Michigan Law Review

Volume 101 | Issue 4

2003

Resolving the Title VII Partner-Employee Debate

Kristin Nicole Johnson
University of Michigan Law School

NOTE

Resolving the Title VII Partner-Employee Debate

Kristin Nicole Johnson

TABLE OF CONTENTS

INTRODUCTION

In January of 2001, a New York court issued an order affirming a plaintiff's ability to bring suit against a law firm partnership for discriminatory acts that occurred during her tenure as an associate at the firm.[1] The plaintiff, Stacy Ballen-Stier, joined Hahn & Hessen, L.L.P. as an associate, and, on January 1, 1997, the firm invited her to join the partnership.[2] According to Ms. Ballen-Stier's complaint, the words and actions of a fellow partner, Mr. Blejwas, created a hostile and abusive

1. Ballen-Stier v. Hahn & Hessen, L.L.P., 727 N.Y.S.2d 421 (N.Y. App. Div. 2001).

2. *Id.*

work environment[3] and continued to plague her "even when [she] was away from the office."[4] Ms. Ballen-Stier alleged she was the victim of sexual harassment that began when she was an associate and continued for a significant period after she became a partner.[5] While permitting Ms. Ballen-Stier to proceed with the claims involving acts that occurred when she was an associate, the court order dismissed the claims regarding harassment that occurred after her promotion to partner.[6] Although the alleged harassment continued in the same

3. The Court of Appeals for the District of Columbia was one of the first courts to acknowledge that sexual harassment could be actionable under Title VII of the Civil Rights Act of 1964. *Barnes v. Costle*, 561 F.2d 983, 988-95 (D.C. Cir. 1977). Today, courts classify sexual harassment claims as either quid pro quo claims, involving "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature"by an actor relying on apparent or actual authority to force the subject of the harassment to comply, or, as hostile work environment claims, alleging sexual misconduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating . . . or offensive working environment." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (quoting EEOC Guidelines, 29 CFR § 1604.11(a), (a)(3) (1985) (internal quotations omitted)); *see also* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Harris v. Forklift, 510 U.S. 17, 20-22 (1993); CATHARINE MACKINNON, SEX EQUALITY 942-61 (2001); CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979) (providing the original terminology for the two forms of sexual harassment adopted by lower courts and, eventually, the United States Supreme Court in *Meritor*). Ms. Ballen-Stier filed suit under New York antidiscrimination law. *Ballen-Stier*, 727 N.Y.S.2d at 421-22. New York courts apply the same legal standard federal courts apply in Title VII litigation to determine whether behavior amounts to actionable harassment. *See* Bennett v. Progressive Corp., 225 F. Supp. 2d 190, 203 n.4 (N.D. N.Y. 2002) (citing Martin v. New York State Dep't of Correctional Servs., 115 F. Supp. 2d 307, 311 (N.D.N.Y. 2000)); *see also infra* note 6. It is notable, however, that the standard for determining employer liability under New York human rights law differs from the standard federal courts apply in Title VII litigation. *See Bennett*, 255 F.2d at 210 (explaining that "employer liability under [New York Human Rights Law] is not judged under *respondeat superior*, but instead requires a more stringent showing, in particular, that the employer had knowledge of and acquiesced in, or subsequently condoned" the behavior that is the subject of the litigation (citation omitted)); *see also id.* at 210 n.6 ("The New York Court of Appeals has yet to determine whether they will follow the *Ellerth* and *Faragher* guidelines regarding employer vicarious liability." (citing Vitale v. Rosina Food Prod., Inc., 727 N.Y.S.2d 215, 219 (N.Y. App. Div. 2001))). While quite interesting, the differing standards of employer liability are beyond the scope of this Note.

4. *Ballen-Stier*, 727 N.Y.S.2d at 421-22. To present a cognizable claim for sexual harassment, a plaintiff must establish that the defendant behaved in a manner that was both objectively and subjectively offensive.

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

Harris, 510 U.S. at 21-22. To satisfy the objective element of the inquiry, a plaintiff must present evidence that a reasonable person would have found that the behavior in question amounted to harassment severe and pervasive enough to create a hostile and abusive work environment. *See Ellerth*, 524 U.S. at 742. The subjective element of the standard queries whether the behavior actually offended the plaintiff. *See Harris*, 510 U.S. at 20-22; *Meritor*, 477 U.S. at 59.

5. *Ballen-Stier*, 727 N.Y.S.2d at 422.

manner before and after her promotion, the court reasoned that Ms. Ballen-Stier's status as a partner prevented her from bringing the claims relating to harassment she experienced after her promotion.[7]

Discrimination against partners in law firms presents a unique legal issue.[8] While the Supreme Court has recognized that Title VII protects law firm associates from discriminatory acts committed by supervising partners,[9] the circuits are split on the issue of whether Title VII covers partners alleging to be victims of discrimination.[10] In accordance with

6. Ballen-Stier alleged that she was the victim of harassment and an adverse employment action because of her sex. *Id.* Under the New York statute proscribing employment discrimination it is unlawful for:

> an employer or licensing agency, because of the age, race, creed, color, national origin, sexual orientation, sex, disability, genetic predisposition or carrier status, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

N.Y. EXEC. LAW § 296 1(a) (2001). The New York statute mirrors the language of the federal statute prohibiting employment discrimination. *See* 42 U.S.C. § 2000e-2(a) (1994). The text of Title VII states: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.*

Ms. Ballen-Stier may have chosen to file suit under state antidiscrimination law because an earlier decision by the Second Circuit Court of Appeals rejected the theory that a partner could claim to be an employee and file suit under Title VII. *See* Hyland v. New Haven Radiology Assocs., 794 F.2d 793, 797 (2d Cir. 1986) [hereinafter *Hyland I*] (finding that "[i]t is generally accepted that the benefits of the [federal] antidiscrimination statutes . . . do not extend to those who properly are classified as partners").

7. *Ballen-Stier*, 727 N.Y.S.2d at 422 (citing Levy v. Schnader, Harrison, Segal & Lewis, 628 N.Y.S.2d 572 (N.Y. App. Div. 1996)).

8. While this Note focuses on discrimination experienced by partners in law firm partnerships, it argues for a broader understanding of who qualifies as an employee under Title VII. The author recognizes that law firms increasingly elect to organize their businesses using forms other than the partnership model. For a discussion of the contemporary development of the various business forms available to law firms see *infra* notes 50-72 and accompanying text. For a sampling of the diverse circumstances in which the partner-employee question has arisen, see Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997) (raising the question of whether a law firm partner qualifies as an employee); Simpson v. Ernst & Young, 100 F.3d 436, 439 (6th Cir. 1996) (raising the question of whether a partner in an accounting firm qualifies as an employee); *Hyland I*, *supra* note 6, 794 F.2d at 796 (examining the defendant professional corporation's argument that radiologists who owned and managed a corporation could not qualify as employees because of their role as partners in the business); and EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1177-79 (7th Cir. 1984) (discussing whether shareholders of a law firm organized as a professional corporation qualify as employees).

9. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 802 (1998) (holding that under Title VII an employer is vicariously liable for the acts of a supervisor whose sexual harassment of subordinates created a hostile work environment).

10. While the Second and Seventh Circuits have adopted a per se rule excluding partners from the definition of employee, *see Hyland I*, *supra* note 6, 794 F.2d 793 (2d. Cir. 1986); Burke v. Friedman. 556 F.2d 867 (7th Cir. 1977), the First, Ninth, Sixth, Tenth and Eleventh Circuits have adopted the economic realities test for partners and other executives or business owners claiming employee status, *see Serapion*, 119 F.3d at 985; *Simpson*, 100 F.3d 436

well-established principles of jurisdiction, plaintiffs seeking protection under Title VII must fall within the purview of the statute.[11] Title VII covers "employers" and "employees."[12] Courts determine who qualifies as an "employer" or an "employee" by looking to the statutory definitions of the terms,[13] and they decline to exercise jurisdiction if the party alleging discrimination does not qualify as an employee[14] or the party accused of discriminating is not an employer as defined by the statute.[15]

While the plain language of Title VII explicitly forbids employers from treating employees less favorably because of race, color, religion, sex, or national origin,[16] the statute fails to offer a substantive definition of who qualifies as an employee. An employee, according to the definitional provision, is "an individual employed by an employer."[17] This circular definition offers trial courts inadequate guidance for determining who should be included or excluded from the definition of employee.[18] The definitional provisions of other antidiscrimination

---

(6th Cir. 1996); Strother v. Permanente Med. Group, 79 F.3d 859 (9th Cir. 1996); Fountain v. Metcalf, Zima & Co., 925 F.2d 1398 (11th Cir. 1991); Wheeler v. Hurdman, 825 F.2d 257, 268 (10thCir. 1987).

11. *See, e.g., Hyland I, supra* note 6, 794 F.2d at 796 (indicating that the antidiscrimination statutes offer protection only to employees and only when an employer has acted in violation of the statute's provisions).

12. *See* 42 U.S.C. § 2000e(b) (2000) (defining "employer"); 42 U.S.C. § 2000e(f) (2000) (defining "employee").

13. *See, e.g., Hyland I, supra* note 6, 794 F.2d 793 (2d Cir. 1986) (indicating that the antidiscrimination statutes offer protection for individuals who were employees when the relationship with the defendant employer terminated and stating that the term employer, defined broadly by the statute, includes individuals, governments, government agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, and trustees). Only businesses with fifteen or more employees fall within the purview of Title VII. 42 U.S.C. § 2000e(b). In circumstances involving law firms with a small number of partners and associates, determining who qualifies as an employee directly impacts the court's ability to exercise jurisdiction and actually reach the merits of the claim. *See, e.g., Burke*, 556 F.2d at 868-70.

14. *See* 42 U.S.C. § 2000e(f). For a definition of "employee" and an explanation of the term's significance for the purposes of this Note, see *infra* note 17 and accompanying text.

15. *See generally* Deanne M. Mosely & William C. Walter, *The Significance of the Classification of Employment Relationships in Determining Exposure to Liability*, 67 MISS. L.J. 613, 628 (1998).

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

17. 42 U.S.C. § 2000e(f).

18. *See, e.g.*, Simpson v. Ernst & Young, 100 F.3d 436 (6th Cir. 1996) (discussing the ambiguity of this definition as it arises under the Age Discrimination in Employment Act and Employee Retirement Income Security Act). One commentator refers to the interplay of the definitions for employee and employer as "magnificent circularity," finding the defini-

statutes such as the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA") contain similarly ambiguous language.[19]

While there is hope that a decision resolving the issue is forthcoming,[20] the Supreme Court has not yet addressed the question of whether or not partners qualify as employees under Title VII. To evaluate whether or not partners can claim employee status for the purposes of Title VII, lower courts have relied on precedent addressing related issues.[21] In resolving the partner-employee question, most courts apply dicta from the seminal case *Hishon v. King & Spalding*.[22] In *Hishon*, the Court considered a female associate's claim that the defendant law firm partnership discriminated against her because of her

tion of employee "virtually useless." *See* Daniel Kleinberger, *A Focus on Unincorporated Businesses: "Magnificent Circularity" and the Churkendoose: LLC Members and Federal Employment Law*, 22 OKLA. CITY U. L. REV. 477, 481, 492 (1997).

19. The terms "employee" and "employer" are ill-defined in other antidiscrimination statutes. The ADEA defines "employee" as "an individual employed by any employer." 29 U.S.C. § 630(f) (2003). The ADA, 42 U.S.C. 12111(4) (2003), the Employee Retirement Income Security Act, 29 U.S.C. § 1002(6) (2003) ("ERISA"), and the Family Medical Leave Act, 29 U.S.C. § 2611(3) (2003), share this definition. All of these statutes derive their definition of employee from the Fair Labor Standards Act, 29 U.S.C. 203(e) (2003) (defining employee as "any individual employed by an employer"). The similarities in the language and purpose of these statutes have led courts to regard the statutes as standing in pari parssu and to treat precedent interpreting one statute as instructive in resolving similar claims brought under another statute. *See, e.g.*, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979); Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997) ("We regard Title VII, ADEA, ERISA, and FLSA as standing *in pari parssu* and endorse the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another."); *Hyland I*, *supra* note 6, 794 F.2d 793, 796 (2d Cir. 1986) ("Since [the] statutes have a similar purpose — to stamp-out discrimination in various forms — cases construing the definitional provisions of one are persuasive authority when interpreting the others."). While the similarity in language and underlying purpose — the elimination of discrimination in employment — is undisputed, the question of whether or not considering the authority persuasive across statutes works to the benefit of each covered group is disputable. *See* George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491 (1995).

