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NOTES

Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner

The decision by the members of a law partnership to invite an associate of the firm to become a partner involves careful consideration of the associate's qualifications. Recently some associates who have been denied advancement to partnership have alleged improper consideration of religion, national origin, or sex in the partner selection process. There are, of course, practical difficulties in proving discrimination in the subjective context of partnership selection. Assuming clear evidence of such discrimination, this Note addresses the question whether an associate may invoke the protection of federal antidiscrimination legislation.

Determining whether discrimination in the selection of a partner is unlawful involves a consideration of conflicting societal values. On the one hand, society has an interest in prohibiting racial, ethnic, religious, and sex discrimination, particularly where, as in the selection of a law partner, that discrimination denies important economic benefits and serves to perpetuate the misconception that only white males are qualified for society's more prestigious positions. On the other hand, a concern for privacy and freedom of association suggests


4. See note 61 infra and accompanying text.
that governmental interference with the selection of one's intimate business associates should be avoided.  

This Note resolves this conflict in favor of the interest in prohibiting discrimination by concluding that current federal antidiscrimination legislation applies to the selection of a law partner. The first section of the Note considers whether the partner relationship can qualify as the employment relationship that is requisite to the application of Title VII of the Civil Rights Act of 1964 or, alternatively, whether consideration for advancement to partner can be characterized as one of the “terms, conditions, or privileges” of the associate’s employment position within the meaning of Title VII. The second section of the Note argues that, since partnership is a contractual relationship and each partner’s interest is considered to be personal property, 42 U.S.C. sections 1981 and 1982 provide independent grounds for the prohibition of racial discrimination in the selection of a partner. As will be shown in the third section, application of either Title VII or sections 1981 and 1982 to the selection of a partner is not precluded by the subjective nature of the partnership selection process, congressional limitations on antidiscrimination legislation intended to protect certain intimate relationships, or a constitutional freedom of associational privacy. The final section examines the various remedies available to plaintiffs who establish that unlawful discrimination prevented their advancement to partnership.

I. TITLE VII

Title VII provides that

(a) 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,

5. See text at notes 169-97 infra.
6. See text at notes 33-61 infra.
8. See text at notes 62-82 infra.
9. See text at notes 83-122 infra.
10. See text at notes 123-97 infra.
11. See text at notes 198-222 infra.
because of such individual’s race, color, religion. sex, or national origin.12

The Act defines “employer” as any “person” who has fifteen13 or more employees and is engaged in an “industry affecting commerce.”14 “Person” is explicitly defined to include partnerships.15 The Equal Employment Opportunity Commission has suggested that a law firm is an “industry affecting commerce” if it provides legal assistance to clients engaged in interstate commerce.16 The courts, within the constitutional limits imposed by the commerce clause,17 have also construed that phrase liberally,18 and thus they have had little difficulty in treating law partnerships as employers under Title VII.19

16. See EEOC, FIRST ANNUAL DIGEST OF LEGAL INTERPRETATIONS, JULY 2, 1965 THROUGH JULY 1, 1966 § I(B)(5) (opinion letter from general counsel of EEOC indicating that law firms are considered “employers” under the Act). Subsequent to issuance of the above opinion letter, the EEOC clarified that such opinion letters were not intended to meet the standards required of a “written interpretation or opinion of the Commission” within the meaning of 42 U.S.C. § 2000e-12(b) (1970). 35 Fed. Reg. 18692 (1970).
17. The commerce clause, U.S. Const. art. I, § 8, has not been interpreted as imposing any significant limitations on the scope of Title VII. See generally Bureau of National Affairs, Inc., THE CIVIL RIGHTS ACTS OF 1964, at 23-24 (1964) [hereinafter cited as BNA].
18. For an example of the broad interpretation given the phrase “industry affecting commerce” under the National Labor Relations Act, currently 29 U.S.C. §§ 152, 153, 158, 169 (1970), see NLRB v. Painblatt, 306 U.S. 601, 606-07 (1938) (“[t]he power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small . . . because . . . commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small”). The guidelines established by the NLRB, with the approval of the courts and Congress, which specify the volume of business below which the Board will not exercise jurisdiction do not affect the scope of Title VII. The reference in 42 U.S.C. § 2000e(h) to the Labor-Management Reporting and Disclosure Act is not intended to limit the scope of Title VII, but merely to provide examples of industries affecting commerce.

Although it is conceivable that a firm with an extremely limited clientele would
The major obstacle to applying Title VII to discrimination20 in
the selection of law partners lies in the definitions of “employee”
and “employment practice.”21 As do other federal statutes,22 the
Act defines “employee” simply as “an individual employed by an
employer.”23 Unlike the definitions in legislation with more limited
purposes,24 the Title VII definition has not been restricted to any
particular class of workers.25 Nonetheless, the courts have inter­
preted the Act as prohibiting only those discriminatory practices that
occur within the context of an employment—that is, an employer–
employee—relationship.26

Since Title VII prohibits employment practices that discriminate
against prospective as well as current employees,27 either a potential

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20. Unless the context indicates otherwise, the terms “discrimination” and “dis­

 criminate” will be used throughout this Note to refer to consideration of factors,

such as race, sex, national origin, or religion, made unlawful by Title VII or 42


21. The professional nature of a law partnership is not an obstacle to the appli­

 cation of Title VII. See Milton v. Bell Laboratories, Inc., 428 F. Supp. 502 (D.

 N.J. 1977); EEOC v. Rinella & Rinella, 401 F. Supp. 175, 180 (N.D. Ill. 1975)

(“[t]he courts . . . have found little distinction between professional and nonprofes­sional job situations, concluding that, since the primary objective of Title VII

is the elimination of the major social ills of job discrimination, discriminatory prac­tices in professional fields are not immune from attack”).


common federal statutory definition for “employee”).


vant to the issues addressed in this Note, are specified.


(1970), in which, consistent with the purpose of regulating labor disputes, super­

visory employees are considered part of management and thus excluded from cover­

age as employees. 29 U.S.C. § 152(3) provides in part: “The term ‘employee’

. . . shall not include . . . any individual employed as a supervisor.”

25. The courts, consistent with congressional intent, have given a liberal construc­

tion to the term “employee.” See, e.g., McClure v. Salvation Army, 460 F.2d 553,

557 (5th Cir.), cert. denied, 409 U.S. 896 (1972); Parham v. Southwestern Bell

Tel. Co., 433 F.2d 421, 425 (8th Cir. 1970). This development broadens the cover­

age of Title VII in two ways. First, more employers will be found to have the

requisite number of employees and thus be subject to the Act. Second, the class

of individuals protected from discriminatory practices is expanded.

26. The EEOC has occasionally argued that Title VII confers rights on any

“person claiming to be aggrieved.” 42 U.S.C. § 2000e-5(b) (Supp. V. 1975), without

regard to the existence of an employment relationship. See Mathis v. Standard


1975). The courts, however, have taken the position that it was Congress’ intent to

limit the Act to employment relationships. See Kyles v. Calcasieu Parish Sheriff’s


27. See text at note 12 supra.
or present employment relationship will come under the statute. These two types of employment relationships correspond to two alternative approaches to the question whether discrimination in the selection of law partners falls within the scope of Title VII. The first approach focuses on the partner's status. If a partner is considered an employee, discrimination in regard to advancement to partnership becomes discrimination with respect to a potential employment relationship, which is unlawful under Title VII. The second approach focuses on an associate's employment status. Since it is well established that an associate is an employee within the meaning of Title VII, if consideration for advancement from associate to partner is characterized either as one of the "terms, conditions, or privileges of employment" or as an "employment opportunity," then any discrimination that occurs with respect to the associate's possible advancement is prohibited by the Act.

A. The Partner as Employee

Whether the partner may be treated as an employee might turn, at least in part, on whether the statuses of partner and employee are mutually exclusive. Under the aggregate theory of

28. Even discriminatory refusal to consider an employee for advancement might violate Title VII. See Gillin v. Federal Paper Bd. Co., 479 F.2d 97 (2d Cir. 1973) (refusal to consider a woman for a promotion to a position for which the defendant believed women were not suited constituted unlawful discrimination even though she would not have received the promotion in any event since the man chosen to fill the position was clearly better qualified).


32. See text at notes 62-82 infra.

33. The view that the two statuses are mutually exclusive can lead to bizarre results. For example, in Kershner v. Heller, 14 N.Y.S.2d 595 (Sup. Ct. 1939), an owner of a small diner was able to avoid compliance with a state statute governing labor picketing by making all his employees partners, which thus eliminated the employer-employee relationship. 14 N.Y.S.2d at 598. Accord, Angilos v. Mesevich, 289 N.Y. 498, 46 N.E.2d 903, rev'd. on other grounds, 320 U.S. 293 (1943). Cf. R.F. Roof, Ltd. v. Sommers, 75 Ohio App. 511, 62 N.E.2d 647 (1944) (member of partnership association, but not of partnership, considered an employee for purposes of worker's compensation). See generally J. Crane & A. Bromberg, LAW OF PARTNERSHIP § 3 (1968).

The majority of jurisdictions accept the premise that a partner cannot also be an employee and is therefore ineligible for worker's compensation in the event of injury. See Herman v. Kandrat Coal Co., 205 Pa. Super. Ct. 117, 208 A.2d 51 (1965); J. Crane & A. Bromberg, supra § 3, at 24. Further support for the notion that partners are not employees can be found in the Internal Revenue Code, which generally provides that partners are to be treated as self-employed individuals, not employees. See, e.g., I.R.C. § 7701; United States v. Empey, 406 F.2d 157,
partnership, a partnership is merely the aggregate of its individual partners and has no identity apart from them. Thus, the partnership can be an employer only if its members are employers. The theory suggests that as employers, partners cannot also be employees, implying that the employment relationship necessary to trigger Title VII does not exist.

If a court were to accept this implication of the aggregate theory, then it could treat as employees persons designated by a firm as "partners" only if they had been denied the incidents of individual partnership status and in reality held positions that were more like those of employees than of partners. Illustrative of this situation is Peterson v. Eppler, in which the partnership agreement of an accounting firm expressly provided that a "junior partner" was to have no authority to participate in the firm's management and no financial interest in the partnership other than a fixed percentage of the firm's profits in addition to a predetermined monthly "salary." Relying on this absence of co-ownership and management rights, the New York state court held that the plaintiff, who had recently been advanced to junior partner, was merely an employee and therefore could not bring an action for an accounting of the partnership profits. Although Peterson did not involve interpretation of a statutory definition of "employee," the EEOC has indicated that it might apply a similar standard to determine the status of a junior partner of a law firm.


