory and punitive damages. Thus, it is difficult to imagine how the constitutional right to a jury trial is not implicated.

[195] *See Barry*, 116 U.S. at 565; *see also Smithers*, 204 U.S. at 645.

A response to the argument that allowing a judge to decide issues that are intertwined with merits of the plaintiff's case infringes upon the plaintiff's right to a jury trial is that the jury trial problem can be avoided by denying any preclusive effect to the federal court's factfinding if the case is refiled in state court. If this seems inconsistent with the premises of the federal court's dismissal, however, perhaps it illustrates that the federal court's dismissal was actually a decision on the merits, and not simply a jurisdictional determination.

[196] 359 U.S. 500 (1959). In *Beacon*, Fox West Coast Theaters asked for declaratory relief against Beacon Theaters. *Id.* at 502. Fox alleged that there was a controversy under both the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1-2, and the Clayton Act, 15 U.S.C. § 15, 38 Stat. 731. *Id.* In its complaint entitled "Complaint for Declaratory Relief," Fox asserted that it operated a movie theater in San Bernardino, California, and that it had exclusive rights from movie distributors to show "first run" pictures in the "San Bernardino competitive area." *Id.* at 502-03. Fox also asserted that the contracts with the movie distributors provided it with "clearance"—a period in which no other theater could exhibit the same picture. *Id.* at 502.

Beacon Theaters had built a drive-in theater about eleven miles out of San Bernardino; it notified Fox that it considered Fox's contracts with the movie distributors to be a violation of anti-trust laws. *Id.* Fox alleged in its complaint that Beacon threatened a treble damage suit against Fox and its distributors and that this deprived Fox of a "valuable property right—the right to negotiate for exclusive first-run contracts." *Id.* Fox then asked for both an injunction to prevent Beacon from commencing any action against it under the antitrust laws, and a declaration that a grant of "clearance" between Fox and Beacon was reasonable and not in violation of antitrust laws. *Id.* at 502-03. Beacon's answer and counterclaim against Fox "asserted

mandamus to require a district court judge to vacate orders that allegedly deprived it of a jury trial.[197] The district judge had compelled Beacon Theaters to split up its claims, trying some to the judge and others to the jury.[198] The Supreme Court found this to be impermissible: where the petitioner is seeking legal relief, the constitutional right to a jury trial cannot be defeated simply by joining a demand for equitable relief.[199] The Court stated, "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[200] More important than this general principle was the Court's finding that the trial court's exercise of discretion to deprive Beacon Theaters of a full jury trial was not justifiable.[201]

A similar result was reached more recently in *Lytle v. Household Manufacturing, Inc.*,[202] where the lower court had dismissed the petitioner's § 1981 legal claims and held a bench trial on the remaining Title VII equitable claims.[203] After reversing the dismissal of the § 1981 claims, the Supreme Court held that the doctrine of

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that there was no substantial competition between the two theaters, that the clearances granted were therefore unreasonable, and that a conspiracy existed between Fox and its distributors to manipulate contracts . . . so as to restrain trade and monopolize first-run pictures . . . in violation of the anti-trust laws." *Id.* at 503.

Beacon asked for a jury trial of all the factual issues in the case. *Id.* The district court, however, viewed the issues raised by Fox's "Complaint for Declaratory Relief" as essentially equitable. *Id.* It, therefore, found that the issues raised by Fox should be tried by the court alone before the jury determined the validity of the anti-trust violations that Beacon alleged in its counterclaim. *Id.*

[197] *Beacon*, 359 U.S. at 501.

[198] *Id.* at 503-05.

[199] *Id.* at 510.

[200] *Id.* at 501 (quoting Dimick v. Schiedt, 293 U.S. 474 (1935)).

[201] *Id.* at 508.