20. The Supreme Court recently granted certiorari to *Wells v. Clackamas Gastroenterology Associates*, 271 F.3d 903, 905 (9th Cir. 2001), *cert. granted*, 123 S. Ct. 31 (U.S. Oct. 1, 2002) (No. 01-1435), in which the Ninth Circuit declined the plaintiff-shareholder's request to apply the economic realities test and held that shareholders in a professional corporation qualify as employees. The issue presented before the Court is whether or not a shareholder in a professional corporation qualifies as an employee under the ADA for the purpose of determining if the defendant-employer has the requisite number of employees to satisfy the jurisdictional trigger. *Id.* Resolution of this question will likely entail discussion of the definition of "employee" for both the purposes of determining who qualifies as an employee under the statute and for the purpose of determining if the employer has the requisite number of employees. Since the definition of employee is interpreted similarly under different antidiscrimination statutes, *see supra* note 19, the definition or standard adopted by the Court may resolve the question of whether or not partners can claim employee-status under Title VII.

21. *See, e.g.*, *Hyland I*, *supra* note 6, 794 F.2d at 797 (describing Hishon v. King & Spalding, 467 U.S. 69 (1984) as influential in determining whether a partner can qualify as an employee); EEOC v. Dowd & Dowd Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984) (same).

22. 467 U.S. 69 (1984).

sex in the decision not to promote her to partner.[23] Ruling in favor of the plaintiff, the Court opined that consideration for partnership constituted a term, condition, or privilege of employment and evidence that the firm considered an impermissible characteristic, namely the plaintiff's sex, in the selection process was subject to scrutiny under the provisions of Title VII.[24] The Court held that Title VII explicitly forbids discrimination against a member of a protected class on the basis of an immutable characteristic when deciding to promote associates to partner.[25] *Hishon* left unresolved the issue of whether a partner facing analogous circumstances — discrimination based on her sex — could bring a Title VII claim against her partnership.[26]

In response to the question of who qualifies as an employee, most circuit courts have adopted either a per se rule or an economic realities test.[27] To varying degrees, these two approaches rely on language from Justice Powell's concurring opinion in *Hishon.*[28] According to the concurrence, partners in traditional law firm partnerships do not require the protection of Title VII because of the intimate nature of a partnership.[29] Justice Powell's concurrence assumes that partners, having contributed similar amounts to the firm's capital structure, are co-owners of the business, participants in the firm's management structure, and contributors to the firm's decisionmaking process, which is characterized by common agreement.[30]

Relying on Justice Powell's concurrence, courts adopting the first method of analysis employ a per se rule to exclude partners from the definition of employee and to prevent partners from invoking Title VII against partnerships.[31] Some courts using a per se rule have applied the rule exclusively to businesses organized as partnerships with management officials titled partners.[32]

23. *Hishon*, 467 U.S at 72.

24. *Id.* at 74-76.

25. *Id.* at 74.

26. *Id.*

27. *See supra* note 10.

28. *See, e.g.*, Serapion v. Martinez, 119 F.3d at 987 (1st Cir. 1997) (citing *Hishon* as support for adopting the economic realities test); *Hyland I*, *supra* note 6, 794 F.2d 793, 797 (2d Cir. 1986) (citing *Hishon* for the proposition that when the indicia of partnership are not present the individual is an employee entitled to Title VII coverage).

29. *Hishon*, 467 U.S. at 80 (Powell, J., concurring) ("The relationship among law partners contemplates that decisions important to the partnership normally will be made by common agreement . . . or consent among the partners.").

30. *Id.*

31. *See, e.g.*, *Hyland I*, *supra* note 6, 794 F.2d at 797; Burke v. Friedman, 556 F.2d 867, 869-70 (7th Cir. 1977).

32. *See Hyland I*, *supra* note 6, 794 F.2d at 797. In *Hyland*, the court addressed the issue of whether the plaintiff, an officer, director, and shareholder in a professional corporation, could be considered an employee under the ADEA. *Id.* The defendant corporation argued

Courts adopting the second approach inquire as to whether the plaintiff-partner's economic reality, meaning her actual level of ownership and control, provides her with sufficient authority to combat discrimination levied against her.[33] These courts reject the argument that partners in law firm partnerships must be exempted from Title VII coverage by virtue of their job title or the law firm's chosen business form.[34] Instead, these courts propose a case-by-case analysis of the partner's relationship with the defendant-business and the partner's participation in the firm's ownership and decisionmaking processes.[35] The economic realities test aims to discern whether the partner alleging discrimination is "so dominated in or by the organization that he or she is really like an employee, with corollary susceptibility to discrimination."[36]

In recent years, many structural and organizational changes within law firms have complicated the partner-employee analysis.[37] In the years after *Hishon*, firms began to adopt business models that differ significantly from the traditional partnership model referenced in Justice Powell's concurrence.[38] Modern law firms may select from

that the firm functioned like a partnership and therefore Hyland, the plaintiff, should be considered a partner, not an employee. *Id.* at 795. The court rejected the defendant's argument and held that "the use of the corporate form" distinguished the corporation from a partnership, and, as a result, Hyland should not be considered a partner. *Id.* The *Hyland* court explained that "[i]t is generally accepted that the benefits of the antidiscrimination statutes ... do not extend to those who properly are classified as partners," but "those who own shares in a corporation may or may not be employees." *Id.* at 797-98. *But see id.* at 799 (Cardamore, J., dissenting) ("[T]he status of the entity Hyland was associated with and his status within that entity must be analyzed in order to determine whether he was an employee covered by the ADEA.").

33. *See, e.g., Serapion*, 119 F.3d at 987-92; Simpson v. Ernst & Young, 100 F.3d 436 (6th Cir. 1996). Aimed at determining a party's real rather than nominal level of ownership and control within a firm, the economic realities test offers an evolved understanding of the common law agency test. In *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992), the Supreme Court employed a test derived from the general common law agency principles, juxtaposing the classic characteristics of a common law master-servant relationship to the interaction of an independent contractor and his contractual employer. *Id.* (considering, among several other factors, the party's ability to control "the manner and means by which the product [of the hired party's labor] is accomplished ... the source of the instrumentalities and tools [of the hired party's labor] ... the duration of the relationship between the parties ... the method of payment; [and] the hired party's role in hiring and paying assistants" (citation omitted)); *see also* Leigh Pokora, Comment, *Partners as Employees Under Title VII: The Saga Continues a Comment on the State of the Law*, 22 OHIO N.U. L. REV. 249 (1995) (offering an explanation of the development of the test applied to the partner-employee inquiry).

34. *See, e.g., Simpson*, 100 F.3d at 444; Fountain v. Metcalf, Zima & Co., 925 F.2d 1398 (11th Cir. 1991); Wheeler v. Hurdman, 825 F.2d 257, 268 (10th Cir. 1987).

35. *See, e.g., Simpson*, 100 F.3d at 444; *Fountain*, 925 F.2d at 1400; *Wheeler*, 825 F.2d at 267-69.

36. *Wheeler*, 825 F.2d at 269.

37. *See infra* note 50.

38. *See infra* Part I.

numerous forms of business organization, such as general or limited liability partnerships, limited liability companies, or professional corporations.[39] Depending on a law firm's choice of business form, the management structure may include directors, presidents and vice-presidents, shareholders, or managers.[40] Examination of the differences between the traditional law firm partnerships referenced in the *Hishon* concurrence and contemporary law firms raise doubts about the soundness of Justice Powell's assertion that partners are not among those Congress intended Title VII to protect.

This Note argues that the Court should interpret the term employee in Title VII to include partners and similarly situated executives. Noting that the *Hishon* concurrence has had a significant influence on the standards lower courts have adopted to evaluate the partner-employee question, Part I deconstructs Justice Powell's concurrence and identifies the mistaken assumptions in his reasoning. This Part explores the notable structural changes that have occurred in the modern law firm's nature and demographics and the available business organization forms. Part II contends that lower courts have relied on the reasoning articulated in Justice Powell's concurrence or some similarly flawed rationale and, as a result, the standards developed to determine who qualifies as an employee fail to offer a viable solution to the debate. Part III argues that interpreting the definition of employee in Title VII to include partners and similarly situated executives would satisfy the congressional purpose underlying the statute and offer a clear resolution to the debate, allowing litigants to predict with greater accuracy their coverage or exposure under the law.

I. DARWINIAN ADAPTATIONS: DEVELOPMENTS IN STRUCTURAL ORGANIZATION AND BUSINESS FORMS

While at one time the term "vulnerable partner" seemed like an oxymoron, recent organizational changes within law firms have altered leadership and ownership structures increasing the possibility that one can attain the status of partner and remain susceptible to the harms of employment discrimination. This Part contends that arguments denying law firm partners the ability to bring Title VII suits against their firms rest on fundamentally flawed assumptions. Section I.A examines Justice Powell's concurring opinion in *Hishon v. King & Spalding*. This Section argues that the structure of law firms deviates significantly from the firms envisioned in Justice Powell's concurrence, undermining his rationale for refusing to extend Title VII coverage to include

39. *See infra* Part I.

40. *See infra* Part I.

law firm partners. Section I.B presents the Equal Employment Opportunity Commission's current investigation of the law firm partnership of Sidley, Austin, Brown & Wood as an illustration of the complexity of modern law firm partnerships, their management structures, and the relationships among partners.

A. *Mistaken Assumptions: Comparing Modern Law Firms with Traditional Partnerships*

Justice Powell's terse concurrence in *Hishon* marked the first opinion by a member of the Court to posit a solution to the partner-employee question.[41] While the cause of action in *Hishon* did not address the question of whether a partner could claim employee status, Justice Powell recognized that lower courts might apply *Hishon* by analogy to suits brought by a partner alleging that a fellow partner or the partnership discriminated against her.[42] Justice Powell suggested that Title VII should not be interpreted to reach partners because the interaction between partners could not be characterized as an employment relationship.[43] Law firms should be immune from Title VII suits brought by partners, Justice Powell reasoned, because of the uniqueness of the partnership structure.[44] Justice Powell's opinion relied on the assumption that each partner owns a significant share of the business and that each participates in a decisionmaking process based on common agreement.[45] Justice Powell's concurrence explained

41. Hishon v. King & Spalding, 467 U.S. 69, 79 (1984) (Powell, J., concurring).

42. As stated above, *Hishon* involved an associate's claim that the law firm King & Spalding discriminated against her because of her sex in deciding not to promote her to partner. *Id.* at 71.

43. *Id.* at 79. Justice Powell stated in his concurring opinion:

> I write to make clear my understanding that the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners. The reasoning of the Court's opinion does not require that the relationship among partners be characterized as an "employment" relationship to which Title VII would apply. The relationship among law partners differs markedly from that between employer and employee — including that between the partnership and its associates.

Id.

44. *Id.*

45. *Id.* at 80. According to Justice Powell's theory of law firm partnerships, "[t]he relationship among law partners contemplates that decisions important to the partnership normally will be made by common agreement . . . or consent among the partners." *Id.* In addition, Justice Powell's concurrence assumes that there is a certain uniformity of characteristics among partnerships — a common prototype for partnerships. *See id.* at 79 n.2 ("Law partnerships usually have many of the characteristics that I describe generally here."). The partnership described in Justice Powell's concurrence resembles the traditional definition of partnership in the Uniform Partnership Act of 1914 ("UPA"). *Compare Hishon*, 467 U.S. at 80 n.3 (Powell, J., concurring) (explaining that in a law firm partnership, decisions concerning "such matters as participation in profits and other types of compensation; work assignments; approval of commitments in bar association, civic, or political activities; questions of billing; acceptance of new clients; questions of conflicts of interest; retirement programs; and

that the management structure of traditional law firm partnerships minimizes the likelihood that any partner would lack the ability to counter discrimination by another member of the firm.[46]

In generations past, lawyers agreed to form a general partnership, contributed substantively to the firm's capital, divided the firm's profits, and shared, jointly and severally, the costs of liability.[47] Justice Powell's concurrence reflects the presumption that law firms continue to organize around these rudimentary principles.[48] An examination of the current state of the legal services industry, however, reveals significant changes in the organizational forms selected by law firms.[49] In recent years, state legislatures began enacting business governance laws that permit law firms to select from a variety of business forms.[50]

expansion policies" are made by common agreement), *with* UNIF. P'SHIP ACT § 18(e), 6 U.L.A. 213 (1914) (describing a partnership as a business form in which "[a]ll partners have equal rights in the management and conduct of the partnership business"). For the purposes of this Note, the term "traditional partnership" refers to the type of partnership referenced in Justice Powell's concurrence, *Hishon*, 467 U.S. at 80, and the basic form of partnership as defined by the UPA. UNIF. P'SHIP ACT § 18(e). In the years subsequent to the *Hishon* decision and Justice Powell's concurrence, most states have replaced provisions adopted from the UPA with provisions from the revised Uniform Partnership Act ("RUPA"). *See* UNIF. P'SHIP ACT, 6 U.L.A. 280 (Supp. 1995). In 1996, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Limited Liability Partnership Amendments to the UPA. UNIF. P'SHIP ACT §§ 1001-1003, 6 U.L.A. 239 (1997); *see also* notes 49-62 and accompanying text.

