

The Small Firm Exemption and the Single Employer Doctrine In Employment Discrimination Law

By Richard Carlson

Abstract

The small firm exemption is a provision of Title VII and the other major federal employment discrimination laws that exempts very small firms from coverage as “employers.” Under the Title VII version of the exemption, for example, an employer is exempt as long as it employs no more than fourteen employees. However, a small firm might be affiliated or integrated with other firms, which collectively employ more than the number of employees required for coverage. The single employer doctrine is a rule for treating separately organized firms as if they were one employer, for purposes of meeting the statutory threshold for coverage. Lately, a number of critics lead by Judge Posner have questioned the doctrine’s place in discrimination law. The critics charge that the collective bargaining cases in which the doctrine first evolved are not valid precedents for the doctrine’s use as a rule of coverage in discrimination cases, and that the doctrine defeats the purposes of the small firm exemption. Judge Posner and other critics would treat affiliated but separately organized firms as a single employer only if it would be appropriate to pierce to corporate veil or hold them jointly liable under traditional rules of corporate law.

In this article I explore the origins of the single employer doctrine and its vivid presence in the background of the Congressional debates leading to the small firm exemption. I also find support for the doctrine in the text of Title VII, and I show that the doctrine is not only consistent with the purpose of the small firm exemption but is necessary to fully achieve the exemption’s purpose.

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Introduction

Laws prohibiting discrimination in employment often make an exception for the small firm. Title VII,¹ which is the model for many other federal and state discrimination laws, sets a threshold for employer coverage at fifteen employees.² A firm employing fewer employees is exempt. As long as it employs no more than fourteen, it can refuse to hire women, Moslems or disabled persons, and it will not be in violation of federal discrimination law.³ If it employs as many as nineteen, but no more, it can terminate and refuse to hire anyone over the age of forty.⁴

The practice of exempting small firms from employment laws began long before Title VII. Early occupational safety laws⁵ and workers' compensation laws typically exempted small firms.⁶ New Deal-era laws such as the Wagner Act⁷ and Fair Labor Standards Act (FLSA)⁸

¹"Title VII," as used in this article, means Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e - 2000e-17.

²42 U.S.C. §2000e(b).

³Title VII prohibits discrimination with respect to race, color, national origin, religion or sex, and the small employer exemption is the same in every case. With regard to race discrimination, however, another federal law undermines the effectiveness of a small employer defense. The Civil Rights Act of 1866, popularly known as Section 1981, prohibits race discrimination without regard to the size of the employer. See 42 U.S.C. §1981.

Disability discrimination in employment is prohibited by a separate law, Title I of the Americans with Disabilities Act, 42 U.S.C. §12111 - 12117.

⁴The Age Discrimination in Employment Act, 29 U.S.C. §§621-634, defines "employer" as person employing at least twenty employees. 29 U.S.C. §630(b).

⁵See Consolidated Coal Co. of St. Louis v. People of State of Illinois 185 U.S. 203, 22 S.Ct. 616, 46 L.Ed. 872 (1902) (rejecting an equal protection challenge against a mine inspection law exempting mines employing no more than five employees); McLean v. State of Arkansas 211 U.S. 539, 29 S.Ct. 206, 53 L.Ed. 315 (1909) (same).

⁶Middleton v. Texas Power & Light Co., 249 U.S. 152, 39 S. Ct. 227, 63 L.Ed. 527 (1919) (upholding equal protection challenged against workers' compensation law that exempted

originally lacked small firm exemptions, but amendments and administrative practices created protective niches for small firms.⁹ As a result, an exempt small firm can pay less than the statutory minimum wage, refuse to pay overtime rates, discharge union supporters, and reject collective bargaining regardless of the wishes of its employees.¹⁰

The most popular explanation for these exemptions is that a small firm might be overwhelmed by the burden of compliance.¹¹ However, the exemption relieves only the smallest of the small. An exempt firm is a fraction of the size that could qualify as small for many other regulatory or statistical purposes. The Small Business Administration, for example, regards a firm employing up to 500 employees as “small,”¹² but under this standard a firm could be more than thirty times too large to be exempt from Title VII. Exempt firms, therefore, tend to be the sort that provide self-employment as much as profits for their owners. “Nearly any of the Congressional debates that preceded enactment of the major employment laws with small firm exemptions were animated with references to “corner” stores, entrepreneurs working out of their garage, family-owned retail and service operations and other independent business people struggling to provide work for themselves as well as jobs for others despite stifling government

small firms); *Sayles v. Foley*, 38 R.I. 484, 96 A. 340 (1916)(same).

⁷49 Stat. 449 (1935), as amended, 29 U.S.C. §§151 - 169.

⁸52 Stat. 1060 (1938), as amended, 29 U.S.C. §§201 - 219.

⁹See text accompanying notes 86 - 157, *infra*.

¹⁰State laws sometimes fill gaps in the coverage of federal laws, but many state laws incorporate the same exemptions and leave the same small employers outside the scope of regulation. See, e.g., Tex. Lab. Code §21.002 (defining “employer” as a “person ... who has 15 or more employees” for purposes of the Texas law against employment discrimination).

Even common law tort claims that might ordinarily apply to any employer regardless of size might be preempted by a statute that suggests a legislative intent to exempt small employers from liability for facts or circumstances addressed by the statute. See, e.g., *Gottling v. P.R. Inc.*, 61 P.3d 989 (Utah 2002) (tort claim based on small employer’s alleged discrimination barred by statute that exempted small employers from prohibition against discrimination).

¹¹See, e.g., *Clackamas Gastroenterology Associates, P. C. v. Wells*, 538 U.S. 440, 447, 123 S.Ct. 1673, 1678-79 (2003).

¹²The Small Business Administration, for example, counts any business employing fewer than 500 as “small.” See Small Business Administration, Table, Small Business Size Standards matched to North American Industry Classification System (Effective January 5, 2006), available online at <http://www.sba.gov/size/sizetable2002.html>. See also Charles Brown, James Hamilton, James Medoff, *Employers Large and Small*, 9 (Harvard Univ. Press 1990).

regulation.¹³ But legislative favoritism for small firms has important implications for the effectiveness of federal labor policy. Firms small enough to be exempt from Title VII employ more than 19 million employees—equal to the entire population of the State of New York or more than 16 percent of the national workforce.¹⁴ The exemption may be one reason why small firms are much less likely than larger firms to hire a representative number of black employees.¹⁵ According to one recent study, blacks constitute 13.3 percent of the workforces of employers of more than 500 employees, but only 7.9 percent of the workforces of fewer than ten employees.¹⁶

¹³See Brown, Hamilton and Medoff, *supra* note 12, at 4-7, 65-74, 87; Marc Linder, *The Small-Business Exemption Under the Fair Labor Standards Act: The “Original” Accumulation of Capital and the Inversion of Industrial Policy*, 6 J.L. & Pol’y 403 (1998). See also text accompanying notes 193 - 195, 240 - 245, *infra*.

¹⁴Brian Headd, *The Characteristics of Small Business Employees*, Monthly Labor Review (April 2000), p. 13, 14. The actual number of employees employed by exempt small firms, and their share of the national workforce, is probably significantly greater. The number reported in Mr. Headd’s article is for employers employing fewer than ten employees, but Title VII exempts employers employing fewer than fifteen employees.

¹⁵Harry Holzer, *Why Do Small Establishments Hire Fewer Blacks Than Large Ones?* Discussion Paper no. 1119-97, Institute for Research on Poverty, Dept. of Economics, Michigan State Univ. (January 1997). According to Holzer’s research, a small firm of fewer than 15 employees has a .119 probability that the last hire was black. The probability rises to .145 if the firm’s workforce is in the 15 to 49 range (within range of Title VII coverage). The probability rises even higher, to .242, when the firm’s workforce reaches the range of 50 to 99. The probability does not increase, and actually declines somewhat, after the workforce exceeds 100, which is the point at which many firms become subject to the EEO-1 filing requirement. See 29 C.F.R. §1602.7. See also Brown, Hamilton and Medoff, *supra* note 12, at 86 (describing data from 1986 indicating that minority employment expanded much more rapidly in firms subject to EEO reporting requirements).

¹⁶Brian Headd, *The Characteristics of Small Business Employees*, Monthly Labor Review (April 2000), pp. 13-14. Many of the “small” firms in this study were large enough to qualify as “employers” under Title VII, which suggests the possibility that Title VII coverage is not the only reason why small firms are less likely to hire blacks. However, other studies show a distinct increase in the probability that an employer will hire blacks once the employer surpasses the threshold for coverage under Title VII. See note 15, *supra*. Other possible factors include an employer’s coverage under EEO-1 reporting requirements (for a firm employing at least 100), or its coverage under affirmative action and reporting requirements for federal contractors. See W. Carrington, K. McCue & B. Pierce, *Using Establishment Size to Measure the Impact of Title VII and Affirmative Action*, 35 Journal of Human Resources 503-523 (2000); Jonathan S. Leonard, *The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment*, J. Econ. Perspectives, vol. 4, no. 4, p. 47, 50-51 (1990).

For Hispanics, representation in a workforce is inversely related to firm size, probably

These figures might obscure the real situation if, as some observers have suggested, small business owners of all races tend to discriminate in favor of their own race, so that minority employees in the small firm sector are disproportionately employed by minority businesses.¹⁷ Small firms might be much less diverse than large ones.

The right to claim the small firm exemption—and with it an affirmative defense against a charge of discrimination—is an important advantage for firms that qualify, and a disappointment for their applicants and employees. Not surprisingly, the issue of small firm status is frequently contested in employment discrimination cases, even though the test for exemption—a headcount of employees—might seem to be simple and straightforward. Sometimes there are issues about who counts as an employee, especially if the employer has delegated a substantial amount of work to “independent contractors”,¹⁸ “partners”,¹⁹ or other putative non-employees. In other cases there are issues about what entity or set of entities constitute the “employer,” a problem that is the main topic of this article.

This article deals in particular with the problem of the corporate employer that is part of or consists of a family of corporations. For most purposes in the law, each corporation is a single discrete “person,” the basic unit as to which legal rights and duties attach. A corporation is a separate person even if it is owned entirely by another corporation, or by an individual who owns other incorporated or unincorporated enterprises. An “employer” can be a corporation, and in most instances the corporation and the relevant employer are one and the same. In some cases, however, the relevant employer is more or less than a single corporation. For purposes of collective bargaining law or wage and hour law an employer might be an unincorporated division of a corporation.²⁰ On the other hand, a corporation that is small enough standing alone for an

because many small firms are involved in construction and agriculture, and possibly because firms in these sectors are particularly likely to rely on undocumented aliens. Nearly 13 percent of the employees of firms employing fewer than 10 are Hispanic, but only 9 percent of employees of firms employing 500 or more are Hispanic. Headd, *supra* note 16, at pp. 14, 17.

¹⁷See text accompanying notes 254-59, *infra*.

¹⁸Richard Carlson, *Why the Law Still Can't Tell an Employee When It Sees One, and How It Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295 (2001).

¹⁹See *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003), where the Court considered the employee status of a professional corporation's physician shareholders, who also constituted the board of directors. The Court described a multi-factor test for determining whether owners, partners, directors and officers are employees, and it remanded the case for application of the test.

²⁰See, e.g., *American Federation of Television and Radio Artists, Washington-Baltimore Local v. N.L.R.B.*, 462 F.2d 887 (D. C. Cir. 1972) (barring a union's picketing as a “secondary boycott” against a “neutral” division of a corporation). Similarly, the rights of some employees under the Fair Labor Standards Act depend on the revenue generated by the employing

exemption might find itself swept back into the field of coverage by the “single employer doctrine,” which treats affiliated and interrelated corporations as if they are one entity—a “single employer.” Thus, an exemption for a small employer begs the question: Who is the employer?

Multiple corporations might be the “employer” under the single employer doctrine when one corporation owns another, or when two or more corporations are owned by another entity, individual or group of individuals. If a plaintiff can prove that the affiliated corporations also operate to some degree as a single enterprise, such as by pursuing the same business, serving each other, and sharing common management and resources, then all the employees of the multi-corporate enterprise count toward the threshold for employer coverage, frequently with the result that none of the affiliated firms is exempt, no matter how small its own workforce.

The doctrine is not clearly stated in the text of Title VII or the other major federal discrimination statutes. When courts first began to apply the doctrine in employment discrimination cases in the nineteen-seventies, they relied mainly on the example of collective bargaining law, where the doctrine has had a particularly vigorous life since the Wagner Act. The Wagner Act is no clearer than Title VII in providing a statutory basis for the single employer doctrine, but the doctrine seems securely rooted in that law because the Supreme Court has twice approved the doctrine in the context of collective bargaining. Lately, however, critics including some judges have questioned the doctrine’s application in employment discrimination cases. They have wondered whether the single employer doctrine was a mistake from the start, and some judges have declined to apply the doctrine in discrimination cases even if they are bound by higher precedent to apply it in collective bargaining cases.

This article takes a closer look at whether the single employer doctrine appropriately limits the small firm exemption, particularly in Title VII and the employment discrimination laws modeled after Title VII. Part I begins with a brief overview of the exemption and the single employer doctrine, and with a look at Judge Richard Posner’s opinion in *Papa v. Katy Industries, Inc.*²¹ The consolidated cases in *Papa* exemplify some typical settings for the single employer doctrine, and Judge’s Posner’s opinion presents and clarifies the principle arguments against the doctrine. *Papa* remains the leading judicial authority against the doctrine in employment discrimination law, and it serves as a convenient starting point for a closer examination of the debate.

Part II examines one set of the critics’ arguments based on their description of the origins of the single employer doctrine and its specialized function in collective bargaining law. I find as an historical matter that the single employer doctrine is older and serves a much wider variety of functions than the critics suppose. In other words, the examples provided by collective bargaining law and other employment laws are not so easily dismissed as precedents for a more

enterprise, which may be a subpart of a larger corporation. See 29 U.S.C. sec. 203(r), (s). See also the Worker Adjustment and Retraining Notification Act, 29 U.S.C. sec. 2101(a)(1) (defining “employer” as a “business enterprise” employing a certain number of employees.

²¹166 F.3d 937 (7th Cir.), cert. denied, 528 U.S. 1019, 120 S.Ct. 526 (1999).

general application of the single employer doctrine. More importantly, the history of the single employer doctrine was a backdrop for Congress's lively debate about the small firm exemption in the proceedings that led to Title VII. Knowing the history of the doctrine is a step toward answering the question whether Congress intended or expected the doctrine to limit the small firm exemption.

Next, Part III addresses another set of arguments against the doctrine based on the perceived lack of support in the text of the statutes, particularly Title VII, and the assumed lack of other evidence of Congress's intention to adopt the doctrine. On closer examination, I find that the Congressional debates included at least some discussion of the single employer doctrine, bolstering the view that Congress was aware of the likely application of the doctrine in small firm cases. I also find that Title VII's unusual definition of "person" provides an important and probably purposeful link to a body of pre-existing law that included the single employer doctrine.

Part IV looks at Judge Posner's argument that application of the single employer doctrine is contrary to the purpose of the small firm exemption. Judge Posner and other critics have assumed that the small firm exemption's principle purpose is economic: to relieve very small firms of the disproportionate burden of compliance. With respect to this regulatory relief goal, I find contrary to Judge Posner that there are compelling reasons not to grant the small firm exemption to many firms that enjoy the benefits of affiliation with a larger firm or family of firms. I also find that Congress had other purposes in adopting the exemption, including the protection of "personal" relationships in the small workplace. Proper application of the single employer doctrine for purposes of statutory coverage makes it more likely that the exemption will be reserved for firms that have the needs envisioned by Congress. Part V, my conclusion, offers some observations about how the test for single employer status might be better tailored to serve its purpose as a limit on the small firm exemption.

I. Overview: The Small Firm Exemption, The Single Employer Doctrine, and *Papa*

A. The Small Firm Exemption

Small firms are exempt from Title VII because the Act defines "employer" as a "person ... who has fifteen or more employees." Whether an employer is exempt under this rule depends strictly on the number of its employees. An exempt employer might engage in any business in any industry. It might generate less than a million dollars in revenues, or it might generate hundreds of millions in revenues. It might employ unskilled laborers or clerical workers, or it might employ highly skilled computer software engineers, doctors or lawyers. No matter what its business, revenues or types of employees, it is exempt from Title VII and the other major federal anti-discrimination laws as long as it never exceeds the threshold number of employees.

Qualification for a small firm exemption might have been based on other measures. The

FLSA, for example, grants a partial exemption to small “enterprises” based on revenue.²² Counting dollars of revenue is no more arbitrary a test of size than counting heads. However, a firm that wants to know whether it is exempt in any particular year can more easily know or predict the size of its workforce than its revenue, and it can more easily avoid crossing a threshold based on workforce size. Moreover, Title VII was preceded by and modeled after two decades of state civil rights laws and at least a century of other employment regulations that often granted exemptions based on head counts,²³ and this manner of measuring size is consistent with the likely purposes of a small firm exemption in discrimination law. Congressional debates leading to the enactment of Title VII in 1964 and its amendment in 1972 reveal at least five possible purposes for a small firm exemption: (1) to relieve small firms of the otherwise disproportionate costs they might bear under the new law; (2) to preserve a right of “personal” relationships beyond government intervention; (3) to permit racial or ethnic self-help by small firms and family-owned businesses; (4) to avoid over-extension of the EEOC’s limited resources; and (5) to defuse at least some business opposition to Title VII and preserve enough support for its enactment.²⁴ Much more will be said about these purposes and their relevance to the single employer doctrine in Part IV of this article.

B. The Single Employer Doctrine

The small firm exemption requires a headcount of the alleged employer’s employees, but there might be a question about who or what constitutes the “employer.” An administrative agency or an individual plaintiff seeking to overcome a small firm defense might argue in favor

²²20 U.S.C. §203(s).

²³By 1964 most states outside the Old South had adopted civil rights laws, and the fact that many of these laws included small employer exemptions was widely noted in Congress, both as an example for federal legislation and as a basis for determining whether federal law exempted too many or too few employers. See, e.g., 110 Cong. Record S 6548 (March 30, 1964) (Senator Humphrey); 110 Cong. Record S 6562 (March 30, 1964) (Senator Kuchel); 110 Cong. Record S 7214 (April 8, 1964) (Memorandum of Senators Clark and Chase).

Even before the civil rights era, a head count of employees was the usual measure of size for small firm exemptions in many state labor laws. See notes 5 and 6, *supra*.

²⁴A sixth possible explanation, to assure Title VII’s constitutionality by reaching only businesses certain to have a significant impact on commerce, appears to have been asserted by opponents of Title VII mainly as a distraction. After all, the Constitutional basis for Title VII was not the commerce power, it was the Fourteenth Amendment. House Judiciary Committee’s Report, No. 914, 88th Cong., 1st Sess.(Nov. 20, 1963) (separate minority views of Richard Poff and William Cramer), in Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of Civil Rights Act of 1964, p. 2108 (1978); 110 Cong. Record S 7208-7212 (April 8, 1964) (Senator Clark); 110 Cong. Record S 13079 (June 9, 1964) (Senator Clark).

of combining the workforce of the nominal employer with the workforces of affiliated corporations to reach a total in excess of the threshold for coverage. This argument depends on the viability and applicability of the single employer doctrine, also known as the “integrated enterprise” doctrine.²⁵

The idea of treating multiple entities as a single employer is not limited to issues in collective bargaining or discrimination law. One finds variations of the doctrine across the board in employment law, and beginning long before Title VII or the Wagner Act. The proponent of the doctrine is usually an employee or enforcement agency seeking to extend statutory coverage or extend certain employer duties to multiple entities, but an employer can also benefit from some variations of the doctrine. In workers’ compensation law, for example, a corporation affiliated with an injured employee’s nominal employer might claim to be one and the same employer, in order to assert the employer’s exclusive remedy defense.²⁶ In collective bargaining law, two or more corporations might assert the single employer doctrine to support their proposal for a bargaining unit combining employees of both corporations, in order to dilute a union’s strength and make it more difficult for the union to organize employees.

In brief, the prevailing version of the single employer doctrine in discrimination and collective bargaining law regards a group of persons—usually multiple corporations—as a single employer if the facts show (1) common ownership or financial control, (2) common management, (3) centralized control of labor relations, and/or²⁷ (4) interrelation of operations.²⁸ The test is far from mathematically precise. Some degree of common ownership appears to be a premise of most descriptions of the doctrine in the context of employment discrimination law,

²⁵See, e.g., EEOC Compliance Manual, Section 2: Threshold Issues, sec. 2-III-B-1-a-iii, online at <http://www.eeoc.gov/policy/docs/threshold.html#2-III-B-1-a-iii>, (last visited on March 26, 2006) [hereinafter “EEOC Compliance Manual”].

