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“Fair and Full Employment”:[†] Forty Years of Unfulfilled Promises

Adam W. Aston*

I enlist every employer, every labor union, and every agency of Government—whether affected directly by these measures or not—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.

—President John F. Kennedy¹

INTRODUCTION

While President John F. Kennedy’s promise to put a man on the moon² may be more memorable, Kennedy’s announcement of a civil rights bill in June of 1963 may have provided the greatest long-term effect on American society of any policy initiative in his administration.³ Kennedy intended the Civil Rights Act to improve

[†] John F. Kennedy, Special Message to the Congress on Civil Rights and Job Opportunities, 1963 PUB. PAPERS 483, 488 (June 19).

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1. John F. Kennedy, Special Message to the Congress on Civil Rights and Job Opportunities, 1963 PUB. PAPERS 483, 491 (June 19) [hereinafter Special Message]. President Kennedy addressed the need to pass legislation to preserve the rights of African-Americans with respect to education, employment, and public accommodations. *Id.* at 484.

2. In an address to a joint session of Congress outlining several new proposals to carry out the Cold War, President Kennedy suggested that the space program was an integral part of winning the Cold War. John F. Kennedy, Special Message to Congress on Urgent National Needs, 1961 PUB. PAPERS 396, 404 (May 25). The most important goal for the space program, Kennedy announced, was for “this nation [to] commit itself to achieving the goal, before this decade is out, of landing a man on the moon and returning him safely to the earth.” *Id.*

3. President Kennedy addressed the nation on June 11, 1963 in response to the struggle over integration at the University of Alabama. John F. Kennedy, Radio and Television Report to the American People on Civil Rights, 1963 PUB. PAPERS 468, 469–70 (June 11) [hereinafter

race relations and provide equality for African Americans.⁴ When the Civil Rights Act of 1964 was passed, however, it achieved far more.⁵

Among the provisions in the Civil Rights Act, Title VII declared it unlawful for employers⁶ to discriminate against a person based on any one of five characteristics.⁷ From the beginning, the statutory definition of “employer” required a minimum number of employees before a business could be found in violation of Title VII.⁸ Because of this requirement, small businesses remain shielded from discrimination claims under Title VII, and individuals who apply for

Radio and Television]. He announced his intention to present Congress with an act for civil rights in education, public facilities, and the workplace to combat the “moral crisis” facing the nation. *Id.* at 468–70. Kennedy stated “[i]t is a time to act in the Congress, in your State and local legislative body and, above all, in all of our daily lives.” *Id.* at 469.

4. *Id.* at 470.

5. *See generally* 42 U.S.C. § 1971–2000 (2000). The Civil Rights Act of 1964 establishes a prohibition of discrimination in voting rights, access to public accommodations and facilities, public education, federally assisted programs, and employment. *Id.*

6. The statutory definition of an “employer” under Title VII currently reads: “[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). However, this has not always been the Title VII definition. When originally passed, the Civil Rights Act set the minimum employee requirement at twenty-five. Civil Rights Act of 1964, Pub. L. No. 88–352, Title VII, § 701, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e (2000)). The current minimum of fifteen employees has been the statutory requirement since the 1972 Amendment to the Civil Rights Act. Equal Employment Opportunity Act of 1972, Pub. L. No. 92–261, 86 Stat. 103 (1970 ed. Supp. V).

7. 42 U.S.C. § 2000e–2(a) (2000). The Act states:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Id.

Section 2000e–2 also prohibits employment agencies, labor organizations, and training programs from using discriminatory practices. *See* 42 U.S.C. §§ 2000e–2 (b)–(d) (2000).

8. During the initial stages of debate leading to the passage of the Civil Rights Act of 1964, a minimum-employee requirement of 100 was also considered. This number was considered as a permanent number and, alternatively, as the initial step in a gradual reduction of the number of employees required for Title VII employer liability. *See infra* notes 28, 49, 52–53 and accompanying text.

employment at these businesses, along with those who work there, may be without legal remedy for acts of discrimination.

This Note proposes to change the definition of “employer” to include all businesses “engaged in an industry affecting commerce,”⁹ regardless of the number of employees. The minimum-employee requirement is arbitrary, fails to advance the overall purpose of Title VII, and provides an inaccurate picture of a business’s ability to defend against a suit for discrimination.

Part I of this Note examines the history of liability under Title VII for discrimination by an employer. It begins with an examination of the statutory definition of “employer,” focusing on the current fifteen employee minimum and how that minimum became law. This Part also addresses Congress’s rationale behind the adoption of a “minimum” requirement in Title VII.

Part II analyzes why Congress found a twenty-five-employee requirement necessary for the civil rights legislation and how this requirement became part of Title VII when passed in 1964. Analysis of the legislative history of Title VII provides an explanation for the initial belief that a “minimum” was necessary. Then the Note discusses the legislative history of the 1972 amendment to Title VII, which lowered the minimum requirement to fifteen employees. This analysis also addresses the concerns raised on behalf of small businesses during the debate that caused the reduction of the minimum-employee requirement in the 1972 amendment.

Part III of this Note proposes that Congress take a further look at the fifteen-employee minimum. It suggests that the reasons for the 1972 reduction are also present today. Current business practices, such as the extensive use of technology that curbs the need for face-to-face meetings between employees, give certain businesses with few employees anything but a “mom and pop” feel. This Note further suggests that as we continue to grow as a society, it becomes less acceptable for any business—even one with fewer than fifteen employees—to discriminate when making hiring decisions. The Note argues that setting any minimum-employee requirement to establish employer liability is arbitrary and inconsistent with the overall

9. 42 U.S.C. § 2000e(b) (2000).

remedial purpose of Title VII. Further, the employee minimum, even when set as low as fifteen, leaves many American workers without a federal remedy for employment discrimination. This Note also suggests that a business's "number of employees" no longer gives a complete, or accurate, indication of the business's ability to defend against lawsuits. To the extent a judicial award to a successful plaintiff is based on the value of the job opportunity the plaintiff was denied, a business with any number of employees should have the resources to defend against such a suit and to pay damages if the suit is lost. While this Note argues that there is no justification for having a minimum-employee requirement of any kind because of the importance of a fair and just workplace, should a minimum threshold for Title VII liability be desired, the Note suggest the requirement should be set with an eye to the business's assets or profits. A threshold requirement based on a business's financial situation, rather than on the number of employees, would provide a more accurate picture of whether an employer is capable of defending against a Title VII discrimination suit.

This Note concludes with a summary of the analysis of the minimum-employee requirement that serves as a threshold to Title VII liability and the recommendation for a change to the definition of "employer" as it is used in Title VII to eliminate the minimum-employee requirement.

I. HISTORY

A. Title VII Employer Liability Under the Civil Rights Act of 1964

The Civil Rights Act of 1964 began to take shape in 1963¹⁰ as President Kennedy's response to the discriminatory treatment of African Americans,¹¹ and it directly stemmed from the violence in

10. 42 U.S.C. §§ 1971–2000 (2000). The Act was first introduced in Congress in 1963. BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS PART II 1017–18 (1970). Some of its provisions were debated in 1963, but none were passed until the following year. *Id.*

11. *See supra* note 3. President Kennedy asked Congress to "enact legislation giving all Americans the right to be served in [public] facilities . . . [and] end segregation in public education." Radio and Television, *supra* note 3, at 470. Kennedy described the employment difficulties faced by African-Americans, who were two or three times as likely to be

Birmingham, Alabama that surrounded the Civil Rights movement.¹² Initial response to Kennedy’s bill was poor.¹³ Passage of the Civil Rights Act of 1964 came as a result of two key factors: the assassination of President Kennedy¹⁴ and Lyndon B. Johnson’s shifting views towards civil rights legislation.¹⁵ Although Kennedy

unemployed as those in the white population. *Id.* He stated these are “matters which concern us all, not merely Presidents or Congressmen or Governors, but every citizen of the United States.” *Id.*

12. President Kennedy “directly attributed [the bill] to the events of Birmingham.” David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 671 (1995).