46. *See Hishon*, 467 U.S. at 80 (Powell, J., concurring).

47. *See* UNIF. P'SHIP ACT § 18(b), 6 U.L.A. 213 (1914).

48. *Hishon*, 467 U.S. at 79.

49. For examples of states that have enacted provisions permitting law firms to organize as limited liability partnerships, see, for example, ALA. CODE §§ 10-8A-1001 to -1109 (1999); ALASKA STAT. §§ 32.05.405-.760 (Michie 2002); ARIZ. REV. STAT. ANN. §§ 29-1101 (West Supp. 2002); CAL. CORP. CODE §§ 16,951-16,962 (West Supp. 2003); COLO. REV. STAT. §§ 7-60-144 to -154 (2002); CONN. GEN. STAT. §§ 34-400 to -434 (2001); DEL. CODE ANN. tit. 6, §§ 15-1001 to -1105 (Michie 1999 & Supp. 2002); D.C. CODE ANN. §§ 33-110.01 to -111.06 (1994 & Supp. 2002); FLA. STAT. ANN. §§ 620.9001-.9105 (2002); GA. CODE ANN. §§ 14-8-44 to -64 (1994 & Supp. 2002); HAW. REV. STAT. §§ 425-151 to -191 (2001); 805 ILL. COMP. STAT. 205/8.1-8.5 (2000); IND. CODE §§ 23-4-1-44 to -52 (1998); IOWA CODE ANN. §§ 486A.1001-.1105 (West 1999); KAN. STAT. ANN. §§ 56-345 to -347 (1994 & Supp. 1996); KY. REV. STAT. ANN. §§ 362.555-.605 (Michie 2002); LA. REV. STAT. ANN. §§ 9:3431-:3435 (West 1997); ME. REV. STAT. ANN. tit. 31, §§ 801-876 (West Supp. 2002); MD. CODE ANN., CORPS. & ASS'NS §§ 9A-1001 to -1111 (1999); MASS. GEN. LAWS ch. 108A, §§ 45-49 (2000); MICH. COMP. LAWS ANN. §§ 449.44-.48 (West 2002); M.S.A. § 323A.10-01 (West Supp. 2002-2003); MISS. CODE ANN. §§ 79-12-87 to -119 (1972); MO. ANN. STAT. §§ 358.440-.510 (West 2000); MONT. CODE ANN. §§ 35-10-701 to -710 (2001); NEV. REV. STAT. ANN. §§ 87.440-.560 (Michie 1999 & Supp. 2001); N.J. STAT. ANN. §§ 42:1A-47 to -54 (West Supp. 2002); N.M. STAT. ANN. 54-1A-1001 to -1105 (Michie Supp. 2002); and N.Y. PARTNERSHIP LAW §§ 121-1500 to -1503 (McKinney Supp. 1995); VT. STAT. ANN. tit. 11, § 3201 (2002). *See also* Carter Bishop, *The Limited Liability Partnership Amendments to the Uniform Partnership Act (1994)*, 53 BUS. LAW. 101, 101 n.3 (1997).

50. While this Note focuses on limited liability partnerships, law firms may now elect to organize under a broad array of business forms. For a description of LLCs and the benefits available for firms organized as LLCs, see Kleinberger, *supra* note 18, at 559-61 (explaining the hybrid nature — part corporation, part partnership — of LLCs and offering a theory for the application of federal employment statutes to the members of LLCs).

As illustrated in a number of recent cases, law firms now organize as professional corporations ("PCs"), limited liability companies ("LLCs"), and limited liability partnerships ("LLPs").[51]

1. *Law Firms Choose from a Variety of Business Forms*

The LLP business form is one of the more popular organizational models state legislatures have made available to law firms in recent years.[52] LLPs represent a hybrid between the traditional partnership model and the corporate business model.[53] Taxation benefits and protection against personal liability represent two particularly distinct characteristics of the LLP business form.[54] While LLPs distribute profits among the owners of the firm in a manner similar to the corporate profit-sharing distribution scheme,[55] LLPs receive the beneficial tax treatment made available to traditional partnerships but

51. For examples of state statutes permitting alternatives to traditional partnerships, see *supra* note 49.

52. *See* Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 U. COLO. L. REV. 1065, 1067 (1995) ("The LLP has proved to be exceptionally popular wherever it has been enacted. In Texas, for example, more than 1200 law firms, including virtually all of the state's largest firms, elected to become LLPs within one year after its enactment.").

53. LLPs offer an excellent point of departure for comparing the characteristics of the traditional law firm partnerships referenced in Justice Powell's concurrence and those most likely to describe modern firms. LLPs maintain many of the elements of a general partnership while shielding partners from one of the most unattractive elements of general partnerships — full personal liability. *See, e.g.*, DEL. CODE ANN. tit. 6, § 15-306(a) (Michie Supp. 2002); LA. REV. STAT. ANN § 9:3431(A) (West 1995); N.Y. PARTNERSHIP LAW § 26(2) (McKinney 1995); TEX. REV. CIV. STAT. ANN. art. 6132b-3.08(d) (Vernon 1995). In most states, law firms can adopt the LLP form merely by amending their partnership agreements to reflect the organizational change and complying with state insurance coverage requirements. The language of state statutes codifying the LLP form of business organization differs from state to state; however, the underlying requirements for and benefits obtained from electing this form of business organization are fairly similar. *See, e.g.*, DEL. CODE ANN. tit. 6, § 15-1001 (Michie Supp. 2002); LA. REV. STAT. ANN § 9:3431(A) (West 1995); N.Y. PARTNERSHIP LAW § 26(2) (McKinney 1995); TEX. REV. CIV. STAT. ANN. art. 6132b-3.08(d) (Vernon 1995). State regulations regarding LLPs may require law firms operating as limited liability partnerships to carry a minimum amount of insurance coverage in order to maintain LLP status. *See, e.g.*, DEL. CODE ANN. tit. 6, §§ 1544, 1546(a) (Michie 1999) (requiring firms to maintain a minimum of $1,000,000 in liability insurance for each kind of limited liability); TEX. REV. CIV. STAT. ANN. art. 6132b-3.08(d) (Vernon 1995) (requiring $100,000 in liability insurance for the kind of liability considered limited according to the partnership agreement).

54. Unlike corporate firms that are taxed twice — once at the corporate level and again when profits are distributed to shareholders — firms organized as LLPs are taxed only once in accordance with each partner's earnings. *See* DEL. CODE ANN. tit. 6, § 15-1208 (Michie Supp. 2002); N.Y. TAX LAW § 617 (McKinney Supp. 1999); TEX. REV. CIV. STAT. ANN. art. 6132b-3.08(d) (West Supp. 2003).

55. *See, e.g.*, sources cited *supra* note 54.

denied to corporations.[56] LLPs do not face the burden of double-taxation associated with corporate earnings.[57]

The liability structure of LLPs also exempts partners from the most detrimental characteristic of traditional partnerships — unlimited liability.[58] The LLP form effectively shields partners' personal assets from verdicts against the law firm.[59] Under the traditional partnership theory referenced in Justice Powell's concurrence, lawyers joined together to benefit from the economies of scale created by a pool of labor, but each was burdened by the potential threat of personal liability for the debts of the partnership.[60] Under the LLP business model, partners obtain the most valuable benefits of the partnership

56. In accordance with the principles of pass-through taxation, partners are only taxed individually according to their earnings. *See, e.g.*, DEL. CODE ANN. tit. 6, § 15-1208 (Michie 2002); N.Y. TAX LAW § 617 (McKinney Supp. 1999); TEX. REV. CIV. STAT. ANN. art. 6132b-3.08(d) (West Supp. 2003). The Tax Reform Act of 1986 significantly increased the popularity of limited liability firms by eliminating the dual tax structure applied to incorporated businesses. The double-taxation structure involves taxing the income of the corporation and the dividends distributed to individual shareholders. *See* WILLIAM KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 102-03 (7th ed. 2000).

57. *See, e.g.*, sources cited *supra* note 54.

58. *See, e.g.*, DEL. CODE ANN. tit. 6, § 15-306 (Michie Supp. 2002); N.Y. PARTNERSHIP LAW § 26(b) (McKinney Supp. 2002).

59. *See, e.g.*, sources cited *supra* note 58; *see also* Hamilton, *supra* note 52, at 1067.

> A basic principle of general partnership law is that each individual partner is personally liable for all partnership obligations to the extent they exceed the assets of the partnership. This means not only that innocent partners may be required to discharge partnership obligations from their personal assets, but also they may be required to make contributions from their personal assets to the partnership to enable it to discharge all of its liabilities.

Id.

60. The traditional partnership referenced in Justice Powell's concurrence is based on the aggregate theory of partnership, a model that treats the partners and the partnership as a single unit because of the shared liability and the automatic dissolution that results if one partner leaves the firm. *See supra* notes 45-46 and accompanying text; *see also* UNIF. P'SHIP ACT § 18(e), 6 U.L.A. 213 (1914 Supp. 1994) ("The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property."). Arguably the entity theory, a model that presumes partners are individuals, separate, and distinct from the firm as an institution, would better characterize modern firms. *See* UNIF. P'SHIP ACT § 601, 6 U.L.A. 280 (Supp. 1994) (substituting the term disassociation for dissolution and implying that the withdrawal of a general partner does not require the dissolution of the partnership); *see also* Randall J. Gingiss, *Partners as Common Law Employees*, 28 IND. L. REV. 21, 21-22, 25-36 (1994) (discussing how "[t]he [Revised Uniform Partnership Act], which explicitly endorses the entity theory, upsets the conclusions that are based on the aggregate theory of the [Uniform Partnership Act]"). In fact, relying on the entity theory of partnership, one commentator proposes that the United States adopt the United Kingdom model, which affords the same protection to partners and non-partners claiming to be victims of sex or racial discrimination. *See id.* (citing the Sex Discrimination Act, 1975, c. 65, § 11 (Eng.); Race Relations Act, 1976, c. 74, § 10 (Eng.)). According to the Comment to the RUPA, a partner can and should be able to bring discrimination claims against a partnership. *See* UNIF. P'SHIP ACT § 405, 405 cmt. 2, 6 U.L.A. 280 (Supp. 1994).

form without exposure to the costs associated with other partners' negligence, wrongful acts, or misconduct.[61]

A comparison of the structure of the LLP model and the structure of the traditional partnership model that Justice Powell referred to in *Hishon* reveals notable distinctions. Justice Powell reasoned that "relationship[s] among law partners differ[ed] markedly from that between employer and employee," because partners in traditional partnerships agreed to joint risk-exposure of their personal assets.[62] In law firms organized as LLPs, however, the partners face neither the extensive debt obligations nor the threat of dissolution if an individual partner exits the firm.[63] The partners are not concerned about the effects of firm debts on their personal financial assets — as the firm's liabilities no longer reach personal wealth.[64] Moreover, the LLP model, unlike the traditional partnership model, does not presume an invitation to join the partnership guarantees one a tenured position in the firm. Under the revised Uniform Partnership Act, one partner's exit does not impact the firm's continued existence.[65] As a result, firms operating as LLPs are no longer forced to dissolve if an individual partner leaves the firm. Partners practicing law in modern firms may be subject to termination[66] — a disfavored option very rarely invoked to resolve disputes among partners in a traditional partnership.