²⁶See, e.g., *Hall v. Fanticone*, 322 N.J. Super. 302, 730 A.2d 919 (1999); *Sweeney v. City of New York*, 4 Misc.3d 834, 837-38, 782 N.Y.S.2d 537, 543 (N.Y. Sup. 2004); Cf. *Clark v. United Technologies Automotive, Inc.*, 459 Mich. 681, 594 N.W.2d 447 (Mich. 1999) (remanding case for determination of whether “economic realities” supported treating owner and his corporation as a single employer of plaintiff, for purposes of the exclusive remedy defense). Cf. *Gunderson v. Harrington*, 632 N.W.2d 695 (Minn. 2001) (owner who was “alter ego” of the corporation he owned was entitled to assert exclusive remedy defense against employee of the corporation).

²⁷Whether the test should be stated in the disjunctive or conjunctive is one of many issues about the test. In most forums, the requirements for application of the doctrine can be satisfied with something less than proof of all four factors. See, e.g., EEOC Compliance Manual, note 25, *supra*.

²⁸*Baker v. Stuart Broadcasting Co.*, 560 F.2d 389 (8th Cir.1977); *Evans v. McDonald's Corp.*, 936 F.2d 1087 (10th Cir.1991); *Wells v. Firestone Tire and Rubber Co.*, 421 Mich. 641, 364 N.W.2d 670 (Mich. 1984).

but the EEOC advocates a more aggressive view,²⁹ and some variations of the doctrine in collective bargaining and wage and hour law can apply to separately owned firms.³⁰ For reasons I explain in the course of this article, I take a more limited view that separately owned and organized entities merely doing business together cannot be a single employer for purposes of coverage under discrimination law, even if their operations become closely integrated or interrelated. In order for two private firms³¹ to be a single employer, either one must own the other or they must have a common owner or parent. However, even assuming common ownership is an essential element, none of the various judicial or administrative descriptions of the doctrine offers a precise threshold or standard for common ownership. Common *controlling* ownership is probably very important. The relative importance of the other factors is also a matter of dispute. It is widely agreed, however, that a strong showing for one of the remaining factors—especially centralized labor relations—can compensate for a weak showing for the others.³² Many authorities regard a finding of centralized labor relations as very important in every case.³³

When separate corporations are a “single employer,” they are treated as one entity for one or more employment law purposes, including satisfaction of statutory coverage thresholds. In this regard the single employer doctrine is distinctly different from some other doctrines, such as the “joint employer” doctrine, that are frequently confused with the single employer doctrine.

²⁹But see EEOC Compliance Manual, note 25, *supra*, which takes the position that the doctrine applies when “the *operations* of two or more employers are ... so intertwined that they can be considered the single employer.” However, it does not appear that the EEOC or any other party has successfully asserted the doctrine in a reported case without common controlling ownership. The best case for application of the doctrine without common ownership might be where non-profit institutions are not “owned” but are subject to common government or financial control. A few courts have entertained application of the doctrine in such cases. See, e.g., *Tatum v. Everhart*, 954 F.Supp. 225, 229 (D. Kan. 1997) (but finding that separately incorporated nonprofit organizations were not a single employer).

³⁰See text accompanying notes 123, 124, 154-57, *infra*.

³¹Title VII’s rules of coverage require the same headcount of employees for public employers as for private firms. However, the prevailing view is that the single employer doctrine does not apply to public entities. *Sandoval v. City of Boulder, Colo.*, 388 F.3d 1312, 1323 & n. 3 (10th Cir. 2004) (“Absent some indication that the state’s decision was motivated by a desire to circumvent the civil rights laws or other laws, principles of comity counsel federal courts not to be too quick to erase organizational dividing lines drawn up by state authorities.”). Accord, *Lyes v. City of Riviera Beach, Fla.*, 166 F.3d 1332 (11th Cir. 1999).

³²See generally Walter Siebert & Dawn Webber, *Joint Employer, Single Employer, and Alter Ego*, Labor Lawyer (Fall 1987).

³³See, e.g., EEOC Compliance Manual, note 25, *supra*; *Sandoval v. City of Boulder, Colo.*, 388 F.3d 1312 (10th Cir. 2004).

The joint employer doctrine recognizes that one employee can have two or more separate employers, who need not be affiliated by common control or ownership. Joint employers are not treated as a single entity.³⁴ For example, one or both might be exempt small firms even if the combined total of their employees is in excess of the statutory threshold.

The single employer doctrine is also sometimes confused with other doctrines that have a potentially more radical effect, effectively piercing the corporate veil and dissolving the legal separation between two corporate entities or between a corporation and its owner. The alter ego doctrine, for example, includes consideration of many of the same factors as the single employer doctrine, but it includes proof of the owners' intent to evade the law by separate incorporations. Even if the alter ego doctrine is used for a limited purpose in a particular proceeding, the implications of a finding of intent to evade the law or to defraud employees and their representatives could have farther-reaching implications. In contrast, the single employer doctrine does not require or imply any wrongful intent on the part of the entities that comprise the employer. A finding of single employer status does not necessarily taint the separateness of the affiliated corporations for any other purpose. The EEOC's official position in this regard is more aggressive. According to the Commission, the single employer doctrine can impose financial liability on all the affiliated corporations based on the discriminatory act of any one of them.³⁵ For reasons I explain in the course of this article I take a more limited view, that proof of the requirements for single employer status for purposes of coverage would not necessarily justify piercing the corporate veil for purposes of liability without additional circumstances. The doctrine serves its most important role in discrimination law simply by denying an exemption firms that do not really fit within Congress's likely idea of the exempt class. Whether the doctrine has other proper functions in employment discrimination law is a separate issue.

C. An Example of the Doctrine And its Critics: *Papa v. Katy Industries, Inc.*

Not very long after Congress enacted Title VII, federal courts held in a number of cases

³⁴See *Arculeo v. On-Site Sales and Marketing, LLC*, 425 F.3d 193 (2d Cir. 2005); Walter Siebert & Dawn Webber, *Joint Employer, Single Employer, and Alter Ego*, Labor Lawyer (Fall 1987).

³⁵The EEOC also takes the view in its Compliance Manual that if two firms constitute a "single employer," an administrative charge against one is a charge against the other, and that "relief can be obtained from any of the entities that form part of the integrated enterprise." EEOC Compliance Manual, Section 2: Threshold Issues, sec. 2-III-B-1-a-iii, online at <http://www.eeoc.gov/policy/docs/threshold.html#2-III-B-1-a-iii>, (last visited on March 26, 2006). See also *Dunn v. Tuter Group*, 181 F.R.D. 653 (D. Kan. 1998); *E.E.O.C. v. McLemore Food Stores, Inc.*, 1978 WL 13922 (W.D. Tenn. 1978). But this does not necessarily mean that a court would treat the service of judicial process against one as service of process against the other, or that a court would hold one liable for the actions of the other or for a judgment against the other.

that the single employer doctrine does limit the small firm exemption.³⁶ Judicial support for the doctrine appeared to build through the nineteen eighties and early nineties,³⁷ and the EEOC currently takes a particularly strong position in favor of the doctrine.³⁸ Lately, however, some courts have questioned whether the single employer doctrine is appropriate for questions of coverage under the discrimination laws. A recent example of judicial resistance to the doctrine is *Papa v. Katy Industries, Inc.*³⁹ In *Papa*, Judge Posner wrote for a panel of the U.S. Court of Appeals for the Seventh Circuit that rejected the single employer doctrine for purposes of the small firm exemption under Title VII, the ADA and the ADEA. The better rule, Judge Posner and other critics say, is the one that serves for most other purposes: A corporation stands alone as a person and as an employer, provided its owners do not give cause to pierce the corporate veil.

Papa was not the first occasion for a federal court to question whether the doctrine properly limits the small firm exemption. An initial problem for the courts has been the perceived lack of text in the discrimination statutes to support an exception to the usual rule that each corporation is a separate person. In *Lusk v. Foxmeyer Health Corp.*,⁴⁰ for example, Judge Jolly of the Fifth Circuit wrote that the ADEA's definition of "employer" (which is modeled after the Title VII definition) "plainly contains no basis" for treating separately incorporated entities as one.⁴¹ The court's dissatisfaction with the single employer doctrine might have been aggravated by the particular application proposed by the plaintiff, which was to pierce the corporate veil and extend liability, rather than to overcome the small firm exemption. In any event, the court found itself bound by Fifth Circuit precedent not to reject the doctrine out of hand.⁴²

In lieu of a clear statutory mandate for the single employer doctrine, one might look to a

³⁶See text accompanying notes 170-75, *infra*.

³⁷See, e.g., *Armbruster v. Quinn*, 711 F.2d 1332, 1337 (6th Cir.1983).

³⁸EEOC Compliance Manual, Section 2 (Threshold Issues), pt. III (Covered Parties), B.1.a.iii(a), available at <http://www.eeoc.gov/policy/docs/threshold.html#2-III-B-1-a-iii>

³⁹166 F.3d 937 (7th Cir.), cert. denied, 528 U.S. 1019, 120 S.Ct. 526 (1999).

⁴⁰129 F.3d 773 (5th Cir. 1997).

⁴¹*Id.* at 776.

⁴²*Id.* The Fifth Circuit continues to acknowledge the single employer doctrine. However, for purposes of affiliate liability in employment discrimination law the Fifth Circuit applies a much eviscerated form of the doctrine, in which the proponent ordinarily fails as a matter of law if he lacks proof that the separately incorporated entity was actually involved in the decision of which the plaintiff complains. *Johnson v. Crown Enterprises, Inc.*, 398 F.3d 339 (5th Cir. 2005).

pair of Supreme Court decisions⁴³ arguably endorsing the doctrine as a matter of federal common law. However, the scope of these decisions is open to question. In each case the Court considered the single employer doctrine in one of its early settings, collective bargaining. Critics urge that the single employer doctrine's well-established role in collective bargaining does not support the doctrine's extension into employment discrimination law. In *Nesbit v. Gears Unlimited, Inc.*,⁴⁴ for example, Judge Ambro admitted a "surface appeal" to the idea that collective bargaining laws and employment discrimination laws serve the same purpose—regulating "employer-employee relations," and that a doctrine designed for one law might also serve the other.⁴⁵ In Judge Ambro's view, however, the single employer doctrine properly serves purposes unique to collective bargaining law, such as establishing a collective bargaining unit,⁴⁶ or fulfilling Congress's mandate for "expansive" NLRB jurisdiction.⁴⁷ In contrast, Title VII is a law of limited jurisdiction, and one important jurisdictional limit is the small firm exemption. Judge Ambro believed that allowing complainants to overcome the small firm exemption by invoking the single employer doctrine would be inconsistent with the exemption's purpose: "to spare small companies the considerable expense of complying with the statute's many-nuanced requirements."⁴⁸

Uncertainty about the viability of the single employer doctrine was an opportunity for Judge Posner to offer his own analysis of the problem in *Papa v. Katy Industries, Inc.*⁴⁹ In *Papa*, Judge Posner argued that the courts should completely reject the single employer doctrine, or at least to confine it to collective bargaining law.

Papa was a consolidation of two cases in which employer defendants asserted that they were too small to be "employers" under federal employment discrimination laws. In the first case, James Papa sued two affiliated corporations—a parent company and the subsidiary that

⁴³Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 85 S.Ct. 876, 13 L.Ed.2d 789 (1965); South Prairie Construction Co. v. Local No. 627, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976).

⁴⁴347 F.3d 72 (3d Cir. 2003).

⁴⁵Id. at 85.

⁴⁶Id., citing Marc Crandley, Note, *The Failure of the Integrated Enterprise Test: Why Courts Need to Find New Answers to the Multiple-Employer Puzzle in Federal Discrimination Cases*, 75 Ind. L.J. 1041, 1059-71 (2000).

⁴⁷Id., citing Crandley, note 46, supra, at 1065-66. According to this view, the NLRB's jurisdiction is "expansive" because it has authority to address any case in which a labor dispute might have an impact on commerce. See also text accompanying notes 92-111 and 117- 121.

⁴⁸347 F.3d at 85.

⁴⁹166 F.3d 937 (7th Cir.), cert. denied, 528 U.S. 1019, 120 S.Ct. 526 (1999).

employed him—for alleged age and disability discrimination.⁵⁰ Papa lost his job with the subsidiary after the parent became unhappy with the subsidiary’s poor financial performance and ordered the subsidiary to close certain manufacturing operations. Closing these operations required layoffs, including the elimination of Papa’s job, but it was the subsidiary and not the parent that selected Papa in particular for layoff.⁵¹ When Papa charged age and disability discrimination, the subsidiary asserted the small firm defense. Evidently, the subsidiary had employed too few employees to meet the twenty employee threshold of the ADEA or even the fifteen employee threshold of the ADA. But the parent corporation, which controlled 100 percent of the stock in the subsidiary through an intermediate corporate shell, owned many other subsidiaries collectively employing more than a thousand employees.⁵²

The companion case, *EEOC v. GJHSRT, Inc.*, presented similar features. The EEOC sought relief for Richard Mueser for alleged retaliation in violation of Title VII. Mueser’s nominal employer, GJHSRT, employed too few employees to qualify as a covered employer, but the EEOC also named Frederick Transport Group, Inc., a holding company that owned GJHSRT and other subsidiaries. The EEOC alleged that the entire family of corporations constituted a single employer with more than enough employees to overcome the small employer defense.⁵³

Both cases offered a plausible basis for the single employer doctrine. Each nominal employer was a member of a family of corporations wholly owned by a parent or holding company, thus satisfying the “common ownership” factor as to any of the affiliated corporations. In each case, there was at least some evidence of the second factor: common management. In *Papa*, the parent and subsidiary were governed by the same officers and directors, and the subsidiary’s managers reported directly to the president of the parent company.⁵⁴ In *GJHSRT*, the parent and subsidiary shared the same president, and two individuals who were primary shareholders served on both boards of directors.⁵⁵ As for the third factor, centralized labor

⁵⁰Mr. Walsh’s age discrimination claim was based on the Age Discrimination in Employment Act, 29 U.S.C. §§630 et seq. His disability discrimination claim was based on the Title I of the Americans with Disabilities Act, 42 U.S.C. §§12111 - 12117. Each of these acts defines “employer” as a “person” who employs a minimum number of employees. See 29 U.S.C. § 630(b) (twenty employees); 42 U.S.C. §12111(5)(A) (fifteen employees).

⁵¹166 F.3d at 939. See also Reply Brief of Plaintiff-Appellant, 1998 WL 34078635. In the lower court proceedings Papa evidently argued that the parent directed the selection of employees for layoff, but the district court found otherwise, and its finding was not contested on appeal. See *Papa v. Katy Industries, Inc.*, 1998 WL 142390, p. 3 (N.D. Ill.1998) (unpublished).

⁵²166 F.3d at 939.

⁵³*Id.* See also 1998 WL 34179787.

⁵⁴166 F.3d at 939; Brief of Plaintiff-Appellant, 1998 WL 34078634.

⁵⁵166 F.3d at 939; Brief of Defendants-Appellees, 1998 WL 34179787.

management relations, the evidence showed that the respective parent companies pooled the workforces of their subsidiaries, including the employer subsidiaries, into common employee benefit plans, and to some degree they provided centralized administration of payroll.⁵⁶

The fourth factor, interrelation of operations, was the weak link for both cases. Although the parent corporations provided their subsidiaries with some general administrative services, such as payroll, neither employer subsidiary was integrated into a common enterprise with its parent or other affiliated corporations. Indeed, the facts in *Papa* do not disclose any connection between the employer's manufacture of printing presses and the business of any of the affiliated companies.⁵⁷ In *GJHSRT* the argument for interrelationship of operations was somewhat stronger because all members of the corporate family engaged in the same type of business: trucking. However, Judge Posner's opinion states that each of the affiliated corporations was engaged in a "different phase of the trucking business and at a different location."⁵⁸ Evidently, the EEOC failed to present evidence that the different trucking businesses shared customers or facilities, or were integral parts of a common venture.⁵⁹

The lower courts in each case granted summary judgment in favor of the defendants based on the small firm defense, finding that the facts did not support treating either family of corporations as a single employer. Judge Posner's opinion affirmed for a completely different reason. Judge Posner wholly rejected the single employer doctrine, at least for purposes of the small firm defense in employment discrimination law.

Like Judge Jolly in *Lusk*, Judge Posner evidently found nothing in the language of Title VII or the other discrimination laws that would support the single employer doctrine. The Title VII version of the doctrine, Judge Posner surmised, originated in court decisions that had "copied verbatim" from collective bargaining law,⁶⁰ evidently without sufficient forethought.⁶¹ In contrast with the some other jurisdictions, however, the Seventh Circuit lacked decisive precedent for

⁵⁶166 F.3d at 939; Brief of Plaintiff-Appellant, 1998 WL 34078634; Brief of Defendants-Appellees, 1998 WL 34179787.

⁵⁷In another case, *U.S. v. Schurrer*, 156 F.3d 1245, 1998 WL 544308, p. 1 (Table) (10th Cir. 1998) (unpublished), the court described the same parent company (Katy Industries) as a "mini conglomerate" that bought and sold a variety of consumer, industrial and machinery manufacturing businesses.

⁵⁸166 F.3d at 939; Brief of Defendants-Appellees, 1998 WL 34179787.

⁵⁹Brief of Defendants-Appellees, 1998 WL 34179787.

⁶⁰*Id.*

⁶¹*Id.* at 942-43 (courts that rely on the doctrine are "insufficiently sensitive to the bearing of context on the proper formulation of rules of affiliate liability").

adopting the doctrine in an employment discrimination case.⁶² Nor was Judge Posner persuaded by the Supreme Court precedents applying the doctrine in the collective bargaining setting. Like Judge Ambro in *Nesbit*, Judge Posner conceded that “there is an argument” that collective bargaining law requires a single employer doctrine,⁶³ but he was unenthusiastic for the doctrine for any purpose. The doctrine’s four factors, he argued, were vague, unweighted, and frequently pointed in opposite directions.⁶⁴ The Supreme Court had sanctioned the doctrine only for collective bargaining law,⁶⁵ and the doctrine was properly confined to that purpose. Transplanted to employment discrimination law, the single employer doctrine would frustrate the goal of the small firm exemption, which was “To spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail.”⁶⁶ Judge Posner explained at some length why it might be good policy to exempt small firms from these burdens, and why the single employer doctrine is inconsistent with this policy. Judge Posner’s policy and economic arguments are examined in greater detail in Part IV of this article.

Although Judge Posner rejected that the single employer doctrine should be used to

⁶²Judge Posner discounted dicta in earlier decisions of the Seventh Circuit that appeared to endorse the doctrine. None of the earlier Seventh Circuit decisions involved a *successful* assertion of the single employer doctrine in an employment discrimination case. In two Seventh Circuit cases, *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676 (7th Cir, 1998), and *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577 (7th Cir. 1993), the court found the facts insufficient to require reversal of district court findings that separately incorporated entities did not constitute single employers. In a third Seventh Circuit case, *E.E.O.C. v. State of Illinois*, 69 F.3d 167 (7th Cir. 1995), the court reversed a district court judgment that treated the State of Illinois as the real employer of teachers employed by local public school districts. In an opinion written by Judge Posner, the court rejected the EEOC’s argument that the relationship between the State and the school districts was analogous to that of a single employer/integrated enterprise. “The principle that animates the [single employer] doctrine is not limited to the technical relation of parent to subsidiary corporation,” Judge Posner wrote, but he found the facts insufficient to support a single employer claim. *Id.* at 171.

⁶³*Id.* at 940, 942. Judge Posner cited two situations involving a possibly appropriate application of the single employer doctrine: Where the combined operations of integrated firms might satisfy the NLRB’s discretionary jurisdictional standards, and where an appropriate bargaining unit of employees might include employees of separately incorporated firms in an integrated enterprise.

⁶⁴*Id.* at 940.

⁶⁵*Id.* at 942-43. See *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 85 S.Ct. 876, 13 L.Ed.2d 789 (1965); *South Prairie Construction Co. v. Local No. 627*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976).