According to Norbert Schlei, the Assistant Attorney General for the Office of Legal Counsel, who was asked to begin drafting a civil rights bill in response to the May 1963 use of force by the Birmingham police against peaceful demonstrators protesting race-based discrimination, in early 1963, Kennedy “strongly opposed . . . the sponsorship by the Administration of major civil-rights legislation,” but changed his views as a result of demonstrations led by Dr. Martin Luther King, Jr. and the violent responses to demonstrations in Birmingham. *Id.* (citing Norbert A. Schlei, *Forward to BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW*, at vii–viii (1976)).

In President Kennedy’s address to the nation announcing the civil rights bill, he discussed the past events “in Birmingham and elsewhere” and the difficulties faced in integrating the University of Alabama earlier that day. Radio and Television, *supra* note 3, at 468–69.

13. *See supra* note 10.

14. In addition to the “dramatic change in the national climate” regarding race relations stemming from the civil rights movement in the South, two other key factors led to the 1964 Act. SCHWARTZ, *supra* note 10, at 1017.

First, the assassination of President Kennedy in November 1963, and the nation’s desire to memorialize the fallen President, played an integral role in the passage of the Act. *Id.* at 1018. After Kennedy presented Congress with his civil rights bill in the summer of 1963, little had taken place to ensure that it would become law. *Id.* Upon the assassination of President Kennedy, Congress viewed the civil rights bill as the legacy owed to the Kennedy administration. *Id.*

In a memorial address to Congress during the week following Kennedy’s assassination, President Lyndon Johnson declared, “No memorial oration or eulogy could more eloquently honor President Kennedy’s memory than the earliest possible passage of the Civil Rights Bill for which he fought so long.” Lyndon B. Johnson, Address Before a Joint Session of Congress, 1963–64 PUB. PAPERS 8, 9 (Nov. 27, 1963), *quoted in* SCHWARTZ, *supra* note 10, at 1018. President Johnson was able to convince Congress that the civil rights bill was an appropriate and necessary memorial to Kennedy’s legacy. SCHWARTZ, *supra* note 10, at 1018.

15. The second factor, the alteration of Lyndon Johnson’s views on a civil rights bill, also played a key role. As the Senate Majority Leader, Johnson had been opposed to achieving civil rights through legislation. SCHWARTZ, *supra* note 10, at 1018. Although Johnson had been more supportive of civil rights legislation during the debate surrounding the Civil Rights Act of 1957, in his final years in the Senate he led “the smallest of steps forward—and it may even have been a step back” in the civil rights debate. ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 1033 (2002). For a discussion of Senator Johnson’s 1957 determination that the civil rights legislation was necessary, as well as his attempts to convince southerners of the need for such legislation, see *id.* at 863–70, 886–90.

presented his 1963 bill to Congress as a way to combat “the growing moral crisis in American race relations”¹⁶ exhibited in the continued discrimination against African Americans,¹⁷ the scope of the Act, once passed and signed in to law,¹⁸ was far greater.¹⁹

Caro suggests that, although Johnson’s “interest in the 1960 Democratic presidential nomination made it impossible for him to avoid the civil rights issue,” support from the south was absolutely necessary, the “*sine qua non*,” to gaining the party nomination, and that this need may have led to Johnson’s views during the 1959–60 congressional sessions. *Id.* at 1033.

As president, however, Johnson made civil rights a top priority in an attempt to change the public perception of him as “another parochial southerner.” SCHWARTZ, *supra* note 10, at 1018. During his first State of the Union address, Johnson called on Congress to “be known as the session which did more for civil rights than the last hundred sessions combined.” Lyndon B. Johnson, Annual Message to Congress on the State of the Union, I PUB. PAPERS 112 (Jan. 8, 1964), in SCHWARTZ, *supra* note 10, at 1018. With Johnson’s ability to direct legislation that he had developed throughout his service in Congress combined with the resources available to him at the White House, passage of “the strongest civil rights measure since Reconstruction was soon to become a reality.” SCHWARTZ, *supra* note 10, at 1018. Caro summarized President Johnson’s role in the passage of civil rights legislation:

[A]s President of the United States, [Lyndon Johnson was able to] ram to passage the great Civil Rights Acts of 1964 and 1965, legislation that would do much to correct the deficiencies of the 1957 legislation . . . It was Lyndon Johnson, among all the white government officials in twentieth-century America, who did the most to help America’s black men and women in their fight for equality and justice. It was he who was, among all those officials, their greatest champion. And it was in 1957—in that fight for the Civil Rights Act of 1957—that Lyndon Johnson’s capacity to one day be that champion was first foreshadowed.

CARO, *supra* at 1009.

16. Special Message, *supra* note 1, at 483.

17. “[T]he time has come for the Congress of the United States to join with the Executive and Judicial Branches in making it clear to all that race has no place in American life or law.” *Id.* Kennedy wrote further:

In short, the result of continued Federal legislative inaction will be continued, if not increased, racial strife—causing the leadership on both sides to pass from the hands of reasonable and responsible men to the purveyors of hate and violence, endangering domestic tranquility, retarding our Nation’s economic and social progress and weakening the respect with which the rest of the world regards us. No American, I feel sure, would prefer this course of tension, disorder and division—and the great majority of our citizens simply cannot accept it.

Id. at 484.

18. Congress passed the Civil Rights Act in 1964, and it was signed in to law by President Johnson on July 2, 1964. See SCHWARTZ, *supra* note 10, at 1092.

19. The Civil Rights Act addresses the rights and access to public facilities African-Americans had been denied because of discrimination. See generally 42 U.S.C. § 1971–2000 (2000). As President Kennedy had requested in his message to Congress in June 1963, voting rights, education rights, equal employment opportunities, and access to public facilities were among the items included in the Act. Special Message, *supra* note 1, at 483–85.

In a message to Congress delivered in 1963, President Kennedy described combating employment discrimination, which became the focus of Title VII of the Civil Rights Act, as a call for “fair and full employment.”²⁰ Kennedy called for the end of racial discrimination in employment and provided the Secretary of Labor and the Committee on Equal Employment Opportunity with authority and guidelines to “combat this evil in all parts of the country.”²¹

Despite his work on and commitment to the bill which would become the Civil Rights Act, President Kennedy did not live to see its passage through Congress.²² On November 22, 1963, President Kennedy was assassinated, and his Vice President, Lyndon B. Johnson, was sworn into office. When Lyndon Johnson became President, one of his first requests was that Congress enact civil rights

However, African-Americans were not the only group to benefit from the Civil Rights Act of 1964. For example, in addressing the right to vote, the Act states, “All citizens of the United States who are otherwise qualified by law to vote . . . shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude.” 42 U.S.C. § 1971(a)(1) (2000). Title II of the Civil Rights Act prohibits discrimination in places of public accommodation on the grounds of race, color, religion, or national origin. *Id.* § 2000a. In addressing employment discrimination, Title VII prohibits discrimination based on race, color, religion, sex, or national origin. *Id.* § 2000e-2.

20. Special Message, *supra* note 1, at 488. Kennedy recognized that “employment opportunities . . . play a major role in determining whether the [other civil rights] are meaningful. There is little value in . . . obtaining the right to be admitted to hotels and restaurants if [an African American] has no cash in his pocket and no job.” *Id.*

21. *Id.* at 490. The authority granted was intended to address discriminatory practices of private employers and unions as well as in employment with the federal government. *Id.* at 490–91.

22. *See* SCHWARTZ, *supra* note 10, at 1017 (stating that civil rights legislation did not pass through the first session of the 88th Congress, and no action was taken on the bill because of concerns during the committee hearings).

Although a civil rights bill was not passed in the first session, the consideration of such a bill was a priority for the 88th Congress. H.R. REP. NO. 88-914, at 26 (1964), *reprinted* in 1964 U.S.C.C.A.N. 2391, 2391–92. After 172 bills were referred to a House judiciary subcommittee, twenty-two days of hearings were held in the spring and summer of 1963 to discuss the legislative proposals contained in the bills. *Id.* The bills, introduced by both political parties, covered nearly every area of civil rights including:

[V]oting; public accommodations; school desegregation; prohibition of discrimination in Federal financial assistance programs; equal protection of laws; antilynching; fair employment practices; the Civil Rights Commission; establishment of a Community Relations Service; voting and registration statistics according to race, color, and national origin; and authorization for the Attorney General to institute civil actions to protect and enforce civil rights.