2. *Changes in the Internal Hierarchy of the Firm*

The traditional law firm partnership model developed during the early twentieth century. In the 1900s, elite law firms began to adopt the internal structure and promotion system associated with the New York firm of Cravath, Swaine & Moore.[67] These firms, organized

61. *See* UNIF. P'SHIP ACT § 405, 405 cmt.2.

62. Hishon v. King & Spalding, 467 U.S. 69, 79 (1984) (Powell, J., concurring).

63. *See supra* notes 60-61 and accompanying text.

64. *See supra* note 60 and accompanying text.

65. *See supra* notes 60-61 and accompanying text.

66. For an illustration of a law firm adopting a business model and drafting a partnership agreement that permits the demotion and termination of partners, see *infra* notes 108-116 and accompanying text. Partners in large, elite firms may remain in competition with their colleagues after promotion to partner and may be subject to reprimand for failure to meet the demands that accompany promotion. *See* David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. STUD. LEGAL ETHICS 15, 15-16 (1999) (arguing that "[i]n today's competitive environment partnership is no longer the equivalent of tenure"); Wendell Lagrand, *Getting There, Staying There*, A.B.A. J., Feb. 1999, at 54 (discussing the potential for partners to be removed).

67. In the early twentieth century, Paul Cravath began to promote the practice of hiring men with the most impressive academic credentials from Columbia and Harvard and training them for promotion to partnership. MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 9-11 (1991) [hereinafter TOURNAMENT]. This system became widely known as the "Cravath System." Scholars believe Paul Cravath's experience during his clerkship and his tenure as a partner in

almost exclusively as general partnerships, maintained a small number of partners who managed the firm and solicited business, and recruited a large staff of associates from the most selective law schools in the nation.[68] Each year, the partnership invited a handful of the most respected senior associates to join their ranks at the zenith of the profession.[69] Senior associates who failed to receive an invitation to join the firm as a partner were expected to resign.[70] The race to the top, often referred to as the promotion-to-partner tournament,[71] proved a successful business model for firms.[72] The model allowed law firms to minimize the prohibitive information and agency costs of monitoring the productivity of individual associates.[73] Associates' compensation included both a nominal reward in the form of salary and a chance to compete against fellow associates for an invitation to join the partnership.

The internal structure of many contemporary law firms differs markedly from the organizational hierarchy in the traditional partnership referenced in Justice Powell's concurrence. Pressure from within the domestic labor market has driven firms to increase associate salaries and to expand the size of the firm.[74] According to one commentator:

the offices of his mentor Walter S. Carter inspired the creation of the "Cravath system." *Id.* Professors Galanter and Palay view the system as the origin of the modern day tournament of associates competing for partnership within elite law firms. *Id.*

68. *Id.*

69. *Id.* at 26-32.

70. *Id* at 9.

71. *Id.*

72. Applying the promotion-to-partner tournament theory, law firms rewarded associates based on the relative value of their work performance compared to that of their peers. TOURNAMENT, *supra* note 67, at 10. Under the Cravath system, supervising partners evaluated associates on their relative ability to generate a large volume of high-quality work product. *Id.*

73. *Id.* at 23. Transaction costs rise when partners shirk. *Id.* Individual partners have "substantial incentives to renege on their obligations [to work]" and free ride on the profits generated by the partnership. Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 321 (1985) [hereinafter Gilson & Mnookin, *Human Capitalists*]. Commentators note that firms incur greater information costs when they must monitor self-interested behavior and gather data on the performance of each partner. *Id.* Total agency costs rise when the methods for obtaining information become more expensive, either because there are persons being monitored or because the persons being monitored are no longer concentrated in a single geographic location. *See* Devin Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1273 (2000) ("[E]xerting day-to-day control over employees' actions is too expensive [and] counter-productive for the employer.").

74. Michael Goldhaber, *Biggest Firms in the Nation Fare the Best*, N.Y. L.J., Nov. 30, 2000, at 1 (2000).

> [b]etween 1980 and 1988 the number of law firms with more than 100 lawyers grew by 196%, the number of firms with 51-100 lawyers grew by 91%, and the number of firms with 21-50 lawyers grew by 68%. In contrast the number of law firms overall increased by 11% ... From the period 1980 to 1988 alone, the number of lawyers in law firms with more than fifty attorneys more than doubled, from some 27,018 to some 75,912.[75]

Exponential growth in the number of students entering law school and the resulting rise in the number of associates in the labor market forced law firms to reevaluate traditional organizational systems.[76] As a consequence, firms have adapted the tournament to meet their changing needs.[77] These adaptations increased the incremental rewards along the track to partnership, ultimately lengthened the track to partnership, and made the position more difficult to attain.[78]

Firms responded to the larger associate classes by creating additional steps in the career path to partnership.[79] Under the up-or-out strategy of the tournament theory employed by traditional law firms,

---

75. Robert Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 354-73 (1994) (citing Barbara A. Curran & Clara N. Carson, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1988, at 12 (Supp. 1991)). The changes in the legal profession are, in part, the result of changes in the national economy. According to Nelson, the influence of international trade and the shift from production industries to service industries following World War II resulted in two major changes in the legal profession: "1) substantially increased rates of growth by corporate law firms and corporate legal departments, and 2) the significant restructuring of the market for corporate legal services." *Id.* at 354.

76. *Id.* at 368.

77. *See, e.g.*, Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567, 567 (1989) [hereinafter Gilson & Mnookin, *Coming of Age*].

78. *See id.* at 587-92; *see also* David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1587 (1998) (explaining that, due to the changes in the partnership track and the increased volume of associates reducing the likelihood that one will make partner, many associates are no longer participating in the tournament, but rather, perceive their experience at the firm as a temporary opportunity to obtain highly-coveted training). According to commentators Wilkins and Gulati, associates have a declining interest in competing in the tournament. *See id.* They offer the following observations as points of departure for their analysis:

> 1) Many associates are not competing in the tournament; 2) firms do not give every associate an equal chance of winning; 3) the interests of individual partners diverge from those of the firm [permitting individual partner's personal interest in the success of a particular associate to carry greater weight in the decision to promote than the associate's actual contribution to the firm]; 4) the tournament is not divided into two (and only two) distinct stages; 5) partnership is not awarded as a reward for past performance; and 6) firms do not seek to make the tournament's rules and outcomes transparent to associates.

Id.

79. *See* Gilson & Mnookin, *Coming of Age*, *supra* note 77, at 567 (explaining how elite partnerships evolved "from a structure in which there were only two categories of lawyer — partner and associate").

after the appropriate period of apprenticeship the firm either invited an associate to join the partnership or suggested she pursue other career options.[80] Today, law firms recognize the value of maintaining a small pool of highly-skilled and well-trained senior associates.[81] By creating positions such as "of counsel," "permanent associate," "special counsel," "non-equity partner," "staff lawyer," and "junior partner," firms have signaled their willingness to maintain a pool of very senior associates without conveying upon them the most precious rights associated with partnership.[82] The creation of this distinct group of senior associates marked one major change in the hierarchy within traditional partnerships.

The stratification within the partnership itself represents another significant difference between the traditional law firm partnerships envisioned in Justice Powell's concurrence and modern law firms.[83] The management structure in these firms may include full-time and part-time partners,[84] equity and non-equity partners,[85] partners that share equally in the profits of the firm or income partners who draw

80. *See* Hishon v. King & Spalding, 467 U.S. 69, 72 (1984) ("Once an associate is passed over for partnership at [King & Spalding] . . . the associate is notified to begin seeking employment elsewhere."); *see also* TOURNAMENT, *supra* note 67, at 28 ("One of the basic elements of the structure of the big firm is the 'up-or-out' rule, which prescribes that after a probationary period the young lawyer will either be admitted to the partnership or will leave the firm.").

81. *See* Gilson & Mnookin, *Coming of Age*, *supra* note 77, at 576 n.26. The economic rationale for expelling senior associates seems to contradict basic agency and economic theory. Once an associate has completed several years at the firm, "the firm has learned enough about the associate's abilities and attributes to use them effectively. The associate then provides profit for the firm to the extent amounts billed and collected for the associate's time exceed the associate's salary plus related overhead." *Id.* Pointing to the economic inefficiency of the system, Gilson and Mnookin present a compelling critique of firms' rationale for continuing to rely on the up-or-out system. *Id.* at 572-74.

82. *See* Mary Ann Galante, *Firms Look Closer at How to Create Lawyer Categories: Permanent Associate, Salaried Partner Ideas Support and Ire*, L.A. DAILY J., Aug. 22, 1983, at 1; Stephen A. Glasser, *Firm Explores New Partnership Category*, LEGAL TIMES, Feb. 14, 1983, at 12; Deborah Graham, *New "Senior Attorney" Program Draws Attention at Davis Polk*, LEGAL TIMES, Feb. 28, 1983, at 3; Kirk Hallam, *Big Firms Search for Alternatives to Traditional Form: Specialty Partners Receive Promotions But Not Partnerships*, L.A. DAILY J., Mar. 18, 1983, at 1; H. Edward Wesemann, *The Nonequity Tier: Firms May Create Long-Term Problems By Putting People in 'Limbo,'* " LEGAL TIMES, Feb. 3, 2003, at 40.

83. As mentioned above, a law firm may choose a business model different from the partnership model, and thus, the management structure could involve lawyers bearing titles such as director, president, or shareholder. *See supra* Part I.A.1.

84. In effort to accommodate alternative lifestyles and the diverse needs of modern professionals, many law firms created opportunities for part-time partners. *See* Patricia Barnes, *From Outsider to Insider: More Firms are Appointing Women Managing Partners*, A.B.A. J., Nov. 1996, at 24.

85. *See* Wilkins, *supra* note 66, at 16 (noting the difference between equity and non-equity partners). The equity partners generally receive a portion of the profits generated from their contribution to the firm's business while non-equity partners "like associates, continue to be paid a salary." *Id.*

salaries and receive bonuses,[86] partners with the power to vote on significant issues and partners who lack the authority to vote on those same issues.[87] Much like the changes in the associate ranks, these structural changes permit the firm to adopt a diverse array of compensation policies and to exercise greater selectivity in admitting individuals into the highest ranks of the firm.

Modern trends indicate that firms now distribute wealth among partners based on each partner's marginal productivity.[88] During the 1970s and 1980s, many firms eliminated traditional lock-step compensation methods and adopted compensation methods based on the partner's contribution to the overall profits of the firm.[89] Firms have substituted the traditional policies of profit-sharing based on principles of equity for policies based on an "eat what you kill" principle.[90] Profit-based compensation for partners creates a quasi-tournament within the ranks of elite law firm partnerships.[91] With the increasing

86. *Id.*

87. *See* Geri S. Krauss, *Partnership Roles Vary Widely From Firm to Firm*, N.Y. L.J., Jan. 27, 2003, at S7 (describing the different types of partners that may exist within a single firm and the varying financial contributions and roles in management associated with these categories). The management structure of the law firm of Sidley, Austin, Brown and Wood ("Sidley") offers an example of a modern law firm partnership in which partners' participation in the decisionmaking process is limited. *See* EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002). The partners at Sidley do not exercise the authority to set compensation, to vote members out of the partnership, or to select members of the powerful executive committee that makes such important decisions. *Id.* at 699. For a more detailed discussion of the management structure of Sidley, see *infra* Part I.B.

88. *See* Gilson & Mnookin, *Human Capitalists*, *supra* note 73, at 321 (identifying three impediments to the traditional compensation model in large law firm partnerships as "*shirking*, a partner's failure to do his 'fair share' of the work; *grabbing*, a partner's extraction of a larger than previously agreed share of firm profits by threatening to depart; and *leaving*, a partner's departure from the firm with clients and business in tow"); *see also* Glasser, *supra* note 82, at 12; Graham, *supra* note 82, at 3.

89. *See, e.g.*, Gilson & Mnookin, *Human Capitalists*, *supra* note 73, at 341. Partners successful at attracting new clients to the firm and continuing to develop new relationships with existing clients are referred to as "rainmakers." Rita Jensen, *The Rainmakers*, NAT'L L.J., Oct. 5, 1987, at 1.

