September 2004

When a Boss Isn't an Employer: Limitations of Title VII Coverage

Caren Sencer

Follow this and additional works at: https://scholarship.law.berkeley.edu/bjell

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38V05Q

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Employment & Labor Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
# COMMENTS

When a Boss Isn’t an Employer: Limitations of Title VII Coverage

Caren Sencer†

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION</td>
<td>441</td>
</tr>
<tr>
<td>II. GENERAL CONCEPTS</td>
<td>444</td>
</tr>
<tr>
<td>A. Bringing a Suit Against a Union under Title VII, ADA or ADEA</td>
<td>444</td>
</tr>
<tr>
<td>B. Who is a Qualified Employer and the Government Exclusion</td>
<td>448</td>
</tr>
<tr>
<td>III. PRIOR REGULATION OF Unions</td>
<td>450</td>
</tr>
<tr>
<td>A. Regulation under the NLRA and LMRA</td>
<td>451</td>
</tr>
<tr>
<td>B. Regulation under the LMRDA</td>
<td>453</td>
</tr>
<tr>
<td>C. “Mixed” Unions</td>
<td>457</td>
</tr>
<tr>
<td>IV. REGULATION UNDER TITLE VII, THE ADA, AND THE ADEA</td>
<td>460</td>
</tr>
<tr>
<td>A. Congressional Authority to Regulate</td>
<td>460</td>
</tr>
<tr>
<td>B. Interpretation and Interplay of the Definitional Sections of Title VII, the ADA and the ADEA</td>
<td>466</td>
</tr>
<tr>
<td>V. STATUTORY INTERPRETATION</td>
<td>475</td>
</tr>
<tr>
<td>A. Legislative History</td>
<td>475</td>
</tr>
<tr>
<td>B. Inconclusiveness of the EEOC Interpretation</td>
<td>476</td>
</tr>
<tr>
<td>VI. CONCLUSION</td>
<td>478</td>
</tr>
</tbody>
</table>

## I. INTRODUCTION

Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA) each contain statutory provisions which allow a union member to

† JD 2004, University of California, Berkeley School of Law (Boalt Hall). The author would like to thank her family for their continued support of her academic endeavors.
assert liability against their union when the member has been discriminated against in the manners proscribed in the acts. Each of these statutes also defines the term “labor organization” in relation to “employees” and “employers.” As the federal government is expressly excluded from the

1. Collectively, throughout this paper, these three Acts will be referred to as the “Civil Rights Acts.”

2. Title VII defines a “labor organization” as:
   An industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employees concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.


3. Title VII defines an “employee” as:
   An individual employed by an employer, except that term “employee” shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.


4. Title VII defines an “employer” as:
   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, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt for taxation under section 501(c) of the Internal Revenue Code of 1954, except that, during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

   42 U.S.C. § 2000e(b) (2004). The ADA defines an “employer” as:
   (A) In general. The term “employer” means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar years, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

   (B) Exceptions. The term “employer” does not include—
   (i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or
   (ii) a bona fide private membership club (other than a labor organization) that is
definition of "employer" in all three acts, I will argue that, under the plain text of each statute, unions that solely represent employees of the federal government cannot be held liable under the Civil Rights Acts, as they are not a "labor organization" as defined by the statutes.

The applicability of the acts to unions that represent federal employees is unsettled under current case law. The Fourth Circuit and the Eighth Circuit have decided that such unions are to be covered just like unions representing employees of private employers. However, district courts in other circuits have determined that unions that represent only employees of the federal government are not liable under the acts.

This paper will trace the definitions and interpretations used to determine whether a court has jurisdiction over unions that represent federal employees. Section II of the paper will begin with an overview of how a suit is brought against a union under the Civil Rights Acts, and then it will discuss the exemption which excludes the federal government from the Civil Rights Acts. Section III will trace the definitions used in the National Labor Relations Act, the first substantial act to regulate union activities, and the Labor Management Reporting and Disclosure Act. Section IV will explore the Congressional authority to regulate unions, how the civil rights acts have been interpreted, and the interplay of the civil rights definitional sections. Section V will use statutory interpretation to argue that the unions which represent federal employees should not be deemed to be covered by the Civil Rights Acts.

exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

42 U.S.C. § 12111(5) (2004). The ADEA defines an "employer" as:

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; Provided, that prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency but such term does not include the United States, or a corporation wholly owned by the Government of the United States.


5. Jones v. Am. Postal Workers Union, 192 F.3d 417 (4th Cir. 1999); Jennings v. Am. Postal Workers Union, 672 F.2d 712 (8th Cir. 1982).

II.
GENERAL CONCEPTS

A. Bringing a Suit Against a Union under Title VII, ADA or ADEA

Suits against unions are explicitly provided for under Title VII, the ADA and the ADEA. Generally, a union can be held liable for activities that it undertakes that are discriminatory, based on the union's status as either a "labor organization" or as an "employer." To be held liable as an employer, the union must be acting in its capacity as an employer and meet the statutory definition of employer. Thus, when a union is being sued under Title VII by one of its employees, the plaintiff will need to show that the union has at least 15 employees as defined in Title VII. In comparison, union member in a Title VII action against their union must show that the union was acting in its representational capacity and met the statutory definition of a "labor organization." This requires showing that the union represents the requisite number of members, the union deals with a statutory employer, and it is in an industry affecting commerce.

The foregoing Title VII analysis is distinct from the analysis used to

7. Title VII provides:

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
(2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2(c) (2004). The ADA states as a general rule, "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Under 42 U.S.C. § 12111(2), a "labor organization" is a covered entity. The ADEA states, in language similar to Title VII:

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;
(2) to limit, segregate, or classify its membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;
(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.


8. See 42 U.S.C. § 2000e(h). The issue of "industry affecting commerce" will be discussed infra Section IV.
show that a union has breached its duty of fair representation, which also requires the plaintiff to show that the union has acted with hostility or discrimination toward a member of the bargaining unit. To bring a suit against a union, an employee generally must show that the union breached its duty of fair representation under the National Labor Relations Act (NLRA). In addition, the employee must use the established framework for showing that the union has violated Title VII. Because of the relationship between the union and the employer, the framework differs from general Title VII analysis in that allegations against both the union and the employer must be supported. In a claim of discrimination on the basis of sex, therefore, an employee is required to provide a prima facie case on three points.

To establish a Title VII sex discrimination claim against a union, an employee must show that: (1) the employer violated the collective bargaining agreement (‘CBA’) with respect to the employee; (2) the union breached its duty of fair representation by allowing the breach to go unrebated; and (3) there is some evidence of gender animus among the union.

Further, in order to establish the first prong of the test, the employee must advance a prima facie case of discrimination against the employer. If the employee can show the prima facie case, then the burden shifts to the employer or union to articulate a legitimate non–discriminatory reason for the otherwise discriminatory act. If the employer or union produces such a reason, the employee then has an opportunity to expose that reason as merely pretextual. Realistically, to succeed in such a suit against the union, the employee must frequently show that both the employer and the

10. See EEOC v. Reynolds Metal Co., 212 F. Supp. 2d 530 (E.D. Va. 2002). The National Labor Relations Act can be found at 29 U.S.C. § 151 et seq. The duty of fair representation is to represent all employees fairly and without bias in a manner that is neither arbitrary nor capricious. Vaca v. Sipes, 386 U.S. 171, 177 (1967) (“The exclusive agent’s statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct.”)
11. This framework is most commonly referred to as the McDonnell Douglas analysis when an employee is suing her employer. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (explaining the four–pronged prima facie case in a Title VII race discrimination suit as (i) the plaintiff belongs to a racial minority; (ii) the plaintiff applied for and was qualified for the job in question; (iii) despite being qualified, plaintiff was rejected from the job; and (iv) after the plaintiff was rejected, the employer continued to seek applicants for the position).
13. Id. at 539–40.
14. Id. at 540. Most collective bargaining agreements include anti–discrimination language or explicitly incorporate the Civil Rights Acts.
16. Id. at 804.
union had engaged in illegal discrimination.

This potential suit, of an employee against their union in its representational capacity, is analytically distinct from that of an employee of the union suing the union in its capacity as an employer. The two roles of the union—as employer or as labor organization—are not interchangeable. Thus, when an employee of a union sues the union for discrimination, the union must be shown to meet the definition of "employer" rather than "union" to be held liable.\(^\text{17}\) This is demonstrated by the congressional record surrounding the 1972 amendments to the Civil Rights Act of 1964. As stated by Senator Allen, "...[L]abor unions would be employers, I assume, to the extent that they employed people in their operations. So the word 'employer' actually covers in the labor unions. Labor unions can be employers as well as being representatives of their members..."\(^\text{18}\)

Thus, a union being sued as an employer must meet the statutory definition of "employer." In one case, a suit against the union was not allowed to move forward when the employee was unable to show that his employer, a union, did not have the requisite 15 employees.\(^\text{19}\) In Yerdon v. Henry, the plaintiff was an employee of the union and brought suit under Title VII, the Labor-Management Reporting and Disclosure Act (LMRDA), and the Labor Management Relations Act (LMRA) based on sex discrimination and retaliation.\(^\text{20}\) The court would not allow the suit to move forward, as the union did not meet the definition of employer; it had less than fifteen employees.\(^\text{21}\) In this case, the union, which was Yerdon’s employer, was also her bargaining agent, as membership in the union was necessary to maintain the job.\(^\text{22}\) Even though the union was serving in both a representational and an employer capacity, the Court determined that the suit was brought against the union as an employer.\(^\text{23}\)

Although the EEOC’s amicus brief urged that the union be held to be an employer, despite the local not meeting the statutory definition of employer, this argument was rejected by the court.\(^\text{24}\) The EEOC’s interpretation was also rejected by the Ninth Circuit in Herman v. United Brotherhood of Carpenters, Local Union No. 971.\(^\text{25}\) In Herman, an

\(^{17}\) See Yerdon v. Henry, 91 F.3d 370 (2d Cir. 1996).