⁶⁶*Id.*

extend employer coverage, he offered three situations in which a corporate employer's affiliation with another corporation might justify aggregating the two entities' combined workforces. The first was where the facts would support piercing the corporate veil to make one corporation liable for the debts of the other, according to traditional principles.⁶⁷ The second was where an enterprise had "split itself up into a number of corporations, each with fewer than the statutory minimum number of employees, for the *express purpose* of avoiding liability under the discrimination laws."⁶⁸ The third was where the parent or other affiliated corporation *actually took the action* about which the plaintiff complained, such as by ordering the employer subsidiary to adopt an unlawful policy or to discharge a particular employee for unlawful reasons.⁶⁹ In other words, Judge Posner would not treat separate entities as a single employer for purposes of coverage, unless a court would be justified in extending *liability* to both entities under traditional principles (excluding the single employer doctrine). Neither of the cases before the court in *Papa* included facts sufficient to justify disregard of separate incorporation based on the three scenarios envisioned by Judge Posner.⁷⁰ Thus, the Seventh Circuit upheld the lower courts' dismissal of the plaintiffs' claims based on the small firm exemption defense.⁷¹

The position of Judge Posner and others who reject the single employer doctrine in employment discrimination law can be summarized as follows. First, the NLRB invented the single employer doctrine to serve special purposes in the law of collective bargaining, and the doctrine's function in collective bargaining is distinctively different from its proposed function in employment discrimination law. Second, neither Title VII nor the other federal discrimination statutes provide any textual foundation for the doctrine. Finally, the legislative history and likely purpose of the small firm exemption weigh against the single employer doctrine. The following sections of this article will take a closer look at each of these arguments.

II. The Historical Precedent for the Single Employer Doctrine

Critics of the single employer doctrine typically assume that the doctrine evolved for purposes unique to the Wagner Act and different from the purposes for which plaintiffs and the EEOC seek to enlist the doctrine in employment discrimination cases. The history of the doctrine is actually much more complex and in many respects contrary to the critics' assumptions. An accurate account is important for several reasons. First, the doctrine's history may be relevant to the effect and scope of the Supreme Court's decisions upholding the doctrine in specific contexts. Of course, the mere fact that the Wagner Act and Title VII are two distinctly

⁶⁷166 F.3d 940-41.

⁶⁸166 F.3d at 941 (emphasis added).

⁶⁹Id.

⁷⁰Id. at 942.

⁷¹Id. at 943.

different laws might be reason enough to deny that the Court's decisions under the Wagner Act compel any particular interpretation of Title VII. The greater significance of history is its usefulness in understanding Congress's likely knowledge, experience, and intent in adopting the small firm exemption. History makes a persuasive case for concluding that Congress anticipated the single employer doctrine as a limit on the small firm exemption.

A. Pre-Wagner Act Origins of the Single Employer Doctrine

Describing the single employer doctrine as a peculiar outgrowth of the Wagner Act is to suggest that the doctrine is an unnatural and unwelcome interloper in employment discrimination law or anywhere else beyond its original domain. But this description of the doctrine's origin overlooks the doctrine's use for a variety of purposes in employment relations before the Wagner Act. In 1935 when Congress enacted the Wagner Act, the idea of treating multiple corporations as if they were a single employer for purposes of employment law was neither novel nor particularly controversial. The idea was partly rooted in an even earlier set of laws regulating the employee relations of railroads.

The railroad industry was an early testing ground for federal regulation of labor relations because its effect on interstate commerce was indisputable at a time when the Commerce power was still quite limited.⁷² As a result, early federal labor law was shaped in part by the law of common carriers. One important aspect of the law of common carriers was that a passenger injured by one incorporated railroad could sue another corporation that dominated the "system" of interlocking railroad corporations of which the first corporation was a part.⁷³ It was no great stretch for the courts to apply the same approach for the benefit of injured railroad workers in common law personal injury actions.⁷⁴ When Congress enacted the Federal Employers Liability Act in 1908,⁷⁵ the courts continued the practice of treating related railroad corporations as a

⁷²See *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 553-56, 57 S.Ct. 592, 602-604 (1937). See also Ames W. Ely, Jr., "*The Railroad System Has Burst Through State Limits*": *Railroads and Interstate Commerce, 1830-1920*, 55 Ark. Law Rev. 933 (2003)

⁷³*Davis v. Alexander*, 269 U.S. 114, 46 S.Ct. 34, 70 L.Ed. 186 (1925) ("Where one railroad company actually controls another and operates both as a single system, the dominant company will be liable for injuries due to the negligence of the subsidiary company."); *Lehigh Valley R. Co. v. Dupont*, 128 F. 840, 845-46 (2d Cir. 1904); *Ross v. Pennsylvania R. Co.*, 21 Gummere 536, 148 A. 741 (N.J. Err. & App. 1930). See also *Bethlehem Steel Co. v. Raymond Concrete Pile Co.*, 141 Md. 67, 118 A. 279, 284-85 (Md. 1922) (discussing tort liability of common carriers).

⁷⁴See, e.g., *Lehigh Valley R. Co. v. Delachesa*, 145 F. 617 (2d Cir. 1906); *St. Louis & S.F.R. Co. v. Arms*, 136 S.W. 1164 (Tex. Civ. App. 1911).

⁷⁵Act of April 22, 1908, ch. 149, 35 Stat. 65, codified at 45 U.S.C. secs. 51 - 60.

single carrier.⁷⁶

Railroads also provided the first setting for a federal law of collective bargaining. During the early twentieth century, when federal law depended mainly on voluntary compliance with government mediation,⁷⁷ unions representing railway workers sometimes organized according to systems of affiliated railways, such as the “Pennsylvania System” which combined a number of separately incorporated railroads.⁷⁸ In the early stages of collective bargaining law it was purely a matter of private arrangement between the parties whether a union treated a group of railroad corporations as a single employer and whether the affiliated corporations behaved as a single employer.⁷⁹ The practice began its evolution into a rule of law in 1926, when Congress enacted

⁷⁶*Erie R. Co. v. Krysienski*, 238 F. 142 (2d Cir. 1916); *Eddings v. Collins Pine Co.*, 140 F.Supp. 622 (D.C. Cal. 1956); *Conry v. Baltimore & O. R. Co.*, 112 F.Supp. 252, 255 (D.C. Pa. 1953); *Eastern Ry. Co. of New Mexico v. Ellis*, 153 S.W. 701 (Tex. Civ. App. 1912); *Wichita Falls & N.W. Ry. Co. v. Puckett*, 53 Okla. 463, 157 P. 112 (1915). Treating separately incorporated railroads as if they were one was an exception to the rule, already well established at the beginning of the Twentieth Century, that separately incorporated businesses, including railroads, are separate legal entities. See *Peterson v. Chicago, R.I. & P.R. Co.*, 205 U.S. 364, 27 S.Ct. 513 U.S. (1907).

⁷⁷The earliest substantial federal regulation of labor relations in the railway industry occurred during World War I, when the federal government seized the railroads and controlled relations with the unions. Act of Congress of August 29, 1916, c. 418, 39 Stat. 619, 645. See also *Pennsylvania System Board of Adjustment of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Pennsylvania R Co*, 1 F.2d 171 (3d Cir. 1924) (describing the wartime seizure).

At the end of the War, Congress enacted the Transportation Act of February 28, 1920, ch. 91, 41 Stat. 456, 469 (1920), to resolve labor disputes by arbitration. However, in *Pennsylvania R. Co. v. U.S. Railroad Labor Board*, 261 U.S. 72, 43 S.Ct. 278 (1923), the Supreme Court held that the Railroad Labor Board’s decisions were unenforceable except by force of public opinion.

⁷⁸See *Pennsylvania R. R. System and Allied Lines Federation No. 90 v. Pennsylvania R. Co.*, 267 U.S. 203, 205, 45 S.Ct. 307, 307, 69 L.Ed. 574 (1925). The Pennsylvania Railroad system’s family tree is outlined in Robert T. Netzlof, *Corporate Geneology: The Pennsylvania Railroad*, online at <http://broadway.pennsyr.com/rail/prr/Corphist/prr1.html>. See also *New York Central Switchmen’s Union of North America v. National Mediation Board*, 135 F.2d 785, 791 (D.C. Cir. 1943) (describing the New York Central Railroad system and the unions that represented employees of the carriers in that system).

⁷⁹The Railway Labor Board had no enforceable authority under the Transportation Act. Its function was mainly to provide a public forum where the force of public opinion might weigh on the parties and force them to end their dispute. See *Pennsylvania R. Co. v. U.S. Railroad Labor Board*, 261 U.S. 72, 43 S.Ct. 278 (1923).

the Railway Labor Act⁸⁰ and granted real enforcement authority to the Railway Labor Board. Over the next decade, the RLB developed a line of precedent for treating affiliated railroads as a “single carrier” for purposes of collective bargaining. Under the single carrier rule, employees of multiple affiliated corporations could be combined into a single unit to bargain collectively with the carrier system:

If the operations of a subsidiary are jointly managed with operations of other carriers and the employees have also been merged and are subject to the direction of a single management, then the larger unit of management is taken to be the carrier rather than the individual subsidiary companies.⁸¹

In 1934 Congress codified the doctrine by amending the RLA’s definition of “carrier” to include “any railroad ... and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service” for transportation by railroad.⁸² With this endorsement, the single carrier rule became the basis not only for system-wide bargaining units but also for extending the RLB’s authority to firms that, standing alone, were not “carriers” but were affiliated with carriers.⁸³

At about the same time, state courts were developing still another use for a single employer doctrine as part of the of common law of secondary boycotts in collective bargaining. In a secondary boycott, a union attempts to bring additional pressure to bear against a particular employer (the “primary” employer) by threatening to induce a strike or other action against another employer (the “secondary” or “neutral” employer) to force the neutral employer to cease doing business with the primary employer. Until the Taft-Hartley Act,⁸⁴ the states prohibited or restricted secondary boycotts mainly as a matter of tortious interference with the neutral’s business, but a union might assert the defense that the putative neutral was not really separate from the primary employer or was not neutral in the dispute. In some cases state courts held that separately incorporated employers could be treated as one, exposing the putative neutral employer to the same picketing as the primary employer.⁸⁵

⁸⁰Act of May 20, 1926, c. 347, 44 Stat. 577 (1920).

⁸¹National Mediation Board, First Annual Report (for fiscal year ending June 30, 1935), p. 22, *quoted in* Switchmen’s Union of North America v. National Mediation Board, 135 F.2d 785, 791 (D.C. Cir. 1943) (upholding the single carrier doctrine).

⁸²Act of June 7, 1934, c. 426, 48 Stat. 926 (1934), codified at 45 U.S.C. §151 First.

⁸³See *Thibodeaux v. Executive Jet Intern., Inc.*, 328 F.3d 742 (5th Cir. 2003) at 751.

⁸⁴Act of June 23, 1947, c. 120, 61 Stat. 136 (1947).

⁸⁵See, e.g., *Consolidated Realty Co. v. Dyers, Finishers and Bleachers Federation*, 137 N.J. Eq. 413, 45 A.2d 132 (N.J.Ch. 1946); *Newark Ladder & Bracket Sales Co. v. Furniture*

B. The Wagner and Taft Hartley Acts

The single employer doctrine's headwaters may lie in the early railway labor and tort laws, but the doctrine's robust evolution and current notoriety are due mainly to the Wagner Act. The Wagner Act extended federal collective bargaining law to any labor dispute "affecting commerce," without limitation to any particular industry.⁸⁶ The Act was also the charter for a new generation of labor lawyers, and the single employer doctrine became part of their language.

The single employer doctrine continued its evolution as a multi-purpose tool in the hands of the National Labor Relations Board. Critics who oppose extension of the doctrine beyond collective bargaining assert that the Board's uses for the doctrine were unique to collective bargaining. To be sure, most of the NLRB's applications for the doctrine have no clear corollary in employment discrimination law. However, one of the Board's earliest uses for the doctrine was to reach firms that might be exempt from the Board's jurisdiction unless they were combined with affiliated firms into a single employer. Critics find this use of the doctrine distinguishable from the usual small firm/single employer dispute under Title VII. According to the critics, the Board developed the single employer doctrine as one of a set of rules under which the Board *relinquished* some of its otherwise "expansive" jurisdiction.⁸⁷ Indeed, the Board has frequently used the single employer doctrine to retrieve authority over small firms that would otherwise fall outside the Board's *self-imposed* jurisdictional standards. However, a full account of the Board's practices reveals that the Board's first use of the doctrine was to secure the widest jurisdiction possible. In any event, a multi-purpose single employer doctrine was so well known and established in collective bargaining and other aspects of employment law by 1964 that the drafters of Title VII certainly must have anticipated its potential effect on the small firm exemption.

The text of the Wagner Act did not demand a single employer doctrine. In contrast with the Railway Labor Act, the Wagner Act's declaration of a single employer doctrine was subtle at best, and arguably fictive. The only language in the Act that could be viewed as an indirect

Workers Union Local 66, 125 N.J. Eq. 99, 4 A.2d 49 (N.J.Ch. 1939); *Hydrox Ice Cream Co. v. Doe*, 159 Misc. 642, 289 N.Y.S. 683 N.Y.Sup. (1936). But see *State v. Casselman*, 69 Idaho 237, 205 P.2d 1131 (Idaho 1949) (refusing to disregard separate incorporation for purposes of secondary boycott law).

⁸⁶29 U.S.C. secs. 159(c)(1), 160(a).

⁸⁷See the comments of Judge Ambro, at text accompanying notes 46-48, *supra*, and Judge Posner, at text accompanying note 63, *supra*. See also *Tatum v. Everhart*, 954 F.Supp. 225, 228 (D. Kan. 1997); Note, *The Failure of the Integrated Enterprise Test: Why Courts Need to Find New Answers to the Multiple-Employer Puzzle in Federal Discrimination Cases*, 75 Ind. L.J. 1041, 1052-53 (2000).

confirmation of the single employer doctrine was the Act's unusual definition of "person:"

"person" includes *one or more* individuals, labor organizations, partnerships, associations, *corporations*, legal representatives, trustees, trustees in cases under Title 11, or receivers.⁸⁸

This definition, which suggests that "one or more ... corporations" could be a single "person" for purposes of federal collective bargaining law, was apparently unprecedented as a statutory definition of "person," and rarely followed in other statutes⁸⁹—until thirty years later when Congress borrowed the same definition for Title VII.

Although the Act's definition of "person" might have provided the statutory basis for a single employer doctrine, it did not clearly provide any reason for such a doctrine. The Act lacked a small firm exemption. At the time, a small firm exemption would have seemed superfluous, because there were serious doubts whether a federal law regulating more than interstate transportation or communications could survive constitutional review. The limits of Congress's power being uncertain and likely to be narrow, Congress drafted the Wagner Act to reach as far the Supreme Court might ultimately permit. It authorized the NLRB to resolve employee representation disputes "affecting commerce,"⁹⁰ and to prevent unfair labor practices "affecting commerce."⁹¹ If the newly authorized Board reached too far, the Court could reign the Board back to the limits of Congress's constitutional power to regulate commerce, and the essence of the Act would survive for labor disputes indisputably "affecting commerce."⁹² If the

⁸⁸29 U.S.C. §152(1) (emphasis added).

⁸⁹One other statute of the New Deal era that contained this definition of "person" was the Walsh-Healey Act, Ch. 881, 49 Stat. 2036 (1936), codified at 41 U.S.C. §§35 - 45. The Walsh-Healey Act required federal contracts for the manufacture or furnishing of "materials, supplies, articles or equipment" to abide by certain minimum terms and conditions of employment. Coverage under the Act extended to contractors regardless of annual revenue or workforce size, although coverage did depend on the amount of the particular contract. Consequently there was little occasion to apply a single employer doctrine to extend coverage to small firms. But see *U. S. v. Davison Fuel & Dock Co.*, 371 F.2d 705 (4th Cir. 1967) (holding that separately incorporated enterprises, subject to common ownership, constituted the manufacturer of goods subject to the Act's minimum employment standards, and that the owner of these enterprises was responsible for the affiliated companies' compliance).

⁹⁰29 U.S.C. §159(c)(1).

⁹¹29 U.S.C. §160(a).

⁹²One of the industries most obviously "affecting commerce," the railroads, were already subject to the Railway Labor Act, 45 U.S.C. §§151 - 163, and Congress denied the NLRB any authority over that industry. 29 U.S.C. §152(2). Thus, in the worst case scenario, the Court's very restrictive view of interstate commerce could have left Board with only a small portion of

Court moved toward a more permissive view, the Board's realm would automatically expand with the Court's view.

At the outset, small firms had little to fear from the Wagner Act unless they were directly involved in classic interstate activity, like transporting goods across state lines. Considering the Court's decisions before 1935, even some very large employers might have expected to fall outside the NLRA's coverage. They could have taken comfort in cases such as *Hammer v. Dagenhart*,⁹³ where the Court invalidated Congress's first attempt at a child labor law. In that case, the Court held that federal authorities lacked the power to seize goods manufactured by young children even if the goods were destined to cross state lines or did in fact cross state lines.⁹⁴

It was against this backdrop that the NLRB decided its first case, an unfair labor practice proceeding against the Greyhound Bus Lines family of corporations. The Greyhound group operated a number of separately incorporated bus lines and supporting businesses such as repair and maintenance garages.⁹⁵ One might have thought a bus system transporting passengers across state lines was clearly engaged in interstate commerce, and that its labor disputes were undoubtedly matters "affecting commerce." The Board, however, left nothing to chance, particularly the chance that the Court might view separately incorporated garages and maintenance facilities as purely intrastate enterprises.⁹⁶ In asserting its jurisdiction, the Board emphasized that the respondent corporations operated "an integrated system"⁹⁷ of interstate transportation; that a holding company owned stock interests in all of these corporations and had a controlling interest in most of them; and that common control and integration were strengthened by "a system of interlocking officers and directors."⁹⁸ In sum, the Board stated most of the elements of what observers later described as the single employer or integrated enterprise rule.⁹⁹ The Board did not specifically refer to precedents under the Railway Labor Act,

the U.S. economy in its jurisdiction.

⁹³247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101 (1918).

⁹⁴*Id.* at 272, 38 S.Ct. at 531, quoting *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439, 35 S. Ct. 902, 59 L. Ed. 1397 (1915).

⁹⁵*Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1 (1935).

⁹⁶Many of the events that were the subject of the proceeding occurred at the system's Pittsburgh garage. *Id.* at 5-6.

⁹⁷*Id.* at 3.

⁹⁸*Id.* at 4.

⁹⁹See also *Consolidated Edison Company of New York, Inc., and its Affiliated Companies*, 4 NLRB 71, 77-78 (1937) (summarizing evidence that the respondent companies formed a "unitary and integrated system" with a clear impact on interstate commerce);

but it may be more than a coincidence that the NLRB's first use of the single employer doctrine involved an integrated transportation system.

The Board found that the respondent companies and the entities with which they were affiliated had committed a number of unfair labor practices, including unlawfully discharging employees. The named respondents included some, but not all of the companies in the "integrated" Greyhound system, and the named corporations petitioned the Court of Appeals for the Third Circuit for review of the Board's decision.¹⁰⁰ They asserted to the court that they were not the employers of the employees in question, and that the real employers were separately incorporated subsidiaries not named as respondents.¹⁰¹ The court rejected the argument with scarcely a word.¹⁰² The Board, with the Third Circuit's blessing, had run roughshod over Greyhound's separately incorporated units and treated them as one employer, evidently to assure that local subsidiaries would not escape the Board's interstate commerce-based jurisdiction, and perhaps to avoid the necessity of naming each entity as a respondent for all the unfair labor practice charges.

Within a few months of the Board's *Greyhound Lines* decision, the Supreme Court seemed to confirm the Board's worst fears about jurisdiction. In *Carter v. Carter Coal Co.*,¹⁰³ the Court reaffirmed its view that "commerce" equated with "transportation, purchase, sale, and exchange of commodities between the citizens of the different states."¹⁰⁴ On this ground, the Court quashed a law regulating collective bargaining in the coal industry, because mining and production of goods were not interstate commerce.¹⁰⁵ For a moment, the Board seemed destined

Bloedel-Donovan Lumber Mills, 8 NLRB 230 (1938).

¹⁰⁰*N.L.R.B. v. Pennsylvania Greyhound Lines*, 91 F.2d 178 (3d Cir. 1937), reversed, 303 U.S. 261, 58 S.Ct. 571, 82 L.Ed. 831(1938). The Supreme Court reversed the Third Circuit's decision for reasons not pertinent to this discussion.

¹⁰¹*Id.* at 180.

¹⁰²The main opinion of the court did not mention the argument; and the concurring opinion of Justice Biggs tersely rejected it, stating only that "There was ample evidence before the Board to sustain its finding that the discharged employees were in fact mainly employed by the respondent ... for the benefit of subsidiary corporations engaged in actual transportation operations in interstate commerce." *Id.*

¹⁰³298 U.S. 238, 56 S.Ct. 855 (1936).

¹⁰⁴*Id.* at 298, 56 S.Ct. at 867.