90. *See* TOURNAMENT, *supra* note 67, at 52 (citation omitted); *see also* Gilson & Mnookin, *Human Capitalists*, *supra* note 73, at 346-47. Much like the promotion-to-partner tournament occurring among associates, the stratification of the partnership improves efficiency within the partnership by creating incentives for partners to compete to increase the firm's clientele or attract new business opportunities from existing clients. *See* Ken Hildebrant, *Capitalism for Lawyers: It Takes More than a Brain to Keep a Firm Afloat*, N.Y. L.J. Sept. 19. 2000, at 5 ; *see also* Wilkins, *supra* note 66, at 16; Wendell Lagrand, *Getting There, Staying There*, A.B.A. J., Feb. 1999, at 54.

91. *See* Wilkins & Gulati, *supra* note 78, at 1616.

> Further, in addition to fighting to retain their hard-earned partnership positions, partners also compete to move up within the hierarchy of partners. This competition between partners is most visible where people compete for positions on the committees (executive, management, compensation, etc.) that manage the key business decisions at large firms. As such, individual partners are likely to have interests that are at least in tension, and potentially at odds with the interests of the firm as a whole.

Id. (citation omitted).

use of contribution-based compensation and the growing number of partners, larger firms began to construct internal decisionmaking structures in which an individual partner's role in management or seniority in the firm correlates to that partner's financial prominence in the firm.[92]

Many corporate law firm partnerships are no longer the small, closely-held businesses Justice Powell referred to in his concurrence.[93] Partners within a particular law firm are not as geographically concentrated as in the past. In response to the globalization of the economy, law firms have expanded, opening offices across the nation and around the world.[94] As cross-border transactions and litigation become more commonplace, law firms compete to provide for clients' global business needs.[95]

By identifying attractive merger candidates with specialized practice areas and an established client base, many firms have used the merger process to develop expertise in a new market.[96] Firms have

92. *See* Hildebrant, *supra* note 90, at 5; *see also* Wilkins, *supra* note 66, at 16 (stating that "[p]artners who make the biggest contribution to the bottom line and, therefore, receive the largest slice of firm profits, also tend to have significant influence over firm management.").

93. In *Simpson v. Ernst & Young*, 100 F.3d 436, 445-46 (6th Cir. 1996) (Daughtrey, J., concurring), the concurrence emphasized the change in partnership structure:

> In an era of small, closely-operated partnerships, it may have been logical to conclude that an employer/partner could not and would not discriminate in employment decisions against himself or herself or against a close friend and business associate. In a world-wide organization like Ernst & Young that employs almost 2200 "partners," however, the nominal co-owners of the company are, by necessity, so far removed from the seat of actual power as to be subject to the reach of the invidious acts that employment discrimination statutes seek to remedy.

Id. at 445-46.

94. MARK STEVENS, POWER OF ATTORNEY: THE RISE OF THE GIANT LAW FIRMS 14 (1987). By merging, firms strengthen the breadth and depth of services they can offer clients. Several mergers with New York and Washington, D.C. firms allow for increased participation in global activity. *See, e.g.*, Bruce Balestier, *Atlanta's Alston & Bird Merges with Walter Conston*, N.Y. L.J., January 9, 2001, at 1; *see also* Goldhaber, *supra* note 74, at 1; Anthony Lin, *Sonnenschein Plans to Acquire RubinBaum*, N.Y. L.J., May 13, 2002 at 1 [hereinafter *Sonnenschein*] (discussing the merger of Chicago's Sonnenschien Nath & Rosenthal with New York's RubinBaum and the merger of Chicago's Sidley & Austin with New York's Brown & Wood).

95. *See, e.g.*, *Jones Day to Acquire Gouldens of Britain*, WALL ST. J., Feb. 7, 2003, at B4 (discussing American law firm Jones Day's announcement to acquire the United Kingdom law firm Goulden, and, therefore, become the world's sixth largest law firm). The United Kingdom law firm of Clifford Chance's union with New York's Roger & Wells, Germany's Puender Volhard Weber & Axster merger with Italy's Grimaldi e Associati present additional examples of global firms created through the merger process. Konstantin Richter, *Clifford Chance Votes to Merge with Grimaldi*, WALL ST. J., Nov. 6, 2000, at A25.

96. *See, e.g.*, Anthony Lin, *California Law Firms Want Bite of the Big Apple: New York is Crucial to Growth Strategies*, N.Y. L.J., May 28, 2002, at 1 [hereinafter Lin, *California Law Firms*]; *see also* STEVENS, *supra* note 94, at 13 (describing how Skadden, Arps, Slate, Meagher & Flom opened an office in Los Angeles to capture a greater market share of the West Coast mergers and acquisitions business). Firms seeking to merge may select a potential target based on the target's specialization in an area of law, such as antitrust securities, or

increased their business opportunities by merging with identified targets or opening offices in different parts of the country and throughout the world.[97] In the late 1980s and early 1990s, mid-sized firms began to disappear.[98] The rapid consolidation of the legal market can be characterized as *Darwinian.*[99]

Several courts have followed Justice Powell's rationale without giving proper consideration to the relative power held by the partner alleging a violation of Title VII and, therefore, have unfairly disadvantaged parties susceptible to discrimination. In defining who qualifies as an employee for the purposes of Title VII, the Court must consider the varying levels of power partners exercise in modern firms and permit partners to fall within the definition of employee. An examination of the Equal Employment Opportunity Commission's ("EEOC") investigation of discrimination claims made by partners of the law firm Sidley, Austin, Brown & Wood ("Sidley") illustrates the internal and external structural changes discussed above and explains how the impact of these changes undermines Powell's rationale for privileging partnerships accused of violating Title VII.

B. *The Complexity of the Partner-Employee Debate in the Modern Law Firm*

In 1999, Sidley demoted thirty-two equity partners to the position of "counsel."[100] In response to claims that the adverse employment actions were motivated by consideration of an impermissible characteristic, the EEOC initiated an investigation of the firm's demotion decisions.[101] Upon Sidley's refusal to cooperate, the EEOC petitioned a federal district court judge to issue a subpoena deuces tecum to order the firm to release documentation regarding the partners' potential status as employees.[102] Sidley argued that the demoted parties were

intellectual property. The acquired firm enhances the depth of its services by bringing teams of attorneys with significant experience and a client base in these specialized areas.

97. Goldhaber, *supra* note 74; *Sonnenschein*, *supra* note 94 (describing Chicago firms' efforts to merge with various New York firms); *see also* STEVENS, *supra* note 94, at 160-65 (describing Baker & McKenzie's rise as an international law firm with offices in South America, Europe, Mexico, Canada, Asia and Australia).

98. *See* Amy Dockser, *Midsize Law Firms Struggle to Survive*, WALL ST. J., Oct. 19, 1988, at B1.

99. Marc Galanter & Thomas Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747, 748 (1990). In this article, Galanter and Palay argue that growth is inherent in the structure of law firms. *Id.* at 755. The article posits that the internal structure, partners, and associates, who are incipient partners, interact in a manner that forces firms onto a trajectory in which growth is "inevitable." *Id.* at 755-56 n.32.

100. *See* EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 698 (7th Cir. 2002).

101. *Id.* at 699.

102. *Id.* at 700.

"real," meaning bona fide, partners and their demotions resulted from poor job performance.[103] To support its argument that the parties were partners and not employees, Sidley presented evidence that the former partners had contributed to the firm's capital structure; each partner had a capital account with the firm averaging about $400,000.[104] In addition, the parties were liable for the firm's debt in proportion to their capital investment.[105] The factors underlying the demotion decisions were irrelevant, Sidley argued, because the parties' status as former partners rendered them ineligible to claim employee status and prevented them from invoking the protection of antidiscrimination laws.[106]

Like many of the modern firms discussed above, Sidley has changed significantly. The firm is no longer the small partnership founded in 1866 by lawyers with a shared financial vision and similar ethical and professional values.[107] The firm's recent merger with Brown & Wood increased the total number of partners to more than 500.[108] A self-perpetuating executive committee comprised of thirty-six partners basically controls the firm.[109] The executive committee is described as self-perpetuating because only those partners on the executive committee can appoint future members to the committee.[110] The members of the partnership have "no control, direct or indirect, over [the executive committee's] composition."[111] The committee delegates some power to subordinate committees that make decisions regarding the hiring, firing, and compensation of associates.[112] The executive committee controls partner appointments to those subordinate committees and ultimately checks the subordinate committees' decisions.[113] The executive committee has the power to promote partners, to demote partners, and to alter their compensation.[114] The committee determines partners' salaries based on a percentage point scale set according to the firm's overall profits.[115] The merger with Brown &

103. *Id.* at 699.

104. *Id.*

105. *Id.*

106. *Id.*

107. *See, e.g.*, Sidley, Austin, Brown & Wood website, *at* http://www.sidley.com/about/about.asp (last visited Mar. 2, 2003).

108. *Sidley*, 315 F.3d at 702.

109. *Id.* at 699.

110. *Id.*

111. *Id.* at 703.

112. *Id.* at 699.

113. *Id.*

114. *Id.*

115. *Id.*

Wood is the only firm-wide issue on which all partners have voted in the last twenty-five years, and that vote took place after the EEOC began its investigation.[116] Thus, the real power in the firm is concentrated in the hands of the executive committee.[117]

When lawyers agree to create a law firm and organize the business as a general partnership, Justice Powell reasoned, there is an implicit understanding that decisions regarding division of profits, assignments, participation in civic and political activities, acceptance of new clients, retirement programs, and expansion policies will be made by common agreement.[118] Implicitly, Justice Powell's rationale suggests that partners do not require the protection of antidiscrimination legislation because partners have access to tools that enable them to dismantle discrimination levied against them. The Sidley example illustrates the incongruity between Justice Powell's assumptions about the structure of partnerships and the nature of relations among partners. Justice Powell indicates that a firm's choice to adopt a decisionmaking structure based on common agreement signals the egalitarian nature of partnerships and each partner's ability to impact policies or decisions she opposes.

According to the record of the EEOC investigation, Sidley partners did not make decisions by common agreement.[119] Rather, the firm, relied on the two-tiered committee structure in which the executive committee made all of the most important decisions without consulting the general members of the partnership.[120] At the time the EEOC investigation commenced, Sidley had over 1400 lawyers working in offices in thirteen different cities, including London, Hong Kong, Tokyo, Beijing, and Shanghai.[121] The appellate court reviewing the EEOC's petition declared that the thirty-two demoted partners "were defenseless" and that the allocation of power conceding all authority to the executive committee left the partners with "no power over their fate" within the firm.[122]

116. *Id.*

117. *Id.*

118. Hishon v. King & Spalding, 467 U.S. 69, 79-80 (1984) (Powell, J., concurring).

119. *Sidley*, 315 F.3d at 703.

120. *Id.*

121. Sidley, Austin, Brown & Wood website, *at* http://www.sidley.com/offices/offices.asp (last visited Mar. 2, 2003) (The firm, "one of the largest in the United States," has "about 1400 lawyers practicing on three continents.").

122. EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 704 (7th Cir. 2002); *see also* Galanter & Palay, *supra* note 99, at 755-56 ("Informality recedes, collegiality gives way, notions of public service and independence are marginalized, and the imperative of growth collides with notions of dignified passivity in obtaining business."). According to one appellate court reviewing the question of partners as employees, big partnerships are like corporations: "Wall Street law firms . . . are often large, impersonal, highly structured enterprises of

Despite the fact that Sidley maintains the exact business form referred to in his concurrence, one can easily distinguish Sidley from the closely-held business Justice Powell describes. As demonstrated by the demotions in *Sidley*, in a modern law firm, all persons bearing the title "partner" may not participate in the most fundamental decisions regarding the firm and the conditions of their employment. Contrary to Justice Powell's assumptions, the partnership agreement creating the firm may explicitly authorize a particular group or committee to select candidates for promotion and to terminate partners without the consent of general members of the partnership.[123] The *Sidley* investigation illustrates the potential for hierarchy among partners in the firm and the diverse levels of power that a firm may delegate to partners.[124] After an examination of the facts underlying the EEOC investigation, permitting modern firms to benefit from the special privileges accorded traditional law firm partnerships seems perverse. Justice Powell's concurring opinion in *Hishon* must be read in the context of the burgeoning antidiscrimination jurisprudence, and the Court's subsequent suspicion (and later, outright rejection) of the argument that partnerships are sacred and beyond the ambit of antidiscrimination law.[125] By failing to recognize fundamental changes in the nature and organization of law firms as businesses, courts allow law firms to evade the antidiscrimination requirements of Title VII. Law firm partner-

essentially perpetual duration." Wheeler v. Hurdman, 825 F.2d 257, 268 (10th Cir. 1987) (quoting Bellis v. United States, 417 U.S. 85, 93-94, (1974)).