\(^{19}\) Yerdon, 91 F.3d 370; Herman v. United Bhd. of Carpenters, Local Union No. 971, 60 F.3d 1375 (9th Cir. 1995).

\(^{20}\) Yerdon, 91 F.3d at 370.

\(^{21}\) Id. at 375.

\(^{22}\) Id. at 374.

\(^{23}\) Id. at 375.

\(^{24}\) Id. at 375–76.

\(^{25}\) 60 F.3d 1375 (9th Cir. 1995).
employee alleged that her dismissal by her union employer violated the collective bargaining agreement, the ADEA, the ADA, and Nevada employment discrimination statutes.26 The court carefully and deliberately laid out the differences between the responsibilities of the union in its capacity as an employer and as a labor organization.27 As Herman was suing the union as her employer, she had to show that the union met the statutory definition of employer; based on the number of employees that the local employed, her suit was not allowed to continue.28 The court found that the EEOC’s interpretation would be inconsistent with the circuit law as announced in Childs v. Electrical Workers.29 In Childs, the Ninth Circuit found that when being sued in its capacity as an employer, a union must meet the statutory definition of “employer” for the court to retain jurisdiction.30

The Tenth Circuit has also drawn the distinction between unions as employers and unions as representatives. In Ferroni v. Teamsters, Chauffeurs & Warehousemen, Local No. 222,31 Ferroni, a union employee, sued the union as her employer under the Equal Pay Act.32 The court found it did not have jurisdiction, as the union had less than fifteen employees.33 As such, the union was not an “employer” for Title VII purposes. Based on the plain meaning of the statute when looked at in its entirety, Title VII’s subsections that deal with employers and labor organizations contemplate two different relationships, and a union can qualify under either one but is not automatically placed in both categories.34 The statute’s language requires that a union be considered an “employer” when it is implicated in relation to the treatment of an employee and as a “labor organization” when in relation to its membership.35 Again, the EEOC’s interpretation of the statute was rejected, as the unambiguous statutory language contradicted the EEOC’s interpretation.36

An alternative method used to hold a union liable under Title VII is to show that the union was causing the employer to engage in illegal discrimination.37 For example, a union was sued by an employee of the school district who was outside of the class of employees eligible for union

26. Id. at 1379.
27. Id. at 1384.
28. Id. at 1385.
29. 719 F.2d 1379 (9th Cir. 1983).
30. See Herman, 60 F.3d at 1385.
31. 297 F.3d 1146 (10th Cir. 2002).
32. Id. at 1149. The Equal Pay Act can be found at 29 U.S.C. § 206(d) (2004).
33. Id. at 1152.
34. Id. at 1151.
35. ld.
36. ld.
membership. She alleged that the union discriminated against her by causing the employer to discriminate against her. In this situation, the union is the party sued, even though the actual action was taken by the school district. However, the school district is alleged to have acted in response to the union. Thus, the plaintiff sought to hold the union, who was not her representative, liable under Title VII. Although the Court found that the employee could seek to hold the union liable, the Court also found she had not met her prima facie case and dismissed the case on summary judgment.

It is clear that defining the relationships between the individual, union, and employer are crucial to an analysis of union liability under the civil rights acts. When reading the cases and statutory definitions, it is important to note that, while the language used in the ADA is not as particularized as the language found in the other civil rights statutes, it has been interpreted to mean exactly the same thing. This result is a bit unusual, though, because unlike many other sections of Title VII that have been explicitly incorporated into the ADA, section 703(c), which dictates the requirements placed on unions, has not been incorporated. The significance of this difference in language has not been explored in the case law.

B. Who is a Qualified Employer and the Government Exclusion

The definitions of “employer” used in Title VII, the ADA, and the ADEA specifically exclude the federal government and any corporation owned in its entirety by the government. In fact, prior to 1972, there was no provision under Title VII that could be used to sue federal or local governments. The 1972 amendments included § 717 (42 U.S.C. § 2000e–16), which provided for a cause of action against the federal government

---

38. Id. at 410.
39. Id. at 411.
41. Id. at 411–413.
42. See Jones v. Am. Postal Workers Union, 192 F.3d 417, 420 (4th Cir. 1999) (using statutory analysis of Title VII in an ADA case as the definitional sections had been expressly incorporated from Title VII into the ADA).
43. 42 U.S.C. § 2000e–2(c) defines what is unlawful behavior for a labor organization under Title VII. See supra note 7.
44. For example, see 42 U.S.C. § 12117(c) (2004) (“The powers, remedies and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4, 2000e–5, 2000e–6, 2000e–8, and 2000e–9) shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated under section 106, concerning employment.”)
45. See definitions of employer, supra note 4.
but did not modify the federal government's exclusion from the definition of "employer." The 1972 amendments also included local and state governments in the definition of "persons." The definition of "employer" relies on the definition of "person." There are post-1972 cases which disallow Title VII suits against unions representing employees of state and local government, including school boards, based on the definitions of "employer" and "person." This means that the federal government may be sued under Title VII for particular causes of action, but not by being treated as an "employer." In contrast, a local government is now included in the definition of "employer."

Regardless of the language used in Title VII, the United States Postal Service ("USPS") is not an employer for the purposes of civil rights statutes. When a USPS employee sued her employer for sex discrimination and sought punitive damages, the Northern District of New York had its first opportunity to determine if such damages were available against the USPS. This was an unsettled question in the district, as the USPS occupies a peculiar place in sovereign immunity. It is a fully owned and funded governmental endeavor, but Congress has abrogated some of its sovereign immunity through the "sue and be sued" clause of the Postal Reorganization Act. The conclusion reached by the court was that punitive damages were not available, as the USPS is part of the federal government and punitive damages cannot be assessed against the federal government. The court reached this determination after evaluating the holdings made across the nation on the issue of the USPS's immunity.

A similar result was reached in White v. United States Postal Service, in which the court found that the USPS is not an employer as defined in the ADA. The same result was also reached in the Middle District of Alabama when the Court considered the issue of whether a sex

---

49. See definitions of employer, supra note 4.
52. Id. at 487. The Postal Reorganization Act can be found at 39 U.S.C. § 201–208 (2004).
53. Id. at 488.
54. See id. at 487.
discrimination plaintiff could recover punitive damages against the USPS.\textsuperscript{56} The USPS was deemed to be a governmental agency for all claims arising under the Civil Rights Act of 1991, thus precluding any liability under that act.\textsuperscript{57}

Taken together, then, a union can be sued as an employer or a representative of an organization under the Civil Rights Acts. If sued as a representative, then the plaintiff generally must show a breach of the duty of fair representation and an employer violation. The definition of “employer” and “person” has been expanded to cover state and local government, but the provision providing a cause of action against the federal government leaves the federal government outside those definitions. Thus, the federal government is, by definition, not an “employer.”

III.
PRIOR REGULATION OF UNIONS

The National Labor Relations Act and the Labor Management Reporting and Disclosure Act predate Title VII, the ADA and the ADEA. They are relevant to the discussion, as they have defined labor organizations, employees, and employers since the 1930s. That is, it is reasonable to believe that Congress was aware of how these definitions were being applied when it defined the same terms for purposes of the Civil Rights Acts. If this was not the interpretation that Congress wanted courts to apply, it had many opportunities to alter the definition sections when it amended Title VII in 1966, 1972, 1978, and 1991.\textsuperscript{58} Interpretation of the Civil Rights Act thus relies on the interpretations of the NLRA and the LMRDA. In fact, Congress intended that the definition of “labor organization” used in Title VII to be similar to that of the LRMDA.\textsuperscript{59}

\textsuperscript{57} Id. at 276.
\textsuperscript{59} As stated in the legislative history:

“Labor organization” is defined in substantially the same way that the term is defined in the Labor–Management Reporting and Disclosure Act of 1959...Labor organizations will be covered only if they are engaged in an industry affecting commerce...The terms “person,” “employee,” “commerce,” “industry affecting commerce,” and “State” are defined for the purposes of the title in the manner common for Federal statutes... . . .

House Judiciary Committee Report No. 87-914, reprinted in EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 2026-27
A. Regulation under the NLRA and LMRA

The National Labor Relations Act was passed in 1935 as the Wagner Act to provide employees with a means to organize and for protection against employers who sought to curtail that right. It was important to Congress to legislate these relationships in order to ensure that commerce was not disrupted by industrial strife. The NLRA is commonly cited for the rights of employees to organize and the explanation of what are unfair labor practices of both employers and employees. It lays out both sides’ duties in the bargaining relationship and provides for the National Labor Relations Board to adjudicate disputes between them.

Federal government employees are not covered by the NLRA but do receive some of the same protections through the Civil Service Reform Act. The Civil Service Reform Act shows Congress’s intent to regulate the federal employment relationship separately from private and state employment. For example, federal employees take unfair business practices to the FLRA, rather than the NLRB. The FLRA is modeled after and serves many of the same functions as the NLRB; the FLRA enforces unfair labor practices determinations, supervises union elections, and reviews arbitration awards. However, the treatment of strikes, mediation and contract acceptance are other areas where treatment in the public sector differs from the private sector. Postal employees are explicitly placed under NLRB jurisdiction by the Postal Reorganization Act.

As such, the NLRA served as the analytical and structural framework for other regulation of unions and the Civil Rights Acts. The NLRA and the LMRA carefully define the relationships to be regulated and, having been passed under Congress’s Commerce Clause power, only apply to industries and organizations that are involved in interstate commerce.

Like the acts that follow, the NLRA contains a highly-specified definitional section which cross references itself and calls for interpretation. Of relevance to the discussion at hand are the terms “person.”

