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CONSTITUTIONAL LAW—EMPLOYMENT DISCRIMINATION VS. FREEDOM OF ASSOCIATION—THE LIMITS OF TITLE VII APPLICABILITY TO PARTNERSHIP ADMISSION IN THE MODERN LAW FIRM—Hishon v. King & Spalding—On May 22, 1984, the Supreme Court held that a female associate employed by a major Atlanta law firm had stated a cause of action against the firm for sex discrimination under Title VII of the Civil Rights Act of 1964, after the firm had denied the associate admission to the partnership. The case, Hishon v. King & Spalding, centered on the conflict between an individual’s right, pursuant to Title VII, to attain an occupational position commensurate with her abilities, and the right of individuals to freely form business partnerships as protected by the implied right of freedom of association under the first amendment of the Constitution. The Court’s holding in Hishon, however, hinged on the contractual obligations between the parties. The Court left unanswered the critical question of whether thousands of large and medium-sized law firms throughout the country, which have partnership selection procedures different from those of King & Spalding, can claim an exemption from Title VII when selecting new partners.

3. See generally 104 S. Ct. 2229.
4. Id. at 2233-34.
5. Id. at 2231-36. 42 U.S.C. § 2000e-2(a) provides that it shall be an unlawful employment practice for an employer:

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

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

Section 2000e-5(a) which relates to enforcement of Title VII, provides in part:

   (a) The [Equal Employment Opportunity Commission] is empowered as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 . . . of this title

   (b) Whenever a charge is filed by or on behalf of a person claiming to be
row scope of the *Hishon* decision leaves a great many women and minorities, in the legal as well as other professional fields, unprotected under a wide variety of circumstances from invidious employment discrimination on the basis of race or sex. This comment will explore the limitations of the *Hishon* decision as well as the legal and social ramifications which may result from those limitations.

I. INTRODUCTION

In *Hishon*, the petitioner alleged sex discrimination by the respondent law firm after the firm denied her admission to the partnership and notified her to seek employment elsewhere pursuant to the firm's "up or out" policy. The petitioner claimed that the relationship between a partner and a large institutional law firm such as the respondent, is primarily one of employ-

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508  *HUMAN RIGHTS ANNUAL*  [Vol. III]

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6. 104 S. Ct. at 2231-36. Chief Justice Burger's majority opinion held that petitioner stated a cause of action under Title VII because the respondent law firm may have contractually obligated itself to consider petitioner for partnership on her merits. The opinion does not discuss whether law firms are entitled to first amendment protection from Title VII applicability for any other form of partner selection.

7. **Id.** at 2232. At King & Spalding, once an associate is passed over for partnership, the associate is notified to begin seeking employment elsewhere.

8. The author defines "institutional" as analogous to the internal dynamics of a large corporation consisting of many departments, with minimal managerial control of the partnership by the individual partners.
ment and accordingly is within the ambit of Title VII. The petitioner also alleged that while recruiting her for employment, members of the firm made representations that petitioner would be considered for partnership on a “fair and equal” basis with the male associates employed by the firm. Respondent law firm’s standard practice is to consider associates for partnership after their fifth or sixth year with the firm. The Court held that because the decision to deny petitioner admission to the partnership affected her employment status with the firm, petitioner’s allegations, taken as true, made respondent firm’s consideration of petition for partnership a “term, condition or privilege” of petitioner’s employment and therefore subject to Title VII protection from discrimination on the basis of sex, race, religion or national origin.

The Supreme Court’s decision reversed both the Court of Appeals for the Eleventh Circuit and the District Court for the Northern District of Georgia, which had held that admission to a partnership was a decision affecting membership within that partnership and was not within the scope of Title VII. The rationale of both courts was that a partnership’s decision to expand its business, including taking on new clients or new partners, is not an employment decision covered by Title VII. Both courts rejected petitioner’s argument that Title VII should apply to partnership decisions by large, corporate-style law firms like King & Spalding, even when such decisions have a direct im-

9. Ms. Hishon claimed that “[t]he economic reality of the relationship between a partner and a large institutional law firm is primarily one of employment in which the partner earns a livelihood by performing services for clients of the firm.” See Petition for a Writ of Certiorari, on Certiorari to the United States Court of Appeals for the Eleventh Circuit, at 13, Hishon v. King & Spalding, 104 S. Ct. 2229 (1984).
10. 104 S. Ct. at 2232.
11. Id.
12. Id. Pursuant to the firm’s “up or out” policy, petitioner was requested to seek employment elsewhere after having been denied admission to the partnership.
13. Since the Court was adjudicating the sufficiency of petitioner’s complaint it assumed her allegations as true, pursuant to Fed. R. Civ. P. 12. Id. at 2233.
14. Id.
15. Id. at 2234-35.
16. 678 F.2d 1022 (11th Cir. 1982).
18. 678 F.2d at 1030; 24 Fair Empl. Prac. Cas. at 1306-07.
19. 6788 F.2d at 1029; 24 Fair Empl. Prac. Cas. at 1304-05.
20. 678 F.2d at 1028; 24 Fair Empl. Prac. Cas. at 1304.
impact on an associate's employment opportunities with the firm.\textsuperscript{21}

