I. Introduction

The National Labor Relations Act (NLRA) and Title VII of the Civil Rights Act of 1964 are integral elements of this nation's comprehensive labor policy. Although each legislative component must be construed in accordance with the overall scheme of labor relations regulation, it is clear that the NLRA and Title VII differ in their basic foci. The principal aim of the NLRA is to establish collective bargaining as the mechanism for settlement of industrial disputes. The core of Title VII, on the contrary, is application of the antidiscrimination principle to the nation's workplaces. In Emporium Capwell Co. v. Western Addition Community Organization, the Supreme Court acknowledged the pervasive reach of the antidiscrimination principle, but held that minority employees who attempted to bargain separately with their employer on issues of alleged discrimination were not within the protective sphere of section 7 concerted activity. The Court emphasized the importance of preserving the orderly operation of the collective bargaining

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3 "[I]t is a commonplace that we must construe the NLRA in light of the broad national labor policy of which it is a part." Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 66 (1975) (citation omitted).
4 "Experience has proved that protection by law of the right of employees to ... bargain collectively safeguards commerce ... by encouraging ... friendly adjustment of industrial disputes ... ." 29 U.S.C. § 151 (1970).
5 Section 2000e-2(a)(1) provides:
It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual... because of such individual's race, color, religion, sex, or national origin... .
7 "Plainly, national labor policy embodies the principles of nondiscrimination as a matter of highest priority." Id. 66 (citation omitted).
8 29 U.S.C. § 157 (1970). Section 7 of the NLRA defines the basic contours of protected activity. It grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for... mutual aid or protection... ." Id.
process. Emporium Capwell is by no means the only example of the need for judicial reconciliation of these occasionally conflicting principles. Westinghouse Electric Corp. provides an opportunity to examine again the interaction of the two principles through analysis of union liability—under the duty of fair representation and under Title VII—for failure to bring Title VII suits against the employer.

The Westinghouse litigation involved a charge by the International Union of Electrical, Radio and Machine Workers (IUE) that the company had violated section 8(a)(5) of the NLRA by its refusal to furnish certain information solicited by the union. In order to understand the significance of the information request, it is necessary to briefly recount the history of the collective bargaining relationship of the parties.

In 1973, the IUE structured its national negotiations in accordance with its affirmative action program calling for the total elimination of all forms of job discrimination. Pursuant to this goal, the union requested and received extensive bargaining information concerning the distribution of male and female employees by labor grade. These same statistical compilations subsequently were utilized in two Title VII lawsuits filed by the IUE against Westinghouse. In 1974, one year into the existing three year contract, the union made an information request similar to the one answered during the 1973 negotiations. The request specified, inter alia, employment breakdowns on the basis of race and Spanish surname, and a listing of all discrimination charges and complaints.

9 420 U.S. at 69.
11 No. 6-CA-7680 (NLRB Region 6, Pittsburgh, Pa., filed Feb. 17, 1976).
12 29 U.S.C. § 158(a)(5) (1970). Section 8(a)(5) of the NLRA declares it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." Id.
13 Charging Party's Post-Hearing Brief at 6, Westinghouse Electric Corp., No. 6-CA-7680 (NLRB Region 6, Pittsburgh, Pa., filed Feb. 17, 1976). The 1973 effort was not the IUE's first attempt to secure protection against job discrimination for its members. For example, an antidiscrimination clause was previously incorporated into the collective bargaining agreement. Charging Party's Post-Hearing Brief, id. 3-5, contains a complete history of the union's bargaining position on antidiscrimination issues, as well as references to previous contractual provisions, some of which prohibited racial and sexual discrimination, guaranteed equal pay for equal work, and provided for maternity leaves of absence.
14 Brief on Behalf of Respondent at 15, Westinghouse Electric Corp., No. 6-CA-7680 (NLRB Region 6, Pittsburgh, Pa., filed Feb. 17, 1976). The union also caused two other Title VII actions to be brought against Westinghouse. Id.
filed against Westinghouse.\textsuperscript{15} The company objected that such information was not relevant to collective bargaining, was burdensome to compile, and appeared to be a discovery vehicle facilitative to potential discrimination suits against it. Accordingly, it refused to comply with the union's request. The union filed a complaint with the National Labor Relations Board (NLRB), and the Director of the Sixth Region charged Westinghouse with violations of sections 8(a)(5) and 8(a)(1) of the NLRA.\textsuperscript{16} The union asserted that the duty of fair representation required it "to establish fair employment practices that meet the requirements of the Civil Rights Act. The information . . . requested is . . . necessary . . . [to] fulfill that duty."\textsuperscript{17}

Administrative Law Judge Marvin Roth held the company's reasons for withholding the information insufficient, and ordered that the information be furnished to the union as requested. Judge Roth framed the issue as "[w]hether either generally or in the context of this case, maintenance or participation of a union in litigation against an employer can be a legitimate function of collective bargaining."\textsuperscript{18} He observed that the union had "an affirmative duty to root out discrimination,"\textsuperscript{19} and concluded that the filing of Title VII suits for sex or race discrimination constituted a legitimate function of the union's collective bargaining obligation. Failure to take any action, Roth noted, "would leave the union open to charges that it was failing to carry out its responsibilities as bargaining representative, or [was] becoming a party to discriminatory practices . . . ."\textsuperscript{20} Judge Roth thus raised the spectre of union liability for

\textsuperscript{15} Specifically, the union requested a breakdown by race and sex with respect to (1) labor grade; (2) classification and wage rate; (3) incentive and day work; (4) seniority; (5) hiring; (6) promotions and upgrades. The union also requested (7) a list of complaints and charges filed under various fair employment practice laws; (8) copies of the company's affirmative action program; and (9) work force analyses. Westinghouse Electric Corp., No. 6-CA-7680, slip op. at 2-3 (NLRB Region 6, Pittsburgh, Pa., Feb. 17, 1976).

\textsuperscript{16} 29 U.S.C. §§ 158(a)(5) & 158(a)(1) (1970). Section 8(a)(1) of the NLRA declares it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed . . . [them]." Id.

\textsuperscript{17} Charging Party's Post-Hearing Brief, supra note 13, at 14.

\textsuperscript{18} Westinghouse Electric Corp., No. 6-CA-7680, slip op. at 24 (NLRB Region 6, Pittsburgh, Pa., Feb. 17, 1976). Judge Roth characterized the union's purpose in seeking the information as follows: "In the present case, pending or prospective litigation is not merely incidental or coincidental with the Union's requests; rather, it is a major reason why the requests were made." Id.

\textsuperscript{19} Id. 21.

\textsuperscript{20} Id. 25. The IUE argued vigorously that its obligations under the duty of fair representation and Title VII would not necessarily be satisfied by invocation of the available contractual mechanisms: "The Union's duty to eliminate sexual and
failure to prosecute the Title VII claims of its members—liability grounded in the union’s duty of fair representation and in the requirements of Title VII itself.

In the course of his opinion, Judge Roth observed that, aside from litigation, the union had two avenues open to it by which to enforce its antidiscrimination policy. First, it was free to strike. However, economic activity supportive of minority group rights would very likely fail to command the broad support necessary in order for concerted activity to be effective. Second, the union could take no action, and leave effectuation of its goals to individual employees. In addition to depriving such employees of an overview of the company’s policies and practices, such noninvolvement might, as noted, leave the union open to liability. For these reasons, the union, in the judge’s view, had only one viable option: “[T]o initiate or join in the filing and prosecution of antidiscrimination charges and lawsuits.” Exceptions to the decision were filed, and arguments were heard before the NLRB in September, 1977.

Judge Roth’s suggestion that unions could be held liable for failure to institute Title VII actions raises important issues under racial discrimination may require both contractual and statutory relief.” Charging Party’s Post-Hearing Brief, supra note 13, at 31 (emphasis added).

21 See text accompanying notes 33-93 infra.

22 See text accompanying notes 92-125 infra.

23 Judge Roth disregarded possible contractual relief mechanisms. The union could have utilized the grievance process provided for in the collective bargaining agreement, and, if dissatisfied with the outcome, could have requested arbitration pursuant to section XIV(A) of the agreement. Respondent’s Brief in Support of Exceptions at 11-12, Westinghouse Electric Corp., No. 6-CA-7680 (NLRB Region 6, Pittsburgh, Pa., filed Feb. 17, 1976). Judge Roth placed great emphasis on the absence of compulsory arbitration, as if it rendered the antidiscrimination clause completely nugatory. However, breach of the collective bargaining agreement by the employer would be actionable under section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1970).