¹⁰⁵See Bituminous Coal Conservation Act of 1935, Aug. 30, 1935, c. 824, §§ 1 to 23, 49 Stat. 991, repealed, Act of Apr. 26, 1937, c. 127, § 20(a), 50 Stat. 90.

to rule over comparatively few employers of any size.¹⁰⁶ The following year, however, the Court issued its decision in *N.L.R.B. v. Jones & Laughlin Steel Corp.*,¹⁰⁷ adopting the broad view of the commerce power. The Board's statutory jurisdiction, drawn to reach as far as the commerce power might permit, suddenly stretched to include nearly any but the very tiniest of employers.¹⁰⁸ *Jones & Laughlin Steel* was quickly followed by *N.L.R.B. v. Fainblatt*,¹⁰⁹ rejecting an employer's argument that it was beyond the Board's reach by virtue of the relatively small part of its business connected to an interstate passage of goods. Congress's power extended to all commerce "be it great or small."¹¹⁰ For purposes of statutory coverage, the amount of interstate commerce was important "only to the extent that Congress ... excluded commerce of small volume from the operation of its regulatory measure."¹¹¹ But Congress had imposed no such limits on the NLRB's jurisdiction.

The upshot of *Jones & Laughlin Steel* and *Fainblatt* was that the Board's statutory jurisdiction and responsibility extended not only to very large employers and workforces but also to a great many small ones. The single employer doctrine was no longer necessary to enlarge the Board's jurisdiction. But the doctrine still had important roles to play in early NLRB practice. Above all, the NLRB used the single employer / integrated enterprise doctrine in the same manner as the RLB: to establish bargaining units combining workforces of multiple "integrated" corporations.¹¹² This particular use of the doctrine was not necessarily to the disadvantage of employers. An employer might prefer a larger bargaining unit to dilute the union's support among employees. Sometimes, it was the affiliated corporations who sought the larger

¹⁰⁶From 1935 to 1937, federal district courts issued nearly 100 injunctions against the NLRB based on *Carter* and on the Supreme Court's earlier decision in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935), invalidating the National Recovery Act.

¹⁰⁷301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937).

¹⁰⁸The Court implicitly overruled *Hammer v. Dagenhart* in *Jones & Laughlin Steel*. The official notice of death arrived four years later in *U.S. v. Darby*, 312 U.S. 100, 116-17, 61 S.Ct. 451, 458, 85 L.Ed. 609 (1941).

¹⁰⁹306 U.S. 601, 59 S.Ct. 668, 83 L.Ed. 1014 (1939).

¹¹⁰*Id.* at 606, 59 S.Ct. at 671.

¹¹¹*Id.* at 606, 59 S.Ct. at 672.

¹¹²See *Pennsylvania Greyhound Lines*, 3 NLRB 622 (1937); *C. A. Lund Company*, 6 NLRB 423 (1938); *Waggoner Refining Company, Inc.*, 6 NLRB 731 (1938); *Royal Warehouse Corp.* 8 NLRB 1218 (1938); *Bloedel-Donovan Lumber Mills*, 8 NLRB 230 (1938); *The Calco Chemical Company*, 13 NLRB 34 (1939); *Dixie Motor Coach Corporation and Sunshine Bus Lines, Inc.*, 25 NLRB 869 (1940); *Alexander Film Co.*, 36 NLRB 57 (1941); *Shenango Penn Mold Co.*, 19 NLRB 328 (1940).

bargaining unit.¹¹³

The single employer doctrine also served other convenient purposes for the NLRB. While the effect on commerce was much easier to prove after *Jones & Laughlin Steel* and *Fainblatt*, it was still the General Counsel's burden to prove it. The single employer doctrine saved the General Counsel the burden of proving the effect on commerce of each separately incorporated part of an integrated enterprise.¹¹⁴ The Board even used the single employer doctrine to impose its remedies on the entirety of the enterprise in a manner that effectively pierced the corporate veil, making each separately incorporated entity liable for the misdeeds of any other member of the same enterprise.¹¹⁵ As noted earlier, the Act provided no definitively clear basis for a single employer doctrine for any of these purposes. In some of its earliest precedent-setting cases, however, the Board cited, without much explanation, the Wagner Act's definition of "person" as including "corporations."¹¹⁶

Not long after *Feinblatt*, the NLRB began to develop the rules of discretionary jurisdiction with which the single employer doctrine is frequently associated today. In 1940 the Board hinted at what was to come in *Forest City Manufacturing Co.*:¹¹⁷ "[T]he Board has jurisdiction which it may exercise at its discretion," but "[t]he Board considers this case a proper one for the exercise of its jurisdiction."¹¹⁸ The NLRB's reservation of discretion was in anticipation that its now near-plenary jurisdiction might overwhelm its administrative resources.¹¹⁹ Initially the Board declined jurisdiction case-by-case. The single employer doctrine

¹¹³See *Waterman Steamship Corporation*, 10 NLRB 1079 (1939).

¹¹⁴See, e.g., *Westinghouse Electric Corp.*, 85 NLRB 1519, 1520 (1949).

¹¹⁵See, e.g., *Waggoner Refining Company, Inc.*, 6 NLRB 731 (1938); *Roemer Bros. Trucking Co.*, 13 NLRB 549 (1939); *Dixie Motor Coach Corporation and Sunshine Bus Lines, Inc.*, 25 NLRB 869 (1940); *Condenser Corporation of America*, 22 NLRB 347, 449 (1940); *The Middle West Corporation*, 28 NLRB 540 (1940); *R. M. Johnson and G. F. Sharp*, 41 NLRB 263 (1942).

¹¹⁶*Condenser Corporation of America*, 22 NLRB 347, 449 (1940); *National Shoes, Inc.*, 103 NLRB 438, 440 n. 2 (1953); *A. E. Nettleton Co., Nettleton Shops, Inc.*, 108 NLRB 1670, 1676 n. 3 (1954).

¹¹⁷27 NLRB 1100, 1101, n. 2 (1940).

¹¹⁸27 NLRB at 1101, n. 2. See also *Albert Love Enterprises*, 66 NLRB 416, 418 (1946); *Royal Palm Furniture Factories, Inc.*, 74 NLRB 1281, 1282 (1947); *Liddon White Truck Co.*, 76 NLRB 1181 (1948).

¹¹⁹*N.L.R.B. v. Pease Oil Company*, 279 F.2d 135, 137 (2d Cir. 1960) ("Early in its history, however, the Board came to the conclusion that if it were to take cognizance of all complaints within its statutory grant of power it would be unable to decide any complaint with

was simply one set of facts to show that the impact on commerce was more than “de minimis” and to distinguish the NLRB’s exercise of discretionary jurisdiction in one case from its rejection in another.¹²⁰ Congress validated the practice in the Taft-Hartley Act of 1947, but demanded objective standards to distinguish “employers” by “class or category” according to their likely impact in commerce.¹²¹ Three years later the Board declared fixed, objective, employer-based standards for declining jurisdiction,¹²² and it was only then that single employer doctrine became an essential part of the rules for the Board’s discretionary jurisdiction.

The Board’s employer standards for discretionary jurisdiction constitute a small firm exemption. Owing perhaps to their original purpose—to measure prospective impact on commerce—the standards for most industries are based on the dollar volume of a firm’s

the thoroughness and promptitude necessary to achieve the objectives of the Act. “); *N.L.R.B. v. Marinor Inns, Inc.*, 445 F.2d 538, 541 (5th Cir. 1971).

At first, the statutory basis for the NLRB’s discretion to refuse jurisdiction over certain classes of cases was uncertain. The Act states that the NLRB is “empowered” to prevent unfair labor practices. 29 U.S.C. 160(a). With respect to representation proceedings, the Act states that the NLRB “shall” conduct a hearing if it has “reasonable cause to believe” the matter affects commerce. 29 U.S.C. 159(c)(1). The Supreme Court, having declared the NLRB’s statutory jurisdiction in all cases involving more than “de minimis” effect on commerce, acknowledged the NLRB’s discretion to decline jurisdiction in *Polish Nat. Alliance of U.S. v. N.L.R.B.*, 322 U.S. 643, 64 S.Ct. 1196, 88 L.Ed. 1509 (1944).

¹²⁰See, e.g., *Victor Hosiery Co.*, 86 NLRB 195, 196-97 (1949); *N. B. Quarles*, 83 NLRB 697, 708 (1949); *North Memphis Lumber Co.* 81 NLRB 745, 746 (1949); *G. E. Tyner and A. Petrus*, 81 NLRB 380, 381 (1949); *A. B. Fletcher*, 78 NLRB 1215, 1215, n.2 (1948)

¹²¹Taft-Hartley Act, ch. 120, tit. I, §101, 61 Stat. 151, codified at 29 U.S.C. 164(c)(1).

¹²²See *Hollow Tree Lumber Co.*, 91 NLRB 635 (1950):

The Board has determined that it will exercise jurisdiction over those enterprises which affect commerce by virtue of the fact that they furnish goods or services necessary to the operations of other employers engaged in commerce, without regard to other factors, where such goods or services are valued at \$50,000 per annum or more, and are sold to: (a) public utilities or transit systems; (b) companies which function as instrumentalities and channels of interstate and foreign commerce and their essential links; or (c) enterprises engaged in producing or handling goods destined for out-of-State shipment, or performing services outside the State, in the value of \$25,000 per annum or more. This standard reflects, in large measure, the results reached in the Board’s past decisions disposing of similar jurisdictional issues.

Id. at 636. Thereafter, the Board developed more specialized standards for particular industries. See Patrick Hardin & John Higgins, eds., 2 *The Developing Labor Law* 2152-53 (2001).

business, rather than the number of its employees. A firm with few employees but revenues in excess of the applicable threshold cannot claim an exemption, while a firm with revenue below the applicable threshold might be exempt no matter how many workers it employs. The single employer doctrine, however, reclaims many small firms for the Board's jurisdiction, just as it extends jurisdiction under Title VII. A separately incorporated firm with little revenue might be combined with affiliated corporations, and together these corporations might surpass the Board's specific revenue threshold for that particular industry.

In some ways, the NLRB's use of the single employer doctrine for reasserting its jurisdiction has been particularly aggressive. In particular, the Board has not always required that the entities constituting a single employer share any common ownership. This practice by the Board stems from the ultimate question of jurisdiction: whether there was a labor dispute "affecting commerce." For purposes of predicting the effect of a labor dispute on commerce, common ownership of firms may be much less important than other forms of interdependence. For example, the Board has sometimes measured the combined effect on commerce of separately owned restaurants and motels that occupied the same physical structure.¹²³ Similarly, in the construction industry, in which a multitude of independently owned might participate in a single large construction enterprise, the Board and the courts have applied the single employer doctrine without evidence of common ownership.¹²⁴

Was the Board's further development of the single employer doctrine for purposes of discretionary jurisdiction consistent with Congress's demand for objective standards based on "employer" class and category? The answer depends at least in part on what Congress might have meant by "employer" when it enacted the Taft-Hartley Act. Significantly, Section 501 of the Taft-Hartley Act provided that the term "employer" would have "the same meaning" as in the Wagner Act,¹²⁵ and by 1947 the NLRB was clear in its view of the Wagner Act that an "employer" could be more than one corporation. Arguably, Congress implicitly endorsed the single employer doctrine. At the very least, Congress missed a ripe occasion to object.

Following the Taft-Hartley Act, the Board and the courts found at least two other uses for the single employer doctrine in the law of collective bargaining. First, the NLRB and the courts used the doctrine to extend duties under one corporation's collective bargaining agreement to an affiliated corporation that shared control over an interrelated workforce.¹²⁶ Second, the Board

¹²³See, e.g., *N.L.R.B. v. Marinor Inns, Inc.*, 445 F.2d 538 (5th Cir. 1971); *Seeler v. Williams*, 1977 WL 1810 (N.D.N.Y., 1976) (unpublished) (granting the Board a temporary injunction against a restaurant).

¹²⁴See, e.g., *National Labor Relations Board v. Reed*, 206 F.2d 184 (9th Cir. 1953).

¹²⁵Taft-Hartley Act of 1947, ch. 120, §501, 61 Stat. 161.

¹²⁶See, e.g., *Local 705, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Willett, Inc.*, 614 F.Supp. 932 (D.C.Ill. 1985). See generally Stephen F. Befort, *Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and*

and the federal courts used the single employer doctrine in secondary boycott cases in the same fashion as state courts before the Taft-Hartley Act, holding that picketing was not “secondary” if the putative neutral was part of an integrated enterprise combining the primary employer and the putative neutral.¹²⁷

By the time Congress had begun the debates leading to the enactment of Title VII, the single employer doctrine was in full flower,¹²⁸ and the issue of its validity was reaching a crescendo. In late 1963, the Supreme Court of Alabama issued what appeared to be a rejection of the single employer doctrine in *Broadcast Service of Mobile, Inc. v. Local 1264, Intern. Broth. of Elec. Workers*.¹²⁹ In that case, the Alabama court held that an employer involved in a certain labor dispute was too small to come within the bounds of the NLRB’s discretionary jurisdiction, and therefore federal law did not preempt the exercise of state court jurisdiction over the matter.¹³⁰ The union involved in the dispute filed a petition for a writ of certiorari, and its petition was before the U.S. Supreme Court at the very time Congress was debating Title VII and the proposed small firm exemption.¹³¹

The Court granted the union’s petition three months after Congress enacted Title VII,¹³² and in early 1965 the Court reversed the Alabama court in a terse, two paragraph opinion:

Alter Ego Doctrines and a Proposed Reformulation, 1987 Wis. L. Rev. 67 (1987).

¹²⁷*Limbach Co. v. Sheet Metal Workers Intern. Ass’n, AFL-CIO*, 949 F.2d 1241, 1258-59 (3d Cir. 1991); *Local No. 24, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. N. L. R. B.*, 266 F.2d 675 (D.C. Cir. 1959); *Penello for and on Behalf of N. L. R. B. v. American Federation of Television and Radio Artists Washington-Baltimore Local, AFL-CIO*, 291 F.Supp. 409 (D.Md. 1968). See generally Befort, *supra* note 126, at 75-76.

See also *Bowater S. S. Co. v. Patterson*, , 303 F.2d 369 (2d Cir.), cert. denied, 371 U.S. 860, 83 S.Ct. 116, 9 L.Ed.2d 98 (1962) (Norris-La Guardia Act precluded shipowner’s petition for an injunction against picketing motivated by the union’s dispute with an affiliated foreign corporation).

¹²⁸See *Hardin & Higgins*, note 122, *supra*, at 2152-53.

¹²⁹276 Ala. 93, 159 So.2d 452 (1963)

¹³⁰276 Ala. at 97-98, 159 So.2d at 456.

¹³¹The importance of the issue and the Court’s interest in the case was signaled by its June 1, 1964 order inviting the Solicitor General to file a brief in the case. 377 U.S. 950, 84 S.Ct. 1630 (1964).

¹³²*Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 379 U.S. 812, 85 S.Ct. 30, 13 L.Ed.2d 26 (1964) .

[I]n determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise. The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership. The record made below is more than adequate to show that all of these factors are present [in this case].¹³³

Having approved the application of the single employer test, the Court held that federal law preempted the application of the Alabama law to the labor dispute.¹³⁴ The Court's opinion appeared to take the single employer doctrine for granted, for purposes of preemption, and without considering any issue as to its legitimacy. Nevertheless, the Court's opinion is a measure of the maturity of the doctrine had achieved even before the question had reached the Court.

In sum, by 1964 the single employer doctrine was a widely acknowledged part of the law that was the backdrop for the enactment of Title VII. True, the leading proponent of the doctrine—the NLRB—had used the doctrine only in cases involving some aspect of collective bargaining law, but the Board's original and most frequent uses of the doctrine were to extend the reach of its statutory jurisdiction and to limit the availability of the small firm exemptions in its "employer" standards of coverage. In other words, the Board had used the doctrine in ways that were not at all peculiar to collective bargaining law. In fact, the Board's use of the doctrine was very similar to the doctrine's potential use in Title VII cases. Congress had implicitly endorsed the Board's concept of "employer" in the Taft-Hartley Act, and the courts had shown no resistance to the doctrine in principle. The Supreme Court's casual and unanimous endorsement of the doctrine a few months after the enactment of Title VII reflects the doctrine's general acceptance in the law during the time of the Title VII-small firm exemption debates.

C. Other Single Employer Rules Before 1964

While the NLRB provided ample precedent for a single employer doctrine, the Board's use of the doctrine was necessarily limited to collective bargaining law. If NLRB case law and the handful of secondary boycott and FELA cases were the only historical precedents, one might still question whether lawmakers would have expected the doctrine to be part of Title VII. In fact, however, the doctrine had migrated into other spheres of employment law well before 1964. Two New Deal era laws in particular presented occasions for the further development of the doctrine.

¹³³Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256, 85 S.Ct. 876, 877, 13 L.Ed.2d 789 (1965)

¹³⁴Id. A decade later, the Court upheld the application of the single employer doctrine to bind a corporation to an affiliated corporation's collective bargaining agreement, conditioned on a determination that the employees of the two firms constituted an appropriate bargaining unit. South Prairie Const. Co. v. Local No. 627, Intern. Union of Operating Engineers, AFL-CIO, 425 U.S. 800, 803, 96 S.Ct. 1842, 1843, 48 L.Ed.2d 382 (1976).

The first of these New Deal era laws was the Social Security Act of 1935,¹³⁵ which gave birth to a federal-state partnership for the funding and administration of the unemployment compensation system. The Act funded the system by a payroll tax, but it offered a small firm exemption for an employer of fewer than eight employees.¹³⁶ The Act gave no directions for combining affiliated firms for purposes of counting employees. By design, however, primary responsibility for collecting taxes and administering the system fell to the states. Many of the legislatures that adopted implementing legislation foresaw the problem: What if a single owner or group of owners were organized into separate entities with separate payrolls? The statutory solution adopted by many states required counting all employees of a group of entities “owned or controlled by legally enforceable means or otherwise, directly or indirectly, by the same interests...”¹³⁷ These statutes provoked substantial litigation during the late nineteen thirties until the late nineteen forties, with some employers challenging the single employer rule as part of a broad equal protection attack against the unemployment compensation scheme, and others questioning whether the single employer proviso implicitly required proof of unified or interrelated operations.¹³⁸ Litigation over the single employer proviso subsided as Congress and the states gradually repealed the small firm exemptions for payroll taxes.

Yet another New Deal era law that eventually led to a variation of the single employer doctrine was the Fair Labor Standards Act of 1938.¹³⁹ As originally enacted, the FLSA lacked an exemption specifically designed for small firms, but most small firms would have fallen outside the scope of coverage for any of several reasons. Coverage actually depended on the character of an employee’s work, and whether he was personally “engaged in commerce or in the production of goods for commerce.”¹⁴⁰ Under this employee-based system of coverage, an employer of any

¹³⁵Social Security Act, ch. 531, 49 Stat. 620 (1935).

¹³⁶*Id.* § 907(a), 49 Stat. at 642.

¹³⁷See *Kellogg v. Murphy*, 349 Mo. 1165, 164 S.W.2d 285 (1942), quoting the provisions of what was then Mo. Rev. Stat. Ann. § 9432(I).

¹³⁸Many of the earliest cases are described in *Kellogg v. Murphy*, 349 Mo. 1165, 164 S.W.2d 285 (1942). See also *Teets v. Leach*, 112 Colo. 304, 148 P.2d 365 (Colo. 1944); *Karlson v. Murphy*, 387 Ill. 436, 56 N.E.2d 839 (Ill. 1944); *Lindley v. Murphy*, 387 Ill. 506, 56 N.E.2d 832 (Ill. 1944); *Huiet v. Dayan*, 69 Ga.App. 81, 24 S.E.2d 728 (Ga. App. 1943); *State Unemployment Compensation Bd. of Unemployment Compensation Division, Dept. of Treasury v. Warrior Petroleum, Inc.*, 221 Ind. 180, 46 N.E.2d 827 (Ind. 1943); *State ex rel. Okl. Employment Sec. Com'n v. Tulsa Flower Exchange*, 192 Okla. 293, 135 P.2d 46 (Okla. 1943).

¹³⁹Fair Labor Standards Act, ch. 676, 52 Stat. 1060 (1938).

