

Mind the Overlap: Coordinating Implicit Overlaps in Agency Jurisdiction

Abstract

Administrative law scholars have explored how Congress designs overlapping agency authority to carry out complementary agency goals. While discussion of these overlaps is largely positive, what happens when Congress leaves an implicit overlap unaddressed? This Paper explores EEOC and NLRB's overlapping authority over union sexual harassment claims to analyze whether implicit overlaps merit the same support. Unlike explicit overlaps, inattention to implicit overlaps can decrease transparency and efficiency, create procedural confusion, and lead to conflicting legal standards. The Paper assesses solutions by agencies, Congress, and courts, and explores unique separation of powers issues in addressing ambiguous jurisdictional overlap.

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I. Introduction

The jobs were the best they would ever have: collecting union wages while working at Ford, one of America's most storied companies. But inside two Chicago plants, the women found menace. Bosses and fellow laborers treated them as property or prey. . . . The local union, obliged to protect both accusers and the accused, was divided, with a leadership that included alleged predators.¹

In 2017, the U.S. Equal Employment Opportunity Commission (EEOC) reached its second multi-million-dollar settlement with Ford Motor Company in two decades for sexual harassment in its Chicago plants.² EEOC has brought repeated Title VII claims against Ford, the employer, for discrimination and harassment. Despite victims pointing to their UAW union leaders in Chicago as a key source of structural harassment, thwarting their attempts at internal complaints to Ford,³ EEOC has not pursued a claim against the union. Title VII covers discrimination by both employers and labor organizations,⁴ so why would EEOC not involve the union? The Seventh Circuit, like several other federal circuits,⁵ has ruled that union acquiescence in harassment does not violate Title VII, incorporating a labor law standard derived from the National Labor Relations Act—the duty of fair representation—to require a showing of discriminatory intent.⁶ Victims of sexual harassment in unionized workplaces face two different legal regimes, established by EEOC and the National Labor Relations Board (NLRB) under Title VII and the NLRA, respectively. However, neither statute or agency process was designed to address their claims, which fall in an implicit overlap between the jurisdiction of the two agencies.

¹ Susan Chira & Catrin Einhorn, *How Tough Is it to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html>.

² Tracy Samilton, *Once Again, Ford Is Paying Victims of Sexual, Racial Harassment at its Chicago Plants*, NPR (Aug. 18, 2017), <https://www.michiganradio.org/post/once-again-ford-paying-victims-sexual-racial-harassment-its-chicago-plants>.

³ See Tonya Exum, *Why Am I Paying Union Dues When the Union Won't Protect Me from Harassment?*, CHI. TRIB. (Jan. 10, 2018), <https://www.chicagotribune.com/news/opinion/commentary/ct-perspec-ford-sexual-harassment-uaw-union-0111-20180109-story.html>.

⁴ See 42 U.S.C. §2000e-5(b).

⁵ See *infra* Section IV.C.4.

⁶ See *EEOC v. Pipefitters Ass'n Local Union 597*, 334 F.3d 656, 661 (7th Cir. 2003); *infra* Section IV.C.4.

This Paper builds upon recent administrative law scholarship on overlapping agency jurisdiction to analyze the previously-unexplored category of implicit overlaps. Unlike overlaps that result from statutory delegations of shared rulemaking or coordinated adjudicatory authority, implicit overlaps arise when Congress does not address (and in some cases, does not anticipate) how claims could fall under multiple agency processes. While agencies coordinate some implicit overlaps through interagency agreements, I argue that this coordination is less likely to occur when each agency's underlying statutory goals are in conflict. For the purposes of this Paper, I focus on a case study of an implicit overlap with high practical significance: EEOC and NLRB's shared jurisdiction over Title VII and DFR claims, particularly those arising out of union failure to address sexual harassment.⁷ Such implicit overlaps are most likely to occur in contexts outside of formal rulemaking because notice-and-comment processes make jurisdictional struggles more visible and involve OMB coordination.⁸

First, Part II explores current scholarship on overlapping agency jurisdiction and where implicit overlaps fall in generally positive accounts by administrative law scholars. Then, Part III utilizes the theory of dynamic statutory interpretation to explain how implicit overlaps form and grow. I argue that an underlying conflict in agency goals makes Congress more likely to avoid overlaps as they pass landmark legislation and makes agencies less likely to address this overlap as issues become apparent. In addition, difficult claims that fall in the overlap are likely to become hot-potato claims, with each agency demurring to the other's expertise.⁹

⁷ There are likely many other implicit overlaps in the federal administrative apparatus. For example, the EEOC and NLRB also overlap for guidance about workplace civility programs, *see infra* notes Error: Reference source not found-Error: Reference source not found and accompanying text, and took three years to address an implicit overlap for disability accommodations, *see infra* notes Error: Reference source not found-Error: Reference source not found and accompanying text; *see also infra* note Error: Reference source not found (exploring potential implicit overlaps in the immigration law context).

⁸ *See, e.g.,* Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 822 (2015) (arguing that adjudicatory overlaps are less recognized than rulemaking overlaps for this reason).

⁹ *See infra* notes Error: Reference source not found-Error: Reference source not found and accompanying text (showing how NLRB points to EEOC on union sexual harassment claims).

As the Ford Motor Company litigation demonstrates, leaving implicit overlaps unaddressed can present serious drawbacks. In addition to the circuit split over how Title VII applies to union failure to represent victims of discrimination or harassment, Part IV argues that the EEOC and NLRB case study uncovers how implicit overlaps lead to a lack of transparency, confusion due to procedural differences and conflicting requirements, inefficiency, and unfair outcomes for complainants. While implicit overlaps do allow positive effects such as agency expertise and multiple avenues for complainants, these advantages are not unique to implicit, as opposed to explicit, overlaps.

Part V then proposes three primary approaches to address implicit overlaps. I argue that agencies, Congress, and courts each have a role to correct the main disadvantages and better achieve statutory goals. This analysis also uncovers how attempts to address implicit overlaps may raise separation of powers issues as agencies interpret statutory ambiguity over their own adjudicatory jurisdiction. I argue that Congress is best positioned to coordinate agency overlap and that the goal conflicts likely to underlie implicit overlaps could either prove divisive or, counterintuitively, allow coalition building around shared issues such as sexual harassment and union accountability. Finally, Part VI concludes.

II. Implicit Overlaps in Administrative Agency Jurisdiction

Current scholarly treatment of overlapping agency authority is generally positive, built on the premise that Congress and agencies design and coordinate overlaps to take advantage of relative agency expertise and build in productive redundancy.¹⁰ However, this Paper introduces an unexplored variation of agency overlap—implicit overlap—to show how unaddressed overlaps diverge from assumptions underlying this positive reception. Section II.A provides

¹⁰ See *infra* note Error: Reference source not found and accompanying text.

background on the theory of overlapping agency jurisdiction and Section II.B explains how implicit overlaps diverge from currently established coordination of agency jurisdiction.

A. Theory of Overlapping Jurisdiction

Administrative law scholar Jacob Gersen's foundational 2007 article on overlapping agency jurisdiction marked the beginning of a robust literature on how Congress delegates overlapping authority when creating federal agencies.¹¹ Gersen focused on agency rulemaking authority, which quickly spurred a variety of articles on shared regulatory space.¹² Gersen explains various benefits that Congress can achieve by delegating overlapping jurisdiction across agencies, such as increased reliability of bureaucratic performance, monitoring and reporting of peer agency behavior, and incentivizing agencies to develop expertise and assert jurisdiction.¹³ Most importantly, Gersen establishes an intentional model of overlap by Congressional design, arguing that "congressional choice about how to structure delegated authority inevitably reflects the preferences of legislators and interest groups."¹⁴

Then, more recently, Bijal Shah introduced the first analysis of overlapping agency jurisdiction that focuses on adjudication.¹⁵ Shah explores "coordinated interagency adjudication," defined as "explicit and somewhat formalized collaboration or communication required to further an interaction" in a wide variety of areas of public law, including employment

¹¹ Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 THE SUP. CT. REV. 6 (2007).

¹² See, e.g., Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012) (emphasizing the importance of scholarly recognition of interagency dynamics and the advantages of agency coordination in shared regulatory space); Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181 (2011) (analyzing overlapping delegations of power by focusing on issues of efficiency and power shifted to the executive branch and framing them as congressional accidents rather than attempts to spur interagency competition).

¹³ Gersen, *supra* note Error: Reference source not found, at 214-15.

¹⁴ Gersen, *supra* note Error: Reference source not found, at 212.

¹⁵ See Shah [2015], *supra* note Error: Reference source not found, at 807-08 ("Despite the significant volume of administrative adjudication that crosses agency borders, scholars have not written in depth about this topic. By contrast, there is significant literature on coordination in rulemaking (sometimes referred to as "shared regulatory space"), a process that is fundamentally different from adjudication.").

discrimination.¹⁶ In particular, Shah focuses on coordinated interagency adjudication between agencies such as EEOC with partner agencies such as the FCC and OFCCP. For example, FCC's employment discrimination jurisdiction for cable communications systems overlaps with Title VII.¹⁷ Shah discusses the memorandum of understanding (MOU) between EEOC and FCC, which allows both agencies to investigate the same claim in a phased model; under the terms of the MOU, EEOC takes initial jurisdiction and FCC has appellate jurisdiction.¹⁸ Shah also analyzes coordination between EEOC and the DOL Office of Federal Contract Compliance Programs (OFCCP), in which OFCCP acts as EEOC's agent for receiving Title VII complaints against federal contractors and may either close cases that OFCCP determines to lack reasonable cause or refer claims to EEOC upon request.¹⁹

Shah identifies two primary issues in overlapping adjudicatory jurisdiction. First, Shah argues that poorly administered coordination can be detrimental to the public interest, using the example of unreliable communication between DHS and DOJ for asylum seeker cases.²⁰ Additionally, Shah points out that interagency agreements complicate judicial review and expand agencies' authority to determine their own jurisdiction.²¹ Lack of formal mechanisms for shared communication and consistent decisionmaking can waste government resources and raise due process concerns.²² These concerns are magnified in the context of adjudication, which lacks the OMB-type supervision received by agency rulemaking.²³ In response, Shah calls for more executive oversight of interagency coordination after Congress gives agencies overlapping

¹⁶ *Id.* at 821; *see also* Bijal Shah, *Congress's Agency Coordination*, 103 MINN. L. REV. (forthcoming 2019).

¹⁷ *See* 47 U.S.C. § 554.

¹⁸ Shah [2015], *supra* note Error: Reference source not found, at 835.

¹⁹ *Id.* at 841.

²⁰ *Id.* at 815-17.

²¹ *Id.* at 819 (“In coordinated interagency adjudication, the ability of a court to have access to and to review these agency determinations becomes frustrated because the role of each agency might be ill-defined and traces of disagreement might be hard to uncover and harder yet to scrutinize, thus shifting the review and deference paradigm in a manner that merits close attention.”).

²² *Id.* at 823.

²³ *Id.* at 850.

adjudicatory jurisdiction, proposing an OMB or DOJ sub-agency source of oversight similar to OMB oversight of rulemaking. Shah emphasizes benefits to formal coordination such as varied agency expertise, allowing complainants more than one “bite at the apple,” efficient combination of resources, and incremental increases in jurisdiction for agencies favored by Congress.²⁴

However, Shah continues Gersen’s approach to overlaps, wherein Congress is presumed to intentionally create the agencies’ jurisdictional overlap. In particular, Shah’s analysis focuses on overlapping agency jurisdiction based on the same statutory claim:

A related circumstance that this Article does not classify as coordination is one in which multiple agencies adjudicate different statutory claims arising from the same individual claimant but are not required to work together to further a single claim. One such occurrence is when the Equal Employment Opportunity Commission (EEOC) and other agencies investigate different types of complaints in sync.²⁵

Shah explores a variety of statutes and regulations that address explicit overlaps. For example, the Employee Retirement Income Security Act of 1974 coordinates the overlap between the Department of Labor and Department of Treasury when assessing tax penalties against prohibited transactions related to qualified trusts.²⁶ Congress made this overlap explicit in the statute and coordinated how the agencies would handle relevant claims, requiring the Department of Treasury to notify the Department of Labor about a violation and to allow the Department of Labor to provide expert commentary on the type of transaction before the Department of Treasury’s assessment of tax penalties.²⁷ Additionally, Congress included a consultation provision, which requires the Secretary of Labor and Secretary of Treasury to consult with each other on prohibited transactions and

²⁴ *Id.* at 822; *see also* Freeman & Rossi, *supra* note Error: Reference source not found, at 1174.

²⁵ *Id.* at 827; *see also* Shah [forthcoming], *supra* note Error: Reference source not found.

²⁶ 29 U.S.C. § 1203 (2012); Shah [2015], *supra* note Error: Reference source not found, at 892 n.119-23 and accompanying text.

²⁷ 29 U.S.C. § 1203 (2012); *see also* Shah [2015], *supra* note Error: Reference source not found, at 896 n.120 (“Although the Secretary of the Treasury retains the sole discretion to assess tax liability under the governing

exemptions.²⁸ Shah also explores overlaps governed by regulation. For example, provisions in the Labor-Management Reporting and Disclosure Act of 1959 and the Employee Retirement Income Security Act of 1974 provide exemptions on a bar that prevents people who have been convicted of certain crimes from working with labor organizations or employee retirement plans.²⁹ This issue implicates both the Department of Labor and the Department of Justice, and DOJ issued a regulation to coordinate with DOL.³⁰ Under the regulation, formerly convicted applicants must apply for a Certificate of Exemption from DOJ's Parole Commission, which DOJ sends to the Secretary of Labor. The Secretary of Labor may adjudicate the claim and file either approval or non-binding initial disapproval, before switching from adjudicator to prosecutor to present evidence and conduct cross-examination at the applicant's Commission hearing.³¹

Gersen and Shah both take the normative position that agency overlap is a positive feature when handled well, while acknowledging that issues of consistency and transparency are more likely in the absence of formal coordination.³² I argue that implicit overlaps, which develop over time and lack intentional coordination, demonstrate that this risk is higher and more common than Gersen or Shah would likely expect.

B. Implicit Agency Overlaps

In contrast to the current literature's positive take on congressionally-designed jurisdictional overlaps for administrative agencies, I argue that another type of jurisdictional

statute, the Secretary of Labor may obtain a correction from a violator before such liability is imposed.”) (citing 26 U.S.C. § 4975(h) (2012)).

²⁸ 29 U.S.C. § 1203(b) (2012).

²⁹ 29 U.S.C. §§ 504(a)(5), 1111(a)(3) (2012).

³⁰ 28 CFR §§ 4.1-11 (2018).

³¹ *Id.*; Shah [2015], *supra* note Error: Reference source not found, at 833, 896 n.124-27 and accompanying text.

³² *Id.* at 823 (“While the benefits of coordination mean that interagency relationships in adjudication processes are normatively desirable, the drawbacks may outweigh the benefits, especially if the coordinated adjudication has components that are unseen and unchecked by courts or executive branch leaders.”); *see also* Freeman & Rossi, *supra* note Error: Reference source not found, at 1138 (framing overlaps as decisions by Congress to create shared regulatory space).

overlap—implicit overlap—raises a higher level of risk for issues of efficiency, transparency, and consistency. Implicit overlaps can develop in any context where Congress passes broad statutes delegating authority to agencies across subject areas. Given that dynamic statutory interpretation can expand a statute’s scope, administrative agencies created to implement such statutes tend to claim broader jurisdiction as a statute evolves.³³ When multiple agencies experience expanding jurisdiction in related subject areas, an implicit jurisdictional overlap may form. This is likely to happen across a wide range of administrative agencies because of the prevalence of dynamic statutory interpretation and growth of the administrative state.³⁴

While past analysis of agency overlap has focused on addressing arguments about bureaucratic duplication and waste,³⁵ the issues caused by implicit overlaps can affect each agency’s fulfillment of its statutory mission and dramatically diminish fairness for complainants working their way through distinct processes. When Congress designs an overlap, the overlap is part of the agency’s designated purpose; the extent to which the agency fulfills its mission will depend on how well it handles the designated work with another agency and other aspects of its operations. In contrast, when an overlap develops without design, agencies designed to carry out different—and sometimes diametrically oppositional—goals may adjudicate overlapping claims differently and reach outcomes serving different goals than Congress intended.