24 Westinghouse Electric Corp., No. 6-CA-7680, slip op. at 25 (NLRB Region 6, Pittsburgh, Pa., Feb. 17, 1976).

25 Id.

26 Id.


28 For some time, it was not certain that unions were permitted to bring Title VII actions. The statute provides that a Title VII suit may be brought by any person claiming to be aggrieved or, if the EEOC itself has filed a charge, by any person the charge alleges was aggrieved by the unlawful employment practice. Suits may be filed after the regular conditions precedent to lawsuits under the equal employment opportunities sections of the Civil Rights Act have been met. See generally 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975). The Act defines “person” to include labor unions. 42 U.S.C. § 2000e(a) (Supp. V 1975). Despite this language, the EEOC initially took the position that labor unions were not persons aggrieved so as to have standing to sue. In 1966, however, the Commission completely changed its views, and announced that unions had standing to pursue both agency and court actions. This position was subsequently supported by the
the duty of fair representation and Title VII. It is imperative to note that these issues are not limited to the factual setting of *Westinghouse*—the 8(a)(5) information request context. The duty of fair representation question could be raised directly in an unfair labor practice before the NLRB if the charging employee alleged


Although it is clear that unions that have a collective bargaining relationship have standing to file both EEOC charges and Title VII suits, several recent cases cast doubt on the ability of unions to act as class representative for aggrieved employees during class action litigation. In *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973), the court held that an inherent conflict arose from a union's attempt to act as class representative in a Title VII suit. Since the union had previously bargained for the very contract that the Title VII suit claimed was discriminatory, the court held that the union could not fairly and adequately represent employee class interests. *See also* *Air Line Stewards and Stewardesses Ass'n Local 550 v. American Airlines Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied sub nom.* *Air Line Stewards and Stewardesses Ass'n Local 550 v. Zipes*, 416 U.S. 993 (1974). *Cf.* *Case Note, 15 B.C. INn. & CoM. L. Ev.* 1326, 1332 (1974) (In discussing the issue raised by *Air Line Stewards*, the author concluded: "It is clear, then, that a union's status as a certified collective bargaining agent gives it no special role to play in Title VII disputes."). In both *Lynch* and *Air Line Stewards*, however, the courts, despite denying the unions the right to act as class representatives, did recognize that their interests were sufficiently adverse to the employer to permit them to proceed as plaintiffs.

The IUE has brought Title VII suits as class actions in the past, *Respondent's Brief in Support of Exceptions at 2, Westinghouse Electric Corp.*, No. 6-CA-7680 (NLRB Region 6, Pittsburgh, Pa., filed Feb. 17, 1976), a position for which it has been attacked under the *Lynch* rationale. *See International Union of Elec. Workers v. Westinghouse*, 73 F.R.D. 57 (W.D.N.Y. 1976) (denying motion to realign union as party defendant).

Although Judge Roth correctly characterized the issue as whether information sought for litigation purposes is relevant to collective bargaining, and did not hold that the duty of fair representation was applicable, the two issues are inter-related. Just as the duty of fair representation extends to union conduct in contract negotiation and administration, *see text accompanying notes 70-92 infra*, the employer's duty to disclose information relevant to collective bargaining also extends to administration of the agreement. *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967). Of course, the fact that the duties are currently co-extensive in no way requires that they continue to be construed as such. However, the "exclusivity of power" rationale that this Comment will offer as the touchstone of applicability of the duty of fair representation has important implications for the disclosure issue. If, as this Comment demonstrates, the union does not exercise exclusive power when it refuses to initiate Title VII litigation against the employer, the duty to disclose similarly cannot apply. When the union does decide to initiate litigation against the employer, it likewise does not exercise its collective bargaining power to enter into binding agreements with the employer. In both cases, the union acts unilaterally—not bilaterally in the spirit of collective bargaining. For that reason, information requested for litigation purposes is not relevant to collective bargaining. *See text accompanying notes 136-43 infra.*
that the union's decision not to litigate was arbitrary, discriminatory, or in bad faith.\textsuperscript{31} Similarly, although the nature of the "duty" to litigate under Title VII is fundamentally different from that which is arguably imposed by the duty of fair representation,\textsuperscript{32} the union's refusal to bring a Title VII action against the employer could result in it's being held liable as a codefendant.

The thesis of this Comment is that neither the duty of fair representation nor Title VII imposes liability on labor unions for failure to prosecute the Title VII claims of their members. First, the origin and evolution of the duty of fair representation will be examined, and it will be determined that the duty is inapplicable to a union's decision not to file a Title VII suit against the employer. Second, the Comment will survey a conflicting line of Title VII cases on union liability for discriminatory contract clauses and practices, and will conclude that the policies of Title VII would be impeded by a construction that unions must bring suit against the employer to assure freedom from liability. Third, the Comment will demonstrate that the policy preference for settlement of industrial disputes by peaceful collective bargaining, embedded in the NLRA and relevant to the construction of Title VII, mandates the conclusions reached in the two previous sections. Fourth, the Comment will conclude that requests for information for purposes of litigation may properly be denied as falling outside the employer's 8(a)(5) duty of disclosure. The latter section will also develop criteria for separating valid requests for bargaining information from improper requests for litigation information.

II. THE DUTY OF FAIR REPRESENTATION

A. Doctrinal Development

The duty of fair representation has alternately been described as "a legal term of art, incapable of precise definition,"\textsuperscript{33} and as a "picture . . . still being painted, its final colors having not yet been placed on the canvas."\textsuperscript{34} Certainly the scope of its inquiry and the protection it affords employees have expanded greatly since the Supreme Court, in first defining the duty, held that a labor union was liable for negotiating a racially discriminatory contract.\textsuperscript{35} Since

\textsuperscript{31} See text accompanying notes 58-67 infra.
\textsuperscript{32} See text accompanying notes 133-36 infra.
\textsuperscript{33} Griffin v. UAW, 469 F.2d 181, 182 (4th Cir. 1972).
\textsuperscript{34} Weiss, Federal Remedies for Racial Discrimination by Labor Unions, 50 GEO. L.J. 457, 459 (1962).
that time, the duty of a union to represent fairly all of the employees within the bargaining unit has been extended beyond the union's negotiating function to its actions at grievances\textsuperscript{36} and arbitration,\textsuperscript{37} and its substantive reach has been significantly broadened to prohibit arbitrary and perfunctory conduct,\textsuperscript{38} and even union negligence.\textsuperscript{39} A brief account of the doctrinal development of the duty of fair representation is necessary to a reasoned analysis of whether it should be extended to the union's decision whether to bring a Title VII suit against the employer.

The labor movement in the United States began as an effort on the part of workers to organize in the face of overwhelming employer power. Congress assisted in this effort in 1935 with the Wagner Act, which recognized the rights of unions to organize for "the purpose of collective bargaining or other mutual aid or protection . . . ."\textsuperscript{40} In seeking to strengthen unions' position vis-à-vis employers, individual interests were necessarily subordinated to the larger, collective interest. As unions grew, they developed internal hierarchies and formalized structures similar to those of the large corporations with which they were dealing; unions' institutional interests did not always coincide with the interests of their individual members. To avoid having these interests trampled upon by the very groups created to advance them, the courts fashioned the doctrine known as the duty of fair representation.

The seminal duty of fair representation case is \textit{Steele v. Louisville & Nashville R.R.}\textsuperscript{41} In that case, an exclusively white union negotiated a new contract which would have "ultimately . . . exclude[d] all Negro firemen from the service."\textsuperscript{42} The Court reasoned that the exercise of the statutorily-granted power to act exclusively on behalf of those within the bargaining unit necessarily involved the assumption of a duty to exercise that power in the interest and behalf of all those affected—the minority as well as the majority. The Court held that the Railway Labor Act (RLA) implicitly "expresses the aim of Congress to impose on the bargaining representa-

\textsuperscript{38} \textit{Vaca v. Sipes}, 386 U.S. 171 (1967).
\textsuperscript{39} \textit{Ruzicka v. General Motors Corp.}, 523 F.2d 306 (6th Cir. 1975).
\textsuperscript{42} 323 U.S. at 195.
tive 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."