[202] 494 U.S. 545 (1990). Petitioner Lytle, an African-American, filed a cause of action under both Title VII and § 1981, alleging that respondent Schwitzer had terminated his employment because of race and had later retaliated against him for filing a charge with the Equal Employment Opportunity Commission by not providing adequate references to prospective employers. *Id.* at 547-48. He requested a jury trial for all applicable issues. *Id.* at 548. The district court, however, dismissed the petitioner's § 1981 claims and decided that Title VII provided an exclusive remedy. *Id.* It then held a bench trial on the petitioner's Title VII claims. *Id.* at 549. The Ninth Circuit Court of Appeals, although finding that the lower court's decision as to the § 1981 claims was erroneous, nevertheless held that the District Court's findings regarding the Title VII claims collaterally estopped the petitioner from litigating his § 1981 claims "because the elements of a cause of action under § 1981 are identical to those under Title VII." *Id.* at 549.

[203] *Id.* at 548-49.

collateral estoppel did not bar relitigation of the issues decided by the judge because it would not "constitute a second, separate action."[204] It was the lower court's erroneous dismissal of the petitioner's § 1981 claims that allowed it to resolve the equitable claims through a bench trial in the first instance.[205] If the § 1981 claims had not been wrongfully dismissed, Lytle would have been entitled to a full jury trial on any issues common to both the § 1981 legal claims and the Title VII equitable claims.[206] Consequently, the jury's determinations of both legal and factual issues could not then have been disregarded by the district court upon consideration of the petitioner's equitable claims.[207]

Both *Beacon* and *Lytle* illustrate the significance of the right to a jury trial.[208] Courts, while having broad discretion to decide jurisdictional facts, may not exercise that discretion where it would infringe upon the plaintiff's right to a jury trial.[209] By deciding issues that are intertwined with the merits of the case under the guise of determining a purely jurisdictional issue, courts are limiting a plaintiff's right to a trial by jury.

The "intertwined with the merits" exception is, thus, not merely a judge-made rule interpreting Rule 12(b)(1), but rather a constitutionally-mandated application of that Rule.[210] Without it, plaintiffs would be denied their right to have a trial by jury. It is not enough, however, to recognize that such an exception exists. As discussed earlier, the courts of appeals are extremely inconsistent in their application of the "intertwined with the merits" exception.[211] If

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[204] *Id.* The Court distinguished *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), by noting that the holding in *Parklane*, "that a court's determinations of issues in an equitable action could collaterally estop relitigation of the same issues in a subsequent legal action without violating a litigant's right to a jury trial," did not apply because Lytle's § 1981 claim was not a subsequent legal action. *Lytle*, 494 U.S. at 547. Where the court wrongfully dismisses a plaintiff's legal claims, relitigation of the equitable issues decided by the court in a bench trial is permissible. *Id.*

[205] *Lytle*, 494 U.S. at 548-49.

[206] *Id.*

[207] *Id.* at 556.

[208] *See Beacon*, 359 U.S. 500; *see also Lytle*, 494 U.S. 545.

[209] *See generally Beacon*, 359 U.S. 500; *Lytle*, 494 U.S. 545.

[210] *See generally* U.S. CONST. amend. VII. Arguably, it is an interpretation of the rules inspired by such constitutional concerns as avoiding unnecessary constitutional decisions.

[211] *Compare* Da Silva v. Kinsho Int'l Corp., 229 F.3d 358 (2d Cir. 2000) (stating that the threshold number of employees in a Title VII case is not purely jurisdictional where the claim is non-frivolous); Sharpe v. Jefferson Distrib. Co., 148 F.3d 676 (7th Cir. 1998) (holding that the "plaintiff's inability to demonstrate that the defendant has 15 employees is just like any other failure to meet a statutory requirement," thus

the exception is not applied both correctly and consistently plaintiffs will continue to lose their right to a jury trial.[212]