Id. at 2392.

legislation.²³ Congress responded, and the Civil Rights Act became law on July 2, 1964.²⁴

At the heart of Title VII of the Civil Rights Act is its prohibition of discriminatory practices in employment.²⁵ Because Title VII was added to the Act relatively late during the debate in Congress,²⁶ little discussion accompanies some of its key provisions.²⁷ The statutory definition of “employer,” however, did receive a fair amount of debate. In defining “employer,” much of the debate centered on whether or not to include a minimum number of employees to trigger Title VII liability and what that minimum number should be.²⁸ Debate focused on a desire to provide protections for small businesses and competing concerns over the morality of allowing any discrimination to continue.²⁹

Supporters of a minimum-employee requirement for Title VII liability cited the interests of small businesses.³⁰ Senator Norris Cotton stated the “principal reason” for establishing an employee-minimum was to protect the atmosphere of small businesses and the relationships formed within them.³¹ For Sen. Cotton, the “personal

23. SCHWARTZ, *supra* note 10, at 1017 (discussing President Johnson’s call for the civil rights bill to answer the continuing need for an end to the inequality faced in America).

24. *See* Oppenheimer, *supra* note 12, at 672.

25. 42 U.S.C. § 2000e-2 (2000).

26. *See* 110 CONG. REC. 7217 (1964). “Title VII was tacked on to the bill. It was not in the original package, it was never taken seriously and was not the subject of careful Committee deliberation in the House of Representatives” before the passage of House Bill 7215. *Id.*; *see also* H.R. REP. NO. 88-914, at 26 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2392 (showing an early version of the bill, as approved by the House Judiciary Committee, with “Title VII” called “Nondiscrimination in federally assisted programs,” and no title named “Equal Employment Opportunity,” which Title VII would be called in the version of the Act finally passed by Congress in 1964).

27. For example, “sex” was included as one of the five characteristics in Title VII just prior to passage of the Act, so there was little debate over the inclusion of “sex” as a part of Title VII. *See, e.g.*, *Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971).

28. The protection of small businesses and the ability to choose with whom one works were advanced as reasons for setting the employee minimum at a high number. *See, e.g.*, 110 CONG. REC. 13,087 (1964).

29. Senator Morse, D-Or., raised the issue of morality. He argued that, if it is immoral for a large employer to discriminate, then it is immoral for a smaller employer to do so. *Id.* at 13,089.

30. Senator Cotton, R-N.H., was among the more vocal supporters of the need to protect small businesses. “[L]et us not reach the small underdog. . . . In this case, small business is the underdog.” *Id.* at 13,087.

31. *Id.* at 13,085. During the debate over Title VII, Senator Cotton stated:

relationship” of a small business was worth protecting.³² Another justification for the employee-minimum was protecting small businesses from the high costs of litigating discrimination claims.³³

Other members of Congress believed no business should be allowed to escape Title VII liability and discriminate in employment decisions. While these congressmen saw the interests of small businesses as important, their key argument was a moral one.³⁴ They noted that some state statutes already defined an employer as any business with one employee and suggested Congress should write federal law to benefit as many workers as possible, including those already covered by their own state’s laws.³⁵ Thus, these legislators

[I]n a small business which employs 30 or 40 persons the personal relationship is predominant. I can understand how the Federal Government could operate in connection with large factories and industries and in dealing with their employment practices, and in seeking, whenever it finds it necessary to do so, to enforce these provisions—although I think there are even objections to that. But when a small businessman who employs 30 or 25 or 26 persons selects an employee, he comes very close to selecting a partner; and when a businessman selects a partner, he comes dangerously close to the situation he faces when he selects a wife.

Id.

32. *Id.*

33. See *Miller v. Maxwell’s Intern., Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (holding “Title VII limits liability . . . in part because Congress did not want to burden small entities with the costs associated with litigating discrimination claims”).

34. Senator Morse was one of the more vocal proponents of defining “employer” under Title VII independently of the number of employees:

To me, the issue is very simple. It is whether or not we will permit, in this democracy, discrimination against people because of the color of their skin. That is a moral issue as well as a great legal issue. I am at a loss to understand how it can be immoral to have an employer of [a particular number of] employees denied the exercise of discrimination and have it granted to an employer of fewer than [that number].

I do not intend to take my eyes off the basic issue, and that is the immorality of discrimination . . .

It is just as wrong for an employer who employs two people to have that right to discriminate as the basis of his employment as it is for an employer of 2,000 employees to have it.

110 CONG. REC. 13,089 (1964).

35. Senator Humphrey, D-Minn., suggested:

[M]any problems can be foreseen if there is a wide discrepancy between the coverage of State law and Federal law. Federal and State law should be nearly as coextensive as possible. For this reason, it appears sound to include within the Federal statute as many of the employees covered by State law as possible.

argued that allowing large numbers of businesses to escape Title VII liability would defeat the purpose of the bill.³⁶ Senator Hubert Humphrey compared Title VII to other federal statutes in an effort to provide coverage for as many American workers as possible.³⁷ Senator Humphrey cited the National Labor Relations Act, which contained “no minimum requirement for coverage,” and the Fair Labor Standards Act, which covered businesses with two or more employees, as examples of statutes with broad coverage.³⁸

The majority of the congressional members supported one of the versions of the “employer” definition requiring a minimum number of employees for Title VII liability, and the debate shifted to determining what number to establish. The House of Representatives, in passing House Bill 7152, adopted a definition of “employer” with an escalator clause setting the number of employees required to establish liability under Title VII.³⁹ The definition of “employer”

Id. at 13,091.

36. *Id.*

37. Senator Humphrey’s remarks in opposition to the Cotton amendment to Title VII, which would have limited liability to employers with 100 or more employees were as follows:

Other Federal statutes also provide precedent for our consideration of the coverage of title VII. In the past, when Congress has enacted legislation to deal with significant community problems, the goal always has been to make coverage as broad as possible. When Congress has recognized an existing problem, it has tried to deal with that problem to the full extent permitted by the Constitution. Why should employment discrimination be treated any differently?

Id. at 13,091.

38. *Id.* Senator Humphrey stated the inequalities between whites and blacks in employment were “a momentous problem [requiring] imaginative and far-reaching solutions. The need is for drastic action—not feeble, limited steps.” *Id.* He concluded his remarks by stating, “The need for fair employment legislation is imperative. Its scope should be broad and encompassing.” *Id.*

39. See H.R. REP. NO. 88–914, at 26 (1964), reprinted in 1964 U.S.C.C.A.N. 2391, 2402. The House Judiciary Committee report, considering House Bill 7152 and recommending it pass, states the definition of “employer” shall include a requirement of “25 or more employees, except that during the first year after the date the enforcement provisions of the title become operative employers having fewer than 100 employees will not be covered, and during the second year after such date, employers with fewer than 50 will not be covered.” *Id.* at 2402.

The report states House Bill 7152 “is a constitutional and desirable means of dealing with the injustices and humiliations of racial and other discrimination. It is a reasonable and responsible bill whose provisions are designed effectively to meet an urgent and most serious national problem.” *Id.* at 2394.

Representative Meader, R-Mich., though supporting House Bill 7152, suggested eliminating Title VII from the Act until Congress completed further study “required to fashion

included those businesses with “25 or more employees,” but provided exceptions for the first two years after enactment.⁴⁰ In the first year, an “employer” would have a minimum of 100 employees,⁴¹ and in the second year, an “employer” would have a minimum of fifty employees.⁴²

Some congressmen expressed concerns over the inclusion of Title VII in the bill passed by the House. In the “Additional Minority Views” section of the House Judiciary Committee’s report, Congressmen Poff⁴³ and Cramer⁴⁴ questioned the constitutionality of Title VII, stating that neither the Interstate Commerce Clause⁴⁵ nor the Privileges and Immunities Clause⁴⁶ provided a basis for Title VII.⁴⁷

After House Bill 7152 passed, the Senate began considering the civil rights bill. The Senate leadership supported a slightly altered version of the definition of “employer.”⁴⁸ They recommended a more

appropriate legislative language to this end.” *Id.* at 2426–27.