The Court applied the fair representation analysis, developed initially under the RLA, to a case arising under the NLRA, in *Ford Motor Co. v. Huffman*, which also involved a union's conduct in the negotiation of a contract. In *Huffman*, the union and the employer had agreed to a seniority provision crediting veterans with preemployment military service. After noting the impossibility of achieving complete satisfaction of all the disparate elements within a union, the Court concluded that a union must be accorded "a wide range of reasonableness . . . in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

In *Conley v. Gibson*, the Court extended the duty of fair representation to encompass union conduct in the administration of the collective bargaining agreement. The Court held that the duty set out in *Steele* to represent fairly all the members of the bargaining unit "does not come to an abrupt end . . . with the making of an agreement between the union and employer."

In *Miranda Fuel Co.*, the NLRB determined for the first time that a violation of the duty of fair representation constituted an unfair labor practice. The Board held that the union violated section 8(b)(1)(A) of the NLRA by insisting on a reduction in an employee's seniority status that was not required by the terms of the collective bargaining agreement, and that served no other legitimate union purpose. The Board held that the obligation to represent all the employees in the bargaining unit, derived from the exclusive bargaining provision of section 9(a) of the NLRA, was to be viewed

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43 Id. 202-03.
46 345 U.S. at 338.
48 Id. 46.
49 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963). The *Miranda* decision has gained general judicial acceptance, although the Board's rationale has not been uniformly adopted. See R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 698-701 (1976).
as a right "to bargain collectively through representatives of their own choosing . . . ," guaranteed by section 7 of the Act.\textsuperscript{52} The union violated section 8(b)(1)(A) by "restraining or coercing" the employee in the exercise of that right.\textsuperscript{53}

Although the Supreme Court had imposed the duty of fair representation on union conduct in negotiation and administration of the collective bargaining agreement, and the NLRB had incorporated its strictures into the unfair labor practice provisions, the substantive content of the duty afforded aggrieved employees only minimal protection against union abuse of power. \textit{Huffman} emphasized the union's "wide range of discretion," and the courts structured the duty accordingly. Seizing upon the \textit{Steele} Court's admonition to unions "to exercise fairly the power conferred upon . . . [them] in behalf of all those for whom . . . [the unions act], without hostile discrimination against them,"\textsuperscript{54} most lower courts applied a "bad faith" standard of analysis. Courts observed that the duty consisted of nothing more than a requirement "to forbear from 'hostile discrimination.'\textsuperscript{55} The arbitrariness shown must be of the bad faith kind. . . . Something akin to factual malice is necessary."\textsuperscript{56} Furthermore, mere allegations that the union's behavior had been "invidious" or "discriminatory" were insufficient to state a claim. A necessary element was "a concomitant identification


\textsuperscript{53}Moreover, the union, in seeking to reduce the employee's seniority, was also held to have violated section 8(b)(2) of the NLRA, 29 U.S.C. § 158(b)(2) (1970), by causing the employer to derogate his employment status, which had the foreseeable effect of encouraging union membership.

The Board's next fair representation cases dealt with race discrimination, and in \textit{Hughes Tool Co.}, 147 N.L.R.B. 1573 (1964), it held that a union's refusal to process a worker's grievance because of race was also an unfair labor practice in violation of NLRA §§ 8(b)(1)(A), 8(b)(2), and 8(b)(3), 29 U.S.C. §§ 158(b)(1)(A), (b)(2), & (b)(3). In quick succession, the Board found violations in the establishment and maintenance of racially discriminatory work quotas, reduction of seniority because of racial considerations, and the refusal to process grievances concerning a company's racially segregated facilities. \textit{See} \textit{Local 1367, International Longshoremen's Ass'n, 148 N.L.R.B. 897 (1964), enforced per curiam, 368 F.2d 1010 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967); International Union, UAW, 149 N.L.R.B. 482 (1964); Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964), enforced, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967).} It is interesting to note that the Board's sudden activity in race discrimination cases, after so many dormant years, came only as the Civil Rights Act was wending its way through Congress. The Bill was enacted on July 2, 1964; the Board's decision in \textit{Hughes Tool Co.} was issued on July 1, 1964. \textit{See Sherman, Union's Duty of Fair Representation and the Civil Rights Act of 1964, 49 MINN. L. REV. 771, 785, 804 (1965).}

\textsuperscript{54}323 U.S. at 203.

\textsuperscript{55}Cunningham v. Erie R.R., 266 F.2d 411, 417 (2d Cir. 1959).

\textsuperscript{56}Id.
of lack of good faith . . . ." 57 With its emphasis on the prohibition of improperly-motivated union conduct, to the exclusion of any objective requirement of minimally fair representation, the "bad faith" standard led to many unfair and unjust results.

The Supreme Court, recognizing the need for more effective protection of employees against improper union action, reformulated the duty of fair representation in two cases, Humphrey v. Moore,68 and Vaca v. Sipes.69 In a significant departure from prior law, the Humphrey Court injected a new element into the duty of fair representation: a union would not be found liable for action taken "in good faith and without hostility or arbitrary discrimination." 60 To underscore this change, the Court concluded that the union had not violated its duty, for it had acted upon relevant considerations, "not upon capricious or arbitrary factors." 61

In Vaca, the Court again interpreted the content of the duty of fair representation, and articulated the standards that govern fair representation analysis today. The case involved a union's refusal to process an employee's health-related grievance to arbitration after an independent physician had found him unfit to work. Relying upon Humphrey, the Court announced a tripartite standard by which a union's actions subsequently were to be judged. A union violates its duty when its actions are "arbitrary, discriminatory, or in bad faith." 62 In its repeated admonitions to unions to avoid arbitrary conduct,63 in its use of the conjunction "or" in setting out the test,64 and in its act of contrasting the differences between arbitrary and bad faith conduct,65 the Court identified three distinct elements of a union's obligations, and dispensed with the notion

58 375 U.S. 335 (1964).
60 375 U.S. at 350 (emphasis added).
61 Id. (emphasis added).
62 386 U.S. at 190.
63 Id. 177, 183.
64 Id. 190.
65 The Court stated:
Others have urged that the union be given substantial discretion . . . to decide whether a grievance should be taken to arbitration, subject only to the duty to refrain from patently wrongful conduct such as racial discrimination or personal hostility. . . .

[We accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion . . . .

Id. 190-91 (footnote omitted).
that bad faith was a universal requirement for such actions. Since *Vaca*, the bad faith standard has generally fallen from favor, and the prevailing interpretation is that arbitrary union conduct in administration of the collective bargaining agreement violates the duty of fair representation.

However, the Supreme Court reintroduced an element of uncertainty in *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274 (1971). In dealing with the question whether an employee's suit against his union was preempted, the Court stated that the fair representation doctrine "carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives ..." *Id.* 301. The Court further warned that the "distinction...between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment on the other, needs strictly to be maintained." *Id.*


A few courts, however, adhered to the essentially "bad faith" standard of *Lockridge*. See, e.g., *Jackson v. Trans World Airlines Inc.*, 457 F.2d 202 (2d Cir. 1972); *Hiatt v. New York Cent. R.R.*, 444 F.2d 1397 (7th Cir. 1971). Still others appeared to confuse its test with that of *Vaca*. See, e.g., *Patterson v. Tulsa Local No. 513, Motion Picture Operators*, 446 F.2d 205 (10th Cir. 1971). Typifying this confusion, the court in *Woods v. North American Rockwell Corp.*, 480 F.2d 644 (10th Cir. 1973), stated that "breach of the duty of fair representation must be measured by the standards whether the union's action was arbitrary, discriminatory, or in bad faith [the *Vaca* test]... and whether there is fraud, deceit, dishonest conduct, or discrimination that is intentional, severe, and unrelated to legitimate union activities [the message of *Lockridge*]...." *Id.* 648 (citations omitted) (emphasis added).