As Shah has noted, academic analysis of agency jurisdictional overlap has primarily focused on the rulemaking context, leaving issues of adjudicatory overlap unaddressed.³⁶ When using rulemaking authority, agencies must provide notice to affected parties (for example,

³³ See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 48-80 (1994); *supra* Section II.A.

³⁴ ESKRIDGE, *supra* note Error: Reference source not found, at 48-49 (explaining the prevalence of dynamic statutory interpretation). For example, implicit overlaps for agencies involved in immigration law may become more common as immigration enforcement expands; these overlaps may also occur between federal and local counterparts (e.g., underlying conflicts between police departments in sanctuary cities and the Department of Homeland Security leading to cancellation of previous coordination).

³⁵ Gersen, *supra* note Error: Reference source not found, at 214.

³⁶ Shah [2015], *supra* note Error: Reference source not found.

through publication in the Federal Register) and any parties subject to conflicting rules are incentivized to bring suit to parse out issues stemming from a direct contradiction.³⁷ Thus, litigants are likely to bring implicit overlaps to light and courts will assess relative agency expertise (under a presumption of exclusive jurisdiction) to determine which agency merits deference in situations of ambiguous overlap.³⁸ In contrast to broadly applicable rules, implicit overlaps in agency adjudicatory authority do not generate public notice because each adjudication addresses one complaint.

Furthermore, affected parties in a given case are not incentivized to challenge overlaps in adjudicatory authority. In this Paper, I focus on implicit overlaps where the same underlying issue could be brought as a different type of complaint to multiple agencies;³⁹ in this context, a complainant who receives a favorable outcome from one agency is unlikely to protest the existence of another agency process and a complainant who receives an undesired outcome may view the overlap as an advantage because it opens up another “bite at the apple.”⁴⁰ While this may make implicit overlaps appear complainant-friendly, this Section demonstrates the significant drawbacks of implicit overlaps for those whom civil rights statutes aim to help. As a result of these differences between rulemaking and adjudication, the lack of incentive to challenge this type of implicit adjudicatory overlap necessitates a more intentional approach by either agencies, courts, or Congress.

³⁷ See, e.g., *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144 (1991) (conflicting OSHA rules promulgated by the Department of Labor and the Health Review Commission); *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988) (conflicting Flood Control Act rules about reservoirs promulgated by the Secretary of Interior and the Secretary of War); see also Gersen, *supra* note Error: Reference source not found, at 223-24 (explaining such litigation).

³⁸ See Gersen, *supra* note Error: Reference source not found, at 223-24.

³⁹ Implicit adjudicatory overlaps that do not allow complainants to choose their form of agency complaint may be an oxymoron, because a required starting point would suggest agency coordination or statutory clarity on which agency handles the complaint. For the purposes of this Paper, I focus on implicit overlaps where coordination is generally absent.

⁴⁰ Freeman & Rossi, *supra* note Error: Reference source not found, at 1174.

III. Dynamic Statutory Interpretation: Case Study of NLRA and Title VII

In Part III, I explore how implicit overlaps form and grow, through the theory of dynamic statutory interpretation.⁴¹ Professor Bill Eskridge explains that “when successive applications of [a] statute occur in contexts not anticipated by its authors, the statute’s meaning evolves *beyond* original expectations”⁴² and that “sometimes subsequent applications reveal that factual or legal assumptions of the original statute have become (or were originally) erroneous; then the statute’s meaning evolves *against* its original expectations.”⁴³ Subsequent interpretation is particularly likely to diverge from original conceptions when the statute “submerges or fails to resolve controversial issues.”⁴⁴ A bill’s supporters must cater to political necessities and avoid hot button issues to garner a legislative majority, which leaves ambiguity for future agency and court decisions.⁴⁵

As Part III demonstrates, the NLRA and Title VII are both statutes that have evolved as underlying assumptions about racial discrimination and sexual harassment changed throughout the twentieth century. Both statutes began as large bills addressing complex problems in abstract ways, leaving fact-specific interpretation to agencies (the NLRB and EEOC) and courts. I explore four key instances of dynamic statutory interpretation that led to the current implicit overlap between the EEOC and NLRB’s adjudicatory functions: the evolution of the duty of fair representation (DFR) under the NLRA, the interaction of Title VII’s enactment and NLRB’s assertion of jurisdiction over DFR claims, EEOC and NLRB’s application of race-based doctrine

⁴¹ Professor William Eskridge developed this concept and used Title VII as a key example. ESKRIDGE, *supra* note Error: Reference source not found, at 48-80; William N. Eskridge, Jr., *Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 2 YALE L.J. 246 (2017).

⁴² ESKRIDGE, *supra* note Error: Reference source not found, at 49.

⁴³ *Id.* at 49.

⁴⁴ *Id.*

⁴⁵ *Id.* at 51 (“The enacting coalition may also be in general agreement as to the way a social problem should be regulated but may disagree as to collateral issues. To enact the statute the factions often will submerge their disagreements and leave ambiguities to be resolved by other decision makers. This is in part what happened with the Civil Rights Act of 1964....”).

to sex-based discrimination, and EEOC's recognition of sexual harassment as a form of sex-based discrimination.

A. Evolution of the Duty of Fair Representation under the NLRA

Congress enacted the National Labor Relations Act to protect and regulate collective bargaining, in order to promote employee rights and employers' economic interest in addressing strikes.⁴⁶ In 1935, the NLRA reflected the majoritarian nature of collective bargaining—unions fought for higher wages and job security for their membership rather than countermajoritarian goals such as supporting minorities.⁴⁷ The NLRA provided for elections for workers to vote to determine their bargaining representative and gain recognition by the National Labor Relations Board, granting a set of bargaining rights with the employer. In particular, Section 9(a) established the doctrine of exclusive representation, wherein unions enjoy an exclusive right, based on the precondition of majority support in a union election, to represent a group of workers to the exclusion of any other organization.⁴⁸

While exclusive representation is important for aggregating bargaining power, most unions in the 1930s enforced white-only membership policies or relegated black workers to segregated locals.⁴⁹ As a result, white majorities would elect and control union bargaining agents.⁵⁰ The NAACP and National Urban League fiercely opposed Section 9's exclusivity provision and its conception of exclusive power through democratic elections.⁵¹ Such groups

⁴⁶ National Labor Relations Act, 29 U.S.C. §§ 151-169 (1935); NAT'L LABOR RELATIONS BD., *National Labor Relations Act*, <https://www.nlr.gov/how-we-work/national-labor-relations-act> (Congress enacted the NLRA "to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.").

⁴⁷ REUEL SCHILLER, *FORGING RIVALS: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM* 8 (2015).

⁴⁸ *Id.*

⁴⁹ HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* 101 (1986); Paul Frymer, *Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85*, 97 AM. POL. SCI. REV. 483, 483 (2003).

⁵⁰ HILL, *supra* note Error: Reference source not found, at 101.

⁵¹ *Id.* at 101-03; Frymer, *supra* note Error: Reference source not found, at 484.

fought for a civil rights amendment to impose a “duty of fair representation” to prevent unions from only representing the interests of white workers, but the amendment was “soundly defeated.”⁵² The NLRA’s promotion of organized worker rights incorporated strong assumptions about the face of American organized labor and remained silent on widespread racial discrimination to win the support of Southern Democrats in passing the statute.⁵³

Despite Congressional silence on racial discrimination, the other political branch did take action after the NLRA’s enactment—President Roosevelt established a Fair Employment Practice Committee that investigated union discrimination and advocated for voluntary improvement, but the FEPC lacked enforcement power.⁵⁴ At the same time, the NAACP shifted its focus from legislation to litigation and Supreme Court jurisprudence began to shift toward recognizing minority rights.⁵⁵ Courts recognized and began to enforce protections for *Carolene Products* “discrete and insular minorities” unrepresented by majoritarian institutions.⁵⁶ Nearly a decade after the NLRA’s enactment, the Supreme Court faced competing interests in deferring to the expertise of administrative agencies such as the NLRB and addressing discrimination against minorities in the Roosevelt era.⁵⁷ In *Steele v. Louisville & Nashville Rail Road*, the Court recognized that protections for exclusive bargaining representatives (in Section 9’s Railway Labor Act counterpart) would raise Equal Protection issues if the union discriminated against workers on the basis of race and read an implied DFR into the statute.⁵⁸ Because unions receive

⁵² Frymer, *supra* note Error: Reference source not found, at 484-85.

⁵³ Gould, *supra* note Error: Reference source not found; Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. OF EMP’T & LABOR L. 211, 213 (2002).

⁵⁴ Frymer, *supra* note Error: Reference source not found, at 485.

⁵⁵ *Id.* at 486.

⁵⁶ *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

⁵⁷ Frymer, *supra* note Error: Reference source not found, at 486.

⁵⁸ *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202-03 (1944) (“We hold that the language of the Act ... read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.”). *Steele* involved exclusive representation under the Railway Labor Act, which was parallel legislation to the NLRA for railroad workers.

the NLRB's recognition and enforcement of exclusive bargaining rights, allowing racial discrimination in unions would amount to government-sanctioned discrimination. Civil rights groups pointed this out with the failed DFR amendment, but Congress avoided this issue and then allowed the Court's introduction of the DFR to stand.⁵⁹

While the 1944 Court created the DFR, the *Steele* decision framed this duty to refrain from racial discrimination very narrowly; the Court explicitly stated that unions could continue to exclude black workers from membership as long as the union "represent[s] non-union or minority union members of the craft without *hostile* discrimination."⁶⁰ For the next several decades, the NLRB consistently certified all-white unions⁶¹ and rarely used its authority to address racial discrimination.⁶² In fact, NLRB employees continued to view union racial discrimination as outside of its NLRA mandate; as late as 1962, an NLRB investigator in the early stages of a case (*Hughes Tool*) concluded that a complaint against an all-white metal workers union was "not based on Union considerations, but was at most racial discrimination."⁶³ Additionally, the Supreme Court and the NLRB left open the question of jurisdiction over DFR claims; while the right derived from the NLRA, which granted the NLRB jurisdiction over unfair labor practices, the NLRB did not initially treat DFR violations as unfair labor practices and complainants initially took DFR claims to federal court rather than NLRB arbitration.⁶⁴

⁵⁹ For a theoretical account of statutory interpretations as an "anticipated response game," see ESKRIDGE, *supra* note Error: Reference source not found, at 74-80.

⁶⁰ *Id.* at 204 (emphasis added).

⁶¹ See, e.g., *Atlanta Oak Flooring Co.*, 62 NLRB 973 [1945]; Frymer, *supra* note Error: Reference source not found.

⁶² HILL, *supra* note Error: Reference source not found, at 95.

⁶³ SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 136 (2014) (quoting Robert S. Breau to Clifford Potter, July 6, 1962, NLRB Papers—STHF, Box 1976, "23-CB-429 Independent Metal Workers Union, Local No. 1, Houston, Texas" Folder).

⁶⁴ See Herbert L. Sherman Jr., *Union's Duty of Fair Representation and the Civil Rights Act of 1964*, 49 MINN. L. REV. 771, 779 (1965).

B. NLRB Application of the DFR and the Enactment of Title VII

Despite the lack of clarity over how DFR claims should proceed, the NLRA continued to serve as the sole source of a statutory “remedy” for racial discrimination in unions until Congress passed Title VII of the Civil Rights Act in 1964. NLRB began internal discussions to address racial discrimination after *Brown v. Board of Education* and new union cases brought by the NAACP in 1955.⁶⁵ Arthur Christopher Jr., a legal assistant who was the highest ranking African-American employee at the NLRB, led a 1955 committee that presented a report on the constitutional argument for eliminating racial discrimination in unions.⁶⁶ While the General Counsel of the NLRB did not share the Board’s new willingness to use unfair labor practice (ULP) charges against discriminatory practices and ultimately declined to bring charges in the first round of NAACP oil-worker cases, the NAACP took the complaint to the Eisenhower administration’s version of Roosevelt’s FEPC. The Republican committee, led by Vice President Richard Nixon, was more critical of unions due to its support for Right to Work laws and successfully, albeit incrementally, negotiated the desegregation of several oil plant unions.⁶⁷

As Title VII entered the horizon, *Hughes Tool*—the case NLRB investigators initially dismissed as “at most racial discrimination”—demonstrated the rapid evolution of the NLRB’s interpretation of its powers and responsibilities under the NLRA. Investigators initially recommended dismissing the 1962 unfair labor practice charge by a black apprenticeship applicant, Ivory Davis, because NLRB still had not ruled conclusively that racial segregation constituted a ULP under its jurisdiction.⁶⁸ The union argued that “it was not the intention of Congress when enacting the National Labor Relations Act to make racial discrimination a

⁶⁵ LEE, *supra* note Error: Reference source not found, at 103.

⁶⁶ *Id.* at 103.

⁶⁷ *Id.* at 104-10. However, new educational requirements and qualifying tests effectively replaced explicit segregation. *Id.* at 113.

⁶⁸ LEE, *supra* note Error: Reference source not found, at 135-36.

violation of the Act,”⁶⁹ and pointed out, correctly, that that NLRB had ““continuously certified unions with separate locals on the basis of race’ and had refused to recognize racial discrimination as an unfair labor practice.”⁷⁰

However, a new NLRB General Counsel, Stuart Rothman, took an interest in civil rights as an issue in union democracy and requested that the local offices forward him all cases that “bear on the duty of equal representation,” which rescued Davis’s charge from the local investigator’s inclination to dismiss.⁷¹ Herbert Hill, the NAACP’s Labor Director, took an active role in the case and argued that lack of NLRB action against union discrimination in membership violated the Fifth Amendment because of the doctrine of exclusive representation.⁷² In February 1963, President Kennedy also delivered a Special Message to Congress on Civil Rights in which he announced his plan to “direct the Department of Justice to... urge the National Labor Relations Board to take appropriate action against racial discrimination in unions,” which, he argued, would “make unnecessary the enactment of legislation.”⁷³ The same year, President Kennedy also appointed the first African-American member of the Board, Howard Jenkins, Jr.⁷⁴

Political pressure from the President, combined with new NLRB leadership and public pressure (the 1963 March on Washington took place as the NLRB processed the charge⁷⁵), shifted NLRB’s interpretation of its statutory mandate. The Board reached a decision to expand ULP charges to include racial discrimination in violation of the DFR in early 1964, but political winds had changed and Congress was now considering a fair-employment provision for the new

⁶⁹ MICHAEL R. BOTSON, JR., LABOR, CIVIL RIGHTS, AND THE HUGHES TOOL COMPANY 177 (2005) (citing NARACP, RNLRB, RG 25, CF 6768-62, Brief to Trial Examiner, February 8, 1963).

⁷⁰ *Id.*

⁷¹ LEE, *supra* note Error: Reference source not found, at 138.

⁷² *Id.* at 140-41.

⁷³ *Id.* at 142.

⁷⁴ *Id.* at 148.

⁷⁵ *Id.* at 148.