69. “Person’ includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11 . . . or receivers.” 29 U.S.C. §
"employer," 70 "employee," 71 and "labor organization." 72 There are also definitions of "commerce" and "affecting commerce" that are intended to aid in the interpretation of the violation sections of the act. 73 These definitions become important for the Civil Rights Acts, as it is generally accepted that Congress cannot regulate the actions of private employers and entities unless they are involved in an industry that affects commerce in such a manner as to fall under the Commerce Clause. 74

Taken together, an individual cannot be an "employee" without working for a qualified "employer" and a union cannot be a "labor organization" without representing "employees." Any state or federal government employer is not such an "employer."

This interplay of definitions has been used to limit the application of the NLRA to state entities. For example, in Cottrill v. Ohio Civil Service Employees Association, the employee's claims against her union were dismissed for lack of jurisdiction over the claims. 75 As the Apple Creek Developmental Center, her employer, was a political subdivision of the state of Ohio, it was not an "employer" under the Labor Management

152 (1) (2004).
70. "'Employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. § 151 et. seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." 29 U.S.C. § 152(2) (2004).
71. "Employee" is defined as:
"Employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.
72. "'Labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5) (2004).
73. The NLRA defines "commerce" as:
Trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.
29 U.S.C. § 152(6) (2004). "'Affecting commerce' is defined to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." 29 U.S.C. § 152(7).
74. See infra Section IV.A.
Relations Act (LMRA). Because "employees" who can invoke the protections of LMRA are limited to those individuals who are employed by "employers," Cottrill could not invoke the LMRA because she was not a covered "employee." Thus, her union, the Civil Service Employees Association, did not represent "employees." This same analysis was used to reach similar conclusions on the status of public employees in the Third, Sixth and Ninth Circuits.

The same result was reached in Jacobs v. Ohio Valley Regional Transportation Authority, when the employer (OVRTA) was created as a West Virginia public corporation and was found to be a political subdivision of that state. Thus, OVRTA was not an "employer" as defined under 29 U.S.C. § 152(2). As OVRTA was not an "employer," Jacobs was not an "employee," and the union representing Jacobs was not a "labor organization." In determining that the union was not a "labor organization," again, because OVRTA was not an "employer," the court relied on the Third Circuit's determination in Crilly v. Southeastern Pennsylvania Transportation Authority, a case also relied on in Cottrill. The court in Crilly determined that it did not have jurisdiction over the union based on analysis of the interrelationship of the definitional sections of the Wagner Act and the Taft-Hartley Act.

Thus, under the NLRA, the union is not a covered labor organization unless the employer is covered under the statute.

B. Regulation under the LMRDA

The Labor Management Reporting and Disclosure Act provides statutory protection to an employee for actions taken by their union in its representational capacity. The LMRDA was passed as the Landrum-Griffin Act of 1959. It regulates the relationship between a union and its members and provides a mechanism for a member to sue a union if the

---

76. Id. at 527. The LMRA, 29 U.S.C. § 141, passed in 1947, is intertwined with the NLRA.
77. Id.
78. Id. (citing Manfredi v. Hazelton City Auth., Water Dep't, 793 F.2d 101, 104 (3d Cir. 1986); City of Saginaw v. Serv. Employees Int'l Union, Local 446--M, 720 F.2d 459, 462 (6th Cir. 1983); Ayres v. Int'l Bhd. of Elec. Workers, 666 F.2d 441, 442-44 (9th Cir. 1982); Crilly v. Southeastern Pa. Transp. Auth., 529 F.2d 1355, 1357 (3d Cir. 1976)).
80. Id. at 843.
employee feels that the actions taken against them by the union were unfair.\textsuperscript{85} Like the NLRA, the LMRDA has a definitional section that defines who is an "employee,"\textsuperscript{86} "employer,"\textsuperscript{87} and "labor organization."\textsuperscript{88} It also makes reference to "commerce"\textsuperscript{89} and "affecting commerce."\textsuperscript{90}

Unions that represent only public employees cannot be held liable under the Labor Management Reporting and Disclosure Act. As public employers are not "employers" under the LMRDA, unions that represent

---


\textsuperscript{86} "'Employee' means any individual employed by an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice or because of exclusion or expulsion from a labor organization in any manner or for any reason in consistent with the requirements of this chapter." 29 U.S.C. § 402(f) (2004).

\textsuperscript{87} "Employer" is defined as:

Any employer or any group or association of employers engaged in an industry affecting commerce (1) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees or (2) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee but does not include the United States or any corporation wholly owned by the government of the United States or any State or political subdivision thereof.


\textsuperscript{88} "Labor organization" is defined as:

A labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engages which is subordinate to a national or international labor organization, other than a State or local central body.


\textsuperscript{89} "'Commerce' means trade, traffic, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 402(a) (2004).

\textsuperscript{90} A labor organization is deemed to be engaged in an industry affecting commerce if it:

1. is the certified representative of employees under the provisions of the National Labor Relations Act, as amended \[29 U.S.C. §§ 151 \textit{et seq.},\] or the Railway Labor Act, as amended; or

2. although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

3. has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

4. has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

5. is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection, other than a State or local central body.

their employees are not “labor organizations” as defined by the act. An article published after the passage of the LMRDA explained that “a labor organization is not covered unless it represents, or is chartered to represent, or is actively seeking to represent ‘employees’ of an ‘employer’ as those terms are defined in the act.”

For example, in Celli v. Shoell, a suit by two federal government employees against their union, the American Federation of Government Employees (AFGE), the Tenth Circuit Court ruled that the case could not move forward based on the definitional sections of the LMRDA because there was a jurisdictional defect. The court ruled, “to sue a union in district court under LMRDA, a plaintiff must allege that the union qualifies under that statute’s definition of ‘labor organization’.” The definition of “labor organization” requires the organization to deal with “employers.” Employer is defined to exclude “the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof.” Thus, the Tenth Circuit found, in agreement with the Third, Fifth, and Eleventh Circuits, the Northern District of Illinois and the Eastern District of New York, that AFGE is not covered by LMRDA, as it represents only government workers. The Court raised the possibility of the situation being different if the union were “mixed,” representing both government and private sector employees.

In a typical claim filed under the LMRDA, members of a local union sued the national union, as well as officials of the local and national for mismanagement of funds. The local and the national unions, the American Federation of Government Employees (AFGE), represented and continue to represent only federal government employees. The court dismissed the case after finding it to be settled law in the Third Circuit that “[a] union consisting exclusively of government employees is not subject to the statutory prohibitions and rights created by the LMRDA.” The Third Circuit had previously held in New Jersey County & Municipal Council #61, AFSCME v. AFSCME that the LMRDA does not affect public

---

93. 40 F.3d 324 (10th Cir. 1994).
94. Id. at 326–27.
97. Celli, 40 F.3d at 327.
98. Id. This possibility will be more fully explored infra Section III.
100. Id. at 489.
101. Id.
employee unions. The AFGE court concluded its inquiry into LMRDA
jurisdiction by holding that, "[a]s the federal government is expressly
excluded from the statutory definition of employer, the organization which
represents its workers does not represent ‘employees’ of an ‘employer’
within the meaning of the LMRDA."103

In a Ninth Circuit case, Thompson v. McCombe, the plaintiff had been
an employee of the Alameda–Contra Costa Transit District ("AC Transit")
and a member of Local 192 of the Amalgamated Transit Union (ATU).104
The court determined that it did not have jurisdiction over the case because
"a labor organization composed entirely of public sector employees is not a
labor organization for purposes of the LMRDA."105 This statement was
based on a federal regulation explaining and implementing the LMRDA.106
ATU was found to represent only public employees because it had
exclusively represented the employees of AC Transit since 1960 and the
union did not "currently deal with or represent any employees other than
those of AC Transit."107 The Court did not examine the national body of the
ATU or the employers with whom the other locals bargained with.108 The
ATU local’s exclusive representational actions in favor of public employees
prohibited the Court from finding the union to be a "mixed local."

The difficulty of making such determinations increases when one
considers the union’s membership at both the local and international levels.
The definition of "labor organization" expressly contemplates the
relationships between a local and its international or national body, thus the
sought–for relationship with an employer of employees can occur with
either the local or national union.109 The sought–for relationship for an
employee is that their union, which represents them in their public sector
job, at some level (either the international or another affiliated local)
bargains with a private employer. If so, the jurisdictional hook can be
found.

In Chao v. Bremerton Metal Trades Council, the Secretary of Labor,
Elaine Chao, sought to invoke the LMRDA to set aside an officer election
of the joint council of local labor unions, as federal employees seeking that
office were excluded from the election.110 The employee that Chao brought

102. 478 F.2d 1156, 1158 (3d Cir. 1973).
103. AFGE, 522 F.2d at 490.
104. 99 F.3d 352, 353 (9th Cir. 1996).
105. Id. at 353.
107. Thompson, 99 F.3d at 354.
    (E.D.N.Y. 1979).
109. See definition of labor organization from the LMRDA, supra note 88.
110. Chao v. Bremerton Metal Trades Council, 294 F.3d 1114, 1116 (9th Cir. 2002).
the action on behalf of was a member of AFGE, Local No. 48.\footnote{Id.} The
Trades Council, of which Local No. 48 was a member, had argued that they
were not subject to the LMRDA as Local 48 represented only public
employees.\footnote{Id.} Although the Council did not directly deal with any private
employers, the Council was an amalgamation of unions that represented
both public and private employees.\footnote{Id.}