34. See J. Crane & A. Bromberg, supra note 33, § 3.
35. 67 N.Y.S.2d 498 (Sup. Ct. 1946). However, some courts do not look beyond the label given by the partnership. See, e.g., Kershner v. Heller, 14 N.Y.S.2d 595 (Sup. Ct. 1939), discussed in note 33 supra.
36. 67 N.Y.S.2d at 499.
37. 67 N.Y.S.2d at 499-500. The court referred to N.Y. Partnership Law §§ 10, 40 (McKinney 1948). These sections correspond to Uniform Partnership Act § 6(1) ("[a] partnership is an association of two or more persons to carry on as co-owners a business for profit") and § 18(c) ("all partners have equal rights in the management and conduct of the partnership business").
White, supra note 2, at 1100 n.73 (citing [1966] 1 Empl. Prac. Guide (CCH) 17,304.18 (no longer available)), quotes the ruling of the General Counsel of the
It is unclear at what point a junior partner would fail to meet the ownership and management-rights criteria applied in \textit{Peterson}. According to one author, a junior partner in a law firm has "a guaranteed minimum salary, plus a small share of profits. Customarily, he does not own firm capital. He participates in partnership meetings, but does not have control of major firm decisions. This has been described as a promotion to an intermediate status . . . ."\footnote{Gibson, Relations Within the Law Firm, \textit{PRAc. LAW.}, May 1968, at 35. See E. SMIGEL, \textit{The Wall Street Lawyer} 229 (1964); Paone & Reis, \textit{supra} note 3, at 639.}

So viewed, the position of junior partner appears to be one of employment, not of ownership and management. If so, the potential employment relationship requisite for the application of Title VII exists. Thus, even though a determination that the position of junior partner is in reality one of employment must be made on a case-by-case basis, Title VII should apply\footnote{Applying Title VII would neither preclude a partnership from exercising the necessary subjective evaluation of potential partners nor require the courts to institute a quota system for filling "junior partner" positions. Although quotas and objective selection methods are often ordered by the courts, they are not required under Title VII.} to the advancement of an associate to junior partner in a firm in which the responsibilities, authority, and remuneration of newly advanced partners do not reflect the traditional characteristics of partnership but rather suggest merely an employment position with somewhat greater responsibility.\footnote{Under this approach, a court would have to assess the characteristics of the position to which an associate had been denied advancement in order to determine if it were in fact one of employment rather than partnership. This task would be manageable with respect to the typical large or moderately sized law firm, since the court could reasonably presume that the position denied the associate would have been roughly equivalent to the positions held by recently accepted "junior partners." In addition, the partnership agreement itself might specify the responsibilities and interests of each of the partnership positions. \textit{Cf.} \textit{Uniform Partnership Act} § 18 (rules determining rights and duties of partners). If the position of "junior partner" is properly deemed one of employment, Title VII would prohibit discrimination on the basis of race, color, religion, national}

\textsc{EEOC:}

As to the treatment of junior partners of a law firm, we have not as yet had occasion to pass on a particular fact situation, but we incline to the view that the term "partner" is not decisive if their perquisites and tenure are more consistent with the status of employee than of co-owner of the enterprise.

In addition, see EEOC, \textit{supra} note 16, § 1(B)(5):

A law firm having the requisite number of employees as prescribed in Section 701 is an "employer" within the meaning of the Act. However, the determination of whether partners of the firm are "employees" within the meaning of Title VII must be determined on a case-by-case basis.

The approach suggested by cases such as Peterson is of limited usefulness, however, because it only postpones answering a more basic question—whether a partner who actually shares in the ownership and control of the firm may be considered an employee for the purposes of Title VII while retaining his status as a partner for other purposes. Consideration of this question requires an examination of an alternative conceptual approach to partnership—the entity theory.

The entity theory of partnership, which views a partnership as an entity separate from its individual members that has rights and duties distinct from them, provides a theoretical framework for treating a partner as an employee for some purposes. For example, Armstrong v. Phinney presented the issue whether a partner who managed a ranch owned by the partnership could exclude from his gross income the value of meals and lodging supplied by the firm. In ruling for the partner, the Fifth Circuit reasoned that, for this tax purpose, Congress had rejected the view that a partnership is simply an aggregate of self-employed individuals in favor of the entity theory, at least where a partner acts as an outsider in dealing with the partnership.

In Bellis v. United States, the Supreme Court applied the entity theory to support its holding that a member of a three-partner law firm could not invoke his fifth amendment privilege against self-origin, or sex, not only in advancement of an associate to that position, but also in the hiring of a lawyer from outside the firm to fill such a position. See 42 U.S.C. § 2000e-2(a)(1) (1970).

Cf. Paone & Reis, supra note 3, at 632 n.55 (citing correspondence with senior officials in state agencies suggesting that a partner-lawyer might be considered an employee for the purposes of fair employment practices statutes in California and Massachusetts).

43. J. CRANE & A. BROMBERG, supra note 33, § 3, at 19. See generally id. at 16-29.
44. 394 F.2d 661 (5th Cir. 1968).
45. I.R.C. § 119 provides this exclusion for employees.
46. 394 F.2d at 663. See H.R. REP. No. 1337, 83d Cong., 2d Sess. 67 (1954), reprinted in [1954] U.S. CODE CONG. & AD. NEWS 4025, 4093. This view was codified in I.R.C. § 707(a) ("[i]f a partner engages in a transaction with a partnership other than in his capacity as a member of such partnership, the transaction shall . . . be considered as occurring between the partnership and one who is not a partner").

The entity theory has also been accepted in those jurisdictions that have considered a partnership to be separate from its partners and hence an "employer" of a partner-employee under the workmen's compensation statutes. See J. CRANE & A. BROMBERG, supra note 33, § 3. States that have offered partners such protection by statute include California, Cal. Lab. Code § 3559 (West 1971); Michigan, Mich. Comp. Laws Ann. § 418.161 (West Supp. 1977); and Oklahoma, 85 Okla. Stat. Ann. tit. 85, § 3 (West Supp. 1977). The Oklahoma statute was enacted after Stephens Produce Co. v. Stephens, 332 P.2d 674 (Okla. 1958), extended coverage of the state workmen's compensation statute to partners. The Louisiana courts have also allowed partners to recover workmen's compensation. See Trappey v. Lumbermen's Mut. Cas. Co., 229 La. 632, 86 So. 2d 515 (1956).

crimination in order to avoid compliance with a grand jury subpoena ordering production of the partnership's financial records. Analogizing to cases involving corporations and noting that many powerful business enterprises operate in partnership form, the Court concluded that the partnership had an "established institutional identity independent of its individual partners." Although the Bellis holding directly applies only to a partner's fifth amendment privilege, the Court's rationale that even a law firm with three partners can be considered an entity distinct from its members is relevant to the application of Title VII. Taken broadly, Bellis suggests that the availability of constitutional or statutory protections should not turn merely on the form of the business organization.

A choice need not be made between the aggregate and entity theories in order to determine whether a partner can be treated as an employee for purposes of Title VII. Rather, the question should be approached in terms of the purposes of the Act. If the objectives of the statute are best met by treating a partner as an employee and if the incidents of partnership are not inconsistent with that treatment, then Title VII should apply to the partner selection process.

This approach has its roots in the "economic reality" test of

49. See, e.g., Wilson v. United States, 221 U.S. 361 (1911).
50. "Wall Street law firms and stock brokerage firms provide significant examples. These are often large, impersonal, highly structured enterprises of essentially perpetual duration." 417 U.S. at 93-94. Moreover, since state law uniformly permits the incorporation of professional associations, the application of the fifth amendment privilege "should not turn on an insubstantial difference in the form of the business enterprise." 417 U.S. at 100-01.

In dictum the Court in Bellis left open the possibility that a small family partnership or a preexisting relationship of confidentiality among the partners would present a different case. 417 U.S. at 101. But see United States v. Mahady & Mahady, 512 F.2d 521 (3d Cir. 1975) (applying Bellis to a small family partnership); In re September, 1975 Special Grand Jury, 435 F. Supp. 538 (N.D. Ind. 1977).
53. The entity theory of partnership does not compel the conclusion that a partner is an employee unless he or she is a working partner. Cf. B & E Installers v. Mabie & Mintz, 25 Cal. App. 3d 491, 495-96, 101 Cal. Rptr. 919, 921 (1972) (partner held nonemployee although partnership held an entity distinct from its partners).
54. The distinction between the traditional approach to the employer-employee relationship and the "economic reality" test is summarized by Professor Larson:

There are two ways of looking at the employee concept. The conventional way is to think of the employee category as a fixed and immutable one, for all times and for all purposes; under this approach, it is assumed that all modern legislation based on the employment relation intended to adopt in toto the case law of master and servant, which, for vicarious tort liability purposes, had already built up an elaborate set of precedents covering most combinations of facts. . . .

The newer way of looking at the concept . . . is to say that, just as the "servant" concept was tailored to fit a particular purpose—the definition of the scope of a master's vicarious tort liability—so the term "employee" when used in social and labor legislation should be interpreted in the light of the purpose of the leg-
**United States v. Silk.** In that case, the Supreme Court held that individuals who loaded and unloaded railroad coal cars were employees within the coverage of the Social Security Act even though they would have been characterized as independent contractors under the common law. The Court reasoned that "the terms 'employment' and 'employee' are to be construed to accomplish the purpose of the legislation. As the Federal Social Security legislation is an attack upon recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose." Consistent with the *Silk* approach, a small number of jurisdictions have, by legislation or judicial decision, extended workmen's compensation coverage to working partners exposed to traditional employment hazards. Conversely, where the purpose of social legislation does not require the extension of coverage to partners, they have not been treated as employees.

With the possible exception of a concern for the associational and privacy interests of the partners, a matter that will be considered in section III of this Note, nothing in the partnership form of business precludes treatment of a partner as an employee for purposes of Title VII. More important, the objectives of the Act are best met...
by applying its prohibitions to the partner selection process. Unlawful discrimination in partnership decisions deprives those affected of access to a position of economic reward and social prestige and may serve in more subtle ways to perpetuate inequality.61 And, although Title VII does not purport to reach all discriminatory practices that might deprive an individual of economic benefits, it is designed to reach discrimination that directly affects one's occupation and livelihood. Thus, both the nature of law partnerships and the purposes of Title VII indicate that the Act can—and should—be applied to such entities.

B. Consideration for Advancement to Partner as a Term, Condition, or Privilege of Employment

The above approach, under which a partner is treated as an employee, focuses on the associate's potential employment position. An alternative approach focuses on the present employment position of the associate who is anticipating advancement62 to partner.63 Under this alternative, discriminatory refusal to consider an associate for

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(1944), discussed in note 33 supra. A fortiori a stockholder of a large corporation can also be an employee. See BNA, supra note 17, at 26.

Another traditional characteristic of partnership is management and control of the partnership business. See UNIFORM PARTNERSHIP ACT § 18(e), quoted in note 37 supra. However, similar management rights of owners can exist in other forms of business, see J. CRANE & A. BROMBERG, supra note 33, § 23B(f), at 129-30, and can be altered by agreement in a partnership, see UNIFORM PARTNERSHIP ACT § 18. Supervisory and management personnel are "employees" under Title VII, see BNA, supra note 17, at 26, and thus the existence of management responsibilities alone should not preclude classifying a position as one of employment for purposes of Title VII.

Also characteristic of partnership is the unlimited joint and several liability of each partner for the debts and obligations of the partnership, see UNIFORM PARTNERSHIP ACT § 15(a), (b), and the ability of each partner both to act as an agent for the partnership and to bind the partnership, see id. § 9(1). However, the doctrines of respondeat superior and other principles of agency can give rise to similar responsibilities and liabilities for employees of a business organization—including associates of a law partnership. See Plaintiff's Memorandum in Opposition to Defendant's Motion To Dismiss at 41, Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977).

The characteristics of joint liability, mutual obligation, and the participation of each partner in controlling the activities and direction of the partnership do not establish the absence of an employment relationship, but rather indicate the need for discretion in the selection of partners, an issue that is discussed in the text at notes 124-44 infra.

61. See note 158 infra.

62. Perhaps "invitation" is less conclusive than "advancement," since the latter term may imply coverage under Title VII by analogy to "promotion." However, in the larger law firms "advancement" is descriptive of the process of moving through the ranks from a newly hired associate to senior associate and finally to partner. See E. SMIGEL, supra note 40, at 113-40.