123. Law firm partnerships are generally formed by the signing of a partnership agreement. The terms of the partnership agreement can invest in a particular group or committee the power to dismiss partners. *See* Heller v. Pillsbury Madison & Sutro, 58 Cal. Rptr. 2d 336, 341 (1996) (citing to the firm's 1992 Partnership Agreement which stated that "the firm's Executive Committee 'shall be the policy making and governing authority of the Firm'. . . ." and shall have the power to expel partners from the firm). In recent years, numerous partners have filed suit against partnerships raising claims of improper dismissals. *See, e.g.*, Holman v. Coie, 522 P.2d 515 (Wash. Ct. App. 1974) (upholding a law firm's decision to expel two partners where the partnership agreement included provisions for terminating partners).

124. *See supra* notes 108-116 and accompanying text.

125. The majority opinion in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), and the plurality opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), indicate the Court's departure from a jurisprudence privileging partnerships based on assumptions about the relationships among partners. Similar to *Hishon*, *Hopkins* involved an associate's claim that her employer, a partnership, discriminated against her in deciding not to promote her to partner because of her sex. *Hopkins*, 490 U.S. 228 (1984). *Hopkins* involved a well-known accounting partnership, Price Waterhouse. *Id.* For the purposes of this Note, the author includes discussion of large accounting partnerships because their organizational structure and promotion processes closely mirror those of large law firm partnerships.

In both *Hishon* and *Hopkins*, the Court acknowledged that partnerships use the tournament model as a recruiting device to induce young associates to agree to work in a highly strenuous professional environment for several years in exchange for consideration for promotion on a "fair and equal" basis. *See, e.g.*, *Hishon*, 467 U.S. at 74 n.6. When partnerships make decisions based on factors that contravene antidiscrimination law, their decisions should receive no special protection. *See infra* notes 191-194 and accompanying text.

ships are not the small, intimate joint ventures of the past. Partners in a law firm may exercise differing levels of authority and control, work in different cities or on different continents, and may be vulnerable to discriminatory acts perpetuated by other partners or the decision-making authority of the firm.

II. TESTS DEVELOPED BY LOWER COURTS TO DETERMINE A PARTNER'S STATUS

Lower courts have adopted either the per se test or the economic realities test to determine whether a partner qualifies as an employee. Part II argues that these methods reflect Justice Powell's antiquated assumptions about the financial structure and management hierarchy within law firms.[126] Section II.A examines the per se test and argues that the test engenders arbitrary results. Section II.B considers the most widely adopted mechanism for resolving the debate — the economic realities test — and argues that this method also privileges law firms based on misperceptions about the management structure and financing of these firms.

A. *Applying a Bright-Line Rule to Blurry Distinctions: The Fallacies of the Per Se Rule Distinguishing Employers and Employees*

In one of the earliest cases exploring the partner-employee question, *Burke v. Friedman*,[127] the Seventh Circuit applied a per se rule explicitly excluding partners from the statute's definition of employee.[128] *Burke* involved a female partner's allegation that the defendant partnership inappropriately considered her sex in the decision to discharge her.[129] The *Burke* court reasoned that partners do not qualify as employees under Title VII because the employment categories in-

126. *See, e.g.*, Serapion v. Martinez, 119 F.3d 982, 986 (1st Cir. 1997) (relying on language from Justice Powell's concurring opinion in *Hishon*); *Hyland I*, *supra* note 6, 794 F.2d 793, 797 (2d Cir. 1986) (same).

127. 556 F.2d 867 (7th Cir. 1977).

128. *Burke*, 556 F.2d at 868. While *Burke* involved an accounting partnership, the rule articulated in this case has been applied broadly to partners in other types of businesses. *See, e.g.*, EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1177-78 (7th Cir. 1984) (applying a per se rule to exclude attorneys who were shareholders in a law firm organized as a professional corporation, and holding that the shareholders, like partners, could not be counted as employees to determine that the defendant met the statutory requirements to be considered an employer).

129. The court did not reach the merits of Burke's claim, but rather dismissed the suit for lack of jurisdiction. *Burke*, 556 F.2d at 870. According to the text of the statute, an employer is not subject to liability under Title VII if the employer has less than fifteen employees. 42 U.S.C. § 2000e(b) (2000). The court explored the question of Burke's status as an employee in order to determine whether the firm had the requisite number of employees to qualify as an employer under Title VII. *Burke*, 556 F.2d at 869.

volve mutually exclusive groups.[130] One could not, the court explained, be both a proprietor and an employee of the same business.[131] The *Burke* court reasoned that partners who are owners and managers of the business and the persons who comprise the partnership could not be considered employees.[132]

Other circuits have determined liability under Title VII based on the business form selected by the defendant law firm. In *Hyland v. New Haven Radiology Associates*,[133] the Second Circuit addressed the issue of whether to extend the rule excluding partners from the definition of employee to executives in businesses not organized as partnerships.[134] After explaining that the touchstone of the inquiry in *Hishon*

130. *Burke*, 556 F.2d at 869. Justice Powell's concurrence in *Hishon* reflects this same rationale for excluding partners from the definition of employee. 467 U.S. at 79 (Powell, J., concurring) ("The reasoning of the Court's opinion does not require that the relationship among partners be characterized as an 'employment' relationship to which Title VII would apply. The relationship among law partners differs markedly from that between employer and employee — including that between the partnership and its associates.").

131. *See Burke*, 556 F.2d at 869 (stating "we do not see how partners can be regarded as employees rather than employers who own and manage the operation of the business"); *see also Hyland I*, *supra* note 6, 794 F.2d 793 (2d Cir. 1986) (reasoning that "the benefits of antidiscrimination statutes . . . do not extend to those who are properly classified as partners"); *see also* 4 JOSEPH G. COOK & JOHN L. SOBIESKI, JR., CIVIL RIGHTS ACTIONS ¶21.08[E] (noting that "[w]hile the employees of a partnership are protected by Title VII, the partners themselves are not"). *But see* Goldberg v. Whitaker House Coop. Inc., 366 U.S. 28, 32 (1960) (holding that shareholders in knitwear cooperative were employees under the Fair Labor Standards Act, the Court explained that "[t]here is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship").

132. *See Burke*, 556 F.2d at 869; *see also* Wheeler v. Hurdman, 825 F.2d 257, 276 (10th Cir. 1987) (explaining that "in general the total bundle of partnership characteristics sufficiently differentiates between [partners and non-partners so as] to remove general partners from the statutory term 'employee' ").

133. *Hyland I*, *supra* note 6, 794 F.2d 793 (2d Cir. 1986). The plaintiff, an officer and director in a group of medical doctors organized as a professional corporation, filed an ADEA claim alleging that his forced resignation was motivated by discrimination. *Hyland I*, *supra* note 6, 794 F.2d 793 (2d Cir. 1986). Prior to the Second Circuit review, a Connecticut District Court found the medical group "amount[ed] to a partnership in all but name," and that Hyland was, therefore, a partner in the enterprise. Hyland v. New Haven Radiology Assocs., 606 F. Supp. 617, 621 (D. Conn. 1985) [hereinafter *Hyland II*]. While *Hyland* involved an ADEA claim by a medical doctor, the reasoning of the court reached law firms organized as partnerships or as other types of business. *See, e.g.*, Rosenblatt v. Bivona & Cohen, P.C., 969 F. Supp. 207, 214 n.5 (S.D.N.Y. 1997) ("Because Title VII, the ADA and the ADEA set forth identical definitions of the term 'employee,' courts generally cross-reference discussions of the standard required by the statutes."); *see also supra* note 19.

134. *Hyland I*, *supra* note 6, 794 F.2d at 797 ("Justice Powell's concurring opinion expressed the view that Title VII does not cover the *members* of a partnership."). The Second Circuit's recent decision in *EEOC v. Johnson & Higgins, Inc.* suggests that the court intends to apply a rule less rigid than that articulated in *Hyland*. EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1538 (2d Cir. 1996). The *Johnson & Higgins* court paid lip service to the economic realities test and asserted that its holding was appropriate because the director's role, as viewed through the lens of common law agency principles, was that of an employee. *Id.* at 1537-38. Yet, any argument that the Second Circuit has abandoned the *Hyland* per se rule is easily refuted by looking to the court's own language indicating that a party's title might be sufficient to sever the link between employee and employer. *Id.* at 1540 ("J & H can comply with the [statute] by severing the link between the individual's employee

was the firm's decision to organize as a partnership, the *Hyland* court held that the exemption *only* applied to partnerships and no consideration should be given to similarities between the defendant's business form and the partnership business form.[135] The court's holding created a per se rule based on the form of the business accused of discrimination.[136] According to the *Hyland* court's reasoning, directors and managers in law firms organized as professional corporations qualify as employees for the purposes of Title VII, whereas partners exercising similar levels of responsibility in law firms organized as partnerships are denied employee status.[137] Courts following the per se rule adopted in *Hyland*, begin analysis of the partner-employee question by determining whether a "true partnership" exists.[138]

The per se rule fails to offer a viable solution to the partner-employee question. First, courts applying the per se rule misread Justice Powell's concurrence in *Hishon.* While Justice Powell's concurrence does suggest that partners should not be permitted to bring discrimination claims against general partnerships, it also warns lower

---

status and his director status. Once so severed, non-employee directors are not subject to the [statute] as employees."); *see also id.* at 1538 ("Accordingly, *Hyland* remains good law, and J & H is precluded from arguing that it is exempt from the ADEA because it is a *de facto* partnership.").

135. *Hyland I*, *supra* note 6, 794 F.2d at 798 (holding that a firm's decision to select the corporate business form "precludes any examination designed to determine whether the entity is in fact a partnership" or whether the exemption should be extended to the defendant entity); *see also* Wells v. Clackamas Gastroenterology Assocs., 271 F.3d 903, 905 (9th Cir. 2001), *cert. granted*, 123 S. Ct. 31 (U.S. Oct. 1, 2002) (No. 01-1435) (explaining that "because the decision to incorporate is presumably a voluntary one, there is no reason to permit a professional corporation to secure the 'best of both possible worlds' by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination.").

136. *Hyland I*, *supra* note 6, 794 F.2d at 793.

137. *Id.*; *see also* Rosenblatt v. Bivona & Cohen, P.C., 969 F. Supp. 207, 215 (S.D.N.Y. 1997). The *Rosenblatt* court explained that "where [the] defendant is admittedly a professional corporation of which plaintiff is a non-equity partner, [the] plaintiff is a corporate employee for the purposes of Title VII." *Id.* at 215.

To support the distinction between law firm partners and employees, the *Hyland* court cites Justice Powell's statement that " 'the relationship among law partners differs markedly from that between employer and employee.' " *Hyland I*, *supra* note 6, 794 F.2d at 801 (quoting Hishon v. King & Spalding, 467 U.S. 69, 79 (1984) (Powell, J., concurring)); *see also* Johnson & Higgins, Inc., 91 F.3d at 1532 (holding that the per se rule exempting law firm partners from Title VII coverage does not extend to shareholders, directors, or other managers of a corporation, without regard to the similarities between the roles of partners and shareholders, directors, or other managers); Zimmerman v. N. Am. Signal, 704 F.2d 347, 353 (7th Cir. 1983) (finding an ADEA plaintiff, a corporate vice president and one-third shareholder, was an employee).

138. *See, e.g.*, *Rosenblatt*, 969 F. Supp. at 207, 209. The plaintiff, a former non-equity partner, filed a claim alleging that the defendant law firm, organized as a professional corporation, violated Title VII when the firm decided to terminate him. *Id.* The *Rosenblatt* court held that the plaintiff was a corporate employee for Title VII purposes and permitted the plaintiff to bring a Title VII claim because a "true partnership" did not exist. *Id.* at 214-15.

courts against adopting a rule that allows firms to evade liability or to minimize exposure to the provisions of Title VII by simply calling someone a partner.[139] If courts permit titular distinctions to determine access to the protection afforded by Title VII, firms can manipulate the rule and discriminate without fear of reprisal.