The court found the Council to be subject to the LMRDA because it
was a member of the Metal Trades Department of the AFL–CIO. As the
Council was a subordinate of the Metal Trades Department, the Court could
look not only at the bargaining relationships of the Council, but also to the
bargaining relationships of all the other subordinate bodies to the Metal
Trades Department.\footnote{Id. at 1117–18.} As some of the other subordinate bodies bargained
with private employers, the Metal Trades Department was found to be a
"labor organization." As the Metal Trades Department was a "labor
organization," all of its subordinate bodies, including the council, were also
"labor organizations."\footnote{See Lohf v. Runyon, 999 F. Supp. 1430, 1441 (D. Kan. 1998).} This process of looking at the subordinate and
parent organizations to determine if a local is a "mixed union" has
transferred from LMRDA analysis to analysis under the Civil Rights
Acts.\footnote{See Hester v. Int'l Union of Operating Eng'rs, 818 F.2d 1537, 1540–42 (11th Cir. 1987).}

C. "Mixed" Unions

A union that represents only employees of a public employer may be
held liable under the LMRDA if its parent union represents employees of a
private employer or if any other subsidiary local of the same parent union
represents employees of a private employer.\footnote{See Berardi v. Swanson Mem'l Lodge No. 48, 920 F.2d 198 (3rd Cir. 1990).} For this analysis, the
difference between membership and representation is important.\footnote{See London v. Polishook, 189 F.3d 196 (2d Cir. 1999) (requiring briefing on whether the
union representing the employees of the City University of New York represented only private
employees or if it was "mixed" and thus covered by the LMRDA); Kinslow v. Briscoe, 1993 WL 72336,
n. 1 (N.D. Ill. 1993) (allowing a suit between a member and the leadership of the APWU to move
forward under the LMRDA as both parties assumed APWU would be covered under "mixed local"
analysis).} Examples of this finding of "mixed unions" deal with both organizations
that are administrative agencies of the United States government and
corporations wholly owned by the government.\footnote{See London v. Polishook, 189 F.3d 196 (2d Cir. 1999) (requiring briefing on whether the
union representing the employees of the City University of New York represented only private
employees or if it was "mixed" and thus covered by the LMRDA); Kinslow v. Briscoe, 1993 WL 72336,
n. 1 (N.D. Ill. 1993) (allowing a suit between a member and the leadership of the APWU to move
forward under the LMRDA as both parties assumed APWU would be covered under "mixed local"
analysis).}

In Hester v. International Union of Operating Engineers, the plaintiff
was a crane operator for the Tennessee Valley Authority (TVA) and was a member of the IUOE.\textsuperscript{120} The TVA is a corporation wholly owned by the federal government.\textsuperscript{121} Although the TVA is a governmental organization and thus is not an employer under the act, the IUOE was still covered by the LMRDA because it also represents employees of private employers.\textsuperscript{122} It was not relevant to the inquiry whether the particular local involved in the suit represented federal employees, as long as any parent or subsidiary union of the parent represented employees of an employer covered by the Act.\textsuperscript{123} This interpretation is taken from the Code of Federal Regulations, which states:

A labor organization composed entirely of employees of the governmental entities excluded by section 3(e) would not be a labor organization for the purposes of the Act. . . . However, in the case of a national or international labor organization composed both of government local and non-government or mixed locals, the parent organization as well as its mixed and non-government locals would be “labor organizations” and subject to the Act.\textsuperscript{124}

Thus, when a union is “mixed,” its internal affairs are regulated by the LMRDA.\textsuperscript{125}

In a case that muddied the waters of previous precedent on the status of the AFGE, the court in Wildberger v. American Federation of Government Employees found the AFGE to be a “mixed union.”\textsuperscript{126} The plaintiff was an employee of the United States Small Business Administration and president of his union, Local 2532 of the AFGE.\textsuperscript{127} The Eleventh Circuit held that despite the fact that Local 2532 represents only public employees, the case was within the jurisdiction of the LMRDA because Local 2532’s parent, AFGE, was a mixed union.\textsuperscript{128} Given that the national body of the AFGE represented both government and private sector workers, the union was “mixed.”\textsuperscript{129}

In an Amalgamated Transit Union case that pre-dated Thompson v. 

\textsuperscript{120} Hester, 818 F.2d at 1538.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 1541–42.
\textsuperscript{123} See id.
\textsuperscript{124} 29 C.F.R. § 451.3(a)(4).
\textsuperscript{125} Hester, 818 F.2d at 1543.
\textsuperscript{126} 86 F.3d 1188 (D.C. Cir. 1996). Compare the earlier cases against the AFGE supra notes 86–96 and accompanying text (discussing Celli v. Shoell, 40 F.3d 324 (10th Cir. 1994) and finding the AFGE to only represent public employees) with later decisions supra notes 102–107 and accompanying text (discussing Chao v. Bremerton Metal Trades Council, 294 F.3d 1114 (9th Cir. 2002), which found the AFGE to represent private and public employees through its relationship with the Metal Trades Department of the AFL–CIO).
\textsuperscript{127} Wildberger, 86 F.3d at 1190.
\textsuperscript{128} Id. at 1192.
\textsuperscript{129} Id.
McCombe by over twenty years and reached the opposite conclusion, the Eastern District of New York in Kennedy v. Metropolitan Suburban Bus Authority found that both the ATU and the Transport Workers Union (TWU) were covered by the LMRDA. The plaintiff bus drivers sued their employer and the unions that represented them, Local 252 of the TWU and Local 1181-1061 of the ATU, on charges of interfering with the employees' rights to have a unified union. The court distinguished this situation from that found in Local 1498, AFGE v. AGFE, where the LRMADA was deemed not to apply, based on the fact that the TWU and ATU were "mixed locals." The court explained a "mixed local" as existing when either the local, national, or international is composed of both government and non-government employees. "Such 'mixed locals' are subject to the LMRDA." Because both TWU and ATU were found to have mixed membership, the Court had jurisdiction over the LMRDA claims of governmental employees.

In yet another AFGE case, the court in Martinez v. American Federation of Government Employees remanded the case for further fact-finding to determine if the AFGE dealt with any private sector employers. An employee of the federal government at Kelly Air Force Base sued his union under the LMRDA for removing him from local office. In explaining the standards used to determine if a union is covered by the LMRDA the court stated that "[u]nions that bargain solely with the government are not 'labor organizations' subject to the LMRDA; all others are." Although the parties stipulated that AFGE had members who worked in both the private and public sector, the AFGE contended that it did not deal with the private employer in the manner proscribed by the LMRDA. Thus, the key point on LMRDA coverage for "mixed locals" is not the character of the membership, but rather, the nature of the representation given by the union.

This highlights the importance between the union's bargaining relationship with a private employer as compared to merely having members who work for private employers. Only if the union has a
bargaining relationship with a private employer is it covered by the LMRDA.

This point was made explicit by the Third Circuit when it found a police lodge not to be covered by the LMRDA, despite membership of employees of public and private employers.\textsuperscript{142} The lodge did not represent any of the members who had been employed by private employers; it merely offered them membership.\textsuperscript{143} Even if the lodge allowed retired police or employees hired by private employers to be members, that did not change its status: "The mere fact that a union \textit{admits} some members who work for private employers is not enough to bring the union within this definition."\textsuperscript{144} "The question is one of representation not membership."\textsuperscript{145}

This point was also relied on in \textit{Wright v. Baltimore Teachers Union}, in which the court found the local, which represented only employees of the public schools of Baltimore, not to be covered by the LMRDA.\textsuperscript{146} As the teachers were employed by the City of Baltimore, an employer "specifically excluded from the Act," the union was not a "labor organization."\textsuperscript{147} The union was neither an organization in which "employees" participated, nor did it exist for "the purpose of dealing with employers," as those terms are defined in the LMRDA.\textsuperscript{148}

The idea that mixed unions that deal with public and private employers are "labor organizations" and thus covered, even with respect to employees who are in a completely public local, has been accepted in a leading treatise in the field. "Title VII applies to a labor organization when it deals with employers not covered by Title VII, as long as the organization deals with at least one covered employer."\textsuperscript{149}

IV.

\textbf{REGULATION UNDER TITLE VII, THE ADA, AND THE ADEA}

A. \textit{Congressional Authority to Regulate}

Like the NLRA and the LMRDA, the definitional section of each of the Civil Rights Acts defines "commerce"\textsuperscript{150} and "industry affecting

\begin{itemize}
  \item \textsuperscript{142} Berardi v. Swanson Mem’l Lodge No. 48, 920 F.2d 198 (3rd Cir. 1990).
  \item \textsuperscript{143} \textit{Id.} at 201.
  \item \textsuperscript{144} \textit{Id.}
  \item \textsuperscript{145} \textit{Id.} (citing \textit{Wright v. Baltimore Teachers Union}, 369 F. Supp. 848, 855 (D.C. Md. 1974)).
  \item \textsuperscript{146} 369 F. Supp. 848, 849 (D. Md. 1974).
  \item \textsuperscript{147} \textit{Id.}
  \item \textsuperscript{148} \textit{Id.}
  \item \textsuperscript{149} Employment Discrimination Coordinator, ¶23,902.
  \item \textsuperscript{150} Title VII defines the term "commerce" to mean "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside
\end{itemize}
They also explain when a labor organization will be deemed to be engaged in an industry affecting commerce. These definitions are significant, as Congress only has the authority to regulate the behavior of thereof; or within the District of Columbia, or possession of the United States; or between points in the same State but through a point outside thereof.” 42 U.S.C. § 2000e(g) (2004). The same definition is used in the ADEA, 29 U.S.C. § 630(g), and is explicitly incorporated into the ADA, 42 U.S.C. § 12111(7).

151. Title VII defines the term “industry affecting commerce” to mean:

any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry “affecting commerce” within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

42 U.S.C. § 2000e(h). The ADEA definition is substantially the same but does not include the final clause of “and further includes any governmental industry, business, or activity.” 29 U.S.C. § 630(h).

The ADA incorporates the definition of “industry affecting commerce” used in Title VII. 42 U.S.C. § 12111(7).