Civil Rights Act.⁷⁶ Officials from the Justice Department and others cautioned the Board to wait to release its *Hughes Tool* decision until a politically opportune time to avoid dampening support for new fair-employment legislation, which would become Title VII.⁷⁷ In fact, Southern Democrats in the Senate pointed out the potential overlap for organized workers in criticizing drafts of Title VII, arguing that “the NLRB appears to have the power to prevent discrimination on the grounds of race, color, or religion under the National Labor Relations Act. . . . If the NLRB already has that [antidiscrimination] power—which its attorneys believe it has—why do we need an FEPC?”⁷⁸ As Congress debated Title VII of the Civil Rights Act of 1964, this political pressure incentivized supporters of the bill and the NLRB to downplay the potential overlap in order to promote a legislative solution.⁷⁹

The day before President Johnson signed Title VII into law (i.e., after Congress passed the bill), the NLRB issued a unanimous ruling that union racial discrimination violated the DFR, and thus, was illegal under the NLRA.⁸⁰ Labor law scholars observing *Hughes Tool* and the enactment of Title VII quickly noted the potential for conflict in the overlapping jurisdiction of the NLRB’s new interpretation of the DFR and the newly-created EEOC.⁸¹ However, legislators faced incentives to avoid addressing the overlap because they did not want to make Title VII appear redundant. Furthermore, the extent of the overlap was ambiguous during congressional

⁷⁶ *Id.* at 149-50.

⁷⁷ *Id.* at 149-50 (“Marshall believed that, it would be better to have [fair employment] legislation than to have the NLRB do this.”).

⁷⁸ Testimony of Senator Spessard Holland, 110 Cong. Rec. 7016, 91st Cong., April 6, 1964.

⁷⁹ See LEE, *supra* note Error: Reference source not found, at 149-50 (describing the political pressure).

⁸⁰ *Hughes Tool Co.*, 147 N.L.R.B. No. 166 (July 1, 1964); BOTSON, *supra* note Error: Reference source not found, at 3. For an in-depth exploration of the *Hughes Tool* decision, see *id.*

⁸¹ Sherman, *supra* note Error: Reference source not found, at 795-97.

By extending the *Miranda Fuel* [DFR] doctrine to cover racial discrimination cases during the year between the adoption and the effective date of Title VII of the Civil Rights Act of 1964, the Board has laid the foundation for conflict. . . . The overlap of Title VII and the Board’s application of the [DFR] theory to racial discrimination practices of unions is obvious.

Sherman proposed shifting jurisdiction over all union discrimination claims to EEOC. See also William B. Gould, *Black Power in the Unions: The Impact upon Collective Bargaining Relationships*, 79 YALE L.J. 46, 50 (1969) (anticipating the conflict).

debates because the NLRB stalled on issuing its *Hughes Tool* decision to give political space for Title VII.⁸² NLRB's "tardy assumption of jurisdiction" over DFR claims after several decades of DFR-based litigation was certainly plausible for Congress to anticipate.⁸³ Thus, Congress avoided this implicit overlap and the significance of this avoidance began to grow the day before the bill was signed into law.

C. Expansion to Sex-Based Discrimination

Title VII's enactment created an immediate overlap between EEOC charges and NLRA unfair labor practice charges for race-based discrimination claims. However, the last-minute addition of sex as an unlawful ground for discrimination under Title VII did not yet affect this overlapping jurisdiction because NLRB's expansion of the DFR was limited to race-based discrimination⁸⁴ and even Title VII jurisprudence did not immediately treat the statute as equally applicable to race- and sex-based discrimination.⁸⁵ The version of Title VII debated in Congress did not contain sex as impermissible grounds and a Southern Congressman named Howard Smith added sex to the list of prohibited grounds for discrimination the day before Title VII passed as a last-minute attempt to sink the whole bill⁸⁶ (although it is important to note the feminist activism that raised the issue in the first place⁸⁷). Although the EEOC published new

⁸² Sherman, *supra* note Error: Reference source not found, at 781 ("Although the conclusion was reached many years ago that an exclusive bargaining representative under the NLRA owed a duty of fair representation to employees in the bargaining unit, the NLRB had never held, prior to the Senate's vote on the Civil Rights Act of 1964, that racial discrimination by a union constituted an unfair labor practice.").

⁸³ *Vaca v. Sipes*, 386 U.S. 171, 183 (1967).

⁸⁴ Testimony of Rep. Howard Smith, 110 Cong. Rec. 2577 (Feb. 8, 1964).

⁸⁵ SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 23, 26 (2011) ("Public officials and journalists frequently characterized Title VII's sex discrimination provision as an irrelevant fluke.... For most of the 1960s, the EEOC gave short shrift to Title VII's sex discrimination prohibition.").

⁸⁶ Howard infamously asked, "What harm can you do this bill that... is so imperfect today?" and repeatedly joked how "serious" he was about the amendment. Testimony, *supra* note Error: Reference source not found, at 2577. For a fascinating (albeit normatively controversial) discussion of the history of Title VII's sex-discrimination provision, see Robert Stevens Jr. Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880 (1966).

⁸⁷ For an account challenging the conventional portrayal of Title VII sex discrimination as purely a joke added by a Congressman, see Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENVER U. L. REV. 995, 1016-18 (2015).

guidance on sex discrimination,⁸⁸ EEOC's leadership did not view Title VII as a mandate for EEOC to address the issue; Aileen Hernandez, the Commission's only woman member, recalled that the subject of sex discrimination initially elicited either "boredom" or "virulent hostility" and resigned two years later in protest of the EEOC's aversion to sex discrimination cases.⁸⁹

The NLRB was even slower to address sex discrimination. As late as 1974, a Board concurrence (the majority opinion avoided the issue) maintained that there was no constitutional duty to apply the DFR to sex-based discrimination because the Supreme Court had not found sex as a suspect class subject to strict scrutiny,⁹⁰ citing the Court's recent weakening of *Frontiero v. Richardson*⁹¹ in *Kahn v. Shevin*.⁹² In the 1960s and early 1970s, a marked divide within liberal politics existed between feminists, civil rights leaders, and pro-labor organizations due to clashing priorities, such as disputes within the feminist movement over "protective" physical requirements for women in blue-collar jobs and organized labor advocacy for a living wage for breadwinners to support a family.⁹³ Unions were particularly hostile to women workers in the first half of the twentieth century, viewing them as a wage-depressing supply of labor.⁹⁴ Furthermore, many civil rights supporters viewed feminist arguments in the union space as inapposite, arguing that "sex... is not to be equated with race"⁹⁵ and emphasizing that Congress

⁸⁸ EQUAL EMP'T OPPORTUNITY COMM'N, GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, 30 Fed. Reg. 14926-28 (1965).

⁸⁹ CYNTHIA HARRISON, ON ACCOUNT OF SEX 187 (1989); Dorothy M. Ehrlich, *The ACLU Remembers Aileen Hernandez* (Feb 28, 2017 3:45 PM), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/aclu-remembers-aileen-hernandez>.

⁹⁰ The concurrence and dissent in *Bekins* both addressed this issue, reflecting NLRB's stance at the time. *Bekins Moving & Storage Co.*, 211 N.L.R.B. 138, 143-44 n.29 (1974); Betty Southard Murphy & Ella B. Chatterjee, *Sex Discrimination and the National Labor Relations Act*, 1 HARV. WOMEN'S L.J. 87, 99-100 (1978).

⁹¹ 411 U.S. 677 (1973).

⁹² 416 U.S. 351 (1974).

⁹³ MAYERI, *supra* note Error: Reference source not found, at 37; Marion Crain & Ken Matheny, *Labor's Divided Ranks: Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1593 (1999).

⁹⁴ Marion Crain, *Sex Discrimination as a Collective Harm*, in THE SEX OF CLASS: WOMEN TRANSFORMING AMERICAN LABOR 99, 101 (Dorothy Sue Cobble, ed. 2007); Crain [2002], *supra* note Error: Reference source not found, at 213.

⁹⁵ See *Bower v. Colgate Palmolive*, 272 F. Supp. 332, 362 (S.D. Ind. 1967).

enacted antidiscrimination legislation focusing on African-American workers (and by that, they meant African-American men), not women.⁹⁶

However, in response to the new job opportunities for women coming out of World War II and the growing feminist movement, some unions began to form alliances with women's organizations in the 1970s.⁹⁷ For example, United Automobile Workers representatives Dorothy Haener and Caroline Davis worked with the National Organization for Women to garner union support for the Equal Rights Amendment (ERA).⁹⁸ Feminists also supported organized labor, carrying out “girlcotts” to advocate for stronger bargaining rights.⁹⁹ Advocates such as Pauli Murray advancing intersectional arguments about race and sex gained influence during the 1970s debates over the ERA, gradually convincing legislators and judges that legal arguments tied to racial discrimination could also apply to sex discrimination.¹⁰⁰

Despite *Bekins* and the Board's initial avoidance of sex discrimination cases, NLRB Administrative Law Judges began to rule that sex discrimination violated the DFR.¹⁰¹ One ALJ explained his rationale for extending the DFR as a reflection of evolving Congressional intent (keep in mind, only one decade earlier, the last-minute addition of sex-based discrimination by Representative Smith):

While most of the Board cases have involved unfair, irrelevant, and invidious treatment because of race, I can perceive of no logical reason—nor, apparently, did Congress when it enacted Title VII of the Civil Rights Act proscribing discrimination on the basis of race, color, religion, sex, or national origin—for drawing a distinction between discrimination based upon race or sex¹⁰²

⁹⁶ MAYERI, *supra* note Error: Reference source not found, at 78.

⁹⁷ *Id.* at 101.

⁹⁸ *Id.* at 35.

⁹⁹ *Id.* at 56.

¹⁰⁰ *See id.* at 38-39, 58-59.

¹⁰¹ *See, e.g.,* Pacific Maritime Ass'n, 209 N.L.R.B. 519 (1974).

¹⁰² *Pacific Maritime*, 209 N.L.R.B. at 526 (discussed in Murphy & Chatterjee, *supra* note Error: Reference source not found, at 100-01).

After the *Bekins* concurrence's aversion to extending the DFR to sex discrimination, the Board reversed course in *Bell & Howell Company*, one year after the Supreme Court established intermediate scrutiny for sex-based classifications in *Craig v. Boren*.¹⁰³ The Board ruled in *Bell* that "the duty of fair representation includes the duty not to discriminate on the basis of sex."¹⁰⁴ Moving forward after *Bell*, the DFR became well-established as applicable to both race and sex discrimination, without the distinction between strict and intermediate scrutiny from Equal Protection jurisprudence.¹⁰⁵ Over the course of the 1970s, the Board shifted along with EEOC to recognize NLRB's role in combating union gender discrimination. However, the initial interpretation of Title VII and the DFR were a far cry from the approach to sex-based discrimination that developed.¹⁰⁶

D. Sexual Harassment as Sex-Based Discrimination

Finally, the inclusion of sexual harassment as a form of sex-based discrimination was a major source of dynamic statutory interpretation relevant to the overlap between EEOC and NLRB's jurisdiction. Sexual harassment was an invisible workplace phenomenon for much of the twentieth century.¹⁰⁷ During the 1970s, as one legal scholar noted, "sexual harassment exploded upon the national consciousness in a barrage of articles, investigations, and television shows."¹⁰⁸ Sexual harassment was not included as a form of discrimination in the language of Title VII, but a cultural shift led courts to redefine sex-based discrimination to include sexual

¹⁰³ 429 U.S. 190 (1976).

¹⁰⁴ 230 N.L.R.B. 420, 423 (1977) (citing *Local No. 106, Glass Bottle Blowers Association, AFL-CIO (Owens-Illinois, Inc.)*, 210 NLRB 943 (1974), which ruled on a *Brown* separate-but-equal argument without invoking the DFR).

¹⁰⁵ *Goodyear Tire & Rubber Co. v. Dep't of Industry, Labor & Hum. Rel.*, 87 Wis. 2d 56, 81 n.9 (Wis. Ct. App. 1978) ("While sex discrimination in this context has not come before the courts, the NLRB has affirmed that sex discrimination as prohibited by the NLRA is a matter of national labor policy."); *Murphy & Chatterjee*, *supra* note Error: Reference source not found, at 93-94, 100-01.

¹⁰⁶ *See* Schultz, *supra* note Error: Reference source not found, at 1009.

¹⁰⁷ Joseph G. Allegretti, *Sexual Harassment of Female Employees by Non-supervisory Coworkers: A Theory of Liability*, 15 CREIGHTON L. REV. 437, 437 (1982).

¹⁰⁸ *Id.*

harassment. The first circuit court to find a violation of Title VII due to sexual harassment was the D.C. Circuit in 1976.¹⁰⁹ In 1980, EEOC issued its first guidance document on sexual harassment, defining the violation as a form of sex-based discrimination under Title VII that includes “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”¹¹⁰

Throughout the next decade, EEOC updated its sexual harassment guidance as the argument began to take hold. In 1986, the Supreme Court ruled in *Meritor Savings Bank v. Vinson* that sexual harassment was sex-based discrimination that violated Title VII.¹¹¹ The developing case law established that a violation of Title VII can take place either through a quid pro quo violation, in which the defendant requested something in exchange for a workplace outcome, or a hostile workplace when the harassment is sufficiently severe or pervasive to change the conditions of the victim’s employment and create an abusive working environment.¹¹²

However, the expansion of Title VII coverage to sexual harassment was a difficult process. EEOC’s Guidance called out cases such as *Rabidue v. Osceola Refining Co.*,¹¹³ where circuit judges argued that unionized workplaces are masculine and “Title VII was [not] designed to bring about a magical transformation in the social mores of American workers.”¹¹⁴ Judges and arbitrators were often sympathetic to defendants in sexual harassment claims, arguing that blue-collar workplaces were not going to become a “tea room” and emphasizing the collegial value of

¹⁰⁹ *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), rev’d and remanded on other grounds sub nom *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978). This history is discussed in Marian C. Haney, *Litigation of a Sexual Harassment Case after the Civil Rights Act of 1991*, 68 NOTRE DAME L. REV. 1037 (1993).

¹¹⁰ 29 C.F.R. § 1604.11(f).

¹¹¹ 477 U.S. 57 (1986).

¹¹² *Meritor*, 477 U.S. at 65-67; Haney, *supra* note Error: Reference source not found, at 1038-39.

¹¹³ 805 F.2d 611 (6th Cir. 1986), cert. denied, 107 S. Ct. 1983, (1987).

¹¹⁴ 805 F.2d at 621 (citing the District Court judge in *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984).

“shop talk.”¹¹⁵ Unionized workplaces in particular tended to be male-dominated.¹¹⁶ Defendants—and unions supporting them—argued, successfully, that women were intentionally entering “a man’s world” and unrealistically demanding accommodation, that victims of sexual harassment had assumed the risk, had enjoyed the harassment, or were not credible, and that harassment was too mild to justify severe discipline.¹¹⁷

As the case law began to develop amid union resistance, the NLRB also began to acknowledge sexual harassment as a form of sex-based discrimination subject to DFR claims. In its 1984 *Eichelberger* decision, the Board assumed that a violation of the DFR was possible when a union failed to notify Janet Eichelberger of its decision not to process her sexual harassment grievance against her union supervisor, but found that the failure in her particular case did not rise to a level “beyond mere negligence” as required for DFR liability.¹¹⁸

Commentators generally understood the difficulty facing women who attempted to file grievances with their unions and advised that “women who find themselves talking to an unsympathetic union official when alleging sexual harassment should seriously consider filing charges with the NLRB against the union for failure to discharge its duty of fair representation.”¹¹⁹ Sexual harassment claims for labor arbitration increased dramatically in the late 1980s as public recognition of the issue and the need for unions and employers to address it grew.¹²⁰

¹¹⁵ Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 38 (1995).

