

# FOLLOW THE LEADER: WHY ALL STATES SHOULD REMOVE MINIMUM EMPLOYEE THRESHOLDS IN ANTIDISCRIMINATION STATUTES

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*The time has come to bring an end to job discrimination once and for all, and to insure every citizen the opportunity for the decent self-respect that accompanies a job commensurate with one's abilities.<sup>1</sup>*

## INTRODUCTION

A thirty-year-old woman, previously employed by a small computer software company, comes into a law firm with complaints regarding her recent termination. She describes the business: a three-person operation where most of the work is done in one room in a rented office space downtown. The owner of the business was always present and made it very clear to the woman that she was also subordinate to the general manager, whose desk was on the opposite side of a small partition.

The woman had many responsibilities, both administrative and operational; she loved the job itself. Yet, her work experience got progressively worse due to her bosses' inappropriate comments regarding her dress, appearance, and "duties" as an employee. She constantly had to put up with crude jokes and advances from the general manager and owner. Although she wanted to leave several times, she knew there were few options out there for a woman with a high school education. She depended on the money from this job to support her family. Eventually, she was terminated because she "wasn't being a team player" and "wouldn't go the extra mile to keep her job."

She comes to you, a young attorney who just moved to a new city after law school, in search of a remedy under antidiscrimination laws. Right off the bat, you realize that success under a federal cause of action is impossible because the employer is lacking the necessary number of employees for the Equal Employment Opportunity Commission ("EEOC") to have jurisdiction over the case.<sup>2</sup> Thus, you contemplate pursuing an action under your state's

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1. H.R. REP. NO. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2141.

2. *See* 42 U.S.C. § 2000e(b) (2006); *id.* § 12111 (2006) (For claims under Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990, "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."); 29 U.S.C. § 630(b) (2006) (For claims under the Age Discrimination in Employment Act of 1967, "[t]he term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.").

antidiscrimination statute(s). Depending on this business' location, you may not have the option to pursue an action under state antidiscrimination statutes because the business may not have enough employees to be subject to the antidiscrimination laws in that particular state.

Although there are potentially valid reasons for minimum employee threshold, this Note will argue that these reasons are greatly outweighed by the potential dangers that stem from keeping these thresholds in place. The dangers can be compressed into an overarching problem: individuals who work for companies that do not meet minimum employee thresholds are not afforded the same protections as employees who work for companies that employ the requisite number of employees. Further, some of the reasons that justify the threshold at the federal level and keep state courts from agreeing on the issue are not necessarily applicable to state laws. Therefore, state legislators are in the best position to protect a large portion of the workforce that is currently not afforded the protection of antidiscrimination laws. This does not mean that the federal government has no role in making this happen; rather, this Note will argue that the best way to accomplish the objective of removing minimum employee thresholds is through cooperative federalism.

This Note first provides an overview of the history of antidiscrimination law and its current shape at the state and federal level. Part II takes a closer look at legislatures' rationales for minimum employee thresholds. Because state legislative history sheds very little light on the rationale behind state threshold numbers,<sup>3</sup> this Note focuses on the explanations given for the minimum threshold under Title VII of the Civil Rights Act of 1964 ("Title VII"). Part III explores the nature of today's economy and shows why individuals working at these small businesses are particularly vulnerable to discrimination and need to have remedies available to them. The Note focuses mainly on sexual harassment discrimination because more organizational and psychological research has been done in this area than other forms of discrimination. Part IV explores why states are best equipped to remove this threshold and why it should be the state legislatures, not the courts, that make this change. Finally, Part V presents a plan in which the federal government would work with states to remove these minimum employee thresholds from state antidiscrimination statutes.

## I. BRIEF HISTORY AND OVERVIEW OF ANTIDISCRIMINATION LAW

### A. *How Federal Antidiscrimination Law Came to Be*

1. *States Have Historically Led the Way in Developing Antidiscrimination Laws.*—The earliest post-Reconstruction efforts to end employment discrimination came in the 1940s in the form of state statutes.<sup>4</sup> These statutes

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3. Tammi J. Lees, Note, *The Individual vs. The Employer: Who Should Be Held Liable Under Employment Discrimination Law?*, 54 CASE W. RES. L. REV. 861, 873 (Spring 2004).

4. Note, *Fair Employment Practices—A Comparison of State Legislation and Proposed Bills*, 24 N.Y.U. L. REV. 398, 399 (1949).

were usually implemented by state legislatures to protect their citizens from threats to their rights and privileges or any other potential undermining of a free democratic state.<sup>5</sup> The majority of these early antidiscrimination statutes were passed “as an exercise of police power, as a fulfillment of the provisions of the state constitution, as a declaration of public policy or as a combination of two or more such bases.”<sup>6</sup> Although a great deal of individuals feared the potential negative effects stemming from the passage of these laws,<sup>7</sup> by 1963, twenty-two States had some type of statute barring discrimination on the basis of race in private employment.<sup>8</sup>

2. *Federal Government Follows Suit.*—The failure of other states to follow suit in passing antidiscrimination laws, coupled with an increasingly influential civil rights movement, caused an increase in the legislative support for congressional action.<sup>9</sup> Along with the failure of some states to pass antidiscrimination in employment legislation, some states, particularly in the South, had statutes that called for discrimination in employment, further implying the need for the federal government to take action.<sup>10</sup>

On July 24, 1964, President Johnson signed Title VII, the first federal antidiscrimination statute, into law.<sup>11</sup> Among other things, the law states that:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.<sup>12</sup>

As enacted, Title VII followed state antidiscrimination laws closely and, in fact, included much of the same language.<sup>13</sup>

The EEOC enforces Title VII for federal discrimination claims.<sup>14</sup> Title VII prohibits discrimination in all areas of employment, including, “hiring and firing;

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5. *Id.*

6. *Id.* at 398.

7. See Robert G. Meiners, *Fair Employment Practices Legislation*, 62 DICK. L. REV. 31, 42-43 (1957-58) (explaining how people predicted riots, an unsteady business world, and the division of employees if antidiscrimination in employment laws were passed).

8. JOEL W. FRIEDMAN & GEORGE M. STRICKLER, JR., *THE LAW OF EMPLOYMENT DISCRIMINATION* 15 (5th ed. 2001).

9. Lees, *supra* note 3, at 874.

10. See Meiners, *supra* note 7, at 42-43 (describing a Nevada law that made it illegal to hire individuals of certain national origins for public works and a South Carolina law that made it illegal for different races to work in the same room as one another).

11. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

12. 42 U.S.C. § 2000e-2 (2006).

13. GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE* 6 (2d ed. 2007).

14. MARGARET C. JASPER, *EMPLOYMENT DISCRIMINATION LAW UNDER TITLE VII* 5 (1999); see also 42 U.S.C. § 2000e-4 (2006).

compensation, assignment, or classification of employees; transfer, promotion, layoff, or recall; job advertisements; recruitment; testing; use of company facilities; training and apprenticeship programs; fringe benefits; pay, retirement plans, and disability leave; or other terms and conditions of employment.”<sup>15</sup> All federal claims filed with the EEOC must be filed within 180 days of the alleged discriminatory act for the individual to be entitled to file a private lawsuit.<sup>16</sup> The EEOC contracts with approximately ninety Fair Employment Practice Agencies (“FEPAs”) to process claims it receives.<sup>17</sup>

There are limitations in the federal antidiscrimination laws. For example, compensatory and punitive damages are not usually available to plaintiffs in disparate impact and indirect discrimination cases.<sup>18</sup> Furthermore, in reasonable accommodation cases, compensatory and punitive damages are not available if the employer has shown a good-faith effort to accommodate.<sup>19</sup> “Therefore, in contrast to intentional discrimination cases, the incentive for bringing disparate impact and reasonable accommodation cases is low.”<sup>20</sup> Likewise, several scholars have argued using economic analysis methods, that the Americans with Disabilities Act of 1990 (“ADA”) engenders a disincentive for hiring the disabled because it is a better financial decision to discriminate at the time of hiring than at the time of termination.<sup>21</sup> State antidiscrimination laws sometimes fill in these deficiencies in federal law, maintaining the importance of state laws in this area.<sup>22</sup>

3. *The Interplay Between Federal and State Antidiscrimination Laws.*—Title VII neither invalidates nor supersedes any state antidiscrimination laws, unless a state statute allows an action that would be unlawful under Title VII.<sup>23</sup> It specifically provides that “[n]othing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State.”<sup>24</sup> Both the Age Discrimination in Employment Act of 1967 (“ADEA”) and the ADA have similar language that provides that state antidiscrimination laws that

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15. JASPER, *supra* note 14, at 7.