63. Although either analysis applies to an associate seeking advancement, only the partner-as-employee analysis is applicable to an individual outside the firm seeking to fill a partnership vacancy. Cf. NLRB v. Bell Aircraft Corp., 206 F.2d 235, 237 (2d Cir. 1953) (assuming that an applicant for a supervisory position who was not already an employee would not be protected under the National Labor Relations
such advancement would constitute discrimination with respect to either the "terms, conditions, or privileges of employment"64 or an "employment opportunity"65 of the associate.66 This language from Title VII has consistently been held to prohibit discrimination in considering an employee for promotion.67 Thus, the issue crucial to the applicability of this approach is whether advancement to partner should be treated as a promotion for purposes of the Act.

In many respects advancement to partner resembles a typical promotion. Like the possibility of promotion, the possibility of advancement to partner is often offered as an inducement to potential associates to join a law firm68 and to work diligently during the years spent as an associate.69 In addition, an associate's work is typically evaluated in terms of his eventual suitability for partnership, and job security in a law firm generally is not attained until partnership is achieved.70

Advancement to partner, however, is not precisely equivalent to a promotion. Although a promotion typically involves movement from one employment position to another,71 the individual's status as an employee continues. Assuming arguendo that a partner is not an employee for purposes of Title VII, then the advancement to partner, unlike the typical promotion, involves a change in status from associate—a position covered by the Act72—to partner, a position not covered. Moreover, even though advancement to partnership may be an opportunity that is presented to some employees, it is not an "employment opportunity," since it represents a termination rather than a continuation of the employment relationship.73

66. See Paone & Reis, supra note 3, at 640; White, supra note 2, at 1106-07; Note, supra note 3, at 531.
68. See White, supra note 2, at 1106 n.91.
69. It is not unusual for the recruiting literature of firms to intimate that advancement to partnership is almost automatic by stating that it assumes every associate hired is a potential partner and that its expectation is that the associate will become a partner in a certain number of years. The expectation of advancement growing out of this representation might even give rise to an action for breach of contract by an associate who feels that he has not been considered for advancement in accordance with the representations made at the time of initial hiring. See Complaint at 23, Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977).
70. Note, supra note 3, at 531.
71. See Defendant's Reply Brief at 10-11, Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977), which argues that promotion to partner is not an "employment opportunity" since it involves a shift to the status of employer.
72. See text at note 29 supra.
73. See note 71 supra.
That this technical distinction is insufficient to preclude the treatment of advancement to partner as a promotion is suggested by an early National Labor Relations Act case. In *NLRB v. Bell Aircraft Corp.*, the Second Circuit conceded that, although the plaintiff's original position was an "employee" position within the meaning of the labor relations act, the position of foreman, to which he had been denied promotion, was not. Nonetheless, the court awarded earnings lost as a result of the employer's denial of the promotion for reasons prohibited by the statute, stating that

[alt] the time the discrimination took place he was clearly a protected employee, and his prospects for promotion were among the conditions of his employment. The Act protected him so long as he held a nonsupervisory position, and it is immaterial that the protection thereby afforded was calculated to enable him to obtain a position in which he would no longer be protected.

Although *Bell* was not a Title VII case, one recent case has relied upon it to hold that refusal to advance a law-firm associate to partner on the basis of his religion or national origin constitutes discrimination in a condition of his employment in violation of Title VII.

Three arguments against applying the *Bell* rationale to treat advancements as promotions in Title VII cases might be advanced, but none of them is persuasive. First, although the position of the foreman in *Bell* was not that of an employee under the NLRA it was an employee position under common law. Thus, the advancement in *Bell* is more easily characterized as a typical promotion than is the advancement to law partner. A subsequent NLRB case minimizes the importance of this distinction, however, by applying *Bell* to advancement to a position characterized at common law as that of an independent contractor.

Second, it might be argued that different rationales underlie the restrictive definition of "employee" under the NLRA and the exclusion of partners as employees under Title VII. The NLRA does

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74. 206 F.2d 235 (2d Cir. 1953).
75. 206 F.2d at 237.
79. 414 U.S. at 187-88. The case does not directly support the extension of the *Bell* analysis to advancement to nonemployment positions. *Golden State* dealt with whether back pay should be awarded for the period after an expected promotion to an employment position not covered by the NLRA where the aggrieved employee had been improperly discharged prior to the promotion. Also, the position to which the employee would have been advanced, although that of an independent contractor under the common-law test, was probably an employment position under an "economic reality" analysis.
not apply to supervisory personnel because they are considered part of management and hence without need of protection from that entity's unfair labor practices. Thus, refusal to promote an employee to a supervisory position may be considered an unfair labor practice without defeating the purpose of excluding those who have attained supervisory status from coverage. If, in contrast, the failure explicitly to include partners as employees under Title VII reflects a congressional intent to avoid governmental interference with the partnership selection process, then clearly that intent would be defeated by treating discrimination in advancement to partner as discrimination in the terms, conditions, or privileges of employment. The legislative history of Title VII is silent on this issue, however. Moreover, the Act does not distinguish between professional and nonprofessional employees. Thus, there is no evidence that Congress' purposes would be defeated by extending the Bell analysis to Title VII cases.

The third argument against treating advancements to partner as promotions notes that the "terms, conditions, or privileges" approach does not apply to discrimination against persons who were not associates of the firm at the time the discrimination occurred. It might be objected that protecting insiders from unlawful discrimination while denying the same protection to outsiders results in an inconsistent application of the public policy of equal opportunity for economic and professional development. However, this objection is not relevant to firms where the only means of achieving partnership is through advancement from associate. More generally, the failure of the Act to prohibit discrimination in some areas should not prevent its application in other areas.


As shown in the previous section of this Note, the primary obstacle to applying Title VII to the advancement to partner lies in the difficulty of characterizing the partner's affiliation with the law firm as an employment relationship. Even if this obstacle cannot be overcome, an associate who has been denied advancement to partnership on the basis of race may be able to obtain relief under two other statutes, each of which comes from the Civil Rights Act of 1866 and has experienced a recent judicial revival. These stat-

80. See note 60 supra.
82. Even if Title VII does not apply directly to advancement, a court might construe it as prohibiting actual or constructive discharge, see 42 U.S.C. § 2000e-2(a)(1) (1970), of the associate who is, in effect, forced to leave the employment of the firm or to become a "permanent associate" upon the denial of partnership status.
83. Section 1 of the Civil Rights Act of 1866, 14 Stat. 27 (1866) provided that
utes are 42 U.S.C. section 1981,\textsuperscript{84} which provides, \textit{inter alia}, that all persons shall have the same right as white citizens to make contracts, and 42 U.S.C. section 1982,\textsuperscript{85} which provides that all citizens shall have the same right as white citizens to purchase and sell real and personal property. Since the partnership arrangement can be characterized as a contract among the partners,\textsuperscript{86} section 1981 might be invoked when an individual is not allowed to enter into the partnership contract because of his race. Section 1982 might be applicable because a partner’s interest in a partnership is a personal property interest,\textsuperscript{87} and therefore discrimination in the selection of partners may be characterized as discrimination in “selling” an interest in the partnership. This section of the Note examines the feasibility of invoking section 1981 or section 1982 as an alternative to Title VII in the context of the law partnership.

A. \textit{Section 1981}

Since most employment involves a contractual relationship, the revival of section 1981 prompted concern about whether Title VII implicitly repealed that statute, at least with respect to employment contracts.\textsuperscript{88} Congress did not address that potential conflict when it

\begin{itemize}
\item all persons born in the United States and not subject to any foreign power, \ldots are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude \ldots shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens. \ldots
\end{itemize}

This statute was passed pursuant to section two of the thirteenth amendment to United States Constitution, which, in its entirety, reads as follows:

\begin{quote}
\textbf{Section 1:}

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

\textbf{Section 2:}

Congress shall have power to enforce this article by appropriate legislation.
\end{quote}

\textsuperscript{84} 42 U.S.C. § 1981 (1970) provides that
\begin{itemize}
\item all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
\end{itemize}

\textsuperscript{85} 42 U.S.C. § 1982 (1970) provides that “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”

\textsuperscript{86} Partnership being a relation of trust, confidence and mutual agency, it follows that it must be founded on \textit{contract} and that no person can become a partner except by the consent of all the others.” 1 R. Rowley, ROWLEY ON PARTNERSHIP § 18(g), at 499 (2d ed. 1960) (emphasis added).

\textsuperscript{87} See \textit{Uniform Partnership Act} § 26: “A partner’s interest in the partnership is his share of the profits and surplus, and the same is personal property.”

enacted Title VII. However, judicial decisions rejecting implied repeal of section 1981 received explicit legislative approval in 1972 when Congress, in amending Title VII, enacted the Equal Employment Opportunity Act. Furthermore, although the courts have recognized that the protections against employment discrimination embodied in Title VII and section 1981 are coextensive, the circuits were divided over the extent to which an individual alleging employment discrimination must first exhaust his remedies under Title VII before proceeding under section 1981. The Supreme Court settled this question in Johnson v. Railway Express Agency, where it held that the filing of a Title VII claim is not a prerequisite to seeking relief under section 1981 and that remedies under section 1981 are not limited to those available under Title VII.

Given that section 1981 and Title VII provide independent grounds for relief, it must be determined whether application of one statute has advantages over the other in the context of a law partnership. Since section 1981 is not limited to employment contracts, its applicability does not turn on characterizing the partner's affiliation with the partnership as an employment relation. Moreover, an associate might prefer to proceed under section 1981 in lieu of Title VII if he had failed to meet the procedural requirements of Title VII, desired a remedy not generally available under Title VII.


92. See Comment, supra note 89, at 462.


95. 421 U.S. at 459-60. Additional remedies could include punitive damages and back pay beyond the two-year limitation of Title VII.

96. Section 1981 has been held applicable in such situations as contracts of enrollment in private schools, see Runyon v. McCrary, 427 U.S. 160 (1976); security deposits required by a utility, see Cody v. Union Elec., 518 F.2d 978 (8th Cir. 1975); and selection to unpaid positions on a city board, see Guenon v. Board of Liquidation, 396 F. Supp. 541 (E.D. La. 1975). See also Seldin, Eradicating Racial Discrimination at Public Accommodations Not Covered by Title II, 28 RUTGERS L. REV. 1, 18 (1974).

97. For example, the plaintiff must initiate an action within 90 days after the EEOC has indicated it would take no further action. 42 U.S.C. § 2000e-(5)(f)(1) (Supp. V 1975).

98. The plaintiff might seek punitive damages or back pay beyond the two-year limitation in Title VII.
or worked for a firm that would not qualify as an employer under Title VII either because it does not affect commerce or because
it has fewer than fifteen employees.\footnote{99}

A difficulty in applying section 1981 to the law partnership lies in the limitation implicit in its language, which provides that all persons shall have “the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.” The “same right to contract” comes into play only when an employer who is seeking to fill a position refuses to hire a qualified applicant on the basis of race;\footnote{101} that language does not compel an employer to hire an applicant who seeks employment in a position that the employer had no intention of filling or for which the applicant is not qualified. This distinction, which is elementary in the typical situation of employment discrimination, becomes more complex in the context of an offer to join a law partnership, where an established firm does not so much fill vacancies as it evaluates potential partners and creates positions for them. In these circumstances, the inquiry should proceed first by determining the class of potential partners—which in many large, established firms consists of the nonpermanent associates—and

\footnote{99} Since § 1981 is based on power granted to Congress under the thirteenth amendment, its prohibitions are not limited to those employers who can be reached through the commerce clause. See text at notes 16-19 \textit{supra}. See generally Note, \textit{supra} note 94, at 482.