The Supreme Court's decision to sustain petitioner's claim under Title VII reflects the traditional posture of the federal courts to broadly construe Title VII provisions\textsuperscript{22} whenever feasible.\textsuperscript{23} At the same time, the Supreme Court has a history of rejecting claims of freedom of association by non-incorporated business or professional enterprises, if the Court finds that the group exercises a pervasive practice of invidious discrimination on the basis of sex, race, religion or national origin.\textsuperscript{24} In \textit{Hishon} the Court seems to continue its practice of broadly applying Title VII when it defines partnership consideration as a "term, condition or privilege" of an associate's employment in a law firm.\textsuperscript{25}

In \textit{Hishon} the Court determined that because the underlying relationship between the petitioner and respondent was contractual, it followed that the "terms, conditions or privileges" of employment clearly included benefits which were part of the contract.\textsuperscript{26} The Court reasoned that if petitioner's allegations were true, respondent's promise to consider petitioner for partnership on a fair and equal basis was a binding "term" of her employment contract.\textsuperscript{27} The Court also found that even if respondent's promise was not binding under the employment contract, an employer may provide its employees with many benefits where there is no contractual obligation to do so.\textsuperscript{28} Such benefits, said the Court, may qualify as a "privilege" of employment for purposes of Title VII protection, and the employer is therefore prohibited from administering these "privileges" in a discriminatory fashion.\textsuperscript{29} The Court held that the benefit of partnership consideration is a "privilege" of employment, pro-

\begin{itemize}
\item \textsuperscript{21} 678 F.2d at 1028-29; 24 Fair Empl. Prac. Cas. at 1306.
\item \textsuperscript{22} \textit{See generally} 42 U.S.C. § 2000e-2 (1982).
\item \textsuperscript{24} \textit{See generally} Norwood v. Harrison, 413 U.S. 455 (1973); McDonnell-Douglas Corp. v. Green, 41 U.S. 792 (1973).
\item \textsuperscript{25} 104 S. Ct. at 2233-34.
\item \textit{Id.} at 2233.
\item \textit{Id.} at 2234.
\item \textit{Id.}
\item \textit{Id.}
\end{itemize}
vided petitioner establishes that partnership consideration is directly linked to her status as an employee of the law firm.30

Both the majority31 and concurring opinions,32 however, limited the Court’s application of Title VII to circumstances where partnership consideration is either an express or implied benefit of an associate’s employment.33 The Court concluded only that the allegations presented in Hishon,34 if proven, would allow the respondent firm’s partnership admission procedure to fall under the “terms, conditions or privileges” clause of Title VII.35 The Court held that Title VII would then apply to all of an associate’s expressed and implied contractual rights which may exist pursuant to her employment relationship with a law firm.36 What the Court failed to do in Hishon is to define the scope of an associate’s legal rights under Title VII against discriminatory employment practices by law firms where, unlike Hishon, there is no allegation that the firm has either a contractual obligation or has voluntarily assumed an obligation to consider the associate for partnership. A detailed look at the facts in Hishon and the judicial history leading up to the Supreme Court opinion gives some insight into the Court’s reasoning behind its decision.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1972, Elizabeth Hishon was hired as an associate by King & Spalding37 (hereinafter the firm), a partnership comprised of nearly one hundred attorneys38 in Atlanta, Georgia. Ms. Hishon alleged that prior to her employment with the firm, she was told by a recruiter from King & Spalding that advancement to partnership in the firm after five or six years was “a matter of

30. Id.
31. Id. at 2232.
32. Id. at 2236 (Powell, J., concurring).
33. Id. at 2234, 2236.
34. Petitioner alleged that the respondent law firm was bound to consider petitioner for partnership on her merits pursuant to petitioner’s employment contract with the firm. Id. at 2232.
35. Id. at 2233.
36. Id. at 2233-34.
37. King & Spalding was comprised of more than 50 partners and employed approximately 50 attorneys as associates at the time this lawsuit was filed. Id. at 2232.
38. Id.
course" for associates who "receive satisfactory evaluations."\textsuperscript{39} Ms. Hishon also claimed that she was told that all associates would be considered for partnership on a "fair and equal basis."\textsuperscript{40} Ms. Hishon alleged that she relied upon these representations in accepting the position offered by the firm.\textsuperscript{41}

In May, 1978, the firm's partners, all of whom were male,\textsuperscript{42} considered and denied Ms. Hishon admission to the partnership.\textsuperscript{43} One year later, the partners reconsidered and again rejected Ms. Hishon for admission to the partnership.\textsuperscript{44} Pursuant to its "up or out" policy regarding associates,\textsuperscript{45} the firm notified Ms. Hishon that she should seek employment elsewhere.\textsuperscript{46} Her employment with the firm terminated on December 31, 1979.\textsuperscript{47}

Ms. Hishon was the second woman employed as an associate by the firm.\textsuperscript{48} At the time of her departure, there had never been a female partner at the firm.\textsuperscript{49} Along with Ms. Hishon, two male associates were denied admission to the partnership in 1978.\textsuperscript{50}

