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Partners are Individuals: Applying Title VII to Female Partners in Large Law Firms

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ABSTRACT

Women in large law firm partnerships continue to face an uphill battle. While much scholarly attention has been afforded to the relative scarcity of female partners—according to the most recent statistics, women constitute only 18 percent of partners in the largest law firms—less attention has been paid to the continuing discrimination faced by those women who do make it to the partnership level.

This Comment aims to fill that gap in the scholarship analyzing the legal profession. First, this Comment identifies the numerous ways in which female lawyers continue to face discrimination even after they make partner. Second, the Comment highlights a serious gap in current antidiscrimination law that perpetuates discrimination against female partners: Courts have interpreted Title VII of the Civil Rights Act of 1964 to protect employees but not partners, leaving female partners without recourse when they are discriminated against by their firms. Finally, the Comment offers a solution based on textualist-intentionalist statutory interpretation that would bring partners within the ambit of Title VII in order to protect female law firm partners and to disincentivize discrimination against them.

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INTRODUCTION

Women in large law firms have made meaningful strides in recent decades. Significant progress has been made since the days of *Bradwell v. Illinois*,[1] a case in which Justice Bradley wrote in concurrence that women could be excluded from the Illinois state bar because "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[2] Unfortunately, the rate of these advances has recently slowed to a crawl, especially at the partnership level. According to the National Association of Women Lawyers (NAWL), the percentage of female equity partners[3] in top law firms has risen only 3 percent—from 16 percent to 19 percent—over the past decade.[4]

Once there, the few women who do make it to the top continue to face discrimination as partners. For instance, female partners[5] are paid by their firms, on average, 6 to 10 percent less than similarly situated male partners.[6] Female partners also earn less credit for their work and for the origination of business within their firms, and may be underrepresented in firm governance

1. 83 U.S. 130 (1872).
2. *Id.* at 141 (Bradley, J., concurring).
3. Many large law firms have two different classes of partners: equity partners and nonequity partners. The most important differences between the two classes are: (1) Equity partners are usually compensated by a percentage of the firm's profits, whereas nonequity partners typically receive a fixed salary; and (2) equity partners typically hold more control over the partnership's business and operation than do nonequity partners. For a more complete discussion of the distinction between equity and nonequity partners, see *infra* Part II.B.1.
4. DESTINY PEERY, NAT'L ASS'N OF WOMEN LAWYERS, 2017 SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS: NUMBER OF WOMEN EQUITY PARTNERS IN LAW FIRMS MAINTAINS A SLOW AND STEADY PACE 3 (2017) [hereinafter NAWL 2017 SURVEY]. NAWL conducts an annual gender equity survey of *The American Lawyer*'s top two hundred law firms, as measured by gross revenue (*Am Law* 200). *See Methodology*, AM. LAW (May 24, 2017, 12:42 AM), http://www.americanlawyer.com/id=1202786570167 [https://perma.cc/YK2E-WDWW]. In 2017, 45 percent of firms responded to NAWL's survey, an increase of 8 percent over the previous iteration of the survey. NAWL 2017 SURVEY, *supra*, at 2 n.5. Statistics available regarding female nonequity partners reveal a similar trend—only a 4 percent increase from 2007 to 2017. *Id.* at 3.
5. For grammatical purposes, this Comment uses the word "female," which typically connotes biological sex rather than gender identification, as an adjective to describe attorneys who are women. However, the arguments employed apply with equal force to transgender lawyers who face workplace discrimination as women.
6. NAWL 2017 SURVEY, *supra* note 4, at 8.

positions.[7] And female partners often face discrimination surrounding family issues, whether in the use of maternity leave, or in being forced on to a "mommy track" and accepting an unwanted reduction in hours and compensation.[8] In many circumstances, of course, these gender-based impacts may be further exacerbated by their intersection with a partner's other characteristics, such as race or sexuality.[9]

Unfortunately, female lawyers lose one of their strongest antidiscrimination protections the moment they make partner: As it is currently construed, Title VII of the Civil Rights Act of 1964 protects a female law firm associate from workplace discrimination but ceases to provide a remedy for discrimination once she becomes a partner.[10] Despite "Title VII's purpose of eliminating the effects of discrimination in the workplace,"[11] partners in law firms lack Title VII protections because those protections have been construed to extend only to "employees," and partners are classified as "employers."[12]

The basis of courts' reluctance to forbid partners from discriminating against one another is drawn from fundamental principles of contract law and partnership law. A basic tenet of American contract law holds that individuals on equal footing have a right to enter freely into contracts.[13] And

7. *See, e.g.*, Complaint at 3–4, Craddock v. LeClairRyan, No. 3:16-cv-11, 2016 WL 1464562, at *3–4 (E.D. Va. Apr. 12, 2016), *appeal dismissed*, 668 F. App'x 453 (4th Cir. 2016).
8. *See id.*
9. The concept of intersectionality, developed by the preeminent Critical Race scholar Kimberlé Crenshaw, refers to the phenomenon of individuals who belong to multiple discriminated-against classes experiencing discrimination distinct from that faced by either class alone and individually as measured through dominant paradigms. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. Thus, Black women, for example, can experience unique manifestations of discrimination "as Black women—not the sum of race and sex discrimination, but as Black women." *Id.* at 149. For outstanding analyses of intersectionality within the specific context of Title VII, see SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011), and Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre–)History*, 95 B.U. L. REV. 713 (2015).
10. 42 U.S.C. §§ 2000e to 2000e-17 (2012).
11. Johnson v. Transp. Agency, 480 U.S. 616, 630 (1987).
12. *See*, *e.g.*, Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997) ("[C]ourts long ago concluded that Title VII is directed at, and only protects, employees and potential employees.").
13. The principle of "freedom of contract" in the United States has a complicated history, and the term has varied in meaning and importance throughout American history. At its height during the early twentieth century's *Lochner* era, "freedom of contract" was used as a rationale for striking down almost any restriction on contracting. Today's understanding of "freedom of contract" is more limited in scope, and the freedom is

a basic tenet of partnership law is that partners are assumed to be equals entering into a contract.[14] Thus, courts distinguish the partner-partner relationship from the employer-employee relationship and apply Title VII's protections only to the latter.

This line of reasoning was first laid out at the United States Supreme Court level by Justice Lewis Powell in a solo concurrence to *Hishon v. King & Spalding*,[15] in which he argued that partners and nonpartners are distinguished by the amount of leverage they have to affect the partnership's behavior. According to Powell, partners in law firms enjoy equal status and bargaining position relative to one another, and therefore do not need Title VII protection because there is no imbalance of power in their contracting.[16] Justice Powell's *Hishon* concurrence has become the guiding principle for cases declining to extend Title VII to partnerships on the basis that partnerships are contracts entered into by equals.[17]

The dicta in Powell's *Hishon* concurrence explicitly rest upon assumptions that law partners are all of equal status (and therefore should be able to contract without Title VII's restrictions) because "[t]he relationship among law partners differs markedly from that between employer and

subject to various restrictions, such as public policy and antidiscrimination doctrines. Nonetheless, while the modern understanding of "freedom of contract" has limits, it is still an important guiding principle of American contract law. *See generally* Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall"*, 79 B.U. L. REV. 263 (1999).

14. *See* REVISED UNIF. P'SHIP ACT (RUPA) § 401 (UNIF. LAW COMM'N 1997). The RUPA, first promulgated in 1994 and revised several times since, is a model law drafted by the Uniform Law Commission (ULC) that suggests an approach for state regulation of partnerships and limited liability partnerships (LLPs). *Id.* prefatory note at 2. For the most part, the RUPA takes the position that partnership and LLP agreements are flexible, and that many of the terms supplied by the RUPA are default terms that can be modified or discarded through agreement of the partners. *Id.* The ULC has also promulgated a separate model law, the Uniform Limited Partnership Act (ULPA), which governs limited partnerships (LPs) and limited liability limited partnerships (LLLPs). UNIF. LTD. P'SHIP ACT (ULPA) prefatory note at 1 (UNIF. LAW COMM'N 2001). Because of the RUPA's wide adoption, this Comment refers to the RUPA as an authoritative source of general principles of partnership law. *See State Laws Governing Partnerships*, USLEGAL, https://partnerships.uslegal.com/partnership/state-laws-governing-partnerships [https://perma.cc/K8F8-BL5R] (showing that twenty-nine states have adopted the RUPA, while the remaining states, with the exception of Louisiana, follow the RUPA's predecessor, the 1914 Uniform Partnership Act (UPA)).

15. 467 U.S. 69, 79–81 (1984) (Powell, J., concurring).

16. *Id.* at 79–80.

17. *See, e.g.*, Wheeler v. Hurdman, 825 F.2d 257, 273 (10th Cir. 1987) (denying Title VII protection to partner in accounting firm because "[p]artnerships, as Justice Powell so aptly stated in his concurring opinion in *Hishon*, embody very special relationships and sensitive management concerns").

employee—including that between the partnership and its associates."[18] Specifically, Powell argues that the law partnership is defined by the "common conduct of a shared enterprise" and therefore that important partnership decisions are made "by common agreement . . . or consent among the partners."[19] Presumably, then, partners do not need discrimination protection against one another, as a partner's financial investment in the partnership and decisionmaking privileges give her the leverage to fight against discriminatory action from a position of power within the partnership.[20]

Even at the time of Justice Powell's *Hishon* concurrence, which was published in the spring of 1984, Powell's logic rested on shaky ground: The equality among partners he envisioned simply did not exist in many firms. By the mid-1980s, American law firms were more than a decade into a period of rapid expansion and structural change. Corporate firms began to corner more of the market for legal services. And as they did, they expanded their partnership ranks, thus diluting the operational control each individual partner could exercise over the firm as a whole. Since at least the 1970s, large firms had begun to depart from traditional, lockstep, seniority-based partner compensation schemes, and were experimenting with productivity-based compensation, which necessarily gave some partners greater influence over their firms by virtue of their economic clout. And by the mid-1980s, many firms were beginning to change their management practices, moving from the unanimity or consent-based management structures extolled by Powell toward centralized decisionmaking structures.

Today, more than thirty years removed from *Hishon*, the chasm between Justice Powell's theorized partnership and reality has only grown. Powell's specific vision of legal partnerships simply does not accurately describe the modern law firm. In today's legal partnerships, freedom of contract and the real-life

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

19. *Id.* at 79–80. Kristen Johnson further noted:

> According to the [*Hishon*] concurrence, partners in traditional law firm partnerships do not require the protection of Title VII because of the intimate nature of a partnership. Justice Powell's concurrence assumes that partners, having contributed similar amounts to the firm's capital structure, are co-owners of the business, participants in the firm's management structure, and contributors to the firm's decisionmaking process, which is characterized by common agreement.

Kristin Nicole Johnson, Note, *Resolving the Title VII Partner-Employee Debate*, 101 MICH. L. REV. 1067, 1072 (2003) (footnote omitted).

20. *See* Johnson, *supra* note 19, at 1087 ("Implicitly, Justice Powell's rationale suggests that partners do not require the protection of antidiscrimination legislation because partners have access to tools that enable them to dismantle discrimination levied against them.").

experiences of partners in large firms are incompatible. Law firms have grown too large, and their management and compensation schemes too complex, to fit Powell's model. In large law firms partners are simply not all created equal and their voices are often lost in the complexity and size of the modern firm. Thus, today's partners do not, in point of fact, hold the leverage contemplated by Justice Powell.

But the law has been too slow to adjust. Justice Powell's suggested exclusion of law partners from Title VII's ambit has led to a complex factor-driven test, applicable to partnerships in general, that is intended to sort bona fide partners with leverage from nominal partners without leverage by evaluating various indicia of a partner's ability to control the partnership.[21] Still, problems remain in both the application and basic premises of that analysis, which leads to a continuation of the status quo of unchecked discrimination against female law firm partners.