¹¹⁶ *Id.* at 33.

¹¹⁷ *Id.* at 37-45.

¹¹⁸ Office & Professional Employees International Union, Local No. 2, AFL-CIO & Janet Eichelberger, 268 NLRB No. 207, 36-CB-982 (February 29, 1984), *aff’d sub nom Eichelberger v. NLRB*, 765 F.2d 851, 857-58 (9th Cir. 1985) (enforcing NLRB’s ruling that union’s refusal to arbitrate sexual harassment grievance was not arbitrary and did not violate duty of fair representation). The standard for DFR liability was established by the Supreme Court in *Vaca v. Sipes*, 386 U.S. 171 (1967) (“A breach of the statutory duty of fair representation occurs only when a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.”).

¹¹⁹ W.B. Nelson, *Sexual Harassment, Title VII, and Labor Arbitration*, 40 THE ARBITRATION J. 55, 65 (1985).

¹²⁰ Susan A. Fitzgibbon, *Sexual Harassment and Labor Arbitration*, 20 GA. J. INT’L & COMP. L. 71, 77 (1990), Crain [1995], *supra* note Error: Reference source not found, at 14 n.9. However, the grievant is often the disciplined

Thus, the introduction of sexual harassment as a form of sex-based discrimination under Title VII, and the responses to sexual harassment claims, reflected changing cultural assumptions as EEOC and courts applied Congress's original mandate to newly recognized issues. Both EEOC and NLRB responded to vague congressional intent and cultural changes by expanding their interpretation of employment discrimination and exclusive representation. After the four phases of dynamic statutory interpretation explored in Part III, the two agencies found themselves with implicit overlapping jurisdiction far beyond what legislators would have anticipated even if they had decided to confront the overlap.

IV. Analysis of Implicit Overlaps

Given the perhaps inevitable expansion of agency jurisdiction due to dynamic statutory interpretation and new societal issues, Part IV analyzes how implicit overlaps form and whether they should be regarded as positively as explicit, coordinated overlaps. Section IV.A discusses conflicting goals as a key reason that implicit overlaps remain unaddressed as agency jurisdiction grows and Section IV.B compares the advantages and disadvantages of such overlaps. I conclude that the disadvantages relative to agency coordination clearly outweigh any advantages, which are generic to most forms of overlap.

A. Legislative Aversion to Addressing Conflicting Goals

Implicit overlaps form when Congress delegates different agencies authority over the same type of substantive claim without explicitly addressing or coordinating the overlap. Section IV.A utilizes the case study of EEOC and NLRB to explain how an implicit overlap can form in an otherwise lively debate about the creation of a new agency. I argue that underlying conflicts in statutory goals can both make Congress more likely to avoid addressing an overlap and make the overlap more difficult to coordinate post enactment.

harasser rather than the victim, *see* Fitzgibbon, *supra* at 77.

At the time of Title VII's enactment, Congress did not anticipate the rise in gender discrimination claims or the application of future sexual harassment claims, but did recognize that the creation of EEOC would lead to jurisdictional overlaps. However, Congress failed to coordinate such overlaps for two main reasons. First, Congress focused on maintaining political support for the bill's passage rather than entering jurisdictional fights.¹²¹ Second, circumstances changed during and after the bill's enactment; for example, the extent of the overlap with NLRB was unclear at the time of the bill's passage and grew through dynamic statutory interpretation.¹²² A closer look at each agency's authority demonstrates the magnitude of the overlap that Congress failed to address in the case of EEOC and NLRB.

The division between Congress's approach to labor law in the NLRB and employment law in the EEOC reflects the underlying political tension between collective bargaining and antidiscrimination. The fundamental conflict arises because labor law focuses on collective groups of workers, while employment law focuses on individual worker rights.¹²³ Historian Reuel Schiller demonstrates that unions prioritized their right to exclusive representation over allowing minority workers to organize and wanted to preserve seniority systems that heavily advantaged white workers.¹²⁴ Historically, federal courts were "the labor movement's traditional enemy" (because of New Deal rulings that favored employers), but served as the "primary legal mechanism for attacking employment discrimination."¹²⁵ Unions did not want court interference in the bargaining process and union internal affairs;¹²⁶ furthermore, statutes such as Title VII

¹²¹ See *supra* notes Error: Reference source not found-Error: Reference source not found (discussing criticism by Southern Democrats and the avoidance of the issue).

¹²² See *supra* Part III.

¹²³ SCHILLER, *supra* note Error: Reference source not found, at 8 ("[L]abor law depended on an almost unalloyed form of workplace majoritarianism to set the boundaries of employer discretion. The law of employment discrimination, on the other hand, was profoundly antimajoritarian in nature.").

¹²⁴ *Id.* at 254.

¹²⁵ *Id.* at 9.

¹²⁶ *Id.* at 69-70.

threatened “labor law’s hegemony over the workplace and the autonomy that labor unions had spent decades establishing.”¹²⁷

Title VII and the NLRA established expert administrative bodies to administer each statute and established an agency structure designed to achieve each mandate.¹²⁸ The NLRA reflects a New Deal approach to administrative law, giving the NLRB exclusive jurisdiction over unfair labor practices and channeling claims to arbitration in order to increase efficiency and promptly resolve claims.¹²⁹ NLRB arbitrators jointly selected by employers and unions were designed to maintain independence from undue employer interference and promote worker democracy.¹³⁰ In contrast, the purpose of Title VII was to increase access for civil rights complaints and make federal courts an open forum for any plaintiff who receives an EEOC Right to Sue letter.¹³¹ EEOC is required to engage in negotiations with defendants to attempt to conciliate claims, but these settlements must be publicly available, rather than negotiated behind the closed doors of private arbitration.¹³² This can be a critically important difference in the context of sexual harassment because quietly addressing claims does not address underlying issues and can allow repeat offenders to continue.¹³³

Congress also chose different types of authority to carry out unique employment and labor law goals. While the NLRB exercises adjudicatory authority and uses its own

¹²⁷ *Id.* at 119.

¹²⁸ Charles B. Craver, *Minority Action versus Union Exclusivity: The Need to Harmonize NLRA and Title VII Policies*, 26 HASTINGS L. J. 1 (1974).

¹²⁹ Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2013 (2009) (“The great hope of administrative law in the New Deal was that expertise and professionalism, balanced by political accountability and careful institutional design, would yield the best possible governance.”).

¹³⁰ SCHILLER, *supra* note Error: Reference source not found, at 205; Fisk & Malamud, *supra* note Error: Reference source not found, at 2013 (“Administrative agencies were to step in where both the judiciary and the legislature had failed, avoiding the dangers of government by plutocracy and government by patronage.”).

¹³¹ WILLIAM GOULD, BLACK WORKERS IN WHITE UNIONS 211 (1977).

¹³² 42 U.S.C. §2000e-5(b).

¹³³ *See, e.g.*, Terri Gerstein, *End Forced Arbitration for Sexual Harassment. Then Do More.*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/opinion/arbitration-google-facebook-employment.html>.

administrative law judges (ALJs) to arbitrate each NLRA claim, the EEOC brings internally processed claims on behalf of complainants in federal court or issues a Right to Sue letter to private parties if conciliation fails. This difference in authority reflects political compromise; during negotiations over the enforcement mechanism for Title VII, employers preferred litigation over NLRB-like agency adjudication because decentralized individual lawsuits would be slower and more expensive for plaintiffs and would advance antidiscrimination law in a more piecemeal fashion.¹³⁴ Initially, both unions and civil rights groups preferred agency-centered mediation because this prevented litigious splinter civil rights groups from creating bad law, avoided the adversarial court process as unions and civil rights groups attempted to find common ground, and allowed for more-centralized control and injunctive relief.¹³⁵ However, such agencies were prone to regulatory capture and lacked transparency, so civil rights groups began to see courts as a stronger option.¹³⁶ Additionally, shortcomings in state-level fair employment practice commissions (FEPCs) informed civil rights groups' acceptance of a private suit mechanism rather than agency adjudication authority.¹³⁷

Legislators were aware of at least the potential for clashes between EEOC and NLRB's structural design and goals. For example, a Republican Senator primarily concerned with duplicative claims involving employers (but who was also a union supporter¹³⁸) proposed one failed amendment to give EEOC primary jurisdiction over all claims involving employment discrimination by arguing that “there remains untouched by the compromise bill the question of overlapping investigations by Federal agencies or commissions... [and the proposed] amendment

¹³⁴ SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010).

¹³⁵ *Id.* at 1108-17.

¹³⁶ *Id.* at 1093.

¹³⁷ David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071 (2011).

¹³⁸ Archives, *119 in Congress Get Top Score on Voting from A.F.L.-C.I.O.*, N.Y. TIMES (Jan 18, 1970), <https://www.nytimes.com/1970/01/18/archives/119-in-congress-get-top-score-on-voting-from-afcio.html>.

would eliminate that overlap” by ensuring the EEOC’s “jurisdiction is not diluted by operations of other agencies and commissions.”¹³⁹ One of Title VII’s sponsors, Senator Clark, acknowledged the overlap for union racial discrimination claims by asserting that NLRB’s jurisdiction would remain unchanged, arguing that “[i]f a given action should violate both title VII and the [NLRA], the [Board] would not be deprived of jurisdiction.”¹⁴⁰ Senator Clark also noted the ambiguity surrounding the DFR at the time of congressional debate over Title VII:

To what extent racial discrimination is covered by the NLRA is not entirely clear. I understand that the National Labor Relations Board has presently under consideration a case involving the duties of a labor organization with respect to discrimination because of race. At any rate, title VII would have no effect on the duties of any employer or labor organization under the NLRA or under the Railway Labor Act, and these duties would continue to be enforced as they are now.¹⁴¹

Because NLRB withheld the *Hughes Tool* decision and Congress avoided addressing the overlap in order to make the bill’s passage more politically feasible, Title VII, unlike the statutes explored by Shah,¹⁴² created an implicit overlap between EEOC and NLRB that would only grow larger.

As a result of the lack of coordination of the implicit overlap, the Supreme Court has ruled that plaintiffs may pursue both EEOC and NLRB claims for the same issue.¹⁴³ In *Alexander v. Gardner-Denver Co.*, the Court explained that the plaintiff’s complaint had two “legally independent origins”: one in Title VII and one in the collective bargaining agreement.¹⁴⁴ That is, plaintiffs do get two “bite[s] at the apple,” as Shah described.¹⁴⁵ However, the Court’s avoidance of implicit overlaps can create shifting sands for plaintiffs attempting to locate the proper agency

¹³⁹ 110 Cong. Rec. 13,650 (June 12, 1964) (statement of Senator Tower).

¹⁴⁰ 110 Cong. Rec. 7,207 (April 8, 1964) (statement of Senator Clark).

¹⁴¹ *Id.*

¹⁴² See Shah [2015], *supra* note Error: Reference source not found, at 884-902 (“Governing Law” row of each table).

¹⁴³ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

¹⁴⁴ SCHILLER, *supra* note Error: Reference source not found, at 213-14.

¹⁴⁵ See *supra* note Error: Reference source not found and accompanying text.

process for redressing discriminatory union action. In *Emporium Capwell*, a foundational Supreme Court decision on union discrimination, the Court avoided the underlying conflict between EEOC and NLRB's goals and used the existence of one option to diminish the need for the other.¹⁴⁶ African-American employees represented by a civil rights organization alleged racial discrimination in promotions, along with lack of union representation on the issue, so they picketed the employer and challenged the union's position of exclusivity.¹⁴⁷ They were subsequently fired for the picketing.¹⁴⁸ The plaintiffs argued that the union discriminated in its representation of the interests of African-American workers and they should be able to picket the employer given insufficient action by their exclusive representative.¹⁴⁹

The Court's majority opinion cited the relevant statutory text from the NLRA and Title VII, noting how together they expressed a "national labor policy against discrimination," entirely ignoring the underlying conflict between the agencies' goals.¹⁵⁰ The workers argued that they decided to picket rather than file a Title VII charge because filing with EEOC would be time-consuming and their union, while paying lip service to filling their DFR, was not pressing the issue with the employer.¹⁵¹ The plaintiffs' challenge hinged on the notion that racial discrimination outweighed a union's interest in exclusivity. This represented a prime opportunity to acknowledge the implicit overlap and how conflicting goals can impact agency effectiveness. However, the Court focused on the plaintiffs' picketing as a violation of the collective bargaining agreement and held that "whether [racial discrimination complaints] are thought to depend upon

¹⁴⁶ *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 56.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 58-59 n.7.

¹⁵¹ *Id.* at 65; see also Calvin William Sharpe, Marion G. Crain & Reuel E. Schiller, *The Story of Emporium Capwell: Civil Rights, Collective Action, and the Constraints of Union Power in* LABOR LAW STORIES: AN IN-DEPTH LOOK AT LEADING LABOR LAW CASES 241, 278 (Laura J. Cooper & Catherine L. Fisk, eds. 2005) (noting that "practitioners of the day believed that direct action through concerted activity protected under Section 7 and enforced by proceedings before the Labor Board was faster and more expeditious than administrative and court proceedings under Title VII").

Title VII or have an independent source in the NLRA, they cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA.”¹⁵² The Court argued that the plaintiffs’ protests weakened the union’s “united front” and treated a potential Title VII claim as a separate issue.¹⁵³ To make this argument, the Court attempted to cleave off the underlying discrimination issue and shifted to a suggestion that the plaintiffs could have instead filed a Title VII claim.¹⁵⁴

While the Court noted that there are strategic differences between EEOC and NLRB processes,¹⁵⁵ the opinion used the existence of a Title VII remedy to argue that the plaintiffs should not have picketed and to imply that Congress assigned racial discrimination complaints to the EEOC.¹⁵⁶ In fact, the Court avoided evaluation of the implications of the overlap entirely, noting that “this argument is properly addressed to the Congress and not to this Court or the NLRB.”¹⁵⁷ As a result, the Court’s approach to *Emporium Capwell* “sever[ed] anti-discrimination agendas from union agendas at law, leaving minority workers to stand alone against the employer in negotiating redress for racial discrimination.”¹⁵⁸ Plaintiffs continued to have the option to pursue a remedy under either statute, but the decision functionally framed the implicit overlap as “a two-track system—the NLRA as the protective mechanism for

¹⁵² *Id.* at 69.

¹⁵³ *Id.* at 70.

¹⁵⁴ *Id.* (“If the discharges in these cases are violative of §704 (a) of Title VII, the remedial provisions of that Title provide the means by which Hollins and Hawkins may recover their jobs with backpay.”).

¹⁵⁵ *Id.* at 72 (“Respondent objects that reliance on the remedies provided by Title VII is inadequate effectively to secure the rights conferred by Title VII. There are indeed significant differences between proceedings initiated under Title VII and an unfair labor practice proceeding.”).

¹⁵⁶ *Id.* at 72 n.25 (“The Board-enforced duty of fair representation, it is noted, has already exposed it to the problems that inhere in detecting and deterring racial discrimination within unions. What is said above does not call into question either the capacity or the propriety of the Board’s sensitivity to questions of discrimination. It pertains, rather, to the proper allocation of a particular function—adjudication of claimed violations of Title VII—that Congress has assigned elsewhere.”).

¹⁵⁷ *Id.* at 73.