40. *Id.* at 2402.

41. *Id.*

42. *Id.*

43. R-Va.

44. R-Fla.

45. Supporters of Title VII had argued that constitutional support came from, *inter alia*, the interstate commerce clause. H.R. REP. NO. 88–914, at 26 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2475. Congressmen Poff and Cramer disagreed, stating that the number of employees was suggested as a “rational yardstick by which the interstate commerce concept can be measured. [But, o]ut of thin air, the bill pulls a figure and determines that 25 employees is the magic number—not 26 or 24 but 25.” *Id.* The definition of employer, “in an effort to strengthen this flimsy yardstick [includes] ‘a person engaged in any industry affecting commerce.’” *Id.* The Supreme Court in *Wickard v. Filburn* defined “affecting” as “assert[ing] a substantial effect on interstate commerce . . . irrespective of whether such effect at some earlier time has been defined as ‘direct’ or ‘indirect.’” *Id.* (citing *Wickard v. Filburn*, 317 U.S. 111, 215 (1942)). Congressmen Poff and Cramer stated that such a definition, combined with the vague conferral of powers on the Equal Employment Opportunity Commission (EEOC) by Title VII, made it likely the EEOC would “assert plenary jurisdiction over the employment, promotion, discharge, and working conditions policies of every [business] which employs 25 or more full- or part-time employees.” *Id.* at 2475–76. They argued that such a broadened version of the interstate commerce clause would render the idea of intrastate commerce obsolete. *Id.* at 2476.

46. Congressmen Poff and Cramer argued that Title VII could not be justified by the Fourteenth Amendment privileges and immunities clause because: “(1) no State statute or other State action is involved; and (2) the right to employment is not a privilege or immunity protected by the privileges and immunities clause of the [Fourteenth Amendment].” *Id.* at 2477.

47. *Id.* at 2475–77.

48. *See* 110 CONG. REC. 13,088 (1964). Senator Humphrey explained how the minimum-

gradual reduction in the number of employees, but, like the House version, the initial requirement would be set at 100 employees and the final requirement would be established at twenty-five employees.⁴⁹ The version supported by the Senate took five years for the final twenty-five employee requirement to take effect, rather than two.⁵⁰

During the debate, Sen. Cotton proposed an amendment to the statutory definition of “employer.” He suggested the employee-minimum permanently remain at 100 employees.⁵¹ As justification for this amendment, Sen. Cotton described the difficulties the Equal Employment Opportunity Commission (EEOC) would face in enforcing Title VII.⁵² He believed setting the minimum-employee requirement at twenty-five would prevent adequate enforcement of the Act’s anti-discrimination objectives.⁵³

employee requirement for Title VII liability was to gradually go into effect after the enactment of the Civil Rights Act: In the first year, no enforcement; in the second year, employers with 100 or more employees are held liable; in the third year, employers with seventy-five or more employees are held liable; in the fourth year, employers with fifty or more employees are held liable; and in the fifth year, employers of twenty-five or more employees are held liable. *Id.*

The Senate also amended the definition of “employer,” as provided in House Bill 7152, by adding “[to include those employed] each working day in each of 20 or more calendar weeks in a current or preceding calendar year [as employees]” to an employer’s number of employees for determining Title VII liability. *Id.* at 16,001. The purpose of this amendment was to ensure that Title VII liability would extend to businesses that employ only seasonal workers. *Id.* at 7216–17.

49. *Id.* at 13,088.

50. *Id.*

51. *Id.* at 13,085. “My amendment would strike out that portion [of Title VII that gradually reduces the minimum employee requirement], so that the provision would apply permanently, under this bill, only to establishments with 100 or more employees.” *Id.*

52. Senator Cotton argued:

The principle reason for proposing the adoption of this amendment is, first, the problem of enforcement. If it became necessary for the Federal Government to investigate every complaint and to take steps in every situation brought to its attention, in connection with the small businesses of the country employing only 25 or 35 or 40 or 50 or 60 persons, enforcement will become well high impossible; and the enforcement which did occur would be found to be spotty.

I am not suggesting that those to be entrusted with enforcement of this law, if it is enacted, would purposely or necessarily harass the business community; but I am suggesting that when we enact a law, we do so, not in light of what reasonable men would do in enforcing it, but in light of what unreasonable men might do.

Id.

53. He argued that “this will be an impracticable and unenforceable provision if

Senator Cotton also addressed the important role that the work environment plays in a small business. He suggested that to succeed, a small business needed to keep an atmosphere of “congeniality.”⁵⁴ He applauded the role of small businesses in America⁵⁵ and explained the difficulties facing them due to the burdens the federal government placed on their owners.⁵⁶ Senator Cotton suggested the reasonable course to take would be to leave Title VII coverage to larger businesses.⁵⁷ With his arguments falling largely on deaf ears, Sen. Cotton’s final justification for restraint was his uncertainty that the new agency charged with enforcing the comprehensive legislation would be successful.⁵⁸

Senator Everett Dirksen⁵⁹ led the opposition to the Cotton amendment.⁶⁰ He stated that the discrepancies between the federal

eventually the requirement is dropped to 25 employees.” *Id.*

54. “A small business . . . stands or falls, in this age of competition, on the congeniality and skill and ability of the man or partners who own it and the persons who work for them and work with them.” *Id.*

55. Senator Cotton stated:

[D]uring the years I have served in Congress, I have seen more tender tears flow and more pathetic arguments made on behalf of the small businesses in this country than I have seen in behalf of almost any other operation or business activity. We have heard, and we know, that the small businesses along the main streets or in the villages and towns and cities are the backbone of our country and of our free enterprise system.

Id.

56. Senator Cotton continued:

We know the Federal Government has made it very hard for them to operate. We know that the Federal Government burdens them with taxes, and we know that the Federal Government has them investigated on all sorts and kinds of scores. We know that the Attorney General and his agents watch them; and we know that all small manufacturing establishments are required to abide by the minimum wage law and the wages and hours law; and we know that whenever a problem of national origin or religion arises, either this law will not be enforced or else it will become a monstrosity.

Id.

57. Senator Cotton pleaded, “[I]n the interest of reason, in the interest of safety, in the interest of adhering to what we have always believed were the fundamental tenets of this country, I ask consideration of this small proposal which would merely eliminate establishments with fewer than 100 employees.” *Id.* at 13,087.

58. *Id.* He reasoned, “[I]t is proposed to give the Government blanket authority in the very beginning, when we have never had a Fair Employment Practices Commission under the Federal Government, when it is a new departure, a new venture, and men must be trained.” *Id.* He continued, “I suggest that we give the provision a chance to see how it works. But let us not take this step.” *Id.*

59. R-III.

Fair Employment Practice Commission (FEPC) laws and those already in place at the state level had been resolved.⁶¹ Senator Dirksen believed that Title VII would provide benefits to an insufficient number of workers if only employers with 100 or more employees could be held liable under Title VII.⁶²

Senator Dirksen explained that, although the state FEPC acts had different minimum-employee requirements, each act set its minimum much lower than 100 employees.⁶³ He also cited to an employment discrimination bill a Senate committee had reported on earlier in the year that defined an “employer” as a business having as few as eight employees.⁶⁴ Senator Dirksen concluded that the minimum number of employees should not be set so high as to prevent the bill from being effective.⁶⁵

60. Senator Dirksen, the Senate Minority Leader, stated that Title VII was the first part of the civil rights bill he looked at “because of its far-reaching character.” 110 CONG. REC. 13,087 (1964). He continued, “a number of States have FEPC laws and have State-enforcing commissions [and] I thought if there were anything vulnerable in the bill, it would be Title VII.” *Id.*

61. Senator Dirksen stated:

[W]e undertook to keep primary, exclusive jurisdiction in the hands of the State commissions for a sufficient period of time to let them work out their own problems at the local level.

It was a knotty problem, to say the least, because of the differences in approach of the Federal provision and the acts which are on the statute books today. All that, however, was worked out.

Id.