This Comment argues for a reinterpretation of Title VII's operative language, which bans an "employer" from discriminating against "*any individual*"—not, according to the literal text of the statute, an *employee*—in her "compensation, terms, conditions, or privileges of employment" based on a protected characteristic such as sex.[22] Where Title VII does refer to "employees," it does so only in the context of identifying proper defendants under Title VII: An entity with fifteen or more "employees" is an "employer"[23] that must comply with Title VII and is thus prohibited from discriminating against any "individual." But once that fifteen employee threshold is met, the statute purports to protect a broadly defined class from discrimination: "any individual," not just employees.[24] However, the conceptual conflation of "individual" and "employee" in courts' interpretation of Title VII's operative provisions has denied Title VII

21. *See* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 449–50 (2003).

22. The full text of the relevant subsection of Title VII reads:

> 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.

42 U.S.C. § 2000e-2(a)(1) (2012).

23. Title VII's statutory definition of an employer reads, in relevant part: "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ." *Id.* § 2000e(b). An employee is defined, rather circularly, as "an individual employed by an employer." *Id.* § 2000e(f).

24. *Id.* § 2000e-2(a)(1).

protection to partners. Under the textualist-intentionalist reading for which this Comment advocates, any firm that qualifies under Title VII as an "employer" (based on the number of associates and support staff employed by the firm, for example) would be prohibited from engaging in workplace discrimination against any "individual"—including partners.

Part I of this Comment details the slow progress that women have made in large law firms, with a particular focus on how gender discrimination often manifests at the partnership level. Part II provides a profile of the modern large law firm and demonstrates that, under the current legal framework, female partners in large law firms who have been discriminated against face a catch-22: They must either seek to demean their own position within the firm in hopes of gaining Title VII protection by being classified by the court as an "employee" instead of a bona fide partner, or they must simply accept that they are not protected by Title VII. Part II also critiques this standard as based on a fundamentally flawed understanding of the modern law firm and its place within the framework of Title VII. Finally, Part III offers a solution based on the text, purpose, and legislative history of Title VII that would expand discrimination protection to partners in law firms.[25]

25. Three caveats should be noted at this point. First, this analysis applies with equal force to a law partner's Title VII claims alleging discrimination based not only on sex, but on any of Title VII's protected characteristics, which are "race, color, religion, sex, or national origin." *Id.*

Second, this analysis applies similarly to other large partnership structures, such as accounting firms, which suffer from similar gender disparities at the partnership level. *See* AM. INST. CERTIFIED PUB. ACCT., CPA FIRM GENDER SURVEY, at iii (2015) (noting that, in accounting firms with one hundred or more Certified Public Accountants, only 20 percent of firm partners are women).

Third, this analysis also applies to antidiscrimination laws other than Title VII with similar employer/employee dichotomies. Because Title VII's operative language and definitions are virtually identical to those of the Age Discrimination in Employment Act (ADEA), the Employee Retirement Income and Security Act of 1947 (ERISA), the Americans with Disabilities Act (ADA), and other similar antidiscrimination statutes, these statutes are often analyzed interchangeably both by courts and scholars. *See* Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997) ("We regard Title VII, ADEA, ERISA, and FLSA as standing *in pari passu* and endorse the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another."); *see also* LESLIE D. CORWIN & ARTHUR J. CIAMPI, LAW FIRM PARTNERSHIP AGREEMENTS § 6.03(2)(d), at 6-23 (2012) ("[S]ince [the ADEA, ERISA, and Title VII] have a similar purpose—to stamp out discrimination—cases construing definitions of one of the statutes are viewed as persuasive authority when interpreting the others.").

This Comment focuses specifically on the gender, law firm, and Title VII contexts, but draws on sources dealing more directly with other contexts where appropriate.

I. THE SCOPE OF THE PROBLEM

Gender discrimination in the legal profession continues to be a problem at all levels. This Part highlights the discrimination faced by women in law firms at both the pre-partnership and partnership levels.

A. Gender Discrimination on the Road to Partnership

Even as law partnerships have grown and thrived,[26] female lawyers continue to face an uphill battle. This is most clearly visible in the continuing statistical improbability of a woman attaining partnership in the first place. Despite the fact that for almost two decades the percentage of female law school graduates has hovered in the high forties,[27] and despite the fact that women make up 45 percent of large law firms' associate ranks today,[28] women constitute only 36 percent of the legal profession as a whole.[29] Much of this disparity is explained by an enormous gap at the partnership level.[30] Only 19 percent of equity partners at *The American Lawyer*'s top two hundred firms (*Am Law* 200) are women, according to the most recent annual survey conducted by the National Association of Women Lawyers (NAWL).[31] The numbers

26. The top 100 law firms as determined by gross revenue saw, on average, net income growth of 4.3 percent and lawyer headcount growth of 1.7 percent in 2016. Gretta Rusanow, *Citi Report: Growth Slowed in 2016*, AM. L. DAILY (Feb. 13, 2017, 7:14 AM), http://www.americanlawyer.com/id=1202779035805/Citi-Report-Growth-Slowed-in-2016 [https://perma.cc/Q795-7EQW].

27. *Representation of Women Associates Falls for Fourth Straight Year as Minority Associates Continue to Make Gains—Women and Minority Partners Continue to Make Small Gains*, NALP (Dec. 11, 2013), http://www.nalp.org/lawfirmdiversity_2013 [https://perma.cc/FCA6-4SVQ] ("[S]ince 2000, the percentage of minority law school graduates has ranged from 20% to 24%, while women have accounted for 46% to 49% of graduates, with the high point coming in the mid-2000s."); *see also* ABA, FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER, 1947–2011, at 1 (showing that female representation in the first year ranged from 46.0 to 49.4 percent from 1997 to 2011).

28. NAT'L ASS'N FOR LAW PLACEMENT, 2016 REPORT ON DIVERSITY IN U.S. LAW FIRMS 8 (2017), http://www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf [https://perma.cc/TF7U-2HCN].

29. ABA COMM'N ON WOMEN IN THE PROF., A CURRENT GLANCE AT WOMEN IN THE LAW 2 (2017), https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf [https://perma.cc/3CZA-BXYL].

30. Other areas with especially notable gender representation gaps include judgeships (27.1 percent women across state and federal benches) and law school deanships (31.1 percent women). *Id.* at 4–5.

31. NAWL 2017 SURVEY, *supra* note 4, at 2.

are only slightly better for nonequity partners, of whom just 30 percent are women.[32]

It may be tempting to dismiss this disparity as a holdover from a time when men vastly outnumbered women at every step in the pipeline, because partners tend to maintain their partner status for several decades. Since the law school graduate and law firm associate ranks have achieved near gender parity, many assume that the partnership statistics will improve with time as older generations of almost exclusively male partners retire.[33]

Since as early as 1988, however, it has been clear that this assumption has failed.[34] The typical partnership track in most firms is eight to twelve years, and law schools have graduated over 45 percent women for nearly two decades, so one would imagine that by 2018 partnership figures would be in the midst of a strong trend toward gender parity. NAWL reports, however, that "women's progress toward equity partnership in the law firm has changed relatively little over the last 10 years."[35] The organization's most recent report shows just a 3 percent rise in equity female partners since 2007—not nearly the increase that one would expect based on trends in law schools and law firm associate gender diversity.[36] And the most recently released statistics on a class of new partners further serve to dispel the notion that gender parity is just around the corner: Only 33 percent of newly minted equity partners at *Am Law* 200 firms in 2015 and 2016 were women.[37] Clearly, the glass ceiling is not just a historical remnant that will naturally dissipate with time, but is instead a continuing threat to women in the profession going forward.

Writers have attributed this gender disparity to numerous factors. For example, some cite the incompatibility of the disproportionate demands society places on women to be actively involved in their family lives with the

32. *Id.*
33. *See, e.g.*, Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1765 (1991) ("To many decisionmakers, gender inequalities in employment appear primarily due to cultural lag or employee choice . . . . Adherents to this view are always cheerful about its implications: gender roles are breaking down, women are moving up, and full equality is just around the corner.").
34. *See* ABA COMM'N ON WOMEN IN THE PROF., REPORT TO THE HOUSE OF DELEGATES 5–6 (1988) (reporting that women have not been made partner at a rate proportional to their overall presence in the profession).
35. NAWL 2017 SURVEY, *supra* note 4, at 11.
36. *Id.* at 2.
37. *Id.* at 2–3.

rigors of life in a law firm.[38] Others point to the grossly oversimplified hypothesis that women simply less often seek partnership.[39] Still, even those who are most optimistic about the present and future prospects for female partners in law firms admit that at least some of the continued disparity is a product of intentional discrimination against women.[40]

B. Persistent Gender Discrimination at the Partnership Level

Unfortunately, achieving partnership status does not insulate women from discrimination. Discrimination against partners is difficult to track with precision because of a lack of scholarly focus on the issue, which may be attributable to several causes. First, scholars simply may assume that studies of discrimination against partners are less necessary than studies of discrimination against associates due to a misconception of what partnership represents in a female lawyer's career. Specifically, it is widely believed that women who have made partner at a large law firm have shattered the glass ceiling, and therefore have already overcome any discrimination they may have faced.[41] This mindset may result in fewer studies performed on discrimination against partners than against associates in law firms.

Second, discrimination against partners is simply harder to study than discrimination against associates. Law firms have fewer partners than associates.[42] Because of this, case law exposing discrimination against partners is limited,

38. *See, e.g.*, JOHN HAGAN & FIONA KAY, GENDER IN PRACTICE: A STUDY OF LAWYERS' LIVES 97–101 (1995).

39. *See, e.g.*, S. Elizabeth Foster, Comment, *The Glass Ceiling in the Legal Profession: Why Do Law Firms Still Have So Few Female Partners?*, 42 UCLA L. REV. 1631, 1645–47 (1995).

40. *See, e.g.*, Edward S. Adams & Samuel P. Engel, *Gender Diversity and Disparity in the Legal Profession: An Empirical Analysis of the Gender Profile in National Law Firms and Law Schools*, 63 BUFF. L. REV. 1211, 1211–12 (2015) (arguing that although "the progress [women in large law firms] have made is real," case law reveals "disturbing gender discrimination that affects the lives of many people, especially in the legal profession").

41. *See, e.g.*, Elizabeth K. Ziewacz, Comment, *Can the Glass Ceiling Be Shattered?: The Decline of Women Partners in Large Law Firms*, 57 OHIO ST. L.J. 971, 972 (1996) (describing the "glass ceiling" as "an invisible promotion barrier within firms which blocks the rise of women and other minorities to the partnership pedestal"). This use of the term "partnership pedestal" implies that partnership is a haven at the end of a journey marked by discrimination, rather than another setting in which female lawyers might face continued discrimination.

42. The most recent set of *The American Lawyer*'s top one hundred law firms (*Am Law* 100), for instance, employ from 1.59 to 5.88 associates per partner. *Profitability Index*, AM. LAW. (Apr. 26, 2017, 1:14 PM), https://www.law.com/americanlawyer/almID/1202784616036. This ratio is commonly known as a law firm's "leverage."

which suppresses the pool of data available to interested researchers. This paucity of data makes it more likely that scholars will choose to focus on discrimination against associates rather than against partners.