Shortly before she left the firm, Ms. Hishon filed a complaint with the Equal Employment Opportunity Commission\textsuperscript{51}

\begin{itemize}
\item 39. Id.
\item 40. Id.
\item 41. Id.
\item 42. Id.
\item 43. Id.
\item 44. Id. at 2232 n.1. The parties in Hishon disputed whether the law firm actually reconsidered its decision to deny Ms. Hishon admission to the partnership. The law firm claimed it voted not to reconsider the question and that the 180 day period for Ms. Hishon to file her claim with the Equal Employment Opportunity Commission commenced in May, 1978 and not from the 1979 meeting. See 42 U.S.C. § 2000e-5(e). The Court held that the district court's disposition of the case made it unnecessary to decide the dispute.
\item 45. 104 S. Ct. at 2232. Once an associate is passed over for partnership at King & Spalding, the associate is notified to begin seeking employment elsewhere.
\item 46. Id.
\item 47. Id.
\item 48. 678 F.2d at 1024. The first female attorney hired by King & Spalding was an associate for 44 years until her retirement in 1977. See also Comment, Hishon v. King & Spalding: Should Partnership Be Excluded From The Constraints Of Title VII? 1984 Det. C.L. Rev. 189, 191 n.8.
\item 49. Comment, supra note 48, at 191 n.8.
\item 50. 678 F.2d at 1024 n.2.
\item 51. See 29 C.F.R. §§ 1601.27-1601.28 (1984). When a charge is filed with the EEOC for alleged Title VII violations, the Commission may bring a civil action against any respondent named in a charge, except a government, governmental agency or political subdivision within 30 days from the date of the filing of a charge with the Commission. The Commission may seek a conciliation agreement from the respondent named in the
COMMENTS

(hereinafter EEOC), alleging Title VII violations. After investigating Ms. Hishon's charges against King & Spalding, the EEOC issued Ms. Hishon a notice of right to sue. Ms. Hishon then commenced a private action against the firm. King & Spalding moved to dismiss the complaint, claiming that Title VII did not reach decisions affecting the status of partners. The main thrust of King & Spalding's argument was that partners are not employees within the meaning of Title VII, and that partnership consideration is not a "term, condition or privilege" of an associate's employment. King & Spalding also argued that professional partnerships are guaranteed freedom of association under the first amendment, and that Title VII application to partnership consideration infringes upon this constitutional right.

A. The Decisions Below

In ruling on King & Spalding's motion, the district court specifically examined Ms. Hishon's averment that the firm operated as "a corporate giant," and that therefore its decisions to admit partners were similar to promotions of employees to man-
agement positions, which do fall under Title VII. The court concluded, however, that King & Spalding complied with the partnership laws of Georgia. Accordingly, the court held that while associates were indeed employees of the firm, its partners were not. The court distinguished the "promotion" of corporate employees to management-level positions within a corporation from the "election" of associates to membership in a professional partnership. The court likened the admission of associates to a partnership with an election of a corporation's board of directors. The court also viewed the relationship between partners of a law firm as peculiar to other business relationships. The court stated that:

In a very real sense a professional partnership is like a marriage. It is, in fact, nothing less than a "business marriage" for better or worse . . . . To use or apply Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings.

The court held that promotions covered by Title VII could not be extended to include elections of members to private business associations. The district court accordingly dismissed Ms. Hishon's complaint.

In a 2 to 1 decision affirming the dismissal by the district court, the court of appeals agreed with Ms. Hishon that large law firms possess many attributes common to corporate enterprises. The court acknowledged that the size and complexity of King & Spalding's operations were akin to a corporate entity

63. Id. The district court found King & Spalding to be organized pursuant to all the requirements under Georgia partnership law, and accordingly rejected petitioner's argument that King & Spalding's partners were "employees" of the firm for purposes of Title VII.
64. Id. at 1305.
65. Id. at 1306.
66. Id.
67. Id. at 1304.
68. Id. at 1304-05.
69. Id. at 1306-07.
70. Id. at 1307.
71. 678 F.2d 1022 (11th Cir. 1982).
72. Id. at 1026.
possessing a separate and distinct identity from the individual partners. Indeed, both the court and King & Spalding stated that the Supreme Court had held that partnerships are separate entities from their partners for a number of legal purposes. Nevertheless, the majority rejected the theory that de facto corporate operation of a partnership transforms the partners into employees of the firm. The majority stated that a partnership is a "voluntary association," and that partners should be free to select those with whom they will practice law in the absence of clear evidence of the requisite congressional intent behind Title VII to interfere in such matters. The majority concluded that Congress did not intend Title VII to define partnership consideration as an employment practice. The court accordingly upheld the district court's view that partnership admission practices fall outside the scope of Title VII.