¹⁴⁰52 Stat. 1062, 1063. See *Armour & Co. v. Wantock*, 323 U.S. 126, 130-31, 65 S. Ct. 165, 167, 89 L. Ed. 118 (1944); *Walling v. Paramount-Richards Theatres*, 61 F. Supp. 290, 303 (D. La. 1945) (“the application of the Act depends on the character of the employee’s activities

size might find some of its employees within the coverage of the Act, and some of its employees outside the coverage of the Act. Even the smallest of firms might be subject to coverage with respect to at least one employee. However, despite the Supreme Court's groundbreaking decision in *Jones & Laughlin Steel* the year before, it was still widely expected that a great deal of business activity would not count as "interstate commerce."¹⁴¹ For example, Congress evidently assumed that employees of many small firms in the construction and repair industry would fall outside the reach of the Act.¹⁴² Many other small businesses (as well as some very large ones) could take refuge in an exemption for "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."¹⁴³ A small firm unable to prove this exemption for its employees might still turn to any one of a series of other specialized exemptions tending to benefit mainly small firms.¹⁴⁴

Initially, therefore, a small firm exemption might have seemed superfluous, and the omission of a small firm exemption substantially obviated the need for a rule for treating multiple entities as if they were one.¹⁴⁵ An employer's affiliation with other corporations was

rather than on the nature of the employer's business"). As a practical matter, the nature and size of an employer's business was very important to the proof of any employee's involvement in interstate commerce. See, e.g., *Aetna Finance Co. v. Mitchell*, 247 F.2d 190 (1st Cir. 1957) (describing the interrelationship between the employer's establishments in different states as a means of proving that the employees were engaged in interstate commerce).

¹⁴¹See *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 694 (3d Cir. 1994); *National Labor Relations Board v. Dixie Terminal Co.*, 210 F.2d 538 (6th Cir. 1954) (comparing jurisdiction under the NLRA with jurisdiction under the FLSA, and concluding that the FLSA's employee-based coverage is more limited than the NLRA's "labor dispute" coverage); *Linder*, supra note 13, at 417, 423-24.

¹⁴²Cf. *Wells v. Ford, Bacon & Davis*, 6 F.R.D. 606 (W.D.Ky. 1943) (rejecting the plaintiff's "unitary enterprise" theory for regarding construction workers as "engaged in commerce" based on the prospective business of the factory they were building).

¹⁴³52 Stat. 1067.

¹⁴⁴*Id.*

¹⁴⁵See *Mitchell v. Household Finance Corp.*, 208 F.2d 667 (3rd Cir. 1954) (rejecting theory that employees were engaged in commerce simply because the corporation that employed them was part of a larger interstate enterprise); *De Loach v. Crowley's, Inc.*, 128 F.2d 378 (5th Cir. 1942) (issue whether subsidiary was part of a single enterprise with parent was unimportant to whether employees who handled goods passing from one to the other were engaged in interstate commerce).

often part of the proof of an employee's participation in commerce,¹⁴⁶ but the same result could usually be achieved by showing the employer's relationship with independent out-of-state customers or suppliers. A more important early use for a single employer or integrated enterprise doctrine was to extend liability beyond the nominal employer to its affiliates. In *Rutherford v. McComb*,¹⁴⁷ for example, the Supreme Court held that the Secretary of Labor was entitled to injunctive relief against one or both of two affiliated corporations with respect to the employment of boner crews within a slaughterhouse owned by one of the corporations. The specific issue before the Court was whether the boner crews were "employees" of either corporation, or whether the crews were employees of a putative independent contractor. The Court specifically declined to reach the questions whether *both* corporations were employers or whether they constituted a single employer.¹⁴⁸ Nevertheless, in stressing that employment relations should be judged in light of "economic realities,"¹⁴⁹ that the boning work was "a part of the integrated unit of production," and that the boners were employees of the "establishment,"¹⁵⁰ the Court lent support to the concept of an employer enterprise that transcends formal corporate organization.

A single employer rule for purposes of coverage became especially important with the 1961 amendments,¹⁵¹ which created the justification for a true small firm exemption and the need for a rule for identifying the entity to be measured. First, Congress repealed the broad exemption for employees of retail and service establishments, particularly to extend the Act's reach to employees of large nationwide retailers but also eliminating the refuge that had protected many small firms.¹⁵² In place of the old exemption, Congress provided a new exemption based on the revenues of the employer "enterprise." The purpose of the new exemption was to sort "mom and pop" businesses from larger ones.¹⁵³ Qualification for the exemption, however, depended on identification of the "enterprise," which might be greater or less than a single corporation.

¹⁴⁶See, e.g., *Beneficial Finance Co. of Wis. v. Wirtz*, 346 F.2d 340 (7th Cir. 1965); *Walling v. Paramount-Richards Theatres*, 61 F. Supp. 290, 303 (D. La. 1945).

¹⁴⁷331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947).

¹⁴⁸331 U.S. at 727-28, 67 S.Ct. at 1475.

¹⁴⁹331 U.S. at 727, 67 S.Ct. at 1475, quoting the opinion of the court of appeals, 156 F.2d 523, 516 (10th Cir. 1946).

¹⁵⁰331 U.S. at 729, 67 S.Ct. at 1476.

¹⁵¹Fair Labor Standards Amendments of 1961, Pub. L. 87-30, 75 Stat. 65 (1961).

¹⁵²Fair Labor Standards Amendments of 1961, S. Rep. 87-145 (Apr. 10, 1961), 87th Cong., 1st Sess. 1961, 1961 U.S.C.C.A.N. 1620, 1621, 1644-46. See also *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 694-95 (3d Cir. 1994).

¹⁵³See *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 694-95, 696 (3d Cir. 1994).

The concept of an employer “enterprise” was also the focus of a new alternative basis for coverage. After 1961, an employee enjoyed the protection of the law if he was personally engaged in interstate commerce, *or* if he was employed in an “*enterprise*” engaged in commerce. Again the concept of an “enterprise” suggested something possibly larger than a single legal person or entity.

The amendments defined “enterprise” for both purposes as

the *related activities* performed (either through *unified operation or common control*) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments *or by one or more corporate or other organizational units* including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor.¹⁵⁴

From this definition, the courts distilled three elements that closely resemble the elements of the single employer doctrine of collective bargaining law: 1) the entities allegedly constituting a single enterprise are “engaged in related activities,” 2) they are under “unified operation or common control;” and 3) they have a common business purpose.”¹⁵⁵

One might ask why Congress was not content on this occasion to adopt, explicitly or implicitly, the existing single employer doctrine from collective bargaining law. Evidently, the drafters sought a rule that was both more far-reaching and more precisely targeted than the collective bargaining rule. On the one hand, an enterprise might be a mere division of a corporation which was engaged in more than one distinct and unrelated business.¹⁵⁶ On the other hand, the statutory definition of “enterprise” permitted aggregation of separate entities based on “unified operation” in lieu of “common control,”¹⁵⁷ and it did not require proof of common *labor* relations. The result was to extend the reach of the Act to very small corporations, provided they were part of an integrated “enterprise” that exceeded the statutory threshold.

The development of rules for aggregating separately organized firms under the Fair Labor Standards Act and the Social Security Court is one more part of the background that illuminates Congress’s intent in the small firm exemption of Title VII. By 1964, it was perfectly normal to

¹⁵⁴Act of May 5, 1961, Pub. L.. 87-30, §2, 75 Stat. 65 (1961), codified at 29 U.S.C. §203(r). The definition of “enterprise” goes on to exclude independently owned retail and service businesses that are part of franchising, distributorship and similar relationships.

¹⁵⁵Reich v. Gateway Press, Inc., 13 F.3d 685, 694 (3d Cir. 1994); Cruz v. Chesapeake Shipping, Inc., 932 F.2d 218, 229 (3d Cir.1991).

¹⁵⁶Fair Labor Standards Amendments of 1961, S. Rep. 87-145 (Apr. 10, 1961), 87th Cong., 1st Sess. 1961, 1961 U.S.C.C.A.N. 1620, 1660.

¹⁵⁷Id.

treat multiple affiliated entities as a single employer for purposes of statutory coverage under employee protective legislation, either according to the federal common law that had evolved since the beginning of the century, or according to fine-tuned statutory rules. Most importantly, Congress's debate over firm aggregation for FLSA purposes reached its culmination just as Congress was beginning the debate over a new Civil Rights law, and only three years before the enactment of Title VII.

D. Early State Civil Rights Laws and the Single Employer Doctrine

There is one last stage prop for Congress's debate over Title VII and the small firm exemption: discrimination law. Congress did not write Title VII on a blank page. Many of the Act's provisions were modeled after state civil rights laws enacted during the post-War and early civil rights eras. The states took a variety of approaches to the omnipresent issues whether small firms should be exempt, and what number of employees should mark the cutoff. In some states there was no small firm exemption at all. In some others the threshold was so low that there was little work for a single employer doctrine. Enforcement was largely administrative in the early days and was not particularly vigorous. Southern states passed no civil rights laws at all. Nevertheless, at least some state authorities were conscious of the single employer doctrine and expected to apply the doctrine in an appropriate case. As early as 1948, the New York State Commission Against Discrimination took the position that if a single individual owned several businesses, the employees of all businesses would count in determining the applicability of New York's small employer exemption.¹⁵⁸ In 1963, the Legal Counsel for California's Fair Employment Practices Commission opined in an interview that California would follow New York's approach and aggregate affiliated firms.¹⁵⁹

Congress was not necessarily aware of these additional pronouncements of the single employer doctrine in state discrimination law. There does not appear to have been any reported testing the single employer doctrine in state discrimination law before 1964. On the other hand, the declarations of state civil rights authorities in the years before Title VII evidences the strength and obviousness of the connection between a small firm exemption and the increasingly routine practice of treating some affiliated firms as if they were one employer.

III. Is the Single Employer Doctrine Consistent With the Terms and History of Title VII?

A. The Text As Enacted in 1964

¹⁵⁸New York State Commission Against Discrimination, Report on Progress 45 (1948), described in Michael Tobriner, *California FEPC*, Hastings L. Rev. 333, 342-33 (1965).

¹⁵⁹Tobriner, *supra*, note 158, at 343. The interview was dated August 15, 1963. The article describing the interview was published in 1965.

It is clear enough that persons familiar with labor law in 1964 would have been aware of the of single employer doctrine and its importance in matters of statutory coverage, especially as a limit against a small firm exemption. Consider what had happened or was happening by the time of the 1964 Congressional proceedings: (1) the single employer doctrine had developed as an important and well-known limit on small firm exemptions in federal collective bargaining law, state unemployment compensation laws, and the Fair Labor Standards Act; (2) as recently as 1961 Congress had debated the best design for a statutory version of the doctrine for the Fair Labor Standards Act; (3) the viability of the non-statutory version of the single employer doctrine was pending before the U.S. Supreme Court; and (4) state administrative agencies that had taken the lead in anti-discrimination law had predicted that the single employer doctrine would limit local versions of the small firm exemption.

Then there is the record of Congress's debate. Unfortunately, while Congress vigorously debated the small firm exemption, its attention was riveted to the question of what number of employees should be the threshold.¹⁶⁰ The question whether the single employer doctrine would limit the exemption was not a significant part of the public debate. On the other hand, there is evidence that Congress expected that the doctrine would apply. Senator Stennis, an opponent of the Civil Rights Act, warned that many small businesses might be surprised to learn that they were included in the coverage of Title VII. To make his point, he recalled that many businesses were already subject to executive orders requiring nondiscrimination in the performance of federal contracts, and he related the following:

I received many telephone calls from ... small manufacturing operations in Mississippi that did not sell the Federal Government \$1 worth of their products, *but happened to be owned by a company ... which did do business with the Government*. It was insisted that they submit to certain formulas for which there was not authority, and furthermore there was no connection with the Federal Government in what was being manufactured, *except a remote affinity with a chain company*.¹⁶¹

In the face of this evidence of Congress's awareness of the problem, one might still argue that Congress dodged the issue, choosing not to address what might have been a difficult issue for legislation that was already especially challenging for politicians. Silence might imply acquiescence in the doctrine, but there is also an argument to be made for the opposite conclusion. If the single employer doctrine is strong, so too is the "bedrock" rule that a separately organized corporate entity is a separate person.¹⁶² If Title VII is silent, as the critics have assumed, perhaps silence implies adoption of the usual law of corporations, not the law of employment.

¹⁶⁰See text accompanying notes 268-271, *infra*.

¹⁶¹110 Cong. Record S 7073 (April 7, 1964) (Senator Stennis) (emphasis added). Senator Stennis' later description of the same problem for one of his constituents appears to be a repetition of the same story. 110 Cong. Record S 7087 (April 7, 1964) (Senator Stennis).

¹⁶²*U.S. v. Bestfoods*, 524 U.S. 51, 61-62, 118 S.Ct. 1876, 1884, 141 L.Ed.2d 43 (1998).

However, Congress was not completely silent. The proper starting point for understanding the concept of the “employer” in Title VII is not the statutory definition of “employer.” Rather, one must begin with an examination of the statutory definition of “person,” which happens to be the very first term in Title VII’s list of definitions. Title VII’s definition of “person” is out of the ordinary:

The term ‘person’ includes *one or more* individuals, ... labor unions, partnerships, associations, *corporations*, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations.”¹⁶³

This definition of “person” is striking because it includes the plural form of entities that ordinarily qualify as persons on an individualized basis. Two individuals could be a “person,” which would not be surprising in the case of a partnership except that the definition redundantly lists “partnerships” (plural) as another type of “person.” More importantly, “person” includes “one or more ... corporations.” A “person” is not necessarily a covered “employer.” It must have fifteen employees in the case of Title VII. But if the person in question consists of more than one corporation, the sum of these corporations’ workforces evidently would determine whether the “person” was a covered employer or an exempt small firm.

One might object that Title VII’s definition of “person” is more likely careless drafting than a purposeful abrogation of the usual laws of incorporation. After all, if “one or more ... corporations” could be a single “person,” how are we to know whether any particular set of corporations constitute that person? The single employer doctrine likely would have come to mind to anyone considering the matter carefully and knowingly in 1964.

Yet there is another confusing signal in the record, and at first glance it might appear to lead in a different direction. A House Judiciary Committee report explained as follows:

The terms “*person*,” “employee,” “commerce,” “industry affecting commerce,” and “State” are defined ... *in the manner common for Federal statutes*.¹⁶⁴

This statement seems completely wrong, at least with respect to the definition of “person.” Title VII’s definition of “person” is quite *uncommon* in comparison with “Federal statutes” in general. However, the more important message of the Committee report is that the definition of “person” is *borrowed*, not written from scratch. And Congress’s choice of models from which to borrow its definition of “person” is revealing. If Congress had intended that one corporation would equal one person under Title VII, it could have borrowed from one of the many “common”

¹⁶³42 U.S.C. §2000e(a).

¹⁶⁴House Judiciary Committee’s Report, No. 914, 88th Cong., 1st Sess.(Nov. 20, 1963), in Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of Civil Rights Act of 1964, pp. 2027 (1978).

statutes that define a “person” as an “individual” or a “corporation” (singular).¹⁶⁵ Instead, the drafters copied language from the Wagner Act.

In language identical in pertinent respects to Title VII, the Wagner provides that

“person” includes *one or more* individuals, labor organizations, partnerships, associations, *corporations*, legal representatives, trustees, trustees in cases under Title 11, or receivers.¹⁶⁶

As noted earlier, this Wagner Act definition of “person” was the only plausible statutory basis for the early NLRB decisions invoking the single employer doctrine.¹⁶⁷ Indeed, this provision is all that the NLRB has ever cited in support of the doctrine, beyond its own authority to invent a new common law of collective bargaining. Not surprisingly, some of the first courts to invoke the single employer doctrine in Title VII cases cited the corresponding provision of Title VII.¹⁶⁸

¹⁶⁵Compare usual definition of “person” found in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601(21): “The term ‘person’ means an individual, firm, corporation....” In *U.S. v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998), the Court considered the circumstances under which a corporation might be held liable as an “operator” of a facility owned by its subsidiary. The Court, having specifically cited Section 9601(21), stated, “nothing in CERCLA purports to reject [the] bedrock principle” that “a parent corporation (so-called because of control through ownership of another corporation’s stock) is not liable for the acts of its subsidiaries.” The key difference between CERCLA’s definition of “person” and Title VII’s definition is that CERCLA refers to a corporation in the singular form as a type of person.

There are also a number of labor laws that define “person” in the usual sense, and some of these laws predate Title VII and were available models when Congress enacted Title VII. See, e.g., the Fair Labor Standards Act, defining “person” to mean “an individual, partnership association, [or] corporation....”. 29 U.S.C. §203(a). See also the Anti-Kickback Act, defining “person” to mean “a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.” 41 U.S.C. §52.

¹⁶⁶29 U.S.C. §152(1) (emphasis added); 41 U.S.C. §41. The same definition of “person” may be found in two other pre-Title VII employee relations statutes. The first was the Walsh Healey Act of 1936. See note 89 *supra*. The second was the Landrum Griffin Act of 1959, Pub. L. 86-257, 73 Stat. 519 (1959), which primarily addressed union governance and relations between a union and its members, but which also amended the National Labor Relations Act.

¹⁶⁷See text accompanying notes 88-89, *supra*.

¹⁶⁸See, e.g., *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983); *Hague v. Spencer Turbine Co.*, 1982 WL 204 (M.D.N.C., 1982) (unpublished).

A clearer statement by Congress as to the single employer doctrine would have avoided the current uncertainty among the courts. It is important to remember, however, that in 1964 experience under the Wagner Act suggested that no clearer statement was necessary. The NLRB had established a considerable body of law for the single employer doctrine for an analogous purpose, with little controversy, and with no greater statutory support than Title VII provided for the EEOC or the courts. It would have been reasonable to assume that the EEOC and the courts would develop a similar body of law suitably tailored to Title VII. As explained in the next section, that is exactly what happened during the first twenty years after Title VII.

B. Developments After 1964

If Congress had failed to state the single employer doctrine any more clearly during the four decades that followed Title VII, its silence in the face of EEOC and judicial endorsements would count for something. In fact, Congress has not been altogether silent. It has returned to Title VII on several occasions, substantially amending the Act twice, but never even debating, let alone overruling, the single employer doctrine.

Admittedly, by the time of Congress's next close look at discrimination law in 1972, administrative and judicial applications of the single employer doctrine in Title VII cases were scant. The earliest reported applications of the single employer doctrine under Title VII were in EEOC administrative proceedings, beginning in 1970.¹⁶⁹ The first reported judicial application of the doctrine was not until early 1972, in *Williams v. New Orleans S. S. Ass'n*.¹⁷⁰ Moreover, the initial response of the courts was not unanimous. In *Hassell v. Harmon Foods, Inc.*, a district court rejected the plaintiff's single employer theory for overcoming a small firm exemption, seeing "nothing" in Title VII or its history to support the doctrine.¹⁷¹ The Sixth Circuit affirmed in a terse per curiam opinion,¹⁷² but reversed course a few years later in *Armbruster v. Quinn*,¹⁷³ noting among other things Title VII's definition of "person" as including "corporations."¹⁷⁴

In short, however, when Congress returned to the subject of the small firm exemption in 1972, the single employer doctrine was only slightly more obvious an issue than it had been in

¹⁶⁹EEOC Decision No. 71-1677, 3 Fair Empl. Prac. Cas. (BNA) 1242, 1971 WL 3872 (Apr. 12, 1971); EEOC Decision No. 71-1357, 1 E.P.D. ¶ 6235 (March 3, 1971); EEOC Decision No. 71-2598, 4 Fair Empl. Prac. Cas. (BNA) 21, 1970 WL 3560 (June 22, 1970).

¹⁷⁰341 F.Supp. 613 (D.C. La. 1972).

¹⁷¹*Id.* at 433.

¹⁷²454 F.2d 199 (6th Cir. 1972).

¹⁷³711 F.2d 1332 (6th Cir. 1983).

¹⁷⁴*Id.* at 1336-37.

1964. As in 1964, the Congressional debates of 1972 focused on the threshold number and avoided more difficult questions about the rules for identifying an employer entity. Proponents of broader coverage sought to reduce the threshold to eight employees.¹⁷⁵ A compromise reduced the threshold to the current number of fifteen.¹⁷⁶

The balance of judicial authority tipped strongly in favor of the single employer doctrine over the course of the nineteen-seventies and early eighties.¹⁷⁷ In the midst of this period of widespread judicial acceptance of the doctrine, Congress substantially amended the law again in 1991 to overrule a number of Supreme Court decisions with which Congress disagreed.¹⁷⁸ Still, Congress did nothing to reject the single employer doctrine.

To the contrary, over the same period the single employer doctrine inspired Congress in its enactment of two measures extending employer-based coverage. In 1984, Congress amended the Age Discrimination in Employment Act to overrule court decisions refusing to give that law

¹⁷⁵See S. 2515 Section 2(b), reproduced at 117 Cong.Rec. 31702 (1972); H.R. 1746, 1st Sess. 117 Cong. Rec. 212 (1972); H.R.Rep. No. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S.Code Cong. & Ad.News 2137, 2155, 2161.