16. *See* 42 U.S.C. § 2000e-5(e) (2006).

17. *State and Local Agencies*, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/field/indianapolis/fepa.cfm> (last visited June 3, 2014).

18. 42 U.S.C. § 1981a (2006); *but see* Smith v. City of Jackson, Miss., 544 U.S. 228, 239 (2005) (holding that a plaintiff may receive relief under a disparate-impact theory under the ADEA).

19. 42 U.S.C. § 1981a(3) (2006).

20. Julie Chi-hye Suk, Article, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV., 405, 454 (2006).

21. Zachary D. Schurin, *Monkey-Business: Connecticut’s Six Billion Dollar Gorilla and the Insufficiency of the Emergence of the ADA as Justification for the Elimination of Second Injury Funds*, 7 CONN. PUB. INT. L.J. 135, 152-53 (2007-08).

22. *See infra* Part IV.D.2.

23. 42 U.S.C. § 2000e-7 (2006).

24. *Id.*

provide more protection will not be preempted by their federal counterparts.<sup>25</sup> As pointed out in an article written three years after Title VII was passed, Title VII “recognizes the continued effectiveness of state fair employment laws and provides that they will retain a vital and perhaps dominant role in this area.”<sup>26</sup> The aforementioned portions of the ADA and ADEA further solidify this concept.

### *B. The Current State of Minimum Employee Thresholds*

Today, an employer must have at least fifteen employees for an employee alleging discrimination to seek a federal remedy under Title VII for an employment discrimination claim based on race, color, religion, sex, national origin,<sup>27</sup> or disability.<sup>28</sup> To have a federal remedy for an employment discrimination claim based on age, an employer must have at least twenty employees.<sup>29</sup> Victims of these types of employment discrimination who work for businesses with fewer than fifteen employees are in a gap where they are not afforded the protection of federal antidiscrimination laws.<sup>30</sup>

Twenty states have lowered the number of employees an employer must have to incur liability for discriminatory acts, thus lessening this gap of unprotected workers in these states.<sup>31</sup> Fourteen states have completely removed the minimum

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25. 29 U.S.C. § 633(a) (2006); 42 U.S.C. § 12201(b) (2006).

26. Arthur E. Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers*, 61 NW. U. L. REV. 907, 910 (1966-67).

27. 42 U.S.C. § 2000e(b) (2006).

28. *Id.* § 12111.

29. 29 U.S.C. § 630(b) (2006).

30. See David Hemken, *Twelfth Annual Review of Gender and Sexuality Law: Employment Law and Health Care Access Chapter: State Regulation of Sexual Harassment*, 12 GEO. J. GENDER & L. 647, 650 (2011) (“[M]any individuals working for small businesses do not fall under this umbrella of protection.”); see also 137 CONG. REC. 30660 (1991) (statement of Rep. Brooks) (“[W]hen a company has less than 15 employees, there are no damages available whatsoever because there is no cause of action under our current antidiscrimination statutes.”).

31. ARK. CODE § 16-123-102 (2012) (establishing that employers with nine or more employees can be held liable); CAL. GOV'T CODE § 12926 (2012) (establishing that employers with five or more employees may be held liable); CONN. GEN. STAT. § 46a-51 (2012) (establishing that employers with three or more employees may be held liable); DEL. CODE tit. 19, § 710(6) (2012) (establishing that employers with four or more employees may be held liable); IDAHO CODE § 67-5902 (2012) (establishing that employers with five or more employees may be held liable); IND. CODE § 22-9-1-3 (2012) (establishing that employers with six or more employees may be held liable); KAN. STAT. § 44-1002 (2012) (establishing that employers with four or more employees may be held liable); KY. REV. STAT. § 344.030(2) (2012) (establishing that employers with eight or more employees may be held liable); MASS. GEN. LAWS ch. 151B, § 1 (2012) (establishing that employers with six or more employees may be held liable); MO. STAT. §§ 213.010, 055 (2012) (establishing that employers with six or more employees may be held liable); N.H. REV. STAT. § 354-A:2(VII) (2012) (establishing that employers with six or more employees may be liable); N.M. STAT. § 28-1-2 (2012) (establishing that employers with four or more employees may be held

employee threshold and made all employers potentially liable for any discriminatory action in the employment context.<sup>32</sup> It should be noted that Mississippi does not have a state antidiscrimination in employment law and Alabama requires employers to have twenty employees to be subject to its antidiscrimination law.<sup>33</sup> Removing the minimum employee threshold at the state level will provide a remedy to employees alleging discrimination at all small companies, where currently no remedy may exist. States have also been more progressive in their state antidiscrimination statutes by expanding protection to certain classes not covered by federal antidiscrimination statutes and by providing more attractive remedy schemes to potential plaintiffs.<sup>34</sup>

## II. WHY THE MINIMUM EMPLOYEE THRESHOLD?

### A. *Development of the Minimum Employee Threshold*

Title VII was passed to eliminate discrimination in employment.<sup>35</sup> The importance of its passage in relation to the rest of the Civil Rights Act of 1964 was emphasized while it was being debated.<sup>36</sup> An antidiscrimination law that

liable); N.Y. EXEC. LAW § 292(5) (2012) (establishing that employers with four or more employees may be liable); OHIO REV. CODE § 4112.01 (2012) (establishing that employers with four or more employees may be held liable); 43 PA. STAT. § 954 (2012) (establishing that employers with four or more employees may be liable); R.I. GEN. LAWS § 28-5-6(7) (2012) (establishing that employers with four or more employees may be liable); TENN. CODE. § 4-21-102 (2012) (establishing that employers with eight or more employees may be liable); WASH. REV. CODE. § 49.60.040 (2012) (establishing that employers with eight or more employees may be liable); W. VA. CODE § 5-11-3 (2012) (establishing that employers with twelve or more employees may be liable); WYO. STAT. § 27-9-102 (2012) (establishing that employers with two or more employees may be liable).

32. See ALASKA STAT. 18.80.300(5) (2012); COLO. REV. STAT. 24-34-401(3) (2012); HAW. REV. STAT. ANN. § 378-1 (2012); ME. REV. STAT. tit. 5, § 4553 (2012); MICH. COMP. LAWS 37.2201(a) (2012); MINN. STAT. 363A.03 (2012); MONT. CODE 49-2-101(11) (2012); N.J. STAT. ANN. § 10:5-5(e) (2012); N.D. CENT. CODE 14-02.4-02(8) (2012); N.J. OKLA. STAT. tit. 25, § 1301(1)(a) (2012); OR. REV. STAT. § 659A.001(4) (2012); S.D. CODIFIED LAWS § 20-13-1(7) (2012); VT. STAT. ANN. tit. 21, § 495d(1) (2012); WIS. STAT. § 111.32(6)(a) (2012).

33. ALA. CODE § 25-1-20 (2012) (defining employer as “any person employing 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, including any agent of that person”).

34. See *infra* Part IV.D.

35. See H.R. REP. NO. 88-914 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2401 (“The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin. The title authorizes the establishment of a Federal Equal Employment Opportunity Commission and delegates to it the primary responsibility for preventing and eliminating unlawful employment practices as defined in the title.”).

36. See *id.* at 2513 (“The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed

extended to all areas of life other than employment would not be as influential as the legislature intended.<sup>37</sup> Because employment discrimination claims involve a statutory cause of action, those who sought to determine the purpose of the minimum employee threshold turned to legislative history.<sup>38</sup> Because Title VII only went through two House committee reviews, most of its legislative history can be found in the Congressional Record.<sup>39</sup> The original employee threshold for claims under Title VII was twenty-five,<sup>40</sup> but the Equal Employment Opportunity Act of 1972 (“EEOA”) changed this to fifteen.<sup>41</sup> “Many civil rights researchers believe that the 1972 EEOA enabled the EEOC to substantially increase its enforcement powers and coverage.”<sup>42</sup> At the time of EEOA’s passage, nine states, eight of which were in the South, still did not have fair employment practices (“FEP”) laws.<sup>43</sup>

When originally debating Title VII on the floor, although the issue was addressed, Congress deliberated little regarding the number of employees an employer should have in order to be subject to the law.<sup>44</sup> For example, senators estimated that roughly twenty-five percent of the workforce, anywhere from seventeen to eighteen and one-half million workers, would be excluded from coverage if the threshold was set at twenty-five.<sup>45</sup>

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to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one’s pockets are empty. The principle of equal treatment under law can have little meaning if in practice its benefits are denied the citizen. Testimony supporting the fact of discrimination in employment is overwhelming.”).

37. *Id.*

38. *See, e.g.,* *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 81-85 (3d Cir. 2003); *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999); *Miller v. Maxwell’s Int’l, Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993) (all discussing legislative history of Title VII).