The frequency of discrimination lawsuits brought by partners (and, to a lesser extent, associates) against law firms is itself limited by several factors. First, a lawyer bringing a discrimination claim against her firm may face significant career ramifications. While any employee in any context might face consequences from bringing a suit against her employer, the implications are likely to be uniquely far-reaching in legal careers where, due to the ubiquity of online legal news services, the entire legal profession can monitor the lawsuit and form judgments about the plaintiff. Second, it is likely that many discrimination lawsuits brought by lawyers settle with nondisclosure agreements, perhaps even before the suit is filed,[43] making such instances of discrimination particularly hard to track. Third, many law firm employment and partnership agreements include an arbitration agreement, which further removes cases from the public sphere.[44] These factors serve to suppress the total number of discrimination claims brought against law firms by *any* lawyers, whether partners or associates. And the uphill legal battle unique to *partners* seeking to advance these claims even further shrinks the pool of cases brought by that subset of lawyers.[45]

Even in the face of these limitations, however, there is enough data and anecdotal evidence to show that female partners are discriminated against in several ways. Most prominent, and best documented, is the fact that female partners receive lower compensation across-the-board than their male peers. Women also receive less credit for their work and for client origination than their male peers, and often face discrimination following pregnancy or maternity leave. Further exacerbating these problems, female partners are severely underrepresented at the highest levels of firm leadership and in firm governance, which curtails the leverage female partners as a group might wield in an effort to fight back against discriminatory policies and practices.

43. *See* Nancy Levit, *Lawyers Suing Law Firms: The Limits on Attorney Employment Discrimination Claims and the Prospects for Creating Happy Lawyers*, 73 U. PITT. L. REV. 65, 71 n.38 (2011) ("Numerous cases that make a splash in the news simply go away. Some may be settled . . . it is just not possible to tell from the public record.").

44. *Id.* at 70–71; *see also* Craddock v. LeClairRyan, P.C., No. 3:16-cv-0011, 2016 WL 1464562, at *8 (E.D. Va. Apr. 12, 2016) (granting a defendant law firm's motion to compel arbitration in a discrimination case brought by an equity partner), *appeal dismissed*, 668 F. App'x 453 (4th Cir. 2016).

45 See *infra* Part II.C for a more thorough discussion of the law governing partners seeking Title VII antidiscrimination protection.

1. Partnership Compensation Gap

One highly visible sign of gender discrimination at the partnership level is in equity partner compensation: The median female equity partner in a large firm is compensated, on average, 6 percent less than the median male equity partner.[46] This discrepancy is better than the national gender wage gap, calculated by the U.S. Department of Labor at about 20 percent,[47] but is nonetheless particularly notable because of the difference in real dollars that a 6 percent wage gap creates in a high-income setting like equity partnership in a large law firm: Given the high salaries of equity partners in large law firms, a 6 percent wage gap constitutes an average disparity of $46,000 in annual earnings.[48]

In several recent cases, plaintiff female partners have alleged earnings discrepancies relative to their male peers.[49] In one such case, a female equity partner alleged a "systemic and firm-wide" compensation structure that favored male partners over female partners.[50] Additionally, the problems of a wage gap can compound themselves at the partnership level; in that same case, the firm's supplemental partner retirement plan was only available to partners of a certain income level, and the plaintiff alleged that the compensation discrimination she faced not only denied her fair base compensation, but also suppressed her ability to take advantage of what would have been a favorable retirement plan.[51]

46. NAWL 2017 SURVEY, *supra* note 4, at 6. Another survey of partner compensation finds an even wider wage gap between male and female partners, but does not control for pay-influencing factors such as seniority. JEFFREY A. LOWE, MAJOR, LINDSEY & AFRICA, 2014 PARTNER COMPENSATION SURVEY 13 (2014) ("Average compensation for male partners was approximately 47% higher than for female partners, $779,000 (+6%) vs. $531,000 (+7%).").
47. WOMEN'S BUREAU, U.S. DEP'T LABOR, WOMEN'S EARNINGS AND THE WAGE GAP 1 (2016).
48. NAWL 2017 SURVEY, *supra* note 4, at 8 ("Among equity partners, the median man makes, on average, about $46,000 more a year than the median woman ($688,878 vs. $642,583, respectively).").
49. *See, e.g.*, Complaint at 3, Doe v. Proskauer Rose LLP, No. 1:17-cv-00901 (D.D.C. May 12, 2017); Class Action Complaint at 3–5, Campbell v. Chadbourne & Parke LLP, No. 1:16-cv-06832 (S.D.N.Y. June 14, 2017), 2016 WL 4547501; Complaint at 7, Craddock v. LeClairRyan, No. 3:16-cv-0011 (E.D. Va. Apr. 12, 2016) [hereinafter Craddock Complaint]; Civil Complaint at 6–8, Dillon v. Reed Smith, LLP, No. 2:10-cv-01618 (W.D. Pa. Dec. 6, 2010) [hereinafter Dillon Complaint].
50. Craddock Complaint, *supra* note 49, at 7.
51. *Id.* at 19–20.

2. Discrimination in Work and Origination Credit

Relatedly, female partners may face discrimination in the credit they receive for bringing business to the firm and for work done for the firm's existing clients, which, as one of the subjective criteria evaluated by many firms' compensation committees, can further widen the compensation gap.[52] Empirical data show that, in large law firms, only a small percentage of the lawyers bringing the most business to a firm (or "rainmakers") are women.[53] In part, this is a logical consequence of the across-the-board lower numbers of female partners in law firms, but the problem goes further: Only 10 percent of the top "rainmakers" at firms are women, even though women make up 19 percent of equity partners in those firms.[54] Importantly, female partners frequently report that they have at some point had origination credit or work credit that they should have received instead go to a male partner.[55]

Both commentators and plaintiff female partners have pointed to several discriminatory causes of the routing to men of credit that rightfully belongs to women. First, committees in charge of determining origination credit are usually composed of men, and therefore are more likely to be biased against awarding credit to women.[56] In fact, recent NAWL statistics suggest that there may be a positive correlation between greater female representation on law firm compensation committees and female equity partner earnings.[57]

52. *See generally* Ellen Ostrow, *Getting Credit Where Credit Is Due*, 18 WOMAN ADVOC. COMMITTEE 13 (2013).
53. *See, e.g.*, NAWL 2017 SURVEY, *supra* note 4, at 8 ("[O]f the top 10 earners in the firm, most firms (69 percent) reported that no more than one of those 10 rainmakers was a woman.").
54. *Id.*
55. *See, e.g.*, Craddock Complaint, *supra* note 49, at 6 ("[The firm's] subjective application of origination decisions has systematically been applied so as to favor male shareholders, and disfavor female shareholders . . . .").
56. *Id.*; *see also* Ostrow, *supra* note 52, at 15.
57. NAWL explains:

> In the 12 firms that reported having two or fewer female members on the compensation committee, the typical female equity partner earns 77 percent of that earned by a typical male equity partner. In the 18 firms that reported three or more women on the compensation committee, the typical female equity partner earns 87 percent of that earned by a typical male equity partner.

LAUREN STILLER RIKLEEN, NAT'L ASS'N OF WOMEN LAWYERS, WOMEN LAWYERS CONTINUE TO LAG BEHIND MALE COLLEAGUES: REPORT OF THE NINTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 3 (2015). Of course, NAWL's figures in this category reflect a small sample size, and any broad conclusions drawn from them should be viewed cautiously. Still, the numbers are encouraging.

Thus, better representation of women on compensation committees might help to narrow the compensation gap.

Second, women seeking origination credit are hurt by lingering gender role stereotypes, from one or both of two directions. On the one hand, women who speak up for themselves in origination credit determinations are often penalized for not personifying outmoded gender roles casting women as agreeable and team-oriented.[58] As one commentator notes: "Traditional gender role expectations dictate that women should be warm and 'communal.' As a result, women who attempt to negotiate on their own behalf often face a backlash of criticism for being too selfish and aggressive."[59]

On the other hand, women who do not advocate for themselves fare no better. Other outmoded gender stereotypes cast women as caretakers rather than breadwinners. These repressive conceptions of gender roles continue to hold at least subconscious (and sometimes conscious) sway with some decisionmakers. This stereotype may lead decisionmakers to favor men in determining how to award origination credit, compensation, or advancement opportunities because of a greater perceived need for men to "support a family."[60]

Thus, female partners may lose out on origination credit both because they are regarded as "selfish and aggressive" when they advocate for themselves, and because of a gendered default assumption that they have less of a need to provide as breadwinners when they do not advocate for themselves. The Supreme Court has acknowledged this stereotype-driven double bind that career-oriented women like female lawyers face on a daily basis: "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not."[61]

58 *See* Andrea S. Kramer, *Building Clout While Navigating Gender Bias*, 100 WOMEN LAW. J. 10, 10 (2015) ("[C]ommon gender stereotypes are that women have 'feminine' characteristics: they are affectionate, sensitive, warm, friendly, kind and concerned about other people.").

59. Ostrow, *supra* note 52, at 14.

60. *See, e.g.*, Craddock Complaint, *supra* note 49, at 7 (alleging that "[j]ustification for [routing origination credit to men] has included stereotyped concerns over a male attorney's need to support a family" despite the plaintiff's similar economic situation).

61. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

3. Discrimination Resulting From the Choice to Raise a Family

Female partners also face discrimination if they decide to raise families. In the world of large law firms, in which billable hours are viewed as a key indicator of a lawyer's value, lawyers who are also mothers face significant challenges. Although many firms now offer generous maternity leave packages and are increasingly offering flexible part-time work arrangements, insiders continue to report that there is a debilitating stigma attached to making use of these programs.[62] One commentator notes that she is "hard pressed to name an industry that simultaneously has more progressive policies and yet more of an old-school culture than the large law firm environment does."[63]

Some associates report returning from maternity leave to find a lower volume of work and less interesting work.[64] While base compensation remains the same due to firms' lockstep compensation systems for associates, lawyers who become mothers sometimes see discretionary bonuses slashed, even when the lawyer hits or exceeds her billable hours targets and continues to produce work at the same level as her peers.[65] Occasionally, reports surface of associates being fired during or immediately following maternity leave.[66] In other words, the typical large law firm culture is one in which female lawyers who are also mothers often pay a price.

There is no reason to believe that this culture and the discrimination that it engenders are cured when a woman becomes a partner. If anything, the disparate treatment of mothers in law firms is exacerbated at the partnership level, because whereas base salaries for associates in modern large firms tend to stick to a lockstep scale, partner compensation is subjectively determined and is therefore more vulnerable to manipulation in a discriminatory fashion.

62. *See* Nicole Weber, *Are Moms at the Top Law Firms Happy?*, VAULT (May 6, 2015), http://www.vault.com/blog/vaults-law-blog-legal-careers-and-industry-news/are-moms-at-the-top-law-firms-happy [https://perma.cc/N37M-PZ59] ("Maternity leave is generous but there is still a stigma attached to it and to part-time work." (quoting an associate's comment on their firm's gender diversity efforts)).

63. Selena Rezvani, *Large Law Firms Are Failing Women Lawyers*, WASH. POST (Feb. 18, 2014), https://www.washingtonpost.com/news/on-leadership/wp/2014/02/18/large-law-firms-are-failing-women-lawyers [https://perma.cc/CS3X-HLP4].

64. *See* Marc Tracy, *What Happens to Pregnant Women at a Big Law Firm*, NEW REPUBLIC (July 25, 2013), https://newrepublic.com/article/114026/why-big-law-firms-lag-behind-parental-leave [https://perma.cc/C7QZ-N3TJ].

65. *See* Anna T. Collins, *The "Mommy Penalty" in the Legal Profession*, GLASS HAMMER, http://theglasshammer.com/2009/01/19/the-mommy-penalty-in-the-legal-profession [https://perma.cc/BTZ5-BEKB].

66. *See* Tracy, *supra* note 64.