¹⁵⁸ Sharpe, Crain & Schiller, *supra* note Error: Reference source not found, at 278.

majoritarian economic interests and Title VII as the tool for advancing individuals' racial justice concerns."¹⁵⁹

Finally, circuit courts have also explored this issue and ruled that the availability of a remedy from the EEOC under Title VII does not preclude a plaintiff from seeking and obtaining relief under the NLRA.¹⁶⁰ The Third Circuit's ruling on this issue emphasizes that "[n]othing in the text of Title VII itself addresses the relation between section 704(a) and section 8(a)(1). However, the legislative history of Title VII demonstrates that Congress intended to allow an individual to pursue rights independently under both Title VII and other applicable statutes, including the NLRA."¹⁶¹ To support this claim, the opinion cites Senator Clark's testimony that the NLRB would maintain the same jurisdiction as prior to Title VII.¹⁶² Thus, Congress and the judiciary have established that NLRB and EEOC have independent authority to address union discrimination, despite the underlying conflict in each agency's goals.

B. Advantages of Implicit Overlaps

In order to assess implicit overlaps such as the overlap between EEOC and NLRB for union discrimination claims, it is important to consider the baseline comparison. One way to evaluate normative claims about implicit overlaps would be to compare them to explicit overlaps, while another approach to compare them to no overlap at all. This Paper observes that active coordination of implicit overlaps is pareto superior to ignoring implicit overlaps, so this Section focuses on advantages relative to no overlap at all. There are two primary advantages to implicit overlapping jurisdiction relative to no overlapping jurisdiction: 1) relative agency expertise and 2) multiple points of entry for complainants.

¹⁵⁹ *Id.* at 277-78.

¹⁶⁰ *Briscoe v. NLRB*, 637 F.2d 946 (3d Cir. 1981).

¹⁶¹ *Id.* at 951.

¹⁶² *Id.*

1. *Relative Agency Expertise*

First, a generous reading of Congress's decision to allow two separate statutory sources of union discrimination claims would argue that NLRB and EEOC contribute unique expertise on the collective bargaining process and employment discrimination, respectively. At the time of Title VII's enactment, NLRB had developed several decades of agency expertise on the union-employer bargaining process, as well as a polished system of ALJs for review of arbitration to process claims. One contemporaneous commentator dismissed EEOC's new jurisdictional threat, emphasizing the superior "relative speed, flexible proof procedures, and expert knowledge of the NLRB to enforce directly the union duty of fair representation under its power to prevent unfair labor practices."¹⁶³ Another commentator noted that Title VII "does not establish any form of primary jurisdiction in the area of labor discrimination for the commission it creates, and while it provides governmental machinery for redressing grievances, its procedures do not appear to be as appealing as those now available under the NLRA."¹⁶⁴

It is possible to imagine some instances where the speed of an arbitrator is important to a complainant; for example, a worker experiencing sexual harassment may prefer an informal, quick, and private solution without court costs in order to continue to perform her job in a safer environment. In this context, NLRB's relative expertise in arbitration could provide an advantage; this is precisely why liberal scholars championed private arbitration at a time when conservative courts struck down New Deal legislation.¹⁶⁵ However, the joint selection of arbitrators by employers and unions is reflective of the majoritarian impulses of collective bargaining.¹⁶⁶ As a result, an underrepresented worker is unlikely to find her interests advanced

¹⁶³ Note, *Administrative Enforcement of the Right to Fair Representation: The Miranda Case*, 112 U. PA. L. REV. 711, 714 (1964).

¹⁶⁴ B.J.L. Jr., 1231 (1964)

¹⁶⁵ SCHILLER, *supra* note Error: Reference source not found, at 122.

¹⁶⁶ *Id.* at 205 ("The arbitrators themselves were selected by the employer and the union, each of whom may have caused or tolerated the discrimination at issue.")

in arbitration; the lack of a jury, the repeat player nature of private arbitration, and the lower award potential to attract plaintiff's attorneys dramatically reduce a complainant's odds of success.¹⁶⁷

Another way to frame the importance of confining agency jurisdiction to relative expertise is an argument made during congressional debates over Title VII that Congress should limit the authority that it bestows exclusively in any independent agency.¹⁶⁸ Rather than granting EEOC sole jurisdiction over all discrimination claims against employers and unions, one could argue that Congress created an implicit overlap so that the goals unique to collective bargaining would be balanced between EEOC and NLRB. However, explicit coordination of this relationship could achieve the same goals without many of the disadvantages discussed in Section IV.C.

2. *Multiple Avenues for Complainants*

Related to agency expertise, it is also possible to argue that complainants benefit from “another bite at the apple” through implicit overlaps, similar to explicit overlaps.¹⁶⁹ Plaintiffs may prefer one agency's complaint process over the other for a variety of reasons, such as relative speed, cost, privacy, and success rates. Given the increase in mandatory arbitration requirements since the enactment of Title VII—at least 95 percent of collective bargaining agreements require mandatory arbitration clauses¹⁷⁰—complainants may prefer to take their claims to EEOC to circumvent unfavorable arbitration outcomes because EEOC is not beholden to mandatory arbitration agreements.¹⁷¹ However, after the Supreme Court removed the ability to

¹⁶⁷ See, e.g., Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL L. STUDIES 1 (2011); GOULD, *supra* note Error: Reference source not found, at 212 (“The treatment of [DFR] cases by arbitrators does not provide much basis for optimism about the arbitration forum and its ability to resolve discrimination disputes.”).

¹⁶⁸ 110 Cong. Rec. 13,650-52 (June 12, 1964).

¹⁶⁹ See *supra* note Error: Reference source not found and accompanying text.

¹⁷⁰ GOULD, *supra* note Error: Reference source not found, at 210.

¹⁷¹ EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).

bring claims outside of arbitration using a Right to Sue letter,¹⁷² this strategy only works if EEOC decides to directly bring the claim on behalf of the complainant,¹⁷³ which is extremely rare—less than one percent of EEOC complaints result in merits charges.¹⁷⁴ If instead the EEOC issues the complainant a Right to Sue letter, the individual must still exhaust the labor arbitration process.¹⁷⁵ Furthermore, the implicit nature of this overlap and lack of common knowledge about EEOC’s immunity to mandatory arbitration clauses makes this availability of choice less visible for unionized employees than would be the case under explicit agency coordination.¹⁷⁶

Another way in which the existence of multiple avenues could help advance the goals of Title VII and the NLRA would be through allowing complainants more positional strength when bringing claims. For example, an employer may be more willing to settle a complaint during EEOC conciliation if the employer knows that a complainant will simply turn to labor arbitration if the initial effort is not successful. Employers have attempted to argue that this results in unfair double jeopardy, but the Supreme Court rejected this argument in *Alexander v. Gardener-Denver Co.*,¹⁷⁷ emphasizing the distinct legal origins of the union racial discrimination claim at issue and allowing the plaintiff to bring an EEOC complaint after receiving an unfavorable arbitration outcome. Thus, the doctrine arising out of this implicit overlap could support an argument that the two separate fora give employees stronger positions in negotiations and provide twice as many opportunities to challenge discrimination as in a world without the statutory overlap. The following Section explores how this dynamic plays out in practice and provides a variety of

¹⁷² See *14 Penn Plaza v. Pyett*, 556 U.S. 247 (2009).

¹⁷³ See *id.* at 272 (“Union members may also file age-discrimination claims with the EEOC and the National Labor Relations Board, which may then seek judicial intervention under this Court’s precedent.” (citing *Waffle House*)).

¹⁷⁴ U.S. Equal Emp’t Opp. Comm’n, *EEOC Releases Fiscal Year 2017 Enforcement and Litigation Data* (Jan. 25, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/1-25-18.cfm> (showing that in FY2017, EEOC received 82,254 charges and brought 184 merits lawsuits).

¹⁷⁵ *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

¹⁷⁶ See, e.g., Richard Tuschman, *Employers, Don’t Forget the EEOC Carve-Out in Your Mandatory Arbitration Agreement*, FORBES (Sept. 14, 2015), <https://www.forbes.com/sites/richardtuschman/2015/09/14/employers-dont-forget-the-eeoc-carve-out-in-your-mandatory-arbitration-agreement/#6e10ab6f3cb3>.

¹⁷⁷ 415 U.S. 36 (1974).

reasons that this theoretical advantage (over no overlap) does not come to fruition. Again, explicit coordination could offer this advantage while avoiding many of the disadvantages discussed in Section IV.C.

C. Disadvantages of Implicit Overlaps

Despite the advantages that implicit overlaps may provide, the disadvantages are both more numerous and more impactful. The key types of disadvantages are: lack of transparency, confusion due to procedural differences and conflicting requirements, inefficiency and unfair outcomes, and court division interpreting the overlap.

1. *Lack of Transparency*

First, agency adjudication in areas with implicit overlapping authority is inherently less transparent than coordinated agency adjudication. An implicit overlap across different agencies means that agencies will approach the same fact pattern with different goals or mandates; thus, they will frame their engagement with the claim differently and impose the lens of their particular area of expertise and set of tools. Additionally, they may view other agencies as better-suited to achieve parts of the overlap and under-address issues over which they have jurisdiction.

For example, NLRB does not view itself as an employment discrimination agency because Congress did not design it to be one. Despite the fact that NLRB processes DFR claims involving union failure to represent a member challenging sexual harassment, NLRB does not acknowledge and evaluate its performance in this area of its day-to-day functions. In one informative illustration of this lack of clarity, NLRB's response to my FOIA request for data related to DFR claims involving sexual harassment stated that "allegations of sexual harassment/sex discrimination are not issues arising under the NLRA, and thus are not specifically within the Agency's jurisdiction."¹⁷⁸ This would surely be a surprise to complainants such as Donna Marie

¹⁷⁸ Email, Follow-up on NLRB-2019-000225 (sexual harassment case request) (Mar. 8, 2019 12:39 PM EST).

Mata, whose allegations of union failure to address sexual harassment were brought by the NLRB General Counsel as an unfair labor practice complaint and investigated at length for the purposes of her DFR claim.¹⁷⁹ While it is understandable that NLRB would view EEOC as the agency who “investigate[s] allegations of sexual harassment,”¹⁸⁰ NLRB’s failure to acknowledge its own investigative role in the implicit overlap obscures its adjudicative functions.

Second, as a result of how each agency defines its mission, implicit overlap can reduce disclosure of each agency’s work in the jurisdictional overlap. EEOC publishes annual statistics on the number of claims it processes across all bases, such as race, sex, and religion, as well as by type of claim, such as promotion, maternity, sexual harassment, and union representation.¹⁸¹ EEOC’s inclusion of data on claims including union representation is the closest that either agency comes to making the implicit overlap more transparent; while EEOC does not provide information along both the dimensions of sexual harassment and union representation together, EEOC reports that it processes around 60 to 100 Title VII charges on the basis of sex discrimination involving union representation issues annually.¹⁸² However, EEOC does not provide information on individual charges and, given that it brings suit on behalf of the complainant in less than one percent of charges annually and plaintiffs otherwise take their claims to federal court, the overlap for agency adjudication of the types of claims in this Paper’s Introduction is largely a black box even with this aggregate data.

¹⁷⁹ Counsel for the General Counsel’s Brief to the Administrative Law Judge, Int’l Longshoreman’s Ass’n, Local 28 & Donna Marie Mata, 16-CB-181716, at 2 (June 6, 2018).

The Union officials here were aware of Ms. Mata’s allegations of sexual assault but responded negligently, and although they provided lip service to her complaints, they continued to prohibit Mata from obtaining the training that she needs to obtain more work. These actions were arbitrary, discriminatory, and a clear breach of the Union’s duty of fair representation.

¹⁸⁰ Email, Re: FOIA Request (Jan. 18, 2019 4:13 PM EST).

¹⁸¹ See Equal Emp’t Opp. Comm’n, Bases by Issue (Charges Filed with EEOC) FY 2010-FY 2017, https://www.eeoc.gov/eeoc/statistics/enforcement/bases_by_issue.cfm.

¹⁸² *Id.*

Even more opaquely, NLRB does not record when claims involve discrimination, keeping statistics only at aggregate levels by the section of the NLRA that is violated. A search based on data provided in a FOIA request revealed that the vast majority of cases do not have information publicly available to identify the type of claim.¹⁸³ NLRB charges that do include publicly available information show that any potential statistics include both charges brought by victims and alleged *harassers* (complaining that their union did not properly represent them and they were unjustly punished by the employer).¹⁸⁴ Thus, it is impossible to ascertain from EEOC or NLRB the size of this hidden overlap in terms of number of claims, types of unions where it most frequently occurs, or outcomes for plaintiffs. This lack of transparency affects the agencies themselves as they assess their caseload and need for cooperation with other agencies, as well as plaintiffs determining where to bring a claim.

2. *Confusion Due to Procedural Differences and Conflicting Requirements*

Furthermore, differences in agency processes can create confusion when agencies with implicit overlaps do not coordinate forms of adjudication or fail to convey information about differences in process. Each version of agency adjudication comes with its own statute of limitations and exhaustion requirements, creating a labyrinth for complainants.¹⁸⁵ This becomes particularly problematic when pursuing one agency process runs past the statute of limitations of

¹⁸³ Data on file with author. Of 201 DFR cases between 2010 and 2017, only 56 had any public information available (e.g., dismissal letter) and only 9 of these included enough information to even ascertain the gender of the complainant.

¹⁸⁴ See, e.g., *SSA Pacific*, 20–CB–151490, at 16 (Apr. 3, 2018).

¹⁸⁵ Jill Maxwell, *Unifying Title VII and Labor Law to Expand Working Class Women’s Access to Non-Traditional Occupations*, 11 GEO. J. GENDER & L. 681, 700 (2010).

another.¹⁸⁶ Two-track systems may also address different sets of concerns, so that neither process fully responds to the complainant's experiences.¹⁸⁷

This confusion can become further compounded when an issue common to both agency subject areas affects each process in conflicting ways. In union sexual harassment cases, mandatory arbitration in collective bargaining agreements causes practical difficulties for victims of sexual harassment who are often not fully aware of their options through EEOC and NLRB.¹⁸⁸ For most complaints against unions, the Supreme Court has ruled that an individual must exhaust the arbitration process before pursuing the dispute in court.¹⁸⁹ Despite the fact that EEOC can bring suit on behalf of plaintiffs who have signed mandatory arbitration agreements, employers and unions use such agreements to steer plaintiffs toward arbitration, reducing process transparency.¹⁹⁰ Even complainants who find out that they can go to EEOC but then only receive a right to sue must ultimately return to the arbitration process.¹⁹¹

Recent Supreme Court decisions have further expanded the complicated role of mandatory arbitration in collective action protections under the NLRA. In the its 5-4 *Epic Systems* decision, the Court ruled that employment contracts containing individual arbitration requirements (and thus disallowing class actions) did not violate the NLRA's protection of "concerted activities for the purpose of collective bargaining."¹⁹² This further heightens the

¹⁸⁶ For example, the NLRA's six-month statute of limitations may apply to DFR claims that a plaintiff first pursued with state equal employment commissions before EEOC filed a complaint on the plaintiff's behalf. *See, e.g.*, *EEOC v. IBEW, Local Union 998*, 343 F. Supp. 2d 655, 660 (N.D. Ohio 2004) (dismissing a harassment and discrimination claim pursued by the EEOC on the basis of the NLRA's six-month time bar).

¹⁸⁷ Marion Crain & Ken Matheny, *Sexual Harassment and Solidarity*, Wash. U. in St. Louis Legal Studies Research Paper Series No. 18-03-04, at 41 (Mar. 2018).