Other courts, however, have broadly construed the definition of employment practice, pursuant to those courts' conclusions that Congress intended Title VII to remedy all kinds of employment discrimination throughout the private and public

73. Id.
74. Id.
75. Id. Although the court states that appellant brings forth the argument that a partnership has a separate identity from the individual partners, respondent law firm admitted such in its brief before the district court. See 24 Fair Empl. Prac. Cas. at 1304.
76. 678 F.2d at 1026. The Supreme Court has also held that partnerships have separate identities from their partners in Bellis v. United States, 417 U.S. 85 (1974). See Brief of the Women's Bar Association of Massachusetts as Amicus Curiae at 14-24, Hishon v. King & Spalding, 104 S. Ct. 2229 (1984).
77. 678 F.2d at 1026. The court rejected Ms. Hishon's contention regarding the legal status of the King & Spalding internal structure. The court stated that King & Spalding reduced its partnership structure to writing in accordance with Georgia state law and has not incorporated the partnership merely by operating as a corporation.
78. Id. at 1028.
79. Id. at 1027.
80. Id. at 1028.
81. Id. at 1027. The court acknowledged Ms. Hishon's argument that the Supreme Court and the Fifth Circuit have held that part ownership of a business does not preclude a person's classification as an employee subject to federal employment legislation. See Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28 (1961); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974). The court, however, held that these decisions did not make the term "partner" equivalent to the term "employer" for purposes of Title VII. See Burke v. Friedman, 566 F.2d 867 (7th Cir. 1977).
82. 678 F.2d at 1030. The court stated that a cause of action for unlawful discharge under Title VII has a separate identity from termination resulting from a partnership decision that falls outside the scope of Title VII.

81. Id. at 1027. The court acknowledged Ms. Hishon's argument that the Supreme Court and the Fifth Circuit have held that part ownership of a business does not preclude a person's classification as an employee subject to federal employment legislation. See Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28 (1961); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974). The court, however, held that these decisions did not make the term "partner" equivalent to the term "employer" for purposes of Title VII. See Burke v. Friedman, 566 F.2d 867 (7th Cir. 1977).
sectors. The rationale behind such a broad interpretation of Title VII's purpose is, ironically, the lack of specificity in the statutory language and legislative history of the Act. The fifth circuit in particular has determined that Congress' "failure to enumerate specific discriminatory practices was a conscious effort to give the courts wide latitude in construing Title VII [since] constant change is the order of the day and [therefore] seemingly reasonable practices of the present can easily become the injustices of the morrow." In Teal v. Connecticut, the Court of Appeals for the Second Circuit expressed its belief that Congress intended Title VII to prohibit the consequences of employment practices, not simply the motivation behind them. The Second Circuit construed Title VII as invalidating employment practices that, although neutral on their face, have a disparate impact on a class protected by the Act. In Bonilla v. Oakland Scavenger Co., the Ninth Circuit held that the right to be considered for promotion on a non-discriminatory basis is covered by federal employment legislation, even if the employee would not be covered after the promotion.

III. LEGISLATIVE HISTORY OF TITLE VII

Additional evidence of the congressional intent behind Title VII lies in the legislative history of the Equal Employment Opportunity Act of 1972 (hereinafter the Act). Prior to passage of the Act, Congress recognized that the enforcement machinery

84. Comment, supra note 48, at 194.
85. Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), reprinted in Comment, supra note 48, at 194-95.
86. 645 F.2d 133 (2d Cir. 1982).
87. Id. at 136 n.5.
88. Id. at 137, 140.
89. 697 F.2d 1297 (9th Cir. 1982).
90. Id.
created by the Civil Rights Act of 1964 in adequately provided for equal employment opportunities for minorities and women. Despite the broad application of Title VII by the courts, complaints of employment discrimination were steadily rising. Congress accordingly broadened the enforcement powers of the EEOC under the Act in order to assist the courts in enjoining still widespread practices of overt and covert employment discrimination in both the private and public sectors.

In its report to Congress, the House Education and Labor Committee stated that the particular problem of sex discrimination was a special concern behind the Act’s provisions. The Committee found that “women are subject to economic deprivation as a class,” and that their self-fulfillment and development were frustrated by discrimination on the basis of their sex. The Committee’s report concluded that job discrimination of any kind must end once and for all, “to insure every citizen the opportunity for the decent self-respect that accompanies a job commensurate with one’s abilities.”

Although the legislative history indicates that Title VII should be a measure designed to do away with all forms of invidious employment discrimination, the statutory language of Title VII, as amended by the Act, contains a number of limita-

92. Prior to the amendments to Title VII in 1972 the House Education and Labor Committee noted that one of the basic problems with the enforcement procedures created by the 1964 Act was that the EEOC was unable to administer cease and desist orders against violators of Title VII. This meant that the EEOC either had to fully litigate Title VII claims itself or issue the aggrieved party a private right to sue by the EEOC. See House Report No. 92-238 on the Equal Employment Opportunity Act of 1972, P.L. 92-261, reprinted in 2 U.S. Code Cong. & Admin. News 2137, 2139-48, 92nd Cong. 2d Sess. (1972).
93. Id. at 2140.
94. See Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974).
96. Id. at 2148.
97. Id. at 2146-47.
98. Id. at 2140.
99. Id.
100. Id.
101. Id. at 2141.
102. The Federal court’s broad interpretation of Title VII is primarily based on the remedial purpose of the Act to root out invidious employment discrimination. See House Report No. 92-238, supra note 92.
Title VII prohibits discrimination only by employers, employment agencies, and labor organizations. The statute defines an employer as a person or entity (including partnerships) "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." In addition, Title VII does not apply to "employees" who are either elected or appointed to public office or who are employed as an advisor to a public official. There is little else either in the statute itself, or in any related legislative or administrative document that defines an "employee" for purposes of Title VII. Hence the courts, in grappling with cases similar to *Hishon*, must weigh concerns which warrant a broad application of Title VII against constitutional concerns that individuals be free to form private business associations for their mutual benefit.