\footnote{100} Cf. Comment, \textit{supra} note 88, at 638 (discussing previous 25-employee limit). Section 1981 on its face is not limited to employers who have some minimum number of employees. However, the courts might read this limitation into § 1981 as it applies to employment contracts if this minimum size were viewed as a reflection of a national policy not to interfere with the hiring and employment practices of small establishments. \textit{But see generally Note, supra} note 94, at 475, 481, which suggests that, as the courts try to reconcile § 1981 with later antidiscrimination legislation, they should read into § 1981 only those conflicting elements of the later legislation that represent considered determinations of national policy:

\begin{quote}
Areas of non-coverage that reflect limitations in the congressional basis of power or concern over the difficulties of administrative enforcement, and those provisions inserted to effect cloture votes, bereft of any underlying policy justification, need be given no effect in limiting the scope of the earlier statute.
\end{quote}
\textit{Id.} at 475 (footnote omitted). Under this approach, the author of that Note concludes that the exemptions for industries not affecting commerce, for employers with fewer than 15 employees, and for private clubs as employers need not be read into § 1981. \textit{Id.} at 481.


then by ascertaining whether persons of different races have been given equal consideration.103

Other limitations on the application of section 1981 have also been suggested.104 The notions that the statute merely assures legal capacity to contract rather than granting remedies for private discrimination105 and that its guarantees extend only to those areas of private discrimination explicitly mentioned by Congress when it enacted the 1866 Act106 have apparently been rejected by the courts.107 Another suggestion has been that section 1981 be applied only to those areas of private discrimination that recent Congresses have decided to subject to federal regulation. In these areas section 1981 would provide a cause of action where the more recent regulations contain procedural hurdles that reflect congressional bases of power more limited than provided by the thirteenth amendment or that are inconsistent with the spirit of the particular legislation.108 To a large extent, the courts have adopted this position in accommodating section 1981 to Title VII.109 If the only reason Title VII does not apply to the partnership selection process is that a partner does not meet Title VII's technical definition of "employee," then section 1981 should be applicable to this process.

Another suggestion for limiting the applicability of section 1981 has been that the social policy behind avoiding undue governmental compulsion and intrusion into associational privacy should confine that statute to situations where the criteria for entering into the contract are either established in advance or readily ascertainable and the goods or services involved in the contract are, at least theoretically, fungible.110 Under this analysis, section 1981 should not reach contracts in which the criteria for agreement or the nature of the contractual goods or services involves a mixture of fungible aspects.

103. See Note, supra note 101, at 144.


106. These specific areas were housing, employment, and conspiratorial violence. Id. at 486.

107. See, e.g., Runyon v. McCrary, 427 U.S. 160, 168-72 (1976) (applying § 1981 to private educational institutions, an area not specifically considered by Congress in 1866); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 428 n.40 (1968) (suggesting that the references to specific “instances of private mistreatment” in the 1866 debates “were understood as [merely] illustrative of the evils that the Civil Rights Act of 1866 would correct”).


and personal preferences. This approach certainly has merit, since some limitation respecting personal preferences must be read into the broad language of section 1981: marriage, for example, has a contractual component, but it should not be subject to antidiscrimination legislation. Rather than characterizing the partnership relationship as personal or impersonal, this Note will deal with the concerns underlying this suggested limitation in section III below. That section will examine the partnership relationship in light of apparent congressional intent to avoid application of antidiscrimination legislation to intimate relationships and in light of constitutional protection with respect to the associational interests involved in the partnership contract.

B. Section 1982

As originally enacted, the prohibition against racial discrimination in contracts that is currently embodied in section 1981 was part of a more comprehensive statute, a portion of which provided that all citizens should have the same rights as enjoyed by whites to "inherit, purchase, lease, sell, hold, and convey real and personal property." The provisions pertaining to property interests were subsequently incorporated into 42 U.S.C. section 1982. This section has experienced revived application since Jones v. Alfred H. Mayer Co., in which the Supreme Court held that section 1 of the Civil Rights Act of 1866 and its derivative, 42 U.S.C. section 1982, prohibit private discrimination in the sale of property.

Most litigation under section 1982 has involved racial discrimination in the conveyance of interests in real property. Nevertheless, the language of the statute also prohibits discrimination in the conveyance of personal property. Relying on this language, two district courts have held that insurance contracts constitute or embody proper...

111. Note, supra note 94, at 487.
113. See text at notes 145-97 infra.
114. See note 83 supra.
116. 392 U.S. 409 (1968). The Court cautioned that it is important to make clear precisely what this case does not involve. Whatever else it may be, 42 U.S.C. § 1982 is not a comprehensive open housing law. In sharp contrast to the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968, . . . the statute in this case deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin.
117. 392 U.S. at 413 (footnote omitted, emphasis original). See note 122 infra.
118. See, e.g., Seaton v. Sky Realty Co., 491 F.2d 634 (7th Cir. 1974).
property rights that fall within the provisions of section 1982. Since a partner's interest in a partnership is considered to be personal property, section 1982 might be read to prohibit racial discrimination in the conveyance of that interest. However, because the conveyance of personal property is at most merely incidental to selecting a partner and because the courts have thus far applied section 1982 principally to conveyances of real property, section 1981 would appear to be the more appropriate ground for relief for racial discrimination in the selection of a partner.

Finally, two additional possible limitations on the application of both section 1981 and section 1982 should be noted. First, the early cases indicated that state action must be present before these statutes could be invoked. Recent Supreme Court decisions, however, have extended the application of these statutes to incidents of private discrimination. Second, the Supreme Court has been unwilling to extend the scope of these statutes beyond racial discrimination. Thus, sections 1981 and 1982 appear to provide a feasible alternative to Title VII only where racial discrimination occurs in the selection of a partner.

III. FURTHER OBJECTIONS TO APPLYING ANTIDISCRIMINATION LEGISLATION TO THE SELECTION OF A LAW PARTNER: THE SUBJECTIVITY OF THE SELECTION PROCESS AND THE PRIVACY INTERESTS OF THE PARTNERS

Thus far, the discussion focusing on objections to applying either Title VII or 42 U.S.C. sections 1981 and 1982 to the partner selection process has been based upon the limitations imposed by the language of these statutes. Assuming these obstacles can be overcome, attention must be directed toward more general objections that might prevent application of any antidiscrimination legislation to the selection of a partner. In particular, a determination must be made....

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119. See note 87 supra.
120. See, e.g., Hodges v. United States, 203 U.S. 1 (1906).
122. Sections 1981 and 1982, read literally as well as in light of the circumstances under which they were enacted, seem intended to prohibit only racially motivated discrimination. See generally Runyon v. McCrary, 427 U.S. 160, 168-72 (1976); Note, supra note 94. The current interpretation of the Civil Rights Act of 1866, it has been argued, already extends far beyond the original congressional intent. See, e.g., 427 U.S. at 189 (Stevens, J., concurring).

The courts have, nonetheless, resisted demands to apply § 1981 to every possible....
whether application of these statutes would impermissibly interfere


Courts have also refused to apply the statute to religious discrimination or discrimination based on national origin. See, e.g., Schetter v. Heim, 300 F. Supp. 1070, 1073 (E.D. Wis. 1969). Cf. Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (claim of discrimination against all who were outside "mainstream white" educational, social, and cultural establishment was too broad, but it would be appropriate to limit claim to a racial or cultural group that fared demonstrably worse than others). But see Comment, 5 COLUM. HUMAN RIGHTS L. REV. 437, supra note 89, at 453; Comment, 10 U. RICH. L. REV. 339, supra note 89, at 341 (arguing that discrimination based on national origin is banned by § 1981). There is some authority for extending the coverage of the Civil Rights Acts to include Puerto Ricans and Hispanics. See, e.g., Puerto Rican Media Action & Educ. Council v. Metromedia, Inc., 9 Empl. Prac. Dec. ¶ 10,173 (S.D.N.Y. 1975); Miranda v. Local 208, Almagated Clothing Workers, 8 Empl. Prac. Dec. ¶ 9601 (D.N.J. 1974); Sabala v. Western Gillette, Inc., 362 F. Supp. 1142 (S.D. Tex. 1973), affd. in part and revd. in part, 516 F.2d 1251 (5th Cir. 1975) (black and Hispanic plaintiffs).

The lower courts have divided on whether whites could maintain a cause of action under § 1981, compare Kurylas v. United States Dept. of Agriculture, 373 F. Supp. 1072, 1075 (D.D.C. 1974), affd. mem. 514 F.2d 894 (D.C. Cir. 1975) (asserting that most courts deny standing to whites), and Van Hoomisen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973); Perkins v. Banster, 190 F. Supp. 98 (D. Md.), affd., 285 F.2d 426 (4th Cir. 1960) (whites have no standing) with Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90 (D. Conn. 1975) (whites have standing). The Supreme Court, in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), held that whites could maintain a § 1981 claim. Although the language and history of the Civil Rights Act of 1866 might indicate a congressional intention to limit the statute's coverage to blacks and former slaves, the Court in McDonald, after citing some rather convincing language from the original Senate bill and the Senate and House debates that suggested that the Act was to apply to whites as well as blacks, 427 U.S. at 294-95, concluded that the Act was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race. Unlike as it might have appeared in 1866 that white citizens would encounter substantial racial discrimination of the sort proscribed under the Act, the statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves. And while the statutory language has been somewhat streamlined in reenactment and codification, there is no indication that § 1981 is intended to provide any less than the Congress enacted in 1866 regarding racial discrimination against white persons.

427 U.S. at 295-96.

Thus far the decisions applying § 1982 have been limited to discrimination against blacks. See, e.g., Jones v. Alfred H. Mayer, Inc., 392 U.S. 409 (1968). However, the common statutory source of § 1981 and § 1982 suggests that the prohibition of racial discrimination against nonblacks held to be contained in § 1981 will be extended to § 1982. Cf. Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975) (extending § 1982 doctrine that state action need not be shown to § 1981 because of the common statutory source of the two sections); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (white discriminated against for selling to black has standing to sue).
with the subjective nature of partnership selection or would conflict
with the intimacy and associational privacy interests of the part­
ners.123 This section of the Note examines these potential obstacles
to the application of the antidiscrimination statutes to the partner
selection process.

A. Subjective Criteria

It might be argued that it is not appropriate to apply antidis­
crimination legislation to the selection of a partner because that deci­
dision requires the exercise of much discretion. Subjective evaluation
of traits such as personal interests, personality, integrity, motivation,
and the ability to work with others, as well as legal knowledge and
ability are involved in the decision to admit an associate to partnership.124
Some courts have expressed a reluctance to apply Title VII
to employment relationships in which highly subjective selection cri-
teria are required.125 Faro v. New York University,126 in which sex­
discrimination was alleged in the termination of a woman faculty
member's appointment,127 is illustrative:

123. In addition to these concerns, application of Title VII to the partner selec-
tion process might conflict with state partnership legislation that allows partnership
agreements to require unanimity in the selection of new partners. See, e.g., N.Y.
PARTNERSHIP LAW § 40(7) (McKinney 1948). If such a conflict should arise be­
because one or more of the partners refused to approve the selection of a new partner
on discriminatory grounds, the federal antidiscrimination legislation would control.
U.S. CONST. art. VI, § 2; 42 U.S.C. § 2000e-7 (1970); see Lucido v. Cravath, Swaine

A further problem created by the possibility of Title VII suits against law partner­
ships is the threat of disruptive discovery requests. If the courts were to allow vir­
tually unlimited discovery, the mere threat of such discovery and its possible in­
trusive effects upon the privacy of the partners, associates, and even clients might
lead to forced settlement of essentially groundless claims of discrimination. For ex­
ample, the Defendant's Reply Brief at 29, Lucido v. Cravath, Swaine & Moore, 425
F. Supp. 123 (S.D.N.Y. 1977), characterized the expected discovery in that case as
"[a] ferocious inquiry into [the defendant's] most significant partnership pro­
cess—an exercise in terrorem." A court may, of course, issue protective orders to prevent
intrusive discovery, FED. R. Civ. P. 26(c). That power might well be ineffective in
these cases, however, since the information most crucial to showing discrimination in
the selection of a partner may be precisely the information that the partnership most
desires to keep private, such as subjective periodic evaluations of the performance of
a firm's associates.