A more sensible result was reached in *Beriault v. Local 40, Super Cargoes & Checkers of the ILWU*, 501 F.2d 258 (9th Cir. 1974). In determining which test to apply to the union's actions, the court admitted that *Lockridge* injected a degree of ambiguity into the duty of fair representation doctrine. It noted, however, that the *Lockridge* Court had derived its bad faith language from *Humphrey*, which had contained language to the effect that mere arbitrary conduct may constitute a breach of the duty, and further noted that *Vaca* cited *Humphrey* for the proposition that a union had "the duty 'to avoid arbitrary conduct.'" Consequently, the court was unable to conclude that *Lockridge* had rejected "the view that *Vaca* broadened the standard of the duty of fair representation to prohibit arbitrary conduct." *Id.* 263-64. Most significantly, in the Court's latest decision in the fair representation area, *Hines v. Anchor Motor Freight Inc.*, 424 U.S. 554 (1976), the Court, in dealing with the effect of a breach of the duty of fair representation on the finality of an arbitral award, cited *Vaca* approvingly for the proposition that a union may not "'arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion,'" without ever mentioning *Lockridge*. *Id.* 568-69.

In *Griffin v. UAW*, 469 F.2d 181 (4th Cir. 1972), the Fourth Circuit interpreted "[t]he repeated references in *Vaca* to 'arbitrary' union conduct [to indicate] a calculated broadening of the fair representation standard," *id.* 183, and held for the first time that arbitrariness alone constituted a breach of the duty. The court stated:

A union must conform its behavior to each ... [element in *Vaca*'s tripartite standard]. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad dis-
The substantive content of the duty of fair representation is evolving, with the courts and the Board attempting to fashion a set of principles which will adequately protect individual interests without undermining the strength essential to the union's proper functioning as collective bargaining representative. As the courts and the Board have come to realize, imposition of a stricter standard of analysis, and recognition of individual rights at the expense of collective rights, have not produced the disastrous effects once feared. Consequently, administrative and judicial scrutiny of union activities has increased, although the progress has not been uniform and clear analysis has often been lacking.

The doctrinal fluidity of the duty's substantive content, however, should not be confused with the relatively static character of the law regarding the scope of its applicability. In direct contrast to the expansion in its substantive content, the boundaries of the duty's reach over union conduct have not been extended beyond those set in Steele and Conley. Thus extension of the duty beyond the original settings of contract negotiation and administration would constitute a dramatic step in fair representation doctrine. The next subsection of this Comment will consider the "exclusivity of power" rationale that underlies the duty of fair representation, and will conclude that it does not support extension of the duty to require scrutiny of the union's decision whether to bring Title VII litigation against the employer.

The Board has also abandoned the "bad faith" test in favor of the stricter scrutiny mandated by Vaca. See, e.g., Truck Drivers Local 315, 217 N.L.R.B. 616 (1975), enforced, 545 F.2d 1173 (9th Cir. 1976).

"Some unions have survived every attack which government, management, and even other factions in labor have mounted against them. Recognition of the rights of a few unjustly treated employees would not spell the doom of collective bargaining." Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, 61 Mich. L. Rev. 1435, 1495 (1963).

The Sixth Circuit appears to have expanded the construction of the Vaca arbitrariness standard by incorporating a due care requirement into the duty of fair representation. In Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975), the court held that negligence on the part of the union in handling a grievance amounted to unfair representation.
In analyzing the scope of the duty's applicability, it is crucial to take cognizance of its judicial origin. Judicial creation of the duty of fair representation was legitimized by reading into section 9(a)'s grant of power to labor unions the concomitant duty to exercise that power fairly. When the union conduct at issue does not involve use of the statutorily-granted power, there can be no tie-in with the statutory language of section 9(a), and legitimate extension of the duty is impossible.

Although, as noted above, judicial and scholarly efforts have centered on definition of the substantive content of the duty, two commentators have discussed the rationale for imposition of the duty. Professor Gorman has stated: "Most clearly, since the duty is derived from the union's power as exclusive representative in bargaining and grievance-processing, it is only in those activities that the duty of fair representation applies." Professor Summers has identified "two separate tap roots" of the duty of fair representation:

First, a union vested with statutory authority as the exclusive representative, must have a statutory duty, much like that of a governmental body, to represent fairly those governed by its agreements. . . .

Second, a union that acts as bargaining representative of employees owes to the employees it represents the duty owed by an agent to its principal, and the duty owed by a fiduciary to its beneficiary.

The two "tap roots" differ in that they focus on the two sources of the union's power as exclusive collective bargaining representative. The first refers to the congressional grant of power that enables unions to bind all members of the bargaining unit, even those that did not choose the union as representative, to the results of the union's collective bargaining with the employer. The second focuses on the power granted the union by the employees when they select the union as their collective bargaining representative through the

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71 See notes 53-69 & accompanying text, supra.
72 R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 706 (1976).
statutory machinery provided in section 9 of the NLRA. Therefore, although the two "tap roots" focus on different sources of power, both tie the union's duty of fair representation to the grant of exclusive power as collective bargaining representative. Professor Summers emphasizes the interrelationship between power and duty by quoting the language of the Court in Steele v. Louisville & Nashville R.R.: "It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf . . . ."

Although Professor Summers offers these "tap roots" as the rationale for application of the duty of fair representation to union conduct in negotiation of the collective bargaining agreement, he offers basically the same reasoning for extending the duty to administration of the agreement. Once again, Professor Summers focuses on the source of the exclusive power. In contrast to section 9(a)'s explicit grant of exclusive control of the negotiation process, it is only by contractual agreement with the employer that the union acquires exclusive control of the enforcement machinery. Professor Summers emphasizes that Congress' refusal explicitly to grant exclusive control of administration of the agreement to unions indicates a congressional policy that unions need less flexibility in that area. However, he only uses this argument to support his contention that duty of fair representation standards should be more strict when the alleged breach occurs in the administration of the

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74 29 U.S.C. § 159 (1970). The statutory procedure is not the only method of achieving the status of exclusive bargaining representative. For example, an employer can voluntarily recognize a union as collective bargaining representative. In addition, under rare circumstances, a union can be installed as bargaining representative in an unfair labor practice proceeding. See generally R. Gorman, supra note 72, at 40-132.

75 323 U.S. 192 (1944).

76 Id. 202, quoted in Summers, supra note 73, at 253.

77 Section 9(a) provides in pertinent part:

[A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect . . . .


78 "The explicit judgment of Congress, articulated in section 9(a), was that the union needed exclusive power to negotiate agreements, but did not need exclusive power to settle grievances arising under the agreements." Summers, supra note 73, at 255.
agreement. Professor Summers in no way implies that the "exclusivity of power" rationale does not justify extension of the duty to union conduct in contract administration. In fact, he states: "By virtue of this contractually derived status as exclusive enforcer of the collective agreement, the union assumes a heavy responsibility to exercise its control on behalf of, rather than against the individual employee." Indeed, to distinguish between the sources of power would be manifestly unreasonable, because it is only through use of the statutorily-granted power to bargain collectively with the employer that the union can gain exclusive control of the enforcement machinery. The power to eliminate the individual employee's control over enforcement of his own contractual rights justifies imposition of a corresponding duty of fair representation.

Thus Professors Gorman and Summers essentially agree that the duty of fair representation applies to union conduct that involves the exercise of exclusive power. In those situations, the individual employee has no power to protect his own best interests; rather, he must rely on the union to protect them in its actions as collective bargaining representative.

Although there exists little Supreme Court guidance on the question of applicability of the duty of fair representation, language in the Steele and Humphrey cases supports the "exclusivity of power" rationale. In Steele, the Court emphasized the relationship between power and duty in strong language: "Unless the labor union representing a craft owes some duty to represent non-union members of the craft, . . . the minority would be left with no means of protecting their . . . right to earn a livelihood . . . ." The Humphrey Court made no distinction based on the source of the exclusive power. The Court stated: "The undoubted broad authority of the Union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation."
Extension of duty of fair representation scrutiny to a union's decision whether to file a Title VII suit against the employer could not be justified by use of the "exclusivity of power" rationale. When the union decides not to instigate Title VII litigation, it exercises no power that binds the individual employee in any way: the union can never prevent the employee from bringing the action on his own. When the union does not exercise its exclusive power as collective bargaining representative, a court cannot tie the duty of fair representation into the statutory language of section 9(a). Without a credible relationship to the statutory language, judicial extension of the duty would lack legitimacy.

The union's lack of exclusive power to litigate a Title VII action was recognized in Stewards v. American Airlines, Inc. In Stewards, the court held that a union (the Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO) could not bind individual plaintiffs in a sex discrimination class action to the procedures under the Railway Labor Act that enabled employees to file grievances with the Adjustment Board or bring suit for breach of contract. The Court replied:

We need not pass on the Union's claim that it was not obliged to handle any grievances at all because we are clear that once it undertook to bargain or present grievances for some of the employees it represented it could not refuse to take similar action in good faith for other employees just because they were Negroes.