B. Title VII & The Right to a Jury Trial

While the "intertwined with the merits" exception has been applied in cases dealing with a variety of federal statutes, one area in which the application of the exception is notably inconsistent is in Title VII cases.[213] Before 1991, in Title VII cases, judges could decide purely jurisdictional facts, jurisdictional facts that were intertwined with the merits, and purely merits-related facts because there was no right to a jury trial under Title VII.[214] At the time, Rule 12(b)(1) was an efficient method of filtering out the frivolous and insubstantial cases; as importantly, it did so without infringing upon the rights of any parties to the suit.[215] The Civil Rights Act of 1991, however,

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the issue is not purely jurisdictional); EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621 (D.C. Cir. 1997) (holding that the employee requirement under the ADA is not a purely jurisdictional but implicates the merits of the case so Rule 12(b)(1) should not be applied), *and* United States v. North Carolina, 180 F.3d 574 (4th Cir. 1999) (noting that the language of Title VII requiring a "pattern or practice of discrimination" is not jurisdictional but merits-related), *with* Hukill v. Auto Care, Inc., 192 F.3d 437 (4th Cir. 1999) (finding that the employee requirement under the FMLA is purely jurisdictional), and Greenless v. Eidenmuller Enters., Inc., 32 F.3d 197 (5th Cir. 1994) (holding that dismissal for lack of subject matter jurisdiction is warranted where the defendant did not meet the threshold number of employees necessary under Title VII).

[212] As discussed earlier, the function of the "intertwined with the merits" exception is to ensure that issues of fact normally decided by the jury are not summarily decided by the court. *See supra* Part II.B. Thus, the purpose of the exception is to make certain that the plaintiff's right to a jury trial is not infringed upon. *Id.* In order for the exception to serve its purpose, it must be applied both consistently and correctly. Note that whether the right to a jury trial stems from the Constitution or a statute, the analysis of such a right in light of the "intertwined with the merits" exception to Rule 12(b)(1) remains the same. *See infra* notes 213-16.

[213] *Compare* Da Silva v. Kinsho Int'l Corp., 229 F.3d 358 (2d Cir. 2000) (stating that the threshold number of employees in a Title VII case is *not* purely jurisdictional where the claim is non-frivolous), *and* Sharpe v. Jefferson Distrib. Co., 148 F.3d 676 (7th Cir. 1998) (holding that the "plaintiff's inability to demonstrate that the defendant has 15 employees is just like any other failure to meet a statutory requirement," thus the issue is not purely jurisdictional), *with* Calvert v. Midwest Restoration Services, Inc., No. 01-5201, 2002 U.S. App. LEXIS 9747 (10th Cir. May 22, 2002) (holding that the number of employees required to make Title VII applicable was a jurisdictional issue that could be decided by the court), and Greenless v. Eidenmuller Enterprises, Inc., 32 F.3d 197 (5th Cir. 1994) (holding that dismissal for lack of subject matter jurisdiction is warranted where the defendant did not meet the threshold number of employees necessary under Title VII).

[214] Since there was no right to a jury trial, by default all issues of fact had to be decided by the court regardless of whether they were intertwined with the merits. *See Curtis*, 415 U.S. 189; *Robinson*, 444 F.2d 791.

[215] Because the constitutional right to a jury trial exists only for "suits at common

amended Title VII to include a statutory right to a trial by jury.[216] Thus, judges can no longer decide jurisdictional facts that are intertwined with the merits of a Title VII case without infringing upon the plaintiff's right to a trial by jury. The problem, however, is that because of the confusion surrounding the application of the "intertwined with the merits" exception, many courts are in fact restricting plaintiffs' right to a trial by jury.

In *Scarfo*, plaintiff's Title VII claim was dismissed by the Eleventh Circuit because the court found that whether a defendant constituted an "employer" was a jurisdictional fact not intertwined with the merits of the case.[217] This holding, and others like it, raises the question of how courts can conclude that an element of a plaintiff's Title VII claim is not intertwined with the merits of the case, but is purely jurisdictional. Requirements making up a federal cause of action, such as whether an entity meets the requisite definition of "employer" set forth in Title VII, are not and cannot be purely jurisdictional. It would eviscerate the right to a jury trial in such cases if a judge, by stating that he or she is deciding a jurisdictional fact issue, decides elements of the plaintiff's cause of action and then dismisses the case for lack of subject matter jurisdiction. Accordingly, requirements making up a federal cause of action go directly to the merits of the plaintiff's case; at the very least, they are intertwined with the merits of the case.