152. Title VII explains that:

A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or produces for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, of the aggregate number of the members of such labor organization) is (A) twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;
(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or
(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or
(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or
(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce with the meaning of any of the proceeding paragraphs of this subsection.

42 U.S.C. § 2000e(e). The ADA does not mention when a labor organization is deemed to be engaged in an industry affecting commerce, but, as it incorporates the other relevant definitions, it can be assumed to be the same as Title VII. The ADEA uses substantially the same definition; the first paragraph has a slight variation on how many members the union must have to qualify but the five paragraphs of categories of relationships are the same. The first paragraph of the ADEA explanation reads:

A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organization or their representative, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization...

private actors under the Commerce Clause. Unlike actions of state and federal government actors, which can be regulated by passing legislation under section 5 of the Fourteenth Amendment, private action is outside of that broad jurisdictional grant. Thus, a union that is not involved in interstate commerce or that does not represent employees of an employer who is engaged in interstate commerce cannot be regulated by Congress. Sometimes, however, a local union is imputed to be involved in interstate commerce based on its affiliation with a national or international union which is involved in interstate commerce.

Although it is not always considered, the method used by the Congress to pass legislation can affect the jurisdiction of the statute. In *EEOC v. California Teachers Ass'n*, the District Court of the Northern District of California determined that the teacher's association (CTA), a voluntary organization, did not have to comply with the Pregnancy Discrimination Act of Title VII when offering its members insurance on a voluntary basis. This was established after the court concluded that the organization was not regulated by Title VII or the pregnancy discrimination provisions found within it because the CTA did not meet the definition of "labor organization" used in Title VII. Without meeting the definition, there was no way to attach liability to the CTA's actions if its actions were found to be discriminatory.

The court found three potential tests to determine if the CTA was covered by Title VII. Each test required the complainant to demonstrate that the CTA represents or seeks to represent "employees of an employer or employers engaged in an industry affecting commerce." This led to a lengthy discussion on whether school districts, or any intrastate governmental employer more generally, can be engaged in an industry affecting commerce. The court concluded that when Title VII was amended in 1972 to include government employers, the amendment was made under the broad powers of section 5 of the Fourteenth Amendment, rather than Congress's power under the Commerce Clause. Because the regulation was made under the Fourteenth Amendment, there was no intention by

---


154. U.S. Const. amend. XIV, § 5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." This refers to the main text of the Fourteenth Amendment, which provides equal protection and due process for actions taken by the states and extends citizenship to all persons born or naturalized in the United States.


156. Id. at 213.

157. Id.


Congress to deem those internal state actions as activities affecting interstate commerce. The amendment was not contemplated under the Commerce Clause, and previous congressional action establishes that not all governmental entities should be deemed to be industries affecting commerce.\textsuperscript{160}

The analysis involving the 1972 amendments made under section 5 of the Fourteenth Amendment, rather than the Commerce Clause, was previously adopted by the Supreme Court in \textit{Fitzpatrick v. Bitzer}.\textsuperscript{161} The CTA court noted that Congress failed to examine the affect of the 1972 amendments on unions that represent the newly-covered government employees.\textsuperscript{162} Such unions cannot be regulated under the Fourteenth Amendment, as they are not state actors. Thus, they cannot be made subject to the 1972 amendments under the Fourteenth Amendment, rather than the Commerce Clause.\textsuperscript{163}

The court re-opened discovery to provide the EEOC with an opportunity to show that CTA was engaged in an industry affecting commerce.\textsuperscript{164} This could be done either by demonstrating that: (1) the CTA itself was an industry affecting commerce, or (2) the CTA is deemed to be in an industry affecting commerce based on its representation of employees of an employer engaged in an industry affecting commerce (i.e., the school district is an industry affecting commerce).\textsuperscript{165} To determine how close the relationship to commerce needs to be, the court directed the parties to the definitions and case law explaining the matter under the NLRA.\textsuperscript{166}

Regulation of state government under Title VII was passed pursuant to Congress’s power under the Fourteenth Amendment, not the Commerce Clause. This allows for abrogation of state sovereign immunity under the Eleventh Amendment.\textsuperscript{167} Thus, when a state university employee sued her employer on charges of sex discrimination under Title VII, the court had proper jurisdiction to hear the case.\textsuperscript{168} The state’s sovereign immunity

\begin{itemize}
\item \textsuperscript{160} \textit{Id.} at 217.
\item \textsuperscript{161} 427 U.S. 445, 453 n.9 (1976).
\item \textsuperscript{162} \textit{CTA}, 534 F. Supp. at 217.
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{Id.} at 218.
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} U.S. CONST. amend. XI “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another States, or by Citizens or Subjects of any Foreign State." Although it is not clear from the text, the Eleventh Amendment has been interpreted to grant broad sovereign immunity to the states. \textit{See} Hans v. Louisiana, 134 U.S. 1 (1890). However, Congress, when making a clear statement of the intent to abrogate state sovereign immunity, can legislate for states to be held liable under section 5 of the Fourteenth Amendment. \textit{See}, e.g., \textit{Milliken v. Bradley}, 433 U.S. 267 (1977).
\item \textsuperscript{168} \textit{Shawer v. Ind. Univ. of Pa.}, 602 F. 2d 1161 (3rd Cir. 1979).
\end{itemize}
under the Eleventh Amendment was not a bar to suit. Recall that if the inclusion of the state was based on the Commerce Clause, then the plaintiff would have the duty of showing that the university was engaged in an industry affecting commerce. The passage of these amendments to Title VII under the Fourteenth Amendment was a clear abrogation of state immunity by Congress for the purpose of stopping employment discrimination by the state. The analysis offered in Shawer bolsters the boot-strapping argument presented in California Teachers Ass'n, in which the court found the voluntary organization of teachers in California not to be covered by Title VII: the state, in its role as employer, was included under Title VII, which was passed under the Fourteenth Amendment, not under the Commerce Clause. Thus, as the organization was not representing employees of an employer who was engaged in activity affecting commerce, it was not a statutory "labor organization." However, the state entity that Shawer worked for was covered.

Courts have not consistently applied this analysis. For example, a teachers' association was accepted as covered by Title VII without any analysis in Byars v. Jamestown Teachers Ass'n. Using the section defining unlawful employment practices of labor organizations, found at 42 U.S.C. § 2000e-2(c), jurisdiction was conferred. No discussion was made of the teachers association being only intrastate and representing only employees of the school district.

Similarly, when a public university in Pennsylvania engaged in layoffs, an affected employee named Fraser sued the state system of higher education, the state labor relations board, and the Association of Pennsylvania State College and University Faculties (APSCUF). The APSCUF was the bargaining representative of the university faculty and was certified under the state employment relations act, but not under the National Labor Relations Act or the Railway Labor Act. As the APSCUF was a private entity, the court found that it could only be regulated by Congress under the Commerce Clause. Thus, Fraser had the burden of showing that APSCUF was engaged in "an industry affecting commerce."

---

169. Id. at 1162–63.
171. Shawer, 602 F. 2d at 1164.
173. Id. at 217.
174. Shawer, 602 F.2d at 1164.
178. Id. at * 10.
The court provided the plaintiff with the same two possible routes to meet this burden as were provided to the EEOC in California Teachers Ass'n. Fraser could: (1) "demonstrate that APSCUF is 'itself an industry affecting commerce'" (an activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce), or (2) demonstrate that APSCUF is a labor organization deemed to be engaged in an industry affecting commerce. To meet the second option, Fraser would have to show that APSCUF either maintains a hiring hall or has fifteen or more members who are employed by an employer who is engaged in an industry affecting commerce. The result that the court believed would occur was clear; as the APSCUF only represented employees inside the state higher education system, it was neither engaged in an industry affecting commerce nor were its members employed by a statutory employer who engaged in interstate commerce.

In a local government application of this rule with a different result, a plaintiff named Rainey alleged that her union and the international knew and failed to correct the hostile work environment that she faced while employed by the town. In response, the local union claimed that there was no jurisdiction because the local was not a covered entity under Title VII, as it was not engaged in interstate commerce. Finding 42 U.S.C. § 2000e(e)'s definition of an "employer engaged in an industry affecting commerce" applicable to labor organizations, the court found that the local was a covered entity, as it met subparagraph (4), which covers a union if it "has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization." The court found that since the international, which was properly named in the suit, was a covered entity, the local, as its subordinate local body, was also covered. The court distinguished the situation from that found in EEOC v. California Teacher's Ass'n based on the CTA not being affiliated with any larger organization that has interstate claims. The CTA was presumed to be a completely intrastate organization without a larger

179. Id. at *11.
180. Id. at *10; CTA, 534 F. Supp. at 218.
183. Id. at 12.
184. Id. at 13 (citing 42 U.S.C. § 2000e(e)).
185. Id. at 13–14.
186. 534 F. Supp. 209 (N.D. Cal. 1982).
national body. Thus, for the CTA, there was no larger body to bring it under the affecting commerce requirement of § 701(3) [42 U.S.C. § 2000e(e)].

The foregoing analysis allows the court to look at the larger body to find a connection to interstate commerce and gives the Civil Rights Acts jurisdiction where it might otherwise be lacking.

B. Interpretation and Interplay of the Definitional Sections of Title VII, the ADA and the ADEA

Analysis of Title VII, the ADA, and ADEA is very closely integrated, as Title VII and ADEA use the same definitions in most instances and many of those terms are explicitly incorporated into the ADA. As the statutes have similar goals and structures, using the canon of in pari materia, they should be interpreted similarly, unless the legislative history or purpose suggests material differences. I submit that these statutes should be similarly interpreted. In order to be a “labor organization” under the Civil Rights Acts, the union must deal with “employees” of an “employer” as defined in each of the statutes.

