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THE LIABILITY OF THIRD PARTIES UNDER TITLE VII

Title VII of the Civil Rights Act of 1964 applies primarily to the formation, conduct, and termination of employment relationships between employers and individuals. Frequently, however, third parties control—either by law or market structure—an individual’s access to employment or the terms of his employment with another employer. For example, assume that an association of professional golfers sponsors tournaments to demonstrate the skills of its members to prospective employers of golf pros, such as country clubs. The association, while not employing the golfers, would exercise considerable control over the access of its members to employment with other employers.

Title VII explicitly covers two third parties that exercise control over an individual’s employment with other employers: employment agencies and labor organizations. Plaintiffs, however, have used Title VII to attack discrimination by many other
third parties. Most courts have decided such cases on an ad hoc basis, and the lack of a rationale has led to conflicts over whether or not Title VII covers a particular defendant.


11. Compare Spirt v. Teachers Ins. & Annuity Ass’n, 691 F.2d 1054 (2d Cir. 1982) (imposing liability upon insurance company that administers employees’ pension plans),
This Note considers the extent to which Title VII covers discrimination by third parties other than employment agencies and labor organizations.\textsuperscript{12} Part I analyzes the rationale for covering third parties, discussing Title VII's language and the policies that Congress intended it to serve. Part II proposes a framework for analyzing the liability of third parties. Part III applies this framework to three instances where courts have disagreed about the liability of a particular third party: insurance companies' administration of employee benefits, state licensing agencies' licensing of individuals for various occupations, and hospitals' granting of staff privileges to doctors.\textsuperscript{13}


In this Note, "third party" will refer to employers—other than employment agencies and labor organizations—who have some degree of control over an individual's terms of employment or access to employment with another employer. "Actual" or "ultimate" employer will refer to the party for whom the individual was working or with whom the individual was seeking work.

Courts interpreting Title VII have borrowed from National Labor Relations Act (NLRA) cases theories of "single" and "joint" employer liability. As one court explained:

A "single employer" relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a "single employer." The question in the "single employer" situation, then, is whether the two nominally independent enterprises, in reality, constitute only one integrated enterprise.

\textit{NLRB v. Browning-Ferris Indus., 691 F.2d 1117, 1122 (3d Cir. 1982)} (emphasis in original); see \textit{Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255, 256-57 (1966)} (per curiam) (adopting the National Labor Relations Board's (NLRB) standards for the single employer theory); \textit{Baker v. Stuart Broadcasting Co., 560 F.2d 389 (8th Cir. 1977)} (applying the single employer theory to a Title VII case). On the other hand, in joint employer cases, the two entities are separate, but "they share or co-determine those matters governing the essential terms and conditions of employment." \textit{Browning-Ferris}, 691 F.2d at 1123 (emphasis in original); see \textit{Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964)}; \textit{Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 36 PAIR EMPL. PRAC. CAS. (BNA) 6 (S.D.N.Y. Oct. 10, 1984)}; \textit{EEOC v. Sage Realty Corp., 507 F. Supp. 599, 611 (S.D.N.Y. 1981)} (applying joint employer notion in Title VII suit). For a discussion of this and several other issues relating to Title VII's definition of an employer, see Annot., 69 A.L.R. FED. 191 (1984).

A recent article contains a brief discussion of some of the cases that raise the issue that this Note examines, see Dowd, \textit{The Test of Employee Status: Economic Realities and Title VII}, 26 WM. & MARY L. REV. 75, 102-07 (1984), in the context of an examination of the definition of "employee" under Title VII, see infra note 58.

\textit{See supra} note 11 and accompanying text.
I. THE RATIONALE FOR COVERING THIRD PARTIES UNDER TITLE VII

Sections 703 and 704 of Title VII make unlawful various employment practices. To determine whether Title VII imposes liability on a party for discrimination against an individual whose access to employment with another employer the party controls, one must examine Title VII's language and the policies that Congress intended it to serve.

A. The Statutory Language

Section 703(a) prohibits various discriminatory acts by employers. An analysis of this section demonstrates that it prohibits an employer from discriminating against an individual employed by or seeking employment with some other employer. Section 703(a) contains two subsections. Section 703(a)(1) makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . ." In contrast, section 703(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."

One can infer from the language of these two sections that section 703(a)(1) imposes liability upon third parties, but that

15. According to the Act, It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to 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; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
section 703(a)(2) does not. While Title VII explicitly defines the term “employee,”18 section 703(a)(1) uses broader language, prohibiting discrimination against “any individual.”19 One can conclude, therefore, that section 703(a)(1) protects persons other than current employees.20 Moreover, because Congress provided no reason to believe that “any individual” applies only to former employees and applicants for employment,21 one can further conclude that section 703(a)(1) prohibits a third party from discriminating against any individual in his pursuit of employment with other employers, regardless of whether or not the third party ever employed or rejected the employment application of the individual. A comparison with section 703(a)(2) strengthens this conclusion; that section uses narrower language, limiting an employer's liability to improper classification of “his employees or applicants for employment.”22 Because the language of section 703(a)(1), but not that of 703(a)(2), provides a basis for a

21. Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (“Nor is there any good reason to confine the meaning of ‘any individual’ to include only former employees and applicants for employment.”).
cause of action by individuals against third parties that have discriminated against them, courts should limit such actions against third parties to employment practices that violate section 703(a)(1).

It is unclear whether limiting claims against third parties to those brought under section 703(a)(1) has any substantive impact upon the types of claims that plaintiffs could bring. Section 703(a)(1) definitely applies to cases of intentional discrimination,23 where an individual either claims disparate treatment, in that an employer has treated him less favorably because of his race, color, religion, sex, or national origin,24 or claims that an employment practice, on its face, treats one class of employees differently from others.25 Whether section 703(a)(1) applies to disparate impact cases is less certain. Disparate impact cases arise when an employer's facially neutral employment practice, such as requiring that all job applicants pass a written exam, disproportionately affects a class of employees and is not job-related.26 The cases that developed the disparate impact theory have relied upon section 703(a)(2),27 conveying the impression that section 703(a)(1) does not lend itself to disparate impact analysis.28 Recently, however, several cases have applied disparate impact analysis to section 703(a)(1) claims.29 Therefore, individuals can definitely bring cases of disparate treatment and facially discriminatory practices against third parties, and, if the recent trend continues, they will be able to bring disparate im-

23. See, e.g., Hishon v. King & Spalding, 104 S. Ct. 2229 (1984) (relying upon § 703(a)(1) in finding that female attorney stated claim by alleging that her employer declined to invite her to become a partner because of her sex).
25. See, e.g., City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (employer required women to contribute more money to its retirement fund than men of the same age).
pact cases as well.

B. Congressional Purpose

The legislative history of Title VII suggests that Congress did not specifically consider whether employers would be liable if they discriminatorily interfered with an individual’s employment relationship with another employer. On the other hand, the debates over the 1964 Act and the 1972 Amendments to Title VII indicate that Congress did pay considerable attention to the parties to whom the Act’s protections and proscriptions would apply. The legislators proposed and debated amendments concerning several aspects of Title VII's coverage, including types of workers, individuals, and employers. Congress carefully delineated Title VII’s coverage; courts should not tamper with it.