Id. 47.

Broad reading of this language would allow extension of the duty even to the situation hypothesized below, where a union that has brought Title VII suits on behalf of other groups, refuses to do so for black employees, and the refusal is racially motivated. See text accompanying notes 88-92, infra. However, other language suggests that the Court did focus on the power granted to the union, and also on the realities of industrial relations:

The Railway Labor Act, in an attempt to aid collective action by employees, conferred great power and protection on the bargaining agent chosen by a majority of them. As individuals or small groups the employees cannot begin to possess the bargaining power of their representative in negotiating with the employer or in presenting their grievances to him.

Id.

In this passage, the Court realized that acceptance of the union's argument would mean that black employees would be foreclosed from the informal, and more efficacious, grievance process that white employees could utilize; because then only the union could decide whether or not to put its power behind the aggrieved employee and invoke the grievance process. The Railway Labor Act's alternative remedies could not be considered equal to normal union-backed grievance processing. In the Conley context, the union's power could not be characterized as exclusive, but the comparative inefficacy of the alternative remedies made the union's power over the grievance process sufficiently imposing to justify application of the duty.

83 In addition, invocation of contractual relief mechanisms does not bar recourse to Title VII remedies. In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Court held that an unfavorable arbitral award did not bar a subsequent Title VII action.

84 6 F.E.P. Cas. 1197 (7th Cir. 1973).
settlement it had achieved with the defendant airlines. The court noted the conflicting interests that jeopardized the union's role as class representative, and required that the individual plaintiffs be accorded the right to exclude themselves or appear through counsel. The union argued that its status as exclusive bargaining representative vested it with "the power to accommodate and adjust the rights of present and former stewardesses which springs from Title VII, subject only to its obligation of fair representation." The court refused to alter the standard of adequacy of class representation on the basis of the union's status as collective bargaining representative, stating: "Title VII, unlike the National Labor Relations Act and Railway Labor Act, does not create nor necessarily recognize powers of exclusive representation . . . ." Consequently, the union is not "accorded the same power and held to the same degree of duty as [Steele, Humphrey, and Vaca] accord it in the formulation and administration of collective bargaining agreements . . . ."

The conclusion that the duty of fair representation does not extend to a union's decision whether to prosecute Title VII claims has one disturbing implication. Perhaps the core duty of fair representation situation is the case of union action or inaction motivated by racial prejudice. Although the case would undoubtedly be a rare one, it is not inconceivable that a union would prosecute Title VII claims for certain groups, such as white employees alleging reverse discrimination or female employees alleging sex discrimination, but then refuse to file Title VII suits on behalf of black employees. If the refusal were racially motivated, one might well consider extending the duty of fair representation to prohibit such union conduct, despite the aforementioned inconsistency with the "exclusivity of power" rationale. However, tortured extension of the duty of fair representation is not the only available method of proscribing such racially-motivated union conduct. Title VII itself arguably proscribes such union conduct. Section 703(c) provides that it is an unlawful employment practice for a union "to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin." Bush v. Lone Star Steel Co. involved an

85 Id. 1200.
86 Id.
87 Id. 1201.
88 Id.
89 Cf. Summers, supra note 73, at 272-74 (discriminatory access to union-supported grievance processing).
analogous situation, in which a union was held liable under Title VII for, inter alia, its failure to process a grievance filed by a black employee who had alleged that inadequate employment opportunities existed for blacks. *Bush* did not involve discriminatory access to the grievance process; the union was held liable for its general failure to eliminate discrimination. The court concluded: “Thus, in violation of the Act, the unions have failed in their duty to represent the black class members without regard to race.”

The aggressive attitude of the court in *Bush* is consistent with the broad “or otherwise to discriminate against” statutory language. Discriminatory access to union support of Title VII litigation would thus involve a substantial threat of Title VII liability. The courts would be well advised to attack the rare case of discriminatory access to union-supported Title VII litigation through the use of Title VII itself, rather than through tortured extension of the duty of fair representation.

III. UNION LIABILITY FOR DISCRIMINATORY CONTRACT CLAUSES AND PRACTICES

Collective bargaining agreements are brought into existence by negotiation between, and eventual concurrence of, the employer and the union. When provisions of those agreements are allegedly violative of Title VII, a complex legal problem inevitably arises. Although each party theoretically “agrees” to each contractual provision, disparities in bargaining power may enable one party to impose terms on the other, despite the latter party’s best negotiating efforts to avoid that result. Thus courts have been faced with the choice of either scrutinizing the negotiating process to determine if both parties should be held liable, or simply holding both parties equally responsible for the resultant agreement. The latter—“result”—approach in effect forces a party that lacked the bargaining power to exclude an illegal contractual provision to resort to litigation to invalidate the provision. This section of the Comment will examine the conflicting line of cases on this question, and will conclude that the “result” standard is an unsound construction of Title VII.

For reasons that will be described below, this issue has been raised most frequently in the context of union liability for seniority systems that perpetuate past discrimination. Although the Supreme Court’s recent decision in *International Brotherhood of Teamsters* 92 Id. 536.
greatly reduces the significance of the seniority clause problem, the cases are still instructive on the broader issue of union liability for discriminatory contract clauses and practices.

A major focus of the courts' efforts in Title VII cases has been the assessment of the legality of present seniority systems that perpetuate past discriminatory practices. Faced with minority workers' complaints that existing seniority systems perpetuated past discrimination, the courts were forced, early in the history of Title VII litigation, to choose between a "status quo" or a "rightful place" interpretation of the Civil Rights Act's mandates. The "status quo" theory absolved employers and unions from liability if the system then in effect did not facially discriminate in any way. The "rightful place" theory demanded more of unions and employers. Under that theory, a contract seniority provision would violate Title VII if, although neutral on its face, it failed to permit minority employees an opportunity to assume the positions they would have held had there been no past discrimination. Although soon after the passage of the Act commentators declared that "title VII does not call for union action to correct racial imbalances, due to prior practices," the lower courts chose to utilize the stricter "rightful place" interpretation. A finding of liability thus rested upon the existence of two conditions: pre-Act discrimination, and a seniority or promotion system that in any way perpetuated the effects of that

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93 U.S. at 97 S. Ct. 1843 (1977). In Teamsters, the Court rejected a solid phalanx of lower court precedent that had held illegal facially neutral contracts that failed to remedy pre-Act discrimination. See, e.g., McArthur v. Southern Airways, Inc., 404 F. Supp. 508 (N.D. Ga. 1975), vacated and remanded, 556 F.2d 298 (5th Cir. 1977). The Supreme Court held that the seniority system at issue, which afforded no constructive seniority to victims of pre-Act discrimination, fell within the protective sphere of section 703(h) of Title VII, which provides:

[It shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority ... system ... provided that such differences are not the result of an intention to discriminate because of race ... or national origin ...]


The Supreme Court rejected the government's position that no seniority system that perpetuates pre-Act discrimination could be "bona fide." Application of such a principle, it observed, would "destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act." — U.S. at 97 S. Ct. at 1863.

94 Sherman, supra note 53, at 798.

past discrimination. Under such conditions, many seniority systems appeared to be potentially illegal.

When joined as co-defendant in a Title VII suit against an employer, unions asserted the defense that they did no hiring, testing, or promoting, and thus could not be held responsible for any of the employer's prior acts of discrimination. The courts quickly rejected this position, pointing out that, since Steele, unions were obligated to attempt to protect minority members from the discriminatory acts of the employer. The gravamen of the charges against the unions was that the collective agreements negotiated between them and the employers tended to perpetuate past discrimination, thus constituting present discrimination.

There is no doubt but that unions have an affirmative obligation under Title VII to root out the effects of past discrimination. For example, in Carey v. Greyhound Bus Co., two unions asserted the defense that they were merely passive observers of the company's discrimination. Each union claimed to be powerless to revamp the discriminatory seniority system that was the net product of two separate collective bargaining agreements. The Fifth Circuit found the company and both unions liable under Title VII, and stated that the Civil Rights Act imposed on the employer and the unions an affirmative duty to revise the contract, rules, and regulations to assure compliance with the Act. The "ineffectual passivism" of the unions in their relations with the employer facilitated a pattern of continuing job discrimination, which result violated Title VII. Other courts have found unions in violation of Title VII where they passively accepted their employers' discriminatory practices, or failed to take steps to discourage the employers' policies. The Equal Employment Opportunity Commission (EEOC) has also held that a union commits an unlawful employment practice when it acquiesces in a discriminatory policy initiated by the employer.