One of the most frequently cited cases that deals with the definitions was decided in the Eighth Circuit prior to the 1991 amendments to Title VII with little analysis of whether a union is a “labor organization” under the statute. In Jennings v. American Postal Workers Union, the plaintiff employee sued her union on claims of discrimination on the basis of race and sex in the union’s representation of her for a grievance against her former employer, the USPS. The claim was made under § 703(c) [42 U.S.C. § 2000e-2(c)], “which requires the Union to ‘represent and protect the best interests of minority employees.”’ The court made short shrift of the importance of the union representing only federal employees by determining that the issue was “not controlling.” Referring to the issue in only two sentences and a footnote, the court declared that Title VII provides a cause of action against labor organizations and that the nature of the employees represented by the union is not relevant. The court mentioned a previous Fifth Circuit decision regarding the APWU, where the court found that the union could not be sued under § 717(c) [42 U.S.C. § 2000e–

188. CTA, 534 F. Supp. at 217.
189. 672 F.2d 712 (8th Cir. 1982).
190. 672 F.2d 712 (8th Cir. 1982).
191. Id. at 715 (internal citation omitted).
192. Id.
193. Id.
16(c)], but found the analysis of the case to be irrelevant, as the Newbold court did not mention the applicability of § 703(c) to unions representing federal employees.\(^\text{194}\)

The analysis provided by Jennings is an inappropriate usage of the statutory interpretative tool of *expressio unius*. The linguistic inference that is made under that canon is that "the expression of one thing suggests the exclusion of others."\(^\text{195}\) It was improper for the Jennings court to draw that conclusion from the Newbold decision because the Newbold court, as compared to the legislature, did not have the power to decide matters that were not in front of it in the case at hand. Any reference that the Newbold court would have made to § 703(c) would have been incidental dicta, as the case did not raise claims under that section.

The issue addressed in Newbold was much more discrete and simple. An employee filed an untimely charge against the USPS and his union, the American Postal Workers Union, based on claims of race discrimination and conspiracy to discriminate.\(^\text{196}\) In dismissing the case, the court noted that even a timely suit would not have been valid against the union, as the claim made by the plaintiff was based on § 717(c) [42 U.S.C. § 20003–16(c)]. Section 717(c) is applicable only to provide a cause of action against the head of a department or agency or unit of the federal government.\(^\text{197}\) The court never reached the issue of whether it was possible to sue the APWU regardless of its status of only representing federal employees.\(^\text{198}\)

Thus, it is important to distinguish the provisions of Title VII from one another. Under § 717(c), a federal employee can sue her employer.\(^\text{199}\) Under § 703(c) private employees can sue their employer or their union.\(^\text{200}\) There is no provision in § 717(c) that creates a cause of action against a union. Thus, the analysis used in *Thomas v. Biller* does not reach the true heart of the question.\(^\text{201}\) In *Thomas*, the plaintiff sued her union, the American Postal Workers Union (APWU), under Title VII, § 1981, and § 1983 on allegations of age, race, and sex discrimination.\(^\text{202}\) In allowing the claim against the union to go forward, the court noted that there is a

---

194. *Id.* at 715, n. 6 (discussing Newbold v. United States Postal Service, 614 F.2d 46 (5th Cir.) (per curiam), cert. denied, 449 U.S. 878 (1980)). Section 717(c) allows federal government employees to sue the federal government in response to discrimination covered by Title VII.


197. *Id.* at 46.

198. *Jennings*, 672 F.2d at 715, n. 6.


202. *Id.* at *1.
difference between a claim under § 717(c) and one under § 703(c). The two different sections of Title VII draw a distinction between suing the union as an employer and suing the union in its representational capacity.

The Thomas analysis relied on Jennings, which allowed a suit to go forward against a union that represented federal employees and drew the distinction based on the function that the union was serving, as noted in Newbold. The Eastern District of New York agreed with the Eighth Circuit, holding in Jennings that, although an action could not be sustained against the union under § 717(c), that section does not prevent a federal employee from suing his union under 42 U.S.C. § 2000e–2(c) [703(c)]. That is, inability to sue the employer under 703(c) does not preclude an employee from using that provision to sue a "labor organization."

Section 703(c) is a generally applied law, providing employees with a cause of action against "employers" and "labor organizations." Using the weak Jennings analysis, the employer's status is not relevant in determining if the employer can name the union in a suit. Regardless of meeting the statutory definition of a "labor organization" representing employees of employers, the Eastern District of New York found that employees can assert a cause of action against labor organizations. The Thomas court did not analyze the statutory definitions of "employer" or "labor organization" to support this rationale.

This case misses the heart of the argument. Generally, employees do not argue that they should be able to sue their union under the same provisions by which they would sue their federal employer. Instead, the argument is that even if the employee has a special provision to sue their federal employer, that does not, on its own, provide a basis for that employee to sue her union. The court found that the APWU is an unincorporated labor organization that represents only individuals who work for the USPS; it was deemed to have neither a larger, national union nor smaller subsidiary local unions. Thus, the plaintiff would not have been able to assert liability against the union based on its affiliation with a union who has a subordinate or parent body that represents employees of an employer engaged in an industry affecting commerce. Thus, APWU is not a "mixed" union. As discussed previously, the USPS is a fully federally-owned government entity and, as such, is explicitly not covered under Title

205. Jennings v. Am. Postal Workers Union, 672 F.2d 712 (8th Cir. 1982); Newbold v. United States Postal Service, 614 F.2d 46 (5th Cir.) (per curiam), cert. denied, 449 U.S. 878 (1980); Thomas, 1989 WL 47710, at *5.
207. Id. at *1.
VII's definition of "employer."\textsuperscript{208}

The court in \textit{Jones v. American Postal Workers Union} followed the rationale of \textit{Jennings} and \textit{Thomas}, but used a more in-depth analysis to reach the result.\textsuperscript{209} In \textit{Jones}, a former employee of the USPS sued his union under the Americans with Disabilities Act for statements allegedly made to his employer which were a substantial factor in his discharge.\textsuperscript{210} The court began its analysis with the statutory language of Title VII, as that statute's definitional section has been explicitly incorporated into the sister statute of the ADA.\textsuperscript{211} By definition, a "labor organization" is a "covered entity" that must comply with the ADA.\textsuperscript{212} The court then engaged in statutory interpretation of the ADA, relying on the EEOC interpretations as dictated by \textit{Chevron U.S.A., Inc. v. NRDC}.\textsuperscript{213} Under \textit{Chevron} deference, a court may rely on the statutory interpretations of the agency empowered to enforce the statute if Congress has not spoken directly to the issue and the agency's interpretation is "based on a permissible construction of the statute."\textsuperscript{214}

The Court felt free to accept the EEOC's position as explained in \textit{Jennings}\textsuperscript{215} because it found at least four ambiguities in the text of Title VII's definition of "labor organization." In \textit{Jennings}, the EEOC urged for all labor organizations to be covered, regardless of the status of the employer that the unions bargained against. The EEOC considered this a reasonable interpretation of the statute, as Congress could not have intended to allow a private sector employee to sue both his union and his employer while creating a cause of action for public employees to sue only the employer. First, the statute's use of the term "labor organization," as defined, leads to the question, "what is the nature of a labor organization for purposes of Title VII?"\textsuperscript{216} This is irrelevant because Congress defined the terms to be used and chose not to include the underlying nature of the organization in the definition. Second, the definition of "labor organization" in Title VII uses the word "including," which can be interpreted to be a non-exhaustive list; thus, organizations other than those directly listed may be covered by the statute.\textsuperscript{217} This is an \textit{ejusdem generis} argument.\textsuperscript{218} The term "including," however, could just as easily be

\begin{footnotesize}
208. See supra Section II.B.
209. 192 F.3d 417 (4th Cir. 1999).
210. Id.
211. Id. at 420.
212. Id. at 423; 42 U.S.C. § 12111(2) (2004).
214. Chevron, 467 U.S. at 843.
215. Jennings, 672 F.2d 712 (8th Cir. 1982).
216. Jones, 192 F.3d at 426.
217. Id.
218. See ESKRIDGE, supra note 189, at app. B, p. 19. The canon leads to interpreting a general
\end{footnotesize}
interpreted as exhaustive under the canon of *expressio unius.* \(^{219}\) Third, the structure of Title VII provides a special section to deal with employment discrimination when the federal government is the employer, but does not contain a parallel section addressing federal employees' claims against their union. \(^{220}\) This could be construed as a clear statement of not covering the unions in question, rather than an ambiguous one.

Fourth, although the statute explains when a labor organization will be "deemed" to be engaged in an industry affecting commerce, it does not define the term "labor organization" itself. \(^{221}\) A fifth source of ambiguity has been claimed to exist based on the silence in the legislative history on the matter of unions that represent federal employees. However, silence in legislative history should not be a reflection on whether the statute's text is unambiguous on its face. \(^{222}\) The *Jones* court thus accepted the EEOC's definition of "labor organization" from *Jennings* because the term was sufficiently ambiguous (allowing the EEOC to have an interpretation), the EEOC's interpretation was reasonable, the interpretation was not a *post hoc* rationalization, and it was properly put before the court in an *amicus* brief. \(^{223}\) As jurisdiction of the court over the APWU was found for Title VII through the EEOC interpretation, by proxy, the Court had jurisdiction for the ADA claim.