Anecdotal evidence suggests that this occurs; recent lawsuits brought by partners against their firms have alleged an unexplained decrease in wages after returning from maternity leave. In one case, a nonequity partner alleged that her compensation was cut "by almost half" upon returning from a three-month maternity leave; when she complained to firm management, she was asked in response whether she was "done having babies."[67] In another, the plaintiff alleged that female partners in her firm were routinely forced into unwelcome reduced-time arrangements with a commensurate reduction of salary after a pregnancy.[68]

4. Discrimination in Firm Leadership and Governance

Finally, the number of women leading large law firms or serving on firms' highest committees is disproportionately low. According to NAWL, only 18 percent of top firms have a female firmwide managing partner, and only 25 percent of office-level managing partners in those firms are women.[69] And in regards to firms' highest governance committees, which manage the affairs and direction of many large firms,[70] many are disproportionately male: The average executive committee in top firms is composed of nine men and only three women.[71]

These numbers suggest two independent conclusions. First, the numbers may in and of themselves be evidence of discrimination—indications that firms' predominantly male "senior management group[s have] significant financial interests in maintaining the status quo"[72] and therefore work hard to keep women out. But even absent a malevolent motive, the dearth of women in firm leadership roles paints a bleak picture of a future for women in firms, one that runs in direct tension with the idea that partnerships are egalitarian constructs in which each partner has equal bargaining power. If women are distanced from firm leadership, they cannot advocate for meaningful change, and a vicious cycle continues to perpetuate discrimination. As one reporter points out: "You can draft as

67. Dillon Complaint, *supra* note 49, at 7.
68. Craddock Complaint, *supra* note 49, at 8.
69. NAWL 2017 SURVEY, *supra* note 4, at 7.
70. Governance committees are common in large law firm partnerships, and consist of small groups of partners that manage the affairs and direction of the firm. *See* CORWIN & CIAMPI, *supra* note 25, § 4.03. For a more complete discussion of partnership governance committees, see *infra* Part II.B.2.
71. NAWL 2017 SURVEY, *supra* note 4, at 7.
72. Craddock Complaint, *supra* note 49,at 5.

many pro-employee policies as you like, but unless women are co-creators in the firm's strategy, they will not shape the culture. Women must hold positions—I'd argue half of them—on the influential, high-ranking committees that make everyday decisions."[73]

In sum, becoming a partner in a large law firm does not immunize a woman from facing discrimination from her firm; in fact, partnership opens the door to several unique manifestations of discrimination involving compensation, work and origination credit, maternity, and firm leadership.

II. THE FLAWED APPLICATION OF TITLE VII: ARE PARTNERS REALLY PARTNERS?

Although women in law firms do not stop facing discrimination when they become partners, they do lose the protections offered by Title VII because they are no longer "employees" of their firms. This Part highlights the foundation upon which courts' distinction between "employees" and "partners" rests, argues that such a distinction is not viable in the context of modern large firms, and then illustrates that the law has not sufficiently adapted to the new reality of life in modern firms.

A. Title VII Has Been Interpreted to Protect "Employees" but Not "Partners"

Title VII's text makes it illegal for any "employer"—defined by the statute as a person (which includes, according to the statutory definition, a partnership)[74] employing fifteen or more individuals—"to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" on the basis of a protected characteristic.[75] Although all large firms are "employers" based on the number of associates and staff they carry,[76] and all partners are "individuals," Title VII protection has not been extended to partners as a group.[77]

73. Rezvani, *supra* note 63.
74. 42 U.S.C. § 2000e(a) (2012) (defining the term "person" for the purposes of Title VII to include partnerships and unincorporated organizations such as LPs, LLPs, and LLLPs).
75. *Id.* § 2000e-2(a)(1).
76. Large law firms carry a veritable plethora of support staff as well as nonpartner associate attorneys. Invariably, many more than fifteen of these staff members and associates are properly characterized under Title VII as "employees," thus placing large law firms in the category of "employers" subject to Title VII constraints. See Ellen Freedman, *How Many Non-Lawyers Does It Take to Run a Law Firm?*, 23 PA. LAW., Mar.–Apr. 2001, at 32, for a

To achieve this result, the word "individual" in Title VII, which sets forth the class of persons who are protected by the statute, has been consistently interpreted to actually mean "employee" as defined by traditional agency law conceptions of a master-servant relationship.[78] Courts have held that partners are employers, not employees, and thus they do not have standing to bring a claim under Title VII.[79] This is a bright line for the courts; under existing law, partners cannot be categorized as both employers *and* employees, even though prominent legal minds, including Justice Ruth Bader Ginsburg, have argued forcefully that they can fit the definition of both,[80] and despite the fact that the Supreme Court has held that a business' co-owner can simultaneously be classified as its employee.[81]

As associates, female lawyers are categorized as employees and therefore are fully covered by Title VII's protections against discrimination in the workplace. Thus, firms that discriminate against female associates "with respect to [their] compensation, terms, conditions, or privileges of employment" may be held liable under Title VII.[82] This question of law was at issue in *Hishon v. King & Spalding*[83] and is now well settled; the *Hishon* majority explicitly held that in a partnership, Title VII protects associates

general description of the various types of staff members large firms must employ in order to be successful.

77. CORWIN & CIAMPI, *supra* note 25, § 6.03(2)(d).

78. *See, e.g.*, Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1242–43 (11th Cir. 1998). ("[Title VII] does not define 'any individual,' and although we could read the term literally, we have held that only those plaintiffs who are 'employees' may bring a Title VII suit."); Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997) ("Although the language [of Title VII] speaks of 'any individual,' courts long ago concluded that Title VII is directed at, and only protects, employees and potential employees."); McClure v. Salvation Army, 460 F.2d 553, 556 (5th Cir. 1972) ("If the provisions of Title VII are to apply . . . it is necessary that [the defendant] be an 'employer' . . . and that [the plaintiff] be an 'employee' as those terms are defined by . . . the Title.").

79. *See*, *e.g.*, Solon v. Kaplan, 398 F.3d 629, 634 (7th Cir. 2005) (holding that the plaintiff equity partner is, as a matter of law, an employer and therefore not eligible for Title VII protection).

80. *See, e.g.*, Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 451 (2003) (Ginsburg, J., dissenting) ("There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship." (quoting Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 32 (1961))); Ann C. McGinley, *Functionality or Formalism? Partners and Shareholders as "Employees" Under the Anti-Discrimination Laws*, 57 SMU L. REV. 3, 34–36 (2004).

81 Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 32 (1961).

82. 42 U.S.C. § 2000e-2(a)(1) (2012).

83 467 U.S. 69 (1984).

from the beginning of the hiring process through their consideration for partnership.[84]

But once a woman makes partner, she is no longer eligible for Title VII protection. Although the *Hishon* majority did not address the issue, Justice Powell's concurrence drew a line, arguing that partnerships are uniquely situated as organizations steered by a consensus of partners who are each other's equals in influence and bargaining power:

> I write to make clear my understanding that the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners. . . . The relationship among law partners differs markedly from that between employer and employee—including that between the partnership and its associates. The judgmental and sensitive decisions that must be made among the partners embrace a wide range of subjects. The essence of the law partnership is the common conduct of a shared enterprise. The relationship among law partners contemplates that decisions important to the partnership normally will be made by common agreement, or consent among the partners.[85]

Thus, Justice Powell's concurrence focused on the difference between associate-employees and partners, the latter of whom Powell viewed as equal co-managers. Under his egalitarian construction of a partnership, Powell reasoned that associate-employees lack the bargaining power and organizational influence to combat discrimination, whereas each partner has an equal ability to make decisions and influence firm policies. Therefore, associates are entitled to the protections of Title VII, while partners—considered by Powell to be fully capable of fending for themselves and of using their leverage to avoid discrimination—are not.

The reasoning underlying Justice Powell's concurrence has become the baseline for Title VII jurisprudence as applied to partnerships.[86] For instance,

84. *Id.* at 77–78.
85. *Id.* at 79–80 (Powell, J., concurring) (citations omitted).
86. The effect that Justice Powell's concurrence has had is particularly notable given the fact that Powell's opinion is a solo concurrence to a unanimous opinion, and therefore holds no binding precedential value. *See id.* Thus, regardless of how influential Powell's opinion has become in lower courts over the years, the U.S. Supreme Court is not bound by stare decisis, and may at any time freshly examine the issue of Title VII's application to partners without being constrained by prior dicta. *See, e.g.*, Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."). Justice Powell was a particularly prolific writer of concurring opinions, and in several instances besides *Hishon*, his concurrences became arguably more precedentially important than

in *Wheeler v. Hurdman*,[87] a case decided three years after *Hishon*, the Tenth Circuit relied explicitly on Powell's concurring opinion in developing a test to determine whether a partner should be covered by Title VII, arguing: "Partnerships, as Justice Powell so aptly stated in his concurring opinion in *Hishon*, embody very special relationships and sensitive management concerns . . . ."[88] Since *Hishon*, courts have struggled to maintain the line between partners and employees even as the evolution of modern law firm partnerships has made it impractical, if not impossible, to do so.

B. The Distinction Between "Employees" and "Partners" Is Blurred by the Structure of the Modern Law Firm

Even when *Hishon* was decided in 1984, Justice Powell's conception of partnerships, which cited no statistics on the contemporary legal profession, did not quite track reality. By the mid-1980s, law firms had already entered a period of rapid expansion and growth, leaving the legal landscape dominated by large firms that were moving away from the egalitarian model on which Powell's concurrence was premised.[89]

The rapid pace of change has continued, and today, while the specifics of each law firm's structure are unique, few, if any, track the idealized notion of partnership assumed and relied upon by Justice Powell in *Hishon*. Today's large law firms have expanded exponentially in size, scope of practice, and market share in order to better compete in a globalized world, rendering them completely foreign to Powell's model.[90]

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the majority or plurality opinions to which they were attached. *See generally* Tristan C. Pelham-Webb, *Powelling for Precedent: "Binding" Concurrences*, 64 N.Y.U. ANN. SURV. AM. L. 693 (2009).

87. 825 F.2d 257 (10th Cir. 1987).

88. *Id.* at 273.

89. Law firm growth since the 1960s has been well documented and exponential. For instance, in 1968, the largest law firm based in the United States had 169 lawyers; by 1988, "the largest firm had 962 lawyers and there were 149 firms larger than the largest firm in 1968." MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 46 (1991).

90. *See* STEVEN J. HARPER, THE LAWYER BUBBLE: A PROFESSION IN CRISIS 69–97 (2013). In the twenty-seven years since Marc Galanter and Thomas Palay wrote in 1991, *see* source cited *supra* note 89, the expansion of law firms has continued. According to *The National Law Journal*, today's largest law firm Baker McKenzie has 4607 lawyers working around the globe, 1540 of whom are partners. ALM LEGAL INTELLIGENCE, 2017 NLJ 500, at 1 (2017). Today, there are twenty-seven firms that employ more lawyers than did the largest firm when Galanter and Palay gathered statistics thirty years ago. *See id.* at 1–2.

Accompanying that expansion has been a reworking of the internal organization of the partnership. Three key characteristics of the modern law firm illustrate the present-day inapplicability of Justice Powell's egalitarian construct. Each of these three developments belies the notion that the legal partnership is special and that partners do not require protection from discrimination: (1) Partnership in most large firms is stratified into multiple tiers, each of which has different rights and privileges; (2) decisionmaking in firms is concentrated in the most powerful partners, rather than spread equally among all partners; and (3) profits are distributed among partners based on subjective valuations of the partner's contributions to the firm, as opposed to lockstep compensation systems. The following Subparts examine each of these three realities in turn and show how they undermine the legal fiction that partners have built-in protections against discrimination.