¹⁷⁶Equal Employment Opportunity Act of 1972, Pub.L.No. 92-261, 86 Stat. 103, § 2(2), codified at 42 U.S.C. § 2000e(b).

¹⁷⁷In addition to the cases cited above, see *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir.1983); *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982); *Mas Marques v. Digital Equipment Corp.*, 637 F.2d 24 (1st Cir. 1980) (citing the doctrine, but finding evidence insufficient to support aggregation of the affiliated corporations); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389 (8th Cir.1977); *Hague v. The Spencer Turbine Co.*, 28 FEP Cases 450 (M.D.N.C.1982); *Odriozola v. Superior Cosmetics Distributors, Inc.*, 531 F.Supp. 1070 (D.P.R.1982); *EEOC v. Wooster Brush Co.*, 523 F.Supp. 1256 (N.D.Ohio 1981); *Fike v. Gold Kist, Inc.*, 514 F.Supp. 722 (N.D.Ala.1981); *Copley v. Morality in Media, Inc.*, 25 Empl.Prac.Dec. ¶ 31,570 (S.D.N.Y.1981); *Ratcliffe v. Insurance Co. of North Am.*, 482 F.Supp. 759 (E.D.Pa.1980); *Marshall v. Arlene Knitwear, Inc.*, 454 F.Supp. 715 (E.D.N.Y.1978), *vacated on other grounds*, 608 F.2d 1369 (2d Cir.1979) (ADEA); *United States v. Local 638, Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Compressed Air, Ice Machine, Air Conditioning and General Pipefitters*, 360 F.Supp. 979 (S.D.N.Y.1973), *modified*, 501 F.2d 622 (2d Cir. 1974); *Black Musicians of Pittsburgh v. Local 60-471, American Federation of Musicians, AFL-CIO*, 375 F.Supp. 902 (W.D.Pa.1974).

¹⁷⁸See, e.g., the Civil Rights Act of 1991, Pub. L. No. 102-166, §109, 105 Stat 1071, 1077 (1991), overruling decisions of the Supreme Court with respect to the rules for disparate impact discrimination, mixed motive cases, and discrimination by foreign corporations, and also overruling the Court with respect to meaning of the Reconstruction era civil rights law, 42 U.S.C. §1981.

extraterritorial effect.¹⁷⁹ As amended, the ADEA holds an American employer responsible for actions of a foreign corporation under the American corporation's "control."¹⁸⁰ Congress's four-factor test of "control" is an unmistakable restatement of the single employer doctrine: "(1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control." In 1991 Congress amended Title VII in similar fashion,¹⁸¹ responding to the Supreme Court's decision in *EEOC v. Arabian American Oil Co.*¹⁸² In *Arabian American*, the Supreme Court had applied the rule that U.S. law has no extraterritorial effect in the absence of an express statutory direction, and unlike the ADEA, Title VII still lacked an express provision in this regard. Congress's four-factor restatement of the single employer doctrine provided the direction, extending Title VII to foreign corporations through the American employers who owned them.

There is one other set of developments that supports a theory of Congress's implicit approval of the single employer doctrine. The Department of Labor has exercised its authority to issue regulations under two relatively recent employment laws, the Worker Adjustment and Retraining Notification Act of 1988 (WARN),¹⁸³ and the Family and Medical Leave Act of 1993 (FMLA),¹⁸⁴ using the single employer doctrine to resolve problems of coverage under those laws.¹⁸⁵ Both the WARN Act and the FMLA have small firm exemptions,¹⁸⁶ albeit with much higher thresholds than Title VII. The Department of Labor's single employer rule is a way of overcoming these exemptions, just as the doctrine overcomes the small firm exemption under Title VII.¹⁸⁷ The doctrine's impact on these laws is neither obscure nor easily overlooked. As of April, 2005, there were fifty-six judicial decisions listed by Westlaw under the links for the FMLA regulation, and 100 judicial decisions under the links for the WARN Act regulation. On

¹⁷⁹See, e.g., *Zahourek v. Arthur Young and Co.*, 750 F.2d 827 (10th Cir. 1984).

¹⁸⁰Older Americans Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat 1767 (1984), codified at 29 U.S.C. § 623(h).

¹⁸¹Civil Rights Act of 1991, Pub. L. No. 102-166, §109, 105 Stat 1071, 1077 (1991).

¹⁸²499 U.S. 244, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991).

¹⁸³Pub. L. No. 100-379, 102 Stat. 890 (1988), codified at 29 U.S.C. §§2101 - 2109..

¹⁸⁴Pub. L. No. 103-3, 107 Stat. 6 (1993), codified at 29 U.S.C. §§2601 - 2654.

¹⁸⁵20 C.F.R. §639.3(a)(2) (for the Worker Adjustment and Retraining Notification Act); 29 C.F.R. §825.104(c)(2) (for the Family and Medical Leave Act).

¹⁸⁶29 U.S.C. §2611(4)(B) (50 employee threshold);

¹⁸⁷The courts have also held that the doctrine might be used to extend liability to affiliated corporations and under the WARN Act. See *Pearson v. Component Technology Corp.*, 247 F.3d 471 (3d Cir. 2001) (but holding that evidence did not support application of the doctrine in that case).

the whole, the courts have upheld the Department's interpretation of these laws, even though neither law contains an express declaration of the single employer doctrine. The WARN Act arguably provides better support for the doctrine, because it defines "employer" as a "business enterprise" that employs the requisite number of employees.¹⁸⁸ The FMLA, however, defines an employer as a "person" with the requisite number of employees, and it defines a "person" to include a singular "corporation."¹⁸⁹ The WARN Act single employer regulation is now sixteen years old¹⁹⁰ and the FMLA single employer regulation is thirteen years old.¹⁹¹ Neither regulation has provoked a discernable reaction in Congress.

IV. Is the Single Employer Doctrine Consistent With the Purpose of the Small Firm Exemption?

A. What Purpose Does the Exemption's Serve?

Despite Congress's implied endorsement of a single employer rule in principle, the lack of an express and precise legislative statement leaves the courts substantial leeway for shaping the contours of the doctrine. After all, there is nothing in Title VII, as enacted in 1964 or as subsequently amended, that compels any particular version of the doctrine. Moreover, the single employer doctrine might need tailoring to accommodate it to the functions of the small firm exemption of discrimination law. Arguably, this is exactly what Judge Posner and some other judges have done: they have satisfied the purposes of the small firm exemption by limiting the single employer doctrine to the sorts of cases in which it would be appropriate to "pierce the corporate veil" or hold a corporation accountable for actions in which it had some actual involvement. In contrast, courts that favor a robust form of the single employer doctrine may have overstated Title VII's remedial goals and underestimated the need for the exemption. Thus, it is important to inquire about the purposes and merits of the small firm exemption and to ask what version of the single employer doctrine is most consistent with Congressional intent. As noted earlier, Congressmen who supported or acquiesced in the exemption in 1964 and again in 1972 articulated five different purposes for the exemption. The following sections examine these purposes one-by-one in light of the effect of the single employer doctrine.

1. Relief from Costs of Regulation

a. The Argument for Relief

¹⁸⁸29 U.S.C. §2101(a)(1).

¹⁸⁹29 U.S.C. §2611(8), incorporating by reference 29 U.S.C. § 203(a).

¹⁹⁰54 Fed. Reg. 16064 (April 20, 1989).

¹⁹¹58 Fed. Reg. 31812 (June 4, 1993).

The most frequently cited purpose for a small firm exemption is to relieve small firms of disproportionate regulatory costs.¹⁹² Judge Posner, for example, began his opinion in *Papa* with the premise that the small firm exemption was to relieve small firms of the “crushing expense of mastering the intricacies” of discrimination law.¹⁹³ The record of Congressional proceedings leading to Title VII confirms that this was an important justification for the exemption.¹⁹⁴ The essence of the argument is that a firm with very few employees lacks the economies of scale enjoyed by a firm employing a larger workforce. Costs of learning and implementing the law do not vary in direct proportion to the number of employees. For example, the cost of providing sexual harassment training might be nearly the same whether an employer has ten employees or fifty. A small firm might bear nearly the same cost as a large firm, and that cost might be a tolerable burden for the large firm when calculated on a per employee basis, but for the small firm the same cost would translate into a much higher cost per employee.¹⁹⁵

Making an exemption dependent on the number of a firm’s employees is consistent with a goal of avoiding a disproportionate burden for small firms. If the exemption depended on revenue instead of workforce size, an employer-lawyer with two associates and a secretary might fail to qualify for an exemption in a year in which the employer-lawyer won a huge contingency fee, even though the economies of scale would still be very poor for learning and implementing discrimination laws for three employees. In contrast, a new but very substantial business might be exempt under a revenue-based rule during its first year when it was hiring thousands of employees if it did not yet have any sales revenues. Such a firm would escape responsibility for discrimination in hiring its initial workforce, even though it enjoyed large firm economies of scale. Thus, an exemption based on the number of employees makes sense.

¹⁹²The state courts frequently rely on the same rationale when interpreting the effect of their own small firm exemptions. See, e.g., *Brown v. Ford*, 905 P.2d 223 (Okla.1995).

¹⁹³166 F.3d at 940. See also, e.g., *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir.1995); *Miller v. Maxwell's International Inc.*, 991 F.2d 583, 587 (9th Cir.1993).

¹⁹⁴See, e.g., 110 Cong. Record S 7073 (April 7, 1964) (Senator Stennis); 110 Cong. Record S 7074 (April 7, 1964) (Senators Jordan and Long); 110 Cong. Record S 13076-77 (June 9, 1964) (Senator Ervin); 110 Cong. Record S 13085, 13092 (June 9, 1964) (Senator Cotton).

The argument was repeated during the debates preceding the 1972 amendments. 118 Cong. Rec. S 2387, 2410 (1972) (statements of Sen. Stennis and Sen. Fannin); 118 Cong. Rec. 2389-90 (1972) (statement of Senator Allen).

¹⁹⁵Employment regulations are not the only costs that fall disproportionately on small firms. According to a Small Business Research Summary published by the Small Business Administration, the cost of a variety of government regulations calculated on a per employee basis is 45 per cent more per employee for very small firms (employing fewer than 20 employees) than for large firms (employing more than 500). Mark Crain & Thomas Hopkins, *The Impact of Regulatory Costs on Small Firms* (Sept. 2005), available online at <http://www.sba.gov/advo/research/rs264tot.pdf>.

Is the cost of not discriminating or learning not to discriminate truly significant for a small firm? Not discriminating on the basis of race, sex or religion might seem much easier than paying taxes or complying with many other laws. However, time has proved that discrimination law is not only complex but also difficult to understand and implement. It is not enough for the owner or top managers of a firm to learn the law. It must also be learned by every supervisor with authority to take an adverse employment action against any employee, and the firm must adopt measures to monitor its supervisors to make sure they are not discriminating. With the development of sexual harassment law, an employer probably needs to train even non-supervisory employees and monitor their social interactions at the workplace. And sexual harassment law is just one of several very complex rules of anti-discrimination with which employers must now contend. One could add disparate impact theory, interactive reasonable accommodation theory and stereotyping or other subconscious bias theories. The enactment of the Age Discrimination in Employment Act, Pregnancy Discrimination Act, and Americans with Disabilities Act have compounded the complexity of the law. The ADA, for example, requires an employer to understand what mental and physical conditions constitute protected “disabilities,” and to understand what accommodations are “reasonable”—daunting tasks even for lawyers and judges.

A few studies have confirmed that small firms are at a significant disadvantage in bearing these costs. According to one study, firms with fewer than 20 employees pay about \$920 per employee as a result of “workplace” regulations—which include wage and hour laws, occupational safety and health laws and a variety of other regulations—while firms employing more than 500 employees pay only \$841.¹⁹⁶ Presumably, the cost to small firms and the margin of the large firm advantage would increase if all small firms, including those employing as few as 15, were suddenly subject to Title VII and the other discrimination laws. Admittedly, the cost of other regulations is much greater. Environmental regulations, for example, are estimated to cost small firms \$3,296 per employee, and large firms only \$710 per employee.¹⁹⁷ Beyond the cost of discrimination law compliance, however, is the potentially catastrophic cost of litigation defense and liability for a single discrimination lawsuit.

The potential regulatory burdens suffered by a small firm are important for several reasons. Disproportionate burdens might impair its ability to compete, particularly with larger firms that enjoy better economies of scale. Even if a small firm could survive the burden (as it frequently does despite many other disproportionate costs), the small firm might be less likely to hire additional employees, and the resulting loss in employment opportunities could hurt the very persons the law was designed to help. Moreover, a small firm owner experiences regulatory costs quite differently than owners of a large firm. Many small firms owners operate their

¹⁹⁶SBA Office of Advocacy, Frequently Asked Questions (October 2005), available online at <http://www.sba.gov/advo/stats/sbfaq.pdf>. See also Crain & Hopkins, *supra* note 195, at 3, finding that small firms bear a per capita expense of \$829 per employee for “workplace regulations” even with the exemption, while the per capita figure is \$873 for firms employing 40 to 499 employees, and \$698 for firms employing more than 500.

¹⁹⁷*Id.*

businesses as a source of self-employment, and not just as an investment.¹⁹⁸ On the other hand, small business owners do not rely on “wages” or salary” like other workers. Frequently, they earn their sustenance from the profits of the business, which means that they bear all the risks of business. If competitive pressures prevent a small firm from passing disproportionate costs on to customers, the impact has a direct impact on the owner’s livelihood.

Moreover, in a very small firm the owner may be a general manager, front line supervisor and production worker all in one. He does not specialize in human resources or administrative services, either by training or actual work, and he probably lacks the resources to employ a specialist. The additional work and responsibility imposed by any new regulation is not only a financial burden, it is also a burden on his personal time and energy. If an applicant or employee sues the small firm, the owner/manager will also bear the burden in personal time, energy and stress in responding to charges, negotiating and preparing for trial. The time and energy spent in litigation will diminish his effectiveness as the manager of the business.

If the need for a small firm exemption is so clear, why there are no small firm exemptions from many other burdensome regulations? As noted earlier, small firms face particularly high costs because of environmental regulations. Moreover, small firms are not exempt from some expensive employment laws, such as the Occupational Safety and Health Act.¹⁹⁹ There are several reasons why a small firm exemption might be inappropriate for these laws.

First, the decision whether to exempt small firms could reflect a weighing of the costs and benefits of exemption. In the case of environmental regulations, for example, even a very small firm could cause catastrophic damage to the community by pollution or illegal dumping of toxic waste. Violation of occupational safety and health laws by a very small employer could cause death, total and permanent disability, or serious injury. No matter how great the burden of these regulations, it might make sense to require small firms to comply with the law even if small firms can no longer compete at all in particularly hazardous industries. In contrast, the harm caused by small firm discrimination is contained. An adverse employment decision, while harmful, is not fatal, and its effects are not likely to reach beyond the size of the employer’s small workforce unless all small firms discriminate in unison. In general, the jobs from which minorities might be wrongfully excluded in small firms tend to be at the bottom rung rather than the top. Small firms offer lower pay, fewer benefits, and less job security than larger firms.²⁰⁰

A second reason why an exemption might be more appropriate for discrimination law than other for laws is that an employer faces a different set of costs and risks in defending against discrimination claims. The issue whether an employer violated a safety or environmental standard usually depends on objective, physical evidence. Either the employer provided

¹⁹⁸See Small Business Administration, *The Small Business Economy*, pp. 9-11 (2005), available online at http://www.sba.gov/advo/research/sb_econ2005.pdf.

¹⁹⁹29 U.S.C. §651 - 678.

²⁰⁰Brown, Hamilton & Medoff, note 12, *supra*, at 29-51.

protective gear or he did not, and the outcome is not likely to depend on speculation about the employer's state of mind. Discrimination laws, however, provide a plausible basis for argument in many cases in which the evidence is mainly subjective and circumstantial. Even if the employer had a legitimate reason for an adverse action, the employer could still be liable if prejudice was one of the "motivating factors."²⁰¹ The employer may have to prove a speculative proposition, that it would have taken the same action regardless of the employer's discriminatory motive.²⁰² Proving or disproving all the circumstances and motivations for the employer's decision can involve many easily disputed facts. Defending against a discrimination claim is not only expensive, but frequently uncertain, and the ultimate resolution is frequently in the hands of a jury.

The mixed motive doctrine presents another special risk for the owner whose business is his employment and livelihood. In a very small business, the owner usually must take personal responsibility for nearly any significant employment decision. An allegedly discriminatory past act or a past unguarded outburst of prejudice could be circumstantial evidence enough to persuade a fact finder that discrimination was a "motivating factor." In larger organization, a manager with a troubled past might be terminated, assigned to non-supervisory work, or subjected to careful oversight with respect to employment decisions. In the case of a very small business, however, the only sure way for the owner to avoid the risk of a "motivating factor" charge is to sell or liquidate the business.

Still another reason why small firms may have a special need for exemption from discrimination laws has to do with the manner in which discrimination laws are enforced. Employment laws can be roughly divided into those which provide for private enforcement, and those which do not. The OSH Act, which lacks a small firm exemption, is an example of a law with very little private enforcement. It is enforced almost exclusively by the Occupational Safety and Health Administration (OSHA), a division of the Department of Labor.²⁰³ OSHA must take care not to antagonize small business interest groups that enjoy considerable influence in Washington and that have succeeded in limiting OSHA's powers in the past.²⁰⁴ If OSHA decides not to pursue a particular matter or theory or to moderate its demands against an employer, OSHA's decision is usually the end of the matter. There is very little opportunity for private enforcement of the OSH Act's provisions.²⁰⁵

²⁰¹See 42 U.S.C. 42 U.S.C. §2000e-2(m).

²⁰²Id.

²⁰³See 29 U.S.C. §658.

²⁰⁴See Mark Rothstein and Lance Liebman, *Employment Law*. 762-63 (5th ed. 2003).

²⁰⁵The opportunities for employees to challenge OSHA's lack of vigor in enforcement are quite limited. See, e.g., 29 U.S.C. §657(f) (writ of mandamus procedure for employee who believes Secretary of Labor has "arbitrarily or capriciously" failed to seek injunctive relief against an "imminent danger"); and §659(c) (allowing an employee to challenge the time period

In contrast, all the major discrimination laws permit private enforcement. Initial enforcement authority lies in the EEOC, an independent agency.²⁰⁶ Proponents of the small firm exemption for Title VII worried that small firms would be at a distinct disadvantage in dealing with what they feared would be a fearsome bureaucracy.²⁰⁷ In actual practice, the EEOC has been just as important as a facilitator of private enforcement as an instigator of public enforcement. The EEOC offers a charging party a means of preliminary investigation of the possibility of unlawful discrimination at no cost to the employee. However, regardless of whether the EEOC finds “reasonable cause” to believe the employer unlawfully discriminated,²⁰⁸ the individual employee decides for himself whether to sue, what theories to pursue, what remedies to seek, and whether to settle for any particular terms.²⁰⁹ Even if the employee is unable to find an attorney willing to accept his case, Title VII provides that “the court may appoint an attorney” for the employee and “authorize the commencement of the action without the payment of fees, costs, or security.”²¹⁰ If the employee prevails, the employer will pay his attorneys fees.²¹¹ If an employee’s claim has no merit, the claim might still have enough “nuisance” value to fortify the employee’s demand for some settlement price. These opportunities for private enforcement may be necessary to level the playing field between a very large firm and an individual employee. If the employer were a very small firm, however, Title VII’s private enforcement procedures might seem to turn the individual employee into a Goliath.

Finally, liability for employment discrimination is different from many other business liabilities because of the difficulty of insuring against such liability. A simple intentional discrimination lawsuit is excluded from coverage under a commercial general liability (CGL) policy precisely because it is “intentional” and because it does not involve the sort of bodily injury liabilities typically covered by a CGL policy.²¹² For many years after Title VII discrimination liability was essentially an uninsurable risk. Recently, the insurance industry has begun to develop a market for employment practices liability insurance (EPLI).²¹³ This new form

allowed for abatement).

²⁰⁶42 U.S.C. §2000e-4.

²⁰⁷See, e.g., 110 Cong. Record S 7073 (April 7, 1964) (Senator Stennis); 110 Cong. Record S 13079 (June 9, 1964) (Senator Ervin).

²⁰⁸See 42 U.S.C. §2000e-5(b).

²⁰⁹See 42 U.S.C. §2000e-5(f)(1).

²¹⁰Id.

²¹¹42 U.S.C. §2000e-5(k).

²¹²See R. Bales, *Insuring Title VII Violations*, 27 So. Ill.U.L.J. 71, 77-80 (2002).