62. Senator Dirksen stated: “I am afraid we shall really be subject to the charge that we are undertaking to emasculate the bill.” *Id.*

63. *Id.* Senator Dirksen argued: “Many of the statutes begin with one [employee]. In others it is four. In some cases it is five and six, and in some cases it is eight. However, I believe there are 8 or 10 States today which begin with as few as 1 employee.” *Id.* Senator Humphrey summarized the existing state statutes and their coverage:

It should be remembered that 25 States have fair employment laws. The laws of 23 of these States have more liberal coverage than the pending bill. . . Only Missouri and Illinois limit coverage to employers of 50 or more workers but even these two States are twice as liberal as what Senator Cotton proposes.

Id. at 13,090–91.

64. *Id.* at 13,087 (citations omitted).

65. Senator Dirksen cited statistics showing that state statutes provided coverage to about sixty-nine percent of the workforce, leaving about thirty-one percent, or twenty-one million workers, who were not covered. *Id.* He questioned whether it would be proper “to set 31 percent of our working people over in one category and say that the law does not apply to them; whereas in the case of the remaining 69 percent, the law would apply.” *Id.* He stated that the

Senator Dirksen also responded to Sen. Cotton’s allegations that enforcement would prove too difficult. He cited labor statistics, using the manufacturing industry as an example, to show that adequate statistics were available to determine how many workers would remain without legal remedy under the Cotton amendment.⁶⁶

Senator Humphrey continued the opposition to the Cotton amendment. He stated that the President’s Committee on Equal Employment Opportunity, which President Kennedy had established by executive order, already provided far greater equal employment opportunity for the employees of businesses that did business with the federal government than Title VII would provide if the Senate passed the Cotton amendment.⁶⁷ While under the direction of then-Vice President Johnson, the Equal Employment Opportunity Committee provided thousands of people with equal-employment opportunities.⁶⁸ According to Sen. Humphrey, the majority of

minimum employee requirement, if set too high, “[would] produce a gaping hole in the bill and make it appear that we are trying to show partiality on one side and impartiality on another.” *Id.*

66. Senator Dirksen stated that there was “no difficulty in obtaining figures to show the number of employees, the number of reporting units, and the total amount of employment in every case.” *Id.* He offered manufacturing firm statistics showing 77,000 reporting units with between one and three employees, for a total of 140,000 employees. *Id.* at 13,087–88. There were 49,000 reporting units with between four and seven employees, for a total of 261,000 employees. *Id.* at 13,088. His presentation of the statistics continued through the final group of employers, those with more than 500 employees. *Id.* Senator Dirksen then added:

What an amazing thing. If we are going to make that kind of distinction in this kind of bill, and make it only half effective or two-thirds effective, when it should be effective in every section, and with respect to every employer with a given number of employees, how can we justify [such a large number of employees to set as the cutoff] in the light of what is being done in the States today?

Id.

67. *Id.* The executive order, issued on March 6, 1961, applied regardless of the number of workers employed by the company. *Id.* The only requirement was that the firm “[do] any business with the Government of the United States in the form of providing goods or services to the Government of the United States.” *Id.*

Senator Humphrey stated:

What we provide [with Title VII] is much less stringent language, and much less in coverage than what was provided by the executive order [because] [t]he Federal Government is the largest purchaser of goods and services of any establishment in the world [and] the order applies to a firm that hires 5 persons, 1 person, 100 persons, 1,000 persons, or 50,000, or 100,000.

Id.

68. *Id.*

American businesses did not fall within the scope of the Title VII definition of “employer,” regardless of whether the minimum-employee requirement was set at twenty-five or 100.⁶⁹ However, if coverage instead extended to employers of twenty-five or more employees, Sen. Humphrey asserted that the number of covered employees would increase by more than forty percent.⁷⁰

Senator Humphrey pointed to Senate action on other labor bills imposing minimum-employee requirements much lower than the 100 employee minimum proposed under the Cotton amendment.⁷¹ Senator Joseph Clark⁷² joined the opposition, questioning whether there was any equity in the Cotton amendment.⁷³ He argued that Title VII, if the Cotton amendment passed, would make “second-class citizens” out of a majority of the workforce.⁷⁴ He concluded by stating that no acceptable reason existed for eliminating the majority of American workers from the equal opportunity Title VII was designed to provide.⁷⁵

69. Senator Humphrey stated that of the three-million employers registered under the social security system, about eight percent (259,343) had more than twenty-five employees. *Id.* “In other words, under the bill as now drafted, 92 percent of the employers of America would not be covered. They would not be touched by the Federal statute . . . That cannot be regarded as a drastic imposition on the business community.” *Id.*

Under the Cotton amendment, Title VII would have covered less than two percent of the employers in America. *Id.* In terms of covered employees, the Senate leadership version of the bill would have covered nearly thirty million employees, while the Cotton amendment would have covered about twenty-one million employees. *Id.*

70. *Id.*

71. *Id.* He cited the fair labor standards bill and the Landrum-Griffin Act. *Id.* In the fair labor standards bill, an employer is covered if it has at least two employees. *Id.* The Landrum-Griffin Act applied to every union and every employer, regardless of the number of employees. *Id.* Senator Humphrey stated: “I did not hear anyone say it was an imposition upon free enterprise, or that it would hamper small business, when we applied the provisions of the Landrum-Griffin Act to every employer.” *Id.*

72. D-Pa.

73. 110 CONG. REC. 13,089 (1964).

74. Senator Clark argued:

It seems to me the Cotton amendment would make second-class citizens out of employees of every small businessman, of every middle-sized businessman, of every businessman who has fewer than 100 employees . . . It would do so by denying equal employment opportunity to every individual who happened, by luck of the draw, to be a member of a smaller labor union or an employee of a small businessman.

Id.

75. *Id.*

Senator Humphrey summarized the opposition’s concerns with the Cotton amendment, stating that it would limit the Civil Rights Act’s ability to protect American workers because less than two percent of American businesses would be covered.⁷⁶ He suggested the American ideal of equal treatment, a source of inspiration for proponents of human rights outside of the United States, as further reason to protect as many workers as possible under Title VII.⁷⁷

Senator Cotton summarized the principles supporting his amendment, stating that while there was no question that racial discrimination is immoral, the Civil Rights Act, once passed, should be legislation the federal government could enforce “properly, efficiently, and effectively.”⁷⁸ According to Sen. Cotton, the broad scope of Title VII supported by Senate leadership would lead to one of two problems. Either the enforcement officers would choose not to enforce the provision against small businesses, or, if Title VII was enforced against small businesses, it would lead to additional discord between the races in America.⁷⁹

Following this debate, the Senate defeated the Cotton amendment by a vote of sixty-three to thirty-four.⁸⁰ Final approval of the civil rights bill was given in the Senate with the Title VII definition of

76. *Id.* at 13,090 (arguing that Sen. Cotton’s proposal covers “somewhat less than 1 3/4 percent of the employers in [America]”). Senator Humphrey stated that the Cotton amendment would “drastically reduce the effectiveness and impact of [T]itle VII.” *Id.* He reasoned: “Plainly, the coverage [under the gradual reduction from 100 employees to 25 employees] is modest enough[,] and to reduce it to the extent proposed by Senator Cotton is a step of drastic proportions that has no justification whatsoever.” *Id.*

77. Senator Humphrey called on Congress to take a “significant step” in achieving “the principles of equality that have made us great and are the source of admiration and emulation throughout the world.” *Id.* at 13,091.

78. *Id.*

79. *Id.* at 13,092. Senator Cotton suggested that there was the potential for Title VII to lead to “more bitterness, more hatred, more race prejudice, and more strife” than what already existed. *Id.* Senator Cotton also concluded:

[W]e have a bill that is all encompassing. Title VII is the most dangerous part of it, because it would lead the Federal Government with all of its power, majesty and bureaucracy into the way of dealing with a small businessman who can ill afford to protect himself, and in many cases his actions will be judged by the facts of the race or color involved and not by the facts of the case.

Id.