Possible avenues of discovery in the Lucido case included internal firm memo­
randa, deposition of partners and associates, and various statistical information con­
cerning the firm's partnership and hiring practices. Interview with Alan Dershowitz,
counsel for plaintiff in Lucido, reported in Harvard Law Record, Jan. 28, 1977,
at 8, col. 2.

124. See generally E. SMIGEL, supra note 40, at 36-72.

125. See, e.g., Divine, Women in the Academy: Sex Discrimination in University
Faculty Hiring and Promotion, 5 J. of L. & Educ. 429, 433 (1976).

126. 502 F.2d 1229 (2d Cir. 1979).

127. The hiring practices of all educational institutions were originally exempt
bill did not contain this exemption, which was proposed in a substitute bill submitted
Of all fields which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision. Dr. Faro would remove any subjective judgments by her faculty colleagues in the decision-making process by having the courts examine "the University's recruitment, compensation, promotion and termination and by analyzing the way these procedures are applied to the claimant personally." . . . But such a procedure would require a discriminating analysis of the qualifications of each candidate for hiring or advancement, taking into consideration his or her educational experience, the specifications of the particular position open and, of great importance, the personality of the candidate.

A further example is *Kyles v. Calcasieu Parish Sheriff's Department*, which involved the question whether a deputy sheriff was an employee covered by Title VII or was instead an appointee of a public official and thus exempted from the Act. In determining that the deputy sheriff position was not one of employment, the federal district court suggested that the need to utilize subjective selection criteria may preclude the type of employment relationship envisioned in Title VII:

by Senators Dirksen and Mansfield. See EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 1004 (1968). Virtually no legislative history indicates the rationale for this exemption. See 110 Cong. Rec. 12818 (1964) (Dirksen); 110 Cong. Rec. 12722 (1964) (Humphrey). Possibly the exemption was designed to allow private segregated schools to maintain their discriminatory policies with respect to faculty as well as students, since Title VII might apply to those schools if they had the requisite number of employees and could be found to affect interstate commerce. Benewitz, Coverage Under Title VII of the Civil Rights Act, 17 LAB. L.J. 285, 290-91 (1966), suggests that the exemption might have reflected the difficulty of evaluating both the criteria used in hiring and the charges of bias. The House Report on an earlier version of what became the Equal Employment Opportunity Act of 1972, 86 Stat. 103, § 3 (1972) stated, with respect to the elimination of this exemption:

nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees—primarily teachers—from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment.


128. 502 F.2d at 1231-32 (quoting appellant's brief). The court added some interesting dicta in response to plaintiff's request for an injunction to halt further hiring until she was reinstated:

As to "irreparable harm," Dr. Faro is in no way different from hundreds of others who find that they have to make adjustments in life when the opening desired by them does not open. This is not confined to medical schools. Of a hypothetical twenty equally brilliant law school graduates in a law office, one is selected to become a partner.

502 F.2d at 1232.


130. 395 F. Supp. at 1310. 42 U.S.C. § 2000e(f) (Supp. V 1975) provides that the term "employee" shall not include any person elected to public office in any
There is a characteristic personal quality in the appointment of a public official which is entirely lacking in the "hiring" of a public employee. Because of the same personal quality, an appointee is not promoted on the basis of objective criteria or seniority, he is appointed to the higher position. No sheriff is bound by objective criteria in making the appointment. All of the prohibitions and all of the remedies provided by Title VII are framed in terms of an employer-employee relationship which simply does not exist in the sheriff-deputy relationship.131

Faro and Kyles treat a plaintiff's Title VII action as an attempt to "remove any subjective judgments"132 or to force an employer to be "bound by objective criteria."133 An examination of the assumptions underlying these decisions indicates that their assessment of the impact of Title VII is incorrect. Undoubtedly a plaintiff will have a more difficult task proving discrimination on the basis of race, sex, religion, or national origin in a situation where subjective criteria are utilized than in one where they are not.134 But, at the same time, it will be more difficult for the defendant to prove an absence of prohibited discrimination in the former situation than in the latter. Implicit in Faro and Kyles is the assumption that a plaintiff can meet his evidentiary burden simply by establishing that he met all the objective qualifications for the particular position, after which the burden will shift to the employer to show that he has not discriminated against the plaintiff. Given the difficulty the employer will face in meeting this burden in situations where subjective factors constitute the reason for denial of employment or promotion, the courts' reasoning implies that holding Title VII applicable to such situations in effect forces employers to utilize only objective criteria.

The flaw in this argument is the assumption that the plaintiff need show only that he is objectively qualified for the employment position to meet his initial burden. Where subjective criteria may legitimately be used in personnel selection, the plaintiff should be required either to introduce more direct evidence of discrimina-

State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

131. 395 F. Supp. at 1310 (emphasis original).
132. Faro, 502 F.2d at 1231.
134. For this reason the courts have been critical of the use of subjective evaluations in hiring and promotional decisions. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 433 (1975); Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972). In addition to increasing the difficulty of proving unlawful discrimination, subjective evaluations are more likely to involve implicit stereotyping of the position in question, often on the basis of sex. Stacy, Subjective Criteria in Employment Decisions Under Title VII, 10 Ga. L. Rev. 737, 742 (1976).
tion or to demonstrate, perhaps by reliance on employer's internal memoranda, that the employer had favorably evaluated him in terms of the legitimate subjective criteria. By placing a somewhat heavier burden of proof on the plaintiff in situations involving selection for professional positions that require a large subjective element, courts can guard against discrimination without forcing employers to abandon the use of valid subjective criteria. Thus, the preferred view of the relationship between the need for subjective selection criteria and the purposes of Title VII is that adopted in Kohn v. Royall, Koegel & Wells. In determining that alleged sexual discrimination by the defendant law firm in hiring summer and regular associates presented a common question of law or fact for class action purposes, the court properly separated the use of subjective criteria from the central issue under Title VII:

There is no doubt that hiring a professional requires weighing many subjective factors contributing to the applicant's qualifications.

135. Sweeney v. Board of Trustees, Nos. 77-1243, 77-1244 (1st Cir. Jan. 4, 1978), addresses the elements required for establishing a prima facie Title VII case in the context of university faculty employment—a setting in which the use of subjective selection criteria may be legitimate. The court acknowledged that discriminatory motive is an essential element of a plaintiff's burden where "disparate treatment" is alleged. Slip op. at 9-10 (citing International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977)). To avoid the almost certain failure that a plaintiff would suffer if she were required to show discriminatory motive through direct evidence, the Sweeney court held that the presence of discriminatory intent may be demonstrated by circumstantial evidence. Thus the court accepted both statistical evidence supporting an inference of sex bias and testimony concerning other instances from which sex discrimination could be inferred. Slip op. at 16-20.

The court in Sweeney noted that the plaintiff "clearly showed that she was a member of a protected class within Title VII, that she was qualified for promotion, that she was rejected, and that others of her qualifications were promoted." Slip op. at 16 (footnote omitted). Although this language might be read to suggest that the plaintiff met her evidentiary burden simply by showing that she was objectively qualified, two facts in the case are consistent with the assertion in the text of this Note that something more is required in circumstances where subjective selection criteria are legitimately employed. In the first place, the defendant in effect demonstrated that the plaintiff met the subjective qualifications for promotion to full professor by ultimately promoting her to that position. Slip op. at 16 n.18. Second, as indicated above, the plaintiff presented testimonial and statistical evidence that supported an inference of sex bias in promotion decisions.

136. For an example of a case in which a plaintiff failed to meet this burden because the employer's internal evaluations established that the plaintiff was not qualified, see Milton v. Bell Laboratories, Inc, 428 F. Supp. 502 (D.N.J. 1977).

137. Compare Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974) (federal courts should not interfere with faculty appointments at the university level), and EEOC v. Tufts Inst. of Learning, 10 Empl. Prac. Dec. ¶ 10,572 (D. Mass. 1975) (if criteria are reasonably related to professional duties and to personal qualifications of the applicants, neither statistics nor proof that discharged faculty member is a member of protected class is sufficient to establish discrimination), with EEOC Decision No. 74-53, 2 EML. PRAC. GUIDE (CCH) ¶ 6410 (Nov. 12, 1973) (disproportionate number of female medical school faculty members denied tenure coupled with highly subjective criteria in faculty handbook indicated sex bias).

as a whole, above and beyond the more objective academic qualifications. We cannot agree, however, that this fact immunizes discriminatory practices in professional fields from attack on a class basis. . . . The common question in both professional and non-professional employment situations is not whether one individual is better qualified than another, but whether that individual is considered less qualified, not because of his or her own worth, but because of discrimination forbidden by Title VII.\footnote{139} Furthermore, to hold Title VII inapplicable to employment positions that require subjective selection decisions would allow employers of professionals to subvert that statute's purposes. As the federal district court in Milton v. Bell Laboratories, Inc.\footnote{140} stated, "it is precisely because such an evaluation, highly subjective as it is, may mask racial bias, that it must be rigorously reviewed."\footnote{141}

In sum, the need to apply highly subjective criteria in making employment decisions is not unique to the selection of a partner\footnote{142} and should not preclude application of Title VII. The Act does not prevent the use of subjective criteria\footnote{143} but does create a cause of action when race, ethnicity, religion, or sex is used as a criterion.\footnote{144}

\footnote{139. 59 F.R.D. at 521 (emphasis original).}
\footnote{140. 428 F. Supp. 502 (D.N.J. 1977).}
\footnote{141. 428 F. Supp. at 507.}
\footnote{142. See generally Note, supra note 2, at 1615.}
\footnote{143. A determination that subjective criteria are necessary in a particular employment decision might be considered analogous to treating the subjective qualifications as "job-related," which would make them allowable under 42 U.S.C. § 2000e-2(e) (1970) despite adverse impact on a protected class. See Stacy, supra note 134, at 751. Although some decisions appear to fault subjective criteria simply because they are not objective, see id. at 738-44, the better view with respect to higher-echelon management and professional positions is that such criteria "are not to be condemned as unlawful per se, for in all fairness to applicants and employers alike, decisions about hiring and promotion in supervisory and managerial jobs cannot realistically be made using objective standards alone." Rogers v. International Paper Co., 510 F.2d 1340, 1345 (8th Cir.), vacated, 423 U.S. 809 (1975), in light of Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Accord, Hester v. Southern Ry. Co., 497 F.2d 1374, 1381 (5th Cir. 1974).}
\footnote{144. It should be noted that, in addition to forbidding employer discrimination merely because he prefers employees with certain racial, ethnic, religious, or sexual characteristics, Title VII also generally prohibits employment decisions based on similar preferences among the employer's customers or clientele. In fact, the Senate rejected an amendment that would have allowed an employer to hire someone of a particular race, color, religion, sex, or national origin where the employer, on the basis of substantial evidence, believed that the individual would be more beneficial to his business than one hired without reference to such factors. See 110 Cong. Rec. 13825-13826 (1964). Thus, for example, a firm may not justify its failure to advance a woman to partner on the grounds that its clients would not be willing to work with a woman or would not want their litigation handled by a woman. Cf. e.g., Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971) (failure to hire male flight attendants not justified by passenger preference); EEOC Decision No. 70-11, (1973) CCH EEOC Decisions ¶ 6025 (failure to hire female as a security courier not justified by contention that customers would feel that women could not provide adequate security).}
B. Potential Conflict with a Congressional Concern for Intimacy

The potential conflict between the objectives of antidiscrimination legislation and the "intimate" nature of the partnership relationship reflected by the doctrine of delectus personam—that no person may become a partner without the consent of all partners also must be considered. Since Congress has not expressly provided that the partnership selection process is to come under Title VII, section 1981, or section 1982, congressional intent to exempt certain intimate relationships from regulation, as expressed in Title VII as well as in other legislation, must be considered in determining whether partnership intimacy precludes application of antidiscrimination legislation.