²¹³See Joan Gabel, Nancy Mansfield, Ellwood Oakley & Tom Lundin, Jr., *Evolving Conflict Between Standards for Employment Discrimination Liability and the Delegation of That*

of insurance does not necessarily close the gap between very small firms and larger firms insofar as their ability to absorb the costs of liability under employment discrimination laws. Small firms are likely to experience the usual disadvantages in purchasing insurance at competitive rates, and it is questionable whether EPL insurers will choose to sell policies to firms so small that they cannot afford professional human resources or other expensive risk avoidance measures.²¹⁴

The argument that an exemption is necessary to spare small firms from a disproportionate financial burden is undercut to some extent by the fact that small firms are still subject to liability for discrimination under other laws.²¹⁵ Section 1981²¹⁶ prohibits race discrimination without any exemption for small firms; executive orders require “affirmative action” by federal contractors regardless of the number of employees;²¹⁷ and many state discrimination laws lack exemptions or provide much more limited exemptions.²¹⁸ However, none of these laws appeared likely to overburden small firms in 1964, and even today they are of little consequence in comparison with Title VII. In 1964 the Supreme Court had not yet rendered the broad interpretation of Section 1981 that made that statute an alternative basis for an employment discrimination claim against a

Liability: Does Employment Practices Liability Insurance Offer Appropriate Risk Transference?
4 U. Pa. J. Lab. & Emp. Law 1, 28-30 (2001).

²¹⁴See Lorelie S. Masters, *Protection From the Storm: Insurance Coverage for Employment Liability*, 53 Bus. Law. 1249, 1275-76 (1998).

²¹⁵Senator Javitts asserted this argument:

[T]he small businessmen should be covered as well as the large businessman—as he is in a whole string of other laws across the board. Do we think that if he we leave him out of this provision, we will save him from litigation with the Department of Justice, the SEC, or the other departments? Of course not.

110 Cong. Record S 13093 (June 9, 1964) (Senator Javitts).

²¹⁶42 U.S.C. §1981.

²¹⁷Executive Order No. 10925 (1961); Executive Order No. 11246 (1965). Implementing regulations are at 41 C.F.R. §§60-1.1 to 60-999.2. See also 110 Cong. Record S 13088 (June 9, 1964) (Senator Humphrey).

²¹⁸During the 1964 Congressional proceedings, several Congressmen noted that California’s discrimination law applied to employers with as few as five employees. 110 Cong. Record S 6563 (March 30, 1964) (Senator Kuchel); 110 Cong. Record S 13090 (June 9, 1964) (Senator Humphrey). Senator Dirksen noted that some state laws reached employers of only one employee. 110 Cong. Record S 13087 (June 9, 1964). See also 110 Cong. Record S 6548 (March 30, 1964) (Senator Humphrey).

private sector employer.²¹⁹ Today Section 1981 prohibits a very narrow range of discrimination in comparison with Title VII,²²⁰ and it lacks the employee-friendly charge processing and investigatory scheme of Title VII. The executive orders for affirmative action are much less intimidating than Title VII in terms of complexity or potential liability,²²¹ and can be avoided altogether by not doing business with the federal government. As for the states, many did not prohibit discrimination in 1964.²²² Today nearly every state prohibits discrimination, but usually with a small firm exemption modeled after Title VII.²²³ State laws that lack an exemption are sometimes accompanied by administrative dispute resolution and limited liability for employers.²²⁴

There is one more fact—a development since 1964—that might undercut the need for regulatory relief for small firms today. Since 1964, the staffing service industry has developed a number of models for providing professional human resources services for small businesses. One

²¹⁹See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) (Civil Rights Act of 1866 does not require proof of state action).

²²⁰For example, Section 981 prohibits only intentional race discrimination and possibly national origin discrimination. See *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987). It does not prohibit discrimination on any other basis, and it does not prohibit disparate impact race discrimination. *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982).

²²¹There is no private enforcement of employee rights under the executive orders. *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1083 (5th Cir. 1980). If a contractor violates its obligations, it might be disbarred from doing business with the federal government, but the Office of Federal Contract Compliance Programs is likely to use this the threat of this sanction mainly as leverage to encourage reform.

²²²See 110 Cong. Record S 13080 (June 9, 1964) (Senator Clark).

²²³See *Griffin v. Eller*, 130 Wash.2d 58, 66, 922 P.2d 788, 791 (1996) (describing a survey of state laws). The states that provide small firm exemptions have reached conflicting conclusions with regard to whether there is a common law or public policy-based wrongful discharge cause of action based on discrimination. Compare *Roberts v. Dudley*, 140 Wash. 2d 58, 993 P.2d 901 (2000) (small employer liable for wrongful discharge based on a public policy against discrimination); with *Jennings v. Marralle*, 8 Cal.4th 121, 32 Cal.Rptr.2d 275 (1994) (statutory small firm exemption preempts common law cause of action against exempt employer); and *Burton v. Exam Center Indus. & General Medical Clinic, Inc.*, 994 P.2d 1261 (Utah 2000).

²²⁴Wisconsin law, for example, has no small firm exemption. A person could be an employer by virtue of employment of a single employee. Wis. Stat. ch. 111.32(6)(a). However, Wisconsin's law provides for administrative dispute resolution with limited financial liability for the employer. Wis. Stat. ch. 111.39.

model involves the transfer of some or all the small business's employees to the staffing service's payroll, making the staffing service the nominal "employer" of the employees. The contract employer (the workers' original employer) then "leases" the employees from the staffing service, to do exactly the same work as before. The leasing of employees can make it easier to secure insurance and benefits for the employees, and it can also be one way of providing professional human resources management for the workforce, provided such services are part of the arrangement. Whether such services are equally available to or practical for a small firm as for a large firm, and whether they significantly reduce or eliminate a small firm's problems in matching a larger firm's economies of scale is unclear. A survey by the American Staffing Association shows that small firms are less likely than larger firms to rely on staffing services. While 24 percent of firms employing more than 100 employees engaged staffing services, only 12 percent of firms employing 25 to 99 employees engaged staffing services.²²⁵ Most firms that engaged staffing services did so to obtain "temporary" help, to provide temporary substitution for regular employees on leave, or to perform special short term projects. As of 2005, employee leasing or other "contract" worker arrangements appear to have reached a very limited number of firms and workers.²²⁶ In sum, it does not appear that staffing services have been a significant factor in closing the gap between large and small firms.

**b. Is the Single Employer Doctrine Consistent
With the Goal of Regulatory Relief for Small Firms?**

In *Papa*, Judge Posner argued that the single employer doctrine is inconsistent with the small firm exemption's purpose of protecting small firms from the disproportionate burden of regulation.²²⁷ He began his argument with a premise that the regulatory relief purpose of the exemption is unrelated to the wealth of a firm's owner: "If a firm is too small to be able economically to cope with the antidiscrimination laws, the owner will not keep it afloat merely because he is rich; rich people aren't famous for wanting to throw good money after bad."²²⁸ Next, he argued that intercorporate ownership and integration of operations, management, or personnel relation are no more relevant to the small firm exemption than the wealth of the owner.²²⁹ Intercorporate integration, standing alone, reveals nothing about a firm's need for an exemption, according to Judge Posner, because it is a perfectly normal way of doing business, as

²²⁵Steven P. Berchem, American Staffing Association's Annual Economic Analysis of the Staffing Industry (2005), online at www.americanstaffing.net/statistics/economic2005.cfm

²²⁶Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements (July 27, 2005), online at ftp.bls.gov/pub/news.release/conemp.txt.

²²⁷For a discussion of the facts and issues in *Papa*, see text accompanying notes 49-71, *supra*.

²²⁸166 F.3d at 940.

²²⁹*Id.* at 942.

much for very small firms as for larger ones. A small firm must integrate at least some functions with other firms by some means in order to achieve economies of scale necessary to compete, particularly against larger firms. When a small firm integrates by affiliating with another firm, such as by one firm's acquisition of another, it is simply adopting one of at least two different strategies for integration. The small firm could also integrate by making a contract for certain services with an independently owned firm that performs the same service for many other firms.

Indeed, a small firm can achieve economies of scale by either means of integration—affiliation or contract—for nearly any business function. Consider, for example, the integration of personnel management (including payroll and benefits administration). If the firm owns, is owned by, or shares a common owner with another firm, the combined enterprise can employ one full time payroll and benefits administrator to service both firms, splitting the cost between the firms. Alternatively, the small firm could contract with an unaffiliated payroll and benefits servicing agency that serves many different firms, at a fraction of the cost of hiring staff to provide the same services in-house.

In Judge Posner's view, the single employer doctrine ascribes undue importance to a firm's choice of methods for integration. Under most applications of the doctrine in discrimination law, common ownership or some other means of common financial control is a prerequisite for treating two firms as one employer. Naturally, commonly owned firms are more likely to integrate administration and operations with their affiliates, rather than by contracting. However, Judge Posner argued that a small firm's integration by one means rather than the other has little or no bearing on its need for regulatory relief. "*Why* should it make a difference," he queried, "if the integration takes the [contract] form instead of common ownership, so that the tiny employer gets his pension plan, his legal and financial advice, and his payroll function from his parent corporation without contractual formalities, rather than from independent contractors?"²³⁰ Finding no reason, Judge Posner concluded that the means of integration should make no difference at all. In his view, the fact that the employer subsidiaries in *Papa* merged payroll administration and benefits plans with their parents and affiliated subsidiaries was simply irrelevant to whether they qualified as small firms exempt from the reach of employment discrimination laws.

The difficulty with this reasoning is that if it were categorically true, the small firm exemption would serve no practical function at all, except to create an arbitrary and irrational distinction between small corporations on the one hand, and small divisions of corporations on the other. To restate Judge Posner's query, why should it make a difference if firms integrated by affiliation or contracting remain separately incorporated, rather than merging? If it is true that contracting or integration achieve the same economies of scale, then an enterprise is in the same boat whether it is independently owned, separately incorporated but affiliated, or an unincorporated part of a larger corporation. And this would mean that Congress's belief that small firms need relief is simply wrong. Congress should have followed the lead of those states that deny preferential treatment to small firms.

²³⁰Id. (emphasis added).

Judge Posner's argument that the means of integration of personnel administration is not a meaningful basis for distinction is best directed at one arguable overuse of the single employer doctrine: piercing the corporate veil for purposes of holding a corporation liable for the actions of a separately incorporated affiliate. It is, of course, widely accepted that good faith incorporation is a legitimate means of limiting an owner's liability. The rule limiting liability promotes investment as much for small firms as for large ones.²³¹ Since integration by one means or another is normal for any business, the mere fact that integration occurs between a parent corporation and its subsidiary is not, standing alone, a persuasive reason to pierce the corporate veil, and there does not appear to be any reason why liability for discrimination should be anymore penetrating than liability for any other reason. In *Papa*, however, the precise issue on appeal was whether the affiliates should be treated as one "employer" for purposes of *coverage*. True, the EEOC has adopted the NLRB's view that application of the single employer doctrine is the equivalent of piercing the corporate veil for purposes of liability,²³² but piercing the corporate veil raises entirely different issues from the problem of coverage. A finding that a small subsidiary should not be treated as an exempt small firm would not lead ineluctably to a finding that the entire corporate family was jointly liable. Still, the arguments of critics like Judge Posner might best be understood as an anticipatory response to the possibility that plaintiffs, having obtained coverage over a subsidiary, will then hold the parent financially liable.

The real issue for cases like *Papa*, however, is whether separately incorporated entities that are closely affiliated and integrated with larger enterprises should be granted the same exemption allowed to truly small and independent firms. In this regard, there are important limits to Judge Posner's argument. First, independent firms might not be able to gain the same efficiencies of scale by contract that affiliated firms gain by integration. As noted earlier, the staff services industry provides personnel administration on a contract basis for many firms, but very small firms do not seem to have used these services as effectively as larger firms.²³³ Since very small firms tend to be the least stable and pay the lowest wages and the least benefits, it is doubtful that they are attractive clients for the staffing services industry. If so, a firm that affiliates and integrates with a larger enterprise is at a comparative advantage, whether the enterprise provides personnel services internally or contracts for such services on behalf of all its subsidiaries.

Second, the economies of scale that contracting might provide for ongoing personnel functions such as payroll and benefits administration might not apply to the regulatory costs of discrimination law. Some of the principal costs of discrimination law are training and review of supervisors, developing an ongoing awareness of the law, and promoting a culture of nondiscrimination. If the firm is a subsidiary within a larger enterprise, it can combine training

²³¹See generally John A. Swain & Edwin E. Aguilar, *Piercing the Veil to Assert Personal Jurisdiction Over Corporate Affiliates: An Empirical Study of the Cannon Doctrine*, 84 B.U. L. Rev. 445, 446, 450-51 (2004).

²³²See text accompanying note 35, *supra*.

²³³See text accompanying notes 225-26, *supra*.

of managers from all affiliated organization to achieve economies of scale that cannot be obtained by the independent firm's contracting with outside providers. Moreover, an integrated enterprise enjoys the advantage of informal sharing of information and the culture of diversity among affiliated managers, particularly when there is overlapping management, in ways that cannot be achieved by contracting. Other potential costs of discrimination law are defense and liability. As noted earlier, these costs might actually be the most important disproportionate burdens small firms would face if not for the small firm exemption,²³⁴ but small firms might not be able to insure against these costs.²³⁵

Third, Judge Posner was replying mainly to one part of the single employer test, the integration of labor management, which he deemed irrelevant. His attention to this particular factor is not surprising, because the EEOC and the courts have tended to assign particular importance to this factor. However, Judge Posner may be correct that the importance of integrated labor management is overplayed in discrimination cases. The NLRB has emphasized integrated labor management as a factor in bargaining unit cases, and in discretionary jurisdiction cases in which the ultimate question is the effect of a labor dispute on commerce. In discrimination law, however, the question is how to aim the small firm exemption at firms that operate at such a disadvantage in general that they may need relief from government regulation. Even if independent small firms are able to contract for personnel services that affiliated firms gain by integration, there are still many reasons why independent firms might be at a disadvantage. Small independent firms might not be able to gain competitive economies of scale with respect to the integration of other services and operations beyond personnel administration. Moreover, small firms often remain independent even when profits are relatively low because the owner seeks and perhaps needs the independence and security of self-employment.²³⁶

Finally, Judge Posner's initial premise, that the character of the business owner (wealthy or not wealthy) is irrelevant, may be a bit off the mark. At least as a matter of rhetoric, Congress's debates about the small firm were particularly about the individual whose business is his self-employment or the employment for his family. The image of a self-employed business owner seems clear enough from the tenor of the Congressional debates about the burden of regulation on the small business owner.²³⁷ It becomes even clearer in the next section about one

²³⁴See text accompanying notes 201-211, *supra*.

²³⁵See text accompanying notes 212-14, *supra*.

²³⁶For a discussion of personality traits of the self-employed, including their greater emphasis on independence, see Sjoerd Beugelsdijk & Niels Noorderhaven, *Personality Characteristics of Self-Employed: An Empirical Study*, 24 *Small Business Economics* 159 (2005).

²³⁷A test based on the number of employees does not precisely match the rhetoric, but it is hard to imagine a more effective definition of "small" for this purpose. As noted earlier, the only other simple and widely accepted means of measuring firm size is by revenue, but this method

of Congress's other purposes: To protect truly "personal" relationships.

2. A Right of "Personal" Relationships

A second goal articulated by Congressional proponents of the small firm exemption was to secure a limited sphere for a right of personal relationships free from government interference.²³⁸ Even the boldest proposals for the Civil Rights Act of 1964 did not include regulation of intimate relations, such as marriage, family, friendship and purely social relations. There was intense conflict, however, at several points along the uncertain border between "business" and "personal." Provisions of the Act directed at public accommodations, for example, provoked the "Mrs. Murphy" debate: If "Mrs. Murphy" sought to make a little money by offering the extra room in her home to a boarder, should the government tell her whom she must invite?²³⁹

The business versus personal argument extended to Title VII of the Act. There was evidently no dispute that some working relationships such as partnership were personal even if they were for a business purpose, and that these relationships must remain outside the reach of the law. However, advocates of the small firm exemption argued that some employer-employee relations were also personal, and that the law should protect the most personal employment relations by distinguishing between large, bureaucratic workplaces and small, intimate ones. Within a small firm, the argument ran, relations between owners, managers and their employees were like partnerships or other personal associations. These relations were not a proper subject of government regulation.²⁴⁰ "[W]hen a small businessman ... selects an employee," Senator Cotton reasoned, "he comes very close to selecting a partner; and when [he] selects a partner, he comes dangerously close to the situation he faces when he selects a wife."²⁴¹ Senator Cotton conceded

has its own problems and might defeat the purpose of discrimination law in some important respects. See text accompanying note 195, *supra*. One could also envision a test based on the number of a firm's individual owners to distinguish "investment" from self-employment, but such a test would then have to account for the fact that families sometimes act like individuals, depending on lines of authority and loyalty within the particular family.

²³⁸The idea of zone of freedom to discriminate in "personal" relations within very small firms was also a purpose of some of the state laws that preceded Title VII. See *Jennings v. Marralle*, 8 Cal.4th 121, 32 Cal.Rptr.2d 275 (1994); Tobriner, *supra* note 158, at 342 (describing the purposes of California's exemption for firms employing fewer than five employees).

²³⁹110 Cong. Record S 6534 (March 30, 1964) (Senator Humphrey).

²⁴⁰110 Cong. Record S 7074 (April 7, 1964) (Senators Long and Stennis).

²⁴¹110 Cong. Record S 13085 (June 9, 1964) (Senator Cotton)

that discrimination within the small firm was no less immoral than within the large firm.²⁴² Nevertheless, he relied partly on the “personal relations” argument in the course of proposing an unsuccessful amendment to raise the threshold for employer coverage to 100 employees.²⁴³

Proponents of broader coverage conceded that relations in the very small workplace might indeed be so personal as to warrant immunity from the law, but they disagreed that the threshold should be any higher. Senator Humphrey, one of the Act’s leading advocates, argued that if an employer’s workforce reached 25 employees, it would “lose most of whatever intimate, personal character they might have had.”²⁴⁴ He believed that personal relations would be adequately protected by a threshold of 5 or even fewer employees.²⁴⁵ In the end, he agreed to the 25 employee threshold not because a workplace of such size warranted protection for personal relations, but because “We must admit that in terms of appropriation and enforcement there are limits” to the scope of employer coverage.²⁴⁶

Of course, there is no particular workplace population at which relations cease to be “personal” and become “impersonal.” Relations in very large workplaces can be very intimate between some pairs or groups of individuals, and relations between an individual owner/manager and his sole employee can be distant and cold. Assuming that a headcount of employees is still the best test of potentially personal workplace relations, should personal relations be free from the prohibition against discrimination? Most of the reported Congressional commentary on the issue proceeded from an assumption that it is self-evident that the law should not interfere in personal relations, if only it were possible to draft a law to make the appropriate distinctions. But advocates for immunity for personal relations in 1964 frequently made the argument apologetically—they did not mean to suggest that discrimination in employment is ever moral—and over the years the personal relations justification has seemed to fade from memory. Many critiques of the small firm exemption omit any mention of the personal relations argument, as if it was never sincerely or persuasively advanced.

Still, there are reasons to be more protective of personal relations within a small firm than within a large firm. Title VII affects personal relations within the firm in two different ways. First, the enforcement process and remedies that go along with Title VII and other discrimination laws can be disruptive of personal relations within the firm, and more so in small firms than in large ones. When a disappointed applicant or employee charges or sues a small firm for employment discrimination, the resulting litigation can have consequences beyond the cost of

²⁴²110 Cong. Record S 13091 (June 9, 1964) (Senator Cotton).

²⁴³110 Cong. Record S 13085 (June 9, 1964) (Senator Cotton); 110 Cong. Record S 13093 (June 9, 1964).

²⁴⁴110 Cong. Record S 13088 (June 9, 1964) (Senator Humphrey).

²⁴⁵110 Cong. Record S 13089 (June 9, 1964) (Senator Humphrey).

²⁴⁶110 Cong. Record S 13089 (June 9, 1964) (Senator Humphrey).

defense or financial liability. Until the claim is resolved, the right to at least one job is uncertain. If the claimant prevails on the issue of discrimination, he or she might seek reinstatement at the expense of the “innocent incumbent” employee.²⁴⁷ If a firm employing 20 is sued for discrimination in hiring, the litigation affects at least 5 percent of its workforce. The smaller the firm, the larger the impact. If a current employee files an administrative charge with the EEOC while remaining employed, relations between the employee and the accused owner/manager are likely to be frosty—as evidenced by the large number of “retaliation” charges that follow discrimination charges.²⁴⁸ For a large firm, the effect of difficult relations on productivity can be diluted by the size of the workforce or by transfers. For a small firm, the tension between one employee and the owner/manager could become an overwhelming distraction.