80. *Id.* at 13,093.

employer as provided in the Dirksen-Mansfield substitute.⁸¹ The Senate version of the bill was sent to the House of Representatives, where it passed with little discussion or debate.⁸²

*B. Title VII Employer Liability under the Equal Employment
Opportunity Act of 1972*

Eight years after Congress passed the Civil Rights Act of 1964, Congress passed the Equal Employment Opportunity Act to address deficiencies in Title VII.⁸³ The 1972 Act⁸⁴ lowered the twenty-five employee minimum to fifteen⁸⁵ to provide the benefits of the Civil Rights Act to more American workers.⁸⁶

A House Education and Labor Committee report stated that the twenty-five employee minimum did not provide protection for enough workers.⁸⁷ The initial version of the Equal Employment

81. *See id.* The Senate definition included those businesses with “25 or more employees,” with the employee-minimum requirement being gradually reduced from 100 to 25 over the five-year period following passage of the Civil Rights Act. *Id.* at 13,085 (detailing the Dirksen-Mansfield amendment).

82. *See* H.R. REP. NO. 88-914, at 63 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2431-32 (criticizing the quick passage of House Bill 7752 (amended House Bill 7152), the Senate version of the civil rights bill).

83. H.R. REP. NO. 92-238, at 3 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2139. The House report accompanying the bill stated that “the machinery created by the Civil Rights Act of 1964 is not adequate” and that “[t]he persistence of discrimination, and its detrimental effects require a reaffirmation of our national policy of equal opportunity in employment.” *Id.*

84. Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

85. *Id.* In addition to lowering the minimum-employee requirement, the Equal Employment Opportunity Act revised the definition of “employer” to include state and local governments. *Id.*

86. Representative Perkins, D-Ky., in support of the House version of the bill, which reduced the twenty-five employee minimum to eight, stated that “[t]his amendment to the [Civil Rights Act] will assure Federal equal employment protection to virtually every segment of the Nation’s work force.” 117 CONG. REC. 31,961 (1972).

87. H.R. REP. NO. 92-238, at 20 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2155. The Education and Labor Committee report stated that “discrimination in employment is contrary to the national policy and equally invidious whether practiced by small or large employers.” *Id.* The report continued:

Because of the existing limitation in the bill proscribing the coverage of Title VII to 25 or more employees or members [of a union], a large segment of the Nation’s work force is excluded from an effective Federal remedy to redress employment discrimination [T]he committee feels that the [Equal Employment Opportunity] Commission’s remedial power should also be available to all segments of the work

Opportunity bill, passed in the House of Representatives as House Bill 1746, lowered the minimum requirement to eight employees.⁸⁸

However, when the bill reached the Senate,⁸⁹ several senators raised concerns for small businesses. Senator Paul Fannin⁹⁰ suggested the reduction would harm businesses and employees more than it would help.⁹¹ He stated that almost any business could acquire eight employees and, in doing so, the owner would then be unable to hire friends and relatives.⁹² Senator Fannin also addressed the arbitrary nature of using the number of employees to determine which businesses are liable under Title VII.⁹³

Senator Cotton, perhaps the strongest opponent to setting the employee minimum as low as twenty-five in 1964, argued once again in favor of small businesses.⁹⁴ He suggested it would become even

force. With the amendment proposed by the bill, Federal equal employment protection will be assured to virtually every segment of the Nation’s work force.

Id.

88. See Steven K. Sanborn, Note, *Employment Discrimination—Miller v. Maxwell’s International, Inc.: Individual Liability for Supervisory Employees Under Title VII and the ADEA*, 17 W. NEW ENG. L. REV. 143, 152 n.69 (1995) (citing H.R. 92–1746 (1971)).

89. The bill for equal employment opportunity was presented as Senate Bill 2515, and section 2 of the bill was proposed to amend section 701 of the Civil Rights Act of 1964 and hold all businesses with eight or more employees liable under Title VII. 117 CONG. REC. 31,711, 31,715 (1972).

90. R-Ariz.

91. See 118 CONG. REC. 2410 (1972). “I want to talk about what we are doing to the small businessman . . . [W]e are throwing up one roadblock after another to private enterprise.” *Id.* Senator Fannin continued: “We are building regulation-after-regulation that means only one thing—the little man does not have a chance.” *Id.*

92. *Id.* at 2411. “[A]ny type of small firm may find itself with eight employees. They start out small; they are successful; we want them to be successful. In many instances, they desire to employ their neighbors, their friends, their relatives. Should we block that operation?” *Id.*

93. *Id.* at 2409 (stating that “the new, arbitrary power we are granting the Equal Employment Opportunities Commission could be and would be used not only against small businesses and small factories, but against what are essentially family businesses”). He continued:

Now I am not arguing that family businesses nor any businesses should discriminate in employment. I fully believe that people should be hired for jobs on the basis of their ability and their compatibility with the tasks that are to be performed. Twenty-five is not any magic number, nor is the number eight. We might make it 50, or 20, or three, or perhaps total coverage of all businesses clear down to the number one, though I think this would be very inequitable. But to arrive at the figure of eight is just as inequitable.

Id.

94. See *supra* notes 51–53 and accompanying text. “We have for years wept crocodile

more difficult to enforce Title VII if Congress lowered the employee-minimum requirement below twenty-five.⁹⁵ Senator Cotton also addressed the “practical situation”⁹⁶ and the inability of statutes to completely solve the problem of discrimination.⁹⁷

Senator John Stennis⁹⁸ argued that businesses with as few as eight employees would not have the resources to defend against EEOC investigations.⁹⁹ He also expressed concern for what he believed to be an arbitrarily chosen number of eight employees.¹⁰⁰

tears and wrung our hands in sympathy about small business . . . I have felt and I still feel that [the twenty-five employee minimum] is far too low. What have we here now?” 118 CONG. REC. 2391 (1972).

95. Senator Cotton stated:

[W]e can and we have and we should and we shall, as far as is fair and practicable in this law, apply it in favor of every American, and afford equal opportunity, equal social recognition and equal citizenship. However, when we go too far, the act becomes not a help but an irritant. And for my part, unless this bill were amended to maintain the minimum of 25 . . .

It would either be meaningless and only enforced in certain sections of the country and certain places or where certain conditions exist, or it will become a precedent.

Id. at 2392.

96. *Id.* at 2393 (stating that “in a sense, when one tries to go so far in this perfectly laudable attempt to enforce equal rights—and nobody can gainsay that what we want is equal opportunity—as a practical matter, we may be making things more difficult”).

97. Senator Cotton concluded his remarks with the following argument:

[W]e have reached the point now in this country when . . . the only way we can achieve what I am sure every one of us hopes and prays for, and that is the kind of society where no race, no creed, no nationality suffers discrimination, [is from within people’s hearts.] We cannot go the whole way, we cannot go the last mile, by a statute. We cannot enforce it with a bayonet. It has to be by the example of good and earnest people of both races seeking a society in which we can live together.

Id.

98. D-Miss.

99. 118 CONG. REC. 2389 (1972). “When we get down to a firm that employs only eight, that is truly a very small business, one, as I have said, without the assets and capabilities to cope with the legal and administrative technicalities thrust upon them arbitrarily by a commission.” *Id.* Senator Stennis suggested: “To say that employers of down to a level of eight would have to comply and be subjected to all these restrictions . . . is just downright ridiculous. It is a requirement that those people cannot live with.” *Id.*

100. *Id.* He asked:

I wonder how the number eight got into the bill anyway. . . . Who suggested eight? Did that number come from the commission? Where did it come from? What kind of survey was made to see what were the capabilities of a little firm in a little town, even though it employed only eight persons? What resources does such a firm have? What

Though opposition to an eight-employee minimum was strong in the Senate, this provision in the House bill did receive some support. Senator Javits¹⁰¹ supported the reduction of the minimum requirement to eight.¹⁰² He suggested that many of society’s problems would be solved by increased employment opportunities for those traditionally discriminated against.¹⁰³ Though the eight employee minimum failed to receive enough support to pass in the Senate, as a compromise, the Senate did pass an amendment to the House bill that changed the employee-minimum provision from eight to fifteen.¹⁰⁴ When the Equal Employment Act of 1972 was finally enacted, the provision for a fifteen employee minimum became a part of Title VII.¹⁰⁵

are its capabilities? How can it cope with the Department of Justice? Of course it cannot cope with it.