1. The Multi-Tiered Partnership

The most important way in which modern law partnerships differ from Justice Powell's egalitarian conception is through the multi-tiered partnership, which is increasingly becoming the norm at large law firms.[91] Typically, firms adopt two tiers of partnership.[92] In the top tier, "equity partners" pay equity into the firm, make important decisions, and receive their compensation in the form of an allocation of the firm's profits, while in the lower tier, "nonequity partners" do not own equity in the firm, do not make management decisions, and are paid a fixed salary.[93] Firms affix the

91. Of the 2016 *Am Law* 100, for instance, 82 percent employed a multi-tiered partnership structure. *See* Brian Dalton, *Stats of the Week: The Last of the True Biglaw Partnerships*, ABOVE L. (Apr. 29, 2016, 4:17 PM), http://abovethelaw.com/2016/04/stats-of-the-week-the-last-of-the-true-biglaw-partnerships [https://perma.cc/JS8Z-35L7]. Michael Goldhaber illustrates the prevalence of the trend of nonequity partnership in *Am Law* 100 firms by comparing data from 1994 and 2014. Over that period, the average number of nonequity partners in *Am Law* 100 firms rose from 19 to 141, and the number of firms in which nonequity partners outnumbered equity partners rose from 3 to 31. Michael D. Goldhaber, *The Trouble With Nonequity Partners*, AM. LAW. (Apr. 30, 2014, 12:00 AM), http://www.americanlawyer.com/id=1202651707276/The-Trouble-With-Nonequity-Partners [https://perma.cc/S5YP-K4J2].

92. Two tiers of partnership is the norm, but this can vary from firm to firm. *See* Geri S. Krauss, *Partnership Roles Vary Widely From Firm to Firm*, 229 N.Y. L.J. 24 , 24 (2003) ("[S]ome firms have more than one class of non-equity partner, each with different rights.").

93. *Id.*; *see also* David B. Wilkins, *Partner, Shmartner!* EEOC v. Sidley Austin Brown & Wood, 120 HARV. L. REV. 1264, 1266 (2007) (describing many firms' practice of "creating a second tier of 'income' or 'non-equity' partners (or 'artners'—for partners

"partner" label to both tiers, but in most cases only equity partners can have anything resembling the leverage contemplated by Powell as a rationale for denying Title VII protection to partners, given the lack of management power typically granted to nonequity partners.[94]

The stratified partnership structure is the most obvious way in which modern law firms do not fit into Justice Powell's construct, as the reality of the modern firm is that "although the term 'partner' invokes reassuring connotations of equality, it is now painfully clear that some law firm partners are substantially more equal than others."[95] In other words, nonequity partners represent a subsection of the partnership that meets none of the assumptions relied upon by Powell in *Hishon*: These partners categorically lack the financial stake in the firm and the decisionmaking capacity that Powell viewed as the hallmarks of what makes the partner-partner relationship special.[96] Therefore, any legal regime that exempts partners from Title VII protections should address this structure by exempting only equity partners while continuing to cover the prototypical nonequity partner. As discussed in Part II.C, *infra*, the current legal framework for Title VII's application to partnership attempts to make this distinction, but does so in a problem-ridden and ultimately ineffective way.

2. Centralized Decisionmaking

Even among equity partners, there may be differences in the level of control each partner has over decisionmaking within her firm.[97]

without the 'p' for profit—in the vernacular) with little or no right to share in the firm's financial success or governance").

94. *See* Krauss, *supra* note 92. In some instances, nonequity partners have some decisionmaking privileges, but almost always to a lesser degree than equity partners. Regarding financial stake in the firm, there is little difference between nonequity partners and associates, as nonequity partners, like associates, are typically indemnified by equity partners for the firm's liabilities. *See generally id.*

95. David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. STUDY LEGAL ETHICS 15, 16 (1999).

96. *See* Robert W. Hillman, *The Impact of Partnership Law on the Legal Profession*, 67 FORDHAM L. REV. 393, 397 (1998) ("A partner without an equity interest is obviously a contradiction in terms. Yet the ambiguity of such a status has not deterred firms from . . . assigning a growing number of their lawyers to a position that could best be described as that of a 'non-partner partner.'"); Johnson, *supra* note 19, at 1082 ("By creating positions such as 'of counsel,' 'permanent associate,' 'special counsel,' 'non-equity partner,' 'staff lawyer,' and 'junior partner,' firms have signaled their willingness to maintain a pool of very senior associates without conveying upon them the most precious rights associated with partnership.").

97. As Geri Krauss explains:

Decisionmaking in many modern firms is concentrated in committees, which by definition increase the decisionmaking role of committee members while decreasing the role of those partners not on a committee. For example, a typical large law firm might have an "executive committee"—usually composed of the most prominent partners in the firm—tasked with making the most important decisions about what the firm does and how it operates,[98] a "compensation committee" that determines how much each partner is paid,[99] a "practice management committee" in charge of each practice group,[100] and even a "pro bono committee" that oversees the pro bono matters that the firm accepts.[101] Thus, decisionmaking in contemporary firms does not fit with Justice Powell's conception of a partnership in which every partner has leverage to affect every decision of the partnership; the centralization and fragmentation of committee-based governance means that each partner may have different leverage in different areas of decisionmaking, depending on whether she is a member of any committees.

In many instances, these committees are elected by a vote of the partnership;[102] other committees are "self-perpetuating" in the sense that the committee itself is responsible for appointing its own members.[103] And in most firms, consent to the firm's existing decisionmaking structure is a necessary precondition for entry into the partnership; if a prospective partner has an issue with the firm's governance, she almost never has the bargaining leverage to alter the status quo.

Of course, there is nothing inherently wrong with a centralized and fragmented management structure. In fact, as firms grow larger, decisionmaking functions probably *should* be apportioned in a manner that more closely

> What role a new equity partner plays depends largely on the culture and size of the firm. While equity partners participate in the firm's governance and most have a right to vote on firm matters and serve on management committees, in some firms, power is institutionalized in the hands of a few, and new equity partners in fact exercise little control.

Krauss, *supra* note 92, at 25.

98. *See* CORWIN & CIAMPI, *supra* note 25, § 4.03.
99. *See id.* § 5.04.
100. *See id.* § 4.06.
101. *See, e.g.*, LATHAM & WATKINS, LLP, PRO BONO ANNUAL REPORT 2004, at 36 (2005) ("The Pro Bono Committee is made up of 35 attorneys spanning Latham's offices around the globe, including 12 partners, 1 of counsel, and 22 associates.").
102. *See, e.g.*, CORWIN & CIAMPI, *supra* note 25, § 4.03.
103. *See, e.g.*, EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 703 (7th Cir. 2002) ("The partnership does not elect the members of the executive committee; the committee elects them, like the self-perpetuating board of trustees of a private university or other charitable foundation.").

approximates the structure of a corporation than that of a prototypical partnership. This comes as a direct consequence of the expansion in size of law firms: It is simply not practical to make all decisions following a "one partner, one vote" management structure when the average firm in *The American Lawyer*'s top one hundred firms (*Am Law* 100) has 203 equity partners.[104] But as law firms evolve, the law also must evolve, and partnership law has not kept up with the entities it governs. Given that the reality of modern law firms is that partners do not have an equal voice in management, Justice Powell's reasoning for denying partners Title VII protection based on a highly democratic and egalitarian partnership structure simply no longer makes sense. While a partnership governance structure that more closely mirrors that of a corporation may be normatively desirable in many ways, the shift away from partner parity opens the door for discrimination among partners, and the law should address that.

3. Subjective Profit Distribution

Another area in which the reality of law firm partnerships differs from Justice Powell's ideal in *Hishon* is in partner compensation. Powell's equality-driven understanding of partnerships rests implicitly on the assumption that each partner has an equal financial stake in the firm and is compensated accordingly, but this is not the case in contemporary firms.[105] Instead, the modern firm uses compensation "as a system for management" by incentivizing and rewarding business development and good legal work.[106]

In most firms, the compensation committee is tasked with translating a partner's contributions to the firm into a dollar value, and it often does so by awarding "origination credit" to the attorney(s) bringing a matter to the firm,

104. *See* Robert W. Hillman, *The Bargain in the Firm: Partnership Law, Corporate Law, and Private Ordering Within Closely-Held Business Associations*, 2005 U. ILL. L. REV. 171, 183 ("As partners grow in number, governance necessarily becomes centralized, often through a committee of partners elected periodically. . . . In this sense, firms have outgrown the law under which they operate."). For the average number of equity partners in an *Am Law* 100 firm, see Chris Johnson, *The Am Law 100: Signs of a Slowdown*, AM. LAW. (Apr. 25, 2016, 12:00 AM), http://www.americanlawyer.com/id=1202755430908/The-Am-Law-100-Signs-of-a-Slowdown [https://perma.cc/5657-8KBK], which notes that the total number of equity partners in the 2015 *Am Law* 100 firms was 20,337, which averages out to 203.37 equity partners per firm.

105. In fact, this was not even the case at the time of the *Hishon* opinion, despite Justice Powell's apparent misperception to the contrary. *See* GALANTER & PALAY, *supra* note 89, at 31 (explaining that, by as early as the 1960s, law firms had largely moved away from lockstep compensation of partners).

106. Joel A. Rose, *Determining Partner Compensation: Identifying and Defining Criteria*, 87 N.Y. ST. B. ASS'N J. 26, 26 (2015).

"production credit" for the legal work a partner creates, and "discretionary subjective credit" for other, often less tangible factors like "maintaining good working relationships" and "respecting others' contrasting views and respecting each partner as a person."[107]

As with the firm governance structures discussed above, a compensation structure that rewards good performance makes intuitive sense for law firms. But the subjectivity inherent in evaluating good performance opens the door for potential discrimination in a way that is overlooked by Justice Powell's *Hishon* concurrence.

C. Modern Title VII Jurisprudence Inadequately Addresses the Modern Law Firm Partnership Structure

Put simply, the typical modern partnership does not align with what Justice Powell understood partnerships to be. Modern partnerships have grown such that an egalitarian model in which each partner has an equal say over the partnership's policies and behavior is no longer workable, and many have adopted governance structures that more closely approximate those of corporations than of traditional partnerships. In such an environment, the stark distinction between a partner and an employee that Powell espoused cannot be so clear-cut.

Perhaps in an effort to keep up with the evolution of modern partnerships, courts since *Hishon* have undertaken efforts to ensure that a partnership "may not evade the strictures of Title VII simply by labeling its employees as 'partners.'"[108] Virtually all of the post–*Hishon* case law and scholarship evaluating antidiscrimination laws' application to partners have approached the issue from the perspective of determining whether a nominal "partner" is in fact an employee or an employer.[109]

107. *Id.* at 27–30.

108. Hishon v. King & Spalding, 467 U.S. 69, 79 n.2 (1984) (Powell, J., concurring).

109. *See, e.g.*, EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 698 (7th Cir. 2002) ("To be able to establish that the firm had violated the ADEA, therefore, the [EEOC] would have to show that the 32 partners were employees before their demotion."); Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997) ("The rub is whether [the plaintiff] is an employee."); Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75 (1984); Jessica Fink, *A Crumbling Pyramid: How the Evolving Jurisprudence Defining 'Employee' Under the ADEA Threatens the Basic Structure of the Modern Large Law Firm*, 6 HASTINGS BUS. L.J. 35 (2010); Randall J. Gingiss, *Partners as Common Law Employees*, 28 IND. L. REV. 21 (1994); Stephanie Greene & Christine Neylon O'Brien, *Who Counts?: The United States Supreme Court Cites "Control" as the Key to Distinguishing Employers From Employees Under Federal Employment Antidiscrimination Laws*, 2003 COLUM. BUS. L. REV. 761 (2003); McGinley, *supra* note 80;

In earlier days of Title VII jurisprudence, the federal circuits were divided on how to go about answering this question. Several circuits adopted an economic realities test, which determined partner status predominantly by evaluating factors such as compensation, ownership, and the partner's liability share.[110] Other circuits adopted a test placing greater emphasis on the partner's management functions and ability to control her work product.[111] Since the Supreme Court decided *Clackamas Gastroenterology Associates, P.C. v. Wells*[112] in 2003, however, the circuit split has been resolved. Today, the prevailing standard adopted by all circuits is a hybrid test that seeks to determine both whether the "partner" controls her own work and whether she shares in the liabilities and profits of the firm.