IV. SUPREME COURT'S INTERPRETATION OF SCOPE OF TITLE VII

The Supreme Court has historically given a liberal interpretation to Title VII in order to best serve the Act's remedial purposes. In *Franks v. Bowman Transportation Co., Inc.*, the Court stated that:

"In enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or

108. Id.
109. The EEOC guidelines on enforcement of Title VII refer to "employees" in the same generic way as the statute does. See 29 C.F.R. §§ 1601.27-28 (1984).
110. There are a number of variations to the facts in *Hishon* which would fall outside the Court's narrow holding upholding a Title VII action. One example is a firm's express refusal to consider certain associate positions for partnership. Law firms could merely classify associate positions in order to circumvent the Title VII implications of the *Hishon* decision.
national origin . . . and [Congress] ordained that its policy of outlawing such discrimination should have its "highest priority."\textsuperscript{118}

In \textit{Teal v. Connecticut},\textsuperscript{114} the Court also concluded that, "Congress required the removal of artificial, arbitrary and unnecessary barriers to employment and \textit{professional development} that had historically been encountered by women, blacks and other minorities."\textsuperscript{118}

Accordingly, there has been little, if any, precedent by the Court for a narrow application of Title VII concerning discriminatory employment practices in a wide variety of occupations and trades. Indeed, a case decided in 1977 by the District Court for the Southern District of New York\textsuperscript{116} seemed to foreshadow a different result than that which the Court arrived at in \textit{Hishon}.

V. THE Lucido CASE

In \textit{Lucido v. Cravath, Swaine & Moore},\textsuperscript{117} the court held that an associate is an employee of a law firm for purposes of Title VII.\textsuperscript{118} The \textit{Lucido} court had previously recognized a cause of action under Title VII for a law firm's discriminatory hiring practices which denied associate positions to female applicants with disparately superior qualifications as compared to the males hired by the firm.\textsuperscript{119} In \textit{Lucido}, an associate already hired by a law firm stated a claim under Title VII against the firm for its alleged refusal to make the associate a partner on the basis of the associate's national origin and religion.\textsuperscript{120}

The facts and legal issues presented in \textit{Lucido} were quite similar to those in \textit{Hishon}.\textsuperscript{121} Lucido was an associate at a pres-

\textsuperscript{113} \textit{Id.} at 763.
\textsuperscript{114} 457 U.S. 440 (1982).
\textsuperscript{115} \textit{Id.} at 448.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.}
\textsuperscript{121} Many of the legal arguments presented by Mr. Lucido to the district court were virtually identical to those submitted by Ms. Hishon in her petition for certiorari. \textit{See} Petitioner's brief, \textit{supra} note 61, at 11, 14, 15, 25, 43, 48.
tigious New York City law firm for approximately six years,\textsuperscript{122} when he was considered for and subsequently denied admission to the firm's partnership.\textsuperscript{128} Pursuant to Cravath's "up or out" policy, Lucido was notified of the firm's decision and shortly thereafter left the firm.\textsuperscript{124} After leaving the firm, Lucido brought an action under Title VII, alleging that the firm refused to make him a partner because he was Italian and Catholic.\textsuperscript{126} Lucido also claimed that while he was employed at the firm, the firm refused to give him responsibilities which would have prepared him to become a partner because he was Italian and Catholic.\textsuperscript{128}

Like King & Spalding, Cravath argued that a law firm organized as a partnership is a business association which is free to choose new members pursuant to the first amendment.\textsuperscript{127} Cravath also argued that neither partners nor the process of selecting partners for partnership fell within the scope of Title VII.\textsuperscript{128}

The \textit{Lucido} court found that while partners were not considered Title VII employees of a law firm,\textsuperscript{139} partnership consideration at Cravath was by its nature\textsuperscript{130} a "term, condition or privilege" of an associate's employment.\textsuperscript{131} The \textit{Lucido} court also determined that partnership consideration is an opportunity for promotion within a law firm.\textsuperscript{132} The court concluded that although opportunities for promotion are not covered by Title VII, Title VII nevertheless prohibits discrimination once the promotion process is undertaken by the firm.\textsuperscript{133}