Id.

101. R-N.Y.

102. See 118 CONG. REC. 579 (1972). Senator Javits claimed Senate Bill 2515 was “a landmark measure, an effort to bring up to date the historic Civil Rights Act of 1964.” *Id.* He continued:

I think I understand what makes the members of minorities and the poor, and those who are otherwise badly used in our society, have a failing of incentive . . . and there is nothing that is more important than employment [to provide such an incentive to succeed.] Indeed, employment is, in my judgment, the very key to the whole problem that we still face in this country, the most critical kind of emergency in respect of our relations with minorities, and especially the black minority of the United States. The critical element, whether we will or will not be successful or whether our country will be torn with strife, as it has been in the recent past, is employment.

Id.

103. *Id.* He argued:

A man who has a job and a little money in his pocket is capable of everything: better housing, emergence from the slums, participation, better educational opportunity, a cessation of the rates of dependance on public agencies, including brushes with the law; but a man who does not have that kind of substance and status is a man who is not only bereft but also adrift, and it is the root of all our troubles.

Id.

104. See *id.* at 3171.

105. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92–261, 86 Stat. 103 (codified as amended at 42 U.S.C. §§ 2000e to 2000e–17 (2000)).

C. Title VII Employer Liability under the Civil Rights Act of 1991

The Civil Rights Act of 1991¹⁰⁶ provided the most recent changes to Title VII. The 1991 Act provided for monetary damage awards to victims of discrimination.¹⁰⁷ The employee-minimum, however, remained set at fifteen.¹⁰⁸

II. ANALYSIS

Title VII exists to protect the employment interests of several classes of citizens that have suffered past discrimination, and are most likely to be subjected to future discrimination.¹⁰⁹ During consideration of the original civil rights bill passed in the House, the House Judiciary Committee stated that the purpose of Title VII was to prevent discriminatory practices in the American workforce.¹¹⁰

Title VII purports to prohibit discrimination on the basis of color, race, religion, sex, and national origin, but it does not serve as an *absolute* prohibition of discriminatory practices. For example, Title VII includes, as an affirmative defense to discrimination based on religion, sex, and national origin, the “bona fide occupational qualification” exception to liability.¹¹¹ Also, an employer may have,

106. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 2 U.S.C. §§ 1201-1224; 29 U.S.C. § 626; 42 U.S.C. §§ 1981, 1988, 2000e to 2000e-16 (2000)). For a comparison between this Act and the Civil Rights Act of 1990 that President George H.W. Bush vetoed, see J. R. Franke, *The Civil Rights Act of 1991: Remedial Civil Rights Policies Prevail*, 17 S. ILL. U. L.J. 267 (1993).

107. As stated in a House report, the purpose of the Civil Rights Act of 1991 was “to provide monetary remedies for victims of *intentional* employment discrimination to compensate them for resulting injuries and to provide more effective deterrence.” H.R. REP. NO. 102-40(I), at 14 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 552. The Act provides for both compensatory and punitive damages. 42 U.S.C. §§ 1981a(b)(1)-(2) (2000).

108. *See* 42 U.S.C. § 2000e(b) (2000).

109. *See id.* § 2000e-2.

110. *See* H.R. REP. NO. 88-914, at 63 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401 [hereinafter Judiciary Committee Report]. The Committee report stated that the purpose for Title VII was to “eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin. [Title VII] authorizes the establishment of [the EEOC] and delegates to it the primary responsibility for preventing and eliminating [discriminatory] employment practices.” *Id.*

111. 42 U.S.C. § 2000e-2(e)(1) (2000). The provision states:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain

as a requirement for employment, an exam to measure an applicant’s ability to perform certain job functions.¹¹² Even if this exam has a disparate impact on members of a group protected under Title VII, the Act permits a measure of abilities that are “job related.”¹¹³ Title VII is designed to promote a workforce in which jobs are available to people of different backgrounds on an equal basis. Exceptions for “bona fide occupational qualifications” and exams measuring “job related” abilities are acceptable because they serve important societal goals. An exemption from Title VII based on the number of employees does not meet this standard.

The liability exemption under Title VII for businesses with fewer than a certain number of employees has provided benefits to the statutory non-employer, and in doing so it served to hinder the progress that could have been achieved in the American workplace during the past four decades. In 1972, Congress decided they set the employee minimum too high and excluded a “large segment of the Nation’s work force . . . from an effective Federal remedy to redress employment discrimination.”¹¹⁴ Though the House passed House Bill 1746, which amended the Title VII definition of employer to include those who employ “eight or more employees,”¹¹⁵ to get through the

instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise

Id.

112. The Supreme Court provided an explanation of the burdens placed on the parties in *Albemarle Paper Co. v. Moody*, stating that “Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets ‘the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.’” *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (alteration in original) (citation omitted). The Court continued, “If an employer does then meet the burden of proving that its tests are ‘job related,’ it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest in ‘efficient and trustworthy workmanship.’” *Id.*

113. For a discussion of the three kinds of studies available for an employer to justify selection procedures (content, construct, and criterion-related), see *Zamlen v. City of Cleveland*, 906 F.2d 209, 218 (6th Cir. 1990).

114. SENATE SUBCOMM. ON LABOR, COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 80 (Comm. Print 1972).

115. *Id.*

Senate, a minimum-employee requirement of fifteen employees was established.¹¹⁶

The 1972 reduction was a positive development, but it did not solve the problem of discrimination in the American workforce. The fifteen employee minimum for Title VII liability fails to provide the “fair and full employment” opportunities that President Kennedy recognized as vital forty years ago.¹¹⁷ As a remedial measure, Congress should amend Title VII to include as many American workers as possible. The moral issue, whether discrimination based on race, color, sex, religion, or national origin is acceptable in the workplace, does not turn on the number of people a business employs;¹¹⁸ Title VII liability should not be determined by that figure either.

Even some opponents of the employee-minimum requirement had, prior to the passage of the 1972 Title VII provisions, agreed that discrimination was immoral.¹¹⁹ The opponents of the employee-minimum, however, argued it would be too heavy a burden for small businesses to defend against discrimination claims.¹²⁰

Two basic arguments underlie the rationale used by those opposed to setting a lower minimum requirement. However, in light of the important purpose behind Title VII—the elimination of employment discrimination¹²¹—these two arguments are insufficient to sustain an employee-minimum requirement.

First, the need for a business to maintain a collegial work environment is not unique to small businesses. Every business benefits from a healthy work environment. The largest corporations are best served by employing workers who get along. Discriminatory means, however, should not be a tolerated avenue to achieving a harmonious work environment.

116. *See id.*

117. Special Message, *supra* note 1, at 488.

118. As Senator Morse stated during the debate leading up to the Civil Rights Act of 1964, this “is a moral issue.” 110 CONG. REC. 13,089 (1964). He stated that the “basic issue” in the debate over Title VII was “the immorality of discrimination.” *Id.*

119. Senator Fannin remarked: “Now I am not arguing that family businesses nor any businesses should discriminate in employment.” 118 CONG. REC. 2409 (1972).

120. *See supra* notes 30–33 and accompanying text.

121. *See supra* notes 109–10 and accompanying text.

Further, regardless of the size of the corporation, a particular employee really only works “with” a few people. Large corporations are often divided into subsidiaries, offices, divisions, and teams. It is conceivable that a large corporation would have many autonomous working units that employ fewer than fifteen employees. Taken to the extreme, a corporation could argue that each of its many working units would be best served if allowed to make hiring decisions based on race or religion or sex. Clearly, this can not be allowed. Preventing discrimination is far too important an objective to set aside in favor of a large corporation’s hiring preferences. Preventing discrimination should also prevail over similar desires held by small-business owners.

The second argument, that small businesses cannot afford to defend against discrimination charges and lawsuits, also is not convincing. The genuine need to combat discrimination continues to exist today. Title VII, to most effectively achieve its goals, should apply to every business. This governmental interest should prevail over the concerns regarding litigation costs.