39. Phillip L. Lamberson, *Personal Liability for Violations of Title VII: Thirty Years of Indecision*, 46 BAYLOR L. REV. 419, 426 (1994).

40. *Nesbit*, 347 F.3d at 82.

41. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 § 2, 78 Stat. 253.

42. Kenneth Y. Chay, *Impact of Federal Civil Rights Policy on Black Economic Progress: Evidence from the Equal Employment Opportunity Act of 1972*, 51 INDUS. & LAB. REL. REV. 608, 611 (1998).

43. *See id.* at 610 (“As of 1972, eight of the nine states with no FEP laws were located in the South (Alabama, Arkansas, Georgia, Louisiana, Mississippi, South Carolina, Tennessee, and Virginia).”).

44. *See* 110 CONG. REC. 13085-93 (1964) (remarks of Sen. Humphrey Jr.) (Speaking in opposition to Senator Norris H. Cotton’s proposed amendment to raise the threshold to 100 employees, Senator Humphrey explained that only 1.75 percent of American businesses would be subject to the law if the threshold was raised to 100). The amendment failed. *Id.* at 13093. At the time of its original implementation, the law applied to only eight percent of employers. *Id.* at 13090; *see also id.* at 13092 (statement of Sen. Morse) (“I know of no reason why we should set small businessmen aside and say, ‘You can continue discrimination with immunity.’”).

45. *See* 110 CONG. REC. 9123 (1964) (remarks of Sen. Aiken) (estimating that 18.5 million employees, roughly twenty-five percent of the workforce, would be excluded from coverage). *But*

Congress addressed the issue of lowering the threshold from twenty-five to eight in greater detail on the floor in 1972, and Senator Ervin voiced his concern regarding the burden that a minimum employee threshold may put on the associational rights of small businesses.<sup>46</sup> It has been argued that this is the only justifiable reason for a minimum employee threshold and should be limited to those businesses where the employer has sufficient associational interests in its employees.<sup>47</sup> Senator Fannin, on the other hand, emphasized the potential costs businesses may have to incur in their efforts to adhere to federal employment regulations.<sup>48</sup> House Report 92-238, supporting an eight-employee threshold, highlighted the importance of closing the gap of individuals who are unable to seek a remedy under Title VII.<sup>49</sup> Eventually, Congress settled on lowering the minimum threshold number to fifteen as a political compromise.<sup>50</sup>

### *B. Justification for the Minimum Employee Threshold*

The overarching reason for implementing a minimum employee threshold for actions against employers is to protect small businesses from federal regulation.<sup>51</sup>

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*see* 110 CONG. REC. 9801 (1964) (remarks of Sen. Stennis) (suggesting that this number was closer to seventeen million).

46. *See* 118 CONG. REC. 3171 (1972) (remarks of Sen. Ervin) (“[W]hen we get below the coverage of 25, we run into the situation where most of the employment is done on the basis of friends of the employers. The businessman wants members of his own church. He wants members of his own race. He wants people of the same national origin. . . . When we reduce the number below 25, we are taking away some of the most cherished liberties of Americans. There are the most intimate relations between the small businessman and various of his employees. We are entitled to let the man invest his capital, his skills, and his talents in a business instead of having the Government tell him whom he shall hire, whom he shall promote, and whom he shall discharge in order to make his business a success.”); *see also* Bonfield, *supra* note 26, at 912 (“More precisely, in framing these acts legislatures have sometimes sought to consciously reconcile equal employment opportunity for all members of our polity with freedom of association.”).

47. *See* Bonfield, *supra* note 26, at 922-24 (arguing that the only satisfactory justification for a minimum employee threshold is when a business’ associational rights outweigh the right to equal opportunity).

48. 118 CONG. REC. 2410 (1972) (statement of Sen. Fannin) (“Men and women who are very able and eager to run small businesses find that they are overwhelmed by paperwork and regulations and redtape.”).

49. *See* H.R. REP. NO. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2155 (“[T]he committee feels that the Commission’s remedial power should also be available to all segments of the work force. With the amendment proposed by the bill, Federal equal employment protection will be assured to virtually every segment of the Nation’s work force.”).

50. *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 82 (3d Cir. 2003).

51. Jeffrey A. Mandell, Comment, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. CHI. L. REV. 1047, 1063 (2005); Eric Allen Harris, Note, *The Americans with Disabilities Act: Equal Opportunity for Individuals with Disabilities, in Some Large Businesses, in Some Major Cities, Sometimes . . .*, 69 U. PITT. L. REV.



Courts and scholars have broken this main principle down and explained that Congress extended this protection to small businesses for three reasons: to protect small businesses from the high costs of complying with complex federal employment law,<sup>52</sup> to protect the associational interests of small businesses,<sup>53</sup> and to protect businesses from the potential high costs that are associated with litigating a federal lawsuit.<sup>54</sup> Congress even reiterated the overarching principle of protecting small business by stating, “Title VII already addresses the unique needs of small businesses by exempting employers with fewer than 15 employees.”<sup>55</sup>

Others have suggested that the threshold was to ensure Congress did not exceed its authority under the Commerce Clause.<sup>56</sup> This argument does not carry much weight due to the political environment at the time of Title VII’s passage. As the *Nesbit* court explained after exploring the issue in great detail, “the fifteen-employee threshold appears motivated by policy—to spare small companies the expense of complying with Title VII—rather than Commerce Clause considerations.”<sup>57</sup> The Supreme Court of Colorado, a state that has removed the employee threshold entirely,<sup>58</sup> explains that the purpose of its nondiscrimination statute was to eliminate unfair or discriminatory employment practices altogether.<sup>59</sup> Presumably, Colorado’s intent was to put the policy of eliminating discriminatory employment practices above the potential burden that might be placed on small businesses.

Several studies have been conducted regarding the economic impact of employment discrimination and antidiscrimination laws.<sup>60</sup> One of these studies,

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657, 669 (2008).

52. *See* *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (“The purpose is to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance . . .”).

53. *Jendusa v. Cancer Treatment Ctrs. of Am.*, 868 F. Supp. 1006, 1013 (N.D. Ill. 1994).

54. *See* *Miller v Maxwell’s Int’l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (“Title VII limits liability to employers with fifteen or more employees and the ADEA limits liability to employers with twenty or more employees, 29 U.S.C. § 630(b), in part because Congress did not want to burden small entities with the costs associated with litigating discrimination claims.”). *But see* Lamberson, *supra* note 39, at 427 (“Ability to pay and the burden of defending a suit were simply not considerations Congress had in mind when limiting the term ‘employer’ in Title VII.”).

55. S. REP. NO. 102-286, at 13 (1992).

56. Mandell, *supra* note 51, at 1060-62.

57. *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 82 (3d Cir. 2003); *see also* Mandell, *supra* note 51, at 1062 (“At the time of Title VII’s adoption, given the Court’s jurisprudence on the breadth of congressional authority in statutes utilizing the ‘affecting commerce’ formulation, the argument that the minimum employee threshold was necessary to satisfy the Commerce Clause made little sense.”).

58. COLO. REV. STAT. 24-34-401(3) (2012).

59. *Brooke v. Restaurant Servs.*, 906 P.2d 66, 71 (Colo. 1995).

60. *See generally* Stewart J. Schwab, *Employment Discrimination, in* LABOR AND EMPLOYMENT LAW AND ECONOMICS 296, 310 (Kenneth G. Dau-Schmidt, Seth D. Harris & Orly

conducted by Kenneth Chay, explored the impact of the 1972 lowering of the federal minimum employee threshold from twenty-five to fifteen on employment and earnings of African American workers in the South.<sup>61</sup> He concluded that the amendment lowering the federal threshold positively impacted the employment and earnings of African American workers in the South, particularly in certain industries and with those companies that had not previously been subject to Title VII.<sup>62</sup>

### III. WHY EMPLOYEES AT SMALL BUSINESSES NEED PROTECTION

For whatever reason, workplace harassment and discrimination is often associated with big business.<sup>63</sup> Yet, there are three main reasons why employees who work for small businesses are in need of the protection provided by antidiscrimination statutes. First, a significant portion of the population works at what is considered a small business.<sup>64</sup> Second, there are certain features of small businesses that potentially make harassment go unpunished or make the effects of harassment more salient.<sup>65</sup> Finally, the current economic environment shows that those employees working in a harassment-filled environment may not have the option to seek employment elsewhere.<sup>66</sup>

#### A. *The Amount of Employees Working for Small Businesses*

At the time of its passage, approximately eight percent, an amount described as “modest,” of employers were subject to Title VII.<sup>67</sup> When speaking in opposition to an amendment that would raise the threshold to 100 employees, Senator Humphrey argued, “[W]hat Senator Cotton is suggesting is that [T]itle VII should cover somewhat less than 1 3/4 percent of the employers in this country—an infinitesimal number.”<sup>68</sup> Because the law was passed during a time when civil rights were at the forefront of American politics,<sup>69</sup> it is understandable that Congress took a conservative or “modest” approach. There was great

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Lobel eds., 2009) (“Unlike law-and-economics scholarship in some other areas, the scholarship in employment discrimination has gone beyond model building and taken a serious empirical look at discrimination litigation and the effects of antidiscrimination law.”).