¹⁸⁸ *See, e.g.*, EQUAL EMP'T OPPORTUNITY COMM'N, *EEOC Suit Challenging Doherty Enterprises' Attempt to Bar Discrimination Charges Will Go Forward* (Sept. 2, 2015), <https://www.eeoc.gov/eeoc/newsroom/release/9-2-15.cfm> (challenging one employer's contractual language suggesting that EEOC claims were foreclosed by arbitration).

¹⁸⁹ *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

¹⁹⁰ *See* Michael Z. Green, *Retaliatory Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 201, 223-25 (2014).

¹⁹¹ *Id.*

¹⁹² National Labor Relations Act, 29 U.S.C. § 157; *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

conflict between individualism in employment discrimination claims and collective action in labor-management relations.

3. *Inefficiency and Unfair Outcomes*

Implicit overlaps also increase the possibility that an agency will adjudicate issues outside of its area of expertise. Agency coordination, such as the Department of Treasury sending issues involving complex employee pension questions to the Department of Labor, can ensure that each agency handles issues related to its knowledge and value-added. Conversely, implicit overlaps—with or without conflicting agency goals—can reduce efficiency in processing claims. Furthermore, when agency goals do conflict, implicit overlap can cause fundamentally unfair outcomes for complainants whose interests are not represented by the agency on the wrong side of the implicit overlap.

For example, NLRB arbitrators evaluating whether a union fulfilled its DFR tend to lack civil rights or antidiscrimination experience.¹⁹³ Arbitrators in NLRA claims are also chosen jointly by the employer and then union; while this process works well for collective bargaining over issues such as wages and paid leave, underrepresented interests are excluded from this selection process. As the Supreme Court has noted, arbitrators are systemically unfair to plaintiffs in discrimination claims because the arbitrators are “a group which is in large part chosen by the [defendants] against whom their real complaint is made.”¹⁹⁴ This raises both efficiency and fairness concerns. Labor arbitrators are not well-versed in employment discrimination law and focus on precedent specific to the collective bargaining agreement at issue; they are “ill-equipped to implement extra-contractual rights.”¹⁹⁵ At the same time, EEOC

¹⁹³ Stanley P. Herbert & Charles L. Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination*, 46 N.Y.U. L. REV. 449, 469 (1971).

¹⁹⁴ *Grover v. Louis-San Francisco Railway*, 393 U.S. 324, 330 (1969).

¹⁹⁵ Sharpe, Crain & Schiller, *supra* note Error: Reference source not found, at 255 (citing Brief for Respondents WACO at 56, *Emporium Capwell v. WACO*, Nos. 73-696, 73-830 (1974)).

investigators do not necessarily have backgrounds in collective bargaining agreements or the NLRA.

Additionally, the existence of a two-track process allows duplicate claims with entirely new rounds of factfinding.¹⁹⁶ Both agencies bring valuable experience to the issues in the implicit overlap, but can create inconsistencies by applying their different goals and processes to the same set of facts with the same issue at stake.¹⁹⁷ This potential for clashing outcomes is also evident in agency policy guidance decisions. Lack of coordination can result in unfairly contradictory guidance for both employers and employees. For example, in 2018 the private sector took notice of EEOC and NLRB's diverging positions on the confidentiality of internal sexual harassment investigations.¹⁹⁸ The EEOC's new anti-harassment task force published an Executive Summary of their report, which recommended strong workplace rules to preserve the confidentiality of pending internal investigations and workplace civility programming;¹⁹⁹ observers noted that this guidance directly conflicts with a 2002 NLRB decision that prohibits employers from requiring employees not to discuss pending complaints²⁰⁰ and a 2004 NLRB decision, expanded through 2015 guidance, that limits anti-harassment policies that prevent vigorous debate or intemperate comments.²⁰¹ The EEOC's full report acknowledged a potential

¹⁹⁶ Some argue that duplication can be desirable, *see, e.g.*, Herbert & Reischel, *supra* note Error: Reference source not found, but these forms of duplication are intentionally coordinated.

¹⁹⁷ The lack of publication of NLRB arbitration outcomes and EEOC conciliation diminishes the ability to find examples of specific cases that had opposite outcomes, but the EEOC's role as amicus in opposition to the NLRB in *Emporium Capwell* is suggestive. *See* Reuel E. Schiller, *The Emporium Capwell Case: Race, Labor Law, and Crisis of Post-War Liberalism*, 25 BERKELEY J. OF EMP'T & LABOR L. 129, 146-47 (2004).

¹⁹⁸ *See, e.g.*, Mehreen Rasheed, *EEOC, NLRB Differ Over Confidentiality of Workplace Sexual Harassment Investigations* (Sept. 13, 2018), <https://www.kmblegal.com/employment-law-blog/eec-nlr-differ-over-confidentiality-workplace-sexual-harassment-investigations>; Chris Opfer, *Agencies Clash Over Sex Harassment Investigations*, BNA (Aug. 8, 2018), <https://www.bna.com/gag-orders-sex-n73014481560/>.

¹⁹⁹ Select Task Force on the Study of Harassment in the Workplace, *Executive Summary and Recommendations*, EQUAL EMP'T OPPORTUNITY COMM'N 5 (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report_summary.pdf.

²⁰⁰ Phoenix Transit System, 337 N.L.R.B. 510, 28-CA-15177 (2002).

²⁰¹ Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004); Memorandum from Richard F. Griffin, Jr., NLRB General Counsel, to Regional Directors et al., No. GC 15-04 (Mar. 18, 2015), <https://www.nlr.gov/news-publications/nlr-memoranda/general-counsel-memos>; Lindsey A. White, *The EEOC's Training Program- Watch Out For that NLRB Charge!* (Oct. 12, 2017), <https://www.laboremploymentreport.com/2017/10/12/the-eeocs->

conflict with the NLRA and recommended that “EEOC and NLRB confer and consult in a good faith effort to determine what conflicts may exist, and as necessary, work together to harmonize the interplay of federal EEO laws and the NLRA.”²⁰² While it appears that informal conversations have taken place,²⁰³ the lack of formal coordination between EEOC and NLRB can cause duplication and contradictions that are unfair to employers, unions, and employees.

4. *Court Division Interpreting the Implicit Overlap*

Finally, implicit overlaps between agency adjudication can complicate judicial review of agency decisions. When agencies develop different doctrine for separate statutes, attempts to adjudicate issues that fall in the implicit overlap can become contradictory and obfuscating as courts attempt to thread the needle between the two sources of legal claims. Statutory sources with unique lines of precedent can be difficult to incorporate logically and underlying conflicts in the goals of each statute can make this nearly impossible. Furthermore, the implicit nature of the overlap may not attract Supreme Court attention to address discrepancies in the development of relevant doctrine.

In the context of NLRB and EEOC, a major—but relatively unnoticed²⁰⁴—circuit split has developed in the legal standard that courts use when unions systematically fail to press discrimination or harassment claims on a member’s behalf.²⁰⁵ Under Title VII, *Goodman v.*

civility-training-program-watch-out-for-that-nlrp-charge/.

²⁰² Select Task Force on the Study of Harassment in the Workplace, *Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic*, EQUAL EMP’T OPPORTUNITY COMM’N 42 (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

²⁰³ Opfer, *supra* note Error: Reference source not found (“The EEOC and the NLRB have had at least preliminary talks about threading a needle between their competing positions, sources tell Bloomberg Law.”).

²⁰⁴ Few scholars have commented on this circuit split and this conversation largely took place before early-2000s decisions that made the split more impactful. *See, e.g.*, Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 57 (1995) (“Although the Supreme Court has not held unions liable for mere passivity in the face of employer discrimination, several lower courts have stated that unions have an affirmative duty to redress discrimination and ensure compliance with Title VII in their role as the employees’ collective bargaining representative.”). For the only direct discussion of the circuit split shortly after *Pipefitters*, 334 F.3d 656 (7th Cir. 2003), see Comment, Emily White, *Not our Problem: Construction Trade Unions and Hostile Environment Discrimination*, 10 N.Y. CITY L. REV. 245, 252-54 (2006)

²⁰⁵ *See infra* notes Error: Reference source not found-Error: Reference source not found and accompanying text.

Lukens Steel Co. is the main Supreme Court ruling against a union for inadequate responses to harassment.²⁰⁶ The Title VII claim included union inaction that “tolerat[ed] and tacitly encourage[ed] racial harassment.”²⁰⁷ The Court emphasizes that Title VII § 703(c)(1) makes it unlawful for a union to “exclude or to expel from its membership, *or otherwise discriminate against*, any individual” and that the plain language of the statute would include union discrimination in representation.²⁰⁸ Thus, *Goodman* establishes that it is possible for unions to violate Title VII through discriminatory advocacy that fails to address particular forms of discrimination or harassment.²⁰⁹ *Goodman* avoided the lower court’s ruling that the unions violated their DFR (under the NLRA) by instead focusing on the § 703 claim,²¹⁰ and courts have generally held that DFR claims based on unlawful discrimination are available under both Title VII and the NLRA without agreeing on the proper legal standard.²¹¹

Meanwhile, the legal standard for breach of a union’s DFR is whether a union’s lack of response to discrimination is “arbitrary, discriminatory, or in bad faith.”²¹² In order to meet this standard, a plaintiff must provide “substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.”²¹³ This creates a high bar for plaintiffs given the difficulty of finding explicit evidence of discriminatory intent in today’s workplaces.²¹⁴

²⁰⁶ *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987).

²⁰⁷ *Id.* at 660.

²⁰⁸ *Id.* at 667.

²⁰⁹ *Id.* at 669 (“The Unions, in effect, categorized racial grievances as unworthy of pursuit and, while pursuing thousands of other legitimate grievances, ignored racial discrimination claims on behalf of blacks knowing that the employer was discriminating in violation of the contract.”).

²¹⁰ *Id.* at 667.

²¹¹ *See, e.g.*, *Beck v. United Food & Commercial Workers Union Local 99*, 506 F.3d 874 (9th Cir. 2007) (holding that the union violated Title VII and breached its DFR in handling grievances of male and female members differently; plaintiff obtained right to sue from EEOC on both claims); *Tynes v. Illinois Veterans Homes*, 2012 WL 4518816, at *5 (C.D. Ill. July 16, 2012).

²¹² *Vaca v. Sipes*, 386 U.S. 171, 191 (1966).

²¹³ *Amalgamated Ass’n of St. Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 301 (1971).

²¹⁴ Unlike Title VII, the DFR does not allow evidence of discriminatory impact.

The implicit overlap between Title VII and DFR legal claims affects even standalone Title VII cases against unions because some courts incorporate DFR analysis into their assessment of union liability under Title VII. In a major Seventh Circuit case, *EEOC v. Pipefitters Association Local Union 597*, the court characterized a racial harassment claim as involving “mere inaction” by the union and emphasized the “awkwardness of asking the union to take sides in a dispute between two employees both of whom it has a statutory duty to represent fairly.”²¹⁵ Judge Posner appeared to apply DFR analysis to the Title VII claim by arguing that the union’s intent was ambiguous and the union should not be held liable for choosing among other priorities.²¹⁶ Other circuits incorporate similarly limited DFR requirements; for example, the Sixth Circuit cites *Pipefitters* for the proposition that a union “does not have an affirmative duty to investigate and rectify employer discrimination.”²¹⁷ Additionally, one test used recently in both the Fifth and Seventh Circuits states that a “plaintiff can only succeed in a Title VII claim against her union if she can establish the following: (1) her employer violated the collective bargaining agreement with respect to her; (2) the union let such breach go unrepaired, *thereby breaching its duty of fair representation*; and (3) some evidence indicates discriminatory animus motivated the union.”²¹⁸

Alternatively, the First,²¹⁹ Second,²²⁰ Ninth,²²¹ and Tenth²²² Circuits follow an “acquiescence standard” for union liability. Under the acquiescence standard, a plaintiff must

²¹⁵ *EEOC v. Pipefitters Ass’n Local Union 597*, 334 F.3d 656, 661 (7th Cir. 2003).

²¹⁶ *Id.* at 662.

²¹⁷ *Copeland v. IBEW Local No. 8*, 2005 WL 1353905, at *7 (N.D. Ohio June 7, 2005).

²¹⁸ *Tynes*, 2012 WL at *5 (emphasis added). *See also* *Wesley v. Gen. Drivers Warehousemen & Helpers Local 745*, 660 F.3d 211, 214 (5th Cir. 2011).

²¹⁹ *Egger v. Local 276, Plumbers & Pipefitters Union*, 644 F. Supp. 795, 802 (D. Mass. 1986), *aff’d*, 843 F.2d 18 (1st Cir. 1988).

²²⁰ *See Johnson v. Palma*, 931 F.2d 203, 209 (2d Cir. 1991).

²²¹ *See, e.g., Woods v. Graphic Commc’ns.*, 925 F.2d 1195, 1200 (9th Cir. 1991) (“A union may also be liable under Title VII for acquiescing in a racially discriminatory work environment.”); *Siu Man Wu v. United Food & Commercial Workers Union Local 367*, 2014 WL 2694233 (W.D. Wash. June 13, 2014.).

²²² *See, e.g., York v. Am. Tel. & Tel. Co.*, 95 F.3d 948 (10th Cir. 1996).

show that the union (1) knew “that prohibited discrimination may have occurred” and (2) decided not to assert the discrimination or harassment claim.²²³ Thus, the acquiescence standard avoids the limitations of DFR analysis regarding intent and the language of the collective bargaining agreement. This standard reflects the workplace reality that selective inaction is a form of discriminatory action and focuses on the purpose of Title VII rather than the NLRA’s emphasis on the collective bargaining agreement as the boundary of worker rights.²²⁴

The differential application of legal standards for Title VII claims against unions reflects court attempts to balance collective bargaining with civil rights protections. Courts that incorporate DFR analysis developed by NLRB fall short of enforcing the Title VII mandate to address employment discrimination.²²⁵ Additionally, the circuit split raises issues of horizontal equity for plaintiffs in different parts of the country. This inequity is particularly important in the context of unions because of geographic concentration of different industries. The Seventh Circuit’s ruling in *Pipefitters* sets unfavorable precedent for union members such as the Ford Motor Company workers in Chicago and in other major automotive workforce hubs in the Sixth and Seventh Circuits.²²⁶

In sum, Congress creates implicit overlaps by leaving duplication and jurisdictional conflicts unaddressed. As a result, implicit overlaps present a variety of disadvantages that become particularly severe when agencies involved in the overlap pursue sometimes contradictory goals. These disadvantages can also become more severe as the overlap grows through dynamic statutory interpretation. The following Part explores potential solutions to address these disadvantages.

²²³ *York*, 95 F.3d at 956-57.

²²⁴ See White, *supra* note Error: Reference source not found, at 262-64.

²²⁵ *Id.*

²²⁶ See *infra* Part I.

V. Approaches to Address Implicit Overlaps

In addition to the disadvantages of implicit overlaps, it is not clear that the advantages of relative agency expertise and multiple channels for claims are any stronger for implicit overlaps than for explicit coordination. Part V explores three types of solutions to address implicit overlaps, through agencies, Congress, and courts. Section V.A's analysis of agency coordination builds upon Shah's exploration of MOUs as a solution to the disadvantages of implicit overlaps. The Section also raises potential separation of powers issues when agencies interpret ambiguous statutory overlaps because this involves an agency interpreting its own jurisdiction. This analysis suggests that Congressional action to amend the statute(s) creating the overlap to either coordinate agency involvement or remove the overlap itself, as explored in Section V.B, would offer a longer-term solution that is less open to legal challenges. Finally, Section V.C offers a standalone solution for courts to balance competing statutory goals and the availability of different processes to resolve circuit splits.