1. The *Clackamas* Hybrid Test

In *Clackamas*, a doctor was terminated from a small medical clinic and brought claims under the Americans with Disabilities Act (ADA).[113] The clinic was structured not as a general partnership, but rather as a professional corporation, which is a limited-liability business structure for professionals in which the only shareholders of the corporation are the professionals themselves.[114]

Dawn S. Sherman, *Partners Suing the Partnership: Are Courts Correctly Deciding Who Is an Employer and Who Is an Employee Under Title VII?*, 6 WM. & MARY J. WOMEN & L. 645 (2000); Wilkins, *supra* note 93, at 1264; Lauren Winters, *Partners Without Power: Protecting Law Firm Partners From Discrimination*, 39 U.S.F. L. REV. 413 (2005); Leigh Pokora, Comment, *Partners As Employees Under Title VII: The Saga Continues, A Comment on the State of the Law*, 22 OHIO N.U. L. REV. 249 (1995).

110. *See, e.g.*, *Serapion*, 119 F.3d at 982; Simpson v. Ernst & Young, 100 F.3d 436, 444 (6th Cir. 1996).

111. *See, e.g.*, Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793 (2d Cir. 1986).

112. 538 U.S. 440 (2003).

113. *Id.* at 442. As discussed earlier, Title VII and the ADA have nearly identical applicability provisions, and courts treat decisions interpreting the two laws as interchangeable. *See supra* note 25.

114. Professional corporations (PCs) are a relatively new form of business entity that combine many of the core properties of partnerships, such as a unity of ownership and control, with benefits of incorporation, such as limited liability and tax advantages. Typically, PCs are governed in a manner similar to partnerships, with the shareholders determining by common agreement (analogous to a partnership agreement) how the PC is to be managed. As some commentators have said:

> The typical professional corporation statute requires that corporate purposes be limited to the practice of a single profession, and provides that only licensed professionals employed by the corporation can be shareholders or directors. Although the individual shareholders of a professional corporation remain liable for their own professional malpractice, the shareholders are not liable for the malpractice of other professionals who are members of the professional corporation.

The issue before the Court was whether the defendant clinic was large enough to meet the fifteen-employee quasijurisdictional threshold required to subject the partnership to antidiscrimination statutes—in this case, the ADA.[115] If the director-shareholders of the professional corporation were classified as employees, the clinic would be large enough to be subject to the ADA; if they were instead classified as employers, the clinic would be too small to be governed by and subject to antidiscrimination laws.[116]

Writing for the Court, Justice Stevens endorsed a nonexhaustive, six-factor test that the Equal Employment Opportunity Commission (EEOC) proposed for separating employers from employees, regardless of "[t]he mere fact that a person has a particular title—such as partner, director, or vice president."[117] The six factors Stevens endorsed are:

1. Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
2. Whether and to what extent the organization supervises the individual's work;
3. Whether the individual reports to someone higher in the organization;
4. Whether and to what extent the individual is able to influence the organization;
5. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and
6. Whether the individual shares in the profits, losses, and liabilities of the organization.[118]

At its core, the *Clackamas* test is an adapted version of a common law test for determining whether an employment relationship exists, tailored to fit the specific attributes of partnerships, professional corporations, and limited liability partnerships (which share the common attribute of centralized ownership and control over business operations). Thus, the

J. William Callison & Maureen A. Sullivan, Partnership Law and Practice: General and Limited Partnerships § 2:9 (2016).

115. *Clackamas*, 538 U.S. at 442.

116. *Id.* at 441–42. Although the only issue that *Clackamas* squarely addresses relates to the distinction between employers and employees for the purpose of determining whether a *defendant entity* is large enough for Title VII's obligations to apply, circuit courts have also applied the *Clackamas* standard to determine whether a *plaintiff individual* can bring a claim under those statutes. *See, e.g.*, Lopez v. Massachusetts, 588 F.3d 69, 85–86 (1st Cir. 2009) (holding that plaintiffs were not the defendant's employees and therefore were ineligible for Title VII protections under the *Clackamas* test).

117. *Clackamas*, 538 U.S. at 450.

118. *Id.* at 449–50 (quoting EEOC, Compliance Manual § 605:0009 (2000)).

common law of agency, which focuses on control over one's work product and within one's organization, is captured by the first five factors, while the sixth factor attempts to account for the shared profits and liability that make partnerships and other similar business entities economically unique.

2. Problems With the *Clackamas* Approach

Although the Supreme Court has not explicitly said so, and although not all circuit courts have ruled on the issue, the *Clackamas* test seems to now be the standard for determining whether a partner in a law firm is an employee eligible for Title VII protections or an employer ineligible for those protections.[119] While *Clackamas* may seem at first glance to solve the problem of a blurry distinction between partners and employees, the lack of meaningful changes in plaintiff outcomes in the years since *Clackamas* was decided suggests otherwise.

The *Clackamas* test as applied to law firms creates problems from several standpoints. First, the *Clackamas* approach inadequately captures the relevant difference between partner-employees and partner-employers by giving outsized weight to economic stake, which by itself has little or no bearing on a partner's ability to combat discrimination. This is especially true because large law firms are now organized as limited liability partnerships, which afford protection of nonpartnership assets to partners. Of course, equity partners are more likely than nonequity partners to have decisionmaking leverage that might provide some measure of protection from discrimination. But this leverage stems from the equity partner's right to control the firm's operations, not inherently from her economic stake in the firm, which is all that *Clackamas*'s sixth factor measures.

Second, the *Clackamas* inquiry is a burdensome and inefficient process that discourages potential plaintiffs from bringing meritorious claims and provides an undue advantage to litigants with more resources than their opponents. Third, and most importantly, *Clackamas* fails to serve Title VII's broad policy goal: to eliminate discrimination in the American workplace. Law firm partners and associates both exist within the workplace of a legal office, and both face discrimination; if Title VII is to live up to its full

119. *See* Greene & O'Brien, *supra* note 109, at 781 ("Because the [*Clackamas*] factors extend to investigations not only of partners and shareholders in professional corporations, but also of officers, members of boards of directors, and major shareholders, courts will have to revise how they assess the employment status of such individuals.").

potential, courts must stop drawing arbitrary lines regarding who within a workplace may and may not qualify for discrimination protection.

a. *Clackamas* Overemphasizes Economic Control

One concern with using the *Clackamas* test to determine whether a partner is eligible for Title VII coverage is that *Clackamas* seems to conflate the unique characteristics of a partnership generally with the unique characteristics of a partnership that are relevant to the inquiry of whether partners should have antidiscrimination protections. Specifically, the sixth *Clackamas* factor's emphasis on the economics of a business's arrangement has little bearing on whether its partners should be afforded Title VII protection.

As pointed out in J. William Callison and Maureen A. Sullivan's treatise, *Partnership Law and Practice*, defining characteristics of a general partnership are that "all partners are personally liable for business debts and obligations" and that partners "share profits."[120] *Clackamas*'s sixth factor, which asks "whether the individual shares in the profits, losses, and liabilities of the organization," taps into this distinction between partnerships and other forms of business.[121] Clearly, this factor is important to a determination of whether a partnership exists, as opposed to some other business entity.

But economic stake in a partnership does not have any clear relevance to the reasoning behind the denial of Title VII rights to partners—namely, that partners have enough leverage within the partnership to affect whether discrimination occurs.[122] While it is true that equity partners are more likely than nonequity partners to have decisionmaking clout within a firm, their economic stake in the firm does not by itself offer any protection. Thus, using pure economic stake as a proxy for ability to self-protect against discrimination conflates correlation with causation.

Because partnership agreements are highly flexible, a partner could enter into a partnership agreement in which she assumes liability and enjoys a share of the partnership's profits without actually getting a vote on key governance issues; in fact, this is exactly the partnership agreement signed by many partners who are not on their firms' key committees. In such a circumstance, the partner easily satisfies the sixth *Clackamas* factor but is no better off in terms of combating discrimination within the firm. Therefore, the

120. CALLISON & SULLIVAN, *supra* note 114, § 2:3.
121. *Clackamas*, 538 U.S. at 450 (quoting EEOC, COMPLIANCE MANUAL § 605:0009 (2000)).
122. *See supra* note 85 and accompanying text.

economic control factor only matters to the very small extent that participating in a greater share of a firm's profits and liabilities correlates with a partner's ability to veto or otherwise fight discriminatory policy.

Compounding this problem is the lack of guidance given by the *Clackamas* Court as to how to balance its six factors. The majority opinion merely instructs that "no one factor [is] decisive."[123] In the absence of more specific instruction, there are indications that courts might place a greater emphasis on economic control than the other five factors. A publication from one major law firm, for instance, refers to the economic control factor as "the most important one in the eyes of courts and agencies."[124] And prior to *Clackamas*, courts frequently applied similar or overlapping tests on the issue, but with "little agreement between the circuits about which factors are the most important in deciding when a partner is an employee,"[125] with the result that some circuits attached outsized importance to a partner's economic stake in her firm. The Tenth Circuit, for example, favored a test emphasizing the "economic realities" of partnership as the primary basis for denying partners Title VII protection.[126] Without balancing instructions, there is no reason to expect the Tenth Circuit to reduce the emphasis it places on economic control in the wake of *Clackamas*.

Put simply, the *Clackamas* inquiry's treatment of economic control loses sight of the broader picture by instructing courts to answer the question, "Does a partnership exist here?" rather than, "Do the nominal partners here have the leverage required to obviate Title VII protection?" While these issues are addressed to an extent by the other five *Clackamas* factors, the existence of a sixth factor with no bearing on a partner's ability to protect herself from discrimination by her firm, coupled with the Court's lack of guidance about the weight of that factor, means that the *Clackamas* test risks failing to answer the question of whether a partner needs antidiscrimination protection.

123. *Clackamas*, 538 U.S. at 451 (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992)).

124. Jeffrey P. Ayres, The Supreme Court's Recent *Clackamas* Decision Provides Guidance on Whether Law Firm "Partners" Are Really "Employees" 6 (2003) (unpublished manuscript), https://www.venable.com/files/publication/cb92660e-4969-41ae-accc-b8fa2f364880/presentation/publicationattachment/849ac3cf-bace-419b-bb72-b7960847b71d/1036.doc [https://perma.cc/37HG-2JBQ].

125. Catherine Lovly & Matthew J. Mehnert, Note, *Something Every Lawyer Needs to Know: The Employer-Employee Distinction in the Modern Law Firm*, 21 HOFSTRA LAB. & EMP. L.J. 663, 681 (2004) (noting that prior to *Clackamas*, the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits all used similar tests but weighed factors differently).

126. *See, e.g.*, Wheeler v. Hurdman, 825 F.2d 257, 274–75 (10th Cir. 1987).

b. The *Clackamas* Inquiry Suppresses Meritorious Discrimination Claims That Might Otherwise Be Brought

The *Clackamas* test is also troubling for the sheer depth of inquiry it requires before even reaching the merits of a partner's discrimination claim. Before proceeding to the merits of a nominal partner's Title VII lawsuit against her firm, *Clackamas* requires her to prove that she is, in fact, an employee instead of a partner. This requires the plaintiff to undertake significant fact-investigation and other litigation costs before even getting to the merits of a claim, and therefore serves as a barrier to even meritorious discrimination claims.