If, however, Title VII defines the third party as an “employer,” then a court does not tamper with Title VII's coverage by holding the third party liable under section 703(a)(1). Rather, the court is merely defining broadly the unlawful employment practices of section 703(a)(1) so as to include a covered employer’s discrimination against individuals when it controls those individuals’ access to the job market or their terms of employment. Although this interpretation gives section 703(a)(1) a broad reading, the statutory scheme supports it; Congress’s inclusion of employment agencies and labor organizations demonstrates its awareness of the damage that third parties can cause through discrimination. Since it has before it both a party—a covered employer—to which Title VII refers, and an activity—discriminatory exercise of control over employment relationships with other employers—that Title VII prohibits, a court does not reach very far by forbidding a covered employer that

has a relationship with an individual similar to that of an employment agency or labor organization from discriminating in a manner prohibited to those institutions. As one court stated: "To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual’s employment opportunities with another employer . . . would be to condone continued use of the very criteria for employment that the Congress has prohibited." 36

Congress could not have drafted a statute broad enough to encompass all the “peculiar circumstances” that might afford employers the opportunity to discriminate. In order to prevent ambiguous language and unanticipated circumstances from leaving discrimination unremedied, courts have consistently construed Title VII in ways that help effect Congress’s purpose of eliminating invidious and irrelevant characteristics as criteria for employment decisions 37 and have often fashioned theories to help implement this goal. 38 Moreover, when presented with two facially valid interpretations of Title VII’s language, courts choose the one most consistent with the goal of eliminating discrimination. 39 Reading Title VII to prohibit the discriminatory

37. See, e.g., Quijano v. University Fed. Credit Union, 617 F.2d 129, 130-31 (5th Cir. 1980).

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court held that facially neutral employment practices that have a disparate impact upon minorities violate the Act unless job-related. In amending Title VII, Congress indicated its approval of Griggs, see Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982), and the Senate committee noted: "In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. . . . Employment discrimination today is a far more complex phenomenon." S. Rep. No. 415, 92d Cong., 1st Sess. 5 (1971); see H.R. Rep. No. 238, 92d Cong., 1st Sess. 7-8 (1971), reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2137, 2143-44; see also International Brotherhood of Teamsters v. United States, 431 U.S. 324, 383 & n.7 (1977) (Marshall, J., dissenting). The reports cite this complexity as a basis for strengthening the power of the EEOC, see H.R. Rep. No. 238, supra, at 8-10, reprinted in 1972 U.S. CODE CONG. & AD. NEWS, supra, at 2144-46, their favorable citation of Griggs implying approval of that case’s fashioning of a theory to deal with a circumstance that the Congress, by its own admission, did not foresee. Discrimination by third parties other than employment agencies and labor organizations would seem to qualify as one of the complexities that Congress would want the Commission and courts to address. Cf. United Steelworkers v. Weber, 443 U.S. 193, 211 (1979) (Blackmun, J., concurring) (approving "arguable violation" theory as "responsive] to a practical problem in the administration of Title VII not anticipated by Congress").

activities of third parties helps effect Congress's purpose of eliminating discrimination from the job market and the workplace. In sum, the following factors provide the rationale for holding employers liable under Title VII when they discriminate against an individual whose access to a job or terms of employment they control, even though they do not employ that individual. First, section 703(a)(1) indicates that Title VII includes an employer’s discrimination against persons other than its own employees. Second, third parties exert control over the employment opportunities of individuals in ways similar to employment agencies and labor organizations, entities that Title VII covers explicitly. Third, Congress intended courts to interpret Title VII in a manner that would help achieve the goal of eliminating discrimination, since it could not draft a statute to cover all the complex and peculiar ways in which employment discrimination can arise. These factors will aid the analysis of cases that involve third parties’ liability under Title VII.

II. DEFINING THE CAUSE OF ACTION

Developing a framework for analyzing cases that raise the issue of third party liability first requires an examination of some of the ancillary issues that have arisen or might arise in such litigation. Then, combining the resolution of these issues with the rationale set forth in Part I, this Part will propose an analytical framework.

A. Issues Arising in Third-Party Litigation

Several issues have arisen concerning the parties and prereq-

avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.

In General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), the Court held that exclusion of pregnancy as a covered risk in an employer's disability plan did not constitute gender-based discrimination. Id. at 137-40. The Congress responded by amending Title VII to overturn the Court's decision, see 42 U.S.C. § 2000e(k) (1982), the House committee noting its belief "that the dissenting Justices correctly interpreted the Act." H.R. REP. No. 948, 95th Cong., 2d Sess. 5 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4749, 4750. The Gilbert episode warns against narrow interpretations of Title VII.

41. See supra text accompanying notes 16-22.
42. See supra text accompanying notes 35-36.
43. See supra text accompanying notes 37-40.
uisites to a suit against a third party under Title VII. Resolution of these issues will define the limits to the cause of action of an individual against a third party.

1. The "Employer" Status of the Third Party—Courts should only impose liability upon defendants that Title VII defines as employers. Section 703(a)(1), from which the cause of action arises, refers to acts of discrimination by "an employer," a term defined in section 701(b). This requirement gives effect to Congress's careful enumeration of the parties it wished Title VII to cover. If the third party is not an employer, then the courts simply do not have jurisdiction over the action.

2. "Employer" Status of the Ultimate Employer—Several courts have imposed liability upon a third party even though it interfered with an individual's relationship with a party that section 701(b) does not define as an employer. For example,

45. Section 701(b) defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . , and any agent of such a person." 42 U.S.C. § 2000e(b) (1982). Section 701(a) defines a "person" as "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in [bankruptcy cases], or receivers." 42 U.S.C. § 2000e(a).
46. See supra text accompanying notes 30-33. The dicta of some courts have failed to distinguish between a broad definition of the term "employer" and a broad definition of what employers are prohibited from doing. For example, one court stated: "the term 'employer' under Title VII has been construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, conditions, or privileges of employment." Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979), aff'd in part, rev'd in part on other grounds, 691 F.2d 1054 (2d Cir. 1982), vacated and remanded on other grounds, 103 S. Ct. 3565 (1983); accord United States v. City of Yonkers, 592 F. Supp. 570, 590 (S.D.N.Y. 1984); Vanguard Justice Soc'y v. Hughes, 471 F. Supp. 670, 696 (D. Md. 1979). This statement ignores both Congress's explicit definition of the word "employer," see 42 U.S.C. § 2000e(b) (1982), and the legislative history, which "indicates that the term 'employer' is intended to have its common dictionary meaning, except as expressly qualified by the act." Burke v. Friedman, 556 F.2d 867, 870 (7th Cir. 1977) (quoting 110 Cong. Rec. 7216 (1964) (statement of Senator Clark)). In determining whether or not the third party is an "employer," the court should rely exclusively upon § 701(b). If that section defines the third party as an employer, then the court can invoke third-party liability, if otherwise appropriate. See Bonomo v. National Duckpin Bowling Congress, 469 F. Supp. 467, 470 (D. Md. 1979).
47. See Bonomo v. National Duckpin Bowling Congress, 469 F. Supp. 467, 470 ("[T]he number of employees is a jurisdictional prerequisite . . . ."); Lewis v. Hartstock, 18 Fair Empl. Prac. Cas. (BNA) 831, 835 (S.D. Ohio 1976) (declaring to impose liability upon board of bar examiners because it was not an employer under § 2000e(b)).
in two cases, courts have held a hospital liable for interfering with the relationship between health professionals and their patients. Section 701(b) does not define the patients in these cases as employers: they neither employ fifteen or more individuals nor do they engage in an industry affecting commerce. Nevertheless, courts should allow an individual to maintain an action against a third party that blocks access to an employment relationship with a party that Title VII does not define as an employer.