The court's decision in *Bergeron v. Henderson* \(^{224}\) reflects a more thorough analysis of the definition of a "labor organization" than the more superficial analyses in *Thomas,\(^{225}\) Jones,\(^{226}\) and *Jennings.* \(^{227}\) In *Bergeron,* an employee of the USPS sued her employer and her union, the National Association of Letter Carriers (NALC), alleging sexual harassment and discrimination under Title VII. \(^{228}\) After determining that the employee could not sue the union under § 717(c), as that section is reserved for suits against an agency of the federal government, the court moved on to analyze the claim's value under § 703(c). \(^{229}\) The court agreed with and adopted the analysis previously used by the District Court of Kansas in *Luttrell v...."
Runyon,\textsuperscript{230} which found NALC not to be covered by Title VII.\textsuperscript{231} The Court stated:

42 U.S.C. § 2000e(d) defines a “labor organization” as an organization representing “employees” against “employers.” The definition of “employer” expressly \textit{excludes} any “corporation wholly owned by the United States.” The United States Postal Service is a corporation that is wholly owned by the United States, thus, the USPS is not an “employer,” and the Union cannot, by definition, represent employees of an “employer.”\textsuperscript{232}

The court found the analysis used in Jennings,\textsuperscript{233} which reached the contrary conclusion, to be unpersuasive, as it failed to analyze the “definitional provisions that relate to ‘labor organization’” liability under the relevant sections of Title VII.\textsuperscript{234} The NALC local being sued administered the nationwide contract at the local level and the national union only represented federal employees of the USPS.\textsuperscript{235} The claims were dismissed on the grounds that “unions that represent federal employees against federal employers cannot be sued under Title VII.”\textsuperscript{236}

The Bergeron result can be found in other Title VII cases, including the previously mentioned \textit{Luttrell v. Runyon}.\textsuperscript{237} In \textit{Luttrell}, the plaintiff, a USPS employee, sued the USPS and his union, the National Association of Letter Carriers (NALC), under many theories, including Title VII and the ADEA.\textsuperscript{238} In dismissing the claims on summary judgment, the court held that NALC is not covered by the statutes under which the plaintiff had made his allegations.\textsuperscript{239} The Court first stated that claims under the Rehabilitation Act\textsuperscript{240} cannot be sustained against a labor union, as unions are not federal agencies and they do not receive federal funding.\textsuperscript{241} NALC also could also not be sued under Title VII, as “NALC is not a ‘labor organization’ because it does not represent employees against ‘employers’ as the term is defined in Title VII.”\textsuperscript{242}

\begin{itemize}
\item \textsuperscript{230} 3 F. Supp. 2d 1181 (D. Kan. 1998).
\item \textsuperscript{231} Bergeron, 185 F.R.D. at 15.
\item \textsuperscript{232} Id.
\item \textsuperscript{233} 672 F.2d 712 (8th Cir. 1982).
\item \textsuperscript{234} Bergeron, 185 F.R.D. at 15.
\item \textsuperscript{235} Id. at 15–16.
\item \textsuperscript{236} Id. at 16.
\item \textsuperscript{237} 3 F. Supp. 2d 1181 (D. Kan. 1998).
\item \textsuperscript{238} Id. at 1183–84.
\item \textsuperscript{239} Id. at 1191.
\item \textsuperscript{240} 29 U.S.C. § 701. The Rehabilitation Act, passed in 1973 predates the ADA and provides protection from discrimination based on disability from actions of the federal government and from entities that receive federal funding.
\item \textsuperscript{241} Luttrell, 3 F. Supp. 2d at 1191.
\item \textsuperscript{242} Id.
\end{itemize}
This analysis also held for the ADEA as well, since the ADEA "uses the same or a similar definition of 'employer' and 'labor organization.'"243 Part of this analysis depended on the undisputed fact that NALC did not represent employees against any other potential employer other than the USPS, an entity of the United States.244 The significance of representing only the employees of the federal government can be seen when the outcome in Luttrell is compared to the outcome of cases where the union is "mixed." Mixed unions, as discussed above, represent employees of private employers as well as employees of the government, and thus, may be considered "labor organizations" under the LMRDA.245

The Luttrell analysis was predated by Weldon v. Board of Education.246 The plaintiff, a former teacher in a Detroit public school, sued her employer and her union, the Detroit Federation of Teachers (DFT), on claims including a breach of the duty of fair representation and race discrimination in violation of Title VII and the Fourteenth Amendment.247 The alleged violation, however, occurred in 1971, prior to the inclusion of governmental agencies under the 1972 amendments to Title VII.248 Thus, the DFT was not a "labor organization" at the time of the alleged discrimination, as a labor organization must represent "employees" and deal with "employers." The court reasoned that, "[s]ince the (t)erm 'employee' means an individual employed by an employer, and a public board of education was not an 'employer' in 1971, it is clear that the DFT was not a 'labor organization' in 1971."249 Thus, the claims against the union were dismissed based on a lack of jurisdiction.250 Recall that state governments were not included in the definition of "person" until 1972 and the definition of "employers" only covers "persons."251

In a case involving the American Postal Workers Union in Kansas, the court found that the union was not covered by Title VII and was not a mixed union which could be reached through its parent or subsidiary relationships.252 The plaintiff sued his union, the APWU, and his employer, the USPS, on a multitude of charges, including allegations under Title VII, the ADEA, and the Rehabilitation Act of 1973.253 Initially, the court noted

243. Id.
244. Id.
245. See, e.g., Celli v. Shoell, 40 F.3d 324, 327 (10th Cir. 1994); See supra Section III.C.
247. Id. at 437.
248. Id. at 438.
249. Id. (internal citations omitted).
250. Id. at 439.
253. Id. at 1433.
that the APWU only represents employees of the USPS.254 This finding allowed the court to focus solely on the APWU and disregard any potential “mixed local” finding. The court found that the suit against the union could not be maintained, as the APWU was “not a ‘labor organization’ for the purposes of being sued under Title VII and the ADEA.”255 Thus, “the APWU is not a ‘labor organization’ which can be sued under Title VII because it does not represent employees against ‘employers’ as the term is defined in Title VII.”256 This was the same result that was reached in Luttrell.257 As the ADEA used substantially the same definitions, the claims against the APWU under the ADEA had to be dismissed as well.258

In analysis that follows the same line of reasoning as EEOC v. California Teachers Ass’n,259 the court in Saini v. Bloomsburg University Faculty found a public university faculty association not to be covered by Title VII.260 Professor Saini sued his faculty association and a number of its officials for alleged violations of his civil rights during the election process used by the union.261 Saini’s complaint alleged violations of Title VII stemming from the association’s alleged discrimination on the bases of race, color, and national origin.262 The BUFA (faculty association) was an employee organization certified under state law and only represented employees at state–owned universities.263 Saini’s claims were dismissed, as BUFA was found to not be a labor organization “engaged in an industry affecting commerce” and thus was outside of the court’s subject matter jurisdiction.264 BUFA had neither a hiring hall nor dealt with an employer who was engaged in an industry affecting commerce (the state institutions were created under state law and as such were entities with only intrastate influence). BUFA was also not chartered under either the NLRA or the Railway Labor Act, nor was it part of a local/international structure where any other entity within that structure was a statutory labor organization.265

The interpretation that a union cannot be a “labor organization” unless it represents employees of a statutory employer is not confined to unions who interact with the federal government. In Renfro v. Office Professional Employees’ Union, Local 1277, the Fifth Circuit found that a union

254. Id. at 1441.
255. Id.
256. Id.
258. Lohf, 999 F. Supp. at 1441.
261. Id. at 884.
262. See id. at 886.
263. Id.
264. Id. at 886–87 (quoting 42 U.S.C. § 2000e(d) (2004)).
265. Id. at 827; see Guide to Employment Law and Regulation, § 2:10, 2d ed.
representing the sole employee of another union was not a “labor organization,” as the employing union was not an “employer.”\textsuperscript{266} In Renfro, the only employee of the local labor council was represented by OPEIU, and OPEIU was not subject to suit under Title VII as a “labor organization” because the labor council was not an “employer.”\textsuperscript{267} Thus, the court did not have jurisdiction over OPEIU for Renfro’s Title VII claim. Although the court did not discuss the other contracts to which OPEIU was a party, it would have needed to determine if OPEIU was a “mixed” union based on its interactions with other, potentially statutory, employers.\textsuperscript{268} If OPEIU had been found to be mixed, it would follow that Renfro would have been permitted to bring her claim against her union, even though the union was not interacting with a statutory employer on her behalf, as it does interact with statutory employers in general and thus is a “labor organization.”

Using two of the strands of analysis above, the court in Phelps v. International Molders & Allied Workers Union (IMAW), Local 63 approvingly cited Renfro\textsuperscript{269} and refused recovery for an employee who was the sole employee of a local.\textsuperscript{270} The Phelps court determined that the union did not have the requisite number of employees (at least fifteen) to be covered by Title VII as an “employer,” and there was not any justification for treating the IMAW as a union, rather than an employer, since it was acting in its capacity as Phelps’ employer, not her designated representative.\textsuperscript{271} As such, there was no statutory source to apply liability from.

Although there is case law that reflects unions both being covered and being excluded from the Civil Rights Acts, the cases excluding the unions from coverage are more persuasive. Comparatively, they enter into deeper analysis that relies more heavily on the statutory text as compared to the cases, which extend coverage by relying on Congress’s intent to have the Civil Rights Acts apply to as many entities as possible. When the text’s plain language is unambiguous, there is no reason to delve into the legislative history, EEOC interpretations, or intent of Congress; the words should be taken at face value.