In response to Cravath's argument that a partnership comprised of attorneys is afforded the first amendment protection of

\begin{thebibliography}{9}
\bibitem{122} 425 F. Supp. at 124-25.
\bibitem{123} \textit{Id}.
\bibitem{124} \textit{Id}.
\bibitem{125} \textit{Id}.
\bibitem{126} \textit{Id}.
\bibitem{127} \textit{Id} at 126.
\bibitem{128} \textit{Id}.
\bibitem{129} \textit{Id} at 128.
\bibitem{130} \textit{Id}. The court found that Cravath's policy to consider all its associates for partnership was "part and parcel" of an associate's status as an employee of the firm.
\bibitem{131} \textit{Id} at 128. The \textit{Lucido} court concluded that Cravath's policy to consider all of its associates for partnership after a certain number of years made the opportunity to be promoted to partner, "a term, condition or privilege of employment" under Title VII.
\bibitem{132} \textit{Id}.
\bibitem{133} \textit{Id}.
\end{thebibliography}
freedom of association, the court stated that even if Cravath's position were correct, no first amendment rights would be violated by applying Title VII to the procedures Cravath voluntarily implemented for promoting associates to the partnership. The court also held that applying Title VII to a business organization the size of Cravath did not infringe upon the individual partner's right to freedom of association. The court concluded that since Cravath operated its business as if it were a corporation, Cravath's first amendment defense would, if successful, operate as a pretext for discriminatory employment practices in violation of Title VII. Accordingly, the court held that Lucido stated a cause of action under Title VII. Cravath did not appeal the decision.

Lucido, however, had not been generally accepted prior to the Supreme Court's decision in Hishon. The Eleventh Circuit, in its Hishon decision, upheld the district court's view that partnership consideration is a process more similar to an "election" than a "promotion." In Burks v. Friedman, the seventh circuit held that partners were not employees and therefore their selection was not protected by Title VII.

VI. THE HISHON OPINION

The Supreme Court's decision in Hishon supports the Lucido court's application of Title VII to partnership admission in a law firm. The Court, however, limited the scope of Title VII to the extent of Ms. Hishon's status as an employee of King

134. Id. at 129.
135. Id.
136. Id. at 128. Cravath, Swaine & Moore was comprised of approximately 178 attorneys, 48 of whom were partners at the time of the Lucido litigation.
137. Id.
138. Id.
139. Id.
140. Id. at 130.
141. There is no record of an appeal from the district court's decision in Lucido.
142. See Hishon v. King & Spalding, 678 F.2d 1022 (11th Cir. 1982); Burke v. Friedman, 566 F.2d 867 (7th Cir. 1977).
143. 678 F.2d 1028; 24 Fair Empl. Prac. Cas. at 1306.
144. 566 F.2d 867 (7th Cir. 1977).
145. Id. at 869.
The Court did not follow the “promotion” theory expounded by the Lucido court. Instead, the Court considered Title VII to apply in Hishon because partnership consideration was either a “term, condition or privilege” of Ms. Hishon’s employment, or it was an express contractual obligation undertaken by King & Spalding. The Court also did not dismiss King & Spalding’s first amendment defense on the ground that King & Spalding operated as a de facto corporation, as was done in Lucido. Indeed, the determinative issue behind the Court’s holding in Hishon is whether a promise for partnership consideration was made by the law firm. Since the Court was deciding upon the sufficiency of Ms. Hishon’s complaint, it assumed that a promise had been made. This assumption by the Court significantly narrows the scope of the Hishon decision as it applies to Title VII. Indeed, both the majority and concurring opinions leave the impression that but for the alleged promise by King & Spalding to Ms. Hishon, the Court may have affirmed the decisions below.

A. Cause of Action Stated Under Title VII

The Court stated that Ms. Hishon has a right to sue under Title VII, independent of the promise allegedly made by King & Spalding. Yet the Court also narrowly construed this right by tying it to King & Spalding’s policy to consider all of its associates for partnership after being employed with the firm for a

147. 104 S. Ct. at 2233-34.
148. 425 F. Supp at 128. The court in Lucido determined that partnership consideration can be considered an opportunity for promotion within a law firm. The court based its conclusion on the theory that Cravath operated as a de facto corporation.
149. 104 S. Ct. at 2234.
150. Id. at 2235.
151. Id. at 2232, 2234.
152. Id. at 2233.
153. Id. The Court stated that partnership consideration could fall under Title VII as a benefit which becomes an “incident” of employment, independent of King & Spalding’s express promise to consider Ms. Hishon for partnership on a “fair and equal basis.” Yet, the Court based its conclusion on the fact that King & Spalding’s “up or out” policy enabled the prospect of partnership to play a significant role in an associate’s employment status with the firm. Id. at 2234.
154. Id. at 2232-34.
155. Id. at 2236-37.
156. Id. at 2234.
specified period of time.\textsuperscript{157} The Court held that the policy, voluntarily instituted by King & Spalding, might constitute a “privilege” or “benefit” of employment independent of contractual obligations to the associates.\textsuperscript{158} The Court also reasoned that Title VII prohibits employers from granting or withholding voluntary benefits in a discriminatory fashion,\textsuperscript{159} when they become “part and parcel” of an associate’s status with the firm.\textsuperscript{160}