An analogy to employment agencies—who control individuals’ access to the job market in a manner similar to that of other third parties—supports the conclusion that individuals can maintain an action against third parties even when section 701(b) does not cover the ultimate employer. Title VII does not limit employment agencies’ liability to cases of discriminatory referrals to covered employers, and applying this determination to the liability of other third parties makes sense. When a third party controls an individual’s access to employment, that individual should have the same rights as a person using an employment agency: to gain access to the job market on a nondiscriminatory basis, regardless of whether or not the ultimate employer could avoid liability under Title VII.

The policy that underlies Title VII—assuring equality of employment opportunities—also supports the preceding conclusion. To give effect to this policy, courts construe narrowly Title VII’s exemptions. In the case of the exemption for employers professional corporation; number of employees unclear); Puntolillo v. New Hampshire Racing Comm’n, 375 F. Supp. 1089 (D.N.H. 1974) (ultimate employer horse owner; number of employees unclear).


55. See, e.g., Pedreyra v. Cornell Prescription Pharmacies, 465 F. Supp. 936, 941 (D. Colo. 1979); Gearhart v. Oregon, 410 F. Supp. 597, 600 (D. Or. 1976); cf. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (holding that Congress intended the bona fide occupational qualification “to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex”). The only exemption that the courts have construed broadly is § 703(h), which permits employers “to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . .” 42 U.S.C. § 2000e-2(h) (1982); see, e.g., Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2587-90 (1984). However, in construing § 703(h), courts have had to balance the policies of Title VII against a national labor pol-
with less than fifteen employees, Congress limited Title VII's coverage to protect very small businesses from government intrusion. Applying Title VII to covered employers does not implicate the policy behind this exemption. Therefore, no rights ought to accrue to covered third parties from the ultimate employer's exemption.

3. The Nature of the Relationship Interfered With—Courts should only hold third parties liable for interfering with relationships that Title VII defines as employment. For example, courts should not allow actions against third parties who interfere with an individual's prospective independent contractor relationship, because Title VII does not protect individuals when they enter into such a relationship. Thus, courts have

icy of determining conditions of employment through collective bargaining. See California Brewers Ass'n v. Bryant, 444 U.S. 598, 608 (1980).

56. See 118 CONG. REC. 2409-11 (1972) (statement of Senator Fannin).

57. In Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973), the court wished to prevent "a covered employer" from exploiting circumstances giving "it the capability of discriminatorily interfering with an individual's employment opportunities with another employer." Id. at 1341 (emphasis added). One can infer from this language that the court was requiring the third party, but not the ultimate employer, to be covered by § 701(b).

58. See, e.g., EEOC v. Zippo Mfg. Co., 713 F.2d 32 (3d Cir. 1983); Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir.), cert. denied, 459 U.S. 874 (1982); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883-84 (9th Cir. 1980); Spirides v. Reinhardt, 613 F.2d 826, 828-32 (D.C. Cir. 1979). But see Armbruster v. Quinn, 711 F.2d 1332, 1339-42 (6th Cir. 1983) (2-1 decision). In Spirides, the court stated that:

the extent of the employer's right to control the "means and manner" of the worker's performance is the most important factor . . . . If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist.

Additional matters of fact that an agency or reviewing courts must consider include, among others, (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

613 F.2d at 831-32 (footnotes omitted).

The court in Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983), took a different approach. It relied upon NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944), which held that the definition of employee under the National Labor Relations Act (NLRA) must be viewed in light of "the mischief to be corrected and the end to be attained." 322 U.S. at 124 (quoting South Chicago Coal & Dock Co. v. Basset, 309 U.S. 251, 259 (1940) (quoting Warner v. Goltra, 293 U.S. 155, 158 (1934))). Congress overruled Hearst Publications by amending the NLRA to specifically exclude independent contactors. See 29
held that Title VII does not apply to insurance salespersons when their only compensation comes from commissions and when they remain free to set their own hours.\(^59\) Section 703(a) limits protection to employment relationships by prohibiting discrimination in hiring, firing, and "compensation, terms, conditions or privileges of employment,"\(^60\) and forbidding classification of employees that results in deprivations of "employment opportunities."\(^61\) Title VII forbids employment discrimination. Title VII does not make employers liable for interfering with an individual's independent contractor relationships any more than it makes them liable for interfering with an individual's other contractual relationships, such as renting an apartment or borrowing money.\(^62\)

U.S.C. § 152(3) (1982). The court in Armbruster relied upon Congress's failure to place a similar exclusion in Title VII, 711 F.2d at 1341 n.7, and it remanded to the district court "to determine whether the [plaintiffs] are susceptible to the kind of unlawful practices that Title VII was intended to remedy. If they are so, then they must be included as employees . . . ." Id. at 1342. See generally Dowd, supra note 12; Comment, The Definition of "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors, 53 U. Cin. L. Rev. 203 (1984).

59. See, e.g., Dixon v. Burman, 593 F. Supp. 6, 8 & n.8 (N.D. Ind. 1983), aff'd mem., 742 F.2d 1459 (7th Cir. 1984).


62. This conclusion is not inconsistent with the conclusion reached above, that the third party may be liable even if the ultimate employer does not fit within § 701(b)'s definition of an employer. See supra notes 48-57 and accompanying text. That conclusion merely prevents a party from avoiding liability because of another party's statutory exemption. In that case, a court would be exercising jurisdiction over a party, a covered employer, and a relationship, employment, that Title VII contemplates. In the independent contractor cases, on the other hand, the relationship blocked is simply outside the scope of Title VII. See Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980) (stating that "there must be some connection with an employment relationship for Title VII protections to apply").