61. Chay, *supra* note 42.

62. *See id.* at 631 (“[T]his study finds that black men in the high-impact industries in the South achieved large improvements in economic status after 1972. Black employment shares grew 0.5 – 1.1 points more per year and the black-white earnings gap narrowed . . .”).

63. David Wolinsky, *How Sexual Harassment Affects Small Businesses*, NBC CHICAGO (Oct. 13, 2011), <http://www.nbcchicago.com/blogs/inc-well/How-Sexual-Harassment-Affects-Small-Businesses-131214864.html>, archived at <http://perma.cc/4E9S-YUXC>.

64. *See infra* Part III.A.

65. *See infra* Part III.B.

66. *See infra* Part III.C.

67. 110 CONG. REC. 13090 (1964) (remarks of Sen. Humphrey Jr.).

68. *Id.*

69. Lees, *supra* note 3, at 873.

concern that extending the Act to small businesses would actually increase bitterness, hatred, and violence.<sup>70</sup> When the issue of the number of employees who were protected under Title VII arose again in 1971, the House Report again tried to persuade Congress that too many people were unprotected.<sup>71</sup>

In 2010, roughly 16.4 million employees worked for businesses that employed less than fifteen employees.<sup>72</sup> This means that roughly 14.7 percent of employees who worked in America did not work for a business that was subject to Title VII.<sup>73</sup> Of the roughly 7.4 million establishments, defined as “[a] single physical location where business is conducted or where services or industrial operations are performed,”<sup>74</sup> approximately 4.9 million of them are subject to Title VII.<sup>75</sup> Thus, nearly sixty-six percent of all establishments in the country do not need to comply with federal anti-discrimination statutes. As one writer put it, “[A]mazingly, in most states in America, a small employer can still discriminate to its heart’s content.”<sup>76</sup> Although Title VII applies to a greater number of employers today, roughly thirty-four percent, than the eight percent at the time of its implementation, it is still a far cry from providing Title VII remedies to “all segments of the workforce.”<sup>77</sup>

### *B. Nature of Small Businesses*

Several factors may explain why harassment and discrimination occur in small businesses. First, these smaller businesses are less likely to have formal written procedures to safeguard against discrimination.<sup>78</sup> The implementation of strong anti-harassment policies would likely diminish the probability of this type of behavior in the future.<sup>79</sup> Second, the work environment may be less formal,

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70. See 110 CONG. REC. 13087 (1964) (statement of Sen. Cotton).

71. See H.R. REP. NO. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2155 (“[A] large segment of the Nation’s work force is excluded from an effective Federal remedy to redress employment discrimination.”).

72. U.S. Census Bureau, *Statistics of U.S. Businesses Main*, <http://www.census.gov/econ/sub/>, archived at <http://perma.cc/MPU4-TXZQ> (last visited June 3, 2014). Census data is broken down by employers with zero to four; five to nine; ten to fourteen; and fifteen to nineteen employees. I have taken half of the number of employees who currently work at businesses with ten to nineteen employees and added that figure to the number of employees who work for businesses with zero to nine employees.

73. *Id.*

74. U.S. Census Bureau, *Statistics of U.S. Businesses: Definitions*, <http://www.census.gov/econ/sub/definitions.html>, archived at <http://perma.cc/EZW7-USZ2> (last visited June 3, 2014).

75. U.S. Census Bureau, *Statistics of U.S. Businesses Main*, <http://www.census.gov/econ/sub/>, archived at <http://perma.cc/JRQ8-KV73> (last visited June 3, 2014).

76. GAVIN S. APPLEBY, HARASSMENT AND DISCRIMINATION: AND OTHER WORKPLACE LANDMINES 11 (2008).

77. H.R. REP. NO. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2155.

78. Hemken, *supra* note 30, at 650.

79. Scott J. Vitell, Erin Baca Anderson, & Troy A. Festervand, *Ethical Problems, Conflicts*

thus leading to more harassment.<sup>80</sup> As one employment lawyer suggests, “Many times, owners or managers see their businesses as their own personal fiefdoms and they don't think the laws apply to them.”<sup>81</sup> Depending on the state in which the person's business is located and the size of the business, the owner or manager may be correct.<sup>82</sup> This same employment attorney goes on to explain that the fact that many of these businesses function as families can cause other employees to overlook any inappropriate behavior.<sup>83</sup>

In addition to a potential lack of formal policies and a less formal environment, a supervisor or manager of a small business plays a large role in shaping other employees' thoughts regarding what constitutes appropriate behavior for the organization.<sup>84</sup> Immediate supervisors' behaviors, in particular, have a great impact on how other employees perceive the climate in an organization.<sup>85</sup> Therefore, if a manager or boss in a small business portrays an attitude of tolerance regarding discriminatory behavior, a climate of tolerance is likely going to exist throughout the business because this person is likely to be the only manager or boss in the office. In an office like the one described in the hypothetical, it would not take long for other employees to come to the conclusion that the organization tolerates this type of behavior. The likelihood of sexual harassment is much greater in environments where this type of behavior is perceived as socially permissible.<sup>86</sup>

Along with the reasons that potentially explain why harassment occurs in small businesses, the effect of harassment on subjected employees in small businesses must be further explored. The effects of harassment on an employee in a small business will likely be more salient than in a larger business.<sup>87</sup> This increased impact on the employee alleging discrimination can be explained by the climate of tolerance that was established by the supervisor's permissive behavior of such actions.<sup>88</sup>

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*and Beliefs of Small Business Professionals*, 28 J. BUS. ETHICS 15, 23 (2000).

80. Hemken, *supra* note 30, at 650.

81. Wolinsky, *supra* note 63.

82. *See supra* notes 31-32.

83. Wolinsky, *supra* note 63.

84. Sandra L. Robinson & Anne M. O'Leary-Kelly, *Monkey See, Monkey Do: The Influence of Work Groups on the Antisocial Behavior of Employees*, ACAD. MGMT. J. 658, 658-72 (1998).

85. Jane E. Mullen & E. Kevin Kelloway, *Safety Leadership: A Longitudinal Study of the Effects of Transformational Leadership on Safety Outcomes*, 82 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 253, 255 (2009).

86. ALAN M. GOLDSTEIN & IRVING B. WEINER, HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY 266 (John Wiley & Sons, Inc., 11th ed. 2003).

87. Junghyun Lee, *The Effects of Leadership Behavior on Workplace Harassment, Employee Outcomes, and Organizational Effectiveness in Small Businesses*, 19-20 (Jan. 31, 2012) (unpublished Ph.D. dissertation, The George Washington University) (on file with Falvey Memorial Library, Villanova University), available at <http://gradworks.umi.com/3489453.pdf> (last visited June 3, 2014).

88. *Id.* at 48.

Studies have shown that when a victim works in an environment that is tolerant of harassment, the effects of the tolerant environment with regard to psychological well-being, physical health, job withdrawal, and life satisfaction are actually more detrimental than the experiences of harassment themselves.<sup>89</sup> When an employee works at a smaller business that has an environment that is tolerant of discriminatory behavior—particularly when this attitude comes from an immediate supervisor—the employee is not likely to report the incident.<sup>90</sup> An employee is also less likely to seek effective coping methods, such as avoidance or support from other employees where the employee works at a business where everyone is tolerant of such behavior.<sup>91</sup>

It should also be noted that at the time when antidiscrimination in employment laws were being passed at both the state and federal levels, a small business owner might not have had a great deal of concern regarding harassment and discrimination regulations. Today, on the other hand, it is a topic that is consistently brought up to individuals seeking to start a small business.<sup>92</sup> There are certain types of laws affecting a business of which an entrepreneur should be aware. Therefore, an argument centered on the idea that those seeking to start a small business are unaware of or should not be subject to antidiscrimination regulations is not likely realistic.