Additionally, looking to the number of employees to set Title VII liability limitations does not accurately reflect the actual ability a business may have to defend against discrimination claims. A better indicator would be the financial stability, assets, and revenues generated by the business. Further, the U.S. Code includes other statutory provisions holding employers liable to civil suit in which the statutory definition of “employer” does not allow businesses to escape liability based on a certain number of employees.¹²² If a small business may be held liable in suit under these statutes, the business should also be covered under Title VII.

Title VII cannot “eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment”¹²³ if businesses are allowed to remain outside of its parameters. The arguments for allowing these businesses to escape Title VII liability

122. *See, e.g.*, The Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001–2009 (2000). This statute defines “employer” as “includ[ing] any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee.” *Id.* § 2001(2). It also provides very similar remedies to Title VII. *See id.* § 2005(c), *cf.* 42 U.S.C. § 2000e–5(g) (2000) (listing the remedies available for a Title VII claim).

123. Judiciary Committee Report, *supra* note 110.

are insufficient to trump the important goal of discrimination-free employment.

One final consideration is the number of American workers who remain uncovered by Title VII because of the fifteen-employee minimum. Department of Labor statistics indicate this number is a significant portion of the workforce. In *Employment and Wages*, a bulletin of the Bureau of Labor Statistics, employment statistics from the first quarter of each year from 1992 to 2001 show a significant portion of the workforce in private industry is employed by a business that falls outside of the Title VII definition of "employer."¹²⁴ In each of those years, the number of workers employed at businesses with nine or fewer employees exceeds 13.5 million.¹²⁵ This amounts to at least fourteen percent of American workers left uncovered.¹²⁶ Adding the third category of workers, those who work at businesses with "10 to 19 workers," shows that no fewer than twenty-three million workers were employed at businesses with nineteen or fewer employees in any given year.¹²⁷ The percentage of uncovered workers employed at these businesses each year was about one quarter of the

124. The statistics are not classified in a manner that shows precisely how many people work at statutory non-employers. The categories are broken down as follows: "fewer than 5 workers," "5 to 9 workers," "10 to 19 workers," "20 to 49 workers," and so forth, with the final category showing those employers with "1000 or more workers." See BUREAU OF LABOR STATS., DEP'T OF LABOR, EMPLOYMENT AND WAGES ANNUAL AVERAGES, 1992, at 532 tbl. 9 (1993) [hereinafter EMPLOYMENT AND WAGES 1992]. Therefore, the number of workers with no federal legal remedy under Title VII lies somewhere between the number of workers at businesses with nine or fewer employees (the first two categories, combined) and those who work at businesses with nineteen or fewer employees (the first three categories, combined). While these statistics provide an inexact account of the problem, it is clear that a large number of American workers remain outside the provisions of Title VII.

125. The number of employees at companies who have nine or fewer employees ranges from a low of 13,514,513 in 1992 to a high of 15,520,979 in 2001. *Id.*; BUREAU OF LABOR STATS., DEP'T OF LABOR, EMPLOYMENT AND WAGES ANNUAL AVERAGES, 2001, at 45 tbl.3 (2002) [hereinafter EMPLOYMENT AND WAGES 2001].

126. In 2001, 14.2% of employees in private industry were employed at businesses with nine or fewer employees, the lowest percentage for the ten-year period. EMPLOYMENT AND WAGES 2001, *supra* note 125, at 45 tbl.3. In 1993, 15.6% of the employees were employed at businesses with nine or fewer employees, the highest percentage. EMPLOYMENT AND WAGES, 1993, at 532 tbl.9 (1994) [hereinafter EMPLOYMENT AND WAGES 1993].

127. In 1992, over 23,009,500 workers worked at businesses with nineteen or fewer employees. EMPLOYMENT AND WAGES 1992, *supra* note 124, at 532 tbl.9. By 2001, that number had risen to 27,110,237 workers. EMPLOYMENT AND WAGES 2001, *supra* note 125, at 45 tbl.3.

total private workforce.¹²⁸ Accordingly, for each of the ten most recent years for which statistics are available, between fourteen and twenty-six percent of the workers in private industry work for a business exempt from Title VII liability.¹²⁹ This is a significant portion of the American workforce.

III. PROPOSAL

The minimum-employee requirement should be eliminated. The justifications given for the employee-minimum in the original version of Title VII,¹³⁰ if they were ever valid, are now moot.¹³¹ Allowing employment discrimination by some small businesses because of concerns that preventing it would place upon them too great a burden frustrates the broad, remedial purpose of Title VII. While relations between and across the Title VII classification groups may have improved from the 1950s and 1960s, the tensions between racial and religious groups in America are still very real today.¹³² By providing

128. The years 2000 and 2001 had the lowest percentage of workers, with 24.9% each year. BUREAU OF LABOR STATS., DEP'T OF LABOR, EMPLOYMENT AND WAGES ANNUAL AVERAGES 2000, at 535 tbl.9 (2001); EMPLOYMENT AND WAGES 2001, *supra* note 125, at 45 tbl.3. In 1993, 26.5% of the workers were employed by businesses with nineteen or fewer workers, the highest percentage. EMPLOYMENT AND WAGES 1993, *supra* note 126, at 532 tbl.9.

129. *See supra* notes 126–30 and accompanying text.

130. *See supra* notes 31–33 and accompany text.

131. *See supra* text accompanying notes 121–29. The collegial atmosphere of a small business, as well as concerns regarding the ability to defend against suit, should not be protected at the expense of non-discriminatory work opportunities. *See id.* There is also no longer a concern for how the new EEOC will perform its duties like that raised by Senator Cotton in 1964. *See supra* notes 52–53 and accompanying text. The EEOC has a thirty-five year track record, during which it has made strides toward preventing discrimination in the American workplace. *See, e.g.*, EQUAL EMPLOYMENT OPPORTUNITY COMM'N, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS 1 (2000).

132. A clear example of the tension existing in the religious context stems from the terrorist attacks of September 11, 2001. Following the attacks, American society took a distinct turn against members of the Muslim faith. *See* Muqtedar Khan, *Putting the American in 'American Muslim'*, N.Y. TIMES, Sept. 7, 2003, § 4, at 13.

In the racial context, Senator Lott, R-Miss., caused a controversy in December 2002, when he made racially insensitive remarks in honoring a Senate colleague. Dan Goodgame & Karen Tumulty, *Tripped Up By History*, TIME, Dec. 23, 2002, at 22. The public outcry against Sen. Lott was strong and swift, and soon after the incident he stepped down as the Senate Majority Leader. Douglas Waller, *Lott: The Fallout*, TIME, Dec. 30, 2002, at 24.

Additionally, the issue of affirmative action in public institutions of higher education provided two of the most controversial rulings in the most recent term of the United States

Title VII protection to all employees and prospective employees, President Kennedy's call for "fair and full employment" may be brought closer to becoming a reality.¹³³

A business owner should retain the right to hire a member of his or her own family. This right is both justifiable and reasonable. However, this is not the same as allowing businesses to refuse to hire job applicants on the basis of color, race, sex, national origin, or religion.¹³⁴

When balancing the interests of a business owner in making employment decisions with the Title VII goals of preventing discrimination from interfering with employment relationships, the ideals of a non-discriminatory hiring practice should outweigh a business owner's desires.

CONCLUSION

Title VII protections of the employment relationship exist to combat employment discrimination based on one of five characteristics: race, religion, color, sex, and national origin. These characteristics represent groups that have historically been discriminated against. A Title VII exemption for businesses with fewer than fifteen employees is neither necessary, nor justifiable. In light of the remedial purpose underlying—to protect the employment relationship from discrimination—Congress should eliminate the fifteen employee minimum. Holding all businesses accountable for discriminatory employment practices would best serve the rationales that led to the passage of Title VII of the Civil Rights Act.

Supreme Court. *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), show that a majority of Supreme Court Justices believe that the effects of past discrimination against African Americans are still felt today.

133. See *supra* note 20 and accompanying text.

134. A business owner's hiring of a family member should not be viewed as discriminating on the basis of one of the Title VII characteristics. Rather, it is the purposeful search for employees who share, for example, the owner's religious beliefs or national origin that Title VII was designed to prohibit.