Only two cases have explicitly addressed this issue. In Smith v. Dutra Trucking Co., 410 F. Supp. 513 (N.D. Cal. 1976), aff'd mem., 580 F.2d 1054 (9th Cir. 1978) the court held that blocking access to an independent contractor relationship did not violate the Act. 410 F. Supp. at 517-18 & n.11. A recent case has followed the decision in Smith, see Beverley v. Douglas, 591 F. Supp. 1321, 1327-28 (S.D.N.Y. 1984), and the dicta of other cases support this conclusion, see Lutcher, 633 F.2d at 883; Mathis v. Standard Brands Chem. Indus., 10 Fair Empl. Prac. Cas. (BNA) 295, 297 n.2 (1975); cf. Lutcher, 633 F.2d at 884 (holding that union's interference with individual's independent contractor relationship does not violate Title VII). Other courts, however, have found third parties liable in situations where the relationship blocked was arguably not one of employer-employee. See Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973) (private-duty nurse—patient); Pao v. Holy Redeemer Hosp., 547 F. Supp. 484 (E.D. Pa. 1982) (doctor—patient). While neither of these courts made specific findings as to the nature of the relationship interfered with, both characterized it as one of employment. See Sibley, 488 F.2d at 1342 (hospital controlled plaintiff's "access to the patient for purposes of the initiation of such employment"); Pao, 547 F. Supp. at 494 (defendant controlled "plaintiff's access to those prospective patients who are his ultimate 'employers' ").
B. Analytical Framework

The courts that have faced the issue of third party liability have not addressed the issue in a systematic manner. The lack of a framework has led to several conflicts over the application of Title VII to third parties and to a generally confused approach to the issue. A framework through which courts should analyze cases involving third parties can be derived from the rationale developed in Part I and the issues addressed above.

1. Threshold Questions—According to the first part of the rationale, the statutory language authorizes suits against employers when they discriminatorily interfere with an individual's employment relationship with another party. The statute requires that a court address three threshold questions before deciding whether to impose liability upon a third party. The court must determine that (1) section 701(b) defines the third party as an "employer"; (2) the third party committed the type of discrimination actionable under section 703(a)(1); and (3) the third party interfered with a relationship that Title VII defines as employment. If the court does not find that all three conditions are met, then it should dismiss the claim; if it does, then it must conduct a further examination to determine the appropriateness of subjecting the third party to liability under Title VII.

2. Causation—Third parties may control an individual's access to the job market in a manner analogous to that of employment agencies and labor organizations. Such control constituted the second part of the rationale for extending Title VII liability to employer third parties. Therefore, the third party in question should have a nexus with an individual's employment opportunities that is similar to that of the third parties that Title VII explicitly covers. In essence, a court must make a causation inquiry, and it should determine whether or not the third party's discrimination interfered in a direct and substantial way with the plaintiff's access to employment or his terms, conditions, or privileges of employment with another employer.

63. See cases cited supra note 11.
64. See supra notes 44-47 and accompanying text.
65. See supra notes 23-29.
66. See supra notes 58-62 and accompanying text.
67. See supra text accompanying notes 34-35.
68. See supra text accompanying note 42.
69. See Barlow v. AVCO Corp., 527 F. Supp. 269, 274 (E.D. Va. 1981). In Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973), the court found that the defendant's relationship to the plaintiff's employment opportunities was like that of em-
3. **Congressional Intent**— According to the third part of the rationale, imposing liability upon third parties would help rid the job market of discrimination that manifested itself in ways that the Congress did not anticipate.\(^{70}\) Therefore, a court must determine that the third party in question did not operate in a manner sufficiently visible that one must assume that Congress, despite knowledge of the third party’s role in the job market, chose not to include it. This will give effect to two somewhat contradictory sections of Title VII: Congress’s enumeration of employment agencies and labor organizations as third parties subject to Title VII,\(^{71}\) and its use of the “discriminate against any individual” language of section 703(a)(1).\(^{72}\) The contradiction arises because that language alone would, under the analysis of Part I,\(^{73}\) suffice to include the referral activities of employment agencies and labor organizations if they happened to be employers under section 701(b); they would be “employers” who “otherwise . . . discriminate against any individual.”\(^{74}\) It is unlikely, however, that Congress intended to cover the referral activities of employment agencies and labor organizations in such an indirect manner. The inquiry suggested here assumes that the enumeration of employment agencies and labor organizations provides evidence of Congress’s intent to exclude equally notorious third parties from coverage for their third party activity.

In sum, to be liable under Title VII, a third party must (1) be a covered employer as defined by section 701(b); (2) commit an act of discrimination that, if committed against one of its own employees, would be actionable under section 703(a)(1); (3) interfere with a relationship that Title VII defines as employment; (4) directly and substantially control an individual’s access to or terms of employment with another employer; and (5) not have such a well-known impact upon the job market that Congress’s failure to enumerate the third party in section 703 does not pro-

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\(^{70}\) See *supra* notes 36-37 and accompanying text.

\(^{71}\) See 42 U.S.C. §§ 2000e-2(b), (c) (1982).

\(^{72}\) Compare Puntolillo v. New Hampshire Racing Comm’n, 375 F. Supp. 1089, 1091 (D.N.H. 1974) (emphasizing the “discriminate against any individual” language and, therefore, imposing liability upon state licensing agency) with National Org. for Women v. Waterfront Comm’n, 468 F. Supp. 317, 321 (S.D.N.Y. 1979) (emphasizing the enumeration of employment agencies and labor organizations and, therefore, declining to impose liability upon a state licensing agency).

\(^{73}\) See *supra* notes 16-22 and accompanying text.

vide evidence of a legislative intent to exclude its third party activities from coverage.

III. APPLYING THE FRAMEWORK

The issue of third party liability has arisen in a variety of Title VII cases. This Part uses the framework developed in Part II to examine the applicability of third party liability to insurance companies that provide employee benefits, state licensing agencies, and hospitals that grant physicians staff privileges.

A. Insurance Companies

In Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, the Supreme Court held that an employer may not offer its employees, as a retirement option, an annuity that pays women lower monthly benefits than men. Although the Court did not have the issue before it, two courts of appeals have split over whether or not insurance companies that administer these annuities are themselves liable under the Act.

Both cases involved the same insurance company, Teachers Insurance and Annuity Association (TIAA), which contracted to provide retirement annuities to employees at over three thousand educational institutions. Although TIAA contracted directly with the employees, the employers (named as defendants in both actions) matched their employees' contributions. Upon retirement, TIAA paid women less each month than men of the same age. Because, on average, women live longer than men, TIAA paid members of both sexes benefits of equal actuarial value. In Norris, however, the Court subsequently ruled that the

75. 103 S. Ct. 3492 (1983).
76. Compare Peters v. Wayne State Univ., 691 F.2d 235 (6th Cir. 1982) (holding insurance company not liable), vacated and remanded on other grounds, 103 S. Ct. 3566 (1983) with Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982) (holding insurance company liable), vacated and remanded on other grounds, 103 S. Ct. 3565 (1983). The Court remanded both cases for further consideration in light of Norris. Peters was inconsistent with Norris because it held that the plan itself did not violate Title VII; Spirit's awarding of a limited amount of retroactive relief was arguably inconsistent with Norris's holding that any relief should be prospective. See infra note 94.
77. See Peters, 691 F.2d at 237.
78. Id.
employer's participation in this practice violated Title VII.\textsuperscript{79}

The two circuit courts took different approaches to the question of TIAA's liability under Title VII for its practice, reaching different results. In \textit{Spirt v. Teachers Insurance and Annuity Association},\textsuperscript{80} the Second Circuit held that TIAA was "so closely intertwined" with the plaintiffs' actual employer that it "must be deemed an 'employer' for the purposes of Title VII."\textsuperscript{81} On the other hand, in \textit{Peters v. Wayne State University},\textsuperscript{82} the Sixth Circuit found that Title VII did not cover the activities of TIAA for two reasons. First, the court noted that TIAA "[did] not 'employ' the plaintiffs in the conventional sense."\textsuperscript{83} Second, the court found that TIAA was not the agent of the actual employer, because the employer did not delegate to TIAA the determination of any aspect of its employees' compensation and exercised no control over TIAA's decision to use sex-segregated mortality tables.\textsuperscript{84}

In reaching the exact opposite results concerning identical facts, both courts engaged in cursory analysis. An analysis through the framework developed above should result in a more considered decision.