A. Agency Coordination

First, agencies could recognize the damage that leaving the implicit overlap unaddressed can cause to the fulfillment of their respective missions and decide to coordinate their efforts. Shah explores several forms of agency coordination, including phased models where one agency takes a claim first and the other agency either conducts its own factfinding to build off of the first agency's record or takes appellate review.²²⁷ For example, EEOC and the DOL Office of Federal Contract Compliance Programs (OFCCP) have established an MOU wherein OFCCP acts as EEOC's agent for receiving Title VII complaints involving federal contractors (covered in Executive Order 11246²²⁸) and may either close cases that OFCCP determines to lack reasonable

²²⁷ See Shah [2015], *supra* note Error: Reference source not found, at 841.

²²⁸ 30 Fed. Reg. 12319 (Sept. 28, 1965), <https://www.archives.gov/federal-register/codification/executive-order/11246.html>.

cause or refer claims to EEOC upon request.²²⁹ Section V.A.1 explores potential forms of memoranda of understanding and Section V.A.2 analyzes the advantages and disadvantages of agency coordination to address implicit overlaps.

1. Memoranda of Understanding

The primary approach to addressing overlapping agency authority is through memoranda of understanding. Shah's analysis of EEOC's current arrangement with OFCCP provides a potential model where EEOC would handle all claims related to the DFR currently brought to the NLRB (applying its own Title VII standards²³⁰), with an option for NLRB to pull the charge back into labor arbitration in limited, specified circumstances based on a joint agreement that requires the arbitrator to apply Title VII law. A 1993 Memorandum of Understanding between the EEOC and NLRB establishes a similar process for claims under the Americans with Disabilities Act (ADA), wherein the NLRB conducts the preliminary investigation of merit to either dismiss the DFR charge and send the claim to the EEOC or, if the DFR claim has merit, first defer to EEOC investigation and conciliation.²³¹ The agencies established this MOU because ADA individual accommodation requirements conflicted with NLRA requirements that employers bargain with union representatives over changes to working conditions.²³² Unlike Title VII, the ADA has an accommodations provision that created contradictions for employers because they had to choose between confidentially discussing working conditions with an individual to comply with the ADA's accommodations provision or negotiating conditions only with the union representative

²²⁹ *Id.*; MEMORANDUM OF UNDERSTANDING BETWEEN THE EQUAL EMP'T OPPORTUNITY COMM'N & THE U.S. DEP'T OF LABOR OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS REGARDING COORDINATION OF FUNCTIONS (Nov. 9, 2011), https://www.dol.gov/ofccp/regs/compliance/directives/files/mou11072011_508c.pdf.

²³⁰ See Maxwell, *supra* note Error: Reference source not found, at 703.

²³¹ See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, Memorandum of Understanding Between the General Counsel of the National Labor Relations Board and the Equal Employment Opportunity Commission (Nov. 16, 1993).

²³² Connie Y. Harper, *Origin and Nature of the Duty of Fair Representation*, 12 THE LABOR LAWYER 183, 190-91 (1996).

to comply with the NLRA.²³³ Likely as a result of employer pushback, the agencies established the MOU for ADA claims in 1993, only three years after the ADA's passage.²³⁴ Absent such pressure, there is a broader question of what would instigate an agency response to an implicit overlap. If Congress avoids the issue during debate over the relevant statute or dynamic statutory interpretation slowly expands the overlap, this may necessitate an external impetus to make the agencies to address the issue. Thus, it is unclear whether, absent employer pressure such as in the case of conflicting accommodation mandates, NLRB and EEOC would choose to address the implicit overlap between the NLRA and Title VII.

While disadvantages to employees are more diffuse and less likely to be addressed than disadvantages to employers, public interest in victims of sexual harassment could elevate the disadvantages discussed in Section IV.C. For example, media coverage of the interaction between mandatory arbitration and sexual harassment could cause EEOC and NLRB to re-evaluate the drawbacks of their current processes.²³⁵ EEOC and NLRB have begun to cooperate recently in this space; for example, the NLRB addressed the clash with EEOC's workplace civility policies in *Boeing*, overturning the 2004 decision that first created the conflict and ruling that mere maintenance of neutral conduct rules does not violate the NLRA's protection of concerted activity.²³⁶ EEOC Commissioners have indicated that they believe future conversations about collaboration with NLRB are in order,²³⁷ indicating that public attention can in fact cause agencies to evaluate implicit overlaps.

²³³ *Id.* at 192.

²³⁴ *Id.*

²³⁵ *See, e.g.,* Gerstein, *supra* note Error: Reference source not found.

²³⁶ *The Boeing Company*, 365 NLRB No. 154 (2017).

²³⁷ Commissioner Chai Feldblum stated, 'It is important for the EEOC and NLRB to work together in a collaborative manner to provide clarity to employers who wish to create respectful workplaces... I continue to hope that we can do so.' Jacquie Lee, *Workplace Civility Rules Get Boost From Labor Board Decision*, BLOOMBERG NEWS (Dec. 15, 2017), <https://www.bna.com/workplace-civility-rules-n73014473284/>.

2. *Advantages and Drawbacks*

Agency coordination presents several advantages as a solution to implicit overlaps, but the agencies involved must properly identify conflicting goals. This Section analyzes the failure of a previously hidden EEOC Task Force and a 1980 proposed MOU to address the overlap between EEOC and NLRB, assessing the key takeaways for new coordination efforts. Additionally, I briefly overview the legal challenges that agency coordination may face absent congressional authorization.

Agency coordination would maintain the relative expertise of each agency, although it could diminish the availability of multiple channels; an MOU would need to establish which agency would investigate claims first and whether the plaintiff can also take the claim to the secondary agency if the first agency declines to pursue the issue. For example, establishing EEOC as the first agency could reduce the perception of mandatory arbitration clauses as a barrier, but either form of the agreement would improve transparency and efficiency as agencies coordinate their efforts. Any MOU for an implicit overlap would also benefit from a data provision that tracks types of claims that fall in overlapping processes, such as union sexual harassment claims.

However, even if agencies do attempt to coordinate their responses to the implicit overlap, it is crucial that they properly identify the sources of conflict. In 1979, the EEOC established an EEOC Collective Bargaining Project Task Force that aimed to improve coordination with NLRB, but the Task Force became an effort “to address the apparent inability of the Commission to make clear distinctions between employer and union respondents.”²³⁸ The

²³⁸ Memorandum from Eleanor Holmes Norton to Daniel E. Leach, Howard Univ. J. Clay Smith Jr. Papers, folder 13 (Mar. 18, 1980) (on file with author). Note: A thorough search on HeinOnline, Google Scholar, and EBSCO Academic Search Premier revealed no academic discussion of this task force. For a brief discussion by two participants in the task force, see Winn Newman & Carole W. Wilson, *The Union Role in Affirmative Action*, 32 LABOR L.J. 323, 330 (1981).

EEOC invited participants from a range of unions and focused its efforts on recognizing “good faith” efforts by unions working with discriminatory employers to encourage voluntary affirmative action programs.²³⁹ However, not all EEOC Commissioners believed that the Task Force’s efforts were properly focused; in his personal notes on memoranda about the Task Force’s work, EEOC Commissioner Clay Smith Jr. rejected the notion that EEOC should team up with one side (unions) over another (employers)²⁴⁰ and noted the lack of discussion of the DFR as a major source of overlap.²⁴¹ The EEOC’s focus on whether to include unions as co-defendants with employers fundamentally missed the need to discuss conflicting approaches to discrimination claims brought against unions.

A few months later, the NLRB sent a letter to its regional directors explaining that it had proposed an MOU with EEOC for Title VII claims but that EEOC had rejected this proposal.²⁴² The proposed MOU mirrored the deferral process that would later be established for ADA claims, but EEOC’s Staff Committee on Interagency Policy argued that the NLRB’s cease-and-desist authority was preferable for complainants and “that the Board’s and EEOC’s authorities over similar complaints vindicate different Congressional policies and purposes.”²⁴³ Thus, after spending months meeting with union officials on a task force aimed at collective bargaining over affirmative action programs and leaving unions off of new complaints, EEOC took the stance

²³⁹ EQUAL EMP’T OPPORTUNITY COMM’N, COMMISSION RESOLUTION TO ENCOURAGE VOLUNTARY AFFIRMATIVE ACTION, Howard Univ. J. Clay Smith Jr. Papers, folder 14 (Mar. 21, 1980) (on file with author).

²⁴⁰ TITLE VII AND COLLECTIVE BARGAINING: PROPOSAL AND RESOLUTION TO ENCOURAGE VOLUNTARY EFFORTS 3, Howard Univ. J. Clay Smith Jr. Papers, folder 14 (Mar. 21, 1980) (on file with author) (writing “NO” and circling it next to the phrase “Pursuant to such a policy, the Commission would seek to cooperate with a union (in appropriate circumstances) filing charges against an employer).

²⁴¹ Memorandum from Daniel E. Leach to Marvin Rogoff, Collective Bargaining Project: Report on Meetings, Observations 3, Howard Univ. J. Clay Smith Jr. Papers, folder 14 (Mar. 21, 1980) (on file with author) (writing and circling “Duty of Fair Rep. vs Title VII).

²⁴² Memorandum from William A. Lubbers, General Counsel, NLRB, to All Regional Directors, Officers-in-Charge, and Resident Officers, 80-31 (June 24, 1980).

²⁴³ Letter from Francesta E. Farmer, Director, Office of Interagency Coordination, Equal Emp’t Opportunity Comm’n, to William A. Lubbers, General Counsel, NLRB (Apr. 28, 1980).

that the underlying conflict in agency goals—which necessitates coordination—is itself an argument against agency coordination.

It appears that Commissioner Smith disagreed with these justifications for rejecting the proposed MOU. Less than a week after the EEOC’s rejection of the proposal, Commissioner Smith delivered a public speech that identified the DFR overlap as a major conflict and emphasized the need for EEOC and NLRB to coordinate these claims moving forward, in the context of racial discrimination.²⁴⁴ Commissioner Smith argued that addressing the conflict through coordination was within EEOC’s authority because “Executive Order 12067 authorizes the Commission to coordinate the Federal government’s civil rights efforts. EEOC is to consolidate overlapping interests wherever it can appropriately do so.”²⁴⁵ While I explore challenges to the authority of agencies to define their own jurisdiction shortly, Commissioner Smith’s belief in the Executive Order’s relevance (as an EEOC Commissioner) and the ongoing Task Force meetings with union representatives during consideration of the MOU suggests other, unstated motives behind the EEOC’s rejection. The NLRB’s response suggests tension between the two agencies²⁴⁶ and Commissioner Smith’s speech reflects disagreement within EEOC over the nature of the implicit overlap and resulting conflicts.²⁴⁷ Thus, nearly four decades ago, both inter- and intra-agency disagreement over the implicit overlap prevented agency coordination of the conflict between EEOC and NLRB.

Finally, it is not firmly established that agency-initiated coordination is permissible without congressional authorization.²⁴⁸ Supreme Court decisions following Commissioner

²⁴⁴ Speech, J. Clay Smith Jr., Overlapping Jurisdiction of the Equal Employment Opportunity Commission and the National Labor Relations Board, *Selected Speeches* Paper 2, at 14-16 (May 1, 1980), http://dh.howard.edu/jcs_speeches/2.

²⁴⁵ *Id.* at 21.

²⁴⁶ See Memorandum from Lubbers, *supra* note Error: Reference source not found.

²⁴⁷ See Speech, *supra* note Error: Reference source not found, at 21-22.

²⁴⁸ For a new exploration of judicial review of interagency transfers of authority, see Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. ON REG. 279 (2017).

Smith’s assertion that EEOC could coordinate the overlap under EO 12067 have called this assumption into question, holding that “reconciliation of distinct statutory regimes is a matter for the courts, not agencies.”²⁴⁹ The Supreme Court decided in *City of Arlington v. FCC* that an agency’s navigation of the scope of its own authority may be granted *Chevron* deference when agencies act “based on a permissible construction of the statute.”²⁵⁰ However, *City of Arlington* does not address the question of whether agencies may use MOUs to define the scope of their own authority under implicit overlaps; these are, by definition, times when the statute does not speak to the jurisdictional overlap. Implicit overlaps would certainly meet the *Chevron* Step One question of whether there is ambiguity—Congress has not “directly spoken to the precise question at issue”²⁵¹—because the overlap is implicit. However, the Step Two issue of whether agency coordination of implicit overlaps is reasonable would depend on the extent to which the agencies contravene Congress’s delegation of power and raise due process concerns.²⁵² For example, the Tenth Circuit ruled against DHS and DOL for a similar transfer of authority within their overlapping jurisdiction for foreign worker visa determinations.²⁵³ The court framed the coordination as an impermissible delegation: “The issue we confront is whether an agency may delegate its decision-making responsibility to an entirely different agency. Courts are quite tolerant of the administrative practices of agencies, but passing the buck on a non-delegable duty exceeds elastic limits.”²⁵⁴ Litigants have also challenged EEOC’s delegation of Title VII

²⁴⁹ *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018).

²⁵⁰ 569 U.S. 290, 296 (2013).

²⁵¹ 467 U.S. 837, 842-43 (1984).

²⁵² Shah [2017], *supra* note Error: Reference source not found, at 282-83.

²⁵³ *See* 8 U.S.C. § 1184(c)(1) (2012); *G.H. Daniels III & Assoc., Inc. v. Perez*, 626 Fed. Appx. 205, 207 (10th Cir. 2015); *see* Shah [2017], *supra* note Error: Reference source not found, at 282.

²⁵⁴ *Perez*, 626 Fed. Appx. at 207.

authority to OFCCP and, so far only in dicta, some courts have argued that OFCCP should not have jurisdiction over these claims based on due process concerns.²⁵⁵

The Tenth Circuit also emphasized that DHS stretched its mandate to “consult” with DOL too far in delegating decisionmaking.²⁵⁶ Implicit overlaps, in which Congress has not directed agencies to work together, may not even have the jurisdictional hook of consultation provisions to justify delegations of authority. EO 12067 could serve as a form of mandate for EEOC to coordinate DFR claims with NLRB, as Commissioner Smith suggested,²⁵⁷ but this is an executive order rather than a directive by Congress. The EO could helpfully inform court assessment of whether an interpretation of Title VII to allow coordination is reasonable, but as administrative law scholars have recently noted, the lack of case law in this area and the ways in which overlaps disrupt fundamental assumptions about separation of powers in administrative law leaves much room for speculation.²⁵⁸

As the entities created by Congress to carry out specific goals, it is not certain whether agencies may navigate conflicts in statutory goals without congressional direction. For example, EEOC and NLRB could decide that sexual harassment is a major issue that the public cares deeply about and find that current processes do not allow union members to surface such claims in arbitration sufficiently. In response, they could form an MOU that effectively directs all complaints involving employment discrimination to EEOC. However, this approach would prioritize the goal of addressing discrimination over the goal of strengthening collective action,

²⁵⁵ See, e.g., *Walker v. Novo Nordisk Pharm. Indus., Inc.*, 225 F.3d 656, *3 (4th Cir. 2000) (per curiam) (“Title VII requires that a charge be filed with the EEOC, which in turn triggers the investigatory and remedial process called for by the Act. The Act does not, however, contemplate that filing a complaint with another agency can or should be deemed a filing with the EEOC....”); *Meckes v. Reynolds Metals Co.*, 604 F. Supp. 598, 601 (N.D. Ala.) aff’d, 776 F.2d 1055 (11th Cir. 1985).

²⁵⁶ *Id.*

²⁵⁷ Speech, *supra* note Error: Reference source not found.