Two basic types of exceptions in recent antidiscrimination legislation suggest a congressional concern about avoiding governmental interference with intimate relationships. The first precludes application of the legislation where less than a minimum number of employees, patrons, boarders, or neighbors are involved. The second relates to private membership clubs.

Title VII's provision regarding the minimum number of employees required before an employer comes under the Act might

145. The notion of "intimacy" is closely related to the concepts of freedom of association and right of privacy, which have both taken on constitutional dimensions under recent Supreme Court decisions. Undoubtedly concern over the protection of freedom of private association prompted the exemptions given private clubs under Title VII, 42 U.S.C. § 2000e(b)(2) (1970) and Title II, 42 U.S.C. § 2000a(e) (1970).

The constitutional limitations on the application of nondiscrimination legislation to the selection of a partner are discussed in the text at notes 169-97 infra. Congressional concerns with associational privacy overlap with constitutionally protected rights, and therefore the term "intimacy" will be used to describe the former while freedom of association and right of privacy will be used in conjunction with the latter.

146. See also note 123 supra, discussing the potential conflict between federal antidiscrimination legislation and state partnership laws that provide for the unanimous selection of new partners.

147. 42 U.S.C. § 2000e(b) (Supp. V 1975) (15 or more employees necessary in order to qualify as an employer under Title VII). 42 U.S.C. § 2000a(b)(1) (1970) exempts "an establishment located within a building which contains no more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence." 42 U.S.C. § 3603(b)(2) (1970) exempts "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence."


suggest a congressional determination that society’s interest in preventing discrimination outweighs an employer’s interest in freely selecting his employees only where some degree of intimacy has been lost due to the size of the enterprise. Thus, during debate over a proposed amendment to limit coverage permanently to employers with 100 or more employees, Senator Humphrey, who was the floor leader of the Senate bill, stated that “[a] large number of small businesses in America . . . are small businesses that employ fewer than 25 persons. When they get above 25, they . . . lose most of whatever intimate, personal character they might have had.” More important than the actual threshold number of employees established in the Act is the fact, suggested by Humphrey’s statement, that some minimum appeared necessary to Congress in order to protect the natural intimacy of employment relationships involving small numbers of individuals.

However, the legislative history of Title VII suggests that the concern for intimacy was not central to the adoption of an exemption for employers with fewer than a certain number of employees. Rather, the greater concerns were that employers with too few employees would not be “affecting commerce” sufficiently to allow regulation under the commerce clause, that the federal government would have difficulty enforcing the Act if all businesses were covered, that small business should not be burdened with the filing requirements of the Act, and that some compromise figure was necessary to effect cloture since some senators filibustering the legislation opposed universal coverage but were willing to allow passage of the Act if its reach were limited.

Concerns for intimacy and privacy appear more central to the exemptions in Title II and Title VIII of the 1964 Civil Rights Act, which permit resident owners of inns having no more than five rooms for rent and multiple-unit dwellings intended to be occupied by no more than four families to discriminate in the selection of patrons.

150. The amendment was offered, debated, and rejected by a roll call vote of 34 to 63 on June 9, 1964. See 110 Cong. Rec. 13085-93 (1964).
151. Id. at 13088 (emphasis added).
153. Most state fair employment practices acts require a minimum number of employees for coverage. See, e.g., CAL. LAB. CODE § 1413 (West 1971) (five or more employees). Other states have recognized an exemption for employees in the domestic service of an employer. See, e.g., ALASKA STAT. § 18.80.300 (1965).
154. See Comment, supra note 88, at 624-25.
155. Id. at 624-26.
156. See Note, supra note 94, at 482 n.199; Comment, supra note 88, at 625.
and tenants. These exemptions are distinguishable from Title VII's requirement of a minimum number of employees. Since these exemptions apply only to those inns and multiple-unit dwellings actually occupied by the owner, they clearly reflect a concern for intimacy rather than a desire to assure the necessary effect on commerce or to avoid difficulty in enforcement.

To the extent that these exemptions in Title II and Title VIII resulted from a balancing of society's interest in nondiscrimination in public accommodations and housing against the individual's freedom to select his intimate associates, the policy choices appear defensible. For instance, Title VIII's exemption probably only slightly decreases the housing available to minority families and has little effect on perpetuation of a discriminatory society, and hence arguably those societal interests should yield to the resident-owner's freedom to discriminate in the selection of co-occupants of a dwelling. On the other hand, although the freedom of business persons to select their partners might be accorded respect equivalent to that shown the property owner, a balancing suggests that in that context the competing interests of promoting greater economic and social equality should prevail. Even though the number of minority group members that could possibly be affected by discrimination in partnership selection is small, that discrimination seriously deprives those affected of access to positions of economic reward and social prestige. Furthermore, the absence of minorities in such positions may serve in more subtle ways to perpetuate inequality.

The second general area of exemptions within the 1964 and 1968 Civil Rights Acts that reflects a concern for intimacy involves the associational privacy of bona fide private membership clubs. The intimacy involved in these organizations parallels the intimacy that characterizes the partner relationship, for, like the selection of the members of a club, the selection of partners involves choosing those persons with whom the present partners wish to associate as

157. See note 147 supra.
158. Cf. 118 Cong. Rec. 3802 (1972), where Senator Javits, responding to an amendment to exempt physicians employed by public or private hospitals, stated:

Yet, this amendment would go back beyond decades of struggle and of injustice, and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion—just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain—and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them.

159. A good deal of early Title II litigation involved whether some organization was a "private club" entitled to the exemption. E.g., Wright v. Cork Club, 315 F. Supp. 1143 (S.D. Tex. 1970).
160. See note 148 supra.
equals.\textsuperscript{161} The courts have recognized the apparent congressional intent to respect the interests of associational privacy that are manifest in the private club exemption of Title II by reading the exemption into section 1981.\textsuperscript{162}

It must be noted that, both in extending the private club exemption to section 1981 and in applying it as part of Title II, the courts have carefully scrutinized the organization seeking exempt status. Selectivity of membership and genuine control of the organization by the members—which are among the factors that courts have generally considered in determining whether an organization qualifies as a private membership club\textsuperscript{163}—also characterize law partnerships. The profitmaking character of the partnership, however, should be viewed as destroying the analogy between it and the private club. As the federal district court in \textit{Cornelius v. Benevolent Protective Order of Elks}\textsuperscript{164} remarked in recognizing the distinction between private membership clubs and business enterprises:

Those who believe that racial exclusion fosters fraternity are free to act out their belief, but they may not promote prejudice for profit. If a lodge were to . . . become an establishment where economic opportunity was the attraction, it would cease to be exempt: To have their privacy protected, clubs must function as extensions of members’ homes and not extensions of their businesses.\textsuperscript{165}

\textsuperscript{161} In a somewhat different context, Professor Chafee once wrote that “the closest analogy to the position of the member of [a private nonprofit] association is to be found in the relation between . . . a partner and the partnership.” Chafee, \textit{The Internal Affairs of Associations Not for Profit}, 43 \textit{Harv. L. Rev.} 993, 1008 (1930).


\textsuperscript{163} Factors likely to be considered include the exclusivity and degree of selectivity in the club’s membership policies, the degree to which its members participate in governing the club, the purpose and activities of the organization, the use of its facilities by nonmembers, and the effect of its operation on commerce. See \textit{Tillman v. Wheaton-Haven Recreation Assn.}, 410 U.S. 431, 435 (1973) (Title II applies to club open to every white person in the area); \textit{Daniel v. Paul}, 395 U.S. 298, 301 (1969) (despite membership fee, club lacked attributes of self-government and member-ownership and thus was not exempt from Title II); Note, \textit{Going Public with Discriminating Private Clubs}, 3 \textit{Fordham Urb. L.J.} 289, 293 (1975); 2 N.C. Cent. L.J. 157, 159 (1970); 8 Urb. L. Ann. 333, 335-36 (1974).

\textsuperscript{164} 382 F. Supp. 1182 (D. Conn. 1974).

\textsuperscript{165} 382 F. Supp. at 1204. The court held, however, that the discriminatory membership policy of the Elks was exempt under \textsection{1981} as well as under Title II. 382 F. Supp. at 1201.

For a more recent decision that recognizes the distinction made in \textit{Cornelius}, see \textit{Fesel v. Masonic Home}, 428 F. Supp. 573, 577 (D. Del. 1977) (emphasis added):

In Title II, Congress sought to preserve a small, non-commercial enclave for the unfettered exercise of the freedom of association . . . . By including a similar exemption in Title VII, Congress made it possible, in [the] limited [private club] setting, for those who wish to restrict the universe of their personal associates to also determine with whom they would associate in their employer-employee relationships.
Furthermore, although Title VII contains an exemption for private membership clubs as employers, the Act explicitly includes partnerships as employers, which suggests that the relationship among partners is not to be accorded the same protection as that among members of a private club.

Thus, neither of the intimacy exemptions contained in Titles II and VIII evinces a congressional policy that would be violated by application of antidiscrimination legislation to the partnership selection process. Whether such an application of the antidiscrimination statutes would violate the Constitution is a matter to which this Note now turns.

C. Constitutional Limitations: Associational Privacy

Related to the objection that the application of Title VII, section 1981, and section 1982 to a law partnership would conflict with congressional concern about preserving intimacy is the objection that such an application would violate a constitutionally protected freedom to select one's business partners. The specific constitutional grounds on which a right of "associational privacy" from governmental interference might be based are the right of freedom of as-

168. For a criticism of the private membership club exemption of Title VII, see M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 66 (1966).
Wright v. Cork Club, 315 F. Supp. 1143, 1156 (S.D. Tex. 1970), suggests an additional reason for not allowing a partnership to claim that, by analogy to a private club, it should be allowed to select its members free from governmental interference. In that case the court held that the club did not qualify as a "private membership club" under the exemption to Title II because it exercised little or no selectivity among its white applicants, did not strictly limit its facilities or services to members, advertised in the general media, and had financial arrangements with the president of the club that could fairly be characterized as profitmaking. In addition, the court noted that the enterprise originally adopted the "private club" format to take advantage of the more liberal hours for serving mixed drinks allowed under Texas law, compare TEXAS ALCO. BEV. CODE ANN. tit. 3, § 33.01 (Vernon Special Supp. 1978), with TEXAS ALCO. BEV. CODE ANN. tit. 4, § 105.03 (Vernon Special Supp. 1978), not because of any desire to further the associational interests of its members.