The framework makes an insurance company a candidate for liability under the Act.\textsuperscript{85} First, section 701(b) defines it as an employer.\textsuperscript{86} Second, by offering annuities that paid lower monthly benefits to women, the insurance company committed an act that, if committed against its own employees, would have constituted an unlawful employment practice in violation of section 703(a)(1).\textsuperscript{87} Third, the plaintiff's relationship with the uni-

\textsuperscript{79} 103 S. Ct. at 3496-3502.
\textsuperscript{80} 691 F.2d 1054 (2d Cir. 1982), vacated and remanded, 103 S. Ct. 3565 (1983).
\textsuperscript{81} Id. at 1063.
\textsuperscript{82} 691 F.2d 235 (6th Cir. 1982), vacated and remanded, 103 S. Ct. 3566 (1983).
\textsuperscript{83} Id. at 238.
\textsuperscript{84} Id.
\textsuperscript{86} 42 U.S.C. § 2000e(b) (1982). While neither court made an explicit finding on the issue, TIAA presumably employed many more than 15 employees, since 550,000 employees at over 3000 academic institutions contracted with TIAA for retirement benefits. \textit{See Peters}, 691 F.2d at 237.
\textsuperscript{87} \textit{See Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensa-
Applying the last two aspects of the framework, however, poses more difficulty. The first of these requires that the court determine whether or not the insurance company directly and substantially controlled the employee's benefits. Unlike most cases involving a third party's liability under Title VII, where the ultimate employer has not practiced discrimination and remains free from liability, here the ultimate employer's decision to use the insurance company's services makes it liable under Title VII for the insurance company's actions. In such a case, a court should determine whether the third party is merely following the employer's instructions or is acting sufficiently independently that the imposition of liability may affect its behavior.

88. There is no indication that the plaintiffs in *Spirt* and *Peters* were anything other than common-law employees.

89. For example, in the cases challenging state licensing agencies, *e.g.*, *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089 (D.N.H. 1974), the plaintiffs did not claim that those employers with whom the plaintiffs would have sought employment discriminated against them in any way. An analogy to labor organizations demonstrates why the individuals in those cases had no cause of action against the ultimate employers. In the 1964 Senate debate over Title VII, Senator Joseph Clark, one of the bill's floor managers, responded in writing to a question raised by Senator Dirksen about the liability of employers using hiring halls. According to Senator Clark, "[i]f the hiring hall discriminates against Negroes, and sends [the employer] only whites, [the employer] is not guilty of discrimination, but the union hiring hall would be." 110 Cong. Rec. 7217 (1964); cf. *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391-97 (1982) (holding employer utilizing hiring hall not liable under 42 U.S.C. § 1981 (1982) for hiring hall's discrimination in absence of intent to discriminate by the employer).

90. See *Norris*, 103 S. Ct. at 3501; *Peters*, 691 F.2d at 238; see also *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 718 n.33 (1978).

91. In *Crowder v. Fieldcrest Mills, Inc.*, 569 F. Supp. 825 (M.D.N.C. 1983), the court refused to impose liability upon a third-party insurance company that assisted the employer in running its health insurance program. The court found that the insurance company's role was purely advisory, stating that it had "no authority or control . . . over the running of the [employer's] group insurance program . . . ." Id. at 828. The court distinguished *Spirt* because the district court in that case found that the employers' delegation of authority to TIAA had resulted in the insurance company's having control over an aspect of the employee's compensation. *Id.* at 828; see also *Spirt*, 475 F. Supp. at 1308.

It is possible that if a court found that an insurance company was acting under the control and direction of the employer, then the court might find that the insurance company was the employer's agent, and, therefore, liable under Title VII. See 42 U.S.C. § 2000e(b) (1982). Courts have usually used Title VII's coverage of agents to establish jurisdiction over supervisory employees, *see*, *e.g.*, *Jeter v. Boswell*, 554 F. Supp. 946 (N.D. W. Va. 1983), but have had few opportunities to apply agency principles to a contractual relationship between two independent companies.

In *Peters*, the court applied common-law agency principles and found that TIAA was not Wayne State's agent, noting that the University "exercise[d] no control over [TIAA], otherwise essential to a principal agent relationship." 691 F.2d at 238. On the other hand, this same circuit has held that the term "employee" must be defined in light of the
If the court finds such independence, it should hold that the insurance company’s actions have met the causation test.

The framework’s final criterion requires the court to decide if Congress meant to exclude insurance companies from coverage by its enumeration of employment agencies and labor organizations as explicitly covered third parties. While this is a close question, Congress probably did not mean to exclude insurance companies. The legislative history provides no evidence one way or the other, but it is reasonable to assume that Congress might not have foreseen this delegation of responsibility for employee compensation. Although Title VII imposes liability upon employers for the actions of those to whom they delegate responsibility for their employees’ benefits, holding those committing the discriminatory acts directly liable helps rather than hinders the statutory scheme. Imposing liability upon independently acting insurance companies gives those companies a direct incentive to comply with Title VII.

purposes of the Act, not common law. See Armbruster v. Quinn, 711 F.2d 1332, 1339-40 (6th Cir. 1983), discussed supra note 58.

For several reasons, it seems that a similarly broad definition of “agent” would help effect the policies of the Act. First, the party in question might be necessary for complete relief. See EEOC v. Wooster Brush Co. Employees Relief Ass’n, 727 F.2d 566, 575 (6th Cir. 1984); Crowder v. Fieldcrest Mills, Inc., 569 F. Supp. 825, 828-29 (M.D.N.C. 1983); see also Jeter, 554 F. Supp. at 952 & n.20 (rejecting supervisory employee’s argument that his dismissal from case would not prejudice plaintiff because the employer was a co-defendant). Second, holding the party liable will encourage it to comply with the Act. See Jeter, 554 F. Supp. at 952 n.20 (stating that failure to hold supervisory employees liable would encourage them “to violate Title VII with impunity”). Finally, as one court noted, “it is inconceivable that Congress could have intended to exclude from liability the very persons who have engaged in the employment practices which are the subject of the action.” Dague v. Riverdale Athletic Ass’n, 99 F.R.D. 325, 327 (N.D. Ga. 1983).