In Macklin v. Spector Freight Systems Inc., in which the plaintiff

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97 Id.

98 See, e.g., EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975).

99 500 F.2d 1372 (5th Cir. 1974).

100 Id. 1379.

101 EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975).


104 478 F.2d 979 (D.C. Cir. 1973).
alleged racial discrimination in job assignments, the court spelled out in more detail the nature of the union's obligations. It initially noted that the duty of fair representation and Title VII impose an affirmative obligation on labor unions, which cannot be met by simple refusal "to sign overtly discriminatory agreements." Acquiescence in an employer's practices would result in the same conditions Steele condemned. This outcome could be avoided, the court concluded, by requiring "the union, in its vital role as bargaining agent, to negotiate actively for nondiscriminatory treatment..." These decisions suggest that, although a union may be liable for passively acquiescing in an employer's discriminatory policies, it would fulfill its statutory duties under Title VII by prosecuting all grievances referred to it, and by actively negotiating for fair employment treatment. These cases, however, do not address the question whether the union's actions will be judged on the basis of its negotiating effort, or on the basis of the contract that is actually negotiated. In each instance, the court found that the union had failed to exercise its best efforts to eradicate the discrimination. Thus none of the courts had occasion to consider whether Title VII's requirements are met when the union, after aggressively demanding that a discriminatory practice or contract provision be changed, nevertheless, as a result of unequal bargaining power or internal pressure, concedes to the unyielding employer. A 1973 EEOC decision suggests that the very act of making such demands will serve to insulate the union. In a controversy over a sex-segregated wage schedule, the EEOC held that since the union had actively opposed inclusion of the unlawful features of the wage plan, and had proposed nondiscriminatory alternatives, it had not committed an unlawful employment practice under section 703(c) of the Civil Rights Act.

The above analysis implies that strenuous good-faith bargaining and grievance processing within the collective bargaining context

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105 Id. 989.
106 Id. See text accompanying notes 41-43 supra.
107 478 F.2d at 989 (emphasis added). In holding the union liable, the court also emphasized the union's failure to act in the face of "solid evidence of employer discrimination." Id. See also United States v. Local 357, IBEW, 356 F. Supp. 104 (D. Nev. 1973).
108 EEOC decision No. 70-112 (Sept. 5, 1969), [1973] EEOC DECISIONS (CCH) ¶ 6108.
109 42 U.S.C. § 2000e-2(c) (1970). In another EEOC action, the Commission stated that, in the absence of a contract prohibiting racial discrimination, the contracting union was under an obligation to propose such a provision. EEOC decision No. 71-90 (July 17, 1970), [1973] EEOC DECISIONS (CCH) ¶ 6163.
would satisfy a union's duty under Title VII, but this approach has not been unanimously adopted.\textsuperscript{110}

Some courts would impose an even stricter requirement, and hold unions liable for the results of its negotiating efforts. Such a position disregards the fact that the contract is the product of negotiations between two parties who may not always possess equal bargaining power. It is in these cases that a \textit{de facto} obligation to bring a Title VII action has been created. In \textit{Johnson v. Goodyear Tire and Rubber Co.},\textsuperscript{111} the union argued that it was a helpless negotiator in bargaining over discrimination. The court, however, sarcastically observed that the union deserved more credit for its misdeeds. The test the court imposed was indeed a strict one: the union would be held to the natural consequences of the negotiated contract. Without investigating the underlying bargaining, or the union's intentions, the court imposed liability after a strict factual determination. The contract was discriminatory and the union was a party to that contract; it, too, was therefore liable. Similarly, the court in \textit{Robinson v. Lorillard Corp.}\textsuperscript{112} suggested no distinction between those situations in which a union bargains for, or tacitly accepts, employment discrimination, and those where the union actively resists discrimination, but because of inadequate bargaining power cannot force its position into the contract. Although \textit{Robinson} involved a union pressuring an employer to adopt a discriminatory system, the court painted Title VII liability with a broad brush: "Despite the fact that a strike over a contract provision may impose economic costs, if a discriminatory contract provision is acceded to the bargainee as well as the bargainor will be held liable."\textsuperscript{113} The

\textsuperscript{110}Under such an approach, the IUE's fears of liability would be illusory. Judge Roth observed:

\begin{quote}
In 1966, 1970 and 1973, the Union unsuccessfully proposed that the [non-discrimination] clause be made subject to binding arbitration. In these negotiations IUE made other proposals which related or purported to relate to the status of female and minority group employees. In 1966 and 1970, IUE proposed clauses to prohibit sex discrimination in upgrading and layoffs, extension of disability insurance coverage to pregnancy, and training of females for higher paying jobs. In 1970 and 1973, IUE proposed a layoff and recall system based on plantwide seniority, and plantwide posting of job opportunities. In 1973 IUE also proposed a joint employer-union committee, coupled with binding arbitration, to review rates alleged to be discriminatory, and elimination of all contract provisions which treated pregnancy in a different manner from other forms of disability. . . .
\end{quote}

Westinghouse Electric Corp., No. 6-CA-7680, slip op. at 8 (NLRB Region 6, Pittsburgh, Pa., Feb. 17, 1976).

\textsuperscript{111}491 F.2d 1364 (5th Cir. 1974).

\textsuperscript{112}444 F.2d 791 (4th Cir.), dismissed pursuant to Rule 60, 404 U.S. 1006 (1971).

\textsuperscript{113}Id. 799 (footnote omitted) (emphasis added).
Robinson court framed the issue as whether "[a]voidance of union pressure . . . constitute[s] a legitimate business purpose which can override the adverse racial impact of an otherwise unlawful employment practice." In Myers v. Gilman Paper Corp., the defendant unions argued that because they were in no way responsible for the discrimination at issue, the plaintiffs had not made out a prima facie claim against them. Although the court stressed that, the collective bargaining agreement "clearly carried forward the company's prior discrimination," it held that "[the] primary basis of the Union's liability is their joining with the Company in the collective bargaining agreements . . . ." Under this strict interpretation of Title VII, a union is placed in a highly tenuous position. If it has followed a strict nondiscriminatory policy, has faithfully processed all grievances, and has consistently opposed any discriminatory contract provision, it may nonetheless be vulnerable to suit if, because of its bargaining weakness, depleted strike benefits funds, fragile political support, public pressure, or other factors, it is unable to successfully bargain with an obstinate and recalcitrant employer over discrimination issues. The inquiry, as noted, is rather mechanistic: if the contract is illegal, the union is liable, whether it or the employer proposed the contract initially, whether the union actively resisted, or whether the employer has preponderant bargaining power. Under the strict "results" standard, the union effectively seals its fate by signing the agreement. Indeed, the Robinson court explicitly held out the possibility of striking rather than acceding to a discriminatory proposal, despite the severe economic costs this would impose on the union.

One commentator has recognized the union's potential liability in such situations, and has suggested a policy very much akin to that adopted by the IUE. If a union faces potential liability merely

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114 Id.
116 Id. 423.
117 Judge Roth realistically observed that economic activity in support of anti-discrimination goals would probably be ineffective, due to probable lack of support of the membership. See text accompanying notes 23 & 24 supra.
118 Youngdahl, supra note 96. In Westinghouse the employer argued: [T]he IUE wants to sue Westinghouse because it figures if it does not, someone will sue the IUE, either because the IUE has already violated the law by making a contract, or because someone will say the IUE has failed to fairly represent employees by not suing the employer to enforce rights of employees under Title VII.

Brief on Behalf of Respondent, supra note 14, at 95-96.
for being a signatory to a collective agreement that permits or requires past discrimination, its only hope lies in "correct[ing] violations of the law before anyone [in the union] gets litigious. . . ." 119 Initially a union must examine its collective bargaining relationships to identify potential Title VII problems created or perpetuated by contracts to which it is a party. If such problems exist, and the employer stubbornly refuses to change the offending provision, 120 the union must adopt a more aggressive stance:

If the employer refuses to correct the offending condition, the next step in an affirmative course of action is the filing of an Equal Employment Opportunity Commission charge by the union against the employer. If EEOC proceedings still do not have the desired effect, private suit can be brought six months after the charge is filed. 121

The existence of an illegal contract, then, puts a union on notice that, unless and until the offending provisions are eliminated, it stands subject to liability under Title VII. In order to protect itself from crushing liability, the union has every incentive to have the legality of the questionable clause or practice ascertained by a court, before affected employees are significantly damaged.