Such a criticism of *Clackamas* is analogous to common criticisms of the Supreme Court's recent shift away from notice pleading standards in its interpretation of the Federal Rules of Civil Procedure. In *Bell Atlantic Corp. v. Twombly*[127] and *Ashcroft v. Iqbal*,[128] the Court sought to curtail frivolous litigation by imposing a pleading standard requiring "plausible" and "specific" allegations by plaintiffs, making it easier for defendants to win at the dismissal stage. Absent from the *Twombly* and *Iqbal* Courts' reasoning, however, was a discussion of how a lower pre-discovery dismissal threshold would negatively impact plaintiffs' ability to bring meritorious cases by depressing their anticipated value, or how heightened pleading standards would likely prohibitively increase the up-front cost to plaintiffs of crafting an adequate complaint.[129] Similarly, having to undergo the *Clackamas* inquiry depresses the value of partners' discrimination claims by adding hoops for them to pass through and expenses for them to shoulder before a court will address the merits of their claims. This makes it less likely that female partners who face discrimination will be able to fully and effectively litigate their claims.

Even if lawyers making partners' salaries are not the most obvious demographic to which such an "access to justice" argument applies, defendant law firms will always have both greater resources to facilitate litigation and greater access to relevant documents, such as employment records and law firm data, without having to undergo discovery, meaning that the employer/employee inquiry is more likely to prove cost prohibitive to prospective plaintiffs than to defendants. As one observer notes, law firms

127. 550 U.S. 544 (2007).
128. 556 U.S. 662 (2009).
129. *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 67–71 (2010).

often "put up a more vigorous fight . . . because they have the resources to defend themselves less expensively [than third parties paying market rates for legal services], and have strong political incentives to defend themselves."[130] Therefore, forcing nominal partners to first prove that they are not partners creates a procedural hurdle that may be too costly for many potential plaintiffs to overcome.

Further, aside from the negative economic impacts of the *Clackamas* inquiry, *Clackamas* creates psychological barriers that may serve to prevent claims from being brought, which undermines Title VII's goals by depressing the likelihood that an individual who faces workplace discrimination will exercise her rights. Empirical research has shown that litigants take "non-value-maximizing" psychological barriers[131] into account at the settlement stage, and there is no reason to believe that they do not also do so prior to or during other stages of litigation.[132]

Under the *Clackamas* inquiry, a partner who experiences discrimination faces an unenviable task upon filing her lawsuit: She must fight tooth and nail just to prove that she is not actually a partner, thereby disavowing and snubbing her own successful career. Placing such a burden on female partners forces them to overcome the psychological barrier of embarking on a lose-lose endeavor and likely ensures that many female partners who face discrimination will not bring their claims to court or will settle their claims quickly. Thus, the *Clackamas* inquiry creates both financial and psychological pressures that may tend to depress meritorious claims.

c. Excluding Partners From Title VII Is Contrary to the Statute's Policy Goals

Finally, and most importantly, the *Clackamas* test is objectionable on a fundamental level because it undermines the broad policy goals of Title VII. The Supreme Court has expressly acknowledged "Title VII's purpose of eliminating the effects of discrimination in the workplace"[133] and has held

130. Richard C. Reuben, *Suing the Firm*, 81 A.B.A. J. 68, 72 (1995) (quoting Deborah Raskin).

131. A "non-value-maximizing" consideration in litigation is one that prevents a party from acting in her best interest in the case. *See* Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 129 (1994). A classic example is a litigant who, disproportionately fearing a large loss at trial, settles on worse terms than she could reasonably expect from trial. *Id.*

132. *See id.* at 111.

133. Johnson v. Transp. Agency, 480 U.S. 616, 630 (1987).

"that Title VII should not be read to thwart such efforts."[134] Indeed, in most cases interpreting Title VII, courts have taken exactly this approach:

> Title VII has consistently been interpreted broadly as a remedial statute with a congressional purpose transcending mere language and allowing broad interpretations. Such findings have allowed courts to interpret Title VII in a manner consistent with its general purpose and remedial nature while resolving ambiguities "in favor of those whom the legislation was designed to protect."[135]

In other words, Title VII should be (and generally has been) interpreted broadly in light of its broad policy goals. But denying Title VII's application to partners has the opposite effect, even if such a denial is cloaked as an affirmation of freedom of contract among partners.

First, the very existence of antidiscrimination legislation indicates that freedom of contract should not always be an overriding consideration for courts. Specifically, the concept of prohibiting discriminatory contracting implies a policy judgment that freedom of contract should be limited to circumstances in which those entering into contracts do so freely and from positions as equals. That obviously cannot be said for partnership agreements that enable discrimination on the basis of sex against the women entering into them. These terms are not negotiated; they are offered on a take-it-or-leave-it basis, and they bring to light the exact same concerns about discriminatory employment practices that prompted Congress to regulate employment relations in the first place.[136]

Second, a failure to regulate discrimination against partners may have far-reaching impacts on law firm employment discrimination that go beyond partners themselves, potentially affecting nonpartner employees such as associates and staff. For instance, as discussed above, one of the ways in which female partners are often discriminated against is in firm governance: Women are disproportionately excluded from firms' highest decisionmaking

134. *Id.*

135. David A. Forkner & Kent M. Kostka, Note, *Unanimously Weaving a Tangled Web:* Walters, Robinson, *Title VII, and the Need for Holistic Statutory Interpretation*, 36 HARV. J. ON LEGIS. 161, 193 (1999) (footnotes omitted) (quoting Bell v. Brown, 557 F.2d 849, 853 (D.C. Cir. 1977)).

136. As President John F. Kennedy explained to Congress:

> This problem of unequal job opportunity must not be allowed to grow, as the result of either recession or discrimination. I enlist every employer, every labor union, and every agency of Government . . . in the task of seeing to it that no false lines are drawn in assuring equality of the right and opportunity to make a decent living.

109 CONG. REC. 11160 (1963) (statement of President John F. Kennedy).

committees.[137] This not only affects female partners' ability to influence firm policy in a way that prevents discrimination against other female partners, but it also makes it more likely that firm policies will discriminate against female associates and staff.[138]

III. ALTERNATIVE SOLUTIONS: LEGISLATION AND TEXTUALISM

Given the flaws of the *Clackamas* approach and the problems inherent in using an employee/employer distinction to eliminate discrimination in the workplace, a better approach would be to apply Title VII protections to female partners regardless of their status as employee or employer. Doing so would provide a safeguard for lawyers who, despite the legal fiction of equal bargaining power, in fact face discrimination. This Part explores the various ways in which this can be done, first suggesting a legislative fix and then arguing that the present text and legislative history of Title VII support the statute's extension to partners.

A. Legislation: The Obvious (but Unlikely) Solution

The most obvious means of extending Title VII protection to partners is through a legislative amendment to Title VII that explicitly does so. Such an amendment could clarify that Title VII's provision purportedly granting protection to "individuals"—which courts have consistently interpreted to mean employees, prospective employees, and former employees—also extends to partners. A legislative fix along these lines would have several advantages over a court-driven extension of Title VII to partners.

First, using federal legislation as the means of extending Title VII protection to partners would have the advantages of clarity, efficiency, and uniformity. With one fell swoop, Congress could mandate that all courts apply Title VII to partners; waiting for such a result from the judicial branch, by contrast, would likely require piecemeal adoption by the various circuits, followed by a Supreme Court decision (perhaps even decades down the line) eliminating the circuit split. Of these two scenarios, congressional action is without question more efficient. Similarly, a clear and well-crafted amendment from Congress could reduce or eliminate discrepancies in how various courts apply Title VII to partners.

137. *See supra* notes 69–73 and accompanying text.
138. *See* Rezvani, *supra* note 63 (arguing that until women hold at least half of executive committee seats, firms will be unable to implement effective pro-women policies).

Second, an amendment to Title VII would allow Congress to specifically address partnerships without addressing other thorny issues that would be created by judicial expansion of Title VII. For instance, if courts expanded Title VII protection to partnerships, they may also be forced to address whether the reasoning behind such an expansion should apply to independent contractors, undocumented workers, or volunteers.[139] A precise amendment to Title VII, however, can sidestep these issues, as "legislation can resolve particular problems without any obligation to resolve the next problem in precisely the same way."[140] Thus, if for any reason Congress wishes to limit its extension of Title VII solely to partners, it can do so in a way that courts would be hard pressed to replicate.

Despite the relative benefits of legislative action over judicial action, however, political realities make it hard to envision Congress actually making this change. Today's political climate is more polarized than at any point in recent history,[141] and the issue of eliminating workplace discrimination is (somewhat astonishingly) not the type of bipartisan issue that is likely to generate the popular backing necessary to stimulate significant progress in Congress.[142] Therefore, if anything is to be done about discrimination against partners in large partnerships, it probably falls to courts to take the first step.

139. While these groups' status under Title VII is well beyond the scope of this Comment, members of each of these groups are as much "individuals" as are partners, and often face an imbalance of bargaining power similar to or greater than that faced by both partners and the "employees" to whom Title VII has been read to apply. Therefore, any court extending Title VII to partners may also have to address the status of contractors, undocumented workers, and volunteers, among others. *See generally* Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239 (1997); Craig Robert Senn, *Proposing a Uniform Remedial Approach for Undocumented Workers Under Federal Employment Discrimination Law*, 77 FORDHAM L. REV. 113 (2008); Elizabeth R. Langton, Note, *Workplace Discrimination as a Public Health Issue: The Necessity of Title VII Protections for Volunteers*, 83 FORDHAM L. REV. 1455 (2014).

140. Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1518 (1971).

141. *See* PEW RESEARCH CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC 6 (2014) (finding that political polarization and intergroup political antipathy among American adults are at their highest levels of the past two decades).

142. *Cf.* Daniel Cox et al., *Who Sees Discrimination?*, PUB. RELIGION RES. INST. (June 21, 2017), https://www.prri.org/research/americans-views-discrimination-immigrants-blacks-lgbt-sex-marriage-immigration-reform [https://perma.cc/SP7K-YS2Y] (finding that Americans differ significantly in their perceptions of discrimination faced by minority groups based on demographic indicators such as race, religion, and political affiliation).

B. Textualism: Partners Are "Individuals"

Fortunately, the text and legislative history of Title VII provide a sound basis upon which courts could extend Title VII protection to partners in large firms. If courts were to apply a *textualist-intentionalist* approach to statutory interpretation—in other words, an approach that looks at the plain language and drafting context of a statute—they would find ample support for expanding Title VII protection to partners. In fact, the Supreme Court has already applied such an approach to the interpretation of Title VII on numerous occasions.[143] The following Subparts first discuss textualism and its application to Title VII, and then turn to the legislative history of Title VII, making the case that both considerations support extending employment discrimination protections to partners.

1. Textualism and Title VII

Any discussion of textualist statutory construction must begin with the "plain meaning rule," a canon of statutory interpretation providing that when statutory text is unambiguous, the "plain meaning" of its words should be applied.[144] Specifically, "[a] court considers the language of an enactment in its 'natural and ordinary signification' and if there is no ambiguity or obscurity in its language, there will usually be no need to look elsewhere to ascertain intent."[145] Many courts have gone so far as to say that the plain meaning rule is the most important rule of statutory interpretation.[146]

Title VII presents a prototypical case of unambiguous statutory language. The operative language of section 2000e-2(a)(1) reads:

> It shall be an unlawful employment practice for an *employer*—(1) to fail or refuse to hire or to discharge any *individual*, or otherwise

143. *See, e.g.*, EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032–34 (2015); Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *see also* Forkner & Kostka, *supra* note 135, at 194–96 (describing Justice Thomas's textualist-intentionalist approach to the majority opinion in *Robinson*).

144. *See generally* NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION 146 (7th ed. 2007).

145. *Id.* at 158.

146. *See, e.g.*, Swarts v. Siegel, 117 F. 13, 18–19 (8th Cir. 1902) ("There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses . . . ."); SINGER & SINGER, *supra* note 144, at 156 n.6 (listing cases).