In EEOC v. Wooster Brush Co. Employees Relief Ass’n, 727 F.2d 566 (6th Cir. 1984), the Sixth Circuit missed an opportunity to address this question. The Wooster Brush Company provided half the funding for the Employees Relief Association (the other half came from the members’ dues). The Association was a voluntary membership organization for the employees of the company, formed to provide benefits to disabled employees. The Association did not pay for disability arising from pregnancy. See EEOC v. Wooster Brush Co., 523 F. Supp. 1256, 1258-59 (N.D. Ohio 1981), rev’d on other grounds, 727 F.2d 566 (6th Cir. 1984). The district court found the Association liable under the single employer theory of Baker v. Stuart Broadcasting Co., 560 F.2d 389 (8th Cir. 1977), see supra note 12, but the court of appeals reversed. 727 F.2d at 571-73. The EEOC had argued alternatively that the Association was the agent of the company. The district court acknowledged that argument, 523 F. Supp. at 1260, 1261, but, having found liability under the single employer theory, it simply did not address the agency argument. The court of appeals stated, inexplicably, that the district court “concluded that . . . an agency relationship did not exist . . . .” 727 F.2d at 571.

92. See supra text accompanying notes 70-74.


94. The plaintiffs in Spirt and Peters undoubtedly named TIAA as a defendant be-
B. State Licensing Agencies

Professional and occupational licensing agencies erect barriers—often impenetrable—to an individual's pursuit of employment opportunities in his chosen field.\(^{95}\) Backed by the coercive power of the state, a licensing agency prevents an individual who fails a licensing exam from practicing his occupation, even if employers and customers exist who wish to hire him.\(^{96}\) Evidence shows that these exams often have a disparate impact upon racial minorities.\(^{97}\) In addition, individual licensing officials may exercise discretion over the granting of a license and, therefore, cause if they were to win damages, they would have needed TIAA for complete relief. After the Supreme Court held that only prospective relief would be awarded, see Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 103 S. Ct. 3492, 3509-10 (1983); see also id. at 3512 (O'Connor, J., concurring), it seemed that the issue of third party liability was moot since, if applied directly to the insurance companies, prospective relief would mean only that they could no longer utilize sex-segregated mortality tables, a requirement which, in light of Norris, they would have had to meet anyway to market their product to covered employers.

The Second Circuit's treatment of the case on remand, however, has revived the issue. TIAA argued that, because it had begun to use unisex mortality tables for post-August 1, 1983 contributions (the date that the judgment in Norris was handed down, see 103 S. Ct. at 3494), the court should dismiss the case as moot. See Spirt v. Teachers Ins. & Annuity Ass'n, 735 F.2d 23, 25 (2d Cir.), cert. denied, 105 S. Ct. 247 (1984). The court disagreed with this contention, stating that in Norris, the Court applied relief prospectively because it felt that retroactive relief would have required "topping up" women's benefits to the level of men's, imposing a severe financial burden upon the employer. 735 F.2d at 26 (citing Norris, 103 S. Ct. at 3510 n.11). The Spirt court stated that, in the case before it, equalizing benefits would not require topping up, because, unlike the situation in Norris, TIAA had never promised prospective annuitants a definite level of benefits upon retirement. Id. at 27. The court, therefore, reasoned that TIAA could equalize benefits by a combination of reducing men's and increasing women's payments, without depriving prospective male annuitants of any reasonable expectation of benefits. The court concluded that the equalization could take place as of the date of the district court's initial decision without costing TIAA any money, which the court felt was Norris's main concern.

The insurance company's liability under Title VII will also be relevant when, as is likely, the plaintiffs in Spirt and Peters seek attorneys fees under § 706(k), 42 U.S.C. § 2000e-5(k) (1982). See Vulcan Soc'y v. Fire Dep't of White Plains, 533 F. Supp. 1054, 1063 (S.D.N.Y. 1982).


97. For example, a study of aspiring cosmetologists in Missouri and Illinois found that while blacks did nearly as well as whites on the practical exam, blacks failed the written exam at a much greater rate. See Dorsey, The Occupational Licensing Queue, 15 J. Hum. Resources 424 (1980).
may inject their own biases into the licensing process.

Several cases have addressed the issue of the liability of licensing agencies under Title VII. For example, in Puntolillo v. New Hampshire Racing Commission, the plaintiff, a driver-trainer of harness race horses, alleged that the defendant denied him a license to race because of his national origin. The court held that the plaintiff's complaint stated a cause of action. The court addressed two of the three threshold questions of the framework proposed in Part II. It found that section 701(b) defined the defendant as an employer, and it quoted section 703(a)(1) in its analysis of the plaintiff's claim. It did not, however, determine whether the plaintiff's relationship with his ultimate "employers," the horse owners, would have been an employment or an independent contractor relationship. The court also implicitly found that the defendant directly and substantially interfered with the plaintiff's employment opportunities, characterizing the procurement of a license as "critical." The court did not, however, address the question of whether Congress intended to include the licensing activities of state licensing agencies as a possible unlawful employment practice. Rather, the court noted only that the 1972 amendments to Title VII made the defendant an "employer" under section 701(b).

On the other hand, the court in National Organization for Women v. Waterfront Commission seized upon the issue of congressional intent. In NOW, the plaintiffs alleged that the defendant denied them the licenses they needed for cargo checker jobs because of their sex. In analyzing the issue of whether the defendant's licensing activity fell within the proscriptions of Title VII, the court noted that Congress "meticulous[ly] enumerat[ed] ... the categories of entities covered by the Act ... ." The court concluded that Title VII did not apply, doubting that Congress "would have left to speculation and con-

99. Id. at 1092.
100. Id. at 1091.
101. The court did state that the owners "hire and fire and pay the driver-trainers and, as a practical matter, stand in the shoes of an employer vis-a-vis the driver-trainers." Id. at 1090 (footnote omitted). In discussing Puntolillo, however, the court in Smith v. Dutra Trucking Co., 410 F. Supp. 513 (N.D. Cal. 1976), aff'd mem., 580 F.2d 1054 (9th Cir. 1978), noted that "arguably, ... a driver-trainer who works for a horse owner is an independent contractor." Id. at 518 n.11.
103. Id. at 1092.
105. Id. at 318.
106. Id. at 321 (footnote omitted).
jecture any desire to subject to federal regulation city and state licensing activities of which it was obviously aware.  