The basis on which courts hold that such issues are purely jurisdictional is unclear. Courts holding that such requirements are purely jurisdictional issues for the court to decide cannot be relying on § 1331[218] and the propositions set forth in *Bell*.[219] If *Scarfo*[220] had

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law," before Title VII was amended to include a statutory right to a trial by jury, the constitutional right to a jury trial did not apply to Title VII plaintiffs. *See Curtis*, 415 U.S. 189; *Robinson*, 444 F.2d 791; *see also* U.S. CONST. amend. VII. Thus, courts were not infringing upon a plaintiff's right to a jury trial by deciding jurisdictional fact issues.

[216] Civil Rights Act of 1991, Pub.L. 102-166, Title I, § 102, 105 Stat. 1071 (1991) (codified as amended in 42 U.S.C. § 1981a (2002)); *see also supra* note 194 and accompanying text regarding the implication of a constitutional right to a jury trial under Title VII.

[217] *See Scarfo*, 175 F.3d 957.

[218] 28 U.S.C. § 1331 (2001) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

[219] *See Bell*, 327 U.S. 678. Under *Bell*, as long as the complaint seeks recovery under a law of the United States or the Constitution, the federal court is obliged to entertain the suit unless the claim is "immaterial and made solely for the purpose of obtaining jurisdiction or . . . wholly insubstantial or frivolous." *Id.* at 682-83. This strict standard calls for a narrow approach to Rule 12(b)(1).

been decided according to § 1331 and the logic of *Bell*, the federal court would have first taken jurisdiction over the cause of action and then looked at the merits to decide whether the defendant was an "employer" under the statute.[221] It would not have dismissed the action for lack of subject matter jurisdiction under Rule 12(b)(1).

If the court is not relying on § 1331 as the basis for subject matter jurisdiction, the only other explanation is that it is relying exclusively on a specialized grant of jurisdiction within Title VII.[222] This justification, however, is not convincing. The provision granting jurisdiction to the federal district courts in Title VII is separate and distinct from the provision setting forth the statutory requirements relating to the number of employees required for an employer to be subject to the statute.[223] In fact, the provision granting jurisdiction does not even hint that the requirements set forth in earlier provisions must be met before the federal district courts can claim subject matter jurisdiction: "[e]ach 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 [title]."[224] The provision simply grants jurisdiction to the federal district courts for any claim brought under Title VII.[225] Therefore, even if the courts claimed they were relying on the specialized grant of jurisdiction provided in Title VII to rationalize their finding that whether a defendant is an "employer" is a jurisdictional fact, there is nothing in the grant of jurisdiction to support such a holding.[226] Indeed, the Supreme Court has rejected lower courts' attempts to read other procedural requirements of Title VII as jurisdictional, requirements that arguably have a more plausible claim to be jurisdictional than the definition of "employer."[227]

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[220] 175 F.3d 957.

[221] *See* 28 U.S.C. § 1331; *see also Bell*, 327 U.S. 678, 682-83 (noting that as long as the plaintiff's claim is based upon a federal cause of action, the federal court must assume jurisdiction and decide the case on the merits unless the claim is "immaterial . . . or . . . wholly insubstantial or frivolous").

[222] *See* 42 U.S.C. § 2000e-5(f)(3) (2001).