²⁵⁸ Shah [2017], *supra* note Error: Reference source not found, at 283-84 (arguing that “the existence of these types of interagency arrangements destabilizes fundamental assumptions in administrative law scholarship”).

despite clear statutory mandates in Title VII and the NLRA for *both* goals. Furthermore, some have argued that stronger collective action is the ideal solution to workplace sexual harassment,²⁵⁹ so shifting from NLRB jurisdiction could also run counter to the goals of Title VII. As the case study of NLRB and EEOC in Part III demonstrated, even liberal activists disagree among themselves as to whether the mandates in the NLRA or Title VII should take precedence in advancing worker rights.²⁶⁰ This debate raises a fundamental issue of administrative law: how should agencies and courts respond to unclear congressional intent? The following Section explores how Congress could address this interpretive dilemma.

B. Legislative Action

Given the difficulty that underlying statutory conflicts raise for agencies attempting to carry out their mandates, I argue that the most direct solution would be for Congress to address implicit overlaps by amending one or both of the underlying statutes. Gersen and Shah's positive depiction of agency coordination hinges on the nature of the type of overlap they analyze—explicit overlaps that are intentionally coordinated.²⁶¹ The case study explored in this Paper suggests an explanation for why agencies may not step in when Congress fails to coordinate relevant overlaps: an underlying conflict in agency goals. When Congress avoids such conflict in order to press through important legislation, it becomes more difficult for agencies to coordinate their response to the overlap.²⁶² The case study of EEOC and NLRB suggests two general forms of legislative solutions to implicit overlaps, which I characterize as coordinating the overlap or removing the overlap.

²⁵⁹ Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767, 1835 (2001) (arguing for a redefinition of labor organizations as social justice organizations to address issues like sexual harassment).

²⁶⁰ See *supra* notes Error: Reference source not found-Error: Reference source not found and accompanying text.

²⁶¹ See, e.g., Gersen, *supra* note Error: Reference source not found, at 212; Shah [2015], *supra* note Error: Reference source not found, at 837.

²⁶² See *supra* notes Error: Reference source not found-Error: Reference source not found (explaining how EEOC pointed to the conflict to reject NLRB's proposed MOU).

1. Overlap Coordination

First, Congress could coordinate the overlap between agencies by acknowledging when there are conflicting agency goals and making legislative priorities clearer. The ideal solution would be for Congress to preserve the advantages of overlap while addressing the disadvantages through a clearer legislative mandate that democratically balances conflicting goals. In the case of NLRB and EEOC, Congress could amend Title VII's coverage of unions to specify the relevance of the DFR and direct EEOC and NLRB to coordinate their adjudication of overlapping claims with guidance as to how the agencies should balance and prioritize among competing goals. Or, Congress could even create a new mechanism within EEOC that responds to the unique issues that arise in balancing collective action with antidiscrimination in claims against unions.

While such collaborative legislative solutions may seem far-fetched in today's political climate, the sexual harassment example demonstrates one unique aspect of implicit overlaps that may make a legislative solution uniquely feasible. Underlying goal conflict in implicit overlaps can divide advocates, but could also unite different sets of priorities when properly framed. In the context of union sexual harassment, conservative legislators who are not union supporters could view stronger approaches to union discrimination as a way to strengthen the position of employers, while liberal legislators in the midst of the #MeToo movement could rally around a bill aimed at improving adjudication of victims' claims. Thus, a legislative solution, while difficult for precisely the reasons that originally created the implicit overlap (at least for union racial discrimination claims), could also become a unique opportunity for coalition building.

As a smaller step, Congress may also instruct agencies to coordinate but stop short of amending major statutes by passing a resolution interpreting the relevant statute.²⁶³ This would be easier for Congress to pass, while stimulating important agency dialogue.²⁶⁴ However, overlap coordination through this approach could also raise legal issues due to separation of powers doctrine. In the inverse of the issues raised in Section V.A concerning agency coordination without congressional authorization, Congressional resolutions that alter agency jurisdiction may unduly interfere with agency decisionmaking, to the extent that they are considered creatures of the executive branch exercising quasi-judicial authority.²⁶⁵ For example, *INS v. Chadha* may suggest that altering an executive branch agency's previously exercised adjudicatory authority may raise separation of powers concerns.²⁶⁶ However, Gersen argues that courts should defer to Congress's post-enactment interpretation of statutes given the issue of legislative ossification and lack of response to dynamic statutory interpretation.²⁶⁷ In order to balance these concerns, some have advocated for *Chevron* deference to Congressional resolutions that modify agency jurisdiction.²⁶⁸ Overall, implicit overlaps are a particularly thorny example of determining what is "reasonable" in light of statutory ambiguity and clarifying the statute through an amendment likely presents the clearest, if least likely, solution.

²⁶³ See Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 607-12 (2008) (discussing resolutions interpreting hard statutes as "soft statutes").

²⁶⁴ *Id.* at 600.

²⁶⁵ It is possible that this would be less of an issue for independent agencies such as EEOC and NLRB, but an in-depth discussion of the executive and judicial aspects of agency adjudication is outside the scope of this article. See generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (discussing ways in which all administrative agencies, independent or otherwise, constitute a fourth branch of government to which simplistic separation-of-powers analysis is inapplicable).

²⁶⁶ See *INS v. Chadha*, 462 U.S. 919, 951 (1983); Shah [2015], *supra* note Error: Reference source not found, at 813-14 n.17; Note, *A Chevron for the House and Senate: Deferring to Post-Enactment Congressional Resolutions that Interpret Ambiguous Statutes*, 124 HARV. L. REV. 1507, 1508 (2011) ("[T]he Supreme Court, in *INS v. Chadha*, limited Congress's role in administering statutes, despite its institutional advantages over courts—and, in some respects, over agencies—in developing policy." (footnote omitted)).

²⁶⁷ Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 607-12 (2008) (discussing resolutions interpreting hard statutes as "soft statutes").

²⁶⁸ Note, *supra* note Error: Reference source not found, at 1508-09.

2. *Overlap Removal*

Another form of a legislative solution to disadvantages of implicit overlaps would be to remove the overlap entirely by assigning adjudication of the overlapping claims solely to one agency. Advantages of this approach would include increased transparency as one agency fully “owns” a substantive issue, as well as increased efficiency due to reduced duplication. However, this approach would lose the advantages of relative expertise and multiple channels for claims. It may be desirable for one agency to benefit from the other’s expertise under a system of coordination. So, drawing a bright line between agency jurisdictions could arbitrarily deprive complainants of valuable agency experience.

It may also be the case that the statute enacted more recently could be clarified to preempt the earlier statute in the overlapping area. In the case of EEOC and NLRB, EEOC has previously argued that “Title VII should be interpreted to ‘strip labor unions of their exclusive authority in the area of equal employment opportunity’”²⁶⁹ and it would be helpful for Congress to clarify to what extent this authority has been stripped. Federal courts could be the better venue for discrimination claims because of structural advantages, such as an independent adjudicator (not chosen by the employer or union) and the countermajoritarian nature of EEOC.²⁷⁰ In fact, federal courts were the original, pre-*Hughes Tool* venue for DFR claims, so shifting authority from NLRB arbitration may not be a significant stretch.²⁷¹

However, it is possible that agencies and their stakeholders would resist the removal of jurisdiction. Shah argues that agencies are less territorial in the context of adjudication (relative to rulemaking) because individual adjudication does not further the agency’s influence or

²⁶⁹ SCHILLER, *supra* note Error: Reference source not found, at 204 (citing Brief of Amicus Curiae United States Equal Employment Opportunity Commission at 11, WACO, 485 F.3d 917 (D.C. Cir. 1973) (No. 71-1656)).

²⁷⁰ *See id.*; Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1551 (2002) (arguing that labor law has ossified and focus should shift to courts).

²⁷¹ *See supra* Section III.A.

interests and can be a substantial drain on resources.²⁷² However, agencies that are relatively more adjudication-oriented, such as EEOC and NLRB,²⁷³ may view adjudication as more central to their mission. Removing the overlap entirely could also result in procedural due process differences for unionized versus non-unionized workers; for example, if NLRB took all claims involving unions, it is unclear whether arbitrators would as effectively implement Title VII protections as federal judges evaluating cases brought by EEOC.²⁷⁴ Finally, removing the overlap may be an artificial solution because it ignores the underlying conflict in agency goals, simply discarding the goal represented by one agency process in favor of efficiency.²⁷⁵ In sum, legislative solutions could address the overlap more directly than agency coordination and raise fewer legal challenges, but legislative *coordination* of the overlap may be more effective than complete *removal*.

C. Judicial Resolution of Relevant Splits

Finally, courts could address the confusing legal standards and contradictory outcomes created by implicit overlaps. This approach could work independently of an agency or legislative solution, serving either to patch the disadvantages explored in Section IV.C, or as a supplement to new coordination. I argue that courts should standardize treatment of implicit overlaps by choosing a legal standard that best accommodates the goals underlying the sources of statutory authority. This could take place either through each circuit balancing conflicting goals more

²⁷² Shah [2017], *supra* note Error: Reference source not found, at 289.

²⁷³ This is intended as a statement relative to agencies such as the Environmental Protection Agency, which engage in extensive notice-and-comment rulemaking. The NLRB is the quintessential example of an agency that “rel[ies] almost exclusively on decisions made in adjudicative proceedings for making policy to be applied in future cases.” AM. BAR ASS’N, *Use of Rulemaking or Adjudication for the Setting of Policy: A Comparison* 114, in A GUIDE TO FEDERAL AGENCY RULEMAKING (2019).

²⁷⁴ See Herbert & Reischel, *supra* note Error: Reference source not found.

²⁷⁵ See *supra* note Error: Reference source not found and accompanying text (discussing the importance of collective action to address issues like workplace sexual harassment).

intentionally by recognizing implicit overlaps and their effects, or through a Supreme Court decision that resolves the relevant circuit split.

Courts should aim to reach a clear legal standard that balances statutory goals but, at the same time, avoids conflating distinct goals. For example, in cases involving the DFR and Title VII, scholars have argued that “courts [that] attempt to carve out a place for the duty of fair representation in Title VII ... have sacrificed fully realizing the mandate of Title VII in favor of a judicially-created doctrine that affords individual workers with limited protection from discriminatory behavior.”²⁷⁶ Rather than reflexively incorporating DFR analysis into Title VII claims against unions and deferring to collective action goals, federal courts should evaluate the purpose of Title VII § 703(c)(1), which covers union discrimination in representation.²⁷⁷ Introducing DFR analysis into Title VII claims does not help courts balance statutory goals because collective bargaining is already protected throughout the NLRA. Allowing unions to double dip, by receiving deference in both majoritarian arbitration and countermajoritarian Title VII litigation fails to balance congressional goals across the two statutory schemes. Instead, holding unions fully accountable for discriminatory acquiescence under a Title VII standard would strengthen union bargaining on behalf of *all* members.²⁷⁸

Furthermore, holding unions and employers (whose discrimination is only covered under Title VII) equally accountable for discrimination would encourage both to work together to address workplace discrimination and harassment, rather than current skewed incentives that cause unions to point to the employer as the problem.²⁷⁹ To the extent that courts are concerned about collective bargaining strength, the implicit overlap with NLRB arbitration should address this issue because unions clashing with employers will still receive the more deferential DFR

²⁷⁶ Maxwell, *supra* note Error: Reference source not found, at 706.

²⁷⁷ *Id.* at 692.

²⁷⁸ *Id.* at 707.

²⁷⁹ *Id.*

standard in arbitration of workplace discrimination issues. In the context of the countermajoritarian Title VII process, plaintiffs should not face a higher hurdle because their complaints are against their union.

Thus, courts should actively take into account the existence of an implicit overlap and the form that recognition takes will vary depending on the nature of the overlap. This will sometimes mean that courts should recognize when a given statutory claim implicates goals that should be balanced within the same claim; this is most likely to occur when dual goals are reconcilable. However, in cases such as the DFR, a hybrid test is unresponsive to the rights the complainant seeks to vindicate. The existence of a distinct process for a conflicting majoritarian goal makes conflation of the two schemes unworkable, so courts should focus on Title VII standards to counterbalance use of the DFR in arbitration.

It is also possible for the Supreme Court to resolve circuit splits caused by implicit overlaps. Similar to the likelihood of a Congressional response, the conflicting goals in implicit overlaps may counterintuitively make Supreme Court action on the circuit split more likely. For example, the odds of a Supreme Court decision imposing the Title VII standard without DFR analysis to help victims of sexual harassment may appear low,²⁸⁰ but conservative hostility to unions may actually encourage a decision to hold unions to a more plaintiff-friendly standard. In its highly-publicized *Epic Systems* ruling, the Court recently admonished the NLRB for contradicting the Federal Arbitration Act in the context of employee class action waivers.²⁸¹ The Court argued that “on no account might we agree that Congress implicitly delegated to an agency

²⁸⁰ Recent Supreme Court decisions on employment discrimination have been employer-friendly as the Court has shifted to the right. *See, e.g.,* *Yovino v. Rizo*, 586 U.S. ___ (2019) (per curiam) (vacating the Ninth Circuit’s landmark ruling in favor of a plaintiff alleging gender pay discrimination by invalidating Judge Reinhardt’s posthumously counted vote); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017) (ruling that sexual orientation discrimination does not violate Title VII).

²⁸¹ In 2012, the Board held that employer-imposed contracts barring group litigation in any forum—arbitral or judicial—are unlawful in *D.R. Horton*, 357 N.L.R.B. 2277 (2012). *See Epic Systems*, 138 S. Ct. at 1629.

authority to address the meaning of a second statute it does not administer”²⁸² and that “reconciliation of distinct statutory regimes is a matter for the courts, not agencies.”²⁸³ Although *Epic Systems* did not involve another agency and the Court held that the NLRA did not actually overlap with the FAA, the opinion signals that the Court views a judicial solution as the superior approach to resolving any implicit overlaps. The majority opinion may also suggest that the Court would be open to arguments that incorporation of the DFR into Title VII claims injects NLRB influence into the civil rights statute.

While *Epic Systems* is not a decision that helps employees assert their rights (rather the opposite), the anti-union, anti-NLRB nature of Justice Gorsuch’s opinion for the Court could potentially be used to strengthen Title VII rights involving unions. It is also worth noting that Chief Justice Roberts participated in the *Epic Systems* majority, as well as in another major blow to unions earlier last Term, *Janus*.²⁸⁴ This may suggest that the Court will continue to take a firm stance against unions that could ultimately be used to improve union representation and help victims of sexual harassment. Thus, the Supreme Court could choose to take up the circuit split on discrimination and harassment claims when this might otherwise seem unlikely.

VI. Concluding Thoughts

Unaddressed implicit overlaps present an important opportunity to reconcile conflicting agency goals. In this Paper’s case study, it is worth emphasizing that declining union membership and the #MeToo movement provide an ideal scenario to change how the collective bargaining process responds to issues affecting underrepresented segments of a union’s membership. In fact, addressing issues like sexual harassment could provide the coalition-

²⁸² *Epic Systems*, 138 S. Ct. at 1629.

²⁸³ *Id.* (quotations omitted).

²⁸⁴ *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

building jumpstart that unions need in order to regain traction in the modern workplace.²⁸⁵ While this Paper may at first glance appear to reflect an anti-union bent due to how conflicting goals have been carried out, the proposed solutions would strengthen the ability of unions to respond to issues such as sexual harassment. Solutions to implicit overlaps can enable each agency to better fulfill its statutory mandate and achieve important societal goals.

²⁸⁵ See, e.g., Crain & Matheny, *supra* note Error: Reference source not found; Ann C. Hodges, *Strategies for Combating Sexual Harassment: The Role of Labor Unions*, 15 TEX. J. WOMEN & L. 183, 185 (2006).