An analysis within the framework prescribed in Part II demonstrates that licensing agencies do not fit within the theory of third-party liability. Applying the framework, the licensing agency does meet at least three of the criteria for coverage as a third party. First, section 701(b) defines a licensing agency as an employer. Second, in many cases the agency will be granting licenses to persons who will then seek to enter into relationships that Title VII defines as employment. Third, the licensing agency controls directly and substantially the job market of individuals seeking licenses. A fourth criterion, that the third party commit an act of discrimination of a type actionable under section 703(a)(1), depends upon the claim being brought. Individuals surely can bring disparate treatment claims against state licensing agencies, but they may be unable to maintain disparate

107. Id.
108. 42 U.S.C. § 2000e (1982). Section 701(a) defines "person" to include "governments" and "government agencies." A licensing agency could employ over fifteen individuals and, therefore, be an employer in its own right, liable for discrimination against its own employees, and a proper defendant in a Title VII action, see Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650 (5th Cir.), cert. denied, 449 U.S. 891 (1980). Moreover, even if the agency employs less than fifteen persons, the Act might still cover it as an agent of the state. See Woodard v. Virginia Bd. of Bar Examiners, 420 F. Supp. 211, 213 n.3 (E.D. Va. 1976) (finding a state licensing agency an agent of state), aff'd per curiam, 598 F.2d 1345 (4th Cir. 1979); accord Aguilera v. Cook County Merit Bd., 21 Fair Empl. Pract. Cas. 731 (BNA) (N.D. Ill. 1979), rev'd mem., 661 F.2d 937 (7th Cir. 1981); cf. Adams v. Leatherbury, 388 So. 2d 510, 512 (Ala. 1980) (finding a state agency an agent of the state under the Age Discrimination in Employment Act). But see Rogero v. Noone, 704 F.2d 518 (11th Cir. 1983); cf. Dumas v. Town of Mount Vernon, 612 F.2d 974 (5th Cir. 1980) (holding that town employing less than fifteen persons not covered by Title VII). The Seventh Circuit apparently reversed the district court's Aguilera opinion on grounds other than jurisdiction, see Aguilera v. Cook County Merit Bd., 582 F. Supp. 1053, 1054 (N.D. Ill. 1984), and one can distinguish Dumas from Woodard because the town in Dumas was an independent political subdivision, not an agent of the state. The court in Rogero held that, for the court to have jurisdiction over the agent, the plaintiff had to join the principal as a co-defendant. Title VII's language, however, imposes no such requirement, and the concurring judge in Rogero felt that the proper inquiry was whether the facts confirmed the allegation of agency status. See 704 F.2d at 521-22 (Clark, J., concurring).

109. For example, denying an individual a license to practice law will deprive that individual of many opportunities that are in the nature of employment, such as being an associate at a law firm or a lawyer for a corporation or the government.

110. Practicing an occupation without a license is often a criminal offense. See, e.g., 17 Mich. Comp. Laws Ann. § 339.601 (West Supp. 1984-85). One court, which found that Title VII did not cover the licensing activities of the Virginia Board of Bar Examiners, noted that the Board "exercise[d] complete control over the plaintiffs' access to the attorney job market within the Commonwealth of Virginia." Woodard v. Virginia Bd. of Bar Examiners, 420 F. Supp. 211, 213 (E.D. Va. 1976), aff'd per curiam, 598 F.2d 1345 (4th Cir. 1979).
impact claims.\textsuperscript{111} The fifth criterion, whether or not Congress intended to exclude the party from coverage, requires a more extensive examination. The legislative history of Title VII provides some guidance. The congressional debate over the Civil Rights Act of 1964 indicates that Congress did not intend Title VII to apply to bar associations,\textsuperscript{112} which, due to their control over access to the legal profession, stand in an analogous position to lawyers as licensing agencies do to practitioners of licensed occupations. Moreover, the debates and reports concerning the extension of Title VII's coverage in 1972 often mention that Title VII would now cover millions of state and local government employees.\textsuperscript{113} However, neither the proponents nor, more significantly, the opponents of the extension mentioned the possibility that license applicants would fall within the Act's protection.\textsuperscript{114} The opponents of the 1972 Amendments predicted dire consequences from the Amendments' enactment.\textsuperscript{115} These opponents likely

\begin{enumerate}
\item[111.] See supra note 29.
\item[112.] During the debate, Congressman Cahill of New Jersey introduced an amendment to prohibit unions from accepting members on any basis other than job qualifications. In the course of the debate over this amendment, which the House eventually rejected, the following exchange took place between Cahill and Congressman Dent of Pennsylvania:

\begin{quote}
Mr. Dent. If I understand the gentleman right you would go beyond just a labor organization. You might take in a professional association that practices that sort of discrimination, as you call it.

Mr. Cahill. No. That is not the fact.

Mr. Dent. I want to clarify this situation. In Pennsylvania, for instance, a student may enter a law school, he may graduate from that law school, and the local bar association can prevent him from practicing law in any specific county although he has passed the bar, graduated from college, yet the bar association committee on admittance will bar him for something he had nothing to do with.

Mr. Cahill. I understand the gentleman's question, and I understand the situation as it exists in Pennsylvania. I will say this is an amendment to §704 subsection (1) [42 U.S.C. § 2000e-3(a) (1982)] which reads that it shall be an unlawful employment practice for a labor organization. The bar association is not included.

Mr. Dent. I do not think the gentleman's amendment is germane to the purpose of the act anymore than if I offered an amendment to prevent a bar association from admitting only approved applicants.

110 CONG. REC. 2593 (1964).
\item[113.] See 118 CONG. REC. 1816 (1972) (statement of Senator Williams); see also National Org. for Women v. Waterfront Comm'n, 468 F. Supp. 317, 320 (S.D.N.Y. 1979) (citing the legislative history).
\item[115.] Senator Ervin predicted that extending the Act's coverage to state and local governments would result in Federal judges appointing professors at public universities, 118 CONG. REC. 1678 (1972), and taking jurisdiction over the election of state and local offi-
would have mentioned the coverage of state licensing agencies had they considered such coverage a possibility.\textsuperscript{116}

The licensing of professions provides an example of an activity sufficiently well known that one should presume that Congress knew of the activity and chose not to cover it. This conclusion comports with the assumption that Congress does not intend to encroach upon state authority by implication.\textsuperscript{117} While Title VII may define a licensing agency as an "employer,"\textsuperscript{118} liable—like many employment agencies\textsuperscript{119} and labor organizations\textsuperscript{120}—for discrimination against its own employees, the licensing agency focuses primarily—like employment agencies and labor organizations—upon the screening of individuals for other employers. Licensing agencies, therefore, present an instance where courts should interpret Congress’s enumeration of employment agencies and labor organizations as exclusive.\textsuperscript{121}

\begin{quote}


\textsuperscript{118} See supra note 108 and accompanying text.

\textsuperscript{119} B. Schlei & P. Grossman, EMPLOYMENT DISCRIMINATION LAW 656 (2d ed. 1983). The EEOC claims that Title VII prohibits an employment agency from discriminating against its own employees regardless of whether the employment agency is an "employer" as defined by § 701(b). See EEOC Dec. No. 71-1596 (1971), CCH EEOC Dec. (1973) ¶ 6271; cf. 29 C.F.R. § 1625.3(b) (interpreting the Age Discrimination in Employment Act).

\textsuperscript{120} B. Schlei & P. Grossman, supra note 119, at 618; see Rosser v. Laborers' Int'l Union, 616 F.2d 221 (5th Cir.), cert. denied, 449 U.S. 886 (1980).