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *See, e.g.*, Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982). In *Zipes*, the Supreme Court held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Id.* at 393. As noted by the Court, the provision granting the district courts jurisdiction under Title VII "contains no reference to the timely-filing requirement." *Id.* at 393-94. "The provision specifying the time for filing charges with the EEOC appears as an

Even though *Scarfo* focused only on Title VII, the problems associated with the application of the "intertwined with the merits" exception are much broader.[228] By applying the logic of *Scarfo*, federal courts have also wrongfully dismissed cases brought under the FMLA and ADEA for lack of subject matter jurisdiction.[229] As in the cases involving Title VII, where the court decides elements of the cause of action by calling the issues purely jurisdictional, the dismissal of the plaintiff's claim under Rule 12(b)(1) takes away the plaintiff's right to a trial by jury.[230]

IV. PROPOSED SOLUTION

The real question is what makes a jurisdictional fact "intertwined with the merits." Perhaps the logical conclusion is to hold that for any claim brought under § 1331,[231] the jurisdictional issues are necessarily intertwined with the merits of the case and so the court must assume subject matter jurisdiction and then decide the case on the merits. The only exceptions to this would be the two recognized

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entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 394.

Similarly, Title VII's jurisdictional grant is separate and distinct from the definition section of Title VII. *See* 42 U.S.C. § 2000e-5[§ 706](f)(3) (2002). The jurisdictional grant contains no reference to the definition of an "employer" under the statute, nor does it contain a reference to any other term defined by Title VII. *Id.* Applying the logic of *Zipes*, whether a defendant meets the statutory definition of an "employer" under Title VII, or any other statutory definition, cannot be a jurisdictional issue. *See Zipes*, 455 U.S. at 393-94.

[228] As noted earlier, the logic in *Scarfo* can be, and has been, applied to cases brought under a broad panoply of federal statutes. *See supra* Part II.C. Suits brought under Title VII, as well as under the FMLA, ADEA, ADA, and EMTALA have all required discussion on the application of the "intertwined with the merits" exception.

[229] 29 U.S.C. § 630 (2001); 29 U.S.C. § 2611 (2001). *See, e.g.*, *Hukill*, 192 F.3d 437 (noting that the threshold number of employees necessary to satisfy the definition of an employer under the FMLA is jurisdictional); Rogers v. Sugar Tree Prods., Inc., 7 F.3d 577 (7th Cir. 1993) (treating the "employer" requirement of the ADEA as an element of subject matter jurisdiction).

[230] Courts do not actually state that these issues are "purely jurisdictional" although this is the logical effect of not treating them as intertwined with the merits of the case. *See supra* Part II.C. If these issues were truly jurisdictional, a number of things would follow: courts, including courts of appeals, would be obligated to raise these issues *sua sponte*; parties—even a losing plaintiff—could raise these issues for the first time on appeal; and, parties could not waive these issues by failing to raise them, or by mere argument. *See* 2 MOORE ET AL., *supra* note 2, at 12-36. Additionally, a "dismissal for lack of subject matter jurisdiction is not a judgment on the merits, and it therefore has no claim preclusive or res judicata effect." *Id.* Finally, if these issues were "purely jurisdictional" they would not apply in state court. *See infra* notes 235-39 and accompanying text.

[231] 28 U.S.C. § 1331 (2001).

by *Bell v. Hood*—essentially Rule 12(b)(1) could be used to dismiss frivolous or pre-textual federal claims.[232] In contrast, when § 1332[233] is the basis for subject matter jurisdiction, the court may determine the citizenship requirement as a pure jurisdictional fact.

This solution, however, is problematic. Dividing possible claims into § 1331 and § 1332 categories ignores the possibility of cases brought under statutes having their own specialized grant of jurisdiction. Thus, the same issues would arise—whether any of the statutory requirements are purely jurisdictional or intertwined with the merits of the case—and the potential for inconsistencies would still be great. In addition, courts normally do not decide the amount in controversy requirement of § 1332 as a jurisdictional fact because it is intertwined with the merits of the case; thus, the only way to see if the amount is met is to try the claim.[234]

A more effective approach would be to ask whether the requirement in question would apply even if the action were filed in state court. If the requirement still applies, then it cannot be a purely jurisdictional requirement. If, however, the requirement does not apply, then it can be treated as a purely jurisdictional fact to be decided by the court. For example, regardless of where a plaintiff files a Title VII claim, be it in state court or federal court,[235] the plaintiff has no claim unless she can establish that the defendant has the requisite number of employees to bring it within the statutory definition of "employer."[236] In contrast, a plaintiff does not have to prove that the defendants are diverse when filing in state court; it

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[232] *See Bell*, 327 U.S. at 682-83.