### C. Economic Climate

In addition to the effects of harassment being more salient to an employee in a small business, these employees should be offered protection when the economy is struggling. An employee will make decisions on how to respond to

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89. See *id.* (quoting M.S. Stockdale et al., *The Sexual Harassment of Men: Evidence for a Broader Theory of Sexual Harassment and Sexual Discrimination*, 5 PSYCHOL. PUB. POL'Y & L. 630, 640 (1999)) (“[W]aiting for the [sexual harassment] shoe to drop is more anxiety provoking than the experience of [sexual harassment] itself when the organizational climate condones or does not actively dissuade such behavior.”).

90. Deborah E. Knapp et al., *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 THE ACAD. MGMT. REV. 687, 708 (1997).

91. Lee, *supra* note 87, at 1.

92. See, e.g., APPLEBY, *supra* note 76, at 6 (“[S]mart employers not only establish the right policies, they send the right messages . . . . The best employers even go beyond the . . . preventative devices and the limits of the law.”); *Discrimination and Sexual Harassment Policies*, ENTREPRENEUR.COM, <http://www.entrepreneur.com/article/80140>, archived at <http://perma.cc/LQE-7XSU> (last visited June 3, 2014) (excerpted from THE STAFF OF ENTREPRENEUR MEDIA, *START YOUR OWN BUSINESS: THE ONLY START-UP BOOK YOU’LL EVER NEED* (5th ed. 2010) and Larry Rosenfeld, *Do I Need a Sexual Harassment Policy?*, ENTREPRENEUR.COM (Oct. 21, 2001), <http://www.entrepreneur.com/article/4548420>, 2013) (“Concerns over the discrimination are more important than ever in today’s increasingly diverse business world. . . . The best policy is to make sure that everyone in your workplace understands what constitutes harassment and discrimination—and also understands the benefits of a diverse workplace.”).

situations, and their outcome expectations will be different based on the state of the economy at the time the situation occurs.<sup>93</sup> As one study showed, “[d]uring periods of economic weakness, such as high unemployment, slow economic growth, and depressed consumer confidence, a target of [sexual harassment] may be less likely to report an incident for fear of retaliation or retribution culminating in job loss.”<sup>94</sup>

The unlikelihood of an employee reporting harassment, coupled with the fact that the employee will be unlikely to seek other coping methods, such as avoidance or co-worker support, gives the employee very few options. As a May 2012 article points out, “[a]t a time of high unemployment, lackluster job growth and major uncertainty in world financial markets, many employees feel stuck in their jobs, unable to consider a career move even if they’re unhappy.”<sup>95</sup> At the time this Note was submitted, the nation’s unemployment numbers were at roughly 7.9%.<sup>96</sup> Like the woman in the hypothetical who depends on the income to support a family, simply getting a different job is not necessarily an option for a lot of the population, especially those employees who are not in high demand. Her only option without having protection under antidiscrimination statutes may be to “stick it out” at a job where she is being harassed, something that is clearly against public policy.

#### IV. WHY STATE LAWS SHOULD REMOVE THE MINIMUM EMPLOYEE THRESHOLD

##### *A. Avoiding a Potential Constitutional Problem*

One might argue that, rather than allow state laws to remove this threshold, the end result might be better accomplished by removing the employee threshold from federal civil rights statutes. After all, federal statutes can offer a plaintiff certain benefits, such as punitive damages under Title VII.<sup>97</sup> Federal antidiscrimination statutes were enacted under Congress’s Commerce Clause power.<sup>98</sup> The same section of the statute that lays out the minimum employee threshold also specifies that the defendant must be “in an industry affecting commerce.”<sup>99</sup> Courts have differed on whether Title VII’s minimum employee

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93. Knapp et al., *supra* note 90, at 705.

94. *Id.*

95. Susan Adams, *New Survey: Majority of Employees Dissatisfied*, FORBES (May 18, 2012), available at <http://www.forbes.com/sites/susanadams/2012/05/18/new-survey-majority-of-employees-dissatisfied/>, archived at <http://perma.cc/3QD6-H5VU>.

96. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey: Unemployment Rate*, UNITED STATES DEPARTMENT OF LABOR, <http://data.bls.gov/timeseries/LNS14000000>, archived at <http://perma.cc/U4ZA-QZ7G> (last visited June 3, 2014).

97. 42 U.S.C. § 1981a(b) (2006).

98. U.S. CONST. art. I, § 8, cl. 3; *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 311 (6th Cir. 1991).

99. 42 U.S.C. § 2000e(b) (2006).

threshold in particular is tied to its congressional power under the Commerce Clause.<sup>100</sup> As previously discussed, scholars have disregarded the view that the minimum employee threshold was added in order to satisfy the Commerce Clause because the standard required to satisfy the “affecting commerce” element at that time was very low.<sup>101</sup>

Although the minimum employee threshold arguably was not essential to passing Title VII, removing it from federal antidiscrimination statutes today could lead to constitutionality questions. The Supreme Court has limited congressional power under the Commerce Clause since its decision in *United States v. Lopez* in 1995.<sup>102</sup> Imagine a local, family-owned fruit stand where the entire product is grown in the family’s backyard or a small candle shop that sells all of its products in one state and does not have a website. Without going into an aggregate effects analysis,<sup>103</sup> it is easy to conceive that congressional Commerce Clause powers could be raised in these and similar situations if the threshold is removed from federal statutes. Conversely, states are not limited by the Commerce Clause and are able to pass antidiscrimination laws under their police powers even if the activity regulated does not affect interstate commerce.<sup>104</sup>

There are also limits to Congress passing federal antidiscrimination laws under Section 5 of the Fourteenth Amendment.<sup>105</sup> The concern in these cases is

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100. *See Willis*, 948 F.2d at 311 (noting that Congress determined that “any employer with 15 or more employees necessarily implicates interstate commerce”). *But see Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 83 (3d Cir. 2003) (“[T]he requirements that an employer be ‘in an industry affecting commerce’ and have ‘fifteen or more employees’ are separate and independent, and that it is a mistake to conflate the two.”).

101. Mandell, *supra* note 51, at 1061.

102. 514 U.S. 549, 567 (1995) (holding that Congress does not have authority under the Commerce Clause to regulate possession of firearms in a school zone because this activity is “in no sense economic activity”); *see also United States v. Morrison*, 529 U.S. 598, 617 (2000) (holding that Congress does not have the authority under the Commerce Clause to regulate “violent criminal conduct”).

103. *See Wickard v. Filburn*, 317 U.S. 111, 114-29 (1942) (upholding the application of federal crop quotas against an individual farmer who grew wheat largely for use on his own farm and not for sale in the interstate market). *Wickard* established the idea that Congress may regulate intrastate activities that, in isolation, may not affect interstate commerce, but may regulate those activities if they affect interstate commerce in the aggregate. *See id.* at 127-28 (stating “[t]hat appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial”).

104. *Mayor of N.Y.C. v. Miln*, 36 U.S. 102, 133-40 (1837) (explaining that police powers are “complete, unqualified, and exclusive” and that they “extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties and properties of the people”).

105. For a thorough analysis of these limitations, see Robert C. Post & Reva B. Siegel, Essay, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000).

the potential development of a general federal police power.<sup>106</sup> Yet, states do have police powers,<sup>107</sup> and they are not burdened by the limitations of the Commerce Clause.<sup>108</sup> Therefore, states that remove the minimum threshold from their antidiscrimination statutes will not have the same constitutional concerns that Congress would have in removing the threshold from federal antidiscrimination statutes.

### *B. Prevent Further Flooding of EEOC*

Assuming that Congress could meet any constitutional barriers, removing the threshold would also add to an already over-burdened EEOC workload.<sup>109</sup> When discussing the change to lower the threshold from fifteen to eight, the minority report of the House Committee on Education and Labor stated “[t]he figures projected for the extension of Title VII jurisdiction to include all persons employed in establishments which employ eight or more full time employees have been derived from a projected 25% increase in the Commission’s workload due to the extended coverage.”<sup>110</sup>

Although this argument was first raised in 1971 when discussing the lowering of the minimum employee threshold, it would still be an issue today because there is a major backlog of cases with the EEOC.<sup>111</sup> Further, the EEOC’s staffing level has dropped by nearly thirty percent between 2000 and 2008.<sup>112</sup> While the EEOC’s staffing has continuously diminished, “the number of discrimination charges filed with the EEOC reached historic levels, peaking between 2008 and 2010.”<sup>113</sup> As the EEOC’s own budget justification explains, “[t]he convergence of these factors yielded a growing backlog of unresolved discrimination charges.”<sup>114</sup> Removing the minimum employee threshold from the federal antidiscrimination statutes would essentially mean that the amount of businesses that must adhere to these statutes would triple.<sup>115</sup>

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106. *Id.* at 506-07.

107. *Morrison*, 529 U.S. at 618 (“Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States.”).