C. Hospital Staff Privileges

People enter into and perform a variety of contracts on the premises of a hospital. These include many contracts other than those between the hospital and its employees. For example, a surgeon will operate upon a patient and bill him directly. As a consequence, several third party liability cases have involved hospitals as defendants. Two of these cases have reached opposite conclusions about whether a hospital's discriminatory refusal to grant a doctor staff or admitting privileges violates Title VII.

In both cases, Pao v. Holy Redeemer Hospital and Beverley v. Douglas, the physicians claimed that the hospitals denied them staff privileges by reference to discriminatory criteria. They further claimed that this denial adversely affected their relationship with their "employers," i.e., their patients. Therefore, the physicians charged that the hospitals' discrimination members of a licensing agency for discrimination based upon any of the criteria—race, color, religion, sex or national origin—that Title VII covers. See B. SCHLEI & P. GROSSMAN, supra note 119, at 684-85. However, plaintiffs could not bring either a § 1981 or a § 1983 action against a licensing agency alleging the disparate impact of the agency's examinations without alleging discriminatory purpose. See General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982) (holding that only "purposeful" discrimination is actionable under § 1981); Washington v. Davis, 426 U.S. 229, 238-48 (1976) (holding Title VII disparate-impact analysis inapplicable to equal protection claims); see also id. at 248 & n.14 (expressing concern that disparate-impact analysis would invalidate licensing statutes) (citing Silverman, Equal Protection, Economic Legislation, and Racial Discrimination, 25 VAND. L. REV. 1183 (1972)).

In its regulations on employee selection procedures, the EEOC acknowledges the split in authority over the coverage of licensing activities: "These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include . . . licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law." Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.2(8) (1984).

123. See Gomez v. Alexian Bros. Hosp., 698 F.2d 1019 (9th Cir. 1983) (per curiam) (hospital rejected plaintiff's employer's proposal to operate the hospital's emergency room because several of the physicians would have been Hispanic); Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973) (hospital refused to allow male private-duty nurse to report to female patient to whom he had been referred); Beverley v. Douglas, 591 F. Supp. 1321 (S.D.N.Y. 1984) (hospital denied plaintiff's application for admitting privileges); Pao v. Holy Redeemer Hosp., 547 F. Supp. 484 (E.D. Pa. 1982) (hospital refused to grant plaintiff staff privileges).
124. Compare Beverley, 591 F. Supp. at 1327 (refusing to impose liability upon a hospital) with Pao, 547 F. Supp. at 494 (holding hospital liable for discriminatory denial of staff privileges).
127. See Beverley, 591 F. Supp. at 1323; Pao, 547 F. Supp. at 488.
128. See Beverley, 591 F. Supp. at 1327, 1328 n.24; Pao, 547 F. Supp. at 494.
violated Title VII under the theory of third party liability.

In *Pao v. Holy Redeemer Hospital*, 129 the court denied the defendant’s motion to dismiss the doctor’s claim of national origin discrimination, holding that the plaintiff alleged facts analogous to those of *Sibley Memorial Hospital v. Wilson*. 130 In *Sibley*, the District of Columbia Circuit held that a male private duty nurse stated a claim under Title VII when he alleged that the staff nurses at the hospital refused to allow him to report to a female patient to whom a registry had referred him. 131 The court in *Pao* held that the hospital in the case before it “had the same capacity as the defendant in *Sibley* to control the plaintiff’s access to those prospective patients who are his ultimate ‘employers.’ ” 132

In *Beverley v. Douglas*, 133 the court rejected the physician’s argument that a hospital’s discriminatory denial of staff privileges was actionable under Title VII. The court reasoned that even if the hospital interfered with plaintiff’s chances of attracting patients, the doctor-patient relationship was an independent contractor, and not an employment, relationship. The court therefore granted the defendant’s summary judgment motion, stating that “[i]n order to invoke Title VII, plaintiff must allege and prove some link between the defendant’s actions and an employment relationship.” 134

An application of the framework proposed in Part II demonstrates that the court in *Beverley* dealt properly with the issue before it. First, section 701(b) defines the hospital as an “employer.” 135 Second, the hospital has committed an act of discrimination that, if committed against an applicant for employment, would constitute a violation of section 703(a)(1).

The doctors’ claims, however, do not meet the third requirement, that Title VII define the relationship interfered with as employment. As the court in *Beverley* noted, and as the plaintiff in that case apparently conceded, the relationship between doctors and patients is the “classic independent contractor” relationship. 136 The doctor is free to set his own hours and fees, and the patient retains no control over the manner in which the doctor conducts his affairs. Title VII plaintiffs must show some con-

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130. 488 F.2d 1338 (D.C. Cir. 1973).
131. *Id.* at 1340-42.
134. *Id.* at 1328 (footnote omitted).
135. *See* Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1021 (9th Cir. 1983); *Sibley*, 488 F.2d at 1340.
nection between the defendant's discriminatory conduct and interference with an employment relationship. Because a doctor claiming a discriminatory denial of staff privileges cannot demonstrate such a connection, courts should not impose Title VII liability upon hospitals for discrimination in their decision to grant such privileges.

CONCLUSION

Given the broad purposes of Title VII, courts must often, when they interpret its language, fill in gaps, clarify ambiguities, and resolve contradictions. The liability of third parties presents a problem that requires courts to perform all of these tasks. The failure of many courts, however, to follow the rationale for holding third parties liable has led to conflicts in the application of the theory of third party liability. The framework proposed in this Note provides criteria to determine third parties' liability consistent with the rationale for third party liability under Title VII. Application of the framework discloses that courts should impose liability upon insurance companies that provide em-

137. See Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980) ("there must be some connection with an employment relationship for Title VII protections to apply").

138. In Gomez v. Alexian Bros. Hosp., 698 F.2d 1019 (9th Cir. 1983) (per curiam), the plaintiff was a doctor of Hispanic decent who practiced through a professional corporation. The plaintiff submitted a contract proposal to the hospital for his corporation to operate the hospital's emergency room. The hospital rejected the offer and the plaintiff sued, alleging that the hospital refused the proposal because five of the twelve physicians would have been Hispanic. The court of appeals held that the allegations stated a claim under Title VII. The court's conclusions can be worked into the framework proposed in this Note. First, the hospital was an employer under section 701(b). Second, through an act of intentional discrimination, it interfered with the plaintiff's relationship, which was one of employment, with another employer: his own professional corporation. Third, the court found causation, stating: "The conditions of plaintiff's employment are different than they would have been had he not been discriminated against." 698 F.2d at 1021. Fourth, because the court quoted the "peculiar circumstances" language from Sibley, 488 F.2d at 1342, the court may have felt that the plaintiff's predicament was one of those situations not anticipatable by Congress.

One can question the court's "application" of the final part of the test. In effect, Gomez gives employees of minority-owned businesses a Title VII cause of action against firms that discriminatorily reject their employers' contract proposals. It seems doubtful that Congress intended that Title VII create such a far reaching action. But see Note, Title VII Protection for Minority-Owned Businesses, 30 Stan. L. Rev. 993 (1978).
ployee benefits, but courts should not apply third party liability to state licensing agencies or to hospitals that grant physicians staff privileges.

—Andrew O. Schiff