> 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.[147]

There are two classes of persons and entities described by the statute. The first, "employer," describes the class of person or entity that is subject to the restrictions laid out in section 2000e-2(a)(1). Specifically, the word "employer" establishes the entity that cannot "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" on the basis of a protected characteristic. The second, "individual," describes the class of persons that are protected by section 2000e-2(a)(1)—in other words, the persons against whom an "employer" cannot discriminate.

Of these two described classes, "employer" is defined in section 2000e(b) of Title VII, but "individual" is not defined in the statute.[148] According to a plain meaning analysis, then, the word "individual" in Title VII should carry its ordinary dictionary meaning.[149] The noun "individual" is defined as "a particular being or thing as distinguished from a class, species, or collection"—in other words, a person, not a class of employees.[150]

Thus, logic dictates that, since section 2000e-2(a)(1) of Title VII says that no "employer" may discriminate against any "individual," the inquiry should begin with whether the defendant is an "employer"—a person who employs fifteen or more employees, per the statutory definition provided in section 2000e(b). This was the issue in *Clackamas Gastroenterology Associates, P.C. v. Wells*;[151] that case hinged on whether the defendant professional corporation's shareholder-directors were considered employers

147. 42 U.S.C. § 2000e-2(a)(1) (2012) (emphases added).
148. *Id.* § 2000e(b) (defining "employer").
149. Many courts curtail the absolute nature of the plain meaning rule by placing restrictions on the rule's application when it would create an absurd result or would lead to a statutory interpretation that is clearly inconsistent with stated policy goals. *See* SINGER & SINGER, *supra* note 144, at 163–68. Neither of these limitations applies here.
150. The full definition of "individual" reads: "a: a particular being or thing as distinguished from a class, species, or collection: such as (1): a single human being as contrasted with a social group or institution a teacher who works with individuals (2): a single organism as distinguished from a group; b: a particular person." *Individual*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/individual [https://perma.cc/24KW-7387].
151. 538 U.S. 440 (2003).

or employees for the purpose of determining whether the defendant was subject to Title VII's limitations.[152]

Next, the inquiry should turn to whether the plaintiff is an "individual." Obviously, a partner in a law firm satisfies that test, and under a textualist-intentionalist analysis, no judicial determination is necessary regarding her employer/employee status. In short, the determination of whether anyone is an employee is relevant only for showing that the partnership employs the prerequisite number of employees (fifteen, under section 2000e-2(a)(1)) to qualify as an "employer" for Title VII's purposes. But because of the multitude of support staff and associate attorneys employed by the typical large law firm, that low threshold will easily be met in any case involving a large law firm, regardless of the categorization of the plaintiff partner. Thus, in a partner discrimination case, the court should *never* have reason to analyze the employee status of a plaintiff partner, except in the very rare case like *Clackamas* where the plaintiff herself would be the fifteenth employee required to trigger the attachment of the statute.

The only portion of the statutory text that does not obviously agree with this analysis is the last clause of section 2000e-2(a)(1), which makes it illegal for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges *of employment*."[153] The emphasized phrase, "of employment," acts as a modifier of the ways in which individuals cannot be discriminated against, and suggests that an employment relationship must exist in order for an individual to bring suit under Title VII.

But requiring that an employment relationship exist need not be interpreted to mean the same thing as requiring that plaintiffs be solely "employees." First, as the Court determined in *Goldberg v. Whitaker House Cooperative, Inc.*,[154] one can simultaneously own a business and be its employee.[155] In *Goldberg*, the Court was faced with the application of federal minimum wage laws to a "cooperative"—a business entity to which independent artisans paid to become "members" in order to market and sell their goods.[156] Similar to Title VII, the statute at issue defined "employee" circularly as "one 'employed' by an 'employer.'"[157] Writing for a majority,

152. *See supra* notes 113–118 and accompanying text.
153. 42 U.S.C. § 2000e-2(a)(1) (emphasis added).
154. 366 U.S. 28 (1961).
155. *Id.* at 32.
156. *Id.* at 29–30.
157. *Id.* at 31.

Justice William Douglas held that the members were both owners and employees: "There is no reason in logic why these members may not be employees. There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship."[158] This logic is also fundamental to Justice Ginsburg's dissent in *Clackamas*, which argues that the fact that an ownership interest exists should not be the end of the analysis for determining whether an employment relationship also exists.[159]

As discussed above, despite their ownership interests, modern law firm partners are rarely, if ever, true equals, and usually retain at least some "employee" characteristics—for instance, a partner typically lacks the decisionmaking leverage to avoid discrimination by the firm, and typically does not have authority to choose the firm's direction, especially if she does not sit on a powerful committee.[160] Thus, while partners may be "owners," they can usually concurrently be categorized as "employees." Under this more flexible line between partnership and employee status, then, any language in Title VII assuming an employment relationship should nonetheless cover most partners.

Second, even if partners are not "employees" as well as "owners" in their specific circumstances, an "employment relationship" still exists between a partner and her firm, similarly to the way in which an employment relationship exists between a chief executive officer and her corporation. In both cases, the individual may be in a managerial role and may exert significant influence over her organization, but both are subservient to their organizations, as illustrated by the existence of fiduciary duties owed by partners and corporate executives to their respective organizations.[161] Just as a CEO enters into an employment relationship with her shareholders, a partner enters into an employment relationship with her fellow partners and with the partnership as an entity. Thus, when the partnership exercises control over a partner's "terms, conditions, or privileges of employment" in a discriminatory fashion, she should qualify under section 2000e-2(a)(1) for Title VII protection.

158. *Id.* at 32.
159. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 451 (2003) (Ginsburg, J., dissenting) (citing Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 32 (1961)).
160. *See also supra* Part II.B.
161. *See* CORWIN & CIAMPI, *supra* note 25, § 1.03 (explaining law firm partners' fiduciary obligations to each other); 2 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 10.1 (3d ed. 2016) (explaining corporate directors' duty of care toward the corporation and its shareholders).

This reinterpretation of Title VII may seem to be a drastic rollback of precedent, but it should be noted that the current trend in Supreme Court Title VII jurisprudence leans toward strict textualist-intentionalist construction.[162] In the Court's most recent case interpreting Title VII's substantive provisions, for example, the late Justice Scalia, writing for an 8–1 majority, picked apart section 2000e-2(a)(2), Title VII's disparate treatment provision, to determine whether Title VII's ban on discrimination "because of" an individual's religious practice requires that the defendant have had actual knowledge that the individual's practice was religious in nature.[163] Justice Scalia applied the statute to the facts one clause at a time:

> The disparate-treatment provision forbids employers to: (1) 'fail . . . to hire' an applicant (2) 'because of' (3) 'such individual's . . . religion' (which includes his religious practice). Here, of course, [Defendant] Abercrombie (1) failed to hire [Plaintiff] Elauf. The parties concede that . . . Elauf's wearing of a headscarf is (3) a 'religious practice.' All that remains is whether she was not hired (2) 'because of' her religious practice.[164]

Justice Scalia went on to analyze the phrase "because of" in the context of its usage within Title VII as a whole, implying that if Congress had wanted to, it could have explicitly imposed a scienter requirement, thus limiting the class of plaintiffs who can bring a claim under section 2000e-2(a)(2) of Title VII.[165]

Identical logic can be applied to section 2000e-2(a)(1). The word "individual" as used within Title VII as a whole usually means "person,"[166] and Congress easily could have explicitly limited the potential pool of section

162. In fact, each of the Court's four most recent substantive Title VII decisions has made reference to dictionary definitions of the language of the statute. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015) (consulting a dictionary to determine the meaning of Title VII's term "because of"); Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1652 (2015) (consulting a dictionary to determine the meaning of Title VII's terms "conference, conciliation, and persuasion"); Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2527 (2013) (consulting a dictionary to determine the meaning of Title VII's term "because of . . . age"); Vance v. Ball State Univ., 133 S. Ct. 2434, 2444–45 (2013) (looking first to conflicting dictionary definitions of Title VII's term "supervisor" in order to determine that the term is ambiguous).

163. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. at 2033–34.

164. *Id.* at 2032 (quoting 42 U.S.C. § 2000e-2(a) (2012)).

165. *Id.* at 2032–33.

166. For instance, Title VII defines "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f) (2012). In this case, "individual" *must* mean "person" rather than "employee," as the latter meaning would be even more dizzyingly circular—Congress could not possibly have intended that an employee be defined by Title VII as "an employee employed by an employer."

2000e-2(a)(1) plaintiffs, such as to "employees and prospective employees," if it had so desired. In other words, this proposed statutory construction asks no more of the Court than to do exactly what it already does in regard to Title VII—read the statute's language and follow what it plainly says.

2. Legislative History of Title VII

Not only should this interpretation of Title VII ring true for strict textualists, but it also is consistent with the policy goals and legislative history of Title VII. As the Supreme Court has held, Title VII's core purpose is to eliminate discrimination in the workplace.[167] Application to partners would be in furtherance of that broad goal. And given the broad scope of Title VII's ambitions, typical canons of statutory construction suggest it should be construed broadly.

In defining an "employer" covered by Title VII as a person or entity employing a threshold number of individuals, Congress clearly manifested an intent to carve out an exemption for small organizations.[168] This threshold number, however, has since been lowered from twenty-five to fifteen by the Equal Employment Opportunity Act of 1972,[169] which indicates a general shift toward a willingness to regulate smaller and more private entities than before. In other words, the legislative history of the amendments to Title VII shows Congress's intent to expand, rather than contract, Title VII's coverage. Expanding Title VII protections to partners is in keeping with this trend.

Additionally, as large law partnerships continue to evolve, expand, and generally become more similar to corporate entities than to the intimate businesses contemplated during the drafting of the Civil Rights Act in the 1960s, they continue to fall even further within Title VII's purview. Congress's initial reluctance to regulate partnerships in 1964 should be viewed as an outgrowth of the desire to leave small organizations alone, but as partnerships become larger and larger (and as later Congresses have lowered the threshold number of employees required to trigger Title VII), this reservation becomes less principled. Given the scope and unforeseeability of the shift in partnership structure since the 1960s, it can no longer be credibly

167. *See* Johnson v. Transp. Agency, 480 U.S. 616, 630 (1987).
168. *See* 42 U.S.C. § 2000e(b) (limiting Title VII's definition of employer to only those who employ fifteen or more individuals).
169. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 80 Stat. 622 (redefining Title VII's definition of "employer" to encompass individuals employing fifteen or more employees, rather than twenty-five or more employees).

argued that in 1964 Congress intended to grant free rein to discriminate to the behemoths that law partnerships have become fifty-four years later.

In fact, the legislative history of Title VII demonstrates the extent to which Congress did not fathom the growth of the partnership in the ensuing decades. In advocating a narrower statutory reach, Senator Norris Cotton remarked that "when a businessman selects a partner, he comes dangerously close to the situation he faces when he selects a wife."[170] The modern partnership structure is so far removed from Senator Cotton's description that it no longer makes logical sense to assume that Congress did not intend to regulate it.

CONCLUSION

Female lawyers in large law firms continue to face challenges in the workplace, and those challenges are exacerbated by Title VII's failure to provide any meaningful antidiscrimination protection at the partnership level. The denial of Title VII remedies to partners is an anachronism based on an idealized view of the partnership as a business entity that has been proven wrong with the passage of time; law firms have continued to grow and to more closely resemble corporations, yet Title VII protections have not been expanded correspondingly.

The time has come to rethink the outdated view of law firm partnerships on which denial of Title VII protection was predicated and to bring Title VII closer to its stated purpose of eliminating discrimination in the workplace. A reinterpretation applying Title VII to any "individual"—including any partner—instead of only to "employees" would bring the legal profession a much-needed step closer to gender equality.

170. 110 CONG. REC. 13085 (1964).

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