108. U.S. CONST. art. I, § 8, cl. 3.

109. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2012 CONGRESSIONAL BUDGET JUSTIFICATION 1 (2011), available at <http://www.eeoc.gov/eeoc/plan/2012budget.cfm>, archived at <http://perma.cc/Z4H3-JBRA>.

110. H.R. REP. NO. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2141.

111. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2012 CONGRESSIONAL BUDGET JUSTIFICATION 1 (2011), available at <http://www.eeoc.gov/eeoc/plan/2012budget.cfm>, archived at <http://perma.cc/K8BT-6VL3>.

112. *Id.*

113. *Id.*

114. *Id.*

115. See *supra* Part III.A.



*C. State Courts Cannot Agree How to Interpret Antidiscrimination Statutes*

Another argument might be to let state courts decide whether or not state legislatures intended to extend this protection to all employees. Some state courts, despite having a minimum threshold, have decided that a plaintiff can have a cause of action against an employer, even if that employer does not meet the minimum, based on a general public policy argument against discrimination.<sup>116</sup> For example, in *Molesworth v. Brandon*, the Maryland Supreme Court allowed an employee to bring a wrongful discharge claim based on sex discrimination even though the employer fell below the state's employee threshold of fifteen employees.<sup>117</sup> The court, after looking at other statutes, executive orders, and a constitutional amendment that were "ubiquitous" in expressing a public policy against sex discrimination, allowed the employee to bring her claim.<sup>118</sup>

Other state courts have concluded that the state legislature, by including a minimum employee threshold, did not believe small businesses should be subject to antidiscrimination suits; these courts usually reasoned that the legislature chose to include an employee minimum as a way to recognize the public policy of protecting small businesses.<sup>119</sup> For example, in *Chavez v. Sievers*, the Nevada Supreme Court did not allow an employee to bring a claim for tortious discharge based on racial discrimination.<sup>120</sup> The court recognized Nevada's public policy against racial discrimination but ultimately reasoned that it was the duty of the legislature, not the court, to draw the lines between those employers subject to

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116. See *Badih v. Myers*, 43 Cal. Rptr. 2d 229, 232-33 (1995); *Molesworth v. Brandon*, 672 A.2d 608, 616 (Md. 1996) (holding that "the General Assembly did not intend to permit small employers to discriminate against their employees, but rather intended to promote a policy of ending sex discrimination statewide"); *Collins v. Rizkana*, 652 N.E.2d 653, 660 (Ohio 1995); *Roberts v. Dudley*, 993 P.2d 901, 908 (Wash. 2000) ("The statutory remedy is not in itself an expression of the public policy, and the definition of 'employer' for the purpose of applying the statutory remedy does not alter or otherwise undo to any degree this state's public policy against employment discrimination."); *Williamson v. Greene*, 490 S.E.2d 23, 33 (W. Va. 1997).

117. *Molesworth*, 672 A.2d at 616.

118. *Id.* at 613.

119. See, e.g., *Thibodeau v. Design Grp. One Architects, LLC*, 802 A.2d 731, 747 (Conn. 2002) ("In sum, we see no reason why the legislature would have excluded small employers from the act unless it had decided, as a matter of policy, that such employers should be shielded from liability for employment discrimination."); *Weaver v. Harpster*, 975 A.2d 555, 570 (Pa. 2009) ("If the legislature chooses to expand statutes to cover more employers, it is clearly within its authority to do so. Our role, however, does not include expanding statutes beyond their terms."); *Chavez v. Sievers*, 43 P.3d 1022, 1028 (Nev. 2002) ("Nevada's Legislature has created statutory remedies for employment discrimination and has explicitly exempted small employers from the remedies available."); *Burton v. Exam Ctr. Indus. & Gen. Med. Clinic, Inc.*, 994 P.2d 1261, 1267 (Utah 2000).

120. *Chavez*, 43 P.3d at 1026.

antidiscrimination statutes and those employers who are not.<sup>121</sup> The court cites to *Badillo v. Am. Brands*,<sup>122</sup> where the court explains, “Altering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative, not a judicial, function.”<sup>123</sup> It is clear that leaving the responsibility of removing the minimum employee threshold to state courts will lead to the same problem that currently exists: some employees will be protected by state antidiscrimination statutes or common law tort claims and other employees will not have either option at their disposal.

*D. Leaving It up to the States—Choosing the Best Method Without Leaving Anyone Out*

*1. Letting States Decide Increases Competition.*—There are several advantages of implementing a national public policy in a decentralized fashion; these advantages can be broken down into “public participation, effectuating citizen choice through competition among jurisdictions, achieving economic efficiency through competition among jurisdictions, and encouraging experimentation.”<sup>124</sup> Two of these advantages—achieving economic efficiency through competition and encouraging experimentation—will be explored in greater detail.

First, competition among states in an area of such great importance as worker protection could lead to greater protection for workers in order attract individuals to the state.<sup>125</sup> One might argue that leaving these choices up to the states may create a “race to the bottom” situation where states try to exclude more people from protection or provide employees with lessened remedial measures, such as a lack of punitive damages or statutory caps. It could just as easily be argued that states will want to stand out by providing employees with greater protection than federal laws through increased statutory remedies. This would, in turn, create a “race to the top” scenario where state legislatures are trying to attract residents by establishing themselves as worker-friendly states that protect employees and punish businesses with discriminatory practices.<sup>126</sup>

Justice Brandeis explains the importance of states acting as laboratories:

Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk

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121. *Id.* at 1025-26.

122. *Badillo v. Am. Brands*, 16 P.3d 435 (Nev. 2001).

123. *Id.* at 440.

124. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 914 (1994); see also *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991).

125. Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith*, 44 HOUS. L. REV. 349, 357-58 (2007).

126. *Id.* at 358.

to the rest of the country.<sup>127</sup>

Simply eliminating the thresholds across the board does not take this experimental capacity from the states. Rather, among other things, states would retain the ability to experiment when it comes to who is protected by their state antidiscrimination laws, the process by which an employee must follow in pursuing action against an employer, and the adjudication methods available to the employee. By no means would removing the employee threshold from all states result in cookie-cutter implementation of state antidiscrimination laws.

2. *States Have Been on the Forefront of Expanding Discrimination Protection.*—Evidence shows that states have continued their trend of being ahead of their federal counterpart when it comes to antidiscrimination law.<sup>128</sup> States have already passed antidiscrimination statutes that provide greater protection to employees than protection provided by federal antidiscrimination statutes; the states are doing this by expanding the classes to which protection is offered and through more extensive administrative requirements.<sup>129</sup>

The most glaring example of this is the fact that many states have extended protection to employees based on sexual orientation, something that is not included in the federal antidiscrimination statutes.<sup>130</sup> State statutes have also protected individuals based on “gender- or stereotype-related classifications such as pregnancy, childbirth (and related medical conditions such as childbearing capacity, sterilization, and fertility), marital status (including a change thereof and domestic partnership), relationship with a person of another race, breastfeeding, parenthood, personal appearance, family status, and family responsibilities (actual or perceived).”<sup>131</sup> Other states have allowed any individual to bring a claim for age discrimination, whereas the ADEA only allows individuals over the age of forty to bring such a claim.<sup>132</sup> Further, state statutes have defined the term “disability” broader than the ADA has.<sup>133</sup> Others have removed the necessity to have a record of a disability, thus offering more protection to more individuals than the protection provided by their federal counterpart.<sup>134</sup>

Along with expanding its coverage beyond that of the federal statutes, certain states have provided more attractive statutory remedy schemes and adjudication procedures than those provided by federal antidiscrimination statutes.<sup>135</sup> Title VII

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127. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

128. *See supra* Part I.A.1

129. Hemken, *supra* note 30, at 649-55.

130. *See, e.g.*, CAL. GOV'T CODE § 12920 (2012) HAW. REV. STAT. § 368-1 (2012); 775 ILL. COMP. STAT. 5/1-102(A) (2012); N.J. Stat. § 10:5-12 (2013); WASH. REV. CODE § 49.60.180 (2007).

131. *See* Hemken, *supra* note 30, at 649-55.

132. Sperino, *supra* note 125, at 357.

133. *Id.*

134. Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 627 (2004).