\textsuperscript{266} 545 F.2d 509 (5th Cir. 1977).
\textsuperscript{267} Id. at 510.
\textsuperscript{268} Celli v. Shoell, 40 F.3d 324 (10th Cir. 1994); Hester v. Int’l Union of Operating Eng’rs, 818 F.2d 1537 (11th Cir. 1987).
\textsuperscript{269} 545 F.2d 509 (5th Cir. 1977).
\textsuperscript{271} Id. at *2.
V. 
STATUTORY INTERPRETATION

A. Legislative History

The definitional sections of Title VII, the ADA, and the ADEA are surprisingly light on legislative history. However, one can analyze these sections by borrowing the legislative history of the term “labor organization” from the LMRDA. This is permissible, as Congress stated in the Civil Rights Act of 1964’s legislative history that the definition of “labor organization” in Title VII was intended to follow the LMRDA.\(^{272}\)

The court in *Wright v. Baltimore Teachers Union* (BTU) traced the history of the definition of “labor organization” in the LMRDA.\(^{273}\) The case involved public school teachers who were suing to challenge their expulsion from the union.\(^{274}\) To determine if the BTU was intended to be covered by LMRDA, the court traced the proposed legislation of the LMRDA and compared those alternatives to the final result. Under Senate bill 505, Senator John Kennedy provided a definition of “employer” which would not have excluded any public employer from the LMRDA’s reach.\(^{275}\) After the Eisenhower administration sought similar legislation, the Department of Labor compared the two pieces of potential legislation and determined that the Senate bill would raise questions as to the “inclusion of labor organizations representing public employees.”\(^{276}\) In the next incarnations of the proposed legislation, the definition of “employer” was modified to exclude the federal government, but the definition of “labor organization” continued to rely on the National Labor Relations Act. The only change was to reduce the number of exclusions to make coverage under the LMRDA broader.\(^{277}\)

The *Wright* court noted the minority views that were expressed in Congress after these modifications were made. Senators Goldwater and Dirksen believed that under the proposed legislation, unions that covered only government employees would be forced to comply with the LMRDA but could not extend to their members the benefits of the NLRA.\(^{278}\) Later amendments to the legislation did not affect the definition of “labor

\(^{272}\) See House Judiciary Committee Report, *supra* note 59, at 2026.


\(^{274}\) Id. at 849.

\(^{275}\) Id. at 851 (citing to S. 505, 86th Cong. § 501 (1959); 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR–MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 72–73 (1959)).

\(^{276}\) Id. (citing to 105 Cong. Rec. 1164 (1959)).


\(^{278}\) Id. at 852 (citing to 1959 U.S.C.C.A.N. 2391–2392).
organizations." But, the Senators' view has not been accepted because, as the Wright court found, previous case law and the Secretary of Labor agreed that "unions consisting exclusively of government employees" are "not covered by the Act."

As the definitional sections of the Civil Rights Acts explicitly rely on previous union regulation, and since both the NLRA and LMRDA exclude unions that represent solely government employees, the Civil Rights Acts should exclude them as well. To maintain the textual integrity of those statutes, the above limitations on coverage should be recognized. Creating a broader definition renders other sections of the definitions superfluous. If coverage is extended to all, why did Congress bother to define the terms "person," "employer," and "labor organization?" Using canons of textual integrity, the court should rely on "specific provisions targeting a particular issue ... instead of provisions more generally covering the issue." Thus, courts should rely on the specific language of the statute rather than the general goal of having a means to enforce anti-discrimination law. And, as there has been ample opportunity to change the coverage as it applied to the NLRA, LMRDA, and the Civil Rights Acts, it is fair to apply the canon of "the dog that did not bark." This provides a presumption that a prior legal rule or interpretation should be retained if no one in legislative deliberations even mentioned the rule or discussed any changes to the rule. In this context, the Congress has been aware of the potential for unions that represent only federal government employees to not be covered by their statutes since the earliest NLRA and LMRDA cases. Congress has had multiple opportunities to create new legislation or amend existing legislation to specifically seek to create that coverage but has chosen not to act.

B. Inconclusiveness of the EEOC Interpretation

As discussed above, the court may rely on interpretation of an administrative agency charged with enforcing a particular statute when Congress has not spoken directly on the issue in dispute and the agency's interpretation results in a reasonable interpretation of the statute. As seen in Jones, the first stage of inquiry is whether the statutory language employed by Congress is ambiguous. If it is, then the court may rely on the EEOC's interpretation of the ADA, since the EEOC is the agency

279. Id. at 853.
280. Id. at 854.
281. See ESKRIDGE, supra note 189, at app. B, p. 20. The canon used is "avoid interpreting a provision in a way that would render other provisions of the act superfluous or unnecessary."
284. See supra notes 213–214 and accompanying text.
empowered to enforce the act.\textsuperscript{285} The court, however, can determine that the agency interpretation is contrary to the statute.\textsuperscript{286}

After a thorough reading of the relevant definitions of "employer," "employee" and "labor organization," the court in Jones adopted the view of the plaintiff and the EEOC that 42 U.S.C. § 2000e(e), which provides the definition of "labor organization," is "merely a descriptive list of certain conditions which, if met, automatically equate to a labor organization engaging in an industry affecting commerce...[and] the language of § 2000e(d) broadly covers labor organizations of all kinds."\textsuperscript{287} Thus, the court accepted the contention that unions that represent government employees are covered by Title VII. The court favors the EEOC's interpretation because it avoids the "anomalous result...of nonfederal employees being allowed to sue their employers and labor organizations for violations of Title VII and the ADA, but federal employees only being allowed to sue their employer."\textsuperscript{288} The court made no mention of the EEOC not having the same power as other administrative agencies to which Chevron deference is extended, but instead chronicled the expansion of Chevron deference beyond regulations promulgated through comment and notice rule making to positions proffered by agencies in internal communications and amicus briefs.\textsuperscript{289} The relative power of the EEOC was a factor used in other cases where deference was not extended to the EEOC.\textsuperscript{290}

In contrast, in Yerdon, the court felt that the EEOC determination did not need to be deemed conclusive, as the EEOC does not have the power to promulgate rules or regulations with respect to Title VII (as compared to other federal agencies whose determinations then would be given more weight), "reason and statutory interpretation" do not support the position taken by the EEOC, and the EEOC's interpretation contravenes the plain language of the statute.\textsuperscript{291} The legislative history of Title VII's definition of "employer" shows that Congress wanted to avoid placing too many extra burdens on small employers, and the mere fact that Congress places many other regulations on unions is not enough to show the intent of Congress to exclude unions from the qualifying terms of the definition of "employer."\textsuperscript{292}

\begin{itemize}
\item \textsuperscript{285} Jones v. Am. Postal Workers Union, 192 F.3d 417, 423 (4th Cir. 1999) (relying on Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)).
\item \textsuperscript{286} Yerdon v. Henry, 91 F.3d 370, 376 (2d Cir. 1996).
\item \textsuperscript{287} Jones, 192 F.3d at 425.
\item \textsuperscript{288} See Id.
\item \textsuperscript{289} See Id. at 427.
\item \textsuperscript{290} See Ferroni v. Teamsters, Chauffeurs & Warehousemen, Local No. 222, 297 F.3d 1146 (10th Cir. 2002); Yerdon, 91 F.3d 370; Herman v. United Bhd. of Carpenters, Local Union No. 971, 60 F.3d 1375 (9th Cir. 1995).
\item \textsuperscript{291} Yerdon, 91 F.3d at 376.
\item \textsuperscript{292} Id.
\end{itemize}
Additionally, nothing in the statutory definitions of "labor organization" and "employer" gives rise to the conclusion that unions are to be treated differently from any other employer when acting in their capacity as employers. 293

Similarly, the Ninth Circuit Court in Herman felt free to disregard the EEOC's interpretation that a union, when acting in its capacity as an employer, does not have to satisfy the statutory definition of employer, as those EEOC decisions were decided 25 years prior to the suit at hand and in that time, no federal court had accepted that view. 294

The Court in Ferroni found two main reasons to discount the position supported by the EEOC. 295 First, it found that as the EEOC lacked the power to promulgate rules, its interpretation was entitled to "deference only in the proportion to its persuasiveness." 296 Second, as the statute's text is clear, the EEOC's interpretation was "directly contrary to the statute's plain language." 297 These reasons were also found to be controlling in Greenlees v. Eidenmuller Enters., Inc. 298

Even if the text is ambiguous and it is proper to then look at the EEOC interpretation, it is wise to take that interpretation with a grain of salt, based on both the criticism above and the contrary interpretation by the Secretary of Labor in the LMRDA context. 299 As the EEOC does not have the authority to promulgate rules, its interpretation is entitled to less deference. This is exacerbated when the EEOC interpretation contravenes the text and the legislative history of the statute. In comparison, the Secretary of Labor, who can promulgate rules, has interpreted the LMRDA, according to the legislative history that Title VII is based on, to not cover unions in their representative capacity unless they statutorily meet the definition of a labor organization.

VI. CONCLUSION

Based on the plain text of the legislation, the legislative precedent used to formulate the definition sections of the Civil Rights Acts, namely the National Labor Relations Act and the Labor–Management Reporting and

293. Id. at 376–77.
294. Herman, 60 F.3d at 1384.
295. Ferroni, 297 F.3d at 1157–52.
296. Id. (citing to Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976)).
297. Id. (citing to EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 15–16 (1988)).
298. 32 F.3d 197, 200 (5th Cir. 1994) ("we defer to agencies only when the language of a statute is ambiguous...the usual deference afforded to agency interpretations is attenuated when applied to the EEOC, because Congress did not confer on the EEOC authority to promulgate rules or regulations under Title VII").
Disclosure Act, and the inability to regulate unions under the Commerce Clause that are not engaged in an industry affecting commerce, it is clear that unions that represent only employees of the federal government should not be held liable under the Civil Rights Acts. The EEOC's continual push to assert a reading of the statute that the text cannot bear should be disregarded as it is contravened by the plain language of the text, and thus, is not entitled to deference.

Congress has had ample opportunity to address this issue in the numerous amendments that have been made to the Civil Rights Acts since Title VII was originally passed in 1964. The ADEA and the ADA were not passed until well after this issue had been identified and still, Congress did not address this issue in either the main text or the definitional sections of these statutes. Congress's inaction demonstrates its acceptance of the standards used in previous litigation.

Continued reliance on the cases which focus on Congress' intent that the Civil Rights Acts be broad-reaching is misplaced and inconsistent with the twin obligations of courts to limit their actions to interpretation of legislative enactments and not to intrude upon the legislative process. Based on the plain text of the Civil Rights Acts, unions representing only employees of the federal government should not be covered.