By analogy, arguably a law partnership should not be able to assert the associational interests of its members as a bar to federal antidiscrimination regulation because the partnership form was likely chosen not to protect or assert those interests, but rather because that form was required for professionals who desired to organize to practice their profession. See E. SMIGEL, supra note 40, at 210. However, although Wright suggests this argument, dicta in that case asserted that the Constitution precludes governmental interference with the membership decisions of a business partnership. 315 F. Supp. at 1156.

sociation and the right of privacy.\textsuperscript{170} Because there is neither explicit constitutional language nor extensive litigation on the subject, the scope of and interrelationship between the rights of privacy and of freedom of association have not been clearly delineated. However, although no case has ever explicitly found a constitutional right of associational privacy,\textsuperscript{171} dicta in several cases recognize such a right. For example, in his concurring opinion in \textit{Bell v. Maryland},\textsuperscript{172} Justice Goldberg stated:

Indeed, the constitutional protection extended to privacy and private association assures against the imposition of social equality. . . . Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race.\textsuperscript{173}

The national policy against racial, religious, ethnic, and sex discrimination potentially conflicts with the personal associational choices of all employers, union members, patrons and proprietors of public accommodations, students in private schools, and others who are prohibited from engaging in such discrimination. Nonetheless, antidiscrimination legislation has been held to be constitutional as it affects these categories of persons.\textsuperscript{174} Thus, in order to conclude that the selection of a partner is constitutionally immune from this legislation, the partners’ privacy and associational interests must be distinguishable from those of these other persons. As the following discussion indicates, the partnership cannot be so distinguished.

\textsuperscript{170} See generally Note, supra note 94, at 521-24. Various constitutional bases for the right of privacy and freedom of association have been advanced. Justice Douglas found support for a right of privacy within the first, third, fourth, and ninth amendments. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). The freedom of association has generally been thought to arise out of the first amendment freedoms of assembly and expression.

\textsuperscript{171} Note, supra note 94, at 521.

\textsuperscript{172} 378 U.S. 266 (1964).


These judicial comments suggest a concern with the possible conflict between society’s interests in preventing discrimination and in allowing individuals to make certain associational choices free from governmental interference.

\textsuperscript{174} Cf. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-59 (1964) (upholding the constitutionality of Title II).

The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no “right” to select its guests as it sees
The inquiry into whether the Constitution precludes application of antidiscrimination legislation to the selection of partners begins with an examination of the scope of the right of freedom of association. The Supreme Court has recognized that the individual has a constitutionally protected right to send his children to a private school175 or to form or join a labor union.176 However, the Court has determined that the freedom to associate does not give rise to a constitutionally protected right in either private schools or labor unions to discriminate in the selection of students177 or union members.178 Two possible explanations can be suggested for the apparent distinction between forming associations and discriminating in member selection.

The first explanation is premised on the notion that the freedom to associate is narrow in scope, extending only to the processes of forming and joining associations.179 Thus, this freedom does not render either the associations or their individual members immune from reasonable governmental regulation, including a prohibition against specific forms of discrimination.180 If the distinctions drawn in the private school and labor union cases are nothing more than particular applications of this general principle, then certainly that principle should likewise apply to law partnerships.

The second explanation, which would recognize an exception to the general rule illustrated by the private school and union cases for certain types of associations, rests on a theory that affords broader constitutional protection to membership selection. This theory recognizes that choosing members, as well as forming or joining an association, may sometimes be protected by the first amendment,181

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179. The protection to form or join associations exists whether the association is for social, legal, economic, or political purposes. See Griswold v. Connecticut, 381 U.S. 479, 483 (1965).


181. See Note, supra note 94, at 521.
particularly where the purpose of the association would be defeated by regulations requiring nondiscrimination. Although not expressly expounding this rationale, those cases that come closest to announcing such a theory have involved associations organized exclusively for either political or religious purposes. Yet, even if it is valid to protect the membership selection policies of some associations on this ground, generally a law partnership could not claim such a special associational interest, since the primary purpose of the firm is to practice law. The firm at most only tangentially promotes beliefs or goals that would be defeated by governmental prohibition of discrimination in partner selection. Moreover, although prohibitions against racial, religious, ethnic, or sexual discrimination may make membership in an association less desirable to some persons, these restrictions generally would not impair the freedom to join and form associations. As the court in Lucido v. Cravath, Swaine & Moore noted:

[T]he application of Title VII to the process whereby [the partnership] promotes its employees to partner would not infringe the partnership's First Amendment rights . . . . Application of Title VII to this case does not prevent the partners from associating for political, social and economic goals.

Finally, it should be noted that even those associational interests expressly protected by the first amendment may be overridden by a showing of a compelling state interest. Thus, if the selection

182. Cf. Cousins v. Wigoda, 419 U.S. 477, 491 (1975) (state's interest not sufficient to compel seating of one of two delegations at 1972 Democratic National Convention, as qualifications of delegation a matter for internal determination by the party); Barnett v. Rodgers, 410 F.2d 995, 1000 (D.D.C. 1969) (need compelling state interest and no alternative means in order to impede Muslim prisoners' observance of dietary creed).

183. An exception might be suggested by cases such as NAACP v. Button, 371 U.S. 415 (1963), which held that the NAACP had a constitutionally protected first amendment interest in organizing and financing desegregation litigation. Possibly a group of black attorneys could organize a partnership for a purpose similar to that of the NAACP in Button and be exempt from governmental interference with their membership selection process. But cf. Runyon v. McCrary, 427 U.S. 160, 175 (1976) (while first amendment protects right to teach segregation in private schools, it does not follow that the practice of segregation in those schools is constitutionally protected).


186. 425 F. Supp. at 129.

of law partners can be viewed as a form of expression protected by the first amendment, the commercial nature of the partnership coupled with the strong national policy of advancing the civil rights and economic status of minorities and women arguably present a sufficiently compelling state interest to override the associational rights of the partners.

Even if there is nothing peculiar to a law partnership that meaningfully distinguishes it from private schools or labor unions with respect to the first amendment right of freedom of association, it is possible that the members of a law partnership have a right of privacy that students in private schools and members of labor unions do not. If so, then the right of privacy, either alone or in combination with the freedom of association, might immunize the partnership selection process from governmental interference.

Thus far it appears that the only associations that arguably can assert a right to discriminate based on considerations of privacy are the family and possibly the private club. No court has explicitly held that private clubs have a constitutional right to discriminate in the selection of their members, but much of the dicta discussing the existence of a right to discriminate is framed in terms of these organizations. Although it is hazardous to analyze the right to privacy because its dimensions have yet to be clearly defined, one generalization may be made: a limited right to privacy has been recognized that protects some activities “relating to marriage, procreation, contraception, family relationships and child rearing and education.” Given the personal rather than associational focus of this right, it would not appear to extend to the selection of a partner. Moreover, the limitations on associational privacy suggested by the Supreme Court in *Village of Belle Terre v. Boraas* would seem to imply that the combination of the right to privacy and the freedom of association does not extend very far beyond the confines of a familial relationship.

In *Village of Belle Terre*, the Court, over the objections of Justice Marshall’s dissenting assertion that “the choice of those who will form one’s household implicates constitutionally protected rights,” upheld a local zoning ordinance that restricted land use to single-family dwellings and in which “family” was narrowly defined as in-
cluding only persons "related by blood, adoption, or marriage." \(192\) Writing for the majority, Justice Douglas\(193\) appeared to limit the scope of a family's associational privacy to entertaining—but not living with—whomever it chooses.\(194\) If the right of associational privacy does not extend to the decision to make unrelated individuals part of one's household, it is unlikely that the right would extend to the selection of one's business partners.

The impact of discrimination in the selection of a partner also supports the conclusion that the selection process is not constitutionally protected. Within the constitutional context, the notion of "privacy" should be limited to personal decisions and activities that have little or no effect on others.\(195\) Although the members of some partnerships may have a substantial privacy interest if the relationship among them is close, intimate, and continuing, the partnership differs from the family and the private social club in its effects on persons denied membership. Both the primary purpose of the partnership and the primary benefit sought by its members and denied to those who are not admitted to partnership are economic, not merely social. Although racial, ethnic, or religious discrimination in the selection of one's social associates may be regarded in some contexts as deplorable, society's interest in prohibiting such discrimination is simply insufficient to override the interest in allowing uninhibited private association.\(196\) However, discrimination in the selection of

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192. 416 U.S. at 2.

193. Justice Douglas was the Court's most vocal advocate of rights of privacy and freedom of association. See, e.g., United States Dept. of Agriculture v. Moreno, 413 528, 543 (1973) (concurring, he asserted that "[t]he association, the right to invite the stranger into one's home [to become part of the household] is too basic in our constitutional regime to deal with roughshod"); Moose Lodge v. Irvis, 407 U.S. 163, 179 (1972) (dissenting, he would have found state action and held the discrimination impermissible); Griswold v. Connecticut, 381 U.S. 479, 482-86 (1965).

194. 416 U.S. at 9.

195. See Note, supra note 94, at 523, asserting that

"If there is a private right to discriminate, it is derived from the notion implicit in the privacy decisions—that at some point no government may intrude into the private affairs of men and women... That point is reached, if at all, when the discriminatory act involves few people and is only marginally related to marketplace concerns and the basic resources of our society... Cf. Roe v. Wade, 410 U.S. 113, 152 (1973) (citation omitted) ("only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'... are included in this guarantee of personal privacy"); McCrary v. Runyon, 515 F.2d 1082, 1088 (4th Cir. 1975), aff'd, 427 U.S. 160 (1976) ("[t]he right is appropriately recognized in certain instances when only a few people are involved in activity unintended for the public view"); Lovisi v. Slayton, 363 F. Supp. 620, 625 (E.D. Va. 1973) (dicta) (any right to privacy involving intimate sexual relations between consenting adults carried out in secluded conditions is relinquished by allowing children access to pictures of such acts).

a partner does not merely deny the rejected individual access to the incidental social benefits enjoyed by other members of society; it directly prevents or limits access to economic benefits and limits freedom to pursue a chosen vocation simply on the basis of race, religion, national origin, or sex. It is these effects of the membership policies of a partnership that justifies governmental intervention and makes those policies no longer "private."

In summary, the associational and privacy interests members of a law partnership might enjoy under the Constitution do not preclude governmental interference with the selection of a partner. Freedom to associate for business purposes does not include freedom to discriminate in the selection of business associates where Congress has made that discrimination unlawful. The right to privacy does not extend to protect discrimination that has substantial effects on both its victims and society. Consequently, the discretion exercised by the members of a law partnership in choosing a new partner is limited to the extent that Title VII and sections 1981 and 1982 prohibit discrimination. 197

IV. REMEDIES

The conclusion that an associate in a law firm denied advancement to partnership solely on the basis of unlawful discrimination has a cause of action under Title VII, section 1981, or section 1982 raises the issue of whether an appropriate remedy exists for such discrimination. Relief under Title VII generally may include back pay, 198 a preliminary 199 or final injunction, 200 and an award of attorneys'...
fees. The statute makes no specific provision for the recovery of other compensatory or punitive damages, and the courts have generally denied recovery of such damages. Title VII apparently was drafted with the view that injunctive relief would be the primary remedy, but the courts have, by analogy to a back pay recovery, awarded damages for future loss of earnings for the time during which remedial transfer, promotion, or hiring is impractical.

The available relief under section 1981 has not been clearly delineated. The Supreme Court has recently held, however, that an individual who establishes a cause of action under section 1981 is not limited to the remedies available under Title VII and would be entitled to complete equitable and legal relief, including compensatory and, where warranted, punitive damages. Furthermore, recent legislation allows the recovery of attorneys' fees by the prevailing party in a section 1981 suit.