Courts and commentators have criticized the per se rule on these same grounds. The First Circuit, for example, criticized the use of a per se rule, explaining that "the Title VII question cannot be decided solely on the basis that a partnership calls — or declines to call — a person a 'partner.' "[140] Due to the increasingly complex organization within law firm partnerships, a per se rule incorrectly frames the partner-employee inquiry. There is nothing inherent in the title or the position of "partner" that removes one from the potential dangers of discrimination. In addition, law firms have adopted a range of business forms, diminishing courts' abilities to make general assumptions about the level of authority a partner exercises and the partner's ability to confront a discriminatory actor within the firm.[141]

The structure of law firm partnerships has changed such that multiple tiers of authority may exist within a single partnership.[142] The tiers within the ranks of a partnership may reflect a hierarchy based on seniority or rainmaking.[143] As the *Hyland* court conceded, "certain modern partnerships and corporations are practically indistinguishable in structure and operation."[144] One commentator explains the difficulty of transitioning from initial entry to a senior position within the partnership.[145] The day after an associate becomes a partner, her job title changes, but she may still have relatively de minimis authority to affect firm policies or to challenge a more senior partner who treats her differently on the basis of sex.[146] Courts must consider the reality that

139. *Hishon*, 467 U.S. at 79 n.2 (Powell, J., concurring) ("Of course, an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.' "). It is noteworthy that the Seventh Circuit has also acknowledged the dangers of exalting titular form over the actual substance of an employment relationship. *See, e.g.*, *Zimmerman*, 704 F.2d at 352 n.4 ("We caution that employers cannot avoid having employees counted toward the jurisdictional threshold by denominating them as directors, independent contractors, or other designations besides 'employee.' The issue is whether an employer-employee relationship exists, not what title a worker holds.").

140. Serapion v. Martinez, 119 F.3d 982, 987 (1st Cir. 1997).

141. *See supra* Part I.A.

142. *See supra* Part I.A.2.

143. *See supra* notes 66-94 and accompanying text.

144. *Hyland I*, *supra* note 6, 794 F.2d 793, 798 (2d Cir. 1986).

145. Wilkins, *supra* note 66, at 16; *see also supra* notes 66-94 and accompanying text.

146. *See* Wheeler v. Hurdman, 825 F.2d 257, 261 (10th Cir. 1987) ("After being made a partner Wheeler's work remained unchanged. She had the same client load, same duties and responsibilities, same support staff, and was supervised in her work and work assignments, by the same department head."); Montgomery v. Lobman, Carnahan, Batt & Angelle, 729

partners do not possess greater authority to combat discrimination simply because of their role as owners in the firm.[147]

Second, noting that law firms now choose from a diverse array of business organizational forms created by state agency and partnership laws,[148] courts' reliance on a per se rule that exempts certain business forms from Title VII increases the danger that state law will unduly influence the application of a federal statute.[149] The determination of who qualifies to bring suit under Title VII, a federal statute, should not depend on the definitional principles of business forms as codified in state law.[150] Reliance on state agency and partnership laws, even if minimal, threatens to compromise the goals of the federal statute.[151] Federal law has nationwide implications that may be impaired if state law, which may vary greatly, controls the initial inquiry of the analysis.[152]

The irony of applying a per se rule to modern firms is now clear — lower courts' analysis of the partner-employee question focuses on titular distinctions and differences in business form while failing to consider internal and external changes in the legal market that have severely altered the relationships among partners. As illustrated in the above discussion of *Sidley*, a modern firm with more than 500 partners may choose to adopt a structure that closely resembles the corporate

So. 2d 1075, 1079 (La. Ct.App. 1999) (discussing plaintiff-partner's assertion that "she performed essentially the same duties as the associate attorneys").

147. *See* Wilkins, *supra* note 66, at 16.

148. *See infra* Part I.B discussing the changes in the business forms available to law firms through recently enacted state partnership and corporations laws.

149. *See, e.g.*, Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (disregarding the definition of employee under state law and finding that the term "employee" should be interpreted to include "former as well as current employees" because excluding former employees would threaten the term's "consistency with a primary purpose of [the] antiretaliation provisions" of the statute); Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 119 (1983) (explaining that federal laws should not be construed as to make their application dependent on state law). State partnership law may classify all partners as employers, but federal courts' interpretation of the same term may differ from the state interpretation. One federal appellate court has noted that the same nominal partner classified as an employer under state law "might be classified as an employee for other purposes, including the purpose for which federal antidiscrimination law extends protection to employees." EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002).

150. *See* Serapion v. Martinez, 119 F.3d 982, 988 (1st Cir. 1997) (stating as a "widely accepted principle" the proposition that "courts ought to presume that the interpretation of a federal statute is not dependent upon state law" (citing Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43 (1989); Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 119 (1983); and United States v. DeLuca, 17 F.3d 6, 8-9 (1st Cir. 1994)).

151. For a discussion of the legislative purpose underlying Title VII, see *infra* Part III.

152. *See* Jerome v. United States, 318 U.S. 101, 104 (1943) ("But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide . . . .").

form, placing all power in the hands of an executive committee.[153] Noting the exceptional similarities in the management responsibilities of the directors or shareholders in corporations and partners in law firms, such a rule seems arbitrary.[154] Neither a plaintiff's title nor the defendant's chosen form of business should be the touchstone for resolving the employee inquiry.

B. *Closer to the Target: But Still Missing the Mark: The Inconsistencies in the Economic Realities Test*

Courts applying the economic realities test have also relied on Justice Powell's concurrence.[155] Additionally, these courts have found support in the Supreme Court's analysis in *Nationwide Mutual Insurance Co. v. Darden.*[156] In response to the question of whether a party was an independent contractor or an employee, the *Darden* Court held that the issue should be resolved by measuring the party's relationship with the alleged employer according to common law agency principles conventionally used to assess master-servant relationships.[157] The Court considered several factors listed in the Restatement (Second) of Agency[158] as common law indicators of whether the party alleging discrimination qualified as a servant or an employee of the defendant firm.[159] Following the reasoning in *Darden*, lower courts adopting the economic realities test have applied com-

153. *See* EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002); *see also supra* Part I.B.

154. *See* EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1537 (2d Cir. 1991) ("[C]ertain modern partnerships and corporations are practically indistinguishable in [their] structure and operation.").

155. *See, e.g., Serapion*, 119 F.3d 982 (1st Cir. 1997); Simpson v. Ernst & Young, 100 F.3d 436 (6th Cir. 1996).

156. 503 U.S. 318 (1992). While lower courts have applied the reasoning from *Darden* to partner-employee disputes, the Supreme Court has not yet held that *Darden* controls partner-employee inquiries. *See Serapion*, 119 F.3d 982 (1st Cir. 1997); *Simpson*, 100 F.3d 436 (6th Cir. 1996). *Darden* is also distinguishable from the Title VII claims which are the focus of this Note because *Darden* involved a dispute alleging a violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 (2003). *Darden*, 503 U.S. at 320-21. Courts have asserted that the same analysis should apply when determining who qualifies as an employee under antidiscrimination statutes and ERISA because the statues all contain the same circular definition of employee. *See, e.g.*, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979); *Serapion*, 119 F.3d at 985 ("We regard Title VII, ADEA, ERISA, and FLSA as standing *in pari parssu* and endorse the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another."); *Hyland I*, *supra* note 6, 794 F.2d 793, 796 (2d Cir. 1986) ("Since . . . [the] statutes have a similar purpose — to stamp-out discrimination in various forms — cases construing the definitional provisions of one are persuasive authority when interpreting the others.") (citations omitted); *see also supra* note 19.

157. *Darden*, 503 U.S. at 323-24.

158. RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

159. *Id.*

mon law agency principles to determine the proprietary and management roles of partners who allege discrimination.[160]

While the economic realities test offers a more probative inquiry — questioning partners' actual relationships with their firms and fellow members of the firms' management — the test presents notable concerns. Courts have misunderstood the goal of the economic realities inquiry.[161] In *EEOC v. Dowd & Dowd, Ltd.*,[162] for example, the Seventh Circuit used the economic realities test to determine if the shareholder plaintiff exercised a level of authority and invested an amount of capital analogous to the that of a partner in a partnership. Upon deciding that the shareholder's role in the firm was equivalent to the role of a partner in a partnership, the court applied a per se rule rejecting the argument that shareholders could qualify as employees.[163] The court's logic is perplexing for two reasons. First, the court applied the economic realities test solely to determine if the role of the party claiming employee status is more or less analogous to that of a partner.[164] This method of analysis assumes that partners are exempt from the definition of employee without establishing the underlying rationale for such an assumption. Such analysis only evaluates "partner" status, begging the question of whether a partner, in fact, can ever be considered an employee. This analysis also assumes a universal understanding of who falls within the "partner" classification. Second, applying the economic realities test as a partner-litmus test frustrates the goal of the economic realities test. Courts apply the test to ascertain whether the party alleging discrimination is "so dominated in or by the organization that he or she is really like an employee, with corollary susceptibility to discrimination."[165] Using the economic realities test to determine partner status fails to answer the question of whether the subject of the inquiry was or could have been a victim of unlawful discrimination.

Other courts have misapplied the economic realities test by focusing the inquiry narrowly on only one of the many elements that indicate the existence of a master-servant relationship.[166] For example, several of these courts assume that financial contribution offers the single most valuable proxy for determining a partner's level of con-

160. *See, e.g.*, *Serapion*, 119 F.3d 982 (1st Cir. 1997); *Simpson*, 100 F.3d 436 (6th Cir. 1996). For an explanation of the development of the economic realities test see Pokora, *supra* note 33, at 258.

161. *See* EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984).

162. *Id.* at 1178.

163. *Id.*

164. *Id.*

165. Wheeler v. Hurdman, 825 F.2d 257, 269 (10th Cir. 1987).

166. *See, e.g.*, *id.* at 274-75.

trol.[167] These courts rely solely on evidence of *some* financial investment as demonstrative of a party's ability to exercise power within the firm.[168] Yet, when discussing the financial contribution of a particular plaintiff, these courts fail to consider the plaintiff-partner's contribution relative to the contributions of her peers.[169] Moreover, considering a partner's financial contributions without analyzing its correlation to her role in firm management offers little clarification as to the partner's actual power or ability to respond to discrimination.[170] When firms appoint partners to management positions in a hierarchical system, courts must determine the real or nominal authority vested in each of these positions before making assertions regarding the reality of any one partner's power within a firm. Courts currently applying the economic realities test have undermined the value of the test's analysis by relying on mere evidence that the partner exercised *some* control in the firm.

Adding to the confusion surrounding the partner-employee question, courts that have adopted the economic realities test each consider different combinations of factors when evaluating employee status and assign a different value to the presence or absence of the evaluated characteristics.[171] In *Simpson v. Ernst & Young*,[172] the Sixth Circuit applied the economic realities test to the plaintiff-partner's claim and devoted a significant portion of the inquiry to questions of financial ownership, offering only fleeting consideration to the management structure of the partnership accused of discrimination.[173] Upon determining that Simpson made a miniscule financial investment that did not constitute a bona fide ownership interest in the firm, the court held that Simpson qualified as an employee who could bring suit under Title VII.[174]

167. *See, e.g.*, Serapion v. Martinez, 119 F.3d 982, 990 (1st Cir. 1997).

168. *See id.*

169. *See id.*

170. *See supra* Part I.A.2.

171. Courts adopting the economic realities test have considered similar, but often different factors. In addition, the weight they have assigned to the factors considered in the test vary significantly. *See Serapion*, 119 F.3d at 989-90; Simpson v. Ernst & Young, 100 F.3d 436, 443 (6th Cir. 1996); Fountain v. Metcalf, Zima & Co., 925 F.2d 1398, 1401 (11th Cir. 1991); Wheeler v. Hurdman, 825 F.2d 257, 269-70 (10th Cir. 1987).

172. *Simpson*, 100 F.3d at 443-44.

173. *Id.* Simpson did not bring a claim under Title VII; instead, his claim involved violations of the ADEA and the ERISA. The language defining "employers" and "employees" is similarly circular and courts often cross-apply decisions on these and other antidiscrimination statutes. *See supra* note 14 and accompanying text.

174. *Simpson*, 100 F.3d at 443-44.