A second and more direct way that discrimination law affects personal relations within the small firm is by prohibiting the owner/manager’s prejudices for particular types of employees, particularly prejudices that are illegal under the law. It may seem preposterous that the exemption was designed to permit small firms the very evil the law was designed to eradicate.²⁴⁹ Even supporters of the exemption in 1964 stopped short of an explicit defense of discrimination by small firms. Nevertheless, the effect of the exemption is to permit small firms to discriminate, unless they are subject to state or local anti-discrimination laws. Thus, for better or worse, the small firm exemption serves as a refuge for the incurably color-conscious.

In fact, it should neither be surprising nor very troubling if owner/managers of very small firms are allowed to be affected by conscious or subconscious biases or engage in the sort of discrimination that is illegal when practiced by larger firms. Self-employment and ownership of small business provides employment and opportunity for many persons who find it difficult to work for others or to conform to rules established by others. Self-employment may also be the best outlet for persons who cannot conform or who are unwilling to conform to some of the rules of discrimination law. Moreover, if a small firm owner’s biases are susceptible to proof because of past incidents or allegations, he may be unemployable as a manager or supervisor in a nonexempt firm, because his record of possible bias would be evidence of discrimination in any challenged employment decision in which he was involved. If self-employment is the most

²⁴⁷See generally, Note, *Title VII Remedies: Reinstatement and the Innocent Incumbent Employee*, 42 Vand. L. Rev. 1441 (1989). An order for the employment or reinstatement of a prevailing plaintiff does not require the employer to discharge the employer’s preferred candidate, but it is unlikely, especially in a small firm, that the employer can continue to employ both individuals.

²⁴⁸Retaliation cases constitute more than a third of the suits failed by the EEOC against employers. EEOC, FY 2005 Annual Report on the Operations and Accomplishments of the Office of the General Counsel, pt. III. C and D, available online at www.eeoc.gov/litigation/05annrpt/index.html.

²⁴⁹Several state courts have interpreted their own laws, modeled after Title VII and the small firm exemption, to preempt a public policy-based common law prohibition against discrimination. See notes 10, 223, *supra*.

productive option for such individuals, a license to discriminate in the selection of a small number of employees may be a necessary corollary.

Granting such a license is not a trivial matter. As noted at the outset, small firms employ millions of workers, and the impact of their discrimination could be significant, particularly in small towns and labor markets where small firms predominate. Fortunately, there are some limits on this impact. The very worst forms of discrimination, such as rank sexual or racial harassment, are still subject to tort law. A small business owner whose harassment of an employee is “outrageous” might be exempt from an EEOC charge but could still find himself liable for the tort of outrage²⁵⁰ and possibly for assault or battery. Moreover, the impact of the small firm license to discriminate may be diminished by the fact that not all small business owners feel the same biases. To some extent, their biases will be opposite and offsetting. Minority firms, for example, tend to employ a disproportionately large number of minority workers.²⁵¹ In fact, the idea that discrimination by small firms could actually benefit minorities was a third argument advanced by promoters of the small firm exemption in 1964, and this idea is explored in greater detail in the next section of this article.

If protection of personal relationships is a purposes of the small firm exemption, then the single employer doctrine is consistent with that purpose. A small firm owned by an individual or family more nearly matches Congress’s intent than a firm that is affiliated with, and perhaps completely owned by a larger enterprise, particularly if the small firm’s separate incorporation is for business reasons unrelated to personal relationships within its workforce. When the firm is part of a larger family of corporations, its existence is unlikely to be tied to a particular individual, and affiliation with the larger enterprise provides more options for dealing with a dispute over the right to a particular job or the tension resulting from a discrimination charge. For example, centralization of power within an enterprise allows for the possibility of intercorporate reassignments and transfers.

3. Racial and Ethnic Self-Help: Discrimination by Minority Owned Small Firms

Senator Cotton, a defender of the small firm exemption and proponent for an even wider exemption, explained a third reason for the small firm exemption:

If I were a Negro, and by dint of education, training, and hard work I had amassed enough property as a Negro so that I had a business of my own, ... [if] I wanted to help people of my own race to step up as I had stepped up, I think I should have the right to do so.... I do not believe that anyone in Washington should be permitted to come in and say, “You cannot employ all Negroes. You must have some Poles. You must have some

²⁵⁰ Restatement (Second) of Torts §46 cmt. d (1965).

²⁵¹Small Business Administration, *The Small Business Economy*, pp. 60-61, 87-88 (2005), available online at http://www.sba.gov/advo/research/sb_econ2005.pdf.

Yankees.”²⁵²

It is tempting to dismiss Senator Cotton’s plea for ethnic or racial self-help as disingenuous. The right of small business owners to promote their own race did little for the African-American community before Title VII because discrimination, including a great deal of self-help by non-minority businesses, had severely limited minority entrepreneurship. Perhaps Senator Cotton envisioned a day when laws against discrimination would permit minority entrepreneurship to flourish, and a small firm exemption would serve as a kind of self-affirmative action for the first wave of minority entrepreneurs to spread the seeds of their success within their own communities. However, even today African-Americans as a class lag behind White Americans in self-employment or small firm ownership.²⁵³ Minority owned small firms do tend to hire more employees of the same minority,²⁵⁴ but “lawful” discrimination is not necessarily the reason. Minority owned businesses might hire more minorities simply because they are located in racial or ethnic enclaves.

The best support for the racial or ethnic self-help argument comes from the experience of some immigrant communities, where small businesses have created employment opportunities and provided a community-wide economic lift.²⁵⁵ Some measure of immigrant success might depend on intentional discrimination. For example, a family of immigrants might prefer to hire its own members, relatives or friends to work in the restaurant, shop or motel it owns. The family might also share resources and information with or grant preferences to other businesses within a network of families of the same ethnicity.²⁵⁶ Such favoritism could be illegal “national origin” or “race” discrimination by a covered employer,²⁵⁷ but the small firm exemption protects the small family-owned business from the duties of nondiscrimination. Over time, the business might become more successful and graduate to the rank of “covered” employer.

The single employer doctrine is entirely consistent with a legislative intention to permit minority self-help within very small firms. The effect of the doctrine is to limit the right self-

²⁵²110 Cong. Record S 13086 (June 9, 1964) (Senator Cotton). See also 110 Cong. Record S 13086 (June 9, 1964) (Senator Curtis). Senator Fannin raised a similar argument during the debate preceding the 1972 amendments. 118 Cong. Rec. S 2409-10 (1972) (statement of Sen. Fannin). See also 118 Cong. Rec. 3171 (1972) (statement of Senator Ervin).

²⁵³Small Business Administration, *The Small Business Economy*, pp. 60-61, 87-88 (2005), available online at http://www.sba.gov/advo/research/sb_econ2005.pdf.

²⁵⁴See note 251, *supra*.

²⁵⁵Small Business Administration, *The Small Business Economy*, pp. 60-61, 87-88 (2005), available online at http://www.sba.gov/advo/research/sb_econ2005.pdf

²⁵⁶*Id.*

²⁵⁷See, e.g., *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982).

help to the sorts of individually or family owned firms that the proponents of the exemption appear to have had in mind. Even the strongest proponents of the exemption and self-help do not appear to have intended to permit minority self-help by firms closely affiliated with larger enterprises and not necessarily associated with a particular individual or family. Otherwise, a very large enterprise composed of many separately incorporated restaurants, motels, retail establishments or other small-scale establishments might continue to engage in lawful discrimination that might eventually defeat Title VII's goal of racial and ethnic integration.

4. Avoiding Over-Extension of the EEOC's Resources

A fourth argument for the small firm exemption was that the the EEOC's projected budget would not support an unlimited jurisdiction over all employers.²⁵⁸ Questions about the likely size and budget for an EEOC and its capacity to tackle the formidable problem of employment discrimination were frequent topics in the Congressional debate. Past experience was sobering. Lack of administrative resources had undermined efforts to enforce executive orders against discrimination by federal contractors.²⁵⁹ Senator Cotton warned that if Title VII applied to all employers, large and small, it would require a "small army" for enforcement.²⁶⁰ Fiscal support for an "army" of federal bureaucrats was unlikely, and a smaller number of bureaucrats would be overwhelmed by their task. "If it became necessary ... to investigate every complaint," Senator Cotton argued, "enforcement would become well neigh impossible; and enforcement which did occur would be found to be spotty."²⁶¹ The solution was to approve an agency of limited size and mandate to target cases yielding the greatest impact and the greatest number of employment opportunities for minorities.

The small firm exemption was not really necessary for this strategy. Congress might have let the EEOC follow the example of the NLRB, which had adopted self-tailored jurisdictional limits to better manage its administrative resources.²⁶² The extent of the small firm exemption, or perhaps a series of exemptions tailored to particular businesses, might then have evolved according to the EEOC's actual experience and resources. But whether or not a statutory limitation of coverage was necessary, the leading supporters of Title VII used the small firm exemption to assure Congress that the law would not require a bureaucratic behemoth, that the agency's projected budget was sufficient, and that the EEOC would spend its efforts

²⁵⁸See, e.g., 110 Cong. Record S 13091 (June 9, 1964) (Senator Cotton).

²⁵⁹Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of Civil Rights Act of 1964, pp. 1-3 (1978).

²⁶⁰110 Cong. Record S 13086 (June 9, 1964) (Senator Cotton).

²⁶¹110 Cong. Record S 13085 (June 9, 1964) (Senator Cotton). See also *Griffin v. Eller*, 130 Wash.2d 58, 66-69, 922 P.2d 788, 791-92 (1996).

²⁶²See text accompanying notes 117-125, *supra*.

efficiently.²⁶³ Senator Humphrey, who had favored a much smaller exemption, explained his agreement to the twenty-five employee threshold as the product of a realistic appraisal of resources available for enforcement.²⁶⁴ A small firm exemption for employers with fewer than twenty-five employees became one basis for his estimates of the EEOC's responsibilities and needs.²⁶⁵

The single employer doctrine expands coverage and thus increases the number of cases the EEOC must process, but the EEOC endorses the single employer doctrine as part of the rules of coverage. That might be answer enough to the question whether the doctrine is consistent with conservation of the EEOC's resources. The four-factor version of the doctrine recited in the EEOC's regulations is sufficiently vague to permit the EEOC a fair amount of latitude for applying the doctrine according to the demands on agency resources. Moreover, the enforcement process that has evolved since 1964 depends more on private enforcement than the drafters of Title VII might have foreseen. If the EEOC is stymied, individual plaintiffs are still free to pursue enforcement by a private lawsuit.

5. The Small Firm Exemption as a Political Compromise

A realistic appraisal of the original legislative purpose of the small employer exemption deserves the usual caveat for politics. Many of the Congressmen who worried for small firms or who favored a wider small firm exemption represented the Old South and segregation. They were not seeking to make the Civil Rights Act of 1964 a better law. They were hoping to defeat it.²⁶⁶ The record of Congressional debate over the exemption is unusually rich because the Act's opponents filibustered and filled the record with many arguments designed as much to fill time

²⁶³110 Cong. Record S 13081 (June 9, 1964) (Senator Clark)

²⁶⁴110 Cong. Record S 13089 (June 9, 1964) (Senator Humphrey). See also 110 Cong. Record S 13087 (June 9, 1964) (Senator Dirksen).

²⁶⁵110 Cong. Record S 13088 (June 9, 1964) (Senator Humphrey). Relying on employer registrations with the Social Security Administration, Senator Humphrey counted 3 million employers above the threshold for coverage. He believed these 3 million constituted 8 percent of all employers, and that they employed 40 percent of all employees. *Id.*

²⁶⁶Opponents of Title VII were of two minds about the exemption. While most opponents of Title VII appear to have supported the exemption as a way of diluting a law that might be inevitable, some appeared to oppose the exemption as a kind of dare, arguing that anything less than complete coverage was morally inconsistent. Senator Stennis of Mississippi argued during the 1972 debate, "If a principle is involved here, if it is a right these employees have, why exempt those who employ less than eight? . . . If someone has only two employees, if a principle is involved, this bill ought to cover it." 118 Cong. Rec. S 2490 (1972).

as to win votes.²⁶⁷ On the other hand, the Act's supporters were not insensitive to the arguments listed above, and they did not oppose a small firm exemption in principle. They simply resisted an exemption any wider than necessary to gain the Act's passage.²⁶⁸

Politics best explains the decision to set the threshold for coverage at any particular level. Only the explanation of the exemption as a device to match the EEOC's mandate with its means arguably points decisively to a threshold of twenty-five employees in 1964 or fifteen in 1972, rather than any of the other thresholds proposed in Congress or adopted in various state civil rights laws.²⁶⁹ Still, there is little in the record to suggest a studied effort to arrive at precisely the right threshold, other than to find the threshold leaving enough small business owners outside the Act's coverage to make the new law palatable.²⁷⁰ In this regard, Congress was simply following a road to compromise already successfully charted by several state legislatures.²⁷¹ Senator

²⁶⁷See 110 Cong. Rec. S 7069-7092 (April 7, 1964). See also 110 Cong. Record S 7202-7203 (April 8, 1964) (Senator Clark's description of the filibuster). Filibusters had defeated earlier attempts at civil rights legislation. On this occasion, the Senate did not approve the final version of the Civil Rights Act, including Title VII, until after 534 hours of debate. Equal Employment Opportunity Commission, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, pp. 8,11 (1978).

²⁶⁸See 110 Cong. Record S 6549 (March 30, 1964) (Senator Humphrey); 110 Cong. Record S 6563 (March 30, 1964) (Senator Kuchel); 110 Cong. Record S 7218 (April 8, 1964) (Senator Clark); 110 Cong. Record S 13081 (June 9, 1964) (Senator Clark); 110 Cong. Record S 13083 (June 9, 1964); 110 Cong. Record S 13087 (June 9, 1964) (Senator Dirksen); (Senator Javitts); 110 Cong. Record S 13090- 13091 (June 9, 1964) (Senator Humphrey).

²⁶⁹See Note, *The Failure of the Integrated Enterprise Test: Why Courts Need to Find New Answers to the Multiple-Employer Puzzle in Federal Discrimination Cases*, 75 Ind. L.J. 1041, 1056 (2000), describing the different thresholds states had adopted for coverage under their civil rights laws.

Proponents for wider Title VII coverage sought to reduce the threshold from twenty-five to eight employees in 1972. See 118 Cong. Rec. 2390-2409 (1972); H.R. Rep. No. 92-238 (June 2, 1971) 92nd Cong., 2nd Sess. 1972, 1972 U.S.Code Cong. & Admin. News 2137. However, they settled on a reduction to fifteen, which remains the current threshold. Equal Employment Opportunity Act of 1972, Pub. L. 92-261, §2, 86 Stat. 103 (1972), codified at 42 U.S.C. §2000e(b).

²⁷⁰See, e.g., 110 Cong. Record S 13092 (June 9, 1964) (Senator Cotton) (warning of political backlash if small businesses were subject to the law).

²⁷¹In 1963, four years after California adopted its Fair Employment Practices Act, the Counsel for the California Fair Employment Commission summarized the purposes of California's small firm exemption. One reason he listed was to avoid "political repercussions" if individuals were not allowed "to retain some small measure of the so-called freedom to

Javitts defended the 25 employee threshold as part of a web of compromises that marked “the very thin edge of agreement.”²⁷² Senator Dirksen made the same argument in opposition to efforts to raise the threshold higher.²⁷³

The single employer doctrine is more consistent with this compromise than a rule of coverage without the doctrine. The rhetoric of the Congressional debate presented the exemption as protection for small, individually and family owned businesses, not subsidiaries of multi-corporate enterprises. Moreover, there is some evidence that those who argued in favor of the exemption were aware of the single employer doctrine in other contexts.²⁷⁴

V. Conclusion: What Kind of Single Employer Doctrine Best Serves Title VII’s Purposes?

Tradition, statutory text, and Congressional intent do appear to support the single employer doctrine, at least for matters of employer coverage under Title VII and the other major federal employment discrimination laws. What form should the doctrine take for this purpose? Must it necessarily follow the same four-factor test applied by the NLRB in collective bargaining cases? And what of the doctrine’s suitability for other purposes under discrimination law, such as treating affiliated corporations as one “respondent” for administrative purposes, applying the right ceiling for compensatory and punitive damages,²⁷⁵ or piercing the corporate veil to make a corporate parent or affiliate liable for the actions of a subsidiary? Is the test of single employer status necessarily the same for every purpose? Obviously, a conclusion that the single employer doctrine is part of the law of Title VII is only the starting point leading to many other issues. Here are at least a few thoughts about the doctrine’s use and mechanics in cases of employment discrimination.

First, it may be important to distinguish the doctrine’s different functions, particularly its function as a rule of coverage versus its function as a rule of liability. Nearly all the cases in which courts accepted the doctrine involved issues of coverage, not liability. To hold that a corporation is covered by Title VII is one thing. To say that a judgement against one subsidiary

discriminate.” A second was that the “framers” of the California law believed “they could afford to exempt the small employer” in order to obtain a law targeting the most important employers. Tobriner, note 158 *supra*, at 342 (1965).

²⁷²110 Cong. Record S 13093 (June 9, 1964) (Senator Javitts).

²⁷³110 Cong. Record S 13087 (June 9, 1964) (Senator Dirksen).

²⁷⁴See text accompanying note 161, *supra*.

²⁷⁵See 42 U.S.C. §1981a(b).

is good against affiliate and parent corporations is another.²⁷⁶ The failure to distinguish these two different functions may explain some of the recent resistance to the single employer doctrine. In *Papa*, for example, the issue was coverage, but Judge Posner rejected the single employer doctrine and offered a substitute: the traditional grounds for piercing the corporate veil for purposes of liability.²⁷⁷ True, much (but not all) of the history and analysis supporting the doctrine as a rule of coverage might also support the doctrine for purposes of liability, but the test for single employer status might nevertheless be different for each function. These are issues for another day.

Second, the four factor test that evolved for multiple functions in the law of collective bargaining is not necessarily appropriate for distinguishing truly small firms built on personal relationships and needing regulatory relief, from those that are part of a larger enterprise. Common ownership, especially complete common ownership, may be the most important factor for purposes of entitlement to the small firm exemption. On the other hand, Judge Posner may be correct that the usual four-factor test places undue weight on a firm's method of integrating its administration and operations with the affiliates. Whether a firm integrates any particular part of its business by contract or affiliation may say little about its need for relief with respect to the particular burdens imposed by employment discrimination law. Consider, for example, three separately incorporated restaurants owned by a single individual. Like many small businesses, the restaurants may have relatively little occasion to exhibit "integrated" personnel relations, and any single restaurant could operate independently of the others. On the other hand, the owner might now indirectly employ as many as 42 individuals in three allegedly exempt establishments in an industry with relatively high turnover. Such an enterprise is not likely to be based on personal relationships. For example, the owner does enjoy some economies of scale in learning the law. What he learns in his role as manager of one restaurant is equally useful in his role in another. Common ownership also creates the potential for exploiting the advantages of a large workforce, such as the ability to transfer workers from one establishment or division to another.

Finally, the single employer doctrine is often criticized for leading adversaries into a painstaking and seemingly pointless examination of the details of interrelated businesses, such as the sharing of common business forms, geographic proximity, common phone lines, and specific business transactions together. Much of this attention to details stems from the traditional importance attached to integration of operations and personnel administration. A test properly adapted to the purposes of the single employer doctrine would begin with common ownership, and would assign a strong presumption in favor of single employer status in the case of complete or substantially complete common ownership. The burden would then shift to the common

²⁷⁶The question whether the single employer doctrine pierces the corporate veil gained new importance in 1991 when Congress provided for compensatory and punitive damage awards against in discrimination cases, and limited such awards according to the number of a respondent's employees. See Civil Rights Act of 1991, Pub. L. 102-166, Title I, §102, codified at 42 U.S.C. 1981a(b). The question of piercing has also been particularly important in cases under the WARN Act, where the nominal employer is typically in some financial distress.

²⁷⁷See text accompanying notes 67-68, *supra*.

owner of the enterprise to prove that separately organized affiliates were particularly associated with individuals or personal relationships, or that there are circumstances preventing the affiliates from dealing with the burdens of employment discrimination regulation in the same manner as other large enterprises.

Such a test might alter the outcome in many cases. Firms with less than complete common ownership but sufficient integration to qualify under the four factor test might not qualify as a single employer under this revised test. Firms with complete ownership but little integration would not likely be a single employer under the traditional four factor test, but they might under a revised test. The result would more certainly vindicate the real goals of the small firm exemption.