[233] 28 U.S.C. § 1332 (2001).

[234] The amount claimed is "deemed to be made in good faith so long as it is not clear to a legal certainty that the claimant could not recover a judgment exceeding the jurisdictional amount." 5A WRIGHT & MILLER, *supra* note 4, § 1350, at 231; *see also* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938) (stating that the amount claimed by the plaintiff controls as long as it appears to have been made in good faith; only if it can be determined to a legal certainty from the face of the pleading that there can be no recovery of the jurisdictional amount will the plaintiff's claim be dismissed).

When the court decides the amount in controversy, it is inherently deciding the amount of damages to be awarded. This is because to decide as fact what is in controversy implicates both the substantive law of the claim and what is allowed in terms of damages by that particular substantive law. Thus, the inquiries themselves are linked and overlap in a manner sufficient to draw the analogy that the determination of the amount in controversy requirement is intertwined with the merits of the plaintiff's case.

[235] *See* Yellow Freight Sys. Inc., v. Donnelly, 494 U.S. 820 (1990) (holding that federal courts do not have exclusive jurisdiction over Title VII actions).

[236] 42 U.S.C. § 2000e(b) (2001).

must do so only when seeking to adjudicate state law claims in federal court.[237]

A Rule 12(b)(1) motion challenges the authority of a federal court to hear the action brought before it.[238] Therefore, in the majority of cases involving Rule 12(b)(1) motions, it follows that a state court should have jurisdiction over the action. For instance, in *Scarfo* the court dismissed the plaintiff's claim for lack of subject matter jurisdiction because the statutory fifteen-employee requirement was not met.[239] The determination of the court, however, that Scarfo did not have a Title VII claim would have in theory precluded her from succeeding in state court as well. Thus, the fifteen-employee requirement is not a jurisdictional fact pertaining to the jurisdiction of the federal court.

In determining whether a jurisdictional fact is "intertwined with the merits" of the case, the best approach is to consider whether that fact would have the same import in state as in federal court. If the fact at issue is relevant to the plaintiff's cause of action only if the plaintiff is in federal court, then the jurisdictional fact pertains to the subject matter jurisdiction of the federal courts. In such a situation, the application of Rule 12(b)(1) is proper. If, however, the fact at issue is relevant to the plaintiff's cause of action in both federal and state court, it is necessarily "intertwined with the merits" of the claim. In such a case, the application of Rule 12(b)(1) is improper and infringes upon a plaintiff's right to a trial by jury.

CONCLUSION

Currently, the federal courts are inconsistently applying the "intertwined with the merits" exception to Rule 12(b)(1). When faced with a federal statute such as Title VII, which has its own threshold requirements for applicability, federal courts are doing one of two things. They are either holding that statutory requirements are jurisdictional issues to be decided by the court, or that statutory requirements are intertwined with the merits of the case, and as such cannot be decided by the court. Consequently, this inconsistent approach means that while some plaintiffs are given the opportunity to exercise their right to a trial by jury, others are being deprived of that same right.

The result in *Scarfo* and related cases compels the conclusion

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[237] 28 U.S.C. § 1332 (2001).

[238] 5A WRIGHT & MILLER, *supra* note 4, § 1350, at 194.

[239] *Scarfo*, 175 F.3d at 961.

that the federal courts must both re-visit and unify their approach to Rule 12(b)(1) and the "intertwined with the merits" exception. As the name suggests, a pure jurisdictional fact, which is determinative of federal jurisdiction, should be relevant only in federal court. Until the federal courts consistently apply this principle, the plaintiff's right to a jury trial is in serious jeopardy.