In *Serapion v. Martinez*,[175] however, the First Circuit gave little credence to the plaintiff-partner's argument that the court should consider her notably diminutive capital contribution.[176] The *Serapion* court reasoned that the plaintiff's position on several management committees and the fact that she maintained *some* capital contribution were sufficient to remove her from Title VII's definition of employee.[177] While the *Simpson* court emphasized the differences in the partners' financial contribution as a factor in the economic realities test,[178] the *Serapion* court declined to consider the disparity in the size of the partners' capital contributions.[179] As a result of the varying factors applied and different values assigned to each factor, litigants and law firms cannot accurately predict when a partner alleging discrimination may have colorable claim of discrimination.[180]

Even proponents of the economic realities test recognize that it does not present the ideal method of analysis for the partners who may be vulnerable to discrimination. While joining the majority opinion applying the economic realities test in *Simpson*, Judge Daughtrey wrote a separate concurrence urging Congress to take action to resolve the debate.[181] Judge Daughtrey recognized the need for a uniform resolution to the partner-employee debate.[182] Part III pro-

175. 119 F.3d 982 (1st Cir. 1997). In *Serapion*, a proprietary partner sued her partnership for discrimination, claiming that she received a lesser equity interest and compensation package than the named defendants (male partners) of her partnership because of her sex, in violation of Title VII. *Serapion*, 119 F.3d 982 (1st Cir. 1997).

176. *Id.* at 984-85.

177. *Id.* The first stage in the test examines the factors outlined by *Darden* in the common law agency test, including investment in the firm, ownership of firm assets, and liability for firm debts and obligations. The second stage inquires as to how the firm compensates the partner and the extent to which remuneration is based on the "vagaries of the firm's economic fortunes." The third stage considers the partner's consideration in decision making and control of the firm. *Serapion*, 119 F.3d at 990. The economic realities test used in *Serapion* is markedly similar to the test applied by the Eight Circuit in *Devine v. Stone*, 100 F.3d 78, 81 (8th Cir. 1996) (holding that "[t]he actual duties and role of the individual govern the resolution of the [question of whether or not a partner qualifies as an employee under Title VII]").

178. *Simpson*, 100 F.3d at 441-44.

179. *Serapion*, 119 F.3d at 991-92.

180. *See Simpson*, 100 F.3d at 443-44 (examining a partner's role as owner and manager of the firm); Fountain v. Metcalf, Zima & Co., 925 F.2d 1398 (11th Cir. 1991) (analyzing a partner's role in the operations of the firm as well as his role in management, control, and ownership); Wheeler v. Hurdman, 825 F.2d 257, 276 (10th Cir. 1987) (finding that a partner's status under the statute can be determined by examining the "total bundle of partnership characteristics").

181. *Simpson*, 100 F.3d at 445 (Daughtrey, J., concurring). The concurrence explicitly stated that a congressional amendment would offer the best safeguard to ensure proper regard for the law in all employment relationships.

182. While Judge Daughtrey's proffered solution would resolve the debate, a congressional amendment is arguably unnecessary. First, the United States Supreme Court has the authority to interpret the definition of "employee," *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and an opportunity to resolve the question this term, *see* Wells v.

poses that Congress amend Title VII and resolve the partner-employee dilemma by affirmatively including partners in the statutory definition of employee.

III. STRUCTURING A SOLUTION THAT WORKS

In developing a standard for analyzing the partner-employee question, several courts have followed Justice Powell's rationale without giving proper consideration to the relative power held by the partner alleging a violation of Title VII. Both the per se rule and economic realities test unfairly disadvantage parties that may be susceptible to discrimination. Courts should not become entangled in weighing the varying levels of power partners exercise in modern firms, but rather allow partners to fall within the definition of employee and hold defendant firms liable for unlawful acts of discrimination. As Part II demonstrated, both the per se rule and the economic realities test fail to provide viable solutions to the partner-employee dilemma. Given the current inconsistency, the Court should use the opportunity provided by *Wells v. Clackamas Gastroenterology Associates*,[183] to interpret the term "employee" to include partners and similarly situated executives. This interpretation would settle disputes regarding who falls within the purview of the statute and would avoid the gaps created by courts trying to engineer a test that satisfies the congressional intent to protect vulnerable parties from the evils of employment discrimination. Interpreting "employee" to include partners would allow parties to predict their exposure to Title VII and to conform their behavior to the law.

Generally, in determining the definitional scope of a term in a statute, courts look to the legislative history for indication of the congressional intent.[184] While at first blush the term "employee" seems easily defined, the employment context has undergone significant changes in

Clackamas Gastroenterology Assocs., 271 F.3d 903, 905 (9th Cir. 2001), *cert. granted*, 123 S. Ct. 31 (U.S. Oct. 1, 2002) (No. 01-1435). Justice Powell's concurrence in *Hishon* is not controlling precedent on the question of whether a partner can qualify as an employee under the provisions of Title VII, *see* Marks v. United States, 430 U.S. 188 (1977), as no other justices joined his opinion and the majority opinion, which left the partner-employee question unresolved, was unanimous. Second, as explained in Part III, the statute does not contain language explicitly prohibiting partners from claiming employee status or partnerships as employers from suits brought by partners. *See infra* Part III. When Congress intended to exempt a particular class of employees or employers from the statutes provisions, it did so. *See infra* note 190 and accompanying text.

183. 271 F.3d 903, 905 (9th Cir. 2001), *cert. granted*, 123 S. Ct. 31 (U.S. Oct. 1, 2002) (No. 01-1435)

184. *See, e.g.*, Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992); McCarthy v. Bronson, 500 U.S. 136, 139 (1991); *see also* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 621 (1990) ("An analytical conundrum besets a court's interpretation of a statute: The statute's text is the most important consideration in statutory interpretation, and a clear text ought to be given effect.").

the years since the passage of Title VII.[185] Noting the complex structure of relationships and the varying types of business forms available to modern firms, determining with certainty who qualifies as an employee is a difficult task.[186]

The legislative history of Title VII contains no discussion regarding the definition of "employee."[187] During the Senate debate, Senator Cotton proposed the sole amendment to Title VII that addressed the scope of the terms "employer" and "employee."[188] Senator Cotton's comment addressed the number of employees a firm must employ to trigger application of Title VII.[189] Similarly, while Title VII has explicitly exemplified certain business entities and persons from the definitions of "employer" and "employee" the statute contains no language exempting partnerships from the provisions of Title VII.[190] When Congress wanted to exempt a type of business entity, it took the appropriate steps to create an exemption.[191] The absence of such a provision for partnerships eliminates the need to single out this particular business form for an exemption.

There is, however, ample discussion of goals Congress intended to achieve by enacting the statute.[192] Title VII signaled Congress's com-

185. *See supra* Part I.B.1.

186. *See* Serapion v. Martinez, 119 F.3d 982, 987 (1st Cir. 1997). "Partnerships," as the *Serapion* court explained, "are mutable structures, and partners come in varying shapes and sizes. Consequently, attempting to delineate the circumstances in which a particular partner should be regarded as an employee for Title VII purposes is tricky business." *Id.*

187. *See* 110 CONG. REC. 13,085 (1964); *accord* 118 CONG. REC. 1524 (1972); 118 CONG. REC. 2391 (1972).

188. To gain support for an amendment that would increase the number of employees required to exercise jurisdiction under Title VII, Senator Cotton argued that "when a small businessman who employs 30 or 25 or 26 persons selects an employee, he comes very close to selecting a partner; when a businessman selects a partner, he comes dangerously close to the situation he faces when he selects a wife." 110 CONG. REC. 13,085; *accord* 118 CONG. REC. 1524; 118 CONG. REC. 2391.

189. 110 CONG. REC. 13,085; *accord* 118 CONG. REC. 1524; 118 CONG. REC. 2391.

190. The majority in *Hishon v. King & Spalding* opined that there was "nothing in the statute or the legislative history that would support such a *per se* exemption." 467 U.S. 69, 77 (1984).

191. The opinion also noted that when "Congress wanted to grant [a specific type of] employer complete immunity, it expressly did so." *Hishon*, 467 U.S. at 77-78; *see also id.* at 78 n.11 ("For example, Congress expressly exempted Indian tribes and certain agencies of the District of Columbia, 42 U. S. C. § 2000e(b)(1), small businesses and bona fide private membership clubs, § 2000e(b)(2), and certain employees of religious organizations, § 2000e-1.").

192. *See* H.R. REP. NO. 88-914 (1963). "The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin. The title authorizes the establishment of a Federal Equal Employment Opportunity Commission and delegates to it the primary responsibility for preventing and eliminating unlawful employment practices as defined in the title.... It is also declared to be a national policy to protect the right of persons to be free from such discrimination." *Id.* at 26.

mitment to eliminate the barriers that operate to prevent protected classes from equal and fair access to all employment opportunities.[193] Interpreting the term "employee" too narrowly threatens to undermine the primary purpose of the statute.[194]

Including partners in the definition of "employee" is consistent with the purpose underlying the statute — to protect *all persons* from experiencing the indignities of discrimination based on race, color, national origin, or sex.[195] The explicit inclusion of partners will eliminate the arbitrary results of the per se rule and the disparate outcomes that result when courts using the economic realities test consider different factors and assign each factor a different weight.[196]

Other supporters of a broader interpretation of the application of Title VII have proffered various solutions. One of the alternatives would allow a partner to invoke the fiduciary duties created by the partnership agreement if the partner wanted to bring a claim against the firm alleging discrimination.[197] This proposal suffers from the same deficiency as the per se rule based on the firm's chosen business form — undue reliance on state enterprise organization law for determining a party's rights under Title VII, a federal statute.[198] This suggested solution would be too limited to protect vulnerable parties because of the reliance on the firm being organized as a partnership with a partnership agreement. Another commentator suggests considering all partners employees and permitting employers to rebut the presumption with evidence that the partner had sufficient managerial control

193. *See* Griggs v. Duke Power, 401 U.S. 424 (1971). In *Griggs*, the Supreme Court explained that the goal of Title VII is to:

> achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. . . . What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Id. at 429-31. *See generally* Hopkins v. Price Waterhouse, 490 U.S. 228 (1989).

194. In *Robinson v. Shell Oil Co.*, the Court reasoned that the term "employee" must be interpreted to include both current and former employees because a more narrow construction would undermine the primary purpose of Title VII. 519 U.S. 337, 346 (1997).

195. The statute "sets forth a congressional declaration that *all persons* within the jurisdiction of the United States have a right to the opportunity for employment without discrimination on account of race, color, religion, or national origin. It is also declared to be the national policy to protect the right of persons to be free from such discrimination." H. R. REP. NO. 88-914 (1963) (emphasis added). *See Hishon*, 467 U.S. at 79 (Powell, J., concurring).

196. *See supra* Part I.B and Part II.A-B.

197. *See, e.g., Hishon*, 467 U.S. at 70 (arguing that the contractual agreement between the associates and the law firm triggers Title VII protections for associates).

198. *See supra* notes 148-152 and accompanying text.

and economic power to ward off the discrimination.[199] The solution replicates the problems encountered when one applies the multi-factor balancing test currently available under the economic realities test.[200] Outcomes would differ according to the weight courts assign to the various factors "considered in determining whether a defendant firm's rebuttal evidence removes the partner from the definition of "employee." Litigants would remain frustrated by their inability to predict with certainty whether or not they had viable claims. At least one federal appellate court judge has agreed that only federal action can resolve this dispute definitively.[201] Permitting partners to claim employee status fulfills Congress's intent to use Title VII as a tool to feret out discrimination in employment and equalize opportunities in *all* work environments, regardless of whether employees share cubicles or possess private offices with expensive leather couches and mahogany desks.

CONCLUSION

This Note has demonstrated the insufficiency of the current standards used to evaluate the partner-employee question. The diversity in the forms and applications of the per se rule and economic realities test exacerbates the dilemma. These tests fail to account for the differences in the financial investment and management structure of modern law firms. The purpose of Title VII is frustrated by courts' use of these methods of analysis. This Note explained how interpreting Title VII to include partners within the scope of the term "employee" avoids the problems created by applying a per se rule or the economic realities test. Bringing partners within the scope of the statute effectuates the purpose of the statute and enables litigants to predict their exposure to Title VII and to conform their behavior to the law.

---

199. *See* Dawn S. Sherman, Note, *Partners Suing the Partnership: Are Courts Correctly Deciding Who Is an Employer and Who Is an Employee under Title VII?*, 6 WM. & MARY J. WOMEN & L. 664-65 (2000).

200. *See supra* notes 166-180.

201. Simpson v. Ernst & Young, 100 F.3d 436, 445-46 (6th Cir. 1996) (Daughtrey, J., concurring) ("Only by statutory modifications redefining the class of individuals to be protected from such mistreatment can we ensure that hiring, promotion, and firing decisions are undertaken with proper regard for the law of the land.").