It must be recognized that practical difficulties will abound if, in attempting to remedy discrimination in the denial of partnership, a court orders the partnership to instate the aggrieved associate as a partner. Depending upon the circumstances surrounding the initial decision not to admit the associate to partnership, the animosities engendered by that refusal, the size and relative intimacy of the

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201. 42 U.S.C. § 2000e-5(k) (1970). Attorney's fees are frequently awarded to prevailing plaintiffs even absent a showing of bad faith. See, e.g., Sagers v. Yellow Freight Sys., Inc., 529 F.2d 721, 739 (5th Cir. 1976); Rosenfield v. Southern Pac. Co., 519 F.2d 527, 529 (9th Cir. 1975). Occasionally even a complainant who does not prevail in his individual claim has been awarded attorney's fees if the represented class was successful or the action resulted in cessation of the employer's discriminatory employment practices. See, e.g., Watkins v. Scott Paper Co., 530 F.2d 1159, 1198 n.53 (5th Cir. 1975); Fogg v. New England Tel. & Tel. Co., 346 F. Supp. 645 651 (D.N.H. 1972).


204. Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975). The Court also held that recovery for back pay would not be limited to two years, as it is under Title VII.


206. The complaint filed in Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977), exemplifies the mutual hostilities likely to develop between
firm, and perhaps the proportion of the partners who opposed the advancement, a court order requiring advancement to partner might severely disrupt the operation of the firm.\textsuperscript{207} In such a case, perhaps the granting of compensatory damages—in the form of "front pay" under Title VII\textsuperscript{208} in an amount equivalent to the plaintiff's expected earnings as a partner less mitigation—would be more appropriate than requiring advancement to partner.\textsuperscript{209} Courts have been willing to grant front pay for a limited time period in lieu of reinstatement where personal animosities are likely to disrupt the mutual trust required in a professional position.\textsuperscript{210} In addition, at

members of a partnership and an associate who sues them for unlawful employment discrimination.

\textsuperscript{207} In a very large, departmentalized law partnership where the only opposition to advancing, say, a female associate to partner came from a partner with whom the associate would likely have little contact once advanced to partner, the granting of injunctive relief requiring her advancement would hardly be disruptive. At the other extreme, if the partners with whom a female associate would interact on a regular basis as a partner vehemently opposed accepting women as partners, had repeatedly expressed that opposition through words and discriminatory and degrading conduct, and appeared likely to continue to do so if advancement were forced upon the firm, then requiring advancement might jeopardize the functioning of the firm, to the eventual detriment of the other partners, the clients, and even the associate involved. See \textit{EEOC v. Kallir, Phillips, Ross, Inc.}, \textit{420 F. Supp. 919} (S.D.N.Y. 1976).

\textsuperscript{208} See note 203 \textit{supra} for cases in which the courts have awarded "front pay" or future expected earnings under the guise of back pay. The amount of damages would be calculated as the difference between the associate's current salary either with the firm or elsewhere and the average compensation received by individuals who became partners at about the same time the associate would have been advanced. See also \textit{Patterson v. American Tobacco Co.}, \textit{535 F.2d 257}, 269 (4th Cir.), \textit{cert. denied}, \textit{429 U.S. 920} (1976). Faced with the prospect of paying an associate earnings comparable to a partner's might encourage the partnership to reconsider the decision that such a member of a minority group is not suitable for partnership, which would accomplish what the court, in its discretion, felt should not be done by injunction.

\textsuperscript{209} Professor White has noted that there are two desirable elements of partnership status—increased financial rewards and noneconomic factors such as having a voice in shaping the firm. \textit{White, supra} note 2, at 1106-07. White posed two hypotheticals involving an associate denied advancement to partnership on account of her sex. In the first hypothetical, she is denied the increased compensation as well as the status of partner, while in the second she receives compensation equivalent to a partner without acquiring partner status. By balancing the competing considerations of preventing discrimination and allowing free choice of one's business associates, \textit{White} concluded that the first case would violate Title VII and the second would not.

Professor White's analysis would appear to support an order that directed a firm guilty of discrimination to compensate the aggrieved associate at a salary equivalent to the earnings of those associates who have been advanced to partner. Such an order would not, however, compel the firm to actually advance the associate to partner.

\textsuperscript{210} See \textit{EEOC v. Kallir, Phillips, Ross, Inc.}, \textit{420 F. Supp. 919} (S.D.N.Y. 1976). In that case plaintiff had been a senior account executive with the defendant advertising agency. The court concluded that after three and a half years of bitter litigation the necessary trust and confidence can never exist between plaintiff and defendant. To order reinstatement would merely be to sow the seeds of future litigation, and would unduly burden the defendant. Thus, reinstatement will not be ordered in this case. However,
least one court considered the likely disruptive effect when it denied even temporary reinstatement. 211

Under appropriate circumstances, the court should require the firm that unlawfully discriminates in the selection of a partner to advance the aggrieved associate. Such affirmative relief is not without some precedent in discrimination cases involving law firms. In Commonwealth v. Thorp, Reed & Armstrong, 212 Marcella Phelps Hanson, an associate of the firm, alleged employment discrimination violating the Pennsylvania Human Relations Act. 218 Hanson had initially filed a complaint with the Pennsylvania Human Relations Commission charging that she had been denied advancement to partnership because of her sex and age. 214 Upon learning that she had filed this complaint, the firm, by placing her on indeterminate leave with pay, completely disassociated her from the firm. 215 In response to a second complaint alleging that the firm’s action further violated the Act, 216 the commission ordered that Hanson be restored to the employment status she had enjoyed before she was forced to leave the firm. 217 Although the relief granted in this case was only temporary

*420 F. Supp. at 927 (footnote omitted).* The court emphasized that reinstatement was to be denied only in extraordinary cases: “Some antagonism is the natural result of the filing and litigation of discrimination and retaliation charges and to deny reinstatement merely because of the existence of hostility might be contrary to the remedial goals of Title VII.” *420 F. Supp. at 926 (footnote omitted).*

211. Held v. Missouri Pac. R.R. Co., 373 F. Supp. 996, 1004 (S.D. Tex. 1974). Where the record reflected severe personality conflict between the plaintiff and her immediate male supervisors and co-workers and where plaintiff had obtained employment elsewhere while the action was pending, the court concluded that,

> the interests of all parties, the plaintiff, her co-workers and the public which deals with the office of the defendant railroad would be adversely affected by [reinstating plaintiff pending outcome of the case] . . . . [U]nder the circumstances the harm likely, if not certain, to result would clearly outweigh any benefits resulting from an order of reinstatement at this time.

Concern with the possible disruptive effects of “bumping” current employees in order to promote the individuals who had been discriminated against led the court in Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir.), *cert. denied,* 429 U.S. 920 (1976), to delay advancement until an opening appeared.


213. PA. STAT. ANN. tit. 43, § 995(d) (Purdon 1964).

214. 25 Pa. Commw. Ct. at 309, 361 A.2d at 505 (Bowman, P.J., dissenting). This issue was not decided by the court, since the Commission had made no ruling on the charge.


216. The section of the Act allegedly violated, PA. STAT. ANN. tit. 43, § 955(d), (Purdon 1964) prohibits discriminatory treatment in retaliation for charging the employer with unlawful discrimination.

in nature and did not directly involve the relationship among the defendant firm’s partners, the Pennsylvania Commonwealth Court, in affirming the commission’s order, did evince a willingness to oversee the treatment of an attorney in terms of assignments, benefits, and general working environment. 218

Although the courts have on occasion implemented hiring and promotional “quota” systems to overcome the effects of past discriminatory practices, 210 the highly subjective criteria involved in partnership selection suggest that any affirmative action “quotas” may be troublesome. Some settlements of discrimination suits involving the hiring of associates have established hiring “quotas,” 220 but the courts would probably be reluctant to impose such affirmative action programs where the use of subjective selection criteria is legitimate. 221 Perhaps the most appropriate judicial response to past discriminatory practices would be to require that all partners be

read as follows:

1. The Respondent [Thorpe, Reed] shall rescind all action it took with regard to Complainant’s status with the firm as a result of her filing the complaint with the Commission and shall forthwith restore her to the position she was in at the time she informed Respondent she had filed the complaint.

2. Respondent shall take no action to disturb Complainant’s restored position with the firm, and shall provide her with all of the facilities and advantages she had previously enjoyed, and shall continue to make assignments to her without regard to the pendency of her complaint and consistent with the quality she could reasonably have expected prior to the time Respondent learned she had filed a complaint.

3. Respondent shall take affirmative steps to insure that Complainant is not harassed or subjected to any discomfort by any of the partners or employees of the firm.

4. The fact that Complainant filed a charge with the Commission against Respondent shall not be considered by the Respondent in any employment action or decision it takes in regard to Complainant.

5. The Respondent shall within two weeks of the effective date of this order inform the Commission of the manner of compliance with this Order.

218. 25 Pa. Commw. Ct. at 300 n.3, 361 A.2d at 500 n.3.


220. See JURIS DOCTOR, Sept. 1976, at 8-11. The settlement reached in Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515 (S.D.N.Y. 1972), required the firm to pay Columbia University on behalf of Ms. Kohn $40,000 and to follow a “sliding quota” in its hiring practices. Under this “quota” the firm agreed that for three years the proportion of offers made to women would reflect the average percentage of women graduating from the 12 schools where the firm had traditionally recruited, plus an additional 20%.

221. Cf. Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974) (court reluctant to interfere with subjective employment decisions); In re Page College v. Commission on Human Rights, 38 N.Y.2d 28, 39, 377 N.Y.S.2d 471, 479 (1975) (statistics indicating disproportionately few minority employees are entitled to less significance in professional settings where subjective criteria may properly affect incidence of employment and promotion).
advised that factors of race, color, sex, religion, or national origin are inappropriate considerations in the selection of new partners and to direct the partners to make all advancements on the basis of good faith, discretionary appraisals. This general admonition would not preclude granting relief to any specific individual against whom the firm unlawfully discriminated.

V. CONCLUSION

The organization of this Note suggests that the question whether federal antidiscrimination legislation prohibits discrimination in the selection of a law partner raises at least four separate issues: (1) whether the language of this legislation can be construed to cover the selection of a law partner; (2) whether the legitimate need to use highly subjective selection criteria in this selection process should preclude application of such legislation; (3) whether the application of such legislation to the partner selection process presents irreconcilable conflicts with congressional and constitutional concern for associational privacy; and (4) whether the courts can fashion appropriate relief consistent with the close working relationships required in law firms. In some respects this analytic framework underemphasizes the fact that these four issues are part of the larger question, concerning the appropriate limitations that should be placed upon the reach of society’s prohibition against racial, ethnic, religious, and sex discrimination.

As evidenced by the difficulties encountered in addressing each of these four issues, the application of federal antidiscrimination legislation to the selection of law partners approaches the limits of this societal policy. Nonetheless, the proper conclusion, and the one reached by the only court to have directly addressed the issue, is that the special characteristics of a law partnership do not and should not exempt the selection of a partner from the reach of society’s nondiscrimination policy or from the coverage of federal antidiscrimination legislation.

222. Cf. Guesnon v. Board of Liquidation, 396 F. Supp. 541, 544 (E.D. La. 1975). The court directed the board to terminate the two most recent appointments, to publicize that the two openings would be available to qualified whites and nonwhites alike, and to fill the vacancies on the basis of a good faith, discretionary appraisal.