135. For a complete breakdown of state antidiscrimination statutory schemes, see Joseph J.

and the ADA have statutory caps based on the size of the employer,<sup>136</sup> while state law remedies for status discrimination often exceed those available under federal law.<sup>137</sup> Some states allow plaintiffs to recover both compensatory and punitive damages without any cap.<sup>138</sup> Further, a potential plaintiff may be able to avoid the high cost of litigation by using administrative remedies instead. Illinois, for instance, allows administrative resolution of any claim brought under the Illinois Human Rights Act.<sup>139</sup>

States have also imposed more stringent administrative requirements on employers under their state antidiscrimination statutes than those imposed by Title VII, sometimes requiring affirmative action to prevent discrimination.<sup>140</sup> For example, California, Connecticut, and Maine already require certain businesses to provide harassment training to supervisors and managers.<sup>141</sup> “All three states have very specific requirements concerning the content of sexual harassment training, record keeping, refreshment courses, and question and answer sessions.”<sup>142</sup> Other states have been at the forefront of innovation in their antidiscrimination statutes. Some require the posting or distribution of brochures of state policies.<sup>143</sup> Others encourage the prevention of harassment before it

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Shelton, *John H. Fanning Labor Law Writing Competition Winner: In the Wake of Garrett: State Law Alternatives to the Americans with Disabilities Act*, 52 CATH. U.L. REV. 837 (2003).

136. 42 U.S.C. § 1981a(b)(3) (2006).

137. Henry H. Drummonds, Article, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469, 496 (1993).

138. See N.J. STAT. ANN. § 10:5-3 (2012); OHIO REV. CODE ANN. § 4112.99 (2012); *Rice v. CertainTeed Corp.*, 704 N.E.2d 1217, 1218-20 (Ohio 1999) (interpreting Ohio’s antidiscrimination law as permitting punitive damages).

139. 775 ILL. COMP. STAT. 5/7A-101 to 5/7B-104 (2012).

140. See Hemken, *supra* note 30, at 652 (“In addition to the expanded class of employees protected, many states now require employers to take affirmative action to prevent sexual harassment in the workplace.”).

141. See CAL. GOV’T CODE § 12950.1 (2012) (requiring an employer with more than fifty employees to provide sexual harassment training to supervisors within six months of taking a position); CONN. GEN. STAT. § 46a-54(15)(B) (2012) (requiring an employer with more than fifty employees to provide sexual harassment training to supervisors within six months of taking a position); ME. REV. STAT. ANN. tit. 26, § 807(3) (2012) (requiring sexual harassment training for all employees who work for employers with fifteen or more employees within one year).

142. Hemken, *supra* note 30, at 653; see also CAL. GOV’T CODE § 12950.1 (2012); CONN. GEN. STAT. § 46a-54(15)(B) (2012); ME. REV. STAT. ANN. tit. 26, § 807(3) (2012).

143. MASS. GEN. LAWS ch. 151B, § 3A (2012) (requiring employers to annually provide a copy of their sexual harassment policy to employees); ME. REV. STAT. ANN. tit. 26, § 807(1) (2012) (“An employer shall post in a prominent and accessible location in the workplace a poster providing, at a minimum, the following information: the illegality of sexual harassment; a description of sexual harassment, utilizing examples; the complaint process available through the commission; and directions on how to contact the commission.”).

starts.<sup>144</sup> These procedures help to accomplish the most effective way of eliminating harassment in the workplace: prevention.<sup>145</sup>

It is clear that states are already beginning to act as laboratories in determining to whom protection is offered and compensation methods; thus, requiring the states to remove the minimum threshold will not thwart the states' ability to act as laboratories. Rather, it will simply ensure whatever scheme a state devises will extend to all employees, regardless of the size of the employer.

#### V. HOW TO ACCOMPLISH—COOPERATIVE FEDERALISM

The interrelationship between the federal government and state governments regarding employment laws is a topic of great debate.<sup>146</sup> As previously discussed, states have been at the forefront of extending protection and developing attractive remedy schemes.<sup>147</sup> The federal government must work with the states to extend protection to all employees if it is truly serious about eliminating discrimination in the workplace for all employees through its antidiscrimination statutes.<sup>148</sup> The best way to do this is for the federal government to offer states an incentive for removing minimum employee thresholds or a punishment for failing to remove their thresholds.

Cooperative federalism in its ideal form consists of state and federal governments working together to forward a federal policy.<sup>149</sup> In this case, the federal policy would be the elimination of discrimination in the employment sector.<sup>150</sup> The federal government could offer states that remove minimum employee thresholds certain benefits, specifically those that would bolster small businesses.

Conversely, the federal government could also lower or eliminate the amount of benefits a state's small businesses receive if the state refuses to remove its minimum employee threshold. In doing so, any concerns regarding a race to the bottom scenario would be all but silenced. The concern that states would limit the amount of protection to employees in order to become considered "business

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144. HAW. CODE R. § 12-46-109(g) (2012).

145. Chi-hye Suk, *supra* note 20, at 469 (quoting 29 C.F.R. § 1607.4 (2013)).

146. Drummonds, *supra* note 137, at 471-73.

147. *See supra* Part IV.D.

148. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) (explaining that Title VII and the ADEA were passed to eliminate "discrimination in the workplace") (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979)).

149. Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 815 (1998).

150. *See* H.R. REP. NO. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401 ("The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin. The title authorizes the establishment of a Federal Equal Employment Opportunity Commission and delegates to it the primary responsibility for preventing and eliminating unlawful employment practices as defined in the title.").

friendly” states would not have any traction. Instead, when a state removed its minimum employee threshold, it would be forwarding two important policies: protecting its employees from discriminatory practices and displaying its support for small businesses.

*A. Method One—Using a Metaphorical Carrot*

One potential method of support the federal government could provide to states to attract small businesses would be to increase the amount of grants offered or provide low-interest loans to small businesses. This method of providing a proverbial carrot to states could go a long way in increasing the speed at which states remove minimum employee thresholds.

The best incentive-based method to facilitate this cooperative relationship between the state and federal government is by using a program that is already in existence: the State Small Business Credit Initiative (“SSBCI”). On September 27, 2010, President Obama signed into law the Small Business Jobs Act of 2010.<sup>151</sup> The law created the SSBCI, which was designed to increase lending to small businesses and manufacturers by fifteen billion dollars.<sup>152</sup> The overall objective of the initiative is to leverage ten dollars in private investment into small businesses for every one dollar spent by the government.<sup>153</sup> It does this by providing “direct funding to states for programs that expand access to credit for small businesses.”<sup>154</sup>

Each state develops its own program, whereby states are able to build on old models of small business development or come up with innovative new models.<sup>155</sup> To receive funds, states must submit their plans detailing how the program will expand credit to small businesses, particularly in “underserved communities” to the United States Department of the Treasury (“Treasury”).<sup>156</sup> The Treasury has an SSBCI staff that reviews these plans and either approves or denies the program.<sup>157</sup> These funds must be drawn from by March of 2017.<sup>158</sup>

The connection between this program and the removal of a state’s minimum

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151. Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504 (2010).

152. *State Small Business Credit Initiative (SSBCI)*, U.S. DEPT. OF THE TREASURY, <http://www.treasury.gov/resource-center/sb-programs/Pages/ssbci.aspx>, archived at <http://perma.cc/EJ4V-MKZU> (last updated Sept. 30, 2013). See 12 U.S.C. §§ 5701-5710 (2010).

153. Interview by Janet Hamer with Don Graves, Deputy Assistant Sec’y for the Office of Small Bus., U.S. Treasury Dep’t, transcript available at [http://www.frbatlanta.org/pubs/partnersupdate/12no3\\_graves\\_interview.cfm](http://www.frbatlanta.org/pubs/partnersupdate/12no3_graves_interview.cfm), archived at <http://perma.cc/N8CS-K5JU> [hereinafter Graves Interview].

154. Clifton Kellogg, *Treasury’s State Small Business Credit Initiative: A Funding Resource Option for Small Business Lenders*, COMMERCIAL INSIGHTS at 1 (October 2010), <http://www.aba.com/Tools/Ebulletins/CommInsights/RMI-1012-b.pdf>, archived at <http://perma.cc/69FN-56YL>.

155. See Graves Interview, *supra* note 153.

156. Kellogg, *supra* note 154, at 1.

157. *Id.*

158. *Id.* at 2.

employee threshold seems relatively straightforward. In order for a state to receive its funds from the Treasury, the state must first eliminate any minimum employee threshold from its state antidiscrimination statute. In the case of Mississippi, which does not currently have a state antidiscrimination law, there must be an antidiscrimination in employment statute passed that does not contain a minimum employee threshold.

### *B. Method Two—Using a Metaphorical Stick*

The federal government could also choose more of a “stick” method whereby it penalizes those states that fail to remove minimum employee thresholds from their antidiscrimination statutes.

The aforementioned method using the SSBCI as incentive to get states to remove their thresholds could also be seen as a utilization of the stick method. Because it is a program that is already being implemented, one might see it framed in the following manner: if a state fails to remove its threshold, it will not receive federal SSBCI funding. Either way, it provides states an incentive to remove their thresholds while offering assistance to small businesses within the state.