\textbf{B. Right to Freedom of Association}

Both the district court\textsuperscript{161} and court of appeals\textsuperscript{162} addressed their concern that professional partnerships have a constitutional right of freedom of association which cannot be circumscribed by federal legislation. The Court, however, did not directly address King & Spalding’s claim that applying Title VII to partnership consideration under any circumstances infringes upon the firm’s constitutional right of free association.\textsuperscript{163} The Court acknowledged only that lawyers have traditionally been afforded freedom of expression.\textsuperscript{164} The Court concluded, moreover, that freedom of expression is not compromised (in this case) by requiring King & Spalding to consider Ms. Hishon for partnership on her merits.\textsuperscript{165} The Court tersely stated that professional associations do not possess any rights denied other employers to engage in practices of invidious employment discrimination.\textsuperscript{166}

\begin{itemize}
  \item \textsuperscript{157} \textit{Id.} See also \textit{id.} at 2236 (Powell, J., concurring).
  \item \textsuperscript{158} \textit{Id.} at 2234.
  \item \textsuperscript{159} \textit{Id.}
  \item \textsuperscript{160} \textit{Id.}
  \item \textsuperscript{161} 24 Fair Empl. Prac. Cas. at 1306-07.
  \item \textsuperscript{162} 678 F.2d at 1028-29.
  \item \textsuperscript{163} 104 S. Ct. at 2235-36.
  \item \textsuperscript{164} \textit{Id.}
  \item \textsuperscript{165} \textit{Id.}
  \item \textsuperscript{166} \textit{Id.} The Court cited its decision in \textit{Norwood v. Harrison}, 413 U.S. 470 (1973) to support the contention that discrimination in violation of Title VII characterized as freedom of association fails to raise a constitutional issue. The Court, however, does not reach the question of whether King & Spalding’s partnership selection process would violate Title VII if Ms. Hishon’s allegations of breach of contract did not exist.
\end{itemize}
C. THE CONCURRING OPINION

While the Court's dicta in Hishon indicate that the Court may be willing to broadly apply Title VII to future cases involving partner selection by law firms, Justice Powell's concurring opinion cautions the reader not to interpret the majority's decision so liberally.

Justice Powell stated that he does not read the majority opinion in Hishon to extend Title VII to the management of a law firm. A partnership, he reasoned, is a shared enterprise. By common agreement, partners must make the judgments and sensitive decisions important to the partnership generally and to the partners individually.

The underlying theme in Powell's concurrence is the majority's limited application of Title VII to the facts in Hishon. Justice Powell, in defending a limited application of Title VII, stated that the partners of a law firm are entitled to allocate the duties and profits of the firm as they collectively choose. Justice Powell also stated that the partners, being in charge of the general management of the firm, are entitled to make policy decisions such as taking on new clients, new employees, and new partners with minimal interference.

VII. CONCLUSION

Although Justice Powell agreed with the result reached in Hishon, it is clear that he construed Title VII applicability to

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167. Id. at 2234-36.
168. Id. at 2236-37.
169. Id. at 2236.
170. Justice Powell stated, "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." Id. at 2236. Justice Powell, however, concurred in the majority opinion for the following reason: "here it is alleged that [King & Spalding] as an employer is obligated by contract to consider petitioner for partnership on equal terms without regard to sex. I agree that enforcement of this obligation, *voluntarily assumed*, would impair no right of association." Id. (emphasis added). See also id. at 2236-37 n.4.
171. Id. at 2236.
172. Id.
173. Id. See also supra note 169.
174. Id. at 2236 n.3.
175. Id.
partnership admission procedures even more narrowly than the majority. Under Justice Powell's analysis, in the absence of an explicit contractual obligation to the contrary, Title VII would not apply to the selection of partners by law firms, because the first amendment secures the right of partnerships to choose its own members free from outside interference.

The question never reached by the majority in Hishon, however, is whether Title VII applies to partnership decisions by law firms which neither promise an associate to consider him or her for partnership, nor have a policy to consider all its associates for partnership. In Hishon, the Court seems to assume that it is the general practice of law firms to have partnership admission procedures similar to those of King & Spalding. Even if the Court's assumption is correct, will law firms, in the wake of Hishon, change their partnership admission policies in order to thwart future Title VII suits? Perhaps an even more compelling question is why should the Court treat large, corporate-style managed law firms differently from other employers who recruit people for top-level management positions? If partners in a law firm are so different from executives in a corporation, then should the Court apply Title VII provisions to partnership admission under any circumstances? The answers to these questions lie perhaps more in the Court's reluctance to radically alter the internal dynamics of the traditional law firm, than its reluctance to handle first amendment objections to Title VII.

The Court's narrow holding in Hishon, however, may never-

176. Justice Powell acknowledged that, "invidious private discrimination has never been afforded affirmative constitutional protections". This is not to say, however, that enforcement of laws that ban discrimination will always be without costs to other values, including constitutional rights. Such laws may impede the exercise of personal judgment in choosing one's associates or colleagues." Id. at 2236 n.4.

177. Id. at 2236. Justice Powell stated that respondent law firm's constitutional objections to the Court's application of Title VII in this case were unfounded as it was alleged by Ms. Hishon that the firm had a contractual obligation to consider her for partnership.

178. Id. at 2236 n.4.

179. A great many law firms do not select a majority of their new partners from among the associates employed by the firm. Many law firms primarily seek outside attorneys who can bring new ideas and new clients to the firm. See Altman & Weil, AN INTRODUCTION TO LAW PRACTICE MANAGEMENT §§ 2.09, 12.09 (Mathew Bender ed. 1981).