Although International Brotherhood of Teamsters 122 moots the issue in the context of seniority systems that perpetuate pre-Act discrimination, cases such as Macklin 123 and Detroit Edison Co., 124 which involve disputes over such diverse topics as job assignments, hiring, and promotion policy, require that the question be answered. Careful analysis indicates that the "best efforts" standard is a more sound construction of Title VII than the "results" standard.

It must be conceded that the "results" standard cannot be justified by the equal culpability of both parties if the weak party

119 Youngdahl, supra note 96, at 635.
120 Youngdahl suggests that some employer suspicion may stem from the fact that many Title VII remedial principles are similar to union goals that the employer has traditionally resisted, such as emphasis toward "on the job" training as opposed to testing and educational requirements. Id. 636.
121 Id. 636. But see Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971), rev'd on other grounds, 474 F.2d 949 (6th Cir. 1972), wherein the court stated: "[A] union is under no legal obligation to challenge the validity of State laws and regulations regarding the employment of women by initiating a suit to determine the validity of such laws and the failure of the union to do so does not constitute a violation of the Civil Rights Act of 1964." 325 F. Supp. at 1099.
123 See text accompanying notes 104-07 supra.
124 See note 101 supra.
is held liable despite its best efforts to resist inclusion of the discriminatory provision in the contract. Absent some other reason for the imposition of liability, the "results" standard would thus embody a fundamental misconception of the collective bargaining process: that both parties are equally responsible for all parts of the collective agreements. Only two justifications would appear to support such a construction: the desire to assure effective enforcement of Title VII, and the need to create manageable judicial standards for courts to apply in cases where an employer and a union are joined as codefendants.

As noted above, there is no doubt that the "results" standard creates a potent incentive for unions to institute Title VII litigation against the employer. However, analysis of the burdens and benefits of using the threat of liability as an incentive for union enforcement demonstrates that such an approach is undesirable. There is a serious flaw in the enforcement rationale: the fact is that unions forced into the courtroom by fear of Title VII liability would be less than ideal advocates. Motivated solely by its desire to avoid liability, the union would have absolutely no stake in the outcome of the "test case." If the court invalidated the questionable provision, the threat of liability would be removed. If no Title VII violation were found, the union would likewise emerge "victorious." Regardless of the outcome, the union's sole objective—avoidance of liability—would be achieved.

The concern for manageable judicial standards, although entitled to greater weight, does not compel acceptance of the "results" standard. Although the judiciary is understandably reluctant to scrutinize the bargaining conduct of the parties, the task is not one of insuperable difficulty. A workable solution would allow the plaintiff to establish a prima facie case against both parties without bringing in evidence of the union and company positions during negotiations. The court could then allow the defendant (either the union or the company) to prove that it had exercised its best efforts to prevent inclusion of the provision, but was forced to bow to the codefendant's superior bargaining strength. The court as fact finder would not be required to assess the relative responsibility of the parties to the contract; liability would attach if the "weak" party had any responsibility for the illegal provision (aside from its signature on the agreement). Although courts do not possess the collective bargaining expertise of the NLRB, the judiciary is hardly an unsophisticated assessor of bargaining relationships. Effective use of the burden of proof mechanism would prod unions to negotiate
actively, but would allow courts to justly dispose of the rare cases in which a union could demonstrate its lack of responsibility for the discriminatory contract provision.

Although the courts clearly would prefer not to scrutinize the bargaining conduct of the parties, manageable judicial standards are desirable only insofar as they effectuate the policies of Title VII. The absence of a strong justification for the harsh "results" standard, coupled with the dangers presented by disinterested advocacy, mandate the relatively limited judicial role required by the "best efforts" standard.

IV. Labor Policy Implications

The first section of this Comment determined that extension of duty of fair representation scrutiny to a union's decision not to bring Title VII litigation against the employer clashes with the "exclusivity of power" rationale that has operated as the justification for judicial imposition of the duty. Adoption of another rationale for imposition of the duty would raise two problems. First, it is difficult to see how another rationale could be tied into the language of section 9(a)—the statutory source of the duty of fair representation. Second, as will be demonstrated in this section of the Comment, extension of the duty to require scrutiny of a union's decision not to bring Title VII suits against the employer would adversely affect the collective bargaining process that the NLRA is primarily intended to foster.

The second section of the Comment demonstrated that the strict interpretation of union (and management) liability for discriminatory contract clauses and practices is an unsound construction of Title VII. This section of the Comment will demonstrate that adoption of the "results" standard would have a devastating effect on the orderly collective bargaining process contemplated by the NLRA.

In its broadest sense, Emporium-Capwell's reconciliation of the collective bargaining and antidiscrimination principles is instructive on the proper construction of Title VII. Although a court interpreting Title VII need not regard a detrimental effect on orderly collective bargaining as determinative, such an inquiry must be part of the court's analysis. Refusal to consider the effect of a Title VII liability standard on the collective bargaining process would disregard a fundamental rule of statutory construction. In

125 See text accompanying notes 70-92 supra.
126 See text accompanying notes 1-11 supra.
Emporium-Capwell, although the Court refused to construe the Labor Act to protect employees' antidiscriminatory protest activity from employer reprisal, it maintained that the separate legislative components should be construed in accordance with the overall scheme of labor relations regulation.\textsuperscript{127} Thus, the effect that a \textit{de facto} requirement to bring Title VII litigation has on the collective bargaining process is relevant to the construction of Title VII.

The fundamental importance of the collective bargaining process to our national labor policy is set forth in the introductory section of the Wagner Act.\textsuperscript{128} Congress was concerned that the bitter labor disputes characteristic of the early twentieth century would continue to interrupt the nation's trade and commerce. It consequently attempted to create an "equality of bargaining power between employers and employees," so as to encourage the "friendly adjustments of industrial disputes." \textsuperscript{129} The settlement of disputes through collective bargaining, rather than through the exercise of unmitigated economic and physical power, became the linchpin of our labor policy. It is thus vital that the collective bargaining process be protected in order to effectuate the primary purposes of the NLRA. In examining a union's duty of fair representation, the Fifth Circuit, in \textit{Local 12, United Rubber Workers v. NLRB} observed:

\begin{quote}
[T]he vital issue . . . resolves itself into that of determining at what point the exclusive bargaining agent's duty to represent fairly the interests of each individual employee must bow to the equally comprehensive obligation of negotiating and administering the bargaining contract in accordance with the act's primary policy of fostering union-employer relations.\textsuperscript{130}
\end{quote}

The union's fulfillment of its duty of fair representation and Title VII obligations through active negotiation and grievance processing is consistent with its role as collective bargaining representative; indeed, these activities constitute the essence of the union's

\textsuperscript{127} See note 3 supra.

\textsuperscript{128} Section 1 of the Wagner Act provides, in pertinent part: "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . . ." Pub. L. No. 74-198, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 (1970)).

\textsuperscript{129} Id.

\textsuperscript{130} 388 F.2d 12, 16 (5th Cir. 1966), \textit{cert. denied}, 389 U.S. 837 (1967) (emphasis added).
functions. To this extent, then, the union's obligations to represent its members fairly and to bargain with the employer mesh neatly. Once the notion is introduced that a union, in order to meet its legal obligations, must file judicial and administrative actions, however, this mesh becomes unraveled, and the equilibrium between the two obligations is destroyed. The filing of a lawsuit is the very antithesis of collective bargaining. Once litigation is initiated, a mutually satisfactory cooperative arrangement is probably foreclosed, unless the parties settle prior to judgment. Rather, a third party is asked to impose a solution on the deadlocked parties—a far cry from the "friendly adjustment of industrial disputes" envisioned in the NLRA. To hold that a union must institute and maintain Title VII suits in order to ensure its freedom from liability would strike an irreversible blow to the policy of mutual accommodation through bargaining that is embodied in the NLRA.