Another potential method to accomplish this would be to collect a portion of punitive damages collected on employment discrimination suits in those states that have split-recovery statutes. These statutes allow a state to receive a portion of a plaintiff’s punitive damage award in order to fulfill the true purpose of a punitive damage award: to deter and punish.<sup>159</sup> Although this would be an effective method of punishing those states that have not removed their minimum employee thresholds, currently only seven states have passed split-recovery statutes, so this stick method would not be wide-reaching enough to accomplish its purpose.<sup>160</sup>

### *C. Avoiding a Coercion Problem*

One might argue that these methods, particularly the withholding of small business loans to those states that fail to remove their thresholds, might be considered too coercive on the states. In *National Federation of Independent Businesses v. Sebelius*, the Supreme Court of the United States held that withholding all federal Medicaid funding from those states that do not take part in the Medicaid expansion was too coercive on the states.<sup>161</sup> The Court applied the principles laid out in *South Dakota v. Dole*,<sup>162</sup> *New York v. United States*,<sup>163</sup> and *Printz v. United States*,<sup>164</sup> in order to determine whether Congress’s threat of

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159. Bethany Rabe, Note, *The Constitutionality of Split-Recovery Punitive Damage Statutes: Good Policy But Bad Law*, 2008 UTAH L. REV. 333, 340-42.

160. See *id.* for a complete breakdown of split-recovery statutes.

161. 132 S. Ct. 2566, 2607 (2012).

162. 483 U.S. 203, 210-12 (1987).

163. 505 U.S. 144, 188 (1992).

164. 521 U.S. 898, 933 (1997).

cutting off all federal Medicaid funding to states for failure to expand Medicaid was a proper use of its Spending Clause power or if this threat was too coercive on the states.<sup>165</sup>

Chief Justice Roberts, with whom Justices Breyer and Kagan joined, highlighted Congress's right to offer grants to the states that had accompanying conditions, but also emphasized the importance of preserving the states' right to choose whether or not to participate in the expansion.<sup>166</sup> He explained that the financial incentive to expand Medicaid was not "relatively mild encouragement" but that "it is a gun to the head" of the states.<sup>167</sup> He concluded that the Patient Protection and Affordable Care Act as written took this ability to choose away from the states, making that particular portion of the Act unconstitutional.<sup>168</sup> Part of the Court's reasoning centered on the fact that federal Medicaid funding potentially made up more than ten percent of a state's overall budget, leaving the states without any real option other than abiding by the expansion.<sup>169</sup> Although the Court specifically explained that it was not going to set a definitive percentage of a state's budget that would constitute coercive action on the part of Congress, it held that a potential ten percent loss is "surely beyond it."<sup>170</sup>

The proposed methods of cooperative federalism would not likely be considered too coercive on the states. In order to determine that Congress was being too coercive using similar reasoning to that used in *Sebelius*, it would need to be shown that Congress basically removed all ability to choose whether or not to remove the minimum employee threshold from the states.<sup>171</sup> Or, put another way, is the incentive of these small business loans for the states to remove their minimum employee thresholds "relatively mild encouragement" or is it "a gun to the head?"<sup>172</sup>

First, it would be helpful to look at what percentage of a state's budget is made up of the SSBCI funds. Looking at three states that have not lowered their minimum employee threshold from fifteen—Arizona, North Carolina, and South Carolina—it will be relatively clear that the portion of these states' budgets coming from SSBCI funds is not very significant. Arizona had a budget of \$8.3 billion in 2011 and has received \$18.2 million in SSBCI funds in roughly two years, approximately \$9.1 million per year; North Carolina had a budget of \$18.5 billion in 2011 and has received roughly \$46.1 million in SSBCI funds over the last two years, roughly \$23.05 million per year; South Carolina had a budget of \$5.1 billion in 2011 and has received roughly \$18 million in SSBCI funds, approximately \$9 million per year.<sup>173</sup> This amounts to approximately 0.11, 0.12,

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165. *Sebelius*, 132 S. Ct. at 2601-08.

166. *Id.* at 2608.

167. *Id.* (quoting *Dole*, 483 U.S. at 211).

168. *Id.*

169. *Id.* at 2605.

170. *Id.* at 2606.

171. *Id.* at 2608.

172. *Id.* (quoting *Dole*, 483 U.S. at 211).

173. See *State Small Business Credit Initiative (SSBCI)*, U.S. DEPT. OF THE TREASURY,



and 0.18 percent of these states' budgets, respectively.

The financial incentive for states to remove their minimum employee thresholds would not be so coercive as to find the incentive unconstitutional. States would continue to have a choice regarding whether to remove their threshold, but in doing so, the states would provide the protection of antidiscrimination laws to all workers while potentially helping the small businesses within their state receive favorable loans. The dual incentive provided to states should make this an attractive proposition, even factoring in any potential additional administrative costs that might go along with the increased number of people who would be protected by the elimination of the threshold.

#### CONCLUSION

As one commentator explained prior to the passage of any federal antidiscrimination laws, “[I]f it is wrong for an employer with thirteen employees to discriminate, it is equally wrong for the employer with twelve or six or one.”<sup>174</sup> Some states have accepted this notion and passed legislation accordingly in the form of antidiscrimination laws without minimum employee thresholds.<sup>175</sup> In doing so, these states have ensured that all businesses, regardless of the number of individuals employed there, must comply with state antidiscrimination laws. Those states that have not removed their minimum employee thresholds have continued a decades-long trend of putting the policy of protecting small businesses above the protection of potentially vulnerable workers from discrimination in the workplace. Although there is something to be said about holding onto tradition and history, as President Barack Obama said in his second-term Presidential Inaugural Address, “[W]e have always understood that when times change, so must we.”<sup>176</sup> One could speculate that the complete removal of minimum employee thresholds could go a long way in eliminating discrimination across the board, because empirical evidence has shown that lowering the minimum employee threshold at the federal level has decreased the amount of discrimination in certain areas.<sup>177</sup>

Individuals working in small businesses may need the protection offered to them by antidiscrimination laws more than, or at least as much as, individuals who work for businesses that employ a greater number of workers. The informality of both the environments and written policies of small businesses may

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<http://www.treasury.gov/resource-center/sb-programs/Pages/ssbci.aspx>, archived at <http://perma.cc/K2DW-6PX2> (last updated Apr. 29, 2014); see also *Fiscal Survey of States*, THE NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS, <http://www.nasbo.org/publications-data/fiscal-survey-of-the-states>, archived at <http://perma.cc/G46X-A2ZL> (last visited June 3, 2014).

174. Meiners, *supra* note 7, at 32.

175. See *supra* note 32.

176. President Barack Obama, *Inaugural Address by President Barack Obama* (Jan. 21, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>, archived at <http://perma.cc/6FJM-2JJP>.

177. See Chay, *supra* note 42, at 631.

lead to environments that do not address the seriousness of discriminatory actions. Further, when owners and managers of small businesses portray an attitude of tolerance regarding these activities, the attitude reaches other employees quickly assuming that the employees are working in close proximity to one another. Finally, workers that work in these types of environments will likely be constantly aware that this type of behavior may happen, making an “everyday” workday a miserable experience.

States have always been at the forefront of antidiscrimination law in America.<sup>178</sup> States continue to hold that distinction by establishing broader categories of protection and offering other remedial and administrative advantages to plaintiffs in antidiscrimination suits.<sup>179</sup> In the past, the federal government has been able to follow suit by passing its own laws that mirror state laws.<sup>180</sup> The federal government can play a role in the extension of antidiscrimination protection to all workers, even though current Commerce Clause jurisprudence might not lend itself well to this event reoccurring.<sup>181</sup> By providing an incentive for states to remove their minimum employee thresholds, the federal government would be displaying its commitment to ending discrimination in the workplace for good. Although the quoted language at the outset of this Note was stated more than four decades ago, the federal government has a chance to see the underlying idea become a reality by encouraging states to protect all of their workers.

If the federal government is serious about removing discriminatory practices from the workplace, it needs to encourage states to remove minimum employee thresholds from state antidiscrimination statutes. This does not mean that all states will have the exact same laws leading to the exact same outcomes; states can continue to execute fifty separate experiments based on their priorities. Regardless of the state in which a business operates, one thing should be present: every employee should be afforded protection from discrimination in the workplace. With a bit of cooperation between the federal government and the states, this concept that was once a sensible idea could become a reality.

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178. Lees, *supra* note 3, at 873.

179. *See supra* Part IV.D.2.

180. RUTHERGLEN, *supra* note 13, at 6.

181. *See supra* Part IV.A.