180. The Court of Appeals for the Eleventh Circuit acknowledged that many large firms have management schemes similar to those of corporations. 678 F.2d 1026. See also Altman & Weil, supra, note 179, §§ 2.05(3), 2.08.
theless have a great and broad impact on future cases involving discrimination in the partner selection process. One basis for such a conclusion is the Court's rejection of King & Spalding's contention that, because elevation to partner entails a change in status from being an associate "employed" by the firm to becoming an "employer" and "owner" of the firm, preference cannot be a "term, condition or privilege" of employment. The Court agreed with the Lucido court's determination that a change in an associate's status as a result of admission to the partnership is independent from the associate's privilege to be considered for partnership by the existing partners. Accordingly, the Court would seemingly disregard the change in status from "employee" to "employer" in any future Title VII case concerning partner selection.

Yet, if one interprets the concurring opinion by Justice Powell as clarifying the dicta found in the majority opinion, then the Hishon decision does virtually nothing but apply Title VII to a very narrow set of facts. Since the Court declined to decide whether partner selection is protected from Congressional interference by the first amendment, law firms which do not voluntarily obligate themselves to consider all their associates for partnership are unaffected by Hishon. In addition, any law firm which chooses to abandon partner selection policies similar to those of King & Spalding can conceivably choose partners on the basis of race or sex with impunity.

181. 104 S. Ct. at 2235. King & Spalding's argument in essence was that an associate, once admitted to the partnership, is no longer an employee for purposes of Title VII and hence consideration for that admission is not an employment practice covered by the act.

182. Id.

183. Id. It should be pointed out that the Court did not expressly agree with the analysis of Lucido on this issue, but that the author draws this conclusion by comparing both decisions.

184. Id. The Court stated that there was no infringement of King & Spalding's freedom of association in upholding a cause of action under Title VII for Ms. Hishon. The Court, however, based its conclusion on King & Spalding's inability to demonstrate that the function of a professional partnership would be inhibited by a contractual requirement to consider Ms. Hishon for partnership on her merits.

185. Id. at 2235 n.10 & 2236 n.4 (Powell, J., concurring).
A. Title VII and the Lawyer's Need to Freely Associate

The Hishon decision is also significant in that the Court has recognized the need for attorneys to be able to freely form and manage partnerships in order to efficiently pool their professional resources.\footnote{186} Indeed, even the most liberal reading of Title VII does not support its application in situations where two or more attorneys choose to form a partnership for their mutual benefit.\footnote{187}

On the other hand, the enormous growth of the legal profession and the increasing number of large law firms across the nation\footnote{188} are realities which mandate a more thorough examination of the problem of discrimination in partner selection than the Court gave in Hishon. Although primarily structured as partnerships, most law firms as large and diverse as King & Spalding operate essentially as corporations.\footnote{189} The duties of a partner in a large law firm are akin to those of a management executive in a corporation.\footnote{190}

While the legal profession has been growing steadily over the past few decades, women and minorities have been entering the profession in increasing numbers annually.\footnote{191} Yet today, women and minorities are still by and large inadequately represented in the partnerships of many of the largest and most prestigious law firms across the nation.\footnote{192} While this lack of propor-

\begin{footnotes}
186. Id. at 2235. The Court recognized that the activities of lawyers may make a distinctive contribution to the ideas and beliefs of our society. Therefore the courts may accommodate a law firm’s distinctive need for free association whenever legally feasible. See NAACP v. Button, 371 U.S. 415, 431 (1963).
188. In 1982, the law firms included in the National Law Journal’s list of the top 200 law firms employed a total of 16,683 associates. See Petition for a Writ of Certiorari, supra note 9, at 26.
189. Altman & Weil, supra note 179, at § 2.05(3).
190. Id. at §§ 2.05(3), 2.08.
191. At Harvard Law School, 38 percent of the 1983 graduating class was female, compared to only 13 percent in 1974. Abramson & Franklin, Harvard Law ’74: Are Women Catching Up? Am. Law. 79 (May 1983). Despite the objective evidence that women are as well qualified as men to practice law, women made up only 12.8% of the total number employed as lawyers or judges in the legal profession in 1980. “The large percentage of these women were employed as associates in law firms.” See Petition for Writ of Certiorari, supra note 9, at 27-28. See also U.S. Bureau of Census Statistical Abstract of the United States 402, Chart No. 676 (105th ed. 1985).
192. Abramson & Franklin, supra note 191, at 79. Nine years after their graduation, only 23% of the women in the ’74 class of Harvard Law had made partner in a law firm.
\end{footnotes}
tional representation is not conclusive evidence that women and minorities are discriminated against in the partner selection process, the *Hishon* decision, in the author's opinion, fails to guarantee Title VII protection against such discrimination in the future.

B. A Possible Solution

In the absence of an authoritative directive by the Court, the time has come for Congress to amend Title VII to include all personnel-related decisions made by business and professional associations run for profit. At the very least, such legislation will likely force before the Court the issue of whether law firms and other partnerships can claim an exemption to Title VII under the first amendment. The Court will then have to decide the legal issue it chose to leave for another day in *Hishon*.

*Jeffrey J. Rea*

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193. The ambiguity of the term “employee” under Title VII mandates some sort of qualification by Congress if its intent to do away with employment discrimination in all sectors of society is ever to be realized. A great many service and professional positions today no longer fit the traditional employer-employee relationship of the industrial era factory.