In the Westinghouse case, Judge Roth observed that litigation of discrimination charges might not constitute a derogation of the collective bargaining relationship, but "might well constitute conduct to preserve that relationship." It is difficult to imagine, however, how pending litigation could enhance collective bargaining. The employer, fearful that sensitive information can and will be used against it, is liable to balk at every step of the negotiations. Similarly, bitterness engendered by contested discrimination cases cannot fail but to affect the daily interaction of the two parties.

Thus, both extension of the duty of fair representation and adoption of the "results" standard would adversely affect the collective bargaining process, although their effects would differ in degree. As described in the first section of this Comment, the duty of fair representation is primarily negative in focus. Extension of the duty to forbid union refusals to bring Title VII suits that are grounded in impermissible motives would significantly encourage resort to litigation, to the detriment of the collective bargaining process.

131 The Court in Conley v. Gibson stated:
Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules . . . . The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement.
355 U.S. 41, 46 (1957) (footnote omitted) (emphasis added).


133 In Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the Court, in holding that the filing of an EEOC charge did not toll the statute of limitations applicable to an action brought under 42 U.S.C. § 1981, stated: "We recognize . . . that the filing of a lawsuit might tend to deter efforts at conciliation . . . ." Id. 461.
As the Board emphasized in *General Truck Drivers Local 315*, the arbitrariness prong does, to a certain extent, impose an affirmative duty to take action:

Whatever the precise outlines of this duty, a subject of scholarly debate of long standing, its fiduciary nature connotes some degree of affirmative responsibility. . . . [T]he duty of fair representation is more than an absence of bad faith or hostile motivation. . . .

Another way this elusive element of the duty of fair representation has been authoritatively described is the avoidance of arbitrary conduct. Here again, although phrased in negative terms, the duty is to some extent an affirmative one, for a common characteristic of arbitrariness is the *absence* of some ingredient in the decisionmaking process. . . .

Thus, to the extent that a union might resort to litigation to avoid the appearance of arbitrary conduct, application of the duty of fair representation to a union’s decision not to instigate a Title VII action would disrupt the collective bargaining process.

The “results” standard would have a much greater destructive impact on collective bargaining. Unlike the duty of fair representation, the “results” standard does not focus on defects in the union decision-making process; it threatens Title VII liability even for unions that have vigorously represented minority interests. The “results” standard focuses on one aspect of the union’s conduct: whether it signed the collective bargaining agreement. On issues that implicate Title VII, agreement between the employer and the union would constitute a mere preliminary step to dispositive settlement of the issues by litigation. Emphasis on litigation rather than negotiation as the settlement mechanism for these disputes contravenes the goal of an orderly collective bargaining process embodied in the NLRA. In addition, the threat of liability would undoubtedly result in expensive litigation whenever a questionable provision was included in the agreement—litigation that could only endanger the bargaining relationship of the parties.

**V. The Employer’s Duty to Disclose Information**

In *NLRB v. Acme Industrial Co.*, the Supreme Court held that the employer’s obligation to provide information to the union

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134 217 N.L.R.B. 616 (1975), enforced, 545 F.2d 1173 (9th Cir. 1976).
135 Id. 617 (footnotes omitted) (emphasis in original).
extended to the furnishing of information to enable the union to decide whether to process a grievance to arbitration. Because one of the union's functions as collective bargaining representative is the processing of grievances, the information requested was relevant to collective bargaining.\textsuperscript{137}

In \textit{Alexander v. Gardner-Denver Co.},\textsuperscript{138} the Court recognized a distinction between proceeding under a collective bargaining agreement and filing suit under Title VII, when it held that unfavorable arbitral awards did not bar subsequent recourse to Title VII remedies in employment discrimination cases. Courts should also distinguish between information requests that are made for litigation purposes (e.g., the \textit{Westinghouse} case) and those that are made for collective bargaining purposes (e.g., the \textit{Acme Industrial} case). The first section of this Comment demonstrated that the duty of fair representation should not be extended to scrutinize a union's decision not to bring a Title VII action, because in so doing the union does not bind the employee by use of the statutorily-granted collective bargaining power. If a union decides that it does want to bring a Title VII action, it likewise does not use its power as collective bargaining representative. To the contrary, litigation is a conscious choice against resolving the dispute by agreement with the employer. If the employer can prove that the union does not intend to use the information in the collective bargaining process, it would be anomalous to force the employer to surrender it on the ground that it is relevant to collective bargaining.

The difference in intended use is crucial. To the extent that the union is permitted to use the employer's duty to disclose relevant information as a discovery device, it will have the incentive to go through the pretense of bargaining with the employer. Such abuse of the collective bargaining process should be prevented by allowing the employer to prove the existence of the improper litigative purpose.

The narrowness of this suggested limitation on the employer's disclosure duty must be emphasized. Consistent with this limitation, a union could request information for bargaining purposes, and subsequently decide to file a Title VII suit against the employer.


\textsuperscript{138} 415 U.S. 36 (1974).
When the union intends to use the information for bargaining purposes, there can be no objection that the request lacks relevance to collective bargaining. It is only when the union intends at the outset to bypass the collective bargaining process that the request should be denied. Only at that point should the union be denied access to information, under the aegis of the NLRB. When litigation becomes the union's primary purpose, no hardship is imposed when it is required to turn to the normal discovery procedures afforded plaintiffs.

It will be difficult for the Board and the courts to draw the line between situations in which data is sought principally for the purpose of bargaining, and those in which the proven purpose of the request is to facilitate contemplated litigation. A court should consider several factors in determining whether the union's primary purpose is to use the information in litigation. First, the court should take note of the point in the contract cycle at which the information request is made. In Westinghouse, the request was made one year into a three year agreement; such timing strongly implies a purpose other than collective bargaining. Second, the court should scrutinize the union's behavior at previous negotiating sessions. An information request following silence at previous bargaining rounds might support the conclusion that the union never intended to resolve the issue through the collective bargaining mechanism. Third, the court should determine whether similar litigation between the parties is pending at the time the request is made. Finally, the court must examine the union's declared policies and objectives, which may indicate its intentions as to negotiation or litigation. While no single factor may be conclusive in a particular case, taken together they provide a useful starting point in this difficult inquiry.

The distinction between the differing effects of litigation and collective bargaining on requests for information formed the basis of a recent administrative law proceeding, White Farm Equipment Co. The union therein requested data relating to employment of minority groups. The administrative law judge concluded from the facts that "the Union's purpose in requesting the information in question was not a collective-bargaining purpose (in any sense of the term as applied under the Act)..." Rather, it "suggest[ed] that the Union's purpose was fulfillment of its duty of fair representation under Title VII [litigation] . . . ." Accordingly, the

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139 No. 9-CA-8835 (region 9, Columbus, Ohio, filed Oct. 3, 1974).
140 Id. 5.
141 Id.
judge held that the company's refusal to furnish the information was not a violation of section 8(a)(5) of the NLRA.

In addition to holding that the employer's duty to disclose information did not require the employer to honor union requests made primarily for litigation purposes, Administrative Law Judge Jalette relied on two of the four aforementioned factors in finding that the "Union's purpose in requesting the information was not... a collective bargaining purpose." 142

In short, the chronology of events, the Union's foreknowledge of possible discrimination based on sex and race and its silence in negotiations... warrant a finding that the Union did not request the information for the purpose of obtaining data to fulfill its duty of fair representation by the negotiation of a new contract, nor to police the administration of the contract.143

VI. CONCLUSION

This Comment has examined four aspects of the union's role as Title VII plaintiff. It was first argued that the duty of fair representation is inapplicable to a union's decision not to prosecute Title VII suits; second, that the "results" standard—which creates a de facto union obligation to bring Title VII suits—is an unsound construction of Title VII; third, that these conclusions are more consistent with the policy preference for orderly collective bargaining than their rejected counterparts; and fourth, that the employer has no duty to disclose information when the union's primary purpose is litigation.

These conclusions do not unduly sacrifice the antidiscrimination goals of Title VII to the collective bargaining principle embedded in the NLRA. This Comment has demonstrated that discriminatory access to union-supported Title VII litigation can be attacked directly under Title VII, and that the "results" standard in fact jeopardizes the goals of Title VII. Finally, to force a litigious union to utilize normal discovery procedures can hardly be criticized as an unduly harsh result.

In summary, the conclusions reached in this Comment are consistent with Emporium-Capwell's requirement that the separate components of the national labor policy be construed as part of a comprehensive scheme.

142 Id.
143 Id